

**OPINION  
65-504**

May 19, 1965 (OPINION)

Mr. Owen T. Owen

Chairman

Workmen's Compensation Bureau

RE: Workmen's Compensation - Subrogation Rights - Prospective Applic

This is in response to your letter in which you ask if the provisions of House Bill No. 898 as passed by Thirty-ninth Legislative Assembly amending section 65-01-09 of the North Dakota Century Code applies only to injuries sustained after the effective date of this Act, July 1, 1965, or if its provisions would also apply to such injuries sustained prior to July 1, 1965, but have not been disposed of by either settlement, trial or otherwise.

House Bill No. 898, which becomes effective July 1, 1965, and which amends section 65-01-05 of the North Dakota Century Code, provides as follows:

65-01-09. INJURY THROUGH NEGLIGENCE OF THIRD PERSON - OPTION OF EMPLOYEE - FUND SUBROGATED WHEN CLAIM FILED. When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, the injured employee, or his dependents may claim compensation under this title and proceed at law to recover damages against such other person. The fund shall be subrogated to the rights of the injured employee or his dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount paid or to be paid in compensation and benefits for the injured employee and the action against such other person may be brought by the injured employee, or his dependents in the event of his death, in his or in his dependents' own right name and as trustee for the workmen's compensation bureau for the subrogation interest of the bureau. If the injured employee or his dependents do not institute suit within sixty days after date of injury the bureau may bring the action in its own name and as trustee for the injured employee or his dependents and retain its subrogation interest. Within 60 days after both the injured employee and the bureau have declined to commence an action against a third person as provided above, the employer may bring the action in his own name and/or in the name of the employee, and in trust for the bureau and for the employee. The party bringing the action may determine if the trial jury should be informed of the trust relationship. If the action is brought by the injured employee or his dependents, or the employer as provided above and the bureau shall pay fifty percent of the costs of the action, exclusive of attorney fee,

when such costs are incurred. Should there be no recovery of damages in the action this shall be cost of the bureau to be paid from the bureau general fund. When there is recovery of damages in the action the costs of the action, exclusive attorneys fees, shall be prorated and adjusted on the percentage of the total subrogation interest of the bureau recovered to the total recovery in the action. The bureau shall pay attorney fees to the injured employees attorney from the bureau general fund as follows: 1. Twenty percent of the subrogation interest recovered for the bureau when legal action is not commenced. 2. Twenty-five percent of the subrogation interest recovered for the bureau when action is commenced and settled before judgment. 3. Thirty-three and a half percent of the subrogation interest recovered for the bureau when recovered through judgment. The above provisions as to costs of the action and attorney fees is effective only when the injured employee advises the bureau in writing the name and address of his attorney, and that he has employed such attorney for the purpose of collecting damages or of bringing legal action for recovery of damages."

The key language contained in House Bill No. 898 as pertains to the question submitted is found in the first sentence and is as follows:

When an injury or death for which compensation is payable under the provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, \* \* \* \*."

It is significant to note that this language, substantially in the same form, has been in the Workmen's Compensation Act from its inception. We do not believe that any argument could be successfully presented that when the Workmen's Compensation Act was adopted in 1919 it applied to injuries sustained prior to the effective date of the Act. This language has consistently been held to apply prospectively only and not retroactively or in retrospect.

We must assume that the quoted phrase has the same meaning as when it was initially adopted in 1919. It has the same intent and purpose as when it was initially used. We must also take into consideration the rule of law which is applicable in North Dakota and found in section 1-02-10 that all legislative acts are presumed to be prospective unless the Legislature clearly manifests a contrary intention. The statutory provision pertaining thereto is "\* \* \* \* No part of this code is retroactive unless it is expressly declared to be so \* \* \* \*."

The North Dakota Supreme Court had under consideration a similar question involving the same section of law when it was amended in 1949, at which time substantive changes were made in section 65-01-09. The subject matter before the Court was whether or not the rights of the injured person were modified as the result of the 1949 amendment or whether the law in effect at the time of the date of injury (June, 1948) controlled. The Court in Gimble v. Montana-Dakota Utilities Co., 44 N.W.2d. 198, on page 203, said:

The right of subrogation under the old law gave the Workmen's

Compensation Bureau exclusive authority to bring an action against a third party, from the proceeds of which the fund would be eliminated resulting from the tort of such party. While this authority may not have been a vested right in the constitutional sense, it was a substantive right which enabled the bureau to institute, maintain and control the litigation primarily for the benefit of the Workmen's Compensation fund and incidentally for the benefit of the claimant if the recovery exceeded the amount paid on the award. This right to bring and maintain the suit to recover damages for an injury which has resulted in disbursements from the fund is a substantive right and not a mere matter of remedy or procedure and falls within the rule that the intention to make legislation retrospective must clearly appear."

That the provisions of House Bill No. 898 are to operate prospectively only is further borne out by the following language contained therein:

If the injured employee or his dependents do not institute suit within sixty days after date of injury the bureau may bring the action in its own name and as trustee for the injured employee or his dependents and retain its subrogation interests."  
(Emphasis supplied.)

A similar question was before the Federal Court involving the 1949 amendment. In *Nelson v. Westland Oil Co.*, 96 Fed. Supp. 656, the Federal District Court held that the subrogation rights were substantive rights and that the 1949 amendment applied only respectively and did not have a retroactive application. This case was appealed to the Circuit Court of appeals where it was reversed, (181 Fed. 2d. 375). The Circuit Court, however, was uncertain of its grounds for reversal. It said: "We cannot, of course, say with certainty that the applicable law of North Dakota is not what the District Court believed it to be." The Court went on to provide that if the North Dakota Supreme Court were to rule otherwise before the instant case was settled, the North Dakota Supreme Court decision would prevail. In the meantime, the North Dakota Supreme Court decided the Gimble case, supra. As a result of this the supplementary opinion as appearing in *Nelson v. Westland Oil Co.* reaffirmed the former decision of the District Court in accordance with the decision of the North Dakota Supreme Court in the Gimble case, and in effect reversed the District Court decision. The rule of law and decision of the Gimble case was followed in *LaDuke v. Wylie*, 44 N.W.2d. 204.

It is therefore our opinion that the provisions of House Bill No. 898 as pertaining to the subrogation rights limiting the Bureau to fifty percent of the damages recovered, operates prospectively only and applies only to injuries sustained on or after July 1, 1965.

HELGI JOHANNESON

Attorney General