Workers’ Compensation:
Vocational Rehabilitation Overview

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1) Purpose of Vocational Rehabilitation

a) True Purpose: To return Petitioner to productive employment through reasonable effort.

b) False purpose: Gamesmanship to mask the desires by either or both parties to avoid the effort and expense.

i) If Petitioner does not want to return to work the effort will not likely be successful and benefits will be suspended.

ii) If Respondent does not want to provide vocational assistance, the goals of vocational rehabilitation are nearly impossible to implement.

2) Authority

a) Prior to 2005 neither the Act nor the Commission Rules adequately addressed the issue of whether vocational rehabilitation was appropriate and, if so, the nature of the rehabilitation. The Supreme Court helped fill the void by listing factors to consider in determining appropriate vocational rehabilitation.

i) Initially, in Hunter Corporation v. Industrial Commission 86 Ill.2d 489 (1981) the Court addressed an unfortunate fact pattern:

(1) A pipe fitter could no longer perform his work in his ordinary occupation. He had been a journeyman pipe fitter for 30 years but could not return to his regular work because of the injury. The Respondent declined to continue to employ him. The Petitioner thereafter sent out more than 100 resumes and had 12 job interviews but no offers of employment. Clearly he needed some vocational assistance but at issue was what kind of rehabilitation. Petitioner sought a college education to teach pipefitting and plumbing. He presented, though, no evidence that the degree he sought was a qualification for the teaching position he planned on. Furthermore, he had failed academically in his exam for a license to teach. Finally there was no evidence that a teaching position would be available were he to have finished the degree he proposed. The Court found, then, that the Petitioner did qualify for rehabilitation under the Workers’ Compensation Law but not for the particular type of rehabilitation he sought. The Court felt that the nature of the rehabilitation should not be “based on the wish of a claimant”. Furthermore, it found the fact that he had left the State of Illinois to return to his home in New York had no bearing on whether he was entitled to rehabilitation.

(2) In effect, the Petitioner must present a reasonable goal and an appropriate plan to get to that goal. The vocational rehabilitation he seeks must actually qualify him for the stated goal. He must show that he has an
ability to complete the rehabilitation plan he proposes. He must show that there is a likelihood that the vocational training will result in actual employment “given the claimant’s age, physical limitations, experience, and background”.

ii) In National Tea Company v. Industrial Commission 97 Ill. App. 2nd 424 (1983) the Supreme Court considered what has become a recurrent fact pattern. The Petitioner had worked as a meat cutter for 20 years but, because of his injury, could not resume that employment. He had diligently sought alternative employment without success. Both his physician and a rehabilitation counselor determined that he would benefit from vocational rehabilitation. The Court determined what factors to consider in approving or rejecting a particular plan and identified these:

(1) Whether a claimant has sustained an injury which caused reduction in earning capacity or job security.
(2) Whether there is evidence that rehabilitation will increase his earning capacity or job security.
(3) Whether there is a likelihood that he will obtain employment upon completion of the requested training.
(4) Whether he has failed similar treatment in the past.
(5) Whether he was “trainable” considering his age, education, training, and occupation.
(6) Whether he has sufficient skills to find employment without the requested training or education.
(7) Whether a cost benefit analysis determines that the costs and benefits derived from the program justify the cost. Considerations include his work life expectancy and his ability and motivation to undertake the program.

iii) No demand for 7110 is necessary. See Roper 349 Ill. App. 3d 500 (2004).

b) In 1983 the Commission Rules were amended to include Section 7110.10. The Rule notes that the employer shall prepare a written assessment of rehabilitation if appropriate. While the Rule continually uses the word “shall” as opposed to “may” as a practical matter, it is seldom enforced. The rehabilitation plan “shall” be prepared on a form furnished by the Commission. Copies of that form and of the Rule itself are attached. It is most affective when all parties agree.

c) The Act
i) In 2005 the legislature gave more direction in expanding Section 8(a). Section 8(a) requires the employer to pay for necessary vocational rehabilitation including maintenance costs and expenses incidental thereto. It requires that vocational rehabilitation counselors have “appropriate” certifications. It notes that vocational rehabilitation may include, but is not limited to, “counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution.” An employee is to be paid maintenance during the vocational rehabilitation. The amount is not less than the temporary total disability rate and includes the cost of expenses incidental to a vocational rehabilitation program. Additionally, the Petitioner is entitled to temporary partial benefits if working light duty and earning less than he would if working full capacity. Temporary partial is two-thirds the difference between the average amount the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the net amount which he is earning in his modified job.

ii) Section 6(d) requires the employer to notify any injured employees of his rights to rehabilitation services as well as the location of available public rehabilitation centers and any other such services of which the employer has knowledge.

3) Nature of Rehabilitation Awarded

a) As stated above, Section 8(a) states that vocational rehabilitation may include, and is not limited to counseling for job services, supervising a job search program and vocational retraining including education at an accredited learning institution.

b) The Rehabilitation Maybe Self Directed

i) See *Roper Contracting v. Industrial Commission*, 349 Ill. App. 3d, 500, 812 N.E. 2d 65 (5th Dist. 2004) wherein the Appellate Court noted that there is nothing “prohibiting claimant-created and directed vocational rehabilitation”.

ii) The Commission followed *Roper* in *Krolkowski v. Acme Steel Co.*, 2004 WL 2832089, 04 I.I.C. 0695 where a claimant who used sources available to him to find work, i.e. the newspaper, a trade industry business index, and a computer was considered to have made a good job search. He also visited union job fairs, and “drove the streets” to obtain names of businesses. He visited various retailers. His activities trumped the vocational counselor’s claim that he could’ve earned $9.00 to $10.00 an hour “immediately”. The Commission noted that the vocational counselor’s opinions did not square with the abysmal results of the claimant’s job search.
c) Training or schooling may be allowed. There are limits to the extent of retraining the Commission will allow. For example, it has approved a college education but declined to award further training to become a licensed CPA. The college education would help the Petitioner to achieve his earlier financial condition; the CPA license would have allowed him to exceed it.


ii) See Howlett’s Tree Service 160 Ill. App. 3d (1987)

d) The vocational plan must be tailored to the individual. A person with mental health issues and learning disabilities may require particular attention. See Belice v. Mayfield Transfer 07 IIC 0169.

4) What Payments a Vocational Effort Affects

a) Maintenance after MMI

b) 8(d)1 Awards through demonstrating what is “suitable” alternative work

c) Temporary Partial Awards pursuant to Section 8(a) of the Act

d) Total Permanent Disability Awards by establishing Petitioner’s inability to find alternative work

i) See Mathew v. State of Illinois/Chicago Read Mental Health Center 04 I.I.C. 0581, 93 IL.W.C. 22458, 96 IL.W.C. 8523 (2005 Addendum, Chapter 11, p. 8). In Mathew, the Petitioner had done his part by conducting a valid, but unsuccessful job search. The attempt created a rebuttable presumption that there was no reasonably stable labor market for the claimant. The employer failed to prove that a reasonable stable market existed for the claimant. Petitioner was therefore found permanently and totally disabled pursuant to Section 8(f) of the Act. The Commission addressed the employer’s affirmative obligation to provide a vocational rehabilitation assessment and any vocational rehabilitation indicated by such an assessment.

ii) See also Waldorf Corp. v. Industrial Commission, 303 Ill. App. 3d 477, 484 (1999). If the Petitioner documents a diligent but unsuccessful attempt to find work, he may have met his burden of proving that he will not be regularly employed in a well-known branch of the labor market. After he presents such proof, the Respondent has the burden of production but not persuasion. It must produce evidence that the claimant is employable in a stable labor market and that such a market exists.

iii) In Allen Lemme v. Monterey Coal Company for example, the injured worker finished treating for his low back and thereafter began his own job search. He
made 307 contacts in an effort to find employment. The Arbitrator found that the Petitioner acted in good faith and engaged in a diligent effort to find alternative work although no such work was forthcoming. He was awarded total permanent disability.

iv) In *Lorbiecki v. P.R. Streich & Sons* 12 IWCC 0927 the Petitioner, a 61 year old journeyman pipe fitter was found capable of performing work at a medium physical demand level. The Petitioner requested vocational rehabilitation. The Respondent did not provide it. Petitioner began his own job search and contacted over 50 employers. He declined a job selling cars on commission but otherwise found no work. He hired a vocational rehabilitation counselor who testified there was no stable labor market for a person with Petitioner’s circumstances. She felt the car salesman position was inappropriate because it paid commission only and the Petitioner had no experience in sales. The Respondent provided a labor market survey on the second day of trial; its vocational representative concluded that the Petitioner could earn between $12.00 and $13.00 an hour. The Respondent claimed that the Petitioner’s job search of only 6 to 7 months was inadequate. The Commission found that Petitioner’s efforts had shifted the burden to the Respondent to show both that he was employable in a stable labor market and that such market exists. It pointed out that no rehabilitation assistance was provided, only opinions. The Commission ruled that the Respondent failed to meet its burden whereupon the Commission determined the Petitioner was unemployable.

5) Petitioner’s Obligations

a) Petitioner must make a “good faith effort.” In *Archer Daniels’s Midland v. Industrial Commission* 138 Ill. 2d 107, 561 N. E. 2d 623 (1990) the Appellate Court, Third District, discussed whether a Petitioner whose cooperation with a retaliation effort was questionable, was still entitled to maintenance. The Court noted that “an analogous provision in the Act gives the Commission the discretion to reduce or suspend compensation either when a claimant persists in unsanitary or injurious practices which tend to imperil or retard his recovery or when he refuses to submit to…treatment which is reasonably essential to promote his recovery”. The Court concluded that conduct injurious to one’s vocational rehabilitation was analogous to conduct injurious to one’s physical treatment plan. The Court found that, “an employee participating in a rehabilitation program is required to reasonably cooperate in his rehabilitation” or lose his maintenance.

b) In order to qualify for a particular retraining plan, there must be evidence, such as the opinion of a rehabilitation expert, that the plan will be effective.

i) See *Lukey v. State of Illinois* 96 I.I.C. 1187 where an employee’s choice of retraining was denied.
ii) Similarly in Stickles v. Daily Racing Form 97 I.I.C. 324 the Commission noted that there was insufficient evidence that training to be a card dealer would prepare the Petitioner for new work. Conversely, the Commission felt that the new job (as a card dealer) was “suitable” in making an 8(d)(1) award.

iii) The Petitioner should articulate a plan to improve his chances of being entitled to vocational benefits. See Milos v. Hyman Freightways 99 I.I.C. 0993.

iv) Petitioner should follow his dream. In Hartley v. State of Illinois, Illinois State University 12 IWCC 0787 the injured worker had searched for jobs without success following his injury. He therefore began attending college classes at Lincoln Land Community College. The Respondent offered no vocational assistance at all. The Petitioner completed his associate’s degree at Lincoln earning a 4.0 grade average. Arbitrator White awarded the Petitioner benefits while he pursued a Bachelor of Fine Arts degree at Southern Illinois University at Edwardsville. There was sufficient evidence that the Petitioner’s efforts were serious and his endeavor likely would be successful. He had already enrolled in a four year program. He found a part time light duty job in an office. He researched the demand for the profession that he sought. The Petitioner provided the exact cost of tuition for the completion of his bachelor’s degree ($25,752.65) and the cost of other university fees ($8,034.65). The Arbitrator found that the Petitioner had sustained an injury which caused a reduction in earning power; that he was trainable; that rehabilitation would increase his earning capacity and that he would be able to find appropriate employment after the training ended.

c) The Petitioner’s vocational effort may be less than ideal. For example, in O’Toole v. Jewel (Ill. W.C. Comm. 2007) the Petitioner did not attend a job fair as was suggested by the rehabilitation counselor. The Commission reviewed the Petitioner’s overall participation with the rehabilitation effort, though, and found it adequate.

d) There is no certain number of job contacts necessary to qualify a Petitioner for continued rehabilitation benefits.

i) Several of the local arbitrators will find that a six month search with at least one hundred potential employers is adequate to show that a person made a good faith effort.

ii) On the other hand, in Connell v. Industrial Commission 170 Ill App 3d 49 (1988) the Court, followed the National Tea standards, found that 71 job contacts was adequate.

e) The initiation of a job search effort maybe suspended until the Petitioner knows whether the Respondent will or will not take him back, particularly if the Respondent is still paying group benefits.
f) Petitioner need not hide his restrictions from prospective employers. In *Bubak v. Murman Construction Co.* 02 I.I.C. 0891 (2002) the Commission found that the Petitioner’s “brutal honesty” with prospective employers did not amount to non-cooperation.

g) There is no question that any job search effort should be documented, see *Kurek v. Glenmark Industries* 95 UUC 305 and *Krutsinger v. Art & Shroeder Mechanical Contractors* 93 I.I.C. 0593 (1993).

h) Petitioner’s Attorney’s Role

i) While both parties have an obligation to assess the vocational capabilities and prospective loss the Petitioner’s attorney must communicate his client’s willingness to participate in the rehabilitation effort. In *Frank Lemisza v. Wesly Quality Construction and Index Construction, Inc.* 09 WC 19936 the Commission was not tolerant of Petitioner’s attorney’s failure to cooperate with vocational counselors. The Arbitrator found that the Petitioner had been ill served by his counsel as well as the Respondent. Mr. Lemisza, the Petitioner was a 55 year old Polish immigrant whose severe injuries prevented his returning to work in the construction industry. His attorney hired a Polish speaking certified rehabilitation counselor whose assistance was impeded by the attorney himself. Petitioner’s rehabilitation expert tried to proceed with services by contacting the Petitioner’s counsel but counsel did not return calls. Respondent’s expert met with the Petitioner at his counsel’s office but Petitioner’s attorney declined the offered services. The Arbitrator was critical of all involved: the Petitioner’s job search was inadequate and questionable; the Respondent’s weakly attempted to overcome vocational hurdles; the Petitioner’s attorney bore most of the reported blame. Ultimately, the Commission pushed restart. Maintenance was awarded but only as of the date of the decision. Respondent was ordered to pay for the Petitioner’s vocational specialist who was to prepare a plan to file with the Commission. The Arbitrator noted that “this is an untenable situation that resulted from the actions of all parties involved and for equity sake; all parties must bear the brunt of a solution”. Interestingly, the Arbitrator also found that the notice requirements in *Gherer v. Industrial Commission* 278 Ill. App. 3d 840 (1996) relate solely to medical opinions and not to vocational rehabilitation opinions.

ii) Make sure your client has a goal and a plan to reach it. The shotgun job search, without regard to the nature of the prospective position’s requirements is a waste of time and unimpressive.

iii) Provide your client job search forms and monitor his efforts.

iv) Suggest the Department of Human Resources.
v) Advise of the benefits accompanying his effort. He may find productive work but, if he can not, then he will be more likely to qualify for continued payments including maintenance, temporary partial benefits, 8(d)1 or a total permanent award.

vi) Caution the Petitioner not to abandon his current job. In Helmbrecht v. Centralia Friendship House 96 I.I.C. 696 the Commission denied vocational benefits to a person who abandoned his work with the Respondent. The Respondent thereafter would not rehire the Petitioner because she did not meet lifting requirements applicable to new hires.

vii) Work with a rehabilitation counselor, one hired by either the Respondent, by the State of Illinois, or by the Petitioner.

1) The counselor should provide actual help, not simply a labor market survey. Such help includes assisting the Petitioner in:

   a) job seeking skills
   b) finding job leads
   c) help with resume

2) The rehabilitation counselor should be familiar with the county that the Petitioner is applying for work in.

3) The client should not sign a contract promising any certain minimum number of contacts with potential employers but should assure the rehabilitation representative that he will contact a reasonable number of prospective employers.

4) If the rehabilitation representative is hired by the Petitioner, demand that the Respondent pay for expenses.

   a) In Ratliff v. Bumper Works, 96 I.I.C. 001 the Commission held that Petitioner’s choice of rehabilitation counselors was reasonable and helped him actually find work. The Respondent was ordered to pay the reasonable expenses of the counselor.

   b) If a physician suggests retraining and the Petitioner requests it of the Respondent and the Respondent refuses, then the Respondent is more clearly obligated to pay for the Petitioner’s choice of rehabilitation representatives. See Avaneius v. Consolidated Freightways 86 1 I.I.C 1498.
(c) In *Susi v. Rutunno’s Garage* 99 I.I.C. 1007 the Respondent was ordered to pay the charges of Petitioner’s choice of rehabilitation counselors although that counselor found Petitioner permanently totally disabled.

(d) In *Roper Contracting v. Industrial Commission, 349 Ill.App.3d 500, (5th Dist. 2004)* the Court made it clear that the Petitioner is not necessarily obligated to make a 7110 demand. Still, it is better practice to do so.

(5) If the rehabilitation counselor is hired by the Respondent, then make sure the counselor’s reports are forwarded to you in a timely fashion.

(6) Otherwise be mindful of the role of the rehabilitation counselor discussed below.

viii) Remember, it is hard for many injured workers to begin a job search and face continued rejection

6) Respondent’s Efforts

a) The guiding light for both parties is to operate with good faith in an attempt to get the Petitioner back to productive work.

i) The key is to actually offer help rather than simply evaluate and critique the Petitioner’s performance.

ii) The Commission will not tolerate a “sham” job offer by a Respondent. Such offers are not “economically justified” and represent an attempt to avoid the expenses of vocational retraining, 8(d)1 awards or even odd-lot total permanent awards. See, for example, *Reliance Elevator Company v. Industrial Commission 309 Ill. App. 3rd 987, 243 Ill.Dec. 294 (1st District 1999).*

iii) Similarly a “hazy” job offer is insufficient. In *Malkawski v. Steel Craft Products Co. 93 I.I.C. 0753 (1993)* the Arbitrator found that the Petitioner had physician imposed restrictions and required a sit down job. The Respondent offered the Petitioner a position but described it poorly. The Arbitrator felt that the position would require the Petitioner to stand for nearly four hours at a time. The Arbitrator found the Petitioner totally permanently disabled and the Commission agreed noting that “a job offer made by the Respondent was a sham as it was unable to employ claimant until he achieved legal status”.

b) What are sufficient efforts on the part of the Respondent?

i) A labor market survey, while helpful, it is certainly not sufficient.
The labor market surveys must be realistic. In *Lehman v. Halliburton Energy Services*, 2005 WL 1325016, 5 I.W.C.C. 285, 01 IL WC 22130 (April 11, 2005) – (2005 Addendum, Chap. 19, p.10) physical limitations prevented the Petitioner from performing his regular job. He later found low paying work after Respondent refused to rehire him. Respondent then suspended vocational assistance but conducted two labor market surveys suggesting Petitioner could find better paying work. The Commission noted that a job need not pay the best possible wage to still be “suitable” and that positions listed in a survey must be realistic for the Petitioner in light of his experience, restrictions and driving ability.

For such a survey to be meaningful at all, though, it must be current and sufficient. See *Northington v. Town and Blank Inc.* 97 WC 041165, 07 I.W.C.C. 0908 (2007) wherein the Commission interprets further Rule 7110.10.

ii) The Respondent’s simply providing a Petitioner a list of jobs likewise is insufficient. In *Leyrer v. Residential Development Group* (I.W.C.C 2007) the Petitioner, a carpenter, had knee, shoulder, and back problems resulting in a 35 pound lifting restriction. The Respondent hired a vocational specialist who printed out job lists and told him to look. The specialist did not determine which jobs were available and which were in his restrictions nor did the specialist help the Petitioner determine what kind of re-training/ rehabilitation was appropriate. The Petitioner met with the vocational counselor between March and June of 2004. He interviewed at 50 locations and had 50 telephone interviews but had not found employment. The Arbitrator found him to be disabled under the odd-lot theory. The Commission agreed and chastised the employer for failing to provide any real assistance.

iii) Simply blaming the Petitioner is insufficient. See *Szewczyk v. Advanced Wire Products* (I.W.C.C 2008), for example, where the Respondent was required to provide vocational assistance and pay maintenance even if the Petitioner’s vocational search was inadequate since the Commission found the inadequacy was not entirely her fault.

iv) Simply blaming the union is insufficient. See *Hernandez v. Jewel* 03 I.W. C.C. 43653 where the Respondent’s claim that it was only following the union contract when it declined to offer more than 3 days of light work in a week did not destroy Petitioner’s claim for maintenance.

c) The Respondent should follow Section 6(d) of the Act discussed above. That is, it should notify the Petitioner of its rights to rehabilitation services and advise him of locations of available public rehabilitation.
d) The Respondent may wish to petition the Commission under Section 19(b) to determine the Petitioner’s eligibility to vocational efforts. In practice, Respondents seldom present such petitions and instead simply suspend benefits.

e) Consequences of an insufficient effort by the Respondent

i) If the Respondent makes an ineffective effort to vocationally rehabilitate its employee, the result may be a total permanent award under the odd-lot theory even if the Petitioner’s efforts also are less than adequate. See Leyrer v. Residential Development Group (I.W.C.C. 2007) discussed above.

ii) See also Kirth v. Food Stuffs 07 I.W.C.C. 1217 (2007) where the Commission not only awarded vocational rehabilitation services but also penalties. The Respondent offered services, but they were only to supervise (and report on) Petitioner’s own job seeking efforts. The Respondent’s vocational counselor did not contact employers himself, failed to file a vocational rehabilitation plan with the Commission and failed to provide testing.

f) Using Vocational Efforts in Defense of a Case

i) Use vocational rehabilitation to limit the exposure for wage differential claims, and to establish the claimant’s earning power.

ii) See Thornton v. United Airlines, 00 ILWC 20081. A claimant must prove the value of his/her post-injury earning potential. In this case, the Commission held the claimant was not entitled to a wage differential because she failed to cooperate with vocational rehabilitation and there was no evidence of any attempt at a self-directed job search.

iii) See Rausch v. John Keno, 02 ILWC 13525 (2009). Although the claimant was uncooperative with vocational rehabilitation, and failed to complete assignments, he was still awarded a wage differential. The calculation however was based on the position the claimant found on his own, because it was within the pay range prescribed by the vocational expert. See also Brenda Guernsey v. Illinois State Police, 07 ILWC 49374.

g) The Respondent can not insist on a Functional Capacities Evaluation (FCE) under Section 12. The FCE is frequently relied upon to determine whether a Petitioner is physical capable of certain occupations. In 2007 the Commission ruled that under Section 12 a Petitioner is not required to attend an FCE in Pomelow v. Blaw & Knox Construction Equipment 07 IWCC 1113. There the Commission ruled that a Respondent had no right to terminate Petitioner’s benefits upon his refusal to attend an FCE. In W. B. Olson, Inc. v. Illinois Workers’ Compensation Commission the Appellate Court considered whether the Respondent is entitled to an FCE and concluded that it is not. Simply stated, it narrowly interpreted
Section 12 as requiring only examinations by a “duly qualified medical practitioner or surgeon” a “physical therapist” was not a medical “practitioner”.

7) Role of Vocational Counselor

a) The new Section 8(a) of the Act notes that a vocational counselor who provides services must have appropriate certifications. A rehabilitation counselor in private practice must be a certified rehabilitation counselor. It may be that one with lesser qualifications may be involved in case management but not in vocational job placement. Furthermore, the opinions of a rehabilitation counselor should only be admitted into evidence if the counselor is a certified rehabilitation counselor. It is appropriate to ask whether the testifying counselor has offered opinions before Administrative Law Judges for the United States Government at Social Security hearings.

b) Rehabilitation counselor’s attempts to compare a claimant’s residual physical abilities with the physical requirements of prospective employment frequently rely on simplistic approaches in determining both restrictions and job requirements.

   i) A Functional Capacity Evaluation (FCE) is frequently used to determine physical restrictions. The FCE, though, is usually done over only a few hours. It is simplistic to extrapolate from a few hours effort what a claimant’s abilities would be over 2,000 hours a year. That is especially true if the testing effort left the claimant unable to perform the same physical activities the day following the FCE.

   ii) Oversimplification occurs also with the description of job requirements. Frequently, the job requirement is listed only as sedentary, light, medium, heavy, or very heavy. The requirements of the actual work, though, normally can not be so easily packaged. Requirements to perform certain activities, e.g. ranges of motion are critical to consider but are not within the sedentary, light, etc. job descriptions. Those descriptions are as follows:

      (1) Sedentary Work: Exerting up to 10 pounds of force occasionally. (Occasionally = activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently = activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

      (2) Light Work: Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly = activity or condition exists 2/3 or more of the
time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

(3) Medium Work: Exerting 20 to 50 pounds of force occasionally and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

(4) Heavy Work: Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work.

(5) Very Heavy Work: Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Heavy Work.

c) Vocational Counselor’s Testimony

i) Arbitrators universally request that the vocational opinions be submitted in deposition forms. It would certainly try the patience of an arbitrator to present a vocational counselor in the flesh more than once.

ii) In *West v. Board of Education & City of Chicago 09 IWCC 0991* the Arbitrator found, and the Commission affirmed that the Petitioner was permanently and totally disabled under the odd-lot theory. There was little wonder. The Petitioner was 58 years of age when injured while working as a physical education teacher but 72 by the time this matter was arbitrated. The Respondent offered testimony of the vocational counselor. She felt there were alternative occupations which maybe available to the Petitioner. The Arbitrator found her opinions unpersuasive. The vocational counselor failed to identify or provide any information about any specific job or position currently available. Furthermore, when conducting her assessment she did not take into consideration the Petitioner’s description of his physical limitations. Finally, she did not consider the side effects of medications the claimant was
taking. The Arbitrator felt such inquiries are standard considerations when performing a vocational assessment.

iii) The Appellate Court noted in *Illinois Tool Works v. Illinois Workers’ Compensation Commission* 20113 IL App. (2d) 11256 WC the Commission gave little weight to the testimony of Petitioner’s vocational expert or the Petitioner’s own job search. The Commission felt the search was so limited that the job the claimant found was not clearly the best he could. The rehabilitation counselor apparently testified that she felt the Petitioner’s job search was sufficient and therefore lost credibility. Although unrebutted, her testimony was found unpersuasive and “lacked credibility”. The Arbitrator questioned the usefulness of the vocational testimony, and criticized the lack of specificity: the vocational counselor estimated that the Petitioner’s earning capacity was between $8.00 and $12.00 an hour with a possibility that it could be as high as $15.00 an hour. Although it was clear that the injured worker could no longer pursue his usual and customary line of employment, he had not established an impairment of earning capacity. The result was an award under 8(d)2 rather than a wage differential under 8(d)1. Interestingly, an 8(d)1 award would have resulted in the maximum being paid were the Petitioner’s earnings to have been either $8.00 or $11.50 per hour.

iv) In *Detlaf vs. Rexam Consumer Plastics, Inc. 20 ILWCLB 63 (Ill. W.C. Comm. 2012)* both parties proposed a rehabilitation plan. The Petitioner’s was specific, he would complete a bachelor’s degree at Northern Illinois University and therefore after work as a teacher. The Petitioner’s plan included an estimate of teacher’s earnings and predicted the exact probability of job growth in the industry. The Respondent disputed the reasonableness of training to be a teacher. The suggestion, however, was not incorporated into a specific vocational rehabilitation plan. Its proposal lacked specificity but alluded to CAD operator training. Petitioner had suffered a severe hand injury causing reflex sympathetic dystrophy. Respondent’s vocational examiner was found to be less credible than the Petitioner’s when the Respondent’s witness proposed a rehabilitation plan that lacked specificity. The Petitioner proposed a specific plan.

v) The suggested form of a vocational counselor’s questioning is like most other expert witnesses.

(1) Clearly one must inquire as to qualifications especially in light of the new Section 8(a). The practical qualifications include an understanding of the vocational picture in the area where the Petitioner resides and the relevance of that picture to the Petitioner’s probability of finding work.

(2) The Counselor’s observations of Petitioner
(a) His physical difficulties if any, such as sitting for extended periods of time, etc. are relevant.

(b) His skill set to determine if he has transferable skills (an essential consideration).

(3) For Section 8(d)1 purposes, one should inquire to what alternative work is suitable and what that work would pay. Section 8(d)1 does not require that a person actually find new work.

(4) If the Petitioner is likely totally permanently disabled, then one should ask whether there are any positions available to the Petitioner, expecting those so limited in quantity, quality, and dependability that they do not represent a reasonably stable job market.

(5) If one is trying to qualify the claimant for vocational training or rehabilitation, it is critical to inquire about the criteria discussed in the National Tea case.

8) The Hearing

   a) Better practice is to list “maintenance” in the issues on the stipulations sheet but probably it may still be awarded if not specifically listed, see Hoopingarner v. Smith Investments, 2005 WL 1794659, 01 I.W.C.C. 48249, 5 I.W.C.C 494 where the Commission followed the Roper Contracting v. Industrial Commission, 349 Ill.App.3d 500 (5th Dist. 2004) ruling that the issue of maintenance had been properly preserved and, further, that the claimant is not required to request vocational rehabilitation before being entitled to an award of maintenance.

   b) Pursuant to Section 8a an employee or an employer may petition the Commission to determine disputes relating to vocational rehabilitation. The Commission will resolve any such disputes including the payment of vocational rehabilitation by the employer. See also Cynthia Lukey v. State of Illinois, Administrative Office of Illinois Courts, 96 I.I.C. 1187 finding that vocational rehabilitation may be awarded under Section 19(b).

9) Future considerations

   a) The Economy Packing case proves that undocumented aliens may still be entitled to total permanent disability awards. What is questionable, though, is what the vocational ramifications are. It is hard to imagine a successful effort to officially vocationally rehabilitate an undocumented alien.

   b) The Commission’s recent rulings suggest that it is more likely to order more job seeking even after an exhaustive search, particularly if the Petitioner is young.
i) See also Donnell Russell v. Landshire 07 I.W.C.C. 1078 (2007) wherein the Petitioner reached MMI in roughly September 2004. He claimed to have looked for employment “continually” in newspapers, the unemployment office, etc. He had had two to three interviews by the time of the arbitration on October 25, 2005. He felt that “there is still an option out there”. The Arbitrator found that the Petitioner was totally permanently disabled but the Commission vacated the award finding insufficient evidence for a total disability finding. The Commission remanded for continuing rehabilitation efforts. The Petitioner was 47 years old at the time of the injury.

ii) See also Daryl Treece v. Sony Music Distribution 08 I.W.C.C. 0197 here again the Commission vacated a total permanent disability award under an odd-lot theory. The Petitioner was only 36 years old at the time of the arbitration. He had worked with a vocational counselor for only 60 days. The Commission ordered the Respondent to consult with the Petitioner’s counselor to prepare a written assessment pursuant to 7110 and to provide maintenance benefits.

iii) But, if Petitioner is not desirous of returning to work, proving a wage differential or going through a vocational rehabilitation effort, then it may be best to simply evaluate the claim under 8(d)1 because that is the approach the Commission will take. In Travis v. Ponderosa 08 IWCC 1123 Petitioner never requested vocational rehabilitation. The Commission found that she seemed to have no desire of vocational rehabilitation. Importantly, she admitted that she did not feel she was totally permanently disabled. The Commission awarded 30% disability to the Petitioner’s person as a whole.

iv) See also Washington v. Country Wide Center (I.W.C.C. 2009).

10) Further Study


Section 7110.10 Vocational Rehabilitation

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

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

c) At least every 4 months thereafter, provided the injured employee was and has remained totally incapacitated for work, or until the matter is terminated by order or award of the Commission or by written agreement of the parties approved by the Commission, the employer or his or her representative in consultation with the employee, and if represented, with his or her representative shall:

   1) if the most recent previous assessment concluded that no plan or program was then necessary, prepare a written review of the continued appropriateness of that conclusion; or

   2) if a plan or program had been developed, prepare a written review of the continued appropriateness of that plan or program, and make in writing any necessary modifications.

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

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

(Source: Amended at 30 Ill. Reg. 11743, effective June 22, 2006)
ATTENTION. The employer, in consultation with the injured worker, shall prepare a rehabilitation plan when the employee has been unable to work for more than 120 continuous days or when it can be reasonably determined that the injured worker will be unable to resume his or her regular, pre-injury duties. The plan shall be updated at least every four months while the employee remains incapacitated or until the case is closed by the Commission. A copy of each document shall be given to the injured worker. See Section 7110.10 of the Commission Rules.

Case # ______ WC ______

Employee/Petitioner

v.

Employer/Respondent

Attach the most recent medical report and provide an assessment of the medical care necessary for the petitioner to return to work.

Is rehabilitation necessary for the employee to return to work? Yes [ ] No [ ] Explain below.

If rehabilitation is necessary, address the need for each of the following:

Medical evaluation

Vocational evaluation

Modified or limited duty

Retraining

Other

Signature of petitioner __________________________ Date __________

Name of petitioner (please print) __________________________

Signature of person completing this form __________________________ Date __________

Name of person completing this form (please print) __________________________