

Memorandum

TO: Vocational Rehabilitation Counselors and Job Placement Specialists
CC: Vocational Rehabilitation Specialists, Nancy Sedlacek
FROM: Glenn Morton
DATE: October 26, 2012
SUBJECT: Meeting Announcement & Results of July 27, 2012 meeting

The next informal meeting between court staff and certified vocational rehabilitation service providers is scheduled for Friday, November 2, 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 October 26, 2012 was rescheduled to November 2, 2012. Meetings are held on a quarterly basis, and tentative dates for 2013 quarterly meetings will be determined at the November 2, 2012 meeting.

The following are the results from the July 27, 2012 meeting. Please bring any questions or concerns regarding the discussions or decisions to the attention of court's Vocational Rehabilitation Section and they will be considered at the next meeting.

1. Counselor Fee Disputes: There was discussion regarding a counselor's options when an employer or insurer refuses to pay a counselor's fees, despite language in the statute and/or court rules providing that such fees shall be paid by the employer or its insurer. Some counselors stated that they have continued to require a written agreement from the parties despite the fact that Rule 42 no longer requires such an agreement. Others noted that while a counselor cannot directly file an action with the compensation court the employee can file an action for unpaid counselor fees. Although one judge of the court has refused to hear such an action for lack of jurisdiction, other judges have heard the case and ordered payment of the fees. It was also noted that a counselor can directly file an action in another state court.

2. Average Weekly Wage: There was discussion at the April 20, 2012 quarterly meeting regarding the appropriate wage to be used for development of a vocational rehabilitation plan for a part time employee. The outcomes memo from that meeting stated that while the court staff had discovered no definitive case law on this issue it was likely that the average weekly wage would be determined in accordance with section 48-126 (i.e., based on the contract of hire and the period of time ordinarily constituting the employee's workweek) rather than under section 48-121(4) (i.e., based on a workweek of five days or 40 hours).

However, counselors should be aware of a decision just recently issued by the Nebraska Supreme Court in the case of *Jeffrey Becerra v. United Parcel Service*, 284 Neb. 414 (2012). In that case the Court held that the proper average weekly wage for purposes of determining an appropriate vocational rehabilitation plan was the claimant's wage based on a 40-hour workweek, and not the employee's part-time wage he earned at the time of the injury. The Court reasoned that "[i]n certain situations, an employee's actual earnings may not be a predictable

measure of future earning capacity,” and that “the goal of any average income test is to produce an honest approximation of the claimant’s probable future earning capacity.”

It is unclear at this time whether or how this opinion will be applied in future cases. In any event, counselors are reminded once again that the plan form instructions require that the average weekly wage must be agreed to by all the parties, and that 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. MMI in Multiple Injury Cases: There was also discussion at the April 20, 2012 quarterly meeting regarding cases involving multiple injuries, some of which are at maximum medical improvement (MMI) and some are not. The outcomes memo from that meeting stated that “[i]n such cases the court specialists will not automatically reject a plan [for lack of MMI], but will make a case by case decision based on the facts of the particular case.” This was based on the supposition that vocational rehabilitation might be successful in some multiple injury cases even though MMI and permanent restrictions had not been established for all of the injuries.

However, subsequent research has revealed at least one appellate court opinion which ruled that the trial court could not award vocational rehabilitation given that the claimant had not reached MMI for all of her injuries. The Nebraska Supreme Court has also specifically held that “a claimant has not reached maximum medical improvement until all injuries resulting from an accident have reached maximum medical healing.” See *Rodriguez vs. Hirschback Motor Lines and Dakota Truck Underwriters*, 270 Neb. 757 (2005).

Therefore, counselors are asked to disregard the above statement from the April 20, 2012 meeting memorandum. Rather, the court's Vocational Rehabilitation Section will require MMI and permanent restrictions for each work related injury regardless of whether the employee has incurred only one injury or multiple injuries.

4. MMI for Psychological Injuries: An inquiry was received regarding whether MMI will be required by the court’s specialists for psychological injuries, given that treatment for such injuries may sometimes be required over an extended period of time. The response given was that the court staff is unaware of anything that would exclude psychological injuries from the requirement for MMI and permanent restrictions. In fact, there are cases in which a judge of the court has held that vocational rehabilitation is premature in the absence of MMI for a psychological injury. The courts have also observed that in determining whether a claimant has reached maximum medical improvement the fact that some treatment is still required does not necessarily rule out a finding that the condition has become stabilized (i.e., reached MMI).

A follow-up question was then raised regarding whether a statement of MMI from a psychologist would be acceptable for a psychological injury. Discussion then followed, and it became clear that this is a difficult and complex issue. On the one hand, the appellate courts which have addressed this issue have stressed the need for permanent *medical* impairment and *physician* ordered permanent physical restrictions. See, e.g., *Swanson v. Park Place Automotive*, 267

Neb.133 (2003) (“[A] physician-ordered permanent physical restriction, based on a medically established permanent impairment of a body function, establishes a permanent medical impairment...”). The plan form instructions also require that the date of MMI and any permanent restrictions used must be authored by a physician. On the other hand, judges of the court have relied on opinions from a psychologist or neuropsychologist to support various decisions, including MMI status. It may also be overly burdensome in some cases to require the parties to hire a psychiatrist just to confirm whether MMI has occurred, when the employee is being treated by a psychologist who has issued, or could issue, such an opinion.

Therefore, it has been decided after careful consideration that an opinion from a treating psychologist establishing MMI and/or permanent restrictions for a psychological injury will be accepted for administrative review and approval of a plan. However, if there are multiple opinions on either MMI or permanent restrictions then the opinion relied upon by the counselor must be agreed to by the parties or determined by a judge. This decision is also limited to licensed psychologists and does not extend to opinions by other non-physician providers.

Lastly, there was a question as to whether a stipulation by the parties regarding MMI would be acceptable for administrative review and approval of a plan, in lieu of a professional opinion on this issue. The answer is no. Consistent with the above discussion and with the current plan for instructions, the court’s specialists will honor an agreement by the parties as to which of differing professional opinions should be used. However, the specialists will not entirely forgo the requirement for at least one such professional opinion on MMI and permanent restrictions absent an order from a judge of the court.

5. Legislative Activity: Legislative Resolution 581 was introduced at the close of the last legislative session. This resolution directed the Business and Labor Committee to conduct an interim study to “analyze the effectiveness of vocational rehabilitation in workers’ compensation cases in Nebraska...” and to “determine the effectiveness of vocational rehabilitation by examining the outcomes of those persons in the system who receives vocational rehabilitation.” A hearing pursuant to the resolution was conducted by the Committee on October 19, 2012, and testimony was received regarding perceived shortcomings of the vocational rehabilitation program and improvements that could be made. It is unclear at this time what, if any, further action will occur as a result of the hearing or the study.

In advance of the hearing the court received requests for statistics regarding the success of the program in returning injured employees to work. Data from the current closure form was helpful in responding to the request, but it was also recognized that additional information would have allowed the court to more fully demonstrate the effectiveness of the program. Therefore, additional changes to the case closure form will be considered to better respond to such requests in the future.

6. Next meeting agenda items: At the next meeting on November 2, 2012 the following will be addressed as time permits:

a. ACH/Debit Cards: The court will soon begin requiring that payments from the Workers’ Compensation Trust Fund to new vocational rehabilitation clients be made by

direct deposit into a checking account or by debit card. The court's Business and Human Resources Manager and a representative of the State Treasurer's Office will make a brief presentation regarding the program and respond to questions.

b. Quarterly Meeting Dates: Establish tentative quarterly meeting dates for 2013. Suggested dates for consideration are January 25, 2013, May 3, 2013, July 26, 2013, and October 25, 2013.

c. Case Closure Form: Consideration of revisions to the case closure form in light of LR 581.

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

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