

HOUSE BILL REPORT

ESHB 2073

As Passed House:

March 8, 2007

Title: An act relating to a pilot program for vocational rehabilitation services.

Brief Description: Establishing a pilot program for vocational rehabilitation services.

Sponsors: By House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Wood, Kenney, Moeller, Simpson and Ormsby; by request of Governor Gregoire).

Brief History:

Committee Activity:

Commerce & Labor: 2/15/07, 2/23/07 [DPS].

Floor Activity:

Passed House: 3/8/07, 85-13.

Brief Summary of Engrossed Substitute Bill

- Creates an industrial insurance vocational rehabilitation pilot program from January 1, 2008, until June 30, 2013.
- Increases allowable costs for vocational rehabilitation plans to \$12,000 and increases time for retraining to two years.
- Establishes time frames for the vocational plan development process.
- Creates options and benefits for workers who decline to participate in an approved vocational plan.
- Addresses issues related to vocational plan interruption.
- Limits the time and allowable costs for vocational rehabilitation in certain subsequent or re-opened claims.

HOUSE COMMITTEE ON COMMERCE & LABOR

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

Minority Report: Do not pass. Signed by 2 members: Representatives Condotta, Ranking Minority Member and Chandler, Assistant Ranking Minority Member.

Staff: Sarah Beznoska (786-7109).

Background:

Industrial Insurance Act

One of the stated primary purposes of Washington's Industrial Insurance Act (Act) is to enable an injured worker to become employable at gainful employment. The Department of Labor and Industries (Department) pays, or directs self-insured employers to pay, the costs of vocational rehabilitation services when these services are necessary and likely to enable the injured worker to become employable at gainful employment. Costs are chargeable to a state fund employer's cost experience. Under Department rules, an injured worker is employable if the worker has the skills and training necessary in the labor market to be capable of performing and obtaining gainful employment on a reasonably continuous basis, considering age, education, experience, and preexisting limitations or limitations due to the industrial injury.

Vocational Rehabilitation

Under Department rules, an ability-to-work assessment is used to determine if an injured worker should receive vocational rehabilitation services. An ability-to-work assessment report must recommend one of the following:

- the injured worker is employable at gainful employment;
- vocational rehabilitation services are necessary and likely to enable the injured worker to become employable at gainful employment; or
- the injured worker is not likely to benefit from vocational services.

If vocational rehabilitation services are necessary and likely to enable the injured worker to become employable at gainful employment, vocational rehabilitation plan development services are authorized to obtain a vocational rehabilitation provider's assistance in producing a vocational rehabilitation plan for the worker. Vocational rehabilitation plan implementation and monitoring services follow plan development. A variety of reporting requirements apply at each step in the process.

Costs for vocational rehabilitation services include the cost of books, tuition, fees, supplies, equipment, child or dependent care, and other necessary expenses. The cap for these costs is \$4,000 in any 52-week period. A worker may also receive transportation costs. The Department may extend the time frame for an additional 52 weeks. If a worker is required to reside away from his or her customary residence while undergoing vocational rehabilitation, the reasonable costs of board and lodging must also be paid. A worker undergoing vocational

rehabilitation is entitled to continuing time-loss compensation while actively and successfully undergoing vocational rehabilitation.

If a worker refuses or obstructs evaluation or examination for vocational rehabilitation purposes or does not cooperate in reasonable efforts at vocational rehabilitation, the Department or the self-insurer, may suspend any further action on any claim of the worker as long as refusal, obstruction, or non-cooperation continues. The Department or self-insurer may reduce, suspend, or deny any compensation for a period of refusal, obstruction, or non-cooperation.

WorkSource

WorkSource is a joint venture to address employment needs in the state. WorkSource partners include state and local government agencies as well as local community-based organizations that provide a wide range of employment and training-related services. WorkSource Centers provide information, technology, and career services for job seekers.

Summary of Engrossed Substitute Bill:

The Department of Labor and Industries (Department) is required to create a vocational rehabilitation pilot program from January 1, 2008, until June 30, 2013. The elements of the pilot program apply to vocational plans approved between January 1, 2008, and June 20, 2013.

Vocational Rehabilitation Pilot Program

Vocational Initiative Project

The Department must establish a vocational initiative project that includes a partnership between the Department and WorkSource. The Department must place full-time vocational professionals at pilot WorkSource locations. The Department must refer some workers to the vocational professionals at pilot WorkSource locations.

The Department must work with employers in pilot WorkSource areas to market the benefits of on-the-job training programs. The Department also must work with community colleges to reserve slots in high demand programs that may be considered by the Department and private sector vocational professionals for vocational plan development.

The Department will also assist stakeholders in developing additional vocational training programs in various industries, including but not limited to agriculture and construction. These programs will expand the choices available to injured workers in developing their vocational training plans with the assistance of vocational professionals.

Vocational Rehabilitation Subcommittee

The Department must create a vocational rehabilitation subcommittee. Members must be appointed by the Department for at least the duration of the pilot program. The subcommittee

must provide the business and labor partnership needed to maintain focus on the intent of the pilot program. The subcommittee must provide consistency and transparency to the development of rules and policies.

The subcommittee must report to the Department at least annually and recommend to the Department and the Legislature any additional statutory changes needed, including extension of the pilot program.

The subcommittee must also provide recommendations for additional changes or incentives for injured workers to return to work with their employer of injury.

Vocational Referral, Plan Development, and Approval

When vocational rehabilitation is necessary and likely to enable the injured worker to become employable at gainful employment, the worker must be provided with services necessary to develop a vocational plan that, if completed, would render the worker employable. However, an injured worker may not participate in vocational rehabilitation if participation would result in payment of benefits by willful misrepresentation. Benefits paid because of willful misrepresentation may be recouped.

Some changes are made in the vocational plan development process. At the initial meeting with the worker, the vocational professional assigned to the claim must inform the worker of return-to-work priorities and of the worker's rights and responsibilities. The Department must provide tools to the vocational professional to communicate this and other information to the worker.

On the same date that the worker begins vocational plan development, the Department must also inform the employer, in writing, of the employer's right to make a valid return-to-work offer during the first 15 days of vocational plan development. A valid offer must be for bona fide employment with the employer of injury and must be consistent with any documented physical and mental restrictions of the worker. If a valid offer is made, vocational plan development services and time loss must be terminated effective the starting date of the job regardless of whether the worker accepts the offer.

If an employer fails to make a valid return-to-work offer within 15 calendar days, the employer may still make an offer, but the worker may decline the offer and choose to remain in vocational plan development.

A vocational plan must be completed and submitted to the Department for approval within 90 days of beginning vocational plan development. The Department may extend the 90 days for good cause and criteria for good cause must be set forth in rule. Frequency and reasons for good cause extensions must be reported to the vocational rehabilitation subcommittee.

During vocational plan development, the worker must, with the assistance of a vocational professional, participate in vocational counseling and occupational exploration, including, but not limited to, identifying possible job goals, training needs, resources, and expenses, consistent with the worker's physical and mental status. A vocational rehabilitation plan must

be developed by the worker and the vocational professional and submitted to the Department or self-insurer.

Vocational plans must contain an accountability agreement signed by the worker. The agreement must detail expectations related to progress and other factors that influence successful participation in the plan. Failure to abide by these expectations may result in suspension of vocational benefits.

Formal education included as part of the vocational plan must be for an accredited or licensed program or a non-accredited or unlicensed program approved by the Department. The Department must develop rules for the approval of non-accredited or unlicensed programs.

Vocational Costs and Time Frames

Allowable costs for vocational rehabilitation plans are set at \$12,000, but must be adjusted annually on July 1 of each year. The annual adjustment applies to plans approved on or after July 1 of the adjustment until the following June 30. The adjustment must be made based on the average percentage change in tuition for the next fall quarter for all Washington community colleges.

A vocational plan must not exceed two years. As under current law, if a worker is required to reside away from his or her customary residence while undergoing vocational rehabilitation, the reasonable costs of board and lodging must also be paid and a worker undergoing vocational rehabilitation is entitled to continuing time-loss compensation while actively and successfully undergoing vocational rehabilitation.

Worker Options

Following vocational plan development, a worker has two options. Option one is to participate in the vocational plan implemented by the Department or self-insurer. Option two is to decline to participate in the vocational plan and receive other benefits. The worker has 15 days after approval of the plan to select option two.

If the worker chooses option two and declines to participate ("makes an option two selection"), the worker is entitled to six months of time-loss, paid in bi-weekly payments. Payments do not include interest on the unpaid balance and the Department has the discretion to provide the entire amount in a lump sum payment.

If the worker makes an option two selection, the amount of tuition benefits or educational costs remain available to the worker for five years. The worker must apply to the Department or self-insurer to receive the tuition benefits or educational costs and may use them at an accredited institution or a program from the list approved by the Department for tuition, books, fees, and tools. The amount available for tuition must increase based on the average percentage change in tuition for the next fall quarter at all Washington state community colleges.

If the worker makes an option two selection, the Department must issue an order confirming the option two selection, setting a payment schedule, and terminating time loss payments. The Department must close the claim on the date the worker chooses not to participate.

Future Vocational Assistance

A worker who chooses option one or makes an option two selection may be entitled to future vocational assistance if the claim is re-opened based on an aggravation or if the worker files a new claim.

Following successful completion of the vocational plan under option one, any subsequent assessment of whether vocational rehabilitation is necessary and likely to enable the injured worker to become employable at gainful employment must include consideration of transferable skills obtained in the vocational plan. If the claim is re-opened, the total amount available for vocational services is subject to the \$12,000 cost cap and the two-year time limit minus any amounts previously expended.

If the worker made an option two selection, the worker is entitled to vocational assistance in a subsequent claim or a re-opening that occurs five years following the date the worker made the option two selection and the claim was closed. Future vocational assistance is limited to 18 months and in a re-opened claim, costs are limited to \$12,000 minus the amount expended by the Department or self-insurer for training at an accredited institution pursuant to the option two selection. Another option two selection is not available to the worker under the subsequent claim or reopening of the claim.

The Director of the Department (Director) has the discretion to provide the worker with vocational assistance not to exceed the \$12,000 and two year limits regardless of the worker's prior option selection or benefits expended, if the Director determines that vocational assistance would prevent permanent total disability.

Vocational Plan Interruption

Vocational plan interruption is defined as an occurrence that disrupts a vocational plan to the extent that the employability goal is no longer attainable within the cost and time limits detailed in the vocational plan. Institutionally scheduled breaks in educational programs or occasional absence due to illness are not vocational plan interruptions.

When vocational plan interruption is beyond the control of the worker, the Department or self-insurer must recommence vocational plan development. If necessary to complete vocational services, the Department or self-insurer may credit any time and money expended prior to the interruption. An interruption is beyond the control of the worker when it is due to closure of an accredited institution, death of an immediate family member, or documented changes in the worker's objective medical condition that prevent further participation in the vocational plan.

When vocational plan interruption is the result of the worker's actions, entitlement to benefits is suspended. If the vocational plan is recommenced, or a new plan is developed, time and

money expended prior to interruption is not credited. Interruption is the result of the worker's actions when it is due to the failure to meet attendance expectations set by the training or educational institution, failure to achieve passing grades or acceptable performance review, unaccepted or post-injury conditions that prevent further participation in the vocational plan, or the worker's failure to abide by the accountability agreement.

Costs to the Employer

Generally, vocational costs are chargeable to the employer's cost experience or must be paid by a self-insured employer. However, state fund vocational costs, including time-loss, may be paid from the medical aid fund at the discretion of the Department if:

- the worker previously participated in a vocational plan under the pilot program or made an option two selection under the pilot program;
- the date of injury or disease manifestation, for state fund employers, is within the period of time used to calculate the state fund employer's experience factor; and
- the subsequent claim is for an injury or occupational disease that resulted from employment and work-related activities beyond the worker's document restrictions.

When paid from the medical aid fund, vocational costs are not charged to an employer's cost experience.

Register

The Department must develop and maintain a register of workers who have been retrained or have chosen one of the vocational options during the pilot program. The register must be kept for at least the duration of the pilot program.

Study and Review

An independent review and study of the effects of the pilot program must be conducted to determine whether the pilot program has achieved appropriate outcomes at reasonable cost to the system. The review must include, at minimum, the following:

- a report on the Department's performance with regard to the provision of vocational services;
- the skills acquired by worker who receive retraining services;
- the types of training programs approved;
- whether the workers are employed, at what jobs and wages after completion of the training program and at various times subsequent to their claim closure; and
- the number of demographics of workers who choose option two and their employment and earnings status at various times subsequent to claim closure.

The Department may adopt rules, in collaboration with the vocational rehabilitation subcommittee to further define the scope and elements of the study. The subcommittee must provide input and oversight with the Department with respect to the study.

Reports of the independent researcher are due on December 1, 2010, December 1, 2011, and December 1, 2012.

Department Report

The Department must develop an annual report on the vocational rehabilitation system. The first report must be provided to the Legislature and the vocational rehabilitation subcommittee by December 1, 2009. The report is due annually thereafter until December 1, 2012. The annual report must contain information about workers who have participated in more than one vocational training plan approved under the pilot project and information about the industries in which the workers were employed. The final report must include the Department's assessment and recommendations for further legislation, in collaboration with the vocational rehabilitation subcommittee.

The Department also must report all expenses to the medical fund that result from the discretionary decision to fund vocational costs from the medical aid fund. The expenditures must be separately documented as a medical aid fund expenditure and reported annually to the vocational rehabilitation subcommittee and the Legislature. The report must include the number of claims for which relief to the employer was provided, the average cost per claim, and whether the employers were state fund or self-insured.

Appropriation: None.

Fiscal Note: Requested on February 7, 2007.

Effective Date: The bill takes effect on January 1, 2008.

Staff Summary of Public Testimony:

(In support) There was a group of five people working throughout the summer and fall on this legislation. The process to develop this bill was unique. There have been many attempts over the years to achieve reform of vocational rehabilitation. The group of individuals working on it this time built on past efforts and came together to resolve issues by looking at the outcomes and needs of employers and workers. This bill is an attempt to bring together reforms that make the system work. It has support from labor and many in the business community. It is a compromise and does not include everything that everyone wanted, but it is a major step forward.

There is a common understanding that the current vocational system is not working for business, workers, or Washington despite the hard work of many vocational counselors. Last year, the state spent \$44 million in vocational professional fees (assessment, plan development, and monitoring) and \$6 million in actual retraining for workers. It is important to make wise investments in tax dollars and the current system is not a good investment.

The current system is too limited. The bill gives the worker options. The bill provides greater accountability and creates a closer link between vocational programs and good jobs for

workers. The increased up front costs will be offset by better outcomes, fewer people going through the system multiple times, and more people returning to work. Today almost all workers who move into the vocational rehabilitation system move through an ability-to-work assessment or a plan development attempt more than once. More than 40 percent fail the first time though in part because of the limited options for workers. What appear to be increases in money and time for vocational rehabilitation in this bill is really a cost-shift.

This is an expansive pilot program that engineers a reform of the entire system for a period of time for all workers. A higher level of benefits will be provided to all workers, with an option to opt out of the system. The Department will study what happens under the pilot program and make adjustments and recommendations. The pilot will continue a committee of stakeholders to work on issues and include an independent researcher to analyze elements of the pilot. Better training for workers with better results will likely help to avoid pension cases.

There are common themes about how to fix the vocational system and this bill addresses them. The pilot program will give workers the skills they need to return to family wage jobs. All issues may not be addressed in this bill and some issues were put aside in creating this bill. For example, the issue of gainful employment was set aside by labor. Employers set aside the issue of compromise and release. But this bill is a step forward and makes improvements in the current system. For example, there are improvements in moving the vocational process along. In addition, the opt-out provision provides an option for workers who should not be pushed through the system.

The words and summaries do not reflect all of the innovations in this bill. There is a commitment to return-to-work that is a part of this bill. Investing the worker in the process is a part of the bill, including giving real choices to workers and vocational counselors. Under the current program, the vocational benefits qualify a worker for approximately six community and technical college programs. The options available under the pilot make a worker eligible for almost any program at a community or technical college.

Self-insurers vocational claims costs are 5.5 times higher than non-vocational claims. Vocational programs sometimes fail because employees are just not interested in being retrained. There are a variety of reasons for this. Employees may receive more than one retraining plan. This bill addresses those issues.

This bill helps workers in the construction industry who get injured on the job and will help put them back in the workplace.

Finality was a difficult issue in developing this proposal, particularly the issue of a worker getting retrained or not and then returning to the industry of original injury. Not everyone got what they wanted with respect to finality. Data on this issue is not developed. The pilot will help get data on this issue.

(Opposed) It is not reasonable to ask employers to accept double the time-loss, triple tuition payment and no accountability. Recidivism is a problem and this bill does not address

finality. A worker who works outside of his or her plan restrictions should not be eligible for future retraining and that language should be in statute.

The \$20 million diversion of workers' compensation funds is also a concern. This comes out of the medical aid fund. Self-insured employers and workers do not pay into the medical aid fund and yet they will benefit from it. If this money is used for this program, the self-insured community must have a stake in the fund. In addition, the Director of the Department has the authority to withdraw funds as needed. The authority should be limited by criteria that must be met before funds are withdrawn.

Farm workers do not use vocational rehabilitation because the predominant job in agriculture is fruit picking and sorting. If a worker cannot do either of these jobs, there is likely not another area for training. The bill should include a section stating that the Department will work with agricultural stakeholders to create agricultural vocational curriculum.

There are concerns about the time frames in the bill. Employers must be given a fair chance to make a job offer. The 15-day time frame to make an offer is not long enough. Limits should be placed on the Department's authority to extend the 90-day vocational plan development time frame.

The bill increases costs without any benchmarks. There should be more benchmarks in the bill.

The bill should not let vocational money be used to purchase equipment and tools for self-employment purposes.

Studies show that opt-out is not good for workers. Oregon has an opt-out provision and only 41 percent of workers who take the opt-out are employed three years after injury. The opt-out would remove injured workers from the labor force and would transfer costs onto the economy.

Persons Testifying: (In support) Peter Bogdanoff, Governor's Executive Policy Office; Judy Schurke and Vickie Kennedy, Department of Labor and Industries; Jeff Johnson, Washington State Labor Council; Terry Peterson, Comprehensive Risk Management; Kris Tefft, Association of Washington Business; Lori Carlson, Sellen Construction; Tina Coakley, Boeing; Terri Herring, Washington State Trial Lawyers' Association; David Johnson, Washington State Building and Construction Trades Council; and Owen Linch, Joint Council of Teamsters.

(Opposed) Samuel Harvey, Vocational Counselor; Dan Fazio, Washington State Farm Bureau; Amy Brackenbury, Building Industry Association of Washington; Carolyn Logue, National Federation of Independent Business; and Gary Smith, Independent Business Association.

Persons Signed In To Testify But Not Testifying: Steve Duncan and Kathryn Hudson, International Association of Rehabilitation Professionals; Don Bennett, Workforce Training and Education Coordinating Board; and Dave Kaplan, Washington Self-Insurers Association.