

WORKERS COMPENSATION

CHAPTER 765

SENATE BILL NO. 2256
(Committee on Industry, Business and Labor)
(At the request of the Workers Compensation Bureau)

WORKERS COMPENSATION AWARDS AND BENEFITS

AN ACT to amend and reenact sections 65-01-02, 65-05-02, 65-05-03, 65-05-12, 65-05-13, 65-05-28, and subsection 2 of section 65-13-10 of the North Dakota Century Code, relating to definitions, unusual stress for mental injury claims, impairment, disability, medical services and impairment awards.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

* SECTION 1. AMENDMENT. Section 65-01-02 of the 1987 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-01-02. Definitions. Whenever used in this title:

1. "Adopted" or "adoption" refers only to a legal adoption effected prior to the time of the injury.
2. "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. Eye-glasses or contact lenses are not artificial members 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 eye-glasses or contact lenses not previously worn by the injured worker, or requires a change in existing prescription.
3. "Artificial replacements" means mechanical aids including braces, belts, casts, or crutches as may be reasonable and necessary due to compensable injury. The term does not include:
 - a. Personal items that are for the injured employee's personal use or hygiene, including hand massages, toothbrushes, slippers, shampoo, and soap;
 - b. Any product or item such as clothing or footwear unless the items are considered orthopedic devices and are prescribed by the treating doctor or health care provider;
 - c. All items of furniture except hospital beds, shower stools, wheelchairs, or whirlpools if prescribed by the treating doctor or health care provider;
 - d. Vitamins and food supplements except in those cases where the injury causes severe dietary problems, where the injury results

* NOTE: Section 65-01-02 was also amended by section 74 of Senate Bill No. 2056, chapter 69, and section 4 of Senate Bill No. 2324, chapter 295.

- in the employee's paraplegia or quadriplegia, or where the employee becomes wheelchair-bound due to the injury;
- e. Eye exams unless there is a reasonable potential for injury to the employee's eyes as a result of the injury;
 - f. Home gym or exercise equipment unless the bureau otherwise orders;
 - g. Memberships or monthly dues to health clubs, unless the bureau orders otherwise;
 - h. Private hospital or nursing home rooms except in cases of extreme medical necessity, and only when directed by the attending doctor. If the employee desires better accommodations than those ordered by the attending doctor, the difference in cost will be paid by the employee;
 - i. Serological tests (VDRL and RPR) for syphilis or any other venereal disease tests, pregnancy tests, or any other routine tests unless clearly necessitated by the injury; and
 - j. Aids or programs primarily intended to help the employee lose weight or stop smoking.
4. "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.
- ~~4~~ 5. "Brother" and "sister" includes a stepbrother and a stepsister, a half brother and a half sister, and a brother and sister by adoption, but such terms shall not include a married brother or sister unless he or she actually is dependent.
- ~~5~~ 6. "Bureau" means the North Dakota workers compensation bureau, or any director, departments heads, assistants, or employees designated by the commissioners, to act within the course and scope of their employment in administering the policies, powers, and duties of this title.
- ~~6~~ 7. "Child" 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 not include a married child unless actually dependent.
- ~~7~~ 8. "Compensable injury" means an injury by accident arising out of and in the course of employment including an injury caused by the willful act of a third person directed against an employee because of his employment; but such term shall not include an injury caused

by the employee's willful intention to injure himself or to injure another; nor any injury received because of the use of narcotics or intoxicants while in the course of the employment. If an injury is due to heart attack or stroke, such heart attack or stroke must be causally related to the worker's employment; with reasonable medical certainty; and must have been precipitated by unusual stress.

a. Such The term "compensable injury", in addition to an injury by accident, includes:

a- (1) Any disease which can be fairly traceable to the employment. Ordinary diseases of life to which the general public outside of the employment is exposed shall not be compensable except where the disease follows as an incident to, and in its inception is caused by a hazard to which an employee is subjected in the course of his employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease includes impairment and effects from radiation fairly traceable to the employment. It need not have been foreseen or expected, but after it is contracted, it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. However, preventative treatment for communicable diseases is not compensable under this title.

b- (2) An injury to artificial members.

(3) Injuries due to heart attack, stroke, and mental injury precipitated by mental stimulus, which must be causally related to the worker's employment, with reasonable medical certainty, and which must have been precipitated by unusual stress.

(4) Injuries arising out of employer-required or supplied travel to and from a remote job site 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.

b. The term "compensable injury" does not include:

(1) An injury caused by the employee's willful intention to injure or kill himself, herself, or another, which includes those instances where the injury or aggravation thereof results from the employee's suicide or attempted suicide.

(2) Any injury caused by the use of narcotics or intoxicants.

(3) An injury that arises out of an altercation in which the injured employee is the initial physical aggressor.

- (4) An injury that arises out of the commission of an illegal act by the injured employee.
- (5) An injury that arises out of an employee's purely 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.
- (6) Injuries attributable to a preexisting injury, disease, or condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. However, it is insufficient to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of such employment trigger, unless the employment trigger is also deemed a substantial aggravating or accelerating factor. An underlying condition is preexisting injury, disease, or infirmity.
- (7) A nonemployment injury that, although acting upon a prior compensable injury, is established as an independent intervening cause of injury.
- (8) A mental or emotional injury arising principally out of a bona fide personnel action, including a transfer, promotion, demotion, or termination except such action that is the intentional infliction of emotional harm.
9. "Date of first disability" and "loss of earnings date" mean the first full date the employee was unable to work in relation to a compensable injury. This term does not apply to recurrent disabilities.
10. "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.
- ~~10-~~ 11. "Disability" means inability to work as a result of a compensable injury that period of time an employee is totally or partially incapacitated from:
- a. Performing employment at any suitable gainful employment or occupation for which the employee is reasonably suited by experience or training;
 - b. Earning in the same or any other employment the wages the employee was receiving at the time of injury.

12. "Doctor" means doctor of medicine, chiropractor, osteopathy, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license.
- 9- 13. "Employee" means every person engaged in a hazardous employment under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, and:
- a. Such 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) Poor relief workers except such as are engaged in repaying to counties relief moneys which the counties have been compelled by statute to expend for poor relief.
 - (4) Minors, whether lawfully or unlawfully employed; a minor is deemed sui juris for the purposes of this title, and no other person may have any claim for relief or right to compensation for any injury to such minor workman, but in the event of the award of a lump sum of compensation to such minor employee, such sum shall be paid only to the legally appointed guardian of such minor.
 - b. Such 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 his employer.
 - (2) Any person who is engaged in an illegal enterprise or occupation.
 - (3) The spouse or child of the employer dwelling in the household of the employer.
 - c. Persons employed by 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 therefor. This subdivision may not be construed as imposing 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.
- +0- 14. "Employer" means:
- a. The state and all political subdivisions thereof.

- b. All public and quasi-public corporations in this state.
 - c. Every person, partnership, 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, association, or corporation, having one or more employees as herein defined.
 - f. The president, vice presidents, secretary, or treasurer of a business corporation.
- ~~11-~~ 15. "Employment" means employment by the state and all political subdivisions thereof, by all public and quasi-public corporations therein, and all private employments.
- ~~12-~~ 16. "Fairly traceable to the employment" when used to modify the term "disease" means only a disease which:
- a. Arises under conditions wherein it is apparent to the rational mind upon consideration of all the circumstances that there is a direct causal connection between the conditions under which the work is performed and the disease;
 - b. Can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
 - c. Can be fairly traced to the employment;
 - d. However, any condition or impairment of health of a full-time paid fireman or law enforcement officer caused by lung or respiratory disease, hypertension, heart disease, or exposure to infectious disease as defined by sections 23-07.3-01 and 23-07.3-02, or occupational cancer in a full-time paid fireman, resulting in total or partial disability or death is presumed to have been suffered in the line of duty. The condition or impairment of health may not be attributed to any disease existing before that total or partial disability or death unless the contrary is shown by competent evidence. As used in this subdivision, an occupational cancer is one which arises out of employment as a full-time paid fireman and is due to injury due to exposure to smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances while in the performance of active duty as a full-time paid fireman. A full-time paid fireman or law enforcement officer is not eligible for the benefit provided under this subdivision unless that full-time paid fireman or law enforcement officer has completed two years of continuous service and has successfully passed a physical examination which fails to reveal any evidence of such a condition.
17. "Fee schedule" means the relative value scale, conversion factors, fee schedules, and medical aid rules adopted by the bureau.

- ~~13-~~ 18. "Fund" means the North Dakota ~~workmen's~~ workers' compensation fund.
- ~~14-~~ 19. "Grandchild" and the terms defined in subsections 4 and 6 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.
- ~~15-~~ 20. "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:
- Agricultural or domestic service.
 - Any employment of a common carrier by railroad.
 - 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.
 - All members of the clergy and employees of religious organizations engaged in the operation, maintenance, and conduct of the place of worship.
21. "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.
- ~~15-1-~~ 22. "Orphan" means a child who has no lawful parent.
- ~~16-~~ 23. "Parent" includes a stepparent and a parent by adoption.
- ~~17-~~ 24. "Permanent impairment" means the loss of or loss of use of a member of the body existing after the date of maximum medical improvement or recovery, and includes disfigurement resulting from an injury if such disfigurement diminishes the ability of the employee to obtain employment. The loss must be determined in accordance with and based upon the most current edition of the American medical association's "Guides to the Evaluation of Permanent Impairment." Any impairment award, not expressly contemplated within the American medical association's "Guides to the Evaluation of Permanent Impairment," must be determined by clear and convincing medical evidence.
- ~~18-~~ 25. "Premises" means that part of the employer's property upon or in which the employee is expected to perform services for his employer.
26. "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. Such services 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.

- ~~19-~~ 27. "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.
28. "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.
- ~~20-~~ 29. "Wages" includes the market value of board, lodging, fuel, and other advantages which can be estimated in money which the employee receives from the employer as a part of his remuneration means all remuneration payable in money or a substitute for money for services rendered by an employee.
- a. The term "wages" includes:
- (1) The actual value of board, lodging, rent, or housing and per diem expenses to be included within the actual wage as remuneration, if such board, lodging, rent, or housing and per diem is lost as a result of the injury.
 - (2) Commissions and bonuses.
 - (3) Extra wages for any and all overtime work.
 - (4) Wages or salary paid during holidays, vacations, or sickness periods.
 - (5) Gratuities received in the course of employment, from others than the employer, only when such gratuities are received with the knowledge of the employer and reported to the internal revenue service.
 - (6) Wages earned from employment at more than one occupation or employer other than the employer at the time of injury, if those wages are lost due to compensable injury.
 - (7) Unemployment insurance benefits and workers' compensation temporary total disability benefits paid to the injured worker during the twelve months preceding the month of injury will be taken into account when computing the average weekly gross earnings in cases where there are special circumstances under which the average gross weekly earnings cannot be determined.
- b. The term "wages" does not include:
- (1) Severance pay.

- (2) The cash value of health, medical, life, or other insurance benefits or retirement benefits.
- (3) Social security benefits.
- (4) Passive investment income such as income from stocks, bonds, trust accounts, or individual retirement accounts.

~~21-~~ 30. "Weekly wage" "Gross weekly wage" means the computation best calculated to give the weekly earnings of the employee weekly wages the worker was receiving from all employments at the time of injury. The average weekly wage as determined under this section must be rounded to the nearest dollar. In cases where the worker's wages are not fixed by the week, they must be determined in the following manner:

- a. Hourly or daily rate multiplied by number of hours or days worked per seven day week;
- b. Monthly rate multiplied by twelve months and divided by fifty-two weeks;
- c. Biweekly rate divided by two;
- d. If the weekly earnings of an employee cannot be ascertained, the wage for the purposes of calculating compensation must be taken to be the usual wage paid other employees engaged in like or similar occupations where the wages are fixed; or
- e. If there are special circumstances under which the average weekly wages cannot be reasonably and fairly determined by applying subdivisions a through d, an average weekly wage may be computed by dividing the aggregate wages during the twelve months prior to the injury by fifty-two weeks, or the number of weeks actually worked, whichever is less.

~~22-~~ 31. Any term includes the singular and plural and either or both sexes where the context so requires.

* SECTION 2. AMENDMENT. Section 65-05-02 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-02. Form in which claim shall be filed. Every claim shall be made on forms to be furnished by the bureau and shall contain all the information required by it. Each claim shall be signed by the person entitled to compensation or by the person acting on his behalf and, except in case of death, shall be accompanied by a certificate of the employee's ~~physician~~ doctor stating the nature of the injury and the nature and probable extent of the disability. For any reasonable cause shown, the bureau may waive the provisions of this section.

SECTION 3. AMENDMENT. Section 65-05-03 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-03. Jurisdiction of bureau to hear questions within its jurisdiction - Finality of determination. The bureau shall have full power and authority to hear and determine all questions within its jurisdiction,

* NOTE: Section 65-05-02 was also amended by section 3 of Senate Bill No. 2237, chapter 766.

and its decisions, except as provided in chapter 65-10, shall be final and shall be entitled to the same faith and credit as a judgment of a court of record. During the period of experience rating, before an award for permanent impairment can be made to a claimant, the bureau shall give notification in writing, by registered or certified mail, addressed to the employer of said claimant at his last known address, of their intention to make such award; outlining reasons and amount of such evaluation and giving the employer ten days in which to file a written protest to such award. If such protest is registered by the employer, the bureau shall set a date of hearing to show cause, if any there be, why such award should not be made, and shall notify the employer of the date set, and the bureau shall order an examination of the claimant on or before the date set for the hearing by a duly qualified physician licensed to practice and practicing his profession in the state of North Dakota, designated by the employer.

SECTION 4. AMENDMENT. Section 65-05-12 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-12. Permanent impairment - Weekly compensation - Time paid. The injured employee's doctor shall report to the bureau any rating of any impairment of function as the result of the injury on the date of maximum medical improvement, except for total losses claimed under section 65-05-13. Any rating of the percentage of functional impairment should be in accordance with the standards for the evaluation of permanent impairment as published in the most recent edition of the American medical association's "Guides to the Evaluation of Permanent Impairment" unless proven otherwise by clear and convincing medical evidence. The doctor's report shall include a clinical report in sufficient detail to support the percentage ratings assigned. Any subsequent award for impairment shall be made minus any previous award given on any earlier claim or the same claim for that same member or body part. If the injury causes permanent impairment, other than scheduled injuries, as elsewhere provided for in this chapter, the percentage which such impairment bears to total impairment shall be determined, and the fund shall pay to the impaired employee a weekly compensation in the sum of sixty dollars per week for the following periods lump sum, calculated by multiplying thirty-three and one-third percent of the average weekly wage in this state rounded to the next highest dollar, on the date the impairment is determined, by the following number of weeks, depending upon the percentage of impairment:

- For a one percent impairment 5 weeks.
- For a ten percent impairment 50 weeks.
- For a twenty percent impairment 100 weeks.
- For a thirty percent impairment 150 weeks.
- For a forty percent impairment 200 weeks.
- For a fifty percent impairment 250 weeks.
- For a sixty percent impairment 300 weeks.
- For a seventy percent impairment 350 weeks.
- For an eighty percent impairment 400 weeks.
- For a ninety percent impairment 450 weeks.

SECTION 5. AMENDMENT. Section 65-05-13 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-13. Scheduled injuries - Permanent loss of member - Weekly compensation - Time compensation payable. If the injury causes the loss of a member, the fund shall pay to the impaired employee a weekly compensation equal to sixty dollars per week for the following periods lump sum,

calculated by multiplying thirty-three and one-third percent of the average weekly wage in this state rounded to the next highest dollar, on the date the impairment is determined, by the following number of weeks, depending upon the percentage of impairment:

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| 1. | For loss of arm at shoulder | 250 weeks. |
| 2. | For loss of arm at or above elbow | 220 weeks. |
| 3. | For loss of hand at or above wrist | 200 weeks. |
| 4. | For loss of thumb | 65 weeks. |
| 5. | For loss of second or distal phalanx of thumb | 28 weeks. |
| 6. | For loss of first finger | 40 weeks. |
| 7. | For loss of middle or second phalanx of first finger | 28 weeks. |
| 8. | For loss of third or distal phalanx of first finger | 22 weeks. |
| 9. | For loss of second finger | 30 weeks. |
| 10. | For loss of middle or second phalanx of second finger | 22 weeks. |
| 11. | For loss of third or distal phalanx of second finger | 14 weeks. |
| 12. | For loss of third finger | 20 weeks. |
| 13. | For loss of middle or second phalanx of third finger | 16 weeks. |
| 14. | For loss of third or distal phalanx of third finger | 10 weeks. |
| 15. | For loss of fourth finger | 16 weeks. |
| 16. | For loss of middle or second phalanx of fourth finger | 12 weeks. |
| 17. | For loss of third or distal phalanx of fourth finger | 6 weeks. |
| 18. | For loss of leg at hip | 234 weeks. |
| 19. | For loss of leg at or above knee | 195 weeks. |
| 20. | For loss of foot at or above ankle | 150 weeks. |
| 21. | For loss of great toe | 30 weeks. |
| 22. | For loss of second or distal phalanx of great toe | 18 weeks. |
| 23. | For loss of any other toe | 12 weeks. |
| 24. | For loss of middle or second phalanx of any other toe | 10 weeks. |
| 25. | For loss of third or distal phalanx of any other toe | 7 weeks. |
| 26. | For loss of an eye | 150 weeks. |
| 27. | For loss of hearing in one ear | 50 weeks. |
| 28. | For loss of hearing in both ears | 200 weeks. |

The amount paid for the loss of more than one finger of one hand shall not exceed the amount provided in this schedule for the loss of a hand. For the loss of the metacarpal bone, of the palm, together with the corresponding thumb or finger, ten weeks shall be added to the number of weeks of payment. The permanent loss of use of a thumb, finger, toe, arm, hand, foot, leg, or

eye shall be considered as the equivalent of the loss of such thumb, finger, toe, arm, hand, foot, leg, or eye, and compensation for partial loss of use of said parts shall be allowed on a percentage basis. Twenty-five percent additional shall be allowed as compensation for the loss of use of the master hand or any member or members thereof. The loss of any part of a phalanx shall be considered equal to the loss of the entire phalanx. If any employee dies from some independent cause, the right of any compensation payable under section 65-05-12 or this section, unpaid at the date of his death, shall survive and pass to his dependent spouse, minor children, parents, or his estate and in that order named. Wherever possible, an impairment award must be made under the terms of this section.

Recovery under this section shall bar an additional award of permanent impairment for the same injury, as elsewhere provided in this chapter. If a compensable injury causes an impairment under this section, and also causes impairment to a part of the body which cannot be compensated under the terms of this section, a whole body award may be made under section 65-05-12 if such award is not duplicative.

An impairment award made by the bureau in the past under this section or section 65-05-12 must be deducted from a subsequent impairment award for injury to the same part of the body.

*SECTION 6. AMENDMENT. Section 65-05-28 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-28. Examination of injured employee - Paid expenses - No compensation paid if claimant refuses to reasonably participate. After suffering an injury, an employee, as frequently and at such times and places as reasonably may be required, shall submit himself to examination by a duly qualified ~~physician~~ doctor designated or approved by the bureau. The employee may have a duly qualified ~~physician~~ doctor designated and paid by him present to participate in such examination. In case of any disagreement between ~~physicians~~ doctors making an examination on the part of the bureau and the employee's ~~physician~~ doctor, the bureau shall appoint an impartial ~~physician~~ doctor duly qualified who shall make an examination and shall report thereon to the bureau. The employee, in the discretion of the bureau, may be paid his reasonable traveling and other expenses and loss of wages incurred in submitting to any such examination. If the employee refuses to submit himself for, or in any way obstructs, any examination, or refuses reasonably to participate in medical treatments, his right to claim compensation under this title shall be suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and the period of such refusal or obstruction shall be deducted from the period for which compensation is payable to him.

SECTION 7. AMENDMENT. Subsection 2 of section 65-13-10 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

2. If the mental, physical, or emotional condition of a victim or claimant is material to a claim, the board may order the victim or claimant to submit to a mental or physical examination by a ~~physician~~ doctor or psychologist, and may order an autopsy of a deceased victim. The order may be made for good cause shown upon notice to the person to be examined and to all persons who have appeared. The order shall specify the time, place, manner, conditions, and scope of the examination or autopsy and the person by whom it is to be made, and shall require the person to file with the board a detailed written report of the examination or autopsy. The report shall set out his findings, including results of all tests made, diagnoses, prognoses, and other conclusions and reports of earlier examinations of the same conditions.

Approved April 19, 1989
Filed April 19, 1989

* NOTE: Section 65-05-28 was also amended by section 8 of Senate Bill No. 2237, chapter 766.

CHAPTER 766

SENATE BILL NO. 2237
(Committee on Industry, Business and Labor)
(At the request of the Workers Compensation Bureau)

WORKERS COMPENSATION CLAIMS ADMINISTRATION

AN ACT to amend and reenact sections 65-02-06, 65-05-01, 65-05-02, 65-05-09.1, 65-05-15, 65-05-17, 65-05-25, 65-05-28, 65-05-29, 65-05-30, 65-05-32, 65-05-33, and 65-08-01 of the North Dakota Century Code, relating to workers' compensation and reinsurance, filing on behalf of an injured worker, physician's certificate of physical examinations, offset in cases of social security overpayment, aggravation law application, death benefits, bureau ordered independent medical evaluations, offset in cases of overpayment, medical information available to the bureau, privacy rights of claimants, definition of a false claim, providing a penalty for filing a false claim, bureau authority to compromise and settle disputed claims, and out-of-state jobsites; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

* SECTION 1. AMENDMENT. Section 65-02-06 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-02-06. Expenditures by bureau from fund - Employment of full-time assistant attorney general authorized. ~~The~~ With prior approval of the emergency commission, the bureau may make necessary expenditures to implement reinsurance. The bureau may make necessary expenditures to obtain statistical and other information required for the proper enforcement of the provisions of this title. The salaries and compensation of the members of the bureau, of its secretary, and of all employees of the bureau, and all other authorized expenses thereof, including the premium on the bond required of the state treasurer under the provisions of section 65-04-30, shall be paid out of the fund. The bureau may employ as its full-time attorney a duly appointed assistant attorney general and pay from the fund the entire salary of such assistant.

SECTION 2. AMENDMENT. Section 65-05-01 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-01. Claims for compensation - When and where filed. All original claims for compensation shall be filed by the injured worker, or someone on the injured worker's behalf, within one year after the injury or within two years after the death. The date of injury for purposes of this section shall be the actual date of injury when such can be determined with certainty by the claimant and bureau. When the actual date of injury cannot be determined with certainty the date of injury shall be the first date that a reasonable person knew or should have known that the injury was related to employment. No compensation or benefits shall be allowed under the provisions of this title to any person, except as provided in section

* NOTE: Section 65-02-06 was also amended by section 9 of Senate Bill No. 2324, chapter 295.

65-05-04, unless he or she, or someone on his or her behalf, shall file a written claim therefor within the time specified in this section. Such claim shall be filed by:

1. Delivering it at the office of the bureau or to any person whom the bureau by regulation may designate; or
2. Depositing it in the mail properly stamped and addressed to the bureau or to any person whom the bureau by regulation may designate.

* SECTION 3. AMENDMENT. Section 65-05-02 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-02. Form in which claim shall be filed. Every claim shall be made on forms to be furnished by the bureau and shall contain all the information required by it. Each claim shall be signed by the person entitled to compensation or by the person acting on his behalf and, except in case of death, shall be accompanied by a certificate of the employee's physician stating that the employee was physically examined, stating the nature of the injury and the nature and probable extent of the disability. For any reasonable cause shown, the bureau may waive the provisions of this section.

** SECTION 4. AMENDMENT. Section 65-05-09.1 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-09.1. Social security offset. When an injured employee, spouse or dependent of an injured employee, is eligible for and is receiving permanent total or temporary total disability benefits under section 65-05-09, and is also eligible for, is receiving, or will receive, benefits under Title II of the Social Security Act [42 U.S.C. 423], the aggregate benefits payable under section 65-05-09 shall be reduced, but not below zero, by an amount equal as nearly as practical to one-half of such federal benefit. The federal benefit, or primary insurance amount, must be determined by the social security administration. The amount to be offset must equal the primary insurance amount less attorneys' fees and costs withheld from past due social security benefits or paid directly by the claimant for representation before the social security administration. The amount of the offset computed by the bureau initially will remain the same throughout the period of eligibility and will not be affected by any increase or decrease in federal benefits.

Any injured employee, or dependent of an injured employee, receiving permanent total or temporary total disability benefits under section 65-05-09 and whose benefits are offset as provided herein, shall not be eligible for any escalation of benefits which would adversely affect the bureau's right to offset ~~workmen's~~ workers' compensation benefits against social security benefits, as provided for in this chapter. This offset will become effective on January 1, 1980, provided that it meets the criteria necessary to allow states to offset federal benefits under Title II of the Social Security Act [42 U.S.C. 424a]. Providing further that:

1. If the receipt of social security benefits results in an overpayment of temporary or permanent total disability benefits by the bureau, a refund of any overpayment must be made by the injured worker or that overpayment must be taken from future temporary

* NOTE: Section 65-05-02 was also amended by section 2 of Senate Bill No. 2256, chapter 765.

** NOTE: Section 65-05-09.1 was also amended by section 82 of Senate Bill No. 2056, chapter 69.

total or permanent total disability benefits or permanent partial impairment awards, on the current claim or any future claim filed, at a recovery rate to be determined by the bureau.

2. If a claim has been accepted on an aggravation basis and the injured worker is eligible for social security benefits, the bureau's offset must be proportionally calculated.
3. If any person described in this section refuses to authorize the release of information concerning the amount of benefits payable under the Social Security Act, the bureau's estimate of the amount is deemed to be correct until the actual amount is established and no adjustment may be made for any period of time covered by the refusal.

SECTION 5. AMENDMENT. Section 65-05-15 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-15. Aggravation of injury or disease - Compensation and benefits not paid for preexisting condition awards. Compensation shall not be paid for any condition which existed prior to the happening of a compensable injury nor for any disability chargeable to such condition. In case of aggravation of a condition existing prior to a compensable injury and in case of the aggravation of a compensable injury by a nonemployment injury, compensation, medical or hospital expenses, or death benefits, shall be allowed by the bureau and paid from the fund only for such proportion of the disability, death benefits, or expense arising from the aggravation of such prior condition as reasonably may be attributable to such compensable injury. If the degree of aggravation cannot be determined, the percentage award shall be fifty percent of total benefits recoverable if one hundred percent of the injury had been the result of employment. But any compensation paid on the basis of aggravation shall not be less than ten dollars per week unless the actual wages of claimant shall be less than ten dollars, in which event the actual wages shall be paid in compensation. However, in case of death due to an employment aggravated condition, burial expenses and special benefits shall be paid in full pursuant to sections 65-05-17 and 65-05-26. The bureau shall calculate an aggravation award in case of aggravation of a preexisting condition, disease, or infirmity by a compensable injury, and in case of aggravation of a compensable injury by a nonemployment injury, on the following terms:

1. A "preexisting condition" means disability or impairment known in advance of the work injury. It is sufficient to invoke the aggravation statute if the preexisting condition is active at the time of the work injury, evidenced by work restriction (active disability) or interference with function (active impairment).
2. In cases of preexisting condition, aggravated by compensable injury, the bureau shall pay medical expense to treat the acute injury in full. If evidence establishes that the preexisting condition has combined with the work injury, and will necessitate further treatment beyond the acute stage, an aggravation award may be invoked as to the remainder of the medical expense award.

Likewise, the bureau shall pay temporary total disability to the worker, during the acute disability phase, in full. When the worker reaches maximum medical recovery, and is awarded permanent

partial impairment, partial disability, permanent total disability, or vocational retraining services, and the evidence establishes that the preexisting condition has combined with the work injury to produce the continuing disability, an aggravation award may be invoked.

3. In case of aggravation of a prior compensable injury by a nonemployment injury, the aggravation statute may be invoked where the nonemployment injury acts upon the prior compensable injury, and substantially contributes to the severity, acceleration, or progression of the final result, or, if it acts as a trigger to produce recurrent symptoms, and the trigger is itself a substantial aggravating or accelerating factor. All benefits may be apportioned when the aggravation statute is invoked under this subsection. The aggravation statute may not be invoked if the result is but a natural progression of the compensable injury.
4. The bureau shall determine the aggravation award based upon all evidence, as reasonably establishes the proportion or percentage of cause as is reasonably attributable to the compensable injury. If the degree of aggravation cannot be determined, the percentage award must be fifty percent of the total benefits recoverable if one hundred percent of the injury had been the result of employment.
5. Compensation paid on the basis of aggravation may not be less than ten dollars per week unless the actual wages of the claimant were less than ten dollars, in which event the actual wages must be paid in compensation. In case of death due to an employment aggravation condition, burial expenses and special benefits must be paid in full under sections 65-05-17 and 65-05-26. Dependency allowance may not be reduced by the percentage of aggravation and must be paid in full under section 65-05-09.

* SECTION 6. AMENDMENT. Section 65-05-17 of the 1987 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-17. Weekly compensation allowances for death claims. If death results from an injury under the conditions specified in section 65-05-16, the fund shall pay to the following persons, for the periods specified, a weekly compensation:

1. To the spouse or guardian of the orphaned child or children of the decedent, an amount equal to sixty-six and two-thirds percent of the weekly wage of the deceased, at the bureau's benefit rate in effect on the date of death, and not to exceed two hundred ten dollars per week. These benefits continue until the death or remarriage of the spouse; or, in the case of a guardian, until the orphaned child or children of the decedent no longer meets the definition of child in this title. Where there is more than one orphaned child of a decedent, death benefits must be divided equally among guardians. In no case may total death benefits be less than fifty percent of the maximum weekly death benefits. In no case may total death benefits exceed one hundred ninety-seven thousand dollars as a result of any employee's death.

* NOTE: Section 65-05-17 was also amended by section 15 of Senate Bill No. 2324, chapter 295.

2. To each child of the deceased employee, the amount of seven ten dollars per week for each child. This rate must be paid to each eligible child regardless of the date of death. The bureau, in its discretion, may make this payment directly to the child of the deceased employee or to the surviving parent or guardian of the child. Dependency allowance may not be reduced by the percentage of aggravation and must be paid in full.
3. In addition to the awards herein, the commissioners shall make an award in the sum of three hundred dollars to the spouse or guardian of the orphaned child or children of the deceased and one hundred dollars for each dependent child. Where there is more than one guardian of orphaned children, the three hundred dollars must be divided equally among the guardians.

SECTION 7. AMENDMENT. Section 65-05-25 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-25. Lump sum settlement - Granted in discretion of bureau - How computed. The bureau, if it determines it is in the best interest of the claimant, may pay a lump sum equal to the present value of all future payments of compensation or a lump sum stipulated to by the claimant after an opportunity to seek legal counsel. The bureau and the claimant, after an opportunity to seek legal counsel, may compromise to resolve a disputed claim. The contract of settlement made is enforceable by the parties. The probability of the beneficiary's or claimant's death before the expiration of the period during which he is entitled to compensation shall be determined by reference to generally accepted mortality studies. In case of the spouse of a deceased employee, the lump sum shall not exceed compensation for four hundred sixteen weeks and the probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded. If at the expiration of a period for which lump sum settlement was made hereunder the claimant is still alive and has not remarried, the bureau, in its discretion, may again assume liability and resume pension payments. The bureau may also grant a partial lump sum settlement, based upon the same computations as the complete lump sum. Any decision of the bureau rendered under this section may be appealed to the district court as provided for in chapter 65-10, and the district court shall render its decision sustaining the decision of the bureau, reversing it, or remanding it back to the bureau with instructions.

* SECTION 8. AMENDMENT. Section 65-05-28 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-28. Examination of injured employee - Paid expenses - No compensation paid if claimant refuses to reasonably participate. ~~After suffering an injury, an employee, as frequently and at such times and places as reasonably may be required, shall submit himself to examination by a duly qualified physician designated or approved by the bureau. The employee may have a duly qualified physician designated and paid by him present to participate in such examination. In case of any disagreement between physicians making an examination on the part of the bureau and the employee's physician, the bureau shall appoint an impartial physician duly qualified who shall make an examination and shall report thereon to the bureau. The employee, in the discretion of the bureau, may be paid his reasonable traveling and other expenses and loss of wages incurred in submitting to any such examination. If the employee refuses to submit himself for, or in any~~

* NOTE: Section 65-05-28 was also amended by section 6 of Senate Bill No. 2256, chapter 765.

way obstructs, any examination, or refuses reasonably to participate in medical treatments, his right to claim compensation under this title shall be suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and the period of such refusal or obstruction shall be deducted from the period for which compensation is payable to him. Every employee who sustains an injury may select a physician of that employee's choice to render initial treatment. An injured employee shall follow the directives of that employee's physician or health care provider, and comply with all reasonable requests during the time the employee is under medical care. Providing further that:

1. No employee may change from one physician to another while under treatment or after being released, without the prior written authorization of the bureau. Failure to obtain approval of the bureau renders the employee liable for the cost of treatment and the new physician will not be considered the attending physician for purposes of certifying temporary disability.
 - a. Any employee requesting a change of physician shall file a written request with the bureau stating all reasons for the change. Upon receipt of the request, the bureau will review the employee's case and approve or deny the change of physician, notifying the employee and the requested physician.
 - b. Emergency care or treatment or referral by the attending physician does not constitute a change of physician and does not require prior approval of the bureau.
2. Travel and other personal reimbursement for seeking and obtaining medical care is paid only upon request of the injured employee. All claims for reimbursement must be supported by the original vendor receipt and must be submitted within one year of the date the expense was incurred or reimbursement must be denied. Reimbursement must be made at the bureau reimbursement rates in effect on the date of incurred travel or expense. Mileage calculations must be based upon the atlas or map mileage from city limit to city limit and do not include intracity mileage. Providing further that:
 - a. No payment for mileage or other travel expenses may be made when the distance traveled is less than fifty miles [80.47 kilometers] one way, unless the total mileage equals or exceeds two hundred miles [321.87 kilometers] in a calendar month;
 - b. All travel reimbursements are payable at the rates at which state employees are paid per diem and mileage, except that the bureau may pay no more than actual cost of meals and lodging, if actual cost is less;
 - c. Reimbursement may not be paid for travel other than that necessary to obtain the closest available medical or hospital care needed for the injury. If the injured employee chooses to seek medical treatment outside a local area where care is available, travel reimbursement may be denied;
 - d. Reimbursement may not be paid for the travel and associated expenses incurred by the injured employee's spouse, children,

or other persons unless the employee's injury prevents travel alone and the inability is medically substantiated; and

- e. Other expenses, including telephone calls and car rentals are not reimbursable expenses.
3. The bureau may at any time require an employee to submit to an independent medical examination by a duly qualified physician or physicians designated or approved by the bureau. The independent medical examination must be for the purpose of review of the diagnosis, prognosis, treatment, or fees. The employee may have a duly qualified physician designated by that employee present at the examination if procured and paid for by that employee. Providing further that:
- a. In case of any disagreement between physicians making an examination on the part of the bureau and the employee's physician, the bureau shall appoint an impartial physician duly qualified who shall make an examination and shall report to the bureau.
- b. The employee, in the discretion of the bureau, may be paid reasonable travel and other per diem expenses under the guidelines of subsection 2. If the employee is working and loses gross wages from the employee's employer for attending the examination, the gross wages must be reimbursed as a miscellaneous expense upon receipt of a signed statement from the employer verifying the gross wage loss.
4. If an employee, or the employee's representative, refuses to submit to, or in any way intentionally obstructs, any examination, or refuses reasonably to participate in medical or other treatments, 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 9. AMENDMENT. Section 65-05-29 of the 1987 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-29. Assignment of claims void - Claims exempt. Any assignment of a claim for compensation under this title shall be void. All compensation and claims therefor shall be exempt from claims of creditors except ~~either~~ any of the following:

1. A child support obligation ordered by a court of competent jurisdiction.
2. A claim by job service North Dakota for reimbursement of unemployment benefits, for the amount that was paid by job service during the period for which the claimant is found eligible for temporary total, or permanent total disability benefits, not to exceed the disability award actually made by the bureau.
3. A claim by the bureau for any payments made due to:

- a. Clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient, or any other circumstance of a similar nature, all not induced by fraud, in which cases the recipient shall repay it or recoupment of any unpaid amount may be made from any future payments due to the recipient on any claim with the bureau;
- b. An adjudication by the bureau or by order of the board or any court, if the final decision is that the payment was made under an erroneous adjudication, in which cases the recipient shall repay it or recoupment of any unpaid amount may be made from any future payments due to the recipient on any claim with the bureau;
- c. Fraud, in which case the recipient shall repay the payment or the unpaid amount of the sum may be recouped from any future payments due to the recipient on any claim with the bureau; or
- d. Overpayment due to application of section 65-05.1-09.

SECTION 10. AMENDMENT. Section 65-05-30 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-30. Filing of claim constitutes consent to use of information received by doctor. The filing of a claim with the bureau shall constitute a consent to the use by the bureau, in any proceeding by it or to which it is a party in any court, of any information including subsequent prognosis reports, medical records, medical bills, and other information concerning any health care or health care services which was received by any doctor, hospital, or clinic in the course of any examination or treatment of the claimant. The filing of such claim shall authorize a doctor, hospital, or clinic to disclose any such information to the bureau or to its representative. No physician or health care provider furnishing such reports or records incurs any liability as a result.

SECTION 11. AMENDMENT. Section 65-05-32 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-32. Privacy of records and hearings. The bureau shall keep the medical files of claimants closed to the public and may, at the request of a claimant, close the medical portion of the hearing to the public. However, an employer of a claimant shall have access to the file of the claimant. In the event that a source from outside the bureau requests in writing that information submitted by such source be kept confidential, such information may be released only upon court order. Information contained in the claim files and records of injured employees is confidential and is not open to public inspection, other than to bureau employees or agents in the performance of their official duties. Providing further that:

1. Representatives of a claimant, whether an individual or an organization, may review a claim file or receive specific information from the file upon the presentation of the signed authorization of the claimant.
2. Employers or their duly authorized representatives may review and have access to any files of their own injured workers.

3. Physicians or health care providers treating or examining workers claiming benefits under this title, or physicians giving medical advice to the bureau regarding any claim may, at the discretion of the bureau, inspect the claim files and records of injured workers.
4. Other persons may have access to and make inspections of the files, if such persons are rendering assistance to the bureau at any stage of the proceedings on any matter pertaining to the administration of this title.
5. The claimant's name; social security number; date of birth; injury date; employer name; type of injury; whether the claim is accepted, denied, or pending; and whether the claim is in active or inactive pay status will be available to the public.
6. At the request of a claimant, the bureau may close the medical portion of a hearing to the public.

SECTION 12. AMENDMENT. Section 65-05-33 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-33. Filing false claim or false statements - Penalty. Any claimant who files a false claim or makes a false statement in connection with any claim or accepts total disability benefits paid for a period after the claimant has returned to work is guilty of a class B misdemeanor. In addition to any other penalties provided by law, the claimant shall reimburse the bureau for any benefits paid based upon such false claim or false statement or for such period that the claimant was not totally disabled; and, in addition, shall forfeit any additional benefits relative to that same injury. Any person claiming benefits or payment for services under this title, who willfully files a false claim or makes a false statement, in connection with any claim or application under this title is guilty of a class B misdemeanor. Provided further that:

1. For the purposes of this section, the term "statement" includes any testimony, claim form, notice, proof of injury, proof of return to work status, bill for services, diagnosis, prescription, hospital or doctor records, X-ray, test results, or other evidence of loss, injury, or expense.
2. In addition to any other penalties provided by law, the person claiming benefits or payment for services in violation of this section shall:
 - a. Reimburse the bureau for any benefits paid based upon the false claim or false statement, and if applicable, under section 65-05-29.
 - b. Forfeit any additional benefits relative to that injury.

SECTION 13. AMENDMENT. Section 65-08-01 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-08-01. Extraterritorial coverage, when and how furnished.

1. Compensation shall be paid on account of injuries occurring outside this state or because of death due to an injury occurring outside of this state only when:
 - ~~1-~~ a. A North Dakota employee is a duly qualified peace officer of this state who received injury or was killed outside of this state in the course of his employment.
 - ~~2-~~ b. A North Dakota employee sustains an injury beyond the borders of this state in a service which is incidental to and is referable to the principal employment, the situs of which is within North Dakota.
 - ~~3-~~ c. A North Dakota employer and the bureau previously shall have contracted for insurance protection for employees while working outside of this state in the employment in which the injury occurred, which employment is incidental to or referable to the principal employment the localization and situs of which is not in North Dakota.
 - ~~4-~~ d. A North Dakota employer or his authorized agent has hired an employee, who is a resident of another state, for temporary employment the situs of which is located in another state, and where such temporary employment is necessary to the principal employment of such employer, provided that such other state recognizes the coverage under this title as a sole remedy of the employee against the employer for such injury or death.
2. If the injury is sustained at an identifiable out-of-state jobsite, the services rendered and injury sustained may not be deemed to be incidental and referable to the North Dakota employment, even if the contractual relationship between employer and employee was entered in North Dakota.
3. An employer of over-the-road truck drivers will be deemed to be a North Dakota employer only if:
 - a. The employer's trucking business has an office, operates, and dispatches from North Dakota; and
 - b. The employer retains control over the driver, and does not exclusively lease the driver to out-of-state employers.

Approved April 28, 1989
Filed April 28, 1989

CHAPTER 767

SENATE BILL NO. 2173
(Committee on Industry, Business and Labor)
(At the request of the Workers Compensation Bureau)

WORKERS COMPENSATION ATTORNEYS' FEES

AN ACT to amend and reenact sections 65-02-08 and 65-10-03 of the North Dakota Century Code, relating to the payment of attorneys' fees by the North Dakota workers compensation bureau; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-02-08 of the 1987 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-02-08. Rulemaking power of the bureau - Fees prescribed by bureau. The bureau shall make, promulgate, and enforce such rules, not inconsistent with the provisions of this title, as may be necessary to carry out the provisions of this title. All fees on claims for legal, medical, and hospital services rendered under this title to any claimant must be in accordance with schedules of fees adopted or to be adopted by the bureau. The bureau shall specify the amount allowable for court reporter and attorney's fees in proceedings before the bureau and shall pay the same from the bureau general fund; provided further that proceedings are defined as commencing after action by the bureau which reduces or denies a claim. Such attorney's fees shall constitute the entire remuneration for the claimant's attorney for all services before the bureau establish, by administrative rule, an hourly rate to compensate claimants' attorneys for legal services following constructive denial of a claim or issuance of an administrative order under chapter 28-32 reducing or denying benefits. "Constructive denial" means delay in payment, failure to issue an administrative order, or failure to act within ninety days of the date when all elements of filing or notice of reapplication of claim have been satisfied or a claim for additional benefits over and above benefits previously awarded has been made. The bureau shall establish, by administrative rule, a reasonable maximum fee for each stage of the proceedings, provided further that the maximum fee may be exceeded upon application of the claimant and approval of the bureau, which may not be unreasonably denied, upon a finding that the claim has clear and substantial merit and additional fees are warranted because the legal or factual issues involved in the dispute are unusually complex. The bureau may also provide, by administrative rule, an hourly fee for legal assistants or paraprofessionals, and fees for court reporters. The bureau may establish reasonable rules governing payment of fees, required fee statements, billing practices, reimbursement for costs, and other necessary rules governing payment for legal services not inconsistent with the provisions of this title. All attorneys' fees and costs must be paid from the bureau general fund. Nothing provided herein may be construed to prevent a claimant or employer from hiring or paying his or her own attorney; however, the claimant's attorney shall not seek or obtain costs or attorney's fees from

both the bureau and the claimant relative to the same services. The bureau may deny attorneys' fees upon a finding that the claim is frivolous. All disputes relating to payment or denial of attorneys' fees must be submitted to binding arbitration by a fee arbitration panel composed of one member selected by the claimant's attorney, one member selected by the bureau, and one member selected jointly by the claimant's attorney and the bureau. An attorney who agrees to accept compensation from the bureau for services pursuant to this section agrees to binding fee arbitration of all disputes relating to payment or denial of fees.

SECTION 2. AMENDMENT. Section 65-10-03 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-10-03. Cost of appeal and attorney's fee fixed by the court bureau. The cost of the judicial appeal and an attorney's fee for the appellant's claimant's attorney shall must be set by the appellate court and taxed against borne by the bureau unless the appeal is determined to be frivolous when the claimant prevails. The claimant is deemed to have prevailed when any part of the decision of the bureau is reversed or the claim is remanded to the bureau for further administrative proceedings. In an appeal by the bureau to the North Dakota supreme court, the claimant shall recover costs and attorneys' fees incurred in responding to the appeal. The bureau shall pay such attorney's fee from the bureau general fund. The amount of such attorney's fee shall must be determined in the same manner as prescribed by the bureau for attorney fees, and the amount of attorney's fee already allowed in administrative proceedings before the bureau shall must be taken into consideration. The bureau shall, pursuant to section 65-02-08, establish a maximum fee to be paid in an appeal, provided that the maximum fee may be exceeded upon application of the claimant and approval of the court, upon a finding that the claim had clear and substantial merit, and that the legal or factual issues involved in the appeal were unusually complex. Notwithstanding the foregoing, the bureau is liable for its costs on appeal if the decision of the bureau is affirmed.

Such attorney's fee shall constitute the entire remuneration for the appellant's attorney for all services in connection with the appeal. Nothing provided herein shall be construed to prevent a claimant or employer from hiring or paying his or her own attorney.

SECTION 3. EFFECTIVE DATE. This Act applies to all legal services rendered to claimants on or after July 1, 1989.

Approved April 19, 1989
Filed April 19, 1989

CHAPTER 768

SENATE BILL NO. 2323
(Senators Olson, D. Meyer, Langley)
(Representatives Whalen, Mertens, Dorso)

WORKERS COMPENSATION ADVISORY COUNCIL

AN ACT to create and enact a new section to chapter 65-02 of the North Dakota Century Code, relating to a workers compensation advisory council.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 65-02 of the North Dakota Century Code is hereby created and enacted to read as follows:

State advisory council - Composition - Compensation - Duties. The bureau shall appoint a state advisory council composed of an equal number of employer representatives and employee representatives who may be regarded fairly as representative because of their vocation, employment, or affiliations, and members representing the general public as the bureau may designate. The council shall aid the bureau in formulating policies, discussing problems related to the administration of the bureau, and in assuring impartiality and freedom from political influence in the solution of these problems. The members of the council may be reimbursed for expenses in the amounts provided by law for state officials but must serve without further compensation except as may be authorized and fixed by the bureau by rule. The bureau shall provide staff services to the council. The council shall assist the bureau in formulating policies and discussing problems related to the administration of the bureau, including adoption of rules, establishment of fees, determination of employer premium rates, maintenance of the solvency of the workers compensation fund, and provision of rehabilitation services. The council may make recommendations and proposals for consideration by the bureau.

Approved March 28, 1989
Filed March 28, 1989

CHAPTER 769

HOUSE BILL NO. 1119
(Committee on Industry, Business and Labor)
(At the request of the Workers Compensation Bureau)

WORKERS COMPENSATION MEDICAL CHARGES

AN ACT to amend and reenact section 65-05-07 of the North Dakota Century Code, relating to prohibition against a medical provider billing the claimant for the difference between the usual and customary charge and the amount allowed by the bureau fee schedule.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-07 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-07. Injured employee given medical and hospital service required - Furnished artificial limbs and appliances for rehabilitation. Immediately after an injury sustained by an employee and during the resulting period of disability, the fund shall furnish to the employee such reasonable and appropriate medical, surgical, and hospital service and supplies as the nature of the injury may require. ~~If the injury causes permanent impairment, the fund, in addition to the specific benefits provided, may furnish such artificial limbs, glasses, braces, equipment, or appliances or provide such rehabilitation services~~ The fund may furnish such artificial members and replacements as in the judgment of the bureau may be necessary to rehabilitate such injured employee. ~~The bureau may not provide any permanent additions, remodeling, or adaptations to real estate under this section.~~

1. The health care provider or physician must be acting within the scope of the provider's or physician's license or fees will be denied.
2. Fees may not be approved for more than one health care provider or physician, or both, in a case where treatment is provided over the same period of time except for the services of a consulting physician, assistant surgeon, or anesthesiologist or in an emergency.
3. The bureau, in cooperation with professional organizations of doctors and health care providers, shall establish a system of peer review to determine reasonableness of fees and payment denials for unjustified treatments, hospitalization, or visits. The doctor or health care provider shall have the right to appeal adverse decisions of the bureau in accordance with the medical aid rules adopted by the bureau.
4. Health care providers or doctors may not bill injured workers for any services rendered as a result of the compensable work injury.
5. If the bureau determines that it is necessary to provide permanent additions, remodeling, or adaptations to real estate to those workers who sustain catastrophic injury as defined in chapter 65-05.1, such improvements may be made, but may not exceed ten thousand dollars for the life of the claimant, regardless of any subsequent claim.

Approved March 31, 1989
Filed March 31, 1989

CHAPTER 770

HOUSE BILL NO. 1128
(Committee on Industry, Business and Labor)
(At the request of the Workers Compensation Bureau)

WORKERS COMPENSATION DISABILITY BENEFITS

AN ACT to create and enact a new section to chapter 65-05 of the North Dakota Century Code, relating to offset of workers compensation benefits by social security benefits; and to amend and reenact sections 65-05-08, 65-05-09, and 65-05-10 of the North Dakota Century Code, relating to workers compensation partial and total disability and benefits.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-08 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-08. Compensation not paid unless period of disability is of five days' duration or more - ~~Paid during disability~~ Application required. No compensation will be paid for total or partial disability, the duration of which is less than five consecutive calendar days. If the period of total or partial disability is of five consecutive calendar days' duration or more compensation shall be paid during such disability providing that:

1. When partial or total disability benefits are discontinued, the claimant shall provide the bureau written notice of reapplication for disability benefits. In case of reapplication, the award may commence no more than thirty days before the date of reapplication.
2. A health care provider or physician may not certify or verify past disability unless the health care provider or physician has examined the employee within the previous sixty days and filed those reports required by this title. A health care provider or physician certifying disability shall include in the report the basis for the certification of disability and a professional opinion as to the expected length of, and reason for, the disability.
3. All payments of benefits must be suspended during the period of confinement of any worker who is eligible for, or receiving, benefits under this title who is confined in any institution under conviction and sentence unless the worker has a spouse or child, in which case the benefits must be paid directly to such spouse or child. After discharge from the institution, payment of benefits thereafter due must be paid as the worker would, but for the provisions of this subsection, otherwise be entitled.
4. Any worker who is eligible for, or receiving, disability benefits under this title shall report any wages earned, from part-time or full-time employment, from the employer of injury or any other

employer. Failure to report such wages earned requires the worker to refund to the bureau any partial or total disability benefits overpaid by the bureau for that time period. To facilitate recovery, the bureau may offset future benefits otherwise payable, under section 65-05-29.

5. The provisions of this section apply to any disability claim asserted against the fund on or after July 1, 1989, irrespective of injury date.

SECTION 2. AMENDMENT. Section 65-05-09 of the 1987 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-09. Temporary total or permanent total disability - Weekly and aggregate compensation. If an injury causes temporary total or permanent total disability, the fund shall pay to the disabled employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the gross weekly wage of the claimant, computed to the next highest dollar, subject to a minimum of sixty percent and a maximum of one hundred percent of the average weekly wage in this the state, computed to the next highest dollar. If an employee is disabled due to an injury, that employee's benefits will be based upon the employee's wage at the time of the commencement of the first disability and the bureau benefit rates in effect on the date of first disability. However, if

1. If an employee suffers disability but is able to return to employment for a period of twelve months or more, that employee's benefits will be based upon the wage in effect at the time of the recurrence of the disability or upon the wage that employee received prior to the injury, whichever is higher; and the benefits bureau benefit rates shall be those in effect at the time of that recurrence.
2. In case of ~~temporary~~ permanent total or ~~permanent~~ temporary total disability, there must be paid to such disabled employee an additional sum of ten dollars per week for each child of the employee dependency allowance for each child of the employee at the rate of ten dollars per week per child. Effective July 1, 1989, this rate must be paid to each eligible employee regardless of the date of injury.
3. Dependency ~~awards~~ allowance for the children may be made directly to either parent or guardian at the discretion of the bureau.
4. In no case may the compensation or combined compensation and dependency award exceed the weekly wage of the employee after deductions for ~~taxes, except in the case of volunteer firemen and volunteer disaster emergency trainees~~ social security and federal income tax.
5. When an employee who is permanently and totally disabled and must be maintained in a nursing home or similar facility, and has no dependent parent, spouse, or children, part or all of his that employee's weekly compensation may be used by the bureau to help defray the cost of such care.

SECTION 3. AMENDMENT. Section 65-05-10 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05-10. Partial disability - Weekly compensation. If the injury causes temporary partial disability ~~the fund shall pay to the disabled employee during such disability a weekly compensation to be fixed by the bureau~~ resulting in decrease of earning capacity, the compensation 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 disability benefits may not exceed an amount equal to sixty-six and two-thirds percent of the employee's average weekly wage at the time of the injury.

1. It is the burden of the employee to show that the inability to obtain employment or to earn as much as the employee earned at the time of injury, is due to physical limitation related to the injury, and that any wage loss claimed is the result of the compensable injury.
2. If the employee voluntarily limits income or refuses to accept employment suitable to the employee's capacity, offered to or procured for the employee, such employee is not entitled to any compensation at any time during the continuance of such refusal unless, at any time, such refusal is justified in the opinion of the bureau.
3. No compensation is payable unless the loss of earning power exceeds ten percent. The claimant may earn up to ten percent of the claimant's average gross weekly earnings with no reduction in total disability benefits.
4. Upon securing suitable employment, the injured employee shall notify the bureau of the name and address of the employer, the date the employment began, and the amount of wages being received on an annual basis. The injured employee shall notify the bureau whenever there is a change in wages received.
5. The benefits provided by this section are available to any otherwise eligible worker, providing the loss of earning power occurs after July 1, 1989. Partial loss of earning power occurring prior to July 1, 1989, must be paid at a rate to be fixed by the bureau.
6. Dependency allowance must be paid under section 65-05-09 on claims receiving benefits under this section.

SECTION 4. A new section to chapter 65-05 of the North Dakota Century Code is hereby created and enacted to read as follows:

Retirement offset. If a claimant is entitled to permanent total disability benefits and social security retirement benefits under 42 U.S.C. sections 402 and 405, the aggregate wage-loss benefits payable under this title must be determined in accordance with this section. The employee's social security retirement offset must equal forty percent of the calculated ratio of the employee's average weekly wages, as calculated on the commencement of the first, or recurrent, disability under section 65-05-09,

to the current state's average weekly wage. Any offset calculated cannot exceed forty percent of the employee's weekly social security retirement benefit. If a claim has been accepted on an aggravation basis and the worker is eligible for social security benefits, the bureau's offset must be proportionally calculated. An overpayment must be recouped in the same manner as set forth in section 65-05-09.1. The provisions of this section are effective for workers who retire on or after July 1, 1989.

Approved April 28, 1989
Filed April 28, 1989

CHAPTER 771

HOUSE BILL NO. 1191
(Committee on Industry, Business and Labor)
(At the request of the Workers Compensation Bureau)

WORKERS COMPENSATION REHABILITATION BENEFITS

AN ACT to create and enact two new sections to chapter 65-05.1 of the North Dakota Century Code, relating to workers' compensation rehabilitation services; to amend and reenact sections 65-05.1-01, 65-05.1-02, and 65-05.1-04 of the North Dakota Century Code, relating to workers' compensation rehabilitation services; to repeal sections 65-05.1-05 and 65-05.1-06 of the North Dakota Century Code, relating to workers' compensation rehabilitation services; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

* SECTION 1. AMENDMENT. Section 65-05.1-01 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05.1-01. Rehabilitation services.

1. The state of North Dakota exercising its police and sovereign powers, declares that disability caused by injuries in the course of employment and disease fairly traceable to the employment create a burden upon the health and general welfare of the citizens of this state and upon the prosperity of this state and its citizens.
2. It is the purpose of this chapter to provide for the health and welfare by ensuring to ~~workmen's~~ workers' compensation claimants otherwise covered by this title, services, so far as possible, necessary to assist the claimant and the claimant's family in the adjustments required by the injury to the end that the claimant may receive comprehensive rehabilitation services. Such services shall include medical, psychological, economic, and social rehabilitation.
3. It is the goal of vocational rehabilitation to return the disabled worker to substantial gainful employment with a minimum of retraining, as soon as possible after an injury occurs. "Substantial gainful employment" means bona fide work, for remuneration, which is reasonably attainable in light of the individual's injury, medical limitations, age, education, previous occupation, experience, and transferable skills, and which offers an opportunity to restore the worker as soon as practical and as nearly as possible to the worker's average weekly earnings at the time of injury, or to the average weekly wage in this state on the date the rehabilitation consultant's report is issued under section 3 of this Act, whichever is less.

* NOTE: Section 65-05.1-01 was also amended by section 83 of Senate Bill No. 2056, chapter 69.

4. The first appropriate option among the following, calculated to return the worker to substantial gainful employment, must be chosen for the worker:
 - a. Return to the same position.
 - b. Return to a modified position.
 - c. Return to a related occupation suited to the worker's education, experience, and marketable skills.
 - d. On-the-job training.
 - e. Short-term retraining of fifty-two weeks or less.
 - f. Long-term retraining of one hundred four weeks or less.
 - g. Self-employment.
5. By agreement between the bureau and the worker, the priority options in subsection 4 may be waived.
6. Vocational rehabilitation services may be initiated by:
 - a. The bureau on its own motion; or
 - b. The worker or the employer if proof exists:
 - (1) That the claimant has reached maximum medical recovery;
 - (2) That the claimant is not working and has not voluntarily retired or removed himself from the labor force; and
 - (3) That the worker has made good faith efforts to seek, obtain, and retain employment.
7. The provisions of chapter 50-06.1 do not apply to determinations of eligibility for vocational rehabilitation made pursuant to this chapter.

SECTION 2. AMENDMENT. Section 65-05.1-02 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05.1-02. Bureau responsibility. The ~~workmen's~~ workers compensation bureau shall:

1. Appoint a director of rehabilitation services and such other staff as necessary to fulfill the purposes of this chapter.
2. Cooperate with such federal or state agency as shall be charged with vocational education, vocational rehabilitation, and job placement in order that any duplication of effort can be avoided, as far as possible, in any individual claim.
3. Make determinations on individual claims as to the extent and duration of the ~~workmen's~~ workers compensation bureau involvement under this chapter.

4. Enter into such agreements with other agencies and promulgate any rules or regulations as may be necessary or advantageous in order to carry out the purpose of this chapter.
5. Provide such rehabilitation services and allowances as may be determined by the bureau to be most beneficial to the claimant worker within the limits of this chapter.
6. Establish medical assessment teams, the composition of which must be determined by the bureau on a case-by-case basis, as the nature of the injury may require, for the purpose of assessing the worker's physical restrictions and limitations. The medical assessment team must be provided the medical records compiled by the worker's treating physicians. The medical assessment team may consult the worker's treating physicians prior to making its final assessment of the worker's functional capacities. The provisions of section 65-05-28 do not apply to the medical findings made under this section.
7. Appoint one or more vocational consultants, the identity of which must be determined by the bureau on a case-by-case basis, as the nature of the injury may require, for the purpose of assessing the worker's transferable skills, employment options, and the physical demand characteristics of the worker's employment options, and determining which option available under subdivisions a through f of subsection 4 of section 65-05.1-01 will enable the worker to return to employment within the physical restrictions and limitations provided by the medical assessment team. The vocational consultant shall issue to the bureau a report as provided in section 3 of this Act.

SECTION 3. A new section to chapter 65-05.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

Vocational consultant's report. The vocational consultant shall review all records, statements, and other pertinent information and prepare a report to the bureau and worker.

1. The report must:
 - a. Identify the first appropriate rehabilitation option by following the priorities set forth in subsection 4 of section 65-05.1-01.
 - b. Contain findings of why a higher listed priority, if any, is not appropriate.
2. Depending on which option the consultant identifies as appropriate, the report also must contain findings that:
 - a. Identify jobs in the local or statewide job pool and the worker's anticipated earnings from each job;
 - b. Describe an appropriate on-the-job training program, and the worker's anticipated earnings;

- c. Describe an appropriate short-term or long-term retraining program, the employment opportunities anticipated upon the worker's completion of the program, and the worker's anticipated earnings; or
- d. Describe the worker's potential for specific self-employment, limitations the worker might have in such a self-employment, any assistance necessary, and the worker's anticipated earnings.

SECTION 4. AMENDMENT. Section 65-05.1-04 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05.1-04. Injured worker responsibility.

1. It shall be the responsibility of the injured worker to seek, obtain, and retain reasonable and substantial employment in order to reduce the period of temporary disability to a minimum. The worker has the burden to establish that the worker has met this responsibility.
2. In the event that the injured worker is unable to obtain substantial employment as a direct result of his injury he shall promptly notify the bureau and thereafter be available for such examinations and testing as may be prescribed by the bureau to determine whether or not a program of rehabilitation is necessary under subdivision b of subsection 6 of section 65-05.1-01.
3. It is the responsibility of the injured worker to be available for testing under subsection 6 or 7 of section 65-05.1-02, and for any further examinations and testing as may be prescribed by the bureau to determine whether or not a program of rehabilitation is necessary.
4. If the bureau determines that a program of rehabilitation is necessary and feasible, the injured worker, upon having been so notified, shall be available for such a program. Upon notification, with the appropriate assistance and testing from a vocational coordinator appointed by the bureau, the worker shall identify a specific qualified rehabilitation program within sixty days. A qualified rehabilitation program is a rehabilitation plan that meets the criteria of this title, and which is an approved option of the rehabilitation consultant, or is a stipulated rehabilitation plan under subsection 5 of section 65-05.1-01.
5. If the injured worker shall fail to comply with this section without a reasonable cause, the bureau, by ~~format~~ administrative order, shall discontinue all lost-time benefits under this title during the period of noncompliance. If, upon the bureau order becoming final, the period of noncompliance shall continue for six months, the bureau shall have no further jurisdiction in awarding any further temporary total, temporary partial, permanent total, or rehabilitation benefits.

SECTION 5. A new section to chapter 65-05.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

Rehabilitation award.

1. If the bureau determines that vocational rehabilitation is necessary and feasible, the bureau shall make an award of rehabilitation services by order, under chapter 28-32. The bureau shall establish, by administrative rule, an hourly rate to compensate a worker's attorney from the date the bureau has notified the worker to identify a rehabilitation plan under section 65-05.1-04. The bureau may establish, by administrative rule, absolute maximum fees for such representation.
2. The rehabilitation award must be within the following terms:
 - a. For the worker's lost time, and in lieu of further temporary total, temporary partial, and permanent total disability benefits, the bureau shall award a rehabilitation allowance. The rehabilitation allowance must be limited to the amount and purpose specified in the award, and must be equal to the disability and dependent benefits the worker was receiving, or was entitled to receive, prior to the award.
 - b. The rehabilitation allowance must include an additional twenty-five percent while the worker maintains two domiciles, or meets other criteria established by the bureau by administrative rule.
 - c. The rehabilitation allowance must be limited to one hundred four weeks except in cases of catastrophic injury, in which case additional rehabilitation benefits may be awarded in the discretion of the bureau. Catastrophic injury includes:
 - (1) Paraplegia, quadraplegia, severe closed head injury, total blindness, or amputation of an arm or leg, which renders a worker permanently and totally disabled without further vocational retraining assistance; or
 - (2) Those workers the bureau so designates, in its sole discretion, provided that the bureau finds the worker to be permanently and totally disabled without further vocational retraining assistance. There is no appeal from a bureau decision to designate, or fail to designate, a worker as catastrophically injured under this subsection.
 - d. The rehabilitation award must include the cost of books, tuition, fees, and equipment, tools, or supplies required by the educational institution. The award may not exceed the cost of attending a public college or university in the state in which the worker resides, provided an equivalent program exists in the public college or university.
 - e. The rehabilitation allowance may be paid only during such time as the worker faithfully pursues vocational retraining. The rehabilitation allowance may be suspended during such time as the worker is not faithfully pursuing the training program, or has failed academically. If the work injury itself precludes the worker from continuing training, the worker remains eligible to receive disability benefits.

- f. In the event the worker successfully concludes the rehabilitation program, the bureau may make, in its sole discretion, additional awards for actual relocation expenses to move the household to the locale where the claimant has actually located work.
- g. In the event the worker successfully concludes the rehabilitation program, the bureau may make, in its sole discretion, an additional award, not to exceed two months disability benefit, to assist the worker with work search.
- h. If the worker successfully concludes the rehabilitation program, the worker is not eligible for further vocational retraining or total disability benefits unless the worker establishes a significant change in medical condition attributable to the work injury which precludes the worker from performing the work for which the worker was trained, or any other work for which the worker is suited. The bureau may waive the provisions of this section in cases of catastrophic injury defined by subdivision c of subsection 2.
- i. If the worker successfully concludes the rehabilitation program, the worker remains eligible to receive partial disability benefits, as follows:
- (1) Beginning the date at which the worker completes retraining, until the worker acquires and performs substantial gainful employment, the partial disability benefit is sixty-six and two-thirds percent of the difference between the injured worker's average weekly wages before the injury, and the worker's wage-earning capacity after retraining, as measured by the average wage in the worker's occupation, according to criteria established by job service North Dakota in its statewide labor market survey, or such other criteria the bureau, in its sole discretion, deems appropriate. The average weekly wage must be determined on the date the worker completes retraining. The benefit continues until the worker acquires substantial gainful employment, but in no case may exceed two years in duration.
 - (2) Beginning the date at which the worker acquires substantial gainful employment in the field for which the worker was trained, or in a related occupation, the partial disability benefit is sixty-six and two-thirds percent of the difference between the injured worker's average weekly wages before the injury, and the worker's wage-earning capacity after retraining.
 - (3) Beginning the date at which the worker acquires substantial gainful employment in an occupation unrelated to the worker's training, the partial disability benefit is sixty-six and two-thirds percent of the difference between the injured worker's weekly wages before the injury, and the worker's wage-earning capacity after retraining, as determined under paragraph 1 of this

subdivision i, or the worker's actual postinjury wage earnings, whichever is higher.

- (4) The partial disability benefit payable under paragraphs 1, 2, and 3 of this subdivision must be reduced so that the benefit and the worker's earnings or calculated earnings capacity, together, do not exceed one hundred twenty-five percent of the average weekly wage in this state. For purposes of this subsection, the average weekly wage must be determined on the date the worker completes retraining or the date the worker acquires substantial gainful employment. The partial disability benefit so calculated is not subject to increase or decrease when the average weekly wage in this state changes.
- (5) The partial disability benefits paid under paragraphs 1, 2, and 3 of this subdivision may not together exceed five years' duration.
- (6) For purposes of paragraph 1 of this subdivision, the date the worker completes retraining is defined as the date the worker is available for full-time work. A worker cannot be deemed available for full-time work while the worker pursues education, unless such pursuit will in no way interfere with full-time work.
- (7) For purposes of paragraphs 1, 2, and 3 of this subdivision, "substantial gainful employment" means full-time bona fide work, for a remuneration, other than make-work. "Full-time work" means employment for twenty-eight or more hours per week, on average.
- (8) The bureau may waive the five-year limit on the duration of partial disability benefits, in cases of catastrophic injury under subdivision c of subsection 2.

* SECTION 6. REPEAL. Section 65-05.1-05 of the North Dakota Century Code and section 65-05.1-06 of the 1987 Supplement to the North Dakota Century Code are hereby repealed.

SECTION 7. EFFECTIVE DATE. The duties, responsibilities, and benefits available under this Act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date.

Approved April 14, 1989
Filed April 17, 1989

* NOTE: Section 65-05.1-06 was also amended by section 17 of Senate Bill No. 2324, chapter 295.

CHAPTER 772

HOUSE BILL NO. 1364
(Representatives Graba, Gerl, Haugland)
(Senators Stenehem, Schoenwald)

WORKERS COMPENSATION SUPPLEMENTARY BENEFITS

AN ACT to amend and reenact section 65-05.2-02 of the North Dakota Century Code, relating to supplementary workers' compensation benefits; and to provide for application of the Act.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05.2-02 of the 1987 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-05.2-02. Supplementary benefits - Amount. Claimants who are eligible for supplementary benefits and who are receiving temporary total disability benefits or permanent total disability benefits are entitled to receive a weekly benefit of at least one hundred ~~fifty~~ sixty dollars per week. Claimants who are eligible for supplementary benefits and who are receiving death benefits are entitled to receive a weekly benefit of at least ~~ninety~~ one hundred dollars per week.

SECTION 2. APPLICATION OF ACT. This Act applies to benefits payable after June 30, 1989.

Approved March 29, 1989
Filed March 30, 1989

CHAPTER 773

SENATE BILL NO. 2477
(Schoenwald)

MODEL BOILER INSPECTION EXEMPTION

AN ACT to create and enact a new subsection to section 65-12-04.1 of the North Dakota Century Code, relating to exemption of miniature model boilers from boiler inspection.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new subsection to section 65-12-04.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

Boilers of a miniature model locomotive, boat, tractor, or stationary engine design constructed as a hobby and not for commercial use having an inside diameter not exceeding ten inches [25.4 centimeters] and a grate area not exceeding one and one-half square feet [1393.54 square centimeters] and which are properly equipped with a safety valve, water level indicator, and pressure gauge.

Approved March 28, 1989
Filed March 28, 1989

CHAPTER 774

HOUSE BILL NO. 1522
(Graba)

BOILER INSPECTION FEES

AN ACT to amend and reenact section 65-12-11 of the North Dakota Century Code, relating to workers' compensation boiler inspection fees.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-12-11 of the 1987 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

65-12-11. Inspection fees. The owner or user of a boiler required by this chapter to be inspected by the boiler inspector shall pay to the bureau, upon completion of inspection, fees, or a combination of fees, which must be determined annually by the bureau. The bureau may determine and annually adjust a fee scale for the internal inspection of power boilers, internal inspections of low pressure heating boilers, external inspections of all boilers, and inspection of boilers used exclusively for exhibition purposes.

Not more than seventy-five dollars may be charged or collected for any and all inspections of any boiler in any one year except for special inspections made upon request. All other inspections made by the boiler inspector, including shop inspections and reviews and special inspections when requested by the owner or user of a boiler, must be charged for according to the current fee scale applicable to an internal inspection plus any additional expenses incurred in connection with the inspection at a rate not to exceed one hundred eighty-five dollars per day or one hundred dollars per half day of four hours or less, plus payment for mileage, meals, and hotel expenses as allowed by sections 44-08-04 and 54-06-09.

The bureau shall charge a fee of ten dollars for each certificate of inspection issued as the result of inspections authorized under section 65-12-05. The fees are the liability of the insurance company or self-insured company and must be paid in accordance with rules established by the bureau.

Approved March 29, 1989
Filed March 30, 1989