



WORKERS' COMPENSATION COMMENTARY



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VOCATIONAL REHABILITATION: UNTANGLING THE NOTICE REQUIREMENTS

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As you know from our recent letter, Dennis Baker has joined our firm and we are pleased and proud to welcome him aboard. We thought that a fitting introduction to our clients would be to have Dennis prepare an article for the *Commentary*. After a brief pause, which permitted us to catch up (somewhat) with all of the changes this year has brought, we resume publication of our newsletter on a bimonthly basis with an occasional interval bulletin as necessary. I'm sure you will find this issue of the newsletter to be informative and useful. *[John C. Martin, Esq.]*

Failure to comply with notice requirements regarding vocational rehabilitation has cost employers more in time and money than probably any other aspect of this part of the Workers' Compensation laws. This article is designed to highlight some of the more significant notice requirement provisions and serve as a reference source. You will find enclosed a pullout flow chart that can be used as a desk reference and this article primarily follows the flow chart. Please take note that this chart does not cover all notice requirements and is focused on vocational rehabilitation notices for injuries on or after January 1, 1994. The last section of this article will provide a synopsis of two cases that I find rather noteworthy in the field of vocational rehabilitation.

NOTICES TO EFFECTUATE THE \$16,000 CAP

As everyone is aware, for injuries occurring on or after January 1, 1994 there is a \$16,000 cap on rehab expenses. However, for the cap to apply there are certain prerequisite events that are addressed in *Administrative Code 10125*. This code section indicates that vocational rehabilitation ex-

penditures shall apply toward the cap when the following three events occur:

1. The applicant is identified as medically eligible for vocational rehabilitation services, and the claims administrators send out notice of potential eligibility;
2. The employee has received notice in writing of the existence or non-existence of alternate or modified work with the employer, and;
3. The employee has made a request for vocational rehabilitation services.

All three of the above requirements need to occur before payments can be credited towards the \$16,000 cap. I have seen that many times the issue of credit towards the cap has not been raised by the applicants attorneys even though the examiner never sent out a notice to the applicant about the availability or non-availability of alternate or modified work. An alert applicant's attorney could have argued that we had not qualified for imposition of the \$16,000 cap!

Prior to my discussion of notice requirements for industrial injuries, I want to bring to your attention *L.C. §6201*. This code section places a duty on public agencies to send notice to an injured public agency employee of our state rehabilitation program. The notice must be sent after 28 days of deemed non-industrial continuing disability. I merely make mention of this code section because of the curious added responsibility placed on public agencies.

THE 90 DAY NOTICE

(Continued from page 1)

Labor Code §4636 requires that after 90 days of aggregate disability the carrier/employer needs to send out a notice of potential eligibility (herein after referred to by the acronym NOPE).

Labor Code §4636 also requires that after 90 days of aggregate temporary total disability, the employer shall jointly develop with the employee a job description (RU-91) to be sent to the treating doctor to determine the employee's medical eligibility for vocational rehabilitation services. The treating doctor may respond by issuing a report or completing a RU-90 form that advises the parties of the applicant's QIW status.

At times a dispute may arise as to whether or not a job description is adequate or whether a QRR should be appointed to do a Job Analysis. This decision will depend upon whether or not there is a dispute between the employer's version and employee's version of the physical requirement of job tasks, or if the job involves rather varied tasks that require detailed explanations. The more detailed and the more controverted the description of the job tasks, the more likely that a detailed Job Analysis will be required.

In addition to sending a NOPE letter, it is also good practice to include a reply card for the applicant to execute with his specified intention regarding vocational rehabilitation participation.

NOTICE OF DETERMINATION OF QIW STATUS

If the treating doctor indicates, especially upon review of the job description or Job Analysis, that the applicant is a Qualified Injured Worker, then the employer or insurance carrier must make a determination whether to accept the treating doctor's opinion and concede QIW status. *Labor Code §4637* indicates that within 10 days of receipt of a medical report finding the applicant to be a Qualified Injured Worker, the employer or insurance carrier is to provide the applicant with notice of his medical rehabilitation eligibility, and a copy of this notice is to be forwarded to the Rehabilitation Unit. Additionally, the employee is to be provided with "Help in Returning to Work-94" pamphlet and an offer, or denial or delay notice. The applicant must also receive notice of the availability or non-availability of modified or alternative work (Please see Administrative Code 9813(2)(f). This

latter notice is to be sent within 30 days of issuance of notice of potential eligibility for rehabilitation.

If modified or alternate work is available and it complies with requirements of *Labor Code §4644(a)(6)*, then it is mandatory that the employer/insurance carrier complete and send out an RU-94 form to the applicant. The RU-94 form is entitled, "Notice of Offer of Modified or Alternative Work." I also suggest that you send a copy of this notice which will describe the duties of the alternate or modified work position to the treating doctor for his opinion regarding the medical feasibility of the injured worker to perform such duties.

Assuming that modified or alternative work is found to be medically feasible for the applicant, and should applicant decline such modified or alternate work, then the employer should be able to successfully argue that they have satisfied their vocational rehabilitation obligations. At this point in time, the employer or carrier should send a denial of vocational rehabilitation benefits letter, and attach a RU-103 in case the employee desires to dispute a denial of further benefits. I also recommend that a RU-105 be completed as well by the employer or carrier and submit it to the Rehab Unit.

If modified or alternate work is not available, and should the injured worker not request vocational rehabilitation services after notification of medical eligibility, then *Administrative Code §9813(d)(3)* requires a reminder notice be sent during the 46th to 69th day after the notice of potential eligibility was sent.

If the treating doctor has indicated that the applicant is not a Qualified Injured Worker, then notice of non-eligibility needs to be sent to the applicant within 10 days of such knowledge. This notice should also include a RU-101 and RU-103.

A final option would result, if the treating doctor initially indicates that he is undecided as to whether the applicant is a Qualified Injured Worker. Then *Labor Code §4636(b)* requires a follow up with the treating doctor every 60 days until the treating doctor can make a final decision. If there is no medical determination that the applicant is a Qualified Injured Worker after 365 days of aggregate disability, then please take note, there is a rebuttable presumption that the applicant is a Qualified Injured Worker, as expressed in *Labor Code §4636(c)*. Therefore, if the applicant has received temporary total disability benefits for an aggregate of 365 days without a determination by the treat-

(Continued on page 3)

(Continued from page 2)

ing doctor or a QME that the applicant is a Qualified Injured Worker, then, the employer or insurance carrier is under an obligation to notify the injured worker of the rebuttable presumption within 10 days and find out if the injured worker has any present desire to participate in vocational rehabilitation services. [Please see *Administrative Code §9813(d)(2)*]

CASE NOTES

I conclude this article with a brief review of two interesting cases involving vocational rehabilitation issues.

The first case is *John Maynard v WCAB 61 CCC 400 (1996)*. The court in this case held that it was unreasonable for defendants to rely upon a one-page report from applicant's treating physician that concluded that the applicant was not a Qualified Injured Worker. In essence the Court of Appeals stated that the entire medical record must be reviewed. It was found unreasonable for defendants to not pay VRMA benefits when both parties' QME reports found the applicant was a Qualified Injured Worker. (Please take note that this is a pre-1994 injury case, in which there is no presumption of correctness for the treating doctor's opinion, and also both parties procured QME reports finding applicant to be a Qualified Injured Worker.)

The main reason I decided to report to you on this case is that the carrier was actually penalized twice with respect to VRMA benefits. The first penalty came under *Labor Code §4642* that increased the delayed payment from the VRMA rate to applicant's temporary disability rate. The next penalty was 5814 ten percent penalty on the entire species of VRMA benefits for unreasonably failing to pay retroactive benefits as a result of the carrier's reliance on a one page medical report from the treating doctor that was not considered substantial medical evidence.

The last case that I would like to bring to everyone's attention was recently reported in the Daily Journal on October 7, 1998. The case is entitled, *Foodmaker, Inc. v WCAB. (98 Daily Journal D.A.R. 10617)* Our State Appellate Court ruled that an employer who unknowingly hires an undocumented immigrant cannot be forced to provide vocational rehabilitation benefits, when modified or alternate work would have been available to the employee.

The court's decision focused on the equal protection clause of the U.S. Constitution. The court concluded that there was no rational basis for providing an illegal (undocumented) immigrant with more extensive rehabilitation benefits than a legal resident would have received.

There is a possibility that the *Foodmaker* case will be appealed to the California Supreme Court by applicant's counsel. If the decision is amended or reversed, then we will provide a brief update.

It is my pleasure and privilege to attempt this summation of some very important and relevant statutory provisions pertaining to vocational rehabilitation notice requirements. Should you have any further questions or concerns regarding any of the information provided in this article, please contact me at your convenience.

NEXT NEWSLETTER:

Horseplay and the Bunkhouse Rule

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained