

WORKERS' COMPENSATION

CHAPTER 548

HOUSE BILL NO. 1266

(Representative Berg)

BUREAU CAPITAL PURCHASES

AN ACT relating to the expenditure of bureau funds for capital purchases; to provide a continuing appropriation; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Purchase of building and property - Authority. The bureau may contract to purchase a building and property to house its operations only if the following requirements are satisfied:

1. Completion of a certified appraisal of the building and property to be purchased;
2. Completion of a physical inspection of the building to be purchased demonstrating that the building is structurally sound and suitable for housing bureau operations;
3. Completion of a cost-benefit analysis demonstrating that purchasing a building and property would be economically advantageous in that it would generate a higher yield compared to investing the anticipated purchase price with the same investment allocation as the workers' compensation fund;
4. The cost-benefit analysis must consider alternative locations to house bureau operations;
5. The building and property purchase must include adequate land to satisfy parking requirements of bureau staff and anticipated visitors; and
6. Approval of the purchase by the workers compensation board of directors after consideration of the certified appraisal, physical inspection report, and cost-benefit analysis.

SECTION 2. CONTINUING APPROPRIATION. Money in the workers' compensation fund is hereby appropriated on a continuing basis to defray the costs of a purchase under this Act. The independent annual financial audit of the bureau must report any expenditures made pursuant to this Act.

SECTION 3. EXPIRATION DATE. This Act is effective through July 31, 2003, and after that date is ineffective.

Filed April 13, 1999

NOTE: The Governor's veto of House Bill No. 1266 was not sustained. For the text of the Governor's veto message see chapter 564.

CHAPTER 549

HOUSE BILL NO. 1331 (Representatives Keiser, Berg, Wald)

INTENTIONAL WORK-RELATED INJURIES AND FRAUD

AN ACT to create and enact a new section to chapter 65-01 of the North Dakota Century Code, relating to civil liability for intentional work-related injuries; to amend and reenact sections 65-01-05, 65-02-23, 65-04-14, 65-09-01, and 65-09-02 of the North Dakota Century Code, relating to employer and provider fraud and to the liability of a noncomplying employer for work-related injuries; to provide a penalty; and to provide a continuing appropriation.

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:

Civil liability for intentional injuries. The sole exception to an employer's immunity from civil liability under this title, except as provided in chapter 65-09, is an action for an injury to an employee caused by an employer's intentional act done with the conscious purpose of inflicting the injury.

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

65-01-05. Employment of those unprotected by insurance unlawful - Effect of failure to secure compensation - Penalty - Injunction. It is unlawful for any employer to employ anyone, or to receive the fruits of the labor of any person, in a hazardous employment as defined in this title, without first making application for workers' compensation insurance coverage for the protection of such employees by notice to the bureau of the intended employment, the nature thereof, and the estimated payroll expenditure for the coming twelve-month period. Failure to secure workers' compensation coverage for employees by application for workers' compensation insurance constitutes a class A misdemeanor. If the premium due exceeds five hundred dollars, the penalty for willful failure to secure coverage is a class C felony. Where the employer is a corporation or a limited liability company, the president, secretary, treasurer, or person with primary responsibility is liable for the failure to secure workers' compensation coverage under this section. In addition to the penalties prescribed by this section the bureau may, by injunction proceedings as provided for in this title, enjoin any employer from unlawfully employing uninsured workers.

³⁶⁵ **SECTION 3. AMENDMENT.** Section 65-02-23 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

³⁶⁵ Section 65-02-23 was also amended by section 4 of House Bill No. 1325, chapter 553.

65-02-23. Workers' compensation fraud unit - Continuing appropriation. 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 fraud against the fund by employers, injured workers, or providers of medical or other services, including activities described under section 65-04-14 or 65-05-33. The unit shall refer cases of fraud to the bureau for the imposition of administrative penalties and may refer them to the appropriate authorities for prosecution. Money in the workers' compensation fund is appropriated on a continuing basis for payment of costs associated with identifying, preventing, and investigating employer or provider fraud. The biennial independent performance audit of the bureau must evaluate and report on the effectiveness of these expenditures. The bureau may establish a process to charge investigative costs against the rate class of an employer being investigated and to credit any recoveries to that rate class.

SECTION 4. AMENDMENT. Section 65-04-14 of the North Dakota Century Code is amended and reenacted as follows:

65-04-14. False payroll report - Liability of employer - Collection and disposition of penalty. An employer who willfully misrepresents to the bureau or its representative the amount of payroll upon which a premium under this title is based, or willfully fails to secure coverage for employees, is liable to the state in the amount of two thousand dollars plus ten times the amount of the difference between the premium paid and the amount of premium the employer should have paid. The bureau shall collect a penalty imposed under this section in a civil action in the name of the state, and the bureau shall deposit a penalty collected under this section to the credit of the fund. An employer who willfully misrepresents to the bureau or its representative the amount of payroll upon which a premium under this title is based, or willfully fails to secure coverage for employees, is guilty of a class A misdemeanor, but if the difference between the premium paid and the amount the employer should have paid is more than five hundred dollars, the offense is a class C felony.

SECTION 5. AMENDMENT. Section 65-09-01 of the North Dakota Century Code is amended and reenacted as follows:

65-09-01. Liability of uninsured employer for injury to employees.

1. Any employer subject to this title who ~~fails to comply with chapter 65-04 is liable~~ is in violation of section 65-04-14 is not protected by the immunity from civil liability granted to employers under this title for injuries to that employer's employees for damages suffered by reason of injuries sustained in the course of employment and ~~is liable~~ to the dependents and legal representatives of an employee whose death results from injuries sustained in the course of employment. The employer is liable ~~also~~ for the premiums, reimbursements, penalties, and interest provided for in this title.
2. The bureau shall establish a procedure by which a person may apply to the bureau for a determination of whether that person is an employer required to obtain workers' compensation coverage under this title. A determination under this section that a person is not required to be insured is effective for no more than one year from the date the person is notified of the determination. The bureau retains continuing jurisdiction over determinations made under this section and may reconsider or revoke its decision at any time.

SECTION 6. AMENDMENT. Section 65-09-02 of the North Dakota Century Code is amended and reenacted as follows:

65-09-02. Application for compensation - Common-law defenses not available - Fund subrogated to recovery - Hearing - Time for filing. An employee whose employer ~~has failed to comply with chapter 65-04~~ is in violation of section 65-04-14, who has been injured in the course of employment, or the employee's dependents or legal representatives in case death has ensued, may file an application with the bureau for an award of compensation under this title and in addition may maintain a civil action against the employer for damages resulting from the injury or death. In the action, the employer may not assert the common-law defenses of:

1. The fellow servant rule.
2. Assumption of risk.
3. Contributory negligence.

The bureau is subrogated to the recovery made in the action against the uninsured employer. The subrogation interest is determined according to section 65-01-09, with the uninsured employer being the person other than the fund with a legal liability to pay damages with respect to the employee's injury or death. An injured employee, or the dependents of an employee who died as a result of a work-related accident, shall file the original claim for compensation within one year after the injury or within two years after the death. The bureau shall notify the claimant and the employer that the matter is being processed under this chapter, and subsequently shall hear and determine the application for compensation as it would for other claims before the bureau. A determination by the bureau that a person is not an employer required to obtain workers' compensation coverage under this title is a defense to any claim that the person failed to obtain coverage for the time period during which the determination is effective.

Approved March 25, 1999
Filed March 25, 1999

CHAPTER 550

HOUSE BILL NO. 1332 (Representatives Keiser, Berg, Wald)

WORKERS' COMPENSATION DEFINITIONS, TREATMENT, AND COVERAGE

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

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

³⁶⁶ **SECTION 1. AMENDMENT.** Section 65-01-02 of the 1997 Supplement to 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.
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.
4. "Artificial replacements" means mechanical aids including braces, belts, casts, or crutches as may be reasonable and necessary due to compensable injury.
5. "Average weekly wage" means the weekly wages the employee was receiving from all employments at the date of first disability. The average weekly wage as determined under this ~~section~~ subsection must be rounded to the nearest dollar. In cases where the employee's wages are not fixed by the week, they must be determined by using the first applicable formula from the schedule below:

³⁶⁶ Section 65-01-02 was also amended by section 1 of House Bill No. 1422, chapter 551.

- a. For seasonal employment, during the first consecutive days of disability up to twenty-eight days the average weekly wage is calculated pursuant to the first applicable formula in subdivisions b through g of this subsection, and after that are calculated as one-fiftieth of the total wages from all occupations during the twelve months preceding the ~~injury~~ date of first disability or during the tax year preceding the ~~injury~~ date of first disability, or during an average of the three tax years preceding the ~~injury~~ date of first disability, whichever is highest and for which accurate, reliable, and complete records are readily available.
 - b. The "average weekly wage" of a self-employed employee is determined by the following formula: one-fiftieth of the net profits based on the preceding tax year or preceding fifty-two weeks whichever is higher if accurate, reliable, and complete records for those fifty-two weeks are readily available, plus depreciation, meal and travel expenses, and any expenses chargeable to use of personal residence as allowed under the federal tax laws.
 - c. Hourly or daily rate multiplied by number of hours or days worked per seven-day week.
 - d. Monthly rate multiplied by twelve months and divided by fifty-two weeks.
 - e. Biweekly rate divided by two.
 - f. The usual wage paid other employees engaged in similar occupations.
 - g. A wage reasonably and fairly approximating the weekly wage lost by the claimant during the period of disability.
6. "Average weekly wage in the state" means the determination made of the average weekly wage in the state by job service North Dakota on or before July first of each year, computed to the next highest dollar.
 7. "Board" means the North Dakota workers compensation board of directors.
 8. "Brother" and "sister" include a stepbrother and a stepsister, a half brother and a half sister, and a brother and sister by adoption. The terms do not include a married brother or sister unless he or she actually is dependent.
 9. "Bureau" means the North Dakota workers compensation bureau, or the director, or any department heads, assistants, or employees of the bureau designated by the director, to act within the course and scope of their employment in administering the policies, powers, and duties of this title.
 10. "Child", for determining eligibility for benefits under chapter 65-05, means a child under eighteen years of age residing in the employee's household or to whom the employee has a legal obligation of support; or a child eighteen years of age or over and physically or mentally incapable of self-support who is actually dependent upon the employee

for support; or any child between eighteen and twenty-two years of age who is enrolled as a full-time student in any accredited educational institution who is actually dependent upon the employee for support. This term includes a legitimate child, a stepchild, adopted child, posthumous child, foster child, and acknowledged illegitimate child, but ~~shall~~ does not include a married child unless actually dependent.

11. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.
 - a. The term includes:
 - (1) Disease caused by a hazard to which an employee is subjected in the course of employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. Disease includes effects from radiation.
 - (2) An injury to artificial members.
 - (3) Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but only when caused by the employee's employment with reasonable medical certainty, and only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as 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) A willfully self-inflicted injury, including suicide or attempted suicide, or an injury caused by the employee's willful intention to injure or kill another.

- (3) Any injury caused by the use of intoxicants or the illegal use of controlled substances.
 - (4) An injury that arises out of an altercation in which the injured employee is 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.
 - (5) An injury that arises out of an illegal act committed by the injured employee.
 - (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.
 - (7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.
 - (8) A nonemployment injury that, although acting upon a prior compensable injury, is an independent intervening cause of injury.
 - (9) A latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a subsequent injury.
 - (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.~~
12. "Date of first disability" means the first date the employee was unable to work ~~in relation to~~ because of a compensable injury.
 13. "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.
 14. "Director" means the director of the bureau.
 15. "Disability" means loss of earnings capacity and may be permanent total, temporary total, or partial.
 16. "Doctor" means doctor of medicine, ~~chiropractor,~~ or osteopathy, chiropractor, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license.

17. "Employee" means a person who performs services hazardous employment 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 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 of an employer or a child under the age of twenty-two of the an employer dwelling in the household of the employer. For purposes of this paragraph and section 65-07-01, "child" means any legitimate child, stepchild, adopted child, foster child, or acknowledged illegitimate child.
 - (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.
18. "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.
19. "Fee schedule" means the relative value scale, conversion factors, fee schedules, and medical aid rules adopted by the bureau.
20. "Fund" means the North Dakota workers' compensation fund.
21. "Grandchild" and the terms defined in subsections 7 and 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. "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. "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. ~~"Orphan" means a child who has no lawful parent.~~
- ~~25.~~ "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. 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.
- ~~27.~~ 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.
- ~~28.~~ 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.
- ~~29.~~ 28. "Seasonal employment" includes an occupation that has periods of forty-five consecutive days of not receiving wages.
- ~~30.~~ 29. "Spouse" includes only the decedent's husband or wife who was living with the decedent or was dependent upon the decedent for support at the time of injury.
- ~~34.~~ 30. "Utilization review" means the initial and continuing evaluation of appropriateness in terms of both the level and the quality of health care and health services provided a patient, based on medically accepted standards. The evaluation must be accomplished by means of a system that identifies the utilization of medical services, based on medically accepted standards, and which refers instances of possible inappropriate utilization to the bureau to obtain opinions and recommendations of expert medical consultants to review individual cases for which administrative action may be deemed necessary.
- ~~32.~~ 31. "Wages" means an employee's remuneration from all employment reportable to the internal revenue service as earned income for federal income tax purposes. For purposes of chapter 65-04, "wages" may not include dismissal or severance pay.

SECTION 2. AMENDMENT. Subsection 4 of section 65-05-28 of the North Dakota Century Code is amended and reenacted as follows:

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

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

- 1. During the first sixty days after a ~~compensable work~~ injury, an employee of an employer who has selected a preferred provider under this section may seek medical treatment only from the preferred provider for the injury. Treatment by a provider other than the preferred provider is not compensable and the bureau may not pay for treatment

by a provider who is not a preferred provider, unless a referral was made by the preferred provider. A provider who is not a preferred provider may not certify disability or render an opinion about any matter pertaining to the injury, including causation, compensability, impairment, or disability. This section does not apply to emergency care nor to any care the employee reasonably did not know was related to a compensable work injury.

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

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

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

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

Approved March 22, 1999
Filed March 23, 1999

CHAPTER 551

HOUSE BILL NO. 1422

(Representative Berg)

PERMANENT IMPAIRMENT AWARDS

AN ACT to amend and reenact subsection 26 of section 65-01-02 and section 65-05-12.2 of the North Dakota Century Code, relating to workers' compensation awards for permanent impairment; to provide for a study of workers' compensation permanent impairment awards; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

³⁶⁷ **SECTION 1. AMENDMENT.** Subsection 26 of section 65-01-02 of the 1997 Supplement to 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. ~~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.~~

SECTION 2. AMENDMENT. Section 65-05-12.2 of the North Dakota Century Code is amended and reenacted as follows:

65-05-12.2. Permanent impairment - Compensation - Time paid. When a compensable injury ~~results in~~ causes permanent ~~loss of, or loss of use of, a member of the body~~ impairment, the bureau shall determine a permanent impairment award on the following terms:

1. If the compensable injury causes permanent impairment and the permanent impairment award payable by the bureau is at least two thousand dollars, the injured employee may defer payment of the permanent impairment award for a period of time not to exceed the date the employee reaches age sixty-five. A permanent impairment award payable by the bureau under this subsection must be paid to the employee in a lump sum that consists of the amount of the award plus any interest that has accrued at the actuarial discount rate in use by the bureau. The actuarial discount rate applied to the award is the average actuarial discount rate in effect for the period of deferment of the

³⁶⁷ Section 65-01-02 was also amended by section 1 of House Bill No. 1332, chapter 550.

employee's award. The bureau shall adopt rules implementing any necessary procedures for award payments made under this subsection.

2. ~~If a compensable injury that occurs after July 31, 1995, causes permanent impairment, the~~ The bureau shall calculate the amount of the lump sum payable under subsection 4 award by multiplying thirty-three and one-third percent of the average weekly wage in this state on the date of the impairment evaluation, rounded to the next highest dollar on the date of the original injury, by the number of weeks specified in subsection 15 10. The bureau shall pay permanent impairment benefits under subsection 4 at the rate of one hundred twenty-two dollars per week for a compensable injury that occurred before August 1, 1995.
3. The bureau shall notify the employee by certified mail, to the last-known address of the employee, when that employee becomes potentially eligible for a permanent impairment award. After the bureau has notified the employee, the employee shall file, within one hundred eighty days from the date the employee was notified, a written request for an evaluation for permanent impairment. Failure to file the written request within the one hundred eighty-day period precludes an award under this section.
4. An injured employee is entitled to compensation for permanent impairment under this section only for those findings of impairment that are permanent and ~~that~~ which were caused by the compensable injury. The bureau may not issue an impairment award for impairment findings due to unrelated, noncompensable, or preexisting conditions, even if these conditions were made symptomatic by the compensable work injury, and regardless of whether section 65-05-15 applies to the claim.
5. An injured employee is ~~not~~ eligible for an evaluation for ~~of~~ permanent impairment ~~until the employee is at~~ only when all conditions caused by the compensable injury have reached maximum medical improvement. The injured employee's doctor shall report to the bureau the date an employee has reached maximum medical improvement and any evidence of impairment of function the injured employee has after that date. ~~A doctor making an evaluation for permanent impairment shall include a clinical report in sufficient detail to support the percentage ratings assigned.~~ If the report states that the employee is potentially eligible for a permanent impairment award, the bureau shall provide notice to the employee as provided by subsection 3. If the injured employee files a timely written request under subsection 3, the bureau shall schedule an impairment evaluation by a doctor qualified to evaluate the impairment.
6. ~~Unless otherwise provided by this section, a doctor evaluating the impairment of an injured employee shall use the edition of the American medical association's "Guides to the Evaluation of Permanent Impairment" in effect on the date of the employee's evaluation to establish a rating for impairment of function. A doctor evaluating the impairment of an injured employee resulting from a mental disorder shall use the edition of the American psychiatric association's "Diagnostic and Statistical Manual of Mental Disorders" in effect on the date of the employee's evaluation to establish a rating for the impairment. A doctor evaluating permanent impairment shall include a clinical report in sufficient detail to support the percentage ratings~~

assigned. The bureau shall adopt administrative rules governing the evaluation of permanent impairment. These rules must incorporate principles and practices of the American medical association's "Guides to the Evaluation of Permanent Impairment" modified to be consistent with North Dakota law, to resolve issues of practice and interpretation, and to address areas not sufficiently covered by the guides. Until rules adopted under this subsection become effective, impairments must be evaluated under the fourth edition, third printing, of the guides.

7. The bureau shall deduct, on a whole body impairment basis, from a subsequent an award for impairment under this section, any previous impairment award given or calculated on an earlier claim or the same claim for that same member or body part under the workers' compensation laws of any jurisdiction.
8. ~~A rating for impairment of function from an injury to the spinal cord resulting in paraplegia, hemiplegia, or quadriplegia must be calculated based solely on the percentage the impairment of function bears to total impairment of function of the whole body.~~
9. ~~A rating for impairment of function of the cervical, thoracic, lumbar, or sacral spine must be calculated according to the doctor's diagnosis of the employee's injury or condition that is directly related to the compensable work injury. The rating may not include a rating for other factors, including loss of range of motion, pain, loss of strength, loss of sensation, and radiculopathy unless established by unequivocal electrodiagnostic evidence of nerve root compromise.~~
10. ~~A rating of impairment of function resulting from injuries other than amputations, injuries to the cervical, thoracic, lumbar, or sacral spine, and injuries to the spinal cord resulting in paraplegia, hemiplegia, or quadriplegia must be based on a diagnosis directly related to the compensable work injury, if the American medical association's "Guides to the Evaluation of Permanent Impairment" provide for an impairment on a diagnostic basis.~~
11. ~~A rating for impairment of function for loss of strength and sensation must be based on objective medical evidence of nerve damage.~~
12. ~~A rating of impairment of function due to loss of range of motion must be based on objective medical evidence of structural damage to a joint or loss of motor function.~~
13. ~~An injured employee is not entitled to a permanent impairment award due solely to pain.~~
44. 9. If an employee dies, the right to any compensation payable pursuant to an impairment evaluation previously requested by the employee under this section subsection 3, which remains unpaid on the date of the employee's death, survives and passes to the employee's dependent spouse, minor children, parents, or estate, in that order. If the employee dies, only those findings of impairment that which are objectively verifiable such as values for surgical procedures and amputations may be considered in a rating for impairment. Impairment findings not supported by objectively verifiable evidence may not be included in a rating for impairment. The deceased employee's dependents or

representatives shall request an impairment award under this subsection within one year from the date of death of the employee.

- 45- 10. If the injury causes permanent impairment, the award must be determined based on the percentage ~~the~~ of whole body impairment ~~bears to total impairment must be determined~~ in accordance with the first applicable whole body impairment the following schedule:

For one to fifteen percent impairment	0 weeks
For sixteen percent impairment	5 <u>10</u> weeks
For seventeen percent impairment	5 <u>10</u> weeks
For eighteen percent impairment	40 <u>15</u> weeks
For nineteen percent impairment	40 <u>15</u> weeks
For twenty percent impairment	45 <u>20</u> weeks
For twenty-one percent impairment	45 <u>20</u> weeks
For twenty-two percent impairment	20 <u>25</u> weeks
For twenty-three percent impairment	20 <u>25</u> weeks
For twenty-four percent impairment	20 <u>30</u> weeks
For twenty-five percent impairment	25 <u>30</u> weeks
For twenty-six percent impairment	30 <u>35</u> weeks
For twenty-seven percent impairment	35 weeks
For twenty-eight percent impairment	40 weeks
For twenty-nine percent impairment	45 weeks
For thirty percent impairment	50 weeks
For thirty-one percent impairment	60 weeks
For thirty-two percent impairment	70 weeks
For thirty-three percent impairment	80 weeks
For thirty-four percent impairment	90 weeks
For thirty-five percent impairment	100 weeks
For thirty-six percent impairment	110 weeks
For thirty-seven percent impairment	120 weeks
For thirty-eight percent impairment	130 weeks
For thirty-nine percent impairment	140 weeks
For forty percent impairment	150 weeks
For forty-one percent impairment	160 weeks
For forty-two percent impairment	170 weeks
For forty-three percent impairment	180 weeks
For forty-four percent impairment	190 weeks
For forty-five percent impairment	200 weeks
For forty-six percent impairment	210 weeks
For forty-seven percent impairment	220 weeks
For forty-eight percent impairment	230 weeks
For forty-nine percent impairment	240 weeks
For fifty percent impairment	250 <u>260</u> weeks
For fifty-one percent impairment	265 <u>280</u> weeks
For fifty-two percent impairment	280 <u>300</u> weeks
For fifty-three percent impairment	295 <u>320</u> weeks
For fifty-four percent impairment	310 <u>340</u> weeks
For fifty-five percent impairment	325 <u>360</u> weeks
For fifty-six percent impairment	340 <u>380</u> weeks
For fifty-seven percent impairment	355 <u>400</u> weeks
For fifty-eight percent impairment	370 <u>420</u> weeks
For fifty-nine percent impairment	385 <u>440</u> weeks
For sixty percent impairment	400 <u>465</u> weeks
For sixty-one percent impairment	415 <u>490</u> weeks
For sixty-two percent impairment	430 <u>515</u> weeks

For sixty-three percent impairment	445 <u>540</u> weeks
For sixty-four percent impairment	460 <u>565</u> weeks
For sixty-five percent impairment	475 <u>590</u> weeks
For sixty-six percent impairment	490 <u>615</u> weeks
For sixty-seven percent impairment	505 <u>640</u> weeks
For sixty-eight percent impairment	520 <u>665</u> weeks
For sixty-nine percent impairment	535 <u>690</u> weeks
For seventy percent impairment	550 <u>715</u> weeks
For seventy-one percent impairment	565 <u>740</u> weeks
For seventy-two percent impairment	580 <u>765</u> weeks
For seventy-three percent impairment	595 <u>790</u> weeks
For seventy-four percent impairment	610 <u>815</u> weeks
For seventy-five percent impairment	625 <u>840</u> weeks
For seventy-six percent impairment	640 <u>865</u> weeks
For seventy-seven percent impairment	655 <u>890</u> weeks
For seventy-eight percent impairment	670 <u>915</u> weeks
For seventy-nine percent impairment	685 <u>940</u> weeks
For eighty percent impairment	700 <u>965</u> weeks
For eighty-one percent impairment	715 <u>990</u> weeks
For eighty-two percent impairment	730 <u>1015</u> weeks
For eighty-three percent impairment	745 <u>1040</u> weeks
For eighty-four percent impairment	760 <u>1065</u> weeks
For eighty-five percent impairment	775 <u>1090</u> weeks
For eighty-six percent impairment	790 <u>1115</u> weeks
For eighty-seven percent impairment	805 <u>1140</u> weeks
For eighty-eight percent impairment	820 <u>1165</u> weeks
For eighty-nine percent impairment	835 <u>1190</u> weeks
For ninety to one hundred percent impairment	4000 <u>1215</u> weeks
<u>For ninety-one percent impairment</u>	<u>1240</u> weeks
<u>For ninety-two percent impairment</u>	<u>1265</u> weeks
<u>For ninety-three percent impairment</u>	<u>1290</u> weeks
<u>For ninety-four percent impairment</u>	<u>1320</u> weeks
<u>For ninety-five percent impairment</u>	<u>1350</u> weeks
<u>For ninety-six percent impairment</u>	<u>1380</u> weeks
<u>For ninety-seven percent impairment</u>	<u>1410</u> weeks
<u>For ninety-eight percent impairment</u>	<u>1440</u> weeks
<u>For ninety-nine percent impairment</u>	<u>1470</u> weeks
<u>For one hundred percent impairment</u>	<u>1500</u> weeks

- 46: 11. An amputation of a finger or toe at the level of the distal interphalangeal joint or proximal to that joint, or the thumb or the great toe at the interphalangeal joint or proximal to that joint, which is determined by the American medical association's "Guides to the Evaluation of Permanent Impairment" to result in a whole body impairment of less than sixteen percent is payable as a sixteen percent impairment.
- 47: 12. If there is a medical dispute regarding the percentage of an injured employee's permanent impairment ~~is disputed~~, all relevant medical evidence must be submitted to an independent doctor who has not treated the employee and who has not been consulted by the bureau in relation to the injury upon which the impairment is based. The bureau shall establish a ~~comprehensive list~~ lists of doctors who are ~~medical specialists within the state~~ qualified by their training, experience, and area of practice to rate permanent impairments caused by various types of injuries. The bureau shall define, by rule, the process by which the bureau and the injured employee choose an independent doctor or

doctors to review a disputed permanent impairment evaluation or rating. The decision of the independent doctor or doctors chosen under this process is presumptive evidence of the degree of permanent impairment of the employee which can only be rebutted by clear and convincing evidence. This subsection does not impose liability on the bureau for an impairment award for a rating of impairment for a body part or condition the bureau has not determined to be compensable as a result of the injury. The employee bears the expense of witness fees of the independent doctor or doctors if the employee disputes the findings of the independent doctor or doctors.

- 48: 13. ~~The bureau shall establish, by rule, a reasonable hourly rate and a maximum fee to compensate an employee's attorney for legal services rendered as a result of the award or denial of compensation for permanent impairment. An attorney's fees are not payable unless there is a bona fide dispute as to the percentage of the employee's permanent impairment or unless there is a dispute as to the employee's eligibility for an award for permanent partial impairment. An attorney's fees payable in connection with a permanent impairment dispute may not exceed twenty percent of the additional amount awarded upon final resolution of the dispute, subject to the maximum fees established pursuant to section 65-02-08.~~
- 49: 14. An attorney may not seek or obtain from an employee through a contingent fee arrangement, or on a percentage basis, costs or fees payable in connection with the award or denial of compensation for permanent impairment. A permanent impairment award is exempt from the claims of creditors, including an employee's attorney, except as provided by section 65-05-29.

SECTION 3. PERMANENT IMPAIRMENT AWARDS STUDY. During the 1999-2000 interim, the bureau shall study the awards provided to injured employees with permanent impairments caused by compensable work injuries. The study must include involvement from labor, employers, medical providers, and organizations representing those constituencies, and must identify the advantages and disadvantages of the current system and of any proposed alternate system. The study must include recommendations on whether changes are needed, including changes to the threshold for qualifying for an award, and the cost of any proposed changes. Before the 2001 legislative session, the bureau shall report the results of the study to an interim committee identified by the legislative council.

SECTION 4. EFFECTIVE DATE. Sections 1 and 2 of this Act apply to all impairment evaluations performed after July 31, 1999, regardless of the date of injury or date of claim filing.

Approved April 15, 1999
Filed April 15, 1999

CHAPTER 552

SENATE BILL NO. 2272

(Senators Klein, Krebsbach)
(Representatives Berg, Poolman)

STAFFING SERVICE IMMUNITY

AN ACT to amend and reenact section 65-01-08 of the North Dakota Century Code, relating to workers' compensation employer and staffing service relief from liability for injuries to an employee.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-01-08 of the North Dakota Century Code is amended and reenacted as follows:

65-01-08. Contributing employer or staffing service relieved from liability for injury to employee.

1. ~~Where~~ If a local or out-of-state employer ~~has~~ secured the payment of compensation to that employer's employees by contributing premiums to the fund, the employee, and the parents in the case of a minor employee, or the representatives or beneficiaries of either, do not have ~~ne~~ a claim for relief against ~~such~~ the contributing employer or against any agent, servant, or other employee of ~~such~~ the employer for damages for personal injuries, but shall look solely to the fund for compensation.
2. If a client company contracts with a staffing service for an employee's services, the client company and the staffing service are immune from any claim for relief by that employee or by another employee of the client company or staffing service, to the same extent granted under this title to contributing employers if the client company or staffing service secured the payment of compensation in accordance with this title. The employee is considered an employee of the client company and staffing service for purposes of application of immunity for injuries incurred by or caused by that employee.
3. For purposes of this section:
 - a. "Client company" means a person that contracts to receive services within the course of that person's usual business from an employee of a staffing service.
 - b. "Staffing service" means an employer in the business of providing the employer's employees to persons to perform services within the course of that person's usual businesses.

4. The bureau may adopt rules consistent with this section which further define client company and staffing service and which provide a procedure by which the bureau may determine whether an entity meets these definitions.

Approved March 8, 1999

Filed March 8, 1999

CHAPTER 553

HOUSE BILL NO. 1325

(Representatives Poolman, Berg, Martinson, Porter)
(Senators Klein, Krebsbach)

BUREAU DECISIONS, ASSISTANCE PROGRAM, AND AUDIT

AN ACT to create and enact a new subsection to section 65-01-16 of the North Dakota Century Code, relating to disputed decisions of the workers compensation bureau; to amend and reenact subsections 6 and 7 of section 65-01-16, sections 65-02-06.1, 65-02-27, and 65-02-30 of the North Dakota Century Code, relating to the workers' assistance program and to the independent audit of the workers compensation bureau; to amend and reenact section 65-02-23 of the North Dakota Century Code as amended by section 3 of House Bill No. 1331 and the new section to chapter 65-03 of the North Dakota Century Code as created by section 2 of House Bill No. 1296, as approved by the fifty-sixth legislative assembly; to repeal section 65-02-29 of the North Dakota Century Code, section 3 of chapter 612 of the 1995 Session Laws, section 7 of chapter 532 of the 1997 Session Laws, and section 8 of chapter 542 of the 1997 Session Laws, relating to the independent audit of the workers compensation bureau, disputed decisions of the workers compensation bureau, the expiration date of the workers' adviser program, and the expiration date of the preacceptance disability benefits provisions; to provide an appropriation; and to provide a continuing appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsections 6 and 7 of section 65-01-16 of the 1997 Supplement to the North Dakota Century Code are amended and reenacted as follows:

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~~ office of independent review 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~~ office of independent review mails its notice that the ~~program's office'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.

SECTION 2. A new subsection to section 65-01-16 of the 1997 Supplement to the North Dakota Century Code is created and enacted as follows:

This section is effective for all orders and decisions on all claims regardless of the date of injury or the date the claim was filed.

SECTION 3. AMENDMENT. Section 65-02-06.1 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-02-06.1. Allocated loss adjustment expenses - Continuing appropriation - Annual review. Money in the workers' compensation fund is appropriated on a continuing basis for the payment of all allocated loss adjustment expenses experienced by the bureau in its administration of this title. In its annual audit and its biennial report, the bureau shall include a breakdown of those allocated loss adjustment expenses that reflect the attorney fees and costs paid to attorneys who represent injured workers, the attorney fees and costs paid to attorneys with whom it contracts to represent the bureau, the amount paid for administrative law judges for hearings, and the court reporter and other legal expenses paid. ~~The performance audit required under section 65-02-29 must include a review of the bureau's legal costs to determine whether the system is operating efficiently.~~

³⁶⁸ **SECTION 4. AMENDMENT.** If House Bill No. 1331 becomes effective, section 65-02-23 of the North Dakota Century Code, as amended by section 3 of House Bill No. 1331, is amended and reenacted as follows:

65-02-23. Workers' compensation fraud unit - Continuing appropriation. 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 fraud against the fund by employers, injured workers, or providers of medical or other services, including activities described under section 65-04-14 or 65-05-33. The unit shall refer cases of fraud to the bureau for the imposition of administrative penalties and may refer them to the appropriate authorities for prosecution. Money in the workers' compensation fund is appropriated on a continuing basis for payment of costs associated with identifying, preventing, and investigating employer or provider fraud. The biennial independent performance ~~audit~~ evaluation of the bureau must evaluate and report on the effectiveness of these expenditures. The bureau may establish a process to charge investigative costs against the rate class of an employer being investigated and to credit any recoveries to that rate class.

³⁶⁹ **SECTION 5. AMENDMENT.** Section 65-02-27 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-02-27. ~~(Effective until July 31, 1999) Workers' adviser program~~ Office of independent review. ~~A workers' adviser program~~ The bureau's office of independent review is established. ~~The program office of independent review~~ is independent of the claims department of the workers compensation bureau and activities administered through the program office must be administered in accordance with this title. The program office of independent review must provide assistance to an injured employee a worker who has filed a claim, including which may include acting on behalf of an injured employee a worker who is aggrieved by a decision of the bureau, communicating with bureau staff regarding claim dispute resolution, and advising an injured employee informing a worker of the effect of decisions made by the bureau, the employee worker, or an employer under this title. The office of

³⁶⁸ Section 65-02-23 was also amended by section 3 of House Bill No. 1331, chapter 549.

³⁶⁹ Section 65-02-27 was also amended by section 9 of House Bill No. 1325, chapter 553.

independent review shall provide assistance to workers, upon request, in cases of constructive denial or after a vocational consultant's report has been issued. The bureau shall employ a director of the program, support staff for the program, office of independent review and other personnel determined to be necessary for the administration of the program office. Personnel A person employed to administer the program office of independent review may not act as an attorney for an injured employee a worker. The bureau may not pay attorney fees to an attorney who represents an injured employee a worker in a disputed claim before the bureau unless the injured employee worker has first attempted to resolve the dispute through the workers' adviser program office of independent review. A written request for assistance by an injured employee a worker who contacts the program office of independent review within the period for requesting a hearing on an administrative order tolls the time period for requesting a hearing on that order. The period begins upon notice to the employee worker, sent by regular mail, that the program's office of independent review's assistance to the employee worker is completed. The information contained in a file established by the workers' adviser program office of independent review on an injured employee's a worker's disputed claim, including communications from a worker, is not subject to discovery and may not be used as evidence in subsequent proceedings relative to that dispute privileged and may not be released without the worker's permission. Information in the file containing the notes or mental impressions of office of independent review staff is confidential and may not be released by the office of independent review.

SECTION 6. AMENDMENT. Section 65-02-30 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-02-30. Independent ~~audit~~ performance evaluation - Bureau development of performance measurements - Continuing appropriation. Biennially, the director shall request the state auditor to select an audit a firm with extensive expertise in workers' compensation practices and standards to complete a performance audit evaluation of the functions and operations of the bureau during that biennium. This may not be construed to require the firm to be a certified public accounting firm. The audit evaluation 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 evaluation of the board to determine whether the board is operating within section 65-02-03.3 and within the board's bylaws. The audit firm's 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~~ a representative of the firm shall present the audit evaluation 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 performance evaluation. The director shall provide a copy of the audit performance evaluation 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 performance evaluation performed under this section. Money in the workers' compensation fund is appropriated on a continuing basis for the payment of the expense of conducting the performance evaluation.

³⁷⁰ **SECTION 7. AMENDMENT.** If House Bill No. 1296 becomes effective, the new section to chapter 65-03 of the North Dakota Century Code, as created by section 2 of House Bill No. 1296, is amended and reenacted as follows:

Safety programs. The bureau shall create and operate work safety and loss prevention programs to protect the health of covered employees and the financial integrity of the fund, including programs promoting safety practices by employers and employees through education, training, consultation, grants, or incentives. The biennial independent performance ~~audit~~ evaluation of the bureau must evaluate and report on the effectiveness of these programs.

SECTION 8. REPEAL. Section 65-02-29 of the 1997 Supplement to the North Dakota Century Code is repealed.

³⁷¹ **SECTION 9. REPEAL.** Section 3 of chapter 612 of the 1995 Session Laws is repealed.

SECTION 10. REPEAL. Section 7 of chapter 532 of the 1997 Session Laws of North Dakota is repealed.

SECTION 11. REPEAL. Section 8 of chapter 542 of the 1997 Session Laws is repealed.

SECTION 12. APPROPRIATION. There is hereby appropriated out of the workers compensation fund the sum of \$440,000, or so much thereof as may be necessary, to the workers compensation bureau for the purpose of defraying the costs of the office of independent review established under section 65-02-27, for the biennium beginning July 1, 1999, and ending June 30, 2001.

Approved April 14, 1999
Filed April 15, 1999

³⁷⁰ Section 65-03-04 was created by section 2 of House Bill No. 1296, chapter 555.

³⁷¹ Section 65-02-27 was also amended by section 5 of House Bill No. 1325, chapter 553.

CHAPTER 554

HOUSE BILL NO. 1333

(Representatives Keiser, Berg)

MEDICAL AND HOSPITAL FEE SCHEDULES AND MANAGED CARE

AN ACT to amend and reenact sections 65-02-08, 65-02-20, and 65-02-21 of the North Dakota Century Code, relating to workers' compensation medical and hospital fee schedules and workers' compensation managed care; and to repeal sections 65-02-19 and 65-05-07.1 of the North Dakota Century Code, relating to workers' compensation medical and hospital fee schedules and workers' compensation managed care.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-02-08 of the 1997 Supplement to 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 goods and services rendered provided 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.~~ Before the effective date of any adoption of, or change to, a fee schedule, the bureau shall hold a public hearing, which is not subject to chapter 28-32. 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 reducing or denying benefits. The bureau shall issue 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.
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 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 2. AMENDMENT. Section 65-02-20 of the 1997 Supplement to 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, including utilization review and bill review,~~ 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 in a cost-effective manner~~ upon a finding by the bureau that the employee suffered a compensable injury. ~~The managed care administrator program 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 and shall assist the bureau in the provide for medical management of claims within the bounds of workers' compensation law. Information compiled and analysis performed pursuant to a managed care program which relate to patterns of treatment, cost, or outcomes by health care providers are confidential and are not open to public inspection to the extent the information and analysis identify a specific health care provider, except to the specific health care provider, bureau employees, or persons rendering assistance to the bureau in the administration of this title.~~ If an employee, employer, or medical provider disputes ~~the recommendation of the a managed care administrator decision,~~ the employee, employer, or medical provider ~~may shall~~ request binding dispute resolution on the ~~recommendation decision.~~ The bureau shall make rules providing for the procedures for dispute resolution. Dispute resolution under this section is not subject to chapter 28-32 or section 65-01-16 or 65-02-15. A dispute resolution decision under this section requested by a medical provider concerning payment for medical treatment already provided or a request for diagnostic tests or treatment is not reviewable by any court. A dispute resolution decision under this section requested by an employee is reviewable by a court only if medical treatment has been denied to the employee. A dispute resolution decision under this section requested by an employer is reviewable by a court only if medical treatment is awarded to the employee. The dispute resolution decision may be reversed only if the court finds that there has been an abuse of discretion ~~by in~~ the dispute resolution ~~panel process.~~ Any person providing binding dispute resolution services under this section is exempt from civil liability relating to the binding dispute resolution process and decision.

SECTION 3. AMENDMENT. Section 65-02-21 of the North Dakota Century Code is amended and reenacted as follows:

65-02-21. Contract for administration of managed care program. The bureau ~~shall may~~ contract for the services of a third-party administrator to implement ~~the a~~ managed care program: ~~The bureau shall solicit by soliciting bids for these administrative services: The solicitation must include including a description of the program and the services expected of the managed care administrator.~~ The bureau shall award an administrative services contract to the bidder who will best serve the interests of the bureau and the employees under this title. The contract must be for the period of a biennium. The bureau may renew, renegotiate, or rebid a contract based upon contract performance, cost, and the best interests of an employee who suffers a compensable injury. ~~The bureau shall rebid the contract for the biennium~~

~~beginning July 1, 1995, and shall rebid subsequent contracts at least every four years.~~

SECTION 4. REPEAL. Sections 65-02-19 and 65-05-07.1 of the North Dakota Century Code are repealed.

Approved March 17, 1999

Filed March 17, 1999

CHAPTER 555

HOUSE BILL NO. 1296

(Representatives Carlson, Boucher, Berg)
(Senators G. Nelson, Solberg)

WORKPLACE SAFETY AND PREMIUM CALCULATION PROGRAMS

AN ACT to create and enact a new section to chapter 65-03 and a new section to chapter 65-04 of the North Dakota Century Code, relating to protecting the health of employees through workplace safety programs and to workers' compensation premium calculation programs; to amend and reenact sections 65-02-13.1 and 65-04-17.1 of the North Dakota Century Code, relating to expenditures by the workers compensation bureau for extraterritorial coverage and other states' insurance and to retrospective rating; to provide an appropriation; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-02-13.1 of the North Dakota Century Code is amended and reenacted as follows:

65-02-13.1. Expenditures by bureau for reinsurance and extraterritorial coverage and other states' insurance - ~~Report to budget section in annual financial audit.~~ There is appropriated out of the workers' compensation fund, as a continuing appropriation, an amount necessary to allow the bureau to establish a program of reinsurance and a program of extraterritorial coverage and other states' insurance. The bureau may execute a contract for reinsurance ~~which is~~ and a contract for extraterritorial coverage and other states' insurance binding on the bureau and the ~~reinsurer~~ contracting party. The term identified in the contract may extend past the end of the biennium in which ~~the~~ a contract under this section is executed. The independent annual financial audit report on the bureau shall report to the legislative council's budget section annually on any contract negotiated between the bureau and an insurer for reinsurance executed pursuant to this section.

³⁷² **SECTION 2.** A new section to chapter 65-03 of the North Dakota Century Code is created and enacted as follows:

Safety programs. The bureau shall create and operate work safety and loss prevention programs to protect the health of covered employees and the financial integrity of the fund, including programs promoting safety practices by employers and employees through education, training, consultation, grants, or incentives. The biennial independent performance audit of the bureau must evaluate and report on the effectiveness of these programs.

SECTION 3. A new section to chapter 65-04 of the North Dakota Century Code is created and enacted as follows:

³⁷² Section 65-03-04 was amended by section 7 of House Bill No. 1325, chapter 553.

Premium calculation programs - Authority. Upon approval of its board of directors, the bureau may create and implement by emergency rulemaking actuarially sound employer premium calculation programs, including dividends, group insurance, premium deductibles, and reimbursement for medical expense assessments. Programs under this section may be created or modified by emergency rulemaking and must include requirements or incentives for the early reporting of injuries.

SECTION 4. AMENDMENT. Section 65-04-17.1 of the North Dakota Century Code is amended and reenacted as follows:

65-04-17.1. Retrospective rating pilot program. The bureau may establish a ~~pilot~~ program to provide retrospective rating ~~to an employer whose annual workers' compensation premium is two hundred fifty thousand dollars or more.~~ The bureau may not require an employer to participate in the program, but it may refuse to allow an employer to participate when it determines that refusal is appropriate. The bureau shall establish formulas, based on sound actuarial principles, for premium calculation under the program. Sections 65-04-01, 65-04-04, and 65-04-04.2 do not apply to retrospective premiums allowed under this section. Any moneys held by the bureau for future claim payments must accrue interest at a reasonable rate as determined by the bureau. The bureau may execute a contract with an employer to establish a retrospective rating plan for that employer. The contract is binding on the employer and the bureau for the term identified in the contract. The term identified in the contract may extend past the end of the biennium in which the contract is executed but the term may not exceed ten years. ~~The bureau may not enter any contract under this section after June 30, 1999.~~ The bureau shall determine the amount of the deposit premium to be paid by an employer participating in the program. The amount of the deposit premium must be based on current rates, payroll, and experience rate factors. The bureau shall establish the maximum premium liability of a participating employer. The maximum premium is not subject to the limitations of section 65-04-17. The bureau may provide refunds from the workers' compensation fund when it is determined appropriate under the retrospective rating formula established. The bureau shall provide any refund due within thirty days after the date of the retrospective premium valuation. The bureau may impose a penalty if an employer fails to pay additional premium due within thirty days after the retrospective premium valuation. The bureau may require an employer to provide a bond, letter of credit, or other security approved by the bureau to guarantee payment of future employer obligations incurred by a retrospective rating plan. The bureau may charge an employer participating in the program a nonrefundable surcharge for the purpose of assisting retirement of any unfunded liability of the fund.

SECTION 5. APPROPRIATION. There is hereby appropriated out of the workers' compensation fund the sum of \$1,856,603 to the bureau for the purpose of defraying the expenses of operating workplace safety and loss prevention programs, for the biennium beginning July 1, 1999, and ending June 30, 2001. The bureau may employ no more than seven additional full-time equivalent positions for the workplace safety and loss prevention programs and may contract for the provision of risk management services.

SECTION 6. EMERGENCY. This Act is declared to be an emergency measure.

Approved March 17, 1999
Filed March 17, 1999

CHAPTER 556

SENATE BILL NO. 2214

(Senators Krebsbach, Klein, Kinnoin)
(Representatives Boucher, Poolman)

WORKERS' COMPENSATION BENEFITS

AN ACT to amend and reenact subsection 3 of section 65-05-08 and sections 65-05-09, 65-05-10, and 65-05.2-01 of the North Dakota Century Code, relating to maximum wage-loss benefits payable by the workers compensation bureau and the waiting period for supplementary workers compensation benefits; to provide for a study of long-term benefits; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 3 of section 65-05-08 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

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 work from any source. If an employee fails to report wages earned, the employee shall refund to the bureau any 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 payable, under section 65-05-29. If the employee willfully ~~failed~~ fails to report wages earned, the employee 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 periodically shall ~~periodically~~ provide a form to all injured employees receiving disability or rehabilitation benefits ~~that~~ which the injured employee must complete to retain eligibility for further disability or rehabilitation benefits, regardless of the date of injury or claim filing. 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.

SECTION 2. AMENDMENT. Section 65-05-09 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-05-09. Temporary total or permanent total disability - Weekly and aggregate benefit. If an injury causes temporary total or permanent total disability, the fund shall pay to the disabled employee during that disability a weekly benefit

equal to sixty-six and two-thirds percent of the gross weekly wage of the employee, subject to a minimum of sixty percent and a maximum of one hundred ten 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. The bureau benefit rates are those in effect at the time of that recurrence.
2. The disability benefit or the combined disability benefit and dependency award may not exceed the weekly wage of the employee after deductions for social security and federal income tax.
3. When an employee is permanently and totally disabled, must be maintained in a nursing home or similar facility, and has no dependent parent, spouse, or children, as much of that employee's weekly benefit as is necessary may be used by the bureau to help defray the cost of the nursing home care.

SECTION 3. AMENDMENT. Section 65-05-10 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-05-10. Partial disability - Weekly benefit. If the injury causes temporary partial disability resulting in decrease of earning capacity, the disability benefit is sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages before the injury and the employee's wage earning capacity after the injury in the same or another employment. However, the partial 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. The benefits provided by this section are available to any otherwise eligible worker, providing the loss of earning capacity occurs after July 1, 1989. Partial loss of earning capacity occurring prior to July 1, 1989, must be paid at a rate to be fixed by the bureau.
2. Benefits must be paid during the continuance of partial disability, not to exceed a period of five years. The bureau may waive the five-year limit on the duration of partial disability benefits in cases of catastrophic injury as defined in section 65-05.1-06.1 or when the injured worker is working and has long-term restrictions verified by clear and convincing objective medical and vocational evidence that limits the injured worker to working less than twenty-eight hours per week because of the compensable work injury. This subsection is effective for partial loss of earnings capacity occurring after June 30, 1991.
3. The employee's earnings capacity may be established by expert vocational evidence of a capacity to earn in the statewide job pool where the worker lives. Actual postinjury earnings are presumptive evidence of earnings capacity where the job employs the employee to full work capacity in terms of hours worked per week, and where the job is in a field related to the employee's transferable skills. The presumption may

be rebutted by competent evidence from a vocational expert that the employee's actual earnings do not fairly reflect the employee's earnings capacity in the statewide job pool, considering the employee's capabilities, education, experience, and skills.

SECTION 4. AMENDMENT. Section 65-05.2-01 of the North Dakota Century Code is amended and reenacted as follows:

65-05.2-01. Eligibility for supplementary benefits. A workers' compensation claimant who is receiving permanent total disability benefits, or death benefits, and who has been receiving disability or death benefits for a period of ~~ten~~ seven consecutive years ~~or more as of June thirtieth of each year~~ is eligible for supplementary benefits. Eligibility for supplementary benefits ~~starts on July first of each year and lasts for~~ as long as the claimant is entitled to permanent total disability benefits or death benefits.

SECTION 5. LONG-TERM BENEFITS STUDY. During the 1999-2000 interim, the bureau shall study the benefits available to persons receiving long-term disability or death benefits from the bureau. The study must identify the advantages and disadvantages of the current system, including the current system of supplementary benefits, and of any proposed alternate system. The study must include recommendations on whether changes are needed and the costs of any proposed changes. Before the 2001 legislative session, the bureau shall report to an interim committee identified by the legislative council on the results of the study.

SECTION 6. EFFECTIVE DATE. Sections 2 and 3 and the reduction in the waiting period in section 4 of this Act are effective for all claims for injuries occurring after July 31, 1999. The remainder of section 4 of this Act is effective August 1, 1999, for all claims regardless of the date of injury.

Approved March 15, 1999

Filed March 15, 1999

CHAPTER 557

HOUSE BILL NO. 1283

(Representatives Carlson, Boucher, Poolman)
(Senators Kinnoin, Krebsbach, G. Nelson)

WORKERS' COMPENSATION DEATH BENEFITS

AN ACT to amend and reenact sections 65-05-17, 65-05-20.1, 65-05-26, and 65-05.2-02 of the North Dakota Century Code, relating to increasing workers' compensation death benefits; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-17 of the 1997 Supplement to 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 children of the decedent, an amount equal to ~~sixty-six and two-thirds percent of the weekly wage of the decedent, not to exceed the state's average weekly wage in effect at the time of the death~~ the benefit rate for total disability under section 65-05-09. These benefits continue until the death or remarriage of the decedent's spouse; or, if the surviving children of the decedent are under the care of a guardian, until those children no longer meet the definition of "child" in this title. If there is more than one guardian for the children who survive the decedent, the bureau shall divide the death benefits equally among the children and shall pay benefits to the children's guardians. ~~Total weekly death benefits paid may not be less than sixty percent of the maximum weekly death benefits payable.~~ Total death benefits, including supplementary benefits, paid on any one claim may not exceed one hundred ninety-seven thousand dollars. All recipients of benefits under this subsection are eligible for benefits at the rate provided in this section, regardless of the date of death of the deceased employee.
2. To each child of the deceased employee, the amount of ten dollars per week. This rate must be paid to each eligible child regardless of the date of death. The bureau may 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.
3. In addition to the payments provided under subsections 1 and 2, ~~the bureau shall make~~ a payment in the sum of ~~six~~ twelve hundred dollars to the decedent's spouse or the guardian of the children of the decedent and ~~two~~ four hundred dollars for each dependent child. Where there is more than one guardian of the decedent's surviving children, the ~~six~~ twelve hundred dollars must be divided equally among the children and paid to the children's guardians.

SECTION 2. AMENDMENT. Section 65-05-20.1 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-05-20.1. (Effective through July 31, 2001) 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. The bureau may also grant scholarships to injured workers for whom the bureau determines a scholarship would be beneficial and appropriate because of exceptional circumstances as determined by the bureau. 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 fifty thousand dollars. The maximum amount payable on behalf of an applicant is ~~one~~ three 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 and identifying information an applicant is required to submit to determine an appropriate scholarship award. There is no right to reconsideration, rehearing, or appeal from any decision regarding the award, denial, or amount of a scholarship.

SECTION 3. AMENDMENT. Section 65-05-26 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-05-26. Burial expenses. If death benefits are payable under section 65-05-16, the fund shall pay to the facility handling the funeral arrangements of the deceased employee burial expenses not to exceed ~~five~~ six thousand ~~five hundred~~ dollars.

SECTION 4. AMENDMENT. Section 65-05.2-02 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

65-05.2-02. Supplementary benefits - Amount. A claimant who is eligible for supplementary benefits and who is receiving permanent total disability benefits, or death benefits regardless of the date of death, is entitled to receive a weekly supplementary benefit that, when added to 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. An annual recalculation of supplementary benefits may not result in a rate less than the previous rate. If a claim has been accepted on an aggravation basis under section 65-05-15 and the claimant is eligible for supplementary benefits, the claimant's supplementary benefit must be proportionally calculated.

SECTION 5. EFFECTIVE DATE. Eligibility for the increased benefit rate pursuant to the changes in subsection 1 of section 1 and in section 4 of this Act is prospective only, beginning with the effective date of this Act. Injured workers receiving benefits under subsection 1 of section 65-05-17 and also receiving supplementary benefits under section 65-05.2-02 are not eligible for the increased benefit rate provided in subsection 1 of section 1.

Approved March 16, 1999
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