

**Fifty-fifth Legislative Assembly, State of North Dakota, begun in the
Capitol in the City of Bismarck, on Monday, the sixth day of January,
one thousand nine hundred and ninety-seven**

HOUSE BILL NO. 1262
(Representative Berg)
(Senator Mutch)

AN ACT to amend and reenact subsection 4 of section 65-05.1-01, subsection 3 of section 65-05.1-02.1, subsections 4 and 6 of section 65-05.1-04, and section 65-05.1-06.1 of the North Dakota Century Code, relating to workers' compensation vocational rehabilitation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 4 of section 65-05.1-01 of the North Dakota Century Code is amended and reenacted as follows:

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 ~~in~~ 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 of one hundred four weeks or less.
 - j. Self-employment.

SECTION 2. AMENDMENT. Subsection 3 of section 65-05.1-02.1 of the North Dakota Century Code is amended and reenacted as follows:

3. The vocational consultant's report is due within sixty days from the ~~initial referral for rehabilitation~~ date the vocational assessment is performed under this chapter. However, where the vocational consultant determines that short-term or long-term training options must be evaluated because higher priority options are not viable, the final report is due within ninety days of the ~~initial~~ vocational assessment to allow the employee to assist in formulating the choice among the qualified training programs.

SECTION 3. AMENDMENT. Subsections 4 and 6 of section 65-05.1-04 of the North Dakota Century Code are amended and reenacted as follows:

4. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01 is return to the same, modified, or alternative occupation, or return to an occupation that is suited to the employee's education, experience, and marketable skills, or on-the-job

training, the employee is responsible to make a good faith work trial or work search. If the employee fails to perform a good faith work trial or work search, ~~the finding of nondisability or partial disability is res judicata, and the bureau may not reinstate temporary total pay additional disability benefits or recalculate an award of partial disability benefits in the absence of a significant change in medical condition attributable to the work injury. The bureau shall recalculate the partial disability award, however, if the employee returns, in good faith, to gainful employment unless the employee meets the criteria for reapplying for benefits required under subsection 2 of section 65-05-08.~~ If the employee meets the burden of proving that the employee made a good faith work trial or work search and that the work trial or work search was unsuccessful due to the injury, the bureau shall reevaluate the employee's vocational rehabilitation claim. ~~A good faith work search that does not result in placement is not, in itself, sufficient grounds to prove the work injury caused the inability to acquire gainful employment. The employee shall show that the injury significantly impacts the employee's ability to successfully compete for gainful employment in that the injury leads employers to favor those without limitations over the employee.~~

6. If, without good cause, the injured employee ~~fails to perform a good faith work trial in a return to the same, modified, or alternative occupation, or in an on-the-job training program, or fails to make a good faith work search in return to work utilizing the employee's transferable skills, the employee is in noncompliance with vocational rehabilitation. A good faith work search that does not result in placement is not, in itself, sufficient grounds to prove the work injury caused the inability to acquire gainful employment. The employee shall show that the injury significantly impacts the employee's ability to successfully compete for gainful employment in that the injury leads employers to favor those without limitations over the employee.~~ If, without good cause, the injured employee fails to attend specific vocational testing, remedial, or other vocational services determined necessary by the bureau or the rehabilitation consultant, the employee is in noncompliance with vocational rehabilitation. If, without good cause, the injured employee fails to attend a scheduled medical or vocational assessment, fails to communicate or cooperate with the vocational consultant, or fails to attend a specific qualified rehabilitation program within ten days from the date the rehabilitation program commences, the employee is in noncompliance with vocational rehabilitation. If, without good cause, the employee discontinues ~~a job the employee is performing, or a training program in which the employee is enrolled,~~ the employee is in noncompliance with vocational rehabilitation. If at any time the employee is noncompliant without good cause, subsequent efforts by the employee to come into compliance with vocational rehabilitation are not considered successful compliance until the employee has successfully returned to the job or training program for a period of ~~sixty~~ thirty days. In all cases of noncompliance by the employee, the bureau, by administrative order, shall discontinue ~~lost time disability and vocational rehabilitation~~ benefits. If, after issuance of the bureau order becomes final, the period of noncompliance continues for ~~sixty~~ thirty days, or a second instance of noncompliance occurs without good cause, the bureau ~~has no further jurisdiction in awarding~~ may not pay any further ~~temporary total disability, temporary partial disability, permanent total disability, or vocational rehabilitation benefits, regardless of whether the employee sustained a significant change in medical condition due to the work injury.~~

SECTION 4. AMENDMENT. Section 65-05.1-06.1 of the North Dakota Century Code is amended and reenacted as follows:

65-05.1-06.1. Rehabilitation award.

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

- a. For the employee's lost time, and in lieu of further ~~temporary total, temporary partial, and permanent total~~ disability benefits, the bureau 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 bureau 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 bureau. Catastrophic injury includes:
 - (1) Paraplegia; ~~quadraplegia;~~ 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 bureau so designates, in its sole discretion, provided that the bureau finds the employee to be permanently and totally disabled without further vocational retraining assistance. There is no appeal from a bureau 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. ~~The rehabilitation allowance may be paid only during such time as the employee faithfully pursues vocational retraining. The rehabilitation allowance may be suspended during such time as the employee is not faithfully pursuing the training program, or has failed academically. If the work injury itself precludes the employee from continuing training, the employee remains eligible to receive disability benefits.~~
- f. ~~In the event~~ If the employee successfully concludes the rehabilitation program, the bureau 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.
- g. ~~f.~~ In the event If the employee successfully concludes the rehabilitation program, the bureau may make, in its sole discretion, an additional award, not to exceed two months disability benefit, to assist the employee with work search.
- h. ~~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 bureau may waive this section in cases of catastrophic injury defined by subdivision c of subsection 2.
- i. ~~h.~~ 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 bureau, 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, ~~but in no case may exceed one year in duration.~~
 - (2) Beginning the date at which the employee acquires substantial gainful employment ~~in the field for which the employee was trained, or in a related occupation, 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.~~
 - ~~(3)~~ Beginning the date at which the employee acquires substantial gainful employment in an occupation unrelated to the employee's training, 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 of this subdivision, or the employee's actual postinjury wage earnings, whichever is higher.
 - ~~(4)~~ (3) The partial disability benefit payable under paragraphs 1, and 2, ~~and 3~~ of this subdivision ~~must be reduced so that the benefit and the employee's earnings or calculated earnings capacity, together, do not exceed one hundred twenty five percent of the average weekly wage in this state. For purposes of this subsection, the average weekly wage must be determined on the date the employee completes retraining or the date the employee acquires substantial gainful employment. The partial disability benefit so calculated is not subject to increase or decrease when the average weekly wage in this state changes~~ may not exceed the limitation on partial disability benefits contained in section 65-05-10.
 - ~~(5)~~ (4) The partial disability benefits paid under paragraphs 1, and 2, ~~and 3~~ may not together exceed one year's duration.
 - ~~(6)~~ For purposes of paragraph 1, ~~the date the employee completes retraining is defined as the date the employee is available for full time work. An employee cannot be deemed available for full time work while the employee pursues education, unless such pursuit will in no way interfere with full time work.~~
 - ~~(7)~~ (5) For purposes of paragraphs 1, and 2, ~~and 3~~, "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.
 - ~~(8)~~ (6) The bureau may waive the one-year limit on the duration of partial disability benefits, in cases of catastrophic injury under subdivision c of subsection 2.
3. If the appropriate priority option is return to the same or modified position, or to a related position, the bureau shall determine whether the employee is eligible to receive partial disability benefits pursuant to section 65-05-10. In addition, the bureau, 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 bureau shall pay the employee a ~~lost-time disability~~ disability benefit throughout the duration of the on-the-job training program. Upon completion of the training program, the bureau shall determine whether the employee is eligible to receive partial disability benefits pursuant to section 65-05-10. In addition, the bureau, 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.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fifty-fifth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1262.

House Vote: Yeas 70 Nays 24 Absent 3

Senate Vote: Yeas 30 Nays 17 Absent 2

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 1997.

Approved at _____ M. on _____, 1997.

Governor

Filed in this office this _____ day of _____, 1997,

at _____ o'clock _____ M.

Secretary of State