Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals — *November 2009*

A Word from the Practice Group Chair

This month's newsletter is authored by Brad Elward of our Peoria office. Brad specializes in workers' compensation appellate work. He handles appeals for our firm and also handles workers' compensation appeals that are referred to us from other firms or employers who seek specialized appellate work. He has probably handled more workers' compensation appeals that any practicing workers' compensation attorney in the state.

We are pleased to present Brad's discussion of vocational rehabilitation benefits. As you know, this area of workers' compensation law is volatile and, given the current job market, we are seeing and expect to continue to see an increase in this type of claim.

As a quick side note, you can see from the box on this page that Bruce Bonds and the undersigned recently completed a book titled Illinois Workers' Compensation Law for West Publishing. We received substantial assistance from a number of other members of our workers' compensation team, and would like to thank them and our firm for all of the support provided to us.

Have a great Thanksgiving!!!

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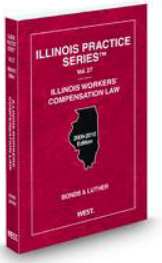
New from West Publishing:

We are pleased to announce that two of our partners, **Bruce Bonds** and **Kevin Luther**, have authored *Illinois Workers' Compensation Law*, 2009-2010 ed. (Vol. 27, Illinois Practice Series)(West). The book, which can be obtained at west.thomson.com, provides a full overview of Illinois Workers' Compensation law and practice in Illinois and is "a must" for risk managers and claims professionals.



This Month's Author:

Brad Elward practices in the Peoria office and handles all of the firm's workers compensation appeals before the circuit and appellate courts. Brad is a Director of the Illinois Appellate Lawyers' Association, a member of the Illinois Workers' Compensation Lawyers' Association, and writes a quarterly column on appellate practice for the Illinois Association of Defense Trial Counsel journal. He writes and speaks frequently on appellate issues as they affect workers' compensation cases.

REHABILITATION AND MAINTENANCE AWARDS

With unemployment rates high and possibly rising, we fully anticipate seeing an increase in the number of claimants seeking rehabilitation and maintenance benefits as part of their workers' compensation claims. As of this past August, the Illinois unemployment rate of 10.0 percent is just slightly higher than the national unemployment rate of 9.7 percent.

Rehabilitation and maintenance awards originate in Section 8(a) of the Workers' Compensation Act and Section 7110.10 of the Workers' Compensation Commission Rules. 820 ILCS 305/8(a); 50 Ill. Admin. Code § 7110.10. Unfortunately for Illinois employers, neither provision provides much guidance as to when such benefits are appropriate or what triggers the obligation to provide them.

VOCATIONAL REHABILITATION

Section 8(a) of the Workers' Compensation Act provides that "[v]ocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution." 820 ILCS 305/8(a). Generally, a claimant is entitled to rehabilitation where (1) he sustained an injury which caused a reduction in earning power and (2) there is evidence that rehabilitation will increase his earning capacity. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 454 N.E.2d 672 (1983). The burden of proving an entitlement to rehabilitation is placed on the claimant.

Rehabilitation comes into play where the claimant is unable to return to his or her former line of employment. As this suggests, there is some overlap between a rehabilitation claim and one seeking a wage differential or permanent total disability. In each case, the claimant is not able, because of his restrictions, to return to his former employment, and must seek work elsewhere.

Where rehabilitation is **agreed to** by both parties, Rule 7110.10 provides some general guidance as to what is required:

a) The employer or his representative, 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, rehabilitation required to return the injured worker to employment 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 engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs.

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

c) At least every 4 months thereafter, provided the injured employee was and has remained totally incapacitated for work, 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. 50 Ill. Admin. Code §7110.10 (a-c).

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, to 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.

The rehabilitation plan must be prepared on a form furnished by the Commission.

At least one decision supports the interpretation that Rule 7110.10 applies only in circumstances where the parties *agree* to a course of rehabilitation. *See National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 431, 454 N.E.2d 672 (1983).

However, in most cases, the employer will have reservations concerning the entitlement to or benefits of rehabilitation and will oppose such efforts by the claimant. In such cases, the employer must develop its case before the Commission to prove that rehabilitation is not appropriate.

While neither Section 8(a) nor Rule 7110.10 provide any guidance as to when rehabilitation is proper, case law consid-

ers the following factors in determining whether a claimant is entitled to rehabilitation benefits:

Factors Favoring Rehabilitation:

- The planned rehabilitation will likely increase the claimant's earning power;
- The claimant is likely to lose job security due to the injury;
- The claimant is likely to obtain employment upon completion of the rehabilitation or training.

Factors Negating Rehabilitation:

- The claimant has unsuccessfully undergone training under a prior rehabilitation program;
- The claimant is not trainable due to his age, education, or skills;
- The claimant has sufficient skills to obtain employment without further training or education.
- The claimant has a short work-life expectancy.

In any event, it must be shown that: (1) the rehabilitation program requested is a prerequisite for the position sought by the claimant; (2) that the claimant has the ability to complete the rehabilitation program satisfactorily; (3) a position is available in the field of endeavor upon completion of the rehabilitation program; and (4) there is no other "remedial or vocational training" for which the claimant might be qualified. *Hunter Corp. v. Industrial Comm'n*, 86 Ill. 2d 489, 499, 427 N.E.2d 1247 (1981).

Where rehabilitation is disputed, the employer has several options, depending on the strength of the claimant's request for rehabilitation. First, the employer can aggressively attack the claimant's efforts, showing that the claimant's job search was a sham or that his efforts are not designed to increase his earning power. This method has its own risks, namely that the Commission will deem these efforts satisfactory and, in the absence of contrary evidence, award rehabilitation. An employer must always be aware that once a claimant establishes the unavailability of employment to a person in his circumstances, the burden shifts to the employer to prove "that the [claimant] is capable of engaging in some type of regular and continuous employment" and that "such work is reasonably available." *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353, 362, 376 N.E.2d 206 (1978). Countering this proof typically requires some form of vocational assessment.

Second, an employer can choose to try to assist the claimant in finding alternative work. This may be formal or informal, but in any event must be well documented. The services of a certified vocational counselor, with associated skills and aptitude testing, is one method of attaining this goal. 820 ILCS 305/8(a). Third, the employer can agree to fund limited retraining, with the goal of preparing the claimant to find new work.

It should also be noted that rehabilitation can be avoided by an employer's *bona fide* offer of a job within the claimant's restrictions. Such offers must be in good faith and not a concocted position or a sham. *Reliance Elevator Co. v. Industrial Comm'n*, 309 Ill. App. 3d 987, 993, 723 N.E.2d 326 (1st Dist. 1999). Such jobs should be within the prescribed medical restrictions and made in writing.

ASSOCIATED MAINTENANCE

The obligation to pay maintenance is found in Section 8(a), which provides that the employer shall also pay, in addition to the costs of rehabilitation, "all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a). By statute, the maintenance benefit cannot be less than the employee's Temporary Total Disability (TTD) benefit rate. While TTD benefits are generally only available until an injured claimant has recovered as fully as the nature of the injury permits, he may nevertheless be entitled to maintenance under Section 8(a) while he is in a prescribed rehabilitation program. *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55, 523 N.E.2d 1265 (1st Dist. 1988). Since maintenance is a component of vocational rehabilitation, it is commonly awarded only after the claimant has proven an entitlement to vocational rehabilitation.

Illinois law provides that a claimant does not have to specifically request vocational rehabilitation from his or her employer. According to *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506, 812 N.E.2d 65 (5th Dist. 2004), "neither section 8(a) nor Rule 7110.10(a), when read separately or together, support [an] argument that [the claimant] was required to request vocational rehabilitation before he was entitled to an award of maintenance."

While awards of maintenance are commonly associated with the claimant's participation in a vocational rehabilitation program, there are cases that provide for maintenance during the period of time after completion of the rehabilitation while the claimant looks for employment. *See Waldschmidt*

v. Industrial Comm'n, 186 Ill. App. 3d 477, 542 N.E.2d 726 (3rd Dist. 1989).

ISSUES ARISING IN REHABILITATION AND MAINTENANCE CASES

One of the first questions with rehabilitation and maintenance is, when does the potential for a rehabilitation/maintenance award arise? The simplest answer is when the claimant cannot return to his former employment. In all cases, it is important to monitor when an employee returns to work and, if because of his restrictions he cannot return to work, counsel should be utilized to contact the claimant and inquire as to whether he is working elsewhere. If he is working, the chances of a rehabilitation/maintenance award are considerably reduced. In that event, the case will most likely proceed on a Permanent Partial Disability (PPD) percentage basis.

If the claimant is not working elsewhere, then a decision must be made as to whether rehabilitation should be offered. Given today's economic times, offering a limited rehabilitation plan may be a wise move in an effort to ward off a wage differential or a permanent total disability claim. Remember that in both situations, the benefits are triggered when the claimant, who can no longer return to his former job, is unable to find reasonably stable work in the job market. *See* 820 ILCS 305/8(d)(1) and (f).

Determining what constitutes a sufficient rehabilitation program is often difficult; courts have allowed claimants, in certain circumstances, to pursue what has been described as a "self-created and self-directed" job search. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506, 812 N.E.2d 65 (5th Dist. 2004). While such plans are not favored, *i.e, Hunter Corp. v. Industrial Comm'n*, 86 Ill. 2d 489, 499, 427 N.E.2d 1247 (1981), they are nevertheless becoming more and more commonplace. *See Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1075, 820 N.E.2d 570 (5th Dist. 2004) (physician-assisted rehabilitation plan approved). Indeed, cases are legion stating that Section 8(a) is intended to be flexible and does not limit rehabilitation to formal training. *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55, 523 N.E.2d 1265 (1st Dist. 1988).

In *Roper*, the Appellate Court, Workers' Compensation Commission Division, held that the claimant's self-directed vocational rehabilitation plan, which consisted simply of the claimant sending out job resumes, was a proper plan which thereby entitled the him to maintenance while he conducted his job search. On appeal, the Court observed that the claimant had met the first aspect of the rehabilitation test (that his restrictions reduced his earning power) because, due to his restrictions, he was no longer able continue working in his former job. The Court then found that the second prong of the test had been met because the "the claimant's self-created vocational program did in fact increase his earning capacity as demonstrated by the positive results of the claimant's job search."

Roper raises the question of what happens when the claimant engages in a self-directed plan to no avail. That question is currently on appeal before the Appellate Court, with a decision anticipated in late 2009.

One positive note – although the Supreme Court in *Hunter* did tacitly approve of self-directed rehabilitation plans, it by no means endorsed them, and went on to reject the plan offered by the claimant on the ground that the manifest weight of the evidence did not show that the plan would actually improve the claimant's chances of obtaining work upon its completion. In *Hunter*, the claimant had sought maintenance for his self-directed rehabilitation plan, which involved returning to college for a degree. The Court found that the degree sought by the claimant did not improve the claimant's chances of obtaining steady work in his targeted profession of a welding instructor.

THE CLAIMANT'S OBLIGATION TO COOPERATE

Even where vocational rehabilitation and maintenance benefits are awarded to a claimant, an employer must still monitor the claimant's rehabilitation efforts. Illinois law places the burden on the claimant to cooperate with the vocational provider, whether by attending interviews in the proper mindset and properly dressed, attending the prescribed classes, or by diligently pursuing job leads. Failure to cooperate with rehabilitation efforts can result in the suspension of benefits. *Zenith Co. v. Industrial Comm'n*, 91 Ill. 2d 278, 437 N.E.2d 628 (1982).

PARTING THOUGHTS

Claims involving potential rehabilitation and maintenance benefits must be aggressively defended. In many cases, this means obtaining a second vocational specialist opinion to counter the claimant's expert. In other cases, an aggressive defense means taking the initiative by either assisting the claimant

in finding employment within his restrictions or placing the claimant in a rehabilitation program designed to enhance his employment opportunities.

Through its comments at several recent oral argument calendars, the Appellate Court has signaled that it intends to be more liberal in reviewing rehabilitation awards. This translates into the need for a more aggressive stance by employers.

Finally, since the failure to provide such benefits can serve as the basis for imposition of Section 19(l) and (k) penalties and Section 16 attorneys' fees, it is important to prioritize vocational rehabilitation and maintenance issues. *Waldschmidt v. Industrial Comm'n*, 186 Ill. App. 3d 477, 542 N.E.2d 726 (3rd Dist. 1989).

Please feel free to contact us if you have any questions relating to vocational rehabilitation or maintenance awards.

RECENT CASES

The Appellate Court, Workers' Compensation Commission Division, recently published the decision of *Washington District 50 Schools v. Workers' Compensation Comm'n*, No. 3-08-0923 WC (October 16, 2009), which held that the average weekly wage for a school teacher should consider only those weeks and parts thereof in which the teacher worked. Thus, where the teacher earned $40,416.48 spread over a 52-week period, but only worked 39 weeks of the school year, her average weekly wage should be $1,036.32 ($40,416.48/39), rather than $777.24 ($40,416.48/52). The Appellate Court relied on the language of Section 10, which states that "[w]here the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed." 820 ILCS 305/10. Moreover, the Court stated that the claimant "was required to devote or apply her time and energy to teaching for 29 weeks, not 52 weeks." However, that reasoning overlooks the fact that most teachers are hired on a yearly contract and many are tenured and thus truly year-long employees of the districts. By treating the teacher in the same manner as a laborer, the resulting average weekly wage provides a significant windfall to the claimant. Moreover, if the teacher has a summer job, as the claimant did in this case, those additional earnings can be factored into the average weekly wage as a second job. In this case, the teacher's average weekly wage is $259.08 higher, and her yearly income soars by $13,472.16 (33.3 percent) to $53,888.64.

* * * * *

In a recent case of interest, which was handled by our firm, the Appellate Court, Workers' Compensation Commission Division, unanimously reversed an award of penalties and fees imposed by the Commission. In *Reynolds v. Workers' Compensation Comm'n*, No. 3-08-0759WC (3rd Dist., October 5, 2009), the Commission awarded approximately $60,000 in penalties and attorneys' fees against the employer for the employer's allegedly unreasonable and vexatious termination of TTD and medical benefits. The claimant had sustained an unwitnessed neck injury and was treated and evaluated by four different physicians. An MRI taken shortly after the accident showed significant degeneration at three different levels of the neck. Two of the physicians, who were company doctors, questioned how the mechanics of the injury could have caused the results seen on the MRI films. The other two physicians, although opining that the claimant had a bulging disc, did not offer any opinion testimony connecting the condition to the alleged work injury.

After undergoing conservative treatment for several months, the claimant underwent a myelogram, which showed a herniation. He was then evaluated by his own IME, who opined that surgery was needed and that the condition was causally related to his employment. The employer immediately obtained its own IME opinion which, although agreeing with the need for surgery, causally related the problems to an advanced degenerative condition. Even though the employer contested liability for the surgery and for the continuing complaints, the employer nevertheless paid five weeks of TTD benefits and made an advance of permanency.

Despite the employer's reliance on the two company physicians and its IME report, the Commission summarily rejected the IME's opinions and awarded penalties and fees.

The circuit court reversed the penalties and fees issue, and that result was unanimously affirmed by the Appellate Court. The Appellate Court found that the employer had been reasonable in basing its denial of benefits on the various medical opinions, including that of its IME. According to the court, the employer could rely upon the three physicians' opinions and "no reasonable person could conclude that the employer was not entitled to do so."

Unfortunately, the Appellate Court declined to publish the opinion, which means that, while controlling as to parties in this case, the decision and opinion cannot be cited as precedent in other cases. However, we have filed a motion asking the Court to publish the opinion, and are hopeful that it will do so.

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