

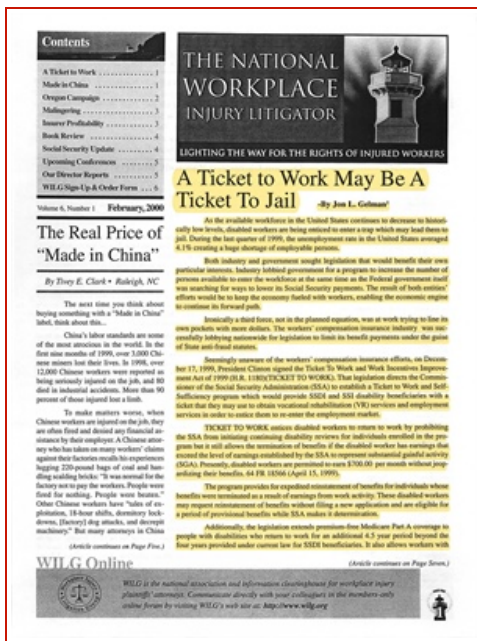
A Ticket to Work May Be A Ticket To Jail

Trial Work Period

As the available workforce in the United States continues to decrease to historically low levels, disabled workers are being enticed to enter a trap that may lead them to jail. During the last quarter of 1999, the unemployment rate in the United States averaged 4.1%, creating a huge shortage of employable persons.

INDUSTRY'S INTEREST

Both industry and government sought legislation that would benefit their own particular interests. Industry lobbied the government for a program to increase the number of persons available to enter the workforce at the same time as the Federal government itself was searching for ways to lower its Social Security payments. The result of both entities' efforts would be to keep the economy fueled with workers, enabling the economic engine to continue its forward path.



WORKERS' COMPENSATION FRAUD STATUTES

Ironically a third force, not in the planned equation, was at work trying to line its own pockets with more dollars. The workers' compensation insurance industry was successfully lobbying nationwide for legislation to limit its benefit payments under the guise of State anti-fraud statutes.

TICKET TO WORK ENTICEMENT

Seemingly unaware of the workers' compensation insurance efforts, on December 17, 1999, President Clinton signed the [Ticket To Work and Work Incentives Improvement Act of 1999](#) (H.R. 1180)(TICKET TO WORK). That legislation directs the Commissioner of the Social Security Administration (SSA) to establish a Ticket to Work and Self-Sufficiency program, which would provide SSDI and SSI disability beneficiaries with a ticket that they may use to obtain vocational rehabilitation (VR) services and employment services to entice them to re-enter the employment market.

TICKET TO WORK entices disabled workers to return to work by prohibiting the SSA from initiating continuing disability reviews for individuals enrolled in the program but it still allows the termination of benefits if the disabled worker has earnings that exceed the level of earnings established by the SSA to represent substantial gainful activity (SGA). Presently, disabled workers are permitted to earn \$700.00 per month without jeopardizing their benefits. [64 FR 18566](#) (April 15, 1999).

The program provides for expedited reinstatement of benefits for individuals whose benefits were terminated due to earnings from work activity. These disabled workers may request reinstatement of benefits without filing a new application and are eligible for a period of provisional benefits while SSA makes its determination.

MEDICARE BENEFITS

Additionally, the legislation extends premium-free Medicare Part A coverage to people with disabilities who return to work for an additional 4.5-year period beyond the four years provided under current law for SSDI beneficiaries. It also allows workers with disabilities who have Medicare coverage and a Medigap policy to suspend the premiums and benefits of the Medigap policy if they have employer-sponsored coverage.

TIME LIMIT

This legislation extends the trial work period (TWP) program of the SSA that allows a disability recipient the opportunity to attempt to return to work without the risk of losing SSA disability benefits. The TWP program had permitted a time period of up to nine months (not necessarily consecutively) for work performed after the onset of disability. 42 USC 422, 20 CFR 404.1592(e).

CONFLICT WITH STATE WORKERS' COMPENSATION LAWS

A conflict arises in many State jurisdictions where there is no recognition of a TWP. Working while receiving workers' compensation total disability benefits amounts to fraud and subjects the injured worker to civil and criminal penalties, including a loss of all present and future workers' compensation benefits, including medical treatment.

Some States may utilize the return to work (RTW) as evidence of the ability to work and terminate benefits. North Carolina, while having a statute that provides for a TWP of nine months, does not prohibit the use of the return to work as evidence that could jeopardize the continuation of the total disability status of an injured worker. NC ST §97-32.1. Therefore, returning to work effectively acts as a one-way door out of total disability status. A 26-year-old mixer operator sustained a back injury while lifting a bucket of dye mixes. He required a laminectomy discectomy and an intertransverse fusion resulting in an award of total disability benefits. The injured worker owned his distributorship of a network marketing company and could make phone calls to others to recruit them into the business for 10 to 20 hours per week. That evidence was used by the Court to conclude that he was able to return to work, to remove him from total permanent disability compensation status, and to preclude him from receiving any partial disability benefits. [Lanning v. Fieldcrest-Cannon, Inc.](#), 516 S.E. 2d 894 (N.C. App. 1999).

Some jurisdictions attempt to make a difficult distinction between part-time employment and sheltered employment and sweep the entire concept into work status, thereby prohibiting the payment of benefits during any period during which work was performed. Vista Properties of [Vero v. Heumann](#), 516 So. 2d 1032 (Fla. Dist. Ct. App. 1987).

While the employee in most jurisdictions is required to receive notice of termination, and the employer has the burden to demonstrate the employee's ability to work at a subsequent hearing, it may be to the employee's advantage to establish an agreement with the employer and/or the insurance company before the commencement of any TWP. This procedure has been suggested by the Supreme Court of Maine. [Davis v. Scott Paper Company](#), 507 A. 2d 581 (Me. 1986).

Various other jurisdictions have reported the handling of the TWP concept differently. In some instances, the agreement for a TWP can be memorialized thru judicial order, as sometimes occurs in Longshore matters. In addition, it has been reported that in MO, suspension of payments during a TWP, which is provided for by statute, in practice, never results in a resumption of payments. R.S.Mo. 287.200-2. In VT, they have a statutory presumption called a "successful TWP," where the injured person is allowed to work for a sixty-day TWP. If the worker goes longer than 60 days, there is a presumption, established by case law, that the individual has successfully returned to work.

A contested administrative hearing before a workers' compensation agency during or following a TWP could subject the injured worker to compromise his/her right to due process. The administrative workers' compensation hearing may actually result in a quasi-criminal proceeding. Since the rules of evidence are usually relaxed in the workers' compensation forum, the claimant's constitutional rights may be jeopardized, resulting in unforeseen subsequent civil and criminal penalties .

The rush of Industry to enact fraud prevention statutes has conflicted with the TICKET TO WORK legislation. On the one hand, the Federal government is encouraging a RTW in most states through the continuation of the payment of benefits, and on the other hand, the states provide no such latitude. The state fraud acts make it a criminal offense to make a false or misleading statement. The fraud acts also establish civil penalties if any person wrongfully obtains benefits, which could result in immediate forfeiture of present and future benefits and require reimbursement of past benefits with interest. See [NJSA 34:15-74](#).

CONSULTATION

Practitioners in the field of workers' compensation should discuss these issues with their clients in advance of the injured worker's attempt to RTW. The client should be cautioned as to the specific interpretations and consequences of what constitutes work under his/her state's specific statute. Failure to do so may subject the

injured worker to falling into a trap and entering the world of Alice in a criminal wonderland that may result in incarceration.

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