

## LEGISLATIVE BILL 594

Approved by the Governor March 7, 1994

Introduced by Lindsay, 9

AN ACT relating to workers' compensation; to amend section 48-118, Reissue Revised Statutes of Nebraska, 1943; to change settlement provisions; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 48-118, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-118. When a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his or her dependents should have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation; PROVIDED, that nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee or of his or her personal representative to bring suit against such third person in his or her own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his or her dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid. Before the making of a claim or the bringing of suit against such third person by the employee or his or her personal representative or by the employer or his or her insurer, each shall give to all others, unless waived in writing, notice of not less than thirty days, by certified or registered mail, an opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel. If a party entitled to notice cannot be found, the clerk of the Nebraska Workers' Compensation Court shall become the agent of such party for the giving of such notice as required in this section, and the notice when given to the clerk of the Nebraska Workers' Compensation Court shall include an affidavit setting forth the facts, including the steps taken to locate such party. After the expiration of thirty days, for failure to receive notice or other good cause shown, the district court before which the action is pending shall allow either party to intervene in such action, and if no action is pending then the district court in which it could be brought shall allow either party to commence such action. Each shall have an equal voice in the claim and the prosecution of such suit and any dispute arising shall be passed upon by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought. If either party after the giving of such notice fails, by and through his or her attorney, to join in the making of such claim and the prosecuting of the suit, such party shall waive any and all claims or causes of action for improper prosecution of such suit or inadequacy of a settlement made in accordance herewith, and the party bringing the claim or prosecuting the suit shall be entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees, which expenses and attorney's fees shall be prorated to the amounts payable to the employer or his or her insurer under the above right of subrogation and to the amount in excess of such amount payable to the employer or his or her insurer under his or her right of subrogation, and which expenses and attorney's fees shall be apportioned by the court between the parties as their interests appear at the time of such recovery. If either party makes the claim or prosecutes such action without the giving of a notice to the other party, the party bringing the claim and prosecuting such action shall not deduct expenses or attorney's fees from the amount payable to the other party.

If the employee or his or her personal representative or the employer or his or her compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no

action is pending then by the district court in which such action could be brought. A settlement of any lawsuit commenced under this section shall be void unless (1) such settlement and the distribution of the proceeds of the settlement thereof are agreed upon in writing by the employee or his or her personal representative and the insurer of the employer if there be one, and if there be no insurer, then by the employer; or (2) in the absence of such agreement, such settlement is approved by the court before which the action is pending. A settlement of any lawsuit commenced under this section shall be void unless (1) such settlement is agreed upon in writing by the employee or his or her personal representative and the insurer of the employer if there is one, and if there is no insurer, then by the employer, or (2) in the absence of such agreement, the court before which the action is pending determines that the settlement offer is fair and reasonable considering liability, damages, and the ability of the third person and his or her liability insurance carrier to satisfy any judgment.

If the employee or his or her personal representative and the insurer of the employer if there is one, and if there is no insurer, then the employer, do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court upon application shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

In any case in which an injured employee is entitled to benefits from the Second Injury Fund and recovery is had against the third party liable to the employee for the injury, the Second Injury Fund shall be subrogated to the rights of the employee against such third party to the extent of the benefits due to him or her or which shall become due to him or her from such fund, subject to the rights of the employer and his or her insurer.

Sec. 2. That original section 48-118, Reissue Revised Statutes of Nebraska, 1943, is repealed.