

LEGISLATIVE BILL 128

Approved by the Governor March 26, 1997

Introduced by Business and Labor Committee: Abboud, 12, Chairperson;
Dierks, 40; Preister, 5; Schimek, 27; Schrock, 38

AN ACT relating to workers' compensation; to amend sections 48-124, 48-134.01, 48-157, 48-162.01, 48-177, and 48-1,110, Reissue Revised Statutes of Nebraska; to change provisions relating to dependents, independent medical examiners, court records, and procedure; to harmonize provisions; to provide for motions; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 48-124, Reissue Revised Statutes of Nebraska, is amended to read:

48-124. The following persons shall be conclusively presumed to be dependent for support upon a deceased employee: (1) A wife upon a husband with whom she is living or upon whom she is actually dependent at the time of his injury or death; (2) a husband upon a wife with whom he is living or upon whom he is actually dependent at the time of her injury or death; and (3) a child or children under the age of eighteen years, or over such age, if physically or mentally incapable of self-support, or any child eighteen years of age or over who is actually dependent, or any child between eighteen and twenty-five years of age who is enrolled as a full-time student in any accredited educational institution.

The term child shall include a posthumous child, a child legally adopted or for whom adoption proceedings are pending at the time of death, an actually dependent child in relation to whom the deceased employee stood in the place of a parent for at least one year prior to the time of death, an actually dependent stepchild, or an actually dependent a child born out of wedlock. Child shall not include a married child unless receiving substantially entire support from the employee. Grandchild shall mean a child, as above defined, of a child, as above defined, except that as to the latter child, the limitations as to age in the above definition do not apply.

Brother or sister shall mean a brother or sister under eighteen years of age, or eighteen years of age or over and physically or mentally incapable of self-support, or eighteen years of age or over and actually dependent. The terms brother and sister shall include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption but shall not include married brothers or married sisters unless receiving substantially entire support from the employee.

Parent shall mean a mother or father, a stepparent, a parent by adoption, a parent-in-law, and any person who for more than one year immediately prior to the death of the employee stood in the place of a parent to him or her, if actually dependent in each case.

Actually dependent shall mean dependent in fact upon the employee and shall refer only to a person who received more than half of his or her support from the employee and whose dependency is not the result of failure to make reasonable efforts to secure suitable employment. When used as a noun, the word dependent shall mean any person entitled to death benefits. No person shall be considered a dependent, unless he or she be a member of the family of the deceased employee, or bears to him or her the relation of widow, widower, lineal descendant, ancestor, brother, or sister. Questions as to who constitute dependents and the extent of their dependency shall initially be determined as of the date of the accident to the employee, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees. No dependent of any injured employee shall be deemed, during the life of such employee, a party in interest to any proceeding by him or her for the enforcement or collection of any claim for compensation, nor as respects the compromise thereof by such employee.

Sec. 2. Section 48-134.01, Reissue Revised Statutes of Nebraska, is amended to read:

48-134.01. (1) The Nebraska Workers' Compensation Court may develop and implement an independent medical examiner system consistent with the requirements of this section. As part of such system, the compensation court by a majority vote of the judges thereof may create, maintain, and periodically validate a list of health care providers that it finds to be the most qualified and to be highly experienced and competent in their specific

fields of expertise and in the treatment of work-related injuries to serve as independent medical examiners from each of the health care specialties that the compensation court finds most commonly used by injured employees. The compensation court may establish a fee schedule for services rendered by independent medical examiners and may adopt and promulgate any rules and regulations considered necessary to carry out the purposes of this section.

(2) An independent medical examiner shall render medical findings on the medical condition of an employee and related issues as specified under this section. The independent medical examiner shall not be the employee's treating health care provider and shall not have treated the employee with respect to the injury for which the claim is being made or the benefits are being paid.

(3) If the parties to a dispute cannot agree on an independent medical examiner of their own choosing, the compensation court shall assign an independent medical examiner from the list of qualified examiners to render medical findings in any dispute relating to the medical condition of a claimant, including, but not limited to, whether the injured employee is able to perform any gainful employment temporarily or permanently, what physical restrictions, if any, would be imposed on the employee's employment, whether the injured employee has reached maximum medical improvement, the existence and extent of any permanent physical impairment, and the reasonableness and necessity of any medical treatment previously provided, or to be provided, to the injured employee.

(4) The compensation court may adopt and promulgate rules and regulations pertaining to the procedures before the independent medical examiner, including the parties' ability to propound questions relating to the medical condition of the employee to be submitted to the independent medical examiner. In addition to the review of records and information, the independent medical examiner may examine the employee as often as the examiner determines necessary to render medical findings on the questions propounded by the parties or by the compensation court.

(5) The independent medical examiner shall submit a written report to the compensation court, the employer, and the employee stating the examiner's medical findings on the issues raised and providing a description of findings sufficient to explain the basis of those findings. The fee for the examination and report shall be paid by the employer.

(6) The written report of the independent medical examiner's findings shall be admissible in a proceeding before the compensation court and may be received into evidence by the compensation court on its own motion. If the parties agree to use of a medical examiner, the examiner's findings shall be binding unless the employee was not given fair and adequate notice of all rights relinquished by the agreement at the time the agreement was made in a form and manner established by the compensation court or unless the agreement to the use of a medical examiner was procured by fraud or coercion.

(7) Any health care provider acting without malice and within the scope of the provider's duties as an independent medical examiner shall be immune from civil liability for making any report or other information available to the compensation court or for assisting in the origination, investigation, or preparation of the report or other information so provided.

Sec. 3. Section 48-157, Reissue Revised Statutes of Nebraska, is amended to read:

48-157. The presiding judge of the Nebraska Workers' Compensation Court shall appoint a clerk of the Nebraska Workers' Compensation Court, who shall hold office at the pleasure of the compensation court. The judge shall in like manner appoint such other assistants and employees as he or she may deem necessary to carry out the Nebraska Workers' Compensation Act, including rehabilitation specialists. The clerk shall, under the direction of the presiding judge, keep a full and true record of the proceedings of the compensation court and record all pleadings and other papers filed with the compensation court, and no other action shall be taken thereon until the same have been recorded. The clerk shall in like manner issue all necessary notices and writs, superintend the clerical business of the compensation court, and perform such other duties as the presiding judge may direct. All other assistants and employees of the compensation court shall perform such duties, pertaining to the affairs thereof, as the compensation court may prescribe. The clerk may, under the direction of the presiding judge, microfilm make or cause to be made preservation duplicates of any court record. The original record and other papers may be destroyed, but only with the approval of the State Records Administrator pursuant to sections 84-1201 to 84-1220. The reproduction of the microfilm preservation duplicates shall be admissible as evidence in any court of record in the State of Nebraska and, when duly certified, shall be evidence of equal credibility with the original

record.

Notices of hearings, notices of continuances, and summonses may be destroyed without microfilming preparing preservation duplicates after a record of their issuance has been made in the docket book. A reproduction of the page of the docket book or of the microfilm preservation duplicate of the page of the docket book showing such record and, in the case of summonses, showing issuance or return of the summons, when duly certified, shall be evidence of equal credibility with the original notice or summons. Correspondence, exhibits, and other papers which the Nebraska Workers' Compensation Court deems to be irrelevant, unimportant, or superfluous may be destroyed without microfilming preparing preservation duplicates. The compensation court may charge a fee for the reproduction of documents from microfilm preservation duplicates sufficient to pay the costs incurred by the compensation court in providing the service.

Sec. 4. Section 48-162.01, Reissue Revised Statutes of Nebraska, is amended to read:

48-162.01. (1) One of the primary purposes of the Nebraska Workers' Compensation Act shall be restoration of the injured employee to gainful employment. To this end the Nebraska Workers' Compensation Court may employ one or more specialists in physical, medical, and vocational rehabilitation to be appointed by the presiding judge. Salaries, other benefits, and expenses incurred for purposes of vocational rehabilitation may be paid from the Vocational Rehabilitation Fund created under section 48-162.02.

(2) Such specialists shall continuously study the problems of rehabilitation, both physical and vocational, and shall investigate and maintain a directory of all rehabilitation facilities and individual service providers and counselors, both private and public, which have been approved by the Nebraska Workers' Compensation Court. The compensation court shall approve as qualified such facilities, institutions, physicians, and other individual service providers and counselors as are capable of rendering competent rehabilitation service to seriously injured employees. No facility or institution shall be considered as qualified unless it is specifically equipped to provide rehabilitation services for persons suffering from either some specialized type of disability or some general type of disability within the field of occupational injury and is staffed with trained and qualified personnel and, with respect to physical rehabilitation, unless it is supervised by a physician qualified to render such service. No physician shall be considered qualified unless he or she has had the experience and training specified by the compensation court. No individual service provider or counselor shall be considered qualified unless he or she has satisfied the standards for certification established by the compensation court and has been certified by the compensation court.

(3) An employee who has suffered an injury covered by the Nebraska Workers' Compensation Act shall be entitled to prompt medical and physical rehabilitation services. When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including job placement and retraining, as may be reasonably necessary to restore him or her to suitable employment.

If entitlement to vocational rehabilitation services is claimed by the employee, the employee and the employer or his or her insurer shall attempt to agree on the choice of a vocational rehabilitation counselor from the directory of vocational rehabilitation counselors established pursuant to subsection (2) of this section. If they are unable to agree on a vocational rehabilitation counselor, the employee or employer or his or her insurer shall notify the compensation court, and the compensation court shall select a counselor from the directory of vocational rehabilitation counselors established pursuant to subsection (2) of this section. Only one such vocational rehabilitation counselor may provide vocational rehabilitation services at any one time, and any change in the choice of a vocational rehabilitation counselor shall be approved by the compensation court. The vocational rehabilitation counselor so chosen or selected shall evaluate the employee and, if necessary, develop a vocational rehabilitation plan. It shall be a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation. The fee for the evaluation and the vocational rehabilitation plan shall be paid by the employer or his or her insurer. The compensation court may establish a fee schedule for services rendered by a vocational rehabilitation counselor. Any loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor from the directory established pursuant to subsection

(2) of this section and chosen or selected according to the procedures described in this subsection. It shall be a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.

The following priorities shall be used in developing and evaluating a rehabilitation plan. No higher priority may be utilized unless all lower priorities have been determined by the rehabilitation counselor to be unlikely to result in a job placement for the injured employee that is consistent with the priorities listed in this section. If a lower priority is clearly inappropriate for the employee, the next higher priority shall be utilized. The priorities are, listed in order from lower to higher priority:

- (a) Return to the previous job with the same employer;
- (b) Modification of the previous job with the same employer;
- (c) A new job with the same employer;
- (d) A job with a new employer; or
- (e) A period of formal retraining which is designed to lead to employment in another career field.

If physical or medical rehabilitation services are not voluntarily offered and accepted, the Nebraska Workers' Compensation Court or any judge thereof on its or his or her own motion, or upon application of the employee or employer, and after affording the parties an opportunity to be heard by the compensation court or judge thereof, may refer the employee to a qualified facility, institution, physician, or other individual service provider for evaluation and report of the practicability of, need for, and kind of service or treatment necessary and appropriate to render him or her fit for a remunerative occupation, and the costs of such evaluation and report involving physical or medical rehabilitation shall be borne by the employer or his or her insurer. Upon receipt of such report and after affording the parties an opportunity to be heard, the compensation court or judge thereof may order that the physical or medical services and treatment recommended in the report or other necessary physical or medical rehabilitation treatment or service be provided at the expense of the employer or his or her insurer.

Vocational rehabilitation training shall be paid from the Vocational Rehabilitation Fund.

(4) When physical or medical rehabilitation requires residence at or near the facility or institution away from the employee's customary residence, whether within or without this state, the reasonable costs of his or her board, lodging, and travel shall be paid for by the employer or his or her insurer in addition to any other benefits payable under the Nebraska Workers' Compensation Act, including weekly compensation benefits for temporary disability. When vocational rehabilitation requires residence at or near the facility or institution away from the employee's customary residence, whether within or without this state, the reasonable costs of his or her board, lodging, and travel shall be paid from the Vocational Rehabilitation Fund and weekly compensation benefits for temporary disability shall be paid by the employer or his or her insurer.

(5) The Nebraska Workers' Compensation Court may cooperate on a reciprocal basis with federal and state agencies for vocational education or vocational, physical, or medical rehabilitation or with any public or private agency.

(6) If the injured employee without reasonable cause refuses to undertake or fails to cooperate with the rehabilitation, training, or educational program determined by the compensation court or judge thereof to be suitable for him or her or refuses to be evaluated under subsection (3) of this section or fails to cooperate in such evaluation, the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act. The compensation court or judge thereof may also modify a previous finding, order, award, or judgment relating to physical, medical, or vocational rehabilitation services as necessary in order to accomplish the goal of restoring the injured employee to gainful and suitable employment, or as otherwise required in the interest of justice.

Sec. 5. (1) The Nebraska Workers' Compensation Court or any judge thereof may rule upon any motion addressed to the court by any party to a suit or proceeding, including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial or motions for reconsideration. Several objects may be included in the same motion, if they all grow out of or are connected with the action or proceeding in which it is made.

(2) Parties to a dispute which might be the subject of an action under the Nebraska Workers' Compensation Act may file a motion for an order regarding the dispute without first filing a petition.

(3) If notice of a motion is required, the notice shall be in writing and shall state: (a) The names of the parties to the action, proceeding, or dispute in which it is to be made; (b) the name of the judge before whom it is to be made; (c) the time and place of hearing; and (d) the nature and terms of the order or orders to be applied for. Notice shall be served a reasonable time before the hearing as provided in the rules of the compensation court.

Sec. 6. Section 48-177, Reissue Revised Statutes of Nebraska, is amended to read:

48-177. At the time a petition or motion is filed, expiration of the time fixed for filing the answer, the presiding judge shall assign one of the judges of the Nebraska Workers' Compensation Court shall be assigned to hear the cause. It shall be heard in the county in which the accident occurred, except as otherwise provided in section 25-412.02 and except that, upon the written stipulation of the parties, filed with the compensation court at least fourteen days before the date of hearing, the cause may be heard in any other county in the state. Upon a motion for dismissal duly filed by the plaintiff, showing that a dispute between the parties no longer exists, the compensation court may dismiss any such cause without a hearing thereon.

Sec. 7. Section 48-1,110, Reissue Revised Statutes of Nebraska, is amended to read:

48-1,110. (1) Sections 48-101 to 48-1,117 and section 5 of this act shall be known and may be cited as the Nebraska Workers' Compensation Act.

(2) It is the intent of the Legislature that the changes made in Laws 1986, LB 811, shall not affect or alter any rights, privileges, or obligations existing immediately prior to July 17, 1986.

Sec. 8. Original sections 48-124, 48-134.01, 48-157, 48-162.01, 48-177, and 48-1,110, Reissue Revised Statutes of Nebraska, are repealed.

Sec. 9. Since an emergency exists, this act takes effect when passed and approved according to law.