

VOCATIONAL REHABILITATION AND RE-EMPLOYMENT ISSUES

A BRIEFING PAPER

ISSUE

This paper addresses issues relating to the vocational rehabilitation and re-employment of injured workers in the BC workers' compensation system.

BACKGROUND

The WCB provides vocational rehabilitation to injured workers, and in some cases to workers' dependants, to offset the effects of compensable injuries, occupational diseases, and fatalities. The authority to provide these services is found in section 16 of the *Workers Compensation Act*. Services provided include vocational assessment and planning, counselling, skill development, job readiness and placement assistance, income continuity, and employability assessments.

The provision of vocational rehabilitation under section 16 of the *Act* is discretionary, and is governed by Governors' published policies in chapter 11 of the *Rehabilitation Services & Claims Manual*.

In 1995 there were 9,017 new referrals for WCB vocational rehabilitation assistance. Expenditures on vocational rehabilitation were \$64.1 million.

History

Prior to 1942, the WCB carried out a limited program of rehabilitation by commuting life pensions and using the lump sums to assist injured workers to establish a business or enter a new trade.¹

In the report of his 1942 Royal Commission, Mr. Justice Sloan noted that both industry and labour groups fully supported the provision of rehabilitation to injured workers, and stressed:

...the necessity of a rehabilitation scheme being set up in this Province; and I use the term in its widest sense. Such a scheme would, I think, tend to solve many of the administrative problems with which the Board is now faced.²

Mr. Justice Sloan recommended that a rehabilitation program be established under the direction of the Board, with strong links to external rehabilitation agencies.

1 1942 Sloan Royal Commission Report, p.125.

2 *Ibid.*, p.125.

In 1943, following Mr. Justice Sloan's recommendation, the first statutory provisions relating to rehabilitation were included in the *Workers Compensation Act*. The provision stated that:

To aid in getting injured workmen back to work and to assist in lessening or removing any handicap resulting from their injuries, the Board may take such measures and make such expenditures from the Accident Fund as it may deem necessary or expedient; provided that the total expenditure shall not exceed seventy-five thousand dollars in any calendar year.³

That same year, the Board established a Rehabilitation Department based on a model developed by the British Medical Association and the Trade Union Congress in England. The Rehabilitation Centre opened with a staff of 15 physiotherapists and one physician.

In the report of his 1952 Royal Commission, Mr. Justice Sloan noted the successful establishment of a rehabilitation program at the Board. He reviewed the program in some detail, stressing the importance of the role of the rehabilitation counsellor in assisting the worker to overcome the broader effects of the injury:

Quite frequently it has been found that it is impossible to plan for vocational goals for a handicapped workman until problems in the psychological and social areas have been solved, and unless this philosophy is recognized, it is not always possible to establish that rapport with the man which is essential to his effective rehabilitation.⁴

Mr. Justice Sloan also stressed the responsibility of the employer, independent of the WCB, to assist with vocational rehabilitation. He noted that while some employers were willing to employ those who were injured on the job, industry as a whole had discriminated against hiring disabled workers.

Mr. Justice Sloan's 1952 recommendations included:⁵

- striking of the word "expedient" in section 17;
- engaging more rehabilitation counsellors to assist injured workers in various parts of the province as required;
- extending rehabilitation services to the dependants of workers who were killed in industrial accidents; and
- extending financial assistance to dependants where special circumstances warranted.

The 1966 Tysoe Royal Commission praised the Board's rehabilitation program, noting it compared favourably with services in other jurisdictions.⁶ Mr. Justice Tysoe noted there

3 The \$75,000 limit on expenditures was removed in 1952.

4 1952 Sloan Royal Commission Report, p. 336.

5 *Ibid.*, p. 340.

remained a need for more rehabilitation counsellors to provide services in locations across the province. However, he resisted the suggestion that decentralization of services was the best approach:

I appreciate that, for vocational rehabilitation purposes, there should be two classes of workmen - namely, those in the Vancouver area for whom the service is readily available and those in other parts of the Province for whom it is not available or available only spasmodically. But, in a Province such as ours, with its areas of industrial activity so widely scattered, it may not be possible to attain the ideal of similar treatment for all workmen. The effort and expense of providing service in a given area may far outweigh any beneficial results that are likely to flow from it.⁷

Mr. Justice Tysoe also emphasized the importance of returning the worker to work, and suggested that the reluctance of some employers to hire injured workers could be overcome by the establishment of a second injury fund.

In 1972, the *Act* was amended to include a provision which allowed the WCB to provide counselling and placement services to workers' dependants. In 1974, this provision was extended to making expenditures for the training of a surviving or dependent spouse.

The current provision that sets out the WCB's responsibilities regarding rehabilitation is found in section 16 of the *Act*:

- 16 (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.
- (2) Where compensation is payable under this Part as the result of the death of a worker, the board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.
- (3) The board may, where it considers it advisable, provide counselling and placement services to dependants.

6 1966 Tysoe Royal Commission Report, p.172.

7 *Ibid.*, p. 171.

Recent Reviews of the System

In 1991, the Board of Governors arranged for the W. E. Upjohn Institute for Employment Research to carry out an administrative inventory of the Compensation Services Division, which at that time included Vocational Rehabilitation Services.

The authors of the inventory noted the need for:⁸

- clarification of the operational goal of the vocational rehabilitation process;
- better definition of the role of the Vocational Rehabilitation Consultant;
- development of delivery options to enhance early intervention efforts;
- better access to services in locations outside Richmond;
- policy clarification of the resources to be expended on vocational rehabilitation; and
- enhanced ongoing program evaluation of vocational rehabilitation services.

Chapter 11 of the *Rehabilitation Services & Claims Manual*, which sets out Governors' published policy for vocational rehabilitation, was revised in 1992. The revisions included the development of a definition of "quality rehabilitation", and seven principles of vocational rehabilitation.⁹

In addition to revising the *Manual*, Compensation Services made a number of administrative changes. These changes led to the dissolution of the Vocational Rehabilitation Services Department in 1993. A decentralized model of service delivery was implemented whereby vocational rehabilitation consultants were placed in service delivery locations under the management of a client service manager.

In 1995, the Upjohn Institute conducted a follow up inventory to the 1991 Report.¹⁰ This inventory identified a number of issues arising out of the structural and management changes which had taken place within the department since 1991, and commented:

These structural and management changes appear to have contributed greatly to the general loss of focus and morale among the consultant group, a significant and sustained increase in spending patterns, and what is generally perceived to be an overall decline in the quality and accountability of vocational rehabilitation services provided to clients during the ensuing 2-year period.¹¹

The report noted that in early 1995, the WCB had reinstated a centralized department and management structure in support of vocational rehabilitation services.

8 H. Allan Hunt, Peter S. Barth & Michael J. Leahy, *Workers' Compensation in British Columbia: An Administrative Inventory at a Time of Transition*, (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1991), p. 157-159.

9 #85.20 and #85.30 in the *Rehabilitation Services & Claims Manual*.

10 H. Allan Hunt, Peter S. Barth & Michael J. Leahy, *Workers' Compensation System of British Columbia: Still in Transition*, (Kalamazoo, MI: W. E. Upjohn Institute for Employment Research, 1996).

11 *Ibid.*, 130.

The 1995 inventory restated many of the issues discussed in the 1991 inventory, including the need to clarify the expected outcome of vocational rehabilitation.¹² Additional issues identified included:

- inadequately explained increases in expenditures;
- the need for clearer guidelines, expectations, and standards of practice for the provision of vocational rehabilitation services;
- potential over-use of the “deeming” process;
- the need to develop new models of service delivery;
- the need for a program evaluation system that provides meaningful management information on process and outcomes;
- the need for additional resources to support the activities of the vocational rehabilitation consultants; and
- the need for research to inform future policy and practice decisions.

The Current State

A new Rehabilitation Division was created in 1996. This Division includes the Rehabilitation Centre, the Medical Department, the Psychology Department, and the Vocational Rehabilitation Services Department.

Vocational Rehabilitation Consultants determine the nature and extent of assistance provided to individual workers, within the parameters of Governors’ published policies. The procedures followed by the Vocational Rehabilitation Consultants are set out in the *Vocational Rehabilitation Services Procedure Handbook*.

Referrals to vocational rehabilitation are made by WCB claims adjudicators, medical practitioners, unions, social service agencies, and claimants themselves. Referrals are made where medical evidence indicates that the workers will experience difficulty in returning to the pre-injury employment or where the pre-injury employment is no longer available.

The objectives of vocational rehabilitation outlined in #85.40 of the *Rehabilitation Services & Claims Manual* are threefold:

- to assist workers in their efforts to return to their pre-injury employment or to an occupational category comparable in terms of earning capacity to the pre-injury occupation;
- to provide the assistance considered reasonably necessary to overcome the immediate and long-term vocational impact of the compensable injury, occupational disease or fatality; and
- to provide reassurance, encouragement and counselling to help the worker maintain a positive outlook and remain motivated toward future economic and social capability.

12 *Ibid.*, p.xx.

The vocational rehabilitation process has five phases:

- *Phase One:* The consultant assists the worker to return to the same job with the accident employer. Interventions at this phase may include programs of physical conditioning or work hardening, graduated return to work, work evaluation, and refresher training or skill upgrading.
- *Phase Two:* If it is determined the worker cannot return to the same job, the consultant encourages and works with the accident employer to make worksite accommodations and job modification, or to provide alternative in-service placement.
- *Phase Three:* If the employer is unable or unwilling to accommodate the worker, the consultant identifies suitable occupational options in the same or related industry.
- *Phase Four:* If the worker is unable to return to alternative employment in the same or a related industry, the consultant explores opportunities in all industries, with emphasis placed on the workers' transferable skills, aptitudes and interests.
- *Phase Five:* If existing skills are insufficient to return the worker to suitable employment, the consultant uses training programs to enable the worker to acquire new occupational skills. In addition, the consultant assists the worker to secure employment once the training is complete.

The following table compares vocational rehabilitation activity volumes in 1995 and 1996.

Vocational Rehabilitation Activity Volumes

	YTD June '96	YTD June '95	Change Increase/(Decrease)
New Referrals	4,167	4,729	(562)
Closures			
Return to Work	1,287	1,424	(137)
Non-return to Work	1,898	1,806	92
Other	1,451	1,537	(86)
Employability Assessments			
Referrals	257	331	(74)
Completed	488	411	77

The Current Environment

The WCB is delivering vocational rehabilitation services in a climate of significant economic and social change. The environmental factors shaping the delivery of vocational rehabilitation in BC and across Canada include:

Changing Economic Structure: Changes in the structure of work and working relationships, regional unemployment, and limited re-employment opportunities in sunset industries are making it difficult to find re-employment for injured workers.

Shifting Demographics: The demographics of those who sustain work related injuries and illnesses are changing. An aging workforce means more older workers are being referred for rehabilitation. These individuals often experience significant barriers to re-employment.

Concern over the Costs of Compensation:¹³ Although workers who experience permanent disabilities account for a relatively small proportion of workplace injuries, they account for a relatively large proportion of compensation costs. Costs can be significantly reduced if a worker has an early return to work with his previous employer. The increased emphasis on vocational rehabilitation and return to work programs in workers' compensation boards across Canada in recent years has come, at least in part, from a push to limit periods of disability and to reduce related benefit payments.

Increased Awareness of Anti-discrimination/Human Rights Initiatives: One of the key trends shaping the development of new approaches to rehabilitation in Canada is a focus on statutorily mandated "re-employment" obligations which are being incorporated into workers' compensation statutes in some jurisdictions.

Changing Approaches to Vocational Rehabilitation: Increasingly, vocational rehabilitation strategies are based on a recognition of the importance of working to remove the systemic barriers faced by injured workers,¹⁴ and changing the workplace to accommodate the worker's residual functioning capabilities. This has been accompanied by a shift in rehabilitation goals towards job retention, return to work, accommodation, and disability management.¹⁵

A changing economic and employment environment means rehabilitation strategies must focus on meeting the needs of individual workers within their own environment. This fact is recognized in item #85.20 of the *Rehabilitation Services and Claims Manual*, which says:

¹³ WCB total claims costs for current year and prior years' injuries in 1995 were \$1.15 billion. Workers' Compensation Board, *1995 Annual Report*, (Richmond, BC, 1996) p. 26.

¹⁴ Morley Gunderson, Douglas Hyatt & David Law, "Re-employment and Accommodation Requirements Under Workers' Compensation" in Terry Thomason and Richard P. Chaykowski (eds.), *Research in Canadian Workers' Compensation*, (Kingston, ON: IRC Press, Industrial Relations Centre, Queen's University, 1995) at 142.

¹⁵ Lauren B. Gates, Yechezkel Taler & Sheila H. Akabas, "Optimizing Return to Work Among Newly Disabled Workers: A New Approach Towards Cost Containment" in *Benefits Quarterly* (vol. 5 no. 2) 19 at p. 20.

Quality rehabilitation requires individualized vocational assessment, planning and support provided through timely intervention and collaborative relationships to maximize the effectiveness of rehabilitation resources and worker-employer outcomes.

DISCUSSION

There is general agreement that the primary aim of vocational rehabilitation plans should be to return the worker to the pre-injury employer. Difficulties arise when this primary objective is not met, or is not met within a reasonable timeframe. Many of these difficulties are longstanding issues for the WCB. Principal among these are:

- Is the objective employment or employability?
- Should the WCB “deem” jobs?
- Are the WCB’s vocational rehabilitation services cost effective?
- Should there be a statutorily mandated duty to accommodate injured workers?

Is the objective employment or employability?

The debate over whether the objective of rehabilitation is return to “employment”, i.e. an actual job, versus the enhancement of “employability” was identified in both the 1991 and 1995 inventories as requiring policy clarification:

One of the principle issues that emerges when discussing the vocational rehabilitation process is expected outcome. While a great deal of divergent opinion exists among consultants, managers, and worker advocates, the issues appear to center around whether the WCB’s mission is to provide services to injured workers to enhance “employability,” or to focus on “placement” and the return to actual employment.¹⁶

The authors went on to state:

While it is quite normal for Boards to focus on employability rather than employment when vocational rehabilitation is viewed as discretionary within workers’ compensation systems, policy clarification is clearly warranted in this case, based on the amount of uncertainty observed and the formal requests made recently from consultants for a reaffirmation of the WCB’s commitment to help injured workers return to employment.¹⁷

The WCB’s commitment to a “return to work” model of vocational rehabilitation was clarified in the Senior Executive Committee’s 1996 Strategic Plan. The Strategic Plan includes the statement that:

16 *Op cit, Still in Transition*, p. 151.

17 *Ibid.*, p. 151.

After prevention, the rehabilitation and RTW of injured workers is the priority for the Board. Providing safe, timely and durable return to pre-accident employment will always be a primary objective of Board operations.¹⁸

This focus on “return to work” has not come without controversy. Critics are concerned that people are being forced back to work prematurely. They are also concerned that workers who return to their former employment face the same uncorrected hazards that initially injured them. They believe a worker’s personal circumstances should be given more consideration and that a worker’s refusal of work for such reasons should not result in a reduced pension as a result of the WCB deeming the work suitable and available.

Should the WCB “deem” jobs?

A lot of attention has been focused on the question of “deeming”.¹⁹ In cases where there has been no return to work when the pension is assessed, permanent loss of earnings pensions are based on “deemed” jobs. The deeming process involves the vocational rehabilitation consultant making the judgment that the worker is capable of performing a particular job or occupation, and that the job is reasonably available to the worker.

The Board’s policy contains guidelines for making these decisions. These include the requirement that the job be “suitable and reasonably available”.²⁰ Once the consultant has “deemed” the job, the pension is calculated as if the job had been obtained by the worker.

In the 1995 inventory it was noted that:

While there is certainly a legitimate need for such a procedure in cases of last resort, significant potential exists for over-use of the “deeming process” in situations where the policy focus is on developing employability rather than actual placement (particularly in the absence of clear standards and expectations).²¹

The practice of “deeming” has always been contentious, both in BC and in other jurisdictions that have loss of earnings pensions. Part of the problem is that a number of factors other than the compensable injury can affect the injured worker’s post-injury earnings level, including age, education, language ability, other medical conditions, willingness to retrain, place of residence, and general economic conditions. These factors create the context in which the compensable injury takes place, and in which

18 Workers’ Compensation Board of British Columbia, *Transforming the Workers’ Compensation Board of British Columbia: A Strategic Plan* (Richmond, BC, 1996), p. 18.

19 For more discussion of the “deeming” issue see discussion paper on Permanent Disability Pensions which was previously provided to the Royal Commission.

20 #40.12 and #89.11 of the *Rehabilitation Services & Claims Manual*.

21 *Op cit*, *Still in Transition*, p. 150.

vocational rehabilitation services are provided. They can also have a significant effect on the level of disability flowing from the compensable injury.

While the WCB has no clear policy on the extent to which these factors are relevant to the employability assessment, the Strategic Plan states:

Employability Assessments will continue to be based on actual jobs that are both suitable and reasonably available to the injured worker. If no employment can be found in the worker's area of residence, the worker may have to consider relocation. If the worker has strong ties to the community in which s/he was employed, or if the worker is at a stage in life when relocation is not feasible these factors will be considered in the Employability Assessment. In rare cases workers do not cooperate in the employability assessment process, or by personal choice prefer options such as retirement, for example. When this occurs, and after all other options have been exhausted, the Board may elect to estimate the workers entitlement and complete the process.²²

Despite this statement, questions about the appropriate use and credibility of employability assessments continue. The outcomes of these assessments are frequently the subject of appeals to the Review Board and the Appeal Division. The criticisms of the process relate to the following:

- The WCB is deeming workers to be capable of engaging in work for which they are not qualified without first being given appropriate training.
- The WCB is deeming workers to be capable of obtaining employment at rates of pay that are unrealistic for the jobs in question.
- The WCB is deeming workers to be capable of obtaining work in fields of employment in which job opportunities do not exist.

Employers are concerned over the costs of vocational rehabilitation and consider that if a worker is fit to work and work is available, then if the worker chooses not to work for personal reasons, deeming is appropriate.

Recent practice changes with respect to the timing of employability assessments and restrictions on the level of income continuity payments are also fueling controversy. Formerly, the worker would receive income continuity or "Code R" payments in an amount equivalent to wage loss payments until a pension was awarded. Under the current practice, once the employability assessment is completed, the workers' income continuity is equivalent to the permanent pension amount.

22 *Op cit, Strategic Plan, p. 19.*

As stated, problems related to deeming are not unique to BC. For example, the New Brunswick Commission has recently taken a number of steps to reform its “deeming” process.²³ In 1995, the Commission:

- introduced a systematic approach to making and documenting all deeming decisions;
- established staff training for all case managers and other staff involved in the process; and
- introduced quality control review of all deeming decisions.

Earlier this year, the New Brunswick Commission requested written submissions on the question of deeming from all stakeholders. As a result of this process, the Commission made a number of significant policy changes including:

- Making more rehabilitation aid available to help injured workers get back to work. This includes assistance with job search skills as well as using outside providers to seek employment opportunities for injured workers.
- Ensuring the deeming decision flows from the rehabilitation plan. That is, the deemed occupation must be consistent with the rehabilitation plan, and the plan activities and claimant skill development must complement the occupation.
- Ensuring the deemed occupation matches the worker’s profile. The case manager ensures the worker has the physical abilities, employment qualifications and aptitudes necessary to obtain and hold employment in the chosen occupation.
- Basing the general salary level for a particular position on external data established through a labour market analysis for the region by the federal or provincial government.
- Providing the worker with a minimum six weeks of job search benefits following deeming; in special cases, extending the benefits to 13 weeks.²⁴

The New Brunswick Commission reports that these changes have resulted in an annual ongoing cost increase of \$3 to \$3.5 million.

Further changes are now being considered by the New Brunswick Commission with respect to the impact of the deeming process on employer assessment rates. The current situation in New Brunswick is the same as in BC. That is, the pre-accident employer, who does not re-employ the worker, benefits from the cost experience reduction which results when the worker is deemed capable of earning income even though the worker is not earning that income. The proposed changes in New

²³ Correspondence October 1996 from David Greason Vice-president New Brunswick Workplace Health, Safety and Compensation Commission to Dale Parker, President & CEO, Workers' Compensation Board of British Columbia. Many of these “reforms” are already in place in BC.

²⁴ In BC, training on the job programs subsidized by the WCB range from 3 months to 2 years in duration.

Brunswick are designed to offset the benefit the employer receives as a result of the deeming process.

Are WCB's vocational rehabilitation services cost effective?

The extent to which cost should be a consideration in the context of rehabilitation is a matter of some debate. Expenditure patterns in rehabilitation were reviewed in the 1995 administrative inventory, *The Workers' Compensation System of British Columbia: Still in Transition*. The authors of the inventory noted that in 1994, the WCB spent \$68,606,888 on vocational rehabilitation services. This figure represented a 50 percent annual rate of increase from 1991 when \$20,352,282 was spent on the delivery of such services. This increase took place during a period when new referrals decreased from 11,700 in 1991 to 8,700 in 1994.

Expenditure patterns since 1986 showed a period of modest growth from 1986 to 1990, followed by a period of great acceleration in expenditures from 1991 through 1994. Figures for 1995, which were not available at the time of the administrative inventory, show that vocational rehabilitation expenditures decreased 6.6% to \$64.1 million. This marked the first decline in vocational rehabilitation expenditures since 1991. It is estimated that 1996 costs for vocational rehabilitation will be approximately \$45 million.

Some concern has been raised over these decreased expenditures. Critics suspect that "RTW" strategies are a euphemism for benefit reduction. The question being asked is whether the WCB is providing adequate support to individuals who are unable to return to work after the completion of the five phases of vocational rehabilitation.

Employers are concerned about the costs of vocational rehabilitation and are generally supportive of reductions in expenditures. However, due to the limits of the current Experience Rated Assessment (ERA) system, employers do not have any real incentive to reduce duration in cases that run over two years.²⁵ A review of BC's ERA system is currently underway. The details of the review are addressed in a separate paper. Certainly, however, the relationship between different system features can have a significant impact on return to work rates. And to the extent that there is a tension between these aspects, it can impact the effectiveness, and cost effectiveness, of vocational rehabilitation and re-employment programs.

In the 1995 inventory, concern was expressed over spiralling rehabilitation costs without a corresponding increase in successful outcomes. Recently, cost has become a focal point in program evaluation. The increased emphasis on rehabilitation and return to work has come, in part, from a push to limit periods of disability and to reduce related benefit payments:

²⁵ An issue related to whether the *Act* precludes considering rehabilitation expenditures in calculating experience rated assessments has been raised by employers before the Appeal Division. More information on this issue will be provided in a forthcoming paper on "Classification & ERA".

The cost of disability, including short term disability benefits, long term early retirement payments to disabled workers and related medical costs is astronomical. Recently, many have begun to realize that optimizing return-to-work decisions and actions is both humanitarian and cost effective.²⁶

Should there be a Statutorily Mandated Duty to Accommodate Injured Workers?

While all Canadian workers' compensation statutes have provisions dealing with rehabilitation, there is a wide range of legislative treatment of this issue. In BC, there is no specific provision in the *Workers Compensation Act* requiring an employer to re-employ a worker who is injured, or to accommodate a worker who has physical restrictions. However, if an employer refuses to re-employ or accommodate, the worker may seek redress under the *Human Rights Act*.

Elsewhere in Canada, there is a trend towards including a statutory requirement that employers accommodate the re-employment of injured workers. Quebec passed the first such legislation in 1985. Since then, Ontario, PEI, New Brunswick and Nova Scotia have all implemented statutory re-employment provisions.

The re-employment provisions in each of these provinces are based on the human rights concept of a "duty to accommodate". Under federal and provincial human rights legislation, all employers in Canada have a "duty to accommodate" injured workers. This duty involves removing the barriers to joining or re-joining the work force. If, for example, a person is incapable of doing certain parts of a job, accommodation may include finding other methods of doing the work, or re-assigning tasks to other employees.²⁷

In Ontario, the re-employment obligations are found in section 54 of the *Workers' Compensation Act*. These provisions came into force January 1990. Section 54(6) states that an employer:

... shall accommodate the work or the workplace to the needs of a worker who is impaired as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.

For the section to apply, the worker must have been continuously employed with the accident employer for at least one year prior to the injury, and the employer must regularly employ at least 20 workers. To trigger the obligations, the Board determines the worker's level of fitness, and notifies the employer.

²⁶ *Op cit, Gates.*

²⁷ Employers have a duty to accommodate up to the point of undue hardship. The factors that are considered when deciding whether undue hardship exists are: financial costs; disruption of collective agreements; interchangeability of work force and facilities; size of employer's operations; and safety factors. Obligations under human rights legislation are considered paramount to those under workers' compensation legislation.

If the WCB finds that an employer has not met its re-employment obligation, the WCB may levy a penalty on the employer, and make payments to the worker for a maximum of one year as if the worker were entitled to temporary disability benefits.

The current system in Ontario is under review. Recommendations for reform were set out in the *Report on New Directions for Workers' Compensation Reform*, which formed the basis for Bill 99,²⁸ which was given first reading in November 1996.

The proposed reforms include modifying the current system, which relies heavily on vocational rehabilitation, and introducing a comprehensive "return to work" model based on:

- an employer requirement to develop a return to work plan to expedite re-employment with the pre-accident employer;
- a labour market re-entry plan to facilitate the re-employment of workers unable to return to their pre-accident employment; and
- a worker obligation to cooperate with the return to work and labour market re-entry plans.

The *Report on New Directions* describes the "return to work" model as an alternative to the current "vocational rehabilitation" model. The new model has two phases:

- a "return to work phase", the objective of which is return to work with the accident employer as early as possible; and
- a "labour market re-entry phase", the objective of which is re-employment with an employer other than the accident employer.

The elements of the return to work phase are similar to the five phases of vocational rehabilitation set out in item #87.20 of BC's *Rehabilitation Services and Claims Manual*. The labour market re-entry phase is similar to the process described in Chapter 11 of the *Manual*. The significant difference between the Ontario proposals and the current BC approach is the greater reliance in Ontario on statutory direction to achieve these goals. That is, while BC's aims are expressed as policies made pursuant to statutory discretion, the Ontario proposals would imbed the same concepts directly into legislation.

In Nova Scotia, provisions similar to the existing Ontario legislation require employers who regularly employ more than 20 workers to re-employ workers who have been employed for at least 12 months at the time of the injury,²⁹ and to "...accommodate the work or the workplace to the needs of a worker who requires accommodation as a

²⁸ An Act to secure the financial stability of the compensation system for injured workers, to promote the prevention of injury and disease in Ontario workplaces and to revise the Workers' Compensation Act and make related amendments to other Acts

²⁹ Section 90(b) *Workers Compensation Act* (Nova Scotia).

result of the injury to the extent that the accommodation does not cause the employer undue hardship.”³⁰

In Quebec, sections 236 through 240 of the *Industrial Accidents and Occupational Diseases Act* provide that a worker who suffers an employment injury “is entitled to be reinstated by preference to others”, or to be reassigned to “equivalent employment in that establishment or in another establishment of his employer”.³¹ A worker who is unable to continue his or her employment as a result of the injury is entitled to hold the first suitable employment that becomes available with the pre-accident employer.³² This right to return to work must be exercised within one year if the employer has 20 workers or less; and within two years if there are more than 20 workers.³³ The worker is entitled to the same wages or salary and benefits as if he or she had continued with his or her employment during his/her absence.³⁴

In New Brunswick, re-employment provisions were added to the *Workers Compensation Act* in 1989. Section 42.1 provides that, “No employer shall dismiss, suspend, lay off, penalize discipline or discriminate against a worker” because of a compensable injury. Section 42.1 also requires the employer to re-employ the worker following the injury, and binds the employer for one year if the employer has 10 to 20 employees, and two years if the employer has 20 or more employees.³⁵

Enforcement provisions were not included in the New Brunswick *Workers Compensation Act*, but were placed within the *Employment Standards Act*. This means that enforcement of the return to work provisions is not within the authority of the Workplace Health, Safety and Compensation Commission, but rests with the Employment Standards Branch. Workers must file a complaint seeking redress under the *Employment Standards Act*.

In PEI, the *Workers Compensation Act* provides a right to reinstatement with no loss of seniority of accrued benefits for workers who have been employed with the accident employer for a period of at least one year.³⁶ An employer is bound by this provision for a period of one year of the date of entitlement to compensation.³⁷

What are the implications of including mandatory re-employment provisions in the Act?

30 *Ibid.*, Section 91(1).

31 Section 236 *Industrial Accidents and Occupational Diseases Act* (Quebec).

32 *Ibid.*, Section 239.

33 *Ibid.*, Section 240.

34 *Ibid.*, Section 242.

35 These provisions do not apply to the construction industry (s. 42.1(3) *Workers Compensation Act* (New Brunswick)).

36 Section 86(2) *Workers Compensation Act* (PEI).

37 *Ibid.*, Section 86(5).

There are some advantages to including mandatory re-employment provisions in legislation:

- They provide the WCB with a clear mandate to enforce employers' obligation to accommodate injured workers.
- They have the potential of providing a more timely remedy for discrimination than the *Human Rights Act*.
- Recovery has shown to be faster when the worker has the security of re-employment.
- They can lead to a more equitable and efficient system, because the costs fall on the accident employer.
- They have preventive value, creating an economic incentive for employers to reduce injuries.
- They may provide a counter-measure to disincentives in the system which may be affecting employer and worker behaviour.

On the other hand, there are disadvantages to a legislated approach. Many of these are set out in a discussion paper prepared by the WCB for the Minister of Labour in 1975 (Item No. 105 (2 *WCR* 33)). The discussion paper restricts its discussion to cases where a worker has residual disability. The disadvantages identified at that time included:³⁸

- diverting the rehabilitation consultant from considering whether retraining or other skills development are more appropriate for the individual worker;
- difficulties in enforcing the statutory obligation;
- danger of re-injury if the worker is returned to the same work which caused the injury without modification of the work/workplace;
- negative impact on labour relations;
- difficulties in placing workers with small companies; and
- cost to employers.

A more recent discussion of these issues can be found in Terence Ison's 1989 work, *Workers' Compensation In Canada Second Edition* and in his 1994 work, *Compensation Systems for Injury and Disease: The Policy Choices*.³⁹ Ison is concerned that a "right" to re-employment can lead to the impairment of mobility rights of injured workers, ongoing surveillance, ongoing submission to medical examination and psychological testing, continuing loss of confidentiality of medical information, and other incursions on civil liberties.⁴⁰

The Ontario experience since the introduction of re-employment provisions in 1992 illustrates how legislating employment relationships can lead to increased litigiousness,

38 2 *WCR* 39

39 Terence G. Ison, *Compensation Systems for Injury and Disease: The Policy Choices* (Toronto, ON: Butterworths, 1994).

40 Terence G. Ison, *Workers' Compensation in Canada Second Edition* (Toronto, ON: Butterworths, 1989) p. 160.

decreased ability to respond to the nuances of individual situations, and escalating administrative costs. Surprisingly, the response to these issues by the government of Ontario has been to propose more, rather than less legislation.

Whether or not a tightly legislated approach will be successful at returning workers to safe, durable employment remains to be seen. Regardless of the outcome, the Ontario experiment will provide valuable lessons for other provinces which may be considering a similar approach.

The New Brunswick Commission recently released a consultation document which contains a number of legislative and policy proposals designed to strengthen the employers' obligation to accommodate injured workers. These proposals include:

- An expanded wage support program aimed at encouraging employment of injured workers. The Commission would provide a direct wage subsidy to the employer of 25% of wages for the first six months, and 50% of wages for up to an additional six months. Employment would be for a minimum of six months. This program would not be available to the original employer of the injured worker.⁴¹
- Transfer of the enforcement provisions which are currently in the *Employment Standards Act* to the *Workers Compensation Act*.
- Legislative provisions which would penalize employers who do not re-employ injured workers, or who do not report accidents within legislated timeframes.
- Assessment rebates for employers who implement claims management programs. The rebate would be up to 5% of annual assessments.

The New Brunswick Commission released these proposals for consultation in October 1996. The results of the stakeholder consultation are not yet known.

The models being proposed by other provinces offer some interesting examples for BC to consider. It may, however, be advantageous for BC to monitor the experiences of other jurisdictions before setting a new course if that course includes legislatively mandated provisions.

What steps is the WCB taking to address these issues?

One of the three focal points of the WCB's 1996 Strategic Plan is to "Transform service to injured workers through improved claims processes and expeditious, safe and durable RTW [return to work]."⁴²

41 See note 24.

42 *Op cit, Strategic Plan*, p.16.

Specific initiatives inherent in this strategy include a return to work focus that encourages the implementation of disability management programs within industry, and the involvement of workers, employers, unions and other disability insurance providers.

The Strategic Plan envisions the development of a case management approach to service delivery:

The case manager will be responsible for the management of all services which are to be provided or funded by the Board. To do this, he or she will facilitate and coordinate the involvement of other Board and external experts to deliver services including effective clinical rehabilitation, workplace integration through disability management programs, and establishment of functional or loss of earnings pension awards.⁴³

The Strategic Plan also states:

The programs, outcomes, and systems for Vocational Rehabilitation Services will be reviewed and, where necessary, redesigned to improve opportunities to return injured workers to the workplace. The nature and scope of vocational rehabilitation and the professional development needs of current and future staff will be examined. Investments will be made in new technologies and in developing new policies and programs that will enhance RTW [return to work].⁴⁴

RESOURCES

Alexander, Holburn, Beaudin & Lang, "Understanding the Legal Implications of Accommodation of Disabled Employees in the Workplace" (Vancouver, BC, June 1996).

Allingham, Richard & Hyatt, Douglas, "Measuring the Impact of Vocational Rehabilitation on the Probability of Post-Injury Return to Work" in Terry Thomason and Richard P. Chaykowski eds., *Research in Canadian Workers' Compensation* (Kingston, ON: IRC Press, Industrial Relations Centre, Queen's University, 1995) at 159.

Ballantyne, Duncan S. & Dunleavy, James F., *Workers Compensation in Oregon Administrative Inventory* (MASS: Workers' Compensation Research Institute, 1995).

British Columbia Council of Human Rights, *Human Rights and Employment Equity: Interim Policy Guidelines*, (Vancouver, BC, 1994).

43 *Ibid.*, p. 16-17.

44 *Ibid.*, p. 18.

Commission de la sante et de la securite du travail, *Keeping Ties with Work For a Prompt and Lasting Return to Work* (Quebec, 1993).

Dean, David H. & Robert C. Dean, "Issues in the Economic Evaluation of the Vocational Rehabilitation Program" *Journal of Rehabilitation* (v. 53 n.1 1987) 13-19.

Fulton Consulting Group, *Review of International and Jurisdictional Best Practice in Return to Work: A Report of the Return to Work Advisory Group* (Australia: Comcare National Rehabilitation Policy Unit, 1996).

Fulton, Jane & John Atkinson, *Medical and Rehabilitation Programs in Workers' Compensation: An Administrative Inventory in British Columbia* (Ottawa, ON: The Health Group, 1993).

G. Allan Roeher Institute, *On Target? Canada's Employment-Related Programs for Persons with Disabilities* (North York, ON: Roeher Institute, 1992).

Gardner, John A., *Return to Work Incentives: Lessons for Policymakers from Economic Studies* (MASS: Workers' Compensation Research Institute, 1989).

Gates, Lauren B., Yechezkel Tlaer & Akabas, Sheila H. "Optimizing Return to Work Among Newly Disabled Workers: A New Approach Toward Cost Containment" *Benefits Quarterly* 1989 (2) at 20.

Gunderson, Morley, Douglas Hyatt & Law, David "Re-employment and Accommodation Requirements Under Workers' Compensation" in Thomason, Terry & Chaykowski, Richard P. (eds.), *Research in Canadian Workers' Compensation* (Kingston, ON: IRC Press, Industrial Relations Centre, Queen's University, 1995) at 141.

Habeck, Rochelle V., Michael J. Leahy, H. Allan Hunt, Fong Chan & Welch, Edward M. "Employer Factors Related to Workers' Compensation Claims and Disability Management" *Rehabilitation Counselling Bulletin* 34(3) March 1991 at 210.

Health Management Resource Group, *Current Status of the Rehabilitation Service Delivery System in British Columbia* (Victoria, BC: Ministry of Health and Ministry Responsible for Seniors, 1994).

Hunt, H. Allan, Peter S. Barth & Michael J. Leahy, *Workers' Compensation in British Columbia: An Administrative Inventory at a Time of Transition* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1991).

Hunt, H. Allan, Peter S. Barth & Michael J. Leahy, *The Workers' Compensation System of British Columbia: Still in Transition* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1996).

Ison, Terence G., *Compensation Systems for Injury and Disease: The Policy Choices* (Toronto, ON: Butterworths, 1994).

Ison, Terence G., *Workers' Compensation in Canada, Second Edition* (Toronto, ON: Butterworths, 1989).

Kiernan, William E. and Schalock, Robert L. eds., *Economics, Industry and Disability: A Look Ahead* (Baltimore: Paul H. Brookes Publishing Co., 1989).

Liberty International Canada, *Unfolding Change: Workers' Compensation in Canada* (Toronto, ON: Liberty International Holdings Canada Ltd., 1995).

Nexus Actuarial Consultants Ltd., *WCB BC Survey of Canadian Workers' Compensation Jurisdictions*, (Richmond BC: Workers' Compensation Board of British Columbia, August, 1996).

Rehabilitating & Re-employing Injured Workers Making it Work, Proceedings of the Corpus Sixth Annual Workers' Compensation Conference, October 1989.

Workers' Compensation Board of British Columbia, *Terms of Reference and Statement of Work: Evaluation of the WCB's Vocational Rehabilitation Interventions* (Richmond, BC, 1993).

Workers' Compensation Board of British Columbia, *Vocational Rehabilitation Interventions Evaluation Study (Back Injury Claims): Internal Audit*, (Richmond, BC, 1994).

Workers' Compensation Board of British Columbia, *Transforming the Workers' Compensation Board of British Columbia: A Strategic Plan* (Richmond, BC, 1996).

Workers' Compensation Board of British Columbia, *Rehabilitation Services & Claims Manual*, (Richmond, BC, 1995-).

Workers' Compensation Board of British Columbia, *Vocational Rehabilitation Services Procedure Handbook*, (Richmond, BC, 1994-).

Workers' Compensation Board of British Columbia, *Workers' Compensation Reporter* (Richmond, BC, 1973-).

Workplace Health, Safety and Compensation Commission, *Balancing Services, Benefits and Assessments* (NB, October, 1996).

World Rehabilitation Fund Inc. *The Changing Nature of Work, Society, and Disability: The Impact on Rehabilitation Policy* (New York, 1987).