

**Sixty-third Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 8, 2013**

HOUSE BILL NO. 1080
(Industry, Business and Labor Committee)
(At the request of Workforce Safety and Insurance)

AN ACT to amend and reenact subsection 31 of section 65-01-02, sections 65-02-06.1, 65-02-09, and 65-05-05, subsection 2 of section 65-05-08, subsection 11 of section 65-05-12.2, subsection 3 of section 65-05.1-01, subdivision a of subsection 6 of section 65-05.1-01, subsection 7 of section 65-05.1-02, section 65-05.1-02.1, subsection 1 of section 65-05.1-03, subsections 3, 4, 5, and 6 of section 65-05.1-04, subsection 1 of section 65-05.1-06.1, subdivision f of subsection 2 of section 65-05.1-06.1, subsection 3 of section 65-05.1-06.1, and sections 65-05.1-06.2 and 65-05.1-07 of the North Dakota Century Code, relating to definition of wages and federal wages for national guard employees, biennial report requirements, out-of-state claim filing, discontinuation of benefits during incarceration, permanent partial impairment law for amputations, vocational consultants, and claimants; and to provide for application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 31 of section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

31. a. "Wages" means an:
- (1) An employee's remuneration from all employment reportable to the internal revenue service as earned income for federal income tax purposes.
 - (2) For members of the national guard who sustain a compensable injury while on state active duty, "wages" includes income from federal employment and may be included in determining the average weekly wage.
 - (3) For purposes of chapter 65-04 only, "wages" means all gross earnings of all employees. The term includes all pretax deductions for amounts allocated by the employee for deferred compensation, medical reimbursement, retirement, or any similar program, but may not include dismissal or severance pay.
- b. The organization may consider postinjury wages for which coverage was not required or otherwise secured in North Dakota for purposes of determining appropriate vocational rehabilitation options or entitlement to disability benefits under this title.

SECTION 2. AMENDMENT. Section 65-02-06.1 of the North Dakota Century Code is amended and reenacted as follows:

65-02-06.1. Allocated loss adjustment expenses - Continuing appropriation - Annual review.

Money in the workforce safety and insurance fund is appropriated on a continuing basis for the payment of all allocated loss adjustment expenses experienced by the organization in its administration of this title. In its annual audit ~~and its biennial report~~, the organization shall include a breakdown of those allocated loss adjustment expenses that reflect the attorney's fees and costs paid to attorneys who represent injured workers, the attorney's fees and costs paid to attorneys with whom it contracts to represent the organization, the amount paid for administrative law judges for hearings, and the court reporter and other legal expenses paid.

SECTION 3. AMENDMENT. Section 65-02-09 of the North Dakota Century Code is amended and reenacted as follows:

65-02-09. General information to public - Biennial report.

The organization, from time to time, may publish and distribute among employers and employees general information as to the business transacted by the organization as in its judgment may be useful. The director shall submit a biennial report to the governor and the secretary of state in accordance with section 54-06-04. The report must include:

1. A statement of the number of awards made by it.
2. A general statement of the causes of accidents leading to the injuries for which the awards were made.
3. A detailed statement of the disbursements from the fund.
4. A statement of the conditions of the various funds carried by the organization.
5. A breakdown of those allocated loss adjustment expenses that reflect the attorney's fees and costs paid to attorneys who represent injured workers, the attorney's fees and costs paid to attorneys with whom the organization contracts to represent the organization, the amount paid for administrative law judges for hearings, and the amount paid for the court reporter and any other legal expenses.
6. Any other matters which the organization wishes to call to the attention of the governor, including any recommendation for legislation or otherwise which it may have to make.

SECTION 4. AMENDMENT. Section 65-05-05 of the North Dakota Century Code is amended and reenacted as follows:

65-05-05. Payments made to insured employees injured in course of employment and to their dependents.

1. The organization shall disburse the fund for the payment of compensation and other benefits as provided in this chapter to employees, or to their dependents in case death has ensued, who:
 1. a. Are subject to the provisions of this title;
 2. b. Are employed by employers who are subject to this title; and
 3. c. Have been injured in the course of their employment.
2. If an employee, or any person seeking benefits because of the death of an employee, applies for benefits from another state for the same injury, the organization will suspend all future benefits pending resolution of the application. If an employee, or any person seeking benefits because of the death of an employee, is determined to be eligible for benefits through some other state act or enters an agreement to resolve a claim through some other state act, no further compensation shallmay be allowed under this title and the employee, or any person seeking benefits because of the death of an employee, must reimburse the organization for the entire amount of benefits paid.

SECTION 5. AMENDMENT. Subsection 2 of section 65-05-08 of the North Dakota Century Code is amended and reenacted as follows:

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~~ whom must be suspended when the employee is confined in a penitentiary, jail, youth correctional facility, or any other penal institution for a period of between seventy-two consecutive hours and one hundred eighty consecutive days. After discharge from the institution, the organization shall pay subsequent disability or rehabilitation

benefits as the employee otherwise would be entitled under this title. All payments of disability and rehabilitation benefits of any employee who is eligible for, or receiving, benefits under this title must be discontinued when the employee is confined in a penitentiary, jail, youth correctional facility, or any other penal institution for a period in excess of one hundred eighty consecutive days.

SECTION 6. AMENDMENT. Subsection 11 of section 65-05-12.2 of the North Dakota Century Code is amended and reenacted as follows:

11. An amputation of a finger or toe at the level of the distal interphalangeal joint or proximal to that joint, or the thumb or the great toe at the interphalangeal joint or proximal to that joint, which is determined to result in a whole body impairment of less than ~~sixteen~~fourteen percent and which is not identified in the following schedule, is payable as a ~~sixteen~~fourteen percent impairment. If an evaluation for the loss of an eye or for an amputation results in an award that is less than the permanent impairment multiplier identified in the following schedule, the organization shall pay an award equal to the permanent impairment multiplier set out in the following schedule:

For amputation of a thumb	permanent impairment multiplier of 65
For amputation of the second or distal phalanx of the thumb	permanent impairment multiplier of 28
For amputation of the first finger	permanent impairment multiplier of 40
For amputation of the middle or second phalanx of the first finger	permanent impairment multiplier of 28
For amputation of the third or distal phalanx of the first finger	permanent impairment multiplier of 22
For amputation of the second finger	permanent impairment multiplier of 30
For amputation of the middle or second phalanx of the second finger	permanent impairment multiplier of 22
For amputation of the third or distal phalanx of the second finger	permanent impairment multiplier of 14
For amputation of the third finger	permanent impairment multiplier of 20
For amputation of the middle or second phalanx of the third finger	permanent impairment multiplier of 16
For amputation of the fourth finger	permanent impairment multiplier of 16
For amputation of the middle or second phalanx of the fourth finger	permanent impairment multiplier of 12
For amputation of the leg at the hip	permanent impairment multiplier of 234
For amputation of the leg at or above the knee	permanent impairment multiplier of 195
For amputation of the leg at or above the ankle	permanent impairment multiplier of 150
For amputation of a great toe	permanent impairment multiplier of 30
For amputation of the second or distal phalanx of the great toe	permanent impairment multiplier of 18
For amputation of any other toe	permanent impairment multiplier of 12
For loss of an eye	permanent impairment multiplier of 150

For the loss of vision of an eye which equals or exceeds 20/200 corrected

permanent impairment multiplier of 100

The award for the amputation of more than one finger of one hand may not exceed an award for the amputation of a hand. The award for the amputation of more than one toe of one foot may not exceed an award for the amputation of a foot. If any of the amputations or losses set out in this subsection combine with other impairments for the same work-related injury or condition, the organization shall issue an impairment award based on the greater of the permanent impairment multiplier allowed for the combined rating established under the sixth edition of the American medical association's "Guides to the Evaluation of Permanent Impairment" or the permanent impairment multiplier set forth in this subsection.

SECTION 7. AMENDMENT. Subsection 3 of section 65-05.1-01 of the North Dakota Century Code is amended and reenacted as follows:

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.

SECTION 8. AMENDMENT. Subdivision a of subsection 6 of section 65-05.1-01 of the North Dakota Century Code is amended and reenacted as follows:

- a. If the ~~vocational consultant~~ organization concludes that none of the priority options under subsection 4 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.

SECTION 9. AMENDMENT. Subsection 7 of section 65-05.1-02 of the North Dakota Century Code is amended and reenacted as follows:

7. ~~Appoint one or more vocational consultants, the identity of which must be determined by the organization~~ Determine and report on a case-by-case basis, as the nature of the injury may require, for the purpose of assessing the worker's transferable skills, employment options, and the physical demand characteristics of the worker's employment options, and determining which option available under subdivisions a through f of subsection 4 of section 65-05.1-01 will enable the worker to return to employment within the physical restrictions and limitations provided by the medical assessment team. ~~The vocational consultant shall issue to the organization a report as provided in section 65-05.1-02.1.~~

SECTION 10. 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~~organization~~ 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 retraining program, the employment opportunities anticipated upon the employee's completion of the program, 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 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 11. AMENDMENT. Subsection 1 of section 65-05.1-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Direct the implementation of programs for individual ~~workforce safety and insurance claimants~~injured employees in accordance with organization determinations in compliance with the purpose of this chapter.

SECTION 12. AMENDMENT. Subsections 3, 4, 5, and 6 of section 65-05.1-04 of the North Dakota Century Code are amended and reenacted as follows:

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 by the organization ~~or the vocational consultant. If the employee is noncompliant with this subsection, the organization shall suspend benefits during the period of noncompliance.~~
4. If the first appropriate rehabilitation option under subsection 4 or 6 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, 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 organization may not pay additional disability benefits unless the employee meets the criteria for reapplying for benefits required under subsection 1 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 organization shall reevaluate the employee's vocational rehabilitation claim. When the first appropriate vocational rehabilitation option is identified for an employee, the organization shall notify the employee of the obligation to make a good-faith work search or

good-faith work trial, and provide information to the employee regarding reinstatement of benefits if the work search or work trial is unsuccessful.

5. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01 is retraining, the employee shall cooperate with the necessary testing to determine whether the proposed training program meets the employee's medical limitations and aptitudes. The employee shall attend a qualified rehabilitation training program when ordered by the organization. A qualified training program is a rehabilitation plan that meets the criteria of this title, ~~is the approved option of the rehabilitation consultant,~~ and commences within a reasonable period of time such as the next quarter or semester. The organization and the employee, by agreement, may waive the income test applicable under this subsection.
6. If, without good cause, the injured employee 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 organization ~~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~~organization, 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 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 thirty days. In all cases of noncompliance by the employee, the organization shall discontinue disability and vocational rehabilitation benefits. If the period of noncompliance continues for thirty days following the date benefits are discontinued, or a second instance of noncompliance occurs without good cause, the organization may not pay any further disability or vocational rehabilitation benefits, regardless of whether the employee sustained a significant change in medical condition due to the work injury.

SECTION 13. AMENDMENT. Subsection 1 of section 65-05.1-06.1 of the North Dakota Century Code is amended and reenacted as follows:

1. Within sixty days of receiving the final vocational ~~consultant's~~ report, the organization shall issue an administrative order under chapter 28-32 detailing the employee's entitlement to disability and vocational rehabilitation services.

SECTION 14. AMENDMENT. Subdivision f of subsection 2 of section 65-05.1-06.1 of the North Dakota Century Code is amended and reenacted as follows:

- f. 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~~injured employee has actually located work.

SECTION 15. AMENDMENT. Subsection 3 of section 65-05.1-06.1 of the North Dakota Century Code is amended and reenacted as follows:

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 claimantinjured employee has actually located work.

SECTION 16. AMENDMENT. Section 65-05.1-06.2 of the North Dakota Century Code is amended and reenacted as follows:

65-05.1-06.2. Contract for vocational rehabilitation services.

The organization may contract with vocational rehabilitation vendors to provide vocational rehabilitation services to claimantsinjured employees. The organization shall determine the criteria that render a vocational rehabilitation vendor qualified. If additional services are determined to be necessary as a result of failed or inappropriate rehabilitation of an injured employee through no fault of the employee, the organization may contract with the vendor for additional services. If the failure or inappropriateness of the rehabilitation of the injured employee is due to the vendor's failure to provide the necessary services to fulfill the contract, the organization is not obligated to use that vendor for additional services on that claim and the organization may refuse payment for a service that the vendor failed to perform which was a material requirement of the contract.

SECTION 17. AMENDMENT. Section 65-05.1-07 of the North Dakota Century Code is amended and reenacted as follows:

65-05.1-07. Person furnishing training exempt from civil liability - Claimant'sInjured employee's remedy.

Any person, partnership, corporation, limited liability company, association, or agency that furnishes on-the-job or other similar training to a ~~workforce safety and insurance claimant~~ injured employee as the result of a rehabilitation contract, without establishing an employment relationship with the claimantinjured employee, is exempt from all civil liability.

SECTION 18. APPLICATION. Sections 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 apply to all claims regardless of date of injury. Section 6 applies to permanent impairment evaluations performed on or after August 1, 2011.

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 Sixty-third Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1080.

House Vote: Yeas 90 Nays 3 Absent 1

Senate Vote: Yeas 45 Nays 2 Absent 0

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2013.

Approved at _____ M. on _____, 2013.

Governor

Filed in this office this _____ day of _____, 2013,

at _____ o'clock _____ M.

Secretary of State