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Workers' Comp 101: Injured Employees Seek an Education Rather Than Employment

Megan E. Miller

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INTRODUCTION

Under North Carolina's Workers' Compensation system, an injured employee is "disabled" if a compensable, work related injury causes him a loss in earning power.¹ A "disabled" employee will receive a percentage of his weekly wage from his employer to compensate him for his disability.² However, the employee is required to seek and obtain suitable alternative employment, thereby relieving the employer of any further duty to pay compensation to an employee who is no longer working.³ If the employee cannot find suitable alternative employment based on his skills and education, then he may be afforded vocational rehabilitation services. Vocational rehabilitation services traditionally have involved job-seeking assistance and sometimes skills training.⁴ Recently, North Carolina

1. N.C. GEN. STAT. § 97-2(9) (2003); *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378 (1986).

2. N.C. GEN. STAT. § 97-9, § 97-29 and § 97-30; *see infra* Section I; *see also* *Little v. Anson County Sch. Food Serv.*, 295 N.C. 527, 533, 246 S.E.2d 743, 747 (1978) (holding that the employee did not have to show total physical incapacitation to receive benefits).

3. N.C. GEN. STAT. § 97-18.1. *See infra* Section I (defining suitable alternative employment).

4. "Specific vocational rehabilitation services may include, but are not limited to: vocational assessment, vocational exploration, counseling, job analysis, job modification, job development and placement, labor market survey, vocational or psychometric testing, analysis of transferable skills, work adjustment counseling, job-seeking skills training, on-the-job training

employees have begun to consider formal education as part of vocational rehabilitation.⁵

Traditional vocational rehabilitation services may be inadequate in returning some employees to work. For example, in *Smith v. Winn-Dixie, Inc.*,⁶ Smith was injured while working as a truck driver for Winn-Dixie.⁷ After the injury, Smith, who had worked as a truck driver for twenty-five years, was restricted to working only in sedentary positions due to a 30 percent permanent partial impairment to his back.⁸ Unfortunately, Smith only had a fourth grade education and was functionally illiterate.⁹ The North Carolina Industrial Commission (“the Commission”) found that Smith, “based upon the cumulative effect of his advanced age, limited education, lack of work skills transferable to sedentary work, and his medical limitations,” was unable to earn any wages.¹⁰ If Smith were to return to gainful employment, he would have to be retrained for a sedentary position.¹¹ For an illiterate employee, education may be a necessary part of an employee’s retraining.¹²

The need for education is particularly clear in North Carolina. Like Smith, almost 50 percent of the general population has no education beyond high school.¹³ Further, within the last decade, North Carolina has seen a shift in the job market as its economy has become more service oriented and less manufacturing oriented.¹⁴ Between 1995 and 2000,

and retraining, and follow-up after re-employment.” Application of the Rules, N.C. ADMIN. CODE tit. 4, r. 10C.0103 (June 2000). See also *Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346, 350, 560 S.E.2d 870, 873 (2002). The additional cost of vocational training may be well worth it to the employer, because once the employee returns to gainful employment the employer will be relieved of the obligation to pay further benefits.

5. See *infra* Section I (discussing *Russos v. Wheaton Indus.* and *Foster v. U.S. Airways*).

6. *Vernon Smith*, N.C. Indus. Comm’n No. 082639 (March 31, 2003) (on file with the North Carolina Law Review). All North Carolina Industrial Commission decisions referenced in this article can be accessed by visiting the North Carolina Industrial Commission Searchable Databases online at <http://www.comp.state.nc.us/ncic/pages/database.htm>.

7. *Id.*

8. *Id.* Due to his back injury, Smith would frequently drop things due to numbness in his arms, and his legs would often give out from under him, preventing him from working in any manual labor position. *Id.*

9. *Id.*

10. *Id.*

11. See *id.* (stating that even a position as a shipping and receiving clerk, recommended by the employer’s rehabilitation counselor, involved too much physical exertion).

12. Unfortunately, in *Smith*, the Commission pointed out that even education would be futile because the plaintiff was nearing retirement age (stating that the “[p]laintiff is not getting any younger, and his continued aging is consequently a permanent condition.”). *Id.*

13. N.C. Rural Econ. Dev. Ctr., Inc., *Rural Databank*, at <http://www.ncruralcenter.org/databank/datasheet.asp?topic=Education> (last visited August 17, 2004) (on file with the North Carolina Law Review). Of the total N.C. population, 28.4 percent have a high school diploma and 21.9 percent never completed high school. *Id.*

14. N.C. Rural Econ. Dev. Ctr., Inc., *Choices*, 19–20 (2000). The service economy includes

manufacturing jobs declined 9.7 percent.¹⁵ During that same time, several other industries grew, including the service industry by 30 percent; retail trade by 11.7 percent; construction by 32.7 percent; and finance, insurance, and real estate by 25.8 percent.¹⁶ In a state that historically has been dependent on agriculture and manufacturing, injured employees who spend entire careers in these industries may find it difficult to find replacement positions as these industries continue to decline.¹⁷ Even when such positions are available, they are often too physically demanding for injured employees, like Smith, to fulfill. Therefore, education may be the only option for returning many North Carolinians to work.

North Carolina should allow injured employees to receive workers' compensation for their education when the classroom is the only way for them to return to the workforce. The challenge for the Commission and courts is developing law in this area that balances the competing interests of employer and employee. Specifically, the Commission and courts must be cognizant of the financial burden that will be imposed on an employer who is expected to fund an employee's education in addition to providing a percentage of the employee's weekly wage.

Part I of this Comment provides an overview of workers' compensation law in North Carolina and addresses the ways in which the law regarding education benefits has developed. Part II analyzes education benefits in the context of North Carolina statutory law and argues that providing such benefits is consistent with the purpose of the workers' compensation statute, so long as the employer's interest in limited liability is taken into account. Accordingly, Part III offers recommendations designed to balance the interests of employer and employee. These recommendations, modeled on approaches taken in sister states, provide guidelines for determining an employee's eligibility for education benefits, the fields of study an employee is allowed to pursue when receiving such benefits, the duration of an employer's liability for an employee's education, education-related expenses for which an employer is liable, and the reasonableness of an employee's proposed plan of rehabilitation through education.

a broad category of occupations, "encompass[ing] everything from the local automotive repair shop to the dentist office." *Id.* Higher paying positions, as is typical in health care service, and low wage employment, such as cashiers and wait staff, are included within the service economy. *Id.*

15. N.C. Dep't of Commerce, Policy, Research and Strategic Planning Div. N.C. Econ. Review (Sept. 2002) 2, available at http://cmedis.commerce.state.nc.us/econdata/review/NC_Economic_Review.pdf (on file with the North Carolina Law Review).

16. *Id.*

17. *See id.*

I. BACKGROUND ON WORKERS' COMPENSATION AND VOCATIONAL REHABILITATION

At common law, workers could bring suit against their employers for on-the-job injuries; however, such suits were not frequent.¹⁸ Employees did not want to risk losing their jobs and employers were often protected from liability under theories such as assumption of risk and contributory negligence.¹⁹ As industrial employment rose, and along with it the prevalence of work related injuries, state legislatures began adopting workers' compensation statutes to give employees additional protection.²⁰ Such statutes provided an efficient method for handling claims, while protecting both employer and employee.²¹

In 1929, the North Carolina General Assembly adopted the state's Workers' Compensation Act ("the Act").²² The Act provides exclusive remedies to North Carolina employees for injuries "arising out of and in the course of [their] employment."²³ The North Carolina Industrial Commission was created to administer the Act²⁴ and is charged with promulgating rules and regulations to implement the Act.²⁵ It also has exclusive authority to adjudicate all issues between employers and employees.²⁶ Any award decision of a commissioner is first subject to review by the Full Commission²⁷ and then by North Carolina appellate courts.²⁸

The purpose of the Act is to provide a fair and efficient system for handling work related injuries.²⁹ It was designed to benefit both employer and employee. Though deprived of his common law remedy,³⁰ the employee is afforded compensation for his injuries and loss of earning

18. Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1086 (1999).

19. *Id.* Under the theory of contributory negligence, if the employee is found to be even partially negligent in causing his own injury, then he will be denied any recovery. *Miller v. Miller*, 273 N.C. 228, 237, 160 S.E.2d 65, 73 (1968).

20. Gabel, *supra* note 18, at 1086-87.

21. *Id.* at 1083-84.

22. Workers' Compensation Act, ch. 120, 1929 N.C. Pub. Laws 117 (codified at N.C. GEN. STAT. §§ 97-1 to -143 (2003)).

23. *Id.* § 97-3. The Act itself creates a presumption that all employers and employees come within its ambit. *Id.*

24. *Id.* § 97-77.

25. *Id.* § 97-80.

26. *Id.* § 97-91.

27. *Id.* § 97-85.

28. *Cooke v. Gillis*, 218 N.C. 726, 728, 12 S.E.2d 250, 252 (1940).

29. Gabel, *supra* note 18, at 1083.

30. *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 118, 266 S.E.2d 848, 849 (1980).

power.³¹ Since the remedy provided under the Act is exclusive, the employer is insulated from compensatory and punitive damages.³² The employer's liability, as adjudged by the Commission or by a court, is limited and determined.³³

When an injury occurs the employee must report it to the employer within thirty days.³⁴ The employer may either accept or deny the employee's claim.³⁵ If accepted, the parties enter into a compensation agreement, which must then be approved by the Commission.³⁶ If the employer denies the claim,³⁷ the employee may request a hearing of the Commission.³⁸ The Commission then makes findings of fact and conclusions of law and issues an award of compensation, if the employee is eligible, that is binding on the employer.³⁹ If the decision is appealed, the Commission's findings of fact are binding.⁴⁰ The court's review is limited

31. Michael Doran, *The Substantial Certainty Exception to Workers' Compensation*, 17 CAMPBELL L. REV. 413, 413 (1995). The Act sets forth a compensation schedule for certain types of injury. N.C. GEN. STAT. § 97-31. For example, with the loss of an index finger an employee is entitled to 66 2/3 percent of his average weekly wage for forty-five weeks. *Id.* A thumb, however, is significantly more valuable. The injured employee would receive the same compensation but for seventy-five weeks. *Id.*

32. *See* Branham v. Denny Roll & Panel Co., 223 N.C. 233, 236, 25 S.E.2d 865, 867 (1943) (stating that the Act "provides no compensation for physical pain or discomfort [and compensation] is limited to the loss of ability to earn").

33. Ruggery v. N.C. Dep't of Corr., 135 N.C. App. 270, 274, 520 S.E.2d 77, 81 (1999). The Act defines the amount of compensation the employee will receive for many types of scheduled injuries. N.C. GEN. STAT. §§ 97-29, -31. Alternatively, the Act also allows the employee to seek compensation for partial disability, at a rate of 66 2/3 percent of the employee's weekly wage, for up to 300 weeks. *Id.* § 97-30.

34. N.C. Indus. Comm'n Rules for Workers' Comp. Claims, Form 19, available at <http://www.comp.state.nc.us/ncic/pages/form19.pdf> (on file with the North Carolina Law Review). The Industrial Commission provides standardized forms for employer and employee. The employee or dependent reports the claim on a Form 18. N.C. Indus. Comm'n Rules for Workers' Comp. Claims, Form 18, available at <http://www.comp.state.nc.us/ncic/pages/form18.pdf> (on file with the North Carolina Law Review). Use of these forms is mandated by statute. N.C. GEN. STAT. § 97-82.

35. N.C. GEN. STAT. § 97-82. If the claim is allowed by the employer, the parties execute a Form 21 agreement as to compensation. N.C. Indus. Comm'n Rules for Workers' Comp. Claims, Form 21, available at <http://www.comp.state.nc.us/ncic/pages/form21.pdf> (on file with the North Carolina Law Review).

36. N.C. GEN. STAT. § 97-82.

37. An employer's denial of a claim is accomplished via a Form 61. N.C. Indus. Comm'n Rules for Workers' Comp. Claims, Form 61, available at <http://www.comp.state.nc.us/ncic/pages/form61.pdf> (on file with the North Carolina Law Review).

38. N.C. GEN. STAT. § 97-83. The employee must submit a Form 33 to the Commission to receive a hearing. N.C. Indus. Comm'n Rules for Workers' Compensation Claims, Form 33, available at <http://www.comp.state.nc.us/ncic/pages/form33> (on file with the North Carolina Law Review).

39. N.C. GEN. STAT. § 97-86.

40. *Id.* As part of its findings of fact, the Commission will determine whether the employee is capable of earning the same wages and whether the incapacity was caused by the injury. Grant

to a determination of whether there is competent evidence to support the award.⁴¹

To receive workers' compensation benefits from the Commission, the employee bears the burden of proving that he is disabled.⁴² Disability is not synonymous with physical infirmity. In North Carolina, disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."⁴³ Disability is not a medical question but rather is an assessment of the employee's ability to earn income, including consideration of vocational factors such as age, education, and training.⁴⁴

Disability can be proven in one of four ways: (1) evidence that, due to the injury, the employee is incapable of working at any employment; (2) evidence that the employee has been unsuccessful in finding employment after a reasonable effort at a job search; (3) evidence that the employee is employed but at lower wages; or (4) evidence that it would be futile for the employee to seek work due to lack of education, experience, or other factor.⁴⁵ Once a disability is proven, it is presumed to continue until the employee returns to suitable employment at wages comparable to those he was receiving at the time his injury occurred.⁴⁶

If the Commission determines that the employee is disabled, the employer must then pay benefits pursuant to the award by the Commission.⁴⁷ To subsequently terminate benefits, the employer must

v. Burlington Indus., Inc., 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985). A finding that earning power is reduced is tantamount to declaring the employee disabled and entitled to benefits as a matter of fact. *See id.* This makes the Commission's finding extremely significant and unlikely to be overturned on appeal. *But see id.* at 249, 335 S.E.2d at 333. (holding that the evidence was inadequate to support the Commission's findings of fact that the plaintiff was able to return to employment).

41. *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 204, 472 S.E.2d 382, 385 (1996).

42. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). If the injury is one of the scheduled injuries listed in N.C. GEN. STAT. § 97-31, disability is presumed. *Grant*, 77 N.C. App. at 250-51, 335 S.E.2d at 334.

43. N.C. GEN. STAT. § 97-2(9). The Supreme Court of North Carolina has recognized that the employee may be disabled even when he is making a higher wage after the injury, if employed in a position that is not available in a competitive market. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805-06 (1986).

44. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982). Further, rehabilitation of the disability is not limited to the employee's physical recovery, but rather rehabilitation refers to regained earning power. *See Russos v. Wheaton Indus.*, 145 N.C. App. 164, 168, 551 S.E.2d 456, 459 (2001) (holding that a finding that the employee has reached maximum medical improvement does not alone indicate that the employee's disability has been rehabilitated).

45. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

46. Termination of Compensation, N.C. ADMIN. CODE tit. 4, r. 10A.0404 (June 2000).

47. N.C. GEN. STAT. § 97-18. The employer may also pay benefits pursuant to an agreement

rebut the presumption of continuing disability.⁴⁸ Since disability is based on earning capacity, the employer must show that the employee is capable of working at a job with comparable wages but has unjustifiably refused such suitable alternative employment.⁴⁹ If the employee refuses suitable alternative employment, he forfeits any further benefits.⁵⁰

However, in some circumstances, no suitable alternative employment is available. Factors such as "age, education, physical limitations, vocational skills, and experience" are relevant to a determination of suitability.⁵¹ Courts have further found that "make-work" does not constitute suitable alternative employment.⁵² "Make-work" is defined as a job that has been modified by the employer to suit the injured employee's physical capabilities, one that would not ordinarily be available in the marketplace.⁵³ "Make-work" is not considered suitable alternative employment nor is it indicative of the employee's actual earning power.⁵⁴ Additionally, alternative work that does not provide similar opportunities for career advancement is not suitable. For example, in *Dixon v. City of Durham*,⁵⁵ the court found that the water meter reader position offered to an injured police officer was not suitable employment because it did not offer a similar opportunity for income advancement.⁵⁶

with the employee.

48. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994).

49. *See Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 63-64, 546 S.E.2d 133, 139-40 (2001) (holding that the employee unjustifiably refused to return to a light duty position approved by his doctor and therefore allowing the employer to terminate further benefits).

50. N.C. GEN. STAT. § 97-32.

51. *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994).

52. *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 389-90, 561 S.E.2d 315, 320 (2002). In *Moore*, the employer offered Moore, formerly a truck driver, a position as a maintenance worker. *Id.* Prior to Moore's injury, there was no such position; various drivers performed the duties as needed. *Id.* Because the position was not advertised to the public nor filled after Moore refused the position, the court concluded that it was make-work. *Id.* Should the injured employee be terminated from the make-work position, he would be unable to find a comparable position and would be left with no income. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437-38, 342 S.E.2d 798, 806 (1986). Thus, a make-work position is not a true indicator of the employee's earning capacity since the position is not one which is readily available to the injured employee under normal employment conditions. *Id.*

53. *See Peoples*, 316 N.C. at 438, 342 S.E.2d at 806. *See also Donna Harrison*, N.C. Indus. Comm'n No. 475328 (Nov. 16, 1999) (holding that modifications made to the position to account for the employee's fear of heights did not constitute make-work because the modifications occurred prior to the employee's work related injury) (on file with the North Carolina Law Review).

54. *Moore*, 149 N.C. App. at 389-90, 561 S.E.2d at 320-21 (stating that "an employer cannot avoid its duty to pay compensation by offering the employee a position that could not be found elsewhere under normally prevailing market conditions").

55. 128 N.C. App. 501, 495 S.E.2d 380 (1998).

56. *Id.* at 503-04, 495 S.E.2d 382-83. Courts have even considered personal factors in determining whether employment is suitable. In *Cialino v. Wal-Mart Stores*, the court held that

When no suitable alternative employment is available, the employer may provide vocational services to assist the employee in finding work that is suitable.⁵⁷ Vocational rehabilitation has typically been limited to either helping the employee find a job or vocational skills training.⁵⁸ North Carolina has only recently addressed the issue of whether vocational rehabilitation also includes formal education. In 2001, the North Carolina Court of Appeals held, in *Russos v. Wheaton Industries*,⁵⁹ that Russos, a factory employee, was entitled to paralegal training as a type of vocational rehabilitation service.⁶⁰ In its findings of fact, the Commission found that Russos was entitled to temporary total disability until completion of a paralegal training program at a community college.⁶¹ The court left undisturbed the Commission's finding that, because of the Russos's permanent five percent disability and her inability to make similar wages in another job, paralegal training was a "reasonable attempt" at rehabilitation.⁶² Thus, Russos was not required to seek alternative employment and her employer was required to pay Russos benefits while she was in school.⁶³

A year later, in *Foster v. U.S. Airways*,⁶⁴ the North Carolina Court of Appeals held that Foster, who was unable to continue working as a flight attendant, was entitled to community college tuition as part of her vocational rehabilitation.⁶⁵ Foster had worked for U.S. Airways for eleven years at an average salary of \$35,000.⁶⁶ While vocational counselors hired by the employer were actively searching for alternative employment for Foster, she enrolled as a full-time student at a community college.⁶⁷ A rehabilitation specialist from the North Carolina Department of Vocational Rehabilitation ("NCDVR") testified that Foster lacked the skills and education to obtain a job within her physical limitations at a comparable

the plaintiff had justifiably refused a position working a daytime shift since she could not get childcare. 156 N.C. App. 463, 467, 577 S.E.2d 345, 354 (2003).

57. See Kathy Foster, N.C. Indus. Comm'n No. 349246 (July 21, 2000) (allowing the plaintiff education benefits since she was not employable at pre-injury wages in another position) (on file with the North Carolina Law Review).

58. See *supra* note 4; see also *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 334, 499 S.E.2d 470, 472 (1998) (noting the possibility of allowing the plaintiff to retrain for a more sedentary position).

59. 145 N.C. App. 164, 551 S.E.2d 456 (2001).

60. *Id.* at 165, 169, 551 S.E.2d at 457, 460.

61. *Id.* at 166, 551 S.E.2d at 458.

62. *Id.*

63. *Id.*

64. 149 N.C. App. 913, 563 S.E.2d 235 (2002).

65. *Id.* at 924, 563 S.E.2d at 238.

66. *Id.* at 916, 563 S.E.2d at 238.

67. *Id.* at 916-17, 563 S.E.2d at 238.

salary.⁶⁸

Arguing that Foster's coursework interfered with her ability to actively seek employment, the employer sought to suspend disability benefits.⁶⁹ The Deputy Commissioner refused, but did order Foster to "comply with the [employer's] vocational rehabilitation efforts . . . and to attempt to locate a (low-paying) job within her restrictions."⁷⁰ Foster nevertheless failed to apply for a lower paying position recommended by the counselor and failed to conduct any job search on her own.⁷¹ Again, the employer sought to terminate benefits—and this time the Special Deputy Commissioner agreed.⁷² The Special Deputy Commissioner found that "[w]hile plaintiff should be encouraged to continue to pursue her education, she also [had] the responsibility to simultaneously pursue job leads for suitable and gainful employment, if requested by the defendants, and she [could not] disregard her affirmative duty to search for employment simply because she [was] in school."⁷³ The employer appealed, and the Full Commission reversed concluding that the "rehabilitation plan offered by the [employer] was not appropriate and the Special Deputy Commissioner should not have ordered the [employee] to comply with it."⁷⁴

On appeal, the North Carolina Court of Appeals affirmed, holding that placing Foster in a lower paying job was an inappropriate form of rehabilitation.⁷⁵ Because the Commission found that Foster was not capable of making wages comparable to her flight attendant salary, the court did not require Foster to continue a futile job search in order to continue receiving benefits.⁷⁶ Foster was awarded \$435.90 per week from the date that the employer stopped paying.⁷⁷ However, the court did not address the extent of benefits to which Foster was entitled; a determination of this question would have required resolution of related issues including how long the employer would be required to support Foster's educational pursuits and which education expenses would be compensable.

The employer, in *Foster*, was required to pay wage benefits while the employee pursued an education in her chosen field.⁷⁸ The goal of education was to rehabilitate. However, at the time of trial, Foster's

68. *Id.* at 916, 563 S.E.2d at 238.

69. Kathy Foster, N.C. Indus. Comm'n No. 349246 (July 21, 2000).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Foster v. U.S. Airways*, 149 N.C. App. 913, 924, 563 S.E.2d 235, 242 (2002).

76. *Id.*

77. *Id.* at 918, 563 S.E.2d at 239.

78. *Id.*

education had not rehabilitated her as evidenced by the fact that she still was not employable at pre-injury wages.⁷⁹ The Commission noted in its findings of fact that even after completing her associates degree in applied science in the spring of 1997, the rehabilitation specialist from NCDVR thought that Foster would need additional education to obtain work at her pre-injury wage.⁸⁰ Neither the decision of the Commission nor the court of appeals dealt with this fact.

II. STATUTORY ANALYSIS

Awarding costs of education as a type of vocational rehabilitation is consistent with North Carolina Workers' Compensation Act. Although the text of the Act does not expressly include formal education as a type of vocational rehabilitation, the Act delegates broad authority to the Commission to make rules for vocational rehabilitation.⁸¹ Promulgating rules concerning the costs and duration of education benefits is consistent with the purpose of the Act, so long the Commission considers employers' interests in limited liability.

The North Carolina Court of Appeals, in the *Foster* decision, attempted to read education into the statutory definition of medical compensation.⁸² The *Foster* court reasoned that education benefits are a valid form of vocational rehabilitation based on sections 97-25 and 97-2(19) of the North Carolina General Statutes.⁸³ Section 97-25 requires the employer to pay medical compensation to the injured employee.⁸⁴ Section 97-2(19) defines medical compensation as:

medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability.⁸⁵

Disability is defined based on wage earning potential (rather than physical incapacity)⁸⁶ and rehabilitative services are considered medical compensation (since rehabilitative services are aimed at lessening the period of disability);⁸⁷ however, it is difficult to characterize the payment of

79. *Id.* at 920, 563 S.E.2d at 240.

80. *Id.*

81. N.C. GEN. STAT. § 97-25.5 (2003).

82. *Foster*, 149 N.C. App. at 923–24, 563 S.E.2d at 242.

83. *Id.*

84. N.C. GEN. STAT. § 97-25.

85. *Id.* § 97-2.

86. *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383 (1998).

87. *Foster*, 149 N.C. App. at 923–24, 563 S.E.2d at 238–42.

education expenses as a type of medical compensation. The term “rehabilitative services” suggests physical rehabilitation to prepare the body for working.⁸⁸ Courts interpreting North Carolina’s workers’ compensation law should “not enlarge the ordinary meaning of the terms used by the legislature.”⁸⁹ Yet, courts have repeatedly held that the workers’ compensation statutes should be construed liberally so as not to deny benefits to an employee.⁹⁰

Alternatively, the *Foster* court could have based its decision to award education benefits on section 97-25.5. Section 97-25.5 provides that “[t]he Commission may adopt utilization rules and guidelines, consistent with this Article, for vocational rehabilitation services and other types of rehabilitation services. In developing the rules and guidelines, the Commission may consider, among other factors, the practice and treatment guidelines adopted by professional rehabilitation associations and organizations.”⁹¹

Awarding education benefits based upon the Commission’s authority to adopt rules for rehabilitation in section 97-25.5 is more appropriate than trying to force education into the meaning of medical compensation. However, courts cannot apply law based on this section until the Commission has promulgated rules. Thus far, the Commission has not adopted any specific rules or guidelines pertaining to education benefits under the Act. The Commission’s promulgation of rules under this specific statutory authorization is the preferable means of legitimizing the award of educational benefits in North Carolina.⁹²

88. The North Carolina Rules for Utilization of Rehabilitation in Workers’ Compensation Claims provide that:

“Medical rehabilitation” refers to the planning and coordination of health care services. The goal of medical rehabilitation is to assist in the restoration of injured workers as nearly as possible to the workers’ pre-injury level of physical function. Medical case management may include but is not limited to case assessment, including a personal interview with the injured worker; development, implementation and coordination of a care plan with health care providers and with the worker and family; evaluation of treatment results; planning for community re-entry; return to work with the employer of injury and/or referral for further vocational rehabilitations services.

Application of the Rules, N.C. ADMIN. CODE tit. 4, r. 10C.0103 (June 2000).

89. *Deese v. Southeastern Lawn and Tree Expert Co.*, 306 N.C. 275, 277, 293 S.E.2d 140, 143 (1982).

90. *See Petty v. Transport, Inc.*, 276 N.C. 417, 415–26, 173 S.E.2d 321, 328 (1970); *Hartley v. N.C. Prison Dep’t*, 258 N.C. 287, 290–91, 128 S.E.2d 598, 601 (1962); *Robertson v. Hagood Homes, Inc.*, 160 N.C. App. 137, 143–43, 584 S.E.2d 871, 874–75; *Grantham v. Cherry Hosp.*, 98 N.C. App. 34, 37, 389 S.E.2d 822, 823 (1990). The Commission’s findings of fact are conclusive while the Commission’s statutory interpretation and conclusions of law are subject to de novo review. *See* N.C. GEN. STAT. § 97-86.

91. N.C. GEN. STAT. § 97-25.5.

92. However, clearly delineating the provision of education benefits by rulemaking arguably

In lieu of any rulemaking effort by the Commission, the General Assembly should amend section 97-2 to include a specific definition of vocational rehabilitation that includes formal education as a benefit to which injured employees may be entitled.⁹³ Additionally, section 97-25.5 should be amended to include specific limitations on such awards, including possibly creating a statutorily defined period over which benefits can last and detailing the costs for which employers would be responsible. When “[s]tated in unambiguous language, well-defined legislative policy decisions reduce the need for judicial interpretation and inform potential claimants of what to expect from the workers’ compensation schemes.”⁹⁴

The amendments proposed above comport with the spirit of the Act, even though the text of the Act does not explicitly authorize these benefits.⁹⁵ To be fully consistent with the spirit of the Act, the law must reflect the Act’s dual purpose: to compensate employees for work related injuries and provide employers fixed and limited liability.

The Act was designed to extend protection to workers who are injured on the job and to force employers to bear the costs of business.⁹⁶ The primary focus of the Act is to provide wages to injured employees. For a number of scheduled injuries and without regard to the fault of the employer, the Act compensates “a worker for work related injuries which prevent him from earning the equivalent amount of wages” he was making

would not be in the interest of employees, because setting limits by rule may restrict the provision of benefits. Given the Commission’s generally pro-employee leaning, this argument would suggest that the Commission would not be interested in promulgating a rule of this kind. See Isabel B. Loytty, *The Fairness Requirement for a Workers’ Compensation Agreement—The Effect of Vernon v. Steven L. Mabe Builders*, 17 CAMPBELL L. REV. 521, 531 (1995).

93. However, the lack of a clear statutory basis for education benefits has not prevented the courts from making these awards. See *Foster v. U.S. Airways*, 149 N.C. App. 913, 924, 563 S.E.2d 235, 242 (2002).

94. Marc A. Antonetti, *Labor Law: Workers’ Compensation Statutes and the Recovery of Emotional Distress Damages in the Absence of Physical Injury*, 1990 ANN. SURV. AM. L. 671, 689 (1993).

95. Given that the statutes do not specifically provide for education benefits, we might look to legislative history to determine the legislature’s intended application of sections 97-2(19), 97-25 and 97-25.2 of the Act. See *Taylor v. J. P. Stevens and Co.*, 300 N.C. 94, 102, 265 S.E.2d 144, 148–49 (1980). Unfortunately, there is little legislative history on these sections, and their interpretations by the Commission and the courts to date are not of much help on the question of education benefits. For example, in *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm’n*, the Supreme Court of North Carolina defined medical compensation broadly based on what gives relief. See 336 N.C. 200, 218–19, 443 S.E.2d 716, 727–28 (1994) (holding that medical compensation should “be reasonably required to effect a cure or give relief or tend to lessen the period of disability”).

96. See *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951) (stating that “[t]he philosophy of which supports the Workmen’s Compensation Act is ‘that the wear and tear of human beings in modern industry should be charged to the industry’”) (quoting *Cox v. Kansas City Ref. Co.*, 195 P. 863 (Kan. 1921)).

before his injury in the amount of 66 2/3% of the average weekly wage.⁹⁷ These scheduled injuries indicate, at least in part, that the Act is aimed at providing an efficient and easy method for the injured employee to receive compensation without regard to any effect on the employee's earning power.⁹⁸

The Act was also intended to extend benefits and protection to the employer.⁹⁹ It seeks to "ensure a limited and determinate liability for [the] employer"¹⁰⁰ and to promote "uniformity, efficiency, predictability, and fairness."¹⁰¹ In addition, section 97-2 was enacted under the 1994 Reform Act,¹⁰² as an effort to contain costs to the employer.¹⁰³

Further, the purpose of the Workers' Compensation Act is not to make the employee significantly better off but rather to compensate the employee for the injury.¹⁰⁴ Therefore, benefits paid by the employer should only be to the extent necessary to compensate the employee. This suggests that the Commission must award benefits that are limited to the amount necessary for the quickest rehabilitation of the employee.

In sum, North Carolina has chosen to allow education benefits under the workers' compensation statute; however, the Commission must weigh the interest of all parties in determining the amount of compensation to award.¹⁰⁵ In adopting rules under section 97-25.5, the Commission should be sure to consider the costs to the employer as well as the benefit to the employee. The employer should be held accountable for the damage

97. See N.C. GEN. STAT. §§ 97-29, -30 (2003). The Plaintiff needs to show a reduction in wage earning capacity to receive these benefits. *Grant v. Burlington Indus.*, 77 N.C. App. 241, 250-51, 335 S.E.2d 372, 334 (1985).

98. However, if an employee can show a loss of earning capacity, he is allowed to seek compensation for his loss of earning capacity rather than proceeding under the scheduled injury provision of the statute. *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11-13, 562 S.E.2d 434, 442-43 (2002).

99. *Winslow v. Carolina Conference Ass'n of Seventh Day Adventists*, 211 N.C. 571, 579, 191 S.E. 403, 408 (1937).

100. *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966).

101. See Gabel, *supra* note 18, at 1083.

102. Workers' Compensation Reform Act of 1994, ch 679, 1993 N.C. Sess. Laws 319 (codified as amended at N.C. GEN. STAT. §§ 97-1 to -122 (2003)).

103. John Richard Owen, Comment, *The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance*, 73 N.C. L. REV. 2502, 2506 (1995) (stating the Reform Act "adjusts the workers' compensation employer-employee balance through changes designed to contain costs, add flexibility, and streamline administration").

104. In fact, the Supreme Court of North Carolina has said that, "one of the purposes of the act is to relieve hardship rather than to afford full compensation for injury." *Kellams v. Carolina Metal Prod., Inc.*, 248 N.C. 199, 203, 102 S.E.2d 841, 844 (1958).

105. This is the method generally used for workers' compensation awards. See *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 657-59, 94 S.E.2d 790, 794 (1956) (holding that all of the statutory methods for determining average weekly wages must be considered to ascertain legislative intent that results in a decision that is "fair and just to both parties").

suffered by the employee, but to comport with the spirit of the Act the benefits must also be limited.

III. RECOMMENDED REGULATORY GUIDELINES

Since North Carolina allows education benefits, the Commission must address some issues that were not considered in the *Foster* case, including which employees are eligible for benefits, what fields of study they may pursue, how long benefits should last, what expenses the benefits should cover, and the reasonableness of the rehabilitation plan for the particular employee. In addressing these issues the Commission must be mindful of the fact that the Act was aimed at protecting both employee and employer. In allowing these benefits, the Commission should require a reasonable rehabilitation plan, one that assists the employee in moving towards gainful employment in his chosen field while specifically defining the employer's liability for continued support of that employee.

A. *Determining an Employee's Eligibility for Education Benefits*

To be eligible for any vocational rehabilitation, the employee must first show that he is disabled within the meaning of the Act. To determine disability the Commission must ascertain whether any suitable alternative employment is available for that employee. The determination of suitable alternative employment is the same whether the employee is requesting education benefits or traditional vocational services. Only if suitable employment does not exist is the employee eligible for vocational services.

The Commission has established a priority list for determining the employee's options for returning to work:

- (1) Current job, current employer;
- (2) New job, current employer;
- (3) On-the-job training, current employer;
- (4) New job, new employer;
- (5) On-the-job training, new employer;
- (6) Formal vocational training to prepare worker for job with current or new employer;
- (7) Due to the high risk of small business failure, self-employment should be considered only when its feasibility is documented with reference to worker's aptitudes and training, adequate capitalization, and market conditions.¹⁰⁶

106. Application of the Rules, N.C. ADMIN. CODE, tit.4, r. 10C.0103 (June 2000). This approach is consistent with the approaches other states have adopted. For example, in North Dakota the goal of the Workers' Compensation Statutes is "to return the disabled worker to substantial gainful employment with a minimum of retraining, as soon as possible after the injury occurs." N.D. CENT. CODE § 65-05.1-01 (2003). New Mexico's statute similarly provides that "vocational rehabilitation services are those services designed to return the employee to gainful employment, in the following priority: (1) pre-injury job with the same employer; (2) modified work with the same employer; (3) job related to former employment; or (4) suitable employment

When a case comes before the Commission, it first should make a finding of fact on whether suitable alternative employment in one of the first five categories above is available to the employee. Application of the list ensures that the employer is not asked to bear the cost of retraining when suitable alternative employment is available.

Although application of the priority list appears to be relatively clear, courts have applied it haphazardly; reaching different decisions as to suitable alternative employment in cases involving essentially the same facts.¹⁰⁷ The inconsistencies in determining suitable alternative employment are not specific to situations in which the employee is seeking education benefits. However, the consequence of these inconsistencies is more significant in those situations because the costs to the employer, when education is awarded, are greater than those associated with traditional vocational services.¹⁰⁸

Nebraska's priority system,¹⁰⁹ which is similar to North Carolina's, was not applied at all in *Heironymus v. Jacobsen Transfer*.¹¹⁰ In *Heironymus* the Nebraska Supreme Court allowed the employee, a former truck driver, vocational rehabilitation even though there was evidence that she also had experience in bookkeeping, retail sales, auto mechanics, and production work.¹¹¹ It was not clear that the injury prevented the employee from working in any of these areas in a new job with a new employer.¹¹² The court's decision in *Heironymus* effectively placed the burden on the employer to prove that the employee was not disabled.¹¹³

When asking the court for education benefits, the employee should bear the burden of proving that he is not presently able to obtain any suitable employment.¹¹⁴ If the employee is employable, he should be

in a nonrelated work field." N.M. STAT. ANN. § 52-3-17 (1978).

107. See *infra* notes 115–25 and accompanying text.

108. See Section III.B.

109. See NEB. REV. STAT. § 48-162.01 (2004) ("The priorities are listed in order from lower to higher priority: (a) return to the previous job with the same employer; (b) modification of the previous job with the same employer; (c) a new job with the same employer; (d) a job with a new employer; or (e) a period of formal retraining which is designed to lead to employment in another career field").

110. 337 N.W.2d 769 (Neb. 1983).

111. *Id.* at 771–72.

112. The court's explanation for allowing the employee education in spite of her other job experience was that "[t]here [was] no showing that the plaintiff could do bookkeeping for anyone except her husband or that she could perform such services without help." *Id.* at 771.

113. In North Carolina, if the employee is not seeking compensation for a scheduled injury (either because his injury is not a scheduled injury or because he thinks that he can collect more under an alternate remedy) then the plaintiff bears the initial burden of providing that he is disabled. See *Russell v. Lowes Prod. Dist.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

114. This seems to be what is required under the *Russell* test. *Id.* To guard against false claims, the court should require clear and convincing proof. See *Mack v. Cerro Copper Tube and*

required to accept a position, thus terminating further obligation on the part of the employer. If the employee chooses not to work in any of the fields in which he was already trained, the employee himself should bear the costs associated with education for a new line of work. This result is consistent with the aims of the Act. It protects the employer with limited liability. It further prevents employees from taking advantage of the system by getting an education at the expense of employers when they decide to move into an entirely new line of work following an injury.¹¹⁵

In cases such as *Foster*, where it is evident that the employee cannot make the same wages in a different job due to lack of education or experience,¹¹⁶ the quickest method for returning the employee to pre-injury wages may be an education. If it is indeed the fastest method of rehabilitation, then courts should allow the employee to go to school without requiring any further job search. This benefits both the employee, by allowing him to pursue an education, and the employer since the quickest method for rehabilitation will lessen the period over which the employer will have to pay benefits.

Thus, the Commission and the courts must be able to draw a fine line between employees who can find suitable alternative employment and those who have no other option but education. In *Ward v. Floors Perfect*,¹¹⁷ the employee suffered knee problems as a result of his job installing flooring.¹¹⁸ The court held that the employee did not make a sufficient showing that he was unable to find suitable alternative employment and therefore did not consider him disabled.¹¹⁹ The court concluded that he voluntarily removed himself from the workforce and was not entitled to further benefits.¹²⁰

It is difficult to reconcile *Ward*, where the employee was deemed to have voluntarily withdrawn from the job market, with *Foster*. In *Foster*, the employee could not obtain similar wages because of the high salary level she obtained and her limited education credentials.¹²¹ In *Ward*, the employee had spent most of his adult life working in flooring and only had passed the General Education Development (GED) test.¹²² The

Constitution State Servs. Co., 37,319 (La. App. 2 Cir. 6/25/03), 850 So. 2d 1005, writ denied, 2003-2607 (La. 12/12/03), 860 So. 2d 1157.

115. This is not to say that the employee would not receive compensation for the injury. To the contrary, the employee might also be entitled to wage benefits during the time he is in school.

116. Kathy Foster, N.C. Indus. Comm'n No. 349246 (Feb. 8, 2001).

117. No. COA01-568, 2002 WL 1791348 (N.C. App. Aug. 6, 2002).

118. *Id.* at *1.

119. *Id.* at *5-6.

120. *Id.* at *7.

121. *Foster v. U.S. Airways*, 149 N.C. App. 913, 917-27, 563 S.E.2d 235, 238-44.

122. David Ward, N.C. Indus. Comm'n No. 816964 (Feb. 8, 2001) (on file with the North

Commission emphasized the fact that the employee in *Ward* had not actually sought alternative employment;¹²³ however, neither had the employee in *Foster*.¹²⁴ The Commission in *Ward* seems to base its decision, at least in part, on its subjective determination that the employee was intelligent and articulate.¹²⁵ The Court of Appeals, with deference to the Commission's findings, agreed that *Ward* was able to procure alternative employment and thus not entitled to education benefits.¹²⁶

Ward is not much help in establishing criteria to determine generally when an employee is voluntarily withdrawing from the workforce and when an employee has no suitable alternative employment options. To some degree this determination must be a subjective one. Factors like the employee's mental capacity cannot be precisely measured but are certainly considered in determining employment opportunities.¹²⁷ However, an objective determination of the injured worker's employability in the marketplace must also be made. By making the determination of whether there is suitable alternative employment a subjective and objective determination, the Commission and the courts can comply with the purpose of the Act. The objective components ensure that awards are fair and predictable and protect employers from having to pay benefits to employees who can work.

The Commission should also consider refining the type of objective criteria used in the determination. As a preliminary matter, it seems necessary that the employee conduct a job search, even if brief and fruitless, either on his own or with the assistance of vocational specialists. Further, the vocational counselors working with the employee should guide the determination,¹²⁸ though it is likely that both parties will have

Carolina Law Review).

123. *Id.* A Deputy Commissioner recently awarded the employee in *Ward* total disability compensation due to his inability to obtain employment at his pre-injury wage despite reasonable attempts to do so. David Ward, N.C. Indus. Comm'n No. 816964 (Aug. 9, 2004) (on file with the North Carolina Law Review).

124. *Foster*, 149 N.C. App. at 917, 563 S.E.2d at 238.

125. *Ward*, 2002 WL 1791348, at *7. In their findings of fact, the Commission noted that "[a]s demonstrated at the hearing, Plaintiff is intelligent and articulate and should do well in pursuing his education." Ward, N.C. Indus. Comm'n No. 816964. One of the peculiar facts of this case was that *Ward* was actually a self-employed small business owner. *Id.* This may have contributed to the court's finding that *Ward* was employable; however, it is unclear that someone experienced in the flooring business could transfer those skills into developing another business in which he was physically capable of performing.

126. *Ward*, 2002 WL 1791348, at *7-8.

127. *Id.* See also *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400, 368 S.E.2d 388, 391 (1988) (noting the plaintiff's age and education as factors in considering employability).

128. The court of appeals "has approved the use of testimony by vocational rehabilitation specialists on the issue of wage earning capacity" and therefore disability. *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 31, 398 S.E.2d 677, 681 (1990). The court also noted that

vocational experts who agree with their position.¹²⁹ These specialists have the knowledge and experience to make a determination as to employability that the Commission and the courts may not.

The Commission must also consider what happens when the employee is presently employable in another position at comparable wages but does not have the same opportunity for advancement as he did in his prior employment. That was exactly the case in *Dixon*.¹³⁰ In that case, the court held that to be considered suitable alternative employment, the employee must have the equivalent potential for income advancement.

Similarly, in *Muckler v. Valassis Communications, Inc.*¹³¹ the Commission awarded benefits even though the employee was offered a position with the defendant that paid the same wages.¹³² The employee was a high school graduate making \$12.16 as a warehouse material handler.¹³³ Prior to the injury, he had hoped to move into higher paying positions within the company.¹³⁴ The court held that, since the proffered position did not afford the same opportunity for income advancement, it was not suitable alternative employment and the employee was entitled to vocational rehabilitation compensation for his educational pursuits.¹³⁵

Mere aspiration to higher wages is not sufficient to justify the added cost to the employer.¹³⁶ In cases like *Dixon*, the court has stretched the definition of disability to allow benefits even when the employee is presently capable of making pre-injury wages.¹³⁷ An employee like Muckler, who is not disabled, should not be entitled to education benefits when he is presently employable at pre-injury wages.¹³⁸ Courts should not further strain the workers' compensation scheme by requiring the employer pay additional education benefits under an equally stressed definition of medical compensation.¹³⁹ North Carolina courts and the Industrial

testimony of the plaintiff himself may be adequate proof of disability. *Id.*

129. See *Foster*, 149 N.C. App. at 916, 563 S.E.2d at 238 (stating that the plaintiff's vocational counselor found that the plaintiff needed an education to reach the same pay level while the defendant's vocational counselor actively pursued job prospects for the plaintiff).

130. See *supra* notes 55–56 and accompanying text.

131. Travis Muckler, N.C. Indus. Comm'n No. 950747 (Sept. 9, 2003) (on file with the North Carolina Law Review).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. See *Dixon v. City of Durham*, 128 N.C. App. 501, 504–05, 495 S.E.2d 380, 383 (1998) (finding that the employee was entitled to education benefits because as a meter reader she would not be eligible for pay raises that she would have been eligible for in her previous position).

137. See *supra* notes 55–56 and accompanying text.

138. Travis Muckler, N.C. Indus. Comm'n No. 950747 (Sept. 9, 2003) (on file with the North Carolina Law Review).

139. Medical compensation is limited to compensation "that may be reasonably

Commission should reject such outcomes.¹⁴⁰ In serving the dual purposes of the Act, education benefits should not be awarded when the employee is presently employable at pre-injury wages.

However, education benefits may be justified if it is highly probable that the employee would have achieved higher wages in his pre-injury position. In *Dixon*, the court looked at the pay increases the employee could receive in a position as meter reader. The Commission found that, although the employee would be given the same wage in the meter reader position, she would start at the top of the pay scale for that position and would be frozen out of any pay increases she might have received if she was allowed to continue working in her pre-injury position as a police officer.¹⁴¹ In *Muckler*, the Commission's analysis seems to go a step too far by basing its decision about income advancement not on the potential advancement in the pre-injury position, but on the employee's aspiration for higher paying positions.¹⁴² There was no assurance that the employee would meet his career goals.¹⁴³ Income potential is a factor in determining whether suitable alternative employment exists. However, to justify the additional cost to the employer, the consideration of income potential should be based on a substantial likelihood that the employee will reach the higher income level in the pre-injury employment, not in any position that he may have wished to obtain.

B. Fields of Study an Employee is Allowed To Pursue

Once it is determined that the employee is eligible for education benefits, the Commission should then require the employee to submit a plan for rehabilitation. The plan should first address the type of education the employee is pursuing. The employer is likely to argue for a form of education that puts the employee back into comparable employment as quickly as possible so as to limit the employer's expense. While there should be some limitation to the areas of study the employee may pursue, the aptitudes and preferences of the employee should be given some consideration.

required . . . to lessen the period of disability." N.C. GEN. STAT. § 97-2(19). *But see Foster v. U.S. Airways*, 148 N.C. App. 913, 923-34, 563 S.E.2d 235, 238-42 (2002) (allowing education benefits under N.C. GEN. STAT. § 97-2).

140. *But see Foster*, 148 N.C. App. at 923-34, 563 S.E.2d at 238-42 (2002) (allowing education benefits under N.C. GEN. STAT. § 97-2).

141. *Dixon*, 128 N.C. App. at 383, 495 S.E.2d at 504-05.

142. *Muckler*, N.C. Indus. Comm'n No. 950747. Significant, though, is that the Commission noted that the income advancement potential of the proffered position was not comparable to the income advancement potential of the employee's pre-injury position. *Id.*

143. In fact, the employee had recently moved from Iowa, where he had been attending community college, and had only worked for the defendant for six months. *Id.*

Though the employee should be allowed to choose his field of study, an employer should not be forced to fund an employee's career change unless necessary. In *Doyle v. Spangler Bros., Inc.*,¹⁴⁴ the Idaho Supreme Court upheld the Commission's denial of a benefit award to an employee who sought to return to school.¹⁴⁵ Since the employee could not establish that he needed retraining in order to restore his earning capacity, the Commission did not obligate the employer to pay benefits so that the employee could change his occupation via an education.¹⁴⁶

In *Murphy v. Duke City Pizza, Inc.*,¹⁴⁷ the employee suffered severe injuries to her left hand in a motor vehicle accident and could no longer work.¹⁴⁸ She sought and was awarded benefits to pursue a degree in mathematics.¹⁴⁹ On appeal by the employer, the New Mexico Court of Appeals concluded that the employee should not have received benefits under the New Mexico statute.¹⁵⁰ The statute provided that, "if a worker is unable to perform the pre-injury job or modified work with the same employer, the worker is entitled to vocational rehabilitation benefits that enable her to perform a job related to her former employment or suitable employment in a non-related field."¹⁵¹ Mathematics was not related to pizza delivery and thus the rehabilitation program was not compensable until the worker showed that she could not obtain work in a related field.¹⁵²

By forcing the employee to remain in the same field, the period of disability should be shorter and thus the burden on the employer should be less. This limitation strikes a fair balance between allowing the employee to get an education while limiting the costs to the employer. However, forcing the injured employee into an occupation not of his own choosing is unreasonable,¹⁵³ not to mention potentially wasteful should the employee choose not to work in that field. When the employee must find a new career because of his injury, his options should not be limited to his prior occupation.

If forced into a related field just to receive education benefits, the employee may not recapture his lost earning capacity if he ultimately

144. 718 P.2d 1195 (Idaho 1986).

145. *Id.* at 1195-96.

146. *Id.*

147. 881 P.2d 706 (N.M. App. 1994).

148. *Id.* at 708.

149. *Id.* at 711.

150. *Id.*

151. N.M. STAT. ANN. § 52-1-50 (1978) (repealed by 1990 N.M. Laws ch. 2, § 151).

152. *Id.*

153. *See, e.g., Kepler v. Mirza*, 102 F. Supp. 2d 617, 624 (W.D. Pa. 1999) (noting the liberty interest in pursuing one's occupation of choice is protected by the Fourteenth Amendment).

chooses not to work in that field.¹⁵⁴ North Carolina allows for a suspension of benefits when the employee does not cooperate with rehabilitation efforts.¹⁵⁵ If benefits can be suspended for non-cooperation and non-cooperation is more likely when the employee is forced into a field of study,¹⁵⁶ then it becomes more likely that the employee will be stripped of the benefit the court has decided that he deserved. The court should limit the duration of the benefit to only the period necessary so as to lessen the expense to the employer. However, the court must balance this with the need to allow the employee to pursue any field of study that will not present an additional expense to the employer.

Similarly, courts may also look at the chosen course of study not only to determine the duration of the proposed rehabilitation but also to determine whether it is suitable to the individual employee. Minnesota law requires that the Workers' Compensation Board, as opposed to the Department of Vocational Rehabilitation, consider the propriety of the course of study.¹⁵⁷ Minnesota courts analyze the "suitability of the course selected in light of the employee's intelligence, education, and physical condition."¹⁵⁸

The Nebraska Supreme Court in *Pollock v. Monfort of Colorado, Inc.*¹⁵⁹ considered many of the same factors in determining the appropriateness of the employee's chosen field of study.¹⁶⁰ The court considered the fact that the employee, who was hoping to pursue an associate degree in mechanical drafting, had a GED and was deficient in math but had an aptitude for drafting.¹⁶¹ The court analyzed the employee's

154. Nebraska courts require that any vocational rehabilitation be in the best interest of the employee. *Pollock v. Monfort of Colo., Inc.*, 381 N.W.2d 154, 155 (Neb. 1986). Factors courts consider in determining the employee's best interest include "education, employment history, and permanent functional impairment." *Overshiner v. Simon Contractors and Liberty Mut. Ins. Co.*, Doc: 197 No: 2146, 2000 WL 489031, *2 (Neb. Work. Comp. Ct. Apr. 20, 2000). It is difficult to argue that any field of study is in the employee's best interest if it is not a field in which the employee is interested in working.

155. See N.C. GEN. STAT. § 97-25 (2003) (stating that the "refusal of the employee to accept any medical . . . or other treatment of rehabilitation procedure when ordered by the Commission" may lead to suspension of benefits). See also *Deskins v. Ithaca Indus.*, 131 N.C. App. 826, 829-30, 509 S.E.2d 232, 234 (1998) (holding suspension unwarranted when there is a lack of evidence that the employee refused any rehabilitation, but simply requested a change in treating physician).

156. See generally *Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 145-46, 523 S.E.2d 439, 441 (1999) (noting the plaintiff's refusal to "apply for jobs and her intentional poor performance in interviews"); *Swain v. C & N Evans Trucking Co., Inc.*, 126 N.C. App. 332, 337, 484 S.E.2d 845, 849 (1997) (stating that the plaintiff did not cooperate with rehabilitation efforts even after the Commission ordered him to do so).

157. *Anderson v. Pilot City Health Ctr.*, 239 N.W.2d 227, 229 (Minn. 1976).

158. *Id.* at 228.

159. 381 N.W.2d 154 (Neb. 1986).

160. *Id.* at 154-55.

161. *Id.*

immediate and potential wages in the field.¹⁶² However, the court denied compensation for the cost of education, based primarily on the employee's physical limitations.¹⁶³ The employee's injury involved the loss of four fingers on his left hand. Based on evidence of increased use of computers in the field, the court reasoned that the employee's injury would prevent him from meeting the future requirements of the field.¹⁶⁴ Though the employee's intelligence and education certainly factor into how well the employee will perform educationally, physical considerations were equally important in *Pollock* in determining the employee's employment potential upon completion of his education.

Another consideration of primary importance is whether the employee will be employable upon completion of his rehabilitation program. Since the goal of rehabilitation is to return the employee to pre-injury wages, some states require the employee to show that there are job opportunities within the field of study. In *Kurtenbach v. Frito-Lay*,¹⁶⁵ when the employee could no longer perform his job as a route salesman, he sought to obtain a degree in metallurgical engineering.¹⁶⁶ The South Dakota Supreme Court denied benefits for the rehabilitation plan since the employee could not show that the plan was reasonable.¹⁶⁷ There were few, if any, job opportunities in metallurgy in the employee's community.¹⁶⁸

The North Dakota Supreme Court used a similar analysis to determine whether the employee's chosen course of study would render him employable.¹⁶⁹ The court granted employee education benefits based in part on a labor market survey showing that there is a reasonable expectation of employment within the employee's physical limitations and salary range.¹⁷⁰

Montana has also found employment prospects to be of primary

162. *Id.* at 155.

163. *Id.*

164. *Id.* Today, there are many ways a person with a physical disability like Pollock can effectively use a computer. Pollock today could be aided by the use of a one-handed keyboard or an eye-gaze system, which allows users to control a computer with eye movements. See, e.g., *Infogrip, Inc.*, at <http://www.onehandkeyboard.com> (marketing and selling "products that provide people with a healthier and more productive way to interact with computers") (last visited Aug. 17, 2004) (on file with the North Carolina Law Review).

165. 1997 SD 66, 563 N.W.2d 869 (S.D. 1997).

166. *Id.* at 871-72.

167. *Id.* at 875.

168. *Id.* The court could not consider the fact that the employee was willing to move. Willingness to relocate is irrelevant under South Dakota law, which requires that reasonableness be established by the availability of positions in that community. *Id.* The court would not allow the employee to look outside his current area for alternative employment when the employer was also limited in geographic scope.

169. *Thompson v. N.D. Workers' Comp. Bureau*, 490 N.W.2d 248, 254-55 (N.D. 1992).

170. *Id.*

importance when determining whether a rehabilitation plan is reasonable. In *Reeves v. Liberty Mutual Fire Insurance Co.*,¹⁷¹ the Montana Supreme Court held that the employee's plan to obtain a master's degree in counseling was not reasonable rehabilitation.¹⁷² Though the court felt assured of her success in the program based on her intellectual capacity, it did not feel the plan was reasonable rehabilitation because it would not put her in a better position in the job market.¹⁷³ Since the goal of rehabilitation is to restore the employee to pre-injury wages, the court should only approve forms of education that are likely to accomplish this result. This was also an issue in *Foster*. The vocational rehabilitation specialists noted that Foster was not employable at pre-injury wages even after completing an associate degree in applied science.¹⁷⁴ North Carolina courts should require the employee to show that allowing education benefits is a reasonable attempt at rehabilitation by showing that he is likely to find employment at pre-injury wages upon completion of the chosen education program.

Finally, there may be public policy concerns about the chosen field of study. In *Towne v. Bates File Co.*,¹⁷⁵ the employee sought compensation for costs associated with enrolling in a professional gambler's school in Nevada.¹⁷⁶ The employee was planning on returning to Florida to work on a cruise ship where gambling is allowed. While this may be acceptable in Florida, it is not likely that a North Carolina business would look favorably on paying for an employee to go to gambler's school.¹⁷⁷

The Commission should develop guidelines for determining what educational goals an employee may pursue. Initially, there may be some forms of education, such as gambling school, that the Commission will not consider to be valid.¹⁷⁸ The employee should be required to submit a plan for education rehabilitation for consideration by the employer and ultimately approval by the commission.¹⁷⁹ If the field of study has been

171. 911 P.2d 839 (Mont. 1996).

172. *Id.* at 842.

173. *Id.* According to testimony from the plaintiff's rehabilitation counselor, the plaintiff could make the same wages with a bachelor's degree. *Id.*

174. Kathy Foster, N.C. Indus. Comm'n No. 349246 (July 21, 2000).

175. 532 So. 2d 65 (Fla. App. 1988).

176. *Id.* at 66.

177. See N.C. GEN. STAT. § 14-292 (2003) (stating that "any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, shall be guilty of a Class 2 misdemeanor").

178. See *supra* notes 175-77 and accompanying text.

179. See *Bixenmann v. H. Kehm Constr.*, 676 N.W.2d 370, 375 (Neb. 2004) (stating that "an injured employee may not undertake rehabilitation on his or her own and receive temporary total disability benefits without approval from either the court or his or her former employer").

deemed to be generally appropriate, then the Commission must determine whether it is appropriate for that particular employee. The Commission must consider the likelihood that the employee will be successful in pursuing that goal.¹⁸⁰ In making this determination the Commission should consider the employee's prior education and mental abilities. The Commission should also place significant weight on the employee's employment prospects.¹⁸¹ Vocational experts and market surveys should assist the Commission in its assessment of the employee's employability.¹⁸²

C. *Duration of an Employer's Liability for an Employee's Education*

Once the court has awarded education benefits, there is also the issue of how long the employer must pay those benefits. The employee may hope to pursue a two year degree, four year degree, or just enough to make him employable.¹⁸³ The court's award should address this issue. In *Muckler*, the Commission failed to address the issue of duration. At the time of the injury, the employee was working as a warehouse material handler.¹⁸⁴ The Commission awarded the employee "vocational rehabilitation compensation for educational pursuits, including a college education."¹⁸⁵ In failing to specify how "educational pursuits" is defined, the Commission has offered no guidance for future cases nor has it even completely settled the dispute between these parties as to what compensation the employee will receive.

Some states have opted for a statutorily defined period of vocational rehabilitation.¹⁸⁶ Other states have let the workers' compensation commission define the appropriate time frame. In North Dakota, the Workers' Compensation Bureau has determined that it will only award two

180. See *supra* notes 156–62; 171–73.

181. See *supra* notes 164–68.

182. The opinions of vocational experts guided the court's decision in *Reeves*. See *Reeves v. Liberty Mut. Fire Ins. Co.*, 911 P.2d 839, 841–42 (Mont. 1996). But see N.M. STAT. ANN. §§ 52-1-25 to -26 (1978) (stating that the "workers' compensation judge shall not receive or consider the testimony of a vocational rehabilitation provider offered for the purpose of determining the existence or extent of disability").

183. Employees have even sought reimbursement of expenses associated with obtaining a master's degree. In *Peabody v. Home Ins. Co.*, the plaintiff was ironically a vocational rehabilitation specialist when she injured her back. 751 A.2d 783, 784 (Vt. 2000). She sought compensation for cost incurred in pursuing a master's degree in counseling. *Id.* The court held that she must show she was not employable at pre-injury wages of \$37,500. *Id.* at 787.

184. Travis Muckler, N.C. Indus. Comm'n No. 950747 (Sept. 9, 2003).

185. *Id.*

186. See KY. REV. STAT. ANN. § 342.710 (Mitchie 2003) (limiting vocational training and service to 52 weeks except in unusual cases); *McInnis v. Town of Bar Harbor*, 387 A.2d 739, 741 (Me. 1978) (stating the benefits could only extend for up to fifty-two weeks plus an additional fifty-two weeks if the court deemed it necessary for full rehabilitation according to the state's workers' compensation statute).

years of benefits as a general rule.¹⁸⁷ While these methods provide easy to apply standards that assure little subjectivity in decisionmaking, they may not lead to effective rehabilitation since age, experience and previous education are also factors in determining what rehabilitation is appropriate and how long it will take.

Other states strictly limit the time the employee may spend in school based on the minimum time necessary for rehabilitation. In *Chiolis v. Lage Development Co.*,¹⁸⁸ the South Dakota Supreme Court would not allow the employee compensation for costs to get a four-year degree when a two-year degree would restore the employee to gainful employment.¹⁸⁹ The court stated that rehabilitation is not for the purpose of elevating the employee's station in life.¹⁹⁰ The court "must not lose sight of the fact that the employer has a stake in the case [because] the employer is required to 'underwrite' the expenses of rehabilitation."¹⁹¹

While awarding education benefits only in the amount necessary to rehabilitate the employee is a legitimate limitation that comports with the purpose of workers' compensation statutes, the *Chiolis* court took the restriction too far. The court did not allow the employee to recover any education costs since he was enrolled in a four-year program even though he was only seeking to recover for two years worth of expenses.¹⁹² While the employer should only have to pay the costs required for rehabilitation, the employee should be allowed to choose his field of study even though he may not be fully reimbursed for the costs.¹⁹³ The employee who was forced into a new occupation should be allowed to choose the field of study regardless of its duration but should only be compensated for the education necessary to restore the employee to gainful employment.

Further, the courts must require some type of rehabilitation plan, as it failed to do in *Muckler*, so that both parties clearly know what can be expected. *Yeargin v. Daniel International*¹⁹⁴ clearly illustrates the problems that can occur when the court does not define the extent of its award. The employee in *Yeargin*, formerly a welder, initially studied construction, and

187. *Levey v. N.D. Workers' Comp. Bureau*, 425 N.W.2d 376, 377 (N.D. 1988).

188. 512 N.W.2d 158 (S.D. 1994).

189. *Id.* at 160-61.

190. *Id.* at 161.

191. *Id.* See also *Irwin v. Contemporary Woodcrafts, Inc.*, No. 0416-99-4, 1999 WL 1134729, at *1 (Va. App., Dec. 7, 1999) (holding that the court should consider the costs to the employer and the benefits to the employee when determining the appropriateness of a proposed rehabilitation program).

192. *Id.* at 164. (Sabers, J., dissenting). In another sarcastic dissent, Judge Henderson notes that the plaintiff is not trying to elevate himself but is only trying to stay off welfare. *Id.*

193. See e.g., *Kepler v. Mirza*, 102 F. Supp. 2d 617, 624 (W.D. Pa. 1999) (noting the plaintiff's right to pursue the occupation of his choice).

194. 384 S.E.2d 114 (Va. App. 1989).

then changed her focus to engineering.¹⁹⁵ She finally settled on working toward a bachelor's degree in business administration.¹⁹⁶ The Virginia Court of Appeals held that she was not entitled to receive benefits for this type of general education since the economic benefits she would receive are too speculative.¹⁹⁷ The court can prevent this type of problem by clearly defining the rehabilitation plan for the employee at the outset. The employer will have the benefit of a definitive duration of payments and the employee will know that for which he is being compensated. The plan should be structured so that the employer will terminate benefits after the minimum period for rehabilitation, even if the employee is not yet employed at pre-injury wages.

D. Education-Related Expenses for Which an Employer is Liable

When education is awarded, the employer must often bear the costs of tuition, books, and other fees associated with the program.¹⁹⁸ However, under New Mexico statutes the employer is also required to pay for (1) lodging, travel and other expenses, and (2) maintenance of the employee's family. Compensation for these additional expenses is not to exceed \$3,000.¹⁹⁹ The New Mexico Court of Appeals, in *Garcia v. Schneider*, awarded the employee amounts for moving and travel expenses.²⁰⁰ Additionally, the court held there was no limitation on the amount spent for the actual vocational rehabilitation service other than that it must be reasonable.²⁰¹

Nebraska statutes similarly provide for reasonable costs to be paid by the employer if the employee must travel away from home for an education.²⁰² If the injured employee had accepted alternative employment instead of education that required the employee to travel away from home for work, the employer would not be responsible for those additional travel expenses.²⁰³ While this may seem unfair, the employee may only be able to take advantage of the educational opportunity if the employer covers these

195. *Id.* at 115.

196. *Id.*

197. *Id.* at 116. The court held the benefits were speculative because the worker did not present evidence regarding wage potential and likelihood of finding employment with this degree. *Id.*

198. See *Pinkston v. Teletronics, Inc.*, 4 S.W.3d 130, 132 (Ky. 1990); *Arnstrom v. Excalibur Cable Communication, Ltd.*, 790 A.2d 764, 771 (Md. App. 2002); *Garcia v. Schneider, Inc.*, 731 P.2d 377, 378 (N.M. App. 1986); *Diversified Rubber v. Harvey*, 74 P.3d 619, 621 (Okla. Civ. App. 2003).

199. *Garcia*, 731 P.2d at 378.

200. *Id.*

201. *Id.* at 380.

202. NEB. REV. STAT. § 48-162.01(4) (2003).

203. See N.M. STAT. Ann. § 52-1-56 (1978).

costs. If the court deems the employee to have a right to education benefits it would be absurd not to provide enough compensation to allow the employee to utilize the benefit. While this is an additional cost, in a sense, the employer is only paying the full costs associated with engaging in a business that puts some risks on its employees.

Alternatively, a California court has limited the costs the employer has to pay. In *Niedle v. W.C.A.B.*,²⁰⁴ the employee was injured while working in California but subsequently moved to Nevada.²⁰⁵ The parties agreed that she would obtain a teaching certificate, but the California employer refused to pay the extra \$637 that it would cost to obtain the certificate in Nevada.²⁰⁶ The court held that the employer was not required to pay these additional costs. The California statutes specifically prohibit an out-of-state rehabilitation plan unless it is more cost effective.²⁰⁷ North Carolina should consider adopting a similar rule, because it gives the employee the opportunity to be fully rehabilitated in a field of his choosing while controlling costs to the employer.

E. Reasonableness of a Proposed Rehabilitation Plan

The employee seeking rehabilitation benefits should present a plan for rehabilitation to the employer and the Commission. Today, in North Carolina workers' compensation cases, it is typically the employer's rehabilitation counselor who determines the plan for the employee's rehabilitation.²⁰⁸ The counselor can represent the employer's interest by making sure the plan achieves the quickest method of rehabilitation. However, the employee should have considerable influence in determining the type of rehabilitation since the employee's cooperation with the rehabilitation program is essential to its success.²⁰⁹ Since it has already been determined that the employee has no opportunity for suitable employment, he should be allowed to direct his educational goals, to the extent that allowing the employee some discretion is compatible with

204. 104 Cal. Rptr. 2d 534 (Cal. App. 2001).

205. *Id.* at 537.

206. *Id.*

207. CAL. LAB. CODE § 4644(g) (2003).

208. See *Walker v. Lake Rim Lawn & Garden*, 155 N.C. App. 709, 712, 575 S.E.2d 764, 766 (2003) (stating that the defendant assigned the plaintiff's vocational rehabilitation counselors); *Foster v. U.S. Airways, Inc.*, 142 N.C. App. 913, 917, 563 S.E.2d 235, 238 (2002) (stating that a vocational rehabilitation counselor hired by the defendant told the plaintiff to conduct a job search after the plaintiff requested that she be allowed to pursue an education).

209. North Carolina allows suspension of benefits, but not termination, if the employee fails to cooperate with vocational rehabilitation. *Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 145-46, 523 S.E.2d 439, 441 (1999). Once the employee shows that he is willing to cooperate, benefits may be reinstated by the court. *Id.* at 150-52, 523 S.E.2d at 443-44.

limiting the liability of the employer.

The employee should bear the burden of proving that the rehabilitation plan is reasonable.²¹⁰ In determining whether the plan is reasonable, the court should look at the relative costs and benefits of the plan to both employer and employee.²¹¹ Factors to consider include the employee's intelligence, prior education, and experience.²¹² These indicators are helpful, though not determinative, in predicting whether the employee will be successful in the chosen field of study.²¹³ Determining the employee's likely success in the field will necessarily be a subjective finding of fact and thus substantial deference should be given to the Commission's findings.²¹⁴

Additionally, the Commission should consider the employee's physical abilities, which might impact the employee's success in the field of study, and his hopes for employment upon completion of the rehabilitation plan. If the employee cannot physically perform in the occupation or does not want to work in the field, the Commission should not approve that field of study for the employee's rehabilitation plan.²¹⁵

Finally, in awarding education benefits, the Commission should consider the employee's dedication to other rehabilitation programs.²¹⁶ The Commission and courts will be responsible for planning and monitoring an employee's progress. Failure on the part of the employee to make diligent efforts toward the education goals defined by the rehabilitation plan should result in the termination of benefits.²¹⁷

While an award and a rehabilitation plan serve the employer's interest by defining the liability, they should not be completely rigid. An award by

210. *Kurtenbach v. Frito-Lay*, 1997 SD 66, 563 N.W.2d 869, 875 (S.D. 1997).

211. *See Irwin v. Contemporary Woodcrafts, Inc.*, No. 0416-99-4, 1999 WL 1134729, at *1 (Va. App. Dec. 7, 1999).

212. *See Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61 (1998) (holding that the rehabilitation plan was unreasonable because the employee was incapable of completing the plan due to mental illness resulting from her work related injury).

213. *See supra* Section III.B.

214. The Commission is responsible for the initial finding of fact; the appellate court only determines whether there was competent evidence to support that finding. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986).

215. *See Yeargin v. Daniel Int'l*, 384 S.E.2d 114, 115 (Va. App. 1989) (stating that the plaintiff had to change her field of study once she learned her knee injury would prevent her from pursuing a career in construction).

216. *See Warburton v. M & D Constr. Co.*, 498 N.W.2d 611, 614 (Neb. Ct. App. 1993). *See also Anderson v. Pilot City Health Ctr.*, 239 N.W.2d 227, 229 (Minn. 1976) (holding that the compensation board should have admitted evidence of the employee's failure in the first portion of the retraining program and remanding to the board for a final determination on benefits).

217. *See Behrens v. Am. Stores Packing Co.*, 421 N.W.2d 12, 18 (Neb. 1988) (affirming lower court's finding that the employee must diligently pursue the agreed upon education plan or the court will suspend disability benefits).

the court should not be final, but subject to modification as necessary.²¹⁸ Modification should only be allowed based on a substantial change in the conditions related to the compensable injury.²¹⁹ In *Dougherty v. Swift-Eckrich, Inc.*,²²⁰ the Nebraska Supreme Court denied the employer's request for modification because there was no evidence of any increase in incapacity due to the initial injury.²²¹ By limiting modification only to situations where the injury is the cause of the changed circumstance, the court can prevent spurious claims. An employee who is not truly interested in being rehabilitated cannot extend the period of benefits by simply not performing in his educational pursuits or changing his field of study.

Upon completion of the approved plan, the employer will have fulfilled his obligation to the employee. The court should only allow the plan if it is expected to rehabilitate the employee.²²² Payments will be terminated because the rehabilitation plan should be presumed to have fully restored the employee's wage earning capacity. Even if the employee is not employed at pre-injury wages this may be due to other factors outside of the parties' control.²²³

CONCLUSION

The legislature should adopt a statute specifically addressing education benefits under the Workers' Compensation Act. The statute should define any broad limitations on awards including the duration of benefits, what expenses the employer is required to cover, and any other limitation it may choose to impose. These overarching concerns should be defined by elected officials rather than the Industrial Commission. The legislature has chosen to define these limitations with respect to workers' compensation generally and is the appropriate body to address issues specific to educational benefits.²²⁴

218. See *Thompson v. N.D. Workers' Comp. Bureau*, 490 N.W.2d 248, 256 (N.D. 1992) (Meschke, J. concurring).

219. This is the standard used in North Carolina for other workers' compensation awards. *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 179, 565 S.E.2d 209, 215 (2002).

220. 557 N.W.2d 31, 32-33 (Neb. 1996). The court held that although the length of time the employee would need to complete the course work was miscalculated due to failure to consider the employees' reading deficiencies, the employee was not entitled to a modification of benefits.

221. *Id.* at 32-33.

222. See *supra* notes 210-16 and accompanying text. For the employee to prove the rehabilitation plan is reasonable, there must be an expectation that the employee will complete it and return to employment at pre-injury wages.

223. See *Evans v. Am. Cmty. Stores*, 385 N.W.2d 91, 93 (Neb. 1986) (affirming the compensation court's holding that the plaintiff's inability to find a job was largely due to the economy and cut backs at his place of employment).

224. See, e.g., N.C. GEN. STAT. § 97-29 (amount of weekly compensation for total incapacity); *Id.* § 97-30 (amount of weekly compensation for partial incapacity); *Id.* § 97-31

The legislature has vested the Industrial Commission with the discretion to fashion specific rules for vocational rehabilitation and other types of rehabilitation services.²²⁵ As more and more cases like *Foster*, *Russos*, and *Ward* arise, the courts and Commission need to have standards in place to prevent arbitrary decisionmaking, to the extent possible.²²⁶ To receive education benefits, the employee must prove that he has no suitable alternative employment prospects, that the rehabilitation is necessary to restore the employee to gainful employment, and that the employee's proposed rehabilitation plan is a reasonable method for returning the employee to gainful employment.²²⁷

To prove that he is unable to work at his previous employment or at an alternative for which he is qualified, the employee must prove he is not capable of obtaining suitable employment at an equivalent wage.²²⁸ Showing that the education is a necessary method of rehabilitation is subjective in nature. The Commission should be required to make specific findings of fact regarding the employee's physical and mental capacity that make him a suitable candidate for education benefits.²²⁹ If the proposed plan of rehabilitation is suitable the court must consider the factors of age, physical and mental capacity, and previous experience, education and training, and employment prospects.²³⁰

Education benefits are a viable alternative for employees who are

(schedule of compensation and rates of compensation for injury ranging from loss of thumb to permanent damage to important organ).

225. *Id.* § 97-25.5. The court of appeals has stated "what treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Commission." *Neal v. Carolina Mgmt.*, 130 N.C. App. 228, 234, 502 S.E.2d 424, 429 (1998).

226. These guidelines should be promulgated by the Commission under section 97-25.5. If the Commission does not act in this area, the court of appeals has already demonstrated in *Foster*, *Ward*, and *Russos* that it is willing to make the rules as cases arise.

227. This is a modified formulation of the test used by South Dakota courts applied in *Cozine v. Midwest Coast Transp., Inc.*, 454 N.W.2d 548, 553 (S.D. 1990). This is also similar to the test developed in *Jaramillo v. Consol. Freightways*, 790 P.2d 509, 513 (N.M. App. 1990). That cases states that the employee must prove (1) that he is unable to perform work at which he has some previous training or experience, (2) that he is a proper candidate for the requested rehabilitation, and (3) that it is likely that the rehabilitation will end the period of disability. *Id.*

228. *See Nichols v. Teledyne Econ. Dev. Co.*, 707 P.2d 1203, 1204 (N.M. App. 1985).

229. In a New Mexico case, the court awarded rehabilitation services to the employee stating only "[w]e have reviewed the evidence and conclude that the plaintiff is entitled to rehabilitation services." *Trujillo v. Beaty Elec. Co.*, 577 P.2d 431, 437 (N.M. App. 1978). This gives the workers' compensation board in the state no guidance as to what factors are important in determining the suitability of the rehabilitation to future plaintiffs and leaves a lot of room for arbitrary decisionmaking. However, New Mexico's statute gives greater guidance to the courts. *See Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, 928 P.2d 250, 255 (N.M. 1996) (stating that the judge is to apply a statutory formula, "which incorporates the worker's impairment rating, age, education, and residual physical capacity in order to arrive at a disability rating, which determines the level of benefits available").

230. *See Anderson v. Pilot City Health Ctr.*, 239 N.W.2d 227, 228 (Minn. 1976).

rendered unemployable by a work related injury. As North Carolina courts begin to allow employees these benefits, courts should have in place guidelines to achieve consistent and fair decisions. These rules should force the employer to bear the costs of retraining employees who are injured while working for the employer and therefore can no longer perform their job. However, the rules should also establish limits on benefits. The workers' compensation system was also intended for the benefit of the employer and he should not be required to bear the costs of educating every injured employee. Employees should receive only the benefits needed to restore them to gainful employment at pre-injury wages. This result is fair to injured employees as well as employers and thus serves the purpose of the Workers' Compensation Act.

MEGAN E. MILLER