

# MAINE STATE LEGISLATURE

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STATE OF MAINE  
114TH LEGISLATURE  
FIRST REGULAR SESSION

REPORT OF THE  
REHABILITATION  
SUBCOMMITTEE STUDY

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Sen. Thomas H. Andrews  
Sen. Donald F. Collins

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## PREFACE

This is the final report of the rehabilitation subcommittee established by Public Law 1987, chapter 779, on the workers' compensation rehabilitation system. The report is a brief synopsis of the entire study process since the time requirements for introducing legislation to the First Regular Session of the 114th Legislature prevent a more detailed exposition of the evidence received and considered by the subcommittee and the rationale of the subcommittee's decisions. It is hoped that the suggested legislation will in large measure speak for itself as regards the subcommittee's processes.

The rehabilitation subcommittee would like to thank those persons who cooperated in the study and presented testimony to the subcommittee. Special thanks is due to the two consultants whose expertise and talents contributed immeasurably to the subcommittee's final product, Kathryn Maietta and Dr. Monroe Berkowitz.

## **I. LEGISLATIVE BACKGROUND**

This study was performed pursuant to Public Law 1987, chapter 779, section 7, a copy of which is attached to this report as Appendix A. That legislation was itself the result of a study performed pursuant to Public Law 1987, chapter 559, Part B, section 53, a copy of which is attached to this report as Appendix B.

In response to an imminent crisis caused by the pending withdrawal of workers' compensation insurers from the Maine market, Public Law 1987, chapter 559, enacted sweeping changes to the workers' compensation benefit structure in the State. Chief among these reforms was the limitation of benefits for partial incapacity under the Workers' Compensation Act to a maximum duration of 400 weeks from the date that an employee reached maximum medical improvement. An agreement was also reached at that time to conduct a study of the workers' compensation rehabilitation system to identify ways in which an injured workers' right and duty to participate in rehabilitation could be strengthened and the overall system streamlined and made more effective.

Due to severe time constraints, the initial rehabilitation study conducted pursuant to chapter 559 failed to complete its efforts in time to report comprehensive reform legislation to the Second Regular Session of the 113th Legislature. The amendments enacted by chapter 779 were only one small piece of the intended rehabilitation reform and so that law provided for additional study of the rehabilitation system. That law's directives were similar to those found in chapter 559, except that the subcommittee was no longer directed to investigate the establishment of an injured employee's duty to participate in rehabilitation. This report and the accompanying legislation is the result of that additional study.

## **II. CONSULTANTS' REPORTS**

### **A. Kathryn Maietta.**

The rehabilitation subcommittee contracted with Kathryn Maietta to conduct a survey of rehabilitation system participants to determine their attitudes toward rehabilitation under both the workers' compensation rehabilitation system and the Bureau of Rehabilitation. The following is a summary of many of the issues identified by the various participants.

#### **1. Injured Employees.**

Injured employees who received rehabilitation services under the workers' compensation rehabilitation system reported the following:

- a. Little "neutral" information about the rehabilitation system is available to employees;

- b. Long delays occurred during the rehabilitation process;
- c. Too much emphasis is placed upon return to work with no effort made to maximize the employee's potential; and
- d. Insurers have too much power over whether a plan is implemented.

## **2. Rehabilitation Providers.**

The rehabilitation providers in the current system made the following points:

- a. The current system contains too many bureacratic requirements;
- b. Rehabilitation services should be more wholistic and offer more than a quick return to work;
- c. The Workers' Compensation Commission should be able to order the implementation of plans in appropriate instances; and
- d. The system has too many delays built into it.

## **3. Employers.**

Employers who have been involved with the rehabilitation system stressed the following issues:

- a. Injured workers should not be able to select a rehabilitation provider over the objections of the employer and without a review process for developed plans;
- b. Sanctions are difficult to enforce upon an uncooperative employee; and
- c. The system has not been in effect long enough to adequately evaluate it.

## **4. Insurance Companies.**

Insurers made the following comments:

- a. Injured workers should not be able to select a rehabilitation provider over the objections of the insurer;
- b. Benefits should be suspended following rehabilitation;
- c. The system requires strict guidelines to screen suitable employees for rehabilitation;
- d. Too many delays exist in the system. The Office of Employment Rehabilitation should be involved only when a problem arises.

## **B. Dr. Monroe Berkowitz**

The rehabilitation subcommittee contracted with Dr. Monroe Berkowitz, a professor at Rutgers University, to assist in investigating possible options for amendments to the workers' compensation rehabilitation system to address many of the concerns expressed by system participants. Through a series of meetings with the rehabilitation subcommittee, Dr. Berkowitz refined the options available to the Subcommittee to address issues of concern. His final report discussed the following options, all of which are incorporated in the subcommittee's suggested legislation.

### **1. Suitability Evaluation Criteria.**

In response to statistics showing an unusually high rate of positive employee evaluations, Public Law 1987, chapter 779, directed the subcommittee to investigate the possibility of employing public rehabilitation counselors to perform the initial evaluation of suitability. After consideration of the apparent conflict of interest issues involved, Dr. Berkowitz discussed the possibility of simply explicitly describing the requirements for an employee to be found suitable for rehabilitation under the Workers' Compensation Act.

The final report discussed the option of adopting criteria to guide and limit a private rehabilitation provider who performs an initial evaluation of suitability for an injured employee under the Act. Such criteria could serve many purposes, including the following:

- A. Ensure the early identification of injured employees who could benefit from rehabilitation services;
- B. Provide greater assurance over the appropriateness of employees entering the system to permit the loosening of administrative control and involvement in later stages of the rehabilitation process;
- C. Limit the discretion of a private rehabilitation provider to find an injured employee suitable for rehabilitation; and
- D. Prevent the expenditure of system resources and employers' dollars on employees who were unlikely to receive any benefit from the rehabilitation services.

### **2. Reduction of Bureaucratic Restrictions.**

Dr. Berkowitz also discussed the possibility of loosening the tight bureaucratic controls on the rehabilitation process under current law. Presently, the rehabilitation administrator reviews every rehabilitation case and must issue an order in

each case before rehabilitation can proceed to the next stage; this is true even where the employee, the employer and the rehabilitation provider all agree to the next step in rehabilitation. As Dr. Berkowitz commented, this requirement tends to delay the rehabilitation process unnecessarily, "(n)o matter how efficient the process." The studies brought to the attention of the subcommittee unanimously agreed that any delay in the rehabilitation process increases rehabilitation costs and reduces the chances of achieving a successful job placement for an injured employee. The option discussed by Dr. Berkowitz is to free up this process by permitting rehabilitation to proceed automatically when all parties are in agreement while retaining the ability of the administrator to intervene if the services appear to be improper or if some question regarding the process is raised.

### **3. Macro-management of the Rehabilitation System.**

As a further method of reducing bureaucratic involvement with the rehabilitation process, Dr. Berkowitz discussed the possibility of shifting toward a process of "macro-management" within the rehabilitation system. The present system requires the Office of Employee Rehabilitation to monitor individual cases. This approach is traditional and its strength is, of course, the ability to identify problems in any single case. Its drawback is the vast amount of administrative resources required to adequately monitor the number of cases that arise under the workers' compensation system.

The option presented by Dr. Berkowitz was to enhance the office's use of computers to perform routine monitoring, such as determining when 120 days has elapsed since a worker's injury. Over time, such a system would be capable of generating trend data indicating the general performance of the system and of various insurers or rehabilitation providers within the system. This data could identify chronic problem areas or participants within the rehabilitation system much more efficiently than the traditional case-by-case monitoring approach.

### **4. Improved Communication.**

Finally, in addressing the apparent conflict of interest issues involved in "medical management" of cases as required by Public Law 1987, chapter 779, Dr. Berkowitz discussed the need for improved communications among the participants in the rehabilitation system as a whole. While acknowledging that encouraging such communication is difficult if not impossible to achieve through legislation, the need for better communication and understanding of participant roles within the system is critical.



### **III. AN INJURED EMPLOYEE'S RIGHT TO REHABILITATION**

#### **A. Other State Systems.**

As required by Public Law 1987, chapter 779, the rehabilitation subcommittee investigated methods in which an employer is required to pay for the costs of an injured employee's rehabilitation. The Rehabilitation Subcommittee very early on investigated other state systems which provide for a strong worker right to rehabilitation.

#### **1. Mandatory Rehabilitation Systems.**

The first of these models provides a mandatory right to rehabilitation for every injured worker capable of benefiting from rehabilitation, like the rehabilitation system in effect in California. The costs of rehabilitation are borne by the employer/insurer liable for the compensable injury. Two problems are commonly encountered with such a system. First, costs of rehabilitation tend to escalate since the employee can demand rehabilitation and have it paid for by the employer/insurer upon order of the workers' compensation administrative agency. Second, this type of mandatory system tends to foster litigation by the employer/insurer who is attempting to limit liability for rehabilitation costs. Excessive rehabilitation costs obviously increases pressure on insurance rates while excessive litigation interferes with the rehabilitation process and also increases system costs.

#### **2. State-funded Rehabilitation Systems.**

The second model investigated by the subcommittee is a system of state-funded rehabilitation, as is currently in effect in Connecticut. Under this model, the state assesses insurers and self-insured employers in the state to create a pool of money which is then used to award rehabilitation to injured workers. Many of the actual rehabilitation services, including the initial identification of injured workers suitable for rehabilitation, are performed by the state agency. The primary advantage of this model is that it removes the issue of rehabilitation from litigation between the parties. One difficulty associated with this system is that employers who return their injured employees to work end up subsidizing those employers who make no such efforts. This approach reduces the responsibility of an employer/insurer to participate in rehabilitation efforts since the state may eventually perform this service at no direct cost to the employer/insurer. Other problems are associated with this model, including the lack of an early-intervention screening mechanism, excessive rehabilitation costs in individual cases due to late intervention and the possibility of spending all of the assessment before a subsequent assessment is due, resulting in the denial of rehabilitation services to injured employees until the fund is replenished. A final objection raised

against this type of system is that it tends to require an extensive bureaucracy to adequately administer the caseload, diverting funds that could be used to pay for injured employees' rehabilitation to pay for the administrative services.

## **B. The Proposed System.**

The subcommittee attempted to devise a rehabilitation system that could strengthen an injured employee's right to rehabilitation, without engendering the problems discussed above. Particularly, the subcommittee was very wary of any changes that could result in excessive rehabilitation costs, putting additional pressure upon workers' compensation insurance rates. At the same time, the subcommittee desired to preserve the availability of effective rehabilitation services to any employee who could benefit from those services.

The suggested legislation implements the subcommittee's proposed rehabilitation system. That legislation preserves much of the present voluntary rehabilitation system, but adds one primary additional component; if an employer/insurer refuses to implement a rehabilitation plan, the rehabilitation administrator can order the implementation of the plan at the employee's request. This component secures an injured employee's inherent right to rehabilitation within the 5 broad suitability criteria. Safeguards are added to prevent the problems encountered under either a mandatory system or a state-funded system as described above. These safeguards include the following.

### **1. Payment from Employment Rehabilitation Fund.**

The costs of implementing a rehabilitation plan ordered by the administrator will be paid from the Employment Rehabilitation Fund. The primary purpose of this provision is to prevent litigation between the employer/insurer and the employee and to avoid the resultant disruption of the rehabilitation process and the additional costs of that litigation. A secondary purpose advanced by this provision is to retain an employer/insurer's involvement with the case. The employer/insurer will not be an isolated bystander to the rehabilitation process but is encouraged to actively participate in the development of the rehabilitation plan. A plan can only be ordered after the employer/insurer has a final chance to agree to a suitable rehabilitation plan and refuses to implement that plan. At this point the employer/insurer is removed from the process by their own choice.

### **2. Restriction upon Plans Ordered by the Administrator.**

To prevent excessive use of the system's limited rehabilitation and financial resources, the administrator can order a plan implemented only if the administrator finds that

it is likely to successfully return the injured employee to suitable employment at a reasonable cost. Plans that are unlikely to result in employment will not be ordered, nor will plans be ordered which require excessive expenditures to implement. This standard provides dual protection against excessive use of the Employment Rehabilitation Fund. Further protection against high plan costs is provided since the system retains its screening mechanism, ensuring early identification of injured workers and early intervention for rehabilitation purposes, and also retains the current rehabilitation priorities which emphasize low-cost plans.

### 3. Recovery of Plan Implementation Costs.

As a further hedge against excessive use of the Employment Rehabilitation Fund, the administrator will order the employer/insurer who refused to approve the plan to pay to the Fund twice the costs of implementing a plan if the plan is deemed to be successful after being ordered by the administrator. This requirement serves two purposes:

A. It ensures that funds will be returned to the Employment Rehabilitation Fund to protect against Fund insolvency and excessive assessments against employers/insurers; and

B. It provides a financial incentive for employers/insurers to participate seriously in the rehabilitation process.

As noted above, the proposed system continues to encourage the active participation of the employer/insurer in the development of rehabilitation plans. An employer/insurer will have to carefully evaluate each proposed rehabilitation plan and gauge its likelihood of success; if the employer/insurer is correct in its evaluation, they will suffer no penalty. Judging by the response from system participants who testified before the subcommittee, the refusal of some insurers to participate in the rehabilitation process is a current problem. The present law provides a "carrot" to insurers in the form of a "money-back guarantee" by refunding plan implementation costs for rehabilitation efforts which prove to be unsuccessful. Given the apparent failure of the "carrot" to induce serious involvement by some insurers, the suggested legislation substitutes the "stick" of ordered plan implementation and double payment. This approach adds a component of individual employer/insurer responsibility that is missing in state-funded systems like Connecticut's.

The combined effect of these three safeguards is to limit the possibility of the appearance of the problems encountered by other states' rehabilitation systems discussed above. The ordered plan process is insulated from excessive litigation between the parties through the use of the Employment

Rehabilitation Fund to pay for plan implementation costs. The Fund itself is protected from excessive use through limitations on an injured employee's right to rehabilitation and the costs of individual plans. Further protection is obtained by requiring employers/insurers to pay twice the costs of plan implementation back into the fund, which also provides an incentive for employers/insurers to work with employees and rehabilitation providers to devise appropriate plans.

#### IV. CONCLUSION

The proposed system embodied in the suggested legislation appears to achieve the rehabilitation subcommittee's twin goals of providing effective vocational rehabilitation to every injured employee who establishes the inherent right to rehabilitation by meeting the suitability criteria while preventing excessive rehabilitation costs through appropriate safeguards. It also preserves an active role for an employer/insurer while reducing the need for administrative involvement in the rehabilitation process. The minimal effects that the proposed system will have on total workers' compensation liability are exhibited in the following examples.

In a worst-case scenario, where every plan ordered by the administrator fails to return the injured employee to work, the maximum effect upon workers' compensation paid losses is 1%, the limit upon the assessment which funds the Employment Rehabilitation Fund. Even this relatively minor adverse effect upon the Fund is almost certainly overstated in this scenario, since it assumes that all money in the Fund will be spent to implement plans ordered by the administrator. For rehabilitation cases closed during 1987, 164 plans were refused implementation. The 1% assessment upon paid workers' compensation losses could raise approximately \$2,000,000 annually. Plan implementation costs would have to average over \$12,000 to use the full 1% assessment, excluding other potential expenditures from the Employment Rehabilitation Fund. For cases closed during 1987, the actual average plan implementation cost was \$1,091 per case.

The adverse effects upon workers' compensation costs are less, or even non-existent, upon analysis in a more probable scenario. Assuming an equal distribution of plan costs, if 1/2 of the plans ordered by the administrator are successful, there will be no effect on the Employment Rehabilitation Fund and no resultant assessment against employers/insurers since the double assessment of implementation costs will pay for all plans. Even after considering the double payment of plan costs by employers/insurers, there should still be a reduction in total workers' compensation paid losses if 1/2 of the plans succeed since the employees will have returned to work and their employers/insurers will gain the benefit of reduced weekly benefits to offset the double penalty.

It is hoped that enactment of the suggested legislation will provide ready access to effective rehabilitation services for all Maine workers who may suffer a work-related injury that prevents them from returning to their original employment. The system is designed to provide the maximum opportunity for a rapid return to suitable work at as low a cost as possible to Maine employers. Recent legislative enactments have attempted to control workers' compensation costs by limiting the amount of benefits paid to a worker who has the misfortune to suffer an incapacitating injury. The suggested legislation promises to reduce system costs by returning injured employees to employment but carries the greater promise of reducing the often neglected human costs of the system by returning a sense of accomplishment and purpose to Maine's injured but not incapable employees.

7. Career retraining. A goal-oriented period of formal training which is designed to lead to employment in another career field.

Sec. 7. Legislative study on rehabilitation. The Legislative Council shall establish a Subcommittee on Rehabilitation to study the use of vocational rehabilitation and retraining under the Workers' Compensation Act. The subcommittee shall consist of 7 members as follows: Four members of the House of Representatives, appointed by the Speaker of the House, 3 of whom shall represent the Joint Standing Committee on Labor and one representing the Joint Standing Committee on Human Resources; 3 members of the Senate, appointed by the President of the Senate, 2 representing the Joint Standing Committee on Labor and one representing the Joint Standing Committee on Human Resources.

The subcommittee shall hold an organizational meeting at the call of the chairman of the Legislative Council by May 1, 1988. At this meeting, the subcommittee shall elect a chairman from within the membership.

Members of the subcommittee shall receive the legislative per diem for each day's attendance at committee meetings and reimbursement for necessary expenses. The subcommittee may request staff assistance from the Legislative Council and may consult with vocational rehabilitation or retraining experts whenever suitable. All state agencies shall cooperate fully with the subcommittee to further the purposes of this section.

The subcommittee shall hold 3 public hearings throughout the State and conduct a comprehensive study of the current system of providing vocational rehabilitation to injured workers within the State, including the following:

1. Vocational rehabilitation conducted under the Workers' Compensation Act, including the following aspects of that system:

A. The current and potential roles of private and public rehabilitation providers evaluating the suitability of injured workers for rehabilitation and the development of rehabilitation plans;

B. The implications of requiring an insurance carrier to pay reasonable rehabilitation costs;

C. The implications of private rehabilitation providers working on behalf of both the injured worker and insurance carriers through medical management; and

D. Any other aspects of the system that may pose problems currently or in the future or that may benefit from changes and result in increased efficiency and effectiveness of the workers' compensation rehabilitation system;

2. Vocational rehabilitation conducted by the Bureau of Rehabilitation;

3. Vocational rehabilitation conducted by private providers;

4. Issues and problems raised by the interaction of vocational rehabilitation efforts under the Workers' Compensation Act by the Bureau of Rehabilitation and private providers; and

5. Identification and evaluation of alternative vocational rehabilitation models in use or proposed by other states or foreign countries and their potential suitability for application in the State, including the option of requiring employers to provide vocational-technical retraining to injured employees.

The subcommittee shall report its findings, together with any legislative recommendations, to the First Regular Session of the 114th Legislature no later than December 1, 1989.

Sec. 8. Appropriation. The following funds are appropriated from the General Fund to carry out the purposes of this Act.

	1987-88	1988-89
<u>LEGISLATURE</u>		
Subcommittee on Rehabilitation		
Personal Services	\$ 770	\$ 3,465
All Other	700	46,000
Total	<u>\$1,470</u>	<u>\$49,465</u>

Provides funds for per diem and related expenses for a 7-member subcommittee to meet 8 times and hold 3 public hearings. The cost of 2 consultants and an extensive outreach program are included in this study.

WORKERS' COMPENSATION COMMISSION

Office of Employment Rehabilitation		
Positions		(3)
Personal Services		\$74,008
All Other		5,000
Capital Expenditures		16,675
Total		<u>\$95,683</u>

Provides funds for one Administrative Assistant, one Data Entry Specialist and one Planning and Research Associate II to perform the additional data gathering, compilation, analysis and worker education required.

TOTAL APPROPRIATIONS	<u>\$1,470</u>	<u>\$150,268</u>
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Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

Effective April 26, 1988.

4. Enforcement and collection. Penalties assessed under this section are in addition to any other remedies available under this Act and are enforceable by the Superior Court under section 103-E.

A. The Attorney General shall prosecute any action necessary to recover penalties assessed under this section or the commission may retain private counsel for that purpose.

B. If any person fails to pay any penalty assessed under this section and enforcement by the Superior Court is necessary:

(1) That person shall pay the costs of prosecuting the action in Superior Court, including reasonable attorney fees; and

(2) If his failure to pay was without due cause, any penalty assessed upon that person under this section shall be doubled.

C. All penalties assessed under this section are payable to the General Fund.

5. Not an element of loss. An insurance carrier's payment of any penalty assessed under this section shall not be considered an element of loss for the purpose of establishing rates for workers' compensation insurance.

Sec. 52. PL 1985, c. 372, Pt. A, §51 is repealed.

Sec. 53. Legislative study on rehabilitation. The joint standing committee of the Legislature having jurisdiction over labor shall study the use of vocational rehabilitation and retraining under the Maine Workers' Compensation Act. The chairmen of the committee shall call the first meeting of the committee no later than December 1, 1987.

Members of the committee shall receive the legislative per diem for each day's attendance at committee meetings and reimbursement for necessary expenses upon application to the Executive Director of the Legislative Council. The committee may request staff assistance from the Legislative Council and may consult with vocational rehabilitation or retraining experts whenever suitable. All state agencies shall cooperate fully with the committee to further the purposes of this section.

The committee shall hold public hearings and conduct a comprehensive study of every aspect of the current system of providing vocational rehabilitation to injured workers within the State, including the following:

1. Vocational rehabilitation conducted under the Workers' Compensation Act, including the following aspects of that system:

A. The desirability of requiring the initial evaluation of suitability for rehabilitation and the development of

rehabilitation plans to be performed by the Office of Employment Rehabilitation or other public rehabilitation providers;

B. The desirability of allowing injured employees to choose their own rehabilitation provider;

C. The desirability of making vocational rehabilitation mandatory upon the injured employee, the employer or insurance carrier, or both;

D. The desirability of permitting or prohibiting medical management or medical monitoring by rehabilitation providers;

E. The desirability of requiring earlier intervention in cases where an employee may benefit from rehabilitation services; and

F. Any other aspects of the system that may pose problems currently or in the future or that may benefit from changes and result in increased efficiency and effectiveness of the workers' compensation rehabilitation system;

2. Vocational rehabilitation conducted by the Bureau of Rehabilitation;

3. Vocational rehabilitation conducted by private providers;

4. Issues and problems raised by the interaction of vocational rehabilitation efforts under the Workers' Compensation Act, by the Bureau of Rehabilitation and by private providers; and

5. Identification and evaluation of alternative vocational rehabilitation models in use or proposed by other states or foreign countries, and their potential suitability for application in the State, including the option of requiring employers to provide vocational-technical retraining to injured employees.

The committee shall report back to the Second Regular Session of the 113th Legislature and shall recommend legislation to implement a program under which injured employees will have a right to obtain and a duty to participate in vocational rehabilitation or retraining under the Workers' Compensation Act in suitable cases. The committee may recommend any other legislation or rules necessary or desirable to improve in any way the current system of vocational rehabilitation and retraining in the State.

Sec. 54. Applicability. Sections 15, 17 to 19, 21 to 38 and 41 to 43 of Part B of this Act apply only to injuries occurring on or after the effective date of this Act.

Sec. 55. Appropriation. The following funds are appropriated from the General Fund to carry out the purposes of this Act.

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