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from the Minnesota Workers' Compensation Desk Book**

4. Retraining

a. Purpose

Retraining is a formal course of study in a school setting that is designed to train an employee to return to suitable gainful employment. MINN. STAT. § 176.011(23) (2006). It differs from other forms of rehabilitation assistance in that an individual who has been approved to participate in a retraining program is entitled to receive weekly compensation benefits that are, in essence, temporary total disability benefits, for up to 156 weeks while participating in an approved retraining program.

With the enactment of Minnesota Statutes section 176.102 in 1979, the Legislature directed that “vocational rehabilitation shall train an employee so he may be returned to a job related to his former employment or to a job in another work area which produces an economic status as close as possible to that he would have enjoyed without disability.” Jerde, 484 N.W.2d at 795. In Kostreba v. Stay Clean Janitorial, slip op. (W.C.C.A. July 31, 1990), the Workers’ Compensation Court of Appeals ruled that an employee was not necessarily required to conduct a job search prior to qualifying for retraining.

Under the 1992 rehabilitation rule revisions, retraining is to be given equal consideration with other rehabilitation services, and proposed for approval if other considered services are not likely to lead to suitable gainful employment. MINN. R. 5220.0750(1) (2006).

b. Eligibility

In 1995, the Legislature added Minnesota Statutes section 176.102(11)(c), which provided that requests for retraining must be filed with the Commissioner of the Department of Labor and Industry before 104 weeks of any combination of temporary total or temporary partial disability benefits have been paid. In 2000, the Legislature amended this subdivision to allow injured employees more time in which to request retraining. Minnesota Statutes section 176.102(11)(c) now provides that requests for retraining shall be filed before *156 weeks* of any combination of temporary total or temporary partial compensation have been paid. Retraining is not available to an employee unless a request for retraining has been filed with the commissioner before the 156 weeks in compensation benefits have been paid. In Hallam v. Potlach Corporation, slip op (W.C.C.A. August 18, 2006), the Workers’ Compensation Court of Appeals held where an employee made a number of filings which raised the issue of retraining and which resulted in contested administrative conferences, the employee made a request for retraining which tolled the limitation period set out in Minnesota Statutes section 176.102, subdivision 11(c). The statute refers to *any request for retraining* and it is not necessary to file a proposed retraining plan within the relevant time period.

Minnesota Statutes section 176.102(11)(d) obligates the employer or insurer to give an injured employee written notice of the 156-week limitation for filing a request for retraining with the Commissioner. The employer and insurer must give an injured employee notice of the right to request retraining before 80 weeks of temporary total or temporary partial disability compensation have been paid, regardless of the number of weeks that have elapsed since the date of injury. The Workers’ Compensation Court of Appeals has held the provision requiring an employer to inform the employee of the limitation period for filing a claim for retraining is satisfied where the notice is included in the body of an introductory letter sent to the employee shortly after the injury. Schug v. City of Hibbing, slip op. (W.C.C.A. April 29, 2003). If the notice is not given to an injured employee before 80 weeks of

temporary total or temporary partial disability benefits have been paid, the period of time for an employee to request retraining is extended by the number of days the notice is late. However, no request for retraining may be filed later than 225 weeks after a combination of temporary total or temporary partial disability benefits have been paid. The Commissioner may assess a penalty of \$25 for each day the notice is late, with a maximum penalty of \$2,000. MINN. STAT. § 176.102(11)(d) (2006).

The Minnesota Supreme Court has held that retraining is necessary if it will materially assist the employee in restoring an impaired earning capacity. Norby v. Arctic Enter., Inc., 28 W.C.D. 48, 232 N.W.2d 773, 775 (Minn. 1975). An award of retraining benefits is not automatic, but must be supported by competent evidence. Nordby, 232 N.W.2d at 776. Factors to consider in determining eligibility for retraining include:

1. the reasonableness of retraining compared to the employee's return to work with the employer or through job placement activities;
2. the likelihood of the employee succeeding in a formal course of study given the employee's abilities and interests;
3. the likelihood that retraining will result in a reasonably attainable employment; and
4. the likelihood that retraining will produce an economic status as close as possible to that which the employee would have enjoyed without the disability.

Poole v. Farmstead Foods, 42 W.C.D. 970, 978 (1989); Rutledge v. Control Data Corp., slip op. (W.C.C.A. September 20, 1991).

Thus, in Knoll v. ConAgra, slip op. (W.C.C.A. May 18, 1992), the court denied a proposed retraining plan of a four-year accounting degree, concluding that the employee had, at best, marginal aptitude for the proposed career and that the retraining plan was inadequately supported by a labor market analysis.

In Stadick v. United Parcel Service, 47 W.C.D. 9 (1992), the Workers' Compensation Court of Appeals affirmed the compensation judge's denial of the employee's proposed retraining plan, concluding that the proposed program would: (1) produce an economic status exceeding the employee's pre-injury economic status; (2) not increase the employee's employability; and (3) not result in reasonably attainable employment in the field in which the employee proposed to be retrained.

In considering whether a retraining program is appropriate, consideration must be given not only to whether the employee will be successful in the program from a scholastic standpoint, but also to whether the retraining program is within the employee's physical capabilities. Thus, in Bauman v. Trevilla of Golden Valley, 45 W.C.D. 89 (1991), the Workers' Compensation Court of Appeals concluded that although there was substantial evidence of record that retraining of the employee was necessary to restore her impaired earning capacity, they did not find substantial evidence to support the compensation judge's findings that the retraining program suggested was within the employee's physical capabilities. The court also concluded there was not sufficient evidence to support a finding that this program would materially assist the employee in restoring her impaired earning capacity. *Id.* at 95.

If an alternative retraining plan is proposed by an employer and insurer, the compensation judge must do a comparative analysis of the retraining plans. The four factors set forth in Poole must be applied to the proposed retraining plan, the alternative retraining plan, and then a comparison made between the two plans. The comparison should include a review of how long the various programs will

take, how soon the employee will be returned to an economic status as close as possible to that which they would have enjoyed without the disability, and the total costs associated with providing the retraining. Kunferman v. Ford Motor Co., 55 W.C.D. 464 (1996).

Retraining can range from vocational technical programs to post-secondary education. In certain circumstances, college or other post-secondary education can be an appropriate retraining option. In Anderson v. Ford Motor Co., 46 W.C.D. 24 (1991), an employee sustained a back injury while employed as a riveter for Ford Motor Company. He was unable to return to his pre-injury job and subsequently obtained a position as a bartender. After it became apparent there was no opportunity for advancement, the qualified rehabilitation consultant recommended retraining. Because the employee had an interest in business management and a demonstrated aptitude, but had no work experience other than as a laborer, the Workers' Compensation Court of Appeals affirmed the compensation judge's decision that college-level training was appropriate. *Id.* at 31.

In Stiffler v. Suburban Auto Body, slip op. (W.C.C.A. November 15, 1994), the Workers' Compensation Court of Appeals approved a three-year registered nurse program with an estimated cost of \$35,000 where (1) the employee was unable to return to work as an auto body repairman; (2) he had conducted an adequate, but unsuccessful job search; (3) he had limited transferable skills; (4) he had a low potential earning capacity without retraining; (5) the employee was intellectually capable of succeeding in the retraining program; (6) there was work available in the field; (7) the work was within the employee's physical restrictions; and (8) the work would produce an economic status as close as possible to the employee's pre-injury wage.

The cost of a proposed retraining program versus the cost of traditional approaches to rehabilitation is also to be considered in assessing the reasonableness of a rehabilitation program. Rovinsky v. Paulson's Super Valu, slip op. (W.C.C.A. October 20, 1993). In Rovinsky, the employee was unable to return to her pre-injury job. She subsequently found part-time work which paid less than her pre-injury wage. The Workers' Compensation Court of Appeals rejected a proposed plan of retraining as a respiratory therapist in part because of the \$50,000 cost of the proposed retraining

In Varda v. Northwest Airlines, 692 N.W. 2d 440 (Minn. 2005), the Workers' Compensation Court of Appeals reversed and award of a 4-year, \$144,088 retraining program in nursing and substituted a 2-year, \$9500 nursing program. Although the 4-year program likely provided a slight advantage in post-graduate employment opportunities, the programs were otherwise found to be comparable, in the expected vocational outcome. The Minnesota Supreme Court affirmed the Workers' Compensation Court of Appeals noting where the undisputed facts show that a 2-year retraining program would restore an injured employee to an economic status higher than she enjoyed before her disability, the Workers' Compensation Court of Appeals correctly determined that the record did not support the compensation judge's conclusion that a more costly 4-year program was "necessary. The Supreme Court held where two different "retraining programs are appropriate and reasonable, the deciding factor in determining which program is necessary becomes the cost." *Id.* at 445.

An employer and insurer are entitled to vocational testing of an employee to determine if training is appropriate. Wolf v. Yellow Freight Sys., Inc., 32 W.C.D. 597 (1980).

The length of time an employee will be able to work in a future career is not a bar to retraining. Boland v. United Van Bus Delivery, 36 W.C.D. 192 (1983). In Boland, the employee would have been 60 years old when he finished the proposed retraining course. The employer and insurer objected to the program, arguing the employee would have only a short career left upon completion of the

retraining course. The Workers' Compensation Court of Appeals determined that length of a future career is not a bar to an appropriate retraining course. *Id.* at 193.

The fact that an employer offers an employee a job that can be performed in a disabled state does not necessarily preclude the employee from entitlement to retraining benefits. Emmons v. Control Data Corp., 34 W.C.D. 540, 541 (1981). In Emmons, the Workers' Compensation Court of Appeals was not convinced that the offered employment would necessarily provide a stable future employment status for the employee. The court determined that retraining was appropriate since there was a clear showing that retraining would materially assist the employee in restoring her impaired capacity to earn a livelihood in the future. *Id.* at 541. Also, the Supreme Court has held that a "tenuous" offer, by the employer, to provide the employee with "employment at some time in the future, if possible" is insufficient justification to delay the employee's entry into an otherwise appropriate retraining program. Wilson v. Crown Cork & Seal, 49 W.C.D. 51, 503 N.W.2d 472 (Minn. 1993).

Additionally, an employee is not necessarily precluded from retraining even though the employee is working in a job at the pre-injury wage. In Custer v. I.S.D. No. 2154, slip op (W.C.C.A. February 28, 2007), the employee returned to work with the school district as a teacher, but was precluded from performing her previous part-time work in a billing department due to her physical work restrictions. The employee filed a request for retraining requesting a retraining program for a master's degree in Fine Arts. At the time the retraining request was heard, the employee's post injury weekly wage in teaching exceeded that which she earned on the date of her injury from both jobs. In Erickson v. City of St. Paul, slip op (W.C.C.A. April 16, 2007), the employee was injured working as a firefighter for the City of St. Paul. He was permanently disabled for work as a firefighter, but returned to work with the employer in a position that was commensurate with the wage he earned at the time of injury. The employee resigned from that position when he discovered that had he not left his position with the employer before changes went into effect with PERA, his PERA benefits would have been adversely affected. The employee later filed a retraining plan for a master's degree in public safety administration. In both cases, the Workers' Compensation Court of Appeals held that a loss of earning capacity is not synonymous with a loss of actual earnings and affirmed the award of the retraining plans.

Where a retraining plan anticipates the employee's relocation to a new geographic area, the employee is not required, as a prerequisite to retraining, to perform a job search in that area to establish that employment, at wages commensurate to the occupation involved in the employee's proposed retraining, are not otherwise attainable in the absence of retraining. Schmidt v. Arrowhead Electric, slip op. (W.C.C.A. March 12, 2004).

Several cases have made it clear that employees precluded from their pre-injury jobs are entitled to *evaluations* to determine whether retraining is an appropriate and feasible option. In Siltman v. Partridge River, Inc., 523 N.W.2d 491 (Minn. 1994), the Minnesota Supreme Court held that retraining may be "necessary" if it "will be likely to restore impaired capacity to earn a livelihood; an earning capacity may be impaired if the employee's injury prevents him or her from returning to the former employment or from securing advancement in that employment." *Id.* at 492. See Leahy v. St. Mary's Hosp., 36 W.C.D. 253, 339 N.W.2d 265, 267 (Minn. 1983). The court determined the employee in Siltman had an impaired earning capacity and was entitled to evaluation for purposes of developing a rehabilitation plan.

Similarly, in Thompson v. Catholic Services for the Elderly, 50 W.C.D. 400, *aff'd*, 519 N.W.2d 211 (Minn. 1994), the Workers' Compensation Court of Appeals concluded that where an employee's post-injury job was unsuitable and the employee was unable to return to her pre-injury job as

a certified nursing assistant for reasons related to her injury, it was not unreasonable for the compensation judge to conclude that the employee was entitled to an evaluation to determine the feasibility of retraining. If an employer disagrees with a retraining plan developed following appropriate evaluation, it has the recourse of litigating that issue, at which time the employee would have the burden of establishing entitlement to the proposed retraining program. *Id.* at 408.

The Workers' Compensation Court of Appeals has issued numerous decisions which address the factors to be considered in making a determination as to whether retraining is appropriate. In Heldt v. Carpetman Floor Covering, slip op. (W.C.C.A. January 27, 1995), the employee suffered injuries which precluded a return to work as a carpet layer. The employee began to pursue a retraining program that would allow him to become a physical therapist or, in the alternative, an industrial hygienist. The employer and insurer argued that the proposed retraining plan was inappropriate because there was a possibility the employee would not be accepted into the physical therapy program and would be unable to pursue certain types of jobs in the field because of his restrictions. The Workers' Compensation Court of Appeals approved the retraining program stating that the fact the program was difficult to get into does not, standing alone, make the plan "necessarily unreasonable." *Id.* at 4. The evidence revealed the employee had a good chance of being accepted and had the academic ability to succeed. Moreover, there were many positions the employee could pursue within his restrictions upon completion of the program, the employee's post-training wages would be comparable to his pre-injury earnings, and there was a high demand for physical therapists.

The length of time it will take to regain lost earning capacity after completion of a retraining program is also a factor to be considered in assessing the reasonableness of a proposed retraining program. In Olson v. Kleinhuizen, 50 W.C.D. 427 (1994), the Workers' Compensation Court of Appeals concluded that although the employee would be unable to regain her pre-injury economic status without retraining, the proposed course of retraining as a dietitian was unreasonable where the employee would not regain her lost earning capacity for five to seven years after the completion of the proposed three-year retraining program.

Another factor considered by the courts is whether a proposed field of retraining allows an employee to utilize transferable skills and work experience while allowing the employee to produce an economic status as close as possible to that which the employee would have enjoyed without the disability. Aus v. Precision Welding, slip op. (W.C.C.A. June 13, 1994).

There is no basis in the statute to consider PERA disability income when determining an employee's eligibility for retraining assistance. Erickson v. City of St. Paul, slip op (W.C.C.A. April 16, 2007).

c. Formulation of Retraining Plan

Specific procedures have been developed to determine whether a proposed retraining program is appropriate. Generally, vocational testing, including aptitude testing, is conducted to determine whether the injured employee has the requisite intellectual ability to complete a proposed course of study. Interest testing is conducted to determine appropriate fields of study. A labor market survey is necessary to determine the current and future availability of jobs in the proposed area of retraining. Finally, a determination must be made as to whether the employee is physically capable of performing work in the proposed area of retraining.

Practice Tip:

The importance of a thorough and complete retraining plan cannot be overemphasized. Before submitting a retraining plan for approval it is crucial that the appropriateness of the program be substantiated by proper vocational testing and a detailed, specific labor market analysis which establishes the likelihood of suitable employment upon completion of the program.

Once the prerequisites have been carried out, a proposed retraining plan must be developed and filed with the Commissioner that contains the following information, as set forth in Minnesota Rule 5220.0750(2):

- A. identifying information on the employee, employer, insurer, and assigned qualified rehabilitation consultant;
- B. the retraining goals;
- C. information about the formal course of study required by the retraining plan, including the name of the school, titles of classes, the courses length in weeks, an itemized cost of tuition, books, and other necessary school charges, mileage costs and other required costs;
- D. starting and completion dates;
- E. pre-injury job title and economic status, including, but not limited to, pre-injury wage;
- F. a narrative rationale describing the reasons why retraining is proposed, including a summary comparative analysis of other rehabilitation alternatives and information documenting the likelihood that the proposed retraining plan will result in the employee's return to suitable, gainful employment;
- G. dated signatures by the parties signifying an agreement to the retraining plan; and
- H. an attached copy of the published course syllabus, physical requirements of the work for which retraining will prepare the employee, medical documentation that the proposed training and field of work is within the employee's physical restrictions, reports of all vocational testing or evaluations, and a recent labor market survey of the field for which training is proposed.

d. Retraining Plan Approval

The Commissioner shall review the proposed retraining plan within 30 days of its submission and notify the parties of plan approval or denial. The Commissioner may also request additional information from the parties, confer with the parties, recommend modifications, and otherwise seek agreement about the plan. MINN. R. 5220.0750(5) (2006).

A retraining plan can be retroactively approved where the employee completes a retraining program but did not obtain certification or follow the appropriate procedures for certification at the time of initiation of training. Lund v. Metro. Transit Comm., 45 W.C.D. 479 (1991); Tilbury v. Campbell Soup Co., 26 W.C.D. 498 (1972). *But compare* Le v. State of Minnesota, 35 W.C.D. 665, 330 N.W.2d 453, 455 (1983), where the Minnesota Supreme Court held that retraining benefits may only be allowed *after* proper procedures have been complied with, including completion of a properly documented rehabilitation plan.

In Dahn v. Sheldahl, Inc., 55 W.C.D. 232 (1996), the Workers' Compensation Court of Appeals upheld a denial of an attempted retroactive approval of a retraining program where the employee failed to obtain approval for the retraining program as required by Minnesota Statutes section 176.102, subdivision 6 and where the employee had previously refused an offer of suitable employment. Moreover, the court held there was substantial evidence to support the compensation judge's finding that the employee failed to conduct a job search at any time subsequent to the closing of her previous rehabilitation effort and where the employee was physically capable of performing her date of injury job.

Temporary disability benefits are not payable during a period of retraining absent certification or approval of retraining or a demonstrated inability to find other employment. Van Milligan v. Northwest Airlines Corp., slip op. (W.C.C.A. October 11, 2001).

e. Amendment

If the employee believes that the occupation he or she is being trained for is not suitable, the Commissioner or compensation judge may amend the retraining plan at the request of an employee, if the request is made within 90 days from the commencement date of the retraining. No more than one change shall be permitted for this reason. MINN. R. 5220.0750(3) (2006). In the event of a dispute about a retraining plan, any party may file a rehabilitation request. MINN. R. 5220.0750(6) (2006) A retraining plan may also be amended under Minnesota Rule 5220.0750(3) according to part 5220.0510(1).

f. Compensation

As explained above, retraining differs from other aspects of rehabilitation services in that an employee who is approved to participate in a formal course of study, a "retraining program," is also entitled to payment of "retraining benefits," monetary benefits paid directly to the employee over which the employee has discretionary use. See Granberg v. PCL Constr., 41 W.C.D. 565, 434 N.W.2d 467 (Minn. 1989); Sherman v. Whirlpool Corp., 38 W.C.D. 585, 386 N.W.2d 221 (Minn. 1986). In Sherman, the Minnesota Supreme Court held that rehabilitation services are not monetary benefits within the meaning of Minnesota Statutes section 176.102(11)(a). The court distinguished between benefits paid directly to the employee over which the employee has discretionary use, which they regarded as "monetary benefits," and the expenses of rehabilitation services which are not paid directly to the employee and over which the employee does not retain discretionary use. *Id.* at 224.

Because retraining benefits are monetary benefits, the amount and duration of payment is subject to the law in effect on the date of injury, rather than the law in effect on the date of the employer's liability for said benefits is established. Granberg, 434 N.W.2d at 469. Consequently, an overview of the applicable law regarding monetary retraining benefits is necessary.

Prior to the 1979 enactment of Minnesota Statutes section 176.102(11), employees were allowed to "double dip" once they were approved for retraining. That is, they were allowed to simultaneously receive retraining benefits and temporary total disability benefits. The concurrent payment of benefits was first approved in Vreeman v. The Kahler Corp., 23 W.C.D. 1 (1963).

In 1967, legislative amendments to Minnesota Statutes section 176.101(8) allowed for concurrent payments of temporary total disability benefits and retraining benefits equal to 200 percent of regular temporary total disability benefits for a period of up to 104 weeks. Nelson v. Nat'l. Biscuit Co., 27 W.C.D. 355, 217 N.W.2d 734 (Minn. 1974); Rowe v. Duluth Laundry, 31 W.C.D. 168, 272 N.W.2d 255 (Minn. 1978). In 1975, the duration of the retraining benefits was extended to a maximum of 156 weeks. MINN. STAT. § 176.101(9) (1967).

Concerns about the enormous costs associated with retraining led to the repeal of Minnesota Statutes section 176.101(7), and the enactment of Minnesota Statutes section 176.102. Minnesota Statutes section 176.102(11) provided for the payment of 156 weeks of retraining benefits in an amount equal to 125 percent of the temporary total disability rate. Subdivision 11 further provided that payment of retraining benefits was in lieu of payment of temporary total, temporary partial, or permanent total disability to which the employee might otherwise be entitled. Thus, in Maneske v. Gould Battery, Inc., 36 W.C.D. 697 (1983), the court determined the employee was entitled to retraining benefits at 125 percent of his temporary total disability rate, even though he was working. See also Bakken v. 3M Co., slip op. (W.C.C.A. September 16, 1992). Retraining benefits are to be considered the equivalent of temporary total disability benefits for purposes of supplementary benefits. MINN. STAT. § 176.102(11) (1979).

In 1983, Minnesota Statutes section 176.102(11), was further amended to delete the automatic award of retraining benefits at 125 percent of the employee's temporary total disability rate. The amended subdivision provided that an employee approved for retraining could petition for an additional 25 percent in compensation benefits if it was determined that the additional compensation was warranted due to "unusual or unique circumstances of the employee's retraining plan."

The unusual or unique circumstances of the retraining plan that are contemplated in Minnesota Statutes section 176.102(11), are ones that result in a financial burden for the employee. A retraining plan does not qualify for additional benefits simply because of its unique approach or because of the unique challenges it may present to the employee. Absent evidence of specific expenses attributable to particular aspects of the plan itself, neither the fact that the employee plans to move from a blue collar to a white collar profession, nor the fact that his plan is a uniquely flexible one, qualifies as a basis for extra benefits under the statute. Breiwick v. Bricks & Sons, 45 W.C.D. 58, 60 (1991). A claim for additional benefits under Minnesota Statutes section 176.102(11) must be based on specific evidence as to matters such as amounts, purposes, and dates of expenditures. Anderson v. Creamette Co., 44 W.C.D. 262 (1990). An employee's pre-injury wages do not form an independent basis for concluding there is something unusual or unique about a retraining plan. Circumstances triggering additional benefits under Minnesota Statutes section 176.102(11), must be cost-compelling circumstances of the plan itself. Caruso v. Statewide Servs., slip op. (W.C.C.A. March 1, 1991).

In Fettig v. ABB Combustion Eng'g, 52 W.C.D. 338 (1994), the Workers' Compensation Court of Appeals addressed an employee's request for an additional 25 percent in compensation due to the "unusual or unique circumstances of the employee's retraining plan." Although the court affirmed the compensation judge's finding that "grooming guidelines" which required students to wear appropriate attire constituted "unusual or unique circumstances" of the retraining plan, the court modified an award of an additional 15 percent compensation and ordered the employer and insurer to pay the employee the sum of \$2,500 as reimbursement of clothing expenses. The court reversed the compensation judge's findings that transportation costs and a significant disparity in income constituted financial burdens or expenditures attributable to the retraining plan itself.

A four-year college degree retraining program does not, in and of itself, present unusual or unique circumstances entitling an employee to an additional 25 percent in compensation benefits. Stasica v. Olympic Wall Sys., 47 W.C.D. 271 (1992). In Stasica, the employee argued that the duration of his retraining plan, which potentially could have taken as long as five years, and the possibility he would be required to relocate upon completion of the plan constituted unusual and unique circumstances. Citing Breiwick and Anderson, *supra*, the Workers' Compensation Court of Appeals noted that *any* retraining plan that provides for a four-year college degree would extend beyond the 156-week limit.

In 1983, the Legislature also added subdivision 11(a) which explicitly provides that Minnesota Statutes section 176.102 applies to “all employees injured prior to or on and after October 1, 1979, except for those provisions which affect an employee’s monetary benefits.”

In 1992, Minnesota Statutes section 176.102(11), was further amended to clarify benefit entitlement in light of the enactment of the “two-tier” system of benefits in 1984 and to clarify the subdivision’s effect on the temporary partial disability limitations enacted in 1992. Minnesota Statutes section 176.102(11)(b) provides:

If the employee is not employed during a retraining plan that has been specifically approved under this section, temporary total compensation is payable for up to 90 days after the end of the retraining plan; except that, payment during the 90-day period is subject to cessation in accordance with § 176.101. If the employee is employed during the retraining plan, but earning less than at the time of injury, temporary partial compensation is payable at the rate of 66-2/3 percent of the difference between the employee’s weekly wage at the time of injury and the weekly wage the employee is able to earn in the employee’s partially disabled condition, subject to the maximum rate for temporary total compensation. Temporary partial compensation is not subject to the 225-week or 450-week limitations provided by § 176.101, subdivision 2, during the retraining plan, but it is subject to those limitations before and after the plan.

MINN. STAT. § 176.102(11)(b) (2006).

Minnesota Statutes section 176.102(11), has also been amended to provide that an employee may petition the Commissioner or a compensation judge for up to 25% additional compensation. The Commissioner or the compensation judge has the right to determine if additional compensation is warranted. MINN. STAT. § 176.102(11)(a) (2006).

Retraining benefits, which are, in essence, temporary total disability benefits, are subject to cost-of-living adjustments under Minnesota Statutes section 176.645. Rowe, 272 N.W.2d at 255. Retraining benefits can also be augmented by supplementary benefits under Minnesota Statutes section 176.132 for injuries occurring prior to October 1, 1995. Leahy, 339 N.W.2d at 269; Freyholz v. Heritage Manor Health Care Center, slip op. (W.C.C.A. February 1, 1995).

Only employees involved in a formal program of vocational retraining are entitled to benefits at the rate of 125 percent of the temporary total disability rate. Rippentrop, 316 N.W.2d at 514. In Rippentrop, an employee involved in direct job placement was awarded a “rehabilitation benefit” of 125 percent of his temporary total disability rate. The Minnesota Supreme Court concluded the 125 percent benefit is payable only to employees while they are receiving formal vocational retraining. *Id.* at 516.

As now codified by Minnesota Statutes section 176.102(11)(b), an employee may be entitled to temporary partial disability benefits during a period of retraining. In Bliss v. Minneapolis Star & Tribune Co., 33 W.C.D. 402, 303 N.W.2d 460 (Minn. 1981), the Minnesota Supreme Court upheld an award of temporary partial disability benefits during a retraining program in an instance where the employee had made no effort to seek other employment, but was forced to leave his former employment due to an occupational disease and the employer did not offer him another job. However, in Le v. State of Minnesota, 35 W.C.D. 665, 330 N.W.2d 453 (1983), the court held that an employee was not entitled to temporary partial disability benefits during a period of retraining where he had not demonstrated an inability to find other employment and he had not been certified for retraining. The court distinguished its holding in Bliss by emphasizing that Le was not certified for retraining, whereas the employee in Bliss was given vocational tests and certified for the training course appropriate for his abilities. Bliss, 330

N.W.2d at 455. The court explained its rationale by stating that without a determination as to the need of a retraining course, employers may potentially be liable for disability benefits during courses of retraining far in excess of the need created by the injury. *Id.* at 455. Retraining benefits are only allowed after proper procedures have been complied with, including completion of a properly documented rehabilitation plan. *Id.* at 455. *But see* Lund v. Metro. Transit Comm., 45 W.C.D. 479 (1991).

Pursuant to Minnesota Statutes section 176.102(1a), a spouse who is provided rehabilitation services is not entitled to weekly compensation under Minnesota Statutes section 176.102(11).

CHAPTER 8
REHABILITATION AND RETRAINING
UPDATE – 2011

§ 8.3 COMMENCEMENT OF REHABILITATION

B. Appointment And Change Of Rehabilitation Personnel

1. Qualified Rehabilitation Consultant

A compensation judge's finding that the employer and insurer had reasonably lost confidence in the employee's lawyer-appointed QRC is adequate grounds to order a change in QRCs. Gombold v. Metal Craft Mach. & Eng., slip op. (W.C.C.A. September 11, 2007).

The issue whether a change of QRC is in the best interest of the parties is a question of fact. The fact that the employee's QRC is an employee of the insurer is irrelevant to the determination. Stutelberg v. Kelleher Construction Inc., slip op. (W.C.C.A. April 17, 2009).

§ 8.4 INITIATION OF REHABILITATION SERVICES

E. Eligibility

1. Qualified Employee

"A discharge for misconduct" does not disqualify an employee from [vocational] rehabilitation services. Conklin v. Becker County Dev. Achievement Ctr., slip op. (W.C.C.A. April 28, 2011).

§ 8.5 REHABILITATION PLAN

D. Plan Costs And Expenses

In Najarro v. Minn. Minerals & Aggregates, Inc., slip op. (W.C.C.A. December 21, 2009), the Workers' Compensation Court of Appeals held that the employee is not precluded from seeking vocational rehabilitation services from a private vendor where the employer has denied primary liability for the claim. However, the vendor assumes the risk of not being paid for the services rendered if the employer prevails with its defenses.

Significantly, however, the Najarro court also determined that charges for "job development" services provided by a placement specialist were properly denied where the judge determined that the services represented a "generalized canvassing effort by representative of [the placement vendor] which did not relate to any specific client."

E. Manner And Means Of Effecting Rehabilitation Plan

4. Retraining

b. Eligibility

Effective October 1, 2008, the statute was amended to extend the period of time in which retraining may be requested to 208 weeks.

Where an employee testified that she never received notice from an employer pursuant to Minnesota Statutes section 176.102, subdivision 11(d), that any claim for retraining must be filed prior to

receipt of 156 (changed to 208 weeks for injuries on or after October 1, 2008) weeks of wage replacement benefits as required under Minnesota Statutes section 176.102, subdivision 11(c), and where there was evidence that procedures in the claims' adjusters office were subject to human error, the compensation judge's conclusion that the employee's claim for retraining benefits after receipt of 182 weeks of benefits was not barred by Minnesota Statutes section 176.102, subdivision 11(c), was not clearly erroneous and unsupported by substantial evidence. Clegg v. Winona Health Services, slip op. (W.C.C.A. July 2, 2009).

While application of the Poole factors in a convenient way to analyze retraining cases, the Poole factors are not meant to be exclusive in considering whether or not a retraining program is appropriate. In Lardani v. Lardani Stucco, slip op. (W.C.C.A. October 18, 2010), the special master acknowledged that the present labor market is difficult, but that the retraining plan would run for 92 weeks and whether the labor market in 2012 would be as dismal is simply speculation. The special master and the W.C.C.A. also noted that, in contrast to the law in effect at the time of Poole, the employee has a limited entitlement to temporary partial disability. It was also observed that waiting for "some point in time" for the market to change might be appropriate for a 20-something employee, who had few, if any responsibilities, but for a 46-year-old worker with a career ending injury, ongoing restrictions and significant family responsibilities, lengthy waits to see what the future holds would not meet the needs to the injured worker.