

Fifty-ninth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1171

Introduced by

Representative N. Johnson

Senator Klein

(At the request of Workforce Safety and Insurance)

1 A BILL for an Act to amend and reenact sections 65-01-02, 65-05.1-01, 65-05.1-02.1,
2 65-05.1-04, and 65-05.1-06.1 of the North Dakota Century Code, relating to the definition of
3 permanent total disability and temporary total disability, vocational rehabilitation options,
4 eligibility for partial disability benefits, elective vocational rehabilitation retraining, and vocational
5 rehabilitation noncompliance appeals for workforce safety and insurance purposes; to provide
6 an effective date; and to provide for application.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1. AMENDMENT.** Section 65-01-02 of the North Dakota Century Code is
9 amended and reenacted as follows:

10 **65-01-02. Definitions.** In this title:

- 11 1. "Acute care" means a short course of intensive diagnostic and therapeutic services
12 provided immediately following a work injury with a rapid onset of pronounced
13 symptoms.
- 14 2. "Adopted" or "adoption" refers only to a legal adoption effected prior to the time of
15 the injury.
- 16 3. "Artificial members" includes only such devices as are substitutes for, and not mere
17 aids to, a natural part, organ, limb, or other part of the body. The term does not
18 include eyeglasses or contact lenses unless the eye is, or eyes are, injured as a
19 result of a compensable injury, and such injury causes a change in sight which
20 requires fitting of eyeglasses or contact lenses not previously worn by the injured
21 worker or requires a change in existing prescription.
- 22 4. "Artificial replacements" means mechanical aids, including braces, belts, casts, or
23 crutches as may be reasonable and necessary due to compensable injury.

- 1 5. "Average weekly wage" means the weekly wages the employee was receiving from
2 all employments at the date of first disability. The average weekly wage
3 determined under this subsection must be rounded to the nearest dollar. If the
4 employee's wages are not fixed by the week, they must be determined by using
5 the first applicable formula from the schedule below:
- 6 a. For seasonal employment, during the first consecutive days of disability up to
7 twenty-eight days the average weekly wage is calculated pursuant to the first
8 applicable formula in subdivisions b through g, and after that are calculated as
9 one-fiftieth of the total wages from all occupations during the twelve months
10 preceding the date of first disability or during the tax year preceding the date
11 of first disability, or an average of the three tax years preceding the date of
12 first disability, whichever is highest and for which accurate, reliable, and
13 complete records are readily available.
- 14 b. The "average weekly wage" of a self-employed employer is determined by the
15 following formula: one fifty-second of the net earnings reported the preceding
16 tax year or preceding fifty-two weeks whichever is higher if accurate, reliable,
17 and complete records for those fifty-two weeks are readily available.
- 18 c. Hourly or daily rate multiplied by number of hours or days worked per
19 seven-day week.
- 20 d. Monthly rate multiplied by twelve months and divided by fifty-two weeks.
- 21 e. Biweekly rate divided by two.
- 22 f. The usual wage paid other employees engaged in similar occupations.
- 23 g. A wage reasonably and fairly approximating the weekly wage lost by the
24 claimant during the period of disability.
- 25 6. "Average weekly wage in the state" means the determination made of the average
26 weekly wage in the state by job service North Dakota on or before July first of each
27 year, computed to the next highest dollar.
- 28 7. "Board" means the workforce safety and insurance board of directors.
- 29 8. "Brother" and "sister" include a stepbrother and a stepsister, a half brother and a
30 half sister, and a brother and sister by adoption. The terms do not include a
31 married brother or sister unless that person actually is dependent.

1 9. "Child", for determining eligibility for benefits under chapter 65-05, means a child
2 under eighteen years of age residing in the employee's household or to whom the
3 employee has a legal obligation of support; or a child eighteen years of age or over
4 and physically or mentally incapable of self-support who is actually dependent
5 upon the employee for support; or any child between eighteen and twenty-two
6 years of age who is enrolled as a full-time student in any accredited educational
7 institution who is actually dependent upon the employee for support. This term
8 includes a legitimate child, a stepchild, adopted child, posthumous child, foster
9 child, and acknowledged illegitimate child, but does not include a married child
10 unless actually dependent.

11 10. "Compensable injury" means an injury by accident arising out of and in the course
12 of hazardous employment which must be established by medical evidence
13 supported by objective medical findings.

14 a. The term includes:

15 (1) Disease caused by a hazard to which an employee is subjected in the
16 course of employment. The disease must be incidental to the character
17 of the business and not independent of the relation of employer and
18 employee. Disease includes effects from radiation.

19 (2) An injury to artificial members.

20 (3) Injuries due to heart attack or other heart-related disease, stroke, and
21 physical injury caused by mental stimulus, but only when caused by the
22 employee's employment with reasonable medical certainty, and only
23 when it is determined with reasonable medical certainty that unusual
24 stress is at least fifty percent of the cause of the injury or disease as
25 compared with all other contributing causes combined. Unusual stress
26 means stress greater than the highest level of stress normally
27 experienced or anticipated in that position or line of work.

28 (4) Injuries arising out of employer-required or supplied travel to and from a
29 remote jobsite or activities performed at the direction or under the
30 control of the employer.

- 1 (5) An injury caused by the willful act of a third person directed against an
2 employee because of the employee's employment.
- 3 (6) A mental or psychological condition caused by a physical injury, but
4 only when the physical injury is determined with reasonable medical
5 certainty to be at least fifty percent of the cause of the condition as
6 compared with all other contributing causes combined, and only when
7 the condition did not preexist the work injury.
- 8 b. The term does not include:
- 9 (1) Ordinary diseases of life to which the general public outside of
10 employment is exposed or preventive treatment for communicable
11 diseases, except that the bureau may pay for preventive treatment for
12 significant exposures documented by emergency medical services
13 providers under chapter 23-07.3, for significant exposures for the
14 employees of licensed facilities as defined by chapter 23-07.3, and for
15 exposure to rabies occurring in the course of employment.
- 16 (2) A willfully self-inflicted injury, including suicide or attempted suicide, or
17 an injury caused by the employee's willful intention to injure or kill
18 another.
- 19 (3) Any injury caused by the use of intoxicants or the illegal use of
20 controlled substances.
- 21 (4) An injury that arises out of an altercation in which the injured employee
22 is an aggressor. This paragraph does not apply to public safety
23 employees, including law enforcement officers or private security
24 personnel who are required to engage in altercations as part of their job
25 duties if the altercation arises out of the performance of those job
26 duties.
- 27 (5) An injury that arises out of an illegal act committed by the injured
28 employee.
- 29 (6) An injury that arises out of an employee's voluntary nonpaid
30 participation in any recreational activity, including athletic events,

- 1 parties, and picnics, even though the employer pays some or all of the
2 cost of the activity.
- 3 (7) Injuries attributable to a preexisting injury, disease, or other condition,
4 including when the employment acts as a trigger to produce symptoms
5 in the preexisting injury, disease, or other condition unless the
6 employment substantially accelerates its progression or substantially
7 worsens its severity.
- 8 (8) A nonemployment injury that, although acting upon a prior
9 compensable injury, is an independent intervening cause of injury.
- 10 (9) A latent or asymptomatic degenerative condition, caused in substantial
11 part by employment duties, which is triggered or made active by a
12 subsequent injury.
- 13 (10) A mental injury arising from mental stimulus.
- 14 11. "Date of first disability" means the first date the employee was unable to work
15 because of a compensable injury.
- 16 12. "Date of maximum medical improvement" or "date of maximum medical recovery"
17 means the date after which further recovery from, or lasting improvement to, an
18 injury or disease can no longer reasonably be anticipated based upon reasonable
19 medical probability.
- 20 13. "Director" means the director of the organization.
- 21 14. "Disability" means loss of earnings capacity and may be permanent total,
22 temporary total, or partial.
- 23 15. "Doctor" means doctor of medicine or osteopathy, chiropractor, dentist,
24 optometrist, podiatrist, or psychologist acting within the scope of the doctor's
25 license.
- 26 16. "Employee" means a person who performs hazardous employment for another for
27 remuneration unless the person is an independent contractor under the "common
28 law" test.
- 29 a. The term includes:
- 30 (1) All elective and appointed officials of this state and its political
31 subdivisions, including municipal corporations and including the

- 1 members of the legislative assembly, all elective officials of the several
2 counties of this state, and all elective peace officers of any city.
- 3 (2) Aliens.
- 4 (3) County general assistance workers, except those who are engaged in
5 repaying to counties moneys that the counties have been compelled by
6 statute to expend for county general assistance.
- 7 (4) Minors, whether lawfully or unlawfully employed; a minor is deemed
8 sui juris for the purposes of this title, and no other person has any claim
9 for relief or right to claim workforce safety and insurance benefits for
10 any injury to a minor worker, but in the event of the award of a lump
11 sum of benefits to a minor employee, the lump sum may be paid only to
12 the legally appointed guardian of the minor.
- 13 b. The term does not include:
- 14 (1) Any person whose employment is both casual and not in the course of
15 the trade, business, profession, or occupation of that person's
16 employer.
- 17 (2) Any person who is engaged in an illegal enterprise or occupation.
- 18 (3) The spouse of an employer or a child under the age of twenty-two of an
19 employer. For purposes of this paragraph and section 65-07-01, "child"
20 means any legitimate child, stepchild, adopted child, foster child, or
21 acknowledged illegitimate child.
- 22 (4) Any real estate broker or real estate salesperson, provided the person
23 meets the following three requirements:
- 24 (a) The salesperson or broker must be a licensed real estate agent
25 under section 43-23-05.
- 26 (b) Substantially all of the salesperson's or broker's remuneration for
27 the services performed as a real estate agent must be directly
28 related to sales or other efforts rather than to the number of hours
29 worked.
- 30 (c) A written agreement must exist between the salesperson or
31 broker and the person or firm for whom the salesperson or broker

- 1 works, which agreement must provide that the salesperson or
2 broker will not be treated as an employee but rather as an
3 independent contractor.
- 4 (5) The members of the board of directors of a business corporation who
5 are not employed in any capacity by the corporation other than as
6 members of the board of directors.
- 7 (6) Any individual delivering newspapers or shopping news, if substantially
8 all of the individual's remuneration is directly related to sales or other
9 efforts rather than to the number of hours worked and a written
10 agreement exists between the individual and the publisher of the
11 newspaper or shopping news which states that the individual is an
12 independent contractor.
- 13 (7) An employer.
- 14 c. Persons employed by a subcontractor, or by an independent contractor
15 operating under an agreement with the general contractor, for the purpose of
16 this chapter are deemed to be employees of the general contractor who is
17 liable and responsible for the payments of premium for the coverage of these
18 employees until the subcontractor or independent contractor has secured the
19 necessary coverage and paid the premium for the coverage. This subdivision
20 does not impose any liability upon a general contractor other than liability to
21 the organization for the payment of premiums which are not paid by a
22 subcontractor or independent contractor.
- 23 17. "Employer" means a person who engages or received the services of another for
24 remuneration unless the person performing the services is an independent
25 contractor under the "common law" test. The term includes:
- 26 a. The state and all political subdivisions thereof.
- 27 b. All public and quasi-public corporations in this state.
- 28 c. Every person, partnership, limited liability company, association, and private
29 corporation, including a public service corporation.
- 30 d. The legal representative of any deceased employer.

- 1 e. The receiver or trustee of any person, partnership, limited liability company,
2 association, or corporation having one or more employees as herein defined.
- 3 f. The president, vice presidents, secretary, or treasurer of a business
4 corporation, but not members of the board of directors of a business
5 corporation who are not also officers of the corporation.
- 6 g. The managers of a limited liability company.
- 7 h. The president, vice presidents, secretary, treasurer, or board of directors of an
8 association or cooperative organized under chapter 6-06, 10-12, 10-13,
9 10-15, 36-08, or 49-21.
- 10 i. The clerk, assessor, treasurer, or any member of the board of supervisors of
11 an organized township, if the person is not employed by the township in any
12 other capacity.
- 13 18. "Fee schedule" means the payment formulas established in the organization
14 publication entitled "Medical and Hospital Fees".
- 15 19. "Fund" means the workforce safety and insurance fund.
- 16 20. "Grandchild" and the terms defined in subsections 8 and 9 include only a person
17 who, at the time of the death of the deceased employee, is under eighteen years of
18 age, or if over that age, is incapable of self-support.
- 19 21. "Hazardous employment" means any employment in which one or more
20 employees are employed regularly in the same business or in or about the
21 establishment except:
22 a. Agricultural or domestic service.
23 b. Any employment of a common carrier by railroad.
24 c. Any employment for the transportation of property or persons by
25 nonresidents, where, in such transportation, the highways are not traveled
26 more than seven miles [11.27 kilometers] and return over the same route
27 within the state of North Dakota.
- 28 d. All members of the clergy and employees of religious organizations engaged
29 in the operation, maintenance, and conduct of the place of worship.

- 1 22. "Health care provider" means a doctor or any recognized practitioner providing
2 skilled services pursuant to the prescription of, or under the supervision or direction
3 of, a doctor.
- 4 23. "Organization" means workforce safety and insurance, or the director, or any
5 department head, assistant, or employee of workforce safety and insurance
6 designated by the director, to act within the course and scope of that person's
7 employment in administering the policies, powers, and duties of this title.
- 8 24. "Parent" includes a stepparent and a parent by adoption.
- 9 25. "Permanent impairment" means the loss of or loss of use of a member of the body
10 existing after the date of maximum medical improvement and includes
11 disfigurement resulting from an injury.
- 12 26. "Permanent total disability" means ~~an employee is determined incapable of~~
13 ~~rehabilitation of earnings capacity as determined by the:~~
- 14 a. ~~Nature of injury.~~
- 15 b. ~~Degree of physical impairment.~~
- 16 c. ~~Education.~~
- 17 d. ~~Work history.~~
- 18 e. ~~Vocational rehabilitation potential~~ disability that is the direct result of a
19 compensable injury that prevents an employee from performing any work and
20 results from any one of the following conditions:
- 21 a. Total and permanent loss of sight of both eyes;
- 22 b. Loss of both legs or loss of both feet at or above the ankle;
- 23 c. Loss of both arms or loss of both hands at or above the wrist;
- 24 d. Loss of any two of the members or faculties in subdivision a, b, or c;
- 25 e. Permanent and complete paralysis of both legs or both arms or of one leg and
26 one arm;
- 27 f. Third-degree burns that cover at least forty percent of the body and require
28 grafting;
- 29 g. A medically documented traumatic brain injury affecting cognitive and mental
30 functioning which renders an employee unable to provide self-care and

requires supervision or assistance with a majority of the activities of daily living; or

h. A compensable injury that results in a permanent partial impairment rating of the whole body of at least twenty-five percent pursuant to section 65-05-12.2. If the employee has not reached maximum medical improvement within one hundred four weeks, the employee may receive a permanent partial impairment rating if a rating will assist the organization in assessing the employee's capabilities. Entitlement to a rating is solely within the discretion of the organization.

27. "Rehabilitation services" means nonmedical services reasonably necessary to restore a disabled employee to substantial gainful employment as defined by section 65-05.1-01 as near as possible. The term may include vocational evaluation, counseling, education, workplace modification, and vocational retraining including on-the-job training or training for alternative employment with the same employer, and job placement assistance.

28. "Seasonal employment" includes occupations that are not permanent or that do not customarily operate throughout the entire year. Seasonal employment is determined by what is customary with respect to the employer at the time of injury.

29. "Temporary total disability" means disability that results in the inability of an employee to earn wages as a result of a compensable injury for which disability benefits may not exceed a cumulative total of one hundred four weeks or the date the employee reaches maximum medical improvement or maximum medical recovery, whichever occurs first.

30. "Spouse" includes only the decedent's husband or wife who was living with the decedent or was dependent upon the decedent for support at the time of injury.

~~30.~~ 31. "Utilization review" means the initial and continuing evaluation of appropriateness in terms of both the level and the quality of health care and health services provided a patient, based on medically accepted standards. The evaluation must be accomplished by means of a system that identifies the utilization of medical services, based on medically accepted standards, and which refers instances of possible inappropriate utilization to the organization to obtain opinions and

recommendations of expert medical consultants to review individual cases for which administrative action may be deemed necessary.

~~34.~~ 32. "Wages" means an employee's remuneration from all employment reportable to the internal revenue service as earned income for federal income tax purposes.

For purposes of chapter 65-04, "wages" may not include dismissal or severance pay.

SECTION 2. AMENDMENT. Section 65-05.1-01 of the North Dakota Century Code is amended and reenacted as follows:

65-05.1-01. Rehabilitation services.

1. The state of North Dakota exercising its police and sovereign powers declares that disability caused by injuries in the course of employment and disease fairly traceable to the employment create a burden upon the health and general welfare of the citizens of this state and upon the prosperity of this state and its citizens.
2. The purpose of this chapter is to ensure that injured employees covered by this title receive services, so far as possible, necessary to assist the employee and the employee's family in the adjustments required by the injury to the end that the employee receives comprehensive rehabilitation services, including medical, psychological, economic, and social rehabilitation.
3. It is the goal of vocational rehabilitation to return the disabled employee to substantial gainful employment with a minimum of retraining, as soon as possible after an injury occurs. "Substantial gainful employment" means bona fide work, for remuneration, which is reasonably attainable in light of the individual's injury, functional capacities, education, previous occupation, experience, and transferable skills, and which offers an opportunity to restore the employee as soon as practicable and as nearly as possible to ninety percent of the employee's average weekly earnings at the time of injury, or to sixty-six and two-thirds percent of the average weekly wage in this state on the date the rehabilitation consultant's report is issued under section 65-05.1-02.1, whichever is less. The purpose of defining substantial gainful employment in terms of earnings is to determine the first appropriate priority option under subsection 4 which meets this income test set out above.

4. The first appropriate option among the following, calculated to return the employee to substantial gainful employment, must be chosen for the employee:

- a. Return to the same position.
- b. Return to the same occupation, any employer.
- c. Return to a modified position.
- d. Return to a modified or alternative occupation, any employer.
- e. Return to an occupation within the local job pool of the locale in which the claimant was living at the date of injury or of the employee's current address which is suited to the employee's education, experience, and marketable skills.
- f. Return to an occupation in the statewide job pool which is suited to the employee's education, experience, and marketable skills.
- g. ~~On the job training.~~
- h. ~~Short term retraining of fifty two weeks or less.~~
- i. ~~Long term retraining~~ Retraining of one hundred four weeks or less.
- j. ~~Self employment.~~

5. If an option listed in subdivision a, b, c, d, e, or f, ~~or g~~ of subsection 4 has been identified as appropriate for an injured employee and the employee is initially released by the doctor to return to part-time employment with the reasonable expectation of attaining full-time employment, the organization shall pay temporary partial disability benefits under section 65-05-10 until the doctor determines the employee is medically capable of full-time employment.

6. a. If the vocational consultant concludes that none of the priority options under subsection 4 of section 65-05.1-01 are viable, and will not return the employee to the lesser of sixty-six and two-thirds percent of the average weekly wage, or ninety percent of the employee's preinjury earnings, the employee shall continue to minimize the loss of earnings capacity, to seek, obtain, and retain employment:
 - (1) That meets the employee's functional capacities; and
 - (2) For which the employee meets the qualifications to compete; ~~and~~.

1 (3) ~~That will reasonably result in retained earnings capacity equivalent to~~
2 ~~the lesser of ninety percent of the employee's preinjury earnings or the~~
3 ~~state's current hourly minimum wage on the date the rehabilitation~~
4 ~~consultant's report is issued. If an employee is initially released to~~
5 ~~part time employment by the doctor, the income test defined under this~~
6 ~~paragraph must be waived provided there is a reasonable expectation~~
7 ~~that the employee will return to full time employment meeting the~~
8 ~~income test previously defined under this paragraph.~~

9 b. Under section 65-05-10, the organization shall award partial disability based
10 on retained earnings capacity calculated under this section.

11 c. For purposes of calculating partial disability based on a retained earnings
12 capacity, an employee is presumed to be capable of earning the greater of the
13 state's hourly minimum wage times the hours of release based on a valid
14 functional capacities examination or the wages payable within the appropriate
15 labor market. This presumption is rebuttable only upon a finding of clear and
16 convincing medical and vocational evidence to the contrary. If the
17 presumption is successfully rebutted, the employee may receive partial
18 disability benefits based on a retained earnings capacity of zero.

19 7. The income test in subsection 3 must be waived when an employer offers the
20 employee a return-to-work option at a wage lower than the income test as defined
21 under subsection 3 or when the organization and the employee agree to waive the
22 income test and the priority options.

23 8. Vocational rehabilitation services may be initiated by:

24 a. The organization on its own motion; or

25 b. The employee or the employer if proof exists:

26 (1) That the employee has reached maximum medical recovery;

27 (2) That the employee is not working and is not voluntarily retired or
28 removed from the labor force; and

29 (3) That the employee has made good-faith efforts to seek, obtain, and
30 retain employment.

9. Chapter 50-06.1 does not apply to determinations of eligibility for vocational rehabilitation made pursuant to this chapter.

10. If retraining is the first appropriate vocational rehabilitation option identified for an employee, the employee shall notify the organization of the acceptance of the retraining option on a form provided by the organization within thirty days from the date the employee receives notice of eligibility for retraining. If the employee fails to notify the organization of the acceptance of the retraining option within the thirty-day period, the organization shall calculate a retained earnings capacity as provided in subdivision c of subsection 6. A vocational rehabilitation allowance does not accrue as weeks of temporary total disability as defined in section 65-01-02 if the employee successfully completes a retraining program approved by the organization. If the employee fails to successfully complete a retraining program approved by the organization, the vocational rehabilitation allowance paid accrues against the maximum number of weeks of temporary total disability allowed pursuant to section 65-01-02. If an employee attempts and withdraws from an approved retraining program within the first twenty weeks following commencement of the retraining program, the employee, upon request, may receive no more than one hundred eighty-two weeks of temporary partial disability benefits calculated pursuant to subdivision c of subsection 6.

SECTION 3. AMENDMENT. Section 65-05.1-02.1 of the North Dakota Century Code is amended and reenacted as follows:

65-05.1-02.1. Vocational consultant's report. The vocational consultant shall review all records, statements, and other pertinent information and prepare a report to the organization and employee.

1. The report must:

- a. Identify the first appropriate rehabilitation option by following the priorities set forth in subsection 4 of section 65-05.1-01.
- b. Contain findings of why a higher listed priority, if any, is not appropriate.

2. Depending on which option the consultant identifies as appropriate, the report also must contain findings that:

- a. Identify jobs in the local or statewide job pool and the employee's anticipated earnings from each job; or
 - b. ~~Describe an appropriate on-the-job training program, and the employee's anticipated earnings;~~
 - e. Describe an appropriate ~~short term or long term~~ retraining program, the employment opportunities anticipated upon the employee's completion of the program, and the employee's anticipated earnings; ~~or.~~
 - d. ~~Describe the employee's potential for specific self-employment, limitations the employee might have in such a self-employment, any assistance necessary, and the employee's anticipated earnings.~~
3. The vocational consultant's report is due within sixty days from the date the vocational assessment is performed under this chapter. However, if the vocational consultant determines that ~~short term or long term training~~ retraining options must be evaluated because higher priority options are not viable, the final report is due within ninety days of the vocational assessment to allow the employee to assist in formulating the choice among the qualified training programs.

SECTION 4. AMENDMENT. Section 65-05.1-04 of the North Dakota Century Code is amended and reenacted as follows:

65-05.1-04. Injured employee responsibility.

1. The injured employee shall seek, obtain, and retain reasonable and substantial employment to reduce the period of temporary disability to a minimum. The employee has the burden of establishing that the employee has met this responsibility.
2. If the injured employee is unable to obtain substantial employment as a direct result of injury, the employee shall promptly notify the organization under subdivision b of subsection 8 of section 65-05.1-01.
3. The injured employee shall be available for testing under subsection 6 or 7 of section 65-05.1-02, and for any further examinations and testing as may be prescribed by the organization to determine whether or not a program of rehabilitation is necessary. The injured employee also shall participate in remedial or other educational services when those services are determined to be necessary

1 by the organization or the vocational consultant. If the employee is noncompliant
2 with this subsection, the organization shall suspend benefits during the period of
3 noncompliance.

4 4. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01
5 is return to the same, modified, or alternative occupation, or return to an
6 occupation that is suited to the employee's education, experience, and marketable
7 skills, ~~or on-the-job training~~, the employee is responsible to make a good-faith work
8 trial or work search. If the employee fails to perform a good-faith work trial, the
9 organization may not pay additional disability benefits unless the employee meets
10 the criteria for reapplying for benefits required under subsection 1 of section
11 65-05-08. If the employee meets the burden of proving that the employee made a
12 good-faith work trial or work search and that the work trial or work search was
13 unsuccessful due to the injury, the organization shall reevaluate the employee's
14 vocational rehabilitation claim.

15 5. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01
16 is ~~short-term or long-term training~~ retraining, the employee shall cooperate with the
17 necessary testing to determine whether the proposed training program meets the
18 employee's medical limitations and aptitudes. The employee shall attend a
19 qualified rehabilitation training program when ordered by the organization. A
20 qualified training program is a rehabilitation plan that meets the criteria of this title,
21 is the approved option of the rehabilitation consultant, and commences within a
22 reasonable period of time such as the next quarter or semester. The organization
23 and the employee, by agreement, may waive the income test applicable under this
24 subsection.

25 6. If, without good cause, the injured employee fails to make a good-faith work search
26 in return to work utilizing the employee's transferable skills, the employee is in
27 noncompliance with vocational rehabilitation. A good-faith work search that does
28 not result in placement is not, in itself, sufficient grounds to prove the work injury
29 caused the inability to acquire gainful employment. The employee shall show that
30 the injury significantly impacts the employee's ability to successfully compete for
31 gainful employment in that the injury leads employers to favor those without

1 limitations over the employee. If, without good cause, the injured employee fails to
2 attend specific vocational testing, remedial, or other vocational services determined
3 necessary by the organization or the rehabilitation consultant, the employee is in
4 noncompliance with vocational rehabilitation. If, without good cause, the injured
5 employee fails to attend a scheduled medical or vocational assessment, fails to
6 communicate or cooperate with the vocational consultant, or fails to attend a
7 specific qualified rehabilitation program within ten days from the date the
8 rehabilitation program commences, the employee is in noncompliance with
9 vocational rehabilitation. If, without good cause, the employee discontinues a
10 training program in which the employee is enrolled, the employee is in
11 noncompliance with vocational rehabilitation. If at any time the employee is
12 noncompliant without good cause, subsequent efforts by the employee to come
13 into compliance with vocational rehabilitation are not considered successful
14 compliance until the employee has successfully returned to the job or training
15 program for a period of thirty days. In all cases of noncompliance by the
16 employee, the organization, ~~by administrative order~~, shall discontinue disability and
17 vocational rehabilitation benefits. If, ~~after issuance of the order~~, the period of
18 noncompliance continues for thirty days following the date benefits are
19 discontinued, or a second instance of noncompliance occurs without good cause,
20 the organization may not pay any further disability or vocational rehabilitation
21 benefits, regardless of whether the employee sustained a significant change in
22 medical condition due to the work injury.

23 **SECTION 5. AMENDMENT.** Section 65-05.1-06.1 of the North Dakota Century Code
24 is amended and reenacted as follows:

25 **65-05.1-06.1. Rehabilitation award.**

- 26 1. Within sixty days of receiving the final vocational consultant's report, the
27 organization shall issue an administrative order under chapter 28-32 detailing the
28 employee's entitlement to disability and vocational rehabilitation services.
- 29 2. If the appropriate priority option is short-term or long-term training, the vocational
30 rehabilitation award must be within the following terms:

- a. For the employee's lost time, and in lieu of further disability benefits, the organization shall award a rehabilitation allowance. The rehabilitation allowance must be limited to the amount and purpose specified in the award, and must be equal to the disability and dependent benefits the employee was receiving, or was entitled to receive, prior to the award.
- b. The rehabilitation allowance must include an additional twenty-five percent when it is necessary for the employee to maintain two households, when it is necessary for the employee to maintain two households and the employee elects to commute to and from school on a daily basis rather than maintain a second household and the distance from the employee's residence to the school or training institution is at least thirty miles, or when the employee meets other criteria established by the organization by rule.
- c. The rehabilitation allowance must be limited to one hundred four weeks except in cases of catastrophic injury, in which case additional rehabilitation benefits may be awarded in the discretion of the organization. Catastrophic injury includes:
 - (1) Paraplegia; quadriplegia; severe closed head injury; total blindness in both eyes; or amputation of an arm proximal to the wrist or a leg proximal to the ankle, caused by the compensable injury, which renders an employee permanently and totally disabled without further vocational retraining assistance; or
 - (2) Those employees the organization so designates, in its sole discretion, provided that the organization finds the employee to be permanently and totally disabled without further vocational retraining assistance. There is no appeal from an organization decision to designate, or fail to designate, an employee as catastrophically injured under this subsection.
- d. The rehabilitation award must include the cost of books, tuition, fees, and equipment, tools, or supplies required by the educational institution. The award may not exceed the cost of attending a public college or university in

the state in which the employee resides, provided an equivalent program exists in the public college or university.

e. If the employee successfully concludes the rehabilitation program, the organization may make, in its sole discretion, additional awards for actual relocation expenses to move the household to the locale where the claimant has actually located work.

f. If the employee successfully concludes the rehabilitation program, the organization may make, in its sole discretion, an additional award, not to exceed two ~~months~~ months' disability benefit, to assist the employee with work search.

g. If the employee successfully concludes the rehabilitation program, the employee is not eligible for further vocational retraining or total disability benefits unless the employee establishes a significant change in medical condition attributable to the work injury which precludes the employee from performing the work for which the employee was trained, or any other work for which the employee is suited. The organization may waive this section in cases of catastrophic injury defined by subdivision c ~~of subsection 2~~.

h. If the employee successfully concludes the rehabilitation program, the employee remains eligible to receive partial disability benefits, as follows:

(1) Beginning the date at which the employee completes retraining, until the employee acquires and performs substantial gainful employment, the partial disability benefit is sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages before the injury, and the employee's wage-earning capacity after retraining, as measured by the average wage in the employee's occupation, according to criteria established by job service North Dakota in its statewide labor market survey, or such other criteria the organization, in its sole discretion, deems appropriate. The average weekly wage must be determined on the date the employee completes retraining. The benefit continues until the employee acquires substantial gainful employment.

- (2) Beginning the date at which the employee acquires substantial gainful employment, the partial disability benefit is sixty-six and two-thirds percent of the difference between the injured employee's weekly wages before the injury, and the employee's wage-earning capacity after retraining, as determined under paragraph 1, or the employee's actual postinjury wage earnings, whichever is higher.
 - (3) The partial disability benefit payable under paragraphs 1 and 2 may not exceed the limitation on partial disability benefits contained in section 65-05-10.
 - (4) The partial disability benefits paid under paragraphs 1 and 2 may not together exceed one year's duration.
 - (5) For purposes of paragraphs 1 and 2, "substantial gainful employment" means full-time bona fide work, for a remuneration, other than make-work. "Full-time work" means employment for twenty-eight or more hours per week, on average.
 - (6) The organization may waive the one-year limit on the duration of partial disability benefits, in cases of catastrophic injury under subdivision c.
3. If the appropriate priority option is return to the same or modified position, or to a related position, the organization shall determine whether the employee is eligible to receive partial disability benefits pursuant to section 65-05-10. In addition, the organization, when appropriate, shall make an additional award for actual relocation expenses to move the household to the locale where the claimant has actually located work.
- ~~4. If the appropriate priority option is on the job training, the organization shall pay the employee a disability benefit throughout the duration of the on the job training program. Upon completion of the training program, the organization shall determine whether the employee is eligible to receive partial disability benefits pursuant to section 65-05-10. In addition, the organization, when appropriate, shall make an additional award for actual relocation expenses to move the household to the locale where the claimant has actually located work.~~

1 **SECTION 6. EFFECTIVE DATE.** Sections 1 and 2 of this Act become effective
2 January 1, 2006.

3 **SECTION 7. APPLICATION.** This Act applies to all claims filed on or after the effective
4 dates of this Act.