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Vocational Rehabilitation for the Industrial Injured Worker

John Crawford

broad deterrent and disclosure policies of rule 10b-5 should predominate over the compensatory concerns relevant in the private market. The formulation of reasonable damage criteria cannot be accomplished in an atmosphere of blind subservience to timeworn catch phrases of the common law, but demands a reappraisal of damage concerns in light of the aims of rule 10b-5.

JAMES P. DENVIR

VOCATIONAL REHABILITATION FOR THE INDUSTRIALLY INJURED WORKER

> If a man cannot work, he cannot live. If he can but half work, he can but half live. The mills of our industries have ground off his arms, or hands, or legs, or feet, or put out his eyes. But there is a practical and easy solution to the problem of his rehabilitation. The solution is not a pension. He does not ask that. The offer of a pension would be a moral crime. He asks simply a new industrial chance through industrial re-education. . . . To this he is entitled by our industrial prosperity achieved, in part, at his expense. To this he is entitled by the very humanity of the age.[1]

Ron,[2] a machinist in a manufacturing plant, has only an eighth grade education and has no secondary employable skills. He has two children and a wife who are totally dependent upon him for economic survival. While operating one of the machines at work, Ron has an accident,[3] resulting in the loss of his right hand. His employer pays all his medical expenses and compensates him according to the schedule in his state's workmen's compensation statute.[4] These payments do not reimburse him for his entire lost salary,[5] however, and Ron will still be unemployed when the payments cease since he is unable to continue at the only occupation for which he is trained.

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1. E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 282 (1961) (*citing* CALIFORNIA INDUSTRIAL ACCIDENT COMM'N, REPORT ON SPECIAL INVESTIGATIONS OF SERIOUS PERMANENT INJURIES (1914-1918) (1919), a special pamphlet issued the year California first enacted a law establishing a special fund to rehabilitate injured employees).

2. Ron is not an actual person but a composite of the typical characteristics of workers who can benefit from vocational rehabilitation.

3. Whether the accident is his fault or the result of malfunctioning equipment is not material because compensation is payable regardless of the fault of either party. *See, e.g.*, FLA. STAT. §440.09 (1973); CHAMBER OF COMMERCE OF THE UNITED STATES, ANALYSIS OF WORKMEN'S COMPENSATION LAWS 3 (1974).

4. In Florida, Ron would be entitled to 60% of his average weekly wages for a period of 175 weeks. FLA. STAT. §440.15(3)(c) (1973).

5. *See* FLORIDA DEP'T OF COMMERCE, THE WORKMEN'S COMPENSATION LAW vi (1972). Part of the loss falls on the employee so that he loses no incentive to avoid being injured. *Id.*

The best solution would appear to be to encourage Ron's old employer to rehire him, perhaps giving him on-the-job training in a new position.[6] In this way he can take advantage of any pension and health benefits that may have accrued and he will not suffer the emotional and financial trauma involved in beginning work for a new employer.[7]

Even if Ron is rehired, however, he may be cheated out of training to which he is entitled. Typically this occurs where the employer is self-insured and thereby has a motivation to rehire as quickly as possible. Thus, an injured employee receiving 65 dollars per week as temporary disability can be put on the payroll as a cleanup man at 100 dollars per week. The result is that the employer has received a cleanup man for only 35 dollars per week.[8] A worker rehired in this fashion, however, is not being exposed to rehabilitation.[9]

This note looks at the alternatives available in implementing a rehabilitation program. Initially it examines whether an injured worker should be denied access to rehabilitation, the alternative means of financing and administering a rehabilitation system, and several rehabilitation questions currently being faced by state agencies. Collaterally, proposed statutory modification to aid in determining how rehabilitation should be implemented and integrated into a productive economic system is provided.

INTRODUCTION

While no commonly accepted definition of "vocational rehabilitation" has been developed, it can generally be viewed as:

> [T]he 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 be better adapted with his handicap.[10]

The concept of vocational rehabilitation is not new to workmen's compensation; "rehabilitation" was listed as one of the principal objectives of such

6. CALIFORNIA WORKMEN'S COMPENSATION PRACTICE, Vocational Rehabilitation Assistance Appendix A (Cal. Bar Continuing Legal Educ. Practice Book no. 62, 1973); E. CHEIT, *supra* note 1, at 301; Johnson, *Rehabilitation*, ABA SECT. INS., NEG. & COMP. L. 492, 497 (1967).

7. E. CHEIT, *supra* note 1, at 301. The Florida practice is to return the employee to his old job if possible. 30 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 20 (1966).

8. The employee, upon being rehired, will probably lose most, if not all, of his benefits since the wages he earned will be considered in determining whether he has incurred a loss of earning capacity, upon which his benefits are based. This result will depend, however, on whether he has incurred a "scheduled" or a "nonscheduled" injury. See text accompanying notes 121-131, 201-208 *infra*. Since a self-insured employer would be paying the benefits, he would have a resulting gain of $65 per week plus the services of a cleanup man, at a net cost of only $35 per week. *Id.*

9. Halpin, *Compensation, Motivation, and Rehabilitation*, ABA SECT. INS. NEG. & COMP. L. 487, 490 (1967).

10. Dixon, *Legal and Economic Aspects of Rehabilitation of Injured Workers*, ABA SECT. INS. L. 178 (1949); *see* Tibbits v. E.G. Staude Mfg. Co., 166 Minn. 139, 207 N.W. 202 (1926); Gelhorn & Lauer, *Administration of the New York Workmen's Compensation Law*, 37 N.Y.U.L. REV. 564, 595 (1962).

legislation as early as 1916,[11] and some of the earliest workmen's compensation acts included programs aimed at restoring the disabled worker to a job.[12] Even though the early statutes included only physical rehabilitation, including physical therapy and the fitting of prosthetic devices, vocational benefits were soon added in most states.[13] Because of the early focus on physical therapy, however, many legislatures and courts today continue to view vocational retraining as a mere adjunct to physical rehabilitation.[14]

Practically speaking, it is impossible to separate completely medical rehabilitation from vocational programs. Successful action in both areas is necessary to restore handicapped workers to "the fullest physical, social, vocational, and economic usefulness of which they are capable,"[15] a goal commonly accepted as the ultimate aim of all rehabilitation programs.[16] Nonetheless, the National Commission on State Workmen's Compensation Laws[17] has stressed the importance of the physical aspect of rehabilitation, reasoning that the more effective the medical rehabilitation, the less need there will be for vocational rehabilitation.[18]

There is, however, great divergence of opinion regarding the mechanics of coordinating these two rehabilitative services. The National Commission recommended that each state's workmen's compensation agency establish a "medical-rehabilitative division" within its structure to have general supervisory responsibility over both programs with actual rehabilitative services being handled by the state agency having the most expertise in the particular field.[19] On the other hand, another authority has concluded that the best solution is a comprehensive center offering medical, psychological, social, and vocational services under the same roof.[20] This note does not examine which of these

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11. *See* DONOGHUE, RESTORING THE INJURED EMPLOYEE TO WORK, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 210, at 212, 213 (1917).

12. Allan, *Observations on Rehabilitation in the 60's*, ABA SECT. INS. NEG., & COMP. L. 204, 211 (1963).

13. *See* Keaney, *What Have the States Done to Improve Their Workmen's Compensation Systems?*, ABA SECT. INS. NEG. & COMP. L. 424, 425 (1971).

14. *See, e.g.*, Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §939(c) (1970); MO. ANN. STAT. §287.141 (Vernon, Cum. Supp. 1974).

15. H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 241 (1954); *see* 23 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 54 (1959).

16. H. SOMERS & A. SOMERS, *supra* note 15, at 241.

17. This Commission was established by Congress "to undertake a comprehensive study and evaluation of state workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation." Dahl, *Shaping Up: Florida's Workmen's Compensation Law*, 47 FLA. B.J. 500 (1973). Its conclusions were reported on July 30, 1972. *See generally* REPORT OF THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS (1972) [hereinafter cited as NATIONAL COMM'N REPORT]; Comment, *Workmen's Compensation: National Commission on State Workmen's Compensation Laws: Import for Oklahoma*, 26 OKLA. L. REV. 446 (1973).

18. NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 168 (1973) [hereinafter cited as COMPENDIUM].

19. NATIONAL COMM'N REPORT, *supra* note 17, at 21.

20. E. CHEIT, *supra* note 1, at 295. The Florida practice is normally to send only cases involving double amputations, paraplegia, or quadraplegia to such centers. 30 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 21 (1966).

mechanical suggestions is the better, and many of the comments made herein are equally applicable regardless of the structure employed.

The Case for Vocational Rehabilitation

Though authorities differ on how the system should be structured, they concur in the belief that some provision should be made for a vocational program within a state's workmen's compensation law.[21] A leading commentator has pointed out that, even when viewed as a purely legal concept, rehabilitation is a necessary adjunct to a comprehensive workmen's compensation system. This necessity, of course, arises from the legal doctrine of restitution, since, in losing his ability to work at a specific occupation, the injured worker has lost something that cannot be restored by mere money damages. Rehabilitation, because it restores the worker's earning capacity, is thus viewed as the equivalent of the remedy of restitution.[22]

An alternative approach recognizes that the ultimate purpose of all workmen's compensation acts is to return the injured employee to the labor market at a minimum of inconvenience and expense to him and to society.[23] Even if complete restoration of an individual's earning capacity is impossible, sufficient rehabilitation to enable the injured worker to maximize his post-injury earning capacity would appear consonant with this purpose.[24] Studies comparing the benefits of such programs with their costs have arrived at benefit/cost ratios varying from 3.30/1 to 70/1.[25] In accord was a study of the state program in Florida[26] that estimated a return to Florida taxpayers of $4.87 for every dollar spent, with a return on each federal dollar of $2.60.[27] Neverthe-

21. *E.g.*, National Comm'n Report, *supra* note 17, at 15 ("The injured worker's physical condition and earning capacity should be promptly restored."); 2 A. Larson, Workmen's Compensation Law §61.20 (1970); Johnson, *Can Our State Workmen's Compensation System Survive?*, 3 Forum 264, 267 (1968); U.S. Dep't of Labor, Bull. No. 212, State Workmen's Compensation Laws (rev. 1967); Symons, *The Future of Workmen's Compensation*, ABA Sect. Ins., Neg. & Comp. L. 182, 184 (1959).

22. 2 A. Larson, Workmen's Compensation Law §61.20 (1970).

23. *See, e.g.*, Lee Eng'r & Constr. Co. v. Fellows, 209 So. 2d 454 (Fla. 1968); McLean v. Mundy, 81 So 2d 501 (Fla. 1955).

24. *See* Compendium, *supra* note 18, at 25.

25. *Id.* at 174. None of these studies dealt expressly with rehabilitation programs as they applied to workers with job-related injuries (*i.e.*, those that would receive their benefits under the workmen's compensation system); however, a majority of insurance carriers have endorsed vocational rehabilitation as a workmen's compensation benefit, an unlikely occurrence were such benefits to cost them more than they would gain. Herlick, *Rehabilitation of Industrially Injured Workers*, 25 Hastings L. J. 165, 171 (1973).

26. This is a joint federal and state rehabilitation program whereby the state, in return for federal monies, agrees to abide by the requirement dictated by Congress. See text accompanying notes 97-105 *infra*.

27. Kiser, *A Review of Benefit-Cost Analysis in Vocational Rehabilitation*, in 2 Supplemental Studies for the National Comm'n on State Workmen's Compensation Laws 383, 393 (M. Berkowitz ed. 1973) (*citing* Ballantine, A Cost-Benefit Analysis of the Florida Federal-State Vocational Rehabilitation Program, unpublished doctoral dissertation, Florida State University (1971). *But see* Herlick, *supra* note 25, at 167, 168 *citing* Larry Kiser, a consultant to the National Commission, for a discussion of the possible negative effects of vocational rehabilitation in a full employment economy).

less, the inclusion of vocational rehabilitation as a workmen's compensation benefit should not have to be justified solely by economic considerations. Even if these benefit/cost ratios were less than one, "[t]he worker's feeling of worth and well-being is a legitimate concern."[28] As the Florida Industrial Commission has stated, a reduction in the overall cost of compensation for the severely injured is but a secondary justification for rehabilitation; the primary one must be to procure a reduction in human suffering.[29]

The number of injured workers who require rehabilitation benefits before they can return to gainful employment is relatively small compared with the total number of workmen's compensation claimants.[30] Nonetheless, the statistical conclusions that can be drawn from available data are alarming. In most jurisdictions, fewer than one percent of claimants receive vocational rehabilitation.[31] In Florida, where the statute recognizes every employee's right to receive needed rehabilitation,[32] between one and three percent of claimants in recent years actually received such benefits.[33] The inference is inescapable that many injured employees eligible for rehabilitation are in some way being foreclosed from participation.

It must be admitted, however, that these figures are somewhat illusory. In the majority of rehabilitation cases, the entire matter is handled by private agreement between the employee and the employer or his insurance carrier.[34] In this way the employer retains some control over the particular program that the employee undertakes[35] and can often channel the workman into a program funded entirely from public sources.[36] Because of the proliferation of private agreements, court cases and administrative rulings dealing with vocational rehabilitation are rare. It is nevertheless apparent that most legislatures and workmen's compensation agencies are avoiding rehabilitation as a possible benefit. Given the modern view[37] that such an alternative should be available

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28. NATIONAL COMM'N REPORT, *supra* note 17, at 39.

29. 31 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 16 (1967).

30. The estimates range from 1% to 10%. Statement by Robert A. McLeod to the National Commission in COMPENDIUM, *supra* note 18, at 161.

31. COMPENDIUM, *supra* note 18, at 171.

32. The Florida Industrial Commission (now the Industrial Relations Commission) has endorsed the standard set forth by the International Association of Industrial Accident Boards and Commissions that "When a State passes a Workmen's Compensation Law and deprives the injured worker of his common law rights, that State concurrently assumed (sic) responsibility to protect that man and society by assuring the sure and certain rehabilitation of the injured worker." 23 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 54 (1959); *see* FLA. STAT. §440.49 (1973). For a more detailed discussion of Florida's program, see text accompanying notes 156-158 *infra*.

33. COMPENDIUM, *supra* note 18, at 172. This was for 1968-1970, the most recent years for which complete figures are available. In 1973 the Bureau of Workmen's Compensation established 136,169 claims for disability and screened 8,781 of these for rehabilitation. ANNUAL REPORT OF THE DEP'T OF COMMERCE OF THE STATE OF FLORIDA 33, 34 (1973).

34. COMPENDIUM, *supra* note 18, at 170.

35. *Id.*

36. *Id.* at 169. For a discussion of the financing of rehabilitation programs, see text accompanying notes 68-120 *infra*.

37. Johnson, *Rehabilitation*, ABA SECT. INS., NEG. & COMP. L. 492, 497 (1967).

where there are highly disabling permanent injuries[38] — disabilities sufficient to interfere with claimants' normal occupations[39] — as well as long-run yet temporary disabilities,[40] the time to address the issue has clearly arrived.

TYPES OF BENEFITS

There are three principal types of benefits that fit within the broad category of vocational rehabilitation: the lump-sum award, the retraining benefit award, and the maintenance benefits. The three are designed to serve different rehabilitative purposes, but they are not mutually exclusive. Indeed, most comprehensive plans involve all three types, and a system excluding one or more would be an inherently weak one.

Lump-Sum Payments. Lump-sum payments are authorized by statute[41] so that an employer's liability for compensation may be discharged by the discounted lump-sum payment of a computed amount of money to an injured employee.[42] Technically, however, the lump-sum payment is not a rehabilitation award, because such a device avoids the requirement that there be a rehabilitative effort. For this reason, the lump-sum award device can be used only if a judge of industrial claims[43] finds "that it is for the best interests of the person entitled to compensation," after weighing the "interests of all interested parties."[44]

In *Feldkamp v. Coast Cities Coaches, Inc.*,[45] claimant petitioned for a lump-sum payment so that he could establish a boys' camp. The Deputy Commissioner allowed the award and the employer and his carrier appealed. The Industrial Relations Commission recognized that the award was made only after the claimant had been referred to the Rehabilitation Department[46] for evalua-

38. Such injuries include paraplegia, amputations and similar injuries which require that the injured person relearn how to do even the simplest tasks.

39. This involves a more limited injury but one which, because of the nature of the employee's occupation, prevents him from engaging in that occupation to the extent he could before the injury. An example is a coal miner who, because of an occupational disease, is no longer able to work in the mines but who could do other types of jobs not requiring physical exertion if properly trained.

40. These are relatively rare injuries. However, in the case where an individual is injured on the job and will require extensive physical therapy before being able to return to his duties, vocational rehabilitation is appropriate to give the employee a skill by which he can earn a living during this interim period.

41. *E.g.*, Fla. Laws 1975, ch. 75-209, §11, *to be codified as* FLA. STAT. §440.20(10).

42. *Id.*

43. Judges of Industrial Claims are appointed by the governor to serve a four-year term, with reappointment contingent on a recommendation by the Judicial Nominating Commission. Fla. Law 1975, ch. 75-209, §22, *to be codified as* FLA. STAT. §440.45. They serve as the finders of fact at hearings on workmen's compensation claims. Fla. Laws 1975, ch. 75-209, §12, *to be codified as* FLA. STAT. §440.25(3).

44. *Id.* The term "interested party" has been interpreted broadly. *See* Goldberger v. Wolfie's Restaurant, IRC order 2-2424 (Oct. 8, 1973) (creditor hospital of claimant held to be "interested").

45. 1 F.C.R. 22, *cert. denied*, 98 So. 2d 903 (Fla. 1956).

46. The rehabilitation department is the division of the workmen's compensation agency

tion of whether there was a "reasonable probability that with appropriate training or education he might be rehabilitated to the extent that he can become gainfully employed."[47] The Board permitted the award after finding that the investment was financially sound and that the projected earnings exceeded those benefits to which the claimant was entitled under the workmen's compensation law.[48] The *Feldkamp* case thus indicates that a contested lump-sum payment will be approved only after it has been demonstrated that the claimant cannot be employed in any gainful occupation.[49] Moreover, a lump-sum payment requires a showing that the proposed investment is financially sound. The financial soundness test, of course, is a necessary concomitant because the claimant usually loses all the deferred benefits arising from continued surveillance of his case by workmen's compensation personnel; in a few years an unsound investment might result in a much worse financial situation for him than before the award.[50] While the *Feldkamp* court did not face the loss of future benefits problem, the court's rationale was premised on the belief that lump-sum awards should be restricted to those infrequent situations where it would clearly provide the only method for a claimant to enhance his earning power.

The same difficulties inherent in contested lump-sum awards also exist in a variation of the lump-sum award – the private employer-employee lump-sum settlement. In *State* ex rel. *Iowa National Mutual Insurance Co. v. Florida Industrial Commission*,[51] the claimant had privately agreed to accept a $4,000 lump-sum payment so he could engage in business. After several months, however, the claimant concluded that the settlement was insufficient and sought to escape the agreement. The Florida supreme court, relying on traditional contract theory, refused to set aside the agreement. Reasoning in favor of the amicable settlement of disputes, the court found the agreement binding in the absence of a showing of fraud or mutual mistake.[52] The decision, however, is not reconcilable with the stringent limitations placed on lump-sum awards in contested situations. To subject lump-sum awards to stringent safeguards in order to accomplish remedial rehabilitation and yet refuse to extend such protection to private lump-sum agreements is anomalous since the substantive effect of either approach is the same.[53] The law should require, therefore, that

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in Florida that is responsible for the rehabilitation of industrially injured workers. 32 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 14 (1968).

47. 1 F.C.R. at 26.

48. *Id.* at 27.

49. A great deal of discretion is vested in the finder of fact, however. *See* FLA. R. WORKMEN'S COMP. 17(d).

50. 2 A. LARSON, WORKMEN'S COMPENSATION LAW §61.20 (1970). In Florida such orders are subject to modification and review unless stipulated to the contrary by the parties. FLA. R. WORKMEN'S COMP. 17(f).

51. 151 So. 2d 636 (Fla. 1963).

52. *Id.* at 640, 641.

53. *E.g.*, Thomas Smith Farms, Inc. v. Alday, 182 So. 2d 405 (Fla. 1966); Alexander v. Peoples Ice Co., 85 So. 2d 846 (Fla. 1956); Di Giorgio Fruit Corp. v. Pittman, 49 So. 2d 600 (Fla. 1950).

all settlements be approved only after a careful investigation by the rehabilitation department of the workmen's compensation agency.[54]

Retraining and Educational Benefits. The second category of vocational rehabilitation benefits, and the heart of any rehabilitation program consists, of course, of benefits that cover the costs of retraining or educational programs necessary to return the claimant to the labor force. The benefits may take the form of payments for tuition, books, or possibly expenses incurred in on-the-job training for a new line of work.[55] Costs of placement services will also normally be included once the training or program of study has been completed.[56] Nearly all workmen's compensation acts that include rehabilitation benefits include retraining and educational benefits; therefore, they need not be further discussed at this point.[57]

Maintenance Payments. The third type of benefit essential to a sound rehabilitation program is maintenance payments. These payments are usually given to the injured employee in addition to any other rehabilitation benefits as a supplement to normal compensation payments. Because they make it possible for a claimant to bear the increased cost necessarily involved in retraining or education at a location other than his usual place of residence,[58] maintenance payments are critical to the success of an adequate rehabilitation scheme. Moreover, these benefits are viewed as essential in ensuring the worker's continued cooperation with the particular rehabilitation program in which he is entered.[59] To accomplish these purposes, the benefits must, of necessity, include the reasonable cost of an employee's lodging, meals, and travel while he is engaged in a program away from his home.[60]

Despite the importance of maintenance benefits, at least 11 states, including

54. It appears that this is now a common, though not required, practice for settlements in excess of $2,000, although the same standards of proof are not enforced if both parties have agreed to the settlement. *See* Goldberger v. Wolfie's Restaurant, IRC Order 2-2424 (Oct. 8, 1973); FLA. R. WORKMEN'S COMP. 17. The ideal solution, of course, would be a requirement that all such settlements be reviewed by a judge of industrial claims, but this is impractical for reasons of judicial economy.

55. For example, Fla. Laws 1975, ch. 75-209, §20, *to be codified as* FLA. STAT. §440.49(1), provides that the labor division can assist such workers in obtaining "appropriate training, education, and employment."

56. For a more detailed discussion of placement services, see text accompanying notes 187-199 *infra.*

57. *E.g.*, ALASKA STAT. §23.30.040 (1962); MD. ANN. CODE art. 101, §36(9) (Supp. 1974); OHIO REV. CODE ANN. §4123.57 (Page 1973). Many states merely use the term "vocational rehabilitation" to describe the benefits. This term definitionally includes such services since it is taken from the state's vocation rehabilitation act which, in turn, is based on the federal act that includes these services. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, §103, 87 Stat. 355 (Sept. 26, 1973). For a discussion of the federal act, see text accompanying notes 97-115 *infra.*

58. 2 A. LARSON, WORKMEN'S COMPENSATION LAW §61.20 (1970).

59. NATIONAL COMM'N REPORT, *supra* note 17, at 21.

60. *See Council of State Governments*, MODEL WORKMEN'S COMPENSATION LAW (DRAFT) §13(d), in 2 A. LARSON, WORKMEN'S COMPENSATION LAW §61.20 (1970). See also U.S. DEP'T OF LABOR, BULL. NO. 212, STATE WORKMEN'S COMPENSATION LAWS 12, 13 (rev. 1967).

Florida, have no provision for them in their current codes.[61] Moreover, many of the states that do have such provisions severely limit the benefits, with at least one providing for such payments only while the employee is undergoing physical, not vocational, rehabilitation.[62]

In those states where maintenance benefits are available, only a few pay the entire cost of an employee's maintenance.[63] The majority have maximum limits on the amount of maintenance benefits which can be paid, ranging from a high of 84 dollars per week in Ohio[64] to a low of 10 dollars per week in Mississippi,[65] with most also providing a maximum total dollar amount or time limit which may not be exceeded.[66] The majority of states permitting maintenance benefits extend eligibility to any claimant actually receiving rehabilitation benefits.[67]

The great bulk of state maintenance provisions are inadequate. For a state's rehabilitation program to be successful, its statute must also provide for maintenance benefits, since only in a minority of cases will the claimant be able to undergo complete vocational redevelopment within commuting distance of his home. Ideally, the amount of such benefits should be limited only by a standard of reasonableness. In any event, any maximum should be sufficient to cover the added expenses necessarily incurred from temporary relocation.

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61. COMPENDIUM, *supra* note 18, at 175. Florida does provide that the employee can receive temporary total disability benefits during rehabilitation. FLA. STAT. §440.15(2)(b) (1973). This does not cover the added expenses incurred in being away from home, however. A new Florida statute increases these benefits from 60% of the employee's average weekly wage to 80% or $400, whichever is less, for employees with certain specified severely disabling injuries. It is severely limited in its utility, however, by a restriction that this increase will not last longer than 6 months from the date of injury. FLA. LAWS 1975, ch. 75-209, §6, *to be codified as* FLA. STAT. §440.15(2)(c). The COMPENDIUM listed 14 states that did not have maintenance benefits, but since its publication at least 3 of these have added such provisions to their workmen's compensation statutes. See ARIZ. REV. STAT. ANN. §23-1065 (Supp. 1974); IOWA CODE ANN. §85.70 (Supp. 1974); MD. ANN. CODE art 101, §36(9)(d) (Supp. 1974).

62. MO. ANN. STAT. §287.141 (Vernon, Cum. Supp. 1974).

63. *E.g.*, ARK. STAT. ANN. §80-2551 (1960) ("maintenance"); ARIZ. REV. STAT. ANN. §23-1065 (Supp. 1974) ("discretion"); N.H. REV. STAT. ANN. §281:21-b (Supp. 1973) ("reasonable cost"); MASS. GEN. LAWS ANN. ch. 152, §30B (Supp. 1973) ("reasonable and necessary").

64. OHIO REV. CODE ANN. §4123.57 (Page 1973).

65. MISS. CODE ANN. §71-3-19 (1972).

66. ALASKA STAT. §23.30.040 (1974) (maximum of $100/month up to $5000); HAWAII REV. STAT. §286-25 (1968) (maximum of $35/week (plus travel) up to $5000); IOWA CODE ANN. §87.50 (Supp. 1974) ($20/week maximum for thirteen weeks, with a possibility of the time being extended); ME. REV. STAT. ANN. tit. 39, §52 (Supp. 1974), *as amended,* Maine Laws 1975, ch. 302, §1 ($35/week maximum plus travel for up to 52 weeks, with a possible extension of another 52 weeks); MD. ANN. CODE art. 101, §36(9)(d) (Supp. 1974) ($40/week maximum for up to 24 months); MONT. REV. CODE ANN. §92-1403 (Supp. 1974) ($50/week maximum); N.Y. WORKMEN'S COMP. LAW ANN. §15(9) (Supp. 1974) ($30/week maximum); N.D. CENT. CODE §65-05.1-06 (Supp. 1974) (maximum of 125% of claimant's normal compensation benefits); *see* Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. §908(g) (1970) ($25/week maximum).

67. *See* Mass. Bonding and Ins. Co. v. Industrial Comm'n, 275 Wis. 505, 82 N.W.2d 191 (1957) (even though there was no real showing that he needed rehabilitation, claimant was allowed to receive such benefits because he had been accepted in the state vocational education program). *See also* Berenowski v. Anchor Window Cleaning Co., 221 App. Div. 155, 223 N.Y.S. 73 (3d Dep't. 1927).

Direct Employer Payment. One method used to finance rehabilitation programs relies on direct employer payment. Such plans generally provide that "the employer and insurer shall pay the expenses of vocational rehabilitation."[68] This is the only financing structure which takes the burden of caring for injured workers off society at large and places it on the industry producing the injury.[69] The result, in theory, is that each employer and industry pays its fair share of the total cost of such injuries. In the long run, this tends to shift resources from hazardous industries to safe industries and from unsafe employers within an industry to safety-conscious employers.[70] Theoretically, higher workmen's compensation costs will force employers with hazardous operations to raise their prices. This competitive disadvantage will provide a strong incentive for industries and individual employers to make their operations safer.[71]

The question arises, however, whether requiring the payment of rehabilitation expenses directly by the employer of the injured worker would further this objective. The expenses of retraining and maintenance stem from the injury, and theoretically, such retraining and maintenance will provide economic benefit to the employer in the form of reduced compensation benefits paid.[72] By placing the burden of payment directly on the employer, he is given an incentive to initiate rehabilitation benefits as soon as possible after the injury, or to rehire the employee if at all possible.[73] In theory, since rehabilitation is normally needed by those injured workers with the most disabling injuries, this provides a safety incentive to the most dangerous industries. Such reasoning, however, is based on the premise that the most hazardous industries produce the most disabling injuries, an assumption that may not be completely accurate.[74] At least part of the total rehabilitation package, such as vocational

68. MD. ANN. CODE art. 101, §36(9)(a) (Supp. 1973); *see* MASS. GEN. LAWS ANN. ch. 152, §30B (Supp. 1973).

69. *E.g.*, Lee Eng'r. & Constr. Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968); Port Everglades Terminal Co. v. Canty, 120 So. 2d 596, 602 (Fla. 1960); Duff Hotel Co. v. Ficara, 150 Fla. 442, 445, 7 So. 2d 790, 791 (1942).

70. COMPENDIUM, *supra* note 18, at 25; *see* Keaney, *supra* note 13, at 425.

71. Keaney, *supra* note 13, at 425. The incentive to individual employers is primarily a by-product of the incentive to the industry as a whole. Because the insurance rate structure for employers is chiefly based on the safety record of the entire industry, the incentive will be felt directly by the employer only if he is self-insured. The number of self-insurers is small relative to the total number of employers covered by workmen's compensation. 33 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 3, 11 (1969).

72. Once the program of rehabilitation has been completed, the employee's earning capacity will be increased and his consequent need for compensation lessened. See text accompanying notes 201-208 *infra*.

73. The mere fact that an employee has been rehired will not destroy his right to compensation for a "scheduled" injury. FLA. STAT. §440.15 (1973); see text accompanying note 124 *infra*. If the employee's injury is a "non-scheduled" one, however, his re-employment is one of the factors that may be taken into account. See text accompanying notes 132-135 *infra*.

74. Ontario, considered by many to have the most progressive workmen's compensation system, categorizes compensable injuries as either occupational diseases, which are directly attributable to inherent dangers of particular industries, or as other industrial injuries, for

counseling and placement, is much more an administrative cost of the workmen's compensation system.[75] To place the cost of these services directly on the employer, then, serves no great economic purpose, since he has no control over the quality of such services or the speed with which they are dispensed. Safety incentive, on the other hand, can still be effectuated by financing the more traditional rehabilitation benefits — retraining and maintenance — through direct employer payment plans and generating funds for counseling and placement costs from some other source.

Contribution Fund System. A second means of paying for rehabilitation benefits is the employer contribution fund. Such funds depend upon assessments made on each carrier or self-insured employer within the state.[76] The cost of the program is thus spread throughout the system, precluding the necessity for individual assessments and treating rehabilitation as an administrative cost of the overall program.

While superficially this appears to be a proper means of financing the rehabilitation program,[77] such funds do not accomplish the goal of reallocating the cost of a work-related injury from society at large to the industry producing it.[78] This was one basis for the National Commission's recommendation that the entire cost of rehabilitative services should be paid directly by the individual employer.[79] The other reason given was "to assure that rehabilitation receives appropriate attention in the workmen's compensation program."[80] Through the use of an employer assessment fund to pay for the counseling and placement portions of the program, with the burden for the remainder of the program placed directly on the employer, these goals would be better realized. The employer would still have an incentive to see that his employee received benefits as quickly as possible;[81] at the same time, the state would be able to retain enough control over the quality of the program to prevent the individual worker from being victimized.[82]

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which this generalization may not be accurate. Rehabilitation benefits arising from the former are paid directly by the employer; those resulting from the latter are paid out of a general employer assessment fund. ONT. REV. STAT. ch. 505, §53 (1970). This alleviates the problem, but does not eliminate it.

75. *See* Feldkamp v. Coast Cities Coaches, Inc., 1 F.C.R. 22, 27, *cert. denied*, 93 So. 2d 903 (Fla. 1956).

76. It has been held that, in administering such a fund, the state acts in its sovereign capacity, not as a trustee, so it can appropriate the monies in such funds for general state purposes. *In re* Lloyd's Ins. Co., 281 N.Y. 176 (1939). The constitutionality of these funds is no longer in doubt. *See* R.E. Sheehan Co. v. Shuler, 265 U.S. 371 (1924); N.Y. State Yrs. v. Shuler, 265 U.S. 379 (1924).

77. *E.g.*, MODEL WORKMEN'S COMPENSATION ACT, *supra* note 60.

78. See text accompanying notes 68-71 *supra*. This goal is not completely ignored by such plans since the assessments are normally based on an employee's insurance payments. *See* FLA. STAT. §440.51 (1973). This is not nearly as satisfactory as direct employer payment, however.

79. NATIONAL COMM'N REPORT, *supra* note 17, at 21, 82.

80. *Id.* at 21.

81. See text accompanying notes 23-27 *supra*.

82. Another variation of this scheme has been proposed by a noted scholar in this area, Mr. Earl Cheit, who proposes that an assessment fund be financed by making an employer

The employer assessment fund concept is currently being used in Florida. The applicable statute[83] requires a preliminary estimate of the amount necessary for the administration of the state's workmen's compensation act.[84] The Bureau of Workmen's Compensation then levies assessments upon each carrier within the State in an amount based upon the gross premiums collected by the carrier during the preceding year and upon each self-insured employer in an amount based on the premiums he would have to pay if he were not self-insured.[85] Under the rehabilitation statute,[86] money "may" be expended from this fund "for the purpose of assisting such injured employees to obtain appropriate training, education, and employment in connection with their vocational rehabilitation."[87] A great deal of discretion is left to the judges of industrial claims and the workmen's compensation agency in determining which rehabilitation costs should be assessed against the fund and which should be paid by the employer.[88]

No-Dependent Death Funds. A popular variation of the employer assessment fund is the no-dependent death fund, in which only employers of workers who suffer a fatal, on-the-job compensable injury and who have no dependents to whom compensation benefits can be paid are assessed. Typical of such statutes is the New York provision,[89] stating that each employer of an employee who dies as the result of an injury in the course of employment leaving no dependents must pay $1000 into the special fund, which is used to furnish an employee undergoing rehabilitation "additional compensation necessary for his rehabilitation."[90]

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who does not rehire an injured worker pay a sum equal to the employer's cash benefit in not rehiring the employee. E. CHEIT, *supra* note 1, at 346. This solution has the advantage of providing an incentive to rehire employees; however, the administrative costs would be extremely high since an individual investigation would have to be made in each case. The sums obtained still might not be sufficient to cover the rehabilitation costs of employees not rehired. Further, this proposal assumes that being rehired is always best for the employee, an assumption which, as has been seen, is not always valid. See text accompanying notes 5-9 *supra*.

83. FLA. STAT. §440.51 (1973).

84. FLA. STAT. §440.51(1)(a) (1973).

85. Fla. Laws 1975, ch. 75-209, §25, *to be codified as* FLA. STAT. §440.51(1)(b). In 1970 Florida collected $3.7 million for this fund from an assessment of 2%. Brooke, *Administering Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York, and Wisconsin*, in 3 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 77, 92 (M. Berkowitz ed. 1973). Another approach assesses employers and carriers based upon a percentage of their liability in the preceding year. CONN. GEN. STAT. ANN. §31-283b (Supp. 1974).

86. FLA. STAT. §440.49(1)-(3) (1973), *as amended*, Fla. Laws 1975, ch. 75-209, §24.

87. FLA. STAT. §440.49(1) (1973).

88. Only the benefits supportive of rehabilition (counseling and placement) seem to be contemplated by this language. *See* Feldkamp v. Coast Cities Coaches, Inc., 1 F.C.R. 22, 27, *cert. denied*, 93 So. 2d 903 (Fla. 1956) ("Considering both the purpose and results obtained [from vocational evaluation and counseling], the costs thereof should be borne by the Commissioner and not the carrier.").

89. N.Y. WORKMEN'S COMP. LAW ANN. §15(9) (Supp. 1974).

90. *Id.*; *See* ARIZ. REV. STAT. ANN. §23-1065 (Supp. 1974); Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. §§908(g), 944 (1970).

In addition to the problems inherent in all employer assessment funds,[91] no-dependent death funds raise further questions. As the New York Court of Appeals recognized, they "impose a penalty upon the wrongdoer," and thus the employer "is made responsible for his wrongful act."[92] Workmen's compensation acts, however, are designed to provide compensation to injured workers even in the absence of any wrongdoing on the part of the employer.[93] Furthermore, they are supposed to benefit both employer and employee by providing the employee an expeditious remedy without his having to prove fault while guaranteeing the employer limited liability.[94]

Clearly, no-dependent death funds directly contravene one purpose of workmen's compensation legislation in that they serve to punish the employer rather than to reimburse the employee for his injury. Further, they fail to fulfill another goal as there is no evidence of any relationship between those industries having the most no-dependent death cases and the industries having the highest number of employees needing rehabilitation.

Another more serious defect with no-dependent death funds is that they do not guarantee money to every injured worker in need of rehabilitation. First, less than one percent of all job-related injuries result in death,[95] so that the funds have a very limited source of income. Second, many statutes provide that administration expenses of the state's workmen's compensation agency or second-injury payments have priority over rehabilitation expenses in the use of the fund.[96] Thus, in those states using no-dependent death funds, rehabilitation has been given the lowest priority in use of the moneys in the fund.

Taxpayer-Funded System. The final alternative for financing vocational rehabilitation programs is the use of tax revenues. This is accomplished by utilizing a combined state and federally funded program that exists independently of the workmen's compensation system. The vehicle for this program is the Rehabilitation Act of 1973,[97] which provides 90 percent federal funding for projects providing vocational training services to handicapped individuals.[98] Where the disability arises out of a job-related injury, however, a problem arises from the federal requirement that the state designate an independent agency to administer the rehabilitation program.[99] Consequently, the workmen's compensation agency is not entitled to receive any federal funds

91. See text accompanying notes 76-82 *supra.*

92. Phoenix Indem. Co. v. Staten Island Rapid Transit Ry., 251 N.Y. 127, 139, 167 N.E. 194, 200 (1929), *aff'd,* 281 U.S. 98 (1930) (New York statute held constitutional).

93. *See, e.g.,* FLORIDA DEPT OF COMMERCE, THE WORKMEN'S COMPENSATION LAW 1 (1972). *See generally* Protectu Awning Shutter Co. v. Cline, 154 Fla. 30, 16 So. 2d 342 (1944).

94. McLean v. Mundy, 81 So. 2d 501, 503 (Fla. 1955); *see* Florida Game & Fresh Water Fish Comm'n v. Driggers, 65 So. 2d 723, 725 (Fla. 1953); Grice v. Suwannee Lumber Mfg. Co., 113 So. 2d 742, 745 (1st D.C.A. Fla. 1959).

95. COMPENDIUM, *supra* note 18, at 179.

96. *E.g.,* 33 U.S.C. §944 (1970); ALASKA STAT. §23.30.040 (1962). For a discussion of second injury funds, see text accompanying notes 197-199 *infra.*

97. Act of Sept. 26, 1973, Pub. L. No. 93-112, §103, 87 Stat. 355.

98. *Id.* §302(b). The maximum amount a state may receive under this act is determined through a complicated allotment formula based, in general, on the state's population. *Id.* §110.

99. *Id.* §101(1).

directly and, in effect, has little or no control over the program.[100] This creates an anomalous situation since the main pressure for passage of the first civilian rehabilitation act came from the industrial workers,[101] and approximately 15 percent of all recipients under this program were referred by workmen's compensation agencies.[102]

The chief shortcoming in relying entirely on this program for workmen's compensation vocational rehabilitation is similar to the improper allocation problem arising in regard to employer assessment funds.[103] This type of funding has the effect of shifting the cost of such programs from the industry producing the injury to the general public, destroying whatever safety incentive might otherwise result from making an industry bear the cost of its injuries. Additionally, any financial incentive the employer may have to retain the injured worker on his payroll is greatly reduced, since he will not have to pay the cost of the employee's rehabilitation if he does not rehire him.

Fortunately, very few workmen's compensation agencies rely exclusively on the taxpayer-funded plan to rehabilitate their claimants. The majority of states have formulated a plan of cooperation between the workmen's compensation bureau and the vocational education agency.[104] This plan avoids unnecessary duplication of facilities, but unless the statute is explicit, there still exists a high probability that none of the cost of the rehabilitation can be charged to the employer.[105] Even if this hurdle is overcome, there are still other problems that must be minimized before an effective program can be established.

The first major problem is inherent in the cooperative plan. The majority of state plans envision a "referral" mechanism whereby workmen's compensation claimants who might benefit from rehabilitation are sent to the state vocational education agency. At least one commentator has suggested that this ability to refer the most difficult cases to another agency encourages the workmen's compensation system to abdicate its responsibility for the restoration of industrially injured workers to the labor force.[106] Since this results in there being no one to bear the primary responsibility of seeing the rehabilitative process through to a successful conclusion,[107] the person hurt is the injured worker. For this reason the National Commission has recommended that the workmen's compensation agency should take a "more active role" in managing rehabilitative programs,[108] with its medical-rehabilitative division assuming the

100. Nevertheless, the act authorizes the state vocational education agency to enter into cooperative agreements with other state agencies for the use of its facilities and services. *Id.* §101(11). Florida has also provided statutory authorization for such arrangements. FLA. STAT. §413.26 (1973).

101. H. SOMERS & A. SOMERS. WORKMEN'S COMPENSATION 254 (1954).

102. COMPENDIUM, *supra* note 18, at 170.

103. See text accompanying notes 76-82 *supra.*

104. *E.g.*, FLA. STAT. §413.26 (1973); HAWAII REV. STAT. §386-25 (1968); ME. REV. STAT. ANN. tit. 39, §52 (Supp. 1974); MINN. STAT. §121.31 (1974).

105. Stafford v. United States Envelope Co., 45 N.J. Super. 333, 132 A.2d 555 (1957).

106. E. CHEIT, *supra* note 1, at 310.

107. Dixon, *Legal and Economic Aspects of Rehabilitation of Injured Workers*, ABA SECT. INS. L. 178, 180, 181 (1949).

108. NATIONAL COMM'N REPORT, *supra* note 17, at 82.

responsibility for seeing that every worker who could benefit is offered such services.[109] With the workmen's compensation agency having direct supervision of rehabilitation from the onset of the injury to the return of the worker to employment, this "referral" problem will be greatly reduced.[110]

Another problem with the taxpayer-funded program originates in the friction among the state agencies involved. A prospective rehabilitation beneficiary faces a major hurdle just in being accepted by the state vocational education agency. The National Commission found an alarming variation between the number of workers referred from the workmen's compensation system and the number actually admitted into a rehabilitative program.[111] This variation is partially explained by the fact that referrals must compete with non-industrially disabled cases for the limited resources of the agency.[112] In addition, Congress has directed that such agencies must first serve those with the most severe handicaps.[113] A further problem stems from the state vocational education agencies' historical tendency toward erratic performance; there is no assurance that even the most severely disabled claimants will receive needed rehabilitation.[114] Finally, even if a claimant is accepted into a program, he will likely face a waiting period of several months before beginning rehabilitation.[115]

As a means of financing any necessary rehabilitation programs for workmen's compensation claimants, the taxpayer-funded rehabilitation plan is clearly inadequate. Only by funding such programs entirely through the workmen's compensation system will a reliable source of financial support be guaranteed.[116] This is also the only method which ensures that a major goal of workmen's compensation — allocating to the responsible industries all the costs of work-related injuries — can be satisfied.[117] The best type of financial plan seems to be the combination of the employer assessment and direct payment plans, which has been previously discussed.[118]

Placing the entire responsibility on the workmen's compensation bureau does not mean that it should purchase all the rehabilitative services. Once the actual responsibility is recognized, each agency can take advantage of the experience and expertise of the state's vocational education agency and the various voluntary agencies within the state.[119] The optimal solution would be a program whereby the workmen's compensation bureau makes the initial determination whether a worker could benefit from rehabilitation, and counseling services from the state vocational education agency could be used to de-

109. *Id.*
110. E. CHEIT, *supra* note 1, at 314-16.
111. COMPENDIUM, *supra* note 18, at 172.
112. E. CHEIT, *supra* note 1, at 298.
113. Act of Sept. 26, 1973, Pub. L. No. 93-112, 87 Stat. 355.
114. NATIONAL COMM'N REPORT, *supra* note 17, at 82.
115. E. CHEIT, *supra* note 1, at 298.
116. *See* NATIONAL COMM'N REPORT, *supra* note 17, at 82.
117. *Id.* See text accompanying notes 76-82 *supra.*
118. *Id.*
119. NATIONAL INSTITUTE ON REHABILITATION AND WORKMEN'S COMPENSATION, REHABILITATING THE DISABLED WORKER — A PLATFORM FOR ACTION 90 (M. Berkowitz ed. 1963).

termine the types of rehabilitation that would best suit the individual claimant.[120]

The Process Leading to an Award of Rehabilitation Benefits

Determination of Loss in Earning Capacity

Since the primary purpose of all workmen's compensation legislation is to compensate an injured employee for a loss of earning capacity arising out of, and in the course of, his employment,[121] a rehabilitation award can be made only when there is such a loss.[122] In accord with most states, Florida has provided by statute for a schedule of compensation to be paid to employees receiving certain enumerated injuries.[123] Regardless of any actual loss of earning power, the statute provides for a conclusive presumption that the scheduled injuries are permanently disabling.[124] Since rehabilitation benefits may be awarded where "it appears disability probably will be permanent,"[125] it logically follows that this presumption would also be applicable to claimants seeking to prove permanent disability in order to receive a rehabilitation award. This is not the case, however.

First, the Florida supreme court has held that the permanency presumption only applies "to the extent for which compensation is provided in the statute."[126] The applicable statute merely provides that the benefits paid for scheduled injuries shall be 60 percent of the claimant's weekly wages for a stated number of weeks, depending on the injury.[127] Rehabilitation, on the other hand, is designed to effect the *restoration* of an injured worker to his former economic condition.[128] If the employee has suffered no actual loss of earning capacity, such restoration is unnecessary.

Second, the Florida law requires that rehabilitation benefits only be awarded where "it appears that disability probably will be permanent."[129] Since disability is defined as "incapacity because of injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury,"[130] the disability necessary to trigger a rehabilitation award in Florida flows from an actual loss of earning capacity. In awarding these benefits, therefore, courts are aided by no presumptions but must consider in

120. See text accompanying notes 156-159 *infra* for a discussion of how this stage of vocational rehabilitation is handled in Florida.

121. *E.g.*, Board of County Comm'rs v. Alman, 156 So. 2d 850, 851 (Fla. 1963); Port Everglades Terminal Co. v. Canty, 120 So. 2d 596, 601 (Fla. 1960).

122. *See* Vierling v. Spencer Kellogg & Sons, Inc., 187 Minn. 252, 245 N.W. 150 (1932).

123. Fla. Stat. §440.15 (1973), *as amended*, Fla. Laws 1975, ch. 75-209, §6.

124. Southern Bell Tel. & Tel. Co. v. Bell, 116 So. 2d 617, 620 (Fla. 1959); Dennis v. Brown, 93 So. 2d 584, 586 (Fla. 1957); *see* Dixon, *supra* note 102, at 181.

125. Fla. Stat. §440.49(1) (1973).

126. Southern Bell Tel. & Tel. Co. v. Bell, 116 So. 2d 617, 620 (Fla. 1959).

127. Fla. Stat. §440.15(3) (1973), *as amended*, Fla. Laws 1975, ch. 75-209, §6.

128. See text accompanying notes 10, 22 *supra*. *See* Black's Law Dictionary 1451 (4th ed. rev. 1968).

129. Fla. Stat. §440.49(1) (1973).

130. Fla. Stat. §440.02(9) (1973).

all cases the same factors upon which an award of compensation for non-scheduled injuries is based.[131]

Those considerations that must be taken into account in order to determine whether there has been an actual loss of earning capacity include the claimant's physical condition, age, employment history, and education.[132] Significantly, the fact that an injured worker has been unable to secure subsequent employment at the same wage rate as before his injury is not conclusive evidence of a loss in earning capacity.[133] Similarly, the fact that the employee is earning the same or a higher wage after his injury does not mandate a finding of no loss.[134] Ultimately, then, the findings can appear inconsistent, but consistency can be found in the judicial posture that "a multiplicity of extraneous factors" enters into the determination of an employee's wage rate.[135]

To determine whether, and to what extent, such an actual loss exists requires reliance on a common standard by which the various factors can be evaluated. The general test used in measuring total disability for workmen's compensation purposes is whether the injury has reduced the employee's skills so much "in quantity, dependability, or quality that a reasonably stable labor market" does not exist for them.[136] The standard used to determine if a worker has incurred an actual loss of earning capacity is whether "a reasonably stable labor market" exists for his skills at a wage rate comparable to that enjoyed before the injury.[137] In the context of workmen's compensation benefits, the "labor market" contemplated by the actual loss test has been limited to the claimant's residence area.[138] While the Florida rehabilitation statute presently incorporates no relocation variable, if the employee is willing to relocate, his loss of earning capacity, the limitations on the marketability of his skills, and his eligibility for rehabilitation should be based upon the labor situation in the area to which he will be relocating. To forestall fraud, relocation must be restricted to areas where the loss of earning capacity would be no greater than it had been at the former residence.

One question that courts have faced in applying such a standard is whether the loss of earning capacity is measured only with reference to the occupation in which the employee was working at the time of injury. A problem can arise where a claimant possesses sufficient skills in another field to earn comparable

131. *See* Millender v. City of Carrabelle, 174 So. 2d 740 (Fla. 1965); Kashin v. Food Fair, Inc., 97 So. 2d 609 (Fla. 1957).

132. Ball v. Mann, 75 So. 2d 758, 760 (Fla. 1954).

133. Sterling Equip. Mfg. Corp. v. May, 144 So. 2d 305, 308 (Fla. 1962); Port Everglades Terminal Co. v. Canty, 120 So. 2d 596, 601 (Fla. 1960).

134. Nuce v. City of Miami Beach, 140 So. 2d 303, 305 (Fla. 1962); *see* Berenowski v. Anchor Window Cleaning Co., 221 App. Div. 155, 223 N.Y.S. 73 (3d Dep't 1927). *But see* Reeves v. Echota Cotton Mills, 123 Ga. App. 649, 182 S.E.2d 126 (1971).

135. Withers Van Lines, Inc. v. Walker, IRC Order 2-2350 (Nov. 6, 1973). For example, such factors may include bonuses or cost of living increases, which may serve to camouflage the fact that the employee might have been earning even more had he not incurred the injury.

136. *E.g.*, Abbenante v. United Parcel Service, Inc., 241 So. 2d 1, 4 (Fla. 1970); Reed v. Sherry Frontenac Hotel, Employers Serv. Corp., 150 So. 2d 225, 227 (Fla. 1963).

137. *See* Johnson v. Shelby Mut. Ins. Co., 274 So. 2d 514 (Fla. 1973).

138. *See, e.g.*, Millender v. City of Carrabelle, 174 So. 2d 740, 742 (Fla. 1965).

wages. The determination of actual loss must reflect such variables. While Florida has endorsed this latter position,[139] all jurisdictions are not in accord.[140]

Two explanations are given for the position that only the job in which the employee is engaged at the time of injury is considered in determining loss of earning capacity. First, permitting the measurement of actual loss to include earnings generated from another skill could lead to erosion of the workmen's compensation statute because an employer would continue an injured worker in his hire until the claim period had lapsed.[141] This argument has little merit since an employer could use the same device even if net loss of earning capacity in all employments were considered. The second reason usually given focuses on an injured employee's ability to obtain work. Regardless of the employee's other skills, if his injury results in a reduction of the opportunities available to him, his ability to obtain work is impaired.[142] Such reasoning, however, is unsound. Workmen's compensation acts are not designed to compensate for an employee's increased pain and suffering or his increased difficulty in performing duties after an industrial injury.[143] Moreover, to measure actual loss from the myopic viewpoint of the job at the time of injury is antagonistic to a rehabilitative purpose. Rehabilitation is a device to retrain injured claimants who must shift into another occupation;[144] thus, the pre-existence of an equally profitable second skill should be relevant to the rehabilitation effort.[145] The better view, followed in Florida, for determining whether a claimant has suffered a loss in earning capacity for rehabilitation has a broader focus. Instead of the narrow "job at time of injury" measure, the determination has turned on whether the employee's injury affected his skills to the extent that a reasonably stable labor market no longer exists for them at a wage rate comparable to his pre-injury earning capacity.

Under such a test the question arises of which party carries the burden of proof. When a total disability award is contested, after the employee initially shows by "competent, substantial evidence"[146] that no reasonably stable labor market exists for his skills, the burden of going forward then shifts to the employer.[147] In a rehabilitation award case, however, the employee might not be

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139. FLA. STAT. §440.02(9) (1973); *see* J.J. Murphy & Son, Inc. v. Gibbs, 137 So. 2d 553 (Fla. 1962).

140. *See, e.g.*, Daugherty v. National Gypsum Co., 182 Kan. 197, 318 P.2d 1012 (1957); *In re* Carrigan's Case, 169 N.E.2d 870 (Mass. 1960); Epsten v. Hancock-Epsten Co., 101 Neb. 442, 163 N.W. 767 (1917); Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

141. McGhee v. Sinclair Ref. Co., 146 Kan. 653, 658, 73 P.2d 39, 42 (1937).

142. *Id.*

143. Liberty Mut. Ins. Co. v. Goins, 96 Ga. App. 887, 890, 101 S.E.2d 920, 922 (1958); *see* Allen v. Maxwell Co., 152 Fla. 340, 11 So. 2d 572 (1943); Grice v. Suwannee Lumber Mfg. Co., 113 So. 2d 742 (1st D.C.A. Fla. 1959).

144. See text accompanying note 10 *supra*.

145. If an employee with other marketable skills were to be awarded rehabilitation benefits merely because he is unable to return to his old job then totally disabled workers might be deprived of needed retraining because of the shortage of available facilities.

146. *E.g.*, Ross v. Roy, 234 So. 2d 99, 101 (Fla. 1970); South Atlantic Shipbulders, Inc. v. Taylor, 234 So. 2d 97, 98 (Fla. 1970).

147. *E.g.*, Stanley v. Master Masonry Constr., Inc., 287 So. 2d 67, 68 (Fla. 1973); South Atlantic Shipbuilders, Inc. v. Taylor, 234 So. 2d 97, 98 (Fla. 1970).

the person seeking the award. The employer might be doing so in an effort to reduce his long-run compensation payments.[148] Where the employee has already been adjudicated totally disabled, there has necessarily been a determination that his skills are unmarketable, and no further proof is required.[149] In the absence of a total disability finding, however, the person seeking the award should have the burden of showing that the employee's skills are unmarketable at wages comparable to his pre-injury earning capacity.

The Propriety of Rehabilitation

Even if an employee has been found to have suffered a loss of earning capacity, it does not follow that rehabilitation will alleviate the loss. The determination of whether the employee could benefit from rehabilitation, then, is an intermediate stage between determination of loss of earning capacity and an actual award. This intermediate step can be directly analogized to the proceedings that determine the degree of incapacity prior to an award of other workmen's compensation benefits.

In such proceedings, courts are virtually unanimous in holding that any doubts should be resolved in favor of the claimant.[150] Consequently, in the determination of whether the claimant could benefit from rehabilitation, he need only show a reasonable probability that through appropriate training or education his earning capacity can be increased.[151] In addition, the claimant will not be held to a rigid standard of proof.[152]

Since the ultimate goal of workmen's compensation is to return the employee to gainful employment and thus eliminate the need for unproductive compensation,[153] and since the purpose of rehabilitation merges with this goal, harmony dictates that in those situations where the employer is seeking an award of rehabilitation for his employee, no higher standard of proof should apply. In accord with such reasoning, the person seeking the award must prove

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148. See text accompanying notes 25-29 *supra*, 201-208 *infra*. Today an employer is likely to seek a rehabilitation award only in order to reduce an award of permanent disability benefits. *Cf.* South Atlantic Shipbuilders, Inc. v. Taylor, 234 So. 2d 97 (Fla. 1970). If rehabilitation can be considered only after a claimant has been adjudged permanently disabled, however (see text accompanying notes 162-164 *infra*), the employer seeking the same result will have to come into court as a plaintiff, though such situations will concededly be rare.

149. An exception is the case of "scheduled" total disability, where there is a presumption to aid in such a finding and not necessarily a factual determination. FLA. STAT. §440.15 (1)(b) (1973).

150. *E.g.*, Thomas Smith Farms, Inc. v. Alday, 182 So. 2d 405, 406 (Fla. 1966); Cook v. Georgia Grocery, Inc., 125 So. 2d 837, 842 (Fla. 1960); Estes v. Workmen's Compensation Comm'r, 150 W.Va. 492, 495, 147 S.E.2d 400, 403 (1960). *But see* State *ex rel.* Iowa Nat'l Mut. Ins. Co. v. Florida Ind. Comm'n, 151 So. 2d 636, 640 (Fla. 1963) (policy not to be adhered to where it would be inequitable to the employer).

151. *See* Feldkamp v. Coast Cities Coaches, Inc., 1 F.C.R. 22, *cert. denied*, 93 So. 2d 903 (Fla. 1956).

152. *See, e.g.*, Duff Hotel Co. v. Ficara, 150 Fla. 442, 7 So. 2d 790 (1942).

153. 21 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 35 (1957); Symons, *The Future of Workmen's Compensation*, ABA SECT. INS., NEG. & COMP. L. 182, 184 (1959).

by a mere preponderance of the evidence[154] that the employee could benefit from rehabilitation. Nevertheless, even such a minimal standard may be difficult to prove without specialized assistance. Consequently, once a loss of earning capacity has been established, the employee should undergo an immediate evaluation by the workmen's compensation agency to determine whether he might benefit from rehabilitation, and the findings should be available to all interested parties to the action.[155]

In all cases where an employee may encounter difficulty in returning to his former job, Florida requires that he submit to an evaluation by a trained rehabilitation staff nurse of the state workmen's compensation bureau.[156] This individual, trained in the procedures of both the workmen's compensation law and the vocational education agency, is then required to contact the injured worker's family, his doctor, his employer, and the employer's carrier. After the initial report on prospects of rehabilitation is reviewed by the Chief of the Rehabilitation Department, a final recommendation is made.[157] Should the recommendation be contested, the report, while not controlling, will be afforded great deference by a court.[158] In any event, in Florida, which is one of the few jurisdictions that automatically refer possible rehabilitation claimants for counseling, the staff nurse can channel the claimant to the vocational education agency, the Florida State Employment Service, or a rehabilitation center, as the situation requires.[159]

It is imperative that this evaluation be conducted as soon as it appears that a claimant has suffered a loss in earning capacity. A key element affecting the success of any rehabilitation award is the early determination that a particular employee can profit from it,[160] since the effectiveness of rehabilitative benefits is directly related to the time it takes to implement them.[161] Florida, however, permits the judge of industrial claims to postpone an adjudication of permanent disability until after receipt of a report on the possibility that the em-

154. The only case dealing directly with the burden of proof in this area agrees that the more lenient standard is applicable. However, it dealt with the burden of proof as it applied to an employee. Estes v. Workmen's Comp. Comm'r, 150 W.Va. 492, 495, 147 S.E.2d 400, 403 (1960).

155. The most comprehensive attempts at state legislation in this area are both recent enactments: MD. ANN. CODE art. 101, §36(9)(a) (Supp. 1974); N.H. REV. STAT. ANN. §281:21-b (Supp. 1973). It is extremely doubtful whether the employer presently can compel the worker to undergo such an evaluation. In one recent case, the judge of industrial claims, at the urging of the employer, ordered the claimant to undergo an evaluation by a vocational counselor and provided that if he refused, the case would be dismissed. The Industrial Relations Commission reversed, holding that the judge had no authority to impose such a sanction in the absence of statute. Albury v. International Bhd. of Elec. Workers, Local 349, IRC Decision No. 2-2331 at 9, 10 (Oct. 4, 1973).

156. NATIONAL INSTITUTE ON REHABILITATION AND WORKMEN'S COMPENSATION, REHABILITATING THE DISABLED WORKER — A PLATFORM FOR ACTION 41 (M. Berkowitz ed. 1963).

157. 26 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 12 (1962).

158. *E.g.*, Ross v. Roy, 234 So. 2d 99, 101 (Fla. 1970); Feldkamp v. Coast Cities Coaches, Inc., 1 F.C.R. 22, 26, *cert. denied*, 93 So. 2d 903 (Fla. 1956).

159. NATIONAL INSTITUTE ON REHABILITATION AND WORKMEN'S COMPENSATION, *supra* note 156, at 41.

160. E. CHEIT, *supra* note 1, at 41.

161. *Id.*

ployee could benefit from rehabilitation.[162] The result of such a delay is that the claimant will reduce his future compensation entitlement by immediately accepting privately offered rehabilitation; the practice is therefore a systemic dysfunction. If the claimant accepts rehabilitation before his actual loss of earning capacity is determined, such efforts would increase his earning capacity.[163] This anomaly not only encourages an employee to delay accepting any rehabilitation that might be offered by the employer but also offers an incentive to conceal any retraining he has undergone on his own initiative.[164] The effect, of course, is to increase the difficulty inherent in the rehabilitation nurse's task of making an honest evaluation. Consequently, any advantage gained through early screening of possible rehabilitation claimants is minimized.

A much more equitable solution would be to remove rehabilitation from the initial consideration of whether the claimant's disability is permanent in nature, but to permit the workmen's compensation agency to conduct its preliminary investigation on the question of whether a rehabilitation award would be beneficial. In this way, the injured worker would be encouraged to cooperate fully with all interested parties from the onset of his injury, and a determination of the permanence of his disability could be made as quickly as possible. Even if the disability is found to be temporary, the system could work because the benefits can be discontinued at an early stage. More important, if the claimant is permanently disabled, the early commencement of rehabilitation can better serve the purpose of returning the claimant to the labor force as soon as possible.[165]

Implementing a Specific Program

Once it has been determined that the claimant is eligible for rehabilitation, a program to fit his particular skills and interests must be chosen. The workmen's compensation agency can provide the employee with vocational counseling. In the final analysis, however, the claimant must decide on the type of available training, since nothing could debilitate a worker's morale more than to be forced into a job in which he has no interest.

The only court that has directly addressed the issue of how a proposed program must be qualified in order to be acceptable as a vocational rehabilitation award is the Minnesota supreme court. In *Vierling v. Spencer Kellogg & Sons, Inc.*,[166] the employee had suffered permanent loss of the use of both hands. He sought rehabilitation to enable him to become a chicken farmer. The court, after concluding that he was "fit to engage in this occupation,"[167] found:

162. American Int'l Aluminum Corp. v. Perez, IRC order 2-2413 (survived) (Oct. 8, 1973).

163. *See* FLA. STAT. §440.15 (1973), *as amended*, Fla. Laws 1975, ch. 75-209, §6.

164. Halpin, *Compensation, Motivation, and Rehabilitation*, ABA SECT. INS., NEG. & COMP. L. 487, 490 (1967). Further, if the rehabilitation should turn out to be unsuccessful, at least one court has held that the worker's compensation cannot thereafter be increased. *In re* Thomas v. Kornblum & Co., 17 App. Div. 2d 889, 233 N.Y. 2d 634 (3d Dep't 1962).

165. See text accompanying notes 201-208 *infra*.

166. 187 Minn. 252, 245 N.W. 150 (1932).

167. *Id.* at 258, 245 N.W. at 153.

> The evidence is very convincing that the employee, without the training, cannot make a success of the chicken business, and that the proposed retraining is necessary and that it will materially assist in restoring his impaired capacity to earn a livelihood.[168]

From such a finding, three required elements can be gleaned. First, there must be a determination that the employee is qualified to engage in the particular occupation for which he desires training. This can be done in the workmen's compensation agency's evaluation, wherein the options available to the claimant are narrowed. Second, the proposed program must be "necessary" to the extent that the employee cannot engage successfully in the desired occupation without rehabilitation. While such a determination most frequently is implicit in a finding of loss of earning capacity, it could in any event be inferred from the rehabilitation evaluation. The key factor, however, is whether the proposed program would "materially assist in restoring [the employee's] impaired capacity to earn a livelihood."[169] Implicit in this test is a requirement that once the retraining is completed, a "reasonably stable labor market" will exist for the employee's new skills, on the theory that he could not have improved his earning capacity otherwise.[170]

After a rehabilitation course has been selected, it must be implemented as quickly as possible.[171] Florida authorizes an award of benefits when "it appears that disability probably will be permanent."[172] Prior to 1959, however, the applicable law stated that such benefits could be given only in cases where disability had been "adjudged to be permanent."[173] Florida courts, however, construed this as requiring such an adjudication by the judicial arm of the workmen's compensation agency,[174] prompting the Legislature to amend the statute to its present wording.[175] Despite the statutory modification, Florida jurists have continued to require some form of adjudication that permanent disability exists before rehabilitation benefits can be awarded.[176] Because of this judicial reluctance, the statute must be further amended to clarify the legislative intent. Unnecessary delay in initiating rehabilitation can only serve to hamper the effectiveness of the programs.

Once the rehabilitation award has been made, most authorities agree that

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168. *Id.*

169. *Id.*; *see* Tibbits v. E.G. Staude Mfg. Co., 166 Minn. 139, 207 N.W. 202 (1926).

170. See text accompanying notes 136-138 *supra*. *See also* Reed v. Sherry Frontenac Hotel, Employers Serv. Corp., 150 So. 2d 225 (Fla. 1963).

171. See text accompanying notes 157-158 *supra*.

172. FLA. STAT. §440.49(1) (1973).

173. FLA. STAT. §440.49(1) (1957).

174. Stewart v. Board of Pub. Instruction, 102 So. 2d 821 (3d D.C.A. Fla. 1958); Vaughn v. International Co., 102 So. 2d 825 (3d D.C.A. Fla. 1958).

175. Fla. Laws 1959, ch. 101, §1 at 178. *See* Schroll, *Workmen's Compensation: 1954-1959*, 14 U. MIAMI L. REV. 154, 157 (1959).

176. Adams v. Sun Gold Septic Tank, Inc., 272 So. 2d 499 (Fla. 1973); Nuce v. City of Miami Beach, 140 So. 2d 303 (Fla. 1962); Finkley v. John Raffa Lathing, 120 So. 2d 9 (Fla. 1960); *see* L. ALPERT, FLORIDA WORKMEN'S COMPENSATION LAW §11.16 (1966); FLORIDA WORKMEN'S COMPENSATION PRACTICE 168, 169 (Fla. Bar Continuing Legal Educ. Practice Manual, 2d ed. 1975). *But see* South Atlantic Shipbuilders, Inc. v. Taylor, 234 So. 2d 97 (Fla. 1970).

it should be mandatory upon both employer and employee.[177] The only effective sanction to accomplish this is a reduction of permanent disability benefits where rehabilitation is rejected.[178] Yet only a handful of states, including Florida, have incorporated such a sanction in their workmen's compensation acts.[179]

The fact that acceptance of the program is mandatory does not mean, however, that no limit should be placed on the employer's liability to pay. As the National Commission concluded, expenditures that do not enhance a worker's earning capacity should not be made the responsibility of the employer since he would receive no corresponding reduction in liability for other compensation benefits.[180] Further, an industry should not be required to pay for benefits that raise the worker's earning capacity significantly above that which he had prior to the injury. To do so would be contrary to the primary purpose of workmen's compensation legislation – compensating employees for the loss of earning capacity caused by injuries arising out of and in the course of their employment.[181] The National Commission's policy accords with the philosophy enunciated in almost all such statutes that the average weekly wage of the employee prior to the injury is the basis for an award of benefits to him.[182] If the employee decides to undertake a rehabilitation program that would significantly raise his earning capacity, he should bear the cost of the additional training required.[183]

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177. NATIONAL COMM'N REPORT, *supra* note 17, at 21, 83; *see* South Broward Medical Clinic Security Ins. Group v. Howard, IRC Order No. 2-2610(S) (Nov. 22, 1974).

178. Such a penalty must be included in the statute since a court would probably refuse to impose it on its own initiative. *In re* Kalevas v. J.H. Williams & Co., 27 App. Div. 2d 22, 275 N.Y.S.2d 546 (3d Dep't 1966).

179. Fla. Laws 1975, ch. 75-209, §24, *to be codified as* FLA. STAT. §440.49(2), (3); ME. REV. STAT. ANN. tit. 39, §65 (1964); MD. ANN. CODE art. 101, §36(9)(f) (Supp. 1974); NEV. REV. STAT. §616.222(2) (1973); N.D. CENT. CODE §65-05.1-04 (Supp. 1974); *see* COMPENDIUM, *supra* note 18, at 175. At least one state statute expressly declares that such benefits are not required to be accepted. MASS. GEN. LAWS ANN. ch. 152, §30C (1965). A further problem that arises in encouraging an employee to accept rehabilitation is posed by the Social Security system's provision that 80% of all workmen's compensation payments are to be deducted from social security disability payments. 42 U.S.C. §424a(a) (1970). Experts are unanimous in their belief that, for rehabilitation to be successful, the injured worker must desire to be rehabilitated. Yet this provision means that, in effect, many workers can get more money off the job than they could by working, thus resulting in a negative incentive for them to accept rehabilitation. Keaney, *What Have the States Done to Improve their Compensation Systems?*, ABA SECT. INS., NEG. & COMP. L. 424, 425 (1971). The American Bar Association has urged Congress to remedy this situation, Resolution of the House of Delegates of the ABA, reported in 88 A.B.A. REP. 113, 114 (1963), yet nothing has been done.

180. National Comm'n Report, *supra* note 17, at 38, 39. These expenditures do not fall within the purposes of rehabilitation as a tool of workmen's compensation, though they may be valid when considered with other aspects of the legislation, such as medical benefits.

181. *E.g.*, Port Everglades Terminal Co. v. Canty, 120 So. 2d 596, 601 (Fla. 1960); *see* Berenowski v. Anchor Window Cleaning Co., 221 App. Div. 155, 156, 223 N.Y.S. 73, 74 (3d Dep't 1927) (the New York Bureau of Rehabilitation used, as a test of eligibility, whether the employee "might at some future date establish an earning capacity comparable with his . . . previous earnings before the accident.").

182. *See, e.g.*, FLA. STAT. §440.14 (1973).

183. The employee's disability payments should still continue during this time, however,

In addition to these qualitative limitations on the amount that may be spent for rehabilitation, many states also impose a maximum time period during which such benefits may be given.[184] Additionally, the amount of time that can be used for individual programs is effectively limited in the remaining jurisdictions by maximum monetary or time limits on the amount of maintenance expenses that may be paid.[185] As in the case of maintenance expenses, the qualitative limitations on rehabilitation benefits should be sufficient since the limitations protect the employer both by ensuring that no money is spent by him which does not directly increase the worker's earning capacity and by placing a ceiling on how much the earning capacity can be increased. Here, as elsewhere, the payments should otherwise be limited only by the "reasonableness" standard;[186] an employee with half a skill is not worth much more than one with no skill. The length of time an employee will need to complete rehabilitation can, in most instances, be estimated accurately during the initial stages of evaluation and counseling, and any programs that will not meet this test can be eliminated from further consideration.

POST-REHABILITATION INVOLVEMENT OF THE WORKMEN'S COMPENSATION AGENCY

The ultimate goal of rehabilitation is always to restore the injured worker to employment and eliminate the need for nonproductive compensation.[187] It follows, then, that once rehabilitation is completed, the workmen's compensation agency should ensure that the employee is placed in a suitable job.[188] Consequently, the success of a program is logically contingent on the adequacy of post-treatment placement services.[189] Ideally, the rehabilitated worker would return to his former job,[190] but such action is often neither possible nor desirable.[191]

A major obstacle in the way of placement is the reluctance of many employers to hire handicapped workers.[192] While much of the reluctance stems

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to encourage him to better himself should he so desire. *See* Underwood v. Terminal-Frouge Builders, 128 So. 2d 605, 608 (Fla. 1961).

184. For a summary of the various provisions in all jurisdictions, see CHAMBER OF COMMERCE OF THE UNITED STATES, ANALYSIS OF WORKMEN'S COMPENSATION LAWS, chart ix (1974).

185. See text accompanying notes 58-67 *supra.*

186. New Hampshire, while purporting to adopt a one-year maximum on all rehabilitation benefits, appears to have incorporated such a standard since its statute provides that this period may be extended for such time "as is deemed to be reasonable and necessary to accomplish a successful result." N.H. REV. STAT. ANN. §281:21-b (Supp. 1973).

187. 21 ANNUAL REPORT OF THE FLORIDA INDUSTRIAL COMM'N 35 (1957). If complete restoration of income is impossible, the rehabilitation is directed toward enabling the employee to maximize his earning capacity. COMPENDIUM, *supra* note 18, at 25.

188. NATIONAL COMM'N REPORT, *supra* note 17, at 83.

189. E. CHEIT, *supra* note 1, at 300. The National Commission found that placement services were grossly inadequate in most states. NATIONAL COMM'N REPORT, *supra* note 17, at 78.

190. E. CHEIT, *supra* note 1, at 301.

191. See text accompanying notes 6-9 *supra.*

192. NATIONAL COMM'N REPORT, *supra* note 17, at 83.

from lack of employer awareness of the positive aspects of hiring rehabilitated workers,[193] it is nonetheless a very real problem faced by post-rehabilitative placement officers. Moreover, a portion of this reluctance is based on valid economic grounds, since employers hiring handicapped applicants often must bear a higher risk of liability[194] if those workers are injured again.[195]

To help overcome this reluctance, most states have established second injury funds.[196] Such programs involve the establishment of a monetary reserve which reduces the extra liability risk assumed by an employer who hires a handicapped worker. The fund is financed by general assessments against all employers, since second injuries are not attributable to any one industry.[197] The employer pays compensation related only to the disability produced directly by the second injury. The employee, on the other hand, suffers no detrimental reduction in his injury-generated compensation since benefits for the combined disability come from both the employer-generated fund and the state-subsidized general reserve fund.[198] Florida has established such a fund, with an assessment structure based upon estimates of the amount necessary to administer the fund each year.[199]

After an employee is rehired,[200] the question arises as to the extent to which compensation benefits should be reduced. If compensation is reduced to exactly offset the amount of increase in earning capacity, financial incentive to rehabilitate is destroyed. If, on the other hand, full compensation is continued,

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193. A representative of workmen's compensation has acknowledged that, because of the "courage, patience and determination to master a handicap, rehabilitated workers are equal or superior to other workers with regard to production, absenteeism, job turnover, and injury rate." Report of the Association of Casualty and Surety Companies, cited in Herlick, *Rehabilitation of Industrially Injured Workers*, 25 HASTINGS L.J. 165, 172 (1973).

194. This is brought about, in part, by an employee's increased susceptibility to an aggravating injury as a result of the initial handicap and in part by the greater possibility that an employer will become liable for permanent disability benefits. Thus, to use Florida as an example, if an employee suffers the loss of one hand, his employer is only liable for 175 weeks' compensation. FLA. STAT. §440.15(3)(c) (1973). Excluding consideration of second injury funds for the time being, if this individual is rehabilitated, hired by another employer, and then suffers an identical injury to the other hand, the second employer becomes liable, not for another 175 weeks' compensation, but for compensation for as long as the disability lasts, *i.e.*, in this situation, for the rest of the employee's life. FLA. STAT. §440.15(1)(a) (1973).

195. Tibbitts v. E.G. Staude Mfg. Co., 166 Minn. 139, 142, 207 N.W. 202, 203 (1926).

196. NATIONAL COMM'N REPORT, *supra* note 17, at 78.

197. See text accompanying notes 76-88 *supra*.

198. CHAMBER OF COMMERCE OF THE UNITED STATES, ANALYSIS OF WORKMEN'S COMPENSATION LAWS 30 (1974). This pamphlet also contains a summary of the important features of the second injury funds in all jurisdictions having them. *Id.* chart xii.

199. FLA. STAT. §440.49(4) (1973), *as amended*, Fla. Laws 1975, ch. 75-209, §24. This system appears to have functioned fairly well. In fiscal year 1972, the assessments resulted in payments of $1,156,410 into the fund while $1,516,092 was disbursed. COMPENDIUM, *supra* note 18, at 178. For a general discussion of the mechanics of the Florida second injury fund, see FLORIDA WORKMEN'S COMPENSATION PRACTICE ch. 6 (Fla. Bar Continuing Legal Educ. Practice Manual, 2d ed. 1975).

200. "Rehired" is used here to designate not only the typical situation in which the employee returns to work for the same or another employer but also the more unusual situation where the claimant has been awarded part of his compensation in a "lump sum" to establish his own business. See text accompanying notes 41-54 *supra*.

the employer's incentive to finance rehabilitation is equally destroyed.[201] Workmen's compensation acts are designed to compensate the employee only for the loss of his earning capacity attributable to his injury,[202] while providing for his employer a liability both limited and determinative.[203] Hence, to compel an employer to pay for rehabilitation benefits and concomitantly force him to continue paying the same compensation benefits after rehabilitation contravenes the policies served by the statute. The best solution retains aspects of both employer incentive to finance and employee incentive to participate, coupled with a penalty that will affect both employer and employee.[204] By utilizing a graduated reduction schedule of compensation benefits, an incentive to return to work can be built into the benefit scheme, which would encourage rehabilitation while simultaneously reducing employer obligations to pay so that employers will support retraining.[205] Presently, however, payment schemes for both scheduled and nonscheduled injuries do not have such built-in incentive devices. Insofar as scheduled injuries are concerned, such a modification in the payment scheme needs detailed cost-benefit study before it could be effected.[206] Insofar as nonscheduled injuries are at issue, however, such a plan for reduction of payments could occur under existing law.[207] Nonetheless, in either type of injury, the determination of how much the payment scheme should be graduated requires further economic study.[208]

CONCLUSION

The National Commission unanimously concluded that "workmen's compensation laws are in general neither adequate nor equitable."[209] Similarly, state vocational rehabilitation provisions are even less adequate and less equitable. State legislatures should begin to recognize that vocational rehabil-

201. 2 A. LARSON, WORKMEN'S COMPENSATION LAW §61.20 (1970).

202. Port Everglades Terminal Co. v. Canty, 120 So. 2d 596, 601 (Fla. 1968).

203. McLean v. Mundy, 81 So. 2d 501, 503 (Fla. 1955).

204. Leonard, *Legal Roadblocks to Rehabilitation*, ABA SECT. INS., NEG. & COMP. L. 229, 235 (1963). Florida provides that if an employee being compensated for permanent total disability becomes "rehabilitated to the extent that he shall establish an earning capacity by employment," his compensation shall be reduced by 60% of the wages he is able to earn after rehabilitation. FLA. STAT. §440.15(1)(d) (1973).

205. 2 A. LARSON, WORKMEN'S COMPENSATION LAW §61.20 (1970).

206. *Id.*

207. The Florida Statutes provide that an award of compensation may be modified "on the ground of a change in condition" within two years after the date of the last payment of compensation pursuant to a compensation order. FLA. STAT. §440.28 (1973), *as amended*, Fla. Laws 1975, ch. 75-209, §13. A specific reduction authorization exists for an employee rehabilitated from a permanent total disability. FLA. STAT. §440.15(1)(d) (1973).

208. A second alternative would be for the judge of industrial claims to reserve jurisdiction over the claimant for purposes of enabling a modification of the award should the claimant's earning capacity increase. *See* Sanz v. Eden Roc Hotel, 140 So. 2d 104, 106 (Fla. 1962). However, the judge would then have to be aware of the possibility that the claimant could benefit from rehabilitation before making the adjudication of permanent disability, with the likelihood that this factor might enter into the original determination. See text accompanyng notes 173-176 *supra*.

209. NATIONAL COMM'N REPORT, *supra* note 17, at 25.

itation is an integral aspect of any workmen's compensation system. They should delineate implementation responsibility for rehabilitation and guarantee every injured employee in need of rehabilitative services the opportunity to procure them.

In every instance where an employee suffers a loss in earning capacity resulting from a work-related injury, the workmen's compensation agency should determine whether rehabilitation is a suitable method for enhancing his earning capacity. If this course is found to be viable, then the agency should prepare a list of alternative proposals, giving the employee responsibility to make the decision as to the specific retraining or educational program he desires to undertake. This would not only ensure that the employee retains some freedom of choice, but also would guarantee professional counseling as part of the decisional process.

The ideal system would incorporate an internal hearing device so that if a claimant elects not to participate in rehabilitation, the governing agency could determine whether the probability of restoration was sufficient to warrant reducing an individual's benefits. In this way, approach-avoidance incentives could be built in so that the decision to rehabilitate or remain disabled could be tied to economic and social reality. The injured worker electing not to strive for rehabilitation could do so without burdening the system beyond society's fair share, while the injured worker who is so disabled that rehabilitation is not feasible would not be compelled to pursue an unattainable goal in order to protect his benefit income.

Similarly, the ideal system would also incorporate maintenance benefits sufficient for rehabilitation to be meaningful. To do so, the system should separate funding of the effort so that maintenance and retraining expenses are paid by the employer while administration and professional expenses are financed by a general reserve fund. This, of course, would allow the further development of placement services funded by employer assessments. Ironically, the ability of the system to finance both retraining and placement from employer assessments would inevitably lead to efficiencies in both areas: an efficient retraining program would reduce placement costs, while better placement services would preclude the necessity for retraining in some cases. Thus, built-in employer incentives would develop. In this way, society could benefit, since there would be fewer nonproductive members; the employer would benefit, since he would no longer have to pay full disability benefits to his injured worker; and, most important, the employee would benefit, because he would once again enjoy the contentment that comes with being a productive asset rather than a liability to others.

JOHN CRAWFORD

APPENDIX

The following legislative proposal is an attempt to codify the major recommendations that have been made throughout this note. While the statute is based upon current Florida law, it is readily adaptable to any other jurisdiction.

An Amendment to Florida Statute 440.49

Part 1. Delete sections (1)-(3) and substitute the following:

(1) When as the result of an injury sustained in the course of and arising out of his employment, an employee is so disabled that a reasonably stable labor market no longer exists for his skills at a wage comparable to that which he was earning prior to his injury, and such disability appears to be permanent, the division shall immediately evaluate the employee as to the reasonable probability that, with appropriate training or education, his earning capacity could be increased.

(2) If it appears that the employee could benefit from vocational rehabilitation, he shall be required to submit to such further evaluation as is necessary to determine the program of vocational rehabilitation that would be most appropriate to render him fit for a remunerative occupation. The division shall formulate a recommendation, with the individual preferences of the employee entitled to great weight.

(3) Once such a recommendation has been completed, the division shall promptly notify all parties of its contents. Any interested party may then request a hearing to challenge the recommendation within ten (10) days of its issuance.

(a) If no hearing is requested, the employee shall immediately submit to the program of rehabilitation recommended by the division.

(b) If a hearing is requested, it shall be held pursuant to the procedures in section 440.25, provided, however, that no hearing shall be held until after there has been an adjudication of permanent disability or an adjudication of temporary disability with the likelihood that such temporary disability shall extend for two or more years. The contents of the recommendations provided for in sections (1) and (2) shall not be considered by the judge of industrial claims in making such an adjudication. The judge of industrial claims shall then make a decision accepting or rejecting in whole or in part the recommendations of the division and issue an appropriate order regarding the vocational rehabilitation of the employee.

(4) Any employee undergoing vocational rehabilitation in the course of which he is required to live at a location other than his place of residence shall be entitled in addition to the temporary total disability benefits provided by Section 440.15(2)(b), to sufficient funds to adequately maintain himself during the period of vocational rehabilitation. He shall also be entitled to reasonable travel expenses to and from the place of training.

(5) Whenever the division determines that there is a reasonable probability that, with appropriate training or education, a person entitled to compensation may be rehabilitated to the extent that his earning capacity could be significantly increased or to the extent that he will require less care and attendance and it is for the best interests of such person to undertake such training or education, if the injured employee without reasonable cause refuses to undertake the training or educational program determined by the division to be suitable to him, the division shall, in its discretion, reduce or limit the compensation otherwise payable to such person under this chapter, any provisions of this chapter to the contrary notwithstanding.

(6) In carrying out the provisions of this statute, the division may cooperate with federal and state agencies for vocational education and with any public or private agency cooperating with such federal or state agencies in the vocational rehabilitation of injured employees, provided, however, that the division shall not relinquish the responsibility for seeing that the employee's vocational rehabilitation is carried through to a successful conclusion.

(7) Once the program of vocational rehabilitation has been completed, the division shall assist the employee in securing a job commensurate with his skills and abilities.

(8) The costs of the evaluation and other services required by sections (1), (2), and (7) shall be paid by the division out of the special fund established by section 440.50. All other

reasonable and necessary costs of the vocational rehabilitation shall be paid by the employer. However, should the division recommend that the employee undertake training for a position that would give him a significantly greater earning capacity than he had before his injury, he is entitled to be paid only for that proportion of such rehabilitation and maintenance benefits as his former earning capacity bears to his expected new earning capacity.

(9) Should the employee become rehabilitated to the extent that his earning capacity is increased, his compensation benefits shall be recomputed on the basis of the formula provided in section 440.15(1)(d).

Part 2. Section 440.49(4) of the Florida Statutes is amended to read "section 440.49(10)."