

ASSEMBLY BILL NO. 420—ASSEMBLYMAN CLABORN

MARCH 19, 2007

Referred to Committee on Commerce and Labor

SUMMARY—Makes various changes relating to workers' compensation. (BDR 53-155)

FISCAL NOTE: Effect on Local Government: May have Fiscal Impact.
Effect on the State: Yes.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to workers' compensation; enacting provisions relating to the calculation of the average monthly wage; enacting provisions relating to injured employees who are discharged for misconduct unrelated to their injuries; revising provisions regarding injured employees who accept lump sum settlements in lieu of vocational rehabilitation services; revising provisions governing administrative fines and benefit penalties; providing for the withdrawal of the certification or authorization of insurers and third-party administrators that commit certain violations; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides for the payment of workers' compensation to an employee who is injured or killed during the course of employment or after incurring an occupational disease. The amount of compensation paid to an injured employee is determined by calculating the injured employee's average monthly wage. (Chapters 616A-617 of NRS)

If an insurer miscalculates the injured employee's average monthly wage and overpays the injured employee, the insurer may, at any time, recalculate the injured employee's average monthly wage and reduce his compensation to recover the amount of the overpayment. (NRS 616C.155; *Ayala v. Caesars Palace*, 119 Nev. 232 (2003)) However, if an insurer miscalculates the injured employee's average monthly wage and underpays the injured employee, the injured employee may recover the underpayment only if the injured employee contests the calculation within 70 days after the insurer's determination. (NRS 616C.315)

Section 2 of this bill allows the injured employee, at any time during the period he is entitled to receive compensation, to seek a recalculation of his average monthly wage based on any error, omission, neglect or wrongful act of the insurer.



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17 However, **section 2** does not allow the injured employee to seek a recalculation if
18 the issue of his average monthly wage was previously adjudicated to a final
19 decision in an administrative or judicial proceeding.

20 Existing case law provides that if an injured employee is discharged from his
21 employment for misconduct unrelated to his injury, the reasons for his discharge
22 are not relevant in determining the injured employee's right to compensation unless
23 the evidence shows that those reasons, rather than the injury, caused the injured
24 employee's inability to secure subsequent work. (*Hudson v. Horseshoe Club*
25 *Operating Co.*, 112 Nev. 446 (1996)) **Section 3** of this bill enacts procedures and
26 evidentiary standards for proceedings in which an insurer seeks to deny or suspend
27 an injured employee's compensation because the injured employee was discharged
28 for misconduct.

29 **Sections 6 and 7** of this bill amend existing law to provide that if an insurer
30 offers an injured employee a lump sum settlement in lieu of vocational
31 rehabilitation benefits, the amount of the lump sum settlement must not be less than
32 50 percent of the maximum amount of vocational rehabilitation benefits due to the
33 injured employee. (NRS 616C.580, 616C.595)

34 Existing law authorizes the Administrator of the Division of Industrial
35 Relations of the Department of Business and Industry to impose certain sanctions,
36 including administrative fines and benefit penalties, against insurers and third-party
37 administrators that violate the laws governing workers' compensation. (NRS
38 616D.120) Existing law also authorizes the Commissioner of Insurance to suspend
39 or withdraw the certification or authorization of insurers and third-party
40 administrators for such violations. (NRS 616B.327, 616B.431, 616B.472,
41 616D.120)

42 **Section 9** of this bill requires the Commissioner of Insurance to withdraw the
43 certification or authorization of an insurer or third-party administrator if the insurer
44 or third-party administrator commits three violations during any period of 180
45 consecutive calendar days and the Administrator imposes administrative fines or
46 benefit penalties, or any combination thereof, against the insurer or third-party
47 administrator because of those violations.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Chapter 616C of NRS is hereby amended by adding
2 thereto the provisions set forth as sections 2 and 3 of this act.

3 **Sec. 2. 1. *Notwithstanding the provisions of subsection 3 of***
4 ***NRS 616C.315 and except as otherwise provided in this section, if***
5 ***an injured employee is receiving compensation based on a***
6 ***calculation of his average monthly wage as determined pursuant***
7 ***to the regulations adopted by the Administrator pursuant to NRS***
8 ***616C.420, the injured employee may, at any time during the period***
9 ***he is entitled to receive such compensation, request a hearing***
10 ***before a hearing officer pursuant to the provisions of NRS***
11 ***616C.315 to 616C.385, inclusive, asking for a recalculation of his***
12 ***average monthly wage.***

13 **2. *The injured employee is entitled to have his average***
14 ***monthly wage recalculated if he proves by a preponderance of the***



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1 *evidence that the insurer calculated his average monthly wage*
2 *improperly or incorrectly as a result of:*

3 *(a) The use of any improper or incorrect information or*
4 *methodology;*

5 *(b) The failure to use any proper or correct information or*
6 *methodology;*

7 *(c) Any error of law or fact; or*

8 *(d) Any other error, omission, neglect or wrongful act.*

9 *3. If the injured employee proves that the insurer calculated*
10 *his average monthly wage improperly or incorrectly, the insurer*
11 *shall:*

12 *(a) Increase the injured employee's future compensation based*
13 *on the correct average monthly wage; and*

14 *(b) Pay the injured employee a lump sum in an amount equal*
15 *to the underpayment of compensation for the period during which*
16 *the insurer was using the incorrect average monthly wage.*

17 *4. The provisions of this section do not apply to an injured*
18 *employee if the issue of his average monthly wage was previously*
19 *adjudicated to a final decision in:*

20 *(a) A hearing before a hearing officer or appeals officer*
21 *pursuant to the provisions of NRS 616C.315 to 616C.385,*
22 *inclusive; or*

23 *(b) Any proceedings for judicial review.*

24 **Sec. 3. 1. If an injured employee is discharged from his**
25 **employment as a result of misconduct, an insurer may deny**
26 **compensation to the injured employee because of that discharge**
27 **for misconduct only if:**

28 *(a) Within the period set forth in subsection 2, the insurer*
29 *requests a hearing before a hearing officer pursuant to the*
30 *provisions of NRS 616C.315 to 616C.385, inclusive, asking for an*
31 *order denying the injured employee's right to compensation; and*

32 *(b) The insurer proves by a preponderance of the evidence*
33 *that:*

34 *(1) The injured employee was discharged from his*
35 *employment solely for his misconduct and not for any reason*
36 *related to his claim for compensation; and*

37 *(2) It is the injured employee's discharge from his*
38 *employment for misconduct, and not his injury, that is the sole*
39 *cause for the injured employee's inability to return to work.*

40 *2. An insurer waives its rights under subsection 1 if the*
41 *insurer does not request a hearing within 70 days after the date on*
42 *which the injured employee is discharged from his employment for*
43 *misconduct or the date on which the injured employee files a*
44 *claim for compensation, whichever date is later.*



1 **3. An insurer may not deny or suspend compensation to an**
2 **injured employee who is discharged from his employment as a**
3 **result of misconduct unless the insurer is authorized to take such**
4 **action pursuant to an order issued by a hearing officer, appeals**
5 **officer or court in accordance with the provisions of this section.**

6 **4. For the purposes of this section, in determining whether an**
7 **injured employee has been discharged for "misconduct," a**
8 **hearing officer, appeals officer or court must apply the same legal**
9 **standards that are used to determine whether a person is ineligible**
10 **for unemployment benefits pursuant to NRS 612.385 for**
11 **misconduct connected with his work.**

12 **Sec. 4.** NRS 616C.315 is hereby amended to read as follows:

13 616C.315 1. Any person who is subject to the jurisdiction of
14 the hearing officers pursuant to chapters 616A to 616D, inclusive, or
15 chapter 617 of NRS may request a hearing before a hearing officer
16 of any matter within the hearing officer's authority. The insurer
17 shall provide, without cost, the forms necessary to request a hearing
18 to any person who requests them.

19 2. A hearing must not be scheduled until the following
20 information is provided to the hearing officer:

21 (a) The name of:

22 (1) The claimant;

23 (2) The employer; and

24 (3) The insurer or third-party administrator;

25 (b) The number of the claim; and

26 (c) If applicable, a copy of the letter of determination being
27 appealed or, if such a copy is unavailable, the date of the
28 determination and the issues stated in the determination.

29 3. Except as otherwise provided in NRS 616B.772, 616B.775,
30 616B.787 and 616C.305, **and section 2 of this act**, a person who is
31 aggrieved by:

32 (a) A written determination of an insurer; or

33 (b) The failure of an insurer to respond within 30 days to a
34 written request mailed to the insurer by the person who is aggrieved,
35 ➔ may appeal from the determination or failure to respond by filing
36 a request for a hearing before a hearing officer. Such a request must
37 include the information required pursuant to subsection 2 and must
38 be filed within 70 days after the date on which the notice of the
39 insurer's determination was mailed by the insurer or the unanswered
40 written request was mailed to the insurer, as applicable. The failure
41 of an insurer to respond to a written request for a determination
42 within 30 days after receipt of such a request shall be deemed by the
43 hearing officer to be a denial of the request.

44 4. Failure to file a request for a hearing within the period
45 specified in subsection 3 may be excused if the person aggrieved



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1 shows by a preponderance of the evidence that he did not receive
2 the notice of the determination and the forms necessary to request a
3 hearing. The claimant or employer shall notify the insurer of a
4 change of address.

5 5. The hearing before the hearing officer must be conducted as
6 expeditiously and informally as is practicable.

7 6. The parties to a contested claim may, if the claimant is
8 represented by legal counsel, agree to forego a hearing before a
9 hearing officer and submit the contested claim directly to an appeals
10 officer.

11 **Sec. 5.** NRS 616C.410 is hereby amended to read as follows:

12 616C.410 Except as otherwise provided by NRS 616C.380,
13 616C.495, 616C.505, 616C.580 and 616C.595, *and section 2 of this*
14 *act*, the insurer shall not make or allow any lump-sum settlements.

15 **Sec. 6.** NRS 616C.580 is hereby amended to read as follows:

16 616C.580 1. Except as otherwise provided in this section,
17 vocational rehabilitation services must not be provided outside of
18 this State.

19 2. An injured employee who:

20 (a) Resides outside of this State, within 50 miles from any
21 border of this State, on the date of injury; or

22 (b) Was injured while temporarily employed in this State by an
23 employer subject to the provisions of chapters 616A to 617,
24 inclusive, of NRS who can demonstrate that, on the date of injury,
25 his permanent residence was outside of this State,

26 ➤ may receive vocational rehabilitation services at a location within
27 50 miles from his residence if such services are available at such a
28 location.

29 3. An injured employee who:

30 (a) Is eligible for vocational rehabilitation services pursuant to
31 NRS 616C.590; and

32 (b) Resides outside of this State but does not qualify to receive
33 vocational rehabilitation services outside of this State pursuant to
34 subsection 2,

35 ➤ may execute a written agreement with the insurer which provides
36 for the payment of compensation in a lump sum in lieu of the
37 provision of vocational rehabilitation services pursuant to NRS
38 616C.595. The amount of the lump sum must not *be less than the*
39 *minimum amount required by NRS 616C.595 but must not* exceed
40 \$20,000.

41 4. An injured employee who resides outside of this State but
42 does not qualify to receive vocational rehabilitation services outside
43 of this State pursuant to subsection 2 may receive the vocational
44 rehabilitation services to which he is entitled pursuant to NRS
45 616C.545 to 616C.575, inclusive, and 616C.590 if he relocates to:



- 1 (a) This State; or
- 2 (b) A location within 50 miles from any border of this State,
- 3 ➔ at his own expense, if such services are available at such a
- 4 location.

5 5. An injured employee who resides in this State may receive
6 vocational rehabilitation services outside of this State at a location
7 within 50 miles from his residence if such services are available at
8 such a location. An insurer may not unreasonably deny a request
9 made by an injured employee pursuant to this subsection to receive
10 vocational rehabilitation services outside of this State.

11 **Sec. 7.** NRS 616C.595 is hereby amended to read as follows:

12 616C.595 1. If an injured employee is eligible for vocational
13 rehabilitation services pursuant to NRS 616C.590, the insurer and
14 the injured employee may, at any time during the employee's
15 eligibility for such services, execute a written agreement providing
16 for the payment of compensation in a lump sum in lieu of the
17 provision of vocational rehabilitation services. An insurer's refusal
18 to execute such an agreement may not be appealed.

19 2. If the insurer and the injured employee execute an agreement
20 pursuant to subsection 1, the acceptance of the payment of
21 compensation in a lump sum by the injured employee extinguishes
22 his right to receive vocational rehabilitation services under his
23 claim. Except as otherwise required by federal law, an injured
24 employee shall not receive vocational rehabilitation services from
25 any state agency after he accepts payment of compensation in a
26 lump sum pursuant to this section.

27 3. Before executing an agreement pursuant to subsection 1, an
28 insurer shall:

29 (a) Order an assessment of and counseling concerning the
30 vocational skills of the injured employee, unless the provisions of
31 subsection 3 of NRS 616C.580 are applicable;

32 (b) Consult with the employer of the injured employee; and

33 (c) Provide a written notice to the injured employee that
34 contains the following statements:

35 (1) That the injured employee is urged to seek assistance and
36 advice from the Nevada Attorney for Injured Workers or to consult
37 with a private attorney before signing the agreement.

38 (2) That the injured employee may rescind the agreement
39 within 20 days after he signs it.

40 (3) That the 20-day period pursuant to subparagraph (2) may
41 not be waived.

42 (4) That acceptance by the injured employee of payment of
43 compensation in a lump sum in lieu of the provision of vocational
44 rehabilitation services extinguishes his right to receive such
45 services.



1 4. *Except as otherwise provided in NRS 616C.580, any*
2 *payment of compensation in a lump sum in lieu of the provision of*
3 *vocational rehabilitation services must not be less than 50 percent*
4 *of the maximum amount of vocational rehabilitation maintenance*
5 *due to the injured employee pursuant to NRS 616C.555.*

6 5. No payment of compensation in a lump sum may be made
7 pursuant to this section until the 20-day period provided for the
8 rescission of the agreement has expired.

9 **Sec. 8.** NRS 616D.030 is hereby amended to read as follows:

10 616D.030 1. No cause of action may be brought or
11 maintained against an insurer or a third-party administrator who
12 violates any provision of this chapter or chapter 616A, 616B, 616C
13 or 617 of NRS.

14 2. The administrative fines , *benefit penalties and other*
15 *remedies* provided for in NRS 616B.318 and 616D.120 are the
16 exclusive remedies for any violation of this chapter or chapter 616A,
17 616B, 616C or 617 of NRS committed by an insurer or a third-party
18 administrator.

19 **Sec. 9.** NRS 616D.120 is hereby amended to read as follows:

20 616D.120 1. Except as otherwise provided in this section, if
21 the Administrator determines that an insurer, organization for
22 managed care, health care provider, third-party administrator or
23 employer has:

24 (a) Induced a claimant to fail to report an accidental injury or
25 occupational disease;

26 (b) Without justification, persuaded a claimant to:

27 (1) Settle for an amount which is less than reasonable;

28 (2) Settle for an amount which is less than reasonable while a
29 hearing or an appeal is pending; or

30 (3) Accept less than the compensation found to be due him
31 by a hearing officer, appeals officer, court of competent jurisdiction,
32 written settlement agreement, written stipulation or the Division
33 when carrying out its duties pursuant to chapters 616A to 617,
34 inclusive, of NRS;

35 (c) Refused to pay or unreasonably delayed payment to a
36 claimant of compensation or other relief found to be due him by a
37 hearing officer, appeals officer, court of competent jurisdiction,
38 written settlement agreement, written stipulation or the Division
39 when carrying out its duties pursuant to chapters 616A to 616D,
40 inclusive, or chapter 617 of NRS, if the refusal or delay occurs:

41 (1) Later than 10 days after the date of the settlement
42 agreement or stipulation;

43 (2) Later than 30 days after the date of the decision of a
44 court, hearing officer, appeals officer or the Division, unless a stay
45 has been granted; or



(3) Later than 10 days after a stay of the decision of a court, hearing officer, appeals officer or the Division has been lifted;

(d) Refused to process a claim for compensation pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(e) Made it necessary for a claimant to initiate proceedings pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS for compensation or other relief found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(f) Failed to comply with the Division's regulations covering the payment of an assessment relating to the funding of costs of administration of chapters 616A to 617, inclusive, of NRS;

(g) Failed to provide or unreasonably delayed payment to an injured employee or reimbursement to an insurer pursuant to NRS 616C.165; or

(h) Intentionally failed to comply with any provision of, or *any* regulation adopted pursuant to, this chapter or chapter 616A, 616B, 616C or 617 of NRS,

➔ the Administrator shall impose an administrative fine of \$1,500 for each initial violation, or a fine of \$15,000 for a second or subsequent violation.

2. Except as otherwise provided in chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has failed to comply with any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, the Administrator may take any of the following actions:

(a) Issue a notice of correction for:

(1) A minor violation, as defined by regulations adopted by the Division; or

(2) A violation involving the payment of compensation in an amount which is greater than that required by any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto.

➔ The notice of correction must set forth with particularity the violation committed and the manner in which the violation may be corrected. The provisions of this section do not authorize the Administrator to modify or negate in any manner a determination or any portion of a determination made by a hearing officer, appeals officer or court of competent jurisdiction or a provision contained in a written settlement agreement or written stipulation.

(b) Impose an administrative fine for:



(1) A second or subsequent violation for which a notice of correction has been issued pursuant to paragraph (a); or

(2) Any other violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, for which a notice of correction may not be issued pursuant to paragraph (a).

➤ The fine imposed must not be greater than \$375 for an initial violation, or more than \$1,500 for any second or subsequent violation.

(c) Order a plan of corrective action to be submitted to the Administrator within 30 days after the date of the order.

3. If the Administrator determines that a violation of any of the provisions of paragraphs (a) to (e), inclusive, or (h) of subsection 1 has occurred, the Administrator shall order the insurer, organization for managed care, health care provider, third-party administrator or employer to pay to the claimant a benefit penalty in an amount that is not less than \$5,000 and not greater than \$37,500. To determine the amount of the benefit penalty, the Administrator shall consider the degree of physical harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), (e) or (h) of subsection 1, the amount of compensation found to be due the claimant and the number of fines and benefit penalties previously imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer pursuant to this section. If this is the third violation within 5 years for which a benefit penalty has been imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer, the Administrator shall also consider the degree of economic harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), (e) or (h) of subsection 1. Except as otherwise provided in this section, the benefit penalty is for the benefit of the claimant and must be paid directly to him within 10 days after the date of the Administrator's determination. If the claimant is the injured employee and he dies before the benefit penalty is paid to him, the benefit penalty must be paid to his estate. Proof of the payment of the benefit penalty must be submitted to the Administrator within 10 days after the date of his determination unless an appeal is filed pursuant to NRS 616D.140. Any compensation to which the claimant may otherwise be entitled pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS must not be reduced by the amount of any benefit penalty received pursuant to this subsection.

4. In addition to any fine or benefit penalty imposed pursuant to this section, the Administrator may assess against an insurer who violates any regulation concerning the reporting of claims



1 expenditures or premiums received that are used to calculate an
2 assessment, an administrative penalty of up to twice the amount of
3 any underpaid assessment.

4 5. If:

5 (a) The Administrator determines that a person has violated any
6 of the provisions of NRS 616D.200, 616D.220, 616D.240,
7 616D.300, 616D.310 or 616D.350 to 616D.440, inclusive; and

8 (b) The Fraud Control Unit for Industrial Insurance of the Office
9 of the Attorney General established pursuant to NRS 228.420
10 notifies the Administrator that the Unit will not prosecute the person
11 for that violation,

12 ➔ the Administrator shall impose an administrative fine of not more
13 than \$15,000.

14 6. Two or more fines of \$1,000 or more imposed in 1 year for
15 acts enumerated in subsection 1 must be considered by the
16 Commissioner as evidence for the withdrawal of:

17 (a) A certificate to act as a self-insured employer.

18 (b) A certificate to act as an association of self-insured public or
19 private employers.

20 (c) A certificate of registration as a third-party administrator.

21 7. The Commissioner may, without complying with the
22 provisions of NRS 616B.327 or 616B.431, withdraw the
23 certification of a self-insured employer, association of self-insured
24 public or private employers or third-party administrator if, after a
25 hearing, it is shown that the self-insured employer, association of
26 self-insured public or private employers or third-party administrator
27 violated any provision of subsection 1.

28 *8. If the Administrator, in a single proceeding or in a series*
29 *of related or unrelated proceedings, orders an insurer or third-*
30 *party administrator to pay administrative fines or benefit penalties,*
31 *or any combination thereof, for any three violations of the*
32 *provisions of this section that occurred during any period of 180*
33 *consecutive calendar days, the Administrator shall notify the*
34 *Commissioner. Upon receiving such notice, the Commissioner*
35 *shall:*

36 (a) *Without complying with the provisions of NRS 616B.327 or*
37 *616B.431, withdraw for 1 year the certification of the party if the*
38 *party is a self-insured employer, association of self-insured public*
39 *or private employers or third-party administrator; or*

40 (b) *Without complying with the provisions of NRS 616B.472,*
41 *suspend for 1 year the authorization of the party to provide*
42 *industrial insurance if the party is a private carrier.*

43 ➔ *The Commissioner shall take such action regardless of whether*
44 *any of the decisions of the Administrator to impose the*



1 *administrative fines or benefit penalties are being appealed by the*
2 *party in an administrative or judicial proceeding.*

3 **Sec. 10.** The provisions of subsection 8 of NRS 616D.120, as
4 amended by this act, apply only to violations that occur on or after
5 July 1, 2007.

6 **Sec. 11.** This act becomes effective on July 1, 2007.

