

**VOCATIONAL REHABILITATION
FOR THE INJURED WORKER IN
MINNESOTA FROM THE
PERSPECTIVE OF THE EMPLOYER
AND INSURER**

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VOCATIONAL REHABILITATION FOR THE INJURED WORKER IN MINNESOTA FROM THE PERSPECTIVE OF THE EMPLOYER AND INSURER

Vocational rehabilitation is described by Minn. Stat. § 176.102, Subd. 1(b) as “intended to restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without the disability.” Thus, the general purpose of vocational rehabilitation is to assist injured employees in returning to work at their former employment, or if precluded by injury, to assist injured employees in returning to work in a modified job. The purpose of vocational rehabilitation is also to assist and encourage injured employees to increase their employability by acquiring additional skills through on-the-job training, skill enhancement schooling, or formal retraining. Vocational rehabilitation is paid for by the employer and insurer in Minnesota. Nevertheless, the cost of vocational rehabilitation in some cases is more than offset by savings in workers’ compensation wage loss benefits that would otherwise be payable to an employee who does not promptly return to suitable alternative employment following a work injury.

A. Employee Eligibility.

A threshold issue is whether or not an injured employee is entitled to vocational rehabilitation services. Only “qualified employees” are entitled to vocational rehabilitation services.

The term “qualified employee” is a term of art used to describe an injured

employee who is entitled vocational rehabilitation services. Minnesota Rule 5220.0100,

Subp. 22 defines “qualified employee” as follows:

“Qualified employee” means an employee who, because of the effects of a work-related injury or disease, whether or not combined with the effects of prior injury or disability:

- A. is permanently precluded or is likely to be permanently precluded from engaging in the employee’s usual and customary occupation or from engaging in the job the employee held at the time of injury;
- B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and
- C. can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician’s opinion of the employee’s work ability.

In somewhat simpler terms, this means that an injured employee is a “qualified employee” if, because of the work injury, the employee is: (1) not able to perform the pre-injury job because of the work-related injury, (2) not expected to return to suitable alternative employment at the pre-injury employer, and (3) may reasonably be expected to be able to return to suitable alternative employment through the provision of vocational rehabilitation services. If those criteria are met, then the injured employee is entitled to vocational rehabilitation services.

Vocational rehabilitation begins with a “rehabilitation consultation” with a qualified rehabilitation consultant (QRC). This must be provided to an employee at the request of the employee or the employer and insurer. A rehabilitation consultation determines whether the employee is eligible to receive rehabilitation services.

An employee is entitled to a rehabilitation consultation as a matter of right unless

an employer or insurer has filed a timely request for a waiver. See Minn. R. 5220.0120. The waiver is made by filing a “disability status report.” This must be filed within 14 days of the request for a rehabilitation consultation.

A waiver may be requested if the employee will return to suitable gainful employment within 180 days of the date of injury within the treating doctor's restrictions. Minn. R. 5220.0120, Subp. 2-4. The Department of Labor and Industry’s practice is to require some sort of documentation of the suitable gainful employment to which the employee will be returning as part of the support for the requested waiver. If the employee does not return to work within 180 days after the injury and a waiver is in effect, the insurer may request renewal of the waiver by filing another disability status report. Renewal of the waiver will be granted based only upon additional documentation that convinces the Department that a consultation is not necessary because a return to work with the date of injury employer is imminent.

If there is no valid waiver and the QRC determines, pursuant to the rehabilitation consultation, that the employee is a “qualified employee,” then vocational rehabilitation services are provided to the injured employee.

B. Benefits.

Vocational rehabilitation services are coordinated by a QRC. They are paid for by the employer and insurer. Vocational rehabilitation services generally include vocational evaluations, vocational counseling, job analysis, job modification, job development, job placement, labor market surveying, vocational testing, transferable skills analysis, job seeking skills training, on-the-job training, and retraining. Minn. R.

5220.0100, Subp. 29. Vocational rehabilitation services may also include medical treatment management assistance.

A QRC is a person professionally trained and licensed by the State of Minnesota to provide vocational rehabilitation services. Minn. R. 5220.0100, Subp. 23. The injured employee generally has the right to select the QRC. See Minn. Stat. § 176.102, Subd. 4(a) and Minn. R. 5220.0710, Subp. 1. The employee may choose the QRC at the onset of rehabilitation or may object to the QRC provided by the employer and request a change within 60 days of filing the rehabilitation plan.

If a change of QRC is needed because the QRC is ill or leaves town, the employee may choose another one. The employee must notify the insurer and commissioner of the request for a change in writing. See Minn. Stat. § 176.102, Subd. 4(a) and Minn. R. 5220.0710, Subp. 1.

Any party may request a change of QRC if the employee has exhausted his or her choice. This may be done, for example, if the QRC is not filing reports or performing well. The parties may always agree to change the QRC. However, if a dispute arises, the standard to be applied is what is in “the best interests of the parties.” See Minn. R. 5220.0710, Subp. 3. Theoretically, this means in the best interests of all parties, including the employer and insurer.

Vocational rehabilitation services are provided to the injured employee pursuant to a “rehabilitation plan.” The Minnesota Workers’ Compensation Act and accompanying rules are clear that vocational rehabilitation services are to be provided only in accordance with a formal, approved rehabilitation plan. See Minn. Stat. §

176.102, Subd. 4(e) and Minn R. 5220.0410. The “rehabilitation plan” is a document completed by the QRC on a form prescribed by the Department of Labor and Industry containing the following information:

- a. the identity of the employee, employer, insurer, and QRC;
- b. the employee’s pre-injury occupation and the vocational goal of the rehabilitation plan; and
- c. an itemization of vocational rehabilitation services to be provided, including vendor names, anticipated completion dates, estimated costs, projected total plan cost, and plan completion date.

The rehabilitation plan is supposed to be and usually is quite informative regarding the vocational services to be provided and the respective responsibilities of the various parties involved. A rehabilitation plan dealing with retraining is known as a “retraining plan” and contains additional specific information related to the proposed retraining program, etc.

The employer and insurer, within 15 days, may agree to the plan, object to the plan and work out the differences with the QRC, or file a “rehabilitation request.” See Minn. R. 5220.0410, Subp. 4. A rehabilitation request results in a conference at the Department of Labor and Industry to address the objections of the employer and insurer to the proposed rehabilitation plan. If the plan is not signed and no rehabilitation request is filed within 15 days, then the employer and insurer are deemed to agree with the plan.

After a rehabilitation plan is in place, the parties may request plan modification including suspension, termination, or alteration if:

- a. the employee cannot physically pursue plan;
- b. the employee's performance level indicates plan will not be successfully completed;
- c. the employee does not cooperate with plan;
- d. the plan or administration is inadequate to achieve objectives; or
- e. the employee is not likely to benefit from further rehabilitation services.

Plan modification is generally accomplished either informally by agreement of the parties and the QRC, or by filing a rehabilitation request.

C. Costs.

The employer and insurer is responsible for the payment of costs associated with vocational rehabilitation services. This includes payment of the QRC's fees and other costs associated with the vocational rehabilitation services provided pursuant to the rehabilitation plan.

The QRC's fee rates are set by Minnesota Rule 5220.1900. Currently (as of October 1, 2004), QRC charges are not to exceed \$83.77 per hour. QRC travel and waiting time is limited to \$41.89 per hour. Moreover, QRC rates are to be reduced by \$10.00 per hour after 39 weeks have elapsed from the first in-person visit, or the QRC's charges for services have reached \$3,500.00.

In addition to the QRC's fees, the employer and insurer is responsible for payment of the other costs associated with the vocational rehabilitation services provided pursuant to the rehabilitation plan. These other costs include:

- a. mileage associated with the employee's job search activities;

- b. necessary custodial day care associated with the employee's job search activities;
- c. placement vendor costs;
- d. skill enhancement course costs; and
- e. moving expenses for relocation after a diligent job search.

The placement vendor fees are limited similar to QRC fees by Minnesota Rule 5220.1900. Specifically (as of October 1, 2004), placement vendors charges are not to exceed \$64.43 per hour.

Retraining results in its own unique costs. During the period of retraining, an employee is entitled to wage loss benefits, payment of schooling costs, and payment or reimbursement of other incidental expenses. Minn. Stat. § 176.102, Subds. 9 & 11. All necessary costs of the schooling program, including tuition, books, lab fees, uniforms, equipment, etc. are paid for by the employer and insurer. In addition, the employee is entitled to payment of reasonable incidental costs including mileage, parking, daycare, etc., which can be significant. It is not uncommon for the costs of retraining to approach \$100,000.00.

The only substantial limitation is durational in nature. Retraining benefits are limited to 156 weeks. Minn. Stat. § 176.102, Subd. 11. This applies both to the costs of the schooling program as well as to the wage loss benefit component.

The wage loss benefits are known under the Minnesota Workers' Compensation Act as "retraining benefits." This distinction is important. The wage loss component of retaining benefits, although similar to temporary total and temporary partial disability

benefits in other respects, are subject to their own durational limits and they are not subject to nor do they count toward the durational limits of temporary total and temporary partial disability benefits.

The wage loss component of retaining benefits is similar to either temporary total disability benefits or temporary partial disability benefits, depending on the circumstances. If the injured employee is not employed during the retraining plan, then the employee will receive retraining benefits paid at the temporary total disability rate (i.e., 2/3rds of the employee's pre-injury average weekly wage, subject to a statewide maximum compensation rate). Minn. Stat. § 176.102, Subd. 11(b). They are payable for the duration of the retraining plan and up to 90 days after completion of the plan, subject to the same discontinuance provisions for temporary total disability benefits pursuant to Minn. Stat. § 176.101.

If the employee is employed during the retraining plan, then the injured employee will receive retraining benefits payable in the same manner as temporary partial disability benefits. Id. They are payable at the rate of 2/3rds of the difference between the employee's pre-injury average weekly wage and the weekly wage that the employee is able to earn in the employee's partially disabled condition. They are limited however by a maximum rate equal to the temporary total disability benefit compensation rate for the employee.

D. Disputes.

If an employer and insurer are not in agreement with a rehabilitation plan as initially submitted by a QRC, then the employer and insurer, within 15 days, should file a rehabilitation request. This will initiate the matter for dispute resolution through the

Department of Labor Industry and Office of Administrative Hearings. Similarly, if the employer and insurer would like a rehabilitation plan changed or a change of QRC, then a rehabilitation request should be filed.

An employee seeking vocational rehabilitation services or retraining may either file a claim petition or rehabilitation request seeking the requested vocational rehabilitation services. See Minn. R. 5220.0750, Subp. 6. A claim petition is generally used in cases where disputes (such as permanent partial disability) are present in addition to the injured employee's vocational rehabilitation claim. If the only dispute is whether or not the injured employee is entitled to certain vocational rehabilitation services or change in service (such as a rehabilitation consultation or change of QRCs), then a rehabilitation request is generally used. There are no distinct advantages in proceeding under either of the two claim initiation procedures.

Proceeding pursuant to a claim petition will usually result in the matter initially being set for a settlement conference conducted by a compensation judge at the Office of Administrative Hearings. If the matter is not resolved at that stage, then the matter will be set for an evidentiary hearing before a different compensation judge at the Office of Administrative Hearings.

Proceeding pursuant to a rehabilitation request will usually result in the matter being set for an administrative conference at the Department of Labor and Industry. A specialist appointed by the Commissioner of the Department of Labor and Industry will hear the arguments and positions of both parties and issue a preliminary decision resolving the disputed issue.

Any party who does not agree with the specialist's decision may appeal the decision for a "de novo" hearing at the Office of Administrative Hearings. The matter will be set for an evidentiary hearing before a compensation judge at the Office of Administrative Hearings. No res judicata effect will be given to the specialist's decision.

5. Strategic Considerations.

Vocational rehabilitation services are most likely to be an issue in those cases where an injured employee has a relatively high pre-injury wage and substantial physical limitations resulting from the work injury. First and foremost, the employer and insurer should, if possible, aggressively attempt to find a way for the employer to accommodate the injured employee's limitations.

If a return to work at the employee's pre-injury job is not feasible, then vocational rehabilitation services will likely come into play. Despite the costs, having a QRC assigned to the case can be beneficial to the employer and insurer. Specifically, a "good" QRC will guide the employee's job search and report on its progress. This allows the employer and insurer to monitor the employee's efforts and activities. If the employee's job search appears inappropriate or less than diligent, then the employer and insurer can take appropriate action to limit the ongoing wage loss claims of the employee.

Nevertheless, vocational rehabilitation services should be closely monitored. An ineffective or dilatory QRC can accrue significant fees without producing meaningful results. The QRC's reports should be reviewed with a keen eye to evaluate the effectiveness of the rehabilitation plan and the follow through on the plan by both the QRC and the employee.

It is also helpful if the employer and insurer can identify early on the potential for the claim to turn into a retraining case. In doing so, the employer and insurer should maintain communication with the employee's QRC. The employer and insurer should attempt to convince the QRC to focus his or her efforts on returning the employee to work at the pre-injury employer or in the alternative, to perform an extensive search for alternative employment. In effect, the employer and insurer should attempt to delay consideration of retraining by the QRC and by the injured employee until other vocational rehabilitation alternatives are exhausted.

If consideration of retraining can be delayed, two things favorable to the employer and insurer's perspective may happen. First, the employee may find alternative employment thereby rendering the issue of retraining moot. Second, the employee may reach maximum medical improvement and may exhaust temporary total disability benefits prior to development of a retraining plan. That places the employer and insurer in a stronger position to obtain a reasonable settlement from the employee if there is a period of time in which the employee is not entitled to ongoing wage loss benefits and the retraining plan approval is still pending.