

ASSEMBLY BILL NO. 106—ASSEMBLYMEN HANSEN, FIORE;
DUNCAN, ELLISON, GRADY, HARDY, HICKEY, KIRNER,
OSCARSON AND WHEELER

FEBRUARY 13, 2013

Referred to Committee on Commerce and Labor

SUMMARY—Provides for the award of certain costs, fees and expenses to prevailing parties in actions before the Occupational Safety and Health Review Board under certain circumstances. (BDR 53-156)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

~

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

AN ACT relating to occupational safety; providing for the award of certain costs, fees and expenses to prevailing parties in actions before the Occupational Safety and Health Review Board under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

1 Existing law authorizes the Division of Industrial Relations of the Department
2 of Business and Industry to prosecute, defend and maintain actions in the name of
3 the Division for the enforcement of provisions relating to occupational safety and
4 health. (NRS 618.525) **Sections 6-8** of this bill provide, under certain
5 circumstances, for certain costs, fees and expenses to be awarded to the prevailing
6 party in actions or proceedings before the Occupational Safety and Health Review
7 Board that are brought by or against the Division or in an action for judicial review
8 before a court. **Section 9** of this bill provides that if the Division appeals an award
9 of costs, fees or expenses made to a prevailing party and the award is affirmed in
10 whole or in part, the Division must pay interest on the amount that is affirmed.
11 **Section 10** of this bill requires an award of costs, fees and expenses made to a
12 prevailing party to be paid from money provided by appropriation by the
13 Legislature for the funding of the Division.



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

Section 1. Chapter 618 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 10, inclusive, of this act.

Sec. 2. *As used in sections 2 to 10, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 3, 4 and 5 of this act have the meanings ascribed to them in those sections.*

Sec. 3. *"Expenses" means the reasonable cost of any study, analysis, engineering report, test or project which is determined by the Board or a court to have been necessary for the preparation of a party's case.*

Sec. 4. *"Fees" means the reasonable fees of attorneys, persons representing a party before the Board and expert witnesses.*

Sec. 5. *"Party" means:*

1. A natural person, other than an employee or official of the Division, who, at the time an action or proceeding by or against the Division was filed, did not have a net worth in excess of \$2,000,000; or

2. An owner of any business entity, corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership or other organization who, at the time an action or proceeding by or against the Division was filed, did not have a net worth in excess of \$7,000,000 and did not have more than 500 employees.

Sec. 6. *In any action or proceeding before the Board brought by or against the Division or an employee or official of the Division acting in his or her official capacity, or in any action for judicial review before a court, the prevailing party must be awarded costs, which must be limited to reimbursing, in whole or in part, the costs incurred by the prevailing party in prosecuting or defending the action or proceeding.*

Sec. 7. *1. Except as otherwise provided in subsection 2 and only upon application by the prevailing party pursuant to subsection 3, in any action or proceeding before the Board brought by or against the Division or an employee or official of the Division acting in his or her official capacity, or in any action for judicial review before a court, the prevailing party must be awarded fees and expenses incurred by the prevailing party in prosecuting or defending the action or proceeding.*

2. An award of fees and expenses must not be made to a prevailing party if the Board or the court, as applicable,



1 *determines that the position of the Division was substantially*
2 *justified or that the existence of special circumstances would make*
3 *the award unjust.*

4 3. *A party seeking an award of fees and expenses must,*
5 *within 30 days after the decision of the Board or the court, as*
6 *applicable, submit to the Board or the court an application for*
7 *such fees and expenses indicating:*

8 (a) *That the party is a prevailing party, along with a statement*
9 *verifying the net worth of the party and, if applicable, the number*
10 *of employees it has;*

11 (b) *That the position of the Division was not substantially*
12 *justified; and*

13 (c) *The amount sought, including an itemized statement*
14 *provided by an attorney, the person who represented the party*
15 *before the Board or the court or any expert witness who*
16 *represented or appeared on behalf of the party that shows the*
17 *actual time expended and the rate at which the requested fees and*
18 *expenses were computed.*

19 4. *Any fees awarded pursuant to this section must be based*
20 *upon the prevailing market rate for the type and quality of the*
21 *service provided, except that:*

22 (a) *No expert witness may be compensated at a rate higher*
23 *than the highest rate of compensation paid by the Division for an*
24 *expert witness; and*

25 (b) *No attorney or person representing the party before the*
26 *Board or the court may be compensated at a rate higher than \$200*
27 *per hour unless the Board or the court, as applicable, determines*
28 *that an increase in the cost of living or other special factor,*
29 *including, without limitation, the availability of qualified attorneys*
30 *or representatives, justifies a higher fee.*

31 5. *Whether or not the position of the Division was*
32 *substantially justified must be determined on the basis of the*
33 *record of the action or proceeding as a whole, including any*
34 *administrative record concerning the action or inaction by the*
35 *Division upon which the matter in controversy was based.*

36 6. *The Board or the court, as applicable, may in its discretion*
37 *reduce or deny any amount to be awarded pursuant to this section*
38 *if a determination is made that the prevailing party engaged in*
39 *conduct during the course of the action or proceeding which*
40 *unduly and unreasonably protracted the final resolution of the*
41 *matter in controversy.*

42 7. *As used in this section:*

43 (a) *"Decision" means a final disposition or order issued by the*
44 *Board or the court, including an order of settlement, whether or*
45 *not appealable.*



(b) "Position" includes:

(1) The alleged action or inaction of the Division which gave rise to the matter in controversy; and

(2) The legal or factual theory asserted by the Division upon which the Division prosecuted or defended the matter in controversy.

Sec. 8. 1. If, in any action or in any proceeding for judicial review of an adjudication brought by the Division, the demand by the Division is substantially in excess of the judgment ultimately obtained by the Division and is unreasonable when compared with such judgment under the facts and circumstances of the case, the party who prosecuted or defended the action or proceeding against the Division shall be deemed to be the prevailing party and the Board or the court, as applicable, shall award to that prevailing party the costs, fees and expenses incurred in defending against the excessive demand made by the Division unless:

(a) The prevailing party has committed a willful violation of law;

(b) The prevailing party has acted in bad faith; or

(c) Special circumstances make an award unjust.

2. A prevailing party seeking an award pursuant to this section must submit to the Board or the court, as applicable, an application for such an award in the same time and manner as an application filed pursuant to section 7 of this act.

Sec. 9. If the Division appeals an award of costs, fees or expenses made to a prevailing party and the award is affirmed in whole or in part, the Division must pay interest, computed at the rate established pursuant to NRS 99.040, on the amount of the award as affirmed from the date of the initial award to the date of the final decree of affirmance.

Sec. 10. An award of costs, fees and expenses made pursuant to sections 6, 7 or 8 of this act must be paid by the Division from money provided by appropriation by the Legislature for the funding of the Division.

Sec. 11. The amendatory provisions of this act apply to actions or proceedings which are pending or which have not yet been commenced as of the effective date of this act.

Sec. 12. This act becomes effective upon passage and approval.

