

CHAPTER 10

VOCATIONAL REHABILITATION¹

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I. HISTORICAL OVERVIEW

Vocational rehabilitation began to be widely utilized in North Carolina workers' compensation cases following the North Carolina Supreme Court's decision in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986).

In *Whitley*, the Supreme Court held that an injured worker who has proven a total loss of wage-earning capacity is entitled to continue to receive total wage loss benefits under N.C. Gen. Stat. §97-29, even though all of his or her injuries are included in the schedule set out in N.C. Gen. Stat. §97-31.

Following *Whitley* and up until the early 1990s, there were few, if any, guidelines pertaining to the utilization of vocational rehabilitation in North Carolina workers' compensation cases. As a result, vocational rehabilitation initially was used more as a tool for limiting total wage loss benefits, rather than as an opportunity to rehabilitate injured workers.

In August 1991, the North Carolina Bar Association's Workers' Compensation Committee prepared "Guidelines for the Utilization of Medical Rehabilitation Specialists in Workers' Compensation Claims." While these guidelines primarily dealt with the medical aspects of rehabilitation, they also addressed some vocational rehabilitation issues, such as communicating with an injured worker's employer regarding job descriptions and other return-to-work issues. But they were only guidelines, not rules, and their guidance on vocational rehabilitation issues was especially limited.

Also in 1991, the term "Medical Compensation" was added to the "Definitions" Section of the North Carolina Workers' Compensation Act.² "Medical Compensation" was defined to include "rehabilitative services."³ A few years later, the term "Health Care Provider" was added to the "Definitions" Section of the Act, and it was defined to include "rehabilitation specialist."⁴

As part of the 1994 Workers' Compensation Reform Act, the North Carolina Workers' Compensation Act was amended to give the Industrial Commission the ability to adopt utilization rules and guidelines for vocational services and other types of rehabilitation services.⁵ In developing its rules and guidelines for vocational and other types of rehabilitation services, the Commission could consider the practice and treatment guidelines adopted by professional rehabilitation associations and organizations.⁶

As a result of the 1994 legislative directive for vocational rehabilitation rules (as well as for medical rehabilitation rules, as set forth in N.C. Gen. Stat. §97-25.4), the Industrial Commission appointed a committee. The committee included representatives from the rehabilitation profession, Industrial Commission, insurance industry, defense bar, and plaintiff's bar. Based on this committee's work, and following a public hearing and comments, the Commission adopted the "North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims" on November 30, 1995, and these Rules (hereinafter "Rehab Rules") became effective January 1, 1996.

In August of 1999, the Industrial Commission appointed a committee to study its Rehab Rules and to make recommendations for additions and revisions to the Rehab Rules. This committee consisted primarily of rehabilitation professionals, but also included representatives from the Industrial Commission, defense bar, and plaintiff's bar. Following a public hearing and comments, the Commission adopted several additions and revisions to the Rehab Rules, which became effective June 1, 2000.

² N.C. Gen. Stat. §97-2(19)

³ N.C. Gen. Stat. §97-2(19)

⁴ N.C. Gen. Stat. §97-2(20)

⁵ N.C. Gen. Stat. §97-25.5

⁶ N.C. Gen. Stat. §97-25.5

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On June 24, 2011, widespread changes to the North Carolina Workers' Compensation Act were made when House Bill 709 became law. Regarding vocational rehabilitation issues, the new law amended the definition of "Medical Compensation" to specifically include "vocational rehabilitation."⁷ More significantly, the new law defined "Suitable Employment,"⁸ and it created a vocational rehabilitation provision.⁹ These three statutory changes regarding vocational rehabilitation issues apply to claims arising on or after June 24, 2011.

The statutory vocational rehabilitation provision gives injured workers who either have not returned to work, or who have returned to work making less than 75 percent of their pre-injury average weekly wages, the right to vocational rehabilitation services, including education and retraining in the North Carolina community college or university systems, so long as the education and/or retraining is reasonably likely to substantially increase the injured worker's wage-earning capacity following completion of the education or retraining program.¹⁰

The statutory vocational rehabilitation provision also makes it clear that the goal or purpose of vocational rehabilitation services is "substantially increasing the employee's wage-earning capacity."¹¹

In 2012, the first sentence of N.C. Gen. Stat. §97-32.2(a) was amended by adding an exception which states that "vocational rehabilitation services may not be required if the employee is receiving benefits pursuant to G.S. 97-29(c) or G.S. 97-29(d)." This exception refers to employees receiving extended total wage loss compensation in excess of the G.S. 97-29(b) 500-week limitation on temporary total disability and to employees who qualify for permanent total disability.

As part of House Bill 709, all of the Industrial Commission's Rules (including its Rehab Rules) became subject to the North Carolina Administrative Procedure Act. The Industrial Commission undertook extensive rulemaking efforts, and while the vast majority of its Rules were approved by the Rules Review Commission, some of its approved Rules received ten or more written objections, which subjected those Rules to legislative review. As a result, the Industrial Commission delayed the effective date of most of its Rules (including all of the approved Rehab Rules), and the Rehab Rules that were adopted and approved following the 2011 legislative changes did not go into effect until November 1, 2014.

II. HOW VOCATIONAL REHABILITATION WORKS IN NORTH CAROLINA WORKERS' COMPENSATION CASES

Typically, vocational rehabilitation first comes into play in compensable North Carolina workers' compensation cases when an injured worker is released to return to work, with or without restrictions.

A. Vocational Rehabilitation Professional Qualifications

Vocational rehabilitation services may only be provided by a "qualified" or "conditional" rehabilitation professional (hereinafter "RP") approved by the Industrial Commission.¹² Rule 105 of the Rehab Rules discusses the specific qualifications required for all RPs, including vocational RPs. Upon request, RPs must provide a resumé of their qualifications and credentials during the initial meeting with the parties.¹³

To meet the "qualified" RP (hereinafter "QRP") standard, the RP must:

- (1) have one of the following certifications: CRC (Certified Rehabilitation Counselor), CRRN (Certified Registered Rehabilitation Nurse), CDMS (Certified Disability Management Specialist), CVE (Certified Vocational Evaluator), COHN-S (Certified Occupational Health Nurse- Specialist),

⁷ N.C. Gen. Stat. §97-2(19)

⁸ N.C. Gen. Stat. §97-2(22)

⁹ N.C. Gen. Stat. §97-32.2

¹⁰ N.C. Gen. Stat. §97-32.2(a)

¹¹ N.C. Gen. Stat. §97-32.2(c)

¹² N.C. Gen. Stat. §97-32.2(b); Rehab Rule 105(c)

¹³ Rehab Rule 105(n)

COHN (Certified Occupational Health Nurse), ONC (Orthopaedic Nurse Certified), or CCM (Certified Case Manager);¹⁴

OR

(2) have prior employment within the North Carolina Department of Health and Human Services as a vocational rehabilitation provider.¹⁵

While the Rehab Rules do not state that certain certifications are appropriate credentials for medical RPs only and other certifications are only appropriate credentials for vocational RPs only, Rehab Rule 106(f) states, “Rehabilitation professionals shall practice only within the boundaries of their competence, based on their education, training, professional experience, and other professionals credentials.” Therefore, it appears that it would not be appropriate, for example, for the RP whose only certification is ONC (Orthopaedic Nurse Certified) and who does not have any prior employment within the North Carolina Department of Health and Human Services as a vocational rehabilitation provider to practice as a vocational RP.

In addition to possessing one of the certifications listed in Rehab Rule 105(d)(1) or having prior employment as a vocational rehabilitation provider for the North Carolina Department of Health and Human Services, a “qualified” RP also must:

(1) possess two years of full-time work experience, or its equivalent, in workers’ compensation case management, where at least 30 percent of the rehabilitation professional’s time was spent managing medical or vocational rehabilitation services to persons with disabling conditions or diseases within the past 15 years;¹⁶

AND

(2) complete the comprehensive course entitled, “*Workers’ Compensation Case Management in NC: A Basic Primer for Medical and Vocational Case Managers*,” as provided by the Industrial Commission or the International Association of Rehabilitation Professionals of the Carolinas.¹⁷

To maintain “qualified” status, the RP must attend a two-hour refresher course every five years, beginning with the date of the original course completion.¹⁸

A “conditional” RP (hereinafter “CRP”) is a person who does not meet the requirements for QRP and who wishes to work as an RP in cases subject to the Rehab Rules. Persons who fall under the designation of CRP include persons with credentials such as CRC, CRRN, CDMS, CVE, COHN-S, COHN, ONC, or CCM who do not have the requisite experience in workers’ compensation case management.¹⁹ Additional examples of persons who fall under the designation of CRP can be found in Rehab Rules 105(j)(2)-(4).

Like QRPs, CRPs also must complete the mandated, comprehensive course entitled, “*Workers’ Compensation Case Management in NC: A Basic Primer for Medical and Vocational Case Managers*.” Under Rule 105(h) of the Rehab Rules, “[a]fter July 1, 2013, any rehabilitation professional who begins providing rehabilitation services in cases subject to the Rules in this Subchapter shall have six months to obtain a certificate of completion of the mandated course.”

Once the RP meets the certification eligibility requirements of a CRP, he or she may maintain CRP status for a period of two years only.²⁰

¹⁴ Rehab Rule 105(d)(1)

¹⁵ Rehab Rule 105(d)(2)

¹⁶ Rehab Rule 105(e)(1)

¹⁷ Rehab Rule 105(e)(2)

¹⁸ Rehab Rule 105(f)

¹⁹ Rehab Rule 105(j)(1)

²⁰ Rehab Rule 105(m)

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In order to work as an RP, a CRP must work under the direct supervision of a QRP until the CRP fulfills the qualifications for a QRP.²¹ The direct supervision of the CRP must include regular case review between the CRP and the QRP supervisor, review of all reports by the QRP supervisor, and periodic meetings no less frequently than quarterly between the CRP and the QRP supervisor.²² The QRP supervisor is responsible for assuring that the CRP's work meets all requirements, including all Rehab Rule and statutory requirements, and the QRP supervisor's name, address and telephone number must be on all documents identifying the CRP.²³

The Industrial Commission website provides a *Registry of Workers' Compensation Rehabilitation Professionals*. This registry is located at www.ic.nc.gov/ncic/registry/registry.php.

The registry lists RPs by name in alphabetical order, and it provides information about each RP's certification(s), including the expiration date(s) of the certification(s), as well as the date on which the RP completed the required comprehensive primer course and the date by which the RP must complete the required refresher course.

B. Professional Responsibility

An RP always must exercise independent professional judgment in making and documenting recommendations for vocational rehabilitation for the injured worker.²⁴ As the statutory vocational rehabilitation provision explains, appropriate recommendations for vocational services may include "retraining, education, or job placement."²⁵

The vocational RP also has an obligation to determine whether or not the worker needs or is likely to benefit from vocational rehabilitation services.²⁶ Therefore, if the vocational RP, in his or her independent professional judgment, determines that the worker is unlikely to benefit from vocational rehabilitation services (due, for example, to factors such as the worker's age, education, work experience, and physical and mental capacities), then the RP should inform the parties of this determination.

If, at any point during vocational rehabilitation services, the RP determines that the employee will no longer benefit from vocational rehabilitation services, then the employer may terminate the vocational rehabilitation services unless the Industrial Commission orders otherwise.²⁷ If, however, the vocational RP determines that the worker may benefit from vocational services, then under the statutory vocational rehabilitation provision, those services may be terminated only by agreement of the parties or by an order of the Commission.²⁸

RPs in cases subject to the Rehab Rules are required to follow the Code of Ethics specific to their certification, as well as any specific to their occupation.²⁹ The full text of the Ethics Code that governs RPs who are certified by the Commission on Rehabilitation Counselor Certification (CRCC), which is the largest certifying organization for vocational rehabilitation counselors, can be found on the CRCC website at www.crc certification.com. The North Carolina Industrial Commission website provides links to various additional professional boards that regulate RPs at www.ic.nc.gov/nursinglinks.html.

RPs shall practice only within the boundaries of their competence, based on their education, training, professional experience, and other professional credentials.³⁰ And if RPs are retained as case consultants or expert witnesses, they have an obligation to provide unbiased, objective opinions.³¹

²¹ Rehab Rule 105(k)

²² Rehab Rule 105(l)

²³ Rehab Rule 105(k)

²⁴ Rehab Rule 106(a)

²⁵ N.C. Gen. Stat. §97-32.2(c)(2)

²⁶ N.C. Gen. Stat. §97-32.2(c)(1)

²⁷ N.C. Gen. Stat. §97-32.2(c)(1)

²⁸ N.C. Gen. Stat. §97-32.2(c)(1); N.C. Gen. Stat. §97-32.2(e)

²⁹ Rehab Rule 106(d)

³⁰ Rehab Rule 106(f)

³¹ Rehab Rule 106(d)

An RP also must disclose any possible conflict of interest, which includes the situation where the carrier or employer is affiliated with the RP (such as when the RP works for the same insurance carrier that is the carrier in the workers' compensation case), to all parties and to all health care providers.³²

It should go without saying, but the Rehab Rules also make it clear that an RP shall not conduct or assist any party in claims negotiation or investigative activities,³³ nor may an RP advise the worker as to any legal matter.³⁴ An RP may not accept any compensation or reward from any source as a result of settlement.³⁵

C. Communications

Rule 107 of the Rehab Rules is devoted to the subject of communications. Among the RP's obligations regarding communications is the obligation to provide copies of all correspondence and reports contemporaneously to all parties by the same mode of transmission.³⁶ This means, for example, that when emailing an adjuster, the RP must simultaneously copy the injured worker or the injured worker's attorney.

The Rehab Rules also require the RP to make periodic written reports documenting accurately and completely the substance of all activity in the case, including rehabilitation activity.³⁷

Additionally, communication of activity to **all parties** by telephone, facsimile, electronic media, or letter must occur when information relevant to the rehabilitation process is obtained, when changes or revisions are recommended or occur in medical or vocational treatment plans, or on any other occasion when the worker's understanding and cooperation is critical to the implementation of the rehabilitation plan.³⁸

D. Work Restrictions

When an injured worker is released to return to work with restrictions, the RP must obtain a list of the work restrictions from the health care provider that addresses the demands of any proposed employment.³⁹

In addition to addressing the injured worker's ability to perform physical activities (such as lifting, carrying, bending, twisting, reaching, gripping, kneeling, squatting, standing, walking, and sitting), the work restrictions also should address any other limitations, including but not limited to, limitations on production requirements, attendance, hours worked, overtime, and ability to operate machinery, as well as the need for breaks, including unscheduled breaks.

If an injured worker's physician orders testing to measure the worker's functional capacity, physical capacity, and/or impairments, the RP must schedule an appointment for the testing ordered by the physician.⁴⁰ It should be noted, however, that it is not appropriate for the RP to step into the shoes of the physician and ask the physician to order a functional capacity evaluation (FCE) or other testing for the worker. This would be tantamount to the RP attempting to direct the worker's medical care, and the Rehab Rules state that "[i]t is not the role of the rehabilitation professional to direct medical care."⁴¹

Concerns have been raised about the value of FCEs in the return-to-work process. An FCE is a very brief snapshot in time under very controlled circumstances, while the workplace is a multifaceted environment where

³² Rehab Rule 106(b)

³³ Rehab Rule 106(g)

³⁴ Rehab Rule 106(h)

³⁵ Rehab Rule 106(i)

³⁶ Rehab Rule 107(d)

³⁷ Rehab Rule 107(f)

³⁸ Rehab Rule 107(g)

³⁹ Rehab Rule 109(e)

⁴⁰ Rehab Rule 109(e)

⁴¹ Rehab Rule 106(a)

many factors interact during the work day. Therefore, the FCE is just one piece of information for a physician to review when assigning work restrictions or reviewing proposed jobs.

E. Job Descriptions

The RP may obtain or prepare (so long as he or she is qualified to prepare) a written or videotaped job description of a proposed job.⁴² In preparing written job descriptions, the RP shall utilize standards, including but not limited to, the Dictionary of Occupational Titles and the Handbook for Analyzing Jobs published by the U.S. Department of Labor.⁴³

The RP must provide a copy of the job description to all parties for review **before** the job description is provided to the physician.⁴⁴

The worker (or his attorney) has seven business days from the mailing of the job description to notify the RP, all parties, and physician of any objections or amendments to the job description.⁴⁵ The only two exceptions to the seven-day period of time are: (1) when “job availability is critical,” in which case the seven-day period may be shortened, and (2) if the worker or his attorney has pre-approved the job description, in which case the seven-day period of time does not apply.⁴⁶ **The job description and the objections or amendments, if any, must be submitted simultaneously to the physician.**⁴⁷

F. Initiation of Vocational Rehabilitation Services and Initial Rehabilitation Meeting

Under N.C. Gen. Stat. §97-32.2 (which applies to claims arising on or after June 24, 2011), in a compensable claim the employer may engage vocational rehabilitation services at any point during the claim, regardless of whether the employee has reached maximum medical improvement, except that vocational rehabilitation services may not be required if the employee is receiving total disability benefits pursuant to N.C. Gen. Stat. §97-29(c) or §97-29(d).⁴⁸

Additionally, N.C. Gen. Stat. §97-32.2 provides that if the injured worker either: (1) has not returned to work or (2) has returned to work making less than 75 percent of his average weekly wages, the worker may request vocational rehabilitation services, including education and retraining in the North Carolina community college or university systems, so long as the requested education or retraining is reasonably likely to substantially increase the injured worker’s wage-earning capacity.⁴⁹ It is important to note that the requested education or retraining does not need to be reasonably likely to restore the worker back to his full pre-injury wages.

Under the statutory vocational rehabilitation provision, unless the parties mutually agree to a vocational RP, the employer may make the initial selection.⁵⁰ This implies that the parties should attempt to mutually agree to the vocational RP assigned to the case. However, at any point during the vocational rehabilitation process, either party may request that the Industrial Commission order a change of vocational RP for good cause.⁵¹

⁴² Rehab Rule 109(g) and Rehab Rule 106(f)

⁴³ Rehab Rule 109(h)

⁴⁴ Rehab Rule 109(g)

⁴⁵ Rehab Rule 109(g)

⁴⁶ Rehab Rule 109(g)

⁴⁷ Rehab Rule 109(g)

⁴⁸ N.C. Gen. Stat. § 97-32.2(a)

⁴⁹ N.C. Gen. Stat. § 97-32.2(a)

⁵⁰ N.C. Gen. Stat. § 97-32.2(b)

⁵¹ N.C. Gen. Stat. §97-32.2(b)

If and when vocational rehabilitation is initiated, the first meeting of the worker and the RP shall take place at the office of the worker's attorney, if requested by the worker or his attorney, and this meeting shall occur within 20 days of the request.⁵²

The Rehab Rules previously permitted the RP to provide the worker with the official Industrial Commission summary of the Rules instead of a full copy of the Rules, but the current Rehab Rules require the RP to provide the worker with a full copy of the Rehab Rules.⁵³ In addition to providing the worker with a full copy of the Rehab Rules, however, the RP also may provide the worker with a copy of one or both of the Industrial Commission Rehab Rule summaries. The Commission has published one Rehab Rule summary for vocational rehabilitation and one Rehab Rule summary for medical rehabilitation. These summaries can be found on the Industrial Commission website under the "Medical Rehabilitation Nurses Section" page, and the vocational rehabilitation summary can be found at the end of this chapter in Appendix A.

At the initial meeting, the RP also must inform the worker that the RP is required to share relevant medical and vocational information with the employer and insurance carrier and that the RP may be compelled to testify regarding any information obtained.⁵⁴

G. Vocational Assessment

A vocational assessment usually is the first step in the vocational rehabilitation process. The vocational assessment should include an evaluation of: (1) the injured worker's medical and vocational circumstances; (2) the worker's expectations of the vocational services; (3) any specific requests of the worker for vocational services; and (4) any other information that is significant to the injured worker's employment potential.⁵⁵

The vocational assessment must also involve a face-to-face interview between the employee and the RP.⁵⁶ Often, however, the vocational assessment is multi-step process that involves more than just a face-to-face meeting with the worker. As part of the vocational assessment process, the RP may administer testing to the injured worker, which may include tests to measure the injured worker's reading comprehension, math ability, manual dexterity, and other skills. The RP also may undertake an analysis of the worker's transferable skills as part of the vocational assessment process. It should be noted, however, that the RP has the responsibility to refrain from those activities which do not fall within his or her qualifications.⁵⁷ Therefore, the RP only should administer tests that he or she is qualified to administer.

There is no specific Industrial Commission-mandated format for the vocational assessment. The procedure and format will vary based on factors relevant to the worker, and will be dictated by the specific circumstances of the case and the RP's professional training and standards.

While the RP should seek information that is significant to employment potential, in preparing oral and written reports the RP should present only information relevant and material to the worker's vocational rehabilitation and must make every effort to avoid invasion of the injured worker's privacy.⁵⁸

H. Individualized Written Rehabilitation Plan

Following a vocational assessment, and assuming the RP determines that the injured worker will benefit from vocational rehabilitation services, the RP must undertake the formulation of an individualized written rehabilitation plan (hereinafter "IWRP").⁵⁹ The plan must be individually tailored to the worker's vocational

⁵² Rehab Rule 107(h)

⁵³ Rehab Rule 107(b)

⁵⁴ Rehab Rule 107(b)

⁵⁵ N.C. Gen. Stat. §97-32.2(c)(1) and Rehab Rule 109(a)

⁵⁶ N.C. Gen. Stat. §97-32.2(c)(1), *and see* Rehab Rule 109(a)

⁵⁷ Rehab Rule 106(f)

⁵⁸ Rehab Rule 107(e)

⁵⁹ N.C. Gen. Stat. §97-32.2(c)(2) and Rehab Rule 109(a)

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needs, skills and goals, as opposed to being a “cookie cutter” plan. As the Industrial Commission has previously stated:

“Cookie cutter outlines concerning vocational rehabilitation plans are not acceptable. Rehabilitation Professionals are required to devote the time and effort to become informed and to understand the injured worker’s needs to the point that reasonable and realistic individualized plans can be produced. The Rehabilitation Professionals must maintain professionalism and treat each injured worker with respect and dignity.”⁶⁰

As with vocational assessments, there is no mandated Industrial Commission format for IWRPs. However, the statute requires every IWRP to include “input from the employee” and states that an IWRP “should be individually tailored to the employee based on the employee’s education, skills, experience, and aptitudes, with appropriate recommendations for vocational services, which may include appropriate retraining, education, or job placement.”⁶¹

The Rehab Rules define “vocational rehabilitation” as “the delivery and coordination of services under an individualized written plan, with the goal of assisting the injured worker to return to suitable employment or participate in education or retraining, as defined by Item (5) of this Rule or applicable statute.”⁶² Likewise, under N.C. Gen. Stat. §97-32.2(b), vocational rehabilitation services “shall include a vocational assessment and the formulation of an individualized written rehabilitation plan with the goal of substantially increasing the employee’s wage-earning capacity. . . .”⁶³ Therefore, both the Rehab Rules and the statute emphasize the importance of an IWRP that is tailored to the particular worker.

The formulation of the IWRP should be a **joint effort** between the RP and the injured worker. While the RP will draft the initial proposed IWRP following the vocational assessment, the RP should give the injured worker (and, if represented, his attorney) the opportunity to review the proposed plan and give input and suggestions for changes before drafting the final plan.⁶⁴ Once the IWRP is finalized, it may be changed or updated by mutual consent.⁶⁵

The only statutory exception to the requirement of an IWRP is when the RP has been retained solely to perform a one-time assessment.⁶⁶

I. Education and Retraining

One of the benefits to injured workers under the 2011 changes to the Workers’ Compensation Act is the creation of a vocational rehabilitation provision that specifically authorizes education and retraining in the North Carolina community college or university systems as a proper form of vocational rehabilitation.⁶⁷ While this statutory provision applies only to claims arising on or after June 24, 2011, the appellate case law establishes that all injured workers (regardless of when their claim arose) may be entitled to education and retraining as part of their vocational rehabilitation.

⁶⁰ This language previously was found on the Industrial Commission website in a document entitled, “NC Industrial Commission Nursing and Medical Rehabilitation Document” located on the Commission’s webpage containing the Registry of Workers’ Compensation Rehabilitation Professionals. While the Commission’s current Registry webpage no longer contains this statement, it provides valuable guidance on the formulation of IWRPs.

⁶¹ N.C. Gen. Stat. §97-32.2(c)(2)

⁶² Rehab Rule 103(3)

⁶³ N.C. Gen. Stat. §97-32.2(c)

⁶⁴ N.C. Gen. Stat. §97-32.2(c)(2)

⁶⁵ N.C. Gen. Stat. §97-32.2(c)(2)

⁶⁶ N.C. Gen. Stat. §97-32.2(c)(2)

⁶⁷ N.C. Gen. Stat. §97-32.2(a)

Specifically, prior to the statutory changes, the North Carolina Court of Appeals held that the Industrial Commission did not err in concluding that an injured worker's educational pursuits are a proper form of vocational rehabilitation.⁶⁸

As the *Foster* Court explained, the term "medical compensation" encompasses rehabilitative services, including vocational rehabilitation, and the Industrial Commission "has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability."⁶⁹ The *Foster* Court also noted that the evidence showed that receiving a social work degree would serve as the foundation for the plaintiff to qualify for a higher wage in another field.⁷⁰

Under *N.C. Gen. Stat. §97-32.2(a)*, in order to qualify for vocational rehabilitation in the form of education or retraining in the North Carolina community college or university system, the injured worker must be able to demonstrate that the education or retraining is reasonably likely to substantially increase his wage-earning capacity following completion of the education or retraining. This standard does **not** require the worker to show that the education or retraining is likely to restore him back to his or her full pre-injury wages; it merely requires a showing that the education or retraining is likely to substantially increase his or her post-injury wage-earning capacity.

When an employee requests retraining or education under *N.C. Gen. Stat. §97-32.2(a)*, the vocational RP must provide a written assessment of the employee's request that includes an evaluation of several factors, namely: (1) the type of retraining or education requested; (2) the availability, location, cost and identity of providers of the retraining or education; (3) the likely duration until completion of the retraining or education, the course names and schedules, and information about which courses are available online; (4) the current or projected availability of employment upon the completion of the retraining or education; and (5) the anticipated pay range for employment upon completion of the retraining or education.⁷¹

J. Job Placement Activities

Job placement activities may not be commenced until after both a vocational assessment of the worker and an IWRP for the worker have been completed.⁷²

Both the Rehab Rules and the statute set forth a priority that the RP should follow when making recommendations for and assisting the injured worker with job placement. While the Rule and statute are not worded identically, both clearly make return to suitable employment with the employer of injury the first priority when it has been determined that job placement activities are appropriate.⁷³

As discussed in further detail immediately below, the RP shall refer a worker only to opportunities for suitable employment.⁷⁴

⁶⁸ *Russos v. Wheaton Industries*, 145 N.C. App. 164, 551 S.E.2d 456 (2001), *disc. rev. denied*, 355 N.C. 214, 560 S.E.2d 135 (2002) (Court of Appeals affirmed the Commission's decision that plaintiff's enrollment in a paralegal program was a reasonable attempt at rehabilitation given the totality of the circumstances surrounding the case); *Foster v. U.S. Airways*, 149 N.C. App. 913, 563 S.E.2d 235 (2002), *disc. rev. denied*, 356 N.C. 299, 570 S.E.2d 505 (2002) (Court of Appeals concluded that the Commission did not err nor abuse its discretion in approving plaintiff's decision to enroll as a full-time community college student for the purpose of completing a bachelor's degree in social work.).

⁶⁹ *Foster* at 923, 563 S.E.2d at 242

⁷⁰ *Foster* at 924, 563 S.E.2d at 242

⁷¹ Rehab Rule 109(d)

⁷² Rehab Rule 109(b); *N.C. Gen. Stat. §97-32.2(f)*

⁷³ Rehab Rule 109(c); *N.C. Gen. Stat. §97-32.2(f)*

⁷⁴ Rehab Rule 109(f) and Rehab Rule 103(4)

K. Suitable Employment

The RP shall refer a worker only to opportunities for suitable employment.⁷⁵ Therefore, it is incumbent upon the RP to thoroughly investigate and determine the suitability of any employment opportunity **before** referring the injured worker to the prospective employer regarding the employment opportunity. The determination of a job's suitability is a threshold determination that must be made by the RP before a referral is made, not after it is made.

The RP shall not initiate or continue placement activities which do not appear reasonably likely to result in placement of the injured worker in suitable employment.⁷⁶ The RP shall report to the parties when efforts to place the worker in suitable employment do not appear reasonably likely to result in placement of the injured worker in suitable employment.⁷⁷

“Suitable Employment” Defined

The concept of suitable employment is complex because it always has had two very different, and often opposing, purposes: (1) to define the type of work a vocational RP is supposed to assist an injured worker with obtaining, consistent with the professional rehabilitation standard for suitable employment; and (2) to establish the minimum level of employment an injured worker can be required to accept when offered, or else risk the suspension of wage-loss benefits under G.S. §97-32.

Until June 24, 2011, the term “suitable employment” was defined only in the Rehab Rules and, less specifically, in our case law. For claims arising before June 24, 2011, the Rehab Rules define suitable employment as:

“employment in the local labor market or self-employment that is reasonably attainable and that offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker’s qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment.”⁷⁸

This definition of suitable employment still applies to claims that arose prior to June 24, 2011.

For claims arising on or after June 24, 2011, suitable employment is defined in the statute as:

“employment offered to the employee or, if prohibited by the Immigration and Nationality Act, 8 U.S.C. 1324a, employment available to the employee that (i) prior to reaching maximum medical improvement is within the employee’s work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee’s authorized health care provider or (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee’s preexisting and injury-related physical and mental limitations, vocational skills, education and experience and is located within a 50-mile radius of the employee’s residence at the time of injury or the employee’s current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment.”⁷⁹

The statutory definition of suitable employment is now referred to in several other sections of the Act, including G.S. §97-29(d) (as a way to rebut the presumption of permanent total disability in certain catastrophic cases), G.S. §97-32 (as grounds for suspension of total disability benefits), and G.S. §97-32.2 (the vocational rehabilitation statute). So it appears that the codification of the definition of suitable employment is a significant change to the Act that is likely to impact a large number of cases.

⁷⁵ Rehab Rule 109(f) and Rehab Rule 103(4)

⁷⁶ Rehab Rule 109(j)

⁷⁷ Rehab Rule 109(j)

⁷⁸ Rehab Rule 103(5)

⁷⁹ N.C. Gen. Stat. §97-2(22)

While there are many similarities between the two definitions of suitable employment, there are also some important differences. One significant difference is the distinction made in the statute between “pre-MMI” and “post-MMI” employment. This distinction allows “rehabilitative or other noncompetitive employment with the employer of injury” (sometimes known as “make-work”) during the healing period and up until the point at which the worker has reached maximum medical improvement (MMI), so long as the worker’s authorized health care provider has approved the employment. This distinction was an attempt to codify the reasoning in the unpublished Court of Appeals decision in *Russo v. Food Lion*, 187 N.C. App. 509, 653 S.E.2d 255 (2007). For cases that arose before June 24, 2011, however, a distinction between “pre-MMI” and “post-MMI” job offers cannot be made, and the employment must be suitable as defined in the Rehab Rules.⁸⁰

A second significant difference between the definition of suitable employment in the Rehab Rules and the statutory definition of suitable employment is that the Rehab Rules definition requires that the employment offer the worker the opportunity to be restored to pre-injury wage as soon as possible and as nearly as practicable, while the statutory definition makes no reference to pre-injury wage.

In *Falin v. The Roberts Company Field Services, Inc.*, a unanimous opinion filed by the North Carolina Court of Appeals, the Court held that the 50-mile radius language in the statutory definition of “suitable employment” is a requirement that must be met in order for any proffered employment to be considered “suitable.”⁸¹ The Court rejected the argument that the 50-mile radius is merely a factor that should be considered, but not required. A Petition for Discretionary Review by the North Carolina Supreme Court was filed by the defendants in the *Falin* case, and as of the publication of this chapter the defendants’ Petition for Discretionary Review was still pending.

Suspension of Benefits for Unjustified Refusal of Suitable Employment

An injured worker who is receiving wage-loss benefits may have his or her benefits suspended under G.S. §97-32 for an unjustified refusal of suitable employment. For claims arising prior to June 24, 2011, the prior version of G.S. §97-32 applies. This version of G.S. §97-32 states:

“If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.”

For claims arising on or after June 24, 2011, G.S. §97-32, as amended, applies:

“If an injured employee refuses suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. Any order issued by the Commission suspending compensation pursuant to G.S. 97-18.1 on the ground of an unjustified refusal of an offer of suitable employment shall specify what actions the employee should take to end the suspension and reinstate the compensation. Nothing in this Article prohibits an employer from contacting the employee directly about returning to suitable employment with contemporaneous notice to the employee’s counsel, if any.”

While there are now two versions of G.S. §97-32, depending on the date on which the claim arose, the operation of this section of the Act has not changed. As always, and as our Courts have long held:

“The burden is on the employer to show that an employee refused suitable employment. Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified.”

Munns v. Precision Franchising, Inc., 196 N.C. App. 315, 317, 674 S.E.2d 430, 433 (2009) (citing *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002) and *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 389-90, 561 S.E.2d 315, 320 (2002)).

⁸⁰ *Wynn v. United Health Services/Two Rivers Health*, 716 S.E.2d 373, 2011 N.C. App. LEXIS 1686 (N.C. App., Aug. 2, 2011), cert. denied, 2012 N.C. LEXIS 76 (N.C., Jan. 26, 2012).

⁸¹ *Falin v. The Roberts Company Field Services, Inc.*, No. COA15-565 (February 2, 2016).

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Breaking the analysis down even further, the way that G.S. §97-32 works is that the employer has the initial burden of proving two things: (1) that the job offered to the employee is suitable employment; and (2) that the employee “refused” the suitable employment.

If the employer fails to prove either of these two elements, then benefits may not be suspended under G.S. §97-32. If, however, the employer proves both of these elements, then the burden shifts to the employee to prove that her refusal of the suitable employment was “justified.”

If the employee proves that her refusal was “justified,” then benefits may not be suspended under G.S. §97-32. But if the employee fails to prove that her refusal was “justified,” then benefits will be suspended under G.S. §97-32.

Presumably, for cases arising on or after June 24, 2011, it will be easier for an employer to prove that a job offered to an employee is suitable employment because the applicable definition of suitable employment does not contain as many factors to be considered when determining suitability. However, this does not impair the employee’s ability to prove that he or she was justified in refusing the suitable employment, under the particular circumstances of the case.

In the past, the distinction between the employer’s burden of proof (showing that the employment offered is “suitable” and showing that the employee “refused” the employment) and the employee’s burden of proof (showing that the refusal of suitable employment was “justified”) was sometimes blurred by the courts and practitioners. But with the new statutory definition of suitable employment, practitioners will now need to be much more precise when analyzing the facts and applying the law.

L. Compliance with Vocational Rehabilitation

If the RP believes that an injured worker is not complying with the provision of vocational rehabilitation services, the RP shall detail in writing the actions that the RP believes the injured worker is required to take to return to compliance.⁸²

Vocational rehabilitation services are a type of medical compensation, and like any other medical compensation provided in a compensable claim, the Industrial Commission may order an injured worker to comply with specific vocational rehabilitation services if the employer or carrier makes a showing that these specific vocational rehabilitation services are reasonably required to effect a cure, give relief, or lessen the period of disability.⁸³ If, however, the Industrial Commission finds that the worker is unlikely to benefit from vocational rehabilitation services and that vocational rehabilitation is therefore futile, the Commission may decline to order the injured worker to comply with vocational rehabilitation services.⁸⁴

If an injured worker previously has been ordered to comply with vocational rehabilitation services and then fails to comply with that order, the injured worker’s total disability compensation may be suspended due to his failure to comply with the prior order of the Commission.⁸⁵ However, upon a proper showing by the worker that he is willing to comply with the prior order of the Commission, his total disability compensation should be reinstated.⁸⁶

Under the statutory vocational rehabilitation provision, any order issued by the Commission suspending compensation under N.C. Gen. Stat. §97-18.1 for failure to comply with a prior order compelling the acceptance

⁸² Rehab Rule 107(j)

⁸³ *N.C. Gen. Stat. §97-2(19); N.C. Gen. Stat. §97-25; Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 471 S.E.2d 92 (1996)

⁸⁴ *See Shoemaker v. Creative Builders*, 150 N.C. App. 523, 563 S.E.2d 622 (2002)

⁸⁵ *N.C. Gen. Stat. §97-25; N.C. Gen. Stat. §97-32.2(g)*

⁸⁶ *See Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 471 S.E.2d 92 (1996).

of or cooperation with vocational rehabilitation services shall specify what action the employee should take to end the suspension and reinstate the compensation.⁸⁷

M. Change or Removal of Rehabilitation Professional

Under the Rehab Rules, if the employer wants to change the RP and the injured worker (and his attorney, if he is represented) consents, then the employer may change the RP.⁸⁸ Under the statutory provision, “[a]t any point during the vocational rehabilitation process, either party may request that the Industrial Commission order a change of vocational rehabilitation professional for good cause.”⁸⁹

An RP may be removed from a case upon motion by either party for good cause shown or by the Industrial Commission in its own discretion.⁹⁰ A motion to remove an RP must be served upon all parties and also must be served upon the RP.⁹¹

III. PRACTICE TIPS

- The North Carolina Division of Vocational Rehabilitation Services is excellent resource for injured workers who need assistance in obtaining or keeping a job. The “Employment Services for People with Disabilities” link on the NC Division of Vocational Rehabilitation Services website, which is found at www.ncdhhs.gov/divisions/dvrs, describes the services offered. These services include development of an employment plan, vocational evaluation, diagnostic services, physical and mental restoration, assistive technology, transportation, modifications to vehicle, home, job and worksite, personal assistance, college or vocational training, and on-the-job training. Additionally, services such as job-coaching, supported employment, and work adjustment activities may be provided by a community rehabilitation program.
- The Commission on Rehabilitation Counselor Certification (CRCC) is the organization that grants the Certified Rehabilitation Counselor (CRC) certification, which is a certification held by many vocational RPs in North Carolina. The CRCC has adopted a Code of Ethics for CRCs, and all CRCs are bound to act in accordance with the Code. The CRCC website (located at www.crcccertification.com) is a helpful resource for workers’ compensation practitioners, and it contains links to the CRCC Code of Ethics, the CRCC Rehabilitation Counseling Scope of Practice Statement, CRCC Advisory Opinions, the CRCC grievance process, and the CRCC Desk Reference on Professional Ethics (which is available for purchase).
- When vocational rehabilitation services are initiated, the injured worker and his attorney should ask for an initial meeting in the attorney’s office. This is a good opportunity to sit down face-to-face with the rehabilitation professional and begin to develop a productive relationship based on open communication and mutual respect.
- The formulation of an IWRP is an opportunity to thoroughly explore an injured worker’s transferable skills, aptitudes, vocational interests, and vocational goals. In formulating the IWRP, the parties should consider whether the worker’s vocational interests and goals may be best achieved through education or retraining in the North Carolina community college or university systems.
- Vocational rehabilitation in the form of education and retraining in the North Carolina community college or university systems is available to injured workers who have not returned to work or who have returned to work making less than 75% of their average weekly wages. The education or retraining must be reasonably likely to substantially increase the employee’s wage-earning capacity

⁸⁷ N.C. Gen. Stat. §97-32.2(g)

⁸⁸ Rehab Rule 110(a)

⁸⁹ N.C. Gen. Stat. §97-32.2(b)

⁹⁰ Rehab Rule 110(b)

⁹¹ Rehab Rule 110(b)

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following completion of the education or retraining program. However, the education or retraining does not need to be reasonably likely to restore the injured worker back to his full pre-injury wages.

- An injured worker who is interested in obtaining a degree as part of his vocational rehabilitation should be encouraged to enroll in classes as soon as practical. Even injured workers who are homebound can take online classes. Having successfully completed some educational coursework is one of the best ways for an injured worker to demonstrate the ability to complete the requested educational program.
- Job placement activities should not be initiated by the RP until the completion of a vocational assessment (which must include a face-to-face interview with the injured worker) and the finalization of the worker's IWRP following input on the rehabilitation plan by the worker.
- Injured workers should make sure to thoroughly and accurately document all job search efforts, even when formal vocational rehabilitation has not been initiated. This means documenting all actions taken to find work (including networking, attending job fairs, and conducting online job search), as opposed to merely documenting the submission of job applications. If the injured worker is called upon to testify about his job search efforts, he will have thorough documentation that will enable him to refresh his recollection, and he will have the opportunity to offer the documentation as evidence of his job search efforts.
- Practitioners should consider whether to hire an RP as a case consultant when the issue of disability is in dispute or likely to be disputed in the future. In most cases, the plaintiff will have the burden of proving disability, and vocational RPs can be very helpful in documenting and presenting evidence on the issue of disability.
- If an injured worker's total disability compensation has been suspended on the grounds of non-compliance with a prior order to comply with vocational rehabilitation, the worker's attorney should make sure that the Commission's suspension order specifies what particular action the worker needs to take to end the suspension and reinstate compensation. Once the injured worker takes the action specified by the Commission in its suspension order, a motion for reinstatement may be filed under N.C. Gen. Stat. §97-18(k) if the defendants do not voluntarily reinstate the compensation. The §97-18(k) provision applies to all claims, regardless of the date on which the claim arose, and an Industrial Commission Form 23 may be used when requesting the reinstatement.

APPENDIX A

Pat McCrory, Governor
Andrew T. Heath, Chairman



Charlton L. Allen, Commissioner
Bernadine S. Ballance, Commissioner
Linda Cheatham, Commissioner
Danny L. McDonald, Commissioner
Tammy R. Nance, Commissioner

North Carolina Industrial Commission Summary of the North Carolina Industrial Commission's Rules for Utilization of Rehabilitation Professionals

A rehabilitation professional (RP) is a medical case manager, coordinator of medical services or vocational rehabilitation professional who works independently with you towards rehabilitation during your workers' compensation claim. Your RP has education and training required by the Industrial Commission (IC) and must act ethically and follow the attached rules.

You must participate in rehabilitation and communicate regularly with your RP. If your RP believes that you are not complying, your RP will detail in writing the actions you are required to take to return to compliance. Your weekly benefits could be stopped if you are ordered to comply with rehabilitation and fail to do so.

You are strongly encouraged to read the attached rules so that you will understand your rights and responsibilities and the role of your RP in your workers' compensation case. If you have questions about the Rules, talk with your RP. However, your RP cannot give legal advice or investigate or settle your case. If you have questions about your RP or the rules, you may also contact the Industrial Commission Information Specialists at (919) 807-2501 or speak with your attorney.

Vocational Rehabilitation Professionals

A vocational rehabilitation professional (VRP) will:

- meet with you to talk about your medical and work situation as well as your specific requests for return to work or retraining and education as appropriate. This is one part of your vocational assessment.
- prepare an individualized written rehabilitation plan with you that makes recommendations to assist you to return to work, train for a new job, or go back to school, based on your education, skills, experience, and abilities
- help you return to work with your current employer or another employer, if needed
- refer you only to suitable jobs
- accurately write job descriptions that list the physical requirements of a job
- stop placement activities if it does not appear that a suitable job can be found for you

This is only a summary of the North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals. Nothing in this summary shall alter the meaning of the Workers' Compensation Act or the North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals.