

STATE OF WISCONSIN

Clearinghouse Rule 19-136

PROPOSED ORDER OF THE STATE DEPARTMENT OF JUSTICE REPEALING, AMENDING, REPEALING AND RECREATING, AND CREATING RULES

INTRODUCTION

The State of Wisconsin Department of Justice proposes an order to repeal Jus 11.05 (3) (b), Jus 11.05 (4) (a) 4. (Note), Jus 11.06 (1) (c) and (d), and Jus 11.08; to amend Jus 11.01 (1) and (2), Jus 11.02 (2) (c), (g) and (h), Jus 11.03 (1), (3) and (4) (a), Jus 11.04 (1), (2) (a) and (d), Jus 11.04 (3), Jus 11.04 (6), (7) and (8) (a), Jus 11.05 (1) (c), (2), (3) (intro.) and (a), Jus 11.05 (4) (a) 4., Jus 11.06 (2) (a) and (b), Jus 11.06 (4) (intro), (b), (c), (e) and (f), Jus 11.07 (1), Jus 11.07 (2) and (7), Jus 11.09 (1) (d) and (3) (g), and Jus 11.11 (1); to repeal and recreate Jus 11.06 (1) (a) and (b), and Jus 11.06 (2) (c); and to create Jus 11.01 (5) (gm), Jus 11.04 (2) (dm) and (2m), Jus 11.04 (3m) and (4m), and Jus 11.07 (1) (a).

The scope statement for the proposed rule, SS 006-18, was approved by the Governor on August 8, 2017, and published in Register No. 746A1 on February 5, 2018, and approved by the Attorney General on December 10, 2018.

ANALYSIS

Statute interpreted: Sections 949.01(4), 949.01(4g), 949.01(5), 949.02, 949.04, 949.06, 949.08, 949.11, and 949.26, Stats.

Statutory authority: Section 949.02, Stats.

Explanation of statutory authority: The Department is responsible for administering the Crime Victim Compensation Program in Wisconsin under 949.02, Stats. Section 949.02, Stats., provides that “[t]he department shall promulgate rules for the implementation and operation” of the Crime Victim Compensation Program, and that “[t]he rules shall include procedures to ensure that any limitation of an award is calculated in a fair and equitable manner.”

Related statutes or rules: None.

Plain language analysis: Chapter 949, Stats., established the Crime Victim Compensation Program (the “Program”) to help pay for unreimbursed eligible expenses that result from crime. This Program is administered by the Department through ch. Jus 11. In 2015 Wis. Act 350, the State of Wisconsin made statutory revisions providing for new benefits available for victims, along with new limitations on awards. This proposed rule effectuates the statutory changes enacted in 2015 Wis. Act 350, revises outdated terminology, and eliminates provisions that have become unnecessary. Specifically, this rule would:

SECTION 1 of the proposed rule updates the terminology used to identify the program administered by the Department as the Crime Victim Compensation Program.

SECTION 2 of the proposed rule incorporates a new definition created by s. 949.01 (4g), Stats., for who is the “parent of the victim.”

SECTION 3 of the proposed rule removes specific language to create a more general criterion of information to be contained on an application form.

SECTION 4 of the proposed rule updates language in Jus 11.03 to: (1) refer specifically to an eligibility determination; (2) clarify that the program manager has the responsibility for issuing a denial decision on a claim and that written decisions are only required when denying a claim; and (3) update the reference to the statute to reflect a single maximum award amount.

SECTION 5 of the proposed rule clarifies that an award is subject to the statutory limitation and removes the requirement that a physician must certify the disability period for any victim claiming economic loss because he or she is unable to work. This section also specifies how net business profits are calculated to conform with the statutory changes in 2015 Wis. Act 350.

SECTION 6 of the proposed rule reflects a statutory change that a physician only needs to determine the disability period if the period exceeds 2 weeks, as well as the percent of loss net wages. Also, this section reflects a new benefit for parents of a minor victim created in 2015 Wis. Act 350.

SECTION 7 of the proposed rule updates language to refer to awards for “caregiver” services instead of “homemaker” services, and also allows the Department to require physician certification that a victim is unable to perform such tasks.

SECTION 8 of the proposed rule incorporates new statutory benefits in 2015 Wis. Act 350 for housing adaptations and for replacement of computers and mobile telephones held by law enforcement for evidentiary purposes.

SECTION 9 of the proposed rule reflects a statutory change in 2015 Wis. Act 350 that increases crime victim funeral benefits to \$5,000 and specifies that such amount is included in a maximum award. This section also reflects a statutory change to simplify how a loss of support award for crime victim dependents is calculated.

SECTION 10 of the proposed rule clarifies that an award can be made to reimburse a third party who is not financially responsible for the support of the victim. This section also reflects a statutory change that the maximum award amount now includes funeral expenses. Statutory changes to simplify the calculation for a loss of support award are also reflected in this section.

SECTION 11 of the proposed rule removes the provision for calculation of economic loss and loss of support awards that was replaced by the changes in Section 10.

SECTION 12 of the proposed rule removes the reference to emergency awards that is no longer needed.

SECTION 13 of the proposed rule removes a note that is no longer needed given the amendment in Section 12.

SECTION 14 of the proposed rule updates who is a qualified mental health treatment provider. The Program provides that victims may get an award to cover eligible services provided by a qualified mental health treatment provider.

SECTION 15 of the proposed rule removes two sections that are no longer applicable given the

changes in Section 14.

SECTION 16 of the proposed rule reflects the changes regarding qualified providers in Section 14. This section also removes the requirement that inpatient psychiatric services must be prescribed by a physician.

SECTION 17 of the proposed rule reflects a change regarding eligible psychotherapy expenses and adds a new provision to expand the range of eligible mental health services that may be covered by an award.

SECTION 18 of the proposed rule clarifies that awards may be made to claimants, in addition to victims. Under 2015 Wis. Act 350, parents of minor victims may receive awards for mental health services and lost wages related to the crime. This section updates language to reflect these statutory changes.

SECTION 19 of the proposed rule reflects the statutory change that allows adults who were victimized as children to file an application regardless of the date of the crime.

SECTION 20 of the proposed rule adopts the language created in 2015 Wis. Act 350 to provide benefits to adults who were victimized as children.

SECTION 21 of the proposed rule allows a waiver of the time limits for a victim reporting the crime to law enforcement when it is in the interest of justice to do so. This section also clarifies that an award cannot be made to an adult passenger victim who knowingly rides with a driver who is impaired.

SECTION 22 of the proposed rule removes the provision for emergency awards that is no longer needed.

SECTION 23 of the proposed rule allows the Department additional time to make a decision about a request for a hearing to contest a decision made by the Program. This section also permits that those hearings may be closed for the benefit of any victim, and not just sexual assault victims.

SECTION 24 of the proposed rule clarifies the responsibility of law enforcement to provide information to crime victims about the availability of crime victim compensation.

Summary of, and comparison with, existing or proposed federal statutes and regulation: The proposed rule is consistent with the federal Victims of Crimes Act, 42 U.S.C. § 10601, et seq., which provides federal funding to qualifying state crime victim compensation programs. There is no other specific existing or proposed federal regulation that addresses the activities to be regulated by the proposed rule.

Comparison with rules in adjacent states: Illinois, Iowa, Michigan, and Minnesota all receive funding from the federal Victims of Crime Act, 42 U.S.C. § 20101, et seq. Iowa established the Crime Victim Compensation Program in Iowa Code ch. 915, and it is administered through Iowa Admin. Code r. 61-9.1, et seq. Illinois' Crime Victim Compensation Program is set forth in 740 Ill. Comp. Stat. 45/1, et seq., which outlines the requirements for awards and provisions governing the program. In Michigan, the Crime Victim's Services Commission oversees its crime victim compensation program, which is set forth in Mich. Comp. Laws § 18.351, et seq. Minnesota also has a compensation program for crime victims, which is administered by the Minnesota Crime Victims Reparations Board consistent with Minn. Stat. §§ 611A.51 to 611A.68 and Minn. R. ch. 3050.

Summary of factual data and analytical methodologies: The proposed rule is based on the

Department's legal and Office of Crime Victim Services staff's analysis of the language and requirements of the relevant statutes. Based on those analyses, the Department has determined that the proposed rule is necessary to incorporate the statutory changes set forth in 2015 Wis. Act 350, and for the Department to carry out its responsibilities under s. 949.02, Stats.

Analysis of effect on small business. The proposed rules do not impose any financial or compliance burdens on or otherwise regulate small businesses. The program will be administered by the Department.

In reaching this determination, the Department posted the statement of scope and proposed rule on its Office of Crime Victim Services webpage and requested comments on the economic impact of the proposed rules. Specifically, the Department solicited information and advice from individuals, businesses, associations representing businesses, and local government units who may be affected by the proposed rules for use in analyzing and determining the economic impact that the rules would have on businesses, individuals, public utility rate payers, local government units, and the state's economy as a whole. Comments were accepted from April 10, 2019, through April 30, 2019. No comments were received.

The Department also sent emails to individuals representing the following organizations that included the statement of scope and proposed rule: Wisconsin Victim/Witness Professionals Association; Wisconsin District Attorney's Association; Wisconsin Hospital Association; Wisconsin Funeral Directors Association; Wisconsin Chiefs of Police Association; Wisconsin Coalition Against Sexual Assault; and End Abuse Wisconsin. The email to these organizations solicited information and advice on the economic impact of draft proposed rules. Comments were accepted from April 11, 2019, through April 30, 2019. No comments were received.

The Department also published a solicitation in the Administrative Register requesting information and advice from businesses, associations representing businesses, local governmental units, and individuals who may be affected by the proposed rules. This public notice was published in Wisconsin Administrative Register No. 760A3. Comments were accepted from April 15, 2019, through April 30, 2019. No comments were received.

Agency contact person: Assistant Attorney General Jody J. Schmelzer, Wisconsin Department of Justice, 17 West Main Street, Madison, Wisconsin 53707-7857, (608) 266-3094, schmelzerjj@doj.state.wi.us.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person named above no later than 30 days after publication of the proposed rule in the Wisconsin Administrative Register.

TEXT OF THE PROPOSED RULES

SECTION 1. Jus 11.01 (1) and (2) are amended to read:

Jus 11.01 (1) AUTHORITY AND PURPOSE. This subchapter is promulgated pursuant to s. 949.02, Stats., for the purpose of administering the awards for the ~~victims of crimes program~~ Crime Victim Compensation Program in Wisconsin which provides assistance to innocent victims of crimes and their families in order to ease their financial burdens.

(2) APPLICABILITY. This subchapter applies to all persons who apply for financial assistance from the awards for the victims of crimes program Crime Victim Compensation Program and to all related matters, proceedings and hearings.

SECTION 2. Jus 11.01 (5) (gm) is created to read:

Jus 11.01 (5) (gm) “Parent of the victim” has the meaning specified in s. 949.01 (4g), Stats.

SECTION 3. Jus 11.02 (2) (c), (g) and (h) are amended to read:

Jus 11.02 (2) (c) An accurate description of the crime, ~~the circumstances which brought it about~~ and the date on which the crime occurred.

(g) The source and amount of ~~benefits~~ benefit the victim, dependent or applicant has received, or is to receive, from any collateral source for economic loss that resulted from the crime and the name of the collateral source.

(h) Whether the claimant ~~is the spouse, sister, brother, child or parent of the offender, the offender's relatives or accomplice or whether the applicant lives with the offender, the offender's relatives or accomplice and the relationship, if any, between the applicant, offender, offender's relatives or accomplice~~ knows the offender, and the nature of the relationship, if any.

SECTION 4. Jus 11.03 (1), (3) and (4) (a) are amended to read:

Jus 11.03 (1) CLAIMS DETERMINATION. Claims may be investigated, verified, and an eligibility determined determination may be made regardless of whether the alleged offender has been apprehended, prosecuted for, or convicted of, any crime based upon the same incident or has been found not guilty of such crime.

(3) WRITTEN DECISION. The department, by the Crime Victim Compensation Program director, shall issue a written decision setting forth the ~~granting of the award or denying~~ denial of the claim and the reasons, and shall furnish the applicant with a copy of the decision. The decision shall also advise the applicant of any right to a contested case hearing.

(4) (a) The statutory ~~maximums~~ maximum allowed under s. ~~949.06 (1) (d) or 949.08 (1m) (a) and~~ (b), Stats., ~~or both, have~~ has been awarded by the department.

SECTION 5. Jus 11.04 (1), (2) (a) and (d) are amended to read:

Jus 11.04 (1) Actual cost of reasonable and necessary medical treatment, subject to the limits set forth under s. 949.06 (1) (bg), Stats.

(2) (a) If the victim was employed at the time of the injury, an award for work loss shall be equal to the victim's unreimbursed net salary. In this paragraph "net salary" means income less deductions for federal withholding tax, state withholding tax, Medicare, and FICA tax. In this paragraph "disability period" means the length of time a victim is unable to work as a direct result of personal injuries caused by the crime. ~~The disability period shall be determined by a physician.~~

(2) (d) If the victim was self-employed at the time of the injury, the loss of actual earnings may be determined by taking into account the net business profit reported on the previous year's federal income tax return or the current year's net business profit based on current financial records, ~~divided by the number of weeks covered by the income tax returns or current financial records.~~ Net loss of earnings shall be determined by deducting self-employment tax as set forth by the IRS, federal withholding tax,

and state withholding tax from the net business profit.

SECTION 6. Jus 11.04 (2) (dm) and (2m) are created to read:

Jus 11.04 (2) (dm) The disability period shall be determined by a physician if it exceeds 2 weeks from the date of the crime. If a physician determines that a claimant's disability is partially related to the victimization, the department shall reimburse the percentage of lost net wages determined by the physician to be directly related to the crime.

(2m) The department may award each parent of a victim not more than \$3,000 total for reimbursement of mental health treatment and for work loss directly related to the crime.

SECTION 7. Jus 11.04 (3) is amended to read:

Jus 11.04 (3) Actual costs of ordinary, necessary and reasonable household and caregiver services in an amount sufficient to ensure that the victim's duties and responsibilities are continued ~~if the victim is a homemaker. Payment shall continue~~ until the victim is able to resume the performance of the duties or until the cost of services reaches the maximum allowable under s. 949.08 (1m) (a), Stats., whichever is less. The department may require that a physician certify that the victim is unable to perform the household or caretaker duties and responsibilities.

SECTION 8. Jus 11.04 (3m) and (4m) are created to read:

Jus 11.04 (3m) If as a direct result of the injury, the victim suffered a protracted disability, reasonable and necessary housing accessibility adaptations, not to exceed the limitations of s. 949.06 (1) (br), Stats.

(4m) Reasonable replacement value of any computer or mobile telephone that is held for evidentiary purposes, not to exceed the limitations of s. 949.06 (1) (cg), Stats.

SECTION 9. Jus 11.04 (6), (7) and (8) (a) are amended to read:

Jus 11.04 (6) Reasonable funeral and burial expenses not to exceed the limitations of s. 949.06 (1) (d), Stats. ~~The funeral and burial award may not be considered by the department under s. 949.08 (1m) (a), Stats.~~ The costs of a reception, wake, or purchase of clothing for burial are not recoverable expenses under this section.

(7) Contributions of things of economic value provided by the victim to dependents but lost as a result of the victim's death and loss Loss of financial support, which shall be determined on the basis of the victim's net annual income at the time of death, and calculated in accordance with s. 949.06 (1) (e), Stats.

(8) (a) "Securing a crime scene" means taking immediate reasonable steps to make the crime scene free of danger and the risk of future loss.

SECTION 10. Jus 11.05 (1) (c), (2), (3) (intro.) and (a) are amended to read:

Jus 11.05 (1) (c) A third person, other than a collateral source, ~~who is responsible for the maintenance of the victim and~~ or business who that has incurred an expense as a direct result of the victim's

personal injury or death.

(2) **MAXIMUM AWARD.** An award shall not exceed the economic loss to the claimant or exceed the limitations of s. 949.08 (1m) (a), Stats., ~~plus the reasonable funeral and burial expenses under s. Jus 11.04 (6), whichever is less.~~

(3) **DEPENDENTS' ECONOMIC LOSS OF SUPPORT.** In determining the amount of the award, the department shall:

(a) Determine loss of support based on the victim's net salary income at the time of death and loss of support shall be calculated equal to four times the victim's annual net salary income. The department shall ~~determine if the dependents have received or will receive proceeds from private or public insurance plans. Public insurance plans include social security benefits. The proceeds from a private or public insurance plan shall be prorated over the life expectancy of the victim and the amount of the first four years shall be deducted from the amount of the lost salary~~ deduct from the loss of support award an amount equal to benefits the dependents received or are to receive, over the course of 4 years, as survivor benefits from the federal social security program. The department shall determine if the dependents have received or will receive life insurance proceeds due to the victim's death and each dependent's loss of support award shall be reduced by the life insurance proceeds available to them.

SECTION 11. Jus 11.05 (3) (b) is repealed.

SECTION 12. Jus 11.05 (4) (a) 4. is amended to read:

Jus 11.05 (4) (a) 4. ~~As an emergency~~ From an award under s. ~~949.10-949.26~~, Stats.

SECTION 13. Jus 11.05 (4) (a) 4. (Note) is repealed.

SECTION 14. Jus 11.06 (1) (a) and (b) are repealed and recreated to read:

Jus 11.06 (1) (a) A physician who has completed a residency in psychiatry, a psychologist, a marriage and family therapist, a professional counselor, or a clinical social worker. The provider shall be licensed by the state in which he or she practices.

(1) (b) A qualified treatment trainee under clinical supervision as defined by s. DHS 35.03 (17m).

SECTION 15. Jus 11.06 (1) (c) and (d) are repealed.

SECTION 16. Jus 11.06 (2) (a) and (b) are amended to read:

Jus 11.06 (2) (a) Inpatient psychiatric services ~~when prescribed by a physician and when provided within the psychiatric unit of a general hospital or a psychiatric facility.~~

(2) (b) Outpatient psychotherapy services ~~when provided by a psychiatrist, licensed psychologist, or an eligible masters level provider who meets the supervision requirements.~~

SECTION 17. Jus 11.06 (2) (c) is repealed and recreated to read:

Jus 11.06 (2) (c) Complementary mental health services may be considered for payment by the department if administered in conjunction with any of the above-listed treatments, prescribed by an eligible provider, and administered by an accredited practitioner.

SECTION 18. Jus 11.06 (4) (intro), (b), (c), (e) and (f) are amended to read:

Jus 11.06 (4) AUTHORIZATION PROCESS. The department shall require eligible providers of services to submit an authorization request which ~~shall~~ may include the following information:

(4) (b) A detailed summary of the problems for which the victim or claimant is seeking mental health treatment.

(4) (c) A detailed summary of the diagnostic examination, including the severity of the victim's or claimant's mental illness, medically significant emotional or social dysfunctions, the medical necessity for treatment and the suggested outcome of treatment.

(4) (e) A statement of the relationship between the crime and the need for treatment, and to what extent the treatment is directly related to the crime.

(4) (f) A statement of the victim's or claimant's psychological condition ~~during the 6-~~
~~months~~ prior to the crime.

SECTION 19. Jus 11.07 (1) is amended to read:

Jus 11.07 (1) The application was not filed within one year after the date of the personal injury or death, subject to the exception under s. 949.08 (1m) (b). The department may waive the one year filing requirement under this subsection in the interest of justice.

SECTION 20. Jus 11.07 (1) (a) is created to read:

Jus 11.07 (1) (a) If an applicant was a child at the time of the personal injury, the department may consider for payment eligible expenses that the applicant incurred not more than one year before the application was received by the department for an award. The department may not make any award after 4 years have passed since the date the person made the application or after 4 years have passed since the date on which the person incurred the expense prior to submitting the application, whichever occurs first.

SECTION 21. Jus 11.07 (2) and (7) are amended to read:

Jus 11.07 (2) The incident upon which the claim is based was not reported to a law enforcement agency within 5 days of its occurrence or, if the incident could not have reasonably been reported within that period, within 5 days of the time when a report could reasonably have been made. The department may waive the time limit on reporting under this subsection in the interest of justice.

(7) The injured victim is an adult passenger in a vehicle operated by the ~~offender's vehicle~~ offender and the crime involved is specified in s. 346.63 (2) or 940.25, Stats., and the passenger knew the offender was under the influence of an intoxicant, a controlled substance, or ~~both, or had a blood-alcohol concentration of 0.1% or more, as defined in s. 885.235 (1) (a), Stats.~~ another drug to a degree that renders him or her incapable of safely driving. This subsection does not apply if the victim is also a ~~victim~~ of a crime specified in s. 940.30, 940.305, 940.31 or 948.30, Stats. This subsection applies, however, if the victim is also a victim of a crime specified in s. 940.09, Stats.

SECTION 22. Jus 11.08 is repealed.

SECTION 23. Jus 11.09 (1) (d) and (3) (g) are amended to read:

Jus 11.09 (1) (d) The department shall either grant or deny the request for a contested case hearing by mailing to the petitioner an order granting or denying the request. within 30 days ~~of the receipt of the request for a contested case hearing.~~ If a hearing is not granted within 60 days of receipt of the request for a contested case hearing, the request shall be deemed denied.

(3) (g) All hearings shall be open to the public unless in a particular case the examiner determines that the hearing, or a portion thereof, shall be held in private having regard for the fact that the offender has not been convicted and for the interest of the victim ~~of an alleged sexual assault.~~

SECTION 24. Jus 11.11 (1) is amended to read:

Jus 11.11 (1) PROVIDE FORMS. The department shall prescribe application forms for awards under this subchapter and ~~shall~~ may furnish law enforcement agencies with the forms. The law enforcement agency investigating a crime shall provide ~~forms to each person who may be eligible to file a claim.~~ information as provided under s. 950.08 (2g) (b), Stats.