

## **CHAPTER 65-05.1 REHABILITATION SERVICES**

### **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 injured employee as soon as practicable and as nearly as possible to ninety percent of the injured employee's average weekly wage, or to sixty-six and two-thirds percent of the average weekly wage in the state on the date the rehabilitation 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. Retraining of one hundred four weeks or less.
5. If the employee's first appropriate option is an option listed in subdivision c, d, e, or f of subsection 4, the organization may pursue retraining of one hundred four weeks or less. If an option listed in subdivision a, b, c, d, e, or f of subsection 4 has been identified as appropriate for an injured employee and the employee is initially released by the health care provider 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 health care provider determines the employee is medically capable of full-time employment.
6.
  - a. If the organization concludes that none of the priority options under subsection 4 are viable, and will not return the injured employee to the lesser of sixty-six and two-thirds percent of the average weekly wage in the state, or ninety percent of the injured employee's average weekly wage, 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.
  - b. Under section 65-05-10, the organization shall award partial disability based on retained earnings capacity calculated under this section.
  - c. For purposes of calculating partial disability based on a retained earnings capacity, an employee is presumed to be capable of earning the greater of the

state's hourly minimum wage times the hours of release based on a valid functional capacities examination or the wages payable within the appropriate labor market. This presumption is rebuttable only upon a finding of clear and convincing medical and vocational evidence to the contrary. If the presumption is successfully rebutted, the employee may receive partial disability benefits based on a retained earnings capacity of zero.

7. The income test in subsection 3 must be waived when an employer offers the employee a return-to-work option at a wage lower than the income test as defined under subsection 3 or when the organization and the employee agree to waive the income test and the priority options.
8. Vocational rehabilitation services may be initiated by:
  - a. The organization on its own motion; or
  - b. The employee or the employer if proof exists:
    - (1) That the employee has reached maximum medical recovery;
    - (2) That the employee is not working and is not voluntarily retired or removed from the labor force; and
    - (3) That the employee has made good-faith efforts to seek, obtain, and 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.

#### **65-05.1-02. Organization responsibility.**

The organization shall:

1. Appoint a director of rehabilitation services and such other staff as necessary to fulfill the purposes of this chapter.
2. Cooperate with such federal or state agency as shall be charged with vocational education, vocational rehabilitation, and job placement in order that any duplication of effort can be avoided, as far as possible, in any individual claim.
3. Make determinations on individual claims as to the extent and duration of the organization involvement under this chapter.
4. Enter into such agreements with other agencies and promulgate any rules or regulations as may be necessary or advantageous in order to carry out the purpose of this chapter.
5. Provide such rehabilitation services and allowances as may be determined by the organization to be most beneficial to the worker within the limits of this chapter.
6. Establish medical assessment teams, the composition of which must be determined by the organization on a case-by-case basis, as the nature of the injury may require, for the purpose of assessing the worker's physical restrictions and limitations. The medical assessment team must be provided the medical records compiled by the

worker's treating health care providers. The medical assessment team may consult the worker's treating health care providers prior to making its final assessment of the worker's functional capacities. The provisions of section 65-05-28 do not apply to the medical findings made under this section.

7. 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.

#### **65-05.1-02.1. Vocational report.**

The 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.

#### **65-05.1-03. Director of rehabilitation services - Duties.**

The director of rehabilitation services shall:

1. Direct the implementation of programs for injured employees in accordance with organization determinations in compliance with the purpose of this chapter.
2. Cooperate, contact, and assist any government or private organization or agency or group of individuals or business or individual necessary or advantageous in carrying out the purpose of this chapter.
3. Keep such records, for statistical purposes, and provide such training necessary for the organization staff as is necessary to keep pace with future developments in the area of rehabilitation services.

#### **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 by the organization.
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 re-evaluate 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 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, 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 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.

**65-05.1-05. Rehabilitation contract.**

Repealed by S.L. 1989, ch. 771, § 6.

**65-05.1-06. Rehabilitation allowance.**

Repealed by S.L. 1989, ch. 771, § 6.

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

1. Within sixty days of receiving the final vocational report, the organization shall issue a notice of decision under section 65-01-16 detailing the employee's entitlement to 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 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, as chosen by the employee, an additional thirty percent of the rehabilitation allowance for expenses associated with maintaining a second domicile or for travel associated with attendance at a school or training institution when it is necessary for the employee to travel at least twenty-five miles [40.23 kilometers] one way. Travel must be calculated from the employee's residence to the school or training institution. If it is necessary for an employee to travel less than twenty-five miles one way to a school or training institution, the employee may qualify for an additional rehabilitation allowance as determined in accordance with the following schedule:

| Round-trip mileage | Percentage increase in<br>rehabilitation allowance |
|--------------------|----------------------------------------------------|
| Under 10 miles     | 0                                                  |
| 10 to 30 miles     | 10                                                 |
| 31 to 49 miles     | 20                                                 |

Travel must be calculated from the employee's residence to the school or training institution.

- 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. Notwithstanding the one hundred four-week limit of subdivision c to facilitate the completion of a retraining program, the organization may award a rehabilitation extension allowance that may not exceed twenty weeks.
- e. 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.
- 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 injured employee has actually located work.
- g. If the employee successfully concludes the rehabilitation program, the organization may make, in its sole discretion, an additional award, not to exceed two months' disability benefit, to assist the employee with work search.
- h. 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 and has sustained an actual wage loss caused by the significant change in the

- compensable medical condition. The organization may waive this section in cases of catastrophic injury defined by subdivision c.
- i. 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 wage, 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 average weekly wage, and the injured employee's wage-earning capacity after retraining, as determined under paragraph 1, or the injured employee's actual wage earnings after retraining, 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 injured employee has actually located work.
  4. If the appropriate priority option is subdivision e or f of subsection 4 of section 65-05.1-01 or subsection 6 of section 65-05.1-01, to assist with work search the organization may award an additional award. The additional award under this subsection is awarded at the organization's sole discretion and may not exceed an amount equal to two months of the employee's total disability benefits calculated under section 65-05-09.

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

The organization may contract with vocational rehabilitation vendors to provide vocational rehabilitation services to injured 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.

### **65-05.1-06.3. Rehabilitation services pilot programs.**

The organization may implement a system of pilot programs to allow the organization to assess alternative methods of providing rehabilitation services. A pilot program may address one or more of the organization's comprehensive rehabilitation services, including vocational, medical, psychological, economic, and social rehabilitation services. The goal of a pilot program must be to improve the outcome of the rehabilitation services offered by the organization to assist the injured employee in making adjustments necessitated from the employee's injury and to improve the effectiveness of vocational rehabilitation services in returning an employee to substantial gainful employment. Notwithstanding laws to the contrary, a pilot program may address a broad range of approaches, including collaborative efforts between the organization and the injured employee through which there are variances from the rehabilitation services hierarchy; return-to-work trial periods during which cash benefits are suspended; intensive job search assistance; recognition of and focused services for injured employees who are at risk; and coordination of services of public and private entities. If a pilot program utilizes coordination of services of other state agencies, such as job service North Dakota, department of health and human services, North Dakota university system, or department of public instruction, the organization shall consult with the state agency in establishing the relevant portions of the pilot program, and the state agency shall cooperate with the organization in implementing the pilot program.

### **65-05.1-07. Person furnishing training exempt from civil liability - Injured employee's remedy.**

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

### **65-05.1-08. Workforce safety and insurance vocational rehabilitation grants - Continuing appropriation.**

The organization may implement a grant program to promote and provide necessary educational opportunities for injured employees within the vocational rehabilitation process. The organization may award a grant to promote necessary skills upgrading and to provide for the completion of remedial educational requirements which allow for optimal transition into the labor force. The total annual amount the organization may grant under this section may not exceed one hundred thousand dollars. The organization shall establish grant eligibility requirements and make grant determinations based on the established criteria. Moneys are appropriated on a continuing basis for the purpose of funding the grants under this section and for payment of educational revolving loan fund obligations after July 31, 2023.