

CR 94-201

RULES CERTIFICATE

STATE OF WISCONSIN)
) SS
 DEPT. OF INDUSTRY,)
 LABOR & HUMAN RELATIONS)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

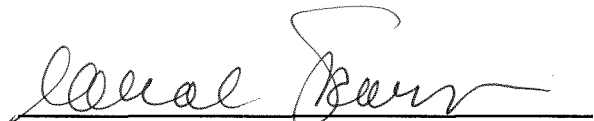
I, Carol Skornicka, Secretary of the Department of Industry, Labor and Human Relations, and custodian of the official records of said department, do hereby certify that the annexed rule(s) relating to Vocational Rehabilitation

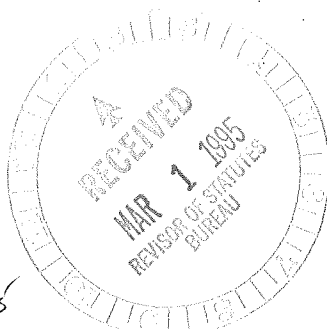
(Subject)

were duly approved and adopted by this department on 2/28/95
 (Date)

I further certify that said copy has been compared by me with the original on file in the department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at 3:00 pm
 in the city of Madison, this 28th
 day of February A.D. 19 95.


 Secretary



5-1-95

ORDER OF ADOPTION

Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s)

102.61 (1m) (c) and (f).

Stats., the Department of Industry, Labor and Human Relations creates; amends;

repeals and recreates; repeals and adopts rules of Wisconsin Administrative Code chapter(s):

Ind 80.49

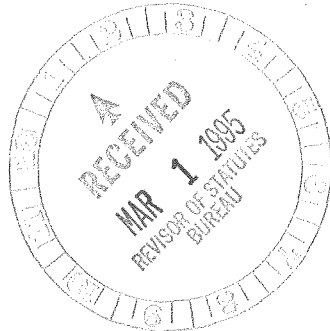
(Number)

Vocational Rehabilitation

(Title)

The attached rules shall take effect on The first day of the month following publication

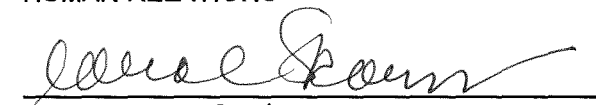
_____ pursuant to section 227.22, Stats.



Adopted at Madison, Wisconsin this

date: February 28, 1995

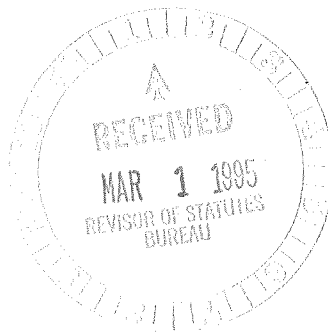
DEPARTMENT OF INDUSTRY, LABOR AND
HUMAN RELATIONS


Secretary



State of Wisconsin \ Department of Industry, Labor and Human Relations

RULES in FINAL DRAFT FORM



Rule No.:

Ind 80.49 _____

Relating to:

Vocational Rehabilitation _____

Department of Industry, Labor and Human Relations

Administrative Rule Relating to Vocational Rehabilitation

The Wisconsin Department of Industry, Labor and Human Relations proposes an order to amend Ind 80.49 (2); to repeal Ind 80.49 (3); to renumber and amend Ind 80.34 (4); and to create Ind 80.49 (1) (title) and Ind 80.49 (5) to (12) relating to vocational rehabilitation benefits.

Analysis of Proposed Rules

Statutory Authority: ss. 102.61 (1m) (c) and (f), Stats., as affected by 1993 Wisconsin Act 370

Statutes Interpreted: ss. 102.43 (5) and 102.61, Stats., as affected by 1993 Wisconsin Act 370

Rule Analysis. Chapter Ind 80.49 establishes the purpose of vocational rehabilitation benefits, clarifies the determination of eligibility for those services, and defines procedures by which an injured employe may receive vocational rehabilitation services from a private rehabilitation specialist. The procedures relating to private specialists in s. Ind 80.49 (4) to (11) only apply if the Department of Health and Social Services determines it cannot provide vocational rehabilitation services to an injured employe who is eligible under federal law to receive those services.

The major provisions in the rule:

1. Prohibit the extension of vocational rehabilitation benefits beyond 80 weeks (consistent with ss. 102.43 (5) and 102.61 (1m), Stats.) when the purpose is primarily to improve upon, rather than to restore, preinjury earning capacity;

2. Specify the procedures for providing injured workers access to vocational rehabilitation services from certified, private-sector, vocational rehabilitation specialists when the Department of Health and Social Services is unable to provide those services;

3. Specify the procedures by which the Department of Industry, Labor and Human Relations (DILHR) will certify private-sector vocational rehabilitation specialists to provide services to injured workers;

4. Specify the process by which the employer and DILHR will notify the injured worker of his or her right to vocational rehabilitation services;

5. Define when suitable employment is available to the injured worker so that the employe is not eligible for vocational rehabilitation services from a certified specialist;

6. Clarify the process for resolving a dispute about permanent work restrictions where the dispute could materially affect either the employer's ability to provide suitable employment or a certified specialist's ability to recommend a retraining program;

7. Clarify that an employe eligible for the services of a certified private specialist may freely choose any certified specialist, but can choose a second specialist only by mutual agreement with the self-insured employer or insurance carrier;

8. Specify that the reasonable cost of a certified specialist's services shall not exceed \$1,000 for each date of injury, but that the Department of Industry, Labor and Human Relations shall adjust the \$1,000 limit to reflect the annual change in the consumer price index;

9. Require certified specialists and employes to diligently attempt to secure suitable employment prior to pursuing a retraining program;

10. Require certified specialists to report certain information regarding outcomes to DILHR, the employe, employer or insurance carrier, and to provide any information or written material requested by the parties to a worker's compensation claim or DILHR (or their representatives) within a reasonable period of time.

SECTION 1. Ind 80.49 (1) (title) is created to read:

Ind (1) (title) PURPOSE.

SECTION 2. Ind 80.49 (2) is amended to read:

(2) (title) ELIGIBILITY. The determination of eligibility for vocational rehabilitation training and whether a person is a suitable subject for training is the responsibility of the department of health and social services. If the department of health and social services determines that an employe is eligible to receive services under 29 USC 701 to 797b, but that the department of health and social services cannot provide those services for the employe, the employe may select a private rehabilitation specialist certified by the department of industry, labor and human relations to determine whether the employe can return to suitable employment without rehabilitative training and whether rehabilitative training is necessary to develop a retraining program to restore as nearly as possible the employe to his or her preinjury earning capacity and potential.

SECTION 3. Ind 80.49 (3) is repealed.

SECTION 4. Ind 80.49 (4) is renumbered Ind 80.49 (3) and amended to read:

Ind 80.49 (3) (title) 80-WEEK RULE. Extension of vocational rehabilitation benefits beyond 40 80 weeks may not be authorized pursuant to s. 102.61 (1) or (1m), Stats., if the primary purpose of further training is to improve upon preinjury earning capacity rather than restoring it.

SECTION 5. Ind 80.49 (4) to (11) are created to read:

(4) DEFINITIONS. In subs. (4) to (11):

(a) "IWRP" or "individualized written rehabilitation program" means a plan developed by a specialist which identifies the vocational goal of a retraining program, the intermediate objectives to reach that goal and the methods by which progress will be measured.

(b) "Retraining program" means a course of instruction on a regular basis which provides an employe with marketable job skills or enhances existing job skills to make them marketable.

(c) "Specialist" means a person certified by the department to provide vocational rehabilitation services to injured employes under s. 102.61 (1m), Stats.

(d) Except as provided in sub (5), "suitable employment" means a job within the employee's permanent work restrictions for which the employee has the necessary physical capacity, knowledge, transferable skills and ability and which pays at least 85 percent of the employee's preinjury average weekly wage.

(5) **SUITABLE EMPLOYMENT EXCEPTIONS.** (a) A job offer at or above 85 percent of the average weekly wage shall not constitute suitable employment if:

1. An employee's education, training or employment experience demonstrates a career or vocational path; the average weekly wage on the date of injury does not reflect the earnings which the employee could reasonably have expected in the demonstrated career or vocational path; and the permanent work restrictions caused by the injury impede the employee's ability to pursue the demonstrated career or vocational path; or,

2. The employee's average weekly wage is calculated pursuant to the part-time wage rules in s. 102.11 (1) (f), Stats., or s. Ind 80.51 (5) and the employee's average weekly wage for compensation purposes exceeds the gross average weekly wages of the part-time employment.

(b) The average weekly wage for purposes of determining suitable employment under par. (a) 1 shall be determined by expert vocational evidence regarding the average weekly wage that the employee may have reasonably expected in the demonstrated career or vocational path.

(c) The average weekly wage for purposes of determining suitable employment under par. (a) 2 shall be determined by expert vocational evidence regarding the employee's age, educational potential, past job experience, aptitude, proven abilities, and ambitions on the date of injury.

(6) **SPECIALIST CERTIFICATION.** (a) A person may apply to the department for certification as a specialist at any time. The department may require applicants to submit, and certified specialists to regularly report, information describing their services, including the geographic areas served by the specialist and the nature, cost and outcome of services provided to employees under this section.

(b) After evaluating the information submitted under par. (a), the department shall certify a person as a specialist if the person has a license or certificate which is current, valid and otherwise in good standing as one of the following, or may certify the person as provided in par. (c):

1. Certified professional counselor with specialty in vocational rehabilitation from the department of regulation and licensing;

2. Certified insurance rehabilitation specialist from the certification of insurance rehabilitation specialists commission;

3. Certified rehabilitation counselor from the commission on rehabilitation counselor certification;

4. Certified vocational evaluator from the commission on certification of work adjustment and vocational evaluation specialists.

Note: The Certification of Insurance Rehabilitation Specialists Commission (CIRSC) and Commission on Rehabilitation Counselor Certification (CRC) are located at 1835 Rohlwing Road, Suite E, Rolling Meadows, Illinois 60008. The Commission on Certification of Work Adjustment and Vocational Evaluation Specialists is located at 7910 Woodmont Avenue, Suite 1430, Bethesda, Maryland 20814-3015.

(c) The department may certify a person as a specialist if the person has state or national certification, licensing or accreditation in vocational rehabilitation other than that required in par. (b) which is acceptable to the department. The department may require a specialist certified under this paragraph to serve a period of probation up to 3 years as a condition of certification. The department shall specify the conditions of the probationary certification. The department may revoke the probationary certification at any time without a hearing for conduct which violates the conditions of probation established by the department or conduct sufficient to decertify the specialist under par. (e).

(d) Unless certification is suspended or revoked under par. (e), certification by the department under par. (b) is valid for 3 years. If a specialist applies to the department to renew his or her certification before the expiration of the certification period, the certification shall remain in effect until the department renews or denies the application to renew. A renewal is valid for three years.

(e) Only the department may initiate a proceeding to suspend or revoke a specialist's certification under this section. The department may suspend or revoke a specialist's certification, after providing the specialist with a hearing, when the department determines that the specialist did not maintain a current, valid certificate or license specified in par. (b) or the specialist intentionally or repeatedly:

1. Fails to comply with the provisions of ch. 102, Stats., or Ind 80;
2. Fails to comply with the orders, rulings, reporting requirements or other instructions of the department or its representatives;
3. Charges excessive fees compared to the value of the services performed or ordered to be performed; or,

4. Misrepresents the employe's work history, age, education, medical history or condition, diagnostic test results or other factors significantly related to an employe's retraining program.

(f) The department shall maintain a current listing of all specialists certified by the department, including the areas they serve, and shall provide the list at no charge to employes, employers, insurers, and others.

(7) EMPLOYEE CHOICE. (a) At the end of the medical healing period, the self-insured employer or insurance carrier shall notify the employe, on a form provided by the department, of the employe's potential eligibility to receive rehabilitation services.

Note: Forms can be obtained from the Department of Industry, Labor and Human Relations, Worker's Compensation Division, 201 E. Washington Ave., P.O. Box 7901, Madison, Wisconsin 53707.

(b) The department shall arrange with the department of health and social services to receive timely notice whenever the department of health and social services determines under s. 102.61 (1m), Stats., that it cannot serve an eligible employe. When the department of health and social services notifies the department that it cannot serve an eligible employe, the department shall mail to the employe and the self-insured employer or insurance carrier a list of certified specialists serving the area where the employe resides.

(c) The employe may choose any certified specialist. The employe may choose a second certified specialist only by mutual agreement with the self-insured employer or insurance carrier or with the permission of the department. Partners are deemed to be one specialist.

(d) A specialist selected by an employe under par. (c) shall notify the department and the self-insured employer or insurance carrier within 7 days of that selection. The department may develop a form for this purpose.

Note: Forms can be obtained from the Department of Industry, Labor and Human Relations, Worker's Compensation Division, 201 E. Washington Ave., P.O. Box 7901, Madison, Wisconsin 53707.

(e) The self-insured employer or insurance carrier is liable for the reasonable and necessary cost of the specialist's services and the reasonable cost of the training program recommended by the specialist provided that the employe and the specialist substantially comply with the requirements in subs. (8) to (11). Except with the prior consent of the self-insured employer or insurance carrier, the reasonable cost of any specialist's services to the employe shall not exceed \$1,000 for each date of injury as defined in s. 102.01 (2) (g), Stats. Effective on the first day of January each year after 1995, the department shall adjust the \$1,000 limit by the same percentage change as the average annual percentage

change in the U.S. consumer price index for all urban consumers, U.S. city average, as determined by the U.S. department of labor, for the 12 months ending on September 30 of the prior year. The department shall notify insurance carriers, self-insured employers and specialists likely to be affected by the annual change in the limit.

(8) EMPLOYER'S DUTIES UPON RECEIPT OF PERMANENT RESTRICTIONS. Upon receiving notice that the department of health and social services cannot serve the employe under s. 102.61 (1m), Stats., the employe or a person authorized to act on the employe's behalf shall provide the employer with a written report from a physician, podiatrist, psychologist or chiropractor stating the employe's permanent work restrictions. Within 60 days of receiving the practitioner's work restrictions, the employer shall provide to the employe or the employe's authorized representative, in writing:

(a) An offer of suitable employment for the employe;

(b) A statement that the employer has no suitable employment available for the employe; or,

(c) A medical report from a physician, podiatrist, psychologist or chiropractor showing that the permanent work restrictions provided by the employe's practitioner are in dispute, and medical or vocational documentation that the difference in work restrictions would materially affect either the employer's ability to provide suitable employment or a specialist's ability to recommend a retraining program. If after 30 days the employe and employer cannot resolve the dispute, either party may request a hearing before the department to determine the employe's work restrictions. Within 30 days after the department determines the restrictions, the employer shall provide the written notice required in par. (a) or (b).

(9) 90-DAY PLACEMENT EFFORT. (a) If the employer fails to respond as required in sub. (8), it shall be conclusively presumed for the purposes of s. 102.61 (1m), Stats., that the employer has no suitable employment available and the employe is entitled to receive vocational rehabilitation services from a specialist.

(b) If the employer does not make a written offer of suitable employment under sub. (8), the specialist shall determine whether there is suitable employment available for the employe in the general labor market without retraining. If suitable employment is reasonably likely to be available, the specialist shall attempt to place the employe in alternative suitable employment for at least 90 days prior to developing a retraining program. The employe shall cooperate fully in the specialist's placement efforts and may not refuse an offer of suitable employment made within the 90-day period. In determining whether the offer is suitable the department shall consider age, education, training, previous work experience, previous earnings, present occupation and earnings, travel distance, goals of the employe, and the extent to which it would restore the employe's preinjury earning capacity and potential.

(c) If the employe is placed in or refuses to accept suitable employment, the self-insured employer or insurance carrier is not liable for any further costs of the specialist's services unless that suitable employment ends within the statute of limitations in s. 102.17 (4), Stats.

(10) RETRAINING. (a) If, after reasonably diligent effort by the employe and the specialist, the employe does not obtain suitable employment, then there is a rebuttable presumption that the employe needs retraining. The presumption is rebuttable by evidence that:

1. No retraining program can help restore as nearly as possible the employe's wage earning capacity;
2. The employe or the specialist did not make a reasonably diligent effort under sub. (9) (b) to obtain suitable employment for the employe; or
3. The employe or specialist withheld or misrepresented highly material facts.

(b) A retraining program of 80 weeks or less is presumed to be reasonable and the employer shall pay the cost of the program, mileage and maintenance benefits, and temporary total disability benefits.

(c) A retraining program more than 80 weeks may be reasonable, but there is no presumption that training over 80 weeks is required. Extension of vocational rehabilitation benefits beyond 80 weeks may not be authorized if the primary purpose of further training is to improve upon preinjury earning capacity rather than restoring it.

(d) If the retraining program developed by the specialist is for more than 80 weeks, the self-insured employer or the insurance carrier may offer an alternative retraining program which will restore the employe's preinjury earning capacity in less time than the retraining program developed by the specialist. An employe may not refuse a self-insured employer's or insurance carrier's timely, good-faith, written offer of an alternative retraining program without reasonable cause.

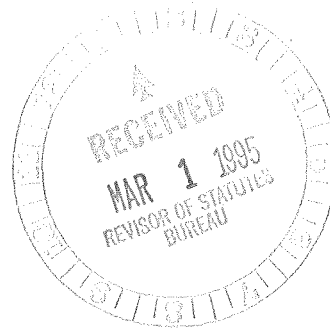
(11) SPECIALIST'S SERVICES. (a) A specialist shall develop an individualized written rehabilitation program for a retraining program for the employe, and may amend it to achieve suitable employment.

(b) A specialist shall make periodic written reports at reasonable intervals to the employe, employer and insurance carrier describing vocational rehabilitation activities which have occurred during that interval.

(c) Within a reasonable period of time after receiving a written request from an employe, employer, worker's compensation insurance carrier or department or their representatives, a specialist shall provide that person with any information or written

material reasonably related to the specialist's services to the employe undertaken as a result of any injury for which the employe claims compensation.

(12) EFFECTIVE DATE. Pursuant to s. 227.22 (2) (intro), Stats., these rules shall take effect on the first day of the month following publication in the Wisconsin Administrative Register.



Tommy G. Thompson
Governor
Carol Skornicka
Secretary



Mailing Address:
201 E. Washington Avenue
Post Office Box 7946
Madison, WI 53707-7946
Telephone (608) 266-7552

State of Wisconsin Department of Industry, Labor and Human Relations

February 28, 1995

Gary Poulson
Assistant Revisor of Statutes
Suite 800
131 W. Wilson St.
Madison, Wisconsin 53703-3233

Douglas LaFollette
Secretary of State
10th Floor
30 West Mifflin Street
Madison, Wisconsin 53703

Dear Messrs. Poulson and LaFollette:

TRANSMITTAL OF RULE ADOPTION

CLEARINGHOUSE RULE NO.: 94-201

RULE NO.: 80.49

RELATING TO: Vocational Rehabilitation

Pursuant to section 227.20, Stats., agencies are required to file a certified copy of every rule adopted by the agency with the offices of the Secretary of State and the Revisor of Statutes.

At this time, the following material is being submitted to you:

1. Order of Adoption.
2. Rules Certificate Form.
3. Rules in Final Draft Form.

Pursuant to section 227.114, Stats., a summary of the final regulatory flexibility analysis is included for permanent rules. A fiscal estimate and fiscal estimate worksheet is included with an emergency rule.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Carol Skornicka'.

Carol Skornicka
Secretary

