

## LEGISLATIVE BILL 854

Approved by the Governor June 10, 1997

Introduced by Abboud, 12

AN ACT relating to workers' compensation; to amend sections 48-128 and 48-144.04, Reissue Revised Statutes of Nebraska, and section 48-118, Revised Statutes Supplement, 1996; to eliminate the Second Injury Fund; to harmonize provisions; and to repeal the original sections. Be it enacted by the people of the State of Nebraska,

Section 1. Section 48-118, Revised Statutes Supplement, 1996, is amended to read:

48-118. When a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his or her dependents should have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation. ~~Nothing 7 PROVIDED, that nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee or of his or her personal representative to bring suit against such third person in his or her own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his or her dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid. Before the making of a claim or the bringing of suit against such third person by the employee or his or her personal representative or by the employer or his or her insurer, each shall give to all others, unless waived in writing, notice of not less than thirty days, by certified or registered mail, an opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel. If a party entitled to notice cannot be found, the clerk of the Nebraska Workers' Compensation Court shall become the agent of such party for the giving of such notice as required in this section, and the notice when given to the clerk of the Nebraska Workers' Compensation Court shall include an affidavit setting forth the facts, including the steps taken to locate such party. After the expiration of thirty days, for failure to receive notice or other good cause shown, the district court before which the action is pending shall allow either party to intervene in such action, and if no action is pending then the district court in which it could be brought shall allow either party to commence such action. Each shall have an equal voice in the claim and the prosecution of such suit and any dispute arising shall be passed upon by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought. If either party after the giving of such notice fails, by and through his or her attorney, to join in the making of such claim and the prosecuting of the suit, such party shall waive any and all claims or causes of action for improper prosecution of such suit or inadequacy of a settlement made in accordance herewith, and the party bringing the claim or prosecuting the suit shall be entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees, which expenses and attorney's fees shall be prorated to the amounts payable to the employer or his or her insurer under the above right of subrogation and to the amount in excess of such amount payable to the employer or his or her insurer under his or her right of subrogation, and which expenses and attorney's fees shall be apportioned by the court between the parties as their interests appear at the time of such recovery. If either party makes the claim or prosecutes such action without the giving of a notice to the other party, the party bringing the claim and prosecuting such action shall not deduct expenses or attorney's fees from the amount payable to the other party.~~

If the employee or his or her personal representative or the employer or his or her compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such

attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought. A settlement of any lawsuit commenced under this section shall be void unless (1) such settlement is agreed upon in writing by the employee or his or her personal representative and the insurer of the employer if there is one, and if there is no insurer, then by the employer, or (2) in the absence of such agreement, the court before which the action is pending determines that the settlement offer is fair and reasonable considering liability, damages, and the ability of the third person and his or her liability insurance carrier to satisfy any judgment.

If the employee or his or her personal representative and the insurer of the employer if there is one, and if there is no insurer, then the employer, do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court upon application shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

In any case in which an injured employee is entitled to benefits from the Second Injury Fund for injuries occurring before December 1, 1997, as provided in section 48-128 and recovery is had against the third party liable to the employee for the injury, the Second Injury Fund shall be subrogated to the rights of the employee against such third party to the extent of the benefits due to him or her or which shall become due to him or her from such fund, subject to the rights of the employer and his or her insurer.

Sec. 2. Section 48-128, Reissue Revised Statutes of Nebraska, is amended to read:

48-128. (1) For injuries occurring before December 1, 1997:

(a) If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. For the additional disability, the employee shall be compensated out of a special trust fund created for that purpose which shall be known as the Second Injury Fund which is hereby created. If the subsequent compensable injury of such an employee shall result in the death of the employee and it shall be determined that the death would not have occurred except for such preexisting permanent partial disability, the employer shall pay the compensation benefits prescribed by this section subsection for a period not exceeding three hundred twenty-five weeks, and for any compensation benefits payable after such period of three hundred twenty-five weeks, the dependents shall be compensated out of the fund.

(2) (b) In order to qualify under this section subsection, the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.

(3) (c) As used in this section subsection, preexisting permanent partial disability shall mean any preexisting permanent condition, whether congenital or the result of injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. No condition shall be considered a preexisting permanent partial disability under this section subsection unless it would support a rating of twenty-five percent loss of earning power or more or support a rating which would result in compensation payable for a period of ninety weeks or more for disability for permanent injury as computed under subdivision (3) of section 48-121.

(4) (2)(a) The Second Injury Fund shall be for the purpose of making payments in accordance with subsection (1) of this section and for paying administrative expenses relating to such fund. The State Treasurer shall be the custodian of the fund, and all money and securities in the fund shall be held in trust by the State Treasurer and shall not be money or property of the state. The fund shall be raised and derived as follows: Every insurance company which is transacting business in this state shall on or before March 1 of each year pay to the Director of Insurance an amount equal to two percent of the workers' compensation benefits paid by it during the preceding calendar

year in this state. Every risk management pool providing workers' compensation group self-insurance coverage to any of its members shall on or before March 1 of each year pay to the Director of Insurance an amount equal to two percent of the workers' compensation benefits paid by it during the preceding calendar year in this state but in no event less than twenty-five dollars.

(5) (b) The computation of the amounts as provided in this section subsection shall be made on forms furnished by the Department of Insurance and shall be forwarded to the department together with a sworn statement by an appropriate fiscal officer of the company attesting the accuracy of the computation. The department shall furnish such forms to the companies and risk management pools prior to the end of the year for which the amounts are payable together with any information relative to the amounts as may be needed or desirable. Upon receipt of the payment, the director shall audit and examine the computations and satisfy himself or herself that the amounts have been properly paid in conformity with this section subsection.

(6) (c) The Director of Insurance, after notice and hearing pursuant to sections 44-2301 and 44-2312, may rescind or refuse to reissue the license of any company which fails to remit the amounts due in conformity with this section subsection.

(7) (d) The Director of Insurance shall remit the amounts paid, in conformity with this section subsection, to the State Treasurer for credit to the Second Injury Fund promptly upon completion of his or her audit and examination, and in no event later than May 1 of the year in which the amounts have been received, except that when there is a dispute as to the amount payable, the proceeds may not be deposited by the director with the State Treasurer until disposition of the controversy. One percent of the amount received shall be credited to the Department of Insurance to cover the costs of administration.

(8) (e) Every employer in the occupations described in section 48-106 who qualifies as a self-insurer and who is issued a permit to self-insure shall furnish to the State Treasurer for the benefit of the fund an annual amount equal to two percent of the workers' compensation benefits paid by it during the preceding calendar year in this state but in no event less than twenty-five dollars.

(9) (f) The amounts required to be paid by the insurance companies, risk management pools, and self-insurers under this section subsection shall be in addition to any other amounts, either in taxes, assessments, or otherwise, as required under any other law of this state.

(10) (3)(a) The presiding judge of the Nebraska Workers' Compensation Court shall be charged with the conservation of the assets of the Second Injury Fund. In furtherance of this purpose the Attorney General shall appoint a member of his or her staff to represent the Second Injury Fund in all proceedings brought to enforce claims for or against such fund.

(11) (b) The Department of Administrative Services shall furnish monthly to the Nebraska Workers' Compensation Court a statement of the Second Injury Fund setting forth the balance of the fund as of the beginning of each month while such fund is in existence, the income and its sources, the payments from such fund in itemized form, and the balance of the fund on hand as of the last day of the preceding month. The State Treasurer may receive and credit to the fund any sum or sums which may at any time be contributed to the state or the fund by the United States of America or any agency thereof to which the state may be or become entitled under any act of Congress or otherwise, by reason of any payment made from the fund.

(12) (c) When the fund equals or exceeds eight hundred thousand dollars, no further contributions thereto shall be required by employers, risk management pools, or insurance carriers. Thereafter whenever the amount of the fund is reduced below four hundred thousand dollars by reason of payments made pursuant to this section or otherwise or whenever the presiding judge of the Nebraska Workers' Compensation Court determines that payments likely to be made from the fund in the next succeeding year will probably cause the fund to be reduced below four hundred thousand dollars, the presiding judge of the compensation court shall notify all self-insurers and the Director of Insurance, who shall notify all workers' compensation insurance carriers and risk management pools, that such contributions are to be resumed as of the date set in such notice and such contributions shall continue as provided in this section after the effective date of such notice. Such contributions shall continue until the fund again equals eight hundred thousand dollars. Out of the Second Injury Fund, the additional compensation payments shall be made to such employee or dependent by the compensation court once each month in the same manner as the salaries of the employees of the compensation court are paid. In all cases when a claim is asserted by the state on behalf of the

Second Injury Fund against an employer, employer's insurer, or risk management pool under this section or when a claim is made against such fund, the State of Nebraska shall be impleaded as a party plaintiff or defendant, as the case may require, and when so impleaded as a defendant, service of summons shall be had upon the Attorney General. It shall be the duty of the Attorney General to act as attorney for the state.

~~(13)~~ (d) Any expenses necessarily incurred by the Second Injury Fund or by the Attorney General on behalf of such fund in any case when a claim is asserted by the state on behalf of the Second Injury Fund against an employer, employer's insurer, or risk management pool under this section or when a claim is made against the Second Injury Fund may be paid out of such fund. Such expenses may be taxed as costs and recovered by the Second Injury Fund in any such case in which the Second Injury Fund prevails.

Sec. 3. Section 48-144.04, Reissue Revised Statutes of Nebraska, is amended to read:

48-144.04. Any employer, risk management pool, or insurance carrier who fails, neglects, or refuses to file any report required of him or her by the Nebraska Workers' Compensation Court shall be guilty of a Class II misdemeanor for each such failure, neglect, or refusal. It shall be the duty of the Attorney General to act as attorney for the state. In addition to the penalty, where an employer, risk management pool, or insurance carrier has been given notice, or the employer, risk management pool, or the insurance carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file a report thereof, the limitations in sections 48-128 and section 48-137 and for injuries occurring before December 1, 1997, the limitations in section 48-128 shall not begin to run against the claim of the injured employee or his or her dependents entitled to compensation or against the State of Nebraska on behalf of the Second Injury Fund, or in favor of either the employer, risk management pool, or the insurance carrier until such report shall have been furnished as required by the compensation court.

Sec. 4. Original sections 48-128 and 48-144.04, Reissue Revised Statutes of Nebraska, and section 48-118, Revised Statutes Supplement, 1996, are repealed.