

**2021 House Bill No. 1084**  
**Testimony before the Senate Industry, Business and Labor Committee**  
**Presented by Tim Wahlin**  
**Workforce Safety and Insurance**  
**February 10, 2021**

Mr. Chairman and Members of the Committee:

My name is Tim Wahlin. I am the Chief of Injury Services at WSI. I am here today to provide testimony regarding House Bill No. 1084. The WSI Board supports this bill.

**Section 1**

Section 65-01-02(11)(b)(3) outlines several injuries or conditions that are not compensable injuries in North Dakota. Injuries of the kind found in this provision are common exceptions in workers' compensation systems. For example, injuries that arise out of an illegal act or result from willfully self-inflicted injuries are not compensable. This provision currently states injuries caused by intoxicants or the illegal use of controlled substances are not compensable. The proposed change makes it clear if the use of recreational marijuana causes an injury, the injury is not compensable.

This proposed change has become necessary due to recreational marijuana becoming legal in other states and the movement to legalize recreational marijuana in North Dakota.

After medical marijuana became legal at the state level in North Dakota, the 2017 Legislative Assembly passed laws prohibiting WSI from paying for medical marijuana to treat a work injury. In addition, the 2017 law prohibited WSI from paying wage loss benefits if the wage loss was related to the use or presence of medical marijuana. The proposed change is consistent with and a logical extension of the 2017 laws addressing medical marijuana.

**Section 2**

Similar to **Section 1**, the proposed changes to section 65-01-11 update the "presumption section" of the law to include recreational marijuana. Currently, a certain level of alcohol or a controlled substance found in an injured employee's system by a post-accident test, creates a rebuttable presumption the injury was due to impairment caused by the use of the alcohol or controlled substance. As a result, the claim is denied. Under the current version of the statute, legalized recreational marijuana is not encompassed, and the proposed change ensures "recreational marijuana use" is included.

**Section 3**

This proposed new section solidifies and establishes in statute WSI's policy of charging fees for outgoing claim file copies, when applicable. WSI does not charge injured employees or employers for reasonable file copy requests and this practice will not

change. WSI will only continue to charge for file copy requests in third-party matters (matters in which a party other than the employer is legally liable for an employee's injuries and a separate demand or lawsuit is made against the liable party).

#### **Section 4**

The proposed changes in this section are necessary to provide clarity when WSI pursues fraudulent activity by making it clear that both a willful false statement or the willful omission of information can amount to fraudulent conduct. The changes include the addition of the terms "statement or omission" to the conduct that defines an employer's willful misrepresentations regarding the reporting of payroll to WSI.

The proposed changes also add the terms "failure to make a statement" to the provision establishing liability for the willful conduct of an employer who attempts to stop an injured employee from receiving workers' compensation benefits. Both a willful false statement or the willful failure to provide information by an employer can amount to wrongful conduct in this circumstance.

#### **Section 5**

The proposed changes in this section close a loophole which exists when an injured employee refuses suitable employment, especially from the pre-injury employer; is terminated; yet becomes eligible for ongoing indemnity benefits.

Currently, under subsection (7) of 65-05-08, failure to accept suitable employment prevents the payment of indemnity benefits only during the unjustified refusal period. There are many circumstances where an unjustified refusal terminates an employment relationship with an employer. If after being terminated, an injured employee immediately indicates a willingness to accept the employment, the unjustified refusal is cured. As a result, the employee would be entitled to indemnity benefits because there is no longer any job to accept. Allowing this loophole to remain can incentivize rejecting suitable employment and more unfortunately, terminates the employment relationship.

#### **Section 6**

The proposed changes to sections 65-05-09 and 65-05-09(1) are minor changes to create consistent language throughout Title 65 regarding the definition of "average weekly wage". In the definition section of Title 65, "average weekly wage" is defined as "the weekly wages the injured employee was receiving from all employments for which coverage is required or otherwise secured at **the date of first disability**" (emphasis added). Any reference to "preinjury" average weekly wage, "wages earned before injury", or "wages at time of injury", is being replaced with "average weekly wage."

## **Section 7**

The proposed changes to section 65-05-10 are minor changes to create consistent language throughout Title 65 regarding the definition of “average weekly wage”. In the definition section of Title 65, “average weekly wage” is defined as “the weekly wages the injured employee was receiving from all employments for which coverage is required or otherwise secured at **the date of first disability**” (emphasis added). Any reference to “preinjury” average weekly wage, “wages earned before injury”, or “wages at time of injury”, is being replaced with “average weekly wage.”

## **Section 8**

The proposed change in this section allows WSI the ability to communicate with relevant people in instances where an injured employee dies or is incapacitated prior to executing written authorization for WSI to release the employee’s claim file information.

Pursuant to 65-05-32, claim file information is confidential, but an injured employee may provide authorization to WSI to release claim file information to others outside of WSI. WSI has experienced the situation where an injured employee has died or become incapacitated prior to executing an authorization allowing WSI to communicate with the appropriate people following the death. This creates awkwardness and inefficiencies for survivors or those left handling the decedent’s personal matters and WSI would like to remedy this situation.

## **Section 9**

Similar to **Section 4**, the proposed changes in this section further clarify what constitutes fraudulent activity when attempting to secure payment of benefits or payment of services from WSI. Currently, if a person covered under the statute willfully files a false claim or willfully makes a false statement to secure benefits or payments, the person is guilty of fraud. The proposed change includes the term “omission” to this section because willfully omitting information to obtain benefits or payments can be equally as deceptive as actually making a false statement.

## **Section 10**

The proposed changes to section 65-05-35 are necessary to assist an injured employee who may be both a WSI and Medicare benefit recipient. Currently, a claim is considered closed if there has not been a demand for payment or a payment has not been made on the claim in the past four years. Often, after a four-year period has expired and the claim is closed, WSI will receive multiple, sporadic “demands” for payment of benefits, but no benefit payments are actually made. However, because of the “demand” for payment, the claim falls into a “reopen status.” Medicare may not commence payment of health benefits unless WSI’s claim is in “closed status.” By removing “demand for payment,” WSI’s claim will not fall into a “reopen status” unless and until benefits are actually paid and restarted.

## **Section 11**

The proposed changes to subsections 3 and 6 of section 65-05.1-01 are minor changes to create consistent language throughout Title 65 regarding the definition of “average weekly wage”. In the definition section of Title 65, “average weekly wage” is defined as “the weekly wages the injured employee was receiving from all employments for which coverage is required or otherwise secured at **the date of first disability**” (emphasis added). Any reference to “preinjury” average weekly wage, “wages earned before injury”, or “wages at time of injury” is being replaced with “average weekly wage.”

## **Section 12**

The proposed changes to subdivision i of subsection 2 of section 65-05.1-06.1 are minor cleanup changes to create consistent language throughout Title 65 regarding the definition of “average weekly wage”.

The proposed change to subdivision h is to close a loophole following the discontinuation of indemnity benefits after an injured employee has been retrained to return to the workforce. When an injured employee is unable to return to the job of injury, a vocational plan is developed based upon the injured employee’s abilities both physically and vocationally. A plan for return to work considering the least disruptive options in the vocational hierarchy is issued. See, NDCC Chapter 65-05.1-01. An appealable order is issued establishing an injured employee’s plan and resulting earnings capacity which controls both the eligibility to receive ongoing benefits as well as the amount.

Once an injured employee’s indemnity or wage loss benefits end, he must “reapply” for the benefits to re-start. Reapplications are governed by subsection 65-05-08(1) which requires a showing that the disability is precipitated by a significant change in the compensable medical condition, and that change has created an actual wage loss.

Because of the current wording in subdivision h, the actual wage loss component of the reapplication section is not required. The exclusion of the wage loss component while an injured employee’s program is progressing is understandable because the employee typically would have no earnings while in school, however, following completion of the program, the exclusion creates a different standard for an injured employee who has completed a program.

This dislocation of otherwise similarly situated injured employees allows an injured employee who has completed a retraining program to never pursue employment. If the injured employee’s medical condition changes, the employee can simply reapply for indemnity benefits. Injured employees under all other return to work options must obtain employment and, should a change of compensable medical condition cause a loss in wages, the employee may be eligible for reinstatement of benefits.

This change will treat all injured employees similarly regardless of the vocational option.

**Section 13**

This section outlines the effective dates.

This concludes my testimony. I would be happy to answer any questions at this time.