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Louisiana Workers Compensation

Chapter 11

Vocational Rehabilitation

Vocational rehabilitation has two functions in a workers' compensation case. Vocational Rehabilitation is a benefit to which an employee, who has a wage loss as a result of a job injury, is entitled, at the employer's expense. Vocational rehabilitation is also a method a establishing an employee's wage earning capacity for the purpose of reducing or terminating weekly benefits. The conflict between these two functions is a source of concern for courts. In Maxie v. Brown Industries, Inc., 657 So.2d 443 (La. App. 3rd Cir. 1995), the court observed:

The fact that a counselor is paid by the employer appears to create an irreconcilable conflict where the employer's objective is to terminate disability benefits and deny meaningful rehabilitation to an employee who is seeking those benefits and who is being counseled by the employer-paid expert. One cannot serve two masters whose interests diverge.

1. Vocational rehabilitation as a benefit to the employee under the Louisiana Workers' Compensation Act

A mandatory rehabilitation provision, La. R.S. 23:1226 was added to the Louisiana Workers' Compensation Act effective July 1, 1983. Before 1983, the Act did not specifically provide for rehabilitation services, and Louisiana courts held that an employer was not obligated to provide rehabilitation services to an injured employee. *See*, Koslow v. E.R. Desormeaux, Inc., 428 So.2d 1275 (La. App. 3rd Cir. 1983), and Pico v. Circle, Inc., 578 So.2d 1183.

Employees entitled to rehabilitation services under La. R.S. 23:1226

The standard for determining whether an employee is entitled to rehabilitation services is slightly different from the standard for determining whether an employee is entitled to supplemental earnings benefits. To recover supplemental earnings benefits, an employee must prove that a job injury prevents the employee from earning at least 90% of pre-injury wages. La. R.S. 23:1221(3)(a). An employee is entitled to rehabilitation services, however, if a job injury prevents the employee from earning wages equal to wages earned prior to the injury. La. R.S. 23:1226(A).

Initiation of Rehabilitation Services

Rehabilitation services may be imitated by (1) the employer or its insurer by designating a rehabilitation counselor and notifying the Office of Workers' Compensation; (2) the Office of Workers' Compensation by requiring the employer or its insurer to designate a rehabilitation provider; or (3) the employee, by request to the Office of Workers' Compensation, which will then require the employer or its insurer to designate a rehabilitation provider. La. R.S. 23:1226(C)(1).

Selection of a rehabilitation counselor

The employer is responsible for the selection of the vocational counselor. La. R.S. 23:1226(B)(3). The employee does not have the right to select a vocational counselor. Romero v. Grey Wolf Drilling Co., App. 3 Cir.1992, 594 So.2d 1008. Similarly, the employee does not have the right to veto the vocational counselor selected by the employer. Id. When the employer fails to provide rehabilitation services or provides inadequate services, however, the trial court has the discretion to order that employer pay for rehabilitation services performed by expert designated by trial court. Kreider v. Schulin's Appliance Service, Inc., App. 4 Cir.1988, 524 So.2d 153. In those cases, the trial court may designate an expert suggested by the Employee. Batiste v. Capitol Home Health, App. 3 Cir.1997, 96-799 (La.App. 3 Cir. 5/7/97), 699 So.2d 395. In all cases, rehabilitation services must be provided by a rehabilitation counselor approved by the Office of Workers' Compensation.

Goal of Rehabilitation Services

The goal of rehabilitation services is to return a disabled worker to work, with a minimum of retraining, as soon as possible after an injury occurs. The first appropriate option among the following must be chosen for the worker:

(a) Return to the same position.

(b) Return to a modified position.

(c) Return to a related occupation suited to the claimant's education and marketable skills.

(d) On-the-job training.

(e) Short-term retraining program (less than twenty-six weeks).

(f) Long-term retraining program (more than twenty-six weeks but not more than one year).

(g) Self-employment.

"Sham rehabilitation" will not be tolerated. Employer is compelled to perform meaningful inventory of workers' compensation claimant's job skills and experience in order to accomplish meaningful rehabilitation of claimant. Employer does not accomplish meaningful rehabilitation of workers' compensation claimant by merely furnishing claimant with list of possible jobs. Batiste v. Capitol Home Health, App. 3 Cir.1997, 96-799 (La.App. 3 Cir. 5/7/97), 699 So.2d 395.

Time for Requesting Vocational Services

An injured employee must request and begin retraining within two years from the date of the termination of temporary total disability as determined by the treating physician. La. R.S. 23:1226(E).

Penalty against employee for failing to accept rehabilitation

Refusal to accept rehabilitation as deemed necessary by a workers' compensation judge shall result in a 50% reduction of week compensation for each week of the period of refusal. La. R.S. 23:1226(E). An employer may not unilaterally reduce an employee's benefits for failure to accept rehabilitation. Willingham v. Employers Insurance of Wausau, 560 So.2d 481 (La. App. 1st Cir. 1990). Also, the penalty does not apply unless the court determines that the employee was offered, but refused, "proper" rehabilitation. Federated Rural Electric v. Simmons, 568 So.2d 644 (La. App. 3rd Cir. 1990).

Effective August 1, 2013 the "Safe Harbor Provisions" amend Section 1226 to allow for an expedited hearing on disputes regarding vocational rehabilitation. As stated previously, the new law is procedurally complex and beyond the scope of this class.

Miscellaneous provisions concerning rehabilitation services

A. Benefits while participating in rehabilitation:

An employee is entitled to temporary totally disability benefits for any period during which the employee is receiving training or education under La. R.S. 23:1226. La. R.S. 23:1226(F).

B. Permanent Total Disability

Prior to the workers' compensation judge adjudicating an injured employee to be permanently and totally disabled, the workers' compensation judge shall determine whether there is reasonable probability that, with appropriate training or education, the injured employee may be rehabilitated to the extent that such employee can achieve suitable gainful employment and whether it is in the best interest of such individual to undertake such training or education. La. R.S. 23:1226(D).

The permanency of the employee's total disability under R.S. 23:1221(2) cannot be established, determined, or adjudicated while the employee is employed pursuant to an on-the-job training or a retraining program as provided in Subsections B and E of this Section. La. R.S. 23:1226(G).

2. Vocational rehabilitation as evidence of wage earning capacity

La. R.S. 23:1221:

> Compensation shall be paid under this Chapter in accordance with the following schedule of payments:
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> (3) Supplemental earnings benefits.
>
> (a) For injury resulting in the employee's ability to earn wages equal to 90% or more of wages at the time of injury, supplemental earnings benefits equal to sixty-six and two-thirds percent of the difference between the average monthly wage at the time of injury and the average monthly wages earned or the average monthly wages the employee is able to earn in any month thereafter in any employment or self-employment, whether or not the same or a similar occupation as that in which the employee was customarily engaged when injured and whether or an occupation for which the employee at the time of injury was particularly fitted by reason of education, training, and experience.
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> . . . .
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> (c)(i) Notwithstanding the provisions of for purposes of Subparagraph (b) of this Paragraph, if the employee is not engaged in any employment or self-employment, as described in Subparagraph (b) of this Paragraph, or is earning wages less than the employee is able to earn, the amount determined to be the wages the employee is able to earn in any month shall in no case be less than the sum the employee would have earned in any employment or self-employment, as described in Subparagraph (b) of this Paragraph, which he was physically able to perform, and (1) which he was offered or tendered by the employer or any other employer, or (2) which is proven available to the employee in the employee's or employer's community or reasonable geographic region.

When the employee is not working or is earning less than he is able to earn as the result of a job-related disability, then it is the employer's burden to establish earning capacity. Daigle v. Sherwin-Williams Company, 545 So.2d 1005 (La.1989).

Actual placement of workers' compensation claimant in job is not required in order for employer to prove that jobs are available that would enable claimant to earn 90% of pre-injury wage, and thus to defeat claim for supplemental earnings benefits (SEB). Rareshide v. Mobil Oil Corp., App. 4 Cir.1998, 97- 1376 (La.App. 4 Cir. 4/22/98), 719 So.2d 494

A labor market survey does not equate with availability. Maxie v. Brown Industries, Inc., 657 So.2d 443 (La. App. 3rd Cir. 1995).

The SEB statute does not permit a claimant to choose not to work and still collect SEB when he is physically able to work and jobs are available. The employer is not required to demonstrate jobs are offered or available which meet all of the employee's personal desires or fit within a claimant's personal commitments. Blanchard v. Federal Exp. Corp., App. 1 Cir.1995, 95 0349 (La.App. 1 Cir. 11/9/95), 665 So.2d 1.

3. Banks v. Industrial Roofing & Sheet Metal Works, Inc., 96-2840 (La. 7/1/97), 696 So.2d 551.

In Banks, the Louisiana Supreme Court clarified the employer's obligation under La. R.S. 23:1226 and the employer's burden of proof under La. R.S. 23:1221(3)(c), without clearly distinguishing between the two. Although the employee has the initial burden of proving a wage loss (inability to earn at least 90% of pre-injury), the court, "mindful that workers' compensation is to be liberally construed," held that the employee carried his burden by showing that he was unable to return to his pre-injury employment (Later in the opinion, without further discussion, the court concluded, for the same reason, that the employee proved his entitlement to vocational rehabilitation).

Once the employee carries the burden of proving a wage loss, the employer has the burden of proving available employment sufficient to reduce or terminate plaintiff's benefits. The court outlined the employer's obligation to prove wage earning capacity as follows:

> An employer may discharge its burden of proving job availability by establishing, at a minimum, the following, by competent evidence:
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> (1) the existence of a suitable job within claimant's physical capabilities and within claimant's or the employer's community or reasonable geographic region;
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> (2) the amount of wages that an employee with claimant's experience and training can be expected to earn in that job (the amount of wage must not be speculative); and

(3) an actual position available for that particular job at the time that the claimant received notification of the job's existence.

A "suitable job," is a job that claimant is not only physically capable of performing, but one that also falls within the limits of claimant's age, experience, and education, unless, of course, the employer or potential employer is willing to provide any additional necessary training or education.

The employer may not rely on the employee's lack of effort in pursuing the identified jobs or other available employment.

4. Appellate Court Application of the Banks' requirements

Since the Louisiana Supreme Court decided Banks, Louisiana appellate courts have further defined the duties of a vocational counselor. Prior to identifying jobs, the vocational counselor is compelled to perform meaningful inventory of workers' compensation claimant's job skills and experience in order to accomplish meaningful rehabilitation of claimant. Louisiana appellate courts have also issued decisions, sometimes conflicting, concerning the necessity of having potential jobs approved by the treating physician; evidence necessary to show actual, as opposed to speculative wages; and evidence to show that potential jobs are actually available when the employee is notified of their existence. The requirements set forth in some these decisions, especially in the Third Circuit, will often be difficult, if not impossible, for vocational counselors to meet.

(a) Physician Approval of Jobs

Most Louisiana courts hold that, to show that a job is available within an employee's physical capabilities, the treating physician must approve the job. A conflict exists among appellate courts, however, as to whether a job may be considered available to the employee before the physician approves the job. In other words, in determining whether an employer has established wage earning capacity, may the court consider jobs that are available when the employee is notified of their existence but that are not approved by the employee's physician? The appellate courts that have addressed this issue have disagreed.

Third Circuit Court of Appeal

The Third Circuit, not surprisingly, requires that the vocational counselor identify available jobs, obtain physician approval of those jobs, confirm that the jobs are still available and then advise the employee of the jobs. In East-Garrett v. Greyhound Bus Lines, 99-421 (La. App. 3 Cir. 11/3/99), 746 So.2d 715, vocational counselor identified eleven jobs for an injured employee and notified the employee of the jobs. The employee's treating physician approved the jobs fifteen days after the labor market survey was performed. The Third Circuit held that the employer did not prove that the jobs were available to the employee because the employer offered no evidence as to whether the jobs

remained available when approved by the physician. The court explained its reasoning as follows:

> We find it implicit in the holding of Banks that the employer must establish that the jobs are still in existence when it is determined that they are within the employee's capabilities. Otherwise, the employee may be put in a position of having to apply for jobs that she might not be capable of performing, essentially a vain and useless act.

In a later case, on similar facts, the employer argued that the requirement set forth in East-Garrett places an undue burden on employers and makes it difficult to ever establish that employment is available. Chellette v. Riverwood International USA, Inc., 02-1347 (La. App. 3 Cir. 4/30/03), 843 So.2d 1245. The court responded that the East-Garrett is not difficult on vocational counselors at all. The court suggested the following procedure for complying with East-Garrett:

> A vocational rehabilitation expert is simply required to make an appointment with the treating physician for the purpose of having the jobs he has identified either approved or disapproved. At that point, the vocational rehabilitation expert should contact the employer prior to or on the day of his meeting with the physician. If he does these things, the information of job availability will not be stale, and the employee will not be set to interview for jobs beyond his or her physical capabilities.

What the court forgets or ignores is that, under La. R.S. 23:1127(C)(2), the vocational counselor cannot meet with the physician until the vocational counselor gives the employee or the employee's attorney fifteen days notice and the opportunity to attend the meeting. This same court, in two separate cases, either excluded or disregarded the testimony of vocational counselors because they met with a physician to obtain approval of jobs in violation of La. R.S. 23:1127(C)(2). When considered along with the requirements of La. R.S. 23:1127(C)(2), the procedure suggested by the court in Chellette would delay vocational efforts to such an extent that identifying "available" employment for an injured employee would be nearly impossible.

First Circuit Court of Appeal

The First Circuit Court of Appeal may agree with the Third Circuit. In Davis v. Cippriani's Italian Restaurant, 2002-1144 (La. App. 1 Cir. 2/14/03), 844 So.2d 58, the court upheld the trial court's finding that vocational services provided to the employee were inadequate to show that the employee had wage earning capacity. Among other reasons for affirming the trial court's ruling, the appellate court noted that, "[t]he counselor was unable to show that the opportunities were still open at the time claimant's treating physician signed-off on them."

This was only one of many reasons given for the court's decision, and the opinion is unclear as to whether or, if so to what extent, the parties presented arguments regarding the timing of physician approval. The First Circuit may not follow Davis if the court is presented with better facts and the parties brief the issue fully. For now, however, the only decision out of the First Circuit requires physician approval before the jobs are communicated to the employee.

Second Circuit Court of Appeal

Fortunately, the cases cited above are not the only cases to address this issue. In Payne v. Lawn Lourd Lawn Service, 35491-WCA (La. App. 2 Cir. 12/5/01), the Second Circuit rejected the argument that an employer must obtain physician approval before notifying an employee of a job. The court found no requirement in Banks for prior physician approval of jobs. The court explained:

> We can find no reason why sending simultaneous notification to the claimant and physician is not appropriate. This practice furthers the goal of allowing the opportunity to secure the job while the position is still open; and, in the event the physician does not approve the job, the claimant is not under any obligation to continue the employment.

(b) Amount of Wages Must be Certain

Banks requires that the employer establish the amount of wages that an employee could earn at an identified job. The amount of the wages must not be speculative. Louisiana courts have interpreted this instruction to mean that the employer must establish exactly how much the employee could earn in each job identified. Any factor that renders the amount of the wages uncertain will disqualify the job from consideration.

For example, the Third Circuit has said that jobs in which earnings are based on commission are too speculative to establish wage earning capacity. Leger v. Young Broadcasting, Inc., 98-572 (La. App. 3 Cir. 10/28/98). Similarly, if, because of the nature of an employer's business, the amount of hours or days that an employee may vary from week

to week, the wages at that job will be considered speculative and, therefore, the job may not be used to show wage earning capacity.[1]

(3) Job Must Be Actually Available When Communicated to Employee

Under Banks, the employer must show that an actual job was available on the day that it was communicated to the employee. As with the amount of wages, any uncertainty on this point may eliminate the position from consideration in showing wage earning capacity.

In Manpower Temporary Services v. Lemoine, 99-636 (La. App. 3 Cir. 10/20/99), 747 So.2d 153, the vocational counselor advised the employee, through correspondence of employers that "currently have openings or are anticipating openings." The court found that the reference to anticipated openings in the correspondence made it unclear which jobs were actually available when the employee was advised of the jobs. Therefore, the court held that the employer failed to show that an actual job was available for the employee.

Similarly, in First Baptist Church v. Fontenot 98-1158 (La. App. 3 Cir. 2/3/99), the court found that the employer did not identify an actual job because, "[a]lthough the vocational counselors testified as to the existence of such a position, they did not testify as to when they learned of the position or whether that position was, in fact, available on [the date that the employee was advised of the position]."

[1] In Banks, for example, the Supreme Court rejected vocational counselor's estimate that the employee could earn $500.00 per week as a tractor-trailer driver as being speculative.