ORIGINAL

980342

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Edward Saari, Claimant/Appellee, v. North Dakota Workers Compensation Bureau, Appellant, and Lake Ready Mix, Inc. Appellee.	Supreme Court No. 980342

++

REPLY BRIEF

++

APPEAL FROM JUDGMENT OF OCTOBER 20, 1998,
RAMSEY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE DONOVAN FOUGHTY

++

Jacqueline S. Anderson (ID # 05322)
Special Assistant Attorney General for
the ND Workers Compensation Bureau
NILLES, HANSEN & DAVIES, LTD.
1800 Radisson Tower
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

I. LIBERAL CONSTRUCTION HAS NO APPLICATION TO THE COURT'S DETERMINATION OF THE ISSUES IN THIS CASE.

Saari relies heavily upon the concept of liberal construction in his arguments, and contends that this Court has recently "reiterated" the rule in Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175 ¶ 12, 584 N.W.2d 530 (N.D. 1998). Saari's contentions should be rejected.

In Zueger this Court was construing a statute relating to false statements [N.D.C.C. § 65-05-33]. This is not one of the situations enumerated in the Attorney General's Opinion (95-08), i.e., vocational rehabilitation, permanent partial impairment or aggravation, wherein it would not be a retroactive operation to apply the amendment to N.D.C.C. § 65-01-01. See Appellant's Brief pp. 12-15. Accordingly, Zueger does not stand for the proposition that the rule of liberal construction applies to permanent impairment determinations after August 1, 1995, the effective date of the amendments to N.D.C.C. § 65-01-01.

In addition, Saari's reliance on Eagle v. North Dakota Workers Compensation Bureau, 1998 ND 154 ¶ 7, 583 N.W.2d 97 (N.D. 1998) for the proposition that permanent impairment or rehabilitation benefits vest on the date of injury (contrary to the Attorney General's opinion) is misplaced. In Eagle, there was no dispute as to which law applied to Eagle's claim. Therefore, it is inappropriate to read Eagle as an affirmation that the date of injury controls "all" benefits and provisions under the act. There were in fact no changes in the vocational rehabilitation law between 1992, when Eagle was injured, and 1993 when the Bureau initiated vocational rehabilitation. See attached 1991 and 1993

versions of N.D.C.C. § 65-05.1. Therefore, there could be no consideration of whether a subsequent amendment to the vocational rehabilitation law could be applied to Eagle's claim. It was not until 1995, when changes were made to the statute at issue in Eagle, which the Court simply notes, in footnote 2 of the opinion. The Court made the same reference in Baldock v. North Dakota Workers Compensation Bureau, 554 N.W.2d 441, 443 n.3 (N.D. 1996), and noted the 1995 law was not before the Court.

Accordingly, under the rationale of the Attorney General Opinion, and due to the fact that there is no ambiguity as to what the Legislature intended as to application of N.D.C.C. § 65-05-12.2 (1995), the rule of liberal construction has no application to this case.

II. THE LEGISLATURE CLEARLY SPECIFIED THAT N.D.C.C. § 65-05-12.2 (1995) APPLY TO ALL PERMANENT IMPAIRMENT AWARDS DETERMINED AFTER ITS EFFECTIVE DATE, REGARDLESS OF DATE OF INJURY.

Saari argues that subsequent legislative direction supports his claim that the date of injury controls entitlement to permanent impairment benefits, citing N.D.C.C. § 65-05-12.2(2) (1995). Again, Saari's argument should be rejected. What Saari has done is isolate only one portion of the 1995 permanent impairment law which changed the rate at which benefits are paid. Such argument ignores the explicit legislative pronouncement on the effective date of the statute. "This Act is effective on August 1, 1995, for all permanent impairment awards determined after July 31, 1995, irrespective of injury date."

1995 N.D. Laws ch. 624 § 3 (emphasis supplied). If this directive is not a clear enough, the legislative history provides: "The effective date in Section 3 makes the bill applicable to all awards for impairment determined after July 31, 1995, regardless of the date of injury." Senate Industry, Business and Labor Committee, S.B. 2202, N.D. 54th Leg. Sess. (January 31, 1995) (testimony of Julie Leer).

III. THIS COURT HAS EXPLICITLY REJECTED AN ARGUMENT THAT THE RIGHT TO PERMANENT IMPAIRMENT BENEFITS VESTS ON THE DATE OF INJURY.

Saari's attempts to distinguish Gregory v. North Dakota Workers Compensation Bureau, 369 N.W.2d 119 (N.D. 1985) ["Gregory I"], because it related simply to the rate at which permanent impairment benefits are paid, and "not the vested nature of Gregory's right to" those benefits, and contends his position "does no damage" to Gregory I. Saari's arguments completely ignore the respective positions taken in Gregory I, and the points argued therein.

In Gregory I, the Bureau argued "the general rule" that the right to benefits "vest on the date of injury" and this rule applied to permanent impairment benefits. Gregory I, 369 N.W.2d at 121. In making this argument, the Bureau "relie[d] on caselaw from other jurisdictions to support its position that the 'general rule' is also the law in North Dakota." Id. In addition, the Bureau in Gregory I made an impermissible retroactivity argument (similar that which is made by Saari in this case). Again, this Court rejected that argument, stating: "To the extent that other states have determined that impairments arise at date of injury, those determinations further their particular workmen's compensation

statutory schemes and legislative policies. They are not binding on us. . . . Therefore, we conclude that permanent impairment awards are to be based on the rate in effect at the time the impairment is determined." Gregory I, 369 N.W.2d at 122. Although it was simply the rate at which permanent impairment benefits were to be paid that was at issue in Gregory I, this Court heard and addressed arguments on the issue that the date of injury controlled entitlement to permanent impairment benefits, and rejected that argument.

Now, some 13 years later, the positions are reversed. Saari makes precisely the arguments made by the Bureau in Gregory I, which the Court rejected, and the Bureau makes the arguments presented by the claimant in Gregory I, which the Court adopted. Therefore, in no way could this Court now hold that the date of injury controls entitlement to permanent impairment benefits, without "doing damage", and in fact, overruling, what it said in Gregory I.

IV. CASES RELATING TO APPLICATION OF STATUTORY AMENDMENTS TO CLAIMS FOR BENEFITS OTHER THAN PERMANENT IMPAIRMENT BENEFITS ARE INAPPOSITE TO THE ISSUE OF APPLICATION OF N.D.C.C. § 65-05-12.2 (1995).

Saari cites numerous cases relating to retroactive application of statutory amendments as supporting his position herein. Importantly, none of these cases relate to permanent impairment benefits. This distinction is important in determining whether a statute is being applied in an impermissibly retroactive manner.

First, Saari cites a portion of the Attorney General Opinion (95-08) relating to retroactivity as to aggravation cases, as supporting his position. See Appellee's

Brief, p. 25. Again, as the Attorney General Opinion points out, it depends upon the benefit at issue as to whether an amendment to a statute may be applied to subsequent determinations. Aggravation cases are one of those in which the Attorney General noted that application of the amendment to N.D.C.C. § 65-01-01 would be permissible. See Appellant's Brief, pp. 12-15. Therefore, in considering the language of the Attorney General Opinion, one should not take a single sentence, out of context, and apply it wholesale to all benefits awarded under the Workers Compensation Act. Rather, the Court must look to the type of benefit at issue in determining whether statutory amendments apply to the claim.

In Jensen v. North Dakota Workers Compensation Bureau, 1997 ND 107, 563 N.W.2d 112 (N.D. 1997) the Bureau issued an order finding Jensen had been disabled by a significant worsening of his work injury as of 1985, but determined Jensen could only be awarded disability benefits retroactive to thirty days before Jensen's 1991 reapplication for benefits. Jensen, 1997 ND 107, ¶ 13, 563 N.W.2d at 115. The Bureau's order was based on the 1989 amendments to N.D.C.C. § 65-05-08 requiring that claimants "reapply" for disability benefits, and providing that disability benefits could only be reinstated thirty days before the date of reapplication. Id. at ¶ 6: 563 N.W.2d at 113. The 1989 legislation stated that "the provisions of this section apply to any disability claim asserted against the fund on or after July 1, 1989, irrespective of injury date." 1989 N.D. Laws, ch. 770 § 1; N.D.C.C. § 65-05-08(5) (1989). However, the Court ruled that the 1989 reapplication requirement could not be applied to Jensen, because the Bureau's order found Jensen had become disabled in 1985, and his right to receive disability

benefits had vested at that time. Jensen, 1997 ND 107, ¶ 11-12, 563 N.W.2d at 114-15. Thus, at the time the order was issued in 1991, Jensen's right to receive past disability benefits for the period from 1985 to 1991 was an "immediate or fixed right" that "did not depend upon an event that is uncertain." Id. at ¶ 11, 563 N.W.2d at 114 (defining "vested right").

The rationale of Jensen cannot be extended to this case. In application, N.D.C.C. § 65-05-12.2 does not reach back to deny past benefits, but instead affects only benefits to be paid after the statute's effective date. The statute is triggered when, after the statute's effective date, a claimant is evaluated for permanent impairment and it is determined that the claimant has sustained a permanent impairment. Jensen is thus distinguishable as it involved an attempt to deny past disability benefits, based upon a later enacted statute. Conversely, N.D.C.C. § 65-05-12.2 affects payment of future permanent partial impairment benefits which are uncertain until an impairment is "determined to be permanent" after an evaluation is conducted. Gregory I, 369 N.W.2d at 122. See also Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93, 576 N.W.2d 861 (N.D. 1998) (leaving open issue on which date or statute governs entitlement to permanent impairment benefits as issue need only be determined if an when claimant reaches MMI and an impairment "is manifest and determined to be permanent.")

Similarly, in Gregory v. North Dakota Workers Compensation Bureau, 1998 ND 94, 578 N.W.2d 101 (N.D. 1998) ["Gregory II"], in avoiding an impermissible retroactive application of N.D.C.C. § 65-05-09.3, the Court held there was a "valid obligation to pay disability benefits as long as Gregory remained totally disabled."

Gregory II, 1998 ND 94 ¶ 29, 578 N.W.2d at 109 (emphasis supplied). In finding a "valid obligation", this Court looked to prior precedents, and in particular, looked at the "continuing" or "ongoing" nature of disability benefits. See Gregory II, 1998 ND 94 ¶ 30, 578 N.W.2d at 109. The Court's decision was clearly based, therefore, on the fact that an injured worker was "already receiving disability benefits" which resulted in the expectation of the continuation of those benefits. Id. ¶ 32, 578 N.W.2d at 110.

In contrast, there is no such "expectation interest" or "valid obligation" to pay permanent partial impairment benefits. Prior precedent as to these benefits support this position. In Tooley v. Alm, 515 N.W.2d 137 (N.D. 1994), this Court approved the Bureau's interpretation of its administrative regulations and N.D.C.C. § 65-05-12 to provide an evaluation for permanent impairment only if the injured worker is at maximum medical improvement and there is medical evidence of an impairment. Tooley, 515 N.W.2d at 142. Thus, an injured worker has no "expectation" of receiving an evaluation, much less an impairment award, unless and until maximum medical improvement is received and there is some evidence of a permanent impairment. Indeed, how could Saari have such an "expectation" when his own physician noted he did not even believe a permanent impairment would result! (App. p. 29) Therefore, applying N.D.C.C. § 65-05-12.2 (1995) to Saari's claim would not be an impermissible retroactive application, as there is neither a "valid obligation" nor "vested right" to permanent impairment benefits.

Finally, Saari also cites Heddon v. North Dakota Workmen's Compensation Bureau, 189 N.W.2d 634 (N.D. 1971) as it relates to application of a subsequent

legislative enactments. In Heddon, the Court looked to whether applying an amendment to N.D.C.C. § 65-05-09 requiring weekly compensation benefits be used to defray cost of nursing home care to Heddon's claim would be an impermissible retroactive application. Id. at 637. In holding the statutory amendment could not be applied to Heddon's claim, the Court relied upon the fact that there was no express declaration that the statute was intended to be applied retroactively. Id. at 637-38. Accordingly, this case is distinguishable from the case at bar as the legislature has clearly indicated an intent to apply N.D.C.C. § 65-05-12.2(1995) to all permanent impairment determinations after its effective date, "irrespective of date of injury." 1995 N.D. Laws ch. 624 § 3.

V. THE BUREAU'S HAS CONSISTENTLY APPLIED THE LAW IN EFFECT ON THE DATE OF EVALUATION.

Saari alleges the Bureau's application of N.D.C.C. § 65-05-12.2 (1995) has been inconsistent both internally and in the Bureau's representations to the Court, citing Tooley, 515 N.W.2d 137. The Bureau believes it has consistently applied N.D.C.C. § 65-05-12.2 (1995) to awards of permanent partial impairment, regardless of date of injury or date of maximum medical improvement, when the impairment evaluation has been conducted after the effective date of the statute. In addition, Saari's argument is based upon an incorrect reading of Tooley.

In Tooley, this Court considered whether the Bureau must notify claimants of both their right to permanent partial impairment benefits and a form wherein the claimant can request an evaluation for a possible permanent partial impairment award. The Court held that there was no affirmative duty to notify a claimant of the

availability of impairment benefits. Tooley, 515 N.W.2d at 141. In addition, the language quoted by Saari in his brief regarding the Bureau's interpretation of "provisions" is taken out of context. What the Court was approving in Tooley was the Bureau's interpretation of the permanent partial impairment statutes and its regulations for setting of an evaluation for permanent impairment. There was nothing discussed or at issue in Tooley regarding what law would apply to govern entitlement to permanent partial impairment benefits. Indeed, the Bureau's position on this issue has not changed since the Supreme Court's decision in Gregory I, wherein the Court held that it was the date of evaluation which controlled the benefit rate to be applied to a permanent partial impairment awards. Since that time, the Bureau has consistently applied the law in effect on the date of evaluation, with the exception of those claimants which fell within a Bureau directive. (App. p. 16)

Saari's counsel primarily utilizes a letter from an analyst dated May 22, 1996, as evidence the Bureau has applied the law in effect on the date of maximum medical improvement. (App. p. 24). However, said letter was simply a response to correspondence from Attorney Steven Schneider of May 6, 1996 (App. p. 25), which asks the analyst to confirm that the law in effect on the date of maximum medical improvement will apply to that claim, as the evaluation date was June 12, 1996. One letter, simply responding to a specific request, albeit poorly worded, does not make the Bureau's entire application of its directive inconsistent. See also letter of June 11, 1996, to a the law firm representing Saari on an unrelated claim, App. p. 17.

The Bureau's application of the "new" permanent partial impairment law, N.D.C.C. § 65-05-12.2, is consistent with the clear intent of the legislature that the

statute govern "all permanent partial impairment awards determined after [the effective date]." 1995 N.D. Laws ch. 624, § 3 (emphasis supplied). This is the same language incorporated into N.D.C.C. § 65-05-12 after Gregory I. In Saari's case, although after-the-fact the Bureau has stipulated that Saari was at maximum medical improvement prior to the effective date of N.D.C.C. § 65-05-12.2 (C.R. 116, 121, 122), Saari made no request for an evaluation date prior to that date and therefore he did not fall within the Bureau directive.

It is unclear what Saari intends to accomplish with these arguments, as legally, they have no significance on whether the Bureau may apply N.D.C.C. § 65-05-12.2 (1995) to his claim. It would appear, therefore, Saari simply seeks to cast stones at the Bureau for his own failure to take advantage of what was a magnanimous gesture on the Bureau's part.

CONCLUSION

The Bureau respectfully requests this Court **reverse** the decision of the District Court, and hold that N.D.C.C. § 65-05-12.2 (1995) may be applied to Saari's award of permanent impairment benefits as the same was determined after the statute's effective date.

DATED this 13th day of January, 1999.

Jacqueline S. Anderson (ND ID No. 05322
Special Assistant Attorney General
For the ND Workers Compensation Bureau
1800 Radisson Tower
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544
ATTORNEYS FOR APPELLANT

ADDENDUM A

1991

benefits under that claim. In case of award of lost-time benefits, the award may commence no more than thirty days before the date of reapplication. In case of award of medical benefits, the award may be for medical services incurred no more than thirty days before the date of reapplication.

Source: S.L. 1991, ch. 714, § 53.

Note.
This section became effective July 1, 1991, pursuant to N.D. Const., Art. IV, § 13. Section 77 of chapter 714, S.L. 1991, provides that the section is retroactive to July 1, 1991.

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. It is the purpose of this chapter to provide for the health and welfare by ensuring to workers' compensation claimants otherwise covered by this title, services, so far as possible, necessary to assist the claimant and the claimant's family in the adjustments required by the injury to the end that the claimant may receive comprehensive rehabilitation services. Such services shall include 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, medical limitations, age, education, previous occupation, experience, and transferable skills, and which offers an opportunity to restore the employee as soon as practical and as nearly as possible to the employee's average weekly earnings at the time of injury, or to seventy-five 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 of section 65-05.1-04 which meets this income test.
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 a modified position.
   c. Return to a related occupation in the local job pool which is suited to the employee's education, experience, and marketable skills.
   d. Return to a related occupation in the statewide job pool which is suited to the employee's education, experience, and marketable skills.
   e. On-the-job training.
   f. Short-term retraining of fifty-two weeks or less.
   g. Long-term retraining of one hundred four weeks or less.
   h. Self-employment.
5. 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 seventy-five percent of the average weekly wage, or the employee's preinjury earnings, the employee shall continue to minimize the loss of earnings capacity, to seek, obtain, and retain employment:
   a. That meets the employee's medical limitations;
   b. In which the employee meets the qualifications to compete; and
   c. Which will reasonably result in retained earnings capacity equivalent to the lesser of the employee's preinjury earnings or fifty percent of the average weekly wage in the state on the date the rehabilitation consultant's report is issued.

   An award of partial disability due to retained earnings capacity under this section must be made pursuant to section 65-05-10.
6. By agreement between the bureau and the employee, the income test in subsection 3 and the priority options in subsection 4 may be waived.
7. Vocational rehabilitation services may be initiated by:
   a. The bureau on its own motion; or
   b. The employee or the employer if proof exists:
      (1) That the claimant has reached maximum medical recovery;
      (2) That the claimant is not working and has not voluntarily retired or removed himself from the labor force; and
      (3) That the employee has made good faith efforts to seek, obtain, and retain employment.
8. The provisions of chapter 50-06.1 do not apply to determinations of eligibility for vocational rehabilitation made pursuant to this chapter.

Source: S.L. 1975, ch. 584, § 1; 1989, ch. 69, § 83; 1989, ch. 771, § 1; 1991, ch. 714, § 55.

Effective Date.
The 1991 amendment of this section by section 55 of chapter 714, S.L. 1991, became effective July 1, 1991, pursuant to N.D. Const., Art. IV, § 13.

Section 77 of chapter 714, S.L. 1991, provides that sections 55 [which amended this section], 57, 58, and 59 of the Act apply to any rehabilitation award made on or after July 1, 1991, irrespective of the date of injury, and further provides that the amendment to this section is retroactive to July 1, 1991.

The 1989 amendment of this section by section 1 of chapter 771, S.L. 1989, became effective on July 16, 1989, 90 days after filing, pursuant to N.D. Const., Art. IV, § 13.

Section 7 of chapter 771, S.L. 1989, provided that the duties, responsibilities, and benefits available under the act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date. But see Smith v. North Dakota Workers Comp. Bureau, 1989 447 NW 2d 250, annotated below.

Note.
Section 65-05.1-01 was amended twice by the 1989 Legislative Assembly. Pursuant to section 1-02-09.1, the section was printed to harmonize and give effect to the changes

made in section 1 of chapter 771, S.L. 1989 and section 83 of chapter 69, S.L. 1989.

Calculation of Earning Capacity.

The worker's average weekly earnings at the time of the injury constitute a reasonable formula for calculating earning capacity. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

Pre-Injury Earning Capacity.

The purpose of a vocational retraining program is to substantially rehabilitate a worker to his pre-injury earning capacity. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

A claimant is substantially rehabilitated if he can be employed to within ten percent of his pre-injury earning capacity, so that he is able, upon completion of the retraining program, to be employed at least at ninety percent of his pre-injury earning capacity. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

Prospective Application of Amendments to Chapter.

As S.L. 1989, chapter 771, amending and reenacting portions of this chapter did not clearly express an intent that the amendments were to apply retroactively, the amendments must be applied only prospectively. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, holding however that the amendments could be considered in order to fill a void in the pre-existing legislation.

Searching for Alternate Suitable Employment.

The workers compensation bureau reasonably found that the claimant was not entitled to rehabilitation benefits, where the claimant was aggressively searching for alternative suitable employment, and even though it was not successful, the search indicated that she had marketable skills. Olson v. North Dakota Workers Comp. Bureau, 1988, 419 NW 2d 894.

Collateral References.

Workers' compensation: vocational rehabilitation statutes, 67 ALR 4th 612.

Workers' compensation: recovery for home service provided by spouse, 67 ALR 4th 765.

65-05.1-02. Bureau responsibility. The bureau 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 bureau 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 bureau 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 bureau 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 physicians. The medical assessment team may consult the worker's treating physicians 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. Appoint one or more vocational consultants, the identity of which must be determined by the bureau 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 bureau a report as provided in section 65-05.1-02.1.

Source: S.L. 1975, ch. 584, § 2; 1989, ch. 771, § 2; 1991, ch. 714, § 56.

Effective Date.

The 1991 amendment of this section by section 56 of chapter 714, S.L. 1991, became effective July 1, 1991, pursuant to N.D. Const., Art. IV, § 13. Section 77 of chapter 714, S.L. 1991, provides this amendment is retroactive to July 1, 1991.

The 1989 amendment of this section became effective on July 16, 1989, 90 days after filing, pursuant to N.D. Const., Art. IV, § 13.

Section 7 of chapter 771, S.L. 1989, provided that the duties, responsibilities, and benefits available under the act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date. But see Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, annotated under section 65-05.1-01.

Calculation of Earning Capacity.

The worker's average weekly earnings at the time of the injury constitute a reasonable formula for calculating earning capacity. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

Pre-Injury Earning Capacity.

The purpose of a vocational retraining program is to substantially rehabilitate a worker to his pre-injury earning capacity. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

A claimant is substantially rehabilitated if he can be employed to within ten percent of his pre-injury earning capacity, so that he is able, upon completion of the retraining program, to be employed at least at ninety percent of his pre-injury earning capacity. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

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 bureau 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;
   b. Describe an appropriate on-the-job training program, and the employee's anticipated earnings;
   c. 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 initial referral for rehabilitation assessment 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 available, the final report is due within ninety days of the initial assessment to allow the employee to assist in formulating the choice among the qualified training programs.

Source: S.L. 1989, ch. 771, § 3; 1991, ch. [illegible] § 57.

Effective Date.

The 1991 amendment of this section by section 57 of chapter 714, S.L. 1991, became effective July 1, 1991, pursuant to N.D. Const. Art. V, § 13.

Section 77 of chapter 714, S.L. 1991, provides that sections 55, 57 (which amended this section), 58, and 59 of the Act apply to any rehabilitation award made on or after July 1, 1991, irrespective of the date of injury, and further provides that the amendment to this section is retroactive to July 1, 1991.

This section became effective on July 16, 1989, 90 days after filing, pursuant to N.D. Const. Art. IV, § 13.

Section 7 of chapter 771, S.L. 1989, provided that the duties, responsibilities, and benefits available under the act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date. But see Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250, annotated under section 65-05.1-01.

65-05.1-03. Director of rehabilitation services — Duties. The director of rehabilitation services shall:

1. Direct the implementation of programs for individual workers compensation claimants in accordance with bureau 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 bureau staff as is necessary to keep pace with future developments in the area of rehabilitation services.

Source: S.L. 1975, ch. 584, § 3; 1989, ch. 69, § 84; 1989, ch. 295, § 16; 1991, ch. 54, § [illegible].

Effective Date.

The 1989 amendment of this section by section 16 of chapter 295, S.L. 1989, became effective on July 27, 1989, 90 days after filing, pursuant to N.D. Const. Art. IV, § 13.

Note.

Section 65-05.1-03 was amended twice by the 1989 Legislative Assembly. Pursuant to section 1-02-09.1, the section is printed above to harmonize and give effect to the changes made in section 84 of chapter 69, S.L. 1989, and section 16 of chapter 295, S.L. 1989.

65-05.1-04. Injured employee responsibility.

1. The injured employee shall seek, obtain, and retain reasonable and substantial employment in order to reduce the period of temporary disability to a minimum. The employee has the burden to establish that the employee has met this responsibility.
2. In the event that the injured employee is unable to obtain substantial employment as a direct result of injury, the employee shall promptly notify the bureau under subdivision b of subsection 6 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 bureau to determine whether or not a program of rehabilitation is necessary.
4. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01 is return to the same or modified position or return to related occupation, 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 total 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. However, the bureau shall recalculate the partial disability award if the employee returns in good faith to gainful employment. 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.
5. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01 is short-term or long-term training, 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 bureau. A qualified training program is a rehabilitation plan that meets the criteria of this title, which is the approved option of the rehabilitation consultant, or is a stipulated rehabilitation plan under subsection 6 of section 65-05.1-01, and commences within a reasonable period of time such as the next quarter or semester.
6. If, without good cause, the injured employee fails to perform a good faith work trial in a return to the same or modified position, 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 must be deemed to be in noncompliance with vocational rehabilitation. If, without good cause, the injured employee fails to attend a scheduled medical or vocational assessment, or fails to attend a specific qualified rehabilitation program within ten days from the date the rehabilitation program commences, the employee must be deemed to be 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 must be deemed to be in noncompliance with vocational rehabilitation. If the employee establishes a pattern of noncooperation as heretofore described, involving two or more incidents of noncooperation, subsequent efforts by the employee to come into compliance with vocational rehabilitation may not be deemed successful compliance until the employee has successfully returned to the job or training program for a period of sixty days. In all cases of noncompliance by the employee, the bureau, by administrative order, shall discontinue lost-time benefits. If, upon

the bureau order becoming final, the period of noncompliance continues for sixty days, the bureau has no further jurisdiction in awarding any further temporary total, temporary partial, permanent total, or vocational rehabilitation benefits.

Source: S.L. 197[illegible] 364, § 4; 1989, ch. 771, § 4; 1991, ch. 714, § 58.

Effective Date.

The 1991 amendment of this section by section 58 of chapter 714, S.L. 1991, became effective July 1, 1991, pursuant to N.D. Const., Art. IV, § 13.

Section 77 of chapter 714, S.L. 1991, provides that sections 55, 57, 58 (which amended this section) and 59 of the Act apply to any rehabilitation award made on or after July 1, 1991, irrespective of the date of injury, and further provides that the amendment to this section is retroactive to July 1, 1991.

The 1989 amendment of this section became effective on July 16, 1989, 90 days after filing, pursuant to N.D. Const., Art. IV, § 13. Section 7 of chapter 771, S.L. 1989, provided that the duties, responsibilities, and benefits available under the act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date. But see Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d [illegible] annotated under section 65-05.1-01.

Calculation of Earnings Capacity.

The worker's average weekly earnings at the time of the injury constitute a reasonable formula for calculating earning capacity. Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250 (decided prior to the 1989 amendments to this chapter).

Failure to Return to Work.

Where claimant was advised to return to work by her physician, she was obligated under this section to make herself available for suitable work arranged for her before the bureau had any obligation to consider the necessity and feasibility of a rehabilitation program. Her failure to do so was noncompliance with this section and prevented the bureau from assessing or testing her capability to work and her need for rehabilitation. Risch v. Workers Comp. Bureau (1989) 447 NW 2d 308 (decided prior to the 1989 amendments to this section).

No Entitlement to Rehabilitation Benefits.

Workers' compensation claimant was not entitled to rehabilitation benefits where bureau determined that program of rehabilitation was not necessary under the facts presented, and claimant did not fulfill section 50-06.1-06's requirement that executive director determine whether vocational rehabilitation could be satisfactorily achieved. Froysland v. North Dakota Workers Comp. Bureau (1988) 432 NW 2d 883.

Pre-Injury Earning Capacity.

The purpose of a vocational retraining program is to substantially rehabilitate a worker to his pre-injury earning capacity. Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250 (decided prior to the 1989 amendments to this chapter).

A claimant is substantially rehabilitated if he can be employed to within ten percent of his pre-injury earning capacity, so that he is able, upon completion of the retraining program, to be employed at least at ninety percent of his pre-injury earning capacity. Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250 (decided prior to the 1989 amendments to this chapter).

65-05.1-05. Rehabilitation contract. Repealed by S.L. 1989, ch. 771, effective July 16, 1989.

65-05.1-06. Rehabilitation allowance. Repealed by S.L. 1989, ch. 771, effective July 16, 1989.

Section 65-05.1-06 was amended by section 1 of chapter 295, S.L. 1989, and repealed by section 6 of chapter 771, S.L. 1989. Pursuant to section 1-02-09.1, the section is treated as repealed.

65-05.1-06.1. Rehabilitation award.

1. Within sixty days of receipt of 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 and vocational rehabilitation services. The bureau shall establish by rule, an hourly rate to compensate an employee's attorney from the date the bureau has notified the employee to be available for testing under subsection 7 of section 65-05.1-02. The bureau may establish by rule, absolute maximum fees for such representation.
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 while the employee maintains two domiciles, or 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, severe closed head injury, total blindness, or amputation of an arm or leg, 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 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. In the event 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. If the employee successfully concludes the rehabilitation program, the employee is not eligible for further vocational retrain-

ing 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. 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) The partial disability benefit payable under paragraphs 1, 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.
   (5) The partial disability benefits paid under paragraphs 1, 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) For purposes of paragraphs 1, 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) 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 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.

Source: S.L. 1989, ch. 771, § 5; 1991, ch. 714, § 59.

Effective Date.

The 1991 amendment of this section by section 59 of chapter 714, S.L. 1991, became effective July 1, 1991, pursuant to N.D. Const., Art. IV, § 13.

Section 77 of chapter 714, S.L. 1991, provides that sections 55, 57, 58, and 59 (which amended this section) of the Act apply to any rehabilitation award made on or after July 1, 1991, irrespective of the date of injury, and further provides that the amendment to this section is retroactive to July 1, 1991.

This section became effective on July 16, 1989, 90 days after filing, pursuant to N.D. Const., Art. IV, § 13.

Section 7 of chapter 771, S.L. 1989, provided that the duties, responsibilities, and benefits available under the act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date. But see Smith v. North Dakota Workers Comp. Bureau, 1989 447 NW 2d 250, annotated under section 65-05.1-01.

DECISIONS UNDER PRIOR LAW

Expenses of Relocating.

Former section 65-05.1-06 did not require the bureau to pay expenses incurred by a claimant in relocating in order to take advantage of a vocational retraining program. Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250.

Vocational Rehabilitation.

The workers compensation bureau's order awarding the claimant vocational rehabilitation benefits for a period of two years instead of four years was affirmed where the bureau normally awarded only two years of vocational rehabilitation benefits, the claimant was informed prior to enrolling in a four-year program that the bureau normally granted only two years of vocational rehabilitation benefits, and there were numerous two-year degree programs which would qualify the claimant for employment. Levey v. North Dakota Workers Comp. Bureau, 1988, 425 NW 2d 376.

65-05.1-06.2. Bids for vocational rehabilitation services. The bureau shall solicit bids from vocational rehabilitation vendors to provide services relative to vocational rehabilitation of claimants. The bureau shall contract with the lowest and best bidders to provide these services on an

ADDENDUM B

1993

Legislative Intent.
The legislative history of this section indicates the intent was to create a penalty for anyone who accepts disability benefits for a period during which that person is actually working. Hayden v. North Dakota Workers Comp. Bureau, 1990, 447 NW 2d 489.

Nature of Employment.
The language of this section does not differentiate between permanent and temporary employment. Hayden v. North Dakota Workers Comp. Bureau, 1990, 447 NW 2d 489.

Nature of Sanctions.
A false statement on a claim can result in the claimant being required both to reimburse the workers compensation bureau for benefits paid and to forfeit future benefits. F.O.E. Aerie 2337 v. North Dakota Workers Comp. Bureau, 1990, 464 NW 2d 187.

Odd Lot Doctrine.
The odd lot doctrine, which has not been expressly adopted in this state, does not apply to the determination of whether or not there has been a violation of this section. The doctrine is used to determine whether a claimant is entitled to benefits due to the nature of the disability and whether he can be returned to work. Hayden v. North Dakota Workers Comp. Bureau, 1990, 447 NW 2d 489.

Penalized Actions.
This section penalizes the making of false claims. A false statement on a claim and collection of disability benefits for a time after the claimant has returned to work. F.O.E. Aerie 2337 v. North Dakota Workers Comp. Bureau, 1990, 464 NW 2d 187.

65-05-34. False statement on employment application. A false statement in an employment application made by an employee bars all benefits under this title if:

1. The employee knowingly and willfully made a false representation as to the employee's physical condition;
2. The employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
3. There was a causal connection between the false representation and the injury.

Source: S.L. 1989, ch. 714, § 2; pursuant to N.D. Const. Art. IV, § 13, Section 65-05-34 of chapter 714, S.L. 1989 amending that section was stricken from the 1991 Supplement.

Note.
This section became effective July 1, 1990.

65-05-35. Inactive claim — Presumption.

1. A claim for benefits under this title is presumed inactive if:
   a. A doctor's report has been filed indicating the employee has reached maximum medical recovery; and
   b. The bureau has not paid any benefit or received a demand for payment of any benefit for a period of four years.
2. A claim that is presumed inactive may not be reopened for payment of any further benefits unless the presumption is rebutted by a preponderance of the evidence. At a minimum, the employee shall present expert medical opinion that there is a causal relationship between the work injury and the current symptoms.
3. With respect to a claim that has been presumed inactive, the employee shall provide the bureau written notice of reapplication for benefits under that claim. In case of award of lost-time benefits, the award may commence no more than thirty days before the date of reapplication. In case of award of medical benefits, the award may be for medical services incurred no more than thirty days before the date of reapplication.

Source: S.L. 1989, ch. 714, § 2; pursuant to N.D. Const. Art. IV, § 13, Section 65-05-35 of chapter 714, S.L. 1989 amending that section was stricken from the 1991 Supplement.

Note.
This section became effective July 1, 1990.

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. It is the purpose of this chapter to provide for the health and welfare by ensuring to workers' compensation claimants otherwise covered by this title, services so far as possible, necessary to assist the claimant and the claimant's family in the adjustments required by the injury to the end that the claimant may receive comprehensive rehabilitation services. Such services shall include 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, medical limitations, age, education, previous occupation experience, and transferable skills, and which offers an opportunity to restore the employee as soon as practical and as nearly as possible to the employee's average weekly earnings at the time of injury or to seventy-five 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 of section 65-05.1-04 which meets this income test.

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 a modified position.
   c. Return to a related occupation in the local job pool which is suited to the employee's education, experience, and marketable skills.
   d. Return to a related occupation in the statewide job pool which is suited to the employee's education, experience, and marketable skills.
   e. On-the-job training.
   f. Short-term retraining of fifty-two weeks or less.
   g. Long-term retraining of one hundred four weeks or less.
   h. Self-employment.
5. 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 seventy-five percent of the average weekly wage, or the employee's preinjury earnings, the employee shall continue to minimize the loss of earnings capacity, to seek, obtain, and retain employment:
   a. That meets the employee's medical limitations;
   b. In which the employee meets the qualifications to compete; and
   c. Which will reasonably result in retained earnings capacity equivalent to the lesser of the employee's preinjury earnings or fifty percent of the average weekly wage in the state on the date the rehabilitation consultant's report is issued.

   An award of partial disability due to retained earnings capacity under this section must be made pursuant to section 65-05-10.
6. By agreement between the bureau and the employee, the income test in subsection 3 and the priority options in subsection 4 may be waived.
7. Vocational rehabilitation services may be initiated by:
   a. The bureau on its own motion; or
   b. The employee or the employer, if proof exists:
      1. That the claimant has reached maximum medical recovery;
      2. That the claimant is not working and has not voluntarily retired or removed himself from the labor force; and
      3. That the employee has made good faith efforts to seek, obtain, and retain employment.
8. The provisions of chapter 50-06.1 do not apply to determinations of eligibility for vocational rehabilitation made pursuant to this chapter.

Source: S.L. 1977 [illegible]

Effective Date

The 1991 amendment of this section by section [illegible] of chapter 714, S.L. 1991 became effective July 1, 1991, pursuant to N.D. Const. Art. IV [illegible]

Section 77 of chapter 714, S.L. 1991, provides that sections 55 [illegible] which amended [illegible] sections 57, 58, and 59 of the Act apply [illegible] rehabilitation award made on or after [illegible] 1991, irrespective of the date of injury, and further provides that the amendment [illegible] is a retroactive [illegible]

Note

Section [illegible] of chapter 771, S.L. 1989, provided that the duties, responsibilities, and benefits available under the act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date. But see Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250, annotated below.

Section [illegible] was amended twice by the 1989 Legislative Assembly. Pursuant to section [illegible], the section was printed to harmonize and give effect to the changes made in section [illegible] of chapter 771, S.L. 1989, and section [illegible] of chapter [illegible], S.L. 1989.

Cross-References.

[illegible] see § 50-[illegible].

Burden of Proof.

Claimant seeking disability and rehabilitative benefits did not have to prove that the work-related injury was the sole cause of her disability or even that it was a primary cause of that disability. To the contrary, the work injury need only have been a substantial contributing factor to the disability. [illegible] v. North Dakota Workers Comp. Bureau (19[illegible]) 4[illegible] NW 2d [illegible].

Calculation of Earning Capacity.

The worker's [illegible] weekly earnings at the time of the injury [illegible] formula for calculating earning capacity. Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

Employment Not Guaranteed.

This chapter does not require that the Workers Compensation Bureau [illegible]

Dakota Workers Comp. Bureau [illegible] NW 2d [illegible].

Interim Rehabilitation Benefits.

Where the [illegible] that claimant was not [illegible] substantial gainful employment during the interim between the date of termination of the disability payments and the [illegible] position, and that during this interim he was disabled to the extent that he could not return to his [illegible] employment or [illegible] employment, the [illegible] denial of [illegible] rehabilitation benefits for the [illegible] v. North Dakota Workers Comp. Bureau [illegible] NW 2d [illegible].

Legislative Intent.

[illegible] bureau to [illegible] medical limitations at the time [illegible] a work-related [illegible] v. North Dakota Workers Comp. Bureau (19[illegible]) 4[illegible] NW 2d 46[illegible].

No Entitlement to Retraining.

Bureau found that worker [illegible] of performing unskilled [illegible] medium work category [illegible] earn [illegible] about $4 [illegible] which is the amount that he was [illegible] at the time of his injury and that [illegible] are available. The bureau correctly [illegible] that worker was not entitled to receive retraining because the first appropriate option under the section was [illegible] Emer[illegible] v. North Dakota Workers Comp. Bureau (199[illegible]) 477 NW 2d 2[illegible].

Pre-Injury Earning Capacity.

The purpose of a vocational retraining program is to substantially rehabilitate a worker to his pre-injury earning capacity. Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250, decided prior to the 1989 amendments [illegible]

[illegible] Smith v. North Dakota Workers Comp. Bureau (1989) 447 NW 2d 250, decided prior to the 1989 amendments to this chapter.

Prospective Application of Amendments to Chapter.

As S.L. 1989, chapter 77[illegible] [illegible]

[illegible] amendments must be applied [illegible] Workers Comp. Bureau, 1992 ND 214, 487 NW2d 611, holding however that the amendments [illegible] retroactive application.

The 1989 amendments [illegible] applied to claims for rehabilitation [illegible] Thompson v. North Dakota Workers Comp. Bureau, 1992 ND 214, 487 NW2d 611.

Searching for Alternate Suitable Employment.

The workers compensation bureau [illegible] that the claimant was not entitled to rehabilitation benefits because the claimant was successfully searching for alternative suitable employment and even though it was not successful the search indicated that he had marketable skills. Lasher v. North Dakota Workers Comp. Bureau, 1992 ND 194, 490 NW2d 694.

Subsequent Nonwork-Related Injuries.

An injured worker with a work-related injury which has resulted in a permanent impairment and which has been [illegible] the work-related injury may have those subsequent injuries considered [illegible] rehabilitation assessment. North Dakota Workers Comp. Bureau, 1992 ND 214, 487 NW2d 611.

Where claimant was not able to return to [illegible] and was not able to perform most [illegible] but did not claim that her work-related [illegible] was a substantial contributing factor to [illegible] and medical [illegible] different from [illegible] Holte v. North Dakota Workers Comp. Bureau, 1992 ND 214, 487 NW2d 611.

Vocational Rehabilitation.

[illegible] rehabilitation [illegible] horse [illegible] and [illegible] receiving [illegible] services [illegible] The bureau [illegible] rehabilitation and was [illegible] entitled to [illegible] payment of disability benefits where [illegible] and medical [illegible] and [illegible] prescribed [illegible] and retraining. Schill v. North Dakota Workers Comp. Bureau, 1992 ND 214, 487 NW2d 611.

Collateral References.

Workers compensation [illegible] rehabilitation of [illegible]

Workers compensation [illegible] [illegible] 71 A.L.R.3d 1265.

65-05.1-02. Bureau responsibility. The bureau shall:

1. Appoint a director of rehabilitation services and such other staff as necessary to fulfill the purposes of this chapter.
2. Cooperate with the rehabilitation services [illegible] 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 bureau involvement under this chapter.
4. Enter into such agreements with other agencies and prescribe any rules or regulations as may be necessary or advisable in order to carry out the purpose of this chapter.
5. Provide such rehabilitation services and all services as may be determined by the bureau 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 bureau in a manner [illegible] to the nature of the injury, the duration of the claim, and the worker's physical restrictions and limitations. The medical assessment team must be provided the medical information by the worker's treating physicians. The medical assessment team may consult the worker's treating physician prior to making the final assessment of the worker's functional capacities. The provisions of section [illegible] do not apply to the medical [illegible] made under this subsection.
7. Appoint one or more vocational consultants the identity of whom must be determined by the bureau in a manner [illegible] to the nature of the injury, the duration of the claim, and the worker's transferable skills, employment options, and the physical demand characteristics of the worker's employment pool. The vocational consultant, in determining which option available under subsection 1 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, shall consult with the worker and shall issue to the bureau a report as provided in section 65-05.1-02.1.

Source: S.L. 1989, ch. 764, § 1; 1991, ch. 774, § 1; 1993, ch. 734, § 1.

Effective Date.

The [illegible] amendment to this section by chapter 734, S.L. 1993 became effective July 1, 1993, pursuant to N.D. Const. Art. IV, § 13. Section 7 of chapter 734, S.L. 1993, provides that this amendment is retroactive to July 1, 1989.

Note.

Section 1 of chapter 774, S.L. 1989 provided that the bureau's responsibilities [illegible] rehabilitation services [illegible] awards for [illegible] rehabilitation services made on or after July 1, 1989, irrespective of the date of injury. Bruce Smith v. North Dakota Workers Comp. Bureau, 1992 ND 147, 487 NW2d 282, annotated under section 65-05.1-01.

Calculation of Earning Capacity.

The [illegible] weekly earnings of the [illegible] reasonable [illegible] Smith v. North Dakota Workers Comp. Bureau, 1992 ND 147, 487 NW2d 280, decided prior to the 1989 amendments to this chapter.

Medical Assessment Team.

The Workers Compensation Bureau [illegible] qualified [illegible] medical [illegible] Workers Comp. Bureau, 1992 ND 214, 487 NW2d 611.

Pre-Injury Earning Capacity.

The [illegible] rehabilitation program [illegible] substantially reduced [illegible] Smith v. North Dakota Workers Comp. Bureau, 1992 ND 147, 487 NW2d 280, [illegible] Although claimant [illegible] with reduced permanent [illegible] there [illegible] available [illegible] program [illegible] employed at least 40 hours per week [illegible] Smith v. North Dakota Workers Comp. Bureau, 1992 ND 147, 487 NW2d 280, decided prior to the 1989 amendments to this chapter.

65-05.1-02.1. Vocational consultant's report. The [illegible] consultant shall review all records, [illegible] and other pertinent [illegible] and shall prepare a report to the bureau and [illegible]

1. The report must:
   a. Identify the first appropriate rehabilitation option [illegible] the worker [illegible] the nature of both the injury [illegible]

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;
   b. Describe an appropriate on-the-job training program, and the employee's anticipated earnings;
   c. 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 initial referral for rehabilitation assessment 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 assessment to allow the employee to assist in formulating the choice among the qualified training programs.

Source: S.L. 1989 ch. 771, § 3; 1991 ch. 714, § 57

Effective Date.

The 1991 amendment of this section by section 57 of chapter 714, S.L. 1991, became effective July 1, 1991, pursuant to N.D. Const. Art. IV, § 13.

Section 77 of chapter 714, S.L. 1991, provides that sections 55, 57, which amended this section, 58, and 59 of the act apply to any rehabilitation award made on or after July 1, 1991, irrespective of the date of injury, and further provides that the amendment to this section is retroactive to July 1, 1991.

Note.

Section 7 of chapter 771, S.L. 1989, provided that the duties, responsibilities, and benefits available under the act apply to all awards of vocational rehabilitation services made on or after July 1, 1989, irrespective of injury date. But see Smith v. North Dakota Workers Comp. Bureau, 1989, 447 NW 2d 250, annotated under section 65-05.1-01.

65-05.1-03. Director of rehabilitation services — Duties. The director of rehabilitation services shall:

1. Direct the implementation of programs for individual workers compensation claimants in accordance with bureau 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 bureau staff as is necessary to keep pace with future developments in the area of rehabilitation services.

Source: S.L. 1973 ch. 564, § 1; 1989 ch. 59, § 94; 1989 ch. 295, § 16; 1991 ch. 54, § 32

Note.

Section 65-05.1-03 was amended by the 1991 Legislative Assembly. Pursuant to section 1 of chapter 54, the section as printed above is harmonized and given effect to the changes made in section 54 of chapter 54, S.L. 1991, and section 32 of chapter 296, S.L. 1991.

65-05.1-04. Injured employee responsibility.

1. The injured employee shall seek, obtain, and retain reasonable and substantial employment in order to reduce the period of temporary disability to a minimum. The employee has the burden to establish 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 bureau under subdivision b of subsection 5 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 bureau to determine whether or not a program of rehabilitation is necessary.
4. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01 is return to the same or modified position, or return to related occupation, 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 total 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. However, the bureau shall recalculate the partial disability award if the employee returns, in good faith, to gainful employment. 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.
5. If the first appropriate rehabilitation option under subsection 4 of section 65-05.1-01 is short-term or long-term training, 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 bureau. A qualified training program is a rehabilitation program that meets the criteria of this title which is the approved plan of the rehabilitation consultant or is a stipulated rehabilitation plan under subsection 6 of section 65-05.1-06 and commences within a reasonable period of time such as the next quarter or semester.

6. If without good cause the injured employee fails to perform a good faith work trial or return to the employee's modified or former job, or fails to attend a job training program, or fails to make a good faith work search in return to work utilizing the employee transferable skills, the employee must be deemed to be in noncompliance with vocational rehabilitation. If, without good cause, the injured employee fails to attend a scheduled medical or vocational assessment, or fails to attend a specific qualified rehabilitation program within ten days from the date the rehabilitation program commences, the employee must be deemed to be 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 must be deemed to be in noncompliance with vocational rehabilitation. If the employee establishes a pattern of noncooperation as hereto described involving two or more incidents of noncooperation, subsequent efforts by the employee to come into compliance with vocational rehabilitation may not be deemed successful. Compliance with the vocational rehabilitation may fully returned to the job or training program for a period of sixty days. In all cases of noncompliance by the employee the bureau, by administrative order, shall suspend the benefits. If upon the bureau's order commencing the period of noncompliance continues for sixty days, the bureau has no further jurisdiction in awarding any further temporary total, temporary partial, permanent total, or vocational rehabilitation benefits.

Source: [illegible]

Effective Date.

The 1991 amendment [illegible] section 65-05.1-08 of chapter [illegible] section [illegible] Act. [illegible]

Section [illegible] provides that sections [illegible] this section and [illegible] rehabilitation award made [illegible] 1991, irrespective of the date [illegible] further provides that the amendment [illegible] section is retroactive [illegible]

Note.

[illegible]

Calculation of Earnings Capacity.

[illegible]

the time [illegible] constitute a noncooperative [illegible] Smith v. North Dakota Workers Comp. Bureau, 1989 ND 147, 447 N.W.2d 250, decided prior to the 1989 amendments to this chapter.

Failure to Return to Work.

Where claimant was advised to return to work by the claims analyst, [illegible] for this section to make herself available for modified work offered for her before the [illegible] and the director to consider the [illegible] of the rehabilitation program. Her failure to do so was noncompliance with this section and prevented the bureau from assessing her employment capabilities, work and personal rehabilitation. Rasch v. Workers Comp. Bureau, 1989 ND 147, 447 N.W.2d 908, decided prior to the 1989 amendments to this section.

No Entitlement to Rehabilitation Benefits.

Workers compensation claimant was not entitled to rehabilitation benefits where [illegible] read information that [illegible] program. Rehabilitation [illegible] center and claimant did not fulfill section 65-05.1-06 requirement that [illegible] vocational rehabilitation [illegible] be established [illegible] Stromme v. North Dakota Workers Comp. Bureau, 1988 ND 83, 433 N.W.2d 583.

Preinjury Earning Capacity.

The purpose of vocational retraining program [illegible] substantially rehabilitate [illegible] preinjury earning capacity. Stromme v. North Dakota Workers Comp. Bureau, 1988 ND 83, 433 N.W.2d 583, decided prior to the 1989 amendments to this chapter.

A claimant [illegible] rehabilitation [illegible] he can be employed within a reasonable period of time with preinjury earning capacity so that he is able upon completion of the rehabilitation program to be employed at least at ninety percent of his preinjury earning capacity. Stromme v. North Dakota Workers Comp. Bureau, 1988 ND 83, 433 N.W.2d 583, decided prior to the 1989 amendments to this chapter.

65-05.1-05. Rehabilitation contract. Repealed by S.L. 1989 ch. 771, § 6, effective July 16, 1989.

65-05.1-06. Rehabilitation allowance. Repealed by S.L. 1989 ch. 771, § 6, effective July 16, 1989.

Note.

Section 65-05.1-06 was amended by section [illegible] chapter 771, S.L. 1989. Subsequent to the amendment and repeal, the section's structure was [illegible] section.

65-05.1-06.1. Rehabilitation award.

1. Within sixty days of receipt of 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 and vocational rehabilitation services. The bureau shall establish by rule an hourly rate to compensate an employee's attorney from the date the bureau has notified the employee to be available for testing under subsection 7 of section 65-05.1-06. The bureau may establish by rule absolute maximum fees for such representation.

2. If the appropriate priority [illegible] long-term training and the vocational rehabilitation award must be within the following terms:

   a. For the employee's lost time and [illegible] 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 depen-

dent 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 while the employee maintains two domiciles, or 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, severe closed head injury, total blindness or amputation of an arm or leg 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 [illegible] 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 satisfactorily. If the work injury itself precludes the employee from continuing training, the employee remains eligible to receive disability benefits.

f. In the event the employee successfully concludes the rehabilitation program, the bureau may make, in its sole discretion, additional awards for actual relocation expense to move the employee to the locale where the claimant has actually located work.

g. In the event the employee successfully concludes the rehabilitation program, the bureau may make, in its sole discretion, an additional award not to exceed six months disability benefits to assist the employee with work search.

h. If the employee successfully concludes the rehabilitation program, the employee is not eligible for further vocational rehabilitation benefits. Disability benefits cease 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. 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 greater.

(4) The partial disability benefit payable under paragraphs 1, 2, and 3 of this subdivision must be reduced so that the benefit and the employee's earnings or calculated earning capacity, together, do not exceed one hundred 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 as calculated is not subject to increase

or decrease when the average weekly wage in this state changes.

5. The partial disability benefits paid under paragraphs 1, 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. For purposes of paragraphs 1 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.

5. 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 area 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 post-time 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 area where the claimant has actually located work.

Source: S.L. 1989 ch. 7[illegible] 1991, in 1[illegible]14, 59

Effective Date.

The 1991 amendment [illegible] section 65-05.1-09 if chapter [illegible] became effective only [illegible] subdivision b of section 10 of Article IV [illegible]

Section [illegible] provides that section [illegible] applies to claims [illegible] on or after [illegible] 1989, irrespective of the date [illegible] further provides that the amendment to section [illegible] applies to claims [illegible] provided that the rates, responsibilities, and benefits available under the act [illegible] awards [illegible] made [illegible] Workers Compensation Bureau [illegible] and [illegible] under section 65-[illegible]

Note.

Section [illegible]

[illegible] NUMBER [illegible] LAW

Expenses of Relocating.

Former section [illegible] the bureau [illegible] claimant [illegible] A [illegible]

Vocational Rehabilitation.

The workers compensation bureau's order awarding the claimant vocational rehabilitation benefits for [illegible] instead of [illegible] years was affirmed where the bureau's award [illegible] occupational goals [illegible] claimant was informed of the remaining [illegible] year.

65-05.1-06.2. Bids for vocational rehabilitation services. The bureau shall [illegible] bids from [illegible] vocational rehabilitation services [illegible] vocational rehabilitation of claimants. The bureau shall contract with the lowest and best bidders to provide these services on a biennial basis. The bureau shall determine the criteria that render a vocational rehabilitation vendor qualified. The request for bids must contain detailed outlines of services which will be expected to provide. The accepted bids is binding upon both the bureau and the rehabilitation vendor. 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 bureau 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 bureau is not obligated to pay that vendor for additional services in that claim and the bureau may refuse payment for services that the vendor failed to perform which were a material requirement of the contract.

Source: S.L. [illegible] ch. 714, 1991, in [illegible]

Note.

This section [illegible] effective July 1, 1991.

65-05.1-07. Person furnishing training exempt from civil liability — Claimant's remedy. Any person, partnership, corporation, limited liability company, association, or agency that furnishes on-the-job or other similar training to a workers' compensation claimant as the result of a rehabilitation contract, without establishing an employment relationship with the claimant, is exempt from [illegible]

Source: S.L. [illegible] ch. 554, 1989, in [illegible]