

duration of VRMA is restricted, which may prevent a plan from being appropriate.

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### Practice Tip

*Because of the cost and scheduling difficulties, counselors should be careful about when and why they recommend informal conferences.*

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#### § 8:160 Formal Conference

The Rehabilitation Unit will expect the parties to have made a good faith attempt to resolve the problems independently before approaching the Rehabilitation Unit for resolution. See, CCR, title 8, § 10127; for formal conferences, see §§ 2:200 et seq.

At the Formal Conference, both sides present their case to the Rehabilitation Consultant. The Consultant issues a determination of the issues that are not resolved at the Conference within thirty days of the Conference. CCR, title 8, § 10127.1(d); for determinations, see §§ 2:110 et seq.

#### D. Common Issues

##### 1. Change of Employers or Jobs

#### § 8:170 Nature of Problem

The injured worker may have difficulty in vocational exploration because of a reluctance to change careers or leave the prior employer. The injured worker cannot accept his or her inability to perform the prior job or the lack of available alternative employment. The injured worker may hope that the employer will find a reasonable accommodation to permit him or her to perform the essential functions of the job. The injured worker may also be waiting for a

However, the counselor must make it clear to the injured worker that no efforts in vocational rehabilitation can be directed toward a plan the physician already disapproved.

#### § 8:180.10 Offering Inappropriate Job

If the injured worker believes the employer is not offering an appropriate job, the counselor has several options:

- Contact the employer's personnel department or job line while the injured worker is present

Review each job with the injured worker to discuss the physical appropriateness and skills required. It may be necessary to do a job analysis of an appropriate job.

- Have the injured worker complete job applications or pursue internal dispute procedures and meet with the employer.

In some cases, the counselor and the injured worker may meet together with the employer.

#### § 8:180.20 Advise Worker of Options

Even after these measures have been taken, the injured worker may believe the employer could accommodate his or her disability or offer alternate work. If the employer has indicated to the counselor that there are no openings and the job cannot be modified, the counselor cannot persist. The counselor may advise the injured worker that this can no longer be pursued through vocational rehabilitation, and he or she needs to consider other alternatives. For relationship of vocational rehabilitation and the Americans with Disabilities Act, see §§ 5:190 et seq.

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### Practice Tip

*If the injured worker is unable to*

## 2. Physical Restrictions

### § 8:190 Worker's Inability to Accept

A common problem during vocational exploration is the injured worker's inability to accept work restrictions established by the physician. This can be further confused by the vast discrepancies among physicians' findings and recommendations.

### § 8:200 Risk of Ignoring Issue

It is of no benefit to anyone if the counselor ignores the injured worker's perceptions of his or her disability. The success of vocational rehabilitation is completely dependent on the injured worker's willingness and ability to work. If the injured worker does not feel able to sustain employment or pursue a certain type of employment, it is absurd for the counselor to ignore that fact.

### § 8:210 Effect on Interest

Physical restrictions are a major issue when they exclude the injured worker from job alternatives that are of the highest interest to him or her. For example, according to the *DICTIONARY OF OCCUPATIONAL TITLES* [see §§ 6:1640 et seq.], only 5% of all jobs are performed in the outdoors. Yet, frequently, injured workers indicate that they must work outside. In that case, the conversations between the counselor and injured worker will frequently loop back to the occupations from which the injured worker is excluded by physical restrictions, and the counselor will have a difficult time identifying other types of jobs that interest the injured worker.

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### **P r a c t i c e   T i p**

*It is helpful for the counselor to do more research into a restricted vocational cluster to identify similar light*

§§ 4:350 et seq. The counselor must explain that no services in vocational rehabilitation can be directed towards returning an injured worker to a job the physician considers physically inappropriate. The injured worker's disagreement with the physician's stated work restrictions is a medical issue the counselor cannot resolve.

### § 8:220.20 Direct Worker to Physician

In some cases, the injured worker believes that the work restrictions are too high and insists that he or she is able to return to work. If a job analysis has been conducted, the counselor can only direct the injured worker to discuss the issue with the physician, the claims adjuster, or the worker's attorney.

### § 8:220.30 Perform Work Evaluation

In some cases, the injured worker believes medical treatment is incomplete and the physician is overestimating the injured worker's physical abilities. If the issue is significant to the duration or cost of comparative rehabilitation plans, a work evaluation [§§ 4:250 et seq.; Chapter 6] may be the best way for the counselor to resolve the issue.

## 3. Wages

### § 8:230 Acceptance of Low Wages

A common major problem is the injured worker's unwillingness or inability to accept entry level wages or positions. It is usually based on genuine financial difficulties that are overwhelming to the injured worker or based on an assumption that he or she should be able to recoup the lost earnings during workers' compensation.

### § 8:250 Counselor's Options

- Remind the injured worker that six months of training positively impacts the likelihood of becoming employed far more than it negatively impacts wages.
- Review job titles available through direct placement or on-the-job training in the industries and fields for which the injured worker has experience or training.

Draw the injured worker into this analysis and initiate open dialogue about all related positions.

- Carefully query the injured worker about:
  - Prior experience
  - Industries he or she was in contact with
  - Types of people he or she dealt with
  - Settings in which he or she worked.

For example, an injured worker who delivered food to grocery stores may be able to resume work in developing new accounts selling the same products.

- If all this fails, instruct the injured worker to go through the newspaper.
 

Have the worker go through newspaper job ads to assess advertised job openings with respect to physical abilities, work skills, and wages. Through this type of research, the injured worker may identify a field that offers faster advancement and allows him or her to return to prior earning capacity sooner than other fields.
- At all times, remain sensitive and provide as much data as possible.
 

Give the injured worker wage information from the state Employment Development Department and the federal Department of Labor and access to databases that offer this type of information. Ultimately, the injured worker will have to decide, and the counselor should provide as much information as possible to ensure a thorough evaluation of the alternatives.

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### Practice Tip

*Avoid discussing permanent disability payments or other legal issues as a method of reassuring the injured worker. The timing of payments in the workers' compensation system is not predictable. No injured worker should make a vocational choice with the assumption that an anticipated permanent disability award will resolve his or her financial problems.*

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## 4. Expenses

### a. Living Expenses

#### § 8:260 Labor Code § 139.5

##### § 8:260.10 Injuries After 1993

For injuries after 1993, Labor Code §139.5(c) provides:

The employee . . . shall receive additional living expenses necessitated by the vocational rehabilitation services, together with all reasonable and necessary vocational training, at the expense of the employer, but in no event shall the expenses, counseling fees, training, maintenance allowance, and costs associated with, or arising out of, vocational rehabilitation services incurred after the employee's request for vocational rehabilitation services, except temporary disability payments, exceed sixteen thousand dollars (\$16,000).

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### Practice Tip

*For injuries on or after January 1, 1994, the injured worker has only \$16,000 for vocational rehabilitation, including VRMA. Therefore, vocational exploration requires careful consider-*

**§ 8:260.20 Injuries Before 1994**

For injuries before January 1, 1994, there is no limitation on the aggregate amount of expenses including living expenses. Before January 1, 1994, Labor Code § 139.5(c) stated:

The employee also shall receive additional living expenses necessitated by the vocational rehabilitation services, together with all reasonable and necessary vocational training, at the expense of the employer.

**§ 8:270 Purpose; Worker’s Burden of Proof**

In *Tangye v. Henry C. Beck & Co.*, 43 CCC 3, 6 CWCR 16 (1978), the Board stated:

We believe the mandatory provision of all “additional living expenses necessitated by the rehabilitation program” was intended to supplant the need for advances against permanent disability.

In *Henry v. Carnation Restaurant*, 6 CWCR 151, 76 OAK 62221 (1978), the workers’ compensation judge held that the injured worker has the burden of proving that a rehabilitation program necessitates additional living expenses.

**§ 8:280 What Constitutes Living Expenses**

The reference in Labor Code § 139.5(c) to “additional living expenses” is highly disputed because §139.5(c) fails to specify which “additional living expenses necessitated by the rehabilitation program” are included. Administrative Guidelines (2/14/97) § 8-50-04, amended effective September 25, 1998, states:

The Unit will require the provision of reasonable additional living expenses for an injured worker necessary for or incurred by his or her

For all dates of injury, the Unit will require the provision of additional living expenses (within applicable caps, if any), including but not limited to:

- 1) The reasonable cost of food and lodging to cover an injured worker’s expenses when he/she is required to be away from home on a temporary basis and at a location too distant to allow for a reasonable commute. The Unit recognizes such living expenses may vary from plan to plan. Where the parties do not agree as to the amount to be paid in such instances, the Unit will refer to State of California rates for per diem expense.
- 2) Funds for dependent care, upon the recommendation of the qualified rehabilitation representative and/or upon a showing that the injured worker’s participation in rehabilitation services is dependent upon the provision of dependent care. When resolving disputes, the unit should consider the contribution of the injured worker to the family’s total household income. The defendant’s responsibility might reasonably be considered to be in line with that contribution.
- 3) Allowance for clothing recommended by the qualified rehabilitation representative or identified by the Unit consultant as reasonably necessary to allow an injured worker to participate in training, placement, or work activities when the employee does not possess suitable attire. The amount allocated should take into consideration the precise needs of the injured worker during training, interviewing or other placement activity, during each or any combination of them all. Funds for clothing should be provided prior to the commencement of the activity for which it is needed.

The Rehabilitation Unit recognizes that employees may elect to waive additional living expenses