

Retraining and Permanent Total Disability Under the Minnesota Workers' Compensation Act

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A. RETRAINING.

1. Why Retrain?

Under the Minnesota workers' Compensation Act, retraining is defined as "a formal course of study in a school setting which is designed to train an employee to return to suitable gainful employment." Minn. Stat. § 176.011, Subd. 23. Accordingly, the purpose of retraining is to return an injured employee to suitable gainful employment by developing new vocational skills through schooling.

Retraining generally does not come into consideration until all other avenues of returning an injured employee to work have been exhausted. Within the Minnesota Workers' Compensation Act, retraining is generally considered by employers and insurers to be the "last resort" in dealing with an injured employee.

Retraining usually follows an attempt or attempts at other forms of vocational rehabilitation. First, there is usually an attempt to return an injured employee to work with the pre-injury employer in the pre-injury job. If that is not feasible, an attempt is then made to return the injured employee to work with the pre-injury employer in a modified or different job. If that also is not feasible, then an attempt is made to find suitable alternative employment for the injured employee with another employer. Retraining is usually only considered after those attempts fail.

Employers and insurers typically try to avoid retraining an injured employee at all costs. There is a perception that retraining is extremely costly. This perception is generally accurate. However, such absolute opposition to retraining may be misguided.

First, from a social point of view, retraining can be a positive thing. This is perhaps self-evident. Nonetheless, providing an injured employee with the skills to be a productive, working member of a community despite a disability is good for society as whole, because then, rather than being a so-called burden on society, the injured worker contributes positively to the economy, etc.

Second, from an economic point of view, in some cases retraining an injured employee can save money for the pre-injury employer and insurer, especially when the alternative to retraining is permanent total disability. Even a costly retraining program may be less expensive in the long run than payment of permanent total disability benefits to the injured employee for the remainder of the injured employee's expected work-life. This is especially likely in cases involving younger workers with relatively high paying pre-injury jobs and significant post-injury limitations.

Many factors come into consideration when retraining is evaluated under the Minnesota Workers' Compensation Act. This section will attempt to deal with the most important legal factors encountered in retraining cases.

2. Eligibility.

Retraining is a specific type of vocational rehabilitation. Therefore, in order for an injured employee to be eligible for retraining, the employee must first be found eligible for vocational rehabilitation services under the Minnesota Workers' Compensation Act.

The term “qualified employee” is a term of art used to describe an injured employee who is entitled vocational rehabilitation services. Minnesota Rule 5220.0100, Subp. 22 defines “qualified employee” as follows:

“Qualified employee” means an employee who, because of the effects of a work-related injury or disease, whether or not combined with the effects of prior injury or disability:

- A. is permanently precluded or is likely to be permanently precluded from engaging in the employee’s usual and customary occupation or from engaging in the job the employee held at the time of injury;
- B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and
- C. can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician’s opinion of the employee’s work ability.

In somewhat simpler terms, this means that an injured employee is a “qualified employee” if, because of the work injury, the employee is: (1) not able to perform the pre-injury job because of the work-related injury, (2) not expected to return to suitable alternative employment at the pre-injury employer, and (3) may reasonably be expected to be able to return to suitable alternative employment through the provision of vocational rehabilitation services. If those criteria are met, then the injured employee is entitled to vocational rehabilitation services.

Vocational rehabilitation services are then provided to the injured employee. They are paid for the by the employer and insurer. However, the vocational rehabilitation services are coordinated by a “qualified rehabilitation counselor” (or “QRC”). A QRC is a person professionally trained and licensed by the State of Minnesota to provide

vocational rehabilitation services. Minn. R. 5220.0100, Subp. 23. The injured employee generally has the right to select the QRC. See Minn. Stat. § 176.102, Subd. 4(a) and Minn. R. 5220.0710, Subp. 1.

Vocational rehabilitation services are provided to the injured employee pursuant to “rehabilitation plan.” The Minnesota Workers’ Compensation Act and accompanying rules are clear that vocational rehabilitation services are to be provided only in accordance with a formal, approved rehabilitation plan. See Minn. Stat. § 176.102, Subd. 4(e); Minn R. 5220.0410. Vocational rehabilitation services include vocational evaluations, vocational counseling, job analysis, job modification, job development, job placement, labor market surveying, vocational testing, transferable skills analysis, job seeking skills training, on-the-job training, and retraining. Minn. R. 5220.0100, Subp. 29.

Just because an injured employee is a “qualified employee” does not mean that he or she is a retraining candidate. Other vocational rehabilitation services should be provided as appropriate. Before retraining is to be considered, there must be a determination that other vocational rehabilitation services are not likely to lead to suitable gainful employment for the injured employee. Nevertheless, pursuant to Minnesota Rule 5220.0750, Subp. 1, retraining is to be given equal consideration with other rehabilitation services, and proposed for approval if other services are not likely to lead to suitable gainful employment for the injured employee. As such, retraining is by definition the “last resort” for returning an injured employee to suitable gainful employment.

The specific factors to consider in determining eligibility for retraining include the following:

- A. the reasonableness of retraining compared to the employee's return to work with the employer or through job placement activities;
- B. the likelihood of the employee succeeding in a formal course of study given the employee's abilities and interests;
- C. the likelihood that retraining will result in a reasonably attainable employment; and
- D. the likelihood that retraining will produce an economic status as close as possible to that which the employee would have enjoyed without the disability.

Poole v. Farmstead Foods, 42 W.C.D. 970, 978 (W.C.C.A. 1989). In addition to the "Poole" factors, a fifth factor is physical ability. In determining eligibility for retraining, consideration must be given not only to whether the employee will be successful in the retraining plan, but consideration must also be given as to whether or not the retraining plan will lead to physically appropriate employment. Bauman v. Trevilla of Golden Valley, 45 W.C.D. 89 (W.C.C.A. 1991).

Retraining is a vocational rehabilitation service. Accordingly, it is to be only provided in accordance with an approved rehabilitation plan. A rehabilitation plan dealing specifically with retraining is aptly named a "retraining plan."

The injured employee's QRC typically develops the rehabilitation plan and/or retraining plan. Minnesota Rule 5220.0850, Subp. 2 provides as follows:

A proposed retraining plan shall be filed on a form prescribed by the commissioner and must contain substantially the following:

- A. identifying information on the employee, employer, insurer, and assigned qualified rehabilitation consultant;

- B. the retraining goal;
- C. information about the formal course of study required by the retraining plan, including:
 - (1) the name of the school;
 - (2) titles of classes;
 - (3) the course's length in weeks, listing beginning and ending dates of attendance;
 - (4) an itemized cost of tuition, books, and other necessary school charges;
 - (5) mileage costs; and
 - (6) other required costs.
- D. starting and completion dates;
- E. pre-injury job title and economic status, including, but not limited to, pre-injury wage;
- F. a narrative rationale describing the reasons why retraining is proposed, including a summary comparative analysis of other rehabilitation alternatives and information documenting the likelihood that the proposed retraining plan will result in the employee's return to suitable gainful employment;
- G. dated signatures of the employee, insurer, and assigned qualified rehabilitation consultant signifying an agreement to the retraining plan; and
- H. an attached copy of the published course syllabus, physical requirements of the work for which the retraining will prepare the employee, medical documentation that the proposed training and field of work is within the employee's physical restrictions, reports of all vocational testing or evaluation, and a recent labor market survey of the field for which the training is proposed.

The retraining plan is supposed to be and usually is quite informative regarding the rationale for retraining in the particular case. The retraining plan also sets out the details of the proposed schooling program. The plan is to contain information detailing the proposed course of study including the identity of the particular school, the duration of the course of study, and the projected costs. The plan also is to detail the rationale as to why retraining is proposed including a comparative analysis of other vocational rehabilitation alternatives, documentation that the proposed field of work will be physically and economically suitable, and documentation that jobs should be available in the proposed field.

The Minnesota Workers' Compensation Act also imposes certain timing requirements on retraining. Specifically, Minn. Stat. § 176.102, Subd. 11(c) provides as follows:

Any request for retraining shall be filed with the commissioner before 156 weeks of any combination of temporary total or temporary partial compensation have been paid. Retraining shall not be available after 156 weeks of any combination of temporary total or temporary partial compensation benefits have been paid unless a request for the retraining has been filed with the commissioner prior to the time the 156 weeks of compensation have been paid.

Accordingly, retraining claims must be submitted prior to the payment of approximately three years of a combination of temporary total and temporary partial disability benefits.

It should be noted that the 156-week limitation can be extended. Specifically, the employer and insurer must notify the employee in writing of the 156-week limitation for the filing of a request for retraining. See Minn. Stat. § 176.102, Subd. 11(d). This notice

must be given before 80 weeks of temporary total disability or temporary partial disability compensation have been paid. If the notice is not given before the 80 weeks, the period of time within which to file a request for retraining is extended by the number of days the notice is late. However, in no event may the retraining request be filed later than 225 weeks after any combination of temporary total disability or temporary partial disability benefits have been paid. A penalty may also be assessed of \$25.00 per day that the notice is late up to a maximum penalty of \$2,000.00.

Eligibility for retraining is usually hotly contested. The claim for retraining must be brought in a timely manner. The injured employee must be qualified for vocational rehabilitation benefits generally, and qualified for retraining specifically pursuant to the “Poole” factors. Finally, the claim must be set forth in retraining plan. Disputes regarding entitlement to retraining will be addressed in section 4.

3. Benefits.

During the period of retraining, an employee is entitled to wage loss benefits, payment of schooling costs, and payment or reimbursement of other incidental expenses. Minn. Stat. § 176.102, Subds. 9 & 11. All necessary costs of the schooling program, including tuition, books, lab fees, uniforms, equipment, etc. are paid for by the employer and insurer. In addition, the employee is entitled to payment of reasonable incidental costs including mileage, parking, daycare, etc., which can be significant. It is not uncommon for the costs of retraining to approach \$100,000.00.

The only substantial limitation is durational in nature. Retraining benefits are limited to 156 weeks. Minn. Stat. § 176.102, Subd. 11. This applies both to the costs of the schooling program as well as to the wage loss benefit component.

The wage loss benefits are known under the Minnesota Workers' Compensation Act as "retraining benefits." This distinction is important. The wage loss component of retaining benefits, although similar to temporary total and temporary partial disability benefits in other respects, are subject to their own durational limits and they are not subject to nor do they count toward the durational limits of temporary total and temporary partial disability benefits.

The wage loss component of retaining benefits is similar to either temporary total disability benefits or temporary partial disability benefits, depending on the circumstances. If the injured employee is not employed during the retraining plan, then the employee will receive retraining benefits paid at the temporary total disability rate (i.e., 2/3rds of the employee's pre-injury average weekly wage, subject to a statewide maximum compensation rate). Minn. Stat. § 176.102, Subd. 11(b). They are payable for the duration of the retraining plan and up to 90 days after completion of the plan, subject to the same discontinuance provisions for temporary total disability benefits pursuant to Minn. Stat. § 176.101.

If the employee is employed during the retraining plan, then the injured employee will receive retraining benefits payable in the same manner as temporary partial disability benefits. Id. They are payable at the rate of 2/3rds of the difference between the employee's pre-injury average weekly wage and the weekly wage that the employee is able to earn in

the employee's partially disabled condition. They are limited however by a maximum rate equal to the temporary total disability benefit compensation rate for the employee.

Retraining benefits, whether payable at the temporary total disability benefit rate or the temporary partial disability benefit rate, are not subject to the durational limits in effect for temporary total or temporary partial disability benefits. Specifically, retraining benefits paid at the temporary total disability rate are not subject to the 104-week temporary total disability benefit limit. Likewise, retraining benefits paid at the temporary partial disability benefit rate are not subject to the 225-week or 450-week limitations provided by Minn. Stat. § 176.101, Subd. 2.

4. Disputes.

Generally, employers and insurers do not voluntarily agree to provide retraining. If an employer and insurer are not in agreement with a retraining plan as submitted by a QRC, then the injured employee must either file a claim petition or rehabilitation request seeking approval of the retraining plan. See Minn. R. 5220.0750, Subp. 6. A claim petition is generally used in cases where disputes (such as permanent partial disability) are present in addition to the injured employee's retraining claim. If the only dispute is whether or not the injured employee is entitled to retraining, then a rehabilitation request is generally used. There are no distinct advantages in proceeding under either of the two claim initiation procedures.

Proceeding pursuant to a claim petition will usually result in the matter initially being set for a settlement conference conducted by a compensation judge at the Office of Administrative Hearings. If the matter is not resolved at that stage, then the matter will be

set for an evidentiary hearing before a different compensation judge at the Office of Administrative Hearings.

Proceeding pursuant to a rehabilitation request will usually result in the matter being set for an administrative conference at the Department of Labor and Industry. A specialist appointed by the Commissioner of the Department of Labor and Industry will hear the arguments and positions of both parties and issue a preliminary decision approving or disapproving the proposed retraining plan. Any party who does not agree with the specialist's decision may appeal the decision for a "de novo" hearing at the Office of Administrative Hearings. The matter will be set for an evidentiary hearing before a compensation judge at the Office of Administrative Hearings. No res judicata effect will be given to the specialist's decision.

In determining whether or not to approve a retraining plan, the compensation judge will consider the "Poole" factors. Generally expert testimony from both sides will be needed to address those factors. The injured employee will generally rely heavily on the QRC as his or her expert. The employer and insurer will rely on the opinions of an independent vocational expert.

The first Poole factor is the reasonableness of retraining compared to the employee's return to work with the employer or through other job placement activities. This factor focuses primarily on job search issues.

Performing a diligent job search is not a prerequisite for approval of a retraining plan. Wilson v. Crown Cork & Seal, 503 N.W.2d 472 (Minn. 1993). Nevertheless, whether or not the employee performed a reasonable and diligent job search before retraining is

explored is a consideration. A retraining plan is much more likely to be approved if the employee has performed a diligent but unsuccessful job search. In contrast, where the employee has failed to conduct a diligent job search, retraining is less likely to be approved.

The expert of the employer and the insurer may also focus on the scope of the employee's job search. If the expert can credibly point out suitable employment alternatives, which were not explored prior to formulation of the retraining plan, retraining may very well be denied. Additionally, the employee's refusal of suitable work offered by the pre-injury employer can also serve as a bar to retraining.

The second Poole factor is the likelihood of the employee's success in the formal course of study given the employee's abilities and interests. This factor focuses on the appropriateness of the retraining plan.

The QRC and the employer will attempt to show that the employee is motivated to be successful in the proposed retraining plan and has the scholastic aptitude to succeed.

On the other hand, if the employee does poorly on vocational testing prior to formulation of the retraining plan, then the expert of the employer and insurer can credibly testify that the employee is unlikely to succeed in the course of study. Likewise, an employee's poor performance in school in the past can be used as evidence that the employee is not likely to perform well in the proposed course of study.

The third Poole factor is the likelihood that retraining will result in reasonably attainable employment. This factor focuses on the projected labor market in the proposed field to which the injured employee will be retrained.

The injured employee must prove that the available jobs in the proposed field are economically better (at least in the long run) than the employee could obtain through job placement without retraining.

The last Poole factor is the likelihood that retraining will produce an economic status as close as possible to that which the employee would have enjoyed without disability. Again, the experts will rely upon labor market surveys, which either support or fail to support the requirement that the post-retraining placement projections justify retraining.

An additional consideration is the physical suitability of the jobs in the proposed field. In connection with this factor, the experts will render opinions as to whether the retraining plan will likely lead to physically suitable employment. The injured employee must prove that he will be physically able to perform the new job.

B. PERMANENT TOTAL DISABILITY.

In those cases when an employee cannot return to work as a result of a work injury, he or she may be entitled to permanent total disability benefits.

1. Eligibility.

Under the Minnesota Workers' Compensation Act there are two separate ways for an employee to be eligible for permanent total disability benefits. An injured employee may be presumed permanently and totally disabled, or an injured employee may be found permanently and totally disabled "in fact."

An injured employee is presumed to be permanently totally disabled if any of the following are true:

1. total and permanent loss of sight of both eyes;
2. the loss of both arms at the shoulder;
3. the loss of both legs so close to the hips that no effective artificial members can be used;
4. complete and permanent paralysis; or
5. total and permanent loss of mental faculties.

Minn. Stat. § 176.101, Subd. 5 (1).

An employee meeting any of the above criteria as a result of a work injury is entitled to permanent total disability benefits. No other conditions need be met.

An employee may also be permanently and totally disabled “in fact.” To be found permanently and totally disabled “in fact,” an injured employee must first meet one of the following three thresholds:

1. the employee must have at least a 17% permanent partial disability rating of the whole body;
2. the employee must have a permanent partial disability rating of the whole body of at least 15% and the employee must be at least 50 years old at the time of the injury; or
3. the employee must have a permanent partial disability rating of the whole body of at least 13%, the employee must be at least 55 years old at the time of the injury, and the employer must not have completed grade 12 or obtained a GED certificate.

Minn. Stat. § 176.101, Subd. 5(2).

The above thresholds may be met through a combination of non-occupational permanent partial disability and permanent partial disability resulting from occupational injuries. Frankhauser v. Fabcon, Inc., 57 W.C.D. 239 (W.C.C.A. 1997). Specifically, there is no

requirement the permanent partial disability threshold be met through permanency ratings from work injuries.

In reality, the permanent partial disability thresholds required for a finding of permanent total disability are relatively easily met by an injured employee. It is generally just a matter of obtaining the ratings. Most people have a number of ratable conditions (such as disc degeneration, prior surgeries, etc.) that can be combined to meet the applicable threshold. Also, most injured employees claiming entitlement to permanent total disability benefits have had significant work injuries and resulting significant permanent partial disability ratings.

Permanent total disability “in fact” boils down to a medical/vocational determination. If the injured employee meets one of the thresholds, then he or she must show that his or her work injury leaves him or her totally and permanently incapacitated from working in an occupation which brings in income. Minn. Stat. § 176.101, Subd. 5(2). “Totally and permanently incapacitated” is further defined by Minn. Stat. § 176.101, Subd. 5 as a physical disability that causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.

The medical/vocational determination of whether an injured employee is permanently and totally disabled is straightforward in principle. First, the employee’s physical ability must be established from a medical standpoint. Then, there is a vocational determination whether or not there are jobs in the employee’s labor market which he or she can physically do. If there are no jobs in the employee’s labor market which he or she can physically perform, then the employee will be considered

permanently and totally disabled. Naturally, disputes often arise in applying the medical/vocational analysis to a particular injured employee.

2. Benefits.

A permanently and totally disabled employee is entitled to permanent total disability benefits which are payable at 2/3rds of the employee's pre-injury average weekly wage subject to a statewide maximum compensation rate. Minn. Stat. § 176.101, Subd. 4. They are paid at the same rate as temporary total disability benefits. They are subject to periodic cost of living adjustments pursuant to Minn. Stat. § 176.645.

However, in the case of permanent total disability benefits, the employer and insurer are allowed to offset the employee's permanent total disability benefits by the amount of government disability or old age and survivor's benefits the employee receives. Minn. Stat. § 176.101, Subd. 4. This includes social security disability benefits, social security retirement benefits, social security supplementary income benefits, and other government retirement and/or disability benefits such as PERA benefits. This is known as the "social security offset." Specifically, Minn. Stat. § 176.101, Subd. 4, states as follows:

For permanent total disability, as defined in subdivision 5, the compensation shall be 66-2/3rd percent of the daily wage at the time of the injury, subject to a maximum weekly compensation equal to the maximum weekly compensation for temporary total disability and a minimum weekly compensation equal to 65 percent of the statewide average weekly wage. This compensation shall be paid during the permanent total disability of the injured employee but after a total of \$25,000.00 of weekly compensation has been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability benefit program if the disability benefits are occasioned by the same injury or injuries which give rise to

the payments under this subdivision. This reduction shall also apply to any old age and survivor insurance benefits.

Permanent total disability benefits are subject to minimum and maximum rates. The maximum rate is the same maximum rate applicable to temporary total disability benefits. This is currently set at \$750.00 per week for injuries October 1, 2000 and later.

The minimum rate is 65% of the statewide average weekly wage. This is changed on an annual basis. As of October 1, 2002 the minimum permanent total disability rate was \$456.30 per week.

Both the maximum rate and minimum rate are applied prior to application of the social security offset. Vezina v. Best Western Maplewood, 627 N.W.2d 324 (Minn. 2001). Thus, it is theoretically possible for an injured employee's permanent total disability benefits to be completely offset by the employee's simultaneous receipt of social security disability benefits. For example, if an injured employee is entitled to the minimum permanent total disability compensation rate of \$456.30 per week and receives \$500.00 per week in social security disability benefits, no permanent total disability benefits are payable. In reality, a complete offset is extremely rare. People who have high social security benefit rates generally also have high average weekly wage rates and correspondingly high compensation rates.

Permanent total disability benefits cease at age 67 because the employee is presumed retired from the labor market. Minn. Stat. § 176.101, Subd. 4. This presumption is rebuttable, however. In order for the employee to rebut the presumption, he needs something more than his own subjective statement that he is not retired. Id. Nevertheless, evidence such as the need for health insurance coverage for a spouse or

other objective evidence such as actually working after the age of 67 will serve to rebut the retirement presumption. In that case, permanent total disability benefits should cease at the age it is determined at which the employee would have retired.

3. Disputes.

The issue of whether or not an employee is permanently and totally disabled is often hotly contested between an injured employee and the employer and insurer. The medical/vocational determination of whether or not an employee is permanently and totally disabled is subjective. Expert testimony will be presented on both sides on both the physical limitation issue and the available employment issues.

The employee will usually rely upon the physical limitations placed upon him by the treating doctor. In some instances, this may be an opinion that the employee is unable to tolerate any work activities. However, in most cases, the treating doctor should provide an opinion as to the employee's work capabilities.

On the other hand, the employer and insurer will generally rely on an independent medical examiner. The independent medical examiner may either agree with the treating doctor's restrictions, or supply his own opinion as to the employee's physical ability to work. Ultimately, a compensation judge may be required to determine the appropriate physical limitations for the employee.

Using the employee's physical limitations, vocational experts will then assess whether or not there is work available in the employee's labor market within his limitations. If there is not, then the employee is permanently and totally disabled.

Generally, the injured employee will be required to look for work to establish permanent total disability. Hanmer v. Wes Barrette Masonry, 403 N.W.2d 839 (Minn. 1987). However, a diligent job search is not necessarily an essential element to permanent total disability. An employee can still be permanently and totally disabled without looking for work if it can be demonstrated that a job search would have been futile. Boryca v. Marvin Lumber & Cedar, 487 N.W.2d 876 (Minn. 1992). Nevertheless, a lack of job search can certainly be evidence that the determination of whether or not an employee is permanently and totally disabled is premature.

Similarly, withdrawal from a labor market may also preclude a determination that an injured employee is permanently and totally disabled. This issue has two parts.

First, an injured employee who relocates to a job market with little likelihood of reemployment can be considered to have failed to perform a diligent job search. Paine v. Beek's Pizza, 323 N.W.2d 812 (Minn. 1982). In that case, it would preclude a finding of permanent total disability. However, if the injured employee can show that the relocation was made with a reasonable expectation of obtaining suitable employment in the new job market, then the employee can still be found permanently and totally disabled. Moreover, if the change in labor market is done after an extensive job search, relocation will not bar an employee's entitlement to permanent total disability benefits.

Another form of withdrawal from the labor market is retirement. If the employer and insurer can show that the employee has in fact retired from the labor market, the employee will not be entitled to permanent total disability benefits.

Interestingly, actual employment by an employee may not necessarily bar the employee from receiving permanent total disability benefits. If an employee is only able to hold sporadic employment earning an insubstantial income, he or she could still be entitled to permanent total disability benefits. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54 (Minn. 1984). The determination of whether or not employment precludes a finding of permanent total disability involves consideration of a number of factors, including the amount of earnings the employee is able to earn, the availability of additional work and ongoing continuity of employment, the ability of the employee to work on a set schedule, whether the work activity is competitive employment or sheltered employment, or other extenuating circumstances regarding the type of work.

Refusal of suitable employment is also not a complete bar to eligibility for permanent total disability benefits. Nevertheless, the employee's refusal of suitable gainful employment will be significant evidence that the employee is not permanently and totally disabled.