

SENATE BILL REPORT

ESSB 5920

As Passed Senate, March 6, 2007

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

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

Sponsors: Senate Committee on Labor, Commerce, Research & Development (originally sponsored by Senators Kohl-Welles, Keiser, Shin and Rasmussen; by request of Governor Gregoire).

Brief History:

Committee Activity: Labor, Commerce, Research & Development: 2/15/07, 2/22/07 [DPS-WM, DNP].

Passed Senate: 3/06/07, 42-4.

SENATE COMMITTEE ON LABOR, COMMERCE, RESEARCH & DEVELOPMENT

Majority Report: That Substitute Senate Bill No. 5920 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Franklin, Murray and Prentice.

Minority Report: Do not pass.

Signed by Senators Clements, Ranking Minority Member and Holmquist.

Staff: Jennifer Strus (786-7316)

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

Under L&I rules, an ability-to-work assessment is used to determine if an injured worker should receive vocational rehabilitation services. An ability-to-work assessment report must recommend one of the following: (1) the injured worker is employable at gainful employment; (2) vocational rehabilitation services are necessary and likely to enable the

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injured worker to become employable at gainful employment; or (3) the injured worker is not likely to benefit from vocational services.

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

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

Summary of Engrossed Substitute Bill: L&I is required to create a vocational rehabilitation pilot program from January 1, 2008, until June 30, 2013. The elements of the pilot program apply to vocational plans approved between January 1, 2008, and June 20, 2013.

Vocational Initiative Project: L&I must establish a vocational initiative project that includes a partnership between L&I and WorkSource. L&I must place full-time vocational professionals at pilot WorkSource locations. L&I must refer some workers to the vocational professionals at pilot WorkSource locations.

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

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

Vocational Rehabilitation Subcommittee: L&I must create a vocational rehabilitation subcommittee. Members must be appointed by L&I for at least the duration of the pilot program. The subcommittee must report to L&I at least annually and recommend to L&I and the Legislature any additional statutory changes needed, including extension of the pilot program. The subcommittee must also provide recommendations for additional changes or incentives for injured workers to return to work with their employer of injury.

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

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

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

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

During vocational plan development, the worker must, with the assistance of a vocational professional, participate in vocational counseling and occupational exploration, including, but not limited to, identifying possible job goals, training needs, resources, and expenses, consistent with the worker's physical and mental status. A vocational rehabilitation plan must be developed by the worker and the vocational professional and submitted to L&I or self-insurer.

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

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

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

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

Worker Options: Following vocational plan development, a worker has two options. Option one is to participate in the vocational plan implemented by L&I or self-insurer. Option two is

to decline to participate in the vocational plan and receive other benefits. The worker has 15 days after approval of the plan to select option two.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appropriation: None.

Fiscal Note: Requested on February 8, 2007.

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect January 1, 2008 and expires June 20, 2013.

Staff Summary of Public Testimony on Original Bill: PRO: The vocational rehabilitation (VR) system, as it is currently configured, does not work for either workers or employers, despite the efforts of vocational counselors. Last year the state spent \$44 million on VR assessments and \$6 million on actual VR services. This is a skewed way to provide VR services. This bill is a compromise; not everyone got what they wanted. The increased upfront costs will be repaid in better outcomes for workers. L&I plans to work with labor and large and small employers to make sure the intended consequences of the bill are realized. The bill does not address the finality of a claim; however, if the pilot is successful, the worker will increase his or her skills and, if hurt again, the vocational counselor will have an even greater number of skills on which to work with that worker. The pilot lasts five years, and it has to be that long because it takes two years to retrain someone, and after that two years, the worker will be monitored to see how he or she fares. This legislation is better than the VR that employers and workers have right now. Recidivism is a huge problem in the construction industry and this bill allows employers to address that issue. The bill also includes improved accountability measures. This bill allows workers to invest in the process, takes the shackles off the vocational counselors, gets the worker back to work, and experiments with the Worksource system.

CON: There is not enough accountability in the bill to deal with the habitual VR repeaters in the construction industry. This legislation should continue to be worked. Farmer workers do not generally use VR. It would be helpful to have specific VR to deal with agricultural workers. The 15 day period within which an employer must offer return to work is not long enough. Self-insurers should contribute to the temporary fund; if it is funded through a transfer of \$20 million from the medical aid fund, then only state fund employers and employees are contributing to the fund. In the performance measures, there should be

language requiring a look at whether the worker is making a better wage after VR than before. VR is a huge issue for small businesses. The system should be fixed, but not sure this bill will do it. There are increased costs and no benchmarks, just "hope" that the bill will work as intended. The vocational plan should be done in 90 days and L&I should not be allowed to extend that time period. The bill should not let VR money be spent on buying tools and equipment for self-employment purposes.

Persons Testifying: PRO: Peter Bogdanoff, Governor's Executive Policy Office; Judy Schurke, Acting Director, L&I; Vickie Kennedy, L&I; Terry Herring, Washington State Trial Lawyers Association; Lori Carlson, Sellen Construction; Jeff Johnson, Washington State Labor Council; Owen Linch, Teamsters; Dave Johnson, Building and Construction Trades Council; Tina Coakley, Boeing; Kris Tefft, Association of Washington Business.

CON: Amy Brackenbury, Building Industry Association of Washington; Dan Fazio, Farm Bureau; Gary Smith, Independent Business Association; Carolyn Logue, National Federation of Independent Business.