Getting the Injured Worker Back to Work:
Impact of Light Duty and Wellness Programs

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Return-to-Work Programs

- Return-to-work (RTW) is an employer-designed program with the goal of accommodating an injured employee's medical restrictions while simultaneously allowing the employee to return to work.
- The implementation of a RTW program allows a company to reduce workers' compensation costs, comply with disability-related legislation, and quickly get valued employees back to work.
- RTW programs help companies reduce the expenses usually related to an injured out-of-work employee. While the company is still bound to pay the injured employee, the company receives greater "bang-for-their-buck" than they would by simply paying lost-time benefits.
- Under RTW, companies place an injured employee in a meaningful job that meets the employee's medical restrictions. As a result, the company is able to extract some production from the injured employee, which helps recoup the costs of the wages paid. Conversely, when an employee is out of work collecting benefits, the employer receives no production at all.
- Moreover, companies avoid the headaches of, and save the costs associated with, having to go through the process of searching for, hiring, and training replacement employees.
- Finally, RTW programs can boost workplace morale by demonstrating that companies value their employees as integral assets. This is true for both the injured employee returning to work and for non-injured employees simply observing the process.

The Employee Also Benefits Under RTW

- RTW programs help to increase the perception of an employee's value to a company and can lead to improved self-esteem after an injury.
- The injured employee is able to make a meaningful contribution to the company without overexerting themselves.
- RTW programs allow an injured employee to stay engaged with co-workers and reduce the isolation that is often experienced when an employee is off work.
- The injured employee is able to retain a semi-normal schedule, avoid deterioration of skills, and stay in the mindset of maintaining regular work.
- Additionally, it reduces the financial impact experienced by the injured employee by allowing them to collect their full-wages.

Issues to Avoid with Return-to-Work

- Be careful about having a 100% rule in place!
  - If an employer has a rule that states an injured employee must be 100% recovered prior to returning to work, and applies said rule to an employee covered by the ADA, the employer has committed a per se violation of the ADA.
- As permitted by state workers' compensation statutes, an employer may have an injured employee undergo a medical exam prior to returning to work.
  - However, the ADA requires that an employer must demonstrate that such an exam is related to the job and associated with a business necessity.
  - Additionally, while no specific time frame is stipulated by the 7th Circuit, if an employer wants an employee to undergo further medical examination, it could be considered bad-faith for an employer to request a secondary exam prior to the employee's return. Upon their return, employees should have meaningful time to demonstrate their abilities before an additional exam is requested.
- When an employee is returning from FMLA leave, companies should make sure to have a policy that informs the injured employee that they must have a physician's certification to return to work.
- Employers should avoid contacting an employee's healthcare provider without direct authorization from the employee.
  - Even if the employee consents, only the company's own healthcare provider should contact the employee's provider for the purposes of authentication or clarification.

Light-Duty Programs

- In order to reduce worker's compensation liability, employers can create light duty programs to allow an employee on leave and receiving workers' compensation to return to work.
- Light-duty positions are temporary positions created specifically for the purposes of providing work for employees who are unable to perform their normal duties.
- The primary goal of light-duty positions are to reduce an employer's workers' compensation costs by mitigating an employee's potential lost earnings. Under the IWCA, an employee's refusal to accept a reasonable light-duty position can result in the termination of worker's compensation benefits.
- Companies should not create permanent light-duty positions and light-duty programs are not meant to last for long periods of time. Light-duty programs are most efficient when they are flexible to an injured worker's restrictions and conducted on an ad hoc basis.
- Employers should clearly express the availability of light-duty positions to injured workers. However, an employee's acceptance of a light-duty position must be completely voluntary. Under the FMLA, an employer cannot require an employee to accept such a position.
- Upon an injured employee's release to resume full-duty work, the employee should be sent notification when a full-duty position becomes available.

Important Pieces of Disability-Related Legislation to Consider When Implementing a Light-Duty Program

1. Family Medical Leave Act (FMLA)
2. American's With Disabilities Act (ADA)
3. Illinois Workers' Compensation Act (IWCA)

Also Consider

Equal Employment Opportunity Commission (EEOC) opinions

Ensure Your Light-Duty Program is Compliant with Disability-Related Legislation

- Acceptance of a light-duty position does not waive an employee's rights under the FMLA. Accordingly, an employee retains the right to be restored to the same position he or she had prior to the injury.
- An employee's time spent employed in a light-duty position does not count against the 12 weeks allotted for FMLA leave.
- However, if an employee is taking an FMLA leave and worker's compensation leave concurrently, the employee may lose worker's compensation benefits for refusing the light-duty option. Nevertheless, the employee would still be entitled to continue on unpaid FMLA leave until they have exhausted the 12 week time period or they are able to return to the same or an equivalent job.
- The FMLA does not address what the rate of compensation should be for an employee working in a light-duty position. Accordingly, as long as it does not violate state workers' compensation laws, an employee may be compensated at an appropriate rate for the light-duty position as opposed to their regular salary. Temporary Partial Disability benefits may be used under the IWCA
- Under the ADA, companies aren't required to create light-duty work if an acceptable position does not already exist. However, a less demanding job may be considered a reasonable accommodation. Additionally, if a company opts to create a light-duty position, it is allowable for that specific position to only be offered on a temporary basis.
- Companies may establish explicit guidelines that specify what temporary means in regard to light-duty. Such as: "Temporary light-duty positions do not usually last longer than (X) weeks. If the employee has not been cleared to return to regular employment at the end of (X) weeks, discussions will be had with the employee to see how the company may help them return to their job."
- Conversely, companies may take a flexible approach to light-duty positions dependent upon the employee's injuries. However, this approach can lock a company into maintaining a light-duty position for longer than desired.
- The EEOC has taken the position that companies cannot restrict light-duty jobs solely to individuals who have suffered on the job injuries. However, many of the jobs the EEOC's opinion may effect would likely already constitute reasonable accommodations under the ADA.
- Companies should not make exceptions regarding performance expectations and policies for light-duty jobs.

Be Wary of Terminating Employees on Light-Duty

Interstate Scaffolding v. Illinois Workers' Comp. Comm'n, 236 Ill. 2d 132, 923 N.E.2d 266, 274 (2010).

- In 2010, the Illinois Supreme Court set the workers compensation world on its head by handing down its decision in *Interstate Scaffolding*.
- In *Interstate Scaffolding*, the claimant was on a light-duty assignment stemming from a work-related injury two years earlier. While employed in the light-duty position, the claimant was terminated for cause after defacing company property with religious graffiti. Interstate Scaffolding subsequently refused to pay TTD benefits upon the claimant's termination. The Illinois Workers' Compensation Commission (IWCC) held that since the claimant had not reached maximum medical improvement (MMI) prior to his termination, he was entitled to TTD benefits.
- On appeal, the Illinois Supreme Court agreed with the IWCC, holding that the Illinois Workers' Compensation Act contained "no provision for the denial, suspension, or termination of TTD benefits as a result of an employee's discharge by his employer. Nor does the Act condition TTD benefits on whether there has been 'cause' for the employee's dismissal. Such an inquiry is foreign to the Illinois workers' compensation system." *Id.* at 146.
- Under this ruling, if a claimant is working in a light-duty position and has not yet reached MMI, even if they are fired for cause, the claimant will be entitled to TTD benefits in most situations.
- The Illinois Supreme Court's ruling in *Interstate Scaffolding,* created a gray area as to whether employers would still be liable for the payment of TTD benefits even if an employee was terminated for criminal acts committed against the employer.

Some Expensive Packs of Cigarettes for Wal-Mart

Matuszczak v. Illinois Workers' Comp. Comm'n, 2014 IL App (2d) 130532WC, 22 N.E.3d 341, (Dec. 22, 2014).

- In 2014, the consequences of *Interstate Scaffolding* became woefully apparent.
- In *Matuszczak*, the claimant was employed at Wal-Mart when he injured his back, neck, and arm in a work-related accident. Subsequently, the claimant returned to work in a light-duty position. While working in the light-duty position, the claimant was terminated for cause because he admitted to stealing cigarettes on multiple occasions in 2011. After the claimant's termination, he was unable to find similar light-duty work. At arbitration, the arbitrator found that the claimant had sustained his injuries in the course of his employment and awarded 23 weeks of TTD benefits. On appeal, the IWCC reversed the arbitrator's TTD award. Subsequently, the circuit court fully reinstated the arbitrator's decision.
- Ultimately, the appellate court agreed with the circuit court, upholding both the 23 weeks of TTD benefits.
- "The record shows claimant was entitled to benefits under the Act as a result of his work-related injury but was terminated from his employment for conduct unrelated to his injury. Per *Interstate Scaffolding*, the critical inquiry for the Commission when determining claimant's entitlement to TTD was whether his medical condition had stabilized and he had reached MMI." *Id.* at ¶ 27.
- The *Matuszczak* court agreed with the court in *Interstate Scaffolding*, reiterating that the Illinois "[S]upreme Court specifically considered and rejected an analysis which included inquiry into whether the 'employee has engaged in misconduct constituting a constructive refusal to perform the work.' " *Id.* at ¶ 26 (quoting Interstate Scaffolding, 385 Ill.App.3d at 1051–52, 324 Ill.Dec. 913, 896 N.E.2d at 1142 (Donovan, J., dissenting, joined by Holdridge, J.)).

Interstate Scaffolding's termination restrictions don't apply if they force an employer to violate the law

Lopez v. Channel Distrib.,14 IL. W.C. 27884 (Ill. Indus. Com'n Feb. 4, 2016)
If an employer is legally prohibited from keeping an injured employee on staff, the termination of that employee is not volitional on the part of the employer.

- In Lopez v. Channel Distribution, the claimant was an illegal alien who experienced a workplace injury. The claimant then underwent surgery for the injury and received TTD benefits. After the injury, the claimant was placed in a light-duty position. In the following months, TSA conducted background checks into the company's employees and discovered issues with the claimant's immigration status. Due to this, the employee was given the option to rectify his immigration status with TSA, resign, or be fired.
- At the advice of counsel, the claimant resigned. However, the claimant contended that his resignation was a actually a constructive termination because he ultimately would have been fired. Additionally, at the time of his resignation, the claimant had not reached MMI. As a result, the claimant argued that the precedent set forth by *Interstate Scaffolding* should apply to his case.
- The IWCC found that since *Matuszczak* had discounted the notion of a claimant's constructive rejection of light duty, a constructive termination argument must also be discounted. Ultimately, the IWCC found that *Lopez* was distinguishable from both *Matuszczak* and *Interstate Scaffolding.* In *Lopez*, the claimant's failure to resolve the issues with his employment status was inseparably linked to his own volitional decisions.
- Therefore, Lopez's employer could not keep Lopez employed without breaking federal laws regarding both immigration and national security. As a result, the arbitrator denied Lopez's requested TTD benefits from the day of his resignation to the date of trial.

An Injured Employee's Refusal of Accommodated Work Can Serve as a Reason to Terminate TTD Benefits

Weller v. Illinois Workers' Comp. Comm'n, 2018 IL App (3d) 170047WC-U. (Tazewell County case)
In cases where a claimant is terminated while injured but has failed to establish that they were unable to perform light-duty work for the respondent, *Interstate Scaffolding*'s holding is inapplicable to the award of TTD benefits.

- In *Weller*, the claimant was operating a forklift when he suffered a workplace injury on September 20th, 2011. After seeking treatment, he was diagnosed with a serious back injury stemming from a herniated disk. The claimant's doctor opined that the claimant could perform light-duty tasks, such as lifting up to 20 pounds and operate heavy machinery as long as he was not required to move his neck.

- Subsequently, the employer's doctor performed an examination and came to the conclusion that the claimant's condition had not been caused by his workplace activities and that the claimant could engage in light duty work. The company made an offer of light duty work pursuant to both of the doctors' opinions. Despite this, the claimant never returned to work after October 4th, 2011, and contended that he was unable to do any work at all.

- The claimant only received medical authorization to miss work on October 19th, 2011, after he had already walked off of his job. Eventually, the claimant was terminated and his TTD benefits were terminated. At arbitration, the claimant was awarded 232 weeks of TTD benefits from Oct. 5, 2011-April 14, 2015. However, the IWCC modified the award, finding that the claimant had only proved entitlement to TTD benefits from Oct. 5-Oct. 19, 2011.

- On appeal, the claimant argued that since he was terminated from his position after he was injured, he was entitled to TTD benefits under *Interstate Scaffolding*. Unpersuaded, the Appellate Court held that the claimant did not present "any evidence to support a claim that his termination played a role in the Commission's decision to reduce his TTD benefits." *Id.* ¶ 26. Additionally, the Appellate Court noted that "the Commission's finding was premised on the fact that claimant failed to establish that he was unable to perform the functions of his position for respondent after October 19, 2011." *Id.*

An Injured Employee's Refusal of Accommodated Work Can Serve as a Reason to Terminate TTD Benefits (Cont.)

Deprow v. U.S. Steel, 24 ILWCLB 30 (Ill. W.C. Comm. 2015).
Penalties and fees are not justified for an employer's termination of TTD benefits once an injured employee has refused a light or restricted duty position. When an employer relies on a physician's judgement that the injured employee is capable of light or restricted duty work in the weeks following surgery, and there is no testimony to dispute the physician's opinion, then the employer has not engaged in conduct so unreasonable to warrant additional penalties.

- In *Deprow*, while working at a steel mill in July 2013, the claimant injured his right shoulder and underwent surgery. At a March 25, 2014 hearing, the claimant testified that for 8-12 hours per day he wore an arm-sling to immobilize his shoulder. The claimant was evaluated by the employer's doctor while still fully restricted from work. The doctor found that the claimant should be allowed to perform restricted duty office work without the use of his right arm. Subsequently, the defendant offered claimant appropriate one-armed work.

- Instead of accepting the position, the claimant decided to follow his personal doctor's orders and did not return to work. As a result, the defendant terminated the claimant's TTD benefits. At arbitration, it was found that the claimant was entitled to TTD payments from Feb. 21, 2014-March 25, 2014 and the defendant was ordered to pay continuing temporary compensation benefits until the claimant was allowed to return to light duty, and awarded penalties and attorney's fees.

- Upon review, the IWCC agreed with the TTD award for the time up until the hearing but found the arbitrator's award of continuing temporary compensation inappropriate.

- Finally, the IWCC reversed the award of penalties and attorney's fees, noting that the defendant relied on a doctor's judgement and there was no testimony that the claimant was incapable of making use of his left arm after surgery. Additionally, the the defendant had previously provided the claimant with similar work for months before his surgery.

- While the defendant may have displayed undue eagerness by offering the claimant one-armed work just two weeks after the surgery, the defendant did not engage in conduct so unreasonable to warrant penalties and fees.

If They Sit at Home They Can Sit at Work

Powell v. Manchester Tank & Equipment, 25 ILWCLB 194 (Ill. W.C. Comm. 2017)
A claimant who refuses light-duty work that exceeds his specified restrictions, but engages in the same activity during his personal time, has no claim for further TTD benefits.

- In *Powell*, the claimant was a welder who injured his back during an April 2015 work injury. At arbitration, the claimant was awarded TTD benefits through June 1st, 2016.
- The claimant was offered light-duty work by the company, but he rejected the position because it required him to sit for long periods of time which violated his medical restrictions.
- However, the claimant admitted that starting in April 2016, he routinely violated his medical restriction against sitting for long periods of time when he was at home.
- On review, the IWCC modified the awarded benefits, finding that the claimant wasn't entitled to TTD benefits after April 1st, 2016.
- The IWCC found that since the claimant volitionally violated his restrictions on his own time, his refusal to do so for his employer warranted the termination of further TTD benefits. Accordingly, since the claimant did not give a precise date in April for when he started violating his restrictions, the IWCC found that first day of the month was an appropriate termination date.

Preventative Action: Workplace Wellness Programs

- A common trend among both private and public sector employers is the establishment of workplace wellness programs.
- In total, over 50 million American workers have access to workplace wellness programs.
- A study done by the University of Chicago found that in 2016 alone, companies spent close to $8 billion on wellness programs. In 2011, companies spent only $1billion on wellness programs.
- Ideally, workplace wellness programs hope to improve the overall health of employees, increase worker productivity, and lower h
- Previous studies have found that for every $1 an employer spends on a wellness program, medical costs fall approximately $3.27. (Workplace Wellness Programs Can Generate Savings by Katherine Baicker, David cutler, and Zirui Song (2010))

Know the Legal Pitfalls of Wellness Programs

- Workplace Wellness programs must comply with federal legislation such as the ADA, Genetic Information Nondiscrimination Act (GINA), and other laws and regulations set forth by the EEOC.
- Additionally, if a workplace wellness program is provided through a health insurance program or is part of a group health plan, it must also comply with the Affordable Care Act and the Health Insurance Portability and Accountability Act (HIPAA).
- Pursuant to Title 1 of the ADA, if an employee wellness program requires participants to undergo a physical exam or respond to disability or illness related questionnaires, the extent to which employers may use incentives is limited.
  - When inquiries for medical information are a voluntary component of a workplace wellness program, they are protected under the ADA. However, the definition of what constitutes a voluntary component of an employer-sponsored wellness program is abstract and can ensnare unsuspecting companies.
  - Similarly, Title 2 of GINA has nearly identical restrictions on incentives for the production of medical information. However, it also extends the permissibility of incentives to an employee's spouse if they are allowed to participate in the wellness program.
    - But an employee's spouse may only be offered incentives to provide information pertaining to the potential existence of a disease or disorder.
- The ADA also requires reasonable accommodations for employer-sponsored wellness programs.
  - If a disabled employee is unable to participate in a physical activity required under the program, the program is required to offer a replacement activity for that employee to participate in.
  - The same is true for goals or penalties mandated under the program. If an employee is unable to reach a mandatory goal or avoid a penalty due to a disability or illness, the program must offer alternative goals and penalties for the employee.
  - Alternative standards or activities can be created on an ad hoc basis and may be individually crafted for each specific employee.
- Due to ADA accommodations, workplace wellness programs can often experience hidden costs and burdens not accounted for in the initial budgetary planning phase.

When is a Workplace Wellness Program Considered Voluntary?

Under the ADA

1. It must be reasonably designed to promote health or prevent disease;
2. It must be voluntary;
3. The incentives offered under the program cannot exceed 30% of the total cost of self-only coverage; (Until January 1st, 2019)
4. It must meet certain confidentiality requirements;
5. It must comply with all of the anti-discrimination laws enforced by the EEOC; and
6. It cannot utilize certain safe harbor provisions that are applicable to underwriting.

Under GINA

1. The program must be designed to prevent disease or promote health;
2. Production of genetic information by the employee must be volitional;
3. In regard to genetic information, the employee must provide written authorization meeting certain requirements that demonstrate prior knowledge and volitional consent;
4. Only approved personnel may be given use of and access to genetic information; and
5. Incentives for employees to produce genetic information are only acceptable for the completion of Health Risk Assessments which include questions specifically related to genetic information.

Participatory Wellness Programs under the ACA

- Participatory wellness programs are permissible as long as they are available to any employee regardless of health. If incentives or rewards are provided, they are not based on the satisfaction of a health-related standard or requirement.
- The Department of Labor provided these examples:
  1. A program that reimburses employees for all or part of the cost for memberships in a fitness center.
  2. A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes.
  3. A program that reimburses employees for the costs of participating, or that otherwise provides a reward for participating, in a smoking cessation program without regard to whether the employee quits smoking.
  4. A program that provides a reward to employees for attending a monthly, no-cost health education seminar.

Health-Contingent Wellness Programs Under the ACA

Health-Contingent Programs Require participants to meet health related goals and expectations in order to obtain an award

Requirements for compliance:

1. The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
2. The total reward for all the plan's wellness programs that require satisfaction of a standard related to a health factor must not exceed 30 % (or 50% for programs designed to prevent or reduce tobacco use) of the cost of employee-only coverage.
   - If dependents may participate in the wellness program, the reward must not exceed
     30 %(or 50%) of the cost of the coverage in which an employee and any dependents are enrolled.

   * Only true until January 1st, 2019
3. The program must be reasonably designed to promote health and prevent disease.
4. The incentives must be available to all similarly situated individuals.
   This means the program must have reasonable accommodations, alternatives, or a waiver policy.
5. In all materials describing the terms of the program, the plan must disclose the availability of a reasonable alternative standard or have a waiver policy.

Changes Are Coming for Permissible Incentives

- Recently, the voluntariness of wellness programs which offer incentives of up to 30% of the cost of employee-only coverage were challenged in **AARP v. United States Equal Employment Opportunity Comm'n**. 292 F. Supp. 3d 238 (D.D.C. 2017).
- The AARP challenged the EEOC's regulation, which was in compliance with the language of the ADA and GINA, that wellness programs which had 30% incentives were voluntary if they met certain requirements.
- The federal district court in Washington D.C. agreed with the AARP, ruling that the EEOC had failed to effectively establish that a 30% incentive did not render a program involuntary.
- The district court ruled that it would vacate the EEOC's regulation on January 1st, 2019, and demanded that the EEOC present a notice of proposed rulemaking before September 2018.
- As of May 2018, the EEOC had yet to decide whether it would create new regulations on wellness program incentives.

Are Wellness Plans Worth the Headache?

- According to a recent study by the University of Illinois, workplace wellness programs may not be the godsend employers once believed them to be.
- The 2017 Illinois Workplace Wellness Study used the employees of the University of Illinois at Urbana-Champaign to conduct a controlled and randomized trial of a comprehensive wellness program.
- The study randomly assigned U of I employees to either a control group without access to a wellness program or one of six groups with access to a wellness program called “iThrive”.
- Participants in the six groups were allowed and encouraged to participate in health screenings, risk assessments, and physical/wellness activities. In total, 3,300 U of I employees were given access to the wellness program while 1,534 were part of the control group.
- Ultimately, the U of I researchers wanted to answer three questions regarding workplace wellness programs:

  1) Do they have any effect on health outcomes, medical spending, and worker productivity?

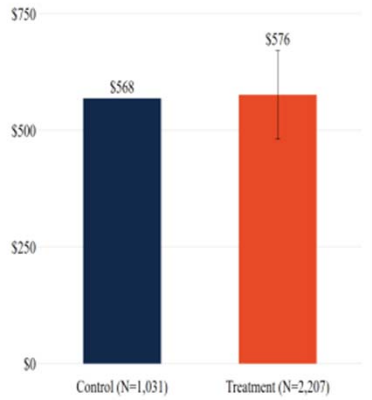
  2) Can financial incentives attract more participants?

  3) What types of employees are likely to participate?

iTHRIVE

The Results After 1 year

1. Do they have any effect on health outcomes, medical spending, and worker productivity?
   - U of I found that a workplace wellness program did not change health care costs
     - The control group (without a wellness program) actually had slightly lower average monthly medical spending!
     - Control group: $568 iThrive Groups: $576
   - Having a wellness program showed no measurable health benefits!
     - Running event participation and gym usage were nearly identical between the control group and the participating groups



2. Can financial incentives attract more participants?
   - The study found that financial incentives work, but only to a certain extent.
     - Participation rates in health screenings
       - $0 incentive: 47% participation rate
       - $100 incentive: 59% participation rate (12% increase as opposed to $0)
       - $200 incentive: 63% participation rate (4% increase as opposed to $100)
3. What types of employees are likely to participate?
   - The employees who chose to participate were already healthier!
     - The employees who participated already had a higher rate of gym usage and nearly 3x the rate of prior running experience.
     - As a result, the employees who participated in iThrive had lower health care costs at the commencement of the program.

- Ultimately, at the end of the first year, U of I reported that nothing in the study pointed towards increased employer savings.

But…

- The study is still in its infancy. U of I plans to continue the study for two more years to see if, over time, savings start to emerge.
  - Prior studies have estimated that wellness programs take around three years to show any benefits.
- The study did find two potential benefits of wellness programs:
  - Employees who participated in iThrive became more likely to seek a health screening
    - The same employees were also more likely to say that their employer cared about their health
  - Employees who participated were less likely to take sick days
- While wellness programs may not have a direct and immediate impact on workplace health savings, eventually they may reduce healthcare costs by attracting and retaining healthier employees.

Permanent Total Disability-Case Example

Sarlo v. ABM Industries Inc., 25 ILWCLB 75 (Ill. W.C. Comm. 2016).

- Accounting manager injured on the job failed to prove she was incapable of employment or that she could not perform any services except those which are so limited in quantity, dependability or quality that there is no reasonably stable labor market for them. She had experience in the sedentary labor market of accounting, thus the Commission found she could perform some form of employment without seriously endangering her health or life. Further, surveillance video revealed her ability to run, squat, bend, carry, and lift. Failed to prove she conducted a diligent and good-faith search for employment. Permanent Total Disability benefits were denied.
- However, the arbitrator conducted the 5 factor analysis for permanent partial disability and found her entitled to permanent disability benefits under Section 8(e) for 20% loss of use of her right leg.

Permanent Total Disability-Case Example

White v. Pleasant Hill CUSD No. 3, 25 ILWCLB 29 (Ill. W.C. Comm. 2017).

- Employer did not offer injured employee work within his restrictions so they provided him with a counselor to provide him with the tools necessary to complete a job search. After the employer discontinued the counselor, the employee performed a diligent and good-faith job search on his own, getting several interviews.
- Employee satisfied his burden of proof that he was within the odd-lot category of permanent total disability 1) by showing diligent but unsuccessful attempts to find work and 2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market.
- Burden then shifted to his employer to show that suitable work was available in the employee's labor market. Employer failed to do so. Commission awarded permanent total disability benefits.

Permanent Total Disability-Case Example

Personnel Staffing Group LLC d/b/a Most Valuable Personnel v IWCC (Alvarado), 25 ILWCLB 5 (Ill. App. Ct., 1st 2016) .

- Employee satisfied his burden of showing he was within the odd-lot category of permanent total disability. Employee proved that because of his age, skills, training, and work history he would not be regularly employed in a well-known branch of the labor market. Employee's vocational report showed he did not have access to gainful employment due to his lack of secondary education, transferable skills, and English language skills, and his age.
- Employer offered proof that it offered employee several jobs as a restroom monitor, but the Commission found that position did not reflect the employee's long-term employment prospects in a competitive labor market. Commission found that employee was permanently and totally disabled pursuant to Section 8(f) Of the WCA under the odd-lot theory.

Permanent Total Disability-Case Example

Cantwell v. Illinois, State of/University of Illinois, 25 ILWCLB 16 (Ill. W.C. Comm. 2016)

- After a work injury, medical evidence established that the employee was not permanently and totally disabled. She could still function at a medium demand level with limited ambulation activities.
- Employee began a self-directed job search but it was ineffective due to her search methods. Employee applied for jobs outside the scope of her medical restrictions, education and training. She further failed to establish that because of her age, training, education ,experience, and condition, no jobs were available to her.
- Employee's vocational rehabilitation counselor testified that employee could return to gainful employment after vocational rehabilitation in the form of retraining in a local college program. Commission found the recommendation reasonable and persuasive and awarded maintenance benefits during the employee's retraining.

Refusing Vocational Services-Case Example

Johnson v. (Chicago, City of) IWCC, 25 ILWCLB 73 (Ill. W.C. Comm. 2017).

- Employee was found to be noncompliant with vocational rehabilitation. He refused to participate in a diligent and good-faith job search. Evidence showed he was repeatedly late for meetings and computer lab, failed to request time off or submit proper time off sheets, completed only half of the weekly required job searches, was argumentative, refused to dress properly, and made personal calls during his computer labs, and missed appointments.
- The arbitrator denied the claimant any further maintenance and found the employer entitled to a credit for maintenance benefits paid.

Maintenance/Vocational Rehabilitation- Case Example

Murff v. (Chicago, City of), IWCC, 24 ILWCLB 209 (Ill. App. Ct., 1st 2017).

- Arbitrator issued a decision finding employee sustained a 50% loss of use of the person as a whole. Employee later filed a petition pursuant to Section 19(h) and 8(a) alleging a material increase in disability and seeking additional benefits, including maintenance and vocational rehabilitation, based on a reduction in his earning power. The Appellate Court noted that in Petrie v. Industrial Commission, the court held that an increase in economic disability alone is not a proper basis for modification of an award pursuant to 19(h). Employee must present evidence showing that his physical or mental condition has changed. Employee failed to prove his physical or mental condition substantially and materially changed.
- Further, the Court held that Section 8(a) does not authorized the Commission to award maintenance and vocational rehabilitation after a final decision has been entered. In order for an employee to obtain maintenance and vocational rehabilitation benefits after a final award under Section 19(a) they must satisfy the preliminary requirement of showing a substantial and material change in his physical or mental condition (disability).

Wage Differential Benefits- Case Example

Crittenden v. (Chicago, City of) IWCC, 08 IL.W.C. 19505 (Ill.Indus.Com'n), 18 I.W.C.C. 0084, 2018 WL 1416744

- Claimant injured his lower back during the course of his employment with the City of Chicago. After a functional capacity evaluation, the claimant was found to be at MMI and was given strict physical limitations. After seeing two vocational experts, it was established that in his current condition, the claimant would likely earn between $8.25-$13.78 per hour. However, the $13.78 figure was based on the median wage for a school bus driver and the claimant did not possess a valid driver's license. Prior to his injury, the claimant had been making $32.79 per hour.
- At arbitration, the claimant was deemed to have been partially incapacitated from pursuing his usual and customary line of employment. The arbitrator found that the claimant was entitled to wage differential benefits based on a theory that he would now only be able to make $11 per hour. Due to this, the employer was ordered to pay the claimant $581.06 in wage differential benefits per week.
- The City of Chicago appealed the decision, arguing that $11 was not an appropriate valuation of the claimant's earning potential since the vocational expert opined he could make up to $13.78 per hour. The City contended that the claimant's lack of effort in obtaining alternative employment should subject him to a rate of $13.78 per hour. The IWCC agreed with the City and reduced the claimant's award accordingly.
- However, the appellate court disagreed with the IWCC's reduction of wage differential benefits. The court pointed out that the IWCA requires that the "average amount a claimant could reasonably earn" be used when conducting a valuation of alternative employment. Due to this, the court reversed the IWCC's decision and remanded the case to the IWCC to recalculate the wage differential award. Ultimately, the IWCC reinstated the $581.06 weekly wage differential benefits.
- In their *Crittenden* ruling, the court essentially held that when a person doesn't have a job, the job search becomes their job.