

**Sixty-seventh Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 5, 2021**

HOUSE BILL NO. 1084
(Industry, Business and Labor Committee)
(At the request of Workforce Safety and Insurance)

AN ACT to create and enact a new section to chapter 65-02 of the North Dakota Century Code, relating to charging fees for outgoing file copies; to amend and reenact paragraph 3 of subdivision b of subsection 11 of section 65-01-02, section 65-01-11, subsections 2 and 3 of section 65-04-33, subsection 7 of section 65-05-08, sections 65-05-09, 65-05-10, 65-05-32, and 65-05-33, subsection 1 of section 65-05-35, subsections 3 and 6 of section 65-05.1-01, and subsection 2 of section 65-05.1-06.1 of the North Dakota Century Code, relating to definition of compensable injury, burden of proof involving recreational marijuana use, an employer's willful misrepresentation by statement or omission, reapplications following a refusal of job offer, calculation of temporary total, permanent total, and temporary partial disability using average weekly wage from the definition section, release of claim file information to survivors in death claims, a person who claims benefits or the employer of a person who claims benefits and makes a false statement or omission, presumed closed claims, and reapplications following completion of a rehabilitation retraining program; to provide a penalty; and to provide for application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Paragraph 3 of subdivision b of subsection 11 of section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

- (3) Any injury caused by the use of intoxicants, including recreational marijuana use, or the illegal use of controlled substances.

SECTION 2. AMENDMENT. Section 65-01-11 of the North Dakota Century Code is amended and reenacted as follows:

65-01-11. Burden of proof in compensation matters - Death certificate.

If the organization or an employer claims an employee is not entitled to the benefits of the North Dakota workforce safety and insurance law because the employee's injury was caused by the employee's willful intention to cause self-injury, or to injure another, or by reason of the voluntary impairment caused by use of alcohol, recreational marijuana use, or illegal use of a controlled substance by the employee, the burden of proving the exemption or forfeiture is on the organization or on the person alleging the same; however, an alcohol concentration level at or above the limit set by the United States secretary of transportation in the Code of Federal Regulations in effect on August 1, 2011, or a level of an illegally used controlled substance or recreational marijuana sufficient to cause impairment found by a test conducted by a physician, qualified technician, chemist, or registered nurse at or above the cutoff level in the Code of Federal Regulations in effect on August 1, 2011, creates a rebuttable presumption the injury was due to impairment caused by the use of alcohol, recreational marijuana use, or the illegal use of a controlled substance. An employer who has a mandatory drug alcohol testing policy for work accidents, or an employer or a health care provider who has reasonable grounds to suspect an employee's alleged work injury was caused by the employee's voluntary impairment caused by use of alcohol, recreational marijuana use, or illegal use of a controlled substance may request the employee undergo testing to determine if the employee had alcohol, marijuana, or the controlled substance in the employee's system at levels greater than the limit set by the United States department of transportation at the time of the injury. If an employee refuses to submit to a reasonable request to undergo a test to determine if the employee was impaired or if an employee refuses to submit to a test for drugs or alcohol after a work accident as mandated by company policy, the employee forfeits all entitlement to workforce safety and insurance benefits arising out of that injury.

Any claimant against the fund, however, has the burden of proving by a preponderance of the evidence that the claimant is entitled to benefits. If a claim for death benefits is filed, the official death certificate must be considered as evidence of death and may not be used to establish the cause of death.

SECTION 3. A new section to chapter 65-02 of the North Dakota Century Code is created and enacted as follows:

Fees for outgoing file copies.

The organization may charge a fee not exceeding twenty dollars for the first twenty-five pages and seventy-five cents per page after twenty-five pages when providing an outgoing file copy. In an electronic, digital, or other computerized format, the organization may charge a fee of thirty dollars for the first twenty-five pages and twenty-five cents per page after twenty-five pages. The fees include any administration cost, retrieval fee, or postage expense.

SECTION 4. AMENDMENT. Subsections 2 and 3 of section 65-04-33 of the North Dakota Century Code is amended and reenacted as follows:

2. a. An employer that willfully misrepresents to the organization or its representative, by statement or omission, the amount of payroll upon which a premium under this title is based, or that willfully fails to secure coverage for employees, is liable to the state in the amount of five thousand dollars plus three times the difference between the premium paid and the amount of premium the employer should have paid.
 - b. The organization shall collect a penalty imposed under this subsection in a civil action in the name of the state, and the organization shall deposit a penalty collected under this subsection to the credit of the workforce safety and insurance fund.
 - c. An employer that willfully misrepresents to the organization or its representative, by statement or omission, the amount of payroll upon which a premium under this title is based, or that willfully fails to secure coverage for employees, is guilty of a class A misdemeanor. If the premium due exceeds one thousand dollars, the penalty for willful failure to secure coverage or willful misrepresentation to the organization or its representative is a class C felony. If the employer is a corporation or a limited liability company, the president, secretary, treasurer, or person with primary responsibility is liable for the failure to secure workforce safety and insurance coverage under this subsection.
 - d. In addition to the penalties prescribed by this subsection, the organization may initiate injunction proceedings as provided for in this title to enjoin an employer from unlawfully employing uninsured workers.
 - e. The cost of an investigation under this subsection which results in a criminal conviction may be charged to the employer's account and collected by civil action.
3. An employer that willfully makes a false statement or fails to make a statement in an attempt to preclude an injured worker from securing benefits or payment for services, or that willfully discharges or threatens to discharge an employee for seeking or making known the intention to seek workforce safety and insurance benefits is liable to the state in the amount of five thousand dollars. The organization shall collect a civil penalty imposed under this section in a civil action in the name of the state, and the organization shall deposit a penalty collected under this section to the credit of the workforce safety and insurance fund. A willful violation of this section is a class A misdemeanor. The cost of an investigation under this subsection which results in a criminal conviction may be charged to the employer's account and collected by civil action.

SECTION 5. AMENDMENT. Subsection 7 of section 65-05-08 of the North Dakota Century Code is amended and reenacted as follows:

7. If the employee voluntarily limits income or refuses to accept employment suitable to the employee's capacity, offered to or procured for the employee, the employee is not entitled to disability or vocational rehabilitation benefits during the limitation of income or refusal to accept employment unless the organization determines the limitation or refusal is justified. To receive additional disability or vocational rehabilitation benefits following an unjustified limitation or refusal, the employee shall meet the requirements of a reapplication for benefits as outlined in this section.

SECTION 6. AMENDMENT. Section 65-05-09 of the North Dakota Century Code is amended and reenacted as follows:

65-05-09. Temporary total or permanent total disability - Weekly and aggregate benefit.

1. If an injury causes temporary total or permanent total disability, the fund shall pay to the injured employee during that disability a weekly benefit equal to sixty-six and two-thirds percent of the gross average weekly wage of the injured employee, subject to a minimum of sixty percent and a maximum of one hundred twenty-five percent of the average weekly wage in the state. If an injured employee is disabled due to an injury, that injured employee's benefits will be based upon the injured employee's wage and the organization benefit rates in effect on the date of first disability.
- ~~1-2.~~ Unless otherwise provided in this subsection, if an injured employee suffers disability but is able to return to employment for a period of three consecutive calendar months or more, that injured employee's benefits will be based upon the wage received at the time of the recurrence of the disability. If the wage received at the time of the recurrence of the disability is lower than the injured employee's average weekly wage received before the injury and the lower wage is due to the physical limitations of the compensable injury, the injured employee's benefits must be based upon the injured employee's average weekly wage the injured employee received before the injury. It is the burden of the injured employee to show the inability to earn as much as the injured employee earned before the injury employee's average weekly wage is due to the physical limitation related to the injury. The organization benefit rates are those in effect at the time of that recurrence.
- ~~2-3.~~ The disability benefit or the combined disability benefit and dependency award may not exceed the weekly wage of the injured employee after deductions for social security and federal income tax.
- ~~3-4.~~ When an injured employee is permanently and totally disabled, must be maintained in a nursing home or similar facility, and has no dependent parent, spouse, or children, as much of that injured employee's weekly benefit as is necessary may be used by the organization to help defray the cost of the nursing home care.

SECTION 7. AMENDMENT. Section 65-05-10 of the North Dakota Century Code is amended and reenacted as follows:

65-05-10. Partial disability - Weekly benefit.

1. If the injury causes temporary partial disability resulting in decrease of earning capacity, the disability benefit is sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages before the injury wage and the injured employee's wage-earning capacity after the injury in the same or another employment. Partial disability benefits are subject to a maximum of one hundred twenty-five percent of the average weekly wage in the state. The combined partial disability benefits, dependency allowance, and postinjury wage-earning capacity may not exceed ninety percent of the preinjury average weekly wage of the injured employee.

- 1-2. The benefits provided by this section are available to any otherwise eligible worker, providing the loss of earning capacity occurs after July 1, 1989. Partial loss of earning capacity occurring prior to July 1, 1989, must be paid at a rate to be fixed by the organization.
- 2-3. Benefits must be paid during the continuance of partial disability, not to exceed a period of five years. The organization may waive the five-year limit on the duration of partial disability benefits in cases of catastrophic injury as defined in section 65-05.1-06.1 or when the injured worker is working and has long-term restrictions verified by clear and convincing objective medical and vocational evidence that limits the injured worker to working less than twenty-eight hours per week because of the compensable work injury. This subsection is effective for partial loss of earnings capacity occurring after June 30, 1991.
- 3-4. The employee's earnings capacity may be established by expert vocational evidence of a capacity to earn in the statewide job pool where the worker lives. Actual postinjury earnings are presumptive evidence of earnings capacity if the job employs the employee to full work capacity in terms of hours worked per week, and if the job is in a field related to the employee's transferable skills. The presumption may be rebutted by competent evidence from a vocational expert that the employee's actual earnings do not fairly reflect the employee's earnings capacity in the statewide job pool, considering the employee's capabilities, education, experience, and skills.

SECTION 8. AMENDMENT. Section 65-05-32 of the North Dakota Century Code is amended and reenacted as follows:

65-05-32. Privacy of records and hearings - Penalty.

Information contained in the claim files and records of injured employees is confidential and is not open to public inspection, other than to organization employees or agents in the performance of their official duties. Providing further that:

1. Representatives of a claimant, whether an individual or an organization, may review a claim file or receive specific information from the file upon the presentation of the signed authorization of the claimant. However, reserve information may not be made available to the claimant or the claimant's representatives. Availability of this information to employers is subject to the sole discretion of the organization.
2. Employers or their duly authorized representatives who are required to have access to an injured employee's claim file for the performance of their duties may review and have access to any files of their own injured employees. An employer or an employer's duly authorized representative who willfully communicates information contained in an employee's claim file to any person who does not need the information in the performance of that person's duties is guilty of a class B misdemeanor.
3. Allied health care professionals treating or examining employees claiming benefits under this title, or allied health care professionals giving medical advice to the organization regarding any claim may, at the discretion of the organization, inspect the claim files and records of injured employees.
4. If an injured employee is deceased or is unable to communicate with the organization, the organization may provide the claim file to and communicate with relevant interested parties to properly adjudicate benefits.
5. Other persons may have access to and make inspections of the files, if such persons are rendering assistance to the organization at any stage of the proceedings on any matter pertaining to the administration of this title.
- 5-6. The claimant's name; date of birth; injury date; employer name; type of injury; whether the claim is accepted, denied, or pending; and whether the claim is in active or inactive pay status

will be available to the public. This information may not be released in aggregate form, except to those persons contracting with the organization for exchange of information pertaining to the administration of this title or except upon written authorization by the claimant for a specified purpose.

- ~~6-7.~~ At the request of a claimant, the organization may close the medical portion of a hearing to the public.
- ~~7-8.~~ The organization may release the social security number of an individual claiming entitlement to benefits under this title to health care providers or health care facilities for the purpose of adjudicating a claim for benefits.
- ~~8-9.~~ The organization may provide an injured employee's insurer information regarding the injured employee's claim.
- ~~9-10.~~ The organization may provide any state or federal agency any information obtained pursuant to the administration of this title. Any information so provided must be used for the purpose of administering the duties of that state or federal agency.

SECTION 9. AMENDMENT. Section 65-05-33 of the North Dakota Century Code is amended and reenacted as follows:

65-05-33. Filing false claim or false statement - Penalty.

- 1. A person who claims benefits or payment for services under this title or the employer of a person who claims benefits or payments for services is guilty of a class A misdemeanor if the person or employer does any one or more of the following:
 - a. Willfully files a false claim or makes a false statement or an omission in an attempt to secure payment of benefits or payment for services.
 - b. Willfully misrepresents that person's physical condition, including deceptive conduct which misrepresents that person's physical ability.
 - c. Has a claim for disability benefits that has been accepted by the organization and willfully fails to notify the organization of:
 - (1) Work or other activities as required under subsection 3 of section 65-05-08;
 - (2) The receipt of income from work; or
 - (3) An increase in income from work.
- 2. If any of the acts or omissions in subsection 1 are committed to obtain, or pursuant to a scheme to obtain, more than one thousand dollars in benefits or payment for services, the offense is a class C felony.
- 3. In addition to any other penalties provided by law, the person claiming benefits or payment for services in violation of this section shall reimburse the organization for any benefits paid based upon the false claim ~~or~~ false statement, or omission, and, if applicable, under section 65-05-29 and shall forfeit any additional benefits relative to that injury.
- 4. For purposes of this section, "statement" includes any testimony, claim form, notice, proof of injury, proof of return-to-work status, bill for services, diagnosis, prescription, hospital or doctor records, x-ray, test results, or other evidence of loss, injury, or expense.

SECTION 10. AMENDMENT. Subsection 1 of section 65-05-35 of the North Dakota Century Code is amended and reenacted as follows:

1. A claim for benefits under this title is presumed closed if the organization has not paid any benefit or received a demand for payment of any benefit for a period of four years.

SECTION 11. AMENDMENT. Subsections 3 and 6 of section 65-05.1-01 of the North Dakota Century Code are amended and reenacted as follows:

3. It is the goal of vocational rehabilitation to return the disabled employee to substantial gainful employment with a minimum of retraining, as soon as possible after an injury occurs. "Substantial gainful employment" means bona fide work, for remuneration, which is reasonably attainable in light of the individual's injury, functional capacities, education, previous occupation, experience, and transferable skills, and which offers an opportunity to restore the injured employee as soon as practicable and as nearly as possible to ninety percent of the injured employee's average weekly earnings ~~at the time of injury~~ wage, or to sixty-six and two-thirds percent of the average weekly wage in ~~this~~ 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.
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 ~~preinjury earnings~~ 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.

SECTION 12. AMENDMENT. Subsection 2 of section 65-05.1-06.1 of the North Dakota Century Code is amended and reenacted as follows:

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 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 wages before the injury 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 wages before the injury wage, and the injured employee's wage-earning capacity after retraining, as determined under paragraph 1, or the injured employee's actual postinjury 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.

SECTION 13. APPLICATION. Sections 1, 2, 5, 6, 7, 8, 9, 10, 11, and 12 of this Act apply to all claims regardless of date of injury. Section 4 of this Act applies to all payroll periods of employer accounts regardless of the date of the statement or omission and applies to all claims regardless of the date of injury.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-seventh Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1084.

House Vote: Yeas 91 Nays 2 Absent 1

Senate Vote: Yeas 44 Nays 3 Absent 0

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2021.

Approved at _____ M. on _____, 2021.

Governor

Filed in this office this _____ day of _____, 2021,

at _____ o'clock _____ M.

Secretary of State