

WORKERS' COMPENSATION

CHAPTER 527

HOUSE BILL NO. 1269

(Representative Berg)

(Senator Mutch)

WORKERS' COMPENSATION DEFINITIONS AND PRESUMPTIONS

AN ACT to create and enact a new section to chapter 65-01 of the North Dakota Century Code, relating to the presumption that certain conditions of paid firefighters and law enforcement officers are work-related; to amend and reenact sections 65-01-02, 65-01-03, 65-01-11, 65-01-15, and 65-07-03 of the North Dakota Century Code, relating to definitions, the presumption of being an employee for purposes of workers' compensation, and the burden of proof in workers' compensation matters; and to provide for a study of wage-loss benefits structure.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

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

1. "Acute care" means a short course of intensive diagnostic and therapeutic services provided immediately following a work injury with a rapid onset of pronounced symptoms.
2. "Adopted" or "adoption" refers only to a legal adoption effected prior to the time of the injury.
- ~~2.~~ 3. "Artificial members" includes only such devices as are substitutes for, and not mere aids to, a natural part, organ, limb, or other part of the body. The term does not include eyeglasses or contact lenses unless the eye is, or eyes are, injured as a result of a compensable injury, and such injury causes a change in sight which requires fitting of eyeglasses or contact lenses not previously worn by the injured worker, or requires a change in existing prescription.
- ~~3.~~ 4. "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:~~

¹ Section 65-01-02 was also amended by section 1 of House Bill No. 1260, chapter 530, and section 1 of House Bill No. 1440, chapter 528.

- 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 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. 5. "Average weekly wage" means the weekly wages the employee was receiving from all employments at the time of injury date of first disability. The average weekly wage as determined under this section must be rounded to the nearest dollar. In cases where the employee's wages are not fixed by the week, they must be determined by using the first applicable formula from the schedule below:
- a. For seasonal employment, one-fiftieth of the total wages from all occupations during the twelve months preceding the injury or during the tax year preceding the injury, or during the three tax years preceding the injury, whichever is highest and for which accurate, reliable, and complete records are readily available.
 - b. The "average weekly wage" of a self-employed employee is determined by the following formula: net profits based on preceding tax year or preceding fifty-two weeks whichever is higher if accurate, reliable, and complete records for those fifty-two weeks

are readily available, plus depreciation, meal and travel expenses, and any expenses chargeable to use of personal residence as allowed under the federal tax laws.

- b. c. Hourly or daily rate multiplied by number of hours or days worked per seven-day week.
 - e. d. Monthly rate multiplied by twelve months and divided by fifty-two weeks.
 - e. e. Biweekly rate divided by two.
 - e. ~~In seasonal employment, the average weekly wage is one-fiftieth of the total wages the employee has earned from all occupations during the twelve calendar months immediately preceding the injury or one-fiftieth of the average annual income for the three-year period immediately preceding the injury, whichever is greater.~~
 - f. ~~If the average weekly wage of an employee cannot be ascertained, the wage for the purposes of calculating compensation is the~~ The usual wage paid other employees engaged in similar occupations where the wages are fixed.
 - g. ~~If there are special circumstances under which the average weekly~~ A ~~wage cannot be reasonably and fairly determined by applying subdivisions a through f, 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 if that number is less than fifty-two approximating the~~ weekly wage lost by the claimant during the period of disability.
5. 6. "Average weekly wage in the state" means the determination made of the average weekly wage in the state by job service North Dakota on or before July first of each year, computed to the next highest dollar.
6. 7. "Brother" and "sister" ~~includes~~ include a stepbrother and a stepsister, a half brother and a half sister, and a brother and sister by adoption. The terms do not include a married brother or sister unless he or she actually is dependent.
7. 8. "Bureau" means the North Dakota workers compensation bureau, or the director, or any department heads, assistants, or employees of the bureau designated by the director, to act within the course and scope of their employment in administering the policies, powers, and duties of this title.
8. 9. "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.

- 9: 10. "Compensable injury" means an injury by accident arising out of and in the course of employment which must be established by medical evidence supported by objective medical findings.
- a. The term "~~compensable injury~~", in addition to an injury by accident, includes:
- (1) ~~Any disease that can be fairly traceable to the employment. Ordinary diseases of life to which the general public outside of the employment is exposed are not compensable except where the disease follows as an incident to, and in its inception is~~ Disease caused by a hazard to which an employee is subjected in the course of employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease ~~Disease~~ includes impairment and effects from radiation fairly traceable to the employment. It does not have to be foreseen or expected, but after it is contracted, it must have had its origin in a risk connected with the employment and have flowed from that source as a rational consequence. Preventive treatment for communicable diseases is not compensable under this title.
 - (2) An injury to artificial members.
 - (3) Injuries due to heart attack or other heart-related disease, stroke, and physical injury ~~precipitated~~ caused by mental stimulus, which must be causally related to but only when caused by the employee's employment, with reasonable medical certainty, and ~~which must have been precipitated by~~ only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work.
 - (4) Injuries arising out of employer-required or supplied travel to and from a remote jobsite or activities performed at the direction or under the control of the employer.
 - (5) An injury caused by the willful act of a third person directed against an employee because of the employee's employment.
 - (6) A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not preexist the work injury.
- b. The term does not include:
- (1) Ordinary diseases of life to which the general public outside of employment is exposed or preventive treatment for communicable diseases.

- (2) (2) A willfully self-inflicted injury, including suicide or attempted suicide, or an injury caused by the employee's willful intention to ~~commit suicide or to~~ injure or kill another; ~~including injury or aggravation of an injury, which results from the employee's suicide or attempted suicide.~~
- (2) (3) Any injury caused by the use of intoxicants or the illegal use of controlled substances.
- (3) (4) An injury that arises out of an altercation in which the injured employee is ~~the initial physical~~ an aggressor. This paragraph does not apply to public safety employees, including law enforcement officers, or private security personnel who are required to engage in altercations as part of their job duties if the altercation arises out of the performance of those job duties.
- (4) (5) An injury that arises out of an illegal act committed by the injured employee.
- (5) (6) An injury that arises out of an employee's voluntary nonpaid participation in any recreational activity, including athletic events, parties, and picnics, even though the employer pays some or all of the cost of the activity.
- (6) (7) Injuries attributable to a preexisting injury, disease, or other 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. It is insufficient, however, to afford compensation under this title solely because, including when the employment acted acts as a trigger to produce symptoms in a latent and underlying the preexisting injury, disease, or other condition if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is determined to be a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity substantially accelerates its progression or substantially worsens its severity.
- (7) (8) A nonemployment injury that, although acting upon a prior compensable injury, is ~~established~~ as an independent intervening cause of injury.
- (8) (9) A latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a ~~nonemployment~~ subsequent injury.
- (9) (10) A mental injury arising from mental stimulus or a mental or emotional injury arising principally out of a bona fide personnel action, including a transfer, promotion, demotion, or termination except an action that is the intentional infliction of emotional harm.

- 40: 11. "Date of first disability" and "loss of earnings date" ~~mean~~ means the first ~~full~~ date the employee was unable to work in relation to a compensable injury. These terms ~~do not apply to recurrent disabilities.~~
- 44: 12. "Date of maximum medical improvement" or "date of maximum medical recovery" means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated based upon reasonable medical probability.
- 42: 13. "Director" means the director of the bureau.
- 43: 14. "Disability" means loss of earnings capacity and may be permanent total, temporary total, or partial.
- a. Permanent total disability is permanent in nature and total in character, and is paid to an employee who is not capable of rehabilitation of earnings capacity, which depend upon the following factors:
- (1) Nature of injury;
 - (2) Degree of physical impairment;
 - (3) Age;
 - (4) Education;
 - (5) ~~Work history; and~~
 - (6) ~~Vocational rehabilitation potential.~~
- b. Temporary total disability is total in character but temporary in nature and is paid to the employee until maximum medical recovery with work release to any occupation for which the employee is reasonably suited by aptitude, education, experience, or training.
- e. Partial disability exists when the following are present and must be paid pursuant to section 65-05-10:
- (1) The employee has a permanent physical inability to perform certain work;
 - (2) The employee is able to do some work subject to the disability;
 - (3) The employee has an actual loss of earning capacity that is causally related to the disability; and
 - (4) The employee has not undergone training under chapter 65-05.1.
- 44: 15. "Doctor" means doctor of medicine, chiropractor, osteopathy, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license.

45. 16. "Employee" means ~~every~~ a person engaged in a hazardous employment ~~under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, who performs services for another for remuneration unless the person is an independent contractor under the "common law" test, and:~~

a. The term includes:

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

b. The term does not include:

- (1) Any person whose employment is both casual and not in the course of the trade, business, profession, or occupation of that person's employer.
- (2) Any person who is engaged in an illegal enterprise or occupation.
- (3) The spouse or child of the employer dwelling in the household of the employer.
- (4) Any real estate broker or real estate salesperson, provided the person meets the following three requirements:
 - (a) The salesperson or broker must be a licensed real estate agent under section 43-23-05.
 - (b) Substantially all of the salesperson's or broker's remuneration for the services performed as a real estate agent must be directly related to sales or other efforts rather than to the number of hours worked.
 - (c) A written agreement must exist between the salesperson or broker and the person or firm for whom the salesperson or broker works, which agreement must provide that the salesperson or broker will not be

treated as an employee but rather as an independent contractor.

- (5) The members of the board of directors of a business corporation who are not employed in any capacity by the corporation other than as members of the board of directors.
- (6) Any individual delivering newspapers or shopping news, if substantially all of the individual's remuneration is directly related to sales or other efforts rather than to the number of hours worked and a written agreement exists between the individual and the publisher of the newspaper or shopping news which states that the individual is an independent contractor.

(7) An employer.

- c. Persons employed by a subcontractor, or by an independent contractor operating under an agreement with the general contractor, for the purpose of this chapter are deemed to be employees of the general contractor who is liable and responsible for the payments of premium for the coverage of these employees until the subcontractor or independent contractor has secured the necessary coverage and paid the premium for the coverage. This subdivision does not impose any liability upon a general contractor other than liability to the bureau for the payment of premiums which are not paid by a subcontractor or independent contractor.

46- 17. "Employer" means a person who engages or received the services of another for remuneration unless the person performing the services is an independent contractor under the "common law" test. The term includes:

- a. The state and all political subdivisions thereof.
- b. All public and quasi-public corporations in this state.
- c. Every person, partnership, limited liability company, association, and private corporation, including a public service corporation.
- d. The legal representative of any deceased employer.
- e. The receiver or trustee of any person, partnership, limited liability company, association, or corporation, having one or more employees as herein defined.
- f. The president, vice presidents, secretary, or treasurer of a business corporation, but not members of the board of directors of a business corporation who are not also officers of the corporation.
- g. The managers of a limited liability company.
- h. The president, vice presidents, secretary, treasurer, or board of directors of an association or cooperative organized under chapter 6-06, 10-12, 10-13, 10-15, 36-08, or 49-21.

- i. The clerk, assessor, treasurer, or any member of the board of supervisors of an organized township, if the person is not employed by the township in any other capacity.
17. "Employment" means employment by the state and all political subdivisions thereof, by all public and quasi-public corporations therein, and all private employments.
18. "Fairly traceable to the employment" when used to modify the term "disease" means only a disease that:
 - 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; or
 - d. However, any condition or impairment of health of a full-time paid firefighter 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 firefighter, 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 firefighter 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 firefighter. A full-time paid firefighter or law enforcement officer is not eligible for the benefit provided under this subdivision unless that full-time paid firefighter or law enforcement officer has completed five years of continuous service and has successfully passed a physical examination which fails to reveal any evidence of such a condition. An employer shall require a physical examination upon employment, and annually thereafter, for any employee subject to this subdivision. Results of the examination must be used in rebuttal to a presumption afforded under this subdivision. For purposes of this subdivision, "law enforcement officer" means a person who is licensed to perform peace officer law enforcement duties under chapter 42-63 and is employed full time by the bureau of criminal investigation, the game and fish department, the state highway patrol, the parole and probation division, the North Dakota state university police department, the North Dakota state college of science police department, the university of North Dakota police department, a county sheriff's department, or a city police department. The presumption does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed for ten years or less, if the condition or impairment is diagnosed more than two years after the employment as a

~~full-time paid firefighter or law enforcement officer ends. The presumption also does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed more than ten years, if the condition or impairment is diagnosed more than five years after the employment as a full-time paid firefighter or law enforcement officer ends.~~

- ~~49.~~ "Fee schedule" means the relative value scale, conversion factors, fee schedules, and medical aid rules adopted by the bureau.
- ~~20.~~ 19. "Fund" means the North Dakota workers' compensation fund.
- ~~24.~~ 20. "Grandchild" and the terms defined in subsections 6 7 and 8 9 include only a person who, at the time of the death of the deceased employee, is under eighteen years of age, or if over that age, is incapable of self-support.
- ~~22.~~ 21. "Hazardous employment" means any employment in which one or more employees are employed regularly in the same business or in or about the establishment except:
- a. Agricultural or domestic service.
 - b. Any employment of a common carrier by railroad.
 - c. Any employment for the transportation of property or persons by nonresidents, where, in such transportation, the highways are not traveled more than seven miles [11.27 kilometers] and return over the same route within the state of North Dakota.
 - d. All members of the clergy and employees of religious organizations engaged in the operation, maintenance, and conduct of the place of worship.
- ~~23.~~ 22. "Health care provider" means a doctor or any recognized practitioner providing skilled services pursuant to the prescription of, or under the supervision or direction of, a doctor.
- ~~24.~~ 23. "Orphan" means a child who has no lawful parent.
- ~~25.~~ 24. "Parent" includes a stepparent and a parent by adoption.
- ~~26.~~ 25. "Permanent impairment" means the loss of or loss of use of a member of the body existing after the date of maximum medical improvement 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.
26. "Permanent total disability" means an employee is determined incapable of rehabilitation of earnings capacity as determined by the:

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

SECTION 2. AMENDMENT. Section 65-01-03 of the North Dakota Century Code is amended and reenacted as follows:

65-01-03. Person performing service for remuneration presumed an employee.

Each person who performs services for another for a remuneration; ~~whether the same is paid as a salary, commission, or other considerations in lieu thereof, under any agreement or contract of hire, express or implied,~~ is presumed to be an employee of the person for whom the services are performed, unless it is proven that the person maintains a separate business establishment or holds that person out to render or renders services to the general public. ~~In determining whether a person is an independent contractor or an employee, the test to be employed is under the "common law" test. The person who asserts that a person is an independent contractor under the "common law" test, rather than an employee, has the burden of proving that fact.~~

SECTION 3. AMENDMENT. Section 65-01-11 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-01-11. Burden of proof in compensation matters - Death certificate. If the bureau or an employer claims that an employee is not entitled to the benefits of the North Dakota Workers' Compensation Law ~~by reason of the fact that~~ because the employee's injury was caused by the employee's willful intention to injure himself, or to injure another, or by reason of the voluntary impairment caused by use of alcohol or illegal use of a controlled substance by the employee, the burden of proving ~~such~~ the exemption or forfeiture is upon the bureau or upon the person alleging the same; however, an alcohol concentration level at or above the limit set by the United States secretary of transportation in 49 CFR 383.51 or a level of an illegally used controlled substance sufficient to cause impairment found by a test required by a physician, qualified technician, chemist, or registered nurse and performed as required by the United States secretary of transportation under 49 CFR part 40, at or above the cutoff level in part 40, creates a rebuttable presumption that the injury was due to impairment caused by the use of alcohol or the illegal use of a controlled substance. An employer who has a mandatory drug alcohol testing policy for work accidents, or an employer or a doctor who has reasonable grounds to suspect an employee's alleged work injury was caused by the employee's voluntary impairment caused by use of alcohol or illegal use of a controlled substance may request that the employee undergo testing to determine if the employee had alcohol or the controlled substance in the employee's system at levels greater than the limit set by the United States department of transportation at the time of the injury. If an employee refuses to submit to a reasonable request to undergo a test to determine if the employee was impaired; or if an employee refuses to submit to a test for drugs or alcohol after a work accident as mandated by company policy, the employee forfeits all entitlement to workers' compensation benefits arising out of that injury. Any claimant against the fund, however, has the burden of proving by a preponderance of the evidence that the claimant is entitled to ~~participate in the same benefits. In the event of~~ If a claim for death benefits is filed, the official death certificate must be considered as evidence of death and may not be used to establish the cause of death.

² **SECTION 4.** A new section to chapter 65-01 of the North Dakota Century Code is created and enacted as follows:

Presumption of compensability for certain conditions of full-time paid firefighters and law enforcement officers. Any condition or impairment of health of a full-time paid firefighter 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 firefighter, 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 section, an occupational cancer is one which arises out of employment as a full-time paid firefighter 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 firefighter. A full-time paid firefighter or law enforcement officer is not eligible for the benefit provided under this section unless that full-time paid firefighter

² Section 65-01-15.1 was also amended by section 2 of Senate Bill No. 2343, chapter 529.

or law enforcement officer has completed five years of continuous service and has successfully passed a physical examination which fails to reveal any evidence of such a condition. An employer shall require a physical examination upon employment, and annually thereafter, for any employee subject to this section. Results of the examination must be used in rebuttal to a presumption afforded under this section. For purposes of this section, "law enforcement officer" means a person who is licensed to perform peace officer law enforcement duties under chapter 12-63 and is employed full time by the bureau of criminal investigation, the game and fish department, the state highway patrol, the parole and probation division, the North Dakota state university police department, the North Dakota state college of science police department, the university of North Dakota police department, a county sheriff's department, or a city police department. The presumption does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed for ten years or less, if the condition or impairment is diagnosed more than two years after the employment as a full-time paid firefighter or law enforcement officer ends. The presumption also does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed more than ten years, if the condition or impairment is diagnosed more than five years after the employment as a full-time paid firefighter or law enforcement officer ends.

SECTION 5. AMENDMENT. Section 65-01-15 of the North Dakota Century Code is amended and reenacted as follows:

65-01-15. Yearly documentation required for firefighter and law enforcement officer. Except for benefits for exposure to infectious disease as defined by sections 23-07.3-01 and 23-07.3-02, a full-time paid firefighter or law enforcement officer who uses tobacco is not eligible for the benefits provided under ~~subdivision e of subsection 18 of section 65-01-02~~ 4 of this Act, unless the full-time paid firefighter or law enforcement officer provides yearly documentation from a physician which indicates that the full-time paid firefighter or law enforcement officer has not used tobacco for the preceding two years. Any full-time paid firefighter or law enforcement officer employed on June 30, 1995, is not subject to this section until July 1, 1997.

³ **SECTION 6. AMENDMENT.** Section 65-07-03 of the North Dakota Century Code is amended and reenacted as follows:

65-07-03. Determination of weekly wage for premium purposes. If the bureau enters into a contract for insurance under this chapter, the premium for such protection shall be based on:

1. The amount of money derived on an annual basis from the business of an employer or self-employed person as outlined in subdivision a b of subsection 4 5 of section 65-01-02. This amount may not be less than the limited payroll required to be reported for an employee in subsection 1 of section 65-04-04.2.
2. A reasonable wage as determined by the bureau for said employees in the same class of industry that the volunteer organization is engaged.

³ Section 65-07-03 was also amended by section 1 of Senate Bill No. 2383, chapter 547.

SECTION 7. BUREAU TO STUDY WAGE-LOSS BENEFITS STRUCTURE. During the 1997-1998 interim, the bureau shall conduct a study of its wage-loss benefits structure to determine if the current structure provides for equitable compensation for wage-loss resulting from a work-related injury. The results of the study must identify the advantages and disadvantages of the current system and of any proposed system. The results must include recommendations on how the bureau's benefits structure could be refined to provide an appropriate balance between adequate benefits and return-to-work incentives. The bureau shall report on the progress of the study to an interim committee designated by the legislative council to receive the report. If any legislation is expected to be proposed as a result of the study, the interim committee designated by the legislative council may review the proposed legislation before it is introduced.

Approved April 2, 1997

Filed April 3, 1997

CHAPTER 528

HOUSE BILL NO. 1440

(Representatives Skarphol, Boucher, Dalrymple)
(Senators Grindberg, Lips, Robinson)

WORKERS COMPENSATION BOARD OF DIRECTORS

AN ACT to create and enact a new subsection to section 65-01-02 and four new sections to chapter 65-02 of the North Dakota Century Code, relating to a workers compensation board of directors; to amend and reenact section 65-02-01 of the North Dakota Century Code, relating to the director and division directors of the workers compensation bureau; to repeal section 65-02-08.1 of the North Dakota Century Code, relating to the workers compensation state advisory council; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

⁴ **SECTION 1.** A new subsection to section 65-01-02 of the North Dakota Century Code is created and enacted as follows:

"Board" means the North Dakota workers compensation board of directors.

⁵ **SECTION 2. AMENDMENT.** Section 65-02-01 of the North Dakota Century Code is amended and reenacted as follows:

65-02-01. Workers compensation bureau - ~~Executive director~~ Director - Division directors. The bureau must be maintained for the administration of this title. The ~~governor board~~ shall appoint the director of the bureau ~~who.~~ The director is subject to the supervision and direction of the ~~governor board~~ and ~~who shall serve~~ serves at the pleasure of the ~~governor board~~. ~~The appointment must be on a nonpartisan, merit basis, in accordance with chapter 54-42. The governor shall set the compensation and prescribe the duties of the director.~~ The director may appoint the director of any division ~~of the bureau which~~ is established by the director. The appointment of a division director must be on a nonpartisan, merit basis.

SECTION 3. A new section to chapter 65-02 of the North Dakota Century Code is created and enacted as follows:

Workers compensation board of directors - Appointment.

1. Beginning September 1, 1997, the initial board of directors shall consist of the members on the state advisory council on December 15, 1996. The initial board shall submit to the governor a list of three names of

⁴ Section 65-01-02 was also amended by section 1 of House Bill No. 1260, chapter 530, and section 1 of House Bill No. 1269, chapter 527.

⁵ Section 65-02-01 was also amended by section 11 of Senate Bill No. 2114, chapter 461.

potential candidates for each of the employer member positions and the medical association position. From each list the governor shall select an individual to fill the member position of the subsequent board. An organization that is statewide in scope and which through its affiliates embraces a cross section and a majority of organized labor in this state shall submit to the governor a list of three names of potential candidates for one of the three employee positions. The governor shall select an individual to fill this organized labor employee member position, and the governor shall appoint two individuals to fill the remaining two employee positions. The subsequent board is effective January 1, 1998.

2. After December 31, 1997, the board consists of ten members. The appointment and replacement of the members must ensure that:
 - a. Six board members represent employers in this state that maintain active accounts with the bureau, at least one of which must be a participant in the risk management program, at least two of which must be employers with annual premiums greater than twenty-five thousand dollars, at least one of which must be an employer with an annual premium of ten thousand dollars but less than twenty-five thousand dollars, and at least one of which must be an employer with an annual premium of less than ten thousand dollars.
 - b. Three members represent employees; at least one member must have received workers' compensation benefits; and at least one member must represent organized labor.
 - c. One nonvoting member is a member of the North Dakota medical association.
3. Board members shall serve six-year terms, except of the initial board members, an employee representative and two employer representatives shall serve only through December 31, 1998; an employee representative and two employer representatives shall serve only through December 31, 2000; and an employee representative, two employer representatives, and the medical association representative shall serve only through December 31, 2002, as determined by lot to initiate a cycle that results in three members' terms expiring on December thirty-first of each even-numbered year, and beginning January first of each odd-numbered year. Board members may not serve more than two consecutive terms. A departing member representing an employer must be replaced by a member representing an employer, most of whose employees are in a different rate classification than those of the employer represented by the departing member. The governor shall appoint the replacement member for a departing employer representative or medical association representative from a list of three candidates submitted by the board. The governor shall select the replacement member for the departing organized labor employee representative from a list of three names of potential candidates submitted by an organization that is statewide in scope and which through its affiliates embraces a cross section and a majority of organized labor in this state, and the governor shall select the replacement member for a departing nonorganized labor employee representative.

⁶ **SECTION 4.** A new section to chapter 65-02 of the North Dakota Century Code is created and enacted as follows:

Compensation of board members. A board member is entitled to receive compensation in the amount of sixty-two dollars and fifty cents per day for days spent in attendance at board meetings or other business as approved by the board. A board member is entitled to reimbursement for mileage and expenses as provided for state officers.

SECTION 5. A new section to chapter 65-02 of the North Dakota Century Code is created and enacted as follows:

Board - Powers and duties. The board may authorize the bureau to transfer moneys between line items within the bureau's budget. The board shall:

1. Appoint a director on a nonpartisan, merit basis.
2. Set the compensation of the director.
3. Ensure a proper response to any audit recommendations.
4. Present an annual report to the legislative audit and fiscal review committee. The report must be presented by the chairman of the board and the director.
5. Prepare, with the assistance of the bureau, a bureau budget, beginning with the July 1, 1999, through June 30, 2001, biennium. The bureau shall present the budget to the governor for inclusion in the governor's budget. If the governor makes adjustments to the budget, the board may concur in the adjustments or may present testimony to the appropriations committees of the legislative assembly, requesting amendments to the budget to remove adjustments made by the governor. The deadline for submission of the budget is the same as the deadline for all executive agencies.
6. Assist the bureau in formulating policies and discussing problems related to the administration of the bureau, while ensuring impartiality and freedom from political influence.
7. Incorporate principles of continuous improvement goalsetting, a procedure for implementing a team-oriented continuous improvement program throughout all operations of the bureau. The program must include a number of challenging, measurable goals to ensure the bureau maintains focus on improving those areas most important to its primary mission.
8. Adopt internal management rules creating bylaws for the board and relating to the election of a board chairman, formation of committees, replacement of departing members, voting procedures, and other procedural matters.

⁶ Section 65-02-03.2 was also amended by section 37 of Senate Bill No. 2052, chapter 432.

SECTION 6. A new section to chapter 65-02 of the North Dakota Century Code is created and enacted as follows:

Independent audit - Bureau development of performance measurements.

Biennially, the director shall request the state auditor to select an audit firm with extensive expertise in workers' compensation practices and standards to complete a performance audit of the functions and operations of the bureau during that biennium. The audit must evaluate the departments of the bureau to determine whether the bureau is providing quality service in an efficient and cost-effective manner. The firm also shall conduct a performance audit of the board to determine whether the board is operating within section 5 of this Act and within the board's bylaws. The audit report must contain recommendations for departmental improvement or an explanation of why no recommendations are being made. The director, the chairman of the board, and the auditor shall present the audit report and any action taken to the legislative council's legislative audit and fiscal review committee and to the house and senate industry, business and labor standing committees during the next regular session of the legislative session following the audit. The director shall provide a copy of the audit report to the state auditor. The bureau shall develop and maintain comprehensive, objective performance measurements. These measurements must be evaluated as part of the independent audit performed under this section.

SECTION 7. REPEAL. Section 65-02-08.1 of the North Dakota Century Code is repealed.

SECTION 8. EFFECTIVE DATE. Section 7 of this Act becomes effective September 1, 1997.

Filed April 7, 1997

NOTE: The Governor's veto of House Bill No. 1440 was not sustained. For the text of the Governor's veto message see chapter 558.

CHAPTER 529

SENATE BILL NO. 2343

(Senators Sand, Thompson)
(Representatives Carlson, Jacobs)

WORKERS' COMPENSATION COVERAGE PRESUMPTIONS

AN ACT to create and enact a new section to chapter 65-01 of the North Dakota Century Code, relating to the presumption that certain conditions are related to a firefighter's or a law enforcement officer's work for purposes of workers' compensation coverage; to amend and reenact subsection 18 of section 65-01-02 of the North Dakota Century Code, relating to the presumption that certain conditions are related to a firefighter's or a law enforcement officer's work for purposes of workers' compensation coverage; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 18 of section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

18. "Fairly traceable to the employment" when used to modify the term "disease" means only a disease that:
 - 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; or
 - d. However, any condition or impairment of health of a full-time paid firefighter 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 firefighter, 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 firefighter 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 firefighter. A full-time paid firefighter or law enforcement officer is not eligible for the benefit provided under this subdivision unless that full-time paid firefighter or law enforcement officer has completed five years of continuous

service and has successfully passed a physical medical examination which fails to reveal any evidence of such a condition. An employer shall require a physical medical examination upon employment, ~~and annually thereafter~~, for any employee subject to this subdivision. After the initial medical examination, an employer shall require at least a periodic medical examination as follows: for one to ten years of service, every five years; for eleven to twenty years of service, every three years; and for twenty-one or more years of service, every year. The periodic medical examination, at a minimum, must consist of a general medical history of the individual and the individual's family; an occupational history including contact and an exposure to hazardous materials, toxic products, contagious and infectious diseases, and to physical hazards; a physical exam including measurement of height, weight, and blood pressure; and laboratory and diagnostic procedures including a nonfasting total blood cholesterol test and papanicolaou smear for women. If the medical examination reveals that an employee falls into a recognized risk group, the employee must be referred to a qualified health professional for future medical examination. This subdivision does not affect an employee's responsibility to document that the employee has not used tobacco as required under section 65-01-15. Results of the examination must be used in rebuttal to a presumption afforded under this subdivision. For purposes of this subdivision, "law enforcement officer" means a person who is licensed to perform peace officer law enforcement duties under chapter 12-63 and is employed full time by the bureau of criminal investigation, the game and fish department, the state highway patrol, the parole and probation division, the North Dakota state university police department, the North Dakota state college of science police department, the university of North Dakota police department, a county sheriff's department, or a city police department. The presumption does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed for ten years or less, if the condition or impairment is diagnosed more than two years after the employment as a full-time paid firefighter or law enforcement officer ends. The presumption also does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed more than ten years, if the condition or impairment is diagnosed more than five years after the employment as a full-time paid firefighter or law enforcement officer ends.

⁷ **SECTION 2.** A new section to chapter 65-01 of the North Dakota Century Code is created and enacted as follows:

Presumption of compensability for certain conditions of full-time paid firefighters and law enforcement officers. Any condition or impairment of health of a full-time paid firefighter or law enforcement officer caused by lung or respiratory disease as defined by sections 23-07.3-01 and 23-07.3-02, or occupational cancer in a

⁷ Section 65-01-15.1 was also amended by section 4 of House Bill No. 1269, chapter 527.

full-time paid firefighter, 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 section, an occupational cancer is one which arises out of employment as a full-time paid firefighter 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 firefighter. A full-time paid firefighter or law enforcement officer is not eligible for the benefit provided under this section unless that full-time paid firefighter or law enforcement officer has completed five years of continuous service and has successfully passed a medical examination which fails to reveal any evidence of such a condition. An employer shall require a medical examination upon employment, for any employee subject to this section. After the initial medical examination, an employer shall require at least a periodic medical examination as follows: for one to ten years of service, every five years; for eleven to twenty years of service, every three years; and for twenty-one or more years of service, every year. The periodic medical examination, at a minimum, must consist of a general medical history of the individual and the individual's family; an occupational history including contact with and an exposure to hazardous materials, toxic products, contagious and infectious diseases, and to physical hazards; a physical examination including measurement of height, weight, and blood pressure; and laboratory and diagnostic procedures including a nonfasting total blood cholesterol test and papanicolaou smear for women. If the medical examination reveals that an employee falls into a recognized risk group, the employee must be referred to a qualified health professional for future medical examination. This section does not affect an employee's responsibility to document that the employee has not used tobacco as required under section 65-01-15. Results of the examination must be used in rebuttal to a presumption afforded under this section. For purposes of this section, "law enforcement officer" means a person who is licensed to perform peace officer law enforcement duties under chapter 12-63 and is employed full time by the bureau of criminal investigation, the game and fish department, the state highway patrol, the parole and probation division, the North Dakota state university police department, the North Dakota state college of science police department, the university of North Dakota police department, a county sheriff's department, or a city police department. The presumption does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed for ten years or less, if the condition or impairment is diagnosed more than two years after the employment as a full-time paid firefighter or law enforcement officer ends. The presumption also does not include a condition or impairment of health of a full-time paid firefighter or law enforcement officer, who has been employed more than ten years, if the condition or impairment is diagnosed more than five years after the employment as a full-time paid firefighter or law enforcement officer ends.

SECTION 3. EFFECTIVE DATE. Section 1 of this Act becomes effective if House Bill No. 1269 is not approved by the fifty-fifth legislative assembly. Section 2 of this Act becomes effective if House Bill No. 1269 is approved by the fifty-fifth legislative assembly.

Approved April 2, 1997
Filed April 3, 1997

CHAPTER 530**HOUSE BILL NO. 1260**
(Representative Berg)
(Senator Mutch)**PERMANENT IMPAIRMENT UNDER WORKERS'
COMPENSATION**

AN ACT to amend and reenact subsection 26 of section 65-01-02 of the North Dakota Century Code, relating to the definition of permanent impairment for workers' compensation purposes.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

⁸ **SECTION 1. AMENDMENT.** Subsection 26 of section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

26. "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.

Approved March 23, 1997

Filed March 24, 1997

⁸ Section 65-01-02 was also amended by section 1 of House Bill No. 1269, chapter 527, and section 1 of House Bill No. 1440, chapter 528.

CHAPTER 531**HOUSE BILL NO. 1227**

(Representative Kilzer)

**WORKERS COMPENSATION BUREAU SUBROGATION
INTEREST**

AN ACT to amend and reenact section 65-01-09 of the North Dakota Century Code, relating to subrogation interests of the workers compensation bureau.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

65-01-09. Injury through negligence of third person - Option of employee - Fund subrogated when claim filed. When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person. The fund is subrogated to the rights of the injured employee or the employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits for the injured employee. The bureau's subrogation interest may not be reduced by settlement, compromise, or judgment. The action against such other person may be brought by the injured employee, or the employee's dependents in the event of the employee's death. Such action shall be brought in the injured employee's or in the employee's dependents' own right and name and as trustee for the bureau for the subrogation interest of the bureau. However, if the director chooses not to participate in a health care malpractice action, the fund has no subrogation interest and no obligation to pay fees or costs under this section. If the injured employee or the employee's dependents do not institute suit within sixty days after date of injury, the bureau may bring the action in its own name and as trustee for the injured employee or the employee's dependents and retain as its subrogation interest the full amount it has paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents. Within sixty days after both the injured employee and the bureau have declined to commence an action against a third person as provided above, the employer may bring the action in the employer's own name or in the name of the employee, or both, and in trust for the bureau and for the employee. The party bringing the action may determine if the trial jury should be informed of the trust relationship. If the action is brought by the injured employee or the employee's dependents, or the employer as provided above, the bureau shall pay fifty percent of the costs of the action, exclusive of attorney fee, when such costs are incurred. If there is no recovery of damages in the action, this shall be a cost of the bureau to be paid from the bureau general fund. When there is recovery of damages in the action, the costs of the action, exclusive of attorneys fees, must be prorated and adjusted on the percentage of the total subrogation interest of the bureau recovered to the total recovery in the action. The bureau shall pay attorney fees to the injured employee's attorney from the bureau general fund as follows:

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

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

Approved April 1, 1997

Filed April 2, 1997

CHAPTER 532**HOUSE BILL NO. 1270**

(Representative Berg)
(Senator Mutch)

**WORKERS' COMPENSATION DECISIONS AND
DISPUTES**

AN ACT to create and enact a new section to chapter 65-01 of the North Dakota Century Code, relating to decisions made by the workers compensation bureau; to amend and reenact sections 65-02-11, 65-02-20, 65-02-27, and subsection 4 of section 65-08-01 of the North Dakota Century Code, relating to process and procedure used by the bureau, dispute resolution under the bureau's managed care program, the workers' adviser program, and procedures for filing a claim under an extraterritorial coverage agreement; and to repeal section 65-01-14 of the North Dakota Century Code, relating to initial decisions made by the workers compensation bureau; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 65-01 of the North Dakota Century Code is created and enacted as follows:

Decisions by bureau - Disputed decisions. The following procedures must be followed in claims for benefits, notwithstanding any provisions to the contrary in chapter 28-32:

1. The bureau shall send a copy of each initial claim form filed with the bureau to the claimant's employer, by regular mail, along with a form for the employer's response, if the employer's response has not been filed at the time the claim is filed. Failure of the employer to file a response within fourteen days from the day the response form was mailed to the employer constitutes the employer's admission that the information in the claim form is correct.
2. The bureau may conduct a hearing on any matter within its jurisdiction by informal internal review of the information of record.
3. The bureau may issue a notice of decision for any decision made by informal internal review and shall serve the notice of decision on the parties by regular mail. A notice of decision must include a statement of the decision, a short summary of the reason for the decision, and notice of the right to reconsideration.
4. A party has thirty days from the day the notice of decision was mailed by the bureau in which to file a written request for reconsideration. The request must state the alleged errors in the decision and the relief sought. The request may be accompanied by additional evidence not previously submitted to the bureau. The bureau shall reconsider the matter by informal internal review of the information of record. Absent a timely

and sufficient request for reconsideration, the notice of decision is final and may not be reheard or appealed.

5. Within sixty days after receiving a request for reconsideration, the bureau shall serve on the parties by regular mail a notice of decision reversing the previous decision or, in accordance with the North Dakota Rules of Civil Procedure, an administrative order that includes its findings, conclusions, and order. The bureau may serve an administrative order on any decision made by informal internal review without first issuing a notice of decision and receiving a request for reconsideration.
6. A party has thirty days from the date of service of an administrative order in which to file a request for assistance from the workers' adviser program under section 65-02-27.
7. A party has thirty days, from the date of service of an administrative order or from the day the workers' adviser program mails its notice that the program's assistance is complete, in which to file a written request for rehearing. The request must specifically state each alleged error of fact and law to be reheard and the relief sought. Absent a timely and sufficient request for rehearing, the administrative order is final and may not be reheard or appealed.
8. Rehearings must be conducted as hearings under chapter 28-32 to the extent the provisions of that chapter do not conflict with this section. The bureau may arrange for the designation of hearing officers to conduct rehearings and issue recommended findings, conclusions, and orders. In reviewing recommended findings, conclusions, and orders, the bureau may consult with its legal counsel representing it in the proceeding.
9. Within sixty days after receiving the recommended findings, conclusions, and order, the bureau shall serve on the parties, in accordance with the North Dakota Rules of Civil Procedure, its findings, conclusions, and posthearing administrative order.
10. A party may appeal a posthearing administrative order to district court in accordance with chapter 65-10.
11. Any notice of decision, administrative order, or posthearing administrative order is subject to review and reopening under section 65-05-04.

SECTION 2. AMENDMENT. Section 65-02-11 of the North Dakota Century Code is amended and reenacted as follows:

65-02-11. Process and procedure - Investigations - Examination of witnesses - Costs. ~~Process~~ Except as otherwise provided by this title, process and procedure under this title ~~shall be~~ is governed by the provisions of chapter 28-32. The bureau may make investigation ~~in such manner and at such places~~ as in its judgment ~~shall be~~ is best calculated to ascertain the substantial rights of all the parties. Any member of the bureau, and any person specifically designated by the bureau ~~shall have the power to~~ may examine witnesses and records, with or without subpoena, ~~to~~ examine, investigate, copy, photograph, and take samples at any pertinent location or facility, ~~to~~ administer oaths to witnesses, ~~to~~ require the attendance of witnesses

without fee whenever the testimony is taken at the home, office, or place of work of ~~such those~~ witnesses, and generally to do anything ~~requisite or~~ necessary to facilitate or promote the efficient administration of this title. The bureau shall pay the costs of any medical examination, scientific investigation, medical or expert witness appearance or report, requested or approved by the bureau, relating to a claim for benefits, ~~shall be paid~~ from the bureau general fund.

SECTION 3. AMENDMENT. Section 65-02-20 of the North Dakota Century Code is amended and reenacted as follows:

65-02-20. Bureau to establish managed care program. The bureau shall establish a managed care program with a third-party administrator to effect the best medical solution for an injured employee. The managed care system must allow for a third-party administrator to direct the program for medical care of the injured employee upon a finding by the bureau that the employee suffered a compensable injury. The managed care administrator shall operate according to guidelines adopted by the bureau to ensure that an injured employee receives appropriate medical treatment in a cost-effective manner. The managed care administrator shall assist the bureau in the medical management of claims within the bounds of workers' compensation law. If an employee, employer, or medical provider disputes the recommendation of the managed care administrator, the employee, employer, or medical provider may request binding dispute resolution on the recommendation. The bureau shall make rules providing for the procedures for dispute resolution. Dispute resolution under this section is not subject to chapter 28-32 or section ~~65-01-14~~ 1 of this Act or section 65-02-15. A dispute resolution decision under this section requested by a medical provider concerning payment for medical treatment already provided or a request for diagnostic tests or treatment is not reviewable by any court. A dispute resolution decision under this section requested by an employee is reviewable by a court only if medical treatment has been denied to the employee. A dispute resolution decision under this section requested by an employer is reviewable by a court only if medical treatment is awarded to the employee. The dispute resolution decision may be reversed only if the court finds that there has been an abuse of discretion by the dispute resolution panel. Any person providing binding dispute resolution services under this section is exempt from civil liability relating to the binding dispute resolution process and decision.

SECTION 4. AMENDMENT. Section 65-02-27 of the North Dakota Century Code is amended and reenacted as follows:

65-02-27. (Effective until July 31, 1999) Workers' adviser program. A workers' adviser program is established. The program is independent of the claims department of the workers compensation bureau and activities administered through the program must be administered in accordance with this title. The program must provide assistance to an injured employee, including acting on behalf of an injured employee who is aggrieved by a decision of the bureau, communicating with bureau staff regarding claim dispute resolution, and advising an injured employee of the effect of decisions made by the bureau, the employee, or an employer under this title. The bureau shall employ a director of the program, support staff for the program, and other personnel determined to be necessary for the administration of the program. Personnel employed to administer the program may not act as an attorney for an injured employee. The bureau may not pay attorney fees to an attorney who represents an injured employee in a disputed claim before the bureau unless the injured employee has first attempted to resolve the dispute through the workers' adviser program. ~~An~~ A request for assistance by an injured employee who contacts the program for assistance within the appeal period after for requesting a hearing on an administrative order ~~has been issued is deemed to have satisfied the~~

~~requirement of tolls the time period for requesting an administrative a hearing or an arbitration hearing on that order. The period begins upon notice to the employee, sent by regular mail, that the program's assistance to the employee is completed.~~ The information contained in a file established by the workers' adviser program on an injured employee's disputed claim is not subject to discovery and may not be used as evidence in subsequent proceedings relative to that dispute.

SECTION 5. AMENDMENT. Subsection 4 of section 65-08-01 of the North Dakota Century Code is amended and reenacted as follows:

4. An employer whose employment results in significant contacts with this state shall acquire workers' compensation coverage in this state unless a reciprocal agreement between the states is entered which provides that the other state will likewise recognize that an employment relationship entered into in this state is exempted from the application of the workers' compensation law of the other state. An employment has significant contacts with this state when (a) the employee earns or would have been expected to earn twenty-five percent or more of the employee's gross annual wage or income from that employer from services rendered in this state; or (b) if no employee earns twenty-five percent of the employee's gross annual income from that employment within this state, the employer's gross annual payroll in a calendar year in this state is at least one hundred thousand dollars. Under this subsection, an employee injured in this state may elect to file a claim in this state notwithstanding that the employee had another remedy in the state in which the employment was principally localized. A claim filed under this subsection is subject to section 65-05-05. The time limits within which the bureau shall issue a decision on a claim, as specified in ~~sections 65-01-14~~ section 1 of this Act and section 65-02-08, do not begin to run for claims filed under this section until the first date the bureau may begin to process the claim as set forth in section 65-05-05.

SECTION 6. REPEAL. Section 65-01-14 of the North Dakota Century Code is repealed.

SECTION 7. EFFECTIVE DATE. These sections apply to all claims for benefits filed after July 31, 1997, regardless of the date of injury.

Approved April 2, 1997
Filed April 3, 1997

CHAPTER 533**HOUSE BILL NO. 1268**

(Representative Berg)
(Senator Mutch)

WORKERS' COMPENSATION ATTORNEY'S FEES

AN ACT to amend and reenact sections 54-12-08, 65-02-08, and 65-10-03 of the North Dakota Century Code, relating to revocation of an appointment of a special assistant attorney general and to payment of attorney's fees paid for representing workers' compensation claimants.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 54-12-08 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

54-12-08. Assistant and special assistant attorneys general - Appointment - Revocation - Compensation. After consultation with the head of the state department or institution or with the state board, commission, committee, or agency affected, the attorney general may appoint assistant or special assistant attorneys general to represent the state board, commission, committee, or agency. A state officer, head of any state department, whether elected or appointed, or state department, board, commission, committee, or agency may not employ legal counsel, and no person may act as legal counsel in any matter, action, or proceeding in which the state or any state department, board, commission, committee, or agency is interested or is a party, except upon written appointment by the attorney general. The workers compensation bureau, the department of transportation, the state tax commissioner, the public service commission, the commissioner of insurance, the board of higher education, and the securities commissioner may employ attorneys to represent them. These entities shall pay the salaries and expenses of the attorneys they employ within the limits of legislative appropriations. The attorneys that represent these entities must be special assistant attorneys general appointed by the attorney general pursuant to this section. Absent good cause, the attorney general shall appoint as special assistant attorneys general licensed attorneys selected by these entities. The attorney general may revoke the appointment only for good cause or upon the request of the entity. Good cause ~~includes~~ means an inadequate level of experience, competence, or ethical standards. The powers conferred upon special assistant attorneys general are the same as are exercised by the regular assistant attorneys general, unless the powers are limited specifically by the terms of ~~such~~ the appointment. ~~An~~ Except as otherwise provided by this section, an appointment is revocable at the pleasure of the attorney general. The appointment may be made with or without compensation, and when compensation is allowed by the attorney general for services performed, the compensation must be paid out of the funds appropriated therefor. The attorney general may require payment for legal services rendered by any assistant or special assistant attorney general to any state official, board, department, agency, or commission and those entities shall make the required payment to the attorney general. Moneys received by the attorney general in payment for legal services rendered must be deposited into the attorney general's operating fund. General fund moneys may not be utilized for the payment of legal services provided by the attorneys employed by the attorney general, except for those payments required of the department of human services, state department of health, and the state hospital.

SECTION 2. AMENDMENT. Section 65-02-08 of the North Dakota Century Code is amended and reenacted as follows:

65-02-08. Rulemaking power of the bureau - Fees prescribed by bureau. The bureau shall adopt rules necessary to carry out this title. All fees on claims for legal, medical, and hospital services rendered under this title to an injured employee must be in accordance with schedules of fees adopted by the bureau. Fee schedules for medical and hospital services must incorporate cost-saving measures and must be submitted to and approved by the committee on administrative rules before submission to the legislative council for publication. The bureau shall establish, by administrative rule, costs payable, maximum costs, a reasonable maximum hourly rate, and a maximum fee to compensate an injured employee's attorney for legal services following issuance of an administrative order ~~under chapter 28-32~~ reducing or denying benefits. The bureau shall issue ~~an administrative order~~ a decision within sixty days of the date when all elements of initial 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. Satisfaction of elements of filing must be defined by administrative rule. The bureau shall pay an injured employee's attorney's fees and costs from the bureau general fund. Except for an initial determination of compensability, an attorney's fee may not exceed twenty percent of the amount awarded, subject to a maximum fee set by administrative rule. The bureau shall pay an attorney's fees and costs when:

1. The employee has prevailed in binding dispute resolution under section 65-02-20; ~~or,~~
2. The employee has prevailed after an administrative hearing under chapter 28-32.

An injured employee has prevailed only when an additional benefit, previously denied, is paid. An injured employee does not prevail on a remand for further action or proceedings unless that employee ultimately receives an additional benefit as a result of the remand. This section does not prevent an injured employee or an employer from hiring or paying an attorney; however, the employee's attorney may not seek or obtain costs or attorney's fees from both the bureau and the employee relative to the same ~~services claim~~. All disputes relating to payment or denial of an attorney's fee or costs must be submitted to the hearing officer or arbitrator for decision, but a hearing officer or arbitrator may not order that the maximum fee be exceeded.

SECTION 3. AMENDMENT. Section 65-10-03 of the North Dakota Century Code is amended and reenacted as follows:

65-10-03. Cost of appeal and attorney's fee fixed by the bureau. The bureau shall pay the cost of the judicial appeal and the attorney's fee for an injured employee's attorney when the employee prevails. The employee ~~is deemed to have~~ has prevailed when any part of the decision of the bureau is reversed ~~or the claim is remanded to the bureau for further administrative proceedings and the employee receives an additional benefit as a result.~~ An injured employee does not prevail on a remand for further action or proceedings unless the injured employee ultimately receives an additional benefit. The bureau shall pay the attorney's fee from the bureau general fund. The amount of the attorney's fee 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 must be taken into consideration. The bureau shall establish, pursuant to section

65-02-08, a maximum fee to be paid in an appeal. The maximum fee may be exceeded upon application of the injured employee ~~and approval of the court~~ to the bureau, 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, but a court may not order that the maximum fee be exceeded. Notwithstanding the foregoing, the bureau is liable for its costs on appeal if the decision of the bureau is affirmed.

Approved April 1, 1997

Filed April 2, 1997

CHAPTER 534**HOUSE BILL NO. 1263**
(Representative Berg)**WORKERS' COMPENSATION FRAUD
INVESTIGATIONS**

AN ACT to amend and reenact sections 65-02-23, 65-02-25, 65-02-26, and 65-05-33 of the North Dakota Century Code, relating to amnesty periods, disclosure of claim and investigative information in workers' compensation fraud cases, and definition of fraudulent activity; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-02-23 of the North Dakota Century Code is amended and reenacted as follows:

65-02-23. Workers' compensation fraud unit. The bureau shall establish a workers' compensation fraud unit. The bureau may employ investigators and licensed attorneys, or contract with a private investigator whenever feasible or cost effective, to investigate and review any alleged case of willful misrepresentation of payroll to the bureau by an employer as fraud against the fund by employers, injured workers, or providers of medical or other services, including activities described under section 65-04-14 and to investigate and review any alleged case of willful filing of a false claim or false statement in relation to a claim as defined under section 65-05-33. The unit shall refer a case cases of willful misrepresentation of payroll fraud to the bureau or of willful filing of a false claim or false statement for the imposition of administrative penalties and may refer them to the appropriate authorities for prosecution.

SECTION 2. AMENDMENT. Section 65-02-25 of the North Dakota Century Code is amended and reenacted as follows:

65-02-25. Amnesty for certain claims and accounts. After the workers' compensation fraud unit is established, the bureau may offer, not more than once every twelve months, a period of amnesty to any person who has willfully made a false claim or false statement or who has willfully misrepresented payroll, to allow that person the opportunity to close and repay the false claim, to close and repay the claim for which a false statement has been made, or to pay the appropriate premium and penalty on an account for which payroll was misrepresented. The amnesty period may not exceed sixty days. A person who receives amnesty under this section is immune from criminal prosecution relating to those acts for which amnesty is received.

SECTION 3. AMENDMENT. Section 65-02-26 of the North Dakota Century Code is amended and reenacted as follows:

65-02-26. Nondisclosure of investigative information. Any investigative information gathered pursuant to section 65-02-23 is criminal investigative information and may not be disclosed except as provided in section 44-04-18.7. Notwithstanding sections 65-04-15 and 65-05-32, the fraud unit may provide

investigative and claim file information to other fraud investigative and law enforcement entities, and gather investigative and claim file information from them.

SECTION 4. AMENDMENT. Section 65-05-33 of the North Dakota Century Code is amended and reenacted as follows:

65-05-33. Filing false claim or false statements - Penalty.

1. Any A person is guilty of a class A misdemeanor if that person is claiming benefits or payment for services under this title, who willfully and that person:
 - a. Willfully files a false claim or makes a false statement; or,
 - b. Willfully misrepresents that person's physical condition, including deceptive conduct which misrepresents that person's physical ability.
 - c. Has a claim for disability benefits that has been accepted by the bureau and willfully fails to notify the bureau as to of:
 - (1) Work or other activities as required under subsection 3 of section 65-05-08;
 - (2) ~~the~~ The receipt of income, from work; or
 - (3) ~~an~~ An increase in income, from employment, after the issuance of an order awarding benefits, in connection with any claim or application under this title is guilty of a class A misdemeanor, but if work.
2. If any of the act is acts in subsection 1 are committed to obtain, or pursuant to a scheme to obtain, more than five hundred dollars in benefits or payment for services, the offense is a class C felony. Provided further that:
 1. ~~For the purposes of this section, "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. 3. In addition to any other penalties provided by law, the person claiming benefits or payment for services in violation of this section shall reimburse the bureau for any benefits paid based upon the false claim or false statement and, if applicable, under section 65-05-29 and shall forfeit any additional benefits relative to that injury.
 4. For purposes of this section, "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.

Approved April 2, 1997
Filed April 3, 1997

CHAPTER 535**SENATE BILL NO. 2334**

(Senator Christmann)
(Representative Carlson)

**WORKERS' COMPENSATION CLAIM FILE
DESTRUCTION**

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

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 created and enacted as follows:

Bureau claim files - Destruction. If the bureau determines that a person who has a claim for injury on file has been deceased for at least ten years, the bureau may destroy any claim files for that person. The bureau may not destroy any claim file it specifically has been requested not to destroy. The bureau shall establish a means for maintaining statistical and identifying information for any claim files destroyed under this section.

Approved March 5, 1997
Filed March 6, 1997

CHAPTER 536**SENATE BILL NO. 2074**

(Appropriations Committee)

(At the request of the Workers Compensation Bureau)

**WORKERS COMPENSATION BUREAU PERFORMANCE
AUDITS**

AN ACT to require the workers compensation bureau to submit to independent performance audits on a biennial basis.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Independent audit. The state auditor shall appoint on a biennial basis an independent audit firm, with extensive expertise in workers' compensation practices and standards, to complete a performance audit of the departments of the bureau. The audit must evaluate departments of the bureau, as determined necessary by the state auditor, to determine whether the departments are providing quality service in an efficient and cost-effective manner. The audit report must contain recommendations for departmental improvement or an explanation of why no recommendations are being made. The executive director of the bureau and the auditor shall present the audit report and any action taken as a result to the legislative council's legislative audit and fiscal review committee and to the house and senate industry, business and labor standing committees during the next regular session of the legislative assembly following the audit. The executive director also shall provide a copy of the audit report to the state auditor.

Approved March 19, 1997

Filed March 19, 1997

CHAPTER 537**SENATE BILL NO. 2110**

(Industry, Business and Labor Committee)
(At the request of the Workers Compensation Bureau)

**WORKERS' COMPENSATION MINE FOREMEN
CERTIFICATION**

AN ACT to create and enact a new section to chapter 65-03 of the North Dakota Century Code, relating to workers compensation bureau rules regarding certification of mine foremen; and to repeal chapter 65-11 of the North Dakota Century Code, relating to the appointment and duties of a safety engineer.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 65-03 of the North Dakota Century Code is created and enacted as follows:

Mine foremen - Rules regarding. The bureau may adopt and enforce rules for the qualification, examination, and certification of mine foremen.

SECTION 2. REPEAL. Chapter 65-11 of the North Dakota Century Code is repealed.

Approved March 13, 1997
Filed March 13, 1997

CHAPTER 538**SENATE BILL NO. 2073**

(Industry, Business and Labor Committee)
(At the request of the Workers Compensation Bureau)

VERTERAN TRAINEES AND REPORTS ELIMINATED

AN ACT to repeal sections 65-04-04.1, 65-04-08, and 65-04-09 of the North Dakota Century Code, relating to the determination of the average weekly wage for premium for veteran-on-the-job trainees, county auditor reports to the workers compensation bureau, and reporting public contracts to the workers compensation bureau.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. REPEAL. Sections 65-04-04.1, 65-04-08, and 65-04-09 of the North Dakota Century Code are repealed.

Approved March 13, 1997
Filed March 13, 1997

CHAPTER 539

HOUSE BILL NO. 1266 (Representative Berg) (Senator Mutch)

WORKERS' COMPENSATION CLAIM FILING

AN ACT to amend and reenact section 65-05-01 of the North Dakota Century Code, relating to the filing of workers' compensation claims; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-01 of the North Dakota Century Code is amended and reenacted as follows:

65-05-01. Claims for compensation benefits - When and where filed. All original claims for ~~compensation~~ benefits must be filed by the injured employee, or someone on the injured employee's behalf, within one year after the injury or within two years after the death. The date of injury for purposes of this section is the ~~actual date of injury when that date 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 is the first date that a reasonable person knew or should have known that the employee suffered a compensable work-related injury and the employee was informed by the employee's treating health care provider that the employee's work activities are a substantial contributing factor in the development of the employee's injury or condition. No compensation or benefits has either lost wages because of a resulting disability or received medical treatment.~~ Notwithstanding a statute of limitations assertion, the claimant bears the burden of proving any entitlement to benefits. If the bureau is estopped from applying the statute of limitations in this section because an employer's willful conduct prevented an injured employee from filing a claim in a timely manner, that employer shall reimburse the bureau for the full amount of all benefits paid during the first five years of that claim. Benefits may not be allowed under this title to any person, except as provided in section 65-05-04, unless that person, or someone on that person's behalf, files a written claim for ~~compensation~~ or benefits within the time specified in this section. A claim must be filed by:

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

SECTION 2. EFFECTIVE DATE. This section applies to all claims for benefits filed after July 31, 1997, regardless of date of injury.

Approved April 1, 1997
Filed April 2, 1997

CHAPTER 540**HOUSE BILL NO. 1265**

(Representative Berg)
(Senator Mutch)

WORKERS' COMPENSATION MEDICAL BENEFITS

AN ACT to amend and reenact section 65-05-07 of the North Dakota Century Code, relating to medical benefits furnished by the workers compensation bureau.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

**65-05-07. Injured employee given medical and hospital service required -
Furnished artificial limbs and appliances for rehabilitation - Fee approval.**
Immediately after an injury sustained by an employee and during the resulting period of disability, ~~the~~ The fund shall furnish to ~~the~~ an injured employee ~~such~~ reasonable and appropriate medical, surgical, and hospital service and supplies ~~as the nature of the injury may require necessary to treat a compensable injury.~~ The fund may furnish such artificial members and replacements as in the judgment of the bureau may be determines necessary to rehabilitate such an injured employee.

1. The health care provider or ~~physician~~ doctor must be acting within the scope of the provider's or ~~physician's~~ doctor's license or fees will be denied.
2. Fees may not be approved for more than one health care provider or ~~physician, or both,~~ doctor in a case where treatment is provided over the same period of time except for the services of a consulting ~~physician~~ doctor, assistant surgeon, or anesthetist 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~~ may appeal adverse decisions of the bureau in accordance with the medical aid rules adopted by the bureau.
4. Health care providers ~~or~~ and doctors may not bill an injured workers employee for any services rendered as a result of the compensable work injury.
5. ~~If the~~ The bureau ~~determines that it is necessary~~ may not pay more than twenty thousand dollars to provide permanent additions, remodeling, or adaptations to real estate ~~to those workers it determines necessary for a worker who sustain~~ sustains a catastrophic injury as defined in chapter 65-05.1; such improvements may be made, but may not exceed ten. The twenty thousand dollars dollar limit is for the life of the claimant injured employee, regardless of any subsequent claim. This subsection does not allow the bureau to purchase any real estate or motor vehicles.

6. If a doctor or health care provider who has treated or provided services to an injured employee fails or refuses without just cause to file with the bureau a report required by section 65-05-02, 65-05-08, or 65-05-08.1, within thirty days of examination, treatment, or provision of other services rendered in connection with a compensable work injury, or within thirty days of a request for ~~such the~~ report made by the claimant, the claimant's representative, or the bureau, the bureau shall assess as a penalty a sum of one hundred dollars. Health care providers ~~or~~ and doctors may not bill an injured workers worker for any penalty assessed by the bureau ~~as a result of failure or refusal without just cause to file a required report~~ under this subsection.
7. The filing of an accident report or the rendering of treatment to an injured worker who comes under the bureau's jurisdiction; ~~as the case may be,~~ constitutes acceptance of the bureau's medical aid rules and compliance with its rules and fees.
8. The bureau may not pay for:
 - a. Personal items that are for the injured employee's personal use or hygiene, including 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. Any 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 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. 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 employee will pay the difference in cost.
 - g. Serological tests, including VDRL and RPR, or other tests for venereal disease or pregnancy, or any other routine tests unless clearly necessitated by the injury.
 - h. Aids or programs primarily intended to help the employee lose weight or stop smoking.
 - i. Home gym or exercise equipment unless ordered by the bureau.
 - j. Memberships or monthly dues to health clubs, unless ordered by the bureau.

k. Massage, unless ordered by the bureau.

Approved March 23, 1997

Filed March 24, 1997

CHAPTER 541

HOUSE BILL NO. 1116

(Representative Keiser)

(At the request of the Department of Corrections and Rehabilitation)

ROUGH RIDER INDUSTRIES WORKERS' COMPENSATION COVERAGE

AN ACT to create and enact six new sections to chapter 65-06.2 of the North Dakota Century Code, relating to workers' compensation coverage for inmates engaged in work programs through roughrider industries; to amend and reenact sections 65-05-07.2 and 65-06.2-01 of the North Dakota Century Code, relating to the requirement that employers pay a portion of the medical benefits of workers' compensation claims and to the definition of an inmate; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-07.2 of the North Dakota Century Code is amended and reenacted as follows:

65-05-07.2. Payment to bureau for certain claims. The employer shall reimburse the bureau for all medical expenses related to a compensable injury to an employee if the expenses are not more than two hundred fifty dollars and shall reimburse the bureau for the first two hundred fifty dollars of medical expenses when the expenses are more than two hundred fifty dollars. If an employee's compensable injury is determined through a civil action to have been sustained through the fault or negligence of a third person, or if a settlement has been entered between the employee and a third person through which the third person agrees to compensate the employee for the injury, the bureau, upon receipt of its subrogation interest, shall credit the account of the employer to the extent of the payment made by the employer to the bureau under this section. Upon the bureau's determination that the claim is compensable, the bureau shall pay the medical expenses associated with the claim and notify the employer of payments to be made by the employer under this section. If the employer does not pay the bureau within ninety days of notice by the bureau, the bureau may impose a penalty on that employer. The penalty may not exceed one hundred twenty-five percent of the payment owed by the employer. The bureau shall collect the penalty in a civil action against the employer and deposit the money in the fund. An employer may not directly or indirectly charge an injured employee for any payment the employer makes on a claim. When the cost of an injured employee's medical treatment exceeds two hundred fifty dollars, the bureau shall pay all further medical expenses pursuant to this title. This section is effective for all compensable injuries that occur after July 31, 1995. Compensable injuries paid under sections 3, 4, 5, 6, and 7 of this Act are not subject to this section.

SECTION 2. AMENDMENT. Section 65-06.2-01 of the North Dakota Century Code is amended and reenacted as follows:

65-06.2-01. Inmate defined. For the purposes of ~~this chapter~~ sections 65-06.2-02 and 65-06.2-03, an inmate is a person who is confined against the inmate's will in a city or county penal institution or is a person who, as a criminal

defendant before a court, is ordered or elects to perform public service for a city or county in conjunction with or in lieu of a jail sentence. The term inmate does not include an individual injured while incarcerated in the North Dakota state penitentiary or any of its affiliated facilities or an individual injured in a fight, riot, recreational activity, or other incident not directly related to the inmate's work assignment.

SECTION 3. A new section to chapter 65-06.2 of the North Dakota Century Code is created and enacted as follows:

Workers' compensation coverage for inmates engaged in work programs through roughrider industries. The director of the department of corrections and rehabilitation may elect to provide and request from the bureau a program of modified workers' compensation coverage established under this chapter and according to administrative rules and fee schedules of this chapter. Roughrider industries shall qualify for the bureau's risk management program before the bureau may provide the modified workers' compensation coverage. The modified workers' compensation coverage would be for inmates incarcerated at the penitentiary and engaged in work in a prison industries work program through roughrider industries, whether the program is operated by roughrider industries or by contract with another entity or private employer. An inmate who sustains a compensable injury arising out of and in the course of work in a prison industries work program through roughrider industries may only receive workers' compensation benefits under the modified workers' compensation coverage established for that purpose.

SECTION 4. A new section to chapter 65-06.2 of the North Dakota Century Code is created and enacted as follows:

Modified coverage of inmates engaged in work programs through roughrider industries - Conditions. Except as otherwise provided in this chapter, all claims for workers' compensation benefits under this section and sections 3, 5, and 7 of this Act are subject to title 65. A claim under this section and sections 3, 5, and 7 of this Act must be filed according to section 65-05-01. While an inmate is incarcerated at the penitentiary, the penitentiary shall pay the reasonable medical expenses of that inmate at penitentiary medical payment levels, if that inmate incurs a compensable injury while working in a prison industries work program through roughrider industries. If an inmate sustains a compensable injury while working in a prison industries work program through roughrider industries, disability, vocational rehabilitation allowance, and permanent partial impairment benefits may not accrue or be paid while the inmate is incarcerated and may only be paid after the inmate is discharged from the penitentiary. If the director of the department of corrections and rehabilitation and the bureau determine that an inmate who suffers a compensable injury under this chapter is in need of vocational rehabilitation services while the inmate is incarcerated, the penitentiary and the bureau may provide vocational rehabilitation services to the inmate. An injury resulting from a fight, riot, recreational activity, or other activity or incident other than the inmate's actual performance of work duties in a prison industries work program through roughrider industries is not compensable under this title.

SECTION 5. A new section to chapter 65-06.2 of the North Dakota Century Code is created and enacted as follows:

Rulemaking - Excess or reinsurance coverage. The bureau, in cooperation with the department of corrections and rehabilitation and the risk management division of the office of management and budget, shall adopt administrative rules and fee schedules for a program of modified workers' compensation coverage

established and provided under this section and sections 3, 4, and 7 of this Act. The administrative rules and fee schedules must provide for the classification of inmates engaged in work in a prison industries work program through roughrider industries, the computation of premium, the payment of claims charges against the classification, the payment of medical bills, excess coverage or reinsurance, and the reimbursement by roughrider industries to the bureau for all claim benefit costs charged against that classification, as well as any allocated loss adjustment expense and all administrative expenses, including the expense of issuing the coverage, for the life of the claim in excess of premiums and medical expenses paid by roughrider industries. Roughrider industries shall secure excess coverage or shall reinsure all excess risks through the risk management division to cover the costs in excess of premiums and medical expenses paid. The risk management division shall assess a premium against roughrider industries for the cost of excess or reinsurance coverage and roughrider industries shall pay that premium.

SECTION 6. A new section to chapter 65-06.2 of the North Dakota Century Code is created and enacted as follows:

State reimbursement for liability in excess of collected premiums. Whenever total costs and expenses charged to the classification of the modified workers' compensation program established under this chapter exceeds the amount of premiums paid into the fund and any policy limits of the reinsurance or excess coverage purchased under section 5 of this Act, those excess costs and expenses are a general obligation of the state and the state shall reimburse the bureau for credit to the workers' compensation fund through legislative appropriation. Roughrider industries shall secure a means of reinsuring excess costs and expenses to minimize exposure of loss to the state general fund. The bureau may not provide the additional excess coverage or reinsurance required under this section. This modified workers' compensation coverage may not be effective unless the excess coverage or reinsurance required under this section is in place.

SECTION 7. A new section to chapter 65-06.2 of the North Dakota Century Code is created and enacted as follows:

No liability for damages - Inmates are not employees. The state and its employees, and the department of corrections and rehabilitation and its divisions, departments, and employees may not be held liable for damages at common law or by statute if an inmate covered under a program of modified workers' compensation coverage under this chapter sustains a compensable injury while working in a prison industries work program through roughrider industries. An inmate covered under a program of modified workers' compensation coverage under this chapter is not an employee of the state or the department of corrections and rehabilitation and its divisions and departments except for the purpose of modified workers' compensation coverage under this chapter.

SECTION 8. A new section to chapter 65-06.2 of the North Dakota Century Code is created and enacted as follows:

Safety and performance audit. The bureau shall perform a safety audit of the roughrider industries work programs covered under this chapter and a performance audit of the program of modified workers' compensation coverage. The bureau shall submit a report with recommendations based on the safety and performance audit to an interim committee designated by the legislative council no later than thirty days before the commencement of each regular session of the legislative assembly.

SECTION 9. EXPIRATION DATE. This Act is effective through June 30, 2003, and after that date is ineffective.

Approved April 10, 1997

Filed April 10, 1997

CHAPTER 542

HOUSE BILL NO. 1264 (Representative Berg) (Senator Mutch)

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 payment of preacceptance disability benefits to an employee who allegedly suffers a work-related injury; to amend and reenact sections 65-05-08, 65-05-08.1, 65-05-09, 65-05-10, and 65-06.2-02 of the North Dakota Century Code, relating to payment of workers' compensation disability benefits and payments to confined workers; to provide an effective date; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

65-05-08. ~~Compensation not~~ Disability benefits - Not paid unless period of disability is of five days' duration or more - Application required - Suspended during confinement - Duty to report wages. ~~No compensation benefits may 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 longer, compensation benefits must be paid for the period of disability provided that:~~

1. ~~If the period of disability is for not more than fourteen days, disability benefits for the first five days may only be paid for days that the employee was scheduled to work.~~
 2. ~~When partial or total disability benefits are discontinued, the claimant shall provide the bureau written notice of bureau may not begin payment again unless the injured employee files a reapplication for disability benefits on a form supplied by the bureau. In case of reapplication, the award may commence no more than thirty days before the date of reapplication. Disability benefits must be reinstated upon a finding proof by the injured employee that:~~
 - a. ~~The employee has sustained a significant change in the compensable medical condition shown by a preponderance of the evidence;~~
 - b. ~~The employee has provided evidence of sustained an actual wage loss attributable to the work injury caused by the significant change in the compensable medical condition; and~~
 - c. ~~The employee has not retired or voluntarily withdrawn from the job market as defined in section 65-05-09.3.~~
3. 2. All payments of disability and rehabilitation benefits must be suspended during the period of confinement in excess of seventy-two consecutive

hours of any employee who is eligible for, or receiving, benefits under this title who is confined in a penitentiary, jail, youth correctional facility, or any other penal institution under conviction and sentence unless the employee is receiving permanent total disability benefits or the bureau has determined that none of the priority options under subsection 4 of section 65-05.1-04 are viable, and the employee 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 the bureau shall pay subsequent disability or rehabilitation benefits thereafter due must be paid as the employee otherwise would; but for the provisions of this subsection, otherwise be entitled under this title.

4. 3. Any employee who is eligible for, or receiving, disability or rehabilitation benefits under this title shall report any wages earned, from part-time or full-time employment, work from the employer of injury or any other employer any source. ~~Failure~~ If an employee fails to report such wages earned requires, the employee ~~to shall~~ refund to the bureau any ~~partial or total~~ disability or vocational rehabilitation benefits overpaid by the bureau for that time period. To facilitate recovery of those benefits, the bureau may offset future benefits otherwise payable, under section 65-05-29. If the bureau determines that the failure employee willfully failed to report wages earned was willful, the employee forfeits all further lost-time benefits otherwise payable under this title for that injury pursuant is subject to the penalties in section 65-05-33. An employee shall report whether the employee has performed work or received wages. The bureau shall periodically provide a form to all injured employees receiving disability or rehabilitation benefits that the injured employee must complete to retain eligibility for further disability or rehabilitation benefits. The form will advise the injured employee of the possible penalties for failure to report any work or activities as required by this section. An injured employee who is receiving disability or vocational rehabilitation benefits must report any work activities to the bureau whether or not the injured employee receives any wages. An injured employee who is receiving disability or vocational rehabilitation benefits also must report any other activity if the injured employee receives any money, including prize winnings, from undertaking that activity, regardless of expenses or whether there is a net profit. For purposes of this subsection, "work" does not include routine daily activities of self-care or family care, or routine maintenance of the home and yard, and "activities" does not include recreational gaming or passive investment endeavors.
5. 4. An employee shall request disability benefits on a ~~lost-time~~ claim form furnished by the bureau. ~~In no case may lost-time~~ Disability benefits may not commence more than one year prior to the date of filing of the initial lost-time claim form for disability benefits.
6. 5. The provisions of this section apply to any disability claim asserted against the fund on or after July 1, 1991, irrespective of injury date.
6. 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.

7. If the employee voluntarily limits income or refuses to accept employment suitable to the employee's capacity, offered to or procured for the employee, the employee is not entitled to any disability or vocational rehabilitation benefits during the limitation of income or refusal to accept employment unless the bureau determines the limitation or refusal is justified.
8. The bureau may not pay disability benefits unless the loss of earning capacity exceeds ten percent. The injured employee may earn up to ten percent of the employee's preinjury average gross weekly earnings with no reduction in total disability benefits. The employee must report any earnings to the bureau for a determination of whether the employee is within the limit set in this subsection.
9. 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. If the injured employee is receiving disability benefits, the injured employee shall notify the bureau whenever there is a change in work status or wages received.
10. The bureau shall pay to an employee receiving disability benefits a 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.
11. Dependency allowance for the children may be made directly to either parent or guardian at the discretion of the bureau.

SECTION 2. AMENDMENT. Section 65-05-08.1 of the North Dakota Century Code is amended and reenacted as follows:

65-05-08.1. Verification of ~~temporary total~~ disability.

1. ~~The claimant's~~ An injured employee's doctor shall certify the period of ~~temporary total~~ disability ~~upon request of the bureau~~ and the extent of the injured worker's abilities and restrictions.
2. A doctor certifying disability shall include in the report filed with the bureau:
 - a. The medical basis established by medical evidence supported by objective medical findings for the certification of disability;
 - b. Whether the employee is totally disabled, ~~from any and all employment,~~ or, if the employee is not totally disabled, whether the employee is able to return to ~~some~~ any employment, ~~including light work or sedentary work~~ and a statement of the employee's restrictions and physical limitations; and
 - c. ~~If the employee is not totally disabled,~~ a statement of the employee's restrictions and physical limitations; and
 - d. A professional opinion as to the expected length of, and reason for, the disability.

- e. d. A doctor may not certify or verify past disability unless the doctor ~~has examined~~ commencing more than sixty days before the doctor's examination of the employee within the previous sixty days and filed these reports required by this title.
3. The report must be filed on a form furnished by the bureau, or on any other form acceptable to the bureau.
 4. The ~~claimant~~ injured employee shall ensure that the required reports for any period of disability are filed.
 5. Prior to the expiration of a period of ~~temporary total~~ disability certified by a doctor, if a report certifying an additional period of disability has not been filed, or upon receipt of a report or other evidence indicating an injured employee who is receiving disability benefits has been or will be released to return to work, the bureau shall send a notice to ~~the claimant~~ that employee of the bureau's intention to discontinue benefits, the reason therefor, and including an explanation of the reason for discontinuing benefits, an explanation of the employee's right to respond, and the procedure for filing the required report or challenging the proposed action. A copy of the notice must be mailed to the ~~claimant's~~ employee's doctor. Thereafter, if the required certification is not filed, the bureau shall discontinue ~~temporary total~~ disability benefits by formal order, effective no sooner than twenty-one days after the date of the notice of intention to discontinue benefits is mailed or the date on which the employee actually returned to work, whichever occurs first.
 6. ~~Upon receipt of a report or other evidence indicating a claimant who is receiving temporary total disability benefits has been or will be released to return to work, the bureau shall issue and mail to the claimant a notice of intention to discontinue benefits. Such benefits may thereafter be discontinued on the date of release to return to work or twenty-one days following mailing of the notice, whichever is later. The notice must include a statement of the reason for the action, a brief summary of the evidence relied upon by the bureau, and an explanation of the right to respond and the procedure for challenging the action and submitting additional evidence to the bureau.~~

SECTION 3. AMENDMENT. Section 65-05-09 of the North Dakota Century Code is amended and reenacted as follows:

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

1. If an employee suffers disability but is able to return to employment for a period of twelve consecutive calendar 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.~~ The bureau benefit rates shall be are those in effect at the time of that recurrence.

2. ~~In case of permanent total or temporary total disability, there must be paid to such disabled employee an additional 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 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~~ The disability benefit or the combined compensation disability benefit and dependency award may not exceed the weekly wage of the employee after deductions for social security and federal income tax.
5. ~~3.~~ 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 as much of that employee's weekly compensation benefit as is necessary may be used by the bureau to help defray the cost of such the nursing home care.

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

Preacceptance disability benefits. If, after receiving a claim for benefits, the bureau determines that more information is needed to process the claim, but that the information in the file indicates the injured employee is more likely than not entitled to disability benefits, the bureau may pay preacceptance disability benefits equal to the minimum weekly disability benefit allowed under section 65-05-09. The bureau may continue to pay preacceptance disability benefits to the employee during the period the claim is pending, unless the injured employee is not cooperating with requests from the bureau for additional information needed to process the claim. The bureau may not pay more than sixty days of preacceptance benefits. The bureau may only recover a payment made to an injured employee under this section if that recovery is allowed under section 65-05-33. There is no appeal from a bureau decision not to pay preacceptance disability benefits.

SECTION 5. AMENDMENT. Section 65-05-10 of the North Dakota Century Code is amended and reenacted as follows:

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

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 capacity 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 capacity occurs after July 1, 1989. Partial loss of earning capacity occurring prior to July 1, 1989, must be paid at a rate to be fixed by the bureau.
6. Dependency allowance must be paid under section 65-05-09 on claims receiving benefits under this section.
7. 2. Benefits must be paid during the continuance of partial disability, not to exceed a period of five years. The bureau may waive the five-year limit on the duration of partial disability benefits in cases of catastrophic injury as defined in section 65-05.1-06.1 or when the injured worker is working and has long-term restrictions verified by clear and convincing objective medical and vocational evidence that limits the injured worker to working less than twenty-eight hours per week because of the compensable work injury. This subsection is effective for partial loss of earnings capacity occurring after June 30, 1991.
8. 3. The employee's earnings capacity may be established by expert vocational evidence of a capacity to earn in the statewide job pool where the worker lives. Actual postinjury earnings are presumptive evidence of earnings capacity where the job employs the employee to full work capacity in terms of hours worked per week, and where the job is in a field related to the employee's transferable skills. The presumption may be rebutted by competent evidence from a vocational expert that the employee's actual earnings do not fairly reflect the employee's earnings capacity in the statewide job pool, considering the employee's capabilities, education, experience, and skills.

SECTION 6. AMENDMENT. Section 65-06.2-02 of the North Dakota Century Code is amended and reenacted as follows:

65-06.2-02. Coverage of inmates - Conditions.

1. If an inmate in performance of work in connection with the maintenance of the institution, or with any industry maintained ~~therein~~ within the institution, or with any public service activity, sustains a compensable injury, the inmate may; ~~upon being released from the institution; or after discharge from public service;~~ be awarded and paid compensation

benefits under the ~~provision~~ provisions of this title, upon being released from the institution or after discharge from public service.

2. Claims under this chapter ~~shall~~ must be filed and processed pursuant to section 65-05-01, except that an inmate ~~shall~~ also ~~have~~ has one year from the date of first release from the institution or discharge from public service to file a claim.
3. Workers' compensation benefits under this chapter accrue and are payable from the time of the inmate's release from the institution or after discharge from public service. Disability benefits must be computed according to the methods provided in chapter 65-05. The inmate's weekly wage must be computed using either the actual wage paid to the inmate or the federal minimum wage as of the date of injury, whichever is higher.
4. If a former inmate receiving disability benefits under the provisions of this chapter is recommitted or sentenced by a court to imprisonment in a penal institution, the disability benefits are payable pursuant to subsection ~~3~~ 2 of section 65-05-08.

SECTION 7. EFFECTIVE DATE. Subsection 2 of section 1 of this Act is effective for all confined employees whose period of confinement begins after July 31, 1997, regardless of the date of injury. Subsection 2 of section 5 of this Act is effective for all determinations made after July 31, 1997, regardless of the date of injury. The remainder of section 1, sections 2 and 3, the remainder of section 5, and section 6 are effective for all claims, regardless of the date of injury. Section 4 of this Act is effective for all claims filed after July 31, 1997.

SECTION 8. EXPIRATION DATE. Section 4 of this Act is effective through July 31, 1999, and after that date is ineffective.

Approved April 2, 1997
Filed April 3, 1997

CHAPTER 543

SENATE BILL NO. 2125

(Industry, Business and Labor Committee)
(At the request of the Workers Compensation Bureau)

WORKERS' COMPENSATION DISABILITY AND RETIREMENT EFFECT

AN ACT to create and enact a new section to chapter 65-05 of the North Dakota Century Code, relating to additional benefits for recipients of workers' compensation disability benefits; to amend and reenact section 65-05-09.3 of the North Dakota Century Code, relating to discontinuance of workers' compensation benefits upon retirement; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 65-05 of the North Dakota Century Code is created and enacted as follows:

Additional benefit payable. If an injured employee's benefits cease under subsection 2 of section 65-05-09.3, the bureau shall pay to that employee every twenty-eight days a benefit based on the length of time the injured employee received disability benefits during the term of that claim. The bureau shall pay the injured employee's additional benefits until the employee's death or for a period of time not to exceed the total length of time the employee received disability benefits under sections 65-05-08, 65-05-08.1, 65-05-09, and 65-05-10, and a vocational rehabilitation allowance under chapter 65-05.1, for that claim, whichever occurs first. The benefit is based on the disability benefit that was discontinued under subsection 2 of section 65-05-09.3, which is the injured employee's compensation rate less any applicable social security offset. The percentage of that final payment payable as the additional benefit is:

<u>At least 1 year and less than 3 years of disability</u>	<u>5 percent of weekly benefit</u>
<u>At least 3 years and less than 5 years of disability</u>	<u>10 percent of weekly benefit</u>
<u>At least 5 years and less than 7 years of disability</u>	<u>15 percent of weekly benefit</u>
<u>At least 7 years and less than 9 years of disability</u>	<u>20 percent of weekly benefit</u>
<u>At least 9 years and less than 11 years of disability</u>	<u>25 percent of weekly benefit</u>
<u>At least 11 years and less than 13 years of disability</u>	<u>30 percent of weekly benefit</u>
<u>At least 13 years and less than 15 years of disability</u>	<u>35 percent of weekly benefit</u>
<u>At least 15 years and less than 17 years of disability</u>	<u>40 percent of weekly benefit</u>
<u>At least 17 years and less than 20 years of disability</u>	<u>45 percent of weekly benefit</u>
<u>Twenty or more years of disability</u>	<u>50 percent of weekly benefit.</u>

However, the bureau shall pay to an injured employee who has been determined to be catastrophically injured as defined by subdivision c of subsection 2 of section 65-05.1-06.1 an additional benefit, until the death of the employee, equal to one hundred percent of the final payment of the disability benefit that was discontinued under subsection 2 or 3 of section 65-05-09.3.

SECTION 2. AMENDMENT. Section 65-05-09.3 of the North Dakota Century Code is amended and reenacted as follows:

65-05-09.3. Retirement presumption - Termination of benefits upon retirement.

1. An employee who has retired or voluntarily withdrawn from the labor force and who ~~is, at that time, was~~ not eligible to receive temporary total disability, temporary partial disability, or permanent total disability benefits, or a rehabilitation allowance from the bureau is presumed retired from the labor market. The presumption may be rebutted by a preponderance of the evidence; however, the subjective statement of an employee that the employee is not retired is not sufficient in itself to rebut objective evidence of retirement.
2. An injured employee ~~who is receiving permanent total, temporary total, or temporary partial disability benefits, or rehabilitation benefits, and who begins receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefits, or who is at least sixty five years old and is eligible to receive social security retirement benefits or other retirement benefits in lieu of social security retirement benefits, or who attains retirement age for social security retirement benefits unless the employee proves the employee is not eligible to receive social security retirement benefits or other benefits in lieu of social security retirement benefits is considered to be retired.~~ The bureau may not pay any ~~permanent total, temporary total, or temporary partial~~ disability benefits, rehabilitation benefits, or ~~supplemental supplementary~~ benefits to an employee who is considered retired; however, ~~the bureau is liable~~ employee remains eligible for payment of medical benefits and, permanent partial impairment benefits, and the additional benefit payable under section 1 of this Act. ~~An employee who is determined to be catastrophically injured as defined by subdivision e of subsection 2 of section 65-05.1-06.4 is not subject to this section.~~
3. The bureau retains liability for disability benefits, rehabilitation benefits, permanent partial impairment benefits, and medical benefits for an injured employee who is ~~eligible to receive~~ receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefits or who attains retirement age for social security retirement benefits unless the employee is not eligible to receive social security retirement benefits or other benefits in lieu of social security retirement benefits and who is gainfully employed; and who suffers an injury arising out of and in the course of that employment. The bureau may not pay disability or rehabilitation benefits under this subsection for more than three years, subject to section 65-05-09.2, for injuries occurring after the effective date for this Act.
4. This section applies to all persons who ~~retire or become eligible for~~ begin receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefits, or who attain retirement age for social security retirement benefits unless the employee proves the employee is not eligible to receive social security retirement benefits or other benefits in lieu of social security retirement benefits, after July 31, 1995.

SECTION 3. RETROACTIVE APPLICATION. This Act applies retroactively to August 1, 1995.

SECTION 4. EMERGENCY. This Act is declared to be an emergency measure.

Approved March 13, 1997
Filed March 13, 1997

CHAPTER 544

HOUSE BILL NO. 1261 (Representative Berg) (Senator Mutch)

WORKERS' COMPENSATION AGGRAVATION AWARDS

AN ACT to amend and reenact section 65-05-15 of the North Dakota Century Code, relating to payment of work-related injuries on an aggravation basis.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-15 of the North Dakota Century Code is amended and reenacted as follows:

65-05-15. Aggravation awards. ~~The~~ When a compensable injury combines with a noncompensable injury, disease, or other condition, 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 award benefits on an aggravation basis, 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 a prior injury, disease, or other condition, aggravated, known in advance of the work injury, which has caused previous work restriction or interference with physical function the progression of which is substantially accelerated by, or the severity of which is substantially worsened by, a compensable injury, the bureau shall pay medical expense to treat benefits during the period of acute injury care 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. The period of acute care is presumed to be sixty days immediately following the compensable injury, absent clear and convincing evidence to the contrary. Following the period of acute care, the bureau shall pay benefits on an aggravation basis.~~
3. ~~2. In case of aggravation of~~ If the progression of a prior compensable injury is substantially accelerated by, or the severity of the compensable

injury is substantially worsened by a nonemployment noncompensable 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 disease, or other condition, the bureau shall pay benefits on an aggravation basis.

4. 3. The bureau shall determine the pay benefits on an aggravation award based upon all evidence, as reasonably establishes basis as a percentage of the benefits to which the injured worker would otherwise be entitled, equal to the proportion or percentage of cause as is reasonably of the resulting condition that is attributable to the compensable injury. If the degree of Benefits payable on an aggravation cannot be determined, the percentage award must be basis are presumed to be payable on a fifty percent of the total benefits recoverable if one hundred percent of the injury had been the result of employment basis. The party asserting a percentage other than the presumed fifty percent may rebut the presumption with clear and convincing evidence to the contrary.
5. 4. 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. When an injured worker is entitled to benefits on an aggravation basis, the bureau shall still pay costs of vocational rehabilitation, burial expenses under section 65-05-26, and dependency allowance on a one hundred percent basis.

Approved April 2, 1997
Filed April 3, 1997

CHAPTER 545

SENATE BILL NO. 2116

(Industry, Business and Labor Committee)
(At the request of the Workers Compensation Bureau)

WORKERS' COMPENSATION DEATH BENEFITS

AN ACT to create and enact a new section to chapter 65-05 of the North Dakota Century Code, relating to payment of workers compensation benefits to and scholarships for spouses and dependent children of employees who have died as the result of work-related injuries; to amend and reenact sections 65-05-16, 65-05-17, 65-05-26, and 65-05.2-02 of the North Dakota Century Code, relating to benefits for dependents of employees who have died as a result of work-related injuries; to repeal section 65-05-23 of the North Dakota Century Code, relating to apportionment of benefits in certain death cases; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-16 of the North Dakota Century Code is amended and reenacted as follows:

65-05-16. Death benefits ~~not payable unless death occurs within one year after cessation of disability and six years after injury.~~

1. ~~No~~ The bureau may pay benefits ~~payable~~ under ~~the provisions of~~ this chapter in the case of the death of an employee as the direct result of an injury sustained in the course of the employee's employment ~~shall be paid unless~~ when:
 1. a. If there has been no disability preceding death, the death occurs within one year after the date of the injury;
 2. b. If there has been disability preceding death, the death occurs within one year after the cessation of disability resulting from the injury; or
 3. c. If there has been disability which has continued to the time of death, the death occurs within six years after the date of injury.
4. ~~2. In all events no~~ The bureau may not pay death benefits ~~shall be payable~~ unless a claim is submitted within two years of the death and:
 - a. The death is a direct result of an accepted compensable injury; or
 - b. If no claim was submitted by the deceased, the claim for death benefits is submitted within two years of the injury.

SECTION 2. AMENDMENT. Section 65-05-17 of the North Dakota Century Code is amended and reenacted 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 decedent's spouse or to the 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 decedent, at the bureau's benefit rate in effect on the date of death, and not to exceed two hundred ten dollars per week the state's average weekly wage in effect at the time of the death. These benefits continue until the death or remarriage of the decedent's spouse; or, in the case if the surviving children of the decedent are under the care of a guardian, until the orphaned child or those children of the decedent no longer meet the definition of child "child" in this title. Where if there is more than one orphaned child of a guardian for the children who survive the decedent, the bureau shall divide the death benefits must be divided equally among the children and shall pay benefits to the children's guardians. In no case may total Total weekly death benefits paid may not be less than fifty sixty percent of the maximum weekly death benefits payable. In no case may total Total death benefits, including supplementary benefits, paid on any one claim may not exceed one hundred ninety-seven thousand dollars as a result of any employee's death.
2. To each child of the deceased employee, the amount of 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 pay the benefit 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 payments herein provided under subsections 1 and 2, the bureau shall make a payment in the sum of three six hundred dollars to the decedent's spouse or the guardian of the orphaned child or children of the deceased decedent and one two hundred dollars for each dependent child. Where there is more than one guardian of orphaned the decedent's surviving children, the three six hundred dollars must be divided equally among the children and paid to the children's guardians.

SECTION 3. A new section to chapter 65-05 of the North Dakota Century Code is created and enacted as follows:

Scholarship fund - Rules. The bureau may establish a scholarship fund to provide scholarships for the spouse and dependent children of a worker who dies as a result of a compensable work-related injury, if the spouse and children have received benefits under section 65-05-17. Scholarships are payable to an accredited institution of higher education or an institution of technical education on behalf of a student attending that institution. The total amount awarded annually in scholarships may not exceed one hundred thousand dollars. The maximum amount payable on behalf of an applicant is one thousand five hundred dollars per year for no more than five years. Scholarships must be awarded by a panel chosen by the bureau. The bureau shall adopt rules establishing selection criteria and obligations associated with the program.

SECTION 4. AMENDMENT. Section 65-05-26 of the North Dakota Century Code is amended and reenacted as follows:

65-05-26. Bureau burial Burial expenses. ~~If death results from an injury within six years benefits are payable under section 65-05-16, the fund shall pay to the personal representatives facility handling the funeral arrangements of the deceased employee burial expenses not to exceed two thousand five hundred thousand dollars.~~

SECTION 5. AMENDMENT. Section 65-05.2-02 of the North Dakota Century Code is amended and reenacted as follows:

65-05.2-02. Supplementary benefits - Amount. ~~Claimants~~ A claimant who ~~are is~~ eligible for supplementary benefits and who ~~are is~~ receiving permanent total disability benefits ~~are or death benefits is~~ entitled to receive a weekly supplementary benefit ~~such that, when added to their the weekly permanent total disability benefit or death benefit, results in a combined benefit of at least sixty percent of the state's average weekly wage on July first of each year is their combined benefit.~~ Claimants who are eligible for supplementary benefits and who are receiving death benefits are entitled to receive a weekly supplementary benefit such that, when added to their weekly death benefit, at least fifty percent of the maximum death benefit on July first of each year is their combined benefit. In no case may the. An annual recalculation of supplemental supplementary benefits may not result in a rate less than the previous rate; notwithstanding an error in calculation. If a claim has been accepted on an aggravation basis ~~pursuant to~~ under section 65-05-15 and the ~~injured employee claimant~~ is eligible for supplementary benefits, the claimant's supplementary benefit must be proportionally calculated.

SECTION 6. REPEAL. Section 65-05-23 of the North Dakota Century Code is repealed.

SECTION 7. EFFECTIVE DATE. Sections 1, 2, 4, 5, and 6 of this Act are effective for all claims for death benefits filed after July 31, 1997. Section 3 of this Act is effective August 1, 1997, for all persons who have received benefits under section 65-05-17, regardless of the date eligibility for those benefits began, and is effective through July 31, 2001, and after that date is ineffective.

Approved April 8, 1997
Filed April 8, 1997

CHAPTER 546**HOUSE BILL NO. 1262**

(Representative Berg)
(Senator Mutch)

**WORKERS' COMPENSATION VOCATIONAL
REHABILITATION**

AN ACT to amend and reenact subsection 4 of section 65-05.1-01, subsection 3 of section 65-05.1-02.1, subsections 4 and 6 of section 65-05.1-04, and section 65-05.1-06.1 of the North Dakota Century Code, relating to workers' compensation vocational rehabilitation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 4 of section 65-05.1-01 of the North Dakota Century Code is amended and reenacted as follows:

4. The first appropriate option among the following, calculated to return the employee to substantial gainful employment, must be chosen for the employee:
 - a. Return to the same position.
 - b. Return to the same occupation, any employer.
 - c. Return to a modified position.
 - d. Return to a modified or alternative occupation, any employer.
 - e. Return to an occupation ~~in~~ within the local job pool of the locale in which the claimant was living at the date of injury or of the employee's current address which is suited to the employee's education, experience, and marketable skills.
 - f. Return to an occupation in the statewide job pool which is suited to the employee's education, experience, and marketable skills.
 - g. On-the-job training.
 - h. Short-term retraining of fifty-two weeks or less.
 - i. Long-term retraining of one hundred four weeks or less.
 - j. Self-employment.

SECTION 2. AMENDMENT. Subsection 3 of section 65-05.1-02.1 of the North Dakota Century Code is amended and reenacted as follows:

3. The vocational consultant's report is due within sixty days from the ~~initial referral for rehabilitation~~ date the vocational assessment is performed under this chapter. However, where the vocational

consultant determines that short-term or long-term training options must be evaluated because higher priority options are not viable, the final report is due within ninety days of the ~~initial~~ vocational assessment to allow the employee to assist in formulating the choice among the qualified training programs.

SECTION 3. AMENDMENT. Subsections 4 and 6 of section 65-05.1-04 of the North Dakota Century Code are amended and reenacted as follows:

4. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01 is return to the same, modified, or alternative occupation, or return to an occupation that is suited to the employee's education, experience, and marketable skills, or on-the-job training, the employee is responsible to make a good faith work trial or work search. If the employee fails to perform a good faith work trial ~~or work search, the finding of nondisability or partial disability is res judicata, and the bureau may not reinstate temporary total pay additional~~ disability benefits or recalculate an award of partial disability benefits in the absence of a significant change in medical condition attributable to the work injury. ~~The bureau shall recalculate the partial disability award, however, if the employee returns, in good faith, to gainful employment unless the employee meets the criteria for reapplying for benefits required under subsection 2 of section 65-05-08.~~ If the employee meets the burden of proving that the employee made a good faith work trial or work search and that the work trial or work search was unsuccessful due to the injury, the bureau shall reevaluate the employee's vocational rehabilitation claim. A good faith work search that does not result in placement is not, in itself, sufficient grounds to prove the work injury caused the inability to acquire gainful employment. The employee shall show that the injury significantly impacts the employee's ability to successfully compete for gainful employment in that the injury leads employers to favor those without limitations over the employee.

6. ~~If, without good cause, the injured employee fails to perform a good faith work trial in a return to the same, modified, or alternative occupation, or in an on-the-job training program, or fails to make a good faith work search in return to work utilizing the employee's transferable skills, the employee is in noncompliance with vocational rehabilitation. A good faith work search that does not result in placement is not, in itself, sufficient grounds to prove the work injury caused the inability to acquire gainful employment. The employee shall show that the injury significantly impacts the employee's ability to successfully compete for gainful employment in that the injury leads employers to favor those without limitations over the employee. If, without good cause, the injured employee fails to attend specific vocational testing, remedial, or other vocational services determined necessary by the bureau or the rehabilitation consultant, the employee is in noncompliance with vocational rehabilitation. If, without good cause, the injured employee fails to attend a scheduled medical or vocational assessment, fails to communicate or cooperate with the vocational consultant, or fails to attend a specific qualified rehabilitation program within ten days from the date the rehabilitation program commences, the employee is in noncompliance with vocational rehabilitation. If, without good cause, the employee discontinues a job the employee is performing, or a training program in which the employee is enrolled, the employee is in noncompliance with vocational rehabilitation. If at any time the~~

employee is noncompliant without good cause, subsequent efforts by the employee to come into compliance with vocational rehabilitation are not considered successful compliance until the employee has successfully returned to the job or training program for a period of ~~sixty~~ thirty days. In all cases of noncompliance by the employee, the bureau, by administrative order, shall discontinue ~~lost-time disability and vocational rehabilitation~~ benefits. If, after issuance of the ~~bureau order becomes final~~, the period of noncompliance continues for ~~sixty~~ thirty days, or a second instance of noncompliance occurs without good cause, the bureau ~~has no further jurisdiction in awarding~~ may not pay any further ~~temporary total disability, temporary partial disability, permanent total disability, or vocational rehabilitation~~ benefits, regardless of whether the employee sustained a significant change in medical condition due to the work injury.

SECTION 4. AMENDMENT. Section 65-05.1-06.1 of the North Dakota Century Code is amended and reenacted as follows:

65-05.1-06.1. Rehabilitation award.

1. Within sixty days of ~~receipt of~~ receiving the final vocational consultant's report, the bureau shall issue an administrative order under chapter 28-32 detailing the employee's entitlement to ~~lost-time~~ disability and vocational rehabilitation services.
2. If the appropriate priority option is short-term or long-term training, the vocational rehabilitation award must be within the following terms:
 - a. For the employee'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 employee was receiving, or was entitled to receive, prior to the award.
 - b. The rehabilitation allowance must include an additional twenty-five percent when it is necessary for the employee to maintain two households, when it is necessary for the employee to maintain two households and the employee elects to commute to and from school on a daily basis rather than maintain a second household and the distance from the employee's residence to the school or training institution is at least thirty miles, or when the employee meets other criteria established by the bureau by 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;~~ quadriplegia; severe closed head injury; total blindness, in both eyes; or amputation of an arm proximal to the wrist or a leg proximal to the ankle, caused by the compensable injury, which renders an employee permanently and totally disabled without further vocational retraining assistance; or

- (2) Those employees the bureau so designates, in its sole discretion, provided that the bureau finds the employee 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, an employee 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 employee 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 employee faithfully pursues vocational retraining. The rehabilitation allowance may be suspended during such time as the employee is not faithfully pursuing the training program, or has failed academically. If the work injury itself precludes the employee from continuing training, the employee remains eligible to receive disability benefits.~~
- f. ~~In the event~~ if the employee 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.~~ f. ~~In the event~~ if the employee 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 employee with work search.
- ~~h.~~ g. If the employee successfully concludes the rehabilitation program, the employee is not eligible for further vocational retraining or total disability benefits unless the employee establishes a significant change in medical condition attributable to the work injury which precludes the employee from performing the work for which the employee was trained, or any other work for which the employee is suited. The bureau may waive this section in cases of catastrophic injury defined by subdivision c of subsection 2.
- ~~i.~~ h. If the employee successfully concludes the rehabilitation program, the employee remains eligible to receive partial disability benefits, as follows:
- (1) Beginning the date at which the employee completes retraining, until the employee acquires and performs substantial gainful employment, the partial disability benefit is sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages before the injury, and the employee's wage-earning capacity after retraining, as measured by the average wage in the employee'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 employee

- completes retraining. The benefit continues until the employee acquires substantial gainful employment; ~~but in no case may exceed one year in duration.~~
- (2) Beginning the date at which the employee acquires substantial gainful employment in the field for which the employee was trained, or in a related occupation, the partial disability benefit is ~~sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages before the injury, and the employee's wage-earning capacity after retraining.~~
- ~~(3)~~ (3) Beginning the date at which the employee acquires substantial gainful employment in an occupation unrelated to the employee's training, the partial disability benefit is sixty-six and two-thirds percent of the difference between the injured employee's weekly wages before the injury, and the employee's wage-earning capacity after retraining, as determined under paragraph 1 of this subdivision, or the employee's actual postinjury wage earnings, whichever is higher.
- ~~(4)~~ (3) The partial disability benefit payable under paragraphs 1, and 2, and 3 of this subdivision ~~must be reduced so that the benefit and the employee'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 employee completes retraining or the date the employee 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 may not exceed the limitation on partial disability benefits contained in section 65-05-10.~~
- ~~(5)~~ (4) The partial disability benefits paid under paragraphs 1, and 2, and 3 may not together exceed one year's duration.
- ~~(6)~~ (4) For purposes of paragraph 1, the date the employee completes retraining is defined as the date the employee is available for full-time work. An employee cannot be deemed available for full-time work while the employee pursues education, unless such pursuit will in no way interfere with full-time work.
- ~~(7)~~ (5) For purposes of paragraphs 1, and 2, and 3, "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)~~ (6) The bureau may waive the one-year limit on the duration of partial disability benefits, in cases of catastrophic injury under subdivision c of subsection 2.

3. If the appropriate priority option is return to the same or modified position, or to a related position, the bureau shall determine whether the employee is eligible to receive partial disability benefits pursuant to section 65-05-10. In addition, the bureau, when appropriate, shall make an additional award for actual relocation expenses to move the household to the locale where the claimant has actually located work.
4. If the appropriate priority option is on-the-job training, the bureau shall pay the employee a ~~lost-time~~ disability benefit throughout the duration of the on-the-job training program. Upon completion of the training program, the bureau shall determine whether the employee is eligible to receive partial disability benefits pursuant to section 65-05-10. In addition, the bureau, when appropriate, shall make an additional award for actual relocation expenses to move the household to the locale where the claimant has actually located work.

Approved April 4, 1997

Filed April 4, 1997

CHAPTER 547**SENATE BILL NO. 2383**

(Senators Wogsland, Krebsbach)
(Representatives Berg, Carlson, Glasheim)

**WORKERS' COMPENSATION WEEKLY WAGE
DETERMINATION**

AN ACT to create and enact a new subsection to section 65-07-03 of the North Dakota Century Code, relating to the determination of weekly wage for workers' compensation premium purposes.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

⁹ **SECTION 1.** A new subsection to section 65-07-03 of the North Dakota Century Code is created and enacted as follows:

Actual wages paid to a clerk, assessor, treasurer, or member of the board of supervisors of an organized township, if the contract for insurance is to provide protection for a person mentioned in this subsection and that person is not employed by the township in any other capacity.

Approved March 21, 1997
Filed March 21, 1997

⁹ Section 65-07-03 was also amended by section 6 of House Bill No. 1269, chapter 527.