

Reviewing the Job Search Requirement in Workers' Compensation Cases: When is a Job Search Really Required

by Arnold G. Rubin

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I. Introduction

Job searches have become intertwined in the process of determining when payment of benefits in workers' compensation claims is appropriate. Many injured employees lose their entitlement to workers' compensation benefits if they do not participate in a job search, or fail to do so in a reasonable manner. A job search requires an injured employee to contact prospective employers to determine if employment is available based upon the employee's age, education, work experience, and work restrictions. The job contact may be by letter, fax, e-mail, telephone or in person. Job searches are either self-directed by the employee, or the job searches are part of a job placement program supervised by a vocational counselor hired by either the injured employee or the employer.

This article will focus upon how job searches impact upon the payment of the following benefits under the Illinois Workers' Compensation Act: 1) temporary total disability benefits, 2) maintenance benefits, 3) wage loss benefits under Section 8(c)1, and 4) permanent disability benefits under the "odd-lot category."

II. Job Searches and Temporary Total Disability Benefits

A typical fact situation which often confronts workers' compensation attorneys involves an injured employee who has sustained a serious injury and, while under active medical care, is advised by the treating doctor that he or she may return to work on a limited-duty or light-duty basis. Many employers do not have light-duty programs and in those situations, the employee is not offered a job by the employer within the work restrictions. At this point, the employee is receiving weekly temporary total disability checks as required under the Act. It has been the position of some unreasonable employers and insurance carriers that, under this scenario, the injured employee must seek alternative employment, despite the fact that the condition of ill-being has not stabilized or reached maximum medical improvement. In some cases, employers suspend temporary total disability benefits if the injured employee does not participate in a job search. The issue, therefore, is whether an injured employee, who is still under active medical care and is released for light duty, must participate in a job search when his employer is unable to offer him light

duty employment, in order to be entitled to continued temporary total disability benefits.

Many injured employees lose their entitlement to workers' compensation benefits if they do not participate in a job search, or fail to do so in a reasonable manner.

The Illinois Appellate Court recently resolved this issue in *Freeman United Coal Mining Company v. Industrial Commission*.¹ In the *Freeman* case, the employee injured both knees in an accident that occurred on October 23, 1995. The employer denied the employee's claim for temporary total disability benefits for the periods from October 24, 1995, through December 2, 1996, and from September 3, 1997, through August 21, 1998. Initially, the claim was denied on a causal relationship defense. That issue was resolved in the employee's favor.

However, the employer had an additional argument claiming that temporary total disability benefits were not appropriate for a period of time from October 31, 1997, through August 21, 1998. The employee had a second knee surgery on September 3, 1997, which

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started the second period of temporary total disability benefits. The employer argued that October 30, 1997, was set as the maximum medical improvement date for the employee's left knee injury. The Commission had found that since September 3, 1997, the date of surgery, the treating physician had not released the employee to return to any type of work and that a total knee replacement was being scheduled. The treating doctor had actually opined that the injured employee should not return to any type of physical work. The employer interpreted this as indicating that the employee could perform light-duty work. The employer argued that the doctor did not indicate that the employee was totally disabled from all types of work and, therefore, temporary total disability benefits should cease as of October 30, 1997. The Illinois Appellate Court held that the employee was entitled to continued payment of temporary total disability benefits for the period of time after the employee was released to perform light-duty work. The court emphasized that the employee's condition of ill-being had not yet reached a state of permanency, since a knee replacement surgery was to be scheduled. The court explained that in determining when temporary total disability benefits were appropriate "the dispositive question is whether the employee's condition had 'stabilized'."² The court further stated "the duration of temporary total disability is not defined by whether an employee can find a job somewhere else."³

The court rejected an argument advanced by the employer setting forth that the employee has an obligation to seek alternative employment through a job search when released for light duty, yet still under active medical care. The court specifically stated that an argument which focuses on whether an employee

is available for work in some other capacity and could and should have sought alternative employment misses the mark in temporary total disability cases.⁴ The court again emphasized that the dispositive question is whether the employee's condition has stabilized.⁵ The Illinois Appellate Court upheld the finding of temporary total disability from October 31, 1997, through August 21, 1998.⁶ The result would have been different had the employee rejected a job offer, by the employer, within his restrictions. That was not the case in *Freeman*.

The court again emphasized that the dispositive question is whether the employee's condition has stabilized.

The finding of the Illinois Appellate Court in *Freeman* is consistent with an earlier decision in *Whitney Productions, Inc. v. Industrial Commission*.⁷ In *Whitney*, the employee sustained an injury to his right hand on October 12, 1992, and was unable to perform certain work duties. He was laid-off from his employer at the end of the work week for reasons unrelated to his injury. He did apply for unemployment compensation and began searching for employment as a warehouse manager. Subsequently, on October 29, 1992, the employee was diagnosed with a fracture to his right hand and was advised to restrict his work activities to light-duty with no lifting over 25 pounds. The Commission awarded the employee temporary total disability benefits for 23-6/7 weeks.⁸ The Illinois Appellate Court affirmed the Commission finding, which awarded temporary total dis-

ability benefits, based on the following rationale: 1) the employee was under active medical care, 2) the employee was under work restrictions, 3) the employee was not provided a job within his restrictions, and 4) the employee had been laid-off by his employer.⁹ The court also pointed out that an employee should not be denied compensation merely because he attempted to work as long as he could after the injury. The employee had been working light duty until the layoff.¹⁰ The Illinois Appellate Court did not mandate that the employee perform a job search following the layoff.

The finding of the court in *Whitney* is consistent with an earlier holding of the Illinois Appellate Court in *Ford Motor Company v. Industrial Commission*.¹¹ In *Ford Motor Company*, the employee sustained an injury to his right ankle on December 5, 1978. He sustained a second injury involving his ankle on June 11, 1980. Following the second accident, the employee was advised to return to work with specific restrictions. Thereafter, a general layoff occurred on June 30, 1980. The employee went back to his regular job on August 25, 1980. The employee did not receive any temporary total disability benefits covering the period from June 30, 1980, through August 25, 1980, the period of the layoff. The Illinois Appellate Court ruled that the employee was entitled to temporary total disability benefits during the layoff period.¹² The court emphasized that neither the ability to do light-duty work nor the non-receipt of medical treatment precludes a finding of temporary total disability.¹³

The Illinois Appellate Court cited with approval the holding in *Ford Motor Company* in the decision of *National Lock Company v. Industrial Commission*.¹⁴ In *National Lock*, the employee sustained four different injuries involving her low back between August 2, 1979, and September 2, 1981. Following the fourth accident, she obtained medical care

that included a surgical procedure performed on her low back. She was released to return to work on July 27, 1982, with a lifting restriction. She actually returned to work within the restriction on September 2, 1982. She continued to work until the date of her layoff, September 12, 1982. The employee was subject to a general layoff. The issue on appeal was whether or not the employee was entitled to temporary total disability benefits following the general layoff in September 1982, because economic conditions had precipitated layoffs rather than the employee's physical condition.¹⁵ The court ruled that the employee was entitled to the payment of temporary total disability benefits during the period of time that she was under a work restriction following the layoff. She was entitled to benefits until April 16, 1983, when the employer offered her a job within her restrictions.¹⁶ In this case, there was no requirement made for the injured employee to seek alternative employment within her restrictions.

If the vocational rehabilitation program is focused on job placement, then the employee must participate in a diligent job search in order to be entitled to receive maintenance benefits.

The Commission recently considered this issue in *Bolstad v. Seven Bridges Country Club*.¹⁷ In *Bolstad*, a beverage cart worker at a country club sustained a fracture of her right lower extremity. During the

employee's recovery period, she was released to return to sedentary work. This release occurred prior to reaching maximum medical improvement. The employer did not offer the employee work within her restrictions. In citing from the previously summarized *Freeman* case, the Commission stated that it did not matter whether an employee could or should look for alternative work.¹⁸ The dispositive test in determining an employee's entitlement to temporary total disability is whether the condition had stabilized. Since the employee had not reached maximum medical improvement, temporary total disability was awarded, although she had been given a release for sedentary work during her recovery period.¹⁹

Similarly, the Commission issued another decision on August 6, 2001, consistent with its finding in *Bolstad*. The Commission confirmed a finding of temporary total disability in the case of *McKinley v. Phillips Getschow Company*.²⁰ In *McKinley*, the employee was a fifth-year apprentice pipe-fitter. He sustained an injury on June 26, 2000, to his low back. Following the accident of June 26, 2000, the employee sought medical care and it was determined that he had herniated discs at two levels in his low back. The employee was immediately placed under a light-duty restriction on June 29, 2000. He continued working for the employer within the light-duty restriction until he was laid-off on July 20, 2000. Following the layoff, the employee remained under the active medical care of his treating physician. He was also examined by a physician chosen by the employer under Section 12 of the Act. Both doctors agreed that the employee was a candidate for surgery for his low back. At the hearing, the apprentice coordinator for the union testified that an apprentice must be able to perform his full-range of job duties if he is sent out to a job site. He pointed out that it was not the policy of the union to send

apprentice pipe-fitters out to work in a light-duty capacity. The Arbitrator awarded the employee temporary total disability benefits from July 20, 2000, through January 5, 2001, the date of Arbitration. The Arbitrator found that the employee's condition of ill-being had not stabilized and that he remained under the active medical care of a treating physician during the temporary total disability period in dispute. The Arbitrator also determined that the employee had performed work in a light-duty capacity for the employer until he was laid-off. The Arbitrator rejected the employer's argument that the worker was obligated to participate in a self-directed job search to obtain alternative employment. The argument was not only rejected by the Arbitrator, but also formed the basis for an award of penalties under Sections 19(k) and 19(l) of the Act.

The Arbitrator held that the conduct of the employer had been unreasonable and vexatious and that the employer had formulated a defense that had no basis under present case law. This award of temporary total disability was affirmed by the Commission. There was a slight modification to the 19(l) award with regard to the number of days upon which the 19(l) penalty was assessed. However, the 19(k) penalty and attorney fees under Section 16 and temporary total disability benefits for 24-1/7 weeks was affirmed.²¹

III. Job Searches and Maintenance Benefits

Section 8(a) of the Workers' Compensation Act sets forth that an injured employee is entitled to receive payment for treatment, instruction, and training necessary for the physical, mental, and vocational rehabilitation, including all maintenance costs and expenses incidental thereto.²² Maintenance is usually considered to be a payment that an injured employee becomes entitled to following the date determined for maximum medical improvement. Maintenance is normally paid when

the employee is no longer temporarily totally disabled, but is involved in a vocational rehabilitation program. If the vocational rehabilitation program is focused on job placement, then the employee must participate in a diligent job search in order to be entitled to receive maintenance benefits.

The court emphatically stated "maintenance and temporary total disability are separate and distinct benefits."

This principle was established by the Illinois Appellate Court in *Manis v. Industrial Commission*.²³ In *Manis*, the employee sustained an injury on February 8, 1998, involving her left shoulder. She eventually underwent a cervical fusion and was released to return to work with specific work restrictions in August 1998. She was subsequently advised to return to work with no restrictions. However, the employee continued to experience pain and eventually sought additional treatment. On November 7, 1998, the treating physician advised the employee to seek a job not requiring constant motion of the arm, shoulder, and neck. The employee sought recovery of temporary total disability benefits and was awarded benefits for a period of 66-3/7 weeks. The Commission reduced the award to 33-4/7 weeks.²⁴ The circuit court reversed the Commission and ordered vocational rehabilitation.²⁵ The appellate court reviewed the issue as to whether the award for temporary total disability benefits was appropriate. The appellate court determined that the statement made by the employee's treating physician,

recommending a change of occupation, could imply that the treating physician felt that the condition was permanent.²⁶ The court determined that since the disability had become permanent, it was no longer temporary. The court held that the employee was not entitled to temporary total disability benefits after November 7, 1998.²⁷ Since the record was silent on the issue of vocational rehabilitation, apparently not requested by the employee, the court decided not to address whether vocational rehabilitation was appropriate.²⁸

Once the condition of ill-being reaches maximum medical improvement, it can be argued that the employee is no longer entitled to receive temporary total disability benefits. Assuming permanent light-duty restrictions and an employer who will not take the employee back to work at his or her former job, then the *Manis* court, *in dicta*, requires that a demand be made by the employee for vocational rehabilitation services in order to sustain an award for maintenance benefits.²⁹

If vocational rehabilitation is authorized, and if the employee participates in a vocational rehabilitation program, it appears that the proper designation for the benefits that the employee receives is that of maintenance under Section 8(a), rather than temporary total disability benefits. The maintenance benefit is normally equal to the temporary total disability benefit.

The court in *Freeman* does address the distinction between maintenance benefits and temporary total disability benefits.³⁰ The *Freeman* court assumed a situation as set forth immediately above in distinguishing between temporary total disability benefits and maintenance benefits. The court explained that there may, indeed, be instances when temporary total disability benefits cease but maintenance benefits for vocational rehabilitation continue.³¹ The court explained that entitlement to vocational

rehabilitation is established when there has been a reduction of earning power due to an employment-related injury and that vocational rehabilitation will increase the employee's earning capacity. The court further explained that in many cases the fact of the reduction in an employee's earning capacity cannot be established until the nature and extent of the permanent disability is known.³² Evidence that an employee can be retrained for jobs other than the one he or she was doing when injured does not necessarily establish maximum medical improvement. The court emphatically stated "maintenance and temporary total disability are separate and distinct benefits."³³ Maintenance benefits apply when the employee begins the vocational rehabilitation process.

If the vocational rehabilitation program is focused on job placement, then cooperation in a job search, although not relevant for determining entitlement for temporary total disability benefits, is relevant in determining entitlement to payment of maintenance benefits under Section 8(a). The Commission clearly mandates diligent job searches in order to support a finding that the employee would be entitled to continued maintenance benefits.

In *Williams v. Dartnell Printing*,³⁴ the Commission held that the employee had performed a diligent job search and was therefore entitled to maintenance benefits under Section 8(a) of the Act. In *Williams*, the employee was 57 years old and had been employed as a paper cutter with the employer for ten years. His job duties required repetitive use of both hands. The employee received treatment for lateral epicondylitis of the right forearm and carpal tunnel syndrome on the right side. The employee was advised that he should limit his work activities to no lifting over ten pounds and no repetitive work activity with his right upper extremity. The Commission ruled in the employee's favor on the issue of medical causal relationship.³⁵

The Commission also resolved the is-

sue of temporary total disability and maintenance benefits. The employee remained under the medical care of his treating physician until January 12, 1999. At that time, the employee was provided with new work restrictions of lifting no more than five pounds and no repetitive lifting. The Commission determined that the employee had reached maximum medical improvement as of that date. Following the determination that the employee had reached maximum medical improvement, the Commission awarded the employee maintenance benefits under Section 8(a) of the Act from January 13, 1999, the date after he had reached maximum medical improvement up to the Arbitration hearing.³⁶ To support the maintenance benefit, the Commission found that the employee had engaged in a "credible job search based on his testimony and medical restrictions."³⁷ The credible job search included nineteen job attempts in Illinois, twenty job attempts in Louisiana, and contact with his union, which was also assisting in seeking employment for the injured employee within his restrictions. This case should be contrasted with the *Manis* case described above. In *Manis*, there was no evidence of any type of diligent job search following the determination of maximum medical improvement.³⁸

A question has arisen in wage loss claims as to whether a diligent job search is required by an employee in order to be entitled to an award for wage differential benefits under Section 8(d)1 of the Act.

In contrast to the *Williams* case cited above, an employee was entitled to temporary total disability benefits or maintenance benefits where the employee did not participate in a diligent job search. There were exceptional circumstances in this case to obviate the need for a diligent job search. This issue was presented in the Illinois Supreme Court case of *Archer Daniels Midland Company v. Industrial Commission*.³⁹ In this case, the employee sustained an injury to his low back while performing his job duties for the employer. The low back injury prevented the employee from returning to his previous occupation as a turbine operator. The uncontested medical evidence established that the employee's physical restrictions included lifting no more than 30 pounds and limitations with regard to bending, stooping and standing. The employer did not provide the employee a job within the restrictions.

Rather, the employer provided the employee with vocational rehabilitation counseling. The vocational counselor agreed that the employee should be enrolled in a locksmithing correspondence course. The course started in late-May 1985 and was completed in December 1985. After completing the locksmithing course, the employee made no attempt to secure employment. Just before completing the course, the employee stated that he had contacted several possible employers and he was informed that no locksmithing jobs were available. The vocational counselor also testified, based on the particularized market studies and personal knowledge of the labor market, that no jobs were available in this area for the employee. The Illinois Supreme Court pointed out that the employee would generally have the burden of establishing the unavailability of employment to a person in his par-

ticular circumstances.⁴⁰ The court emphasized that "diligent but unsuccessful attempts to find employment will satisfy this burden."⁴¹ However, under the facts of this case, the court pointed out that the employer only provided the employee with a locksmithing correspondence course. The employer did not offer the employee any appropriate light-duty work and made no showing that other suitable light-duty work, including locksmithing, was available for him.⁴²

Under the facts of this case, the Illinois Supreme Court awarded the employee additional temporary total disability benefits. Upon closer review of this case, it appears that the Illinois Supreme Court should have distinguished between temporary total disability benefits and maintenance benefits. The court had pointed out that the injured employee was already under permanent work restrictions.⁴³ There should have been a finding that the employee had reached maximum medical improvement. Once the employee began the locksmithing correspondence course, maintenance benefits under Section 8(a) should have been awarded to the employee.

A review of cases from the Illinois Appellate Court and Illinois Supreme Court reveals that the courts often use the terms temporary total disability benefits and maintenance benefits interchangeably. However, it does appear that in more recent cases, the Commission, and the Illinois Appellate Court are attempting to distinguish these particular terms. This is especially clear in the *Freeman* case.⁴⁴

IV. Job Searches and Wage Loss Claims Under Section 8(d)1 of the Act

Section 8(d)1 of the Illinois Workers' Compensation Act allows recovery for wage loss differential benefits for injured employees.⁴⁵ In this

type of case, the injured employee, due to an injury resulting in permanent work restrictions, is required to change jobs and obtain suitable employment within his restrictions. In the event that a wage loss results, the employee then receives benefits representing a percentage difference between his current earnings and those which he would be able to earn in the previous employment.

A question has arisen in wage loss claims as to whether a diligent job search is required by an employee in order to be entitled to an award for wage differential benefits under Section 8(d)1 of the Act. The Illinois Appellate Court has addressed this issue in wage loss claims, just as the court addressed the applicability of job searches in the temporary total disability setting in the *Freeman* case.⁴⁶ The court has arrived at the same result in that it has determined, just as in the temporary total disability setting, that diligent job searches are not necessary in order to support an award under Section 8(d)1 of the Act.

The court specifically considered this issue in the leading case of *Gallianetti v. Industrial Commission*.⁴⁷ In *Gallianetti*, the injured employee was working as a tree-trimming crew foreman when he sustained an injury to his left elbow on July 3, 1992. The elbow injury required multiple surgical procedures. The employee underwent a functional capacity evaluation in August 1994, and it was determined that he would be unable to return to his normal job duties as a tree-trimmer. The employer did not offer the employee a job within the restrictions. From September 1994 through September 1995, he contacted several prospective employers regarding employment. The efforts were fruitless. Although, the employer did not offer the employee vocational rehabilitation services, a

labor market survey was prepared by the employer's vocational expert. The employee also contacted the employers listed in the labor market survey. He did not obtain a job with any of the employers listed in the labor market survey. However, he did eventually obtain full-time employment earning \$5.50 per hour.

The employee sought an award under Section 8(d)1, based on a wage differential claim. The Commission had awarded the employee 60% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act.⁴⁸ However, the Illinois Appellate Court held that the Commission was prohibited from awarding a percentage of the person as a whole where the injured employee had presented sufficient evidence to show a loss of earning capacity.⁴⁹ The court explained that in proving a wage differential award under 8(d)1, the injured employee must prove partial incapacity that prevents him from pursuing his usual and customary line of employment and an impairment of earnings.⁵⁰ The employer argued that the injured employee was not entitled to a wage differential award because he did not secure suitable employment within his restrictions. The employer argued that the job search was "minimal" in both number and geographical scope of employers contacted. The employer also contested the wage differential award since the employee did not provide documentation to support his claims that prospective employers did not have available work for him within the restrictions.⁵¹

The court rejected the argument of the employer and specifically stated: "There is no affirmative requirement under Section 8(d)1 that an employee even conduct a job search. Rather . . . an employee need only demonstrate an impairment of earnings."⁵² The court pointed out that evidence of a job search is but one way to show impairment of earnings.⁵³ The court concluded that

the type of job that the employee could perform was clearly severely restricted. The court commented that the employee regularly inquired about positions that were essentially unskilled jobs. The court also explained that while the employee did not present any physical documentation regarding the job search, he did name all of the employers for which he applied for positions. The employee's testimony was sufficient evidence regarding the nature and extent of the job search.⁵⁴ The Illinois Appellate Court held that the employee had demonstrated his entitlement to a wage differential award under Section 8(d)1 of the Act and the case was remanded to the Commission for determination as to the amount of the award, as well as the effective date.⁵⁵

The focus of the analysis in determining "odd-lot permanent total disability" is the degree to which the employee's medical disability impairs his or her employability.

The *Gallianetti* decision is significant in terms of its discussion regarding the relationship of job searches to awards under Section 8(d)1 of the Act. Written, detailed job searches are simply not required to support an award under Section 8(d)1 of the Act. Although the job search may assist in determining whether there is an impairment of earning capacity, there is no specific requirement as to the number of job contacts or manner of job contacts. Once again, this is a require-

ment not necessarily applicable for an award under Section 8(d)1 of the Act.

Thus, just as in the temporary total disability setting, it is clear that a job search is not mandated for entitlement to an award under Section 8(d)1 of the Act. From the employee's perspective, however, it certainly assists a claim under Section 8(d)1 of the Act if the employee has regularly contacted prospective employers prior to accepting a job within the employee's restrictions. The information obtained through a job search may assist in proving the impairment of earning capacity requirement and the suitable employment requirement. However, the absence of a job search, in and of itself, does not preclude an award under Section 8(d)1 of the Act.

V. Job Searches and Permanent Total Disability Benefits

The Illinois Supreme Court set forth the requirements for proving entitlement for permanent total disability benefits in *E.R. Moore Company v. Industrial Commission*.⁵⁶ In *E.R. Moore*, the Illinois Supreme Court affirmed the finding of the Commission that the employee was permanently and totally disabled. The Illinois Supreme Court stated that an employee need not be reduced to total, physical, and mental incapacity before total and permanent disability compensation can be awarded.⁵⁷ The court further explained that evidence that an employee has been or is able to earn occasional wages or to perform certain useful services neither precludes a finding of total disability nor requires a finding of partial disability.⁵⁸ The court explained that an employee is totally disabled when he or she cannot perform any services except for which no reasonably stable labor market exists.⁵⁹ It is the *E.R. Moore* case that establishes what is referred to as the "odd-lot category" in permanent total disability claims.⁶⁰ The focus of the analysis

in determining "odd-lot permanent total disability" is the degree to which the employee's medical disability impairs his or her employability. The Commission must consider the employee's age, experience, training, and capabilities.⁶¹

According to the court in *E.R. Moore*, it is the employee's initial burden of proving the extent of disability to show that, as a result of the work-related injury, she is unable to perform or obtain regular and continuous employment for which she is qualified. Once the employee has met this burden, the burden then shifts to the employer to come forward with evidence establishing that the employee is capable of engaging in some type of regular and continuous employment.⁶² The employee in *E.R. Moore* had testified to submitting applications to two factories and had continued to look for employment within her restrictions. The employee had suffered from a case of general dermatitis and would remain cured as long as she avoided returning to her former employment. The limited job search that was performed by the employee in *E.R. Moore* satisfied the initial burden of proof that the employee was unable to perform or obtain regular or continuous employment for which she was qualified.

The Illinois Supreme Court determined that although the employee could perform certain types of work without endangering her health, under the circumstances of the case, it was incumbent upon the employer to prove not only what jobs these might be, but more importantly, that such jobs were reasonably available to a person in the employee's position.⁶³ The employer did not meet its burden. The Illinois Supreme Court affirmed the Commission's finding as to permanent total disability.

A different result was reached by the Illinois Appellate Court in a recent case confronting the issue of "odd-lot permanent total disability" and the sufficiency of a job search. In *Alexander v. Industrial Commission*,⁶⁴ the Illinois

Appellate Court affirmed the Commission finding that the employee had failed to prove that he was permanently and totally disabled because he failed to demonstrate that he fell within the "odd-lot category."⁶⁵ In *Alexander*, the employee had sustained a back injury resulting in surgery. A functional capacity evaluation was completed and the employee was released to return to light to medium work. Specifically, the treating doctor released him to return to work with permanent restrictions of lifting no more than 25 pounds and limitations regarding bending, squatting, and repetitive stair climbing. Subsequently, the restrictions were limited further so as to restrict the employee to sedentary work only.

Vocational rehabilitation services were provided to the employee by the employer. The vocational counselor recommended that the injured employee be placed in a machine operator position in a manufacturing setting. The vocational counselor was taking into consideration the employee's lack of education, high pre-injury wage, felony conviction, and "unrealistic expectation of wanting to earn \$18.00 per hour."⁶⁶ The vocational counselor assisted the employee in preparing a resume. He was also instructed as to how to present himself, and how to fill out applications. He was also provided with job contacts. From February 11, 1994, to May 20, 1994, the employee made 431 job contacts. Most of those he obtained on his own. Job logs were kept and the logs were submitted to the vocational counselor. The employee had received three or four interviews, but no job offers.

He was successful in obtaining employment with the Racine Electric Company in June 1994. However, the job duties were in direct conflict with the doctor's restrictions. The owner of

the company contradicted the employee's testimony relative to whether the job was within the work restrictions. The owner stated that he was aware of the employee's restrictions and advised him to work at his own pace. The employee was eventually laid-off from this job. After the employee ceased employment with the Racine Electric Company, he began his own job search in which he contacted approximately 86 companies. This job search lasted from July/August 1994 to February 1995.

The vocational counselor testified at the Arbitration hearing. The vocational counselor testified that she had reviewed the job contacts made by the employee. The vocational counselor had asked the employee to make 10 to 15 job contacts by telephone and two or three in person each day. The vocational counselor advised that the employee failed to meet those quotas. The employee made approximately five contacts per day. The vocational counselor had contacted some of the employers listed on the employee's log sheets. She stated that there were inconsistencies in the job log sheets and she also criticized the employee for contacting employers for jobs for which he was unqualified. Another vocational expert testified that the employee was not complying with the efforts to secure employment and that the employee was not fulfilling the job search requirements of the vocational counselor. The Arbitrator, who first heard the evidence in this case, found that the employee was not unfit to perform any tasks except for which no stable labor market existed. The Arbitrator found that the employee could perform sedentary work. However, the Arbitrator pointed out that the employee had failed to show the unavailability of work through a diligent but unsuccessful job search.⁶⁷ The testimony of the

employer's vocational experts was relied on by the Arbitrator. It was determined that the employee's efforts in the job search were deficient. The Arbitrator also reviewed the employee's job search subsequent to the termination of the vocational rehabilitation services. The Arbitrator noted that the employee made contacts with the same companies that were previously contacted when working with the vocational counselor. The Arbitrator specifically stated in the decision: "The facts, taken as a whole, demonstrate that the employee's job search was less than the diligent job search necessary to prove that [the employee] was unemployable as a result of his age, education skills and position."⁶⁸ The Arbitrator concluded that the employee did not fall within the "odd-lot category" and instead awarded the employee disability to the person as a whole to the extent of 50%.

The Illinois Appellate Court, in affirming the decision of the Commission, held that an employee may meet his burden of proof in establishing an "odd-lot permanent total disability" by showing: 1) "diligent but unsuccessful attempts to find work," or 2) "that, in light of plaintiff's age, experience, training and education, he is unable to perform any but the most menial tasks, for which no stable labor market exists."⁶⁹

The Illinois Appellate Court also emphasized that the Commission decision was based on the employee's failure to conduct a diligent job search.⁷⁰ The Illinois Appellate Court pointed out that the Commission did not find the employee's testimony credible as to the number of contacts that he had made. The court also emphasized that the Commission's decision was based primarily on the insufficient quality and insufficient duration of the employee's contacts, rather than on sheer numbers.⁷¹

Justice Rarick issued an enlightening concurring and dissenting opinion. He concurred with the decision as to the validity of the Commission's decision, but disagreed with the conclusion as to the permanent total disability finding. His dissenting opinion echoes the frustration of the Petitioner's bar regarding the arbitrary requirements set by vocational counselors.

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Justice Rarick specifically criticized the Commission for deferring to a vocational rehabilitation counselor's arbitrary requirements for what constituted a diligent effort at a job search. Justice Rarick stated: "The Arbitrator simply allowed the employer's vocational expert to determine what was diligent and, in so doing, abrogated her responsibility. Moreover, I do not believe that any rational finder of fact could say that Alexander's job search was inadequate." Justice Rarick emphasized that, in absence of the job search, there was sufficient evidence because of the employee's age, training, education, and experience to support a finding of "odd-lot permanent total disability."⁷² Justice Rarick's comments should certainly be useful to any employee's attor-

ney who may question the arbitrary requirements set forth by vocational rehabilitation counselors practicing in the workers' compensation field. Unfortunately, many vocational counselors focus on quantity rather than quality in determining a vocational rehabilitation program.

The finding of the Illinois Appellate Court in *Alexander* is clearly contrasted with the finding of the court in *Reliance Elevator Company v. Industrial Commission*.⁷³ In *Reliance*, the injured employee was employed as an elevator mechanic. He sustained injuries to his low back and right shoulder on July 27, 1992. He was eventually advised to return to work with specific work restrictions. The employer was unable to provide the injured employee with employment within his restrictions. The employer did provide the employee with assistance in obtaining alternative employment. The employee had requested retraining, but the employer balked and denied that request. Only job placement services were authorized. Under the direction and supervision of the vocational counselor, the employee began a job search. At that point, the services of the vocational counselor were terminated by the employer. The employee continued job search activities from June 1994 up to the date of Arbitration, July 13, 1995. The job search consisted of contacting over 3,600 potential employers by the date of Arbitration. No job offers were provided to the employee. A vocational rehabilitation counselor hired by the employer testified that the employee was not placeable and was not a candidate for retraining. Proofs were closed at Arbitration on September 7, 1995. Between the Arbitration hearing dates, on July 24, 1995, the employer offered the employee a job that provided full pay and benefits. It involved delivering materi-

als, picking materials up, identifying parts and various other light duties. The position was not accepted. The Arbitrator concluded that the job offer was "made solely to avoid liability under the Workers' Compensation Act, and not for the purpose of providing legitimate employment to [the employee]."⁷⁴ The Arbitrator also noted that the position that was being offered to the employee was non-union and was normally compensated at \$10.00 per hour, yet it was being offered to the employee at full-union wages and benefits, a compensation package in excess of \$44.00 per hour. The Arbitrator awarded permanent total disability benefits. This finding was affirmed by the Commission.

The Illinois Appellate Court held that the employee met his burden of establishing his entitlement to an "odd-lot permanent total" under the *E.R. Moore* case.⁷⁵ He met his burden by completing "an extensive job search, contacting over 3,600 potential employers."⁷⁶ The Illinois Appellate Court also commented on the job offer that was made by the employer. The court determined that the job offer was a sham and designed to circumvent the employer's responsibility under the Act. The Illinois Appellate Court emphasized: "employers must not be allowed to defeat an injured employee's entitlement to a disability award by making sham job offers."⁷⁷

VI. Conclusion

The purpose of this article has been to point out when job searches are required in order for an injured employee to obtain payment of different types of weekly workers' compensation benefits: 1) temporary total disability, 2) maintenance, 3) wage loss, and 4) permanent total disability. After reviewing several cases from the Illinois Supreme Court, Illinois Appellate Court and

Illinois Industrial Commission and giving special emphasis to the recent Illinois Appellate Court case of *Freeman v. Industrial Commission*,⁷⁸ it appears that job searches are not required in all instances. If an injured employee seeks temporary total disability benefits, there is no requirement for a diligent job search. However, if the injured employee seeks maintenance benefits as part of a vocational rehabilitation program involving job placement, then a reasonable and diligent job search may be appropriate as part of the overall vocational rehabilitation program. Obviously, if the vocational rehabilitation program is education based only, then a job search would not be required in order to be entitled to maintenance benefits. A job search is not necessary in order to be entitled to the wage loss differential benefit under Section 8(d)1 of the Act. However, in establishing an "odd-lot permanent total disability," it may become relevant and a condition precedent in order to establish entitlement to permanent total disability benefits.

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ENDNOTES

¹ *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170, 741 N.E.2d 1144 (5th Dist. 2000).

² *Id.* at 1150, citing *Manis v. Industrial Commission*, 230 Ill.App.3d at 660, 595 N.E.2d at 160-61 (1st Dist. 1992).

³ *Id.* at 1151. See also *SunChoi v. Industrial Commission*, 182 Ill.App.2d 387, 397-99, 695 N.E.2d 862, 867-69 (1998) (A worker in a proceeding under Section 19(b-1) of the Act (820ILCS 305/19(b-

1) (West 1998)) does not have to attach documents to the petition establishing unavailability of employment.)

⁴ *Id.* at 1150.

⁵ *Id.*

⁶ *Id.* at 1152.

⁷ *Whitney Productions, Inc. v. Industrial Commission*, 274 Ill.App.3d 28, 653 N.E.2d 965 (2nd Dist. 1995).

⁸ *Id.* at 966.

⁹ *Id.* at 967.

¹⁰ *Id.*

¹¹ *Ford Motor Company v. Industrial Commission*, 126 Ill.App.3d 739, 467 N.E.2d 1018 (1st Dist. 1984).

¹² *Id.* at 1020-21.

¹³ *Id.* at 1021.

¹⁴ *National Lock Company v. Industrial Commission*, 166 Ill.App.3d 160, 167, 519 N.E.2d 1172, 1176 (2nd Dist. 1988).

¹⁵ *Id.* at 1176.

¹⁶ *Id.* at 1177.

¹⁷ *Bolstad v. Seven Bridges Country Club*, 01 IIC 0329 (May 2, 2001).

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 3.

²⁰ *McKinley v. Phillips Getschow Company*, 01 IIC 0590 (August 6, 2001).

²¹ *Id.*

²² 820 ILCS 305/8(a).

²³ *Manis v. Industrial Commission*, 230 Ill.App.3d 657, 595 N.E.2d 158 (1st Dist. 1992).

²⁴ *Id.* at 160.

²⁵ *Id.*

²⁶ *Id.* at 161.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d at 180, 741 N.E.2d at 1152.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Williams v. Dartnell Printing*, 00 IIC 0616 (August 4, 2000).

³⁵ *Id.* at 4.

³⁶ *Id.* at 5.

³⁷ *Id.*

³⁸ *Manis v. Industrial Commission*, 230 Ill.App.3d at 659, 595 N.E.2d at 160. See also *Stone v. Industrial Commission*, 286 Ill.App.3d 174, 675 N.E.2d 280 (2nd Dist. 1997). (The appellate court affirmed the Commission decision that claimant had failed to reasonably cooperate with vocational rehabilitation and conduct a diligent job search where the claimant did not take any steps to obtain his GED or visit the library to research vocational interests as directed, claimant had forced an interview to be rescheduled due to the fact that he was not given 48 hours notice, claimant went to an interview unshaven and dirty despite having received advice on how to dress and appear, and claimant had first returned to his prior employment four months after having been released to work and then worked for only eight days before quitting.)

³⁹ *Archer Daniels Midland Company v. Industrial Commission*, 138 Ill.App.2d 107, 561 N.E.2d 623 (1990).

⁴⁰ *Id.* at 628.

⁴¹ *Id.* at 629.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d at 180, 741 N.E.2d at 1152.

⁴⁵ 820 ILCS 305/8(d)1.

⁴⁶ *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170, 741 N.E.2d 1144 (5th Dist. 2000).

⁴⁷ *Gallianetti v. Industrial Commission*, 315 Ill.App.3d 721, 734 N.E.2d 482 (3rd Dist. 2000).

⁴⁸ *Id.* at 487.

⁴⁹ *Id.* at 488.

⁵⁰ *Id.* at 489.

⁵¹ *Id.* at 490.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 491.

⁵⁶ *E.R. Moore Company v. Industrial Commission*, 71 Ill.2d 353, 376 N.E.2d 206 (1978).

⁷ *Id.* at 209.

⁵⁸ *Id.*

⁵⁹ *Id.* at 210.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 211.

⁶⁴ *Alexander v. Industrial Commission*, 314 Ill.App.3d 909, 732 N.E.2d 1166 (1st Dist. 2000).

⁶⁵ *Id.* at 1172.

⁶⁶ *Id.* at 1168.

⁶⁷ *Id.* at 1169.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1171.

⁷⁰ *Id.*

⁷¹ *Id.* at 1172.

⁷² *Alexander v. Industrial Commission*, 314 Ill.App.3d 909, 919 (Rarick, J., concurring in part and dissenting in part).

⁷³ *Reliance Elevator Company v. Industrial Commission*, 309 Ill.App.3d 987, 723 N.E.2d 326 (1st Dist. 1999).

⁷⁴ *Id.* at 329.

⁷⁵ *Id.* at 330.

⁷⁶ *Id.* See also *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170, 741 N.E.2d 1144.

⁷⁷ *Id.* at 331.

⁷⁸ *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170, 741 N.E.2d 1144. The court in *Freeman* agreed that one method for determining whether regular and continuous work is available to an employee is to proceed with a diligent job search. This will determine whether the employee is to be considered an "odd-lot permanent total."

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