MONEY WELL SPENT: YOUR DEFENSE ATTORNEY AND YOUR VOCATIONAL SPECIALIST

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
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Section 8(a) of the Illinois Workers’ Compensation Act provides that in addition to medical treatment the employer “shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto.” Pursuant to that section, the Industrial Commission has promulgated Ill. Admin. Code, Title 50, ch. II, § 7110.10 (1983) outlining the requirements of vocational rehabilitation. They are attached as “Addendum A” to this section.

The requirement of developing a written claim within 120 days of the injury is seldom followed in practice. However, the Illinois Workers’ Compensation Commission recently held Rule 7110.10 is a mandate, not a suggestion. Belice v. Mayfield Transfer, 07 I.W.C.C. 0169.

I. WHEN SHOULD VOCATIONAL REHABILITATION FIRST BE EXPLORED?

Section 6(d) requires that the employee be advised by his employer of his right to rehabilitation services and advise him of the locations of available public rehabilitation centers and any other such services of which he has knowledge.

Industrial Commission Rule § 7110.10 (Ill. Admin. Code, Title 50, ch. II, § 7110.10 (1983)) requires that a vocational rehab plan be written if petitioner’s total incapacity for work exceeds 120 days, or when it can reasonably be determined that the injured worker will be unable to resume the regular duties in which he was injured, whichever first occurs.

II. GUIDELINES FOR IMPLEMENTATION OF REHABILITATION

The seminal case on vocational rehabilitation in the State of Illinois is National Tea Co. v. Industrial Comm’n, 97 Ill. 2d 424, 454 N.E.2d 672, 73 Ill. Dec. 575 (1983). National Tea sets out the following criteria for consideration in formulating a rehabilitation plan:

A. Established Factors Regarding Rehabilitation

- Relative costs and benefits to be derived from the program.
- Employee’s work life expectancy.
- Ability and motivation of employee to undertake program.
- Employee’s injury has reduced his earning capacity. (This is the most typical reason for institution of a vocational rehabilitation plan.)
- Evidence that rehabilitation will increase employee’s earning power.
- Likelihood of obtaining employment upon completion of the program.
- Unsuccessful previous rehabilitation programs undertaken by the employee.
• Employee’s existing skills which might enable him to obtain employment without more training or education.
• Designed to restore employee to pre-injury earnings.
• Is not to be applied inflexibly.

B. Additional Factor for Rehabilitation


III. PETITIONER’S RIGHTS UNDER VOCATIONAL REHABILITATION

• Petitioner has the right to vocational rehabilitation as interpreted by National Tea at the employer’s expense. Section 8(a).

• Petitioner has the right to choose his own counselor, although they seldom do. Avenarius v. Consolidated Freightways, 86 IIC 1498; 820 ILCS 305/8(a).

• Petitioner is arguably not restricted to the limitations on the chain of referrals in the selection of a vocational rehabilitation specialist. Section 8(a)(3) states in part:

This paragraph shall not affect the duty to pay for rehabilitation referred to above.

• Most respondents would take the position, however, that the limitations do apply.

• Petitioner has a right to temporary total disability compensation during the rehabilitation program. National Tea Co. v. Industrial Comm’n, 97 Ill. 2d 424, 454 N.E.2d 672, 73 Ill. Dec. 575 (1983); Connell v. Industrial Comm’n, 170 Ill. App. 3d 49, 523 N.E.2d 1265, 120 Ill. Dec. 354 (1st Dist. 1988); Avenarius v. Consolidated Freightways, 86 IIC 1498; 820 ILCS 305/8(a).

• Petitioner has a right to receive a copy of his rehabilitation reports prepared by the respondent’s rehabilitation counselor.

• Petitioner has a right to avail himself of the extraordinary procedures and remedies provisions of sections 19(b) and 19(b-1), and can seek penalties under section 19(k)(1) and attorneys’ fees under section 16 for failure to provide a vocational rehabilitation plan. Archer Daniels Midland Co. v. Industrial Comm’n, 174 Ill. App. 3d 918, 529 N.E.2d 237, 124 Ill. Dec. 417 (3d Dist. 1988), rev’d in part, 138 Ill. 2d 107, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990); Howlett’s Tree Service v. Industrial Comm’n of Illinois, 160 Ill. App. 3d 190, 513 N.E.2d 82, 111 Ill. Dec. 836 (2d Dist. 1987).

• The duty of the rehabilitation vendor is to the employee, not the respondent. *Fricker v. Jewel Food Stores*, 97 I.W.C.C. 2170.

### IV. RESPONDENT’S RIGHTS DURING VOCATIONAL REHABILITATION

• Respondent has the right to nominate the initial vocational rehabilitation consultant pursuant to sections 8(a) and 6(d).


Additionally, section 19(d) may provide an additional basis for a suspension of temporary total disability for non-cooperation. Section 19(d) states in part:

> If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee.

Arguably, however, the respondent must institute a proceeding to suspend benefits rather than simply terminate them. In practice, they are most commonly simply terminated.

*Hayden v. Industrial Comm’n*, 214 Ill. App. 3d 749, 574 N.E.2d 99, 158 Ill. Dec. 305 (1st Dist. 1991), has upheld the respondent’s unilateral termination of temporary total disability on the basis that the petitioner did not cooperate with efforts to place him in another job. In *Hayden*, the petitioner, an ironworker, sustained a back injury that prevented him for returning to his regular job. Temporary total disability was paid while the respondent attempted to place the petitioner in another job. A welding job became available, but the petitioner declined to accept the job because he thought it would be boring and it paid less than his job as an ironworker. Respondent declined temporary total disability for non-cooperation and the Appellate Court upheld this termination.

V. RECENT STATUTORY CHANGES

The amendments to the Workers’ Compensation Act effective February 1, 2006 amended section 8(a) of the Act to provide that any vocational rehabilitation counselor who provides services under the Act shall have appropriate certifications that designate he or she is qualified to render opinions relating to vocational rehabilitation.

VI. VOCATIONAL REHABILITATION IN A DIFFICULT ECONOMY

A. Selection of a Rehabilitation Counselor

With the recent economic downturn, vocational rehabilitation will probably become more important than in the past. Many employers will have fewer alternative positions to which an injured worker can return. Other employers will be hiring fewer people, and more selective in the people whom they do hire, resulting in fewer alternative positions in the job market for those workers displaced from their jobs. Thus, the selection of a vocational rehabilitation vendor will be more important than ever.

While there is no formula for the selection of a proper vocational rehabilitation counselor, the following criteria should be considered:

- It is important to choose a vendor with whom you have had past success. Success can mean successful job placement, or successful claim resolution. It is important to choose a vendor who will make a diligent effort to place the petitioner in alternative employment. It is also important to choose a vendor who, if the petitioner does not make a good faith job search, will be candid in their assessment of that job search and willing to testify against petitioner if necessary.

- It is important to choose a vendor with credibility with the arbitrator before whom the claim will ultimately be presented. That determination is not always easy to make. Check with your defense attorney or other claims adjusters for persons known to have good credibility with the arbitrator. It is important that the vocational vendor be viewed by the arbitrator as a person whose objective was to place the petitioner in an alternative employment, and failed only because of petitioner’s non-cooperation.

- When possible, it is good to have a vocational vendor based in petitioner’s job search area. Such vendors are likely to know the job market better, are likely to have more immediate knowledge of job openings, and are available to keep the pressure on the petitioners to be diligent in their job search.
• It is also important to choose a vocational vendor who will be available at the time of trial. Too often out-of-town or out-of-state vendors find it inconvenient to make trial appearances. Testimony at trial is a critical part of the service which can be offered by a vendor in any unsuccessful job search program.

• It is important to choose a vocational vendor with good credibility and job experience. As noted above, it is helpful if the vendor has had experience testifying at trial.

B. Vocational Rehabilitation Needs Should Be Determined Early

As noted above, in the poor economy, it is more and more likely that injured workers will not have jobs to which to return. Thus, there is an increased probability of vocational rehabilitation being needed. Those acting on behalf of employers should make the determination of the probable need for vocational rehabilitation as early as possible. Too often employers wait for maximum medical improvement before considering vocational rehabilitation. As noted above, Rule 7110.10 requires that a plan be developed as quickly as it can be reasonably determined that the injured worker will be unable to resume regular duties, or when the period of total incapacity of work exceeds 120 days, whichever first occurs.

There are many cases in which such determination can be easily made early on. In those cases, it is to the employer’s benefit to initiate vocational rehab early. Typically, maintenance must be paid during a vocational rehabilitation program. With early determination of the need for vocational rehabilitation, maintenance costs can be reduced as the vocational rehabilitation can occur during the period of petitioner’s temporary total disability. In other words, while petitioner is drawing temporary total disability and recovering from his injury, he can be undergoing the rehabilitation process.

Much of the testing and training necessary for any rehabilitation program can occur early in the process. If a person needs a GED, the GED requirements can be fulfilled while the petitioner is temporarily totally disabled. Further, early initiation of a vocational rehabilitation program can force the petitioner to do something while in the recovery mode rather than simply drawing a temporary total disability check for doing nothing.
Section 7110.10 Vocational Rehabilitation

a) The employer or his representative, in consultation with the injured employee and, if represented, with his representative, shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs.

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

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

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

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

Ill. Admin. Code, Title 50, ch. II § 7110.10 (1983)
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Gary has spent his entire legal career with Heyl Royster beginning in 1975 in the Springfield office. Born in Mt. Erie, Illinois, Gary became a partner with the firm in 1981.

He has handled a wide range of cases, including workers’ compensation, medical malpractice, products liability, automobile, construction accidents, and coverage issues.

Gary concentrates his practice in the area of workers’ compensation and employment law. He has made presentations for the Law Ed Seminars of the Illinois State Bar Association, and has frequently spoken to management and insurance audiences on workers’ compensation and risk management. He regularly counsels self-insureds on their unique problems, offering experience and insight for implementing successful programs. He currently supervises the workers’ compensation practice group in Heyl Royster’s Springfield office.

Gary has been designated one of the “Leading Lawyers” in Illinois as a result of a survey of Illinois attorneys conducted by the Chicago Daily Law Record, a designation awarded to only the top five percent of lawyers in the state.

Public Speaking
- “Repetitive Trauma - The Defenses are in the Details” Heyl Royster 2008
- “Investigating and Resolving the Death Case” Heyl Royster 2007
- “Cumulative Trauma Disorders and Job Site Analysis: Minimizing Risk in the Workplace and the Courts” Midwest Rehabilitation 2008
- “Penalties, Penalties, and More Penalties: The Changes to Section 19 and Strategies for Minimizing Penalty Exposure” Heyl Royster 2006
- “The Illinois Workers’ Compensation Reform Act 2005” CorVel Corporation 2005
- “Top Ten Things Every Employer Should Know About Workers’ Compensation” Illinois Land Improvement Contractors Association 2006
- “Trade-Offs in Claims Management” Hortica Insurance 2006
- “Top Ten Things Every Employer Should Know About Workers’ Compensation” Gateway Rehabilitation Workers’ Compensation Spring Conference 2007

Professional Recognition
- Martindale-Hubbell AV Rated.
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.

Professional Associations
- Workers’ Compensation Lawyers’ Association
- American Bar Association
- Illinois State Bar Association (past member Workers’ Compensation Section Council)
- Sangamon County Bar Association

Court Admissions
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- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit

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