Judicial Training
April 21, 2022

Vocational Rehabilitation
(Petitioner's Perspective)

Arnold G. Rubin
Rubin Law Group. Ltd.
20 S. Clark Street, Suite 1810
Chicago, Illinois
(312) 899-8333
arubin@rubinlawgroup.com

Judicial Training

Illinois Workers' Compensation Commission

April 21, 2022

I. Introduction

Vocational rehabilitation was not included in the Illinois Workers' Compensation Act until 1975. In 1975, the Workers' Compensation Act underwent significant changes. One of those changes was to include Petitioner's right to receive vocational rehabilitation. However, the legislature did not define vocational rehabilitation. Since there was no formal definition of vocational rehabilitation in the Act, much of the case law dealing with vocational rehabilitation involves the interpretation of the words vocational and rehabilitation. The Appellate Court and Supreme Court have weighed in the definition of vocational rehabilitation. As a result, the Illinois Workers' Compensation Commission enacted rules related to vocational rehabilitation. The rules have been amended one time since they were enacted.

II. Early Case Law

In a trilogy of cases, the Illinois Supreme Court criticized the legislature for not providing guidelines in order to determine when and what type of vocational rehabilitation services should be available to the injured worker and should be paid for by the employer. Those three cases are summarized in an article which was published in the Illinois Trial Lawyers Journal in 1983. The three cases were *Kropp Forge Company v. Industrial Commission*, 225 Ill.App.3d 244, 587 N.E.2d 1095 (1st Dist. 1992), *Hunter Corporation v. Industrial Commission*, 268 Ill.App.3d 1079, 645 N.E.2d 259 (1st Dist. 1994) and *Zenith Company v. Industrial Commission*, 91 Ill2d 278, 437 N.E.2d 628 (1982). Those three cases demonstrated the frustration that the Illinois Supreme Court had for the legislature in not providing clear guidelines. In *Zenith Company*, the Supreme Court stated that "we set aside that portion of the Commission's order here because there appears to be a developing practice to have such orders entered routinely and unnecessarily and because their entry is a potential source of confusion." 91 Ill2d 278.

III. Commission Rule on Vocational Rehabilitation (Part 1)

In 1983, the Illinois Workers' Compensation Commission promulgated Industrial Commission Rule 7110.10. That Rule provided that the initial responsibility for formulating a vocational assessment was placed on Respondent. A written assessment was required by the Rule. The written assessment had to be prepared if it could be reasonably determined that the injured worker would be unable to resume the regular duties which he was engaged at the time of injury. The Rule required that the assessment be completed within 120 days of the date of accident or if it was reasonable determined that Petitioner could not return to his pre-injury employment, whichever came first. This Rule failed to answer basic questions regarding vocational rehabilitation. Specifically, it failed to address 1) what factors are important in preparing a vocational

rehabilitation program; 2) the type of program that was appropriate; and 3) was the injured worker entitled to obtain services of his/her own rehabilitation counselor.

Another issue that arose was whether the Rule was binding on both Petitioner and Respondent. The Illinois Supreme Court addressed this issue in *National Tea Company v. Industrial Commission*, 97 Ill2d 424, 454 N.E.2d 672 (1983). The Court, in dicta, stated "the Rule appears to handle only situations in which the employer and employee agree to a course of rehabilitation." *Id.*

IV. The *National Tea* Guidelines

In *National Tea*, the Court outlined the factors to be considered in determining whether vocational rehabilitation was appropriate. 97 Ill2d 424. The factors included 1) proof that the injury caused reduction in earning power; 2) evidence that rehabilitation would increase earning capacity and restore the employee to his/her previous earning level; 3) the employee's potential loss of job security; 4) the likelihood that the employee would be able to obtain employment upon completion of training; 5) the relative cost and benefits to be derived from the program; 6) the employee's work life expectancy; 7) the employee's ability and motivation to undertake the program; 8) evidence that the employee unsuccessfully underwent similar rehabilitation in the past; 9) evidence that the employee had received training under a prior rehabilitation program that would enable the claimant to resume employment; and 10) whether the employee had sufficient skills to obtain employment without further training or education. *Id.*

V. Choice of Counselor

Although Respondent has the burden to prepare the assessment, Petitioner has the right to obtain his/her own vocational rehabilitation counselor. *See W.B. Olson, Inc. v. Illinois Workers' Compensation Commission*, 2012 IL App (1st) 113129WC, 981 N.E.2d 25 (1st Dist. 2012). In *W.B. Olson, Inc,* two vocational experts testified. *Id.* One expert was retained by Petitioner and the other retained by Respondent. *Id.* The Commission found that the vocational rehabilitation program of Thomas Grzesik, Petitioner's counselor, was appropriate. *Id.* The Appellate Court found that the Commission's decision was not against the manifest weight of the evidence. *Id.* The Appellate Court chose not to address claimant's argument that "as a matter of law, section 8(a) of the Act confers upon claimants the right to select their vocational-rehabilitation provider and precludes employers from dictating that choice." *Id.* The case points out that each side may retain a vocational rehabilitation counselor and that the Commission is not bound by the findings or opinions of the vocational counselor hired by Respondent. *Id.* However, Rule 9110.10 only references a vocational counselor hired by Respondent.

VI. Commission Rule (Part 2)

Eventually, the Workers' Compensation Commission amended the vocational rehabilitation Rule to include Section 9110.10. Under this Rule, the vocational assessment is appropriate, if it is 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. The Rule also states that when the

period of total incapacity for work exceeds 365 days a written assessment must be prepared. A copy of the written assessment is to be provided to the Petitioner and/or his representative. The Rule states that it is the Respondent's vocational rehabilitation counselor who shall prepare the written assessment.

VII. What Triggers Vocational Rehabilitation

A common question that has been consistently asked is at what point should vocational rehabilitation services be provided. In other words, what triggers vocational rehabilitation. This issue has become an area of dispute in the practice today. The issues in front of the Commission that arise from the question of when should vocational rehabilitation services be provided are 1) does the employer have the obligation to offer vocational rehabilitation services if the worker is determined to be unable to return to his former job; 2) if the employee requests a job within restrictions and is advised there is no offer or simply does not respond, does this trigger vocational rehabilitation; and 3) does the employer have the obligation to have a vocational assessment completed pursuant to the current Rule without the injured worker beginning a job search?

A. Analysis of *Euclid v. Illinois Workers' Compensation Commission*

Some Respondents are maintaining that under *Euclid Beverage v. Illinois Workers' Compensation Commission*, 2019 IL App (2d) 180090WC (2d Dist. 2019), it is the responsibility of Petitioner to begin a job search before vocational rehabilitation services are required. In *Euclid Beverage,* Petitioner sustained an injury to his low back. *Id.* He was provided with work restrictions. *Id.* Respondent terminated Petitioner's employment and advised him that no further work within his restrictions would be provided. *Id.* Petitioner then requested vocational rehabilitation services and Respondent declined to provide those services. *Id.* Respondent requested that Petitioner interview for a position of warehouse manager. *Id.* Petitioner testified he was not qualified for the position and did not attend the interview. *Id.*

Petitioner was eventually released to return to work with permanent work restrictions. *Id.* After Petitioner reached maximum medical improvement, Respondent terminated temporary total disability benefits. *Id.* Petitioner did not conduct a job search. *Id.* At the request of Petitioner, a vocational rehabilitation counselor prepared a report and Labor Market Survey. *Id.* The Arbitrator awarded TTD through the date of Petitioner's termination and maintenance benefits through the date of the vocational interview. *Id.* The Arbitrator found that Petitioner was also entitled to receive wage differential benefits. *Id.*

The Commission affirmed the award of temporary total disability benefits and maintenance benefits. *Id.* However, the Commission modified the permanency award and found that Petitioner was permanently and partially disabled to the extent of 40% under Section 8(d)2. *Id.* It further stated that Petitioner's election not to work after being medically cleared to work prevented him from establishing what he is capable or earning in suitable employment. *Id.* The Commission accorded the vocational opinions little weight since they were prepared in anticipation of litigation. *Id.* The Circuit Court confirmed the decision of the Commission regarding permanency, but set aside the award of maintenance benefits because Petitioner did not participate in a vocational

rehabilitation program or perform a self-directed job search. *Id.* The Appellate Court affirmed the decision of the Commission. *Id.* The court held that maintenance was awarded incidental to vocational rehabilitation. *Id.* The Court noted that rehabilitation is not appropriate if Petitioner does not intend to return to work. *Id.* The Court held that vocational rehabilitation was not appropriate because Petitioner never sought employment after being terminated. *Id.* According to the Appellate Court, since Petitioner did not participate in a job search, Respondent's obligation to pay maintenance benefits was not triggered. *Id.*

The Court noted that Petitioner had withdrawn from the labor force and had applied for Social Security Disability benefits. *Id.* Therefore, it concluded that he did not intend to return to work. *Id.*

The question is whether the decision of the Appellate Court in *Euclid Beverage* should be limited to its facts. The decision ignores other factors that should trigger vocational rehabilitation. For example, the Court ignored the Commission's Rule that requires an Respondent's vocational counselor to complete an assessment if it can be reasonably determined that the injured worker is unable to resume regular duties in which he/she was engaged at the time of injury. Based on the Commission's Rule, Respondent should have been required to prepare a written assessment.

The Appellate Court took the position that a written assessment is required in *CDW Corporation v. Illinois Workers' Compensation Commission*, 2021 IL App (2d) 200562WC-U (1st Dist. 2021), an unpublished decision. In *CDW Corporation,* the Appellate Court remanded the case to the Commission for a vocational assessment based on the Commission's Rule. *Id.* The court noted that no written assessment was provided as required by the Commission's Rules. *Id.*

The practice of Respondent placing the burden on Petitioner to begin a self-directed job search on his/her own prior to providing vocational rehabilitation services is contrary to the spirit of Section 8(a). The dicta in *Manis v. Industrial Commission*, 230 Ill.App.3d 657, 595 N.E.2d 158 (1st Dist. 1992) sets forth that a demand for vocational rehabilitation triggers the requirement that Respondent offer vocational counseling to Petitioner.

B. Analysis of *CDW Corporation v. Illinois Workers' Compensation Commission* and Vocational Assessment

In *CDW Corporation,* 2021 IL App (2d) 200562WC-U, Petitioner was employed by Respondent as a picker/packer. *Id.* She came to American from Kosovo as a war refugee. *Id.* Her primary language was Albanian. *Id.* On May 28, 2003, Petitioner sustained an injury to her back when she was pulling some merchandise off a shelf. *Id.* Petitioner underwent medical treatment, including a lumbar fusion performed in 2012. *Id.* Petitioner was released with the permanent restriction of no lifting more than 10 pounds. *Id.* After she was released by her physician, she underwent an FCE on June 23, 2014. *Id.* The FCE revealed that she could lift up to 14.8 pounds and carry 17 pounds. *Id.* Respondent terminated Petitioner's employment on November 6, 2006. *Id.*

Petitioner's vocational rehabilitation counselor opined on March 19, 2015 that there was no reasonably stable labor market for her. *Id.* He based his opinion on the 10-pound lifting restriction, lack of transferable skills, lack of education and poor English. *Id.* He stated that to qualify for vocational rehabilitation, Petitioner would require English courses and computer classes. *Id.* Respondent's vocational expert testified that Petitioner was employable. *Id.* She relied on the work restrictions of the FCE. *Id.*

The Arbitrator found that Petitioner sustained a compensable accident. *Id.* He awarded temporary total disability benefits, payment of medical bills and temporary partial disability benefits. *Id.* He found that Petitioner was permanently and totally disabled. *Id.* The Commission vacated the award of permanent total disability benefits. *Id.* It found that Petitioner was permanently and partially disabled to the extent of 60% loss of use of the person as a whole. *Id.* The circuit court reversed the decision of the Commission regarding permanency. *Id.* It found that the denial of permanent and total disability benefits was against the manifest weight of the evidence. *Id.*

The Appellate Court stated that the Commission's decision denying permanent total disability benefits was not against the manifest weight of the evidence. *Id.* It stated that the opinions of Petitioner's vocational rehabilitation counselor could reasonably be more believable than those of Respondent's expert. *Id.* However, it is not clearly apparent that they were more reasonable. Accordingly, the denial of permanent and total disability benefits was not against the manifest weight of the evidence. *Id.*

The Court noted that both counselors stated that Petitioner would benefit from vocational rehabilitation. *Id.* The court stated that Section 9110.10(a) of the Commission Rules require a vocational assessment where the claimant is not able to return to her regular duties. *Id.* Since Petitioner was not able to return to her regular duties, the court found that a vocational rehabilitation assessment was required. *Id.*

The Appellate Court reversed the portion of the circuit court's decision, which reversed the Commission decision. *Id.* The Court reinstated the Commission's award of permanent partial disability benefits to the extent of 60% loss of use of the person as a whole. *Id.* The Court also remanded the case back to the Commission for a vocational rehabilitation assessment. *Id.* The remand back to the Commission for a vocational assessment implies that Petitioner has a right to receive vocational rehabilitation services without a 19(h) hearing. *Id.*

VIII. Conclusion

Vocational rehabilitation continues to be a significant part of workers' compensation claims. It has broad implications for the resolution of the case. As is illustrated by the case law, there are serious disputes regarding the type of program that are approved, what constitutes compliance, what triggers the need for vocational rehabilitation, and how the Commission Rule fit into the process. In many cases, the practice has strayed from the idealistic language of Professor Larson who stated in his treatise:

> It is too obvious for argument that rehabilitation, where possible, is the most satisfactory disposition of industrial injury cases, from the point of view of the insurer, employer and public as well as the claimant... It is probably no exaggeration to say that in this field lies the greatest single opportunity for significant improvement in the benefits afforded by the workmen's compensation system.

*I have attached two articles previous published in the Illinois Trial Journal which are relevant to our discussion today.

Reviewing the Job Search Requirement in Workers' Compensation Cases: When is a Job Search Really Required

by Arnold G. Rubin

Reprinted with permission from *Trial Journal of the Illinois Trial Lawyers Association*

I. Introduction

Job searches have become intertwined in the process of determining when payment of benefits in workers' compensation claims is appropriate. Many injured employees lose their entitlement to workers' compensation benefits if they do not participate in a job search, or fail to do so in a reasonable manner. A job search requires an injured employee to contact prospective employers to determine if employment is available based upon the employee's age, education, work experience, and work restrictions. The job contact may be by letter, fax, e-mail, telephone or in person. Job searches are either self-directed by the employee, or the job searches are part of a job placement program supervised by a vocational counselor hired by either the injured employee or the employer.

This article will focus upon how job searches impact upon the payment of the following benefits under the Illinois Workers' Compensation Act: 1) temporary total disability benefits, 2) maintenance benefits, 3) wage loss benefits under Section 8(d)1, and 4) permanent disability benefits under the "odd-lot category."

II. Job Searches and Temporary Total Disability Benefits

A typical fact situation which often confronts workers' compensation attorneys involves an injured employee who has sustained a serious injury and, while under active medical care, is advised by the treating doctor that he or she may return to work on a limited-duty or light-duty basis. Many employers do not have light-duty programs and in those situations, the employee is not offered a job by the employer within the work restrictions. At this point, the employee is receiving weekly temporary total disability checks as required under the Act. It has been the position of some unreasonable employers and insurance carriers that, under this scenario, the injured employee must seek alternative employment, despite the fact that the condition of ill-being has not stabilized or reached maximum medical improvement. In some cases, employers suspend temporary total disability benefits if the injured employee does not participate in a job search. The issue, therefore, is whether an injured employee, who is still under active medical care and is released for light duty, must participate in a job search when his employer is unable to offer him light duty employment, in order to be entitled to continued temporary total disability benefits.

Many injured employees lose their entitlement to workers' compensation benefits if they do not participate in a job search, or fail to do so in a reasonable manner.

The Illinois Appellate Court recently resolved this issue in *Freeman United Coal Mining Company v. Industrial Commission.*[1] In the *Freeman* case, the employee injured both knees in an accident that occurred on October 23, 1995. The employer denied the employee's claim for temporary total disability benefits for the periods from October 24, 1995, through December 2, 1996, and from September 3, 1997, through August 21, 1998. Initially, the claim was denied on a causal relationship defense. That issue was resolved in the employee's favor.

However, the employer had an additional argument claiming that temporary total disability benefits were not appropriate for a period of time from October 31, 1997, through August 21, 1998. The employee had a second knee surgery on September 3, 1997, which

ABOUT THE AUTHOR

Arnold G. Rubin, Law Offices of Arnold G. Rubin, Ltd., concentrates his practice in the area of workers' compensation law. He is a member of the Board of Managers of the Illinois Trial Lawyers Association. He is past President of the Workers' Compensation Lawyers Association (1993) and served on the Board of Directors for that organization (1994 through 2001). He has authored various articles for the *Illinois Bar Journal* and the ITLA *Trial Journal*. Mr. Rubin is a graduate of Northwestern University (1975), and received his law degree from IIT-Chicago Kent College of Law (1978).

started the second period of temporary total disability benefits. The employer argued that October 30, 1997, was set as the maximum medical improvement date for the employee's left knee injury. The Commission had found that since September 3, 1997, the date of surgery, the treating physician had not released the employee to return to any type of work and that a total knee replacement was being scheduled. The treating doctor had actually opined that the injured employee should not return to any type of physical work. The employer interpreted this as indicating that the employee could perform light-duty work. The employer argued that the doctor did not indicate that the employee was totally disabled from all types of work and, therefore, temporary total disability benefits should cease as of October 30, 1997. The Illinois Appellate Court held that the employee was entitled to continued payment of temporary total disability benefits for the period of time after the employee was released to perform light-duty work. The court emphasized that the employee's condition of ill-being had not yet reached a state of permanency, since a knee replacement surgery was to be scheduled. The court explained that in determining when temporary total disability benefits were appropriate "the dispositive question is whether the employee's condition had 'stabilized'."[2] The court further stated "the duration of temporary total disability is not defined by whether an employee can find a job somewhere else."[3]

The court rejected an argument advanced by the employer setting forth that the employee has an obligation to seek alternative employment through a job search when released for light duty, yet still under active medical care. The court specifically stated that an argument which focuses on whether an employee is available for work in some other capacity and could and should have sought alternative employment misses the mark in temporary total disability cases.[4] The court again emphasized that the dispositive question is whether the employee's condition has stabilized.[5] The Illinois Appellate Court upheld the finding of temporary total disability from October 31, 1997, through August 21, 1998.[6] The result would have been different had the employee rejected a job offer, by the employer, within his restrictions. That was not the case in *Freeman*.

The court again emphasized that the dispositive question is whether the employee's condition has stabilized.

The finding of the Illinois Appellate Court in *Freeman* is consistent with an earlier decision in *Whitney Productions, Inc. v. Industrial Commission*.[7] In *Whitney*, the employee sustained an injury to his right hand on October 12, 1992, and was unable to perform certain work duties. He was laid-off from his employer at the end of the work week for reasons unrelated to his injury. He did apply for unemployment compensation and began searching for employment as a warehouse manager. Subsequently, on October 29, 1992, the employee was diagnosed with a fracture to his right hand and was advised to restrict his work activities to light-duty with no lifting over 25 pounds. The Commission awarded the employee temporary total disability benefits for 23-6/7 weeks.[8] The Illinois Appellate Court affirmed the Commission finding, which awarded temporary total disability benefits, based on the following rationale: 1) the employee was under active medical care, 2) the employee was under work restrictions, 3) the employee was not provided a job within his restrictions, and 4) the employee had been laid-off by his employer.[9] The court also pointed out that an employee should not be denied compensation merely because he attempted to work as long as he could after the injury. The employee had been working light duty until the layoff.[10] The Illinois Appellate Court did not mandate that the employee perform a job search following the layoff.

The finding of the court in *Whitney* is consistent with an earlier holding of the Illinois Appellate Court in *Ford Motor Company v. Industrial Commission*.[11] In *Ford Motor Company*, the employee sustained an injury to his right ankle on December 5, 1978. He sustained a second injury involving his ankle on June 11, 1980. Following the second accident, the employee was advised to return to work with specific restrictions. Thereafter, a general layoff occurred on June 30, 1980. The employee went back to his regular job on August 25, 1980. The employee did not receive any temporary total disability benefits covering the period from June 30, 1980, through August 25, 1980, the period of the layoff. The Illinois Appellate Court ruled that the employee was entitled to temporary total disability benefits during the layoff period.[12] The court emphasized that neither the ability to do light-duty work nor the non-receipt of medical treatment precludes a finding of temporary total disability.[13]

The Illinois Appellate Court cited with approval the holding in *Ford Motor Company* in the decision of *National Lock Company v. Industrial Commission*.[14] In *National Lock*, the employee sustained four different injuries involving her low back between August 2, 1979, and September 2, 1981. Following the fourth accident, she obtained medical care

that included a surgical procedure performed on her low back. She was released to return to work on July 27, 1982, with a lifting restriction. She actually returned to work within the restriction on September 2, 1982. She continued to work until the date of her layoff, September 12, 1982. The employee was subject to a general layoff. The issue on appeal was whether or not the employee was entitled to temporary total disability benefits following the general layoff in September 1982, because economic conditions had precipitated layoffs rather than the employee's physical condition.[15] The court ruled that the employee was entitled to the payment of temporary total disability benefits during the period of time that she was under a work restriction following the layoff. She was entitled to benefits until April 16, 1983, when the employer offered her a job within her restrictions.[16] In this case, there was no requirement made for the injured employee to seek alternative employment within her restrictions.

If the vocational rehabilitation program is focused on job placement, then the employee must participate in a diligent job search in order to be entitled to receive maintenance benefits.

The Commission recently considered this issue in *Bolstad v. Seven Bridges Country Club.*[17] In *Bolstad,* a beverage cart worker at a country club sustained a fracture of her right lower extremity. During the employee's recovery period, she was released to return to sedentary work. This release occurred prior to reaching maximum medical improvement. The employer did not offer the employee work within her restrictions. In citing from the previously summarized *Freeman* case, the Commission stated that it did not matter whether an employee could or should look for alternative work.[18] The dispositive test in determining an employee's entitlement to temporary total disability is whether the condition had stabilized. Since the employee had not reached maximum medical improvement, temporary total disability was awarded, although she had been given a release for sedentary work during her recovery period.[19]

Similarly, the Commission issued another decision on August 6, 2001, consistent with its finding in *Bolstad.* The Commission confirmed a finding of temporary total disability in the case of *McKinley v. Phillips Getschow Company.*[20] In *McKinley,* the employee was a fifth-year apprentice pipe-fitter. He sustained an injury on June 26, 2000, to his low back. Following the accident of June 26, 2000, the employee sought medical care and it was determined that he had herniated discs at two levels in his low back. The employee was immediately placed under a light-duty restriction on June 29, 2000. He continued working for the employer within the light-duty restriction until he was laid-off on July 20, 2000. Following the layoff, the employee remained under the active medical care of his treating physician. He was also examined by a physician chosen by the employer under Section 12 of the Act. Both doctors agreed that the employee was a candidate for surgery for his low back. At the hearing, the apprentice coordinator for the union testified that an apprentice must be able to perform his full-range of job duties if he is sent out to a job site. He pointed out that it was not the policy of the union to send apprentice pipe-fitters out to work in a light-duty capacity. The Arbitrator awarded the employee temporary total disability benefits from July 20, 2000, through January 5, 2001, the date of Arbitration. The Arbitrator found that the employee's condition of ill-being had not stabilized and that he remained under the active medical care of a treating physician during the temporary total disability period in dispute. The Arbitrator also determined that the employee had performed work in a light-duty capacity for the employer until he was laid-off. The Arbitrator rejected the employer's argument that the worker was obligated to participate in a self-directed job search to obtain alternative employment. The argument was not only rejected by the Arbitrator, but also formed the basis for an award of penalties under Sections 19(k) and 19(l) of the Act.

The Arbitrator held that the conduct of the employer had been unreasonable and vexatious and that the employer had formulated a defense that had no basis under present case law. This award of temporary total disability was affirmed by the Commission. There was a slight modification to the 19(l) award with regard to the number of days upon which the 19(l) penalty was assessed. However, the 19(k) penalty and attorney fees under Section 16 and temporary total disability benefits for 24-1/7 weeks was affirmed.[21]

III. Job Searches and Maintenance Benefits

Section 8(a) of the Workers' Compensation Act sets forth that an injured employee is entitled to receive payment for treatment, instruction, and training necessary for the physical, mental, and vocational rehabilitation, including all maintenance costs and expenses incidental thereto.[22] Maintenance is usually considered to be a payment that an injured employee becomes entitled to following the date determined for maximum medical improvement. Maintenance is normally paid when

the employee is no longer temporarily totally disabled, but is involved in a vocational rehabilitation program. If the vocational rehabilitation program is focused on job placement, then the employee must participate in a diligent job search in order to be entitled to receive maintenance benefits.

The court emphatically stated "maintenance and temporary total disability are separate and distinct benefits."

This principle was established by the Illinois Appellate Court in *Manis v. Industrial Commission.*[23] In *Manis*, the employee sustained an injury on February 8, 1998, involving her left shoulder. She eventually underwent a cervical fusion and was released to return to work with specific work restrictions in August 1998. She was subsequently advised to return to work with no restrictions. However, the employee continued to experience pain and eventually sought additional treatment. On November 7, 1998, the treating physician advised the employee to seek a job not requiring constant motion of the arm, shoulder, and neck. The employee sought recovery of temporary total disability benefits and was awarded benefits for a period of 66-3/7 weeks. The Commission reduced the award to 33-4/7 weeks.[24] The circuit court reversed the Commission and ordered vocational rehabilitation.[25] The appellate court reviewed the issue as to whether the award for temporary total disability benefits was appropriate. The appellate court determined that the statement made by the employee's treating physician, recommending a change of occupation, could imply that the treating physician felt that the condition was permanent.[26] The court determined that since the disability had become permanent, it was no longer temporary. The court held that the employee was not entitled to temporary total disability benefits after November 7, 1998.[27] Since the record was silent on the issue of vocational rehabilitation, apparently not requested by the employee, the court decided not to address whether vocational rehabilitation was appropriate.[28]

Once the condition of ill-being reaches maximum medical improvement, it can be argued that the employee is no longer entitled to receive temporary total disability benefits. Assuming permanent light-duty restrictions and an employer who will not take the employee back to work at his or her former job, then the *Manis* court, *in dicta*, requires that a demand be made by the employee for vocational rehabilitation services in order to sustain an award for maintenance benefits.[29]

If vocational rehabilitation is authorized, and if the employee participates in a vocational rehabilitation program, it appears that the proper designation for the benefits that the employee receives is that of maintenance under Section 8(a), rather than temporary total disability benefits. The maintenance benefit is normally equal to the temporary total disability benefit.

The court in *Freeman* does address the distinction between maintenance benefits and temporary total disability benefits.[30] The *Freeman* court assumed a situation as set forth immediately above in distinguishing between temporary total disability benefits and maintenance benefits. The court explained that there may, indeed, be instances when temporary total disability benefits cease but maintenance benefits for vocational rehabilitation continue.[31] The court explained that entitlement to vocational rehabilitation is established when there has been a reduction of earning power due to an employment-related injury and that vocational rehabilitation will increase the employee's earning capacity. The court further explained that in many cases the fact of the reduction in an employee's earning capacity cannot be established until the nature and extent of the permanent disability is known.[32] Evidence that an employee can be retrained for jobs other than the one he or she was doing when injured does not necessarily establish maximum medical improvement. The court emphatically stated "maintenance and temporary total disability are separate and distinct benefits."[33] Maintenance benefits apply when the employee begins the vocational rehabilitation process.

If the vocational rehabilitation program is focused on job placement, then cooperation in a job search, although not relevant for determining entitlement for temporary total disability benefits, is relevant in determining entitlement to payment of maintenance benefits under Section 8(a). The Commission clearly mandates diligent job searches in order to support a finding that the employee would be entitled to continued maintenance benefits.

In *Williams v. Dartnell Printing,*[34] the Commission held that the employee had performed a diligent job search and was therefore entitled to maintenance benefits under Section 8(a) of the Act. In *Williams*, the employee was 57 years old and had been employed as a paper cutter with the employer for ten years. His job duties required repetitive use of both hands. The employee received treatment for lateral epicondylitis of the right forearm and carpal tunnel syndrome on the right side. The employee was advised that he should limit his work activities to no lifting over ten pounds and no repetitive work activity with his right upper extremity. The Commission ruled in the employee's favor on the issue of medical causal relationship.[35]

The Commission also resolved the is-

sue of temporary total disability and maintenance benefits. The employee remained under the medical care of his treating physician until January 12, 1999. At that time, the employee was provided with new work restrictions of lifting no more than five pounds and no repetitive lifting. The Commission determined that the employee had reached maximum medical improvement as of that date. Following the determination that the employee had reached maximum medical improvement, the Commission awarded the employee maintenance benefits under Section 8(a) of the Act from January 13, 1999, the date after he had reached maximum medical improvement up to the Arbitration hearing.[36] To support the maintenance benefit, the Commission found that the employee had engaged in a "credible job search based on his testimony and medical restrictions."[37] The credible job search included nineteen job attempts in Illinois, twenty job attempts in Louisiana, and contact with his union, which was also assisting in seeking employment for the injured employee within his restrictions. This case should be contrasted with the *Manis* case described above. In *Manis*, there was no evidence of any type of diligent job search following the determination of maximum medical improvement.[38]

A question has arisen in wage loss claims as to whether a diligent job search is required by an employee in order to be entitled to an award for wage differential benefits under Section 8(d)1 of the Act.

In contrast to the *Williams* case cited above, an employee was entitled to temporary total disability benefits or maintenance benefits where the employee did not participate in a diligent job search. There were exceptional circumstances in this case to obviate the need for a diligent job search. This issue was presented in the Illinois Supreme Court case of *Archer Daniels Midland Company v. Industrial Commission.*[39] In this case, the employee sustained an injury to his low back while performing his job duties for the employer. The low back injury prevented the employee from returning to his previous occupation as a turbine operator. The uncontested medical evidence established that the employee's physical restrictions included lifting no more than 30 pounds and limitations with regard to bending, stooping and standing. The employer did not provide the employee a job within the restrictions.

Rather, the employer provided the employee with vocational rehabilitation counseling. The vocational counselor agreed that the employee should be enrolled in a locksmithing correspondence course. The course started in late-May 1985 and was completed in December 1985. After completing the locksmithing course, the employee made no attempt to secure employment. Just before completing the course, the employee stated that he had contacted several possible employers and he was informed that no locksmithing jobs were available. The vocational counselor also testified, based on the particularized market studies and personal knowledge of the labor market, that no jobs were available in this area for the employee. The Illinois Supreme Court pointed out that the employee would generally have the burden of establishing the unavailability of employment to a person in his particular circumstances.[40] The court emphasized that "diligent but unsuccessful attempts to find employment will satisfy this burden."[41] However, under the facts of this case, the court pointed out that the employer only provided the employee with a locksmithing correspondence course. The employer did not offer the employee any appropriate light-duty work and made no showing that other suitable light-duty work, including locksmithing, was available for him.[42]

Under the facts of this case, the Illinois Supreme Court awarded the employee additional temporary total disability benefits. Upon closer review of this case, it appears that the Illinois Supreme Court should have distinguished between temporary total disability benefits and maintenance benefits. The court had pointed out that the injured employee was already under permanent work restrictions.[43] There should have been a finding that the employee had reached maximum medical improvement. Once the employee began the locksmithing correspondence course, maintenance benefits under Section 8(a) should have been awarded to the employee.

A review of cases from the Illinois Appellate Court and Illinois Supreme Court reveals that the courts often use the terms temporary total disability benefits and maintenance benefits interchangeably. However, it does appear that in more recent cases, the Commission, and the Illinois Appellate Court are attempting to distinguish these particular terms. This is especially clear in the *Freeman* case.[44]

IV. Job Searches and Wage Loss Claims Under Section 8(d)1 of the Act

Section 8(d)1 of the Illinois Workers' Compensation Act allows recovery for wage loss differential benefits for injured employees.[45] In this

type of case, the injured employee, due to an injury resulting in permanent work restrictions, is required to change jobs and obtain suitable employment within his restrictions. In the event that a wage loss results, the employee then receives benefits representing a percentage difference between his current earnings and those which he would be able to earn in the previous employment.

A question has arisen in wage loss claims as to whether a diligent job search is required by an employee in order to be entitled to an award for wage differential benefits under Section 8(d)1 of the Act. The Illinois Appellate Court has addressed this issue in wage loss claims, just as the court addressed the applicability of job searches in the temporary total disability setting in the *Freeman* case.[46] The court has arrived at the same result in that it has determined, just as in the temporary total disability setting, that diligent job searches are not necessary in order to support an award under Section 8(d)1 of the Act.

The court specifically considered this issue in the leading case of *Gallianetti v. Industrial Commission.*[47] In *Gallianetti*, the injured employee was working as a tree-trimming crew foreman when he sustained an injury to his left elbow on July 3, 1992. The elbow injury required multiple surgical procedures. The employee underwent a functional capacity evaluation in August 1994, and it was determined that he would be unable to return to his normal job duties as a tree-trimmer. The employer did not offer the employee a job within the restrictions. From September 1994 through September 1995, he contacted several prospective employers regarding employment. The efforts were fruitless. Although, the employer did not offer the employee vocational rehabilitation services, a labor market survey was prepared by the employer's vocational expert. The employee also contacted the employers listed in the labor market survey. He did not obtain a job with any of the employers listed in the labor market survey. However, he did eventually obtain full-time employment earning $5.50 per hour.

The employee sought an award under Section 8(d)1, based on a wage differential claim. The Commission had awarded the employee 60% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act.[48] However, the Illinois Appellate Court held that the Commission was prohibited from awarding a percentage of the person as a whole where the injured employee had presented sufficient evidence to show a loss of earning capacity.[49] The court explained that in proving a wage differential award under 8(d)1, the injured employee must prove partial incapacity that prevents him from pursuing his usual and customary line of employment and an impairment of earnings.[50] The employer argued that the injured employee was not entitled to a wage differential award because he did not secure suitable employment within his restrictions. The employer argued that the job search was "minimal" in both number and geographical scope of employers contacted. The employer also contested the wage differential award since the employee did not provide documentation to support his claims that prospective employers did not have available work for him within the restrictions.[51]

The court rejected the argument of the employer and specifically stated: "There is no affirmative requirement under Section 8(d)1 that an employee even conduct a job search. Rather . . . an employee need only demonstrate an impairment of earnings."[52] The court pointed out that evidence of a job search is but one way to show impairment of earnings.[53] The court concluded that the type of job that the employee could perform was clearly severely restricted. The court commented that the employee regularly inquired about positions that were essentially unskilled jobs. The court also explained that while the employee did not present any physical documentation regarding the job search, he did name all of the employers for which he applied for positions. The employee's testimony was sufficient evidence regarding the nature and extent of the job search.[54] The Illinois Appellate Court held that the employee had demonstrated his entitlement to a wage differential award under Section 8(d)1 of the Act and the case was remanded to the Commission for determination as to the amount of the award, as well as the effective date.[55]

The focus of the analysis in determining "odd-lot permanent total disability" is the degree to which the employee's medical disability impairs his or her employability.

The *Gallianetti* decision is significant in terms of its discussion regarding the relationship of job searches to awards under Section 8(d)1 of the Act. Written, detailed job searches are simply not required to support an award under Section 8(d)1 of the Act. Although the job search may assist in determining whether there is an impairment of earning capacity, there is no specific requirement as to the number of job contacts or manner of job contacts. Once again, this is a require-

ment not necessarily applicable for an award under Section 8(d)1 of the Act.

Thus, just as in the temporary total disability setting, it is clear that a job search is not mandated for entitlement to an award under Section 8(d)1 of the Act. From the employee's perspective, however, it certainly assists a claim under Section 8(d)1 of the Act if the employee has regularly contacted prospective employers prior to accepting a job within the employee's restrictions. The information obtained through a job search may assist in proving the impairment of earning capacity requirement and the suitable employment requirement. However, the absence of a job search, in and of itself, does not preclude an award under Section 8(d)1 of the Act.

V. Job Searches and Permanent Total Disability Benefits

The Illinois Supreme Court set forth the requirements for proving entitlement for permanent total disability benefits in *E.R. Moore Company v. Industrial Commission*.[56] In *E.R. Moore*, the Illinois Supreme Court affirmed the finding of the Commission that the employee was permanently and totally disabled. The Illinois Supreme Court stated that an employee need not be reduced to total, physical, and mental incapacity before total and permanent disability compensation can be awarded.[57] The court further explained that evidence that an employee has been or is able to earn occasional wages or to perform certain useful services neither precludes a finding of total disability nor requires a finding of partial disability.[58] The court explained that an employee is totally disabled when he or she cannot perform any services except for which no reasonably stable labor market exists.[59] It is the *E.R. Moore* case that establishes what is referred to as the "odd-lot category" in permanent total disability claims.[60] The focus of the analysis in determining "odd-lot permanent total disability" is the degree to which the employee's medical disability impairs his or her employability. The Commission must consider the employee's age, experience, training, and capabilities.[61]

According to the court in *E.R. Moore*, it is the employee's initial burden of proving the extent of disability to show that, as a result of the work-related injury, she is unable to perform or obtain regular and continuous employment for which she is qualified. Once the employee has met this burden, the burden then shifts to the employer to come forward with evidence establishing that the employee is capable of engaging in some type of regular and continuous employment.[62] The employee in *E.R. Moore* had testified to submitting applications to two factories and had continued to look for employment within her restrictions. The employee had suffered from a case of general dermatitis and would remain cured as long as she avoided returning to her former employment. The limited job search that was performed by the employee in *E.R. Moore* satisfied the initial burden of proof that the employee was unable to perform or obtain regular or continuous employment for which she was qualified.

The Illinois Supreme Court determined that although the employee could perform certain types of work without endangering her health, under the circumstances of the case, it was incumbent upon the employer to prove not only what jobs these might be, but more importantly, that such jobs were reasonably available to a person in the employee's position.[63] The employer did not meet its burden. The Illinois Supreme Court affirmed the Commission's finding as to permanent total disability.

A different result was reached by the Illinois Appellate Court in a recent case confronting the issue of "odd-lot permanent total disability" and the sufficiency of a job search. In *Alexander v. Industrial Commission*,[64] the Illinois Appellate Court affirmed the Commission finding that the employee had failed to prove that he was permanently and totally disabled because he failed to demonstrate that he fell within the "odd-lot category."[65] In *Alexander*, the employee had sustained a back injury resulting in surgery. A functional capacity evaluation was completed and the employee was released to return to light to medium work. Specifically, the treating doctor released him to return to work with permanent restrictions of lifting no more than 25 pounds and limitations regarding bending, squatting, and repetitive stair climbing. Subsequently, the restrictions were limited further so as to restrict the employee to sedentary work only.

Vocational rehabilitation services were provided to the employee by the employer. The vocational counselor recommended that the injured employee be placed in a machine operator position in a manufacturing setting. The vocational counselor was taking into consideration the employee's lack of education, high pre-injury wage, felony conviction, and "unrealistic expectation of wanting to earn $18.00 per hour."[66] The vocational counselor assisted the employee in preparing a resume. He was also instructed as to how to present himself, and how to fill out applications. He was also provided with job contacts. From February 11, 1994, to May 20, 1994, the employee made 431 job contacts. Most of those he obtained on his own. Job logs were kept and the logs were submitted to the vocational counselor. The employee had received three or four interviews, but no job offers.

He was successful in obtaining employment with the Racine Electric Company in June 1994. However, the job duties were in direct conflict with the doctor's restrictions. The owner of

the company contradicted the employee's testimony relative to whether the job was within the work restrictions. The owner stated that he was aware of the employee's restrictions and advised him to work at his own pace. The employee was eventually laid-off from this job. After the employee ceased employment with the Racine Electric Company, he began his own job search in which he contacted approximately 86 companies. This job search lasted from July/August 1994 to February 1995.

The vocational counselor testified at the Arbitration hearing. The vocational counselor testified that she had reviewed the job contacts made by the employee. The vocational counselor had asked the employee to make 10 to 15 job contacts by telephone and two or three in person each day. The vocational counselor advised that the employee failed to meet those quotas. The employee made approximately five contacts per day. The vocational counselor had contacted some of the employers listed on the employee's log sheets. She stated that there were inconsistencies in the job log sheets and she also criticized the employee for contacting employers for jobs for which he was unqualified. Another vocational expert testified that the employee was not complying with the efforts to secure employment and that the employee was not fulfilling the job search requirements of the vocational counselor. The Arbitrator, who first heard the evidence in this case, found that the employee was not unfit to perform any tasks except for which no stable labor market existed. The Arbitrator found that the employee could perform sedentary work. However, the Arbitrator pointed out that the employee had failed to show the unavailability of work through a diligent but unsuccessful job search.[67] The testimony of the employer's vocational experts was relied on by the Arbitrator. It was determined that the employee's efforts in the job search were deficient. The Arbitrator also reviewed the employee's job search subsequent to the termination of the vocational rehabilitation services. The Arbitrator noted that the employee made contacts with the same companies that were previously contacted when working with the vocational counselor. The Arbitrator specifically stated in the decision: "The facts, taken as a whole, demonstrate that the employee's job search was less than the diligent job search necessary to prove that [the employee] was unemployable as a result of his age, education skills and position."[68] The Arbitrator concluded that the employee did not fall within the "odd-lot category" and instead awarded the employee disability to the person as a whole to the extent of 50%.

The Illinois Appellate Court, in affirming the decision of the Commission, held that an employee may meet his burden of proof in establishing an "odd-lot permanent total disability" by showing: 1) "diligent but unsuccessful attempts to find work," or 2) "that, in light of plaintiff's age, experience, training and education, he is unable to perform any but the most menial tasks, for which no stable labor market exists."[69]

The Illinois Appellate Court also emphasized that the Commission decision was based on the employee's failure to conduct a diligent job search.[70] The Illinois Appellate Court pointed out that the Commission did not find the employee's testimony credible as to the number of contacts that he had made. The court also emphasized that the Commission's decision was based primarily on the insufficient quality and insufficient duration of the employee's contacts, rather than on sheer numbers.[71]

Justice Rarick issued an enlightening concurring and dissenting opinion. He concurred with the decision as to the validity of the Commission's decision, but disagreed with the conclusion as to the permanent total disability finding. His dissenting opinion echoes the frustration of the Petitioner's bar regarding the arbitrary requirements set by vocational counselors.

Justice Rarick specifically criticized the Commission for deferring to a vocational rehabilitation counselor's arbitrary requirements for what constituted a diligent search for work.

Justice Rarick specifically criticized the Commission for deferring to a vocational rehabilitation counselor's arbitrary requirements for what constituted a diligent effort at a job search. Justice Rarick stated: "The Arbitrator simply allowed the employer's vocational expert to determine what was diligent and, in so doing, abrogated her responsibility. Moreover, I do not believe that any rational finder of fact could say that Alexander's job search was inadequate." Justice Rarick emphasized that, in absence of the job search, there was sufficient evidence because of the employee's age, training, education, and experience to support a finding of "odd-lot permanent total disability."[72] Justice Rarick's comments should certainly be useful to any employee's attor-

ney who may question the arbitrary requirements set forth by vocational rehabilitation counselors practicing in the workers' compensation field. Unfortunately, many vocational counselors focus on quantity rather than quality in determining a vocational rehabilitation program.

The finding of the Illinois Appellate Court in *Alexander* is clearly contrasted with the finding of the court in *Reliance Elevator Company v. Industrial Commission.*[73] In *Reliance*, the injured employee was employed as an elevator mechanic. He sustained injuries to his low back and right shoulder on July 27, 1992. He was eventually advised to return to work with specific work restrictions. The employer was unable to provide the injured employee with employment within his restrictions. The employer did provide the employee with assistance in obtaining alternative employment. The employee had requested retraining, but the employer balked and denied that request. Only job placement services were authorized. Under the direction and supervision of the vocational counselor, the employee began a job search. At that point, the services of the vocational counselor were terminated by the employer. The employee continued job search activities from June 1994 up to the date of Arbitration, July 13, 1995. The job search consisted of contacting over 3,600 potential employers by the date of Arbitration. No job offers were provided to the employee. A vocational rehabilitation counselor hired by the employer testified that the employee was not placeable and was not a candidate for retraining. Proofs were closed at Arbitration on September 7, 1995. Between the Arbitration hearing dates, on July 24, 1995, the employer offered the employee a job that provided full pay and benefits. It involved delivering materials, picking materials up, identifying parts and various other light duties. The position was not accepted. The Arbitrator concluded that the job offer was "made solely to avoid liability under the Workers' Compensation Act, and not for the purpose of providing legitimate employment to [the employee]."[74] The Arbitrator also noted that the position that was being offered to the employee was non-union and was normally compensated at $10.00 per hour, yet it was being offered to the employee at full-union wages and benefits, a compensation package in excess of $44.00 per hour. The Arbitrator awarded permanent total disability benefits. This finding was affirmed by the Commission.

The Illinois Appellate Court held that the employee met his burden of establishing his entitlement to an "odd-lot permanent total" under the *E.R. Moore* case.[75] He met his burden by completing "an extensive job search, contacting over 3,600 potential employers."[76] The Illinois Appellate Court also commented on the job offer that was made by the employer. The court determined that the job offer was a sham and designed to circumvent the employer's responsibility under the Act. The Illinois Appellate Court emphasized: "employers must not be allowed to defeat an injured employee's entitlement to a disability award by making sham job offers."[77]

VI. Conclusion

The purpose of this article has been to point out when job searches are required in order for an injured employee to obtain payment of different types of weekly workers' compensation benefits: 1) temporary total disability, 2) maintenance, 3) wage loss, and 4) permanent total disability. After reviewing several cases from the Illinois Supreme Court, Illinois Appellate Court and Illinois Industrial Commission and giving special emphasis to the recent Illinois Appellate Court case of *Freeman v. Industrial Commission,*[78] it appears that job searches are not required in all instances. If an injured employee seeks temporary total disability benefits, there is no requirement for a diligent job search. However, if the injured employee seeks maintenance benefits as part of a vocational rehabilitation program involving job placement, then a reasonable and diligent job search may be appropriate as part of the overall vocational rehabilitation program. Obviously, if the vocational rehabilitation program is education based only, then a job search would not be required in order to be entitled to maintenance benefits. A job search is not necessary in order to be entitled to the wage loss differential benefit under Section 8(d)1 of the Act. However, in establishing an "odd-lot permanent total disability," it may become relevant and a condition precedent in order to establish entitlement to permanent total disability benefits.

*Mr. Rubin acknowledges the research and editing contribution of Cameron B. Clark, an associate with the Law Offices of Arnold G. Rubin, Ltd., in connection with the preparation of this article.

ENDNOTES

[1] *Freeman United Coal Mining Company v. Industrial Commission,* 318 Ill.App.3d 170, 741 N.E.2d 1144 (5th Dist. 2000).

[2] *Id.* at 1150, citing *Manis v. Industrial Commission,* 230 Ill.App.3d at 660, 595 N.E.2d at 160-61 (1st Dist. 1992).

[3] *Id.* at 1151. *See also Sun Chol v. Industrial Commission,* 182 Ill.App.2d 387, 397-99, 695 N.E.2d 862, 867-69 (1998) (A worker in a proceeding under Section 19(b-1) of the Act (820ILCS 305/19(b-

1) (West 1998)) does not have to attach documents to the petition establishing unavailability of employment.)

[4] *Id.* at 1150.

[5] *Id.*

[6] *Id.* at 1152.

[7] *Whitney Productions, Inc. v. Industrial Commission*, 274 Ill.App.3d 28, 653 N.E.2d 965 (2nd Dist. 1995).

[8] *Id.* at 966.

[9] *Id.* at 967.

[10] Id.

[11] *Ford Motor Company v. Industrial Commission*, 126 Ill.App.3d 739, 467 N.E.2d 1018 (1st Dist. 1984).

[12] *Id.* at 1020-21.

[13] *Id.* at 1021.

[14] *National Lock Company v. Industrial Commission*, 166 Ill.App.3d 160, 167, 519 N.E.2d 1172, 1176 (2nd Dist. 1988).

[15] *Id.* at 1176.

[16] *Id.* at 1177.

[17] *Bolstad v. Seven Bridges Country Club*, 01 IIC 0329 (May 2, 2001).

[18] *Id.* at 2.

[19] *Id.* at 3.

[20] *McKinley v. Phillips Getschow Company*, 01 IIC 0590 (August 6, 2001).

[21] *Id.*

[22] 820 ILCS 305/8(a).

[23] *Manis v. Industrial Commission*, 230 Ill.App.3d 657, 595 N.E.2d 158 (1st Dist. 1992).

[24] *Id.* at 160.

[25] *Id.*

[26] *Id.* at 161.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d at 180, 741 N.E.2d at 1152.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Williams v. Dartnell Printing*, 00 IIC 0616 (August 4, 2000).

[35] *Id.* at 4.

[36] *Id.* at 5.

[37] *Id.*

[38] *Manis v. Industrial Commission*, 230 Ill.App.3d at 659, 595 N.E.2d at 160. *See also Stone v. Industrial Commission*, 286 Ill.App.3d 174, 675 N.E.2d 280 (2nd Dist. 1997). (The appellate court affirmed the Commission decision that claimant had failed to reasonably cooperate with vocational rehabilitation and conduct a diligent job search where the claimant did not take any steps to obtain his GED or visit the library to research vocational interests as directed, claimant had forced an interview to be rescheduled due to the fact that he was not given 48 hours notice, claimant went to an interview unshaven and dirty despite having received advice on how to dress and appear; and claimant had first returned to his prior employment four months after having been released to work and then worked for only eight days before quitting.)

[39] *Archer Daniels Midland Company v. Industrial Commission*, 138 Ill.App.2d 107, 561 N.E.2d 623 (1990).

[40] *Id.* at 628.

[41] *Id.* at 629.

[42] *Id.*

[43] *Id.*

[44] *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d at 180, 741 N.E.2d at 1152.

[45] 820 ILCS 305/8(d)1.

[46] *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170, 741 N.E.2d 1144 (5th Dist. 2000).

[47] *Gallianetti v. Industrial Commission*, 315 Ill.App.3d 721, 734 N.E.2d 482 (3rd Dist. 2000).

[48] *Id.* at 487.

[49] *Id.* at 488.

[50] *Id.* at 489.

[51] *Id.* at 490.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 491.

[56] *E.R. Moore Company v. Industrial Commission*, 71 Ill.2d 353, 376 N.E.2d 206 (1978).

[57] *Id.* at 209.

[58] *Id.*

[59] *Id.* at 210.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 211.

[64] *Alexander v. Industrial Commission*, 314 Ill.App.3d 909, 732 N.E.2d 1166 (1st Dist. 2000).

[65] *Id.* at 1172.

[66] *Id.* at 1168.

[67] *Id.* at 1169.

[68] *Id.*

[69] *Id.* at 1171.

[70] *Id.*

[71] *Id.* at 1172.

[72] *Alexander v. Industrial Commission*, 314 Ill.App.3d 909, 919 (Rarick, J., concurring in part and dissenting in part).

[73] *Reliance Elevator Company v. Industrial Commission*, 309 Ill.App.3d 987, 723 N.E.2d 326 (1st Dist. 1999).

[74] *Id.* at 329.

[75] *Id.* at 330.

[76] *Id. See also Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170, 741 N.E.2d 1144.

[77] *Id.* at 331.

[78] *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170, 741 N.E.2d 1144. The court in *Freeman* agreed that one method for determining whether regular and continuous work is available to an employee is to proceed with a diligent job search. This will determine whether the employee is to be considered an "odd-lot permanent total."

This article was published in Summer 2002 and appeared in the
Trial Journal
of the Illinois Trial Lawyers Association.

ARNOLD G. RUBIN, LTD.
100 West Monroe Street, Suite 1710
Chicago, Illinois
(312) 899-8333
(800) 899-5060
FAX (312) 899-8141

AN EVALUATION OF VOCATIONAL REHABILITATION UNDER THE ILLINOIS WORKERS' COMPENSATION ACT

By ARNOLD G. RUBIN

INTRODUCTION

A work-related accident creates various rights and duties between employee and employer. The rights of the injured employee and the duties of the employer are governed by the Illinois Workers' Compensation Act,[1] which is administered by the Illinois Industrial Commission. One of the frontiers for exploration within this statutory scheme for recovery is the right of an injured worker to receive vocational rehabilitation.[2]

The Industrial Commission has been unable to set forth a consistent policy upon which to award injured workers vocational rehabilitation benefits. The adoption of a recent Industrial Commission rule has created many questions regarding the substantive and procedural administration of rehabilitation programs.[3] Recent Industrial Commission decisions on this issue have failed to create a clear body of precedent. No clear guidelines have been set for the institution or administration of rehabilitation programs.

The Illinois Supreme Court has been highly critical of Industrial Commission awards for rehabilitation. The court's criticism may have spurred the Industrial Commission to promulgate the aforementioned rule on the subject of rehabilitation.

The purpose of this article is to summarize those problems presently plaguing the Industrial Commission in the administration of rehabilitation programs. The problems can best be analyzed by reviewing recent cases of the supreme court in this area. The Industrial Commission's response to these problems will then be analyzed. Since it is the author's view that recent attempts to solve these problems have been unsuccessful, it will be suggested that Illinois examine statutes of other jurisdictions in order to formulate a more comprehensive rehabilitation statute.

STATUTORY BASIS FOR REHABILITATION BENEFITS

Section 8(a) of the Illinois Workers' Compensation Act provides injured workers with the right to a rehabilitation program:

> (T)he 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.[4]

The language of the statute is indeed broad since it does not contain any limiting language. The Act does not state when rehabilitation shall be instituted. Nor does it provide any time limits for a rehabilitation program. The Act does not state whether rehabilitation counselors must pass certification procedures in order to be employed in the capacity set forth by the statute. The goal of the rehabilitation program is not stated or suggested. For instance, it is unclear whether the goal should be to return an individual to his former economic level or to any gainful employment. The statute does not indicate whether the employer or the employee may initiate the program.

The statute has created more questions than it has answered. Without providing the Industrial Commission any guidelines, the Commission's decisions have been understandably inconsistent. The supreme court, in its role as a reviewing court, has been critical of awards for rehabilitation where there appears to be an inadequate foundation for such an award. A review of three recent cases from the court will point out the uncertainty confronting employers and employees regarding the supplying and receiving of vocational rehabilitation services.

ILLINOIS SUPREME COURT'S CRITICISM OF REHABILITATION BENEFITS

In three recent decisions, the Illinois Supreme Court has taken forceful steps to encourage the Industrial Commission to act with greater consistency in awarding rehabilitation benefits.

The first decision to comment on an award by the Industrial Commission for vocational rehabilitation benefits was *Kropp Forge Company v. Industrial Commission.*[5] In *Kropp Forge Company v. Industrial Commission,* claimant had been employed as a millwright for respondent for 22 years. As a result of an injury to claimant's leg, he was unable to return to his regular work as a millwright. Respondent gave him a job as a timekeeper. Claimant became extremely nervous and uncomfortable in his new job, and subsequently asked for a leave of absence. Following his return to work, claimant refused to continue his job as timekeeper and was told that no other positions were available.

On arbitration, claimant was awarded payments for temporary total incapacity for a period from the date of accident up until the release for light work. He also received an award for 60% loss of use of the leg. The Commission reversed the arbitrator, holding that claimant's condition had not yet become stable, and awarded temporary total compensation from the accident to

(Continued on Page 36)

ABOUT THE AUTHOR

ARNOLD G. RUBIN is an associate in the Chicago law firm of Anesi, Ozmon, Lewin & Associates, Ltd. He is a graduate of Northwestern University and Illinois Institute of Technology Chicago-Kent College of Law. He has specialized in representing Petitioners in workers' compensation claims. He was admitted to the Illinois Bar in 1978. He is a member of the Illinois Lawyers Association, American Trial Lawyers Association, and Illinois Workers' Compensation Lawyers Association.

WORKERS' COMPENSATION —

(Continued from Page 13)

the date of the hearing. In addition, the Commission ordered Kropp Forge to pay for any necessary vocational rehabilitation of the claimant.

On appeal before the supreme court, the employer argued that the issue of vocational rehabilitation had not been properly presented before the Commission. No foundation existed within the record for the implementation of this award. The supreme court responded that the order was "entirely harmless" and simply incorporated the statutory language requiring the employer to pay for necessary rehabilitation.[6] The court further explained that details of the specific type of training and the extent of the training for which Kropp Forge would be required to pay were left for future determination by the Commission.[7]

In contrast to the holding in *Kropp Forge,* the court reversed an award for vocational rehabilitation in *Hunter Corporation v. Industrial Commission.*[8] Claimant was employed as a pipefitter when he sustained two injuries involving his low back. The duties of a pipefitter were described as requiring substantial physical labor. Following treatment for his low back problems, claimant testified that his doctor instructed him "to get a nonphysical job which would not require him to lift more than 35 pounds or require excessive bending or climbing." He was not released to return to work as a pipefitter. Subsequently, claimant returned to his home in New York where he unsuccessfully applied for a supervisory position in maintenance and other related areas. Thereafter, he applied for admission to a private university for the purpose of completing a college degree so that he could teach pipefitting and plumbing in vocational training courses. Evidence adduced at trial showed that claimant had taught pipefitting once before under a temporary teaching license.[9]

The arbitrator awarded claimant temporary total disability benefits. The Industrial Commission modified the decision to order the employer to pay claimant's university tuition. The circuit court affirmed this decision.

The supreme court held that "the terms of the award for rehabilitation were contrary to the manifest weight of the evidence."[10] The court reasoned that a sufficient foundation had not been laid for this award. The record did not disclose that the college degree was a prerequisite for teaching pipefitting and plumbing. Nor was there evidence as to the number of teaching positions available in the field, given the claimant's age, physical limitations, experience and background. The court also commented that Illinois does not have an established procedure for examining and evaluating individuals by trained medical personnel of the state's compensation board.[11] The court implicitly suggested that such a framework should be set up by the Industrial Commission.

Similarly, the court in *Zenith Company v. Industrial Commission,*[12] was critical of an award by the Industrial Commission for vocational rehabilitation. Claimant was employed as a general maintenance man who had experienced back problems prior to his injury of 1976. He testified that following his most recent work-related back injury, he was treated and released for light-duty work. He was informed by his employer that no light-duty work was available and, thereafter, was laid-off. His only work subsequent to the lay-off was that of operating a hot dog vending truck.[13]

The Industrial Commission held that petitioner's condition had not yet reached a state of permanency and awarded him temporary total disability payments. The Commission also ordered the respondent to pay for mental, physical and vocational rehabilitation of the claimant.

On appeal, the supreme court set aside the aspect of the order pertaining to rehabilitation. The court held:

> We set aside that portion of the Commission's order here because there appears to be a developing practice to have such orders entered routinely and unnecessarily and because their entry is a potential source of confusion.[14]

The court again noted its earlier recommendation that the legislature examine whether rehabilitation counseling and procedures through public or private agencies should be provided to assist the Industrial Commission and the courts.[15]

A review of the above decisions reveals the supreme court's dissatisfaction with the Industrial Commission's administration of the vocational rehabilitation provision of the Act.

THE ILLINOIS INDUSTRIAL COMMISSION'S RESPONSE TO CRITICISM OF VOCATIONAL REHABILITATION RULINGS

The Industrial Commission has attempted to respond to the criticism of its vocational rehabilitation awards. The response has been two-fold: 1) opinions providing reasons upon which awards of rehabilitation are based; and 2) adoption of a new Industrial Commission rule specifically dealing with vocational rehabilitation. The success of the response is questionable.

A. INDUSTRIAL COMMISSION DECISIONS

Section 19(e) of the Act[16] provides, in part, that effective January 1, 1981, all decisions of the Commission are required to set forth in writing the reasons for the decision, including findings of fact and conclusions of law, separately stated. Such decisions are to be regarded as precedent by arbitrators for the purpose of achieving a more uniform administration of the Act.

The Commission has employed the above-stated provisions in order to create a body of precedent within the area of vocational rehabilitation.[17] The Commission has provided several rulings in an attempt to guide arbitrators in determining whether rehabilitation is warranted.

1. Rehabilitation Not Applicable

In *Guzy v. Torrvagg, Inc.,*[18] Petitioner filed a 19(h)[19] and 8(a)[20] petition requesting payment for a vocational rehabilitation program. Petitioner had been employed as a drywall taper. He sustained a work-related injury resulting in a severely fractured left wrist.[21] The arbitrator had previously awarded the petitioner a 45% disability to his non-dominant left hand. That decision has been affirmed on Review.

Subsequently he filed the petition which was the subject matter before the Commission. Petitioner testified that he had not worked within his trade for 15 months. His only work involved helping his son reupholster cars for two to three hours per day. He also expressed an interest in motel management. Petitioner introduced expert vocational testimony indicating that he was a good candidate for rehabilitation and could successfully return to work. A specific program in upholstery was recommended. Other

potential occupations were also discussed. Respondent's vocational expert indicated that petitioner possessed skills which could be transferred to other vocations without training. He agreed that petitioner could not return to work as a drywall taper. After evaluating this expert testimony, the Commission held that petitioner failed to prove he was in need of vocational rehabilitation.

This decision is significant since it provided a reasoned analysis as to why a rehabilitation program was disapproved. A significant criterion was the fact that the petitioner possessed transferable skills that could be employed in other vocations without formal retraining. The rehabilitation program, according to the Commission, must be necessary or reasonable, or return him to the job market.

Similarly, the Commission refused to allow rehabilitation where a petitioner returned to a different type of employment after his work-related accident. In *Overton v. K.L. Spring & Stamping Co.*,[22] petitioner sustained a serious injury to his left hand while working as a hand coiler. Petitioner had experienced psychological problems prior to this incident. Petitioner successfully obtained employment with another company working as a "power blender" subsequent to the accident.[23] The earnings on the new job were commensurate with his prior employer's wages for hand coilers. Petitioner also testified he was taking college courses in chemistry. Based on these facts a request for vocational retraining was denied. A key fact evidently relied upon by the Commission was that petitioner had obtained other employment.

It appears that the possession of transferable skills and/or the ability to find other employment are key facts relied upon by the Commission in deciding upon the feasibility of a rehabilitation program.

2. Petitioner's Responsibility to Cooperate in Rehabilitation Process

The Act does not specifically state whether an injured employee must cooperate with a rehabilitation program provided by an employer. The Commission has attempted to confront this issue on a case-by-case basis.

The Commission has refused to allow rehabilitation to be invoked by respondents in order to defeat a claim for total permanent disability. In *Pinkard v. Handy Andy et al.*,[24] petitioner sustained an injury to his right hand resulting in an amputation of two fingers and limited sensation in the other fingers. Petitioner was unable to use his right hand for any useful activities. Petitioner moved from Illinois to Virginia to live with family members and was unsuccessful in obtaining employment. Petitioner was 43 years old with a fifth grade education who had difficulty with reading and mathematics. A request by respondent for a rehabilitation consultation was refused by petitioner and her attorney. The Commission awarded petitioner a permenant total disability.[25] However, the Commission held that respondent was entitled to petitioner's good faith cooperation through at least the evaluation process.

Significantly, the Commission held that the condition had reached a state of permanency despite the lack of cooperation by petitioner in the rehabilitation process. The underlying rationale of the decision was that the Industrial Commission did not feel that petitioner was a candidate for rehabilitation.

In contrast to this decision the Commission was critical of a petitioner who failed to cooperate with a rehabilitation counselor in *Sibert v. Bel-O Heating*.[26] In *Sibert*, petitioner sustained a left shoulder injury preventing him from returning to work as a sheet metal worker. A rehabilitation counselor was hired by the insurance carrier. Efforts at achieving success in the program were thwarted by petitioner's attorney who prohibited direct contact with his client. The Commission awarded petitioner a total permanent disability.[27] However, a period of temporary total disability was disallowed for the period of time for which petitioner failed to cooperate with the rehabilitation counselor.

3. Awards for Rehabilitation are Supported

In *Hinrichs v. Care Management, Inc.*,[28] the Commission held that a rehabilitation program was warranted. Certain factors were pointed out which indicated preconditions for the institution of a program: 1) unsuccessful attempts by the employee in obtaining a job; 2) ability of the employee to obtain temporary work only; 3) the employee was receiving active medical care. The goal of the vocational program was to return the injured employee to the same economic condition as prior to the accident.

Similarly, in *Sibert v. Illinois Veterans Home*,[29] Petitioner attempted to return to work on a light duty job following an accident. She was refused employment by the company. The Commission held that the case should be remanded pursuant to *Hunter*[30] to determine what vocational rehabilitation and training or other services are necessary to return petitioner to the same economic condition as prior to the accident. The record on arbitration was obviously inadequate in terms of providing a proper foundation for a rehabilitation award.

In analyzing the above precedent-setting decisions it is clear that the Commission has become cautious in awarding these benefits. A proper foundation must be met by either side in order to support its position relative to the issue of rehabilitation entitlement. In contrast to this case-by-case analysis, the Commission has promulgated a rule which it hopes will provide a consistent basis upon which vocational rehabilitation benefits will be awarded.

B. INDUSTRIAL COMMISSION RULE

Section 16 of the Act provides the Commission with the authority to publish procedural rules and orders for carrying out the duties imposed upon it by law.[31] In an effort to more effectively respond to the goals of Section 8(a), the Commission promulgated Vocational Rehabilitation Rule No. 11-(1).[32] This rule, which became effective on July 1, 1982, is the first attempt to provide some guidance for the administration of vocational rehabilitation programs under the Act.

The new rule places the initial burden for formulating a vocational assessment, plan or program upon the employer. The written assessment required by the rule must be prepared in the following instances: 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 was engaged at the time of injury; or when the period of total incapacity for work exceeds 120 continuous days, *whichever occurs first.*

The rule further provides for updates of the assessment reports to be made every four months. The written updates are simply intended to determine if prior determinations relating to the feasibility of a plan or program are still appropriate.

These written assessments are to be provided to the employer and/or his representative. They need not be filed with the Commission; however, the rule provides that the written assessments shall be made available for review by the Industrial Commission on its own request until the matter is terminated.

Certain problems become apparent upon a close analysis of the rule. First, the party responsible for the preparation of the vocational assessment is the employer. No provision is contained within this rule to allow an employee to institute a rehabilitation assessment. This inadequacy of the rule creates serious doubts as to its validity.

As previously stated, the Act provides the Commission with authority to publish rules necessary to carry out its duties. However, it is doubtful that the rule may be used for the purpose of creating new rights and duties between parties. The right to vocational rehabilitation is contained within Secion 8(a) of the Act. Within this Section the employee is given free choices of medical, surgical, and hospital services, with the limitation that the employer must pay for the initial service provider and second service provider.[33]

The free choice of medical services contained within Section 8 (a) implicitly grants an employee the right to obtain his or her own rehabilitation counselor for the purpose of preparing a vocational assessment. This right is denied to an injured employee under the present language of Rule 11-(1).

Under the present rule an employee must, at his own expense, obtain an opinion from a rehabilitation expert if he does not agree with the findings and suggestions of the rehabilitation counselor selected by the employer. An employee would have no other procedure available to defeat a rehabilitation program which would not have the best interest of the employee protected.

Unfortunately, an employer or insurance carrier may select an unqualified or uncertified rehabilitation counselor to prepare a written assessment. No provisions are contained within the rule for providing a list of certified or accepted rehabilitation counselors. Justice would demand that an employee be allowed to select, on his own, a rehabilitation counselor from an approved list since the employer is allowed to begin the rehabilitation process without any restrictions.

The rule provides for rehabilitation assessments to be forwarded to an employee and/or his representative. As a practical matter, it is difficult to enforce this rule since no sanctions are indicated for the failure to forward this medical report. If the employee chooses not to cooperate until the reports are sent, he risks being terminated from temporary total disability benefits. The employee and his representative are placed in a difficult situation. Certainly, the employee's attorney could proceed before an arbitrator or commissioner to demand production of these documents. If this is required then perhaps the attorney should be compensated through an award for fees.[34]

The rule also states that the implicit goal of vocational rehabilitation is to "return the injured worker to employment." This language is obviously vague. It does not provide any guidelines indicating whether the goal should be to return the employee to his pre-injury economic status.[35] It also does not state whether an employer would automatically be responsible under the wage-replacement provision of the statute to supplement the employee's salary if he obtained a job at wages significantly lower than wages prior to the injury.[36]

An examination of the rehabilitation rule reveals major flaws: 1) employee does not have free choice of a rehabilitation consultant; 2) no qualifications or certification procedure is suggested for selected consultants; 3) no sanctions are provided for the failure of the consultant to forward reports to the employee and/or his representative; and 4) the goal of the program is vague by stating *only* that the employee should return to employment. The rule, as adopted by the Commission, provides certain duties upon an employer. The common problem contained throughout its provisions is that few specific rights are provided for the employee. Where rights are provided, no specific rules assuring enforcement are deliniated.

The proper forum for determining the substantive rights of those involved in the rehabilitation process is the legislature, not an Industrial Commission rule. An examination of statutes from other states will provide a basis upon which Section 8(a) may be amended.

REHABILITATION STATUTES OF OTHER JURISDICTIONS

Many jurisdictions recognize that from the moment of injury forward, rehabilitation is affected by the ability of the compensation administrative system to maintain surveillance of the case.[37] Specific areas of concern include: 1) the extent to which vocational rehabilitation and placement service are made available to the employee; 2) the extent to which the termination of benefits provides incentives or disincentives to the rehabilitation process. An examination of these statutory provisions from other jurisdictions may provide guidelines upon which Section 8(a) may be amended.

A. AVAILABILITY AND IMPLEMENTATION OF PROGRAM

The availability of rehabilitation is affected by which party may institute the program, when the program may be instituted, and by controls which are placed upon the qualifications of rehabilitation counselors.

Some states provide a mechanism within their rehabilitation statute so that an employee may invoke his right to proceed in a rehabilitation program. The Illinois Industrial Commission rule is silent on this point.

For instance, the Maine rehabilitation provision states than an employee is entitled to reasonable and proper rehabilitation service when it appears necessary in order to restore the injured employee to gainful employment.[38] Further provisions suggest that the program may be arranged through consultation with other governmental agencies. However, if this provision is read in conjunction with an earlier paragraph of the statute allowing the employee the right to choose medical care, then the employee may also have the right to choose a rehabilitation counselor.

In contrast to the above statute, Alabama implies within its statute that the employer has the initial election to place an employee within a rehabilitation program.[39] However, the statute also provides that an employee has the right

to institute his own program, the cost of which service is the employer's obligation. However, it is necessary for the employee to obtain favorable opinions from his treating physician and a vocational rehabilitation specialist.[40]

The New Hampshire rehabilitation provision similarly implies that the employer or insurance carrier has the initial burden for providing rehabilitation services, including retraining and job placement.[41] When these services are not voluntarily offered and accepted, an informal hearing, where all parties are represented, may be instituted to resolve the dispute regarding the necessity of a rehabilitation program.[42]

The actual implementation of a program may occur at various stages of the individual's recovery. Mutual interests of disabled employees and employers generally favor starting rehabilitation as soon as possible. Yet, many statutes do not dictate that vocational rehabilitation must begin immediately following a serious injury. Some states provide that a program should not be instituted unless the employee is unable to perform work for which he has training.[43] Wisconsin provides that a program should be instituted within sixty days from the date upon which the worker has recovered from his injury.[44] Another criterion, applied in Florida, is whether the employee is unable to earn wages equal to those earned prior to the injury.[45] In that situation, a rehabilitation program would be instituted.

These statutory provisions acknowledge that the implementation of a program should be flexible. It should be based on the facts of each case. The 120 day rule invoked in Illinois,[46] which is patently inflexible, certainly creates an automatic economic burden upon an employer and may in fact discourage an employee in his recovery.[47]

After it is determined that a program will be instituted, the question of the competency of the rehabilitation specialist may be called into question. Some states provide lists of qualified specialists to be used in the rehabilitation process. Minnesota provides an approved list of consultants for employers who are required to supply rehabilitation services.[48] New Hampshire created, within the workmen's compensation division, a staff of vocational and physical rehabilitation personnel in order to carry out provisions dealing with the delivery of these services.[49] Michigan provides within its statute that, if services are not voluntarily offered and accepted, the director of the Commission may refer the employee to a bureau-approved facility for evaluation of the need for treatment and training.[50]

One of the more detailed statutes confronting the issue of qualifications is that of Kentucky.[51] A rehabilitation panel was specifically created. Its duties include consultation with the compensation board for the purpose of accrediting facilities, institutions and physicians, as capable of rendering competent rehabilitation services to seriously injured employees. The statute specifically states:

> No facility or institution shall be considered as qualified unless it is specifically equipped to provide rehabilitation services for persons suffering either from some specialized type of disability or general type of disability within the field of occupational injury and is staffed with trained and qualified personnel. . .[52]

The rehabilitation panel in Kentucky is instructed to continuously study the problems of rehabilitation in conjunction with its expressly stated duties.

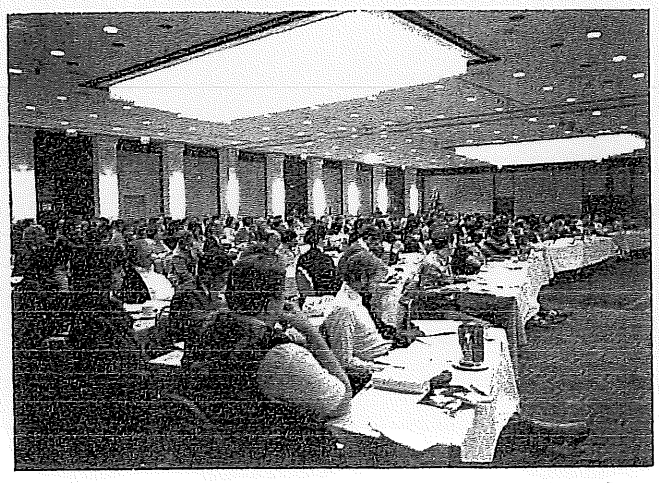
The statutory provisions cited above provide organization to the rehabilitation process. Injured workers and their employers are instructed as to their respective rights to present a rehabilitation plan. The time as to when the program is to begin is stated. Finally, the competency of personnel employed within the process is safeguarded by providing lists of qualified personnel.

B. TERMINATION OF WEEKLY COMPENSATION BENEFITS

After a rehabilitation program has been formulated, the cooperation between the rehabilitation counselor and the injured employee is of considerable significance. This cooperation is necessary for the program to have any chance for success.

In many jurisdictions, the incentives applied by compensation laws to cause the employee to cooperate in rehabilitation take the form of the stick, as well as the carrot. The least subtle of these incentives is to refuse benefits to a claimant who refuses rehabilitation. Some provisions expressly state that any refusal of rehabilitation benefits will result in a loss of compensation benefits.[53] Other statutes provide that benefits will be suspended only where the refusal is unreasonable or not justifiable.[54] In contrast to those statutes which terminate all benefits, two statutes allow for a 50% reduction in compensation benefits

Presiding Judge Brian L. Crowe, Judge of the Circuit Court of Cook County, and ITLA member Jim Costello of Chicago as a witness, during the Trial Demonstration at the December 4, 1982 ITLA seminar.



Attendees at the ITLA Successful Trial Tactics and Techniques Seminar, Westin Hotel, Chicago.

when there is a refusal to participate in the rehabilitation program.[55] Where a statute was silent on the issue of termination of benefits following a refusal to cooperate in rehabilitation, one court has determined that termination of benefits was improper. In *Kalevas v. J.H. Williams & Company*,[56] an employee sustained a disability due to a dermatitis condition of both hands. The employee, who was formerly a machine operator, refused to take a rehabilitation course for retraining as a dental technician. The question presented on appeal was whether he was entitled to an award for compensation for approximately nine months, despite the fact that he refused to cooperate in the recommended rehabilitation program. The employer alleged that the refusal and failure impeded the employee's return to gainful employment. The Workmen's Compensation Board rendered a decision awarding compensation benefits to the claimant. The appellate court affirmed the Board and held that the "legislature had not required submission to rehabilitation as a condition for an award and that no reason had been advanced for judicial adoption of such a requirement."[57] The Court of Appeals of New York affirmed the appellate court decision.

This decision recognizes that rehabilitation programs are not to be followed blindly. An employee does not have an absolute obligation to participate in a rehabilitation program where the statute is silent on the issue of termination or suspension of benefits.

Surely, some incentive may be necessary to obtain the cooperation of an employee in a rehabilitation program. However, the equitable approach to this issue would include a statutory provision that allows for a continuation of benefits until there is a determination as to whether the refusal to cooperate was unreasonable. If it was determined that compensation was overpaid it could then be credited in the award for permanency.

The statutory provisions stated above provide a basis upon which Illinois may amend its rehabilitation statute.

A SUGGESTION FOR CHANGES IN SECTION 8(a)

After reviewing statutory provisions from other jurisdictions it is clear that Section 8(a) is inadequate to handle the multitude of issues relative to the proper administration of vocational rehabilitation. Vocational Rule 11-(1) has created more questions than it has answered and also may actually go beyond its statutory power by affecting the substantive rights of the parties.

In formulating a vocational rehabilitation statute, the legislature should heed the advice of Professor Larson, who has stated:

> Within the compensation system itself, at the minimum there should be an administrative system under which the administrators are charged not merely with settling disputes, but with following and supervising every detail of the treatment, rehabilitation and placement of the injured workman from the moment of injury forward.[58]

In light of Professor Larson's direc-

tive the following are suggesions that may be included in a legislative amendment to Section 8(a):

1. The stated goal of vocational rehabilitation should be to return the injured employee to the same economic condition as prior to the accident.
2. An employee who sustains a serious injury should be entitled to a vocational rehabilitation evaluation within sixty days from the date upon which he has recovered from his injury. If the employee is determined to be unable to perform work for which he has training, then a program of rehabilitation should be instituted.
3. The employee should have the right to select his own rehabilitation counselor at the expense of the employer. The employer also has the right to have the injured worker evaluated by a rehabilitation counselor. If a dispute arises as to the appropriateness of a program, then a special proceeding to reconcile the problem should be instituted by the Industrial Commission.
4. A Rehabilitation Panel should be created which shall be composed of a Director, Medical Director, and specialists in medical and vocational rehabilitation personnel. The Panel should resolve disputes between employer and employee relating to the institution of a particular vocational program.[59] Furthermore, this Panel should set forth a certification procedure for establishing minimum qualifications for rehabilitation personnel.
5. An employee who refuses to cooperate in a rehabilitation program should not be entitled to compensation, if such refusal is unreasonable. If it is decided that the refusal was reasonable, then compensation payments may be reinstated.
6. Vocational rehabilitation training, treatment or service should not extend for a period of more than 52 weeks, except by special order of the Director the period may be extended for an additional 52 weeks.[60]
7. When a vocational rehabilitation program succeeds in obtaining alternative employment for the injured worker, the employer must insure that earnings will be kept at the compensation benefit level. This will be accomplished through a wage replacement provision.[61] This rule will continue to be in effect while the matter is pending before the Commission.

CONCLUSION

This article has pointed out the shortcomings of the Illinois rehabilitation provisions contained within the Workers' Compensation Act and Industrial Commission Vocational Rule. The criticism of Industrial Commission decisions by the Illinois Supreme Court has failed to produce the changes which are necessary to properly administer vocational rehabilitation programs. After reviewing statutory provisions from other jurisdictions it is suggested that Illinois amend its Act so as to incorporate the changes suggested above. Professor Larson has stated:

> It is too obvious for argument that rehabilitation, where possible, is the most satisfactory disposition of industrial injury cases, from the point of view of the insurer, employer and public as well as the claimant... It is probably no exaggeration to say that in this field lies the greatest single opportunity for significant improvement in the benefits afforded by the workmen's compensation system.[62]

The Illinois legislature should respond to this challenge in order to comply with the suggestion of the Illinois Supreme Court relating to the administration of vocational rehabilitation program.

**The author wishes to acknowledge Craig Chval, 2nd year law student at Illinois Institute of Technology Chicago - Kent College of Law for his assistance in the research of this article.*

FOOTNOTES

1. Ill. Rev. Stat. ch. 48, Section 138.1 - 172(g) (1981), hereinafter referred to as the Act.
2. Ill. Rev. Stat. ch. 48, Section 138(a).
3. Ill. Admin. Reg., Rule No. 11 - (1), adopted July 1, 1982. (Illinois Industrial Commission).
4. Ill. Rev. Stat. ch. 48, Section 138.8(a).
5. 85 Ill. 2d 226, 422 N.E. 2d 613 (1981).
6. 85 Ill. 2d at 228, 422 N.E. 2d at 615.
7. *Id.*
8. 86 Ill. 2d 489, 427 N.E. 2d 1247 (1981).
9. 86 Ill. 2d at 495, 427 N.E. 2d at 1249.
10. 86 Ill. 2d at 499, 427 N.E. 2d at 1252.
11. 86 Ill. 2d at 498, 427 N.E. 2d at 1251.
12. 91 Ill. 2d 278, 437 N.E. 2d 628 (1982).
13. 91 Ill. 2d at 281, 437 N.E. 2d at 630.
14. 91 Ill. 2d at 285, 437 N.E. 2d at 633.
15. *Id.*
16. Ill. Rev. Stat. ch. 48, Section 138.19(e).
17. The Industrial Commission decisions, which have been published since 1981, explore all issues relative to workers' compensation claims. For a survey of the impact that these decisions have had on practice before the Commission, *see Schur, A Survey of Published Opinions of the Illinois Industrial Commission,* 64 Chi. Bar Record 189 (1982).
18. 82 IIC 307.
19. Ill. Rev. Stat. ch. 48, Section 138.19(h), (increase in disability).
20. Ill. Rev. Stat. Ch. 48, Section 138.8(a). (vocational rehabilitation).
21. Petitioner also claimed that he sustained a low back injury; however, he was not compensated for a back injury.
22. 82 IIC 480.
23. This job involved the use of a hoist or wheel truck in order to put the contents of a 500 pound drum of material into a blender. The job also involved lifting of a 10 - 20 pound basket with his right hand.
24. 82 IIC 133.
25. In arriving at this decision, the Commission relied on the reasoning of the Illinois Supreme Court in Springfield Park District v. Industrial Commission, 49 Ill. 2d 67, 273 N.E. 2d 376 (1971).
26. 82 IIC 448.
27. The Commission stressed that respondent was not barred from further proceedings under Section 8(f) showing petitioner had returned to his employment or had become an appropriate candidate for rehabilitation program under Section 8(a).
28. 82 IIC 87. This decision is also interesting in that it discussed maintenance costs, which are beyond the scope of this article. The Commission pointed out that the Act does not define "maintenance costs" incidental to such rehabilitation. Since there was no proof that petitioner required more or less than the amount of temporary total disability benefits for maintenance at the hearing, the Commission did not award an additional amount for maintenance.
29. 82 IIC 176.
30. *See,* text accompanying notes 8 - 11, supra.
31. Ill. Rev. Stat. ch. 48, Section 138.16.
32. Ill. Admin. Reg. Rule No. 11 - (1), adopted July 1, 1982. (Illinois Industrial Commission).
33. Ill. Rev. Stat. ch. 48, Section 138.8(a) (2), (3). This limitation on medical services was enacted as part of the September 15, 1980 amendments to the Act.
34. *But cf.,* Childress v. Industrial Commission, No. 55593 (Illinois Supreme Court, filed September 1982) (The court refused to allow an award for attorney's fees where there had been an unreasonable and vexatious delay in the payment of medical bills.)
35. However, the Industrial Commission has ruled that this is the goal of vocational rehabilitation. *See, infra* text accompany note 28.
36. Ill. Rev. Stat. ch. 48, Section 138.8(d) 1. This provision states that an employee who becomes incapacitated from pursuing his usual and and customary line of employment, shall in some cases be entitled to 66 2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in which he was engaged at the time of accident and the average amount which he is earning after the accident. The amount of benefits is limited by paragraph (b). For a discussion of recovery of benefits under 8(d) 1 as opposed to the scheduled awards under 8(e), *see* General Electric Company v. Industrial Commission, 89 Ill. 2d 432, 433 N.E. 2d 671 (1982).

37. *See* A. Larson, Workmen's Compensation Law, Section 61.20, Appendix B, Table 14 (1974); *See, also* U.S. Chamber of Commerce, Analysis of Workers' Compensation Law (1982) (this publication briefly summarizes rehabilitation provisions contained within each state's workers' compensation acts).

38. Me. Rev. Stat. Ann., tit. 39, Section 52 (1979).

39. Ala. Code Section 25-5-77 (1975).

40. Ala. Code Section 25-5-77 (c).

41. N.H. Rev. Stat. Ann. Section 281: 21-b (1978).

42. N.H. Rev. Stat. Ann. Section 281: 21-b (I-II).

43. N.H. Rev. Stat. Ann. Section 281: 21-b (I) (1978); Ky. Rev. Stat. Section 342-710 (1978).

44. Wis. Stat. Section 102.61 (1967).

45. Fla. Stat. Section 440.49 (1) (a) (1979).

46. Vocational Rule No. 11-(1) specifically requires that a vocational assessment must occur within 120 days of period of total incapacity for work.

47. An employer must incur the costs of obtaining a vocational rehabilitation consultant when the employee may actually be able to return to his former type of work. An employee may misunderstand the utilization of rehabilitation at this stage of recovery. It may delay his recovery if he believes he may not be able to return to his employment. In summary, the assessment seems to be premature so early in the recovery stage when an individual is often under active medical care.

48. Minn. Stat. Ann. Section 176.102, 129A.03 (West 1978, Pocket Part).

49. N.H. Rev. Stat. Ann. Section 281: 21-b (VI).

50. Mich. Comp. Laws Section 17.237 (319.(1)) (1969).

51. Ky. Rev. Stat. Section 342. 710 (2) (1978).

52. *Id.*

53. Ala. Code Section 25-5-77(d), Vt. Stat. Ann. tit. 21, Section 641(b) (1981), Mont. Code Ann. Section 39-71-1005(3) (1979).

54. Del. Code Ann. tit. 19, Section 2325 (1974); Md. Ann. Code, art. 101, Section 36(9) (f) (1968).

55. Fla. Stat. Section 440.49 (1) (d); Ky. Rev. Stat. Section 342.710. (5).

56. 231 N.E. 2d 290, 284 N.Y.S. 2d 704 (1967).

57. 231 N.E. 2d at 291,284 N.Y.S. 2d at

58. A. Larson, Workmen's Compensation Law, Section 61.20.

59. *Id.* at note 25, where Professor Larson cites the principal section on rehabilitation in the Council of State Governments' Draft.

60. *Id.* This suggestion for 52 weeks goes farther than the 26 weeks suggested in the draft. Maine provides within its statute for a 52 week program with 2 extensions of 52 weeks possible, Me. Rev. Stat. Ann., tit. 39, Section 52.

61. *See infra* note 36.

62. A. Larson Workmen's Compensation Law, Section 61.20.

CONTINGENT FEE —

(Continued from Page 15)

guage in the original contract required only success at the trial level but the court held that reasonable construction of the contract should not require the contingency payment upon an unsuccessful appeal because the fees are generally paid out of recovery for the client. It was in this context that the Illinois courts adopted the language "a contingent fee contract is always subject to the supervision of the court as to its reasonableness".

Ironically, another case relied upon by the Seventh Circuit in its affirmance of Judge Grady's fee reduction was a case in which Judge Grady actively participated in as an attorney. *Warner v. Basten*[17] involved an action to enforce a 25% contingent fee contract entered into by a minor plaintiff and his attorney, Charles May. Mr. May had the case for three weeks before he was discharged by the minor's father as plaintiff's counsel for possible conflicts of interest.[18] Mr. May's services at that point amounted to no more than hiring an investigator, a meeting with the plaintiff and the dictation of a complaint. The office of Fritzshall & Fritzshall of Chicago was then retained by the plaintiff who later filed the complaint, completed all discovery, and negotiated a $45,000.00 settlement on a $50,000 policy. However, the trial court in Waukegan awarded the 25% fee to the local Mr. May in accordance with the original contract, giving nothing to Fritzshall & Fritzshall.

Fritzshall & Fritzshall appealed this fee distribution and Mr. May retained then attorney John F. Grady to champion Mr. May's rights pursuant to the original contingent fee contract. In *Warner*, the Second District Appellate Court held that Mr. May was entitled to the entire amount of the contract even though his contribution toward the recovery was minimal. The court, consistent with the brief filed by Grady, stressed that even though the injured party was a minor, this does not invalidate the contract and a client owes the duty to be fair, reasonable and abide by his contingent fee contract. Finally, the court pointed out the practical effects of the contingent fee contract itself in that it gives the attorney a pecuniary interest in the successful prosecution of the litigation. Mr. Grady's successful representation of Charles May's contingent contract resulted in quite a windfall for Mr. May, despite his minimal effort towards the case. Strangely, between *Warner* and *Rosquist*, Judge Grady has come about a full one hundred and eighty degrees on the question of the validity of a contingent fee contract.

Illinois Circuit Court's have devised a procedure for determining whether an attorneys' fee is excessive which clearly avoids the problem which arose in *Rosquist*. When an Illinois circuit court judge believes there has been an excessive fee in an attorney - client agreement, he is duty bound to report the matter to the Ethics Committee of the Illinois Bar. Rule 2-106(a) of the Illinois Code of Professional Responsibility specifically provides that:

> (A) a lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee.

If the fee is found to be unconscionable, the attorney is subject to action by the Attorney Registration and Disciplinary Commission.[19] No Illinois court would reduce a one-third contingent fee to 14.5% for no other reason than a judge's personal opinion as to the value of services performed by counsel. One can only conclude that Judge Grady and the Seventh Circuit never really considered nor cared how an Illinois circuit court would decide the question of attorneys' fees. This certainly is a strange way for the Federal system to apply the *Erie* Doctrine.

Judge Grady, again ignoring the Illinois procedure in the post-*Rosquist* case of *U.S. v. Vague*[20], compelled a criminal Defendant's attorney to return part of the fee that the attorney collected from the Defendant, on the ground that the fee was exhorbitant. This time, however, Judge Grady was reversed with the Seventh Circuit, stating:

> . . . it is a mistake to graft into a lawsuit an issue that the Judge is neither asked nor required to resolve. That not only makes federal litigation more complicated than it already is but casts the judge in the role of a prosecutor when there is the simple alternative of reference to an ethics committee.

A different Seventh Circuit panel distinguished *Rosquist* from *U.S. v. Vague* because in Rosquist, it was not the judge who objected to the fee but the Guardian Ad Litem and the creditors of Mr. Rosquist. The *U.S. v. Vague* court reasoned that even though neither the father nor the Defendant in *Rosquist* had objected to the fee, other parties to the litigation - the children represented by the Guardian Ad Litem and the creditors - had objected and were asserting a concrete financial interest in reducing the fee.

In *Rosquist*, no one objected to the plaintiff's counsel's fees, including the Guardian Ad Litem, until Judge Grady made it obvious that he was not going to recognize the contingent fee contract.