

(Reprinted with amendments adopted on May 25, 2013)

FIRST REPRINT

A.B. 106

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.

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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 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 generally requires a final award of costs, fees and expenses
12 made to a prevailing party to be paid from the Fund for Insurance Premiums.
13 **Section 10** further provides that payment of such an award must be approved by the
14 Attorney General if the amount of the award is less than the amount specified by
15 regulation or policy of the State Board of Examiners; for larger awards, payment
16 must be approved by the State Board of Examiners. **Section 10.3** of this bill
17 provides that the provisions in the bill must not be construed to prohibit the
18 Division from agreeing to settle a claim for costs, fees and expenses.



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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 10.3, inclusive, of this act.

Sec. 2. *As used in sections 2 to 10.3, 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,



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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. 1. Within 10 business days after:

(a) An award of costs, fees and expenses made pursuant to section 6, 7 or 8 of this act is upheld by a reviewing court, in whole or in part, and further review is not timely sought or is not available under applicable law; or

(b) When any time allowed by applicable law for seeking such a review expires without review having been timely sought,

the Division shall give written notice of the award, and the name and address of the party entitled to payment of the award, to the Attorney General.

2. The State Board of Examiners shall prescribe by regulation or policy:

(a) The maximum amount of an award that may be approved for payment by the Attorney General; and



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1 (b) *The procedure to be used by the Attorney General to*
2 *approve payment of an award.*

3 3. *If the Attorney General is authorized pursuant to*
4 *subsection 2 to approve payment of an award, the Attorney*
5 *General shall approve payment of the award.*

6 4. *If the Attorney General is not authorized pursuant to*
7 *subsection 2 to approve payment of an award, the Attorney*
8 *General shall investigate the award and submit a report of*
9 *findings to the State Board of Examiners concerning the award.*

10 5. *Upon receiving a report of findings pursuant to subsection*
11 *4, the State Board of Examiners shall approve payment of the*
12 *award.*

13 6. *Upon approval of payment of an award pursuant to this*
14 *section, the State Controller shall draw a warrant for payment of*
15 *the award. Except as otherwise provided in NRS 353.264, the State*
16 *Treasurer shall pay the award from the Fund for Insurance*
17 *Premiums.*

18 **Sec. 10.3.** *The provisions of sections 2 to 10.3, inclusive, of*
19 *this act must not be construed to prohibit the Division from*
20 *agreeing at any time to settle the claim of a party for costs, fees*
21 *and expenses incurred in any action or proceeding governed by*
22 *those sections. Any claim that is so resolved must be paid by the*
23 *Division.*

24 **Sec. 10.5.** NRS 331.187 is hereby amended to read as follows:
25 331.187 1. There is created in the State Treasury the Fund for
26 Insurance Premiums as an internal service fund to be maintained for
27 use by the Risk Management Division of the Department of
28 Administration and the Attorney General.

29 2. Each state agency shall deposit in the Fund:

30 (a) An amount equal to its insurance premium and other charges
31 for potential liability, self-insured claims, other than self-insured tort
32 claims, and administrative expenses, as determined by the Risk
33 Management Division; and

34 (b) An amount for self-insured tort claims and expenses related
35 to those claims, as determined by the Attorney General.

36 3. Each county shall deposit in the Fund an assessment for the
37 employees of the district court of that county, excluding district
38 judges, unless the county enters into a written agreement with the
39 Attorney General to:

40 (a) Hold the State of Nevada harmless and assume liability and
41 costs of defense for the employees of the district court;

42 (b) Reimburse the State of Nevada for any liability and costs of
43 defense that the State of Nevada incurs for the employees of the
44 district court; or



(c) Include the employees of the district court under the county's own insurance or other coverage.

4. Expenditures from the Fund must be made by the Risk Management Division or the Attorney General to an insurer for premiums of state agencies as they become due or for deductibles, self-insured property and tort claims or claims pursuant to NRS 41.0349 ~~or to a party for an award pursuant to section 10 of this act~~. If the money in the Fund is insufficient to pay a tort claim ~~or award~~, it must be paid from the Reserve for Statutory Contingency Account.

5. As used in this section, "assessment" means an amount determined by the Risk Management Division and the Attorney General to be equal to the share of a county for:

- (a) Applicable insurance premiums;
- (b) Other charges for potential liability and tort claims; and
- (c) Expenses related to tort claims.

Sec. 10.7. NRS 353.264 is hereby amended to read as follows:

353.264 1. The Reserve for Statutory Contingency Account is hereby created in the State General Fund.

2. The State Board of Examiners shall administer the Reserve for Statutory Contingency Account. The money in the Account must be expended only for:

(a) The payment of claims which are obligations of the State pursuant to NRS 41.03435, 41.0347, 621.025, 176.485, 179.310, 212.040, 212.050, 212.070, 281.174, 282.290, 282.315, 288.203, 293.253, 293.405, 353.120, 353.262, 412.154 and 475.235;

(b) The payment of claims which are obligations of the State pursuant to:

(1) Chapter 472 of NRS arising from operations of the Division of Forestry of the State Department of Conservation and Natural Resources directly involving the protection of life and property; and

(2) NRS 7.155, 34.750, 176A.640, 179.225 and 213.153,
 ➔ except that claims may be approved for the respective purposes listed in this paragraph only when the money otherwise appropriated for those purposes has been exhausted;

(c) The payment of claims which are obligations of the State pursuant to NRS 41.0349 , ~~and~~ 41.037 ~~and section 10 of this act~~, but only to the extent that the money in the Fund for Insurance Premiums is insufficient to pay the claims; and

(d) The payment of claims which are obligations of the State pursuant to NRS 535.030 arising from remedial actions taken by the State Engineer when the condition of a dam becomes dangerous to the safety of life or property.



1 3. The State Board of Examiners may authorize its Clerk,
2 under such circumstances as it deems appropriate, to approve, on
3 behalf of the Board, the payment of claims from the Reserve for
4 Statutory Contingency Account. For the purpose of exercising any
5 authority granted to the Clerk of the State Board of Examiners
6 pursuant to this subsection, any statutory reference to the State
7 Board of Examiners relating to such a claim shall be deemed to refer
8 to the Clerk of the Board.

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

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

