

**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. 1264  
(Representative Berg)  
(Senator Mutch)

AN ACT to create and enact a new section to chapter 65-05 of the North Dakota Century Code, relating to payment of preacceptance disability benefits to an employee who allegedly suffers a work-related injury; to amend and reenact sections 65-05-08, 65-05-08.1, 65-05-09, 65-05-10, and 65-06.2-02 of the North Dakota Century Code, relating to payment of workers' compensation disability benefits and payments to confined workers; to provide an effective date; and to provide an expiration date.

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

**SECTION 1. AMENDMENT.** Section 65-05-08 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-08. ~~Compensation not~~ Disability benefits - Not paid unless period of disability is of five days' duration or more - Application required - Suspended during confinement - Duty to report wages.** No ~~compensation~~ benefits may be paid for ~~total or partial~~ disability, the duration of which is less than five consecutive calendar days. If the period of ~~total or partial~~ disability is of five consecutive calendar days' duration or ~~more~~ longer, ~~compensation~~ benefits must be paid for the period of disability provided that:

1. ~~If the period of disability is for not more than fourteen days, disability benefits for the first five days may only be paid for days that the employee was scheduled to work.~~
2. When ~~partial or total~~ disability benefits are discontinued, the ~~claimant shall provide the bureau written notice of~~ bureau may not begin payment again unless the injured employee files a reapplication for disability benefits on a form supplied by the bureau. In case of reapplication, the award may commence no more than thirty days before the date of reapplication. Disability benefits must be reinstated upon ~~a finding~~ proof by the injured employee that:
  - a. The employee has sustained a significant change in the compensable medical condition ~~shown by a preponderance of the evidence;~~
  - b. The employee has ~~provided evidence of~~ sustained an actual wage loss ~~attributable to the work injury caused by the significant change in the compensable medical condition;~~ and
  - c. The employee has not retired or voluntarily withdrawn from the job market as defined in section 65-05-09.3.
3. 2. All payments of disability and rehabilitation benefits must be suspended during the period of confinement ~~in excess of seventy-two consecutive hours~~ of any employee who is eligible for, or receiving, benefits under this title who is confined in a penitentiary, jail, youth correctional facility, or any other penal institution ~~under conviction and sentence unless the employee is receiving permanent total disability benefits or the bureau has determined that none of the priority options under subsection 4 of section 65-05.1-01 are viable, and the employee has a spouse or child, in which case the benefits must be paid directly to such spouse or child.~~ After discharge from the institution, ~~payment of the bureau shall pay subsequent disability or rehabilitation benefits thereafter due must be paid as the employee otherwise would, but for the provisions of this subsection, otherwise be entitled under this title.~~

- 4- 3. Any employee who is eligible for, or receiving, disability or rehabilitation benefits under this title shall report any wages earned, from part-time or full-time ~~employment, work from the employer of injury or any other employer~~ any source. ~~Failure~~ If an employee fails to report such wages earned ~~requires~~, the employee ~~to shall~~ refund to the bureau any ~~partial or total~~ disability or vocational rehabilitation benefits overpaid by the bureau for that time period. To facilitate recovery of those benefits, the bureau may offset future benefits otherwise payable, under section 65-05-29. If the bureau determines that the failure employee willfully failed to report wages earned ~~was willful~~, the employee forfeits all further ~~lost time benefits otherwise payable under this title for that injury pursuant~~ is subject to the penalties in section 65-05-33. An employee shall report whether the employee has performed work or received wages. The bureau shall periodically provide a form to all injured employees receiving disability or rehabilitation benefits that the injured employee must complete to retain eligibility for further disability or rehabilitation benefits. The form will advise the injured employee of the possible penalties for failure to report any work or activities as required by this section. An injured employee who is receiving disability or vocational rehabilitation benefits must report any work activities to the bureau whether or not the injured employee receives any wages. An injured employee who is receiving disability or vocational rehabilitation benefits also must report any other activity if the injured employee receives any money, including prize winnings, from undertaking that activity, regardless of expenses or whether there is a net profit. For purposes of this subsection, "work" does not include routine daily activities of self-care or family care, or routine maintenance of the home and yard, and "activities" does not include recreational gaming or passive investment endeavors.
- 5- 4. An employee shall request disability benefits on a ~~lost-time~~ claim form furnished by the bureau. ~~In no case may lost time~~ Disability benefits may not commence more than one year prior to the date of filing of the initial ~~lost-time~~ claim form for disability benefits.
- 6- 5. The provisions of this section apply to any disability claim asserted against the fund on or after July 1, 1991, irrespective of injury date.
6. It is the burden of the employee to show that the inability to obtain employment or to earn as much as the employee earned at the time of injury is due to physical limitation related to the injury, and that any wage loss claimed is the result of the compensable injury.
7. If the employee voluntarily limits income or refuses to accept employment suitable to the employee's capacity, offered to or procured for the employee, the employee is not entitled to any disability or vocational rehabilitation benefits during the limitation of income or refusal to accept employment unless the bureau determines the limitation or refusal is justified.
8. The bureau may not pay disability benefits unless the loss of earning capacity exceeds ten percent. The injured employee may earn up to ten percent of the employee's preinjury average gross weekly earnings with no reduction in total disability benefits. The employee must report any earnings to the bureau for a determination of whether the employee is within the limit set in this subsection.
9. Upon securing suitable employment, the injured employee shall notify the bureau of the name and address of the employer, the date the employment began, and the amount of wages being received. If the injured employee is receiving disability benefits, the injured employee shall notify the bureau whenever there is a change in work status or wages received.
10. The bureau shall pay to an employee receiving disability benefits a dependency allowance for each child of the employee at the rate of ten dollars per week per child. Effective July 1, 1989, this rate must be paid to each eligible employee regardless of the date of injury.
11. Dependency allowance for the children may be made directly to either parent or guardian at the discretion of the bureau.

**SECTION 2. AMENDMENT.** Section 65-05-08.1 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-08.1. Verification of ~~temporary-total~~ disability.**

1. ~~The claimant's~~ An injured employee's doctor shall certify the period of ~~temporary-total~~ disability ~~upon request of the bureau~~ and the extent of the injured worker's abilities and restrictions.
2. A doctor certifying disability shall include in the report filed with the bureau:
  - a. The medical basis established by medical evidence supported by objective medical findings for the certification of disability;
  - b. Whether the employee is totally disabled, ~~from any and all employment~~, or, if the employee is not totally disabled, whether the employee is able to return to ~~some any~~ employment, ~~including light work or sedentary work~~ and a statement of the employee's restrictions and physical limitations; and
  - c. ~~If the employee is not totally disabled, a statement of the employee's restrictions and physical limitations; and~~
  - d. A professional opinion as to the expected length of, and reason for, the disability.
- e. ~~d.~~ A doctor may not certify or verify past disability ~~unless the doctor has examined commencing more than sixty days before the doctor's examination of the employee within the previous sixty days and filed those reports required by this title.~~
3. The report must be filed on a form furnished by the bureau, or on any other form acceptable to the bureau.
4. ~~The claimant~~ injured employee shall ensure that the required reports for any period of disability are filed.
5. Prior to the expiration of a period of ~~temporary-total~~ disability certified by a doctor, if a report certifying an additional period of disability has not been filed, or upon receipt of a report or other evidence indicating an injured employee who is receiving disability benefits has been or will be released to return to work, the bureau shall send a notice to ~~the claimant~~ that employee of the bureau's intention to discontinue benefits, the reason therefor, and including an explanation of the reason for discontinuing benefits, an explanation of the employee's right to respond, and the procedure for filing the required report or challenging the proposed action. A copy of the notice must be mailed to the ~~claimant's~~ employee's doctor. Thereafter, if the required certification is not filed, the bureau shall discontinue ~~temporary-total~~ disability benefits ~~by formal order~~, effective ~~no sooner than~~ twenty-one days after the date of the notice of intention to discontinue benefits is mailed or the date on which the employee actually returned to work, whichever occurs first.
6. ~~Upon receipt of a report or other evidence indicating a claimant who is receiving temporary total disability benefits has been or will be released to return to work, the bureau shall issue and mail to the claimant a notice of intention to discontinue benefits. Such benefits may thereafter be discontinued on the date of release to return to work or twenty-one days following mailing of the notice, whichever is later. The notice must include a statement of the reason for the action, a brief summary of the evidence relied upon by the bureau, and an explanation of the right to respond and the procedure for challenging the action and submitting additional evidence to the bureau.~~

**SECTION 3. AMENDMENT.** Section 65-05-09 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-09. Temporary total or permanent total disability - Weekly and aggregate compensation benefit.** If an injury causes temporary total or permanent total disability, the fund shall pay to the disabled employee during ~~such that~~ disability a weekly ~~compensation benefit~~ equal to sixty-six and two-thirds percent of the gross weekly wage of the ~~claimant employee~~, subject to a minimum of sixty percent and a maximum of one hundred percent of the average weekly wage in the state. If an employee is disabled due to an injury, that employee's benefits will be based upon the employee's wage and the bureau benefit rates in effect on the date of first disability.

1. If an employee suffers disability but is able to return to employment for a period of twelve consecutive calendar months or more, that employee's benefits will be based upon the wage in effect at the time of the recurrence of the disability or upon the wage that employee received prior to the injury, whichever is higher; ~~and the~~. The bureau benefit rates shall be are those in effect at the time of that recurrence.
2. ~~In case of permanent total or temporary total disability, there must be paid to such disabled employee an additional dependency allowance for each child of the employee at the rate of ten dollars per week per child. Effective July 1, 1989, this rate must be paid to each eligible employee regardless of the date of injury.~~
3. ~~Dependency allowance for the children may be made directly to either parent or guardian at the discretion of the bureau.~~
4. ~~In no case may the compensation~~ The disability benefit or the combined ~~compensation disability benefit~~ and dependency award may not exceed the weekly wage of the employee after deductions for social security and federal income tax.
5. 3. When an employee ~~who~~ is permanently and totally disabled ~~and~~, must be maintained in a nursing home or similar facility, and has no dependent parent, spouse, or children, ~~part or all~~ as much of that employee's weekly compensation benefit as is necessary may be used by the bureau to help defray the cost of such the nursing home care.

**SECTION 4.** A new section to chapter 65-05 of the North Dakota Century Code is created and enacted as follows:

**Preacceptance disability benefits.** If, after receiving a claim for benefits, the bureau determines that more information is needed to process the claim, but that the information in the file indicates the injured employee is more likely than not entitled to disability benefits, the bureau may pay preacceptance disability benefits equal to the minimum weekly disability benefit allowed under section 65-05-09. The bureau may continue to pay preacceptance disability benefits to the employee during the period the claim is pending, unless the injured employee is not cooperating with requests from the bureau for additional information needed to process the claim. The bureau may not pay more than sixty days of preacceptance benefits. The bureau may only recover a payment made to an injured employee under this section if that recovery is allowed under section 65-05-33. There is no appeal from a bureau decision not to pay preacceptance disability benefits.

**SECTION 5. AMENDMENT.** Section 65-05-10 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-10. Partial disability - Weekly compensation benefit.** If the injury causes temporary partial disability resulting in decrease of earning capacity, the ~~compensation~~ 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 the injury in the same or another employment. However, the partial disability benefits plus dependency allowance and earning capacity may not exceed the weekly wage of the employee after deductions for social security and federal and state income tax benefit rates as defined in section 65-05-09.

1. ~~It is the burden of the employee to show that the inability to obtain employment or to earn as much as the employee earned at the time of injury, is due to physical limitation related to the injury, and that any wage loss claimed is the result of the compensable injury.~~

- ~~2. If the employee voluntarily limits income or refuses to accept employment suitable to the employee's capacity, offered to or procured for the employee, such employee is not entitled to any compensation at any time during the continuance of such refusal unless, at any time, such refusal is justified in the opinion of the bureau.~~
- ~~3. No compensation is payable unless the loss of earning capacity exceeds ten percent. The claimant may earn up to ten percent of the claimant's average gross weekly earnings with no reduction in total disability benefits.~~
- ~~4. Upon securing suitable employment, the injured employee shall notify the bureau of the name and address of the employer, the date the employment began, and the amount of wages being received on an annual basis. The injured employee shall notify the bureau whenever there is a change in wages received.~~
- ~~5. The benefits provided by this section are available to any otherwise eligible worker, providing the loss of earning capacity occurs after July 1, 1989. Partial loss of earning capacity occurring prior to July 1, 1989, must be paid at a rate to be fixed by the bureau.~~
- ~~6. Dependency allowance must be paid under section 65-05-09 on claims receiving benefits under this section.~~
7. 2. Benefits must be paid during the continuance of partial disability, not to exceed a period of five years. The bureau may waive the five-year limit on the duration of partial disability benefits in cases of catastrophic injury as defined in section 65-05.1-06.1 or when the injured worker is working and has long-term restrictions verified by clear and convincing objective medical and vocational evidence that limits the injured worker to working less than twenty-eight hours per week because of the compensable work injury. This subsection is effective for partial loss of earnings capacity occurring after June 30, 1991.
8. 3. The employee's earnings capacity may be established by expert vocational evidence of a capacity to earn in the statewide job pool where the worker lives. Actual postinjury earnings are presumptive evidence of earnings capacity where the job employs the employee to full work capacity in terms of hours worked per week, and where the job is in a field related to the employee's transferable skills. The presumption may be rebutted by competent evidence from a vocational expert that the employee's actual earnings do not fairly reflect the employee's earnings capacity in the statewide job pool, considering the employee's capabilities, education, experience, and skills.

**SECTION 6. AMENDMENT.** Section 65-06.2-02 of the North Dakota Century Code is amended and reenacted as follows:

**65-06.2-02. Coverage of inmates - Conditions.**

1. If an inmate in performance of work in connection with the maintenance of the institution, or with any industry maintained ~~therein~~ within the institution, or with any public service activity, sustains a compensable injury, the inmate may, ~~upon being released from the institution, or after discharge from public service,~~ be awarded and paid compensation benefits under the provision provisions of this title, upon being released from the institution or after discharge from public service.
2. Claims under this chapter ~~shall~~ must be filed and processed pursuant to section 65-05-01, except that an inmate ~~shall also have~~ has one year from the date of first release from the institution or discharge from public service to file a claim.
3. Workers' compensation benefits under this chapter accrue and are payable from the time of the inmate's release from the institution or after discharge from public service. Disability benefits must be computed according to the methods provided in chapter 65-05. The inmate's weekly wage must be computed using either the actual wage paid to the inmate or the federal minimum wage as of the date of injury, whichever is higher.

4. If a former inmate receiving disability benefits under the provisions of this chapter is recommitted or sentenced by a court to imprisonment in a penal institution, the disability benefits are payable pursuant to subsection ~~3~~ 2 of section 65-05-08.

**SECTION 7. EFFECTIVE DATE.** Subsection 2 of section 1 of this Act is effective for all confined employees whose period of confinement begins after July 31, 1997, regardless of the date of injury. Subsection 2 of section 5 of this Act is effective for all determinations made after July 31, 1997, regardless of the date of injury. The remainder of section 1, sections 2 and 3, the remainder of section 5, and section 6 are effective for all claims, regardless of the date of injury. Section 4 of this Act is effective for all claims filed after July 31, 1997.

**SECTION 8. EXPIRATION DATE.** Section 4 of this Act is effective through July 31, 1999, and after that date is ineffective.

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Speaker of the House

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President of the Senate

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Chief Clerk of the House

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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. 1264.

House Vote:      Yeas    77      Nays    17      Absent    3

Senate Vote:      Yeas    29      Nays    17      Absent    3

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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