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VOCATIONAL REHABILITATION BENEFITS UNDER INDIANA'S WORKERS' COMPENSATION LAW

RUTH C. VANCE*

I. INTRODUCTION

This article addresses the policy issues and administrative questions raised by Indiana's workers'¹ compensation vocational rehabilitation statute, and outlines key elements that contribute to a comprehensive vocational rehabilitation scheme. Other states' vocational rehabilitation systems are compared to raise questions and recommend solutions regarding the policy issues and statutory requirements involved in the development of a comprehensive vocational rehabilitation system.

The objective of this article is to provide policy makers and interested parties with an overview of other states' responses to policy and administrative issues common to all workers' compensation vocational rehabilitation programs. Other states' experiences with vocational rehabilitation are instructive and serve as a basis for opening a meaningful cooperative effort between Indiana's policy makers, legislators, and interested parties concerned with the long-term well-being of Indiana citizens injured in the workplace.

The categorizations and the generalizations that follow in this article must be viewed with the understanding that each jurisdiction differs in (1) the responsibilities prescribed for affected parties; (2) the administrative structure used to implement workers' compensation law; (3) the use of public and/or private providers of rehabilitation services; and (4) the definition of key terms used in the workers' compensation statutes. These differences

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1. There seems to be a difference of opinion on where the apostrophe belongs. I choose to place the apostrophe after the "s" and will consistently do so throughout this report even though Indiana's statute refers to "worker's compensation."

exist because each jurisdiction's law is the unique product of a particular political-economic environment, demographic base, and social policy. Therefore, care must be taken in considering a particular vocational rehabilitation system for Indiana to assure that the system fits Indiana's unique characteristics and needs.

II. WORKERS' COMPENSATION GENERAL BACKGROUND

Among the many programs of social insurance in the United States, workers' compensation is probably the oldest.² The rapid industrialization in this nation at the turn of the century caused a dramatic rise in workplace injuries, diseases, and death.³ At that time, the common law provided that an employer was responsible for the injury or death of an employee only if the employer was negligent.⁴ To recover, an employee had to sue the employer and prove that the injuries resulted from the employer's negligence.⁵ The employer's common law defenses of contributory negligence, assumption of risk, and negligent acts of fellow servants presented the injured employee with often insurmountable legal hurdles.⁶

Workers' compensation statutes were thus enacted at the beginning of this century in response to the nationwide need for an expedient and predictable remedy for the burgeoning health and financial burdens resulting from occupational injury and disease. Between 1900 and 1910, many states, including Indiana, enacted laws to establish employer liabilities for workplace injuries and to place limitations on an employer's use of common law defenses against injured employees.⁷ Even with these statutory modifications of the employers' common law defenses, injured workers still had to establish employer responsibility and prove negligence to recover.⁸ Litigation was an uncertain, time-consuming, and costly process for both the employee and the employer.⁹

The advocates of a statutory workers' compensation system sought to

2. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 4.00 (1989).

3. *Id.*

4. United States Chamber of Commerce, *History of Workers' Compensation and Employer's Liability*, 1989 ANALYSIS OF WORKERS' COMPENSATION LAWS vii [hereinafter 1989 ANALYSIS].

5. *Id.*

6. *Id.*

7. 1989 ANALYSIS, *supra* note 4, at vii; *See also* 1 A. LARSON, *supra* note 2, at §§ 5.20-5.30. The current Indiana Workers' Compensation statute is found at IND. CODE ANN. §§ 22-3-9-1 to 22-3-9-11 (Burns 1986).

8. 1 A. LARSON, *supra* note 2, at § 6.00; *See also* OFFICE OF FISCAL REVIEW, INDIANA LEGISLATIVE SERVICES AGENCY, 6 SUNSET AUDIT ON INDUSTRIAL BOARD AND WORKERS' COMPENSATION SYSTEM 71-72 (1987) [hereinafter SUNSET AUDIT].

9. SUNSET AUDIT, *supra* note 8, at 71.

correct the three primary problems inherent in the common law litigation: delay of litigation, inequity of awards, and imbalance of power between the parties.¹⁰ While lawsuits were pending, injured workers who had suffered a partial or total loss of income had to provide for their dependents and pay their own medical costs.¹¹ If and when suits reached the verdict stage, awards for comparable injuries varied widely. The greater ability of employers and insurance companies to withstand extended litigation often encouraged workers to accept inadequate out-of-court settlements.¹²

In 1911, a form of no-fault insurance based on a statutory scheme of compensation for personal injury and death "arising out of and in the course of employment" emerged as a new concept.¹³ This no-fault insurance was a swift, sure, and nonlitigious system designed to help the injured employee become self-sufficient by replacing lost wages and paying medical expenses.

By 1920, all but eight states had enacted similar laws. Today, each of the fifty states, American Samoa, Guam, Puerto Rico, and the Virgin Islands has a workers' compensation system.¹⁴ Federal employees are covered by the Federal Employees Compensation Act, while both private and public employees in nationwide maritime work are covered by the Longshoremens and Harbor Workers Compensation Act.¹⁵ The unifying element for all these laws is a voluntary exchange between employers and employees of common law rights for a predictable statutory scheme that should provide an equitable and efficient means of distributing adequate compensation and assigning financial liability for occupational injury, disease, and death.

In theory, workers' compensation is really a compromise between employers and employees. In the compromise, employers assume liability for certain occupational diseases, work-related injuries, and deaths, regardless of fault, in exchange for a monetary limit on that liability and the surrender by injured employees of any common law claims against their employ-

10. *Id.*

11. *Id.*

12. *Id.* (citing Temporary Commission on Workers' Compensation and Disability Benefits, State of New York, FINAL REPORT (1986)).

13. 1 A. LARSON, *supra* note 2, at §§ 6.00-6.60 (general discussion on the meaning of "arising out of the employment").

14. 1989 ANALYSIS, *supra* note 4, at vii.

15. *Id.*; See also INTERNATIONAL ASSOCIATION OF INDUSTRIAL ACCIDENT BOARDS AND COMMISSIONS, AN ANALYSIS OF WORKERS' COMPENSATION REHABILITATION LAWS AND PROGRAMS OF THE MEMBER JURISDICTIONS OF THE INTERNATIONAL ASSOCIATION OF INDUSTRIAL ACCIDENT BOARDS AND COMMISSIONS 20-32 (1987) [hereinafter LAWS AND PROGRAMS] (chart on statutory workers' compensation coverage); Foundation for Advancement of Industrial Research, Inc., Position Statement on Vocational Rehabilitation in Indiana 2 [hereinafter FAIR] (1978) (copy on file in the office of Professor Ruth Vance, Valparaiso University School of Law).

ers. In return for their surrender of common law claims making workers' compensation the exclusive remedy, injured employees are guaranteed monetary benefits regardless of fault.¹⁶ Those benefits are not as great as a lawsuit verdict might be, but they are certain. In economic terms, workers' compensation laws make the economic losses of injury, death, and occupational disease a business cost that is ultimately passed on to consumers.

Although each state and interest group can cite a particular set of goals for workers' compensation, the generally recognized goals are to provide income to compensate for lost earnings, to provide medical treatment to restore the injured worker to an optimum level of health, and to return the employee to gainful employment and a productive position in the community.¹⁷ Workers' compensation, unlike personal injury litigation, is not intended to make the injured worker whole for his losses. For example, workers' compensation laws do not provide compensation for pain and suffering resulting from a workplace injury. As an incentive for the worker to return to gainful employment, wage-loss benefits are calculated by statutory formulas that generally do not fully compensate injured workers for actual lost wages.¹⁸ Workers' compensation benefits are essentially a transitional support system designed to provide support to injured workers until they are rehabilitated and self-sufficient.

III. THE CASE FOR VOCATIONAL REHABILITATION IN A WORKERS' COMPENSATION SYSTEM

Rehabilitation in the workers' compensation context is divided into two distinct, yet integrated categories: physical and vocational.¹⁹ Each category is in reality a method or process for reaching a specific workers' compensation goal. The goal of physical rehabilitation is to restore the occupationally injured worker's health to as close to pre-injury status as possible,²⁰ while the goal of vocational rehabilitation is to return the employee to gainful

16. OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDIT, U.S. DEPARTMENT OF LABOR, O.W.C.P. SHOULD EVALUATE NONFEDERAL WORKERS' COMPENSATION TO ASSESS THEIR ADAPTABILITY TO FELA; AUDIT REPORT NO. 02-6-037-09-435 (1988) [hereinafter AUDIT REPORT].

17. FAIR, *supra* note 15, at 1-2.

18. Income or cash benefits payable under either temporary or permanent disability vary significantly between jurisdictions. In many states, these benefits are based on a wage-loss replacement percentage. The majority of states use a payment formula that establishes a maximum weekly benefit in an amount that equals 66-2/3% of that state's average weekly wage (SAWW). 1989 ANALYSIS, *supra* note 4, at 18-20 (Chart VI); See also AUDIT REPORT, *supra* note 16.

19. See generally 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.21 (1989); LAWS AND PROGRAMS, *supra* note 15, at 2-16.

20. LAWS AND PROGRAMS, *supra* note 15.

employment and a productive position in the community.²¹ Physical rehabilitation deals with objectively measurable changes in the worker's physical condition;²² vocational rehabilitation involves a more subjective evaluation of the worker's occupationally related physical and mental skills and abilities.²³ Arthur Larson, the noted authority on workers' compensation, has stated:

Until comparatively recently, the industrial accident problem had two major phases: prevention and cure. The spotlight is now on a third: rehabilitation. The conviction is gradually gaining ground that the compensation job is not done when the immediate wound has been dressed and healed. There remains the task of restoring the man himself to the maximum usefulness that he can attain under his physical impairment.²⁴

While physical rehabilitation can be readily defined as that combination of medical treatment and services required to achieve maximum medical improvement or medical quiescence,²⁵ there is no commonly accepted definition of vocational rehabilitation.²⁶ Each jurisdiction and each commentator fashions a definition responsive to its philosophic goals. For example, one jurisdiction defines vocational rehabilitation as "[a]ssisting in the return of an injured worker to gainful employment at a justifiable cost, within a reasonable time after he is injured, or contracts a occupational disease."²⁷ Another jurisdiction defines vocational rehabilitation in terms of its purpose "to return the injured worker to a job related to the pre-injury employment or to employment in a different work area at an economic status as close as possible to that which would have been enjoyed without the disability."²⁸ The International Association of Industrial Accident Boards and Commissions, in its model program, defines vocational rehabilitation as "the restoration of an occupationally disabled employee to his/her optimum physical, mental, vocational, and economic usefulness."²⁹ A common thread in the foregoing definitions is that they rely on the subjective goals of vocational rehabilitation rather than objective terms of the process involved in

21. *Id.*

22. *Id.*

23. *Id.*

24. *See supra* 2 A. LARSON, note 19, at § 61.21.

25. Note, *Vocational Rehabilitation for the Industrially Injured Worker*, 28 U. FLA. L. REV. 101, 102 (1975).

26. *Id.*

27. INTERNATIONAL ASSOCIATION OF INDUSTRIAL ACCIDENT BOARDS AND COMMISSIONS, AN OVERVIEW OF VOCATIONAL REHABILITATION IN WORKERS' COMPENSATION 5 (1984) [hereinafter OVERVIEW] (citing Nevada Administrative Code 616-8) (throughout this article the International Association will be referred to as the IAIABC).

28. MINN. STAT. ANN. § 176.102 (West Supp. 1989).

29. LAWS AND PROGRAMS, *supra* note 15, at 10.

vocationally rehabilitating the occupationally disabled employee.

A well-known commentator has developed the following comprehensive definition for vocational rehabilitation: "The retraining of the injured or handicapped workman for the purpose of returning him to his former employment, when his disability is such that he must be taught different methods for carrying on his usual tasks; or training him for an entirely different type of occupation to which he can better adapt with his handicap."³⁰ Although this definition uses more objectively measurable goals and includes references to the process of vocational rehabilitation, the terms "training" and "retraining" do not adequately describe the services involved in the rehabilitation process. Vocational rehabilitation as a process involves the formulation of an individualized program of one or more services designed to assist the disabled worker to become self-sufficient.³¹ This process involves the four primary vocational rehabilitation services of counseling and guidance, evaluation, job modification, and education and training.³² In the absence of a generic definition that perfectly blends the goals and process of vocational rehabilitation, it is necessary to keep in mind the distinction between these two aspects of vocational rehabilitation.

Viewed from the perspective of the employer-employee social compact underlying workers' compensation, comprehensive vocational rehabilitation is merely a question of equity. Under Indiana's workers' compensation system, a worker who is permanently disabled is entitled only to medical rehabilitation and weekly indemnity payments—less than the worker's pre-injury earnings—for a limited duration, and to a final settlement after the worker reaches maximum medical improvement in an amount fixed by statutory schedules.³³ That same Indiana worker receiving the same disability as a result of an accident outside the workplace could receive compensation for 100% of lost time earnings, compensation for medical costs, compensation for pain and suffering, indemnity for loss of future income, and even indemnity for loss of quality of life in a successful lawsuit. Additionally, compensation for loss of consortium and companionship can be awarded to the worker's family through successful litigation. Such compensation and indemnity might be hundreds of times greater than Indiana's workers' compensation award for the same disability. In light of this disparity, the equity inherent in a workers' compensation system surely requires that the disabled worker be returned not only to a state of health but also to the maxi-

30. Note, *Vocational Rehabilitation for the Industrially Injured Worker*, 28 U. FLA. L. REV. 101 (1975) (citing Dixon, *Legal and Economic Aspects of Rehabilitation of Injured Workers*, ABA SEC. INS. L. 178 (1949)).

31. J. GARDNER, *VOCATIONAL REHABILITATION IN FLORIDA WORKERS' COMPENSATION: REHABILITANTS, SERVICES, COSTS AND OUTCOMES* 17-21 (1988).

32. *Id.*

33. IND. CODE ANN. § 22-3-3-10 (Burns 1986).

imum usefulness that the worker can attain under the physical impairment.³⁴

With a comprehensive vocational rehabilitation program, many occupationally disabled Hoosiers can be returned to productive jobs so that they and their families are again self-sufficient, and are able, by their efforts, to increase the total production of goods and services within the state. In Indiana the worker's exchange of common law rights and remedies for a statutory system of compensation, codified at Indiana Code 22-3-6, provides that the rights and remedies granted to an employee under Indiana's workers' compensation law shall exclude all other rights and remedies. This exclusive remedy provision has given rise to the concept of disposable employees; an Indiana employee permanently partially impaired as a result of a workplace injury can in some cases be legally terminated and replaced by a healthier worker as long as the employer or the employer's insurer pays workers' compensation benefits according to the statutory prescription.³⁵ Paying workers' compensation to impaired workers and then replacing them on the basis that it is less costly than either rehabilitating impaired workers or modifying the job to accommodate the impairment is economically unsound in terms of social cost and is inconsistent with the goals of workers' compensation.

Vocational rehabilitation is not merely a philosophic goal of the workers' compensation system, it is a viable method of reducing the social and economic cost of occupational injury. Without vocational rehabilitation, the disabled Hoosier becomes a disposable employee; replaced on the job, the worker and the worker's family are left dependent on the state and federal social welfare systems. Indiana's pool of human resources is reduced, while a cost of industrial production is transferred to the taxpayer through publicly funded support systems like food stamps, welfare, and social security programs.

Major insurers and employers have recognized the economic soundness of vocational rehabilitation. Liberty Mutual, one of the nation's leading workers' compensation sureties, opened the first insurer-operated comprehensive rehabilitation center more than 40 years ago.³⁶ The company is firmly committed to rehabilitation, employing more than 125 rehabilitation nurses and 85 orthopedic specialists throughout the country to assist in coordination of rehabilitation programs for injured workers.³⁷ Employers like Ford Motor Company and Kodak, with employees covered under each of

34. 2 A. LARSON, *supra* note 24.

35. Foundation for the Advancement of Industrial Research, Inc., FAIR Position Statement, Issue: Vocational Rehabilitation 1.

36. Legislative Joint Performance Review Committee, Arkansas State Legislature, *Workers' Compensation and Rehabilitation* 19 (1978).

37. *Id.* at 18.

the 50 state compensation laws, are actively committed to vocational rehabilitation of their injured employees.³⁸ Under employer-operated programs, vocational rehabilitation counselors or rehabilitation teams get involved in a case as soon as possible. These companies routinely provide transitional or permanent positions for workers who have been occupationally disabled within their facilities.³⁹

Insurers view vocational rehabilitation as a cost-containment measure. In a published digest of views on key public policy questions, the Alliance of American Insurers, a casualty insurance trade association with more than 170 member companies, took the position that:

Effective rehabilitation programs have also proved to be cost saving measures in the workers compensation system. The system's long-term costs are reduced with every successfully rehabilitated injured employee who is able to return to some form of work and no longer needs workers compensation benefits.⁴⁰

The "conclusions and recommendations for change" in the Sunset Audit of the Indiana Industrial Board and Workers' Compensation System conducted in 1987 by the Indiana Legislative Services Agency's Office of Fiscal Review, mirrored the position of the Alliance of American Insurers quoted above and added that a statutory "vocational rehabilitation program could prove beneficial to employees and employers of the state."⁴¹ The Audit further stated:

Effective rehabilitation programs, both physical and vocational, not only help workers regain their pre-injury physical and income earning capabilities, but can also help hold down workers' compensation costs over the long run. The purpose of rehabilitation services is to minimize the losses which occur as a result of an industrial accident. Rehabilitation can be considered as part of medical care and has the same basic purpose as medical care—to cure and relieve the employee from the effects of the injury. The idea is to provide those services which will speed the return of the worker to his job. The positive by-product of effec-

38. See generally AUDIT REPORT, *supra* note 16 (Two of the non-federal comparison groups were the Ford Motor Corporation and Eastman Kodak.).

39. *Id.*

40. ALLIANCE OF AMERICAN INSURERS, WORKERS' COMPENSATION INSURANCE ISSUES 25 (1986).

41. SUNSET AUDIT, *supra* note 8, at 91; See also IND. CODE ANN. § 4-26-3-25 (Burns 1986) (section requires that certain state agencies including the Industrial Board and the Workers' Compensation System be systematically reviewed to determine whether they should be continued, and to examine the organizational characteristics that enhance or hinder efficiency and effectiveness).

tive rehabilitation is that the system is not overloaded with costly numbers of permanently injured workers (either partially or totally).⁴²

Vocational rehabilitation, a recognized cost-containment measure, directly serves the goal of making injured workers self-sufficient while reducing social costs and adding equity to the employee-employer compact underlying workers' compensation law.

The Occupational Safety and Health Act of 1970⁴³ (OSHA) and the federal Rehabilitation Act of 1973⁴⁴ soften the exclusive remedy provision of workers' compensation laws and place limits on the concept of disposable employees. Certain OSHA health standards require medical removal protection and rate retention to protect employees from job loss when an employee is medically unfit for a particular assignment or works in an area where there is exposure to toxic substances.⁴⁵ Under the Rehabilitation Act employers who are federal contractors or who are receiving federal assistance must take reasonable steps to make job functions fit the capability of occupationally handicapped employees.⁴⁶ An employer covered by either the medical removal protection provisions of OSHA or by the Rehabilitation Act who terminates or reassigns an occupationally disabled employee without being prepared to prove either the employee's inability to do the job or the unreasonableness of accommodation may be placed in a legally untenable position.⁴⁷

IV. VOCATIONAL REHABILITATION AND WORKERS' COMPENSATION REFORM

While the theory and goals of workers' compensation have remained the same during the past 70 years, the evolution of workers' compensation law among jurisdictions has been far from even. Interstate comparisons reveal significant variations in the types of benefits provided, and sometimes great disparity in the amount of economic benefits paid to eligible work-

42. *Id.* at 90.

43. 29 U.S.C.A. §§ 651-78 (West 1985 & Supp. 1989) (The original text of the Occupational Safety and Health Act can be found at Pub. L. No. 91-596, 84 Stat. 1616 (1970)).

44. 29 U.S.C.A. §§ 701-96 (West 1985 & Supp. 1989).

45. *See, e.g.*, OSHA Asbestos Standard 29 C.F.R. § 1910.1017(K)(5) (1981); OSHA Lead Standard 29 C.F.R. § 1910.1025(K) (1981) (each section gives detailed regulations providing for medical removal protection and rate retention provisions affecting injured and handicapped employees).

46. *See generally* 29 U.S.C. §§ 791, 794 (sections dealing with the employment of handicapped individuals and nondiscrimination under federal grants and programs).

47. *See* OVERVIEW, *supra* note 27, at 53 (citing C. Goerth, *Physical Standards: Discrimination Risk*, in OCCUPATIONAL HEALTH AND SAFETY, June, 1983).

ers.⁴⁸ During the past ten years, a majority of states have reformed their workers' compensation systems.⁴⁹ This reform has been in response to a national rise in public awareness of occupational health and safety problems, as well as to the specter of federal intervention on the scale of the Occupational Safety and Health Act of 1970.⁵⁰

Beginning in the late 1960's, occupational disease and injuries became popular topics of television documentaries, and labor organizations and public interest groups produced a proliferation of written materials concerning workplace health and safety.⁵¹ The resulting public concern prompted both state and federal governments to enact occupational safety and health legislation that in turn affected the nation's workers' compensation laws. The Occupational Safety and Health Act of 1970 states in part:

[T]he vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation; . . .⁵²

The Act further states: "[S]erious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws. . . ."⁵³

Along with passage of the Occupational Safety and Health Act of 1970, the United States Congress established the National Commission on State Workmen's Compensation Laws to study and evaluate the states' workers' compensation laws "to determine if such laws provide an adequate, prompt, and equitable system of compensation."⁵⁴

The commission's 1972 report included 84 recommendations for the improvement of workers' compensation systems.⁵⁵ Of the 84 recommenda-

48. See generally 1989 ANALYSIS, *supra* note 4; LAWS AND PROGRAMS, *supra* note 15; See also EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, STATE WORKERS' COMPENSATION: ADMINISTRATION PROFILES (1986).

49. See generally 1989 ANALYSIS, *supra* note 4, at vii.

50. *Id.*

51. See, e.g., NATIONAL SAFE WORKPLACE INSTITUTE, EXPENDABLE HOOSIERS: JOB SAFETY & HEALTH PROBLEMS IN INDIANA (1988).

52. Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1616, § 27(a)(1)(A) (1970).

53. 84 Stat. 1616, § 27(a)(1)(B).

54. 84 Stat. 1616, § 27(b).

55. See generally REPORT OF THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS (1972) [hereinafter NATIONAL COMM'N REPORT].

tions, 12 concerned rehabilitation.⁵⁶ The commission concluded: "In general, workmen's compensation is not doing an effective job of assuring that workers with work-related disabilities be helped to recover lost abilities and to return to their previous jobs, or where, this is impossible, to learn substitute skills."⁵⁷

In 1977, a follow-up study by the Inter-agency Workers' Compensation Task Force found that existing state workers' compensation programs had to be reformed to bring about more effective management.⁵⁸ The task force report emphasized the need for rehabilitating injured workers, stressed re-employment, and called for more private rehabilitation efforts.⁵⁹

56. R4.1 We recommend that the worker be permitted the initial selection of his physician, either from among all licensed physicians in the State or from a panel of physicians selected or approved by the workmen's compensation agency.

R4.2 We recommend there be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.

R4.3 We recommend that the workmen's compensation agency have discretion to determine the appropriate medical and rehabilitation services in each case. There should be no arbitrary limits by regulation or statute on the types of medical services or licensed health care facilities which can be authorized by the agency.

R4.4 We recommend that the right to medical and physical rehabilitation benefits not terminate by the mere passage of time.

R4.5 We recommend that each workmen's compensation agency establish a medical-rehabilitation division, with authority to effectively supervise medical care and rehabilitation services.

R4.6 We recommend that every employer or carrier acting as employer's agent be required to cooperate with the medical-rehabilitation division in every instance when an employee may need rehabilitation services.

R4.7 We recommend that the medical-rehabilitation division be given the specific responsibility of assuring that every worker who could benefit from vocational rehabilitation services be offered those services.

R4.8 We also recommend that the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen's compensation agency.

R4.9 We recommend that the workmen's compensation agency be authorized to provide special maintenance benefits for a worker during the period of his rehabilitation. The maintenance benefits would be in addition to the worker's other benefits.

R4.10 We recommend that each State establish a second injury fund with broad coverage of pre-existing impairments.

R4.11 We recommend that the second injury fund be financed by charges against all carriers, State funds, and self-insuring employers in proportion to the benefits paid by each, or by appropriations from general revenue, or by both sources.

R4.12 We recommend that workmen's compensation agencies publicize second injury funds to employees and employers and interpret eligibility requirements for the funds liberally in order to encourage employment of the physically handicapped.

Id. at 79-84.

57. *Id.* at 81.

58. See LAWS AND PROGRAMS, *supra* note 15, at 15.

59. Re-employment

-a major goal of worker's compensation

The need for and lack of vocational rehabilitation for injured workers was a common theme in both the commission and the task force reports.

Although these relatively recent national studies prompted state legislative interest in vocational rehabilitation, the concept of vocational rehabilitation is not new to the workers' compensation setting. As early as 1916, delegates to the International Association of Industrial Accident Boards and Commissions were advised that a primary goal of workers' compensa-

-shift to replacement of wages as wage loss accrues

Physical and/or Vocational Rehabilitation

- the carrier/employer have the primary responsibility of developing and implementing a physical and/or vocational rehabilitation plan whose prospect for re-employment and return to former earnings capacity would be thereby significantly improved
- the carrier/employer should be fully liable for all rehabilitation costs, including maintenance and necessary travel and expenses

State Worker's Compensation Agency

- should oversee rehabilitation and re-employment
- should be responsible for screening injury reports, physician's reports, periodic reports of continuation or resumption of wage replacement benefits, and case re-openings
- should encourage rehabilitation
- should review plans which are filed
- should resolve disputes between carriers/employers and claimants as to what constitutes appropriate rehabilitation
- when the carrier/employer is unable to develop a suitable plan, refer the case to the State Vocational Rehabilitation agency, with the cost charged to the carrier/employer

Re-employment - Key Element

- employers should make effort to rehire the employee on the same job, an equivalent job, or a job within the capacities of the worker if such jobs are reasonably available, or to give the employee priority if such job becomes available
- if a job with the same employer is not available, the employer/carrier should help the employee find a job elsewhere
- desirable to identify the job into which the employee will be hired prior to starting vocational training
- job redesign to fit the capacities of the impaired worker should be considered
- discharge or discrimination against workers who file a workers' compensation claim should be prohibited
- Second Injury Funds should be broad, publicized, and coordinated with efforts to place workers' compensation claimants
- when a worker with temporary disability is not rehired or given a bona fide job offer, he should receive placement assistance and up to 60 additional days of worker's compensation, provided he is actively engaged in job search.

tion programs would be the rehabilitation of disabled workers.⁶⁰ Massachusetts enacted the first vocational rehabilitation law in 1918.⁶¹ That law, administered by the state's industrial accident board, covered only those persons disabled by industrial accidents or diseases.⁶²

In 1920, Congress created the federal/state vocational rehabilitation program.⁶³ The purpose, as stated in the statute, was to promote the vocational rehabilitation of persons disabled in industry or in any other legitimate occupation.⁶⁴ The law called for cooperative agreements to be developed with existing workers' compensation agencies.⁶⁵ Indiana does have an Office of Vocational Rehabilitation that operates under the federal/state program, but it does not have a written agreement to cooperate with the Workers' Compensation Board.⁶⁶ The Indiana Office of Vocational Rehabilitation defines rehabilitation as "[a] process of providing services to meet the current and future needs of individuals who are handicapped so that these individuals may prepare for and engage in gainful employment to the extent of their capabilities as provided in 29 U.S.C. 706."⁶⁷ The Indiana federal/state program goes on to borrow from the federal act to flesh out the definition of rehabilitation.⁶⁸

Although occupationally disabled employees were at first the prime target for these vocational rehabilitation services, Congress soon began targeting specific disability groups, such as the blind and hearing impaired, to be served by the federal/state programs.⁶⁹ This reallocation of services undermined the original linkage intended to be between state workers' compensation programs and state vocational rehabilitation agencies.⁷⁰ The 1972 report of the National Commission on State Workmen's Compensation Laws concluded that:

[State Vocational Rehabilitation] Departments largely are funded by federal money and often are associated with education programs or other activities of state government with little formal connection with the workmen's compensation agency or even in some states, with the agency responsible for physical res-

60. See LAWS AND PROGRAMS, *supra* note 15, at 11.

61. 1989 ANALYSIS, *supra* note 4.

62. LAWS AND PROGRAMS, *supra* note 15, at 11.

63. Pub. L. No. 236, 41 Stat. 735 (1920).

64. *Id.*

65. *Id.* at 736.

66. IND. CODE ANN. § 4-28-10-1 to 4-28-10-26 (West Supp. 1989) (statute is silent on agreement to cooperate).

67. IND. CODE ANN. § 4-28-10-6 (West Supp. 1989).

68. Compare IND. CODE ANN. § 4-28-10-6 with 29 U.S.C.A. § 706 (West 1985).

69. See IND. CODE ANN. §§ 4-28-10-18 to 4-28-10-21 (West Supp. 1989) (statutes governing the federal/state program include specific reference to special programs for the blind).

70. LAWS AND PROGRAMS, *supra* note 15, at 11-12.

toration of disabled workers.⁷¹

In practice, federal/state vocational rehabilitation programs devote very little attention to occupationally disabled workers.⁷²

While physical rehabilitation has been recognized as the responsibility of the workers' compensation system in all 50 states since the laws were enacted, in most jurisdictions vocational rehabilitation was left to the federal/state rehabilitation agency with inadequate provision for coordination with the state's workers' compensation system. The National Commission on State Workmen's Compensation Laws found that:

Such vocational services as are provided by the workmen's compensation program generally result from the efforts of employers and insurance carriers. Carriers and employers have a strong inducement to provide vocational services for the disabled workers whose prospects indicate they may return to work and give up their claims to weekly benefits.⁷³

Local offices of the Indiana Office of Vocational Rehabilitation confirm the commission's conclusions. Local officials say that workers' compensation referrals by employers and insurance carriers have been almost non-existent, and those referrals that have been made were "impossible cases," meaning that the employer and the insurance carrier sought support from the agency as a last resort when private rehabilitators could do nothing more.⁷⁴

The National Commission on State Workmen's Compensation Laws recognized the difficulty of attempts to bring workers' compensation cases into existing federal/state vocational rehabilitation programs. In its report, the commission stated:

Despite the activities by the state department of vocational rehabilitation and the carriers and employers, it appears that many workers who could benefit from vocational rehabilitation did not receive these services. Workers' compensation should take a more active role in assuring vocational rehabilitation.⁷⁵

The commission urged workers' compensation agencies to create specific rehabilitation units within their own agencies.⁷⁶ The objective was to provide timely supervision of the delivery of medical care and vocational rehabilita-

71. NATIONAL COMM'N REPORT, *supra* note 55, at 81.

72. LAWS AND PROGRAMS, *supra* note 15, at 12.

73. NATIONAL COMM'N REPORT, *supra* note 55, at 82.

74. Conversations with officials of the local offices of Indiana's Office of Vocational Rehabilitation (August 31, 1989 and September 8, 1989) (parts of conversations were off the record; therefore reference will only be made to local offices).

75. NATIONAL COMM'N REPORT, *supra* note 55, at 82.

76. *Id.*

tion necessary to meet the goals of workers' compensation and to keep the cost and management within the compensation system.

Research by the International Association of Industrial Accident Boards and Commissions indicates that in response to the commission and task force reports, the majority of states established vocational rehabilitation programs. In 1976, only 27 states had some type of rehabilitation program.⁷⁷ By 1981, 36 states included vocational rehabilitation provisions in their workers' compensation laws.⁷⁸ By September 1987, the total number of state rehabilitation programs had risen to 43.⁷⁹ Finally, the January 1989 analysis of workers' compensation laws prepared and published by the United States Chamber of Commerce indicates that in the United States and its territories and possessions, only two states do not include a specific statutory provision for vocational rehabilitation of disabled workers.⁸⁰

V. REFORM: THE SECOND ROUND

The rush to reform workers' compensation statutes to provide for vocational rehabilitation has resulted in the enactment of poorly drafted legislation in many states.⁸¹ In some states comprehensive proposals were stripped to the bare minimum, while in other states political confrontation prevented mutually beneficial compromises.⁸² For example, the 1975 amendments to the Illinois Workmen's Compensation Act provide that "[t]he employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. . . ."⁸³ The term "vocational rehabilitation" is not defined. Nor does the statute set forth criteria for eligibility. No one is made responsible for system monitoring. There are no dispute resolution procedures set forth. In short, the essential guidelines for the efficient and effective administration of a vocational rehabilitation program are lacking.⁸⁴ As a result, many injured workers have been denied timely vocational rehabilitation services because they have had to rely on courts to establish definitions, guidelines, and set policy for implementing

77. LAWS AND PROGRAMS, *supra* note 15, at 14.

78. *Id.*

79. *Id.* at 15.

80. 1989 ANALYSIS, *supra* note 4, at vii.

81. J. CHELIUS, *The Status and Direction of Workers' Compensation: An Introduction to Current Issues*, in CURRENT ISSUES IN WORKERS' COMPENSATION 2 (1986).

82. See generally CURRENT ISSUES IN WORKERS' COMPENSATION (1986) (Compilation of a number of articles dealing with problems and solutions in workers' compensation).

83. ILL. REV. STAT. ch. 48, para. 138.8(a) (1983).

84. See generally Gianforte, *Industrial Rehabilitation in Illinois—An Evolving Process*, 71 ILL. B.J. 668 (1983); Donlevy & Moriarity, *Vocational Rehabilitation Needs Legislative Rehabilitation*, 1 C.B.A. REC. 28 (1987).

Illinois' vocational rehabilitation legislation.⁸⁵

Some legislatures have deliberately drafted vague statutes, yet have authorized the administering agency to formulate comprehensive rules and policies through its rule-making authority. This was not the case in Illinois. After experiencing problems implementing the statute, Illinois, and states with similar statutes, are now engaging in a second round of legislative reform in an effort to correct these statutory inadequacies.⁸⁶

Effective reform comes through comprehensive change, based upon research, education, and cooperation among affected parties willing to reach mutually beneficial compromise.⁸⁷ In Alaska, Florida, and Louisiana, reform efforts have resulted in comprehensive and effective change in workers' compensation law. These successful reform efforts share certain characteristics:

1. Thorough research on how the current system operates and how reforms are to be integrated and monitored;
2. Continuous dialogue between the interested and affected parties;
3. Education of the public and the legislators, with a focus on facts rather than opinion; and
4. Policy established before legislative drafting begins and before public positions are taken by the interested and affected parties.⁸⁸

Central to a successful reform process is the establishment of an advisory council or task force comprised not only of representatives of the interested and affected parties—labor, management, insurers, public and private providers of vocational rehabilitation services, and the administering agency for workers' compensation—but objective parties such as scholars and consultants. This group serves as the forum for discussing the problems and proposals of all the interests concerned, avoiding the public posturing and recriminations typically associated with compromise wrought in the halls of the state house. This group serves as the initiator of research and the educator of the legislature and the public. The educational process that takes place within the council or task force, including discussion of policy issues, objectives, and the probable impact of various proposals is critical to drafting comprehensive legislation.⁸⁹

85. See generally Kuster, *Vocational Rehabilitation in Workers' Compensation: A New Perspective*, 74 ILL. B.J. 334 (1986).

86. See *supra* note 81.

87. J. LEWIS, *The Politics of Workers' Compensation Reform*, in CURRENT ISSUES IN WORKERS' COMPENSATION 98-102 (1986).

88. *Id.* at 102.

89. See generally *supra* note 81; Addresses by John H. Lewis and Joseph A. Kinney, Foundation for the Advancement of Industrial Research Institute on Workers' Issues (Novem-

Often, a party's representative has difficulty transcending public positions taken in the past, or is burdened by adversarial baggage from prior political confrontations. Such problems with task force membership stalled the reform process in California and Michigan.⁹⁰ Given the central role of the task force in the reform process, careful selection of members is crucial to success. Although task force selection may not be devoid of politics, it is still the best way to study the issues, provide a neutral forum, and promote a continuing dialogue between interested parties, policy makers, and those active in the legislative process.

In response to concerns regarding the implementation and administration of Indiana's new vocational rehabilitation statute, Governor Evan Bayh called a conference on vocational rehabilitation for September 29, 1989.⁹¹ Representatives from various states discussed their state's approach to administering its vocational rehabilitation system. This conference was the first step in providing an educational forum for the discussion of alternative methods of providing vocational rehabilitation services to Indiana citizens injured in the workplace and in opening a dialogue between the interested parties. At the close of the conference, a questionnaire was distributed to gather information on the opinions and concerns of conference attendees.⁹²

ber 10, 1989).

90. See generally S. KEEFE, *The Minnesota Experience with Workers' Compensation Reform*, and A. TEBB, *The 1982 Changes in California*, and H.A. HUNT, *Two Rounds of Workers' Compensation Reform in Michigan*, all in CURRENT ISSUES IN WORKERS' COMPENSATION (1986).

91. Letter from Governor Evan Bayh issuing vocational rehabilitation conference call (Aug. 29, 1989).

92. The following survey results were forwarded from the Indiana Workers' Compensation Board to the Governor's Office on October 24, 1989:

1. Was this conference informative?
 - A. Very informative; 48
 - B. Somewhat informative; 23
 - C. Not very informative; 0
 - D. Not informative at all; 0
2. Which vocational rehabilitation program do you think would be the most effective/efficient in meeting the needs of the worker?
 - A. Georgia; 9
 - B. Indiana; 11
 - C. Minnesota; 4
 - D. Ohio; 34
 - E. None of these; 6
3. Which vocational rehabilitation program do you think would be the most effective/efficient in meeting the needs of the employer?
 - A. Georgia; 11
 - B. Indiana; 25
 - C. Minnesota; 2
 - D. Ohio; 24
 - E. None of these; 9

Hopefully, the information gathered will become the basis for continued dialogue and the establishment of a workers' compensation advisory council or task force with the purpose of monitoring the current vocational rehabilitation system and recommending changes for improvement.

VI. THE LEGISLATIVE HISTORY OF VOCATIONAL REHABILITATION IN INDIANA

In each recent Indiana legislative session, a number of workers' compensation bills have been sponsored.⁹³ The sponsors usually seek to increase benefits, change the exclusive remedy provisions, or give the injured worker the right to choose a physician.⁹⁴ As routinely as these bills are introduced, they die in committee.⁹⁵ Therefore, the addition of statutory provisions dealing with vocational rehabilitation is a significant step toward comprehensive reform.

Although there has been support to include a vocational rehabilitation provision in Indiana's workers' compensation statute for several years, the legislature considered vocational rehabilitation for the first time in the 1988 spring session.⁹⁶ Although the reform activity during that session focused on increasing workers' compensation and occupational disease benefits, vocational rehabilitation was also an important issue.⁹⁷ Senate Bill 402, essentially a benefits bill authored by Senator Harrison, was reported out of the Pension and Labor Committee chaired by Harrison with the recommenda-

4. After hearing the presentations today, to what degree do you think Indiana needs to change its vocational rehabilitation program?

- A. No changes are needed; 8
- B. Minor changes are needed; 21
- C. Major changes are needed; 41

5. If Indiana were to change its vocational rehabilitation program, which state program do you think would be the best for Indiana?

- A. Georgia; 10
- B. Minnesota; 3
- C. Ohio; 25
- D. Other; 28

93. See generally INDIANA HOUSE AND SENATE JOURNALS, 1st Sess. 1980-81, 102d General Assembly through 1st Sess. 1989-90, 106th General Assembly.

94. *Id.*

95. *Id.* (compare bills indexed under Workmen's Compensation with the histories of Bills and Resolutions for the respective legislative sessions).

96. See generally SUBJECT INDEX TO HOUSE AND SENATE JOURNALS 1988 SESSION (of the twenty-three bills indexed under Workmen's Compensation, five of those bills focused on increases in the benefits scheme) [hereinafter INDEX]; See also Gary Post Tribune, Nov. 15, 1987, Business Section.

97. INDEX, *supra* note 96 (Representative Boatwright offered the vocational rehabilitation amendment to SB 402 on February 5, 1988, and it passed on a roll call vote of 68 yeas to 28 nays. INDIANA HOUSE JOURNAL, 1988 SESSION 424 [hereinafter HOUSE]).

tion "do pass."⁹⁸ After passage in the Senate, SB 402 was referred to the House of Representatives, where after its second reading Representative Boatwright offered an amendment that included a vocational rehabilitation provision.⁹⁹

Boatwright's amendment would have provided the foundation for a relatively comprehensive vocational rehabilitation scheme within the established framework of Indiana's workers' compensation system. The amendment specified when an injured worker is entitled to vocational rehabilitation, what types of services are provided, how to determine if the rehabilitation goal has been reached, and who is to pay the cost. The remaining sections clearly established the central role of the Industrial Board, now known as the Workers' Compensation Board, in administering the vocational rehabilitation system. The board was authorized to order rehabilitation evaluations and services, payment of transportation and necessary expenses, and to impose sanctions for an employee's "unjustifiable refusal to accept rehabilitation." The amendment also authorized the board to resolve disputes through the hearing process and established a time limit for voca-

98. See SENATE JOURNAL, 1988 SESSION 35 [hereinafter SENATE] (information provided through contact with the Indiana Legislative Services Bureau).

99. The vocational rehabilitation provision of SB 402 reads as follows:

SECTION 23. IC 22-3-3-4.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS: Sec. 4.5(a) An injured employee who, as a result of an injury, is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services, including retraining and job placement, necessary to restore the employee to useful employment. The cost of the vocational rehabilitation shall be paid by the employer.

(b) If vocational rehabilitation services are not voluntarily offered and accepted, a member, on the member's own motion or upon application of the employee, carrier, or employer, after affording the parties an opportunity to be heard, may refer the employee to a facility approved by the industrial board for evaluation of the need for, and kind of service, treatment, or training necessary and appropriate to render the employee fit for a remunerative occupation. Upon receipt of the report of the facility, a member may order that the services and treatment recommended in the report be provided at the expense of the employer.

(c) A member may order that any employee participating in vocational rehabilitation is entitled to receive additional payments for transportation or for any extra and necessary expense during the period arising out of the employee's program of vocational rehabilitation.

(d) Vocational rehabilitation training, treatment, or service may not extend for more than fifty-two (52) weeks. However, a member, after review, may extend the period for up to fifty-two (52) additional weeks.

(e) If there is an unjustifiable refusal to accept rehabilitation after a decision of a member, the member shall order a loss or reduction of compensation in an amount determined by the member for each week of the period of refusal, except for specific compensation payable under section 10 of this chapter.

(f) If a dispute arises between the parties concerning application of this section, any of the parties may apply for a hearing before the industrial board.

tional rehabilitation benefits.

Public interest groups like the Foundation for the Advancement of Industrial Research (FAIR), joined with the State Federation of Labor (AFL-CIO), and individual labor organizations in supporting SB 402 as amended.¹⁰⁰ The Indiana Chamber of Commerce took a leadership role in opposing the vocational rehabilitation amendment, which it characterized as mandatory.¹⁰¹

Senate Bill 402 as amended passed the House of Representatives on a roll call vote of 87 yeas and 12 nays. Unfortunately, the Senate dissented from the House amendments on vocational rehabilitation that were subsequently stripped from the bill in conference committee.¹⁰² The benefits element of SB 402 became Public Law 95.¹⁰³ Although vocational rehabilitation did not survive the conference committee, it remained alive as an issue worthy of study assigned to the Interim Study Committee on Insurance Issues.¹⁰⁴

On September 20, 1988, the Interim Study Committee on Insurance Issues Subcommittee on Vocational Rehabilitation held its first meeting to analyze Indiana's existing vocational rehabilitation programs.¹⁰⁵ The director of the Indiana Office of Vocational Rehabilitation and the chairman of Indiana's Workers' Compensation Board both testified as to the current state of vocational rehabilitation in Indiana.¹⁰⁶ At the meeting it was confirmed that the Office of Vocational Rehabilitation is authorized by the federal Rehabilitation Act of 1973.¹⁰⁷ Eighty percent of the funding for the program comes from the federal government and 20% from the state.¹⁰⁸ A portion of the clients of this federal/state agency also receive workers' compensation benefits.¹⁰⁹ It costs the same to rehabilitate workers' compensa-

100. FAIR is a not-for-profit organization composed of individuals and groups from the labor, education, and legal communities. See FAIR, *The Victims of Government: Reforming Indiana's Workers' Compensation Law* 12 (1988) (copy on file in Professor Ruth Vance's office at Valparaiso University School of Law). For organized labor positions in support of vocational rehabilitation, see Indiana State AFL-CIO Legislative Agendas for the years 1987-89.

101. Indiana Chamber of Commerce, *Legislative Report* (Mar. 3, 1988) (provisions removed from Bill No. 402 opposed by the Indiana Chamber of Commerce included "mandatory vocational rehabilitation of up to 104 weeks").

102. See SENATE, *supra* note 98, at 386; see also Indiana Chamber of Commerce, *supra* note 101.

103. See SENATE, *supra* note 98, at 525; see also HOUSE, *supra* note 97, at 645.

104. Vocational Rehabilitation Subcommittee, Interim Study Committee on Insurance Issues, Indiana House of Representatives, Minutes of Sept. 20, 1988.

105. *Id.* at 1.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 2.

tion recipients as it does for other clients. The rehabilitation success rate for workers' compensation recipients in the federal/state program is lower than for other clients of the program.¹¹⁰ Moreover, workers' compensation recipients are referred to the Office of Vocational Rehabilitation on an informal basis, usually "in response to a call from an employee who has exhausted his workers' compensation benefits."¹¹¹

The chairman of the Workers' Compensation Board made the following additional comments:

1. Having employers share the burden of vocational rehabilitation follows more closely the philosophy of worker's compensation.

2. The threshold issue in vocational rehabilitation is evaluation: how you determine who is eligible for the services. In addition, you must be sure that qualified people are providing the vocational rehabilitation services.

3. . . .

4. To put a vocational rehabilitation program in place, the Worker's Compensation Board would need additional staff to apply standards set by the Legislature to identify employees eligible for vocational rehabilitation services. The Legislature should first look at legislation from other states to follow 'as a model. Mr. Shanks noted that there is no true 'model' legislation in this area, but suggested Michigan as a good starting point.

5. There are several 'red flag' areas that must be addressed concerning vocational rehabilitation. These concern:

- the qualifications of providers;
- who polices the providers;
- the malingering of persons receiving vocational rehabilitation services; and
- the selection of persons for vocational rehabilitation services.¹¹²

The chairman concluded that it is vital that the public become aware of vocational rehabilitation services. He further commented that this might be accomplished by requiring insurance carriers to inform injured workers of

110. *Id.*

111. *Id.* at 3 (Testimony of J. Shanks, Chairman, Workers' Compensation Board of Indiana).

112. *Id.* at 3-4.

the services available to them.¹¹³

People seeking change in Indiana's vocational rehabilitation scheme testified at the second meeting of the Subcommittee on Vocational Rehabilitation. Representatives of the AFL-CIO, FAIR, the United Auto Workers, the Indiana Chamber of Commerce, the Indiana Manufacturers Association, the Indiana Trial Lawyers' Association, and private providers of rehabilitation services testified.¹¹⁴

The AFL-CIO representative testified that "vocational rehabilitation for permanently disabled workers in Indiana is the responsibility of the employer. . . . [I]t is inappropriate for the costs of injured and disabled workers' occupational rehabilitation to be shifted by neglect or design to the public sector."¹¹⁵ The AFL-CIO recommended that "a Physical and Vocational Rehabilitation Division with authority to supervise and approve rehabilitation programs be established within the Worker's Compensation Board" and that the division be responsible for "the strict certification of vocational rehabilitation providers."¹¹⁶

The representative of FAIR added in his testimony that "injured workers whose disability prevents them from returning to their former job or occupation must either seek vocational rehabilitation services on their own at their own expense, or utilize existing state vocational rehabilitation services financed by taxpayers,"¹¹⁷ and that:

employees whose injuries result in complete disability or work restrictions need not be reemployed by their employer. There are no job protections for these workers. . . . The cost to employers of providing vocational rehabilitation benefits is negligible. According to the National Council on Compensation Insurance (NCCI), premiums charged to employers would increase only .1% to .8%. This cost could easily be absorbed by employers, since Indiana employers pay from 1/2 to 1/5 of the premiums paid by employers in other states. . . . FAIR supports research into other states' vocational rehabilitation laws to choose the best features of each for use in patterning Indiana legislation.¹¹⁸

The Indiana Chamber of Commerce claimed that a Chamber group studying vocational rehabilitation found that "there is no consensus on what

113. *Id.* at 4.

114. Vocational Rehabilitation Subcommittee, Interim Study Committee on Insurance Issues, Indiana House of Representatives, Minutes of Sept. 27, 1988.

115. *Id.* at 1.

116. *Id.*

117. *Id.* at 2 (Testimony of Mr. William Groth).

118. *Id.* at 2-3.

should be done or how it should be done” among other states.¹¹⁹ Chamber contacts with Indiana’s federal/state program revealed that “there are no restrictions on serving persons injured in the workplace. However, there are certain eligibility criteria. The group also felt that there is need for a more formal referral system.”¹²⁰ The Chamber noted that “the current trend among states is to rethink their current legislation. . . . [T]he current mechanism is capable of working in its present form, however, there is a need to find a better way of getting this information to injured workers.”¹²¹ The Chamber concluded that “Indiana has few statistics available on workers’ compensation” and that “Indiana should look at the wealth of information available from other states.”¹²²

The Indiana Manufacturers Association representative stated that:

worker’s compensation is a no-fault concept. . . . [O]ur main concern should be how we can most effectively provide necessary services to people who are injured in the workplace without regard to who was at fault. . . . [V]ocational rehabilitation is social legislation set up to spread the burden of helping injured workers. . . . [T]he state currently provides services if the workers can be directed to them. . . . [E]mployers currently pay 35% to 40% of all state taxes, which are used to fund these programs. The IMA can see no benefit in placing the financial responsibility on either the employer or on the employee.¹²³

Private providers of vocational rehabilitation services testified that “the first step in the rehabilitation process is to identify the limitations of the injury and to determine the abilities that remain in that person. A program is then developed that meets that person’s needs so that they can return to productive employment.”¹²⁴ It was further stated that “the current state system has little organization, thus people are left to their own means to find services that are available.”¹²⁵

The Indiana Trial Lawyers’ Association representative concluded that there is “no reason why employers should care if the system works because they are not ‘invested’ in this program. The taxpayers are paying for the services that are now available. . . . [T]he need for employer accountability in the program [must be stressed].”¹²⁶

119. *Id.* at 5 (Testimony of Ms. Kathy McKimmie).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 5-6 (Testimony of Mr. Ed Roberts).

124. *Id.* at 5 (Testimony of Mr. Jim Vento, President of Crossroads Rehabilitation).

125. *Id.*

126. *Id.* at 4 (Testimony of Ms. Michealle Wilson).

At the third meeting of the Subcommittee on Vocational Rehabilitation held on October 18, 1988, proposed findings and recommendations were reviewed.¹²⁷ Notably, the committee could reach consensus on only three of several proposed findings.¹²⁸ A straight party line vote maintaining the status quo resulted when alternative proposed recommendations were offered by both the committee chairman and Senator Bushemi.¹²⁹ The chairman's proposed recommendation supported the status quo.¹³⁰ Senator Bushemi recommended establishing a vocational rehabilitation division within the Workers' Compensation Board, allocating the costs of vocational rehabilitation to employers, and requiring certification of private providers of rehabilitation services.¹³¹

By consensus, the committee approved only two recommendations on vocational rehabilitation:

1. The General Assembly should examine mandating the compilation of certain statistical data by the Worker's Compensation Board.

2. The General Assembly should impose a requirement that worker's compensation recipients be informed by either the employer, the worker's compensation carrier, or the Worker's Compensation Board that vocational rehabilitation services are available through the Office of Vocational Rehabilitation of the Indiana Department of Human Services. The notice shall be given in writing, on a form devised by the Worker's Compensation Board.¹³²

In the 1989 spring session of the General Assembly, companion vocational rehabilitation bills were introduced in the House and Senate.¹³³ The reform recommendations rejected by the Interim Study Committee provided the basis of Senate Bill 543 authored by Senator Bushemi and its companion House Bill 1385 introduced by Representative Boatwright.¹³⁴

127. Interim Study Committee on Insurance Issues, Indiana House of Representatives, Minutes of Oct. 18, 1988.

128. *Id.* at 7-8.

129. *Id.* at 8.

130. *Id.*

131. *Id.*

132. *Id.*

133. See H.R. 1385, 106th Leg., 2d Sess., Indiana (1989); S. 543, 106th Leg., 2d Sess., Indiana (1989).

134. Proposed S. 543 and H.R. 1385 provided:

SECTION 1. IC 22-3-12 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 12. Vocational Rehabilitation

Sec. 1. An injured employee who, as a result of an injury or occupational disease, is

Like the earlier proposed amendment to SB 402, this bill also specified when an injured worker is entitled to vocational rehabilitation, how to determine if the rehabilitation goal has been reached, and who is to pay the cost. SB 543 went beyond the SB 402 amendments in clearly placing the control and direction of vocational rehabilitation with the Workers' Compensation Board by establishing a vocational rehabilitation division within the Board. The bill authorized the hiring of additional staff to carry out the new responsibility placed upon the Board. The bill also provided a framework for determining eligibility. Although SB 543 did not specify a sanction for an injured worker's unjustifiable refusal of rehabilitation, the bill contained a significant addition to the prior SB 402 package: certification of providers of vocational rehabilitation services. Like the SB 402 amendment, this bill contained a 52 week time limit for vocational rehabilitation benefits.

House Bill 1385, companion to SB 543, was referred to the Standing Committee on Labor.¹³⁵ Workers' compensation bills referred to the committee were held for hearing until late in the session in an effort to take advantage of the rush to process pending legislation at the close of the ses-

unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment. The cost of the vocational rehabilitation shall be paid by the employer.

Sec. 2. (a) The vocational rehabilitation division is established within the worker's compensation board.

(b) The board shall employ a director and the vocational rehabilitation counselors necessary to provide the screening and identification of potential vocational rehabilitation recipients under this chapter.

Sec. 3. (a) The board shall determine, at the earliest time possible, whether a recipient of worker's compensation or occupational diseases benefits is eligible for vocational rehabilitation services under this chapter.

(b) The determination of eligibility for vocational rehabilitation services and of awards for additional benefits under section 4 of this chapter may be made by any of the following:

- (1) A member of the worker's compensation board.
- (2) The full worker's compensation board.
- (3) The director of the vocational rehabilitation division.

Sec. 4. Vocational rehabilitation benefits under this chapter may be awarded for up to fifty-two (52) weeks. Benefits may be awarded for more than fifty-two (52) weeks as determined necessary by any of the individuals listed in section (3)(b) of this chapter.

Sec. 5. (1) The vocational rehabilitation division shall certify providers qualified to provide vocational rehabilitation services under this chapter. The division shall maintain a list of certified providers.

(b) Providers certified under this section may be either public sector or private sector providers.

135. Telephone conversations with the Honorable John Bushemi, Indiana State Senator (Aug. 3, 1989 and Nov. 6, 1989) [hereinafter Telephone Conversations]; *See also* INDIANA STATE AFL-CIO, 89 STATE OFFICE SCOOPS No. 5 (Feb. 16, 1989) (copy on file in office of Professor Ruth Vance, Valparaiso University School of Law).

sion.¹³⁶ When the last days of the session arrived, these bills died without a hearing. Representatives opposed to workers' compensation reform failed to attend the remaining meetings which deprived the committee of the quorum needed to conduct business.¹³⁷

Senate Bill 543 was referred to the Standing Pensions and Labor Committee where the bill was held by the chairman until late in the session.¹³⁸ Interest groups took the same position relative to proposed SB 543 as they took relative to the vocational rehabilitation amendment to SB 402 during the 1988 session of the General Assembly.¹³⁹ FAIR, the Indiana Trial Lawyers' Association, providers of rehabilitation services, the AFL-CIO and individual labor organizations, like the United Auto Workers, supported the proposed vocational rehabilitation bill.¹⁴⁰ The Indiana Manufacturers Association (IMA) and the Indiana Chamber of Commerce strenuously opposed any meaningful reform of workers' compensation law, and lobbied Committee Chairman Harrison to keep the vocational rehabilitation bill from reaching the full Senate.¹⁴¹ Consistent with their testimony before the Vocational Rehabilitation Subcommittee, the IMA and the Chamber would only support referral of injured workers to the existing federal/state program as long as employers would not have to pay for the vocational rehabilitation.¹⁴²

Senator Bushemi was forced to cut significant parts of his proposed bill and accept a simple referral mechanism, or SB 543 and vocational rehabilitation would have died in committee like its companion HB 1385.¹⁴³ After consultation with supporters of workers' compensation reform, it was decided that a simple referral or notice provision would be at least a first step in a long-term reform effort. After SB 543 was stripped down to a notice provision, it proceeded through the legislative process to become Chapter 12 of Indiana's workers' compensation law.¹⁴⁴ Had SB 543 been enacted into

136. Telephone conversations, *supra* note 135.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*; See also AFL-CIO, LEGISLATIVE AGENDA FOR 1989.

141. Telephone conversations, *supra* note 135.

142. *Id.*

143. *Id.*; See also INDIANA STATE AFL-CIO, STATE HOUSE LEGISLATIVE WRAP-UP I (Oct. 1989).

144. SECTION 1. IC 22-3-12 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 12. Vocational Rehabilitation

Sec. 1. An injured employee, who as a result of an injury or occupational disease is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment.

Sec. 2. When any compensable injury requires the filing of a first report of injury by an

law as proposed, Indiana would have had a solid foundation for a comprehensive vocational rehabilitation program. Instead, the political tug-of-war resulted in a notice statute that looks nothing like the original bill. This legislative process of compromise often yields, as in this case, statutory provisions that are vague and lacking in administrative direction.

VII. POLICY ISSUES IN IMPLEMENTING VOCATIONAL REHABILITATION IN A WORKERS' COMPENSATION SYSTEM

A. *Goals and Obligations of Vocational Rehabilitation*

A comprehensive vocational rehabilitation scheme must have a clearly stated and objectively measurable goal. The goal provides the basis for key policy decisions such as who should be eligible to receive vocational rehabilitation benefits, what types of services should be provided, and who should administer vocational rehabilitation.

The 1989 vocational rehabilitation amendment to the Indiana workers' compensation law fails to establish a clearly stated and objectively measurable goal.¹⁴⁵ The new statute provides that the goal of vocational rehabilitation is "to restore the employee to useful employment."¹⁴⁶ Yet, the term "useful employment" is not defined, and therefore invites litigation. There

employer, the employer's worker's compensation insurance carrier or the self-insured employer shall forward a copy of the report to the central office of the department of human services office of vocational rehabilitation at the earlier of the following occurrences:

(1) When the compensable injury has resulted in temporary total disability of longer than twenty-one (21) days.

(2) When it appears that the compensable injury may be of such a nature as to permanently prevent the injured employee from returning to the injured employee's previous employment.

Sec. 3. Upon receipt of a report of injury under section 2 of this chapter, the office of vocational rehabilitation shall immediately send a copy of the report to the local office of vocational rehabilitation located nearest to the injured employee's home.

Sec. 4. (a) The local office of vocational rehabilitation shall, upon receipt of the report of injury, immediately provide the injured employee with a written explanation of:

(1) the rehabilitation services that are available to the injured employee; and

(2) the method by which the injured employee may make application for those services.

(b) The office of vocational rehabilitation shall determine the eligibility of the injured employee for rehabilitation services and, where appropriate, develop an individualized rehabilitation plan for the employee.

(c) The office of vocational rehabilitation shall implement the rehabilitation plan. After completion of the rehabilitation program, the office of vocational rehabilitation shall provide job placement services to the rehabilitated employee.

Sec. 5. Nothing contained in this chapter shall be construed to affect an injured employee's status regarding any benefit provided under IC 22-3-2 through IC 22-3-7.

IND. CODE ANN. § 22-3-12 (West Supp. 1989).

145. See generally IND. CODE ANN. §§ 22-3-12-1 to 22-3-12-5 (West Supp. 1989).

146. IND. CODE ANN. § 22-3-12-1.

is no guidance as to whether the goal is to return the worker to or near the worker's pre-injury earning capacity, or whether a minimum wage position or sheltered workshop position constitutes "useful employment."

The goal or purpose statement most frequently encountered in vocational rehabilitation statutes and the literature involves "the restoration of the disabled worker to suitable gainful employment."¹⁴⁷ The more comprehensive statutes further qualify the goal of gainful employment with objectively measurable priorities, starting with the return of the employee to the same job with the pre-injury employer.¹⁴⁸ Clearly, in Indiana, the goal of restoring the disabled employee "to useful employment" must be qualified either by statutory definition or through the rule-making authority of the Workers' Compensation Board. Ideally, Indiana's occupationally disabled workers should be returned to their former employment, a related occupation, or other suitable employment with an earning level comparable to their pre-injury earnings.

Indiana's vocational rehabilitation statute places the entire burden of management of vocational rehabilitation within the workers' compensation context with the federal/state program even though the goals of vocational rehabilitation in the context of workers' compensation differ fundamentally from the goals established by the federal regulations that control federal/state vocational rehabilitation programs.¹⁴⁹ The goal of rehabilitation within the workers' compensation context is the prompt return of the worker to gainful employment, while rehabilitation within the federal/state vocational rehabilitation program—the Indiana Office of Vocational Rehabilitation—is a much broader mandate, the maximization of human potential.¹⁵⁰ Efforts to "maximize the human potential" of an injured worker are beyond the purpose and scope of the workers' compensation system.

These differing goals raise several questions. To be consistent with workers' compensation goals, should workers' compensation clients be treated differently than other federal/state program clients? Can the Office of Vocational Rehabilitation legally treat workers' compensation clients differently? In other words, which agency's goals will control the content of the vocational rehabilitation program? Also, which agency's goals will control who receives vocational rehabilitation under the workers' compensation act?

147. See, e.g., FLA. STAT. ANN. § 440.49 (West 1985 & Supp. 1989); J. GARDNER, VOCATIONAL REHABILITATION IN FLORIDA WORKERS' COMPENSATION: REHABILITANTS, SERVICES, COSTS, AND OUTCOMES (1988).

148. See, e.g., N.M. STAT. ANN. § 52-1-50 (1986); See also LAWS AND PROGRAMS, *supra* note 15, at 5.

149. LAWS AND PROGRAMS, *supra* note 15, at 12 (citing the Report of the National Commission on State Workmen's Compensation Laws).

150. *Id.* at 12-13.

B. Who Should Receive Vocational Rehabilitation

Not every worker who has been injured on the job is entitled to vocational rehabilitation benefits.¹⁵¹ The issue of who should receive vocational rehabilitation under Indiana's workers' compensation act rests on three elements: entitlement, eligibility, and suitability.¹⁵² In theory, entitlement and eligibility are separate; in practice there is no distinction.

To be entitled to rehabilitation benefits, an injured worker must be left with a disability that brings him within the eligibility criteria established either by statute or administrative rule. An analysis of the 50 state workers' compensation laws reveal several rehabilitation eligibility criteria.¹⁵³ The injured worker may be eligible for vocational rehabilitation if: 1) he has a permanent disability that renders him unable to return to work for which the injured worker has previous training or experience, 2) the wages the injured worker can earn are not equal to pre-injury wages, 3) retraining is needed to restore or increase earning capacity, 4) a program is necessary for return to gainful employment, 5) the injured worker's impairment reduces employability, or 6) the injured worker is determined to be handicapped or vocationally handicapped.¹⁵⁴

In Indiana, an inability to perform work for which the employee has previous training or experience is what makes a person eligible for vocational rehabilitation under the workers' compensation act.¹⁵⁵ Without statutory definition or administrative clarification, the eligibility criteria incorporated in the vocational rehabilitation provision are problematic. Does the "work for which the employee has previous training or experience" refer to the injured employee's customary occupation, or to *any* previous gainful occupation? Courts in jurisdictions with similar entitlement criteria have held that such work does not mean all work for which an injured employee may have had previous training or experience, but rather the employee's customary occupation.¹⁵⁶ To avoid litigation over the eligibility criteria, a clarifying statutory definition or an administrative rule certainly should be promulgated in Indiana.

151. Annotation, *Workers' Compensation: Vocational Rehabilitation Statutes*, 67 A.L.R. 4th 612, 625 (1989) [hereinafter Annotation].

152. *Id.* at 625-28.

153. *See generally* Annotation, *supra* note 151, at 637-96.

154. *Id.*

155. Chapter 12. Vocational Rehabilitation

Sec. 1. An injured employee, who as a result of an injury or occupational disease is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment.

IND. CODE ANN. § 22-3-12-1 (West Supp. 1989).

156. *See supra* note 151, at 641-47.

Indiana Code § 22-3-12-4(b) states that “the office of vocational rehabilitation shall determine the eligibility of the injured employee for rehabilitation services.” This provision raises a question of which agency’s eligibility criteria control. Will the Office of Vocational Rehabilitation make use of each agency’s eligibility criteria, or will the eligibility criteria in the workers’ compensation statute be ignored? The lack of legislative guidance on coordinating the workers’ compensation system and the federal/state program, each with its individual goals and distinct eligibility criteria, threatens the administrative viability of the vocational rehabilitation provisions.

C. *What Types of Services Should Be Available*

Once eligibility is determined, the next step, according to Indiana Code § 22-3-12-4(b), is for the Office of Vocational Rehabilitation to “develop an individualized rehabilitation plan for the employee.” An individualized rehabilitation plan is a projected combination of services designed to achieve a specific goal.

Federal/state programs are client-centered: the client selects an educational objective, and the agency then determines whether the objective is feasible given the client’s capability.¹⁵⁷ If the agency finds that the educational objective is feasible, the agency formulates a plan and supportive services designed to help the client reach the educational goal.¹⁵⁸ For example, if a client and the agency agree that a college degree is necessary to reach the client’s career objective, the agency will supply college tuition and related expenses even though there may be a less costly plan to return the client to work.¹⁵⁹

Under workers’ compensation rehabilitation programs, the goal established by statute is to expediently return the employee to gainful employment, usually under a scheme of priorities.¹⁶⁰ A plan designed to meet this goal will require different services than a plan designed to meet the federal/state program goal of maximizing human potential.

D. *Who Should Pay for Vocational Rehabilitation*

Should a recognized cost of production—workers’ compensation benefits—be shifted from the employer to the general public? Rehabilitation services are an inherent part of the workers’ compensation system, a system based on the exchange of common law rights between employees and em-

157. OFFICE OF VOCATIONAL REHABILITATION, INDIANA DEPARTMENT OF HUMAN SERVICES, WHAT YOU SHOULD KNOW ABOUT VOCATIONAL REHABILITATION 3-4.

158. *Id.*

159. *See supra* note 157; *see also supra* note 74.

160. *See infra* note 197 and accompanying text.

ployers and governed by the same rationale; the cost of production should be borne by the industry and the consumers of its goods. Governor Bayh's conference call questioned the "notion that vocational rehabilitation for injured workers should be a taxpayer-supported system."¹⁶¹

The National Commission on State Workmen's Compensation Laws recommended that "the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen's compensation agency."¹⁶² The 1977 report of the President's Inter-Departmental Workers' Compensation Task Force also recommended that:

The carrier/employer have the primary responsibility for developing and implementing a physical and/or vocational rehabilitation plan for any claimant whose prospect for re-employment and return to former earning capacity would thereby be significantly improved. The carrier/employer should be fully liable for all rehabilitation costs, including maintenance and necessary travel expenses.¹⁶³

The International Association of Industrial Accident Boards and Commissioners adopted a standard for vocational rehabilitation in 1954 that summarized the obligations of employees and employers. This standard clearly makes the cost of rehabilitation the obligation of the employer:

When a worker cannot be restored to prior employment by ordinary medical treatment, it should be the employer's obligation to provide and pay the cost of rehabilitation; the obligation of the employee to cooperate with such rehabilitation; and the obligation of the workers' compensation agency to monitor the workers' rehabilitation and medical management, minimizing the adversary environment and creating an atmosphere conducive to successful reemployment.¹⁶⁴

Not only is employer responsibility for vocational rehabilitation consistent with the underlying philosophy of workers' compensation, foundation studies and organizations within the workers' compensation system recommend

161. Letter from Governor Evan Bayh (Aug. 29, 1989)(issuing vocational rehabilitation conference call).

162. LAWS AND PROGRAMS, *supra* note 15, at 17 (citing the report of the National Commission on State Workmen's Compensation Laws).

163. *Id.* at 15 (citing the 1977 report of the President's Inter-Departmental Workers' Compensation Task Force).

164. Address by James N. Ellenberger, Assistant Director of AFL-CIO Department of Occupational Safety, Health and Social Security, Governor Evan Bayh's Conference on Vocational Rehabilitation (Sept. 29, 1989) (citing the 1954 IAIABC standard for vocational rehabilitation).

it.

Moreover, the shift of workers' compensation benefit costs to the federal/state program affects the funds available for the targeted client groups of handicapped and disadvantaged persons who generally have no other resource base.¹⁶⁵ The additional drain of workers' compensation clients on the funding of the federal/state program could make the Office of Vocational Rehabilitation unable to service all eligible people. The majority of individual rehabilitation programs handled by the federal/state agency are ongoing; therefore, funds are allocated to the continuation of these individual programs.¹⁶⁶ The funds available for new client services would decrease per client with the addition of each new workers' compensation client, until no funds would be available for additional new clients.

If the legislature and the Workers' Compensation Board do not address these issues, the Indiana courts will have to provide answers on a piecemeal basis. Employees and employers will be forced to resort to the uncertain, time consuming, and costly litigation process—the very problem that the workers' compensation system was originally designed to avoid.

VIII. CONSIDERATIONS IN CREATING A STATUTORY SCHEME FOR VOCATIONAL REHABILITATION

A. *Classification of Statutes*

Studying the features of other states' vocational rehabilitation systems is helpful in trying to create a system for Indiana. However, no two states provide identical vocational rehabilitation programs for their injured workers,¹⁶⁷ which makes the task of classifying vocational rehabilitation statutes almost impossible. Also, definitions of terms are not uniform across the fifty states. For example, in describing state systems, the terms mandatory and voluntary can mean different things. Some programs, such as Minnesota's, are said to be mandatory because screening of the worker is mandatory, although implementation of the plan is voluntary.¹⁶⁸ Despite the unique nature of vocational rehabilitation systems, it is useful to divide vocational rehabilitation statutes into four general categories: statutes that have a hands-off policy, statutes that require transmittal of information, statutes

165. Conversations with officials of the local offices of Indiana's Office of Vocational Rehabilitation (Aug. 31, 1989 and Sept. 8, 1989).

166. *Id.*

167. *See supra* OVERVIEW, note 27, at 36.

168. MINN. STAT. ANN. § 176.102(4) (West Supp. 1989); Minn. R. 5220.0300(1) (1989); *See also* Minn. R. 5220.1200 (1989) (Rehabilitation services pursuant to an approved rehabilitation plan are mandatory for qualified employees, but if a good faith dispute exists over qualified employee status, the rehabilitation services can be converted into a cash settlement agreement.).

that empower the workers' compensation agency to order vocational rehabilitation, and statutes that mandate evaluation of an injured worker's suitability for vocational rehabilitation.¹⁶⁹

States with a hands-off policy, such as Missouri, may be categorized as having a voluntary vocational rehabilitation system because their statute is silent on the subject or their statute calls for the involvement of the workers' compensation agency only if vocational rehabilitation could affect workers' compensation benefits.¹⁷⁰ Even though the workers' compensation agency is not involved in authorizing vocational rehabilitation services in these states, vocational rehabilitation may take place because of an insurance carrier's offer or because of an individual worker's application to the state department of vocational rehabilitation services. In Tennessee, for example, to facilitate use of services offered by the state department of vocational rehabilitation, the division of workers' compensation must refer the cases of all workers who might benefit from vocational rehabilitation to the department of education, which is responsible for the federal/state program.¹⁷¹

New York and other states have statutes that only require a status report on cases in which the injured worker has a particular type of disability, has a particular degree of impairment, or has not returned to work after a certain length of time.¹⁷² The report informs the workers' compensation agency of the steps that the carrier is taking to return the employee to work, including the provision of vocational rehabilitation.¹⁷³ If this type of statute does not obligate the employer to undertake vocational rehabilitation, the role of the workers' compensation agency is merely informational and the program is purely voluntary. Indiana's current statute¹⁷⁴ is informational because it requires notification from the employer's insurance carrier when an injured worker has been on temporary total disability for more

169. OVERVIEW, *supra* note 27, at 35.

170. MO. ANN. STAT. §§ 287.010-.800 (Vernon 1965 & Supp. 1989). Missouri statutes are silent as far as entitling injured workers to vocational rehabilitation. The division of workers' compensation is mandated to study methods of returning the rehabilitated worker to the job, and is required to cooperate with the department of education's vocational rehabilitation section and the division of employment security's employment service to find suitable employment. MO. ANN. STAT. § 287.144. The state board of education is also required to formulate a plan of cooperation to carry out vocational rehabilitation with the workers' compensation commission. MO. ANN. STAT. § 178.620.

171. TENN. CODE ANN. § 50-6-233(b) (Supp. 1989) states: "The commissioner shall cause the division of workers' compensation to refer all feasible cases for vocational rehabilitation to the department of education." *Id.*

172. N.Y. WORK. COMP. LAW § 15(3)(t)(3)(v) (McKinney 1965 & Supp. 1989) (The New York Workers' Compensation Law also allows the Board to obtain a status review on its own motion.).

173. N.Y. WORK. COMP. LAW §§ 110-111.

174. IND. CODE ANN. §§ 22-3-12-1 to -12-5 (West Supp. 1989).

than twenty-one days,¹⁷⁵ or if it appears that the worker will be permanently prevented from returning to his previous employment.¹⁷⁶ Although Indiana's statute is informational, it does not channel the information through the Workers' Compensation Board, but instead assigns the task of administering vocational rehabilitation to the state Office of Vocational Rehabilitation.¹⁷⁷

California's statute represents a third type of state statute, giving the workers' compensation agency the authority to order vocational rehabilitation upon an interested party's application.¹⁷⁸ In states with such statutes, the workers' compensation agency must approve the application. Some statutes, like Michigan's, also authorize the workers' compensation agency to order vocational rehabilitation upon its own motion.¹⁷⁹ This type of statute is usually combined with another statute requiring the filing of status reports by the insurer or rehabilitation provider.¹⁸⁰ This scheme is a bridge between the purely voluntary vocational rehabilitation programs and the mandatory ones, with the workers' compensation agency's role being that of adjudicator and monitor. This category could be described as a voluntary system in which vocational rehabilitation can become mandatory if the workers' compensation agency so orders.

The fourth type of statute mandates evaluation of a worker's suitability for vocational rehabilitation. Minnesota, an example of this category, takes a very active role in vocational rehabilitation and requires an evaluation of all injured workers who have certain impairments or who have been out of work for a certain period, to determine if the injured worker is a suitable candidate for vocational rehabilitation.¹⁸¹ In states such as Minnesota, the workers' compensation agency may have the authority to make the decision regarding suitability, and it may also authorize the development and implementation of a vocational rehabilitation plan.¹⁸² Although Minnesota has a mandatory screening requirement, it does not make implementation of the plan mandatory.¹⁸³

Effective vocational rehabilitation programs are based on statutes authorizing the workers' compensation agency to order vocational rehabilita-

175. IND. CODE ANN. § 22-3-12-2.

176. *Id.*

177. IND. CODE ANN. § 22-3-12-3.

178. CAL. LAB. CODE § 139.5 (West Supp. 1989) (imposes a mandatory duty on employers to provide vocational rehabilitation once chosen by the employee).

179. MICH. COMP. LAWS ANN. § 418.319 (West 1988).

180. MICH. COMP. LAWS ANN. § 418.801(1).

181. MINN. STAT. ANN. § 176.102 (West Supp. 1990) (In evaluating an injured worker's suitability for VR, a counselor may conduct a skill inventory and consider factors such as life expectancy, educational level, and motivation.).

182. Minn. R. 5220.0400 - .0500 (1989).

183. *Id.*

tion evaluations, plans, and services, as well as authorizing the monitoring of those services and settling disputes. The most successful programs use rehabilitation services provided by private vendors approved by the workers' compensation agency, with additional services provided by the state department of vocational rehabilitation.¹⁸⁴ The comprehensive statutes and administrative rules on which these programs are based address both policy and administrative issues.

B. Eligibility

A comprehensive vocational rehabilitation statute needs to include a policy regarding the eligibility of injured workers to participate in vocational rehabilitation programs. Although injured workers may be statutorily entitled to receive vocational rehabilitation so that they can be restored to useful employment, an administrative screening device must separate the injured worker who needs and will benefit from vocational rehabilitation from other injured workers who may be entitled to vocational rehabilitation but for whom such rehabilitation is not suitable. Comprehensive statutes use, as an administrative screening device, a combination of objective and subjective eligibility tests.¹⁸⁵

Indiana's vocational rehabilitation statute entitles injured workers to vocational rehabilitation and makes injured workers eligible if they are "unable to perform work for which . . . [they have] previous training or experience."¹⁸⁶ However, the statute continues by placing the responsibility of determining eligibility on the Office of Vocational Rehabilitation.¹⁸⁷ Indiana's statute does not indicate whether the Office of Vocational Rehabilitation is to apply the eligibility criteria contained in the vocational rehabilitation statute or its own eligibility criteria. Eligibility is determined by the Indiana Office of Vocational Rehabilitation according to criteria set out by the federal Rehabilitation Act of 1973¹⁸⁸ that governs the federal/state agency.

Operating under the mandate of the federal Rehabilitation Act of 1973, the state Office of Vocational Rehabilitation supplies vocational rehabilitation to individuals with handicaps as defined by the Act.¹⁸⁹ Under the

184. J. GARDNER, VOCATIONAL REHABILITATION OUTCOMES: EVIDENCE FROM NEW YORK 22-32 (1986) (Gardner has prepared a study which analyzes the New York workers' compensation system.).

185. Referral for evaluation after a certain number of days is an example of an objective eligibility test. Subjective eligibility tests include assessing the injured worker's motivation to participate in a vocational rehabilitation program.

186. IND. CODE ANN. §§ 22-3-12-1 to 22-3-12-5 (West Supp. 1989).

187. IND. CODE ANN. § 22-3-12-4.

188. Rehabilitation Services Administration Act, 29 U.S.C.A. §§ 701-96 (West 1985 & Supp. 1989).

189. " '[I]ndividual with handicaps' means any individual who (i) has a physical or

Act, an individual is handicapped and eligible for vocational rehabilitation when that individual has any functional limitation that poses a handicap to employment and the vocational rehabilitation can reasonably be expected to remove the handicap to employment.¹⁹⁰ "Handicap to employment" is defined as any disability that interferes with an individual's getting, keeping, and doing a job commensurate with the individual's abilities.¹⁹¹ In determining whether the individual is handicapped in terms of employment, previous employment, training, educational level, and residual and transferable skills are considered.¹⁹² In evaluating whether the vocational rehabilitation will remove the handicap, the stability of the individual's medical condition, the individual's motivation, and the surrounding labor market are taken into account.¹⁹³

The Act's definitions of handicapped¹⁹⁴ and disability¹⁹⁵ reflect the Act's broad goal to maximize the individual's potential. Lengthy and costly retraining programs are often used in pursuit of this goal. Maximizing an individual's potential, however, is not the goal of the majority of state workers' compensation vocational rehabilitation programs. The goal in workers' compensation cases is to provide vocational rehabilitation that will return injured workers to useful employment whether or not doing so causes the injured workers to realize their maximum potential.¹⁹⁶ To this end, the following priority listing, with slight variations, is used by most state workers'

mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services. . . ."

29 U.S.C.A. § 706(8)(A) (West Supp. 1989).

190. 29 U.S.C.A. § 706(8)(A).

191. State Vocational Rehabilitation Services Program, 34 C.F.R. § 361.1(2) (1987).

192. 29 U.S.C.A. § 706(5) (section delineates the factors that should be used to determine if an individual is handicapped in terms of employment).

193. *Id.* Under this section, the work habits, motivations, and social and behavior patterns seem to be quite significant. 29 U.S.C.A. § 706(5)(C).

194. *See supra* note 189.

195. 29 U.S.C.A. § 706. Although this section does not give a specific definition of disability, a number of the subsections give extensive lists of handicaps or mental and physical conditions and diseases which qualify as disabilities.

196. *See, e.g.,* ALA. CODE § 25-5-77(c) (1986) (If, upon examination, vocational rehabilitation is "reasonably calculated to restore the employee to gainful employment," the costs must be borne by the employer. *Id.*); CAL. LAB. CODE § 3202 (West 1961 & Supp. 1989) (This provision simply states that the Workmen's Compensation Act must be broadly construed. However, California courts have used this section to determine that the purpose of the Act is to secure seasonable cure and relief from injury in order to return the employee to work at the earliest possible time. *Davidson v. Indus. Accident Comm'n.*, 50 Cal. Rptr. 76 (Cal. App. 1966)); GA. CODE ANN. § 34-9-200.1(a) (Michie 1988) (employer must furnish employee with benefits if the State Board of Workers' Compensation determines that rehabilitation appears likely to return the employee to suitable employment); MASS. GEN. LAWS ANN. ch. 152, § 30H (West 1988) (agency determination whether vocational rehabilitation is necessary and feasible to return the employee to suitable employment).

compensation vocational rehabilitation systems: 1.) return the employee to the same job with the previous employer; 2.) return the employee to the same job with the previous employer, with slight modifications; 3.) return the employee to a different job with the previous employer; 4.) return the employee to a different employer, with the same or different job; and 5.) retrain.¹⁹⁷ Since the workers' compensation goals for vocational rehabilitation do not match those of the Indiana Office of Vocational Rehabilitation, Indiana may wish to consider establishing its own rehabilitation unit with eligibility criteria that reflect the goal of workers' compensation.

Indiana's statute requires that the first report of injury be sent to the Department of Human Services Office of Vocational Rehabilitation after twenty-one days of temporary total disability.¹⁹⁸ Soon after that time, local offices of vocational rehabilitation must determine eligibility for any injured worker who applies for vocational rehabilitation.¹⁹⁹ After only twenty-one days of temporary total disability, local vocational rehabilitation offices are sending notices to injured workers with acute medical problems that will probably be corrected within thirty days with medical attention. It is not the function of the state Office of Vocational Rehabilitation to deal with acute medical problems such as cut fingers and sprained ankles; rather, the office deals with an individual once that individual has reached maximum medical improvement. Because the Indiana Office of Vocational Rehabilitation cannot help those with acute medical problems, Indiana's twenty-one day notice requirement makes unnecessary paperwork for the state office. To reduce needless paperwork, the statute could be amended to allow greater time on temporary total disability before notice must be given. Additionally, administrative rules could require the Indianapolis Office of Vocational Rehabilitation to screen the first reports of injury for injured workers with acute medical problems before sending any reports to the local offices.

Time limits on state requirements for notifying the workers' compensation agency of a possible vocational rehabilitation candidate range from thirty days for Minnesota workers with back injuries to ninety days of lost work time for Michigan injured workers.²⁰⁰ Both the Insurance Rehabilitation Study Group and the International Association of Industrial Accident

197. See letter from Robert J. Robinson to Professor Ruth C. Vance (Oct. 14, 1988) (discussion of priorities under Montana Vocational Rehabilitation Procedures and attached memorandum); See, e.g., *infra* note 204; See *infra* note 207; Niss, *No Litigation Allowed: Maine Rehabilitation Statute Revised*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Sept./Oct., 1989, 17, 18 [hereinafter Niss, *No Litigation*]. Most statutes do not have specific priority listings, but use administrative procedures to determine proper priority status.

198. IND. CODE ANN. § 22-3-12-2 (West Supp. 1989).

199. IND. CODE ANN. § 22-3-12-4(b) (West Supp. 1989).

200. MICH. COMP. LAWS ANN. § 418.381(1) (West 1988); MINN. STAT. ANN. § 176.235 (West 1986).

Boards and Commissions (IAIABC) recommend notifying the workers' compensation agency not later than 120 days after temporary total disability begins, or sooner if it appears that the injured worker will not be able to return to work.²⁰¹

Besides a notice requirement, most states, including Michigan and Minnesota, and the Insurance Rehabilitation Study Group provide that injured workers are eligible for vocational rehabilitation if they are probably or permanently unable to either engage in the occupation they were in at the time of the injury or engage in work for which they have training or experience while maintaining their prior earning level.²⁰² The Insurance Rehabilitation Study Group adds the requirement that is part of most evaluations, that the injured worker must reasonably be expected to benefit from vocational rehabilitation.²⁰³ Many providers of rehabilitation services believe that the injured worker must cooperate with the program if it is to be successful. Therefore, Ohio requires and the Insurance Rehabilitation Study Group recommends that eligibility also depends on the injured worker's agreement to cooperate with the vocational rehabilitation program.

An injured worker who meets a state's objective and subjective criteria becomes eligible for vocational rehabilitation. At that point, a rehabilitation professional must determine whether the injured worker will benefit from vocational rehabilitation by doing a thorough evaluation.

C. *Evaluation of Need for Vocational Rehabilitation*

Once an injured worker is determined to be eligible for vocational rehabilitation, the worker's suitability for vocational rehabilitation must be evaluated.²⁰⁴ An injured worker who has experienced a loss in earning capacity and who probably will benefit from a vocational rehabilitation program is suitable for vocational rehabilitation.²⁰⁵ In determining suitability,

201. Insurance Rehabilitation Study Group, *Recommendations of the Insurance Rehabilitation Study Group on Rehabilitation Provisions Under Insurance Legislation* [hereinafter *Insurance Rehabilitation*] (copy on file in the offices of Professor Ruth Vance, Valparaiso University School of Law); International Association of Industrial Accident Boards and Commissions, *Model Program: Medical Care and Rehabilitation of Occupationally Disabled Employees* 8 (1979) (copy on file in the offices of Professor Ruth Vance, Valparaiso University School of Law).

202. *Insurance Rehabilitation*, *supra* note 201.

203. *Id.*

204. See, e.g., J. LEWIS, *THE ILLINOIS WORKERS' COMPENSATION SYSTEM: A REPORT TO THE GOVERNOR* 69 (1989). This report dealt with findings of a study of the Illinois workers' compensation system. The study deals with the role of workers' compensation in general and has a specific chapter that reviews medical and vocational rehabilitation services.

205. Crawford, *Vocational Rehabilitation for the Industrially Injured Worker*, 28 U. FLA. L. REV. 101, 119 (1975); J. LEWIS, *supra* note 204. However, the Illinois courts have had to set the bounds for the rehabilitation programs because Illinois' statute is silent. The Illinois

the evaluator ascertains whether the injured worker possesses other skills that could be used without substantial retraining; the injured worker's life expectancy and motivations are also taken into account.²⁰⁶

The evaluator then devises a plan that is a reasonable approach to re-employment, one that will accomplish the goal of reemployment for the least cost. Cost-effective programs place a high priority on returning the injured worker to the same employer, with slight job modifications or in a different position,²⁰⁷ before looking at the possibility of returning the person to work with a new employer in a different position with extensive retraining.²⁰⁸ The written rehabilitation plan should include the rehabilitation goal, the projected goal date, the services necessary to reach that goal, and the estimated costs of implementing the plan.²⁰⁹ A labor market analysis should also be part of the plan if a change of occupation is indicated.²¹⁰ Retraining should only be undertaken if it is determined that an injured worker cannot return to his former earning level with his existing skills and experience. Since self-employment is risky, any plan recommending self-employment should also include a feasibility evaluation.²¹¹

The evaluation for suitability may be conducted by the workers' compensation agency personnel or by a rehabilitation counselor from either the private or the public sector. The rehabilitation counselor who performs the evaluation and writes a plan may or may not be the person who implements it. Before implementing the plan, the evaluator submits it to the employee and the employer/insurer for approval.

Approval of the plan by the rehabilitation provider, the employee, and

Supreme Court has specifically noted that other states require such an analysis and that this analysis should be enacted by statute in Illinois. *National Tea Co. v. Indus. Comm'n*, 97 Ill. 2d 424, 454 N.E.2d 672 (1983); *Hunter Corp. v. Indus. Comm'n*, 86 Ill. 2d 489, 427 N.E.2d 1247 (1981); *See, e.g.*, MINN. STAT. ANN. § 176.102(6) (West 1986); NEB. REV. STAT. § 48-162.01 (1978); MD. ANN. CODE art. 101, § 36(9)(a) (1979).

206. J. LEWIS, *supra* note 204, at 69.

207. Address by Douglas K. Langham, Workers' Compensation Conference at Storrs, Connecticut (May 1, 1987) (Speaker Langham's presentation dealt with worker rehabilitation in Michigan. A copy of the speech is on file in the office of Professor Ruth Vance, Valparaiso University School of Law); Memorandum from Christine Walker to Lynn Swisher (Mar. 3, 1989) (discussing changes to be made in the AASCIF Fact Book concerning the Ohio Rehabilitation Division of the Industrial Commission).

208. Langham, *supra* note 207, at 5; Memorandum, *supra* note 207.

209. J. LEWIS, *supra* note 204, at 69; Transcript of Douglas K. Langham, "Remarks to the Workers' Compensation Advisory Committee at Howell, Michigan" 5 (Jan. 16, 1987); Z Aidman & Clifton, REHABILITATION IN THE MINNESOTA WORKERS' COMPENSATION SYSTEM, REPORT TO THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY 2 (1988) [hereinafter Z Aidman & Clifton].

210. Z Aidman & Clifton, *supra* note 209, at 2.

211. Langham, *supra* note 207 (general observation by Langham supported by Exhibit 4 attached to his speech); Langham, *supra* note 209, at 5.

the employer or insurance company is important to the plan's eventual success. When all interested parties agree to the plan, a cooperative climate is more likely, which enhances the probability of a successful outcome. Some state statutes, such as Minnesota's, provide that an authorized individual within the workers' compensation agency must approve or reject a plan and has the power to order a plan's implementation.²¹² In such states, the workers' compensation agency is actively involved in determining whether the program is necessary to successfully return the employee to work. Other state statutes focus on the workers' compensation agency as dispute resolver.²¹³ If all the interested parties do not agree on the plan, the workers' compensation agency becomes essential in resolving the disputes, which usually concern the injured worker's need for vocational rehabilitation and the appropriateness of the submitted plan.

D. Providers

Once a vocational rehabilitation plan has been approved, it must be implemented, either by the workers' compensation agency, the federal/state agency, or the private sector. How the plan will be implemented depends on the structure of the state's workers' compensation statute. Rehabilitation units within workers' compensation agencies deliver vocational rehabilitation services by three primary methods: direct delivery, referral, and referral with monitoring.²¹⁴ Most state rehabilitation units that directly provide services to claimants are providing only medical services.²¹⁵ In addition, most direct provision states are not considered highly industrialized states.²¹⁶ Comprehensive services provided by a state rehabilitation unit would probably be too financially burdensome for a heavily industrialized state. Ohio is rather unique in being able to directly provide both medical and vocational rehabilitation services through a public agency designed solely for injured workers.²¹⁷ The fact that the state of Ohio is the sole

212. MINN. STAT. ANN. § 176.102(6) (West Supp. 1989).

213. D. Langham, *supra* note 207, at 3, 6 (Langham uses Michigan to show that, in some instances, the only alternative available to the parties is the dispute resolution process).

214. *See supra* OVERVIEW, note 27, at 36 (the study also noted that approximately half of those states that have rehabilitation units use the direct approach; however, most of these states only provide medical and not vocational services); *See generally* J. G. Householter, An Overview of Industrial Vocational Rehabilitation Statutes and Approaches (1986) (unpublished article from which a condensed version is reprinted in Householter, *An Overview of Industrial Vocational Rehabilitation Statutes and Approaches*, 74 ILL. B.J. 342 (1986)) (Unpublished version of article that appears in the Illinois Bar Journal is on file in the office of Professor Ruth Vance, Valparaiso University School of Law).

215. OVERVIEW, *supra* note 214, at 29 (health care service providers are "intimately involved" with physical rehabilitation, but not vocational rehabilitation); *See also* Householter, *supra* note 214.

216. Householter, *supra* note 214.

217. Olsheski & Growick, *Industrial Rehabilitation in the Public Sector: The Ohio Ex-*

underwriter of workers' compensation insurance and that part of all premiums paid support this program probably explains why Ohio is able to meet the financial burden of directly providing services. Most states' vocational rehabilitation units therefore operate on a referral or a referral and monitoring basis.²¹⁸ Depending on state statute, referral can be made to either a public or a private provider of vocational rehabilitation services.²¹⁹

Results of referrals to public and private agencies may differ because of the agencies' differing goals. The traditional state vocational rehabilitation agency's goal is best described as "maximizing the client's potential," while private providers are more interested in a speedy return to work.²²⁰ A 1986 study of vocational rehabilitation outcomes from the state of New York, undertaken by the Workers' Compensation Research Institute, compared results of public and private vocational rehabilitation providers.²²¹ The New York Office of Vocational Rehabilitation handles clients with all kinds of handicaps to employment. Workers' compensation cases represent less than 5% of the agency's caseload at any time.²²² The public agency's objective is "to maximize the client's potential" rather than to quickly return the injured worker to work using existing skills.²²³ In New York, private rehabilitation providers render services in almost 30% of the workers' compensation cases needing vocational rehabilitation services.²²⁴ Overall, the study showed that the private providers had higher completion rates, shorter programs, higher rates of return to work, and better earnings recovery.²²⁵

The results of the New York study showed that with approximately the same number of interruptions in programs for medical reasons, 80% of participants in private programs completed their programs compared to only 70% of participants in public programs.²²⁶ The program length and the time between the injury and the program start were longer for public programs. Perhaps participants in public programs become discouraged or otherwise find themselves unwilling or unable to complete a program.

perience, 1989 J. OF REHABILITATION 46.

218. OVERVIEW, *supra* note 214, at 36; *see also* Householter, *supra* note 214.

219. *See generally* LAWS AND PROGRAMS, *supra* note 15 (a general study done on workers' compensation rehabilitation including charts and studies on modes and programs of rehabilitation used).

220. J. GARDNER, VOCATIONAL REHABILITATION OUTCOMES: EVIDENCE FROM NEW YORK xii (1986).

221. *See generally* J. GARDNER, *supra* note 220, at 22-32.

222. *Id.* at 6.

223. *Id.* at 7.

224. *Id.* (Table 1.1 states the percentage of cases involving public versus private providers.).

225. *Id.* at xii.

226. *Id.* at 22 (graph analysis in figure 3.1).

Among injured workers completing programs, the median program length for private programs was eight months,²²⁷ while the median program length for public programs was eighteen months.²²⁸ Additionally, less than 6% of private programs lasted longer than thirty-six months, while approximately 19% of public programs exceeded that limit.²²⁹ In testifying before Indiana's Subcommittee on Vocational Rehabilitation, the director of the Department of Human Services stated that the average program length for workers' compensation recipients participating in the federal/state program is twenty-nine months.²³⁰ The greater program length and lower completion rate for participants in public programs is probably attributable to the public agency's goal of "maximizing the client's potential."

The study also showed that injured workers completing private programs had a higher rate of return to work than did workers completing public programs.²³¹ Out of every 1,000 people completing private programs, fifty more people returned to work than would have if they had completed public programs.²³² If these fifty people earned what the study determined to be the average wage for those returning to work (\$208 a week),²³³ together they would have earned approximately half a million dollars in the first year. Proponents of public programs might say that this is not a net gain because private programs are more costly than public programs. But since this study showed that private programs' median length is less than half that of public programs, the average cost per person is probably less for a private program.

The New York study further revealed that workers participating in private programs were more likely to have an earnings recovery of at least 90% of pre-injury earnings after adjustment for a normal earnings growth.²³⁴ Those returning to work with their pre-injury employer usually have an earnings recovery approximately twice that of a person who returns to work with a different employer.²³⁵ Observers might say that the differences in earnings recovery can be attributed to the larger number of private program participants returning to their pre-injury employer. But even when only participants returning to their pre-injury employer are compared, 81% of the private participants achieved a 90% earnings recovery, compared to

227. *Id.*

228. *Id.*

229. *Id.* at 24 (under heading "Return to Work").

230. Vocational Rehabilitation Subcommittee, Interim Study Committee on Insurance Issues, Indiana House of Representatives, Minutes of September 20, 1988.

231. J. GARDNER, *supra* note 220, at 24-25.

232. *Id.* at 25.

233. *Id.*

234. *Id.* at 25-27.

235. *Id.* at 28.

52% of public agency participants.²³⁶ Individuals who participate in a private program and have a higher earnings recovery may cause employers to save on post-rehabilitation workers' compensation benefits. Although state statutory provisions vary, post-rehabilitation benefits for reduced earnings are usually two-thirds of the difference between pre-injury and post-rehabilitation earnings.²³⁷

The New York study also looked at early intervention as it affects vocational rehabilitation outcomes. People who started rehabilitation earlier were more likely to complete the program.²³⁸ Whether the program was provided by a public or private provider, completion rates topped 80% when the program started three months after injury.²³⁹ Completion rates fell to 75% when the program was not started until thirty-six months after injury.²⁴⁰ The Workers' Compensation Research Institute pointed out that its statistics may underestimate the importance of early intervention because New York's vocational rehabilitation system is voluntary.²⁴¹ All the people who could have benefited did not because they failed to enter a program. Thus, they are not included in the study. But perhaps this is inaccurate because the results might not be as impressive if unmotivated participants were included.

Early intervention had more of an impact on earnings recovery for participants in private programs. For every month of delay, there was almost a 1% reduction in post-rehabilitation earnings in the first year.²⁴² Participants in public programs were affected in the same way but to a lesser degree. Although early intervention did have an impact on both public and private programs, private programs showed higher rates of completion, shorter programs, and higher rates of earnings recovery than public programs, regardless of whether there was early intervention.

Early intervention does not seem to be the crucial factor in the difference between public and private providers' outcomes. Other explanations such as differences in program content and efficiency must be considered. Public agencies' programs are longer because they offer different services that are targeted at disabled clients of all backgrounds. The emphasis on retraining causes the programs to be longer than those in the private sector. The longer the program, the harder it may be to complete.

The more successful outcomes in the private sector may be linked to

236. *Id.*

237. *Id.*

238. *Id.* at 33.

239. *Id.* at 35.

240. *Id.* at 35-36.

241. *Id.* at 36.

242. *Id.*

efficiency. The private providers may be less burdened by bureaucratic procedures and may have a lighter caseload. Further, where the provider profits, there is more incentive to be efficient.

Perhaps the public agencies handle more difficult cases since they are usually the last resort of the severely disabled. The New York report suggested, however, that the public agency may not necessarily receive the more difficult cases.

Vocational rehabilitation services fall into four main categories: counseling and guidance, evaluation, job modification and placement, and education and training.²⁴³ Obviously, the most frequently used service is counseling and guidance since all cases begin with an initial assessment and progress with counseling regarding careers, goals, and job-search skills.²⁴⁴ Evaluation services include vocational and physical testing and job analysis that determines the physical demands of particular job tasks. Job modification and placement services involve changing the method of performing job tasks or changing the tasks themselves; placement services are similar to those of an employment agency.²⁴⁵ Labor market surveys are also undertaken where appropriate.²⁴⁶ Education and training can be on-the-job, or vocational or academic classroom education. The provider, whether public or private, must make arrangements with schools and employers for education or training.²⁴⁷ Other services, not part of the four categories listed above, include coordinating vocational rehabilitation with physical rehabilitation and government services, arranging for home modification, and testifying at workers' compensation hearings.²⁴⁸

Most vocational rehabilitation plans prescribe a combination of these services to accomplish an identified goal; public or private providers can both offer any of these services. Although both public and private providers can offer the same types of services, their method of delivering these services differs. Usually, private providers can actually perform the services in all the categories listed above except education and training.²⁴⁹ Most public providers, including Indiana's Office of Vocational Rehabilitation,²⁵⁰ do not directly provide most services, but instead have rehabilitation counselors who act as brokers of services. The counselors prepare a plan, arrange for

243. J. GARDNER, VOCATIONAL REHABILITATION IN FLORIDA WORKERS' COMPENSATION: REHABILITANTS, SERVICES, COSTS, AND OUTCOMES 18 (1988).

244. *Id.* at 17-18.

245. *Id.* at 18.

246. *Id.* at 17.

247. *Id.* at 18.

248. *Id.*

249. Conversations with local officials of the Indiana Office of Vocational Rehabilitation (Aug. 31, 1989 and Sept. 8, 1989).

250. *Id.*

the services with outside providers, and monitor the participant's progress. The counselor also performs placement services.²⁵¹

Although Indiana's vocational rehabilitation statute does not create a rehabilitation unit within the Workers' Compensation Board, its system may be termed a referral system without monitoring because notice must be given to the state Office of Vocational Rehabilitation.²⁵² At the point of referral, the Workers' Compensation Board loses control over the vocational rehabilitation of the injured worker. To make informed decisions regarding the injured worker, the Workers' Compensation Board should receive status reports from the Office of Vocational Rehabilitation. Because notice is given to the state Office of Vocational Rehabilitation, one question concerns whether that agency may be the only provider of vocational rehabilitation services.

If Indiana decides to place the responsibility for paying for vocational rehabilitation upon the employer, employers may wish to refer cases to both private and public providers. If the Office of Vocational Rehabilitation is not able to adequately service Indiana's injured workers, the Workers' Compensation Board may want to be able to refer cases to both public and private providers. The method of financing the program once again becomes important. If the taxpayers are to finance the program, it seems that the Office of Vocational Rehabilitation can be the only provider. If the employer is made responsible, there are more options. If a rehabilitation unit is created within the Workers' Compensation Board, the unit itself could provide services or the director could refer injured workers to either public or private providers and monitor the participant's progress in the program. Under any of these methods, use of the Office of Vocational Rehabilitation as a provider requires that there be a cooperative agreement between the two agencies.

States with comprehensive vocational rehabilitation programs either certify, license, or register private providers of vocational rehabilitation services. The states have some system for approving private providers of services in order to keep out unscrupulous people. Both the insurance industry and the International Association of Industrial Accident Boards and Commissions recommend in their model acts that the administrator of the state vocational rehabilitation unit approve qualified individuals, institutions, and facilities as providers of services.²⁵³ In fact, Indiana's proposed SB 543 authorized the vocational rehabilitation division to certify providers of services

251. *Id.*

252. IND. CODE ANN. § 22-3-12-2 (West Supp. 1989).

253. REHABILITATION-WORKERS' COMPENSATION MODEL APPROACH (Alliance of American Insurers 1988); INSURANCE REHABILITATION, *supra* note 201; MODEL PROGRAM: MEDICAL CARE AND REHABILITATION OF OCCUPATIONALLY DISABLED EMPLOYEES (IAIABC 1977).

and to maintain a list of certified providers.²⁵⁴

Minnesota perhaps has one of the most comprehensive certification procedures. In Minnesota, an entity may be approved either as a vendor of services or as a qualified rehabilitation consultant who develops and monitors medical and vocational rehabilitation plans, but not as both.²⁵⁵ The state Department of Labor and Industry specifies educational and experience requirements necessary for approval as a qualified rehabilitation consultant.²⁵⁶ The department registers the qualified rehabilitation consultants, who must renew their registration annually.²⁵⁷ The administrative rules also provide a procedure for approving firms and registered rehabilitation vendors.²⁵⁸ The department rules set standards of performance that are divided into minimum standards, professional conduct, communications, responsibilities, continuing education, and business practices.²⁵⁹ There are rules on fee monitoring, reasonable and necessary services, reporting requirements, and estimated goal dates and costs.²⁶⁰ Finally, the rules also provide ways of disciplining registered consultants and vendors and revoking department approval.²⁶¹

Michigan recognizes both public and private facilities, and although facilities do not need the bureau of vocational rehabilitation's approval to operate, the bureau director must order an evaluation of services from bureau-approved facilities.²⁶² To obtain approval, providers must meet acceptable educational and experience levels and comply with mandatory reporting requirements.²⁶³

Louisiana has taken the licensing approach to qualifying rehabilitation providers.²⁶⁴ Louisiana's statute sets up a licensed professional vocational rehabilitation counselors board of examiners within the Department of Social Services.²⁶⁵ Any person seeking a license must file an application with the board, pay a fee, furnish evidence of meeting certain educational and experience requirements, and pass a written or oral examination.²⁶⁶

254. See *supra* notes 132-33 and accompanying text.

255. MINN. STAT. ANN. § 176.102(10) (West Supp. 1989).

256. MINN. STAT. ANN. § 176.102(2).

257. MINN. R. 5220.1400, .1500 (1989).

258. MINN. R. 5220.1600, .1700.

259. MINN. R. 5220.1800-.1805.

260. MINN. R. 5220.1900.

261. MINN. R. 5220.1500(5).

262. E. Welch, "Rehabilitation," in *Workers' Compensation in Michigan: Law & Practice* § 17.02; MICH. COMP. LAWS ANN. § 418.315(5) (West Supp. 1989).

263. MICH. COMP. LAWS ANN. § 418.315(5)-(6).

264. LA. REV. STAT. ANN. §§ 37:3441, -:3452 and § 36:478(I) (West Supp. 1990).

265. LA. REV. STAT. ANN. § 37.3444 (West Supp. 1990).

266. LA. REV. STAT. ANN. § 37.3447 (West Supp. 1990).

With the use of private vocational rehabilitation providers comes the question of how the provider will be chosen. If the state has a system for approving service providers, choosing from the group of certified providers helps to assure quality services. An injured worker should be allowed to choose who will evaluate and draw up a rehabilitation plan and who will provide those services for many of the same reasons that 34 states allow employees to choose their physicians for medical care.²⁶⁷ Choosing a doctor or a rehabilitation specialist is a personal decision. The employee who has confidence in the rehabilitation specialist is more likely to have a successful rehabilitation. However, an injured worker probably has never dealt with a rehabilitation specialist before the injury, while the worker probably has had experience with doctors. Therefore, it may be wise to allow the insurance carrier to choose the initial rehabilitation specialist, while allowing the employee to retain the right to change providers. Since it is the objective of both the employer and employee to obtain the best quality of vocational rehabilitation and return the injured worker to work as soon as possible, it seems logical to allow both sides input on the choice of provider. At the same time, a state could prevent abuses by limiting the number of changes in provider that the employee can make; Minnesota, for example, has done this. The administrative agency also can have the final word on who the provider must be. If Indiana decides to use private providers, it will want to look into methods of approving providers and methods of choosing providers.

Michigan's system first assumes that vocational rehabilitation will be undertaken voluntarily by both parties²⁶⁸ with the employer and employee agreeing on the provider. If there is no agreement, the director of the bureau of rehabilitation refers the employee to a bureau-approved facility.²⁶⁹ In Minnesota, although the employer initially chooses the qualified rehabilitation consultant, the employee may object, select a different consultant, and notify the commissioner and employer in writing.²⁷⁰ The Minnesota rules allow the employee the final decision on the rehabilitation consultant; it is up to the commissioner to schedule an administrative conference to discuss the change.²⁷¹ To prevent employee abuses, Minnesota allows the employee to choose a different qualified rehabilitation consultant once during the first sixty days after the first personal contact between the employee and the original consultant, and once after that sixty day period.²⁷² Any

267. FOUNDATION FOR THE ADVANCEMENT OF INDUSTRIAL RESEARCH, *THE VICTIMS OF GOVERNMENT: REFORMING INDIANA'S WORKERS' COMPENSATION LAW* (1986).

268. MICH. COMP. LAWS ANN. § 418.319(1) (West Supp. 1989) (the director may take action if "such services are not voluntarily offered").

269. *Id.*

270. MINN. R. 5220.0300(2) (1989).

271. *Id.*

272. MINN. STAT. ANN. § 176.102(4)(a) (West Supp. 1989).

subsequent requests must be approved by the commissioner or compensation judge taking into consideration the best interests of the parties.²⁷³

E. Agency Monitoring and Dispute Resolution

A comprehensive vocational rehabilitation statute provides a system for monitoring rehabilitation and resolving disputes. In appointing an administrator of vocational rehabilitation within the workers' compensation agency, most statutes authorize the administrator to monitor and supervise the provision of vocational rehabilitation services.²⁷⁴ This monitoring can be accomplished through a variety of methods, including establishing procedures for certifying providers of services and requiring status reports from the insurer or the provider.²⁷⁵

Most program monitoring is done at the individual case level, but there are actually three levels of monitoring: micro-monitoring, macro-monitoring, and program-monitoring.²⁷⁶ States with comprehensive programs use micro-monitoring to check the progress of individual cases to ensure that statutory goals are met.²⁷⁷ Using computers enables the agency to determine whether all required procedures are being followed and to take appropriate steps with the employer/insurer if they are not. Macro-monitoring can be performed to detect patterns of conduct among insurers and providers in terms of efficiency in handling cases, quality of services, and results obtained. Such monitoring may lead to making inquiries of the participants, counseling them, and setting standards for their performance. Macro-monitoring can also include other participants in the system such as agency personnel and administrative law judges.²⁷⁸ Program monitoring is essential to evaluate the overall workers' compensation system as well as the vocational rehabilitation program.²⁷⁹ The information gained through program monitoring can be used to make annual reports to the legislature on how well the agency is performing under the statute and to make recommendations for improvements. The monitoring system is essential if there is to be enforcement of the vocational rehabilitation program and data collection for future studies of the system.

273. *Id.*

274. *See generally* OFFICE OF STATE LIAISON AND LEGISLATIVE ANALYSIS, U.S. DEPARTMENT OF LABOR, STATE WORKERS' COMPENSATION: ADMINISTRATION PROFILES (1986) [hereinafter ADMINISTRATION PROFILES].

275. *See generally* Comment, *Vocational Rehabilitation in the Workers' Compensation System*, 33 ARK. L. REV. 723, 731-36 (1980) (The comment reviews the system used in Arkansas and then compares proposed procedures to procedures used by a number of other states, including Minnesota, Florida, and New York.).

276. *See* Niss, *No Litigation*, *supra* note 197, at 5-6.

277. *Id.*

278. *Id.*

279. *Id.*

Indiana's statute makes no provision for monitoring vocational rehabilitation.²⁸⁰ The Workers' Compensation Board has no way to enforce the notice provision because the Board is not informed when the insurer sends notice to the Office of Vocational Rehabilitation. If the notice provision is not enforced, the statute is meaningless. Therefore, the Workers' Compensation Board must perform the function of monitoring for enforcement purposes. To enforce the notice provision, the Workers' Compensation Board must be informed when the insurer notifies the Office of Vocational Rehabilitation of a possibly eligible injured worker. In addition, the Workers' Compensation Board should require the Office of Vocational Rehabilitation to periodically file status reports so the board can monitor the vocational rehabilitation system's delivery of benefits to workers' compensation claimants.

Regarding the data collection component of a monitoring system, the Office of Vocational Rehabilitation currently has computer facilities for collecting information on its cases.²⁸¹ Conversations with local Office of Vocational Rehabilitation officials indicate that local offices have not received instructions on collecting information on their workers' compensation cases.²⁸² Because the Office of Vocational Rehabilitation is collecting data on its other cases and has the computer capability to collect data on workers' compensation cases, this agency can best collect data. At present, it is impractical to expect the Workers' Compensation Board to collect this data because the Office of Vocational Rehabilitation is not reporting to the Workers' Compensation Board and because the Workers' Compensation Board does not have the computer management system necessary for such a task.

The necessity of a cooperative agreement between the Workers' Compensation Board and the Department of Human Services Office of Vocational Rehabilitation becomes apparent in discussing the need for a monitoring system. Several states do have such agreements, which are mandated by statutes governing each agency.²⁸³

In its role as a monitor, the workers' compensation agency also must resolve disputes that arise during all stages of the vocational rehabilitation process. A key consideration in devising a system for dispute resolution is avoidance of delay. Delay in resolving disputes may prevent the early inter-

280. IND. CODE ANN. §§ 22-3-12-1 to -12-5 (Burns Supp. 1989) (the statutes do not cover monitoring procedures).

281. Conversations with officials at the local offices of Indiana's Office of Vocational Rehabilitation (Aug. 31, 1989 and Sept. 8, 1989).

282. *Id.*

283. See LAWS AND PROGRAMS, *supra* note 15, at 105-09 (chart of states that have such agreements and whether those agreements seem helpful).

vention that is important to the success of a rehabilitation plan.²⁸⁴ Delay for hearings also interrupts plans in progress, increasing completion time, cost, and the risk of noncompletion.

A satisfactory solution to this problem of dispute resolution may be hard to find. Most vocational rehabilitation units use the traditional administrative law process to resolve disputes.²⁸⁵ Authorizing one person within the rehabilitation unit who is knowledgeable about vocational rehabilitation to resolve disputes may cause the Workers' Compensation Board to perform more efficiently. Even using methods of alternative dispute resolution, such as mediation, will not avoid delay if satisfactory results are not achieved.

Under Indiana's current statute, it is unclear whether a Workers' Compensation Board hearing officer has the authority to rule on a dispute regarding vocational rehabilitation administered by the Office of Vocational Rehabilitation. Indiana's Office of Vocational Rehabilitation already has a dispute resolution system in place.²⁸⁶ If, after talking to a counselor, the Office of Vocational Rehabilitation client is dissatisfied, he has the option of seeking an informal supervisory review with the counselor's supervisor or proceeding immediately to the formal administrative hearing process.²⁸⁷ A client dissatisfied with the decision resulting from either process has the right to go to the next appellate level.²⁸⁸ The client may be represented by legal counsel at any point in the process.²⁸⁹ The director of the Division of Rehabilitation Services decides whether to adopt or review the administrative hearing officer's decision.²⁹⁰ A client dissatisfied with the director's decision may file a lawsuit in a county circuit or superior court.²⁹¹ Some injured workers receiving services from the Office of Vocational Rehabilitation may have vocational rehabilitation disputes that also involve workers' compensation issues. As Indiana's statute now stands, there is no guidance as to how these disputes should be resolved.²⁹² The issue of dispute resolution is another topic that a cooperative agreement between the two agencies could address.

284. Note, *Vocational Rehabilitation for the Industrially Injured Worker*, 28 U. FLA. L. REV. 101, 120 (1975).

285. ADMINISTRATION PROFILES, *supra* note 274.

286. OFFICE OF VOCATIONAL REHABILITATION, INDIANA DEPARTMENT OF HUMAN SERVICES, WHAT YOU SHOULD KNOW ABOUT VOCATIONAL REHABILITATION 9-13.

287. *Id.* at 10.

288. *Id.* at 11.

289. *Id.* at 13.

290. *Id.* at 12.

291. *Id.* at 13.

292. IND. CODE ANN. § 22-3-12 (West Supp. 1989) (statute is silent on method of dispute resolution).

F. Vocational Rehabilitation Benefits

The vocational rehabilitation benefits available to injured workers typically include the cost of providers' services, including any job modification, retraining, or educational program undertaken.²⁹³ This benefit includes the cost of tuition, books, tools, and other basic materials needed to return the worker to employment.²⁹⁴ In addition to paying the traditional vocational rehabilitation expenses, Minnesota and Washington also provide child care expenses,²⁹⁵ and Montana includes relocation expenses related to the job search.²⁹⁶

Many state statutes supplement normal workers' compensation payments by making maintenance payments part of vocational rehabilitation benefits.²⁹⁷ The majority of state statutes provide that the employer is responsible for maintenance in the form of board, lodging, and travel for the injured worker if the vocational rehabilitation program requires the worker to be away from home.²⁹⁸ Approximately twenty-one state statutes award the entire cost of maintenance,²⁹⁹ and twelve state statutes limit the amount of maintenance benefits.³⁰⁰ Some state statutes continue temporary disability workers' compensation benefits as a maintenance allowance during the period of vocational rehabilitation,³⁰¹ while others give a range of \$10 to \$50 a week in lieu of the actual cost of board, lodging, and travel.³⁰²

Providing the entire cost of maintenance is critical to the success of a vocational rehabilitation plan and to the participant's continued cooperation, because maintenance costs enable the claimant to bear the higher cost involved in rehabilitation at a location other than home.³⁰³

Indiana's vocational rehabilitation statute³⁰⁴ states that it does not affect other workers' compensation benefits allowed under the act.³⁰⁵ Under

293. Croft, *Something More Important Than Money — Vocational Rehabilitation in Workers' Compensation Cases*, 3 ALASKA L. REV. 49, 66 (1986).

294. *Id.*

295. MINN. STAT. ANN. § 176.102(9) (West Supp. 1990); WASH. REV. CODE ANN. § 51.32.095 (Supp. 1989).

296. DIVISION OF WORKERS' COMPENSATION, DEPARTMENT OF LABOR & INDUSTRY — STATE OF MONTANA, VOCATIONAL REHABILITATION PROCEDURES 6 (1987).

297. Croft, *supra* note 293, at 78-79.

298. *Id.*

299. *Id.* at 94-124 (chart outlining the benefits of state workers' compensation programs).

300. *Id.*

301. *Id.* at 77-78.

302. *Id.* at 78.

303. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.20 (1989).

304. IND. CODE ANN. § 22-3-12-5 (Burns Supp. 1989).

305. *Id.*

this statute, a worker could conceivably have received the last award payment and not have completed a vocational rehabilitation program. Since the workers' compensation system does not provide any maintenance while injured workers are in vocational rehabilitation programs, the injured worker must rely on the benefits that the Office of Vocational Rehabilitation might provide. The state agency will cover expenses necessary for participation in the vocational rehabilitation program, and expenses that an individual otherwise would not incur, such as board, lodging, and travel. The federal/state program makes no provision for any other type of living allowance.³⁰⁶

G. Time Limits on Vocational Rehabilitation Benefits

The many services offered by vocational rehabilitation specialists represent multiple approaches to rehabilitating the injured worker; these multiple approaches in turn influence the length of the plan. In the interest of cost effectiveness, most states have adopted a limit on the duration of vocational rehabilitation benefits.³⁰⁷ Indeed, the amendment to Indiana's SB 402 and SB 543 each provided a benefit limit of fifty-two weeks with a possible fifty-two week extension. In Florida, for example, an injured worker who is medically stable and ready for vocational rehabilitation, is allowed twenty-six weeks to complete a program while temporary total disability and maintenance are being paid. An additional twenty-six weeks may be ordered if necessary.³⁰⁸ Because the majority of successful plans are completed within a year,³⁰⁹ a limitation of twenty-six weeks with a possible extension of twenty-six additional weeks for good cause shown is reasonable.

306. See 29 U.S.C. § 723(5) (1985) (provides for maintenance, but no other costs); see *supra* note 281.

307. See, e.g., FLA. STAT. ANN. § 440.49 (West Supp. 1989) (26 weeks extendable for another 26 weeks); GA. CODE ANN. § 34-9-200.1 (Michie 1989) (26 weeks, may be extended if necessary); IOWA CODE ANN. § 85.70 (1984) (13 weeks, may be extended an additional 13 weeks); KANSAS STAT. ANN. § 44-510g (1986) (26 weeks, may be extended an additional 26 weeks); KY. REV. STAT. ANN. § 342.710 (Baldwin 1986) (52 weeks, may be extended if necessary); LA. REV. STAT. ANN. § 23:1226 (West Supp. 1989) (26 weeks, may be extended an additional 26 weeks); MD. ANN. CODE art. 101, § 36(8) (West Supp. 1989) (24 month time limit); MICH. COMP. LAWS ANN. § 418.319 (West Supp. 1989) (52 weeks, may be extended an additional 52 weeks); MINN. STAT. ANN. § 176.101-02 (West 1986) (up to 156 weeks); N.M. STAT. ANN. § 52-1-50 (1987) (up to 2 years); OKLA. STAT. ANN. tit. 85, § 16 (West Supp. 1990) (52 weeks, may be extended an additional 52 weeks); WASH. REV. CODE ANN. § 51.32.095 (Supp. 1989) (52 weeks, may be extended an additional 52 weeks); W. VA. CODE § 23-4-9 (1985) (no specific time period); WIS. STAT. ANN. § 102.423 (West 1988) (40 weeks, may be extended if necessary); see also UNITED STATES CHAMBER OF COMMERCE, 1989 ANALYSIS OF WORKERS' COMPENSATION LAWS (overview and comparison of state workers' compensation statutes).

308. FLA. STAT. ANN. § 440.20 (West Supp. 1989).

309. See *supra* note 307.

The national average length of rehabilitation is six to nine months.³¹⁰ State studies have shown that plan results and duration are highly interrelated; the shorter the plan, the more likely the employee is to return to work.³¹¹ Minnesota workers returning to their former jobs with their pre-injury employer typically had the shortest plans, some as short as five months.³¹² More than sixteen months were needed to provide all the services required to return a Minnesota worker to a different job with a different employer.³¹³ The Minnesota study found that for rehabilitation plans lasting more than two years, success rates plummet and costs rise dramatically.³¹⁴

The current vocational rehabilitation statute in Indiana does not impose any time limits on vocational rehabilitation benefits and is not clear on whether maintenance or temporary total disability benefits must be paid during the program. Indiana policy-makers and administrators should consider imposing a time limit both to contain costs and to promote more successful rehabilitation.

H. Employer-Employee Incentives, Disincentives, and Sanctions

The greatest incentive for employers and their insurers to provide vocational rehabilitation is the cost savings of terminating lifetime benefits. In Indiana, where benefits terminate after 500 weeks,³¹⁵ the employer's incentive is not as great, but there are still savings to be had. Further, the employer and society gain a more productive workforce by the return of employees, and benefit because taxes do not increase to support disabled workers. Because of the low benefit level in Indiana, workers here have a strong incentive to be vocationally rehabilitated so that they can regain their lost earning capacity.

Whether unintentionally or by design, certain features of vocational rehabilitation programs create either an incentive or disincentive for employers and employees. Typically, any provision creating an incentive for either the employer or the employee usually creates a disincentive for the

310. FOX & CO., REHABILITATION SERVICE IN CONNECTION WITH THE MINNESOTA STATE LAW ON WORKERS' COMPENSATION—CHAPTER 176, REPORT TO THE COMMITTEE ON LABOR-MANAGEMENT RELATIONS OF THE MINNESOTA HOUSE OF REPRESENTATIVES 3 (1982) [hereinafter FOX & CO.].

311. ZAIDMAN & CLIFTON, *supra* note 209; *see also* D. LANGHAM, 1986 VOCATIONAL REHABILITATION COST-EFFECTIVENESS STUDY, REPORT TO THE BUREAU OF WORKERS' DISABILITY COMPENSATION, MICHIGAN DEPT. OF LABOR 5 (1987) (Table H is most significant).

312. ZAIDMAN & CLIFTON, *supra* note 209, at 21.

313. *Id.*

314. *Id.* Plans lasting longer than two years had an average cost of \$7,000 and usually ended without the worker returning to work.

315. IND. CODE ANN. § 22-3-3-8 (Burns 1986) (payment for temporary total disability).

other party. For example, the statutory provision reducing workers' compensation benefits after a rehabilitated employee returns to work can result in a disincentive to be rehabilitated if benefits are reduced to exactly offset the amount of increase in the worker's earning capacity. On the other hand, if an employer is forced to continue paying full workers' compensation benefits after an employee returns to work, the employer's incentive to finance vocational rehabilitation is destroyed. One solution to this problem would be a schedule of graduated reductions in workers' compensation benefits that would create an incentive for the employee to participate in vocational rehabilitation and return to work, while also providing an incentive for the employer to provide the vocational rehabilitation because the employer's responsibility for workers' compensation benefits would decline.³¹⁶

In some vocational rehabilitation statutes, incentives for employees to participate in vocational rehabilitation take the form of sanctions. Many statutes provide that workers' compensation benefits will be reduced, forfeited, or suspended if an employee refuses to cooperate with the vocational rehabilitation.³¹⁷ The proposed amendment to Indiana's SB 402 provided a sanction for an employee's "unjustifiable refusal to accept rehabilitation" in the form of lost or reduced compensation for each week of refusal. The committee that drafted the Council of State Governments' Workmen's Compensation and Rehabilitation Law gave the director of vocational rehabilitation discretion to terminate workers' compensation benefits for each week the employee refuses to participate.³¹⁸ In its comment on this provision, the committee stated that the sanction is designed to encourage an employee to accept the benefit of vocational rehabilitation when the employee's post-injury condition interferes with the employee's objective decision-making.³¹⁹

A few states sanction employers with a fine for refusing to implement a vocational rehabilitation plan if the plan is ultimately successful.³²⁰ In Massachusetts, an insurer who refuses to provide the vocational rehabilitation recommended by the office of education and vocational rehabilitation is assessed twice the cost of the program if it successfully returns the injured worker to suitable employment.³²¹

316. See *Vocational Rehabilitation*, *supra* note 284, at 125-26.

317. See generally OFFICE OF STATE LIAISON AND LEGISLATIVE ANALYSIS, U.S. DEPARTMENT OF LABOR, STATE WORKERS' COMPENSATION: ADMINISTRATION PROFILES (1986) (This study gives general administrative information on the workers' compensation procedures for all 50 states and the District of Columbia.).

318. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.24 (1987).

319. *Id.*

320. MASS. GEN. LAWS ANN. ch. 152, § 30H (West Supp. 1986); see also Niss, *No Litigation*, *supra* note 197, at 18 (Maine has a new provision which requires an employer/insurer to pay 180% of the cost of a successful plan.).

321. See *supra* note 320.

I. Data Collection By the Workers' Compensation Agency

The duties of the director of a rehabilitation unit usually include authorizing the collection of data. Data collection is not only necessary for monitoring the vocational rehabilitation program, but is also necessary for studying the system's efficiency and cost. For such monitoring and study purposes, data must be collected on program use, participants' progress, immediate and long-term program results, and costs.

With its limited budget and lack of equipment, the Indiana Workers' Compensation Board has not been able to collect significant data. The Workers' Compensation Board's yearly reports have consisted of one page of data totalling statistics such as number of reported accidents, awards, and disputed applications.³²²

The only other data related to workers' compensation in Indiana is reported by the Research and Statistics Division of the state Department of Labor in a yearly publication entitled *Characteristics of Occupational Injuries and Illnesses in Indiana*.³²³ This information is based on the employer's first report of injury filed with the Workers' Compensation Board.³²⁴ The publication includes information about the nature of the injuries, the injured workers' profiles, and the time and place of the majority of injuries.³²⁵ This information is not helpful in projecting the number of workers who may be eligible for vocational rehabilitation or in projecting estimated costs. Policy-makers cannot look to the Research and Statistics Division for workers' compensation data since that is not its primary function. The division is funded in part by the United States Department of Labor Bureau of Labor Statistics, and the division collects the types of data recommended by the federal agency.³²⁶

Because data collection for Indiana's workers' compensation system is virtually nonexistent, any analysis claiming to be based on Indiana statistics should be carefully scrutinized. The 1987 Sunset Audit of the Industrial Board and Workers' Compensation System recommended that the Workers' Compensation Board obtain a computer management system for collecting data.³²⁷ To permit ease in sharing data, one statewide computer sys-

322. WORKERS' COMPENSATION BOARD OF INDIANA, STATISTICAL REPORT ON WORKERS' COMPENSATION CLAIMS BETWEEN JULY 1, 1987 AND JUNE 30, 1988 (one page report covering all claims for workers' compensation).

323. 7 RESEARCH & STATISTICS DIVISION, INDIANA DEPARTMENT OF LABOR, CHARACTERISTICS OF OCCUPATIONAL INJURIES AND ILLNESSES IN INDIANA, PART I (1988).

324. *Id.* at 1.

325. *Id.* at 1-2.

326. 7 RESEARCH & STATISTICS DIVISION, *supra* note 323, PART II at 1.

327. See SUNSET AUDIT, *supra* note 8, at 92. This volume of fiscal review sets forth Sunset Audits of the Indiana Occupational Safety and Health Administration, the Occupa-

tem would make sense. Given the current statute and the computer capabilities of the Workers' Compensation Board, the Office of Vocational Rehabilitation should collect data on the workers' compensation cases it services through its vocational rehabilitation program.

J. Administrative Structure

An effective vocational rehabilitation system must have an administrative structure capable of collecting data, monitoring plans, resolving disputes, and other vital functions. In its 1972 report, the National Commission on State Workmen's Compensation Laws recommended that a "medical-rehabilitative division" be established within each state's workers' compensation agency.³²⁸ The commission suggested that the division supervise both physical and vocational rehabilitation services with the vocational rehabilitation services being delivered by the state agency administering the federal/state program under the Rehabilitation Act of 1973.³²⁹ Although rehabilitation units within workers' compensation agencies may either directly provide services or refer injured workers to outside providers, most state rehabilitation units operate on a referral or a referral and monitoring basis.³³⁰ Arthur Larson and the Council of State Governments also propose that an administrative unit be established within the workers' compensation agency, and be charged with settling disputes and supervising, from the time of injury, the details of treatment, rehabilitation, and placement.³³¹

State statutes establishing vocational rehabilitation units within their workers' compensation agency also provide for the appointment of an administrative director who possesses broad authority. For example, Minnesota's commissioner is authorized to monitor and supervise rehabilitation services.³³² Besides hiring personnel to staff the unit, the commissioner's authority includes making decisions regarding the approval of rehabilitation service providers and the method of service delivery.³³³ The commissioner is also authorized to set fees for rehabilitation services, certify service providers, and sanction them.³³⁴

tional Safety Standards Commission, the Board of Safety Review, and the Industrial Board and Workers' Compensation System. Each agency is viewed as to its general functions and characteristics. Then the audit sets forth a performance evaluation for each agency, and finally gives recommendations and conclusions.

328. NATIONAL COMM'N REPORT, *supra* note 55, at 82; *see also* Householter, *supra* note 214, at 3.

329. *Id.*

330. *See supra* note 214.

331. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.25 (1989).

332. MINN. STAT. ANN. § 176.102(2) (West 1986 & Supp. 1989).

333. *Id.*

334. *Id.*

The model vocational rehabilitation statutes of the International Association of Industrial Accident Boards and Commissions (IAIABC),³³⁵ the Insurance Rehabilitation Study Group,³³⁶ and the Alliance of American Insurers³³⁷ each call for the establishment of a rehabilitation unit within the workers' compensation agency. Each model statute gives the administrator of the rehabilitation unit broad powers to accomplish the purpose of supervising the provision of vocational rehabilitation. The administrator's powers and duties include, but are not limited to, hiring personnel for the unit, promulgating administrative rules, reviewing and approving rehabilitation plans, monitoring plan implementation and progress, resolving plan disputes, ordering vocational rehabilitation, and certifying providers of services.³³⁸ The Alliance of American Insurers' model statute also establishes a rehabilitation panel composed of the unit administrator, medical director, vocational rehabilitation director, doctors, and vocational specialists to promulgate regulations and assure that all injured workers requiring services receive them. The panel is also responsible for approving and investigating providers of services and maintaining a provider directory.³³⁹

Although Indiana's statute sets up a referral system, it does not provide any administrative structure within the Workers' Compensation Board to supervise or monitor vocational rehabilitation. Governor Bayh recognized that careful thought must be given to the administration of Indiana's new vocational rehabilitation statute, and that is why he called a conference on September 29, 1989, to consider how to best administer Indiana's new vocational rehabilitation statute. Representatives from Minnesota, Ohio, and Georgia addressed conference participants regarding their state administrative structures. Minnesota's administrative structure is quite similar to that recommended by the IAIABC, the Insurance Rehabilitation Study Group, and the Alliance of American Insurers.³⁴⁰

Ohio created a rehabilitation division within the Industrial Commission in 1979.³⁴¹ The rehabilitation division directly provides services to injured workers, and receives its funding from insurance premiums paid by employers to the state insurance fund.³⁴² Before 1979, vocational rehabilitation in

335. IAIABC, *MEDICAL CARE AND REHABILITATION OF OCCUPATIONALLY DISABLED EMPLOYEES: MODEL PROGRAM* (1977 and Addendum 1979).

336. *Insurance Rehabilitation*, *supra* note 201.

337. ALLIANCE OF AMERICAN INSURERS, *REHABILITATION—WORKERS' COMPENSATION MODEL APPROACH*.

338. *See supra* notes 335-37.

339. *See supra* note 337.

340. MINN. STAT. ANN. § 176.102 (West 1986 & Supp. 1989).

341. *See supra* note 217.

342. *Id.* (The entire Ohio workers' compensation system is insured completely through a state fund, and no private insurance companies are allowed to underwrite workers' compensation insurance in the state of Ohio.)

Ohio was provided exclusively by the federal/state agency.³⁴³ Because of its large caseload and reduction in funding, the federal/state agency was not able to provide timely and effective service; forming the rehabilitation division remedied this situation.³⁴⁴ Ohio's rehabilitation division is divided into central administration, field services, and two rehabilitation centers.³⁴⁵ Field services consists of five regional and seven district offices that are responsible for case management.³⁴⁶ These offices are staffed with rehabilitation nurses and counselors, job placement professionals, and physical and medical consultants.³⁴⁷ All vocational rehabilitation is directly provided at Ohio's two rehabilitation centers.³⁴⁸

Georgia's vocational rehabilitation statute is also administered by a rehabilitation division within the State Board of Workers' Compensation.³⁴⁹ In 1984, the industrial rehabilitation specialists unit was established under Georgia's division of rehabilitation services, the federal/state agency.³⁵⁰ The industrial rehabilitation specialists unit is a non-profit, state sponsored, yet self-supporting program with capabilities of providing comprehensive rehabilitation services to any injured worker in the state of Georgia.³⁵¹ Its direct link with the division of rehabilitation services allows easy access to their services.³⁵²

At this point, it is hard to determine whether Indiana's state Office of Vocational Rehabilitation will be able to handle workers' compensation cases in a timely and effective manner. Although working under the current statute for a time may be instructive, the experience of both Ohio and Georgia suggests that a different method of delivering services is necessary. However the delivery of vocational rehabilitation services is handled, the necessity of a rehabilitation unit within the Workers' Compensation Board to perform the supervisory functions of collecting data, monitoring plans, resolving disputes, and coordinating rehabilitation with the balance of the workers' compensation system is apparent. Additionally, Arthur Larson and the model statutes of the IAIABC, the Council of State Governments, and the Alliance of American Insurers each recognize the importance of an agreement of cooperation between the workers' compensation agency and

343. *Id.*

344. *Id.*

345. *Id.* at 47.

346. *Id.*

347. *Id.*

348. *Id.*

349. INDUSTRIAL REHABILITATION SPECIALISTS UNIT, DIVISION OF REHABILITATION SERVICES, STATE OF GEORGIA, ROOSEVELT WARM SPRINGS INSTITUTE FOR REHABILITATION, OVERVIEW (1989).

350. *Id.* at 5.

351. *Id.*

352. *Id.*

the federal/state vocational rehabilitation agency.³⁵³ Under Indiana's new vocational rehabilitation statute, such an agreement is essential.

Also crucial to the smooth operating and continuing improvement of a state's vocational rehabilitation system is an advisory council made up of representatives of labor, management, insurers, rehabilitation specialists, medical specialists, scholars and consultants. Such a council should meet periodically and make recommendations regarding administrative rules and regulations and the general operating of the vocational rehabilitation system. The model statutes of the IAIABC and the Alliance of American Insurers both recommend such a council. Ohio's rehabilitation division has a labor-management-government advisory board and finds that it is an essential tool to make the division responsive to the needs of labor, management, and government.³⁵⁴

Indiana's vocational rehabilitation statute does not establish an advisory council.³⁵⁵ Especially during the infancy of Indiana's vocational rehabilitation program, an advisory council or task force would prove invaluable in studying other state systems and the needs of Indiana's injured workers to recommend the best way of administering the vocational rehabilitation of injured workers in Indiana.

IX. COST OF VOCATIONAL REHABILITATION

The goals of a state's vocational rehabilitation program largely determine its cost. States that adhere to the National Commission on State Workmen's Compensation Laws guideline to promptly restore the injured worker's physical condition and earning capacity have significantly lower vocational rehabilitation costs than states that frequently engage in retraining.³⁵⁶ For example, Minnesota, which follows the guideline, spends on average less than \$1,800 for rehabilitating the worker to return to his prior job with the same employer.³⁵⁷ To return the worker to a different job with a different employer, Minnesota spends on average more than \$4,700.³⁵⁸

353. See *supra* note 331; see also *supra* notes 335 and 337.

354. See *supra* note 341.

355. IND. CODE ANN. §§ 22-3-12-1 to 22-3-12-5 (Burns Supp. 1989) (no mention is made of an advisory council).

356. Robertson, *Minnesota's Workers' Compensation: Reform and Research*, in JOHN BURTON'S WORKERS' COMPENSATION MONITOR, June, 1988, at 6 (citing NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 15 (1972)).

357. ZAIDMAN & CLIFTON, *supra* note 209 at 21.

358. *Id.* See also LANGHAM *supra* note 311. This study was delivered to the Michigan Bureau of Workers' Disability Compensation. The study showed that the cost of rehabilitating an employee to return to his prior job with the same employer was averaged at \$1,762.00. Rehabilitating an employee who returned to work with a new employer, however, cost an aver-

Even though Minnesota's vocational rehabilitation program is one of the most progressive, vocational rehabilitation accounts for less than 5% of the state's total workers' compensation costs.³⁵⁹ The author of one Minnesota study commented that, "[i]n comparison to the medical and weekly benefit payments, the expense of rehabilitation seems almost inconsequential."³⁶⁰ Moreover, the cost of vocational rehabilitation may be recovered after the employee is on the job for only a short time. For instance, in Michigan, vocational rehabilitation costs are recovered after a worker has been back on the job for only 24.5 weeks.³⁶¹

The level of communication between parties and the operating rules of a state's vocational rehabilitation system can either help to contain costs or contribute to increased costs. Poor employer-employee relationships, employees misunderstanding their responsibilities, and employees' dependence on attorneys can all work to increase the costs of vocational rehabilitation.³⁶² In addition, if the rules allow the employee to switch providers after one provider has completed substantial work, costs increase dramatically.³⁶³

In determining the cost of a vocational rehabilitation system, two elements must be considered: the direct program cost and the indemnity attributable to vocational rehabilitation.³⁶⁴ The direct program costs consist of provider billings for counseling, evaluation, placement, and other services, plus third-party billings from schools or training centers related to tuition, books, tools, transportation, and room and board. A sometimes overlooked cost of vocational rehabilitation is the indemnity in the form of workers' compensation benefits paid to the employee while the employee is in vocational rehabilitation rather than in the workforce. Only the indemnity paid while the injured worker is physically able to work but is still in vocational rehabilitation should be added to the cost. This is because indemnity would be paid while the injured worker was unable to work, regardless of the worker's participation in vocational rehabilitation. This indemnity figure must be estimated because there is no way to know if or when the injured worker would have returned to work and what the worker's wage levels would have been.

Results of other state cost-effectiveness studies may look tempting

age of \$3,491.00.

359. Robertson, *supra* note 356, at 6.

360. See FOX & Co., *supra* note 310, at 17.

361. Langham, *supra* note 311, at 9.

362. FOX & Co., *supra* note 310, at 19.

363. ZAIDMAN & CLIFTON, *supra* note 209, at 27 (The report states that when more than one qualified rehabilitation consultant is involved, the average cost is nearly doubled from \$2,800 to \$5,400.).

364. Workers' Compensation Research Institute, *Vocational Rehabilitation in Florida Workers' Compensation*, in 4 WCRI RESEARCH BRIEF (Jan. 1988).

when trying to project costs for Indiana. However, a note of caution must be sounded about interstate cost comparisons. First, any cost analysis must be examined for what types of items are included. For instance, some state figures on rehabilitation include medical costs.³⁶⁵ Second, the data on which each state's studies are based may vary because of different regulations, reporting requirements, and administrative approaches. Most important, costs depend on each state's demographics, vocational rehabilitation goals, method for entry into the system, types of services offered, and schedule of workers' compensation benefits. Because each state's costs depend on that state's unique characteristics, other state studies are of limited value in determining what the cost of vocational rehabilitation might be in Indiana.

Under Indiana's current vocational rehabilitation scheme, the state Office of Vocational Rehabilitation will be responsible for the costs of rehabilitating injured workers.³⁶⁶ Testimony before the Subcommittee on Vocational Rehabilitation indicated that the cost of rehabilitating a workers' compensation recipient is \$4,786.³⁶⁷ Those costs are ultimately borne by Indiana taxpayers. Cost is an important issue whether it is the responsibility of the taxpayers or the employer. Under a system of employer responsibility, there may be greater pressure for cost containment because employers would probably monitor the system more closely than would taxpayers.

As mentioned earlier,³⁶⁸ Indiana lacks sufficient data for projecting vocational rehabilitation costs. Only if meaningful data is collected by either the Workers' Compensation Board or the Indiana Office of Vocational Rehabilitation will the state be able to conduct a cost-effectiveness study after a vocational rehabilitation system is implemented. Further, the system will have to be in place for at least two years before a cost-effectiveness study can be done, so that there will have been enough time for cases to progress through the system.

Although vocational rehabilitation can save costs in the workers' compensation system, that should not be a requirement for a vocational rehabilitation program. Vocational rehabilitation is an additional cost, and it should be. Vocational rehabilitation is justified not because it is a cost-cutter, but because workers are valuable human beings with skills worth retaining.

365. Robertson, *supra* note 356 at 6.

366. IND. CODE ANN. § 22-3-12-4 (c) (West Supp. 1989). The statute states the Office of Vocational Rehabilitation "shall" implement a rehabilitation plan. Since the statute does not provide for outside support, the state must support the program.

367. *Vocational Rehabilitation Subcommittee, Interim Study Committee on Insurance Issues, Indiana House of Representatives*, Minutes of Sept. 20, 1988 (testimony of Mr. Barry Chambers, Director of the Office of Vocational Rehabilitation).

368. See *supra* notes 322-27 and accompanying text.

X. CONCLUSION

Vocational rehabilitation should be part of a comprehensive workers' compensation system that not only returns the worker to optimum physical health, but helps the worker regain lost earning capacity and regain productive status. In enacting its vocational rehabilitation statute, Indiana has recognized the need to vocationally rehabilitate its injured workers. However, returning injured workers to "useful employment" must be further defined, since the concept of "useful employment" forms the basis for key policy decisions on eligibility, services offered, and program administration.

At present the vocational rehabilitation of Indiana's injured workers is handled by the state Office of Vocational Rehabilitation. Thus, an implicit decision has been made that vocational rehabilitation should be taxpayer supported, not employer supported, and that all rehabilitative services are to be provided through the state Office of Vocational Rehabilitation. However, the goals of Indiana's Workers' Compensation Board and the state Office of Vocational Rehabilitation differ. A cooperative inter-agency agreement should be developed that defines the goals and rules to be followed in workers' compensation cases.

In issuing his call for a conference on vocational rehabilitation, Governor Bayh has questioned whether a taxpayer supported system is best. The Governor has also recognized the need for Indiana to decide on an administrative structure to supervise vocational rehabilitation, monitor plans, collect data, and resolve disputes. Governor Bayh called on representatives from Minnesota, Georgia, and Ohio to describe the administrative structures of their states at the conference. As Indiana's statute stands there is no monitoring of vocational rehabilitation services, and therefore no method of enforcing the notice provision. Also, no guidance is provided on resolving disputes arising under vocational rehabilitation. Further, the statute lacks a mandate to collect data, which is necessary to study the cost and efficiency of the system.

States that have brought about effective reform in their vocational rehabilitation systems have done so by conducting thorough research, educating both the public and the legislature, maintaining a continuous dialogue among interested parties, and by establishing policy before legislative drafting begins and before public positions are taken by interested parties. A governor's task force, composed of representatives of management, labor, insurers, public and private providers of services, the administering agency, along with scholars and consultants, is the best vehicle to accomplish these tasks. Governor Bayh's conference on vocational rehabilitation was the first step in providing an educational forum and in opening a dialogue among interested parties. The survey taken at Governor Bayh's conference indicates that the majority of conference attendees think that a thorough study

needs to be undertaken before choosing an administrative structure for Indiana.

Through a task force, Indiana will be able to study and learn from the experiences of other states. Since Indiana will be starting with a virtual clean slate and will have the advantage of learning from other states' successes and failures, Indiana has the opportunity to establish a vocational rehabilitation program for its injured workers that other states will emulate.