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Navigating The Illinois Workers Compensation Act: A Guide For Vocational Rehabilitation Professionals

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NAVIGATING THE ILLINOIS WORKERS COMPENSATION ACT: A GUIDE FOR
VOCATIONAL REHABILITATION PROFESSIONALS

by

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A Research Paper
Submitted in Partial Fulfillment of the Requirements for the
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RESEARCH PAPER APPROVAL

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REHABILITATION PROFESSIONALS

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Approved by:

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TABLE OF CONTENTS

<u>CHAPTER</u>	<u>PAGE</u>
APPROVAL PAGE	i
ACKNOWLEDGMENTS	iii
CHAPTERS	
CHAPTER 1 – Introduction	1
CHAPTER 2 – Literature Review	7
CHAPTER 3 – Discussion.....	23
REFERENCES	26
VITA	30

CHAPTER 1

INTRODUCTION

November 13, 1909 was like any other Saturday. Five hundred men and boys, some as young as 11 years old, loaded the hoisting cages at the Cherry Coal Mine, and descended to begin their work day. Due to electrical problems, the mines three horizontal veins were lit with kerosene lanterns and torches. Some of the lighting was also set into the mine walls.

Mules were used in the mines to assist the workers. A coal car loaded with hay to feed the mules caught fire. Workers panicked, and the fire, consuming much of the mines oxygen, quickly spread to the support beams. The fire ultimately claimed the lives of 259 men and boys, making the Cherry Mine Fire one of the countries worse mining disasters (Gregory, 2006; Tintori, 2002).

This disaster was the impetus for workers compensation legislation. In 1909, the legislature created a special commission to study and recommend the best way to compensate for industrial accidents. In 1910, the Illinois legislature established stronger mining regulations. In 1911, the legislature also passed a separate law that would later develop into the Workers Compensation Act (Tintori, 2002).

Workers compensation laws have always been controversial, and they continue to be controversial to this day. Historically, however, both business and workers have the same fear: financial ruin from a work related injury. Business fears the assumption of liability and workers fear financial loss from the inability to work while injured.

Before the creation of workers compensation, an injured worker had to file a lawsuit against his employer in court. The worker had to prove his employer was

negligent, or failed to use reasonable care. In turn, the employer had a plethora of defenses available to him in court, including contributory negligence. This means the injured person had a duty to take proper precautions to prevent an accident, and if he did not, then his award could be reduced (Fishback and Kantor, 1998).

Illinois enacted Workers Compensation legislation in 1912. It was established as a tradeoff between employers and employees. Employees gave up their rights to file civil lawsuits against their employers and potentially win large amounts of money in exchange for quick resolution and reasonable compensation. Employers, in turn, gave up their civil defenses but were no longer exposed to the possibility of large awards (Fishback and Kantor, 1998).

Initially, the Illinois Courts retained control and administered the new legislation. Eventually, the volume overwhelmed the courts, and a three member Industrial Board was created on July 1, 1913. In 1917, the legislature renamed the Industrial Board the Industrial Commission and empanelled five members rather than three. On July 5, 1957, the Commission separated from the Department of Labor and became a self standing agency. On January 1, 2005, the agency became known as the Illinois Workers' Compensation Commission ("IWCC", n.d.).

During this same time, significant changes were happening with regard to vocational rehabilitation in America. The influx of disabled veterans from World War I overwhelmed the private sector and Congress began enacting legislation to restore the veterans to their optimal physical, mental, social, vocational and economic ability. Prior to 1920, there were no vocational rehabilitation services available for civilians with disabilities (University of Missouri, 2004).

Vocational rehabilitation was developed and evolved concurrently with workers compensation legislation. In the 1970's vocational rehabilitation emerged as a tool in the workers compensation industry. Some state governments began to require vocational rehabilitation as a part of the workers compensation resolution process. The development of this trend will be examined, in addition to the role vocational rehabilitation currently plays in the Illinois workers compensation system (Gasbarre, n.d.; Oberman, 1965).

The Workers Compensation Act in Illinois requires employers to provide workers' compensation benefits for their employees if they conduct business within the State either through insurance policies or through self insurance. An injured worker's benefits are directly linked to his wages, with certain limits in place ("IWCC", n.d.).

Injured workers have the right to represent themselves, or retain counsel. The process to seek benefits is the same for both. Claims, if not settled, are first heard by arbitrators. Decisions may be appealed to the commission, Circuit Court, Appellate Court and the Illinois Supreme Court, However, most cases are settled between the parties ("IWCC", n.d.).

Purpose

The purpose of this paper is to provide a basic understanding of the workers compensation claims process. The statute, although plainly written, can be difficult to navigate. A history of the Act will be examined in addition to the basic components of filing a claim. This paper will also provide a basic understanding of how vocational rehabilitation is currently being utilized within the Illinois workers compensation system. The battle between business and labor has remained constant throughout the years.

Providing insight to navigate the system with ease and return workers to gainful employment in the most efficient manner reduces the financial burden for both parties.

This paper will provide the vocational rehabilitation counselor the tools to maneuver through the potential pitfalls of the Act. Having a general understanding of what a claimant has to go through from the inception of a claim, up through the time of the first meeting with the counselor, will give the counselor insight on how to best provide services. Each claim is different, as are the needs of each claimant. The services requested of the counselor also may vary from case to case depending on which party has hired the counselor. Having a basic understanding of the history and of the claim process will help all vocational rehabilitation counselors maximize their potential with each and every client.

Definition of Terms

arbitrator - An independent person hired by the State of Illinois, who acts as a judge, to solely to resolve workers compensation claims.

average weekly wage - The rate used as the basis of calculating benefits under the Illinois Workers' Compensation Act.

civil court - A governmental body that adjudicates legal disputes by interpreting and applying the law to specific cases that are non criminal in nature.

claimant - A person who brings a cause of action.

contributory negligence - Negligence by an injured party that combines as one of the causes in producing the injury. It can bar the recovery completely or reduce the amount recovered.

employee - A person who works for another in return for financial or other compensation.

employer - A person or firm that employs workers.

lawsuit - A legal action by one person or entity against another person or entity, to be decided in a court of law.

legislation - The preparation and enactment of laws by a legislative body.

maximum medical improvement - The state where an injured employee's medical condition cannot be improved any further or when a treatment plateau in a person's healing process is reached.

negligence - The failure to observe the degree of care and vigilance that the circumstances demand, whereby such other person suffers injury.

preponderance of evidence - The greater weight of the evidence required in a civil or non-criminal lawsuit for the trier of fact to decide in favor of one side or the other. This preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.

restitution - The act of restoring to the rightful owner something that has been taken away, lost, or surrendered.

statute of limitations - A law that restricts the time within which legal proceedings may be brought.

temporary total disability - Monetary benefits available to employees whose injuries leave them totally unable to work for a period of time. The benefits are no longer payable when the temporary disability clears and the employee is able to resume working.

vocational rehabilitation - A melting pot of services that are offered to injured employees to help them return to work following a work injury. Vocational rehabilitation may involve transferable skills assessments, educational courses, job search assistance, and many other vocational aids.

CHAPTER II

REVIEW OF THE LITERATURE

This chapter will review the history of workers compensation and briefly highlight the continued struggle between the divergent interests of the injured worker and the employer. The steps an injured worker takes to filing a claim are also explained, in addition to where, and how, the vocational rehabilitation counselor plays a vital role in returning the injured worker back to gainful employment, when possible.

History of the Illinois Workers' Compensation Act

Workers Compensation laws originated in Germany in 1884. In the late 19th century, workers compensation began emerging across Europe in many forms. The United States, although in the midst of the industrial revolution, was slow to follow (Guyton, 1999). Because workers compensation was considered social legislation, it was implemented by the states, rather than the federal government. In 1908, the federal government passed legislation covering their employees. Thereafter, states followed suit, with the majority adopting workers compensation laws between 1911 and 1920 (Guyton, 1999).

Prior to any legislation in Illinois, an injured worker's remedy for an on-the-job injury was to file a lawsuit against his employer in civil court. It was difficult for an employee to win, or prove his employer was liable for his injuries. Injured workers were victorious an estimated 12% of the time against their employers. However, when they did win, there was no cap on their recovery. Injured workers seeking restitution from their employer under this system often became destitute and turned to charities to feed

their families. The civil court process was lengthy, and the outcome for either party was risky ("IWCC", n.d.; "IWCC Agency History, n.d.).

After the Cherry Mine Fire, the Illinois legislature, in special session, created a committee to study how to best compensate injured workers for industrial accidents. In 1910, the Employers Liability Commission studied various groups including, but not limited to, 1,700 labor organizations and 200 judges and lawyers. As part of their undertaking, they examined approximately 5,000 accidents. Of the 614 fatal accidents they reviewed, only 24 cases resulted in a successful settlement and 204 cases were without any settlement at all. The study also revealed that for every dollar of liability insurance an employer paid, only \$0.25 reached the employee or their dependents. The Commission's final report and recommendation included proposals for doing away with common lawsuits. Their suggestion was legislation that helped to ensure prompt and fair compensation for the injured worker. The benefit to the employer was a limit on the amount the injured worker was allowed to recover ("IWCC Agency History", n.d.; State of Illinois, 1910).

Samuel Harper, a member of the Employers Liability Commission, was the principal architect of the Illinois Workers Compensation Statute that went into effect on May 1, 1912. Illinois was the thirteenth state to enact such a law. It took until 1948 for all states to establish workers compensation laws (Greenburg, 2008). Illinois courts retained control and administered the new legislation. The newly created prompt and fair compensation standards incited increased claim filings which overwhelmed the judiciary. The legislature, understanding the high volume of new cases, created the Industrial Board on July 1, 1913 ("IWCC Agency History", n.d.).

Claims were decided by a three member panel. The employer, injured worker and the Board, each chose a member to participate on the panel. Partiality existed on behalf of the chosen business and labor representatives. Eventually, the Industrial Board recommended a single member from the Board to hear and decide claims. The term arbitrator stuck due to perceived neutrality of this empanelled member (Brundage, 1917; "IWCC Agency History", n.d.).

In 1917, the Illinois legislature changed the name of the Industrial Board to the Industrial Commission. The Commission was expanded from three members to five members. The members were appointed by the Governor and approved by the Senate and consisted of two employer representatives, two employees representatives and one neutral party not identified with either class. The Commission also moved under the control of the Department of Labor (Brundage, 1910; "IWCC Agency History", n.d.).

During the early years of its development, the Commission was responsible for mediating labor disputes. In 1920, the work load and scope of duties proved to be too much for the Commission and this responsibility was transferred solely to the Department of Labor ("IWCC Agency History", n.d.).

On July 5, 1957, the Industrial Commission broke away from the Illinois Department of Labor and became a self standing agency. The Commission reported that during this time, welfare benefits to Illinois residents were higher than workers' compensation benefits ("IWCC Agency History", n.d.).

In 1970, workers compensation benefits were still universally considered insufficient. Congress passed the Occupational Safety and Health Act (OSHA) and developed a team to study the deficiencies of the workers' compensation laws. In 1972,

the Commission issued their report listing nineteen fundamental elements to be included in all workers' compensation programs (US Department of Labor, 1972). In 1975, in response to the report, the Illinois legislature implemented changes in the Act to benefit the injured worker ("Illinois Workers", n.d).

In 1978, three years after the law increased benefits for the injured workers, the Commission's new case filings doubled, and backlogs started to grow. In 1989 reform, supported by both business and labor, granted more funds to the Commission. These funds were used to hire more arbitrators and a temporary panel of commissioners in an effort to decrease the backlog. By 1997, the Commission reduced the pending case load for the first time in twelve years (Illinois Industrial Commission, 1998; "IWCC Agency History", n.d.).

The Commission became funded independently in 2003 through an assessment paid by employers purchasing insurance. This, once again, allowed the Commission to hire more arbitrators to reduce the case loads and address backlogs (Illinois Industrial Commission, 2005).

In 2005, the Commission was renamed the Illinois Workers' Compensation Commission. This year also saw the most dramatic changes to the Act since its inception in 1912. The changes included a third panel of commissioners, the creation and implementation of a medical fee schedule, utilization review, a fraud investigation unit, and an overall increase in benefits to injured workers ("Illinois Workers", n.d.; Illinois Workers' Compensation Commission, 2008).

Culminating months of hearings and protracted negotiations on behalf of business and labor, on May 31, 2011, HB 1698 passed both houses of the Illinois

General Assembly proposing changes to the Act. Governor Quinn voiced support for the bill and signed it into law on June 28, 2011. The new legislation includes a cap on wage differential awards, and a cap on all awards regarding the hand, with a specific cap on carpal tunnel awards. Specific criteria for rating permanent partial disability is included; and medical providers are now prohibited from collecting for medical services deemed unreasonable or excessive from claimants in civil courts. Medical choices and preferred provider programs will be implemented and modifications to the medical fee were approved (HB 1698). The legislation was significant, but did not address the issue of causation. In Illinois, the standard remains that a workers' injury need only be a causative factor in the development of a claimants injury rather than the sole factor (Illinois Workers' Compensation Act, 2007).

How to File a Workers Compensation Claim

The Illinois Workers' Compensation Commission is an impartial state agency that has the authority to resolve workers claims and issue judgments. The Act allows injured employees to file a claim for benefits against their employers. Employers are required by law to purchase workers compensation insurance for all of their employees. When a worker files a compensable claim, the benefits are paid by the workers compensation insurance on the employers behalf, rather than coming directly from the employers pocket ("IWCC", n.d.).

The basic premise of the workers' compensation act has not changed over the last century. To be compensable, an injury must arise out of and in the course of the employment. This requirement has remained constant. The claimant has the burden of proving their claim by a preponderance of the evidence (Fishback, 2008).

An injury arises out of employment if the employee is performing acts they were instructed to perform by their employer, acts the employee has a common law or statutory duty to perform, or acts the employee might reasonably expect to perform in the course of his duties (*Caterpillar Tractor Co. v. Industrial Commission, 1983; Krauter, 2004*). In the course of employment deals with time, place and circumstance of the injury (*Paganelis v. Industrial Commission, 1989; Krauter, 2004*).

Notice

After sustaining an accidental injury arising from employment, a claimant must give notice of the injury to his employer as soon as possible, but not later than 45 days. Notice may be given orally or in writing and should include the approximate date and place of the injury. Lack of notice, or deficient notice, is a weak defense for employers. Deficient notice alone will not preclude a claimants claim unless the employer can prove it was unduly prejudiced by the defect (Illinois Workers' Compensation Act, 2005; Krauter, 2004; *Sohio Pipeline Co. v. Industrial Commission, 1976*).

Each year, approximately 200,000 employees report injuries to their employers (Illinois Workers' Compensation Commission, 2010). After having a compensable accident, and giving notice, a claimant is not required to immediately file a claim. Frequently, claims are resolved without the need for filling a formal Application for Adjustment of Claim with the Commission. When this occurs, an employer has accepted responsibility for an employee's injuries, and any issues regarding benefits due the claimant are fully resolved and consummated on lump sum settlement contracts (Rules Governing Practice Before the Industrial Commission, 2009).

Statute of Limitations

Claims must be filed within three years from the date of injury, or two years from the last payment of compensation, whichever is later. If a claimant does not file within these guidelines, the claim may be time barred (Illinois Workers' Compensation Act, 2007).

Claim Filing and Case Assignment

Claimants are required to file their Application for Adjustment of Claim with the Commission. The Application must be filed in triplicate and with a Proof of Service. There is no filing fee, and no answer or response is required from the employer. Each application is limited to one claim or accident date. Forms are furnished by the Commission and are available for download on the Commission website (Rules Governing Practice Before the Industrial Commission, 2009).

After receiving the Application, the Commission designates a case number, and assigns the claim to a docket. Docket assignments are based on the location of the accident reported on the Application for Adjustment of Claim. If the accident occurs outside of Illinois, then the case is assigned to the docket nearest the claimants residence. A change of venue by agreement of the parties is allowed (Rules Governing Practice Before the Industrial Commission, 2009).

There are currently fifteen arbitrators assigned to hear cases in downtown Chicago, and fifteen arbitrators that travel to various hearing sites set up across the state. After a claim is filed and assigned to a docket, it appears as a setting on that docket every sixty days ("IWCC", n.d.).

Settlements

The Commission averages between 50,000 and 60,000 new case filings each year. A majority of claims resolve prior to trial. When a claim reaches conclusion, the terms are memorialized onto pink lump-sum settlement contracts. The contract must be signed by the claimant, the claimant's attorney, and a representative of the employer. The contracts are then presented to the Commission, usually to an arbitrator, for approval. Contracts can be presented for approval through the mail if the claimant is represented by an attorney, or they may be presented in person at a hearing site (Illinois Workers' Compensation Commission, 2008; 2009; 2010; Rules Governing Practice Before the Industrial Commission, 2009).

Claimants may choose to represent themselves, or obtain legal counsel. If a claimant represents themselves, they are referred to as pro se. If a claimant is pro se, they must appear before the arbitrator at a designated docket to discuss the terms of the settlement to ensure fairness before the contract is approved. On average, 50,000 cases are resolved each year via settlement (Illinois Workers' Compensation Commission, 2010; Rules Governing Practice Before the Industrial Commission, 2009).

Benefits

The purpose of the Workers' Compensation Act is to provide benefits to injured workers. If a claim is found to be compensable, or accepted by the employer, then the claimant is entitled to three types of benefits: (1) medical treatment; (2) temporary total disability; and (3) permanent partial disability or permanent total disability. (Garcia & Johnson, 2004; Illinois Workers' Compensation Act, 2007).

temporary total disability

If a claimant has missed more than three days of work due to his injury, then he may be entitled to temporary total disability benefits, or TTD. The compensation rate is calculated at 66 2/3% of the claimant's average weekly wage. The Commission has set maximum and minimum rates to be applied uniformly to each case filing (Illinois Workers' Compensation Act, 2007).

For example, if claimant had an average weekly wage of \$600/week, his TTD rate would be paid at 66 2/3% or \$400.00/week.

medical expenses

Section 8(a) of the Act, provides that the employer shall pay for all reasonable and necessary medical, surgical and hospital services reasonably required to cure or relieve the effects of the accidental injury (Illinois Workers' Compensation Act, 2007). This is often a high point of contention and a much litigated issue. Parties frequently agree that a claimant needs some type of medical treatment, however, the disagreement arises over the type of treatment being proposed by claimant's treating physician or the reasonableness and necessity of that treatment.

§8(a) also mandates the employer shall pay for treatment, instruction and training necessary for the physical mental and vocational rehabilitation of the claimant. When negotiating the resolution of a claim, vocational rehabilitation, as seen later, can be a powerful tool.

permanent disability

The final category of recovery for a claimant is compensation for a permanent disability, if any. This includes permanent partial disability, or permanent total disability.

At a reasonable time after a claimants medical treatment has concluded, there is an presumption, or at times a medical finding, that the claimant has reached maximum medical improvement, or MMI. Then, the parties try to reach a settlement for any disability that has ensued as a result of the work injury (Garcia & Johnson, 2004).

There are many facets to permanency. This section is designed only to provide a brief overview of the remedies available to the claimant. Some remedies discussed below are complex in nature and are being included for completeness.

The legislature has assigned a value to various body parts and also to the body as a whole. The values are calculated in weeks of compensation and are outlined in §8(c), §8(d), §8(e) and §8(f) of the Act. The compensation rate for permanency is calculated at 60% of the claimants average weekly wage. Maximum and minimum rates apply here as well. Workers' compensation settlements in Illinois are tax free (Garcia & Johnson, 2004; Illinois Workers' Compensation Act, 2007).

For example, under the schedule, a hand is worth the total of 205 weeks of compensation. If claimant had an average weekly wage of \$500/week, his permanency rate would be paid at 60% or \$300.00. If claimants permanent disability to his hand was 10%, then his settlement would be \$6,150.00 or \$300 x 20.5 weeks.

In addition to awards for specific body parts or to the body as a whole, as calculated above, the claimant could be entitled to compensation for a wage differential award pursuant to §8(d)(1) of the Act. A claimant may pursue this type of award if he is partially incapacitated from pursuing his usual and customary line of employment. A claimant can also seek compensation for permanent total disability benefits. These are

outlined in §8(e)18 and § 8(f) of the Act (Garcia & Johnson, 2004; Illinois Workers' Compensation Act, 2007).

Which remedy a claimant chooses to pursue is entirely dependent upon the circumstances of his particular case. No two claims are exactly alike and should not be treated as such.

Hearings

All hearings before the Workers' Compensation Commission are statutory. Hearings at the trial level are presided over by an arbitrator, and as a general rule, there is no pre-trial discovery. There are, however, limited exceptions (Illinois Workers' Compensation Act, 2007).

Hearings can be held for interim issues, such as non-payment of TTD benefits, or entitlement to medical benefits, or hearings can be held to resolve all remaining issues, including an award of permanency, if deemed appropriate. In all instances, the parties fill out and sign a Request for Hearing form, as directed by the Rules Governing Practice before the Commission. This form outlines the issues that are agreed to, and the issues that are disputed between the parties (Rules Governing Practice Before the Industrial Commission, 2009). These forms are also available for download on the Commission website.

During the hearing, the claimant presents his case first through the submission of witness testimony, medical records, deposition testimony and any other evidence necessary to support the claim. The employer has the right to challenge the evidence either through objections or cross examination, and the arbitrator will make appropriate rulings. The employer then presents their evidence in defense of claimant's claim.

At the end of the hearing, the case is taken under advisement. The arbitrator may request the parties submit proposed decisions within fourteen days. The proposal should outline the findings and the outcome desirable to the party being represented. Thereafter, the arbitrator has 60 days from the end of the hearing to prepare and file a written decision with the Commission outlining the findings of fact and conclusions of law specific to the case. Arbitrators, as a collective group in Illinois, issue approximately 3,000 to 4,000 decisions per year, of which approximately 50% get appealed (Illinois Workers' Compensation Commission, 2009; 2010).

Appeals

Either party has the right to appeal the decision of the arbitrator. The appeal must be filed within thirty days of receiving the arbitrator's decision from the Commission. If an appeal is not filed at all, or is not timely filed, the arbitration decision becomes final (Illinois Workers' Compensation Act, 2007; Rules Governing Practice Before the Industrial Commission, 2009).

The first level of appeal rests with the Commission. Each case is assigned to a lead Commissioner. The Commission is not bound by the decision of the arbitrator and reviews each case as if it is being presented for the first time. The parties file briefs outlining their positions and are granted oral arguments before a panel of three Commissioners made up of a business, labor and public representative. The Commission must file its decision within sixty days after oral arguments. Commissioners issue approximately 1,500 decisions per year (Illinois Workers' Compensation Commission, 2010; Rules Governing Practice Before the Workers' Compensation Commission, 2009). The parties retain the right to continue to appeal

their case to the Circuit Court, Appellate Court, and the Illinois Supreme Court (Illinois Workers' Compensation Act, 2007).

Vocational Rehabilitation in Workers Compensation

In 1970, some state governments began to make vocational rehabilitation a mandatory component of the workers' compensation claims process. In the early stages, employers resisted the program and believed it to be expensive without yielding results. However, in the early 1990's, employers realized they could use vocational rehabilitation as a tool to get their injured employees back to work, thereby making vocational rehabilitation a cost containment technique (Gasbarre, n.d.).

The Illinois Workers' Compensation Act references vocational rehabilitation in §6 (d) and §8(a). Although mandatory that vocational rehabilitation services be provided to the claimant, the legislature, again, did not provide any guidance on how this was to be carried out. As such, the Commission implemented certain rules to act as guidance when administering rehabilitation services. These rules work well in instances where the claimant and the employer agree that vocational rehabilitation is necessary, or they agree on a plan (Lorenz, 2004; Rules Governing Practice Before the Commission, 2009).

More importantly, guidance is provided by the Illinois Supreme Court for when the parties do not agree. The Court in the case of *Hunter v. Industrial Commission* set the first guidelines for determining when vocational rehabilitation is required. Under the *Hunter* case, the Commission is given a great deal of latitude or discretion in determining a claimant's vocational award. Some considerations in making an award are cost, time and the ultimate goal of the claimant. The claimant bears the burden of

proving the necessity and benefit of the desired rehabilitation service (*Hunter Corp. v. Industrial Commission, 1981*; Lorenz, 2004).

In the case of *National Tea*, the Court outlined certain guidelines to be used when determining the reasonableness of an award. However, the court stressed the flexibility of the guidelines and their consideration to be applied not only to the claimant, but also to the employer as they are the ultimate financier of the plan (Lorenz, 2004; *National Tea Co., v. Industrial Commission, 1983*).

Under the Illinois Workers' Compensation Act, if a claimant has sustained a work accident, but is capable of returning to his former job, or claimant's employer can accommodate the work restrictions, then the claimant is not entitled to vocational rehabilitation. If the claimant is capable of returning to work in some capacity after a work accident, but the employer cannot accommodate the claimant's restrictions, then the claimant is a candidate for vocational rehabilitation pursuant to §8(a) of the Act (Lorenz, 2004; Workers' Compensation Act, 2007).

Generally, an assessment is performed by a vocational counselor who is hired by the claimant's employer. This assessment is typically performed after the claimant has reached maximum medical improvement, or attained some stability in their medical condition. Some of the things considered when formulating a vocational opinion regarding a claimant is the claimant's age, education and work experience; pre-existing medical conditions; medical conditions caused by the work injury; and transferable skills (Perry, n.d.). The vocational counselor renders an opinion on whether or not the claimant is capable of obtaining employment in the open labor market, and if so, in what capacity. This is prepared in typewritten report form and tendered to the employer.

If the findings in the report indicate the claimant is not capable of obtaining employment in the open labor market, then the counselor's job within the workers' compensation claim is typically done. They will not be asked to provide vocational services to the claimant. If the finding in the report is that the claimant is capable of some type of work, then the employer can choose to hire the counselor to provide vocational services to the claimant or choose to let the opinion stand on its own. The decision rests with the employer or their insured. Regardless of the choice, the testimony of the counselor may be needed if the claim proceeds to trial. The counselor could be asked to testify in court or be asked to give their testimony via a deposition.

When vocational rehabilitation services are being provided, the claimant has the duty to cooperate. If the claimant does not cooperate, benefits can be suspended (*Archer Daniels Midland Co. v. Industrial Commission, 1990; Hayden v. Industrial Commission, 1991; Lorenz, 2004;*).

If the employer does not provide vocational rehabilitation services to the claimant, the claimant can perform a self directed job search, or hire his own counselor to provide vocational assistance. A self directed job search can be difficult and is not always performed properly. When this occurs, the claimant runs the risk of losing entitlement to certain benefits. When disputes do occur over the rehabilitation process between the claimant and the employer, they are adjudicated before the arbitrator. Disputes can be resolved informally with a pre-trial conference with the arbitrator. These conferences have no binding effect on the parties but work effectively as a mediation technique. If the issue cannot be resolved informally, then the claimants

remedy lies in the claims process outlined above (Rules Governing Practice Before the Industrial Commission, 2009).

Overall, the Commission is desirous of getting injured workers back to gainful employment. The Commission, as a general rule, has taken a harsh stance against employers who do not make attempts to return workers to gainful employment within their restrictions (Lorenz, 2004; *Steinke v. Wal-Mart Stores, Inc.*, 2002). Failure to accommodate or provide rehabilitation services to the claimant has also been noted to garner higher awards of permanency on behalf of the claimant. The literature is replete with cases where awards were based on whether the claimants restrictions were accommodated by their employer or whether vocational services were provided (Garcia & Johnson, 2004; Lorenz, 2004; *Roper Contracting v. Industrial Commission*, 2004; *Westfall v. Kroger Co*, 1981).

When utilized properly, vocational rehabilitation is an effective tool in returning injured workers to gainful employment and reducing an employer's continued liability for workers compensation benefits. Business and labor have a common goal which is to return the injured worker to gainful employment. When needed, the efforts of the vocational rehabilitation counselor play a significant part in reaching that goal. Chapter III will address the practical implications vocational rehabilitation counselors will face in a functional workers' compensation system.

CHAPTER III

DISCUSSION

Although well intentioned, the Illinois Workers' Compensation Act is not the best drafted piece of legislation. It is a creature of statute and rules and leaves much to interpretation. The desired meaning is often dependent on the individual or group seeking a particular outcome. Over the years, the Act has been dissected, analyzed and interpreted by the Illinois Courts. Even the significant statutory amendments in 2005, and the most recent amendments of 2011 leave room for conjecture and interpretation. The Act rarely stands black and white on any issue, and as such, each case should be approached with freshness and reviewed on its own merit as no two claims are ever alike.

Vocational rehabilitation counselors will only be involved in a small percentage of cases actually filed before the Commission, however, when they are involved, their role is vital to claim resolution. When providing job placement services, an employer's liability is significantly reduced if a claimant can return to gainful employment in some capacity.

Having a working knowledge of the history of the Workers Compensation Act gives the rehabilitation counselor a brief insight into the ongoing conflict that exists between business and labor. The fear of financial ruin that existed over one hundred years ago remains a driving force not only in the ever evolving legislation, but also in day to day claims management. Having a basic understanding of the claims process, will help the counselor utilize their skills in a more effective and streamline manner to maximize the physical and mental recovery of the claimant.

A delicate balance continues to exist between an injured workers rights and an employer's profits. The role of a vocational rehabilitation counselor in any workers' compensation claim is significantly dependent on the party who hired the counselor and the duties the counselor was hired to perform. A counselor must be careful to work only within the parameters set by the party who hired them. This does not mean that the opinions of the counselor must conform to the party that hired them, merely that they do not do more than they are asked to do. This may include only rendering opinions on a claimants employability rather than providing vocational services to those who are eligible and qualified. Having an understanding of the workers' compensation claims process will help the vocational rehabilitation counselor understand why they are not hired to do more, as services in the private sector differ greatly than services offered and provided in the public sector.

Vocational rehabilitation counselors have an engrained understanding that one's ability to work is profoundly important. In addition to this concept, it is also important for the counselor to understand the path a claimant has traveled before rehabilitation services were finally provided to them. Each injury is different and each claim is managed differently. Claimants have the potential to bring mental baggage related to their work injury, their employer, financial stress and litigating portions of their claims, including litigating their disability or the need for vocational rehabilitation. Having an understanding of the stages or possible stages a claimant has traversed is significant in how vocational rehabilitation is approached with the claimant.

Creating an environment that promotes the potential for success is beneficial for the claimant and the employer. Vocational rehabilitation can be a successful tool in the

workers' compensation arena. It is dependent on a multitude of factors working together to achieve a single goal: returning the injured worker to gainful employment.

Vocational rehabilitation counselors are critical in that role.

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