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# Workers' Compensation Reemployment Programs Options for Modifying the Pension System: Final Report

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Washington Pension System Review

**WORKERS' COMPENSATION REEMPLOYMENT PROGRAMS  
OPTIONS FOR MODIFYING THE PENSION SYSTEM**

**Final Report**

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## **Workers' Compensation Reemployment Programs Options for Modifying the Pension System**

### **1. Statement of the Issues—The Role of Pensions**

This paper seeks to lay out some alternative possible measures that could be employed in an effort to strengthen the workers' compensation program in Washington. In particular we are aware of criticism over the approach to pensions for work injuries, including frequent reference to a need to reduce the rate of awarding pensions for work injuries and illnesses. At the outset we wish to make entirely clear that we expressly favor no option over any other, including leaving the system unchanged. This work is meant to describe some options that policymakers face and to suggest some of the strengths and shortcomings of various approaches. We recognize that any result of an ultimate policy decision can be viewed favorably by some and with dissatisfaction by others. Our hope is that this report allows a wide range of choices to be considered.

In a previous report that we prepared for the Department of Labor and Industries, we found that the incidence of pensions under Washington's workers' compensation program appeared to be very high and out of line with the experience of most jurisdictions in the U.S.<sup>1</sup> This was consistent with the views held by many others, both within and outside the state agency. Some features of the Washington state system make it difficult to precisely compare the incidence of pensions to that found in other states, but our judgment was that the level and the rate of pensions among those with time-loss claims was also growing at a significant rate. Our report suggested a number of reasons for this growth as well as rejecting some other possible sources of the increase.

Our 2008 report was basically descriptive, and it did not include policy recommendations or possible steps that the State could take to diminish the number of pensions to be awarded in the future. What follows in this report are not our recommendations about steps that should or could be taken, but instead a list of possible measures including some taken by other jurisdictions to deal with the issue.

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<sup>1</sup> Barth, Grob, Harder, Hunt, and Silverstein 2008.

## 2. Outline of Current Approach to Pensions

If we exclude those cases involving extraordinarily serious impairments that are listed in the Washington statute,<sup>2</sup> the basis of awarding a pension to an injured worker is shown in the statute as a "... condition permanently incapacitating the worker from performing any work at any gainful occupation."<sup>3</sup> The listed or specific injuries are very few in number, and not of interest in this paper. Many states incorporate such lists in their statutes. Similarly, a sizable number of states use employability or work performance standards criteria for awarding permanent total disability benefits. What sets Washington apart from almost all other states using this standard is that Washington awards permanent partial disability benefits on the basis of impairment only. While some other states use this criterion for permanent partial awards, they use impairment also when evaluating workers for permanent total disability status. In Washington, the very large majority of permanent partial disability awards are for relatively low rated impairments, meaning that the typical beneficiary receives a relatively small benefit. Yet where the worker has had difficulty resuming work in the labor market, a very large gap is created between the permanent partial award and a potential lifetime pension. In evaluating the worker's (economic) condition, the adjudicator is left with a very difficult decision. The permanent partial disability benefit can be perceived as inadequate and all that can be done for the worker is to leave him/her on time-loss benefits or award a pension.<sup>4</sup>

## 3. Pensions as a System Feature

In considering the use of pensions in Washington, we believe that it is critical that they are recognized as just one element embedded within the compensation system. Other parts of the workers' compensation program affect it and are in turn affected by the state's use of pensions. While one could attempt to "fix" the pension question by dealing only with the process of granting pensions, in our view other parts of the state's workers' compensation program contribute substantially to the matter. As a result, changes in the pension program can result from adjustments in other parts of the system. Of course this is not unique to Washington and is true in

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<sup>2</sup> "Permanent total disability" means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis. RCW 51.08.160 (2008).

<sup>3</sup> RCW 51.08.160 (2008).

<sup>4</sup> We recognize that another alternative decision that can be made and in the past was frequently applied was to send and resend the worker into the vocational rehabilitation system.

all workers' compensation programs. However, it is particularly noteworthy here because the likelihood of pensions in Washington seems inextricably linked to the incidence of time-loss claims of very long durations. The numbers of long-term time-loss claims serve as an important predictor of the future of pensions.

Long-term time-loss claims also represent an important cost driver in the state system. A policy focused exclusively on driving down pensions in order to save system costs would be ineffective in achieving that goal, if it was accomplished simply by retaining individuals with active time-loss claims in that status. In that case, benefits would continue to be paid and simply called something other than a pension.<sup>5</sup> Our previous report notes that during certain periods in the past, policy decisions to reduce the numbers of claimants with very long-term time-loss claims led to moving some into pension status, swelling the roles there.

#### **4. Pensions Are Viewed as a Liberal Entitlement Program in Washington**

We believe that pensions are considered to be both a desirable and a significant part of the system of workers' compensation in Washington. We recognize that the perception of an appropriate state system may have more in common with Washington's neighbor to the north, British Columbia, than with other states in the region or across much of the U.S. (Note, for example, that there were only 10 new permanent total disability [PTD] awards in Oregon, along with one previous award rescinded, in 2008. Oregon's Court of Appeals had not granted a single PTD award in the 10 years ending in 2008.<sup>6</sup>) The implication is that efforts to limit the number or the future growth of pensions in Washington will be challenged by many who will consider such practices as fair and reasonable, whereas the practices in other states with less liberal programs regarding pensions are irrelevant or an unacceptable norm for the state.

Our experience in other jurisdictions has taught us that even when laws or regulations or state agency practices are changed, implementing "reforms" can be frustrated by attitudes created by past practices. In short, the courts and appeals bodies and hearing officers become accustomed to viewing claims in a certain way, creating a tendency to grant similar outcomes to workers with comparable conditions and circumstances as they would have done prior to the law change. The implication of this is that very significant changes in the pension system in

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<sup>5</sup> We know that this is not entirely true for the self-insured employer as we recognized in the 2008 report.

<sup>6</sup> Reed 2008.

Washington are likely to be met with continuing resistance even after possible enactment, and the results will be slow to be manifested as legal and other challenges are posed.

## **5. Limitations of this Paper**

In this paper we do not include a discussion of administrative procedures within the Department of Labor & Industries, or the appellate bodies that adjudicate claims for pensions. Some of those issues have been described in other reports and studies and our focus here is primarily on those matters that might be considered for legislative action.

## **6. Options for the Temporary Disability (TD) System**

While there are many elements of the temporary disability benefits methodology employed by L&I that have been assessed over the years by L&I and others, the following discussion focuses solely on issues that relate very directly to permanent disability and pensions.

### **6.A. Leave the TD system as it is and rely simply on changes in the permanent disability system.**

Choosing this option has several implications. Compensation for temporary disability affects the largest number of injured workers receiving indemnity benefits. Our previous work revealed few significant criticisms from stakeholders about the existing approach to temporary disability, although more might have emerged had our study's focus not been directed specifically to pensions issues. Additionally, Washington's approach is broadly similar to that found in the other states. Leaving the system as it is would likely minimize disruption to all persons familiar with the current approach. Staff at L&I would need no retraining to learn the approach.

Almost all pension cases enter into the WC system as temporary disability claims. Measures taken at the earliest stages following work injuries may contribute to reducing the usage of pensions. It may be necessary to weigh the costs of adjusting the approach to temporary disability against the benefit of reducing the future incidence of pension cases.

**6.B. Modify the approach to TD compensation in ways that can contribute to a less inclusive pensions program.**

The key to this change or changes would be to recognize the linkage that exists between pension awards and claims that remain active or open over long periods of time.<sup>7</sup>

**6.B.1. *Set a maximum period of time for which temporary disability benefits will be paid.*** A number of jurisdictions statutorily impose maximum periods of time for which temporary benefits can be paid. The goal of this approach, aside from cost reduction, is to give injured workers a clear understanding that benefits will end at some point and measures must be taken by them to provide for that eventuality, presumably returning to work. (One minor complication to be considered is whether the maximum time period applies to the number of weeks that passed since indemnity benefits have started or the number of weeks for which indemnity benefits have been paid.)

The overwhelming majority of injured workers would be unaffected by adopting such an approach, unless the maximum period before benefits were terminated would be set at a low threshold. Those most likely to be affected would be some of those workers on the path to becoming very long-term claims resulting ultimately in a pension.

Some of the largest states have such limits. California, Florida, and Texas have limits on the period of temporary disability set at 104 or 105 weeks, with some limited exceptions possible. For example, the 105 weeks can be extended in Texas in instances where spinal surgery has been performed late in the claim period. Some jurisdictions have limits of significantly greater maximum duration. As an example, the period for which temporary total disability benefits are paid cannot run for over 500 weeks in Indiana, South Carolina, and Virginia.

Setting the bar this high raises certain questions. In most states, the virtually routine use of compromise and release agreements makes such limits academic, in the sense that temporary benefits rarely reach the point where the statutory limit will be invoked to have benefits ended. However, the restriction can have some impact on the size of the settlement. A potential lifetime benefit is seen as costlier by an insurer than one with a specific end date, thus making the insurer willing to pay a higher price to settle the former. However, the present value of a benefit that might have to be paid only after 400 or 500 weeks have passed is relatively small.

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<sup>7</sup> This linkage is detailed in our 2008 report and has been reported frequently by L&I's actuaries.

In most jurisdictions setting a limit on temporary disability benefits of even three to four years would not be greeted with as much opposition as would many other changes in the approach to temporary disability compensation. Aside from affecting only a small proportion of injured workers, the termination of temporary disability benefits would likely be followed with some injured workers receiving a permanent disability benefit. However, given Washington's current system and its history of having a relatively high rate of very long-term claims, one could expect far greater opposition to this sort of change than one might elsewhere.

A variation on an approach that limits the period of temporary total disability is found in states that place limits on the maximum period that injured workers can receive benefits for the combined period of receipt of both temporary disability benefits and permanent partial disability benefits. Another variant places a limit on the combined dollar amount of temporary and permanent partial disability benefits. Setting limits on the combined benefits is likely to reduce the incentive to collect temporary disability benefits for prolonged periods of time.

**6.B.2. *Terminate the payment of indemnity benefits for temporary disability when the injured worker is found to be at maximum medical improvement (MMI).*** Currently, a Washington worker receiving temporary disability benefits can continue to receive time-loss benefits after the worker has reached MMI if there is no determination that the worker is capable of returning to gainful employment. In many, if not most jurisdictions, MMI alone is grounds for terminating temporary disability benefits. If there is a residual impairment (or disability) those states would then rate the worker for a permanent disability award.

The prospect of earlier benefit termination, at the point of MMI alone, is likely both to encourage some injured workers to begin to seek employment, if they have not already done so, and to obtain possible permanent partial disability benefits. It is at this point that insurer/employers and injured workers typically will settle permanent disability cases with settlement agreements that result in closing down the claim. (This issue will be discussed under the discussion of options for modifying permanent disability compensation.)

In the Washington system, temporary total disability payments will be terminated, typically, if the worker is found to have reached MMI and a health care provider reports that the person is able to return to work. These are separate issues and either one or both can be disputed. Were Washington to move to an approach that terminates benefits when the worker is found to

have reached MMI, it would remove at least one of the possible sources of dispute over the issue of ending temporary disability payments.

**6.B.3. Reduce the wage replacement rate as the period on temporary disability benefits grows longer.** Several jurisdictions lower the rate or level of weekly benefits after a period of time has passed during which the worker has received temporary disability benefits.<sup>8</sup> Reducing the weekly compensation benefit can serve as an inducement for a worker to speed up the period of recovery and hasten the return to work. Such a policy would aim less at the cost savings resulting directly from a reduced weekly benefit but more from the indirect effect of reducing the length of time for which the worker receives temporary disability compensation.

The wage-replacement rate for temporary total disability in Ohio is 72 percent, but it is reduced to 66 2/3 percent after 12 weeks of benefits. In Texas, the wage-replacement rate for most workers is set at 70 percent of their average weekly wage, but for those earning \$8.50/hour or less, the rate is initially set at 75 percent and reduced to 70 percent after 26 weeks. Cutting the wage-replacement rate is very widely found in Australia's workers' compensation systems. For most federal government (Commonwealth) workers, the wage-replacement rate for temporary total disability is cut from 100 percent of the pre-injury wage to 75 percent after 45 weeks.<sup>9</sup> In New South Wales, Australia's largest state, the wage-replacement rate is cut after 26 weeks from 100 percent to a flat dollar amount, adjusted for the presence of dependents. In Victoria, the second most populous state, the 95 percent temporary total disability compensation rate is reduced to 75 percent after 13 weeks. It is likely that some would object to cutting the wage-replacement rate after a period of time has elapsed. These criticisms might be mooted somewhat by increasing the wage-replacement rate for the initial period when done in conjunction with a reduction after an interval of time has passed.

At one level lowering the wage-replacement rate in longer-duration claims may appear to be counterintuitive, as these are the workers generally considered to have sustained more severe or disabling injuries. Indeed, at least two jurisdictions in North America increase the wage-

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<sup>8</sup> Middle to lower paid federal employees covered by the Federal Employees Compensation Act also have the value of their temporary benefits reduced after 45 days, though this applies only to those with occupational injuries and not to those with occupational diseases. Some of this is a result of the tax-free status of their benefits compared with their after-tax income from wages and the continuation of pay practice for 45 days in cases of occupational injuries which is not paid in cases of occupational diseases.

<sup>9</sup> Wage replacement rates within other countries often appear high relative to U.S. jurisdictions. However, cash benefits are usually subject to income taxes in those countries, unlike the U.S. approach.

replacement rate for workers receiving temporary total disability benefits. Nova Scotia law provides that the temporary total disability benefit rate be increased from 75 percent to 85 percent after 38 weeks and Prince Edward Island province hikes its rate of 80 percent to 85 percent after 26 weeks.

**6.B.4. Enhance Return-to-Work Programs at the Temporary Disability Stage.** Disability management for workers' compensation claims attempts to interrupt or eliminate the progression of an injury or disease to becoming a permanent disability.<sup>10</sup> Thus, disability management is generally time specific and employer-employee relationship focused. However, we are interested in system wide workers' compensation policies and programs that encourage or subsidize the practice of disability management by employers or insurers with the expectation that this will lead to lower costs for employers and more satisfactory outcomes for injured workers. We will review state practices that encourage the use of disability management in two states to sample what is possible in this environment.

**6.B.4.a. Oregon Employer-at-Injury Program<sup>11</sup>**

The state of Oregon is renowned among the states for having the most aggressive return-to-work (RTW) orientation. They maintain a focus on RTW at the temporary disability level as well as for those with permanent work-related disabilities. We will consider the Employer-at-Injury Program (EAIP) here because it seeks to enhance the RTW rates for workers while they are still on temporary disability benefits.

The EAIP was introduced in 1993 in Oregon. It applies to employers who secure temporary medical releases from treating sources specifying that a particular injured worker is able to return to light-duty jobs that are transitional in nature. This can occur even before the worker has exhausted the three-day waiting period for wage-replacement benefits to begin. The employer receives a 50 percent wage subsidy for up to three months, as well as financial assistance for necessary worksite modifications and other associated costs of accommodating the injured worker. Insurers who assist in the process are paid a flat fee of \$120 for each placement. They also have the right to terminate time-loss benefits if the worker refuses an EAIP placement. Injured workers can refuse the EAIP offer if the job requires a commute of more than 50 miles

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<sup>10</sup> A broader discussion of the concept of disability management is found in section 9, below.

<sup>11</sup> See the 2008 Biennial Report on the Oregon Workers' Compensation System, pp. 51-54 for a full description of the Oregon Employer-at-Injury Program and its results.

(or is beyond the worker's capacity), or if the job is not with the employer at injury (or not at the same worksite of that employer), or if the job offer is inconsistent with either the employer's past practice or the terms of a collective bargaining agreement.

From its introduction in 1993 the utilization of EAIP increased rapidly to include over 10,000 worker placements and 1,775 employers by 1998. Thereafter, participation declined somewhat but in 2007 there were 7,752 EAIP placements involving 1,793 employers.<sup>12</sup> This is from an employment base of 1.76 million with 23,433 disabling claims.<sup>13</sup> So the EAIP placements involved up to one-third of all disabling claims.<sup>14</sup>

Oregon uses a state-of-the-art "Program Evaluation Model" which gathers quarterly employment and earnings data from the Oregon Employment Department to evaluate the outcomes of EAIP and other RTW programs. They measure program success by comparing employment and earnings levels for EAIP workers and non-program workers in the 13<sup>th</sup> quarter after injury. For the 2004 injury cohort, the increase in employment levels 13 quarters after injury was 5 percent; with the EAIP employment rate of 76 percent compared to the non-EAIP employment rate of 71 percent.<sup>15</sup> Further, a recent follow-up study of EAIP users from 1998 indicates that the average EAIP placed worker earned \$10,318 more than the matched non-users over the following five years.<sup>16</sup> They did not estimate the employer/insurer savings from this program, but presumably there were substantial cost savings involved there also.

#### **6.B.4.b. *Ohio "Remain at Work" Program***

Ohio promotes their "Remain at Work" program as a "healthy approach to staying productive." This is part of a comprehensive disability management program (Health Partnership Program) which will be described more fully below. The idea behind "Remain at Work" is to

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<sup>12</sup> Oregon Biennial Report, 2008, Fig. 17, p. 54.

<sup>13</sup> Workers' Compensation Claim Characteristics, Calendar Year 2007.

<sup>14</sup> This fraction is somewhat uncertain because some of the EAIP claims may involve non-disabling claims, as mentioned above, and some may involve claims from prior years.

<sup>15</sup> It is also worth noting that Oregon includes both the rate of "Reemployment for Injured Workers" and the degree of "Wage Recovery for Injured Workers" in their "Key Measure Analysis" of the workers' compensation system performance.

<sup>16</sup> Maier, Helmer, and Tokarczyk 2009.

prevent workers with medical-only claims from progressing to wage-replacement (time-loss) benefits (i.e., keeping below seven days lost from work due to the injury or disease).

Ohio uses a set of 18 approved Managed Care Organizations (MCOs) to handle the injury reporting, medical management, and claims management functions under the workers' compensation law. Each insured employer selects one of the approved MCOs to handle their workers' compensation claims.<sup>17</sup> The MCO has responsibility for the rapid reporting of workers' compensation claims to the Bureau of Workers' Compensation (BWC) and arranging necessary medical treatment, including specialist referrals, paying and managing medical bills, resolving medical disputes, etc. Anyone can contact the appropriate Managed Care Organization on behalf of the injured worker, and a comprehensive range of disability management services can be made available to the injured worker, at the discretion of the MCO. As we shall see later, this is only one aspect of the comprehensive approach to disability management in Ohio.

Obviously this "Remain at Work" program potentially serves as a very early intervention program, which requires the cooperation of the employer and the medical provider, as well as the injured worker. Ohio BWC recently sponsored an external review by Deloitte which included the performance of the MCOs.<sup>18</sup> According to that report, "The percentage change in average medical costs on lost-time claims for Ohio is consistently less than NCCI subscribers for 2003 to 2006." In general they gave the Ohio MCO system high marks for effectiveness.

While the RTW aspect of MCO performance was not part of the Deloitte review, it seems clear that the MCOs also spearhead the Ohio disability management approach to return to work on behalf of the Bureau of Workers' Compensation. They do this by keeping the critical actors, the injured worker, the employer, and the medical provider, fully informed of the developments in the claim and communicating with each other. This is the first step to a successful disability management intervention.

## **7. Options for the Permanent Partial Disability System**

The linkage between the permanent partial disability system and pension awards is both obvious and highly significant. We described a key element in our previous report. Workers in Washington who are eligible to receive a permanent partial disability award receive a benefit

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<sup>17</sup> Self-insured employers are not included in the program.

<sup>18</sup> See Deloitte Report 2.6, 2009, p. 6.

whose size is solely a function of the degree of impairment. The extent of the impairment is evaluated by a health care professional with standards set by medical guides. Impairments that are rated as less serious will receive a relatively smaller benefit than will a person with a greater degree of impairment. Workers with the same degree of impairment will be entitled to the same amount of compensation, regardless of differences in pre-injury wages, their ages, and number of dependents. This approach is frequently found in other states in the U.S. and in other parts of the world as well.

This “impairment” method of compensation has certain strengths as well as shortcomings. Generally, it appears easier to administer this approach than some alternative methods used for permanent partial disabilities. As such, it should result in relatively fewer disputes; fewer issues should be subject to dispute, and the disputes can be resolved in a more objective manner. Under the “impairment” approach disputes over the degree of permanent disability are centered on the ratings given by medical professionals. Using uniform rating guides as well as medical neutrals to resolve differing evaluations (rather than “dueling docs”) provides a satisfactory mechanism to resolve these disputes.

The primary shortcoming of the “impairment” approach is that it does not consider the economic loss that is suffered by an individual worker due to a work injury. To the extent that the “impairment” approach seeks to compensate for economic loss, it aims to deal with some (unspecified) average loss that all workers with similar degrees of impairment sustain. The result is that providing compensation based on presumed average losses means that some injured workers find that they are under compensated for their economic losses, and of course some others are overcompensated.

In Washington the “impairment” approach is not the basis for the finding of permanent total disability. We believe that placing one criterion for evaluating permanent partial disability alongside a different methodology for evaluating permanent total disability constitutes a central problem for the L&I pension system. The following are some options regarding the existing permanent partial disability (PPD) system that would impact the pension program.

**7.A. Leave the PPD system as it is and rely simply on changes in the permanent total disability system to deal with the pensions issue.**

Choosing this option has several implications. Our previous work revealed few significant criticisms from stakeholders about the current approach to compensating PPD cases,

although more might have emerged had our study's focus not been directed specifically to pensions issues. Additionally, Washington's approach is broadly similar to that found in a sizable number of states. Leaving the system as it is would likely minimize disruption to all persons familiar with the current approach. Staff at L&I would need no retraining to learn the new approach. Health care providers are apparently familiar with the rating process and what is expected of them.

Our experience in other states suggests that fundamental changes in the way that PPD claims are evaluated can be difficult to implement. Attorneys, workers and their representatives, insurers, employers, and health care professionals become accustomed to valuing certain impairments for compensation purposes. The monetary or disability value of a given claim is generally well understood, at least within a narrow range, by practitioners with experience in the state's system. Just as "old habits die hard," the tendency is to evaluate cases as they always have, even if a new approach is mandated, while paying lip service to the new method of rating. Adjudicators and the courts also can drag their feet even when legislative changes appear to bring about significant changes in the way permanent disability is to be evaluated.

When SB 899 (2004) in California changed the basic approach to evaluating the degree of permanent disability, fierce resistance to the changes manifested itself. Recently, the California Workers' Compensation Appeals Board handed down rulings that seem to reverse the direction taken by the 2004 legislation. The cases in question are likely to be appealed to the California Courts of Appeal and then on to the state Supreme Court.<sup>19</sup>

Another example of this with a similar type of inertia, resulting in the outcomes being reversed, can be found in Vermont. The statute was amended in 1999, thereby loosening the longstanding approach to the finding of permanent total disability.<sup>20</sup> Legislation that appeared to widen the eligibility criteria for the awarding of permanent total disability has not succeeded, however, as the Supreme Court seems to have hung on to the previous approach set out in a 1982 decision<sup>21</sup>.

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<sup>19</sup> Taylor 2009.

<sup>20</sup> Described in Kolter and Doolittle, 2006.

<sup>21</sup> Bishop v. Town of Barre, 140 VT. 564, 571 (1982).

**7.B. Allow permanent partial disability claims to be closed with compromise and release (C&Rs) agreements.**

We recognize that this option is one of the most contentious issues presently confronting the Washington's workers' compensation system. The use of such settlements would help to solve some of the challenges associated with the pension system, but it is not without its own difficulties. The use of this practice can also be employed to close down claims while they are at the temporary total disability stage and before they are treated as permanent partial disability claims. It is discussed here rather than under the temporary disability section as the use of such agreements is found so much more frequently in permanent partial disability cases. Here are some implications of employing this option.

A historic reason for the aversion to using lump-sum settlements has been that some workers have been unable to use the proceeds prudently. Instead, if the "pot of gold" is squandered quickly, the worker is left without the resources that are needed to compensate for any lost earnings due to the work injury. The problem may be more acute for those injured workers who have seldom, if ever, had immediate access to a significant amount of money.

In most jurisdictions where C&Rs are commonly used to end permanent disability cases, the settlement typically seals off future liability for the insurer, not only for indemnity benefits but also for any health care costs associated with the work injury. The result can be that the worker is left without adequate resources to pay for health care and is dependent on public support or other means to cover those costs, or do without the treatment completely. In some instances, the worker who is found to be eligible for Social Security Disability Insurance can expect Medicare to pay for some future medical costs, though the issue is clouded as the federal government does not accept the position of primary payer ahead of the workers' compensation benefit. Six states do not allow compromise and agreements that release future medical expenses: Arizona, Massachusetts, New Hampshire, Oregon, Tennessee, and West Virginia (occupational disease cases only).<sup>22</sup>

In Tennessee, C&Rs cannot initially close out future medical. Only after three years have passed from the settlement date of a permanent partial disability claim can there be an agreement to release future medical. In cases of permanent total disability, future medical can never be

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<sup>22</sup> In private correspondence from David B. Torrey, Oct. 23, 2008, to the author.

released. If there is a dispute over the issue of compensability itself or of the amount of compensation due, a C&R can close out the claim but the amount of compensation cannot exceed 50 times the state's minimum weekly benefit and the employee is not entitled to any future medical benefits for that claim.<sup>23</sup> Although this practice limits the scope of the release agreements, it has not led to the abandonment of the practice. Torrey points out that when West Virginia law was amended to allow settlement agreements in 2003 to release future medical, the use of C&Rs became more frequent. He also notes a Michigan case in 1966 where an amicus brief submitted by insurance carriers argued that "No one would ever think of entering into an agreement to redeem a case in part and leave open the possibility of future litigation over medical care."

Some objection to compromise and release agreements along with a lump-sum benefit is raised by those who fear that experienced insurance company staff will regularly seek bargains that are disadvantageous to workers, recognizing the worker's relative inexperience in matters of workers' compensation. This inequality of bargaining power brought about by the "experience factor" can be exacerbated where the insurer delays or denies some benefits in order to weaken the worker's position. This has been termed "starvation therapy" by insurance company critics. Such practices can be mitigated by penalties imposed on insurers for unreasonably delaying or denying the payment of benefits, (from fines to loss of operating licenses, or to discontinuance of permission to self-insure), by vigilantly reviewing C&R agreements before they are approved by the state, and by enabling law suits against a carrier or employer for a failure to act in "good faith."<sup>24</sup> However, the tendency appears to be for states to be less reliant on reviews of C&Rs, and states that now regularly omit such reviews include Florida, Alabama, and Alaska.<sup>25</sup>

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<sup>23</sup> Tenn Code Ann. 50-6-206.

<sup>24</sup> While most states that allow C&Rs require that they be reviewed by a state agency or court, in most instances the reviews are *pro forma*. More thorough reviews may be limited to agreements where the worker is unrepresented. This was acknowledged, effectively, in Florida when the mandatory review by Judges of Compensation Claims was dropped by legislation, in accepted claims and where the worker was represented, Fl. Stat. 440.12(11)(c)(2001). See McConnaughay and Moniz 2002. However, the role of Judges of Compensation Claims has not been as circumscribed as it seemed initially. See Bolton 2009. David Torrey notes a trend by states to move towards less regulation in the use of C&Rs. One authority on C&Rs has observed: Of note is that the trial bar, the injured worker community's only advocate, is not as a group vocally in opposition to the trend. In Pennsylvania, organized labor has raised an eyebrow at the popularity of C&Rs but is not, and has not been, a voice counseling moderation in the practice. Torrey 2007.

<sup>25</sup> Torrey 2007.

Some of these concerns about insurance company practices may be less troubling to critics of C&Rs because of L&I's role as an exclusive state fund. However, some individuals and groups ascribe to L&I the same type of profit seeking behavior that they believe motivate private sector insurance companies. There remains also the issue of self insured employers and third-party administrators.

Denying workers the opportunity to take benefits in the form of lump sums is regarded by some as paternalistic. While some individuals may be unable to use a lump sum wisely, they assert that others who are responsible should not be denied this chance to take their benefit in the form that they choose. To some extent the problem of prudently using settlement money for future medical needs due to the work injury can be mitigated. First, compromise and release settlements need not involve payments as lump sums. Instead, structured settlements allow a trustee to obtain the lump sum from the insurer/employer and make payments periodically from the award. In such cases workers are aware of the size of the settlement in terms of a lump sum though they do not receive it all in a single installment. Most jurisdictions in the U.S. that allow C&Rs require some approval process by a judge or workers' compensation administrator to make certain that the worker understands the terms of the agreement, that on its face the agreement is fair to the worker, and that the worker is aware of the issue of possible future medical needs. This review process is frequently a pro forma one, especially where the worker is represented by counsel or an agent. However, it need not be a superficial review if the state is committed to protecting the well being of the injured employee.

The fact that the use of C&Rs is so common across states is hardly surprising. The stakeholders in workers' compensation all appear to believe they benefit from their utilization. Insurers and employers desire the final resolution of claims; "The only good claim is a closed claim" is frequently one of the first things learned by the claims adjuster staff of insurers. Multiple reasons exist for this preference. Many state workers' compensation administrators prefer this system as well. The settlement of the claim is left to the worker and the insurer/employer, rather than being imposed by the agency or the courts. Letting the parties settle the issues themselves means that fewer decisions and disputes need to be made by an agency or a court that may already be overburdened. In some states the near unanimous view is that the state agency could not possibly cope with the workload were it not for the availability and widespread utilization of C&Rs.

Attorneys, particularly plaintiff attorneys, tend to be strongly supportive of C&Rs. Indeed, in some jurisdictions custom has evolved such that the attorney's fee is tied directly to the size of the final settlement, or the value of the indemnity portion of the settlement. While some labor union representatives oppose the use of C&Rs or seek to have the practice ended, they rarely assert this publicly as their members appear to support their use. Opposition to C&Rs also arises from those who claim that the lump-sum payout serves to attract claimants who would otherwise not seek the benefit, and it induces some to take measures to inflate the size of the award. As an example, even in jurisdictions such as Washington that rate PPDs on the basis of the degree of impairment, evaluators may consciously or otherwise increase the rating of a PPD where the worker has been on temporary disability for a prolonged period. Thus, moving to a system of C&Rs could lead to lengthier periods of temporary disability for some injured workers.

Similarly, the worker may be more likely to seek out a medical provider known to be a source of higher ratings. In some cases the worker may be more willing to submit to surgery if a larger lump-sum settlement may be the result. Ironically, a worker may refuse surgery or other needed treatment in the interest of obtaining a higher PPD rating. While some economists might argue that the lump-sum payment and the periodic payout may have the same present value, depending in part on the discount rate used, modern behavioral economics suggests that a lump-sum payout is seen by the worker as a superior benefit. To the extent that it is especially favored, it can be linked to behavior that is not in the best interest of the worker, and may be costlier than a system without (large) lump-sum settlements. Permitting the use of settlements that involve lump sums seems likely to increase litigation over permanent partial disability, and to enlarge the number of attorneys who will handle workers' compensation claims. Many would see this as a reason to oppose moving to allow use of C&Rs.

Where states allow C&Rs to close off an entitlement to vocational rehabilitation, it will have several effects. First, it will tend to raise the cost of the settlement to the employer/insurer, all other things remaining the same. It will also reduce the utilization of vocational rehabilitation, a desired outcome for some stakeholders (employers and insurers), and an undesirable one for others (providers). After Oregon changed its law in 1990, it led to a drop-off in applications for vocational rehabilitation as workers preferred the cash offered in a C&R.<sup>26</sup>

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<sup>26</sup> Ballantyne 2008.

Opponents of lump-sum payments can point to systems that provide some limited flexibility so as to make them available in special circumstances. If a seriously impaired worker has need for a lump sum for things such as starting a business with reasonable prospects for success, for additional education, to prevent the foreclosure on a home, and so on, exceptions to rules against the use of lump-sum benefits can be made. Where this exists a government agency, including the workers' compensation board, can be given the authority to waive the rule that limits or restricts the use of lump-sum payments.

While C&Rs are meant to bring closure to claims, they do not always succeed in accomplishing that. Disputes can arise over whether an injury is a "new" injury or a recurrence or consequence of the one that was previously settled. Disputes over the possible reopening of a C&R also occur where one of the parties claims that information was withheld or that false information was provided. Of course, disputes over similar issues can arise even where a C&R is not used. As an example, a worker in Washington may be rated for a permanent partial disability, receive appropriate cash benefits, and then subsequently claim that the impairment has worsened and that a new, higher rating (and benefit) is warranted. Some jurisdictions provide that some period following the C&R will be allowed for a party to change their mind. Currently, Washington allows cases that it has closed to be reopened at a later time. Were this practice to continue, it would render the use of C&Rs less attractive for any insurer/employer. If cases that are settled with C&Rs cannot be reopened, some provision could be made for extraordinary cases where absolute closure would create some extreme inequity.

**7.C. Allow claims to be closed with compromise and release (C&Rs) agreements, but only under very special circumstances.**

One possibility is to allow the use of C&Rs where certain conditions are met. For example, the desire of the parties to use a C&R could be used to further the return to work goal. Consider the model that Texas uses where a commutation of impairment income (permanent partial disability) benefits will be allowed, but only if the injured worker has returned to employment for at least three months and is earning at least 80 percent of the employee's pre-injury average earnings. The Texas approach differs from a typical agreement that most states allow as it is not a C&R. However, there is no reason that such an approach could not also be utilized in the case of C&Rs. And there is no reason that 3 months or 80 percent are the only figures that could be used. Were Washington to adopt this sort of approach it would provide an

inducement both to the employer/insurer and the worker to return the injured employee to work should they wish to have the use of a compromise and release settlement.

**7.D. Modify the current PPD rating approach by switching to a bifurcated one.**

Among the reasons for the high rate of pensions in Washington is the inadequacy of benefits for permanent partial disabilities in instances where workers have difficulty re-entering the labor market following their injury. Providing precisely those persons with increased benefits should reduce the need for pensions. An alternative approach to PPD compensation could achieve that. In a bifurcated approach when a worker with a permanent impairment is rated (presumably at the time that MMI has been reached) the worker can be rated based either on the degree of impairment or on the degree of disability. The evaluation method to be used to rate a worker would depend upon the criterion that is chosen. Most claims for a PPD would be rated based on impairment, as currently.

One possibility would be to rate on the basis of disability only those workers who have not returned to employment following their having reached MMI. Alternatively, a disability rating would be used for those who have not returned to employment at or above 80 percent of their pre-injury average weekly wage. (Note: our example here using 80 percent is an arbitrary one.) Assuming the worker does return to employment and earns at or above the 80 percent level, should the wage rate then fall below that or the worker lose employment within a year of the rating, the method of rating could be modified to a disability rating. In the case where a disability rating is employed, the impairment rating would be a floor on the rating, i.e., a disability rating would always have to be equal to or greater than an impairment rating for that worker.

The British Columbia experience, as described briefly in our 2008 report may be instructive. Until a recent change in the law, BC rated all permanently disabled workers on both an impairment basis and a disability basis. The result was that the (higher of the two) disability rating made superfluous the impairment rating. The intent of the law had been, however, for the disability rating to be applied only in a minority of the claims. After a policy review the scheme was modified and now the disability rating is assessed only in limited situations and the vast majority of benefits are awarded on the basis of impairment alone. Still, in cases that can be justified as “exceptional,” the disability rating can be used to replace the lower impairment rating.

Tennessee provides an interesting example of a bifurcated jurisdiction. The permanent partial disability rating for an unscheduled injury is based on the impairment rating using primarily the AMA Guides or the Orthopedic Guides. The percentage of the whole body that is determined to be impaired is multiplied by 400 weeks to obtain the minimum number of weeks of benefits. The workers' compensation commissioner or the courts can apply a multiplier to that impairment measure, depending upon such factors as the worker's age, educational attainment level, skills, and so on. If the worker has returned to his employer at injury with earnings equal to or above the level at the time of injury, the maximum multiplier that can (though it need not) be used relative to the impairment rating is 1.5. If the employee has not returned to his pre-injury employer or is earning below the pre-injury wage, the multiplier can (though it need not) be set as high as six times the impairment rating. This means that the PPD benefit could be four times as high if the worker does not return to the injury employer.

Clearly, this is meant to provide a financial incentive to the employer at injury to retain the injured worker. In 2004, Tennessee enacted HB 3531 which made several changes to the methods used to compensate these unscheduled injuries.<sup>27</sup> Prior to enactment, the multiplier that could be applied in cases where the employer did rehire the injured employee was 2.5. By lowering it to 1.5, this served as a cost saving measure for employers that retain their injured worker. However, it also widened the potential difference in compensation benefits depending upon whether the injured worker was rehired. So the cost penalty for not rehiring an injured worker was potentially increased. In cases where the employee is rehired and earnings are equal to or greater than the pre-injury level, if the worker is subsequently released or earnings fall below the pre-injury level before 400 weeks have passed, the disability rating can be reconsidered. This is a protection for the worker and a measure to encourage the employer to retain the injured worker subsequent to initially reemploying the person.

A significant advantage of moving to a bifurcated approach is that it would be less disruptive than switching to another approach for compensating PPDs. Most claims would likely still be rated as it is done currently, i.e., health care professionals provide the rating of impairment. Benefits could still be paid in line with current practice. The non-impairment rating would be used only in the case of those who would be rated based on disability.

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<sup>27</sup> Tenn. Code Ann. 50-6-207.

Since the disability rating, where used, would generally be higher than an impairment rating, there would exist some financial incentive to the employer to assist in returning the injured worker to employment. The higher claim cost of the disability rated PPD would directly impact the self insured. Those insuring with the state fund could be impacted through the experience rating mechanism.

Some workers might adjust their hours of work, or limit their job-hunting efforts in order to claim higher PPD benefits than if they were to return to work and be rated on an impairment basis only. A new process would need to be devised to determine appropriate benefits for those evaluated for disability. Factors that would likely be considered would include the degree of impairment, the worker's age and education, the usual retirement age for workers in that occupation, and the location of the usual residence.

**7.E. Modify the current PPD system so as to more steeply compensate the more seriously impaired.**

In the previous section we speculated that inadequacy of the PPD benefit due to rating only impairment could be one of the drivers of the utilization of pensions. For unscheduled benefits, the method Washington employs currently ties benefits to the rating in a linear way. Thus, a worker with a 20 percent rating receives a benefit that is equivalent to one half that of a worker with a rating of 40 percent. A number of jurisdictions provide "tiered" or "stepped up" benefits, such that cases with more serious impairments or disabilities are paid disproportionately more. For example in Minnesota as the impairment rate increases, the dollar value of each percentage point increases. In North Dakota, the number of weeks of benefits paid increase disproportionately as the impairment level is higher. Similarly, in California the number of weeks of PPD benefits increase as the disability rating is higher, as shown in the following table.

Range of percentage of permanent disability incurred	Number of weeks for which two-thirds of average weekly earnings allowed for each 1 percent of permanent disability within percentage range *
0.25-9.75	3
10-14.75	4
15-24.75	5
25-29.75	6
30-49.75	7
50-69.75	8
70-99.75	16

\*For injuries occurring on or after 1/1/2009.

The numbers set forth in column 2 above are based upon the percentage of permanent disability set forth in column 1 above and shall be cumulative, and shall increase with the severity of the disability ...<sup>28</sup>

**7.F. Modify the current PPD benefits approach by paying both an impairment benefit and an earnings loss benefit.**

An alternative approach to determining benefits is one where benefits are paid separately for the economic loss resulting from the work injury as well as for the impairment. Victoria, and some other Australian states, pays two types of benefits for a permanent disability. It expressly pays an impairment benefit as well as one for anticipated earnings losses.

Dual benefits can also be found in some of the “wage-loss” states such as Massachusetts. A wage-loss state pays benefits based on the earnings lost due to the work injury. Thus, if the worker is unable to be reemployed following the injury, or does return but with lower weekly earnings, the compensation benefit replaces some portion of the worker’s foregone earnings. Typically, an impairment benefit is paid in addition to the wage-loss benefits, though coverage is often limited to impairments that are listed in a schedule found in the statute, e.g., the loss of (use of) an extremity or an eye (or a portion of the scheduled body part). Thus injuries to the spine, brain, lungs or other internal organs do not make the injured worker eligible for an impairment benefit.

In many instances the impairment benefit payments in “wage-loss” states are small when viewed next to benefits for comparable losses in states with scheduled benefits for certain permanent partial disabilities. But the earnings or wage-loss benefits can be relatively large,

<sup>28</sup> From section 30 of SB 899 amending sec. 4658 of the Labor Code.

whether or not the loss is a scheduled body part, particularly if they are paid for a lengthy period of time. Simply as an example, a worker in Massachusetts whose leg has been amputated in a work injury is entitled to a specific loss benefit of the state average weekly wage (\$1,095 in 2009) multiplied by 39, for a total of \$43,200. (In Washington, the loss of a leg provides a scheduled permanent partial disability benefit of \$108,832 for an injury on or after 7/1/2009. If the injury were not scheduled (not “specific”) there would not be any impairment benefit and the Massachusetts worker would receive only temporary total disability. For a worker with a non-scheduled injury and able to return to work very quickly at the pre-injury wage level, the wage loss benefit would be negligible and there would be no impairment benefit. An economics professor who lost an internal organ in a workplace accident but lost no earnings might not be eligible for any indemnity benefit.

Washington’s approach differs from a wage-loss state such as Massachusetts in at least four important ways:

- It does not limit permanent partial disability benefits to those injuries that are scheduled or specified in the statute.
- It does not set a specified period of time for which a worker can receive temporary total disability benefits (156 weeks in Massachusetts). Wage-loss states generally set maximum periods of eligibility for the receipt of wage-loss benefits.
- Massachusetts regularly evaluates the temporary disability benefit in terms of what the injured worker is capable of earning. (In some jurisdictions this would be termed “notional” or “deemed” earnings.) If the worker is earning less than that, the weekly benefit is still based on the current earning capacity and not on the actual earnings. In practice, in some jurisdictions notional earnings are regularly equated with actual earnings.
- Lump-sum settlements can be used to close off insurer liability for indemnity benefits.

There are several things to consider were Washington to look more like one of the typical dual benefit or wage-loss jurisdictions. Calculating notional earnings can be very challenging and the source of considerable contention. As an example, if a worker does not return to work at all after the work injury, is it due to the worker’s lack of interest or enthusiasm for returning to work, or due to the injury, or weakness in the labor market? If the worker returns to employment but earns below the pre-injury wage, is the worker capable of earning more, or are actual earnings equal to his/her capacity to earn (the notional earnings level)? Understand that the issue can arise multiple times during the course of a single worker’s claim for a work injury as the worker leaves or changes jobs. One way that wage-loss states have reduced the problem is by

avoiding it with frequent resort to the use of C&Rs. Without the use of C&Rs, the calculation and disputation over hypothetical earning power can be a real burden for the workers' compensation agency.

Setting a cap on the period for which earnings loss disability benefits can be paid would be difficult for many to accept, considering Washington's current practices. As noted above, such a limit on the receipt of temporary total disability benefits would likely lead to a reduction in the number of claimants seeking and obtaining pensions.

Limiting permanent partial disability solely to scheduled injuries would also be difficult for many to accept. It seems certain that in the absence of a permanent partial disability benefit for injuries to internal organs including the spine, claims for pensions would increase.

**7.G. Modify the current PPD benefits approach by paying the existing impairment benefit but allow an earnings loss benefit in addition in special circumstances.**

At least two states, Connecticut and Texas, use this approach and Florida used it for a number of years. While this option bears an important resemblance to the bifurcated approach discussed above, it has certain important differences. The key to this approach would be that the current method of compensating permanent partial disabilities, i.e., basing compensation benefits on the degree of impairment, would be largely retained, but in special instances, where there is continuing earnings loss, additional benefits would be possible.

Thus, the advantage of staying with a method that is familiar and accepted exists, although it could be partially altered if desired. For example, nothing would prevent the benefits scheme from being modified so as to pay tiered benefits for the impairment rating. However, what this approach would do is that after the permanent partial disability benefits have expired, certain injured workers could be eligible for an additional income benefit.

In Texas, this is known as a Supplemental Income Benefit (SIB), and can be paid where the worker meets all of the following conditions:

1. The worker has not returned to work or has returned but is earning less than 80 percent of the pre-injury earnings.
2. The worker has not taken a commutation for the permanent partial benefit (known as the impairment income benefit [IIB]) in Texas.
3. The worker has made a good faith effort to obtain employment commensurate with the person's ability to work.

4. The impairment rating for the impairment income benefit was 15 percent or higher, according to the rating based on the American Medical Association Guides to the Evaluation of Permanent Impairment (4th Edition).

Income benefits in Texas (temporary, plus impairment, plus any supplemental) cannot be paid beyond 401 weeks from the date of injury, though Washington could opt for a longer or shorter period of temporary impairment income benefits or a number of weeks from the date of injury. Note that the 401 weeks in Texas runs from the date of injury and is not 401 weeks of benefits. This means, essentially, that there is certain closure in their workers' compensation cases, although medical benefits could continue for as long as they are warranted by the condition. Since the large majority of compensable work injuries involve impairments rated at less than 15 percent, the SIB is limited to the more serious claims, at least as considered by impairment standards. It would permit benefits to be paid for more than impairment, i.e., for disability, when there is no return to work or there is only limited return to work. This approach discourages the use of lump-sum settlements, though that is not a necessary condition for using this method.

Ten years after this approach was started, it came in for some general criticism from the Chief Judge of the Texas Supreme Court. (The "reform" was enacted in 1989, but the effective date was in 1991.) Judge Hardberger clearly expressed his preference for a disability approach, rather than an impairment approach to compensating permanent partial disabilities. That aside, several of his criticisms seem directly pertinent to a state that would consider emulating the Texas reforms approach. First, he points out the clear problem of the very striking threshold in that law. An injured worker is entitled to only 42 weeks of permanent partial disability benefits when the impairment is rated at 14 percent. (Under the Texas statute each point of impairment is compensated with three weeks of benefits.) A 15 percent rating (or higher) opens the door potentially to up to 401 weeks of income benefits (although this includes the period of temporary disability benefits). The step up from 14 percent to 15 percent and higher creates a dramatic target for the injured worker and for the employer/insurer.

Second, Hardberger notes that the standard of eligibility to gain a supplementary income benefit is very high, and very few injured workers ultimately receive a SIB when their impairment income benefit has been exhausted. According to him:

While economics demands that a compensation system place limits on the benefits provided injured workers, imposing a standard on initial

qualification for SIBs that precludes over 99% of injured workers from receiving SIBs violates the primary goal of the system—compensating injured workers during the period necessary for recovery so that the injured worker can return to work at the earliest possible time.<sup>29</sup>

Moreover, of those who receive the benefit, few are able to retain the benefit for the maximum possible time. Among other reasons for the SIB benefit being terminated, is that insurers are “excessively” challenging the continuing eligibility of the SIB recipient according to the Chief Judge. With that in mind he is critical of the disproportionate amount of contention involving SIBs, considering the actual number of claims and recipients.

More recent work from Texas has updated some of the findings used by Judge Hardberger. For workers with injury year of 2005 and who received an Impairment Income Benefit, 63 percent were rated at 1 to 5 percent, another 24 percent were classified as 6 to 10 percent impairment, and 5 percent were rated in the range of 11 to 14 percent.<sup>30</sup> As a result, of those with a permanent partial disability who have received an Impairment Income Benefit, only 8 percent are in the range where a SIB is even possible. Of those who are eligible, some will not qualify because they have returned to work at or near pre-injury earnings levels. Recall that a worker is not qualified for a SIB until the Impairment Income Benefit has expired. For a worker with a 15 or 20 percent impairment rating, 45 or 60 weeks will have passed since that impairment benefit was started.

## **8. Modify the Design of the Existing Pension System**

A variety of options exist that would enable Washington to reduce the number of pensions it would currently be expected to award. Each of those suggested below are based on existing systems found in one or more states. Directly changing the eligibility for pensions in Washington could be done alongside some of the options described above. For example, tightening standards for applicants for pensions could also co-exist with possible changes in the way temporary total disability is administered. Indirect methods of lowering pension usage exist that would make them less attractive to potential applicants than they are currently. Specifically, holding down the value of pensions is going to reduce their cost as well as make them less attractive to potential applicants. In that regard, one note of caution is needed. If changes are

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<sup>29</sup> Hardberger 2000.

<sup>30</sup> Texas Department of Insurance 2008.

made such that pension usage is lowered, L&I accomplishes little if it is simply left with correspondingly more long-term active claims with workers continuing to draw wage-loss benefits.

The following are some methods that other states have used that limit pension utilization or pension costs.

**8.A. Limit pensions to those with injuries listed on a schedule.**

A number of states limit awards for permanent total disability to workers with the most severe injuries and which are specified in the statute. Typically, these losses are limited to the loss (or to the loss of use) of two extremities, both eyes, or damage to the brain. In some cases the loss of extremities is limited to the amputation of the extremities. Obviously, this sets a very high bar on access to permanent total disability and would have an enormous impact on the incidence of pensions in the state of Washington.

Adopting this sort of barrier to pensions can appear to be very harsh in a state accustomed to a rather liberal threshold. It is not difficult to make the standard seem especially unfair when an individual worker is clearly permanently and totally impaired, and whose injury is not included on the schedule. Public reprobation from single cases featured in the media can lead to backlash from or for elected representatives.

**8.B. Limit pensions to those injuries that result in a high level of impairment.**

Such a standard could be applied in one of two ways. First, it could use the one currently in place in Washington but limit access only to those whose impairment exceeds some threshold. Such an approach might be less disruptive than some alternative methods to reduce either the number or the cost of pensions. It would be consistent with measures taken by some other states. As an example, in West Virginia, a state with very high rates of permanent total disability, the recent law changes set a 50 percent impairment rate as necessary, but not sufficient grounds for awarding permanent total disability.

The second way that the standard could be applied would be to make the impairment threshold the sole factor in awarding a pension. Pennsylvania does not have a category that it identifies as permanent total disability but it awards lifetime benefits to persons with a 50 percent or higher impairment rating. (Note that the award can be rebutted even where a 50 percent or greater impairment exists though this tends to be exceptional.) A worker in California will receive permanent total disability benefits only where there is an impairment rating of 100

percent. After a PPD benefit has been fully paid, California also allows the worker to be considered for a lifetime benefit (i.e., a pension) where the injured worker has an impairment rating of 70 percent or higher. This benefit is different and the periodic payment is lower than one where the worker is found to have permanent total disability, i.e., a 100 percent disability rating. In New Jersey, permanent total disability benefits will be granted only to workers with an impairment rating of 75 percent or higher. These impairment level thresholds usually depend upon ratings drawn from some medical guides or other. As such, the ratings are done by health care professionals, much as it is done today in Washington for permanent partial disability.

In any benefits program, public or private, setting some inclusionary threshold is tantamount to the setting of a target. (Recall the Texas threshold of 15 percent or more before a worker can be considered for a SIB.) Suppose Washington would require that a pension could only be awarded in cases where the worker was impaired at the 50 percent level or higher. The experience of other states suggests that the claimant will strive to bump up the rating to achieve the threshold rate if it would otherwise fall below that level. This might be accomplished by adding on the impairment derived from some other (work-related) injury such as a psychological one, hearing loss, or any other possible condition to achieve the rating needed to reach the pensionable level. Similarly, insurer/employers may take extra involvement in claims to keep the claim from crossing the threshold and becoming costlier. Lawmakers should be made aware of the tendencies to target that other states have encountered with this type of specific, quantitative bar.

Such thresholds can also be used in a manner wholly inconsistent with the reason for their enactment. At one time in the recent past Florida required that a worker have at least a 20 percent impairment rating in order to be considered for a permanent total award. Rather than serving as a necessary minimum impairment rate, some practitioners in the system treated the 20 percent rating as the rate that would necessarily bring a permanent total disability rating. A result was that the settlement values in C&Rs (called washouts in Florida) were increased for claims where the impairment was near to or above 20 percent.<sup>31</sup>

Setting a threshold level of impairment, either as a sole condition or as a necessary condition combined with an employability condition may be acceptable to the public. It seems

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<sup>31</sup>Barth 1999.

likely that the public regards a pension as compensatory for a worker who has sustained a severe and permanent impairment.

**8.C. Differentiate pension benefits according to the degree of impairment.**

An alternative to setting a single threshold for the payment of pensions is one where pensions could be adjusted based on one or more factors, such as impairment or age. An example of this can be found in California, where if the injured worker is given a disability rating of 70 percent up to 99.75 percent, the worker is entitled to a lifetime pension following the receipt of the permanent partial benefit. The worker found to have a permanent total disability is also entitled to a lifetime pension. In both cases the disabled worker is eligible to receive a benefit based on two-thirds of the worker's average weekly wage. However, the permanent total award is paid subject to a considerably higher weekly maximum than in the case of a pension based on the permanent partial disability.

A highly imaginative example of this can be seen also in the People's Republic of China. Workers with permanent impairments from work injuries receive ratings from 1 to 10 based on a medical guide, with the lower number representing the most severe cases. Categories 1 to 4 come closest to what would be considered permanent total disability in many other jurisdictions. A lump-sum benefit is paid ranging from 24 months of the worker's pre-injury wage for category 1 impairment to 6 months for a category 10 impairment, subject to a benefit maximum and minimum level. Additionally, workers who are rated into categories 1 to 4 are entitled to a monthly pension with the highest pension rate paid for category 1 impairment, declining to the benefit for a category 4 impairment. Workers with impairments rated in categories 7 to 10 do not receive any pension for their impairments.<sup>32</sup>

Aside from delineating benefits for pensioners according to the extent of the severity of the impairment there are three other elements of the Chinese approach that are especially interesting, though their applicability to the Washington system is limited. In the Chinese approach, persons with category 5 and 6 impairments are not automatically entitled to a pension. However, if they are not reemployed by their employer, they will be able to receive a pension. Second, if a worker with a category 5 or 6 impairment does receive a pension for lack of re-employment by the employer at the time of injury, it is the employer that is liable to pay the

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<sup>32</sup> Barth 2007.

pension, not the employer's insurance carrier. (This system feature, while interesting seems particularly unlikely to be adopted in an American state.) Third, with a further nod to encouraging employers to assist those with less severe impairments (category 7–10) to retain their employment, the employer is obligated to pay them lump-sum payments if the employment contract is terminated following the work injury.

**8.D. Limit pensions to those meeting certain specific conditions beyond simply impairment.**

As we noted in our report, Minnesota specifies the somewhat standard list of conditions that are presumptively deemed permanent total disability, e.g. the loss of both legs, etc. Alternatively, the worker will be found permanently and totally disabled if the worker is permanently and totally incapacitated from working at employment that brings the worker income and there is an impairment rating at or above the 17 percent level, or the 15 percent rate if older than 50, or at least a 13 percent rate if 55 years of age or older. How those specific impairment rates or age thresholds were selected is not known to us but they are likely the result of some political compromises made during the process of enacting the statute.

Several states including Florida and West Virginia place some specific criteria on their employability standard which can be either a barrier or an easing of limits on the award of permanent total disability. As an example, in order to be eligible for permanent total disability a worker in Florida must show that he/she cannot engage even in sedentary employment due to the physical limitation within a 50-mile radius of the person's residence. Were the required distance to be increased, for example to 100 miles, the burden of proving that one meets the permanent total disability standard would be theoretically increased. Reducing the distance would liberalize the standard.

The public may also be more accepting of pension claims in cases involving older workers. Older workers may be perceived as having a greater challenge in gaining re-employment after job loss associated with a work injury. They also have less opportunity to benefit from rehabilitation programs and fewer years, on average, to draw a lifetime pension. Thus, including age qualifiers would be a way to limit opposition to stricter standards for pensions.

**8.E. Reduce the value of the pension, thereby diminishing its attractiveness to claimants as well as lowering system costs.**

By reducing the value of pensions the tendency will be for fewer workers to seek them. As a result the cost of pensions can be expected to fall, due both to decreased utilization and because the pension will provide less to the recipient. We do not discuss the option of simply lowering either the compensation rate, or the maximum periodic benefit. There are various ways that pensions can be made less valuable to those with an entitlement. Some of them would represent less of a hardship for recipients than would others. At one extreme, an absolute ceiling could be the maximum amount of indemnity benefits payable. However, if set at too low a level, this could be seen as creating a serious financial burden for the injured worker. Kansas, for example, has imposed a ceiling of \$125,000 on indemnity benefits.

An alternative approach would place some limit on the time for which pensions could be paid, i.e., rendering these non-lifetime pensions. A number of states have taken steps to eliminate lifetime pensions. Indiana sets a maximum period for the payment of indemnity benefits of 500 weeks, and this includes weeks of temporary disability as well. Lifelong pensions could be limited to the cases with the most severe impairments as in South Carolina. There the maximum period for the receipt of benefits is 500 weeks, but lifetime benefits are paid for work injuries resulting in paraplegia, quadriplegia, or brain damage (physical only). Recall that California pays lifetime benefits to those with a 70 percent disability rating or higher, but at a lower benefit than for a worker found to be permanently and totally disabled, i.e., 100 percent disabled.

The primary problem with an approach that places a time limit on pensions, or setting some (low) ceiling on benefits is that it can result in injured workers being left destitute. This would seem particularly harsh in cases where the worker's impairment was severe. An alternative might be to set some type of time or indemnity benefit limit that is imposed only in claims where relatively minor impairment exists. In this way Washington might be able to reduce the number of pensions while doing no damage to workers with high levels of impairment.

**8.F. Consider broader application of offsets as a way to limit the attractiveness of pensions.**

Washington currently offsets the pension benefit by the amount of old age benefits under Social Security that the worker receives or is entitled to receive. A number of jurisdictions go

beyond this on the theory that at some point the worker likely would have ceased working had there been no work injury. States including Michigan, Minnesota, Montana, Kentucky, and North Dakota terminate the permanent total disability benefit when the worker reaches retirement age or becomes eligible for old age Social Security benefits. A number of states offset the permanent total disability benefit for a variety of employer funded benefits including privately purchased disability insurance, private pensions, and the employer funded portion of Social Security benefits.

**8.G. Another method to reduce the number of pensions that is within the existing means of L&I is to rigorously and frequently review the continuing eligibility of pensioners.**

We are not aware of how much of L&I's staff and other resources are currently devoted to re-evaluating workers subsequent to the decision to award a pension. Certainly, some instances of disability are so substantial that it is clear from the time that a pension is granted that the individual will never return to gainful employment. Additionally, the process of arriving at the pension is already such an extended one that it is not likely that many cases would justify revocation. What do the data show regarding past instances where benefits were terminated? Are income tax records of pension recipients routinely and regularly monitored? Are medical examinations ever performed in a reconsideration process?

**8.H. Align the allowance of a pension with the awarding of a Social Security Disability Insurance (SSDI) benefit.**

Only one state (Florida) formally adopted this method, so far as we know, and ultimately discarded it. When this approach was first enacted its supporters expected that the incidence of permanent total awards would decline. Yet from the outset there was uncertainty if the awarding of SSDI was a necessary condition or a sufficient condition for Florida to award a permanent total disability benefit. The advantage of this approach is perceived as being that a more consistent and uniform criterion would be used to determine whether or not to award a pension. A disadvantage is that this important determination could be taken out of the hands of state officials, in whole or in part, and left to a federal official or a federal process court. Moreover, the belief that the SSDI determination is uniform in its application of criteria both across time and geographic areas is subject to serious challenge.

## **9. Actively Promote Return-to-Work Outcomes**

In sections 6 through 8 above, much of the discussion has focused on the eligibility for pensions, as well as the ways that the entire linked system of indemnity benefits affects the number of pensions in Washington. It has not described the options that could reduce the number of pensions by directly returning to work a larger share of injured workers, particularly those with long-term cases. Clearly, accomplishing that is one of the central goals of the vocational rehabilitation program operated for injured workers. A new approach to vocational rehabilitation in Washington was recently piloted and is now operative. It is not likely that new options will be considered before that one has been initially evaluated at least.

But a seemingly endless number of variations in incentives and disincentives exist to encourage return to work outcomes. The employer at the time of injury, or employers overall can be incentivized to aid in the goal of moving individuals back into the labor market. These policies include insurance premium reductions, tax benefits, and wage cost and special equipment subsidies for those that employ or reemploy the work-disabled.

Though these programs can be applied with various levels of support and qualifications, two generalizations seem to be warranted. First, few of these programs appear to have made a large positive impact on returning sizable numbers of injured workers to work. Second, the lack of substantial success does not prove that such programs are inherently futile. Instead, a different lesson that could be drawn is that the commitment to these programs has been inadequate and that larger, more generous, or better administered programs could possibly be successful.

Finally, one of the arguments against compromise and release settlements is that their use actually can be inimical to return-to-work programs. It is not unusual for the recipient of the lump-sum benefit to agree that the employment relationship will end and no further legal action will be taken against the employer/insurer. Thus, the worker receives the cash, is terminated from or leaves employment, and then may subsequently re-enter the labor market in search of a new position. This need not happen but some employers strongly want the injured worker not to return to their pre-injury employment. One can imagine a number of reasons for that motivation, but the end result would be less positive return-to-work outcomes. Of course, the C&R also would eliminate the likelihood that a pension would follow the agreement.

One way to induce the employer to help an injured worker return to work is to reduce the cost of the permanent partial disability benefit in instances where return to work occurs. We saw

this in the Tennessee provisions for PPD awards earlier. In the 2004 California reform legislation, SB 899, a provision was included that would reduce the size of the weekly permanent disability benefit by 15 percent in the event that injured worker was re-employed or increase it by 15 percent if there was no offer of re-employment:<sup>33</sup>

*(3) (A) If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.*

*(B) If the regular work, modified work, or alternative work is terminated by the employer before the end of the period for which disability payments are due the injured employee, the amount of each of the remaining disability payments shall be paid in accordance with paragraph (1) and increased by 15 percent. An employee who voluntarily terminates employment shall not be eligible for payment under this subparagraph. This paragraph shall not apply to an employer that employs fewer than 50 employees.<sup>34</sup>*

This reform was expected to lead to a reduction in permanent disability costs of about 3 percent, but the Commission on Health and Safety and Workers' Compensation reports that it "appears to be increasing costs."<sup>35</sup> In cases where the weekly benefit is modified, upward adjustments of 15 percent occur more often than where it is lowered. Moreover, in most instances there is no adjustment, upward or downward to the permanent disability benefit. The Commission concludes "As of late 2009 it is doubtful that the two-tiered PD system is an effective incentive to promote RTW."<sup>36</sup>

There is no known system that is reliably able to effectuate a return to work after three or four years (or more) of disability compensation. In fact, the major focus of private disability

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<sup>33</sup> We are not aware of any formal evaluation of this program.

<sup>34</sup> Sec. 30, SB 899, amending Sec. 4658 of the California Labor Code.

<sup>35</sup> The California Commission on Health and Safety and Workers' Compensation, CHSWC 2009 Annual Report, 2010, p. 47.

<sup>36</sup> The California Commission on Health and Safety and Workers' Compensation, CHSWC 2009 Annual Report, 2010, p. 46.

plans for such claims is to help the claimant qualify for public disability benefits; in other words, shift the cost burden to someone else.<sup>37</sup> Traditionally, vocational rehabilitation programs have been used in workers' compensation programs after maximum medical improvement when it is clear that the disabled worker has no significant probability of returning to their previous employment. Attention is customarily centered on an assessment of the residual capacity of the injured worker and the design of a suitable training or work experience program for alternative placement. In Washington, as in many other states, vocational rehabilitation has frequently served as a temporary way station on the way to a pension award. In some instances this has occurred multiple times in the same claim.

An effective way to reduce the number of pensions or long-term time-loss claims is with a disability management program that prevents work-injury claims from getting to that point. Disability management refers to a set of practices designed to minimize the disabling impact of injuries and health conditions that arise during the course of employment. Because of the multitude of such practices, it is actually a very difficult term to define precisely. Disability management should be differentiated from traditional safety and prevention activities, which aim to prevent an accident or disease from occurring in the first place; although there are prevention aspects to disability management. It should also be differentiated from medical and vocational rehabilitation efforts, which take the injury or disease as given and attempt to overcome or mitigate the long-term disabling effects; although disability management arose in a vocational rehabilitation context and is frequently carried out by rehabilitation professionals. Last, but not least, disability management is not synonymous with "return to work" even though this is one of the main indicators of success for disability management programs.

In many ways this would be a very aggressive approach to reducing the number of pension claims in the State of Washington. It would require the most change in orientation, structure, and function at L&I, but it also promises the biggest payoff. Disability management would begin at the front end of the claims-handling process, rather than at the back end where pensions are awarded. However, a full disability management program could be instituted by L&I, building on the foundation of the existing Early Return-To-Work Program which seeks to

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<sup>37</sup> Hunt, Habeck, Owens, and Vandergoot 1996.

make an intervention at the 14th day of disability. Some examples of system-wide disability management programs in workers' compensation systems include the following.

**9.A. Ohio Health Partnership Plan.**

One interesting application of disability management principles has been adopted in Ohio. This program began in 1993, starting as a managed care program designed to improve medical care for injured workers. It has evolved into a full disability management program with extensive support available from the Ohio Bureau of Workers Compensation (BWC).

Besides assistance to individual employers in establishing a disability management program, BWC provides risk analysis, a list of approved Managed Care Organizations (MCOs), assistance with administration of drug-testing programs, access to local occupational health nurse case managers, management of local medical provider relationships, on-site nurse staffing, and other services.<sup>38</sup> One MCO's disability management program offers all of the following services, which can be financed with a grant from the Ohio BWC, resulting in a low-cost way for employers to gain control of their future workers' compensation costs:

- To complete a Disability Management cost benefit analysis that documents the employer's current costs associated with work related disabilities and duration, as well as establishing an on-going risk reduction goal of the program.
- To develop a comprehensive Workers' Compensation Administrative Guideline and employee Claim Packet enabling management and workforce to better understand the steps to take when filing a claim and treating a work related injury.
- To develop a Disability Management Administrative Guideline allowing management to understand and control all aspects of injury management reporting, documentation, and provider compliance.
- To develop a brief employee procedure for Workers' Compensation filing as well as Disability Management Plan compliance to be documented in the existing employee manual/ handbook.
- OHP will provide a standard job analysis format to document essential functions and physical demands of select jobs in each department. OHP will establish categories of jobs to be analyzed that enable the employer to accommodate the majority of the injured worker's restrictions. These categories will offer a transition of physical demand progression.
- To conduct a case review on all current 'experience claims' to determine an appropriate Disability Management Plan for each eligible claim.

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<sup>38</sup>See <http://www.ohiobwc.com>.

- To analyze the feasibility of on-site rehabilitation services and to deploy cost effective and pro-active assistance to return the injured worker to productive employment.
- To supply the employer with effective disability management training to employees, supervisors, and management.
- To obtain a BWC Transitional Work Program Grant on behalf of the employer to cover the OHP consulting costs of developing the program.<sup>39</sup>

In addition, the Ohio BWC offers a “10-Step Business Plan for Safety: A Guide for Developing Organizational Excellence in Safety and Health Management.” This presents a comprehensive approach to disability prevention and management at the firm level.

Ohio is also rather unique in publishing a “report card” on the managed care organizations (MCOs) operating in Ohio. This report is designed to assist employers in selecting the MCO to handle their workers’ compensation claims. The current version reports:

- The number of Ohio employers assigned to the MCO;
- The number of claims handled in the past 13 months;
- Timing of the first report (average number of days between the date of injury and claim filing with BWC);
- First report turnaround efficiency (the number of days from receiving the notice of injury from the employer to the date they file the claim with BWC);
- The optimal return to work score, which is based on comparison against established benchmarks, which are denominated as ‘loosely managed’ to ‘well managed.’<sup>40</sup>

The Ohio WCB publishes these performance statistics on their website annually for each MCO (currently 18 in number) who is operating in the state.

#### **9.B. Massachusetts Qualified Loss Management Program.**

One of the most imaginative applications of disability management programs at the system level is the Qualified Loss Management Program (QLMP) for assigned risk employers in Massachusetts. In 1990, under extreme cost pressures and a rapidly expanding residual market for employers unable to secure workers’ compensation insurance in the voluntary market, the state adopted a program for providing premium credits for residual market employers adopting disability management techniques. The program is administered by the Workers’ Compensation Rating and Inspection Bureau of Massachusetts.

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<sup>39</sup> “Disability Management Program Development” at [www.ohpinc.com](http://www.ohpinc.com).

<sup>40</sup> “MCO 2009 Report Card,” at <https://www.ohiobwc.com>.

A credit (i.e., in advance of actual performance) of up to 10 percent of the workers' compensation insurance premium was offered to employers who would engage a certified consultant to implement a "loss control management" program. At the start, Massachusetts even offered retroactive premium adjustments, so long as the employer participated for at least six months of the year. Furthermore, this credit could be maintained for three years, provided the loss control program continued in effect for the employer. However, the third year only carried 50 percent of the credit as the goal was to improve employer performance and depopulate the assigned risk pool.<sup>41</sup>

It was expected that the program would pay for itself and that employers would soon realize that they could sustain the disability management efforts on their own. Subsequently, based upon results for the first three years, the program was expanded to a fourth year with 25 percent of the original credit available in year four. In addition, the maximum premium credit was increased to 15 percent to provide even greater incentive for employers. The 1993 amendments also provided that the premium credit could continue even after a subscriber "succeeded" in moving to the voluntary market.

Most interesting as a program design element, the actual size of the premium credit is determined by the average credit factor assigned to the loss management firm, not to the employer's actual performance. Provided the loss management firm certifies full QLMP participation, the performance improvements of other firms provides the basis for the credit. So the system is built upon the assumption that disability management practitioners can replicate their loss management performance in any firm.

The requirements for QLMP certification included:

- 1) A structured approach to safe work practices;
- 2) Action plans for post-injury response; and
- 3) Early return to work provisions.

These are the classic elements of any disability management program.

The program produced immediate and sustained benefits for participating employers according to an outside evaluation.<sup>42</sup> In the first year of the program (September 1990 through

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<sup>41</sup> See [www.wcribma.org](http://www.wcribma.org) for more details on the program.

<sup>42</sup> Mahler and Blomstrom 1999.

August 1991), QLMP participants showed 13 percent more improvement than non-participating employers in the loss ratio (ratio of incurred losses to standard premium) at first report. In the second year, the same cohort of employers showed 36 percent improvement, and in the third year 40 percent improvement over non-participating employers, all at first report. Further, these results held up through second and third report, i.e., as claims matured over time. So there was clearly an improving workers' compensation result over time for participating employers.

This program is still in effect in Massachusetts, and was subsequently somewhat emulated by workers' compensation systems in West Virginia, New Hampshire, Missouri, and Wisconsin.

### **9.C. Oregon Disability Management Program.**

In addition to the "Employer-at-Injury" program described above in section 6.B.4.a, Oregon has two other legs on its disability management program. They use "Vocational Assistance" to promote reemployment for the most severe disabilities. Those claims that receive vocational assistance are required to demonstrate "substantial handicap." This means that their permanent work-related disability prevents re-employment in any job that pays more than 80 percent of their pre-injury wage.<sup>43</sup>

Vocational assistance benefits include worker subsistence (wage-loss) payments during training, purchase of needed goods and services to facilitate the rehabilitation plan, and professional rehabilitation services which includes plan development, counseling and guidance, and placement services. Workers who are eligible for vocational assistance are not required to use these benefits, and in fact since 1995 less than one-third of eligible workers have completed a vocational assistance plan.<sup>44</sup>

The reduction in vocational rehabilitation since 1987 in Oregon means that relatively few workers benefit. In 2007, there were only 740 injured workers eligible for vocational assistance in Oregon. Time-loss payments for all vocational assistance claims closed in 2007 were only \$4.5 million, plus \$2.3 million for vocational rehabilitation services, and \$1.7 million for supporting purchases. A "Program Evaluation Model" using 13 quarters of earnings data following a worker's injury indicated that 71 percent of workers injured in 2003 who completed

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<sup>43</sup> See pp 56-57 in Oregon Biennial Report.

<sup>44</sup> Oregon Biennial Report, p. 56.

a vocational assistance plan had been reemployed by 2007 compared to 40 percent of those who had not completed a plan. This is a very substantial difference for seriously disabled workers. However, this only amounted to 132 workers.<sup>45</sup>

In between the Employer-at-Injury program and Vocational Assistance lies Oregon's "Preferred Worker" program, enacted in 1990. The Preferred Worker program seeks to sustain disabled workers in modified regular or new employment as soon as permanent medical restrictions are known. The worker is given a preferred worker identification card when it is determined by the insurer that the worker will not be able to return to their regular job. Injured workers may also request designation as a preferred worker.

There are several benefits available to an employer who hires one of the certified preferred workers. First, there is a 50 percent wage subsidy for six months. In addition, costs of worksite modification to accommodate the injured worker as well as other costs that might be incurred by either the worker or the employer are covered. Last, an employer of a preferred worker does not pay workers' compensation insurance premiums for that worker for the next three years. This premium exemption also transfers to another employer for an additional three years if the worker leaves the first employer. There is no restriction on when preferred worker benefits must commence; it is essentially a lifetime endowment for the worker.

From the program's inception in 1990, the preferred worker eligible population grew to over 4,400 by 1995. Preferred worker contracts (i.e., employed injured workers) reached a peak of 2,227 in 1996. Utilization of the program has receded to approximately 2,000 eligibles and 600 starting contracts per year since 2002. For workers injured in 2003, the Oregon Program Evaluation Model (utilizing employment and earnings in the 13th quarter following injury) indicates that 75 percent of preferred workers with contracts were reemployed in 2007, versus 52 percent of registered preferred workers who did not use the program.<sup>46</sup>

With their advanced Program Evaluation Model, Oregon authorities are able to look across all three components of their disability management approach. Among all closed disabling claims in Oregon about 14 to 16 percent receive some return-to-work program treatment by the fourth year following their injury.<sup>47</sup> We believe this to be the highest penetration rate for

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<sup>45</sup>Oregon Biennial Report, p. 57.

<sup>46</sup> Oregon Biennial Report, pp. 55-58.

<sup>47</sup>Oregon Biennial Report, p. 52.

disability management techniques observed anywhere among workers' compensation programs and justifies the reputation of Oregon as the return-to-work state.

#### **9.D. Other Examples**

While some of Oregon's results seem promising, it must be noted that variations of the preferred worker model have been tried in other states, including Florida, Michigan, California, and Washington without equally satisfying results. In fact, the program has been dropped in Florida and Michigan as ineffective. Florida's experience may be instructive, and an evaluation of the state's return-to-work programs has been conducted by Aubrey Jewett.<sup>48</sup>

In 1993 Florida law was enacted that employers with more than 50 employees were obligated to rehire their injured workers. It also put into place a preferred worker program that was initiated after some positive results had been reported for the Oregon law. According to Jewett, the obligation to rehire legislation was stifled by the business community, and the State Department of Labor did not succeed in promulgating any regulations to implement the law. The primary objection of employers was that the provision could leave them vulnerable to law suits under the Americans with Disabilities Act (ADA). If an employer did not rehire an injured worker, even the costs of defending itself against a worker's possible action at law could be significant.

Rules for the preferred worker program were promulgated by November of 1994. However, as with the case of the obligation to re-hire law, employers were leery of the program. If a job applicant indicated that s/he was a preferred worker, the ADA would inhibit or prevent the employer from following that up with questions probing the worker's post injury capability at least until a tentative or preliminary job offer was made. In its four years only one employer was reimbursed under the Florida preferred worker program. Funding for the preferred worker program was ended as of 1/1/1998. According to Professor Jewett, employers in Florida also indicated that the incentives for employers to participate in the preferred worker program were inadequate and substantially less than in the Oregon program.

Aside from the possible modification of the permanent disability benefit relating to return to work, California has employed several other approaches, some of which parallel measures found in Oregon and other jurisdictions. In 2003 the Vocational Rehabilitation Program was

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<sup>48</sup> Jewett 2001.

repealed by statute and replaced by the Supplemental Job Displacement benefit. This benefit provides a worker with a voucher for education or skills enhancement for those injured on or after January 1, 2004, who cannot return to their at-injury employer. The size of the voucher depends upon the estimated degree of disability. Additionally, the law provides worksite modification reimbursements of up to \$2,500 for employers of 50 or fewer employees. Considering both these programs, as well as the permanent disability benefit modifications, the Commission on Health and Safety and Workers' Compensation in 2010 has concluded that "It is doubtful that any of the direct approaches have improved California's RTW rate."<sup>49</sup> Note that California is considered to have a low return-to-work rate compared with other states.

The approach taken to the preferred worker program in North Dakota also somewhat parallels the Oregon approach. Benefits to the employer include:

- The employer of the injury is not eligible for program participation with its own employees unless the employer of injury has identified permanent alternate work for the injured employee.
- Premium exemption: Upon hiring a Preferred Worker, the employer will not be charged premium on the Preferred Worker's salary for up to three years.
- Wage reimbursement: WSI may reimburse the employer up to 50% of wages (not to exceed the States Average Weekly Wage) at the time of employment start date. The wage reimbursement period is not to exceed 26 consecutive weeks.
- If a worker has a catastrophic injury as defined in the statute the wage subsidy duration is 52 consecutive weeks with a reimbursement rate of 75 percent.
- Claim costs exemption: If the Preferred Worker sustains a new on-the-job injury during the premium exemption period, the claim costs will not be charged to the employer.
- Reimbursement for worksite modifications: Upon approval, participating employers may be reimbursed for worksite modifications.

North Dakota provides benefits for workers who participate in their Preferred Worker program as well. To enter the program the injured worker must have some permanent work restrictions and has not returned to the pre-injury employment. These benefits include:

- Work Search Allowance: Once the vocational assessment is received and an injured worker is deemed eligible for the program, a work search allowance will be provided to the preferred worker to be utilized for appropriate interviewing clothing, uniforms, travel expenses, or other items deemed mandatory for employment. Maximum benefit in this category is \$250.

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<sup>49</sup> The California Commission on Health and Safety and Workers' Compensation, CHSWC 2009 Annual Report, 2010, p. 49.

- Work Search Assistance: An opportunity to work closely with a reemployment specialist who will assist in the preparation of job search skills, job leads, and job placement utilizing the workers knowledge, skills, and capabilities.
- Certification, Licensure or Related Testing Costs: Testing for certifications, licensure or related testing requirements for employment may be reimbursed. This includes physical examinations or membership fees required for the job. Maximum benefit in the category is \$500.
- Moving Expenses: Relocation expenses to move the household to the locale where the preferred worker has actually located work and the distance is greater to or equal than 35 miles from the primary residence.
- Reimbursement for Lodging, Meals and Travel Expenses Relating to On-The-Job Training: The state may reimburse the preferred worker for lodging, meals and travel expenses (public transportation or mileage) to attend on-the-job training.
- Tools and Equipment: Upon WSI approval, the preferred worker may be reimbursed for tools, equipment or starter sets deemed mandatory for employment. Maximum benefit in this category is \$2,500.
- Union Dues: Includes initiation fee and one month of current union dues.

There are currently approximately 600 workers in the program, which began in 2001. In 2009 the law was amended and a number of new benefits for workers were added and some others were made more generous. This was done in order to widen the program's appeal to injured workers. Some measures to enhance the attractiveness of the program for employers were also undertaken at that time. The program appears to be popular in the state.<sup>50</sup> As in all states with such programs there exists a continuing challenge to educate potential users about the nature of the program and the expected benefits.

These examples from specific workers' compensation programs illustrate the degree to which disability management principles can be integrated with public policy on a voluntary basis, potentially with direct financial rewards for successful participation. We hope that policymakers in Washington can find some interesting options here, but we repeat that we do not endorse any particular approach.

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<sup>50</sup> Thanks to Mr. Brad Sibla, the preferred worker program coordinator for North Dakota Workforce Safety & Insurance for providing some of this information.

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