An Introduction to North Dakota Workers Compensation

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CLARE HOCHHALTER AND DEAN J. HAAS*

I. INTRODUCTION

A. THE NATURE AND HISTORY OF WORKERS COMPENSATION

Prior to the establishment of workers compensation laws, common-law principles dictated the liability of a master for any injury to the servant.[1] These principles held a master or employer responsible for injury or death of employees if the injury or death resulted from the negligence of the master.[2] Thus, injured workers

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1. *See,* W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS, § 80, at 569 (5th ed. 1984) [hereinafter W. KEETON]. Generally, the common law required the master (employer) to assume the following duties to protect his or her servants:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools, and equipment for the work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

Id. at 569.

2. *See id.* Recovery by the employee was limited to cases in which the employer failed to fulfill specific duties imposed on the employers by the common law. *See id.* For a list of duties imposed on the employer, see *supra* note 1. The risks which did not lie within these specific duties were considered be accepted by the servant as a mere incident of employment. *See id.* at 570.

had to prove their injuries were a result of the master's negligence, often a slow and costly process. In addition to the time delay and cost, employees had to contend with common-law defenses such as contributory negligence and assumption of risk.[3] The situation led to harsh results for employees and, ultimately, a call for reform.[4]

Society's answer to this problem, workers compensation, provides no-fault wage loss and medical benefits to persons injured as a result of work-related accidents.[5] These benefits are drawn from a fund whose premium costs are born initially by industry.[6] Premium costs are then passed on to industry consumers via the cost of products and services.[7]

Workers compensation acts[8] typically include the following features:

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3. Contributory negligence in this context refers to that standard of conduct on the part of the employee which is below the standard to which he or she is legally required to perform for his or her own protection. *Id.* § 65, at 451. Pursuant to this defense, the employee is barred from recovery even though the employer breached a duty, had been negligent, and would have otherwise been negligent. *Id.* at 451-52. The problem with this defense was that a momentary lapse of caution would result in the employee's total loss of compensation. *Id.* § 80, at 570.

The doctrine of assumption of risk, on the other hand dictates that the employee cannot recover for injuries received when he/she knowingly exposes himself to a danger which he/she appreciated. *See id.* § 68, at 480. However, the courts generally found that any risks on the part of the employee that were not included in an explicitly imposed employer common-law duty were assumed by the employee. *See id.* § 80, at 570. For a list of common-law duties, see *supra* note 1.

4. U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAW vii (1987) [hereinafter WORKERS' COMPENSATION LAWS].

5. 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 1.00 (1985).

6. *Id.* The North Dakota Workers Compensation Bureau sets premium rates for employers by classifying and determining the risk of injury for different types of employment. *See* N.D. CENT. CODE § 65-04-01(1985). Section 65-04-01 provides that the premium rate must be high enough to provide for:

> 1. The payment of expenses of administration of the bureau;
> 2. The payment of compensation according to the provisions and schedules contained in this title; and
> 3. The maintenance by the fund of adequate reserves and surplus to the end that it may be kept at all times in entirely solvent condition.
>
> In the exercise of the powers and discretion . . . the bureau shall fix . . . the lowest rate which still will enable it to comply with the other provisions of this section.

Id. The North Dakota Supreme Court held that it is not unconstitutional for the legislature to delegate the power to classify employments with respect to degree of risk to the North Dakota Workers Compensation Bureau. State *ex rel.* Amerland v. Hagan, 44 N.D. 306, 323, 175 N.W. 372, 379 (1919).

7. 1 A. LARSON, *supra* note 5, § 1.00.

8. At least six common objectives underlie the various workers compensation acts:

> 1-Provide sure, prompt, and reasonable income and medical benefits to work-accident victims, or income benefits to their dependents, regardless of fault;
>
> 2-Provide a single remedy and reduce court delays, costs, and workloads arising out of personal-injury litigation;
>
> 3-Relieve public and private charities of financial drains incident to uncompensated industrial accidents;
>
> 4-Eliminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals;

(1) coverage is extended to employees but not independent contractors;
(2) employees are entitled to benefits regardless of fault whenever employees experience an injury by accident arising out of and in the course of employment;
(3) benefits include wage loss, medical, rehabilitation, dependent's benefits, and permanent impairment;
(4) employees give up their right to sue the employer in exchange for certain relief;
(5) employee's retain the right to sue third parties, but must share any recovery on the basis of the employer or fund's subrogation rights;
(6) workers compensation is usually administered by administrative boards or commissions;
(7) employers secure compensation coverage through state funds, private carriers, or self insurance.[9]

Together, these common factors create a unique social mechanism having characteristics of both tort law and social insurance.[10] For example, workers compensation is, like tort, based upon employer liability without contribution from the employee or state.[11] Like social insurance, however, workers compensation is based on a social policy "of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame."[12]

The underlying policy of workers compensation is based upon

5-Encourage maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism; and

6-Promote frank study of causes of accidents (rather than concealment of fault)-reducing preventable accidents and human suffering.

WORKERS' COMPENSATION LAWS, *supra* note 4, at vii.

9. 1 A. LARSON, *supra* note 5, § 1.10. Each of the fifty states has a workers compensation law. WORKERS' COMPENSATION LAWS, *supra* note 4, at vii. American Samoa, Guam, Puerto Rico and the United States Virgin Islands also have workers compensation laws. *Id.* The federal government has workers compensation programs covering the District of Columbia, federal employees and longshore and harbor workers. *Id.* Finally, each of the Canadian provinces and territories has a workers compensation act or ordinance. *Id.*

10. 1 A. LARSON, *supra* note 5, § 1.20. An understanding of the underlying concept of workers compensation is essential to understanding current workers compensation cases and to interpreting workers compensation acts. *Id.*

11. *Id.*

12. *Id.* A 1972 evaluation by the National Commission on State Workmen's Compensation Laws concluded that the state laws were not fully meeting the objectives of workers compensation. WORKERS' COMPENSATION LAW, *supra* note 4, at vii. The Commission made 84 recommendations for improvement. *Id.* Sixteen of the recommendations were labeled "essential." *Id.*

the wisdom of providing an efficient, dignified, and certain form of relief that a progressive society would likely provide to employees sustaining work-related injuries, and to allocate the cost of this relief to consumers of the product.[13] This is often referred to as the pure form compensation theory.[14] The policy is an important one, and is manifest in any number of statutes and case opinions.[15]

B. EARLY DEVELOPMENT OF WORKERS COMPENSATION

Workers compensation theory may be traced to primitive laws dating back to 1100 A.D.[16] The basis of employer liability involved a primitive rule of causation which survived until at least the fifteenth century.[17] A person accused of having had some responsibility for a death had to take an oath that the deceased was not, through his actions, "further from life and nearer death."[18] The principle of vicarious liability developed in about 1700.[19] Pursuant to this doctrine, the act of a servant became the act of the master.[20] Until the development of the fellow-servant exception in 1837,[21] the master's liability for acts of his servants extended even to injured fellow-servants.[22]

Subsequently, employers' liability to their employees was limited by three common-law defenses. First, the fellow-servant

13. 1 A. LARSON, *supra* note 5, § 2.20.

14. *Id.*

15. *Id.* While statutes and case law in each jurisdiction contain "fault" ideas, the movement in this area of the law is still toward the pure theory. *Id.* In 1986, more than 165 state and federal laws were enacted covering almost every aspect of workers compensation. WORKERS' COMPENSATION LAW, *supra* note 4, at vii. Benefit maximums increased in 44 states and the District of Columbia. *Id.* Funeral allowances were raised in nine states, Puerto Rico and four Canadian jurisdictions. *Id.* Four states expanded coverage for occupational disease claims. *Id.* In addition to expansion of benefits, workers compensation survived the Reagan administration's attempt to tax workers compensation benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, which was signed in April 1986. *Id.; see* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 82.

16. 1 A. LARSON, *supra* note 5, § 4.10.

17. *Id.* §§ 4.10-.20.

18. *Id.* § 4.10. The oath was based upon the "but-for theory of causation in undiluted form." *Id.*

19. *Id.* § 4.20.

20. *See id.* Under the theory of vicarious liability, in tort law referred to as *respondeat superior,* the master was strictly liable for the negligence of his servants. *See* W. KEETON, *supra* note 1, § 69, at 499. While the employer may not be negligent by his or her own acts or omissions, the action itself is based on negligence. *Id.* That is, the fault of the servant would result in the master's liability to third parties. *Id.*

21. 1 A. LARSON, *supra* note 5, § 4.30. Lord Abinger invented the fellow-servant exception to the general rule of the master's vicarious liability. *Id.; see* Priestley v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (1837). The fellow-servant rule was Lord Abinger's attempt to forestall "the consequences of a decision the one way or the other," consequences "consisting largely of 'alarming' examples of possible master's liability for domestic mishaps due to the negligence of the chambermaid, the coachman, and the cook." 1 A. LARSON, *supra* note 5, § 4.30; *Preistley,* 3 M. & W. at 5, 150 Eng. Rep. at 1032.

22. 1 A. LARSON, *supra* note 5, § 4.20.

exception denied employer liability when the employee's injury was caused by another employee.[23] Unfortunately for workers, the industrial age was fast approaching at the time the fellow-servant exception was developed and followed, even in the United States.[24] Second, employer liability was limited by the assumption of risk defense.[25] This defense was based on the notion that an employee was free to accept or reject employment, and if the employee voluntarily accepted the hazards of the work, the employee had no standing to bring suit if injured as a result of one of these hazards.[26] Finally, employers escaped liability pursuant to the contributory negligence defense.[27] This defense prohibited the employee from recovering if he or she was negligent, even if the employee was less negligent than the employer.[28] By 1900, these defenses had virtually eliminated employer liability for injuries to employees.[29]

Eventually, some courts and legislative bodies attempted to slow, if not swing, the liability pendulum the other way.[30] The principal judicial modification of common-law defenses was the vice-principal exception to the fellow-servant rule.[31] In some jurisdictions the exception excluded supervisory employees from the fellow-servant category.[32] In the majority of jurisdictions, however, the exception effectively excluded all employees carrying out common-law duties of the employer.[33] Thus, the employer's duty to furnish a safe work place and safe tools was nondelegable.[34]

These judicial innovations, however, coupled with legislation adopted prior to the enactment of workers compensation acts,[35]

23. W. KEETON, *supra* note 1, § 80, at 571. Generally, the courts' reasons for adopting the fellow-servant exception were usually articulated as an assumption of risk standard. *Id.* In other words, courts stated that upon entering the employment, the employee assumed the risk of fellow-employee negligence, and the employee was as likely to know of their deficiencies as the employer. *Id.* Courts also reasoned "that it would promote the safety of the public and of all [employees] to make each one watchful of the conduct of others for his own protection." *Id.*

24. 1 A. LARSON, *supra* note 5, § 4.30. *See* Farwell v. Boston & Worcester R.R. Corp., 45 Mass. (4 Met.) 49, 56-57 (1842) (adopting fellow-servant rule). In *Farwell* an employer railroad was held immune from liability to an employee who was injured by one of its switchmen. *Farwell,* 45 Mass. (4 Met.) at 62. *Farwell* illustrates the true implications of the fellow-servant exception for American trainmen, miners, and factory workers. 1 A. LARSON, *supra* note 5, § 4.30.

25. 1 A. LARSON, *supra* note 5, § 4.30.

26. *Id.*

27. *Id.*

28. *Id.* According to German statistics of the period, injured workers were "remediless without question in 83 percent of all cases." *Id.*

29. *Id.* Recovery was made even more difficult by problems of proof encountered by injured workers. *Id.* For example, witnesses to the accident were often co-employees who were hesitant to testify against their employer. *Id.*

30. *Id.* § 4.40.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Legislation adopted prior to the adoption of workers compensation acts did not attempt to create any new theories of liability applicable to employers and employees. *Id.* § 4.50. Instead, these

were inadequate to meet employee needs. Early American statistics showing the amounts of recoveries by injured employees illustrate the failings of the precompensation system.[36] In one study, for example, a state commission noted that of 614 death cases, 214 families received nothing.[37] Moreover, 111 families were engaged in pending litigation.[38] Other cases were settled for small amounts averaging a few hundred dollars.[39] Another report indicates that of seventy-four cases, there was no compensation in about forty-three of them, and in approximately forty percent of the cases, compensation was less than $500.[40] After attorney fees, funeral and other expenses were deducted, it was apparent that the precompensation system was a complete failure.[41]

The American compensation scheme began to develop after state commissions investigated and reported on various foreign schemes, including the German plan.[42] The American scheme developed differently than the German scheme, primarily in that the employer was liable without employee premium contribution.[43] The first two American enactments were found unconstitutional.[44] By 1920, however, all but eight states had compensation acts in force.[45] In 1963, Hawaii was the last state to pass a workers compensation law.[46]

C. DEVELOPMENT IN NORTH DAKOTA

The North Dakota Workmen's Compensation Act was passed

laws attempted to restore to the employee a position similar to that of a stranger injured by a negligent employee. *Id.*

36. *See id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. 1 A. LARSON, *supra* note 5, § 4.50.

42. *Id.* § 5.20.

43. *Id.* § 5.10. The German workers compensation plan consisted of three distinct funds. *Id.* Each fund was assigned to provide a separate kind of benefit and included the sickness, accident and disability insurance funds. *Id.* German employees were required to contribute two-thirds of the sickness fund and one-half of the disability insurance fund. *Id.* Employers alone contributed to the accident fund and contributed the remaining portions of the sickness and disability insurance funds. *Id.*

44. *Id.* § 5.20. The Maryland and Montana miners compensation acts were determined unconstitutional. *Id.*; *see* Franklin v. United Rys. & Elec. Co., 2 Baltimore City Rep. 309, ____ (1904) (determining that Maryland Compensation Act was unconstitutional); Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 221-22, 119 P. 554, 566 (1911) (determining that Montana Compensation Act was unconstitutional since an employer who paid compensation under the act was not protected from an action at law by the employee and thus could be compelled to pay twice, therefore denying the employer of equal protection of laws).

45. 1 A. LARSON, *supra* note 5, § 5.30.

46. *Id.* § 5.30 n.51.1 (Supp. 1987); Hawaii's Workmen's Compensation Act, ch. 116, 1963 Haw. Sess. Laws amended at HAW. REV. STAT. (codified as §§ 386-1 to 386-174 (1985 & Supp. 1987)).

in 1919.[47] One of three major bills sponsored by the Non-Partisan League,[48] the Act was a compilation of provisions from seven different state workers compensation acts.[49] The Preamble came from Washington State, and the section on rehabilitation from Massachusetts.[50] While the second injury fund provisions came from Virginia, permanent partial disability and safety provisions came from California.[51] Underwriting and administrative provisions were taken from Ohio, and the benefit provisions were taken from the federal act.[52] The Act's provision for exclusive and compulsory jurisdiction is perhaps its most distinguishing feature.[53]

II. PROCEEDINGS TO SECURE NORTH DAKOTA WORKERS COMPENSATION BENEFITS

A. PROCEEDINGS IN GENERAL

All classes of damages sustained by North Dakota workers are to be determined under one claim for compensation.[54] Moreover,

47. North Dakota Workmen's Compensation Act, ch. 162, 1919 N.D. Laws 258 (codified as amended at N.D. CENT. CODE §§ 65-01-01 to 65-14-05 (1985 & Supp. 1987)). In 1987, the North Dakota Legislature changed the name of the Workmen's Compensation Bureau:

> Workers compensation bureau. The North Dakota legislative council is hereby authorized to delete, where appropriate, "workmen's compensation bureau" wherever it appears in the North Dakota Century Code or in the supplements thereto and to insert in lieu of each deletion "workers compensation bureau." Such changes are to be made when any volume or supplement of the North Dakota Century Code is being reprinted. It is the intent of the legislative assembly that the workers compensation bureau shall be substituted for, shall take any action previously to be taken by, and shall perform any duties previously to be performed by the workmen's compensation bureau.

N.D. CENT. CODE § 65-02-01.1 (Supp. 1987).

48. *See* A. GEELAN, NORTH DAKOTA WORKMEN'S COMPENSATION 28 (1969). House Bill Number 56, the original workers compensation bill, was introduced by Representative George S. Malone, a McLean County miner and secretary-treasurer of the United Mine Workers Local 3803 of Wilton, North Dakota. *Id.; see* H.B. 56, 16th Leg., 1st Sess. (1919).

49. A. GEELAN, *supra* note 48, at 28. A copy of the original draft hangs in a hall at the Bureau offices in Bismarck, North Dakota.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.; see* U.S. DEPARTMENT OF LABOR, STATE WORKERS COMPENSATION LAWS 1-2 (1986) (North Dakota, Wyoming, Puerto Rico and the United States Virgin Islands prohibit all but state fund workers compensation coverage).

54. Schmidt v. North Dakota Workmen's Compensation Bureau, 73 N.D. 245, 252-53, 13 N.W.2d 610, 614 (1944). In *Schmidt,* the court stated:

> [W]here an accident expresses itself in two or more results the sum total of these results is the injury for which he is entitled to compensation....In the same accident an employee may lose a finger, have other bones broken, receive injuries to his head, etc. In allowing compensation, the bureau considers all of these features and awards him compensation for all as one injury.

Id.

section 65-05-01 of the North Dakota Century Code provides that the claim itself must be filed within one year of the date of injury, or, within two years of the date of death.[55] Furthermore, section 65-05-01 applies a reasonable person standard for determining when the limitation on filing begins to run.[56] Section 65-05-01 provides

55. N.D. CENT. CODE § 65-05-01 (1985).

56. *See id.* The North Dakota Supreme Court has interpreted the limitation contained in § 65-05-01 on at least two occasions. *See* Teegarden v. North Dakota Workmen's Compensation Bureau, 313 N.W.2d 716, 718 (N.D. 1981); Beauchamp v. North Dakota Workmen's Compensation Bureau, 126 N.W.2d 417, 420-21 (N.D. 1964). In *Beauchamp,* Safford Beauchamp claimed that he contracted silicosis while he was working as a sandblaster in 1958. *Beauchamp,* 126 N.W.2d at 417-18. He was diagnosed as having silicosis in 1961. *Id.* at 418. Subsequently, the North Dakota Workmen's Compensation Bureau denied Beauchamp's claim for benefits on the ground that the claim was filed more than one year after the date of injury. *Id.* The Supreme Court of North Dakota determined that because a disease may be progressive, and therefore the disease may not culminate in immediate disability, the compensable injury is not deemed to have occurred until the employee is incapacitated. *Id.* at 420 (citing Marsh v. Industrial Accident Comm'n, 217 Cal. 338, 18 P.2d 933 (1933)). Therefore, the court concluded that the filing deadline was extended until the date the injury became disabling. *Id.* at 420-21.

Subsequent to the *Beauchamp* decision, the North Dakota Legislature amended § 65-05-01 of the North Dakota Century Code to include a reasonable person standard for triggering the date the limitation on filing begins to run. Act approved Apr. 20, 1977, ch. 579, § 8, 1977 N.D. Laws 1247, 1250 (codified as amended at N.D. CENT. CODE § 65-05-01 (1985)). Section 65-05-01 provides that "when the actual date of injury cannot be determined with certainty, the date of injury should be the first date that a reasonable person knew or should have known that the injury was related to employment." N.D. CENT. CODE § 65-05-01 (1985). It is arguable that after the amendment to § 65-05-01, the *Beauchamp* analysis was superceded by the reasonable person standard, which was applied by the North Dakota Supreme Court in *Teegarden v. North Dakota Workmen's Compensation Bureau. Teegarden,* 313 N.W.2d at 718. In *Teegarden,* Virgil Teegarden, who was employed as an elevator worker, suffered several incidences of pneumonia and bronchitis from 1969 to 1980. *Id.* at 717. Teegarden filed a claim with the North Dakota Workmen's Compensation Bureau, asserting that his respiratory problems were caused by constant exposure to grain dust during the course of his work at the elevator. *Id.* The Bureau denied benefits on the grounds that the claim was not filed within one year of when Teegarden knew or should have known that the injury he suffered was related to his employment. *Id.* The Supreme Court of North Dakota determined that Teegarden was in no position to link his respiratory problems with his job as an elevator worker. *Id.* at 719. The court stated:

> The Bureau made no specific findings of fact as to when the claimant knew or should have known that his disability was fairly traceable to his employment nor are we aware of any evidence that establishes this fact. The evidence establishes that the physician advised only that the claimant was to avoid dust and to quit smoking, but does not otherwise establish any basis that claimant should have known that the work caused the disease. The evidence may have been sufficient to convince the doctor that the work caused the injury, but the doctor did not articulate this to the claimant. We cannot expect the ordinary claimant to have knowledge in medical matters comparable to that of a doctor.
>
> The letters of Dr. R.W. McLean clearly disclose that the Doctor had formed some very definite opinions or conclusions that Teegarden's injury (disease) was work-related and that smoking affected his health. However, the letters do not disclose if the doctor ever informed Teegarden that the injury (disease) was caused by his working conditions. Nor do the letters disclose if Teegarden was ever told to quit working at the elevator.
>
> The Doctor also advised the claimant to quit smoking. Does this compel a conclusion that the injury (disease) was caused by smoking and that the claimant knew or should have known that smoking caused his injury (disease)? No one has suggested such a conclusion. The parallel between this and the dust is obvious.
>
> Also, upon receipt of the claim by the Bureau an interoffice memo shortly thereafter contained the observation that pneumonia and bronchitis are diseases common to the general public and that aggravation should be considered if the claim was accepted. This clearly gives another indication that it was not obvious to the

that "when the actual date of injury cannot be determined with certainty, the date of the injury shall be the first date that a reasonable person knew or should have known that the injury was related to employment."[57]

Once a completed claim form is filed within the statutorily prescribed time limitations, the Bureau holds what is described as as informal hearing.[58] The informal hearing is actually the initial claims adjudication process.[59] During the informal hearing, the Bureau investigates and determines whether the claim is compensable.[60] The Bureau will determine the injury to be compensable if it is the result of an accident arising out of and in the course of employment.[61] Compensable injuries also include diseases fairly traceable to the employment.[62]

> Bureau and therefore was not obvious for the claimant to know or that he should have known that his disease was work-related.
>
> . . . .
>
> The record contains no evidence of facts indicating that the claimant was informed by anyone that the injury or disease was caused by or was work-related, nor is there any evidence that a worker comparable to the one in question here under the conditions of employment should have known that his injury or disease was caused by work or was work-related. As was observed by the Bureau, pneumonia and bronchitis are diseases that are common to the general public.

Id. The court concluded that the claim was filed within one year after Teegarden knew that his health problems were work-related, and therefore reversed the Bureau's decision denying benefits. *Id.* at 720.

57. N.D. CENT. CODE § 65-05-01 (1985).

58. N.D. ADMIN. CODE § 92-01-02-03 (1985). For a discussion of the informal hearing process, see *infra* notes 182-89 and accompanying text.

59. N.D. ADMIN. CODE § 92-01-02-03 (1985).

60. *Id.*

61. *See* N.D. CENT. CODE § 65-01-02(7) (1985 & Supp. 1987). Subsection 65-01-02(7) of the North Dakota Century Code provides:

> "Compensable injury" means an injury by accident arising out of and in the course of employment including an injury caused by the willful act of a third person directed against an employee because of his employment, but such term shall not include an injury caused by the employee's willful intention to injure himself or to injure another, nor any injury received because of the use of narcotics or intoxicants while in the course of the employment. If an injury is due to heart attack or stroke, such heart attack or stroke must be causally related to the worker's employment, with reasonable medical certainty, and must have been precipitated by unusual stress. Such term, in addition to an injury by accident, includes:
>
> a. Any disease which can be fairly traceable to the employment. Ordinary diseases of life to which the general public outside of the employment is exposed shall not be compensable except where the disease follows as an incident to, and in its inception is caused by a hazard to which an employee is subjected in the course of his employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The diease includes impairment and effects from radiation fairly traceable to the employment. It need not have been foreseen or expected, but after it is contracted, it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
>
> b. An injury to artificial members.

Id.

62. *Id.*

Following the determination, the Bureau then issues its decision. Any party aggrieved by the Bureau's decision can request a rehearing.[63] Generally, such requests for rehearing are granted whenever there is a dispute of material fact.[64] The rehearing itself consists of a formal evidentiary hearing before one of the commissioners of the Bureau. After the rehearing is complete, the Bureau issues its final order. This entire quasi-judicial process is governed by the Administrative Agencies Practice Act,[65] with the adversary concept having only limited application to claims for compensation.[66] The Bureau's primary concern is with the proper, fair, and just determination of claims.[67]

B. JURISDICTION OF THE BUREAU

The Bureau has full authority to determine all questions within its jurisdiction.[68] When final, Bureau decisions are entitled to the same faith and credit as the judgment of a court of record.[69] Moreover, the Bureau's jurisdiction over properly filed claims is continuing.[70] Thus, the Bureau may at any time review the award, whether on its own motion or upon application from a party.[71]

C. CLAIMS FOR COMPENSATION

Claimants or their representative are required to file a claim

63. *Id.* § 28-32-14 (Supp. 1987).

64. *See* Weber v. North Dakota Workmen's Compensation Bureau, 377 N.W.2d 571, 573 (N.D. 1985) (when material facts are in dispute a formal hearing is warranted); Manikowske v. North Dakota Workmen's Compensation Bureau, 338 N.W.2d 823, 824 n.1 (N.D. 1983) (party entitled to formal hearing when an administrative agency acts in a judicial capacity unless there is no dispute as to material facts). For a discussion of rehearings, see *infra* notes 190-99 and accompanying text.

65. N.D. CENT. CODE § 65-02-01 (1985) (Workers Compensation Act is governed by Administrative Agencies Practice Act); *see id.* §§ 28-32-01 to 28-32-21.1 (Supp. 1987) (Administrative Agencies Practice Act).

66. Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692, 702 (N.D. 1978).

67. *Id.* In *Steele* the North Dakota Supreme Court stated:

> We believe the adversary concept employed in our judicial system has only limited application to claims for benefits. The Bureau in carrying out its statutory duties acts in a quasi-judicial capacity and should be primarily concerned with the proper, fair, and just determination of any claim submitted. In making this observation we are fully cognizant that the existing case law places the burden upon the claimant, but nevertheless the Bureau should not place itself in a true or full adversary position to the claimant. In resolving an issue the Bureau should take the position of an administrative agency acting in a quasi-judicial capacity even though it also acts as an investigative body.

Id.

68. N.D. CENT. CODE § 65-05-03 (1985).

69. *Id.*

70. *Id.* § 65-05-04 (1985).

71. *Id.*

for benefits.[72] The claim should, of course, be made upon forms prescribed by the Bureau.[73] There are, however, alternative ways to file the claim. The claim may be filed by either delivering the claim at the Bureau offices or to a person designated by regulation.[74] The filing can also be made by mailing the claim to the Bureau, or to a person designated by regulation.[75] However, even if one of these statutory provisions is not strictly adhered to, any written communication to the Bureau by a claimant will toll the statutory time limitation, provided the communication can reasonably be construed as a request for benefits.[76]

D. MEDICAL EXAMINATION OF CLAIMANTS

The act of filing a claim constitutes a release of medical information and consent to a medical examination.[77] Moreover,

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72. *Id.* § 65-05-01 (1985). Section 65-05-01 of the North Dakota Century Code provides:

> Claims for compensation - When and where filed. All original claims for compensation shall be filed within one year after the injury or within two years after the death. The date of injury for purposes of this section shall be the actual date of injury when such can be determined with certainty by the claimant and bureau. When the actual date of injury cannot be determined with certainty the date of injury shall be the first date that a reasonable person knew or should have known that the injury was related to employment. No compensation or benefits shall be allowed under the provisions of this title to any person, except as provided in section 65-05-04, unless he or she, or someone on his or her behalf, shall file a written claim therefore within the time specified in this section. Such claim shall be filed by:
>
> 1. Delivering it at the office of the bureau or to any person whom the bureau by regulation may designate; or
> 2. Depositing it in the mail properly stamped and addressed to the bureau or to any person whom the bureau by regulation may designate.

Id.

73. *Id.* § 65-05-02 (1985). Section 65-05-02 of the North Dakota Century Code provides:

> Form in which claim shall be filed. Every claim shall be made on forms to be furnished by the bureau and shall contain all the information required by it. Each claim shall be signed by the person entitled to compensation or by the person acting on his behalf and, except in case of death, shall be accompanied by a certificate of the employee's physician stating the nature of the injury and the nature and probable extent of the disability. For any reasonable cause shown, the bureau may waive the provisions of this section.

Id

74. *Id.* § 65-05-01(1) (1985).

75. *Id.* § 65-05-01(2) (1985).

76. N.D. ADMIN. CODE § 92-01-02-02 (1987). Section 92-01-02-02 of the North Dakota Administrative Code provides, in pertinent part: "any written communication to the bureau by the claimant which can be reasonably construed as a request for benefits shall be sufficient to toll the statutory time limitation." *Id.*

77. N.D. CENT. CODE § 65-05-30 (1985). In addition to providing that the act of filing a claim constitutes a release of medical information, § 65-05-30 also provides that the Bureau is entitled to use this medical information in any judicial or administrative proceeding concerning the compensation claim. *Id.* Moreover, once the claimant files the claim, § 65-05-30 authorizes the doctor, hospital, or clinic to disclose the pertinent medical information to the Bureau or its representative. *Id.*

the claimant must then submit to a medical examination as frequently and at such times and places as is reasonably required.[78] If the claimant fails to cooperate with the Bureau when it requests a medical examination, the Bureau will suspend benefits during the term of noncompliance.[79] Claimants are, however, entitled to have their personal physician participate in the examination.[80] If the two doctors disagree in their opinion of the nature of the injury, then the Bureau must appoint an impartial third physician to examine the claimant and report his or her findings to the Bureau.[81] The North Dakota Supreme Court, however, has limited the circumstances under which the Bureau must appoint an independent third physician to conduct an examination of the claimant to situations in which there is a disagreement between a physician selected and paid by the Bureau and a physician selected and paid by the claimant.[82]

E. BURDEN OF PROOF AND PRESUMPTIONS

Generally, the claimant carries the burden of proving, by a preponderance of the evidence, the existence of a compensable injury.[83] Thus, the claimant is required to prove his or her case

78. *Id.* § 65-05-28 (1985). According to § 65-05-28, a refusal to submit to an examination will result in no compensation being paid to the claimant. *Id.* Moreover, the Bureau, in its discretion may award reasonable travel costs and loss of wages incurred by the claimant in attending the requested medical examination. *Id.*

79. *Id.* Although § 65-05-28 of the North Dakota Century Code mandates that benefits will be suspended if the claimant refuses to cooperate with the Bureau's request for a medical examination, it is generally accepted that worker's compensation agencies may not terminate benefits for a claimant's failure to undergo invasive treatments such as surgery. *Id.;* 1 A. LARSON, *supra* note 5, § 13.22(f)..

80. N.D. CENT. CODE § 65-05-28 (1985). When the claimant chooses to have his own physician present, he or she must bear the expense of the independent doctor. *Id.*

81. *Id.*

82. Ambroson v. North Dakota Workmen's Compensation Bureau, 210 N.W.2d 85, 87 (N.D. 1973).

83. N.D. CENT. CODE § 65-01-11 (1985). Section 65-01-11 of the North Dakota Century Code provides:

> Burden of proof in compensation matters - Death certificate. If the bureau or an employer shall claim that an employee is not entitled to the benefits of the North Dakota Workmen's Compensation Law by reason of the fact that his injury was caused by the employee's willful intention to injure himself, or to injure another, or by reason of the voluntary intoxication of the employee, the burden of proving such exemption or forfeiture shall be upon the bureau or upon the person alleging the same; however, a blood alcohol level above the legal intoxication limit as defined in subsection 3 of section 39-20-07 shall create a rebuttable presumption that the injury was due to intoxication. Any claimant against the fund, however, shall have the burden of proving by a preponderance of the evidence that he is entitled to participate in the same. In the event of a claim for death benefits the official death certificate shall be considered as evidence of death and may not be used to establish the cause of death.

Id.

with the greater weight of the evidence, or with evidence having the greater conviction of truth.[84]

In some cases, however, the Bureau or some other person bears the burden of proof. For example, if the Bureau asserts that the claimant's injury was caused by his or her willful intention to sustain injury, the Bureau bears the burden of proving such intent.[85] Likewise, if the Bureau claims that the claimant's injury is a result of the claimant's voluntary intoxication, then the Bureau must again bear the burden of proof.[86] Proof of a blood alcohol level above the legal intoxication limit, however, creates a rebuttable presumption that the injury was due to intoxication.[87]

North Dakota law also attaches a statutory presumption of compensability to specific types of injuries. For example, certain injuries occurring to firepersons and law enforcement officers are presumed to be compensable.[88] Injuries resulting from respiratory disease, hypertension, heart disease, or occupational cancer is presumed to have been suffered in the line of duty.[89] The presumption can only be rebutted by competent evidence to the contrary.[90]

Many states have similar "firemen's presumptions."[91] The effect of these presumptions "varies from a virtually irrebuttable to a virtually worthless presumption."[92] North Dakota's presumption is virtually irrebuttable since the North Dakota Supreme Court has stated that "[i]n order for the Bureau to rebut the presumption in its entirety, it must show that the disease was preexisting *and* that it

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84. Jimison v. North Dakota Workmen's Compensation Bureau, 331 N.W.2d 822, 824 (N.D. 1983) (quoting Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979)).

85. N.D. CENT. CODE § 65-01-11 (1985).

86. *Id.*

87. *Id.* The statutory presumption is much more useful than the familiar quatrain:

> He is not drunk who from the floor.
> Can rise again and drink some more.
> But he is drunk who prostate lies.
> And cannot drink and cannot rise.

88. *Id.* § 65-01-02(12)(d) (Supp. 1987). The statute provides that the presumption applies only to full-time paid fireman or law enforcement personnel. *Id.*

89. *Id.* The addition by the 1987 legislature including occupational cancer appears bizarre, since a proven *occupational* cancer would have been compensable in any event. The language is quite murky and seems to invite litigation.

90. *See* Sunderland v. North Dakota Workmen's Compensation Bureau, 370 N.W.2d 549, 553-54 (N.D. 1985) (Bureau must rebut the presumption by the weight of the evidence).

91. *See, e.g.*, ALA. CODE § 11-43-144 (1977) (listing hypertension, heart disease, and respiratory disease as occupational diseases which are presumed compensable); CAL. LAB. CODE § 3212 (West Supp. 1988) (listing hernia, heart trouble, and penumonia as presumed to arise in the course of a fireman's, sheriff's, or other public or municipal corporation employee's employment); *see also* 1B A. LARSON, *supra* note 5, § 41.72 (discussing special statutes on heart and respiratory disease of police and firefighters).

92. 1B A. LARSON, *supra* note 5, § 41.72.

was not work-related."[93] Whether the Bureau must now show that the disease was pre-existing, as well as that the disease is not work-related remains unclear. The court has apparently adopted the rationale to require the Bureau to show *positive* proof of a nonwork cause of the disease, not to simply show that the work could not be a cause of the disease.[94]

In addition to the presumption in favor of law enforcement personnel and firemen, section 65-01-03 of the North Dakota Century Code sets forth a presumption that a person performing services for remuneration is an employee of the person for whom the services are performed.[95] If, however, the person claiming employee status maintains a separate business or holds herself or himself out to or renders services to the public, the presumption does not apply.[96]

Closely related to the presumption of employee status for persons receiving remuneration for services is the question of what test is applied to determine employee status. Generally, two tests have been applied to determine whether a person is an employee and, therefore, entitled to workers' compensation benefits. First, there is the relative nature of the work test. The relative nature of the work test includes the following considerations:

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93. *Sunderland,* 370 N.W.2d at 554.

94. Schave v. Dep't of State Police, 227 N.W.2d 278, 282-83 (Mich. 1975); Sperbeck v. Dep't of Industry, Labor & Human Rel., 174 N.W.2d 546, 549 (Wis. 1970).

95. N.D. CENT. CODE § 65-01-03 (1985). Section 65-01-03 of the North Dakota Century Code provides:

> Person performing service for remuneration presumed an employee. Each person who performs services for another for a remuneration, whether the same is paid as a salary, commission, or other considerations in lieu thereof, under any agreement or contract of hire, express or implied, shall be presumed to be an employee of the person for whom the services are performed, unless he shall maintain a separate business establishment or shall hold himself out to or shall render services to the general public.
>
> In determining whether a person is an independent contractor or employee, the primary test to be employed is the "right to control" test.

Id.

96. *See* N.D. CENT. CODE § 65-01-03 (1985). For the text of § 65-01-03, see *supra* note 95. The North Dakota Supreme Court adopted the relative nature of the work test in *Brown v. North Dakota Workmen's Compensation Bureau.* Brown v. North Dakota Workmen's Compensation Bureau, 152 N.W.2d 799, 803 (N.D. 1967). In *Brown,* Mr. Brown, who was employed by a lumber wholesaler, was killed when a tractor he was operating was hit by a train. *Id.* at 802-03. At the time Brown was killed, he was driving a tractor that he owned, but he was returning from delivering a trailerload of the lumber wholesaler's products, and he was using one of the wholesaler's trailors. *Id.* at 803. The North Dakota Supreme Court, applying the relative nature of the work test, determined that Brown was an employee of the lumber wholesalers because Brown's duties as a driver were an integral part of the regular business of the employer, and he was not furnishing an independent business or professional service. *Id.* Although *Brown* adopted the relative nature of the work test, the North Dakota Legislature amended § 65-01-03 of the North Dakota Century Code to provide that the right to control test is the primary test for determining employee status. Act approved Apr. 20, 1977, ch. 579, § 3, 1977 N.D. Laws 1247, 1248-49 (codified as amended at N.D. CENT. CODE § 65-01-03 (1985)).

> [T]he character of the claimant's work or business — how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on — and its relation to the employer's business, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.[97]

North Dakota's version of the relative nature of the work test is contained in section 65-01-03's exclusion of persons who maintain a separate business or render services to the public from presumptive employee status.[98]

The second test applied to determine whether a person is an employee is the right to control test. Arthur Larson states that the right to control test includes the following factors:

a. The *right* to exercise control over the details of the work, as opposed to the actual exercise of that right,
b. The nature of the right-to-fire and how it may be exercised,
c. The method of payment, whether by time or commission,
d. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person performing the work.[99]

In 1977, the North Dakota Legislature amended section 65-01-03 to provide that the right to control test is the primary test for determining whether a person is an employee.[100] The language of section 65-01-03, however, makes it clear that the relative nature of the work test must be used in conjunction with the right to control test to determine employee status.[101]

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97. 1C A. LARSON, *supra* note 5, § 43.52. The relative nature of the work test has become the test of choice in many jurisdictions. *Id.* §§ 43.42, 43.51, 43.54.

98. *See* N.D. CENT. CODE § 65-01-03 (1985). For the text of § 65-01-03, see *supra* note 95.

99. *See* 1C A. LARSON, *supra* note 5, §§ 44.10, 44.34, 44.35.

100. Act approved Apr. 20, 1977, ch. 579, § 3, 1977 N.D. Laws 1247, 1248-49 (codified as amended at N.D. CENT. CODE § 65-01-03 (1985)).

101. *See* N.D. CENT. CODE § 65-01-03 (1985). For the text of § 65-01-03, see *supra* note 95.

F. ADMISSIBILITY OF EVIDENCE IN PROCEEDINGS BEFORE THE BUREAU

The Administrative Agencies Practice Act provides that the admissibility of evidence in any administrative proceeding shall ordinarily be determined in accordance with practices in the district court.[102] An agency or person conducting the hearing, however, may waive the statutory rules of evidence if such a waiver is necessary to ascertain the substantial rights of all parties.[103] A specific limitation upon admissibility is that the evidence must be probative.[104] In addition to being probative, the agency must provide procedural due process whenever deprivation of life, liberty, or property may be involved.[105] Thus, evidence that is probative and not unfair is likely to be admissible in proceedings before the Bureau.

G. WEIGHT OF EVIDENCE

The Bureau has a duty to disperse the fund for the payment of compensation and other benefits.[106] In dispersing the fund, the Bureau has full authority to hear and determine evidence of compensability.[107] For example, the Bureau has authority to weigh testimony and to disregard any portion thought to be improbable or incredible.[108] Moreover, the Bureau is not bound to accept as true even uncontroverted evidence or testimony.[109] Thus, the Bureau is

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102. N.D. CENT. CODE § 28-32-06 (1974).

103. *Id.*

104. *Id.*

105. *Id.* For a discussion of the Bureau's administrative procedure, *see infra* notes 182-203 and accompanying text.

106. N.D. CENT. CODE § 65-05-05 (1985). The statute provides:

> Payments made to insured employees injured in course of employment and to their dependents. The bureau shall disburse the fund for the payment of compensation and other benefits as provided in this chapter to employees, or to their dependents in case death has ensued, who:
>
> 1. Are subject to the provisions of this title;
> 2. Are employed by employers who are subject to this title; and
> 3. Have been injured in the course of their employment.
>
> Where compensation is received through some other state act no compensation shall be allowed under this title unless such benefits are awarded by another state as a supplement to this state's benefits.

Id. Claimants having compensable injuries are entitled to immediate medical service at the Bureau's expense. *Id.* at § 65-05-07.

107. *Id.* § 65-05-03 (1985). For a discussion of the Bureau's authority, *see infra* notes 182-203 and accompanying text.

108. *See* Gramling v. North Dakota Workmen's Compensation Bureau, 303 N.W.2d 323, 329 (N.D. 1981) (determining the credibility of witnesses is exclusively a Bureau function).

109. *Id.*

not bound to accept the testimony of claimants, especially if the testimony is uncorroborated, contradictory or vague.[110] Claimants' testimony may be discounted further by the leading character of questions put to the claimant by counsel. The Bureau, moreover, is required to articulate its reasons when evidence or testimony is discounted.[111]

A similar approach is used to weigh medical evidence. Ordinarily, a compensable claim cannot rely on speculative evidence.[112] Expert opinion must be based upon a factual history and scientific reasoning.[113] Expert testimony is then weighed and considered as a whole.[114] The Bureau must also try to resolve conflicts in expert testimony and determine the credibility of witnesses.[115]

H. OTHER ISSUES OF COMPENSABILITY OF CLAIMS FOR COMPENSATION

1. *Specific Exclusions*

There are a number of issues that are critical to the compensability of the claim. For example, the provisions of the North Dakota Workers Compensation Act apply only to hazardous employment.[116] Hazardous employment is defined as "any employment in which one or more employees are employed regularly in the same business or in or about the establishment. . . ."[117] Certain employments, however, are specifically excluded from the hazardous employment.

Agricultural[118] employment is one such exemption. The reasons for agricultural exemptions such as North Dakota's vary in

110. Inglis v. North Dakota Workmen's Compensation Bureau, 312 N.W.2d 318, 323 (N.D. 1981).

111. Satrom v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 824, 832 (N.D. 1982).

112. *See* Kuntz v. North Dakota Workmen's Compensation Bureau, 139 N.W.2d 525, 528 (N.D. 1966) ("causal relationship cannot be based on mere surmise or speculation"), *cited with approval in* Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692, 698 (N.D. 1979).

113. *Satrom*, 328 N.W.2d at 830.

114. *Id.* at 831.

115. *Id.*

116. *See* N.D. CENT. CODE § 65-01-01 (1985). Section 65-01-01 of the North Dakota Century Code sets forth the purpose of the North Dakota Workers Compensation Act, declaring that the Act is to provide for "sure and certain relief" to "workmen injured in hazardous employments, and for their families and dependents." *See id.*

117. *Id.* § 65-01-02(15) (1985 & Supp. 1987).

118. Agricultural is defined as "of, relating to, or used in agriculture...characterized by or engaged in farming as the chief occupation...founded or designed to promote the interest or study of agriculture." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 43 (1981). Agricultural is also defined as "of or having the characteristics of the farmer or his way of life." *Id.*

kind and, some might argue, validity.[119] The best reason in support of the exemption is "the practical administrative difficulty that would be encountered by. . .small farmers in handling the necessary records, insurance, and accounting."[120] Another important reason centers upon the inability of family farmers to add the cost of compensation to their product.[121] Family farmers are usually in a poor position to negotiate the price of a bushel of wheat. Thus, unlike large manufacturers, family farmers are unable to pass along the cost of compensation to consumers.[122]

The North Dakota Supreme Court attempted to define the agricultural service exemption in *Kipp v. Jalbert*.[123] *Kipp* involved a carpenter's claim for compensation for an injury received during the dismantling of a barn.[124] The claimant carpenter had been hired by the farmer to dismantle a barn, salvage the wood, and then build a garage.[125] The court first examined the nature of the alleged employer's business.[126] The court found that the alleged employer was engaged in agricultural service because he was a farmer, and was not employed or involved in another trade, business, profession, or occupation.[127] The court next examined

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119. N.D. CENT. CODE § 65-01-02(15)(a) (1985 & Supp. 1987). The agricultural exemption was declared unconstitutional but not overturned in *Benson v. North Dakota Workmen's Compensation Bureau.* Benson v. North Dakota Workmen's Compensation Bureau, 283 N.W.2d 96 (1979). At a minimum seventeen states are believed to generally exclude farm or agricultural labor from coverage under workers compensation acts. *See* 1 C A. LARSON, *supra* note 5, § 53.10 (background and summary of agricultural exemption); 3 N. HARL, AGRICULTURAL LAW, § 20.03, at 20-20 (1982) ("majority of jurisdictions" exempt some farm labor from coverage). Conditions that limit the application of workers compensation to agricultural employment differ. For instance, some states exempt agricultural employees with less than a statutory set on the basis of casual or seasonal labor. Still others consider whether the employee was engaged in hazardous work or operating power equipment. Like North Dakota, eleven other states distinguish between hazardous and nonhazardous employment as a way to indirectly exclude employees engaged in agricultural service. *See* N. HARL, *supra* at 20-30, n.15.

120. 1C A. LARSON, *supra* note 5, § 53.20.

121. *See id.*

122. *Id.; see* Benson v. North Dakota Workmen's Compensation Bureau, 283 N.W.2d 96, 111 (N.D. 1979) (common knowledge that farmer not able to pass on costs to purchaser). The argument may be of substance if only a few states required compulsory coverage of agricultural workers, but if all states extended coverage to farm labor there would be no competitive disadvantage as far as the domestic market was concerned. 1C A. LARSON, *supra* note 5, § 53.20.

123. 110 N.W.2d 825 (N.D. 1961); *see* Morel v. Thompson, 225 N.W.2d 584, 587-88 (N.D. 1975) (bee-keeping held commercial rather than agricultural); Burkhardt v. North Dakota Workmen's Compensation Bureau, 78 N.D. 818, 830, 53 N.W.2d 394, 400 (1952) ("whole character of the employment shows [claimant] was not employed to perform ordinary farm work"); North Dakota Workmen's Compensation Bureau v. Valker's Greenhouses, Inc., 70 N.D. 515, 522, 296 N.W. 143, 146 (1941) (greenhouse operation found artificial, not agricultural); Lowe v. North Dakota Workmen's Compensation Bureau, 66 N.D. 246, 249, 264 N.W. 837, 838 (1936) ("man who plows a field and sows a crop is engaged in agriculture" whether done for himself or "on an independent contract"). *See generally* 99 C.J.S. *Workmen's Compensation* § 33 (1958 & Supp. 1987) (discussing the agricultural service exemption).

124. Kipp v. Jalbert, 110 N.W.2d 825, 826 (N.D. 1961).

125. *Id.*

126. *Id.* at 828.

127. *Id.*

the nature of the alleged employment.[128] The court held that in order to avoid the agricultural service exemption, the employment "must be in the course of some other [nonagricultural] trade, business, profession, or occupation."[129] The court found that the employer's building project did not constitute engaging in some other business because the project was merely an isolated activity.[130] The court then reasoned that the temporary activity was of insufficient magnitude to establish the farmer as participating in a new course of trade or business.[131] Therefore, the court concluded that the claimant was not entitled to workers' compensation benefits.[132]

Similarly, domestic,[133] railroad,[134] nonresident transportation,[135] and employees of religious organizations engaged in operating or maintaining a place of worship[136] are excluded from the Workers Compensation Act.[137] Despite these exemptions, most North Dakota employers[138] must comply with the provisions of the Act.[139]

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128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 829.
133. N.D. CENT. CODE § 65-01-02(15)(a) (1985 & Supp. 1987). A domestic service exemption applies in all but 24 states. 1C A. LARSON, *supra* note 5, § 50.30. Since domestic service is part of a specific exemption, issues generally involve defining the scope of domestic service. Domestic service has been held to include maid service to a householder and even a sorority. *Id.* Yet, domestic service has excluded services whose essence falls outside household duties such as practical nursing and care of elderly invalids. *Id.*
134. N.D. CENT. CODE § 65-01-02(15)(b) (1985 & Supp. 1987). Railroad employees' remedies are governed by the Federal Employers' Liability Act. 45 U.S.C. §§ 51-60 (1982). The Act is not a workers compensation act but does provide for claims against railroad employers. *See generally* 4 A. LARSON, *supra* note 5, §§ 91.00-91.77 (1987 & Supp. 1987) (discussing conflicts between the Federal Employers' Liability Act and State Compensation Acts).
135. N.D. CENT. CODE § 65-01-02(15)(c) (1985 & Supp. 1987). Subsection 65-01-02(15)(c) exempts 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." *Id.*
136. *Id.* § 65-01-02(15)(d) (1985 & Supp. 1987). Section 65-01-02(15)(d) exempts "[a]ll members of the clergy and employees of religious organizations engaged in the operation, maintenance, and conduct of the place of worship." *Id.* North Dakota, Arkansas and Mississippi expressly exclude charitable or religious employment. *See* 1C A. LARSON, *supra* note 5, § 50.40.
137. N.D. CENT. CODE § 65-01-02(15) (1985 & Supp. 1987).
138. Employer is defined as follows:

> a. The state and all political subdivisions thereof.
> b. All public and quasi-public corporations in this state.
> c. Every person, partnership, 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, association, or corporation, having one or more employees as herein defined.
> f. The president, vice presidents, secretary, or treasurer of a business corporation.

Id. § 65-01-02(10) (1985 & Supp. 1987).
139. Compliance includes annual payment of premiums "determined and fixed" by the Bureau. *Id.* § 65-04-04 (1985).

Employers and others[140] not required to participate in the compensation fund can, however, elect to secure coverage for themselves in addition to their employees.[141] Employers carrying on employments "not classed as hazardous," and therefore not required to comply with the Workers Compensation Act, may comply with the provisions of the Act and will be covered by the Act and are "not liable to respond in damages at common law or by statute."[142] Moreover, even volunteer organizations,[143] inmates,[144] and vocational trainees[145] can be covered.

Injured employees[146] of employers[147] covered by the Act are

140. Those not required to participate in the compensation fund include employers, their spouses and children, volunteer organizations, penal institutions, and participants in vocational retraining or work evaluation programs. *See id.* §§ 65-07-01, 65-06-02, 65-06.1-02, 65-06.2-03, 65-07.1-02 (1985).

141. *See id.* § 65-04-29 (1985).

142. *Id.* Employees of employers carrying on nonhazardous work may, however, before injury, elect not to be covered by the Workers Compensation Act. *Id.*

143. *Id.* § 65-07-01 (1985). Section 65-07-01 provides in part that "any volunteer organization, not otherwise provided for under this title, may contract with the bureau" for coverage in the same manner as employers. *Id.* Volunteer firemen and volunteer disaster emergency trainees, however, are declared employees of municipalities that they serve. *Id.* § 65-06-02 (1985). Volunteer disaster emergency trainees are entitled to the same workers compensation rights as other employees except, oddly, in case of national emergency. *See id.* Section 65-06-02 of the North Dakota Century Code provides that trainees' rights to benefits "shall terminate and cease in the event of any enemy attack on this country," except as to benefits vested at the time of attack. *Id.*

144. *Id.* § 65-06.2-03 (1985). Section 65-06.2-03 of the North Dakota Century Code provides that the governing body of any county or city may elect to cover its inmates pursuant to chapter 65-06.2 of the North Dakota Century Code. *Id.* The county or city making the election is given immunity from liability provided that the provisions of chapter 65-06.2 are met and provided "the premiums as set by the bureau are not in default." *Id.* "Inmate" is defined as a person confined against the inmate's will in a city or county penal institution, or a defendant who elects to perform public service in lieu of a jail sentence. *Id.* § 65-06.2-01 (1985). "Inmate" does not include persons injured in "a fight, riot, recreational activity, or other incident not directly related to the inmate's work assignment." *Id.*

If an inmate "sustains a compensable injury" then the inmate "*may,* upon being released..., be awarded and paid compensation." *Id* § 65-06.2-02(1) (1985) (emphasis added). Secton 65-05-05 provides that "[t]he bureau *shall* disburse the fund for the payment of compensation and other benefits" to injured *employees. Id.* § 65-05-05 (1985) (emphasis added). The language of these statutes suggests that inmates are not entitled to benefits as a matter of law, even though they suffer an otherwise compensable injury. Note, *A time for Recognition: Extending Workmen's Compensation Coverage of Inmates,* 61 N.D. L. REV. 403, 405 (1985).

145. *See* N.D. CENT. CODE § 65-07.1-02 (1985). Section 65-07.1-02 of the North Dakota Century Code provides in relevant part: "Whenever an agency or organization has been approved as an employer...the bureau may contract with the agency or organization for the coverage of participants in a program of vocational training or work evaluation." *Id.* Subsection 65-07.1-01(1) of the North Dakota Century Code defines "employer" as "any agency or organization who sponsors a participant in a vocational training or work evaluation program when such designation has been requested by the agency or organization and has been approved by the bureau." *Id.* § 65-07.1-01(1) (1985).

146. The term employee includes "every person engaged in hazardous employment under any appointment, contract of hire, or apprenticeship, express or implied, oral or written...." *Id.* § 65-01-02(9) (1985 & Supp. 1987). The term "employee" includes elected and appointed officials, aliens, poor relief workers and minors. *Id.* Moreover, volunteer firemen, disaster emergency trainees, and civil air patrol members are deemed employees. *Id.* §§ 65-06-02, 65-06.1-02. Furthermore, persons performing services for another for a remuneration of any kind under any agreement or contract of hire, express or implied, "shall be presumed to be an employee of the person for whom the services are performed, unless he shall maintain a separate business establishment or shall hold himself out to or shall render services to the general public." *Id.* § 65-01-03 (1985).

147. For a definition of employer, see *supra* note 138.

generally bound by the exclusive remedy provisions of the Act.[148] For various reasons, some employees and employers would rather not be bound. An employee might choose not to be bound under circumstances wherein the employee failed to comply with procedural requirements, such as filing. The employee might also prefer common law or other statutory remedies when the employer is clearly at fault, and the probable damage recovery exceeds benefit levels in the Act. An employer might choose not to be covered when the employee contributed substantially to his own injury, or when years of noncompliance with the provisions of the Act could result in a sizable penalty on unpaid past premiums.[149] Most often, the employer's reluctance to admit noncompliance is part of an overall scheme to avoid employment taxes and other expenses common to most employers.

Because some employers and employees would rather not be covered by the Workers Compensation Act, and because only employees are covered by the Act, disputes arise regarding the nature of the employment relationship.[150] Most often the dispute arises after an injury and involves whether the "employee" is in fact an "independent contractor."[151] Persons performing services for remuneration will, as previously noted, be presumed employees.[152] Thus, the party claiming independent contractor status ordinarily bears the burden of proof.[153]

2. *Compensable Injury*

Both injuries by accident[154] arising out of[155] and in the course

148. N.D. CENT. CODE § 65-01-08 (1985). Section 65-01-08 provides in part that employees, their representatives or beneficiaries "have no claim for relief" against employers contributing to the Workers Compensation Fund, "but shall look solely to the fund for compensation." *Id.* Furthermore, § 65-04-28 provides that employers who comply with chapter 65-04 "shall not be liable to respond in damages at common law or by statute for injury to or death of any employee...during the period covered by the premiums." *Id.* § 65-04-28 (1985). Benefits under the Act are "the exclusive remedy against the employer" for injury suffered by North Dakota employees injured in North Dakota. *Id.* at § 65-08-02 (1985). Even out-of-state employees or North Dakota employees injured out-of-state may be bound by the provisions of the North Dakota Workers Compensation Act, or the similar laws of another state. *Id.*

149. *See id.* § 65-04-12 (1985) (employer penalties for failure to comply with compensation provisions).

150. Disputes regarding the nature of the employment relationship arise most often in connection with positions such as truckers, "independent" salespeople, and cab drivers. *See, e.g.*, Lacy v. Grinsteinner, 190 N.W.2d 11, 17 (N.D. 1971) (traveling salesman).

151. For a definition of employee, see *supra* note 146.

152. N.D. CENT. CODE § 65-01-03 (1985). For the text of § 65-01-03 of the North Dakota Century Code, see *supra* note 146.

153. *Id.* § 65-01-03 (1985). The Bureau currently subscribes to the belief that there is no single test to determine whether a worker is an employee as distinguished from an independent contractor. *See* Gregg v. Challburg, 217 Neb. 143, ____, 347 N.W.2d 559, 561 (1984) (must consider all of the facts in determining whether person is employee or contractor).

154. In 1977, the legislature added language to § 65-01-02(7) which expressly limited compensation in cases involving heart attacks and strokes to cases involving unusual exertion. *See* Act

of employment,[156] and diseases fairly traceable[157] to the employment, are compensable in North Dakota.[158] Any statutory distinction between compensable "accident" and occupational

approved Apr. 20, 1977, ch. 579, § 2, 1977 N.D. Laws 1247, 1248 (codified as amended at N.D. CENT. CODE § 65-01-02(7) (1985 & Supp. 1987)). The amendment followed the North Dakota Supreme Court decision in *Stout v. North Dakota Workmen's Compensation Bureau.* Stout v. North Dakota Workmen's Compensation Bureau, 236 N.W.2d 889 (N.D. 1975). In *Stout,* the court followed a majority rule in adopting the usual exertion rule. *Id.* at 894. The rule articulated that a claim, if otherwise within the terms of the Act, "is compensable even though the cause is routine and not accidental," provided that "the result is not foreseen, intended, or anticipated." *Id.* at 894.

Stout involved a claim for death benefits due to heart attack. *Id.* at 890. The rationale in *Stout* was applied to injuries other than heart attack and stroke in *Satrom v. North Dakota Workmen's Compensation Bureau. See* Satrom v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 824, 828 (N.D. 1982). In *Satrom,* the court held that the 1977 amendment applied only to heart attacks and strokes. *Id.* Thus, the usual exertion rule adopted in *Stout* applied to other injuries. *Id.* The court in *Satrom* reaffirmed its approval of the usual exertion rule, quoting from Larson as follows:

> The 'by accident' requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of the routine performance of the claimant's duties. Accordingly, if strain of claimant's usual exertions causes collapse from heart weakness, back weakness, hernia, and the like, the injury is held accidental. A very substantial minority of jurisdictions require a showing that the exertion was in some way unusual, or make other reservations, but this line of decision causes difficulty because of the constant necessity of drawing distinctions between usual and unusual strains.

Id. (quoting 1B A. LARSON, *supra* note 5, § 38.00 (1987)).

The court in *Satrom* concluded that injuries medically related even to usual work exertions are compensable injuries within the meaning of the North Dakota Workers Compensation Act. *Id.*

155. The "arising out of" language of section 65-01-02(7) is a portion of the compensability test that is primarily concerned with causation. *See* 1 A. LARSON, *supra* note 5, §§ 6.00-6.60; N.D. CENT. CODE § 65-01-02(7) (1985 & Supp. 1987) ("'compensable injury' means an injury by accident arising out of and in the course of employment...."). Larson suggests that "[m]ost courts have interpreted 'arising out of employment' to require a showing that the injury was caused by an increased risk to which claimant, as distinct from the general public, was subjected by his employment." 1 A. LARSON, *supra* note 5, § 6.00. A substantial number of courts, including North Dakota, have modified the rule to include employment risks common to the general public. *Id.*

156. The "course of the employment" language of § 65-01-02(7) of the North Dakota Century Code defines work- related causation in terms of time, place, and activity. *See* 1 A. LARSON, *supra* note 5, § 14; N.D. CENT. CODE § 65-01-02(7) (1985 & Supp. 1987) ("'compensable injury' means an injury arising out of and in the course of employment...."). The language requires that an injury arise within the time and space confines of the employment. *Id.* In addition to time and space, the language requires that the injury occur in the course of a work-related activity. *Id.*

157. N.D. CENT. CODE § 65-01-02(7)(a) (1985 & Supp. 1987). Ordinary diseases of life to which the general public is exposed are ordinarily not compensable "except where the disease follows as an incident to, and in its inception is caused by [an employment related hazard]." *Id.* Fairly traceable is further defined as a disease having a "direct causal connection" to work conditions; a disease that follows as a "natural incident" of the work; and, "[c]an be fairly traced to the employment." *Id.* § 65-01-02(12) (1985 & Supp. 1987); *see also* § 65-01-02(12)(d) (diseases of full-time paid firemen and law enforcement officers "presumed to have been suffered in the line of duty.").

In *Syverson v. North Dakota Workmen's Compensation Bureau,* the North Dakota Supreme Court extended the *Satrom* rationale to include diseases such as arthritis. Syverson v. North Dakota Workmen's Compensation Bureau, 406 N.W.2d 688, 690 (N.D. 1987); *see Satrom,* 328 N.W.2d 824. For a discussion of *Satrom,* see *supra* note 154. The court in *Syverson* held that a disease is compensable if a work-related stress is a "substantial contributing factor'" to the disease. *Syverson,* 406 N.W.2d at 690 (quoting *Satrom,* 328 N.W.2d at 831). Syverson related a history of "heavy lifting" at work. The medical expert "presume[d] it's possible" that the lifting caused a unique brand of arthritis and could not find any other explanation for Syverson's increased symptoms. *Id.* at 691. The court held that the expert testimony "clearly demonstrate that the expert considered Syverson's employment to be a substantial contributing factor in the development of his arthritis." *Id.* at 691-92.

158. N.D. CENT. CODE § 65-01-02(7) (1985 & Supp. 1987). Subsection 65-01-02(7) of the North Dakota Century Code provides:

"disease" has become blurred.[159] It is clear, however, that compensability encompasses a wide range of accidents and disease.[160]

3. *Employer Defenses*

Employers' defenses against claims for compensation are limited. Employers most often defend against claims by arguing the claimant's injury is not compensable. For example, an employer might argue that the claimant is not an employee[161] or that the alleged accident did not occur at work.[162] The employer might also challenge the existence of a disability.[163] However, the mere fact that a claimant did not immediately report the alleged accident and seek treatment, that the claimant does not remember all of the details, or that the claimant alleges disabling symptoms beyond

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"Compensable injury" means an injury by accident arising out of and in the course of employment including an injury caused by the willful act of a third person directed against an employee because of his employment, but such term shall not include an injury caused by the employee's willful intention to injure himself or to injure another, nor any injury received because of the use of narcotics or intoxicants while in the course of employment. If an injury is due to heart attack or stroke, such heart attack or stroke must be causally related to the worker's employment, with reasonable medical certainty, and must have been precipitated by unusual stress. Such term, in addition to an injury by accident, includes:

a. Any disease which can be fairly traceable to the employment. Ordinary diseases of life to which the general public outside of the employment is exposed shall not be compensable except where the disease follows as an incident to, and in its inception is caused by a hazard to which an employee is subjected in the course of his employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease includes impairment and effects from radiation fairly traceable to the employment. It need not have been foreseen or expected, but after it is contracted, it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

b. An injury to artificial members.

Id.

159. *See* Syverson v. North Dakota Workmen's Compensation Bureau, 406 N.W.2d 688, 691 (N.D. 1987).

160. Professor Larson believes that the "basic and indispensable ingredient of 'accident' is unexpectedness." 1B A. LARSON, *supra* note 5, § 37.20. In *Satrom v. North Dakota Workmen's Compensation Bureau,* the court determined that an injury is compensable if the "cause was of accidental character" or if "the cause is routine and the result is not foreseen, intended, or anticipated." Satrom v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 824, 827-28 (N.D. 1982) (quoting Stout v. North Dakota Workmen's Compensation Bureau, 236 N.W.2d 889, 894 (N.D. 1975)). The court applied the same rationale to a claimant's development of an arthritic (disease) condition. *Syverson,* 406 N.W.2d at 690.

161. *See, e.g.,* Dunn v. North Dakota Workmen's Compensation Bureau, 191 N.W.2d 181, 184 (N.D. 1971) (partner in a business is not an employee).

162. *See, e.g.,* Mickelson v. North Dakota Workmen's Compensation Bureau, 89 N.W.2d 89, 94 (N.D. 1958) (Bureau's finding of no relationship between injury and employment was justified where expert testimony was in conflict).

163. *See, e.g.,* Sunderland v. North Dakota Workmen's Compensation Bureau, 370 N.W.2d 549, 553 (N.D. 1985) (carcinoma qualifies as a lung disease for purposes of workmen's compensation).

what may be expected is not determinative of compensability.[164] Uninsured employer defenses are limited even more. These employers are statutorily barred from using the common-law defenses of the fellow-servant rule, assumption of risk, and contributory negligence.[165] Moreover, in most cases, a liberal construction of the Act will avoid forfeiture of benefits in favor of compensation.[166]

4. *Benefits Available*

Once the determination of eligibility is made, the worker and/or the worker's dependents will receive benefits. The Act provides four major categories of benefits. These include disability compensation,[167] rehabilitation,[168] permanent impairment,[169] and

164. *See* Robert v. North Dakota Workmen's Compensation Bureau, 321 N.W.2d 501, 504 (N.D. 1980) (liberal construction requires construction "so as to avodi forfeiture and afford relief"); *see also* Inglis v. North Dakota Workmen's Compensation Bureau, 312 N.W.2d 318, 323 (N.D. 1987) (benefit provisions extended to all who can fairly be brought wihtin terms of the act).

165. N.D. CENT. CODE § 65-09-01 (1985). Section 65-09-01 of the North Dakota Century Code provides:

> Liability of uninsured employer for injury to employees - Common-law defenses not available. Any employer subject to the provisions of this title who fails to comply with the provisions of chapter 65-04, shall be liable to his employees for damages suffered by reason of injuries sustained in the course of employment, and also shall be liable to the personal representatives of such employees where death results from such injuries. The employer shall not avail himself in such action of the following common-law defenses:
>
> 1. The defense of the fellow-servant rule;
> 2. The defense of the assumption of risk; or
> 3. The defense of contributory negligence.
>
> The employer shall be liable for the premiums provided for in this title.

Id.

166. *See* Balliet v. North Dakota Workmen's Compensation Bureau, 297 N.W.2d 791, 794 (N.D. 1980) (liberal construction requires construction "so as to avoid forfeiture and afford relief"); *see also* Inglis v. North Dakota Workmen's Compensation Bureau, 312 N.W.2d 318, 323 (N.D. 1987) (benefit provisions extended to all who can fairly be brought within terms of the act).

167. N.D. CENT. CODE § 65-05-09 (Supp. 1987). Section 65-05-09 of the North Dakota Century Code provides:

> Temporary total or permanent total disability - Weekly and aggregate compensation. If an injury causes temporary total or permanent total disability, the fund shall pay to the disabled employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the weekly wage of the claimant, computed to the next highest dollar, subject to a minimum of sixty percent and a maximum of one hundred percent of the average weekly wage in this state, computed to the next highest dollar. If an employee is disabled due to an injury, that employee's benefits will be based upon the wage at the time of the commencement of the first disability. However, if an employee suffers disability but is able to return to employment for a period of twelve months or more, that employee's benefits will be based upon the wage in effect at the time of the recurrence of the disability or upon the wage that employee received prior to the injury, whichever is higher; and the benefits shall be those in effect at the time of that recurrence. In case of temporary total or permanent total disability, there must be paid to such disabled employee an additional sum of ten dollars per week for each child of the employee. Dependency awards for the children

> may be made directly to either parent or guardian at the discretion of the bureau. In no case may the compensation or combined compensation and dependency award exceed the weekly wage of the employee after deductions for taxes, except in the case of volunteer firemen and volunteer disaster emergency trainees. When an employee who is permanently and totally disabled and must be maintained in a nursing home or similar facility has no dependent parent, spouse, or children, part or all of his weekly compensation may be used by the bureau to help defray the cost of such care.

Id.; *see also id.* § 65-05-17 (1985 & Supp. 1987) (provides weekly compensation when death occurs). Disability benefits are based upon loss of earning capacity. Buechler v. North Dakota Workmen's Compensation Bureau, 222 N.W.2d 858, 861 (N.D. 1974).

Total disability exists when a worker "is unable, solely because of his job-related injury, to perform or obtain any substantial amount of labor in his particular line of work, or in any other for which he would be fitted." Jimison v. North Dakota Workmen's Compensation Bureau, 331 N.W.2d 822, 827 (N.D. 1983) (citing Lyson v. North Dakota Workmen's Compensation Bureau, 129 N.W.2d 351, 356 (N.D. 1964)).

168. N.D. CENT. CODE § 65-05.1-01 (1985). Section 65-05.1-01 of the North Dakota Century Code provides:

> Rehabilitation services. The state of North Dakota exercising its police and sovereign powers, declares that disability caused by injuries in the course of employment and disease fairly traceable to the employment create a burden upon the health and general welfare of the citizens of this state and upon the prosperity of this state and its citizens.
>
> It is the purpose of this chapter to provide for the health and welfare by ensuring to workmen's compensation claimants otherwise covered by this title, services, so far as possible, necessary to assist the claimant and the claimant's family in the adjustments required by the injury to the end that the claimant may receive comprehensive rehabilitation services. Such services shall include medical, psychological, economic, and social rehabilitation.

Id. If the Bureau determines "that it is necessary to provide a rehabilitation program to a claimant to comply with the purpose of [the rehabilitation] chapter, the bureau shall enter into a contract with the claimant." *Id.* § 65-05.1-05 (1985). If the Bureau determines that a rehabilitation program is "necessary and feasible" then the worker "shall be available for such program." *Id.* § 65-05.1-04 (1985). The rehabilitation program is usually limited to "an amount equal to two years' weekly compensation and dependent benefits plus twenty-five percent...." *Id.* § 65-05.1-06 (Supp. 1987). However, "in cases of catastrophic injury...additional rehabilitation benefits may be awarded." *Id.* Catastrophic injury is defined as "an acute disabling injury rendering a worker permanently and totally disabled that requires rehabilitation services in order to return the worker to gainful employment." *Id.* Additional awards of up to $10,000.00 can be made for relocation after a worker "successfully concludes a contract." *Id.*

169. *See id.* § 65-05-12 (1985) (setting forth permanent impairment awards for other than scheduled injuries); *see id.* § 65-05-07 (1985) (provides for awards for artificial limbs, glasses, appliances for permanent impairment). Subsection 65-01-02(17) of the North Dakota Century Code defines permanent impairment as "the loss of or loss of use of a member of the body and includes disfigurement resulting from an injury if such disfigurement diminishes the ability of the employee to obtain employment." *Id.* § 65-01-02(17) (1985 & Supp. 1987). "Whole body" impairments, or impairments caused by other than scheduled injuries, may entitle a claimant to a permanent impairment benefit. *See id.* § 65-05-12 (1985). The Bureau prefers to determine whole body impairment on the basis of objective findings as described in the AMERICAN MEDICAL ASSOCIATION'S GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (2d ed. 1984). Copies of the medical guide may be purchased from: Order Department OP-254, American Medical Association, P.O. Box 10946, Chicago, IL 60610.

Bureau Directive 51C provides:

> In order to establish more certainty and uniformity in the award of permanent impairment benefits pursuant to N.D. Cent. Code Sections 65-05-12, 65-05-13, and 65-05-14, the existence and degree of permanent impairment shall be based upon medically and/or scientifically demonstrable findings.
>
> Where not inconsistent with the North Dakota Workmen's Compensation Act, the latest available edition of the "Guides to the Evaluation of Permanent Impairment" by the American Medical Association is adopted as the primary standard for determining permanent impairment.
>
> Nothing in this directive shall be construed to prevent the presentation of

full medical benefits.[170] Disability benefits are payable on a weekly basis and are designed to compensate the worker's loss in earning capacity.[171] While permanent impairment benefits are unrelated to disability benefits, the two are often mistakenly thought to be synonymous.[172] Permanent impairment benefits reflect a measure of damages for the injury itself.[173] Medical benefits are available for hospital and physicians' care.[174] Rehabilitation benefits are available as an alternative to long term or even permanent disability.[175]

In addition, dependency benefits are available for the children[176] of totally disabled workers.[177] The dependency awards may be made to parents or guardians.[178] In case of the death of the worker, unexpended permanent impairment awards are also payable to dependents.[179] If the death is a result of compensable injury, then a weekly benefit is available to dependents.[180] In addition to the weekly benefits, the decedent's dependents may be entitled to supplemental lump sum awards.[181]

I. REHEARING BEFORE THE BUREAU

The term "rehearing" as contemplated by section 28-32-14 of

demonstrable medical and/or scientific findings which are not contemplated by the American Medical Association "Guides" in determining permanent impairment.

North Dakota Workers Compensation Bureau, Directive No. 51C (May 1, 1984).

170. N.D. CENT. CODE § 65-05-07 (1985). Section 65-05- 07 of the North Dakota Century Code provides:

> Immediately after an injury sustained by an employee and during the resulting period of disability, the fund shall furnish to the employee such medical, surgical, and hospital service and supplies as the nature of the injury may require. If the injury causes permanent impairment, the fund, in addition to the specific benefits provided, may furnish such artificial limbs, glasses, braces, equipment, or appliances or provide such rehabilitation services as in the judgment of the bureau may be necessary to rehabilitate such injured employee. The bureau may not provide any permanent additions, remodeling, or adaptations to real estate under this section.

Id.

171. *See* N.D. CENT. CODE § 65-05-09 (1985 & Supp. 1987).

172. *See* N.D. CENT. CODE §§ 65-05-09, -12 (1985 & Supp. 1987).

173. *See* N.D. CENT. CODE § 65-05-12 (1985).

174. *See* N.D. CENT. CODE § 65-05-07 (1985).

175. *See* N.D. CENT. CODE § 65-05.1-01 (1985).

176. "Child" is broadly defined and includes students under age twenty-two. N.D. CENT. CODE § 65-01-02(6) (1985 & Supp. 1987).

177. *Id.* § 65-05-09 (Supp. 1987). Dependency awards equal ten dollars per week. *Id.*

178. *Id.* The awards may be made to either parent or guardian at the discretion of the Bureau. *Id.* In comparison, lump sum awards to injured minors "shall be paid only to the legally appointed guardian of such minor." *Id.* § 65-01-02(9)(a)(4) (1985 & Supp. 1987).

179. *Id.* § 65-05-13 (1985).

180. *Id.* § 65-05-17 (Supp. 1987). The minimum weekly death benefit to the spouse or guardian of the decedent's children is $105.00 per week and the maximum is $210.00 per week. *Id.* Each child as defined in section 65-01-02(6) is entitled to seven dollars per week. *Id.*

181. *Id.* The maximum lump sum award is $300.00 to the spouse or guardian of the decedent's children and $100.00 for each child. *Id.*

the North Dakota Century Code is a misnomer, since no formal hearing has yet been held.[182] After a claim is filed, the "informal hearing" process[183] is initiated. During informal hearing, the

182. *See* N.D. CENT. CODE § 28-32-14 (Supp. 1987). Section 28-32-14 of the North Dakota Century Code provides:

> Any party before an administrative agency who is aggrieved by the decision thereof, within fifteen days after a copy of such decision has been mailed or delivered to such party by the administrative agency, may request a rehearing by such agency; provided, however, that any party appearing before the workers compensation bureau may have thirty days within which to request a rehearing. He shall submit with the request for rehearing a statement of any further showing to be made in the proceedings, and such request and statement shall constitute a part of the record in the proceeding. The administrative agency may deny such request for rehearing or may grant the same on such terms as it may prescribe. This section, however, shall not limit the right of any agency to reopen any proceeding under any continuing jurisdiction which is granted to any such agency by any law of this state.

Id. The North Dakota Supreme Court commented that § 28-32-14 "is clearly premised upon a prior evidentiary hearing having been held," usually in accordance with § 28-32-08 of the North Dakota Century Code. Manikowske v. North Dakota Workmen's Compensation Bureau, 373 N.W.2d 884, 887 n.2 (N.D. 1985). *See* N.D. CENT. CODE § 28-32-08 (1974) (when there is an investigation by an administrative agency the parties involved are entitled to present evidence and be heard). The court stated that in this situation, a party must make a "statement of further showing to be made." *Manikowske,* 373 N.W.2d at 887 n.2. The court noted, however, that the Bureau was exempted from the formal hearing requirement of § 28-32-08, and could proceed by informal hearing if a formal hearing was available on demand. *Id.* The court reasoned that when the Bureau proceeded by informal hearing the claimant was denied the opportunity to make an "initial showing" and therefore the "further showing" requirement was superfluous. *Id.*

The court may have gone farther in *Weber v. North Dakota Workmen's Compensation Bureau* wherein the court remanded the claim to the Bureau to hold a formal hearing despite the fact that the claimant had never requested a hearing. Weber v. North Dakota Workmen's Compensation Bureau, 377 N.W.2d 571, 575 (N.D. 1985).

183. N.D. ADMIN. CODE § 92-01-02-03 (1987). The informal hearing process was reviewed and approved by the North Dakota Supreme Court in *Steele v. North Dakota Workmen's Compensation Bureau.* Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692, 701 (N.D. 1978). The process arises by virtue of § 28-32-08 of the North Dakota Century Code and various provisions of the administrative code. Section 28-32-08 provides, in pertinent part, as follows:

> *Provided, however, that the commissioners of the workmen's compensation bureau may make determinations without the giving of the notice herein provided for.* This provision shall not be construed to relieve the commissioners of the workmen's compensation bureau of the requirements of section 28-32-13 of this chapter [which requires the making of finding of fact, conclusions of law and decision].

N.D. CENT. CODE § 28-32-08 (1974) (emphasis added).

The italicized language exempts the Bureau from providing the parties with a written specification of issues before holding a hearing or making an investigation, or considering a claim. State *ex rel.* Workmen's Compensation Bureau v. Broadway Investment Co., 85 N.W.2d 251, 257 (N.D. 1957). This language, however, does not dispense with the other provisions of the Administrative Agencies Practices Act, particularly § 28-32-05(5) of the North Dakota Century Code. *Steele,* 273 N.W.2d at 700; *see* N.D. CENT. CODE § 28-32-05(5) (Supp. 1987). Subsection 28-32-05(5) provides that the administrative agency must afford the opportunity to present evidence and to examine and cross-examine witnesses at hearings in the same manner permitted under § 28-32-06 of the North Dakota Century Code. N.D. CENT. CODE § 28-32-05(5) (Supp. 1987); *see id.* § 28-32-06 (1974) (admissibility of evidence in administrative agency shall be determined in accordance with practice in the district court).

The Bureau has also promulgated administrative rules which set forth the details of informal hearing and rehearing. These rules appear as follows:

> Rule 92-01-02-03. INFORMAL HEARING. Upon receipt of a claim, the bureau shall investigate the claim, review the file and make a determination. Such

Bureau compiles a claims file,[184] acquires medical reports and other evidence deemed necessary, reviews the evidence without participation by the claimant, and issues its findings of fact, conclusions of law, and decision.[185] Although the informal hearing process takes place without participation by the claimant, the

action shall constitute an informal hearing. Pursuant to N.D. Cent. Code section 28-32-08, no notice of such hearing need be given. Any decision arrived at, as a result of an informal hearing, shall be made pursuant to N.D. Cent. Code section 28-32-13.

Rule 92-01-02-04. REHEARING-FORMAL HEARING. Following an informal hearing, the bureau may set a rehearing on the claim pursuant to the North Dakota Century Code section 28-32-14. Such a rehearing shall be a formal hearing on the claim.

Rule 92-01-02-05. NOTICE OF FORMAL HEARING- SPECIFICATION OF ISSUES. When a claim is assigned for formal hearing, the bureau, at least twenty days prior to such hearing, shall notify in writing all interested parties of the time and place of the hearing. The twenty-day notice may be dispensed with upon agreement by the parties. The bureau shall attach to the notice of hearing a written specification of the issues which are to be considered and determined, and a full opportunity shall be afforded the parties to present evidence and be heard. Formal hearings will be held at the office of the bureau, at the county seat of the county in which the injury occurred, or at such other place as may be agreed upon by the parties.

N.D. ADMIN. CODE §§ 92-01-02-03, 92-01-02-04, 92-01-02-05 (1987).

The Supreme Court did not rule out use of an informal (nonevidentiary) hearing, provided the Bureau will afford the claimant a formal (evidentiary) hearing upon request if a dispute of fact exists, as contemplated by the due process requirements set by the legislature in chapter 28-32 of the North Dakota Century Code. Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692, 701 (N.D. 1978). *See* N.D. CENT. CODE ch. 28-32 (1974 & Supp. 1987) (Administrative Agencies Practices Act).

184. *See* N.D. CENT. CODE § 65-02-11 (1985). Section 65-02-11 of the North Dakota Century Code provides that the Bureau is empowered to undertake whatever investigation it deems necessary to adjudicate a claim for benefits. *Id.* Section 65-02-11 provides:

> Process and procedure under this title shall be governed by the provisions of chapter 28-32. The bureau may make investigation in such manner and at such places as in its judgment shall be best calculated to ascertain the substantial rights of all the parties. Any member of the bureau, and any person specifically designated by the bureau shall have the power to examine witnesses and records, with or without subpoena, to examine, investigate, copy, photograph, and take samples at any pertinent location or facility, to administer oaths to witnesses, to require the attendance of witnesses without fee whenever the testimony is taken at the home, office, or place of work of such witnesses, and generally to do anything requisite or necessary to facilitate or promote the efficient administration of this title. The costs of any medical examination, scientific investigation, medical or expert witness appearance or report, requested or approved by the bureau, relating to a claim for benefits, shall be paid from the bureau general fund.

Id.

185. *See id.* § 28-32-13 (1974). Section 28-32-13 of the North Dakota Century Code provides:

> Within thirty days after the evidence has been received, briefs filed, and arguments closed in a proceeding before an administrative agency, or as soon thereafter as possible, the agency shall make and state concisely and explicitly its findings of fact and its separate conclusions of law, and the decision of the agency based upon such findings and conclusions. The agency shall give notice of its decision or determination in any proceeding heard by it by delivering a copy of such decision or determination to all the parties to the proceeding either personally or by registered or certified mail, and if such notice is given by registered or certified mail, the notice shall be deemed given as of the date of the registry or certification.

Id.

pretermination process comports with due process since the Bureau subsequently affords an opportunity to be heard, as well as counsel at the Bureau's expense.[186] In addition, where disability benefits are at stake, the Bureau must provide pretermination notice.[187]

The informal hearing process culminates in an administrative order specifically detailing the factual findings which support denial, modification, or termination of an award.[188] The administrative order will contain specific findings of fact, which allow claimant's counsel to specifically tailor a case and mold his argument to respond to the precise issues which the decisionmaker regards as crucial.[189] If the claimant disagrees with the factual

186. *See Steele,* 273 N.W.2d at 701-02; Davis v. North Dakota Workmen's Compensation Bureau, 317 N.W.2d 820, 821-22 (N.D. 1982). In *Steele* the North Dakota Supreme Court explained that the informal hearing process was not violative of due process because the Bureau's decision was not final, in that the claimant could seek reconsideration, present witnesses, and cross-examine adverse witnesses. *See Steele,* 273 N.W.2d at 699-700. It is also important to note that the claimant's legal fees are paid by the Bureau, giving further protection to his legal rights. *See id.* at 700.

The *Steele* court cited the United States Supreme Court decisions involving pretermination notice and opportunity to be heard. *Id.* at 699. In *Goldberg v. Kelly* the United States Supreme Court required an evidentiary hearing prior to termination of welfare benefits. Goldberg v. Kelly, 397 U.S. 254, 264 (1970). In *Mathews v. Eldridge,* however, the Court held that a hearing was not required prior to termination of federal social security disability benefits. Mathews v. Eldridge, 424 U.S. 319, 349 (1976). The *Mathews* Court explained that the disability claimant was entitled to seek reconsideration before the administrative agency, and if the disability was found to extend beyond the date of termination, the claimant was entitled to retroactive payments. *Id.* at 339.

The *Steele* court did not find the *Mathews* analysis to be dispositive of the issue because in *Mathews,* the claimant declined to seek reconsideration, while in *Steele,* the claimant requested reconsideration. *Steele,* 273 N.W.2d at 699; *see Mathews,* 424 U.S. at 324-25. Thus, the Bureau's initial determination of the claim via informal hearing is never a "final decision," since the claimant has a right to an evidentiary hearing, as well as to subsequent judicial review, before the decision becomes final.

187. Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770 (N.D. 1988). The court held that the Bureau must provide pretermination notice that disability benefits would be terminated, and a summary of the evidence supporting that termination so that the claimant has an opportunity to respond, thereby decreasing the risk of an erroneous deprivation. *Id.* at 775.

188. *See* N.D. CENT. CODE § 28-32-13 (1974) (agency must make explicit findings of fact and conclusions of law). The adversary concept has limited application to claims for benefits. The Bureau in carrying out its statutory duties acts in a quasi-judicial capacity and should be primarily concerned with the proper, fair, and just determination of any claim submitted. *Steele,* 273 N.W.2d at 702. Thus, the Bureau is obliged to reconcile conflicting evidence, and where a medical record contains discrepancies, the Bureau must, as part of its preliminary investigative duty, refer the report back to the "maker" to clarify the discrepancies. *In re* Bromley, 304 N.W.2d 412, 416-17 (N.D. 1981). Furthermore, the Bureau may not simply ignore competent medical testimony without expressly setting forth in its findings of fact, adequate reasons, which are supported by the record, for doing so. Satrom v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 824, 832 (N.D. 1982). As a result of these holdings, the Bureau has become more adept at considering the entire record, reconciling the evidence, and issuing specific factual findings which allow the claimant to mold an argument to respond to the crucial issues.

189. *See* N.D. CENT. CODE § 28-32-13 (1974) (agency must make explicit findings of fact and conclusions of law). The specific findings of fact set forth in the Bureau's administrative order help guarantee procedural due process of law. While the Bureau's findings of fact are issued pursuant to a no-notice, nonevidentiary hearing, the order serves as notice to the claimant about what evidence is considered by the agency as crucial. Thus, the claimant may specifically tailor his evidence at the "rehearing." The United States Supreme Court, discussing a similar scheme used in the federal social security system, stated:

> A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency.

findings, he may request rehearing within thirty days after the decision has been mailed or delivered to him, and present additional evidence from lay witnesses or medical experts.[190] This additional evidence may be submitted by sworn affidavit, or taken by way of deposition.[191] Though the claimant has no subpoena power, he may compel attendance of a witness by requesting the Bureau to issue the subpoena.[192] The Bureau frequently pays the cost to depose medical experts, but only after approval is sought and obtained.[193]

> In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg,* enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Mathews v. Eldridge, 424 U.S. 319, 345-46 (1976).

190. N.D. CENT. CODE § 28-32-14 (Supp. 1987). The Bureau must grant formal hearing whenever there exists a dispute of material fact. Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692, 701 (N.D. 1978).

191. There are no formal rules requiring the evidence to take any particular form. However, the evidence submitted should be germane to the issue of concern to the Bureau. For example, where the issue is medical causation, it is much more helpful to submit evidence from the claimant's treating physician than his relatives and coemployees. On the other hand, if there is question whether an incident occurred, it is not always necessary to parade a posse of witnesses by the commissioners at hearing. Affidavits can be of immense help.

192. *Steele,* 273 N.W.2d at 701; *see* N.D. CENT. CODE § 28-32-09 (Supp. 1987). Section 28-32-09 of the North Dakota Century Code provides:

> Any officer, examiner, chairman, or acting chairman of any administrative agency, upon request of any party to a hearing conducted by it, or upon his own motion on behalf of the agency, shall require by subpoena the attendance and testimony of witnesses and the production of the documents and other objects described in such subpoena at such hearing or proceeding, and the cost of serving such subpoena shall be paid by the person or agency requesting it. A subpoena to compel a witness to produce documentary evidence will be issued to a party other than the agency only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired. The deposition of a witness or party in any proceeding before an agency may be taken in the same manner and on the same notice as in a civil action pending in the district court. Interrogatories may be sent to any witness or party in any proceeding in the same manner and on the same notice as in an action pending in the district court. A party, other than the administrative agency, must first show good cause before undertaking discovery proceedings, including interrogatories. Any witness who is subpoenaed under the provisions of this section and who appears at the hearing, or whose deposition is taken, shall receive the same fees and mileage as a witness in a civil case in the district court, and such fees shall be paid by the party or agency at whose instance the witness appears or his deposition is taken.

Id.

193. The Bureau normally pays the cost to depose expert witnesses, even though there is no statutory duty for it to do so. If the claimant's counsel, however, requests cross-examination of all the claimant's treating and consulting physicians, the Bureau responds by advising the claimant he may have the Bureau subpoena these witnesses to hearing, and that the claimant will be responsible for the fee available to a witness in a civil case before district court. *See* N.D. CENT. CODE § 28-32-09 (1974 & Supp. 1987) (cost of deposing witness shall be paid by the party on whose behalf the witness appears). For the text of § 28-32-09, see *supra* note 192.

At formal hearing, counsel need not introduce into evidence the material received from the Bureau's claims file.[194] The Bureau will certify its claims file as the record on appeal, along with the hearing and deposition transcripts.[195] With the exception of medical records, which are confidential, the Bureau's record is open to the public.[196] Objections to the Bureau's compiled record must be made at the hearing or they are deemed waived.[197] Also, the Bureau is not bound by the formal rules of evidence, and all evidence that is probative will be considered.[198] The Bureau will

194. *See* Gramling v. North Dakota Workmen's Compensation Bureau, 303 N.W.2d 323, 327 (N.D. 1981). In *Gramling,* the North Dakota Supreme Court stated: "[T]his court will review the record which was before the Bureau, the transcript of the formal hearing, and evidence presented at the hearing; but we will not consider any material outside of this record." *Id.* Section 28-32-07 of the North Dakota Century Code provides that an agency may consider evidence not presented at a formal hearing in the following manner:

> If an administrative agency desires to avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by such agency, in addition to the evidence presented at any formal hearing, it may do so after first transmitting a copy of such information or evidence or an abstract thereof to each party of record in the proceeding, and after affording each such party, upon written request, an opportunity to examine such information or evidence and to present evidence in connection therewith and to cross-examine the person furnishing such information at a further public hearing to be called and held upon at least ten days' notice given by registered or certified mail. Nothing contained in this section prevents any administrative agency from taking notice of any fact or facts set forth in its duly adopted rules or any facts which are judicially noticed by the courts of this state.

N.D. CENT. CODE § 28-32-07 (Supp. 1987).

195. The Bureau will submit the certified record to the clerk of district court. The claimant's counsel receives an index of each item of evidence in the record.

196. *See* N.D. CENT. CODE § 44-04-18 (1985); *id.* § 65-05-32 (1985). *See generally* 85-23 N.D. Op. Att'y Gen. 77 (1985) (discussing open records laws in context of worker's compensation minute record). Section 44-04-18 of the North Dakota Century Code provides:

> Access to Public Records — Penalty.
> 1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.
> 2. Violations of this section shall be punishable as an infraction.

N.D. CENT. CODE § 44-04-18 (1985). Section 65-05-32 provides that the Bureau "shall keep the medical files of claimants closed to the public and may, at the request of a claimant, close the medical portion of the hearing...." *Id.* § 65-05-32 (1985). Employers, however, "shall have access to the file of the claimant." *Id.*

Claimants filing claims for compensation consent to "the use by the bureau, in any proceeding by it or to which it is a party in any court, of any information which was received by any doctor, hospital, or clinic in the course of any examination or treatment of the claimant." *Id.* at § 65-05-30 (1985). In addition, the act of filing a claim "shall authorize a doctor, hospital, or clinic to disclose any such information to the bureau or to its representative." *Id.*

197. *Gramling,* 303 N.W.2d at 327.

198. *See* N.D. CENT. CODE § 28-32-06 (1974). Section 28-32-06 of the North Dakota Century Code provides:

have legal counsel at the hearing. Although this is infrequent, the employer may be represented as well. After the hearing and expert depositions are completed, the commissioners review the evidence, and issue a final administrative order, from which the only recourse is an appeal to district court.[199]

In administering the Workers Compensation Act, the Bureau has the authority to make, promulgate, and enforce rules necessary to carry out its provisions.[200] These rules must be promulgated pursuant to the terms of the Administrative Agencies Practice Act.[201] A rule of construction provides that there is a presumption

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> The admissibility of evidence in any proceeding before an administrative agency shall be determined, insofar as circumstances will permit, in accordance with the practice in the district court. An administrative agency, or any person conducting an investigation or hearing for it, may waive the usual common-law or statutory rules of evidence if such waiver is necessary to ascertain the substantial rights of all the parties to the proceeding, but only evidence of probative value shall be accepted. All objections offered to evidence shall be noted in the record of the proceeding. No information or evidence except such as shall have been offered and made a part of the official record of the hearing shall be considered by the administrative agency, except as otherwise provided in this chapter.

Id.

199. If claimant appeals and subsequently discovers that there is additional evidence, or evidence excluded by the Bureau, he may move the district court to consider the evidence, pursuant to the terms of § 28-32-18 of the North Dakota Century Code. *See* N.D. CENT. CODE § 28-32-18 (1985). Section 28-32-18 provides:

> If an application for leave to adduce additional evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the administrative agency, or that such evidence is material to the issues involved and was rejected or excluded by the agency, the court may order that such additional evidence be taken, heard, and considered by such agency on such terms and conditions as the court may deem proper. After considering such additional evidence, the administrative agency may amend or modify its findings of fact, conclusions of law, and decision, and shall file with the court a transcript of such additional evidence together with its new or modified findings of fact, conclusions of law, and decision, if any.

Id.

200. *Id.* § 65-02-08 (Supp. 1987). Section 65-02-08 of the North Dakota Century Code provides:

> The bureau shall make, promulgate, and enforce such rules, not inconsistent with the provisions of this title, as may be necessary to carry out the provisions of this title. All fees on claims for legal, medical, and hospital services rendered under this title to any claimant must be in accordance with schedules of fees adopted or to be adopted by the bureau. The bureau shall specify the amount allowable for court reporter and attorney's fees in proceedings before the bureau and shall pay the same from the bureau general fund, provided further that proceedings are defined as commencing after action by the bureau which reduces or denies a claim. Such attorney's fees shall constitute the entire remuneration for the claimant's attorney for all services before the bureau. Nothing provided herein may be construed to prevent a claimant or employer from hiring or paying his or her own attorney.

Id.

201. *See id.* §§ 28-32-01 to -05 (1974 & Supp. 1987) (Administrative Agencies Practices Act).

of validity of a rule or regulation of an administrative agency, comparable to the presumption of validity of a statute.[202] The rule, however, must be consistent with the authorizing statute. Any rule that exceeds the statutory authority is considered void.[203]

J. APPEAL

An appeal must be taken to the district court of the county in which the injury occurred or the claimant resides, within thirty days.[204] A district court acquires jurisdiction when it is designated by law to hear the administrative appeal, or if no court is designated, a district court in the county which has heard a hearing on the matter has jurisdiction.[205] Similarly, the district court will have no jurisdiction to entertain an appeal filed outside the thirty-day time limit.[206] Rule six of the North Dakota Rules of Civil Procedure provides guidance in the computation of time of service. This rule mandates that an additional three days be added to the prescribed time period, when service is made by mail.[207] Since the

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202. Newman Signs Inc. v. Hjelle, 268 N.W.2d 741, 750 (N.D. 1978). *See* N.D. CENT. CODE § 28-32-03(3) (Supp. 1987) (rule has same force as a law until amended or repealed).

203. Moore v. North Dakota Workmen's Compensation Bureau, 374 N.W.2d 71, 74 (N.D. 1985).

204. N.D. CENT. CODE § 65-10-01 (1985); *id.* § 28-32-15 (1974 & Supp. 1987). Section 65-10-01 of the North Dakota Century Code provides:

> If the final action of the bureau denies the right of the claimant to participate at all in the fund on the ground that the injury was self-inflicted, or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claim, or if the bureau allows the claimant to participate in the fund to a lesser degree than that claimed by the claimant, if such allowance is less than the maximum allowance provided by this title, the claimant may appeal to the district court of the county wherein the injury was inflicted or of the county in which the claimant resides. An employer may also appeal a decision of the bureau in any injury case in the manner prescribed in this section. An appeal involving injuries allegedly covered by insurance provided under contracts with extraterritorial coverage shall be triable in the district court of Burleigh County. Any appeal under this section shall be taken in the manner provided in chapter 28-32. Any appeal to the district court shall be heard on the record, transmitted from the bureau, and, in the discretion of the court, additional evidence may be presented pertaining to the questions of law involved in the appeal.

Id. § 65-10-01 (1985). Section 28-32-15 provides that an appeal must be taken within thirty days of the notice of the decision. *Id.* § 28-32-15 (1974 & Supp. 1987).

205. Wagner v. North Dakota Board of Barber Examiners, 186 N.W.2d 570, 572 (N.D. 1971); *see also* BoyKo v. North Dakota Workmen's Compensation Bureau, 409 N.W.2d 638, 640-41 (N.D. 1987) (claimant has obligation to perfect appeal to the district court which has jurisdiction to hear it, which is either the court wherein the injury was inflicted or the court for the county wherein the claimant resides).

206. Indianhead Truck Line, Inc. v. Thompson, 142 N.W.2d 138, 140 (N.D. 1966); *see* N.D. CENT. CODE § 28-32-15 (1974 & Supp. 1987) (appeal must be taken within thirty days of the notice of the decision); *see generally* 3 A. LARSON, *supra* note 5, § 80.52(a), n.20-23 (1987) (discussing enforcement of time periods for appeal).

207. N.D.R. CIV. P. 6(e).

Bureau serves its order by certified mail, the appeal must be taken thirty-three days from the date of the affidavit of service mail.

In addition to the time and location constraints on an appeal, notice of appeal and specifications of error must be served upon the attorney general or his assistant.[208] Further procedural requirements for an effective appeal include filing notice of appeal, specification of error, proof of service, and undertaking with the clerk of district court.[209]

The court's review of administrative decisions is governed by section 28-32-19 of the North Dakota Century Code.[210] Section 28-32-19 requires a three-step process to determine whether: (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency decision is supported by the conclusions of law.[211] The standard of review accords considerable latitude to the expertise of the administrative agency.[212] The district court considers the

208. N.D. CENT. CODE § 28-32-15 (1974 & Supp. 1987).

209. *Id.* All of the requirements of statute must be strictly complied with. *Indianhead Truck Line,* 142 N.W.2d at 140; *In re* Bjerke's Estate, 137 N.W.2d 225, 227 (N.D. 1965).

210. *See* N.D. CENT. CODE § 28-32-19 (Supp. 1987). Section 28-32-19 of the North Dakota Century Code provides:

> Scope of and procedure on appeal from determination of administrative agency. The court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 28-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such hearing, the court shall affirm the decision of the agency unless it shall find that any of the following are present:
>
> 1. The decision or determination is not in accordance with the law.
> 2. The decision is in violation of the constitutional rights of the appellant.
> 3. Provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions and decision of the agency are not supported by its findings of fact.
>
> If the decision of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the decision of the court.

Id.

211. *See id.*

212. Skjefte v. Job Service North Dakota, 392 N.W.2d 815, 817-18 (N.D. 1986); Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979). In *Grace v. North Dakota Workmen's Compensation Bureau,* the court summarized the standards it uses in reviewing the decisions of administrative agencies:

> 1. We do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence.

appeal on briefs, and oral argument is scheduled only if a party specifically requests it. On appeal, the North Dakota Supreme Court considers the findings of fact, conclusions of law, and decision of the Bureau, not that of the district court.[213]

K. REOPENING

If a claimant fails to perfect an appeal, section 65-05-03 of the North Dakota Century Code provides that the Bureau's decision shall be final and shall be entitled to the same faith and credit as a judgment of a court record.[214] Thus, the general principle of res judicata applies to administrative decisions which have not become subject to appeal.[215] Generally, only those decisions involving issues capable of final determination come within the principle of res judicata.[216] Therefore, Bureau determinations concerning jurisdiction over the claim, relation of the injury to employment, or, the status of an individual as an employee will be given res judicata effect upon the failure to appeal.[217] Those issues which are not capable of final determination, however, cannot be given res judicata effect.[218] An example is the extent of disability. Once the

2. We exercise restraint when we review administrative agency findings.
3. It is not the function of the judiciary to act as a super board when reviewing administrative agency determinations.
4. We will not substitute our judgment for that of the qualified experts in the administrative agencies.

Grace v. North Dakota Workmen's Compensation Bureau, 395 N.W.2d 576, 579 (N.D. 1986) (quoting Skjefte v. Job Service North Dakota, 392 N.W.2d 815, 817-18 (N.D. 1986)).

The philosophy concerning these limitations on judicial review was articulated by the North Dakota Supreme Court in *Geo. E. Haggart, Inc. v. North Dakota Workmen's Compensation Bureau:*

> The general frame of the power of judicial review is to keep the administrator within the valid statute which guides him and keep him from unreasonable excesses in the exercise of his function, and to ascertain whether there is warrant in the law and the facts for what the administrative agency has done, the court being limited to questions affecting constitutional power, statutory authority, and the basic prerequisites of proof. The primary limitation upon the power of the court to review is in regard to matters calling for the exercise of expert judgment which are committed to the discretion of the administrative agency. Thus, judicial review is extremely limited in regard to findings of fact and to expert judgments of an administrative agency acting within its statutory authority. The courts must not usurp the functions of the administrative agency nor intrude upon the domain which the legislature has entrusted to the agency.

Geo. E. Haggart, Inc. v. North Dakota Workmen's Compensation Bureau, 171 N.W.2d 104, 111 (N.D. 1969) (quoting 2 AM. JUR. 2D *Administrative Law* § 612 (1962)).

213. *Geo. E. Haggart, Inc.*, 171 N.W.2d at 110.

214. N.D. CENT. CODE § 65-05-03 (1985).

215. *See* Knutson v. North Dakota Workmen's Compensation Bureau, 120 N.W.2d 880, 881 (N.D. 1963).

216. *See* 82 AM. JUR. 2D *Workmen's Compensation* § 598 (1976) (citations omitted).

217. *See id.*

218. *Id.*

Bureau has accepted a claim, it cannot conclusively order that the extent of claimant's entitlement is capable of final determination because disability is subject to change.[219]

Section 65-05-04 also provides that the Bureau has the continuing jurisdiction to reopen any claim properly filed.[220] However, there is no appeal from a Bureau decision not to reopen a claim after the Bureau's decision has become final.[221]

III. CONCLUSION

The North Dakota Workers Compensation Act developed in a

219. Lass v. North Dakota Workmen's Compensation Bureau, 415 N.W.2d 796, 799-800 (N.D. 1987). The general rule, in other jurisdiction's appeals, is as follows:

> The general rule with respect to the effect upon the application of the principles of res judicata to decisions under workmen's compensation acts, of a provision authorizing the modification of an award upon a showing of a change in the employee's condition, is that a compensation award is an adjudication as to the condition of the injured workman at the time it is entered, and conclusive of all matters adjudicable at that time, but is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award upon a showing that the employee's physical condition has changed.

Id.

Of course, this is not to say that no Bureau order addressing disability may become res judicata. The order of disability will become final and binding on the date the order is issued.

220. *See* N.D. CENT. CODE § 65-05-04 (1985).

221. *See id.* § 65-05-03 (1985). The failure to recognize a distinction between issues capable of final determination and those subject to change, combined with the language contained in § 65-05-04 that it is within the discretion of the commissioners whether to reopen a claim, has led to a widespread belief by claimant's counsel that future disability too may become res judicata. *See id.* § 65-05-04 (1985). This belief emanates from the North Dakota Supreme Court's holdings in *Jones v. North Dakota Workmen's Compensation Bureau* and *Manikowske v. North Dakota Workmen's Compensation Bureau. See* Jones v. North Dakota Workmen's Compensation Bureau, 334 N.W.2d 188, 191 (N.D. 1983); Manikowske v. North Dakota Workmen's Compensation Bureau, 338 N.W.2d 823, 824 (N.D. 1983). The *Jones* court stated:

> We believe that the meaning of § 65-05-04, N.D.C.C., is clear and unambiguous. The statute allows the Bureau to review an award at any time and to end, diminish, or increase the compensation previously awarded. A claimant may then appeal the Bureau's decision on its review of the award in accordance with the provisions of §§ 65-10-01 and 28-32-15, N.D.C.C. After the Bureau's order on that claim has become final, the claimant is always entitled to submit additional evidence and request that the Bureau reopen his claim. The Bureau's decision regarding whether or not to reopen the original claim, however, is discretionary and the claimant has no right to appeal from the decision. It is evident that our legislature was aware of the possible consequences of not allowing a claimant the right to appeal from such a decision when it amended § 65-05-04, N.D.C.C., in 1981. *See* Minutes of the Senate Committee on Industry, Business and Labor, January 12, 1981 [S.B. 2127]; § ch. 643, 1981 S.L.
>
> The language of § 65-05-04, N.D.C.C., does not permit us to read into it the right of a claimant to appeal from the Bureau's decision not to reopen a claim. If greater safeguards are needed to protect a claimant's ability to continue to participate in the Workmen's Compensation Fund, it is within the province of the legislature, and not the judiciary, to provide such protection.

Jones, 334 N.W.2d at 191. However, in *Jones*, the issues concerned Jones' eligibility for disability benefits for a period prior to the date of the administrative decision. *Id.* at 189. Past disability is clearly capable of final determination. Whether Jones could receive benefits in the future, should he show a change in medical conditions, was not addressed.

tradition that provides sure and certain relief to workers injured in the course of hazardous employment. Unique among states, the Act provides for compulsory participation in an exclusive state fund. Most important, the Act provides immunity to covered employers and provides no-fault benefits for injured North Dakota employees.