Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *July 2020*

A Word From The Practice Chair

Right about now, in years past, I would be writing about return to school issues like hunting for school supplies, back to school clothes shopping, and the return to a real schedule, as the Summer slowly slips away, and we roll into August. Well, that was another time. We now are left wondering, "Are my children going back to school? Will school be taking place at my kitchen table through a computer screen? Will my child be playing sports in the Fall?" I know none of this is normal, and it is hard to draw comfort from all of the unknown.

What I do know is this: you can count on the Heyl Royster Team to be there to take care of you and your claims. I know most of you are still working from home (maybe you are one of those who always did!) We are here to make sure whatever your need, we have you covered. To this end next week you will see an invitation in your mailbox from the Heyl Royster Workers' Compensation Practice Group regarding four virtual lunch and learns. We know it has been far too long since we met, and we are going to remedy that soon. We will be presenting virtually on hot topics in the month of September for our ever changing world of workers' compensation. We may not be able to get together in person, but we can still get together. There will come a day, and it cannot get here soon enough, that we will be able to be in the same room, talking workers' compensation, eating chocolate chip cookies, and enjoying each other's company. Once you get the invitation please feel free to pass it along to your Team members or clients.

This month my partner Bruce Bonds touches on a very important topic that comes up regularly in phone calls with my clients; vocational rehabilitation. We don't like it, but often we are faced with a situation where the injured worker is not able to return to work with the employer and the cause is the work related injury. Therefore, the employer must move forward per the Act to provide vocational rehabilitation. This is always costly and we all realize it does not always bear fruit where a job is found for that worker. Bruce has provided some great insight as to the process, the latest Commission case on point, and how that impacts your claims management. This is a complex issue and frankly this article could have been much longer as there are many nuances to this important topic. So, if you have follow up questions you should feel comfortable contacting Bruce, myself, or any of the Heyl Royster workers' compensation team.

I do hope you and yours are staying healthy and safe. As always, don't hesitate to contact me if you need anything to aid you in your claims management.

Toney J. Tomaso
Workers' Compensation Practice Chair
ttomaso@heylroyster.com

COMMISSION FINDS THAT VOCATIONAL REHABILITATION ASSESSMENT MUST BE PREPARED BY COUNSELOR OF RESPONDENT'S CHOICE

By: Bruce Bonds, Champaign Office

Statutory background

Most of us are familiar with the general principles that govern vocational rehabilitation in Illinois workers' compensation cases. The statutory basis is Section 8(a) of the Illinois Workers' Compensation Act which provides 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." Unlike many states, the Illinois statute does not specifically set forth the circumstances in which vocational rehabilitation should be awarded, nor the specifics of the process it should take. Section 8 states only that an employer ". . . shall also pay for rehabilitative efforts when "necessary."

Did you know?

Rule 9110.10 of the Rules Governing Practice Before the Commission **requires** that a written vocational rehabilitation assessment be prepared any time it can reasonably be determined that the injured employee will be unable to return to regular work and/or when they have been totally incapacitated for 365 days. According to the rules, that report thereafter is required to be updated in writing every four months until the case is resolved. The Commission provides a form for this assessment here: https://www2.illinois.gov/sites/iwcc/Documents/ic31FORM.pdf.

In over 35 years of practice before the Commission the author has only rarely seen such an assessment prepared, let alone followed. In fact, this provision is routinely ignored. Since it outlines the expectations of vocational rehabilitation, it is appropriate for us to familiarize ourselves with its provisions. Section 9110.10 states:

Section 9110.10 Vocational Rehabilitation

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.

(Source: Amended at 40 Ill. Reg. 15823, effective November 9, 2016)

Who is responsible for this vocational assessment?

The Commission addressed this issue in the case of *Broner v. Saks 5th Avenue*, 20 IWCC 0187; 2020 Ill. Wrk. Comp. LEXIS 225, in a decision rendered on March 16, 2020. Strangely, the parties in *Broner* did not raise the implementation of this rule at issue at arbitration. The Arbitrator accepted that both the medical evidence and the lack of a tender of a job within the petitioner's permanent restrictions required a vocational rehabilitation assessment under 9110.10. The Arbitrator ordered the respondent to pay for such an initial assessment performed by a counselor **selected by the petitioner**.

Although the parties did not raise the implementation of the rule as an issue at arbitration, the Commission held the Arbitrator's finding appropriate. However, the Commission rejected the Arbitrator's conclusion that the vocational counselor be of the petitioner's choice. The Commission stated, "No such proposition (that the counselor be of the petitioner's choice) is evident from the rule, which requires the contrary. As noted above, **the rule specifically provides that the written assessment be prepared by the employer's vocational rehabilitation counselor.**" The Commission modified the Arbitrator's Decision to provide that the Respondent's vocational rehabilitation counselor shall prepare the written assessment in accordance with Section 9110.10(a) of the Commission Rules.

What is the significance of the *Broner* decision?

Some Petitioners' counsel aggressively assert demands for vocational rehabilitation and insist that the assessment be performed by a counselor of their choice at the respondent's expense. *Broner* stands for the proposition that the employer has a right to retain the counselor who prepares the initial assessment. By extrapolation, respondent may argue that it is not responsible for paying for any assessment prepared at the request of the Petitioner's counsel. *Broner* did not definitively address that issue, but did by implication.

Where vocational rehabilitation is necessary, it would be appropriate for the respondent's counsel to advise Petitioner and/or Petitioner's counsel up front that pursuant to the Rule and this case, the assessment will be prepared by a counselor of Respondent's choice and indicate that Respondent will not be voluntarily paying for an assessment performed at the request of the Petitioner's counsel. If they object, that matter can be litigated.

Is an employee required to request vocational rehabilitation services in order to trigger the requirement under a Section 9110.10 assessment?

The short answer is "No." The rule places no duty on an employee to prepare a written assessment as to the course of appropriate rehabilitation nor is the employee required to formally request vocational rehabilitation from the employer before maintenance may be awarded. Maintenance is payment at the TTD rate paid subsequent to maximum medical improvement and during the time vocational rehabilitation is undertaken.

Is the employer required to advise the Petitioner that vocational rehabilitation is available?

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, but one would assume it should be at a time when rehabilitation to return to work would be appropriately discussed.

Will Petitioners still retain their own vocational counselor?

Petitioner's attorneys will almost certainly continue to retain their own counselors and seek for the employer to pay for those services. They will argue that these services are addressed in Section 8(a) under the employer's responsibility to pay for medical and vocational rehabilitation services. Where the rehabilitation plan process of 9110.10 is properly followed, a strong argument can be made that not only does *Broner* prohibit the Petitioner from seeking payment for their vocational counselor, but that the plan itself requires the cooperation of both parties in a document signed by Petitioner so reflecting. By following the provisions of 9110.10, the petitioner is agreeing to the plan and any costs associated with the retention of their own counselor should be considered unnecessary and superfluous.

When is vocational rehabilitation necessary?

Notwithstanding the provisions of Rule 9110.10, the possibility of vocational rehabilitation should be considered from the outset. Respondent's representatives should always be wary of the possibility that a case with serious injuries could result in a claim of odd lot permanent total disability.

Given the absence of any legislative guidance regarding when vocational rehabilitation is appropriate, the Illinois Supreme Court in the seminal case of *National Tea Company v. Industrial Commission*, 97 Ill. 2d 424 (1983) addressed the issue. *National Tea* established a number of factors to consider when determining if vocational rehabilitation is appropriate:

- relative cost 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
- the ability and motivation of the employee to undertake the program

- whether the employee is "trainable" due to age, education, training and occupation

The Court indicated that these factors are not exclusive and are intended to be flexibly applied. As a practical matter, vocational rehabilitation should be considered in any case where it is apparent that the petitioner will be unable to return to their original job.

A determination must be made whether "successful vocational rehabilitation" means job placement or claims resolution. This is especially important when the petitioner claims a "failed job search," at which point the burden of proof has shifted to the employer to show that there is indeed a reasonably stable market for jobs in the geographic location the petitioner resides within their physical abilities as well as within their age, experience and education.

Where vocational rehabilitation is unavoidable, consider the following:

1. A determination if the petitioner will have permanent restrictions that will prohibit him or her from returning to their original job.
2. Can the employer provide a "real" job within the medical restrictions to the petitioner at or near their pre-injury wage
3. Extend a fair and perhaps slightly generous offer to the petitioner to avoid vocational rehabilitation costs and expedite settlement
4. Retain a vocational specialist for purposes of performing a labor market survey
5. Transmit the labor market survey to the petitioner's attorney and make a lump sum offer based on the labor market survey conclusions
6. Enhanced vocational rehabilitation (where necessary), which could include:
   a) assisting the petitioner in the preparation of resumes and with interviewing skills;
   b) educating the petitioner with respect to job search strategies and provide the petitioner with potential job leads;
   c) where appropriate, perform testing to determine petitioner's capabilities and job skills for use in a transferrable job skills analysis;
   d) regular meetings with the petitioner (often weekly) to review their efforts and provide assignments for the future; and
   e) if absolutely necessary, identify an occupation to which the petitioner is otherwise capable and interested in and determine the cost associated with re-training or even junior college
7. Document non-cooperation and, where appropriate, suspend maintenance benefits

Returning a petitioner to work in any capacity upon completion of medical treatment is essential to reducing overall exposure in a workers' compensation case. In light of recent decisions favoring wage differential awards over other permanency determinations, returning the 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 a significant savings in the claim.

Takeaways

1. The respondent is required to prepare a vocational assessment after it appears an individual is unable to return to their regular job and/or has been off work 365 days.
2. The assessment required by Section 9110.10 of the Act is to be done at the request of and by the vocational counselor chosen **by the**

respondent, not the petitioner. However, be prepared because in this author's experience petitioner's counsel will want to fight you on this issue.

3. Vocational rehabilitation and/or the threat of vocational rehabilitation coupled with an offer under the "carrot and stick" approach can be successfully used to minimize costs and expedite resolution.

Bruce Bonds
bbonds@heylroyster.com
Champaign Office

Bruce is the Managing Partner of the firm's Champaign office and past chair of the firm's statewide Workers' Compensation Practice. He is a frequent speaker on workers' compensation issues at bar association and industry-sponsored seminars and is an Adjunct Professor of law at the University of Illinois College of Law where he has taught Workers' Compensation Law to upper-level students since 1998.

HEYL ROYSTER

REGIONAL ZONE MAPS

Chicago Zone

Contact Attorney:
Brad A. Antonacci
bantonacci@heylroyster.com
Kevin J. Luther
kluther@heylroyster.com
312.971.9807

Zone 6

Dockets Covered:
Elgin • Geneva • Wheaton
Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Zone 5

Dockets Covered:
Rockford • Waukegan • Woodstock
Contact Attorneys:
Kevin J. Luther
kluther@heylroyster.com
Lynsey A. Welch
lwelch@heylroyster.com
815.963.4454

Zone 4

Dockets Covered:
Kankakee • New Lenox • Ottawa
Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Zone 3

Dockets Covered:
Bloomington • Rock Island • Peoria
Contact Attorney:
Dana J. Hughes
dhughes@heylroyster.com
309.676.0400

Zone 2

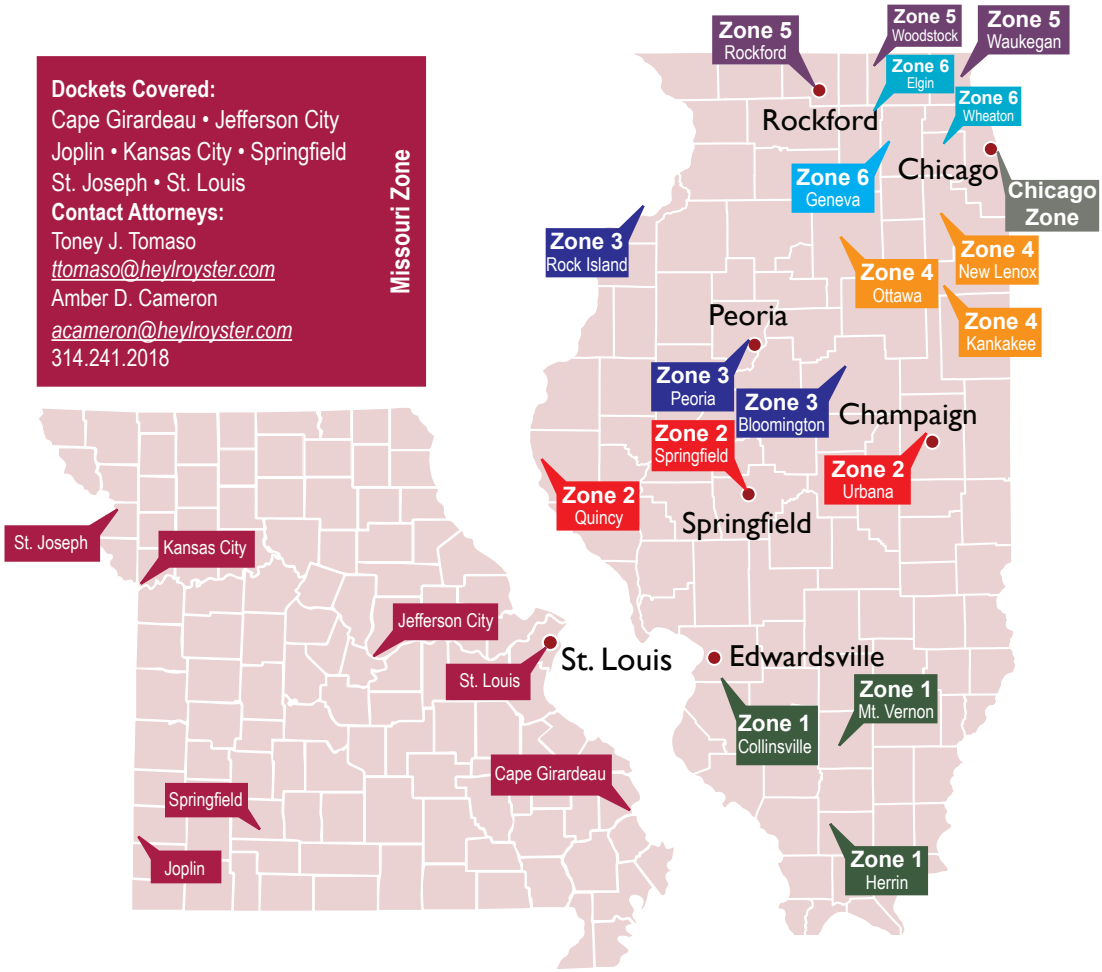
Dockets Covered:
Quincy • Springfield • Urbana
Contact Attorney:
Bruce L. Bonds
bbonds@heylroyster.com
217.344.0060

Zone 1

Dockets Covered:
Collinsville • Herrin • Mt. Vernon
Contact Attorneys:
Toney J. Tomaso
ttomaso@heylroyster.com
618.656.4646

Missouri Zone

Dockets Covered:
Cape Girardeau • Jefferson City
Joplin • Kansas City • Springfield
St. Joseph • St. Louis
Contact Attorneys:
Toney J. Tomaso
ttomaso@heylroyster.com
Amber D. Cameron
acameron@heylroyster.com
314.241.2018



Workers' Compensation Practice Chair

Contact Attorney:
Toney Tomaso - *ttomaso@heylroyster.com*
217-344-0060

Workers' Compensation Appellate

Toney Tomaso - ttomaso@heylroyster.com
Dana J. Hughes - dhughes@heylroyster.com
217-344-0060

State of Wisconsin

Contact Attorney:
Kevin J. Luther - *kluther@heylroyster.com*
815-963-4454

Jones Act Claims

Contact Attorney:
Ann Barron - *abarron@heylroyster.com*
618-656-4646

WORKERS' COMPENSATION OFFICE LOCATIONS

Champaign
301 N. Neil St.
Suite 505
Champaign, IL
61820
217.344.0060

Chicago
33 N. Dearborn St.
Seventh Floor
Chicago, IL
60602
312.853.8700

Edwardsville
105 W. Vandalia St.
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL
62025
618.656.4646

Peoria
300 Hamilton Blvd.
PO Box 6199
Peoria, IL
61601
309.676.0400

Rockford
120 W. State St.
Second Floor
Rockford, IL
61101
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL
62791
217.522.8822

St. Louis
701 Market St.
Peabody Plaza
Suite 1505
St. Louis, MO
63101
314.241.2018

WWW.HEYLROYSTER.COM

WORKERS' COMPENSATION PRACTICE GROUP

Practice Group Chair
Toney Tomaso
ttomaso@heylroyster.com

Champaign Office

Contact Attorney:
Bruce Bonds
bbonds@heylroyster.com

John Flodstrom
jflodstrom@heylroyster.com

Joseph Guyette
jguyette@heylroyster.com

Bradford Peterson
bpeterson@heylroyster.com

Toney Tomaso
ttomaso@heylroyster.com

Chicago Office

Contact Attorney:
Brad Antonacci
bantonacci@heylroyster.com

Kevin Luther
kluther@heylroyster.com

Lynsey Welch
lwelch@heylroyster.com

Reginald Lys
rlys@heylroyster.com

Joseph Rust
jrust@heylroyster.com

Edwardsville Office

Contact Attorney:
Toney Tomaso
ttomaso@heylroyster.com

John Flodstrom
jflodstrom@heylroyster.com

Amber Cameron
acameron@heylroyster.com

Springfield Office

Contact Attorney:
Dan Simmons
dsimmons@heylroyster.com

John Langfelder
jlangfelder@heylroyster.com

Jessica Bell
jbell@heylroyster.com

Peoria Office

Contact Attorney:
Dana Hughes
dhughes@heylroyster.com

Craig Young
cyoung@heylroyster.com

James Manning
jmanning@heylroyster.com

Jessica Bell
jbell@heylroyster.com

Rockford Office

Contact Attorney:
Kevin Luther
kluther@heylroyster.com

Lynsey Welch
lwelch@heylroyster.com

Christopher Drinkwine
cdrinkwine@heylroyster.com

Jordan Emmert
jemmert@heylroyster.com

Wendi Werren
wwerren@heylroyster.com

Adam Rosner
arosner@heylroyster.com

St. Louis Office

Contact Attorneys:
Toney Tomaso
ttomaso@heylroyster.com

Amber Cameron
acameron@heylroyster.com

Jenna Scott
jscott@heylroyster.com

Appellate

Contact Attorney:
Toney Tomaso
ttomaso@heylroyster.com

Dana Hughes
dhughes@heylroyster.com

HEYL ROYSTER

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website **www.heylroyster.com**

Appellate Advocacy
Craig Unrath
cunrath@heylroyster.com

Business and Commercial Litigation
John Heil
jheil@heylroyster.com

Business Organizations & Transactions
Ken Davies
kdavies@heylroyster.com

Casualty/Tort Litigation
Nick Bertschy
nbertschy@heylroyster.com

Civil Rights/Section 1983 & Correctional Healthcare
Keith Fruehling
kfruehling@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Brian Smith
bsmith@heylroyster.com

Governmental
Andy Keyt
akeyt@heylroyster.com

Healthcare
Roger Clayton
rclayton@heylroyster.com

Insurance Services
Patrick Cloud
pcloud@heylroyster.com

Long Term Care/Nursing Homes
Tyler Robinson
trobinson@heylroyster.com

Product Liability
Mark Hansen
mhansen@heylroyster.com

Professional Liability
Renee Monfort
rmonfort@heylroyster.com

Toxic Torts & Asbestos
Kent Plotner
kplotner@heylroyster.com

Trucking/Motor Carrier Litigation
Matt Hefflefinger
mhefflefinger@heylroyster.com

Workers' Compensation
Toney Tomaso
ttomaso@heylroyster.com

Scan this QR Code for more information about our practice groups and attorneys

---

Peoria
300 Hamilton Blvd.
PO Box 6199
Peoria, IL
61601
309.676.0400

Champaign
301 N. Neil St.
Suite 505
Champaign, IL
61820
217.344.0060

Chicago
33 N. Dearborn St.
Seventh Floor
Chicago, IL
60602
312.853.8700

Edwardsville
105 W. Vandalia St.
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL
62025
618.656.4646

Rockford
120 W. State St.
Second Floor
Rockford, IL
61101
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL
62791
217.522.8822

St. Louis
701 Market St.
Peabody Plaza
Suite 1505
St. Louis, MO
63101
314.241.2018

Jackson
1000 Highland
Colony Pkwy.
Suite 5203
Ridgeland, MS
39157
800.642.7471