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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
GETTING BACK IN THE GAME: VOCATIONAL REHABILITATION

I. INTRODUCTION

Vocational rehabilitation is an aspect of workers' compensation claims not often discussed in detail. Many times, disputes arise well before the prospect of vocational rehabilitation comes up and parties sometimes get carried away in those disputes. However, vocational rehabilitation is an extremely important aspect of the claim and, in some instances, might be the most significant factor affecting claim resolution.

Perhaps the reason why vocational rehabilitation is not analyzed in detail is the fact that there are limited sources to look to when considering the various nuances of vocational rehabilitation. Guidance for when and how to institute a course of vocational rehabilitation comes from two primary sources, the Illinois Workers' Compensation Act (Act) and the Administrative Rules (Rules). Section 8(a) of the Act creates the potential for vocational rehabilitation by mandating that, in addition to medical treatment, the employer "shall also pay for treatment, instruction, and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto."

The expectations of vocational rehabilitation are then outlined in Ill. Admin. Code, Title 50, ch. VI., Section 9110.10 (Nov. 9, 2016):

- a) An employer's vocational rehabilitation counselor, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care and, if appropriate, vocational rehabilitation required to return the injured worker to employment. The vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury. When the period of total incapacity for work exceeds 365 days, the written assessment required by this subsection shall likewise be prepared.

- b) The assessment shall address the necessity for a plan or program that may include medical and vocational evaluation, modified or limited duty, and/or retraining, as necessary.

- c) At least every 4 months thereafter, or until the matter is terminated by Order or Award of the Commission or by written agreement of the parties approved by the Commission, the employer, or his or her representative, in consultation with the employee and, if represented, with his or her representative, shall:
  1) if the most recent previous assessment concluded that no plan or program was then necessary, prepare a written review of the continued appropriateness of that conclusion; or
2) if a plan or program had been developed, prepare a written review of the continued appropriateness of that plan or program, and make in writing any necessary modifications.

d) A copy of each written assessment, plan or program, review and modification shall be provided to the employee and/or his or her representative at the time of preparation, and an additional copy shall be retained in the file of the employer and, if insured, in the file of the insurance carrier. Copies shall be made available for review by the Commission, on its request, until the matter is terminated by Order or Award of the Commission or by written agreement of the parties approved by the Commission.

e) The rehabilitation plan may be prepared on a form furnished by the Commission.

f) Nothing in this Section abridges the rights of the parties.

Still, even with those legislative materials addressing vocational rehabilitation, much remained unanswered regarding when vocational rehabilitation is appropriate until the seminal case, *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424 (1983) provided some guidance. *National Tea* established a number of factors to consider when determining if vocational rehabilitation is appropriate:

- Relative costs and benefits to be derived from a vocational rehabilitation program.
- Evidence that vocational rehabilitation will increase earning capacity.
- Evidence that compensable injury reduced employee’s earning capacity.
- Potential for loss of job security as a result of the injury.
- Likelihood of obtaining employment upon completion of the program.
- Whether the employee has sufficient skills to obtain employment without further training or education.
- Ability and motivation of employee to undertake the program.
- Whether employee is “trainable” due to age, education, training, occupation.

Discussion of the factors explained that they are to be flexibly applied.

II. WHEN IS VOCATIONAL REHABILITATION APPROPRIATE

Section 6(d) of the Act requires employers to advise employees of their right to rehabilitation services and advise the employee of the locations of available public rehabilitation centers and any other such services available. No timeframe is provided for when the employer must provide this information to the employee, though one would assume it should be at a time when rehabilitation to return to work would be appropriately discussed.

Illinois Workers’ Compensation Commission Rule 9110.10. Ill. Admin. Code, Title 50, Ch. VI, Section 9110.10 (Nov. 9, 2016) requires that a vocational rehabilitation plan be written if the petitioner’s total incapacity for work exceeds 365 days, or when it can reasonably be determined
that the injured worker will be unable to resume the regular duties in which he was injured, whichever first occurs. Interestingly, this Rule seems to contemplate instituting a course of vocational rehabilitation before the employee has completed his course of care. The first consideration for when to start vocational rehabilitation under this Rule is when the petitioner’s “total incapacity for work exceeds 365 days.” In many cases, employees are totally restricted from work for a time period shortly after the injury until well beyond 365 days while they participate in a course of treatment, whether that includes conservative care or more aggressive means. In practice, however, it would be very uncommon to institute a program of vocational rehabilitation before the employee has reached maximum medical improvement and it is evidence he can no longer return to his pre-injury job. Although this would be contrary to the Rule, it is not often raised as an issue as both parties typically prefer to monitor an employee’s medical progress with the hopes that a return to work can be achieved. Only after it becomes evident that will not happen does vocational rehabilitation become a more serious consideration.

Practically speaking, however, one should not dismiss the idea of instituting vocational rehabilitation just because the employee is still treating. Sometimes the medical condition of the employee and the course of care provided are such that it is obvious the employee will not be able to return to their pre-injury job well before MMI is reached. If the employee’s transferrable skills are such that additional training or education would be necessary to return them to the work force, starting this program while treatment is concluding could expedite resolution.

III. SELECTING A REHABILITATION SPECIALIST

Interestingly, relevant case law and the Act appear to be in conflict over selecting the vocational rehabilitation counselor. Sections 8(a) and 6(d) of the Act suggest the employer has the right to nominate the initial vocational consultant. Case law, however, suggests otherwise. In Derewonko v. Archibald Candy Co., No. 00WC 39260, 2002 Ill. Wrk. Comp LEXIS 651 (July 23, 2002), the Commission stated the Petitioner is entitled to a rehabilitation provider of her choice. Employees seldom raise this right as an issue in starting vocational rehabilitation, though they would be proper if they did.

Before selecting a provider, it is important to determine what your ultimate goal is through vocational rehabilitation. Does “successful vocational rehabilitation” mean job placement or claim resolution? Those goals can have very different outcomes and various providers may be better suited for one over the other.

A. Considerations When Selecting a Specialist

Credentials – It is imperative that the vocational rehabilitation specialist selected is certified to provide vocational rehabilitation services. In fact, Section 8(a) requires such, noting any counselor who provides services “shall have appropriate certifications which designate the counselor as qualified to render opinions relating to vocational rehabilitation.”
Credibility in front of the assigned arbitrator is another important factor and one that can be hard to determine. It is essential that the vendor appear objective to the arbitrator so that any failures of the process be attributed to the efforts of the employee and not the efforts of the vocational counselor. Arbitrators may have varying impressions of the same counselors so check with defense counsel when selecting a provider.

Past success – Selecting a counselor with whom you have had past successes is important. Again, how you define “success” depends on your goals for the claim and will affect your selection of counselor.

Location – It is best to select a counselor based in the employee’s potential job area. Not only will the vendor be more familiar with the employee’s pre-injury job (so as to better understand their transferrable skills), but they will also have a better understanding of the local job market. Moreover, a local vendor will probably be better suited to aggressively push the claimant in the process. They will be able to more effectively put pressure on employees to be thorough in their job search. The more interaction the counselor has with the employee, the more opportunities you create for the counselor to establish a relationship with the employee and therefore render more credible opinions regarding why rehabilitation failed, if that occurs.

Disputes regarding selecting a provider – in *W.B. Olson, Inc. v. Illinois Workers’ Compensation Commission*, 2012 IL App (1st) 113129WC, the appellate court found the petitioner’s vocational rehabilitation counselor more appropriate over respondent’s as his plan was “more focused and promised a more expedient return to the work force.”

**B. Setting the Counselor Up for Success**

Provide information – it is essential to provide the vocational counselor with information necessary to successfully rehabilitate the petitioner. To understand the petitioner’s physical abilities, provide the counselor with the actual medical documents outlining the restrictions. Provide the vocational rehabilitation specialist with a job description describing the activities of the position the claimant was doing at the time of the injury. In instances where the employee has worked at the same job for a long time and has limited transferrable skills, having the job description will help the counselor locate new positions that could be a match for the claimant’s abilities and restrictions.

In some instances, consider suggesting potential fields of work or specific positions to the vocational counselor. Only the employer and the employee know exactly what the pre-injury job really entailed. The employer is therefore possibly in a position to assist in the placement by suggesting positions or fields that could make the most of the claimant’s past work experience, while also considering his restrictions. As stated above, this can be especially helpful in small towns or rural areas where the job market is small or the vocational expert is somewhat unfamiliar with the area.
C. Remember the Counselor’s Unique Representation

The vocational rehabilitation specialist is hired by the employer/insurance company. They are also paid by the employer/insurance company and can be fired by the employer/insurance company. However, the counselor also has a duty to the petitioner and, in fact, case law suggests that duty is the more important of the two. *Fricker v. Jewel Food Stores*, 97 Ill.C. 2170, 91 Ill.W.C. 41130 (Dec. 5, 1996).

It is important to keep that unique set up in mind when working with your vocational rehabilitation specialist. Perhaps the goal you wish to achieve with vocational rehabilitation is different than what the claimant is looking to get out of the process. That difference can create a conflict for the rehab specialist and can complicate the process. Be mindful of that arrangement when selecting a provider and strategizing on claim handling.

Be sure that the specialist you select would be willing to testify against the Petitioner at a hearing if necessary.

IV. PETITIONER’S RIGHTS THROUGHOUT VOCATIONAL REHABILITATION

- Chain of referrals – Section 8(a)(3) suggests the limitation on the employee’s chain of referrals does not apply to selecting a vocational rehabilitation specialist, though many respondents would argue otherwise.
- TTD – A petitioner participating in vocational rehabilitation has a right to temporary, total disability benefits, called maintenance benefits during this process. Participation in a formal program is not necessary; a self-created and directed job search by the claimant can suffice as a program of vocational rehabilitation to entitle the claimant to maintenance benefits. *Roper Contracting v. Industrial Commission*, 349 Ill. App. 3d 500 (5th Dist. 2004).
- Reports – Petitioner has the right to receive a copy of reports from Respondent’s vocational rehabilitation counselor regarding his progress in the program.
- Miscellaneous – Petitioner has a right to file a 19(b) or 19(b-1) petition for the failure to provide vocational rehabilitation services, and can seek penalties under Section 19(k) and/or 19(l), and attorney’s fees under Section 16.

V. RESPONDENT’S RIGHTS THROUGHOUT VOCATIONAL REHABILITATION

TTD – Respondent may suspend TTD/maintenance benefits if the employee is non-cooperative with rehabilitation efforts. *Archer Daniels Midland Co. v. Industrial Comm’n*, 174 Ill. App. 3d 918 (3d Dist. 1988).
If the employee engages in practices that “imperil or retard his recovery” or refuses to submit to treatment essential to promote his recovery, the commission may reduce or suspend the compensation of the employee. Section 19(d).

What is “non-cooperation?” *Bubak v. Murman Construction Co.,* 02 IIC 0891, 98 IL.W.C. 2684 (Nov. 20, 2002) – Claimant’s “brutal honesty” about his unrelated health conditions which likely prevented him from securing employment did not rise to the level of non-cooperation to warrant cessation of benefits.

*Stone v. Industrial Commission,* 286 Ill. App. 3d 174 (2d Dist. 1997) – Non-cooperation found when claimant refused to attend interviews without 48 hours advance notice, showed up for interviews unclean and unshaven, failed to research vocational interests at library as directed, and told one potential employer he would not accept an offered position as it required him to work on his Sabbath.

VI. CONSIDERATIONS THROUGHOUT THE PROCESS

A. Is Vocational Rehabilitation Necessary?

The mere fact that an employee cannot return to his pre-injury job does not necessarily create the need to provide vocational rehabilitation. In many instances, a self-directed job search might be sufficient for the employee to secure a new position. Alternatively, the employer/insurance company can certainly assist in locating employment for the employee if they cannot return to work and, in some instances, might be very successful in doing so. With a motivated petitioner, either of those options could result in a successful return to work without the additional expense of the vocational rehabilitation process.

B. Location

Vocational rehabilitation can be especially challenging when the employee resides in a small town or very rural area. Some considerations to keep in mind:

1. Travel to/from work – the first consideration should be how far the employee traveled to/from their pre-injury employment. Ideally, vocational rehabilitation would place the employee in a position with similar travel expectations. However, that is not always reasonable. Consult with the counselor as to what their general geographic radius for job searching is. In instances where the employee travelled very short distances to their pre-injury job and such a circumstance is not possible in the labor market during rehabilitation, consult with your defense attorney as to what distance would be “reasonable” to expect of the employee should the matter be presented to the Commission.
2. Driving restrictions – it is not uncommon for an employee to complain about discomfort traveling for any period of time if they sustained certain injuries as a result of their work activities. They may then try and claim they cannot be expected to drive any distance to secure new employment as a result. When this occurs, take a close look at the medical records. If there are no orders restricting the employee’s driving, it is not necessary to adjust your vocational rehabilitation plan as a result. Depending on the limits such a restriction could impose, consider an independent medical examination (IME) if necessary. If the employee claims he cannot travel and it seems unrealistic in the circumstances, consider surveillance.

C. Duration of Vocational Rehabilitation

1. Before implementing a plan for vocational rehabilitation, it is important to think about a timeframe for the program.

   (a) Additional training – If the claimant needs additional training or education, the rehabilitation process will likely be longer than one for a claimant that is ready and equipped to re-enter the job market.
   (b) Significance of restrictions – Significant restrictions will likely limit the available job market, potentially making the process of job placement take longer.
   (c) Claimant’s motivation to return to work.

2. A claimant can prove entitlement to permanent, total disability benefits if they are able to show no stable labor market exists for an employee with his restrictions, education, training, skills, etc. Keep that in mind when managing a rehabilitation program.

VII. CONCLUSION

Returning a petitioner to work in any capacity upon completion of medical treatment is essential to reducing overall exposure in a comp case. In light of recent decisions favoring wage differential awards over other permanency determinations, returning a petitioner to work in a position earning as close to their pre-injury wages as possible becomes even more important. The successful use of a vocational rehabilitation program and counselor can significantly affect the likelihood of that return to work, and therefore result in significant savings in the claim.
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Jessica focuses her practice on the defense of insurance clients and employers in workers’ compensation matters. She joined the firm with extensive workers’ compensation defense experience, having appeared before the Illinois Workers’ Compensation Commission representing employers and insurance companies across the state. Jessica has also spoken with businesses directly to help assist in their understanding of the Workers’ Compensation system, as well as the handling of claims within their business.

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- “Defending Your Company Before and After a Lawsuit or Claim is Filed”  
Mid-West Truck & Trailer Show (2017)
- “Temporary Transitional Employment”  
Heyl Royster’s 31st Annual Claims Handling Seminar (2016)
- “Illinois Workers’ Compensation – Back to Basics”  
Mid-West Truck & Trailer Show, Peoria (2016)

Professional Associations
- Tazewell County Bar Association (Vice President, 2011-2012; Treasurer 2010-2011)
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