

# WORKFORCE SAFETY AND INSURANCE

## CHAPTER 434

### HOUSE BILL NO. 1156

(Representative Keiser)  
(Senator Klein)

AN ACT to amend and reenact section 65-01-02, subsection 8 of section 65-05-07, and section 65-05-08 of the North Dakota Century Code, relating to the definition of medical marijuana and prohibiting the payment of workers' compensation benefits for medical marijuana; and to provide for application.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>220</sup> **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.
3. "Artificial members" includes a device that is a substitute for a natural part, organ, limb, or other part of the body. The term includes a prescriptive device that is an aid for a natural part, organ, limb, or other part of the body if the damage to the prescriptive device is accompanied by an injury to the body. A prescriptive device includes prescription eyeglasses, contact lenses, dental braces, and orthopedic braces.
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 for which coverage is required or otherwise secured at the date of first disability. The average weekly wage determined under this subsection must be rounded to the nearest dollar. If the employee's wages are

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<sup>220</sup> Section 65-01-02 was also amended by section 1 of House Bill No. 1137, chapter 438.

not fixed by the week, they must be determined by using the first applicable formula from the schedule below:

- 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, and after that are calculated as one-fiftieth of the total wages from all occupations during the twelve months preceding the date of first disability or during the tax year preceding the date of first disability, or an average of the three tax years preceding the 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 employer is determined by the following formula: one fifty-second of the average annual net self-employed earnings reported the three preceding tax years or preceding fifty-two weeks whichever is higher if accurate, reliable, and complete records for those fifty-two weeks are readily available.
  - 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 workforce safety and insurance 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 that person actually is dependent.
  9. "Child", for determining eligibility for benefits under chapter 65-05, means a legitimate child, a stepchild, adopted child, posthumous child, foster child, and acknowledged illegitimate child who is under eighteen years of age and resides with the employee; or is under eighteen years of age and does not reside with the employee but a duty of support is substantiated by an appropriate court order; or is between eighteen and twenty-two years of age and enrolled as a full-time student in any accredited educational institution and dependent upon the employee for support; or is eighteen years of age or over and is physically or mentally incapable of self-support and is actually dependent upon the employee for support. A child does not include a married child unless actually dependent on the employee as shown on the preceding year's income tax returns.

10. "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 pre-exist 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, except that the organization may pay for preventive treatment for a health care provider as defined in section 23-07.5-01, firefighter, peace officer, correctional officer, court officer, law enforcement officer, emergency medical technician, or an individual trained and authorized by law or rule to render emergency medical assistance or treatment who is exposed to a bloodborne pathogen as defined in section 23-07.5-01 occurring in the course of employment and for exposure to rabies occurring in the course of employment.
- (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.

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- (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 pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity. Pain is a symptom and may be considered in determining whether there is a substantial acceleration or substantial worsening of a pre-existing injury, disease, or other condition, but pain alone is not a substantial acceleration or a substantial worsening.
  - (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.
11. "Date of first disability" means the first date the employee was unable to work because of a compensable injury.
  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.
  13. "Director" means the director of the organization.
  14. "Disability" means loss of earnings capacity and may be permanent total, temporary total, or partial.
  15. "Doctor" means doctor of medicine or osteopathy, chiropractor, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license, or an advanced practice registered nurse or certified physician assistant.
  16. "Employee" means a person who performs hazardous employment for another for remuneration unless the person is an independent contractor under the common-law test.

## 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 workforce safety and insurance 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 an 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 organization for the payment of premiums which are not paid by a subcontractor or independent contractor.
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.
  - j. A multidistrict special education unit.
  - k. An area career and technology center.
  - l. A regional education association.

18. "Fee schedule" means the payment formulas established in the organization publication entitled "Medical and Hospital Fees".
19. "Fund" means the workforce safety and insurance fund.
20. "Hazardous employment" means any employment in which one or more employees are employed regularly in the same business or in or about the establishment except:
  - 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.
21. "Health care provider" includes a doctor, ~~qualified nurse~~ ; pharmacist, audiologist, speech language pathologist, or naturopath or any recognized practitioner providing skilled services pursuant to the prescription of, or under the supervision or direction of any of these individuals.
22. "Medical marijuana" means the use of all parts of the plant of the genus cannabis, the seeds of the plant, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, the seeds of the plant, or the resin extracted from any part of the plant as a physician-recommended form of medicine or herbal therapy. The term does not include treatments or preparations specifically approved by the United States food and drug administration as a drug product.
- 22-23. "Organization" means workforce safety and insurance, or the director, or any department head, assistant, or employee of workforce safety and insurance designated by the director, to act within the course and scope of that person's employment in administering the policies, powers, and duties of this title.
- 23-24. "Parent" includes a stepparent and a parent by adoption.
- 24-25. "Permanent impairment" means the loss of or loss of use of a member of the body existing after the date of maximum medical improvement and includes disfigurement resulting from an injury.
- 25-26. "Permanent total disability" means disability that is the direct result of a compensable injury that prevents an employee from performing any work and results from any one of the following conditions:
  - a. Total and permanent loss of sight of both eyes;
  - b. Loss of both legs or loss of both feet at or above the ankle;
  - c. Loss of both arms or loss of both hands at or above the wrist;

- d. Loss of any two of the members or faculties in subdivision a, b, or c;
- e. Permanent and complete paralysis of both legs or both arms or of one leg and one arm;
- f. Third-degree burns that cover at least forty percent of the body and require grafting;
- g. A medically documented brain injury affecting cognitive and mental functioning which renders an employee unable to provide self-care and requires supervision or assistance with a majority of the activities of daily living; or
- h. A compensable injury that results in a permanent partial impairment rating of the whole body of at least twenty-five percent pursuant to section 65-05-12.2.

If the employee has not reached maximum medical improvement within one hundred four weeks, the employee may receive a permanent partial impairment rating if a rating will assist the organization in assessing the employee's capabilities. Entitlement to a rating is solely within the discretion of the organization.

- 26-27. "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, vocational retraining including training for alternative employment with the same employer, and job placement assistance.
- 27-28. "Seasonal employment" includes occupations that are not permanent or that do not customarily operate throughout the entire year. Seasonal employment is determined by what is customary with respect to the employer at the time of injury.
- 28-29. "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.
- 29-30. "Temporary total disability" means disability that results in the inability of an employee to earn wages as a result of a compensable injury for which disability benefits may not exceed a cumulative total of one hundred four weeks or the date the employee reaches maximum medical improvement or maximum medical recovery, whichever occurs first.
- 30-31. "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 organization to obtain opinions and recommendations of expert medical consultants to review individual cases for which administrative action may be deemed necessary.

~~31-32.~~ a. "Wages" means:

- (1) An employee's remuneration from all employment reportable to the internal revenue service as earned income for federal income tax purposes.
  - (2) For members of the national guard who sustain a compensable injury while on state active duty, "wages" includes income from federal employment and may be included in determining the average weekly wage.
  - (3) For purposes of chapter 65-04 only, "wages" means all gross earnings of all employees. The term includes all pretax deductions for amounts allocated by the employee for deferred compensation, medical reimbursement, retirement, or any similar program, but may not include dismissal or severance pay.
- b. The organization may consider postinjury wages for which coverage was not required or otherwise secured in North Dakota for purposes of determining appropriate vocational rehabilitation options or entitlement to disability benefits under this title.

**SECTION 2. AMENDMENT.** Subsection 8 of section 65-05-07 of the North Dakota Century Code is amended and reenacted as follows:

8. The organization 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~~A product or item ~~such as~~including clothing or footwear unless the items are considered orthopedic devices and are prescribed by the treating doctor or health care provider.
- c. ~~Any furniture~~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 in which the injury causes severe dietary problems, the injury results in the employee's paraplegia or quadriplegia, or the employee becomes wheelchair-bound due to the injury.
- e. Eye examinations 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 unless ordered by the organization.

- i. Home gymnasium or exercise equipment unless ordered by the organization.
- j. Memberships or monthly dues to health clubs, unless ordered by the organization.
- k. Massage, unless ordered by the organization.
- l. Medical marijuana.

**SECTION 3. AMENDMENT.** Section 65-05-08 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-08. 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 benefits~~Benefits may not be paid for disability, the duration of which is less than five consecutive calendar days. An employer may not require an employee to use sick leave or annual leave, or other employer-paid time off work, before applying for benefits under this section, in lieu of receiving benefits under this section, or in conjunction with benefits provided under this section, but may allow an employee to use sick leave or annual leave to make up the difference between the employee's wage-loss benefits and the employee's regular pay. If the period of disability is five consecutive calendar days' duration or longer, benefits must be paid for the period of disability provided that:

1. When disability benefits are discontinued, the organization may not begin payment again unless the injured employee files a reapplication for disability benefits on a form supplied by the organization. In case of reapplication, the award may commence no more than thirty days before the date of reapplication. Disability benefits must be reinstated upon proof by the injured employee that:
  - a. The employee has sustained a significant change in the compensable medical condition;
  - b. The employee has sustained an actual wage loss 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.
2. ~~All payments~~Payments of disability and rehabilitation benefits of any employee who is eligible for, or receiving, benefits under this title must be suspended when the employee is confined in a penitentiary, jail, youth correctional facility, or any other penal institution for a period of between seventy-two consecutive hours and one hundred eighty consecutive days. ~~All payments~~Payments of disability and rehabilitation benefits of any employee who is eligible for, or receiving, benefits under this title must be discontinued when the employee is confined in a penitentiary, jail, youth correctional facility, or any other penal institution for a period in excess of one hundred eighty consecutive days.
3. AnyAn 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 organization ~~any~~ disability or vocational rehabilitation benefits overpaid by the organization for that time period. To facilitate recovery of those benefits, the organization may offset future benefits payable, under section 65-05-29. If the employee willfully 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 organization periodically shall provide a form to all injured employees receiving disability or rehabilitation benefits 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 organization whether or not the injured employee receives any wages. An injured employee who is receiving disability or vocational rehabilitation benefits ~~also~~ must also 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.

4. An employee shall request disability benefits on a claim form furnished by the organization. Disability benefits may not commence more than one year prior to the date of filing of the initial claim for disability benefits.
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 organization determines the limitation or refusal is justified.
8. The organization 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 organization 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 organization 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 organization whenever there is a change in work status or wages received.

10. The organization shall pay to an employee receiving disability benefits a dependency allowance for each child of the employee at the rate of fifteen dollars per week per child.
11. Dependency allowance for the children may be made directly to either parent or guardian at the discretion of the organization.
12. The organization may not pay wage loss benefits if the wage loss is related to the use or presence of medical marijuana.

**SECTION 4. APPLICATION.** Sections 2 and 3 of this Act apply to all claims regardless of date of injury.

Approved April 10, 2017

Filed April 10, 2017

## CHAPTER 435

### SENATE BILL NO. 2093

(Industry, Business and Labor Committee)  
(At the request of Workforce Safety and Insurance)

AN ACT to amend and reenact section 65-01-09, subsection 5 of section 65-01-16, and section 65-02-27 of the North Dakota Century Code, relating to subrogation liens, administrative orders, and the decision review office; and to provide for application.

#### 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 - Organization subrogated when claim filed - Lien created.**

When an injury or death for which compensation is payable under provisions of this title ~~shall have~~has been sustained under circumstances creating in some person other than the organization a legal liability to pay damages in respect thereto, the injured employee, or the injured employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person.

1. The organization is subrogated to the rights of the injured employee or the injured employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount ~~the organization~~ has paid or would otherwise pay in the future in compensation and benefits for the injured employee. The organization also has a lien to the extent of fifty percent of the damages recovered up to a maximum of the total amount ~~the organization~~ has paid in compensation and benefits. The organization's subrogation interest or lien may not be reduced by settlement, compromise, or judgment. The action against such other person may be brought by the injured employee, or the injured employee's dependents in the event of the injured employee's death. Such action shall be brought in the injured employee's or in the injured employee's dependents' own right and name and as trustee for the organization for the subrogation interest of the organization. However, if the director chooses not to participate in an action, and the decision is in writing, the organization has no subrogation interest and no obligation to pay fees or costs under this section and no lien.
2. If the injured employee or the injured employee's dependents do not institute suit within sixty days after date of injury, the organization may bring the action in its own name and as trustee for the injured employee or the injured 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 injured employee's dependents and retain as its lien the full amount ~~the organization~~ has paid in compensation and benefits. In the alternative, the organization may bring an action against a third party to recover its lien for benefits paid to the injured employee. Within sixty days after both the injured employee and the organization 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 injured employee, or both, and in trust for the organization and for the injured employee. The party bringing the action may determine if the trial jury should be informed of the trust relationship.

3. If the action is brought by the injured employee or the injured employee's dependents, or the employer as provided ~~above~~ in subsection 2, the organization shall pay fifty percent of the costs of the action, exclusive of attorney's fees, when such costs are incurred as the action progresses before recovery of damages. If there is no recovery of damages in the action, this shall be a cost of the organization to be paid from the organization's general fund. After recovery of damages in the action, the costs of the action, exclusive of attorney's fees, must be prorated and adjusted on the percentage of the total subrogation interest of the organization recovered to the total recovery in the action. The organization shall pay attorney's fees to the injured employee's attorney from the organization's general fund as follows:
  1. a. Twenty-five percent of the subrogation interest recovered for the organization before judgment: ~~and~~
  2. b. Thirty-three and one-third percent of the subrogation interest recovered for the organization when recovered through judgment entered as a result of a trial on the merits or recovered through binding alternative dispute resolution.
4. The above provisions as to costs of the action and attorney's fees are effective only when the injured employee advises the organization in writing the name and address of the injured employee's attorney, and ~~that the~~ injured employee has employed such attorney for the purpose of collecting damages or of bringing legal action for recovery of damages. If ~~a claimant~~ injured employee fails to pay the organization's subrogation interest and lien within thirty days of receipt of a recovery in a third-party action, the organization'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 injured employee's dependents, no costs or attorney's fees will be paid from the organization's subrogation interest and the organization's lien is the full amount of the damages recovered up to a maximum of the total amount it has paid.
5. The organization's lien is created upon first payment of benefits. The lien attaches to all claims, demands, settlement proceeds, judgment awards, or insurance payable by reason of a legal liability of a third person. If the organization does not receive payment of its lien amount within thirty days of the payment of any recovery and if the organization has served, by regular mail, written notice of its lien upon the injured employee or the injured employee's dependents and upon the third person, ~~the third person~~, the insurer of the third person, the injured employee or injured employee's dependents, and the attorney of the injured employee or injured employee's dependents are liable to the organization for the lien amount. A release or satisfaction of any judgment, claim, or demand given by the injured employee or the injured employee's dependents is not valid or effective against the lien. An action to collect the organization's lien amount must be commenced within one year of the organization first possessing actual knowledge of a recovery.

6. Upon receipt of its subrogation interest, the organization shall credit the medical expense assessment paid by the employer under section 65-04-04.4 to the employer's account.
7. If the organization's lien is not recognized by another jurisdiction, the organization may issue a decision, including a decision demanding repayment from the injured employee, of all benefits and compensation the organization has made on behalf of the injured employee, including costs and administrative fees.

**SECTION 2. AMENDMENT.** Subsection 5 of section 65-01-16 of the North Dakota Century Code is amended and reenacted as follows:

5. Within sixty days afterAfter receiving a request for reconsideration, the organization 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 organization 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. If the organization does not issue an order within sixty days of receiving a request for reconsideration, any interested party may request, and the organization shall promptly issue, an appealable determination.

**SECTION 3. AMENDMENT.** Section 65-02-27 of the North Dakota Century Code is amended and reenacted as follows:

**65-02-27. Decision review office.**

The organization's decision review office is established. The decision review office is independent of the claims department of the organization and activities administered through the office must be administered in accordance with this title. The decision review office shall provide assistance to an injured employee who has filed a claim, which may include acting on behalf of an injured employee who is aggrieved by a decision of the organization, communicating with organization staff regarding claim dispute resolution, and informing an injured employee of the effect of decisions made by the organization, an injured employee, or an employer under this title. ~~The decision review office shall provide assistance to employees, upon request, in cases of constructive denial or after a vocational consultant's report has been issued.~~ The organization shall employ a director of the decision review office and other personnel determined to be necessary for the administration of the office. ~~A person~~An individual employed to administer the decision review office may not act as an attorney for an injured employee. The organization may not pay attorney's fees to an attorney who represents an injured employee in a disputed claim before the organization unless the injured employee has first attempted to resolve the dispute through the decision review office. A written request for assistance by an injured employee who contacts the decision review office 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 injured employee, sent by regular mail, that the decision review office's assistance to the injured employee is completed. The information contained in a file established by the decision review office on an injured employee's disputed claim, including communications from an injured employee, is privileged and may not be released without the injured employee's permission. Information in the file containing the notes or mental impressions of decision review office staff is confidential and may not be released by the decision review office.

**SECTION 4. APPLICATION.** Section 1 of this Act applies to all claims regardless of date of injury.

Approved March 13, 2017

Filed March 13, 2017

## CHAPTER 436

### SENATE BILL NO. 2048

(Legislative Management)  
(Workers' Compensation Review Committee)

AN ACT to amend and reenact sections 65-02-08 and 65-10-03 of the North Dakota Century Code, relating to workers' compensation attorney's fees and costs; and to provide for application.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 65-02-08 of the North Dakota Century Code is amended and reenacted as follows:

**65-02-08. Rulemaking power of the organization - Timeliness for issuance of decision - Fees prescribed by organization - Attorney's fees and costs.**

1. The organization shall adopt rules necessary to carry out this title. All fees on claims for medical and hospital goods and services provided under this title to an injured employee must be in accordance with schedules of fees adopted by the organization. Before the effective date of any adoption of, or change to, a fee schedule, the organization shall hold a public hearing, which is not subject to chapter 28-32. ~~The organization 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.~~
2. The organization shall issue a decision within sixty days ~~following~~ 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~~ The organization's administrative rules must define satisfaction of elements of filing ~~must be defined by administrative rule.~~ The organization shall pay an injured employee's attorney's fees and costs from the organization's general fund.
3.
  - a. ~~By administrative rule, the organization shall establish 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 or judicial order reducing or denying benefits.~~
  - b. 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 amount of the attorney's fees must be determined in the same manner as prescribed by the organization for attorney's fees. The total amount of attorney fees paid by the organization may not exceed the fee cap established for the highest appellate level at which the injured employee prevails.
  - c. The organization shall pay an attorney's fees and costs ~~when~~:

1. ~~Theif the injured employee has prevailed in binding dispute resolution under section 65-02-20:~~
2. ~~The, the injured employee has prevailed after an administrative hearing under chapter 28-32, or the injured employee prevailed at the district or supreme court as provided for under section 65-10-03. The organization shall pay the attorney's fees and costs at the time the injured employee prevails. The organization may not condition payment of attorney's fees and costs upon the injured employee prevailing upon any future appeal.~~
  - d. ~~An injured employee has prevailed only when does not prevail unless an additional benefit, previously denied, is paid. An injured employee does not prevail on a remand for further action or proceedings unless that injured employee ultimately receives an additional benefit as a result of the remand.~~
  - e. ~~Notwithstanding the requirement under subdivision d that an additional benefit be paid or received, an injured employee who prevails at the administrative or district court level is eligible for attorney's fees and costs for prevailing at that level, regardless of whether the organization ultimately prevails upon the organization's appeal of an administrative or district court order.~~
  - f. ~~This sectionsubsection 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 organization and the employee relative to the same claim.~~
  - g. ~~All disputes relating to payment or denial of an attorney's fees or costs must be submitted to the court, hearing officer, or arbitrator for decision, but a court, hearing officer, or arbitrator may not order that the maximum fees be exceeded.~~
  - h. ~~The organization shall pay an injured employee's attorney's fees and costs from the organization's general fund. The organization is liable for its costs on appeal if the decision of the organization is affirmed.~~

**SECTION 2. 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 fees fixed by the organization.**

The organization shall pay the cost of the judicial appeal and the attorney's fees for an injured employee's attorney ~~whenif the employee prevails as provided under section 65-02-08. The employee has prevailed when any part of the decision of the organization is reversed 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 organization shall pay the attorney's fees from the organization's general fund. The amount of the attorney's fees must be determined in the same manner as prescribed by the organization for attorney's fees, and the amount of attorney's fees already allowed in administrative proceedings before the organization must be taken into consideration. The organization shall establish, pursuant to section 65-02-08, a maximum fee to be paid in an appeal. The maximum fee set by the organization may be exceeded upon application of the injured employee to the organization, 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 organization is liable for its costs on appeal if the decision of the organization is affirmed.~~

**SECTION 3. APPLICATION.** This Act applies to administrative and judicial appeal decisions issued on and after the effective date of this Act.

Approved March 9, 2017

Filed March 9, 2017

## CHAPTER 437

### SENATE BILL NO. 2094

(Industry, Business and Labor Committee)  
(At the request of Workforce Safety and Insurance)

AN ACT to create and enact section 65-04-04.4 of the North Dakota Century Code, relating to medical expense assessments; to amend and reenact sections 65-04-22, 65-04-26.1, 65-04-32, and subsections 2, 3, and 4 of section 65-04-33 of the North Dakota Century Code, relating to securing premium payments, correct cross references, employer noncompliance, and employer false statements; to repeal section 65-05-07.2 of the North Dakota Century Code, relating to medical expense assessments; and to provide a penalty.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1.** Section 65-04-04.4 of the North Dakota Century Code is created and enacted as follows:

##### **65-04-04.4. Medical expense assessments.**

The employer shall reimburse the organization for all medical expenses related to a compensable injury to an employee if the expenses do not exceed two hundred fifty dollars and shall reimburse the organization for the first two hundred fifty dollars of medical expenses when the expenses exceed two hundred fifty dollars. If a claim for benefits is filed with the organization by midnight central time on the first business day following the workplace injury, the organization shall pay the first two hundred fifty dollars of medical expenses. A claim is filed by submitting a form furnished by the organization or by another method designated by the organization. If a claim for benefits is filed with the organization more than fourteen days from the date the employer received notice of the workplace injury from the employee, the employer shall reimburse the organization for the first three hundred fifty dollars of medical expenses if the expenses exceed three hundred fifty dollars. If the organization determines the claim is compensable, the organization 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 organization within thirty days of notice by the organization, the organization 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 organization 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. Except as otherwise provided, if the cost of an injured employee's medical treatment exceeds two hundred fifty dollars, the organization shall pay all further medical expenses. This section is effective for all compensable injuries that occur after July 31, 1995. This section does not apply to compensable injuries paid under sections 65-06.2-04 and 65-06.2-08.

**SECTION 2. AMENDMENT.** Section 65-04-22 of the North Dakota Century Code is amended and reenacted as follows:

**65-04-22. Organization may make premium due immediately - When premium is in default.**

The organization may require payment of a premium, including an advance premium, security deposit, or any other instrument that is mutually acceptable to the organization and the employer, within any time which, in the judgment of the organization, is reasonable and necessary to secure the payment of the premium by any employer. The premium, whether paid in full or in installments, shall be in default one month from the payment due date specified in the premium billing statement.

Default of any installment payment will, at the option of the organization, make the entire remaining balance of the premium due and payable. The organization may declare an employer uninsured at any time after forty-five days have passed from the due date specified in the premium billing statement and the employer has failed to make a payment to the organization. The organization may decline coverage to any employer that has been determined to be uninsured under this section or where a premium delinquency remains unresolved.

**SECTION 3. AMENDMENT.** Section 65-04-26.1 of the North Dakota Century Code is amended and reenacted as follows:

**65-04-26.1. Corporate officer personal liability.**

1. An officer or director of a corporation, or manager or governor of a limited liability company, or partner of a limited liability partnership, or employee of a corporation or limited liability company having twenty percent stock ownership who has control of or supervision over the filing of and responsibility for filing premium reports or making payment of premiums or reimbursements under this title and who fails to file the reports or to make payments as required, is personally liable for premiums under this chapter and reimbursement under section ~~65-05-07-265-04-04.4~~, including interest, penalties, and costs if the corporation or limited liability company does not pay to the organization those amounts for which the corporation or limited liability company is liable.
2. The personal liability of any person as provided in this section survives dissolution, reorganization, bankruptcy, receivership, or assignment for the benefit of creditors. For the purposes of this section, all wages paid by the corporation or limited liability company must be considered earned from any person determined to be personally liable.
3. After review of the evidence in the employer's file, the organization shall determine personal liability under this section. The organization shall issue a decision under this section pursuant to section 65-04-32.

**SECTION 4. AMENDMENT.** Section 65-04-32 of the North Dakota Century Code is amended and reenacted as follows:

**65-04-32. Decisions by organization - Disputed decisions.**

Notwithstanding any provisions to the contrary in chapter 28-32, the following procedures apply when the organization issues a decision under this chapter or section ~~65-05-07-265-04-04.4~~:

1. The organization may issue a notice of decision based on an informal internal review of the record and shall serve notice of the decision on the parties by regular mail. The organization shall include with the decision a notice of the employer's right to reconsideration.
2. An employer has thirty days from the day the notice of decision was mailed to file a written petition for reconsideration. The employer is not required to file

the request through an attorney. The request must state the reason for disagreement with the organization's decision and the desired outcome. The request may be accompanied by additional evidence not previously submitted to the organization. The organization 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.

3. Within sixty days after receiving a petition for reconsideration, unless settlement negotiations are ongoing, the organization shall serve on the parties by certified mail an administrative order including its findings of fact, conclusions of law, and order, in response to the petition for reconsideration. The organization 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.
4. A party has thirty days from the date of service of an administrative order to file a written request for rehearing. The request must state specifically 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.
5. Rehearings must be conducted as hearings under chapter 28-32 to the extent that chapter does not conflict with this section.
6. An employer may appeal a posthearing administrative order to district court in accordance with chapter 65-10. Chapter 65-10 does not preclude the organization from appealing to district court a final order issued by a hearing officer under this title.

**SECTION 5. AMENDMENT.** Subsections 2, 3, and 4 of section 65-04-33 of the North Dakota Century Code are amended and reenacted as follows:

2. An employer who willfully misrepresents to the organization or its representative the amount of payroll upon which a premium under this title is based, or who willfully fails to secure coverage for employees, is liable to the state in the amount of ~~two~~five thousand dollars plus three times the difference between the premium paid and the amount of premium the employer should have paid. The organization shall collect a penalty imposed under this subsection in a civil action in the name of the state, and the organization shall deposit a penalty collected under this subsection to the credit of the workforce safety and insurance fund. An employer who willfully misrepresents to the organization or its representative the amount of payroll upon which a premium under this title is based, or who willfully fails to secure coverage for employees, is guilty of a class A misdemeanor. If the premium due exceeds ~~five hundred one thousand~~ dollars, the penalty for willful failure to secure coverage or willful misrepresentation to the organization or its representative is a class C felony. If 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 workforce safety and insurance coverage under this subsection. In addition to the penalties prescribed by this subsection, the organization may initiate injunction proceedings as provided for in this title to enjoin an employer from unlawfully employing uninsured workers. The cost of an investigation under this subsection which results in a

criminal conviction may be charged to the employer's account and collected by civil action.

3. An employer who willfully makes a false statement in an attempt to preclude an injured worker from securing benefits or payment for services is liable to the state in the amount of five thousand dollars. The organization shall collect a civil penalty imposed under this section in a civil action in the name of the state, and the organization shall deposit a penalty collected under this section to the credit of the workforce safety and insurance fund. A willful violation of this section is a class A misdemeanor. The cost of an investigation under this subsection which results in a criminal conviction may be charged to the employer's account and collected by civil action.
- 3.4. An employer who is uninsured is liable for any premiums plus penalties and interest due on those premiums, plus a penalty of twenty-five percent of all premiums due during the most recent year of noncompliance. An additional five percent penalty is due for each year of noncompliance before the most recent year beginning on the date the organization became aware of the employer's uninsured status, resulting in the penalty for the second most recent year being thirty percent, for the third most recent year being thirty-five percent, for the fourth most recent year being forty percent, for the fifth most recent year being forty-five percent, and for the sixth most recent year being fifty percent. In addition, the organization may assess a penalty of five thousand dollars for each premium period the employer was uninsured. The organization may not assess a penalty for more than six years of past noncompliance. The organization may assess additional penalties, from the date the organization became aware of the employer's uninsured status continuing until the effective date of coverage, equal to twenty-five percent of the premium due for that period. In addition, the organization may assess an employer the actual cost and reserves of any claim attributable to the employer during the time the employer was uninsured. The penalties for employers are in addition to any other penalties by law. The organization may reduce the penalties provided for under this section. An employer may not appeal an organization decision not to reduce a penalty under this subsection.
- 4.5. An employer who fails or refuses to furnish to the organization the annual payroll report and estimate or who fails or refuses to furnish other information required by the organization under this chapter is subject to a penalty established by the organization of two thousand dollars. Upon the request of the organization, the employer shall furnish the organization any of that employer's payroll records, annual payroll reports, and other information required by the organization under this chapter and an estimate of payroll for the advance premium year. If the employer fails or refuses to provide the records within thirty days of a written request from the organization, the employer is subject to a penalty not to exceed one hundred dollars for each day until the organization receives the records, in addition to the five thousand dollar penalty set forth ~~above~~ subsection 4. The organization may not assess a penalty that exceeds one hundred fifty dollars under this subsection against an organized township. The organization may reduce penalties for employers under this subsection. However, an employer may not appeal an organization decision not to reduce a penalty. The organization shall notify an employer by regular mail of the amount of premium and penalty due the organization from the employer. If the employer fails to pay that amount within thirty days, the organization may collect the premium, penalties, and interest due by civil action. In that action, the court may not review or consider the

action of the organization regarding the acceptance or payment of a claim filed when the employer was uninsured. No exemptions except absolute exemptions under section 28-22-02 are allowed against any levy under executions pursuant to a judgment recovered in the action.

**SECTION 6. REPEAL.** Section 65-05-07.2 of the North Dakota Century Code is repealed.

Approved March 29, 2017

Filed March 30, 2017

## CHAPTER 438

### HOUSE BILL NO. 1137

(Representative Keiser)

AN ACT to create and enact sections 65-04-26.2 and 65-04-27.2 of the North Dakota Century Code, relating to workers' compensation requirements for general contractors and cease and desist orders; to amend and reenact subsection 16 of section 65-01-02 and section 65-04-19 of the North Dakota Century Code, relating to the workers' compensation definition of employee, assignment of rate classification, and calculation of premium; and to provide a penalty.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>221</sup> **SECTION 1. AMENDMENT.** Subsection 16 of section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

16. "Employee" means ~~a person~~an individual who performs hazardous employment for another for remuneration unless the ~~person~~individual is an independent contractor under the common-law test.

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~~any county, 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~~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 workforce safety and insurance 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~~An individual whose employment is both casual and not in the course of the trade, business, profession, or occupation of that ~~person's~~individual's employer.

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<sup>221</sup> Section 65-01-02 was also amended by section 1 of House Bill No. 1156, chapter 434.

- (2) ~~Any person~~An individual who is engaged in an illegal enterprise or occupation.
- (3) The spouse of an employer or ~~a~~the child under the age of twenty-two of an 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~~A real estate broker or real estate salesperson, provided the ~~person~~individual 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 ~~whom~~which 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~~An 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.
- e. ~~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 organization for the payment of premiums which are not paid by a subcontractor or independent contractor.~~

**SECTION 2. AMENDMENT.** Section 65-04-19 of the North Dakota Century Code is amended and reenacted as follows:

**65-04-19. Organization to assign rate classifications, calculate premium, and determine premium due from employer - Mailing of premium billing statement as notice of amount due.**

1. The organization shall assign rate classifications based on information provided to the organization by the employer or information gathered through the organization's investigative process.
2. The organization shall determine the amount of premium due from every employer subject to this title for the twelve months next succeeding the date of expiration of a previous period of insurance or next succeeding the date at which the organization received information that an employer is subject to the title.
3. If the organization does not receive the annual payroll report or, in the case of a noncompliant employer, the organization does not receive reliable and accurate payroll information, the organization may calculate premium using the wage cap in effect per employee reported in the previous payroll report, using information obtained through the organization's investigative process, or using data obtained from job service North Dakota.
4. ~~The organization shall order the premium to be paid into the fund and shall mail a copy of the premium billing statement to the employer. Mailing of the premium billing statement constitutes notice to the employer of the amount due.~~

**SECTION 3.** Section 65-04-26.2 of the North Dakota Century Code is created and enacted as follows:

**65-04-26.2. General contractor liability for subcontractors and independent contractors.**

1. An individual employed by a subcontractor or by an independent contractor operating under an agreement with a general contractor is deemed to be an employee of the general contractor if the subcontractor or independent contractor does not secure coverage as required under this title. A general contractor is liable for payment of premium and any applicable penalty for an employee of a subcontractor or independent contractor that does not secure required coverage. The general contractor is liable for payment of this premium and penalty until the subcontractor or independent contractor pays this premium and penalty. The liability imposed on a general contractor under this section for the payment of premium and penalties under this title which are not paid by a subcontractor or independent contractor is limited to work performed under that general contractor.
2. Upon request of the organization, a person the organization determines may have information that may assist the organization in determining the amount of wages expended by the subcontractor or independent contractor shall provide this information to the organization.
3. If the organization is unable to obtain complete and reliable payroll information for a subcontractor or independent contractor, the organization may calculate premium using the available payroll information of the subcontractor or independent contractor for work performed under the liable general contractor as permitted in section 65-04-19. If a subcontractor's or independent contractor's liability for failure to secure coverage arises from a single project with a general contractor, the liability of the general contractor is one hundred percent of the amount of premium and penalty owed by the subcontractor or independent contractor. If there is evidence showing the subcontractor or independent contractor was working on multiple projects during the period the

subcontractor or independent contractor failed to secure coverage, the organization shall set the amount of the the general contractor's liability which may not exceed seventy percent of the total premium and penalty owed by the subcontractor or independent contractor.

4. The definition of the term "contractor" under section 43-07-01 applies to this section.

**SECTION 4.** Section 65-04-27.2 of the North Dakota Century Code is created and enacted as follows:

**65-04-27.2. Cease and desist order - Civil penalty.**

1. If it appears to the organization an employer is without workers compensation coverage or is in an uninsured status in violation of this title, by registered mail the director may issue to the employer an order to cease and desist and a notice of opportunity for hearing. Within thirty days of receipt of the order, a party to the order may make a written request for a hearing. If a hearing is not requested, the order is final and may not be appealed. If a hearing is requested, the hearing must be conducted in accordance with chapter 28-32 to the extent that chapter does not conflict with this section and the order remains in effect until the hearing officer renders a decision. If an employer fails to appear at a hearing requested under this section, that employer defaults and the allegations contained in the cease and desist order are deemed true.
2. In addition to the penalties in section 65-04-33, a person that employs an individual in violation of a cease and desist order issued under this section is subject to a penalty of ten thousand dollars and to a penalty of one hundred dollars per day for each day the violation continues. The organization may reduce the penalties under this section.

Approved April 13, 2017

Filed April 13, 2017

## CHAPTER 439

### HOUSE BILL NO. 1086

(Industry, Business and Labor Committee)  
(At the request of Workforce Safety and Insurance)

AN ACT to amend and reenact subsection 5 of section 65-05-08.1, subsection 1 of section 65-05-09.1, section 65-05-28, subsection 2 of section 65-05-33, and section 65-05.1-06.3 of the North Dakota Century Code, relating to notice to treating doctor, social security offset, criminal offense for filing of false claim, and vocational rehabilitation pilot program reports; to provide a penalty; and to provide for application.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Subsection 5 of section 65-05-08.1 of the North Dakota Century Code is amended and reenacted as follows:

5. Prior to the expiration of a period of 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 organization shall send a notice to that employee of the organization's intention to discontinue benefits, including an explanation of the reason for discontinuing benefits, an explanation of the injured 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 employee's doctor.~~ Thereafter, if the required certification is not filed, the organization shall discontinue disability benefits, effective twenty-one days after the date the notice of intention to discontinue benefits is mailed or the date on which the injured employee actually returned to work, whichever occurs first.

**SECTION 2. AMENDMENT.** Subsection 1 of section 65-05-09.1 of the North Dakota Century Code is amended and reenacted as follows:

1. If the receipt of social security benefits results in an overpayment of temporary or permanent total disability benefits by the organization, a refund of any overpayment must be made by the injured ~~worker~~employee or that overpayment must be taken from future ~~temporary total or permanent total disability benefits or~~ permanent partial impairment awards, or personal reimbursements on the current claim or any future claim filed, at a recovery rate to be determined by the organization.

**SECTION 3. AMENDMENT.** Section 65-05-28 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-28. Examination of injured employee - Paid expenses - No compensation paid if claimant~~injured~~ employee refuses to reasonably participate.**

~~Every employee who sustains an injury~~An injured employee may select a doctor of that ~~employee's~~injured employee's choice to render initial treatment. Upon a

determination that the injured employee's injury is compensable, the organization may require the injured employee to begin treating with another doctor to better direct the medical aspects of the injured employee's claim. The organization shall provide a list of three doctors who specialize in the treatment of the type of injury the employee sustained. At the organization's request, the injured employee shall select a doctor from the list. An injured employee shall follow the directives of the doctor or health care provider who is treating the injured employee as chosen by the injured employee at the request of the organization and comply with all reasonable requests during the time the injured employee is under medical care. Providing further that:

1. No injured employee may change from one doctor to another while under treatment or after being released, without the prior written authorization of the organization. Failure to obtain approval of the organization renders the injured employee liable for the cost of treatment and the new doctor will not be considered the attending doctor for purposes of certifying temporary disability.
  - a. Any injured employee requesting a change of doctor shall file a written request with the organization stating all reasons for the change. Upon receipt of the request, the organization will review the injured employee's easeclaim and approve or deny the change of doctor, notifying the injured employee and the requested doctor.
  - b. Emergency care or treatment or referral by the attending doctor does not constitute a change of doctor and does not require prior approval of the organization.
2. Travel and other personal reimbursement for seeking and obtaining medical care is paid only upon request of the injured employee. All claims for reimbursement must be supported by the original vendor receipt, when appropriate, and must be submitted within one year of the date the expense was incurred or reimbursement must be denied. Reimbursement must be made at the organization reimbursement rates in effect on the date of incurred travel or expense. The calculation for reimbursement for travel by motor vehicle must be calculated using miles actually and necessarily traveled. A personal reimbursement requested under this subsection is a managed care decision under section 65-02-20, subject to the appeal process as provided for in section 65-02-20. Providing further that:
  - a. Payment for mileage or other travel expenses may not be made when the distance traveled is less than fifty miles [80.47 kilometers] one way, unless the total mileage equals or exceeds two hundred miles [321.87 kilometers] in a calendar month;
  - b. All travel reimbursements are payable at the rates at which state employees are paid per diem and mileage, except that the organization may pay no more than actual cost of lodging, if actual cost is less;
  - c. Reimbursement may not be paid for travel other than that necessary to obtain the closest available medical or hospital care needed for the injury. If the injured employee chooses to seek medical treatment outside a local area where care is available, travel reimbursement may be denied;
  - d. Reimbursement may not be paid for the travel and associated expenses incurred by the injured employee's spouse, children, or other persons unless the injured employee's injury prevents travel alone and the inability is medically substantiated; and

- e. Other expenses, including telephone calls and car rentals are not reimbursable expenses.
3. The organization may at any time require an injured employee to submit to an independent medical examination or independent medical review by one or more duly qualified doctors designated or approved by the organization. The organization shall make a reasonable effort to designate a duly qualified doctor licensed in the state in which the injured employee resides to conduct the examination before designating a duly qualified doctor licensed in another state or shall make a reasonable effort to designate a duly qualified doctor licensed in a state other than the injured employee's state of residence if the examination is conducted at a site within two hundred seventy-five miles [442.57 kilometers] from the injured employee's residence. An independent medical examination and independent medical review must be for the purpose of review of the diagnosis, prognosis, treatment, or fees. An independent medical examination contemplates an actual examination of an injured employee, either in person or remotely if appropriate. An independent medical review contemplates a file review of an injured employee's records, including treatments and testing. The injured employee may have a duly qualified doctor designated by that employee present at the examination or later review the written report of the doctor performing the independent medical examination, if procured and paid for by that injured employee. Providing further that:
    - a. In case of any disagreement between doctors making an examination on the part of the organization and the injured employee's doctor, the organization shall appoint an impartial doctor duly qualified who shall make an examination and shall report to the organization.
    - b. The injured employee, in the discretion of the organization, may be paid reasonable travel and other per diem expenses under the guidelines of subsection 2. If the injured employee is working and loses gross wages from the injured employee's employer for attending the examination, the gross wages must be reimbursed as a miscellaneous expense upon receipt of a signed statement from the employer verifying the gross wage loss.
  4. If an injured employee, or the injured employee's representative, refuses to submit to, or in any way intentionally obstructs, any examination or treatment, or refuses to reasonably participate in medical or other treatments or examinations, the injured 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 injured employee.
  5. If an injured employee undertakes activities, whether or not in the course of employment, which exceed the treatment recommendations of the injured employee's doctor regarding the work injury, and the doctor determines that the employee's injury or condition has been aggravated or has worsened as a result of the injured employee's activities, the organization may not pay benefits relative to the aggravation or worsening, unless the activities were undertaken at the demand of an employer. An employer's account may not be charged with the expenses of an aggravation or worsening of a work-related injury or condition unless the employer knowingly required the injured

employee to perform activities that exceed the treatment recommendations of the injured employee's doctor.

**SECTION 4. AMENDMENT.** Subsection 2 of section 65-05-33 of the North Dakota Century Code is amended and reenacted as follows:

2. If any of the acts in subsection 1 are committed to obtain, or pursuant to a scheme to obtain, more than ~~five hundred~~ one thousand dollars in benefits or payment for services, the offense is a class C felony.

**SECTION 5. AMENDMENT.** Section 65-05.1-06.3 of the North Dakota Century Code is amended and reenacted as follows:

**65-05.1-06.3. Rehabilitation services pilot programs - Reports.**

The organization may implement a system of pilot programs to allow the organization to assess alternative methods of providing rehabilitation services. A pilot program may address one or more of the organization's comprehensive rehabilitation services, including vocational, medical, psychological, economic, and social rehabilitation services. The goal of a pilot program must be to improve the outcome of the rehabilitation services offered by the organization to assist the injured employee in making adjustments necessitated from the employee's injury and to improve the effectiveness of vocational rehabilitation services in returning an employee to substantial gainful employment. Notwithstanding laws to the contrary, a pilot program may address a broad range of approaches, including collaborative efforts between the organization and the injured employee through which there are variances from the rehabilitation services hierarchy; return-to-work trial periods during which cash benefits are suspended; intensive job search assistance; recognition of and focused services for injured employees who are at risk; and coordination of services of public and private entities. If a pilot program utilizes coordination of services of other state agencies, such as job service North Dakota, department of human services, North Dakota university system, or department of public instruction, the organization shall consult with the state agency in establishing the relevant portions of the pilot program and the state agency shall cooperate with the organization in implementing the pilot program. The organization shall include in its ~~annual~~ biennial report to the workers' compensation review committee under section 54-35-22 status reports on current pilot programs.

**SECTION 6. APPLICATION.** Section 3 of this Act applies to all claims regardless of date of injury.

Approved March 2, 2017

Filed March 3, 2017