

Memorandum

TO: Vocational Rehabilitation Counselors
CC: Vocational Rehabilitation Specialists, Kris Peterson
FROM: Glenn Morton
DATE: March 4, 2005
SUBJECT: Meeting Announcement & Results of December 3, 2004 Meeting

The next informal meeting between court staff and certified vocational rehabilitation counselors is scheduled for Friday, March 25, 2005, at 2:00 pm. The meeting will be held at the court's administrative facilities at 1221 "N" Street, Suite 402, in Lincoln (TierOne Center). Future meetings will be held on a quarterly basis and are tentatively scheduled for June 24, 2005, September 23, 2005, and December 16, 2005.

The following are the results of the discussions at the December 3, 2004 meeting. If you have questions or concerns about any of this please notify the court prior to the next meeting and they will be addressed at that time.

1. **Future Meetings:** It was decided that future meetings will be held on a quarterly basis, with tentative meeting dates as stated above. Meetings will be limited two hours.
2. **Form Revisions:** Further revisions to various court forms were discussed and approved. As requested, Kris Peterson forwarded copies of the revised forms to all certified counselors on December 6, 2004. These and other court forms are also available on the court's web site at <<http://www.wcc.ne.gov/vr.htm>>. The outcome memorandums from previous staff/counselor meetings are also available on that site.
3. **Obligations of Certified Counselors:** A number of related questions were addressed as identified in the agenda for the meeting (see item 6,c from the outcomes memorandum for the October 22, 2004 meeting) regarding the role of a certified counselor under the statutes and court rules.

As a result of the discussions, it was understood and agreed that closing a case does NOT terminate "counselor of record" status. A change of counselor pursuant to Rule 43 would clearly terminate such status, and other circumstances may also justify termination (counselor is no longer in business, has left the state, voluntary termination, etc.). However, as long as the counselor is actively providing services in the state then counselor of record status will generally continue indefinitely. Therefore, counselors should be assured that submitting a case closure will not result in loss of the case should further services be needed.

There was also discussion regarding what services are not subject to the Nebraska Workers' Compensation Act and rules of the court. In other words, under what circumstances can a

counselor certified by the court provide services without complying with the requirements of the Nebraska Workers' Compensation Act and court rules.

Despite significant and productive discussions no conclusions were reached at the meeting. A number of possible "lines" were discussed, including whether expenditures from the trust fund are required, whether training is required, if entitlement is claimed by the employee, and if entitlement exists in fact. However, drawbacks and shortcomings were identified for each of these options. Following the meeting, and after further consideration, the court developed the attached policy on this issue in response to an inquiry from a counselor. Any questions or further discussion regarding this policy can be addressed at the March 25, 2005 meeting.

4. **Next meeting agenda items.** At the next meeting on March 25, 2005 we will address the following items as time permits:

- a. **Services outside the statutes and court rules.** As stated above, there will be a review of the attached court policy on this issue with further discussion as needed.
- b. **Monthly Activity Reports (Rule 37,B).** At the October 22, 2004 meeting there were significant discussions and decisions regarding monthly activity and service reports as required by Rule 37,B. See the attached excerpt from the "outcomes" memorandum for that meeting. Since that time questions and issues have continued to arise, and compliance continues to be a problem despite repeated notices from court staff. The staff has asked for further discussions on this requirement, including the form and content of these reports and whether a reason and estimated end date should be required for cases placed in abeyance.
- c. **Job goals for ESL/GED/ABE.** The court's current policy for ESL and GED is that vocational goals are not mandatory since the focus is on general employability, and that if ESL or GED is a first step in formal retraining the counselor may submit one consolidated plan or two separate plans at the same time. The court's current position for ABE or remedial programs is that they may be a component of a retraining plan but do not constitute retraining in and of themselves. Should the policies for ESL,GED, and ABE be the same and why or why not? Is the court's current policy regarding ESL and GED consistent with statute section 48-162.01(3)(e) and Rules 44,B,3,e and 44,C?

5. **Future meeting agenda items.** The following topics will be addressed at future meetings, not necessarily in this order. Any suggestions for additional agenda items would be welcome.

- a. **Procedural steps.** What will be the steps for determining a violation of the NWCC ethical standards, and what role, if any, will the CRCC Ethics Committee play in considering possible violations of the CRCC Code of Professional Ethics? What are reasonable due process steps for addressing other alleged violations of a statute, rule, or procedural requirement? [Note: For background information see the outcomes memorandum from the June 25, 2004 meeting.]

- b. Counselor/job placement specialist certification process.
- c. Transferable skills. Initial discussion began on this topic at the June 25, 2004 meeting, but no substantive decisions were reached.

Nebraska Worker's Compensation Court Vocational Rehabilitation Policy Statement December 8, 2004

Question: Under what circumstances can a vocational rehabilitation counselor certified by the court provide vocational rehabilitation services without complying with the requirements of the Nebraska Workers' Compensation Act and rules of the court.

Answer: Section 48-162.01(3) provides that an employee is entitled to vocational rehabilitation services under the Act if as a result of a work related injury he or she is unable to perform suitable work for which he or she has previous training or experience. See also NWCC Rules 36,A and 44,C. Further, the Nebraska Supreme Court has determined that absent permanent impairment or restrictions, a worker is fully able to return to any employment for which he or she was fitted before the accident, and that under these circumstances there can be no disability or loss of labor market access. See Swanson v. Park Place Automotive, 267 Neb. 133, 672 N.W.2d 405 (2003), Green v. Drivers Mgmt., Inc., 263 Neb 197, 639 N.W.2d 94 (2002). Therefore, if the employee in fact has no permanent impairment or restrictions, then there is no entitlement to vocational rehabilitation services under the Act. If there is no entitlement to vocational rehabilitation services under the Act, then the statutes and rules regarding the counselor's obligations under the Act do not apply.

However, the court has adopted ethical standards for all vocational rehabilitation service providers certified by the court. These include the CRCC Code of Professional Ethics. Compliance with these ethical standards is relevant to a counselor's certification status, whether or not the services are provided pursuant to the Act. If services are not provided pursuant to the Act (i.e., are not provided in accordance with the requirements of the Act and related court rules), then the counselor has an ethical obligation to inform the employee of this fact as well as the reason services are not being provided under the Act.

Further, a counselor has an ethical obligation to make every reasonable effort to determine whether any evidence of permanent impairment or restrictions exists. Therefore, the counselor may not ethically rely solely on a representation from an insurer or employer that no such evidence exists, and may not ethically rely solely on a medical report obtained by an insurer or employer if there is other evidence to the contrary which the counselor is or should reasonably be aware of. If the counselor is aware the employee has seen other doctors, then the counselor is under an ethical obligation to verify whether or not any of those doctors have expressed an opinion on these issues. If there is any medical evidence supporting the existence of permanent impairment or restrictions, then the counselor is obligated to comply with all of the requirements of the Act and related court rules, absent a court order which has definitively resolved these issues. This is true regardless of the existence of other evidence to the contrary. Should the counselor become aware of any evidence of permanent impairment or restrictions while providing services, then at that point the counselor would become obligated to comply with all of the requirements of the Act and related court rules, once again assuming the absence of a court order which has definitively resolved these issues.

Nebraska Workers' Compensation Court
Excerpt from the "outcomes" memorandum for the October 22, 2004
counselor/specialist meeting:

4. **Monthly Status Reports (Rule 37,B):** The "Monthly Report of Workers' Compensation Cases" log will no longer be required or accepted, effective December 1, 2004. Instead, counselors are permitted to satisfy the requirements of Rule 37,B (monthly report showing the activity and type of services provided) in whatever manner best suits their needs. Possible options discussed at the meeting include submitting copies of the progress reports sent to employers/insurers, submitting only the summary paragraphs from those reports, or submitting a short, newly drafted summary of the activity and type of services provided. These or other methods will be satisfactory so long as the requirements of the rule are met, and so long as a separate report is submitted for each individual client. Firms with multiple counselors can choose to submit the reports on behalf of the individual counselors, again so long as requirements of the rule are met and separate reports are submitted for each client. Reports must be submitted at least once a month, and can be submitted by regular mail, e-mail, or fax (but not all three!). If a plan is placed in abeyance, and the court is so notified, a monthly report need not be submitted during the period of the abeyance. Please contact the court's specialists if there are any questions regarding this change.