

Memorandum

TO: Vocational Rehabilitation Counselors and Job Placement Specialists
CC: Vocational Rehabilitation Specialists, Nancy Sedlacek
FROM: Glenn Morton
DATE: July 13, 2012
SUBJECT: Meeting Announcement & Results of April 20, 2012 meeting

The next informal meeting between court staff and certified vocational rehabilitation service providers is scheduled for Friday, July 27, 2012, at 2:00 pm. The meeting will be held at the court's administrative offices at 1221 "N" Street, Suite 402, in Lincoln. The meeting tentatively scheduled for January 27, 2012 was cancelled due to a lack of agenda items. Meetings are held on a quarterly basis, with the final meeting for this year scheduled for October 26, 2012.

The following are the results from the April 20, 2012 meeting. Please bring any questions or concerns regarding the discussions or decisions at this meeting to the attention of court's Vocational Rehabilitation Section, and they will be considered at the next meeting.

1. Court Personnel: Brett Ruoff was introduced as a new Vocational Rehabilitation Specialist with the court, and Allen Shaw and Sherri Whelan were introduced as VR Staff Assistants.

2. Average Weekly Wage: An inquiry was received by the court regarding the appropriate wage to be used for development of a plan for a part time employee. Should the average weekly wage determined in accordance with section 48-126 be used, or should the higher wage calculated for permanent disability under section 48-121(4) be used?

While no definitive case law on this issue was discovered by the court staff, it is likely that the average weekly wage as determined in accordance with section 48-126 would be most appropriate. Nevertheless, and more importantly, the plan form instructions provide that the average weekly wage must be agreed to by all the parties or an explanation must be provided in the plan justification section of the form. In practice, only rarely and in exceptional circumstances will a court specialist approve a plan in which the average weekly wage is questionable. Therefore, if there is any uncertainty regarding the average weekly wage to be used the counselor should request clarification from the parties. If the parties are unable to agree then one of them can file an action with the court seeking a determination by a judge. Such a clarification or determination should be obtained before the plan is developed and submitted for approval.

3. Books and Supplies: An inquiry was received by the court regarding whether a study guide could be purchased as a general supply, subject to the \$30.00 maximum allowance for such supplies. The school had apparently denied the student's request for the guide as it was not required for the course.

It was first noted that a study guide is not a “supply” and would not be reimbursed as such. However, the question then became whether such a study guide would otherwise be reimbursable. It was noted that there is no longer a rigid requirement that the court will only pay for books determined by the school to be required for every student in the class. Rather, the current student instruction form for formal training now provides that the court will “usually” only pay for books and supplies that are required for a class listed on the program of study. Therefore, in unusual cases a court specialist may consider reimbursement for books or supplies that are not strictly required for the class, but only with sufficient justification and support for the need. Such a decision will be made on a case by case basis, and input from the class instructor will likely be required.

4. MMI/Permanent Restrictions: An inquiry was received by the court regarding whether an employee must be at maximum medical improvement (MMI) before a vocational rehabilitation plan can be approved. The answer is yes.

Rule 36,A provides that vocational rehabilitation services shall be made available “as soon as it has been medically determined that the employee is capable of undertaking such activity and that he or she is unable to perform suitable work for which he or she has previous training or experience.” This would appear to open the door to a vocational rehabilitation plan prior to MMI under the listed conditions.

However, the Nebraska Supreme Court in the case of Green v. Drivers Management, Inc. (2002) held that permanent impairment is a prerequisite for an award of vocational rehabilitation services. A review panel opinion of the compensation court then found that it necessarily follows from the decision in Green that before one can be determined to have sustained a permanent impairment MMI must have been reached. Likewise, a permanent restriction is also required. Citing Green, another review panel opinion observed that Nebraska law expressly provides that in order for a claimant to be entitled to an award of vocational rehabilitation benefits, the claimant must present evidence that he or she has suffered a permanent impairment with attendant permanent restrictions. This is in accord with the Nebraska Supreme Court’s opinion in Swanson v. Park Place Automotive (2003) in which the Court stated that a physician-ordered permanent physical restriction, based on a medically established permanent impairment of a bodily function, establishes a permanent medical impairment.

Therefore, the vocational rehabilitation section will continue to require MMI and permanent restrictions in reviewing and approving a vocational rehabilitation plan. It should also be noted that the plan form instructions provide that if there are multiple physician opinions with differing permanent restrictions, the permanent restrictions must be agreed upon by the parties or determined by a judge.

Concern was expressed that requiring MMI and permanent restrictions could delay return to work for the employee in those cases in which the employee will clearly be unable to perform suitable work for which he or she has previous training or experience. However, the court specialists have no discretion in this regard given that appellate case law takes precedence over a rule of the court (i.e., Rule 36,A). A question was also raised regarding cases involving multiple injuries, some of which are at MMI and some not. In such cases the court specialists will not

automatically reject a plan, but will make a case by case decision based on the facts of the particular case.

5. Case Closure Report: Counselors were reminded to include the total costs of the counselor's services when completing the Closure Report Form (VR-37E). This is in accord with the discussions at the August 19, 2011 counselor/specialist meeting at which it was agreed that such costs must be included, and that the form will be returned to the counselor if the cost information is not provided.

6. Legislative Activity: It was noted that Legislative Resolution 581 was introduced at the close of the last legislative session directing the Business and Labor Committee to conduct an interim study to carry out the purposes of the resolution. As stated in the resolution, the purpose of the study is to "analyze the effectiveness of vocational rehabilitation in workers' compensation cases in Nebraska." Further, the intent of the study, as also stated in the resolution, is to "determine the effectiveness of vocational rehabilitation by examining the outcomes of those persons in the system who receive vocational rehabilitation."

No further information is available at this time regarding how this study will be conducted, or when and if a hearing will be held before the Business and Labor Committee.

8. Web Site Forms: There was discussion that the vocational rehabilitation forms available on the court's website could be more convenient and useful for the counselors. For example, the forms are not in Word format and are "locked down," which prevents a counselor from downloading a form and filling it electronically. In response, the court specialists explained that the forms were "locked down" to prevent a counselor from changing the substance of the form before submitting it to the court. This creates difficulties for the specialist in that the entire form must then be scrutinized closely to insure that the original intent of the form has not been compromised and that the required information has in fact been submitted. Nevertheless, the court will reconsider whether some other method can be identified to address this problem, short of locking down the forms, and whether the forms can otherwise be made more helpful and useful to the counselors.

9. Next meeting agenda items: At the next meeting on July 27, 2012 the following will be addressed as time permits:

a. Counselor Fee Disputes: Discussion of recent issues and cases regarding counselor fee disputes.

b. General Issues: Discussion of any other issues of concern or interest to the counselors or court specialists.

10. Future meeting agenda items: No additional agenda items are currently identified for future meetings. Suggestions are welcome.