Approved R W Douville 2-20-89
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:03 a.m./~~p.m.~~ on January 26, 1989 in room 526-S of the Capitol.

All members were present except:

Representative Gomez - Excused

Committee staff present:

Jerry Donaldson - Legislative Research Department
Jim Wilson - Revisor of Statutes' Office
Kay Johnson - Committee Secretary

Conferees appearing before the committee:

John Ostrowski - Lobbyist, Kansas AFL-CIO
Bud Langston - Director, Kansas Rehabilitation and Clinical Consultants Inc.

The meeting was called to order at 9:03 a.m. by the Chairman, Representative Arthur Douville. He informed committee members that the handout entitled 1987 Legislative Changes Workers Compensation, attachment #1, gives an update on what has been happening over the last 10 (ten) years in workers compensation and the changes that were made in 1987.

John Ostrowski addressed the committee regarding issues relative to vocational rehabilitation since the July 1, 1987 legislative changes of the Kansas Workers Compensation Act, attachment #2. He stressed that the goal was to get the worker back to work but feels the use of "ability" to perform work as the sole consideration in interpreting KSA 44-510e and KSA 44-510g(d) is a misapplied interpretation and defeats the legislative intent and all aspects of vocational rehabilitation. The law should be clarified that actually having work is relevant. Mr. Ostrowski also stated that a) there should be bifurcation of duties and the vendor should not be responsible for attempting to return the claimant to his old employer, b) individual rehab counselors should be reviewed (as opposed to vendors) and assignments should be made on a rotational basis, and c) temporary total should be paid for all periods of evaluation and plan development.

Bud Langston, Director of Kansas Rehabilitation and Clinical Consultants, Inc. addressed the committee from his viewpoint as a private vendor, attachment #3. Mr. Langston recommended the law be clarified to give more direction to the vendor. His recommendations were as follows: a) a cap is needed on the number of vendors in Kansas, at the current level, b) standards for quality and ethics need to be adopted and c) a peer review committee needs to be established to review any complaints or irregularities and to recommend appropriate action for any infractions.

Representative Buehler moved, seconded by Representative Holmes to approve minutes of the January 17, 18 and 19 meetings. The motion carried.

Representative Whiteman questioned Mr. Langston about how many vendors are out there and who's watching them. Mr. Langston deferred to Robin O'Dell (from Workers Compensation Department) to answer the question. Miss O'Dell stated there are 31 (thirty-one) vendors and part of the department's job is to monitor the work they submit. Representative Whiteman asked what actual authority they have to monitor vendors. Miss O'Dell responded they monitor that reports are sent in on a timely basis and review the reports to see if they are objectionable and reasonable assessments and plans. Representative Whiteman asked what recourse does the department have if the reports are not sent on a timely basis. Miss O'Dell stated at this time, not much. They call and write letters to remind them.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Labor and Industry,

room 526-S, Statehouse, at 9:03 a.m./~~p.m.~~ on January 26, 1989.

Representative Whiteman gave the committee background on a specific case in the Wichita area then asked Mr. Ostrowski how common is intimidation. Mr. Ostrowski responded to the level that occurred in that particular case, not often. But, to levels of varying degrees below that it is prevalent on a large scale. For example, leaving things out of reports that should be in and conflicts between the claimants as to what the vendor was told and what the vendor writes down.

It was requested that the discussion be continued at another time. The meeting adjourned at 10:00 a.m.. The next meeting is on call of the Chairman on Tuesday, January 31, 1989 at 9:00 a.m. in room 526-S.

GUEST LIST

COMMITTEE: HOUSE LABOR AND INDUSTRY DATE: 01-26-89

NAME	ADDRESS	COMPANY/ORGANIZATION
[illegible]	Topeka	AFL-CIO
[illegible]	Topeka	KCCI - KTA
Robin O'Dell	Topeka	Work Comp.
Tom Hammond	Wichita	Machinist Union
Joel Rhodes	Lawrence	Intern (Roper)
Pamela Nuss	Lawrence	Intern - Crumbaker
Bud Langston	Topeka	Kans Rehabilitation Clinical Consultants
Jessica Pennewell	Lawrence	KS Rehabilitation Clinical Consultants
Robert A. Anderson	TOPeka	D.H.R. Director, Div. of Work Comp
Jim DeHoff	Topeka	KS AFL-CIO
Wayne Maichel	"	" " "

1987
LEGISLATIVE CHANGES
WORKERS' COMPENSATION

I. INTRODUCTION

A. 1987 Legislative Changes Workers' Compensation has been characterized as "The Quiet Reform".

What does reform mean?

"Attempts to institute improved social and political conditions without revolutionary change." Have we done so?

We have laid the ground work, but the answer lies with all of us who are involved in the process;
employees and employers
attorneys - both claimant and respondent
administration
judiciary.

B. Developments in the law from 1974 to 1986.
The Kansas Legislature, starting in 1974, has taken a number of steps to liberalize the Workers' Compensation Law. We have summarized a number of these changes as they have developed over the intervening years.

In 1974 the compensation act was drastically overhauled.

1. The act was made applicable to practically all employments, including all units of government and not just to hazardous employments.

2. The medical limitation of $10,500 was removed, so today if an employee gets injured there is no limit on his right to medical benefits.

3. The death limitation of $18,500 was removed and increased to $50,000 and was made payable to the wife until her death or remarriage.

4. There was an increased amount of benefits payable to children.

5. The weekly benefit payable per week was increased from 60% to 66 2/3% of the employees weekly wage.

6. The maximum weekly benefit of $56.00 was stricken and the maximum weekly benefit was made to fluctuate with the states average weekly wage and was pegged at 2/3 of the states average weekly wage.

HOUSE LABOR AND INDUSTRY
Attachment #1
01-26-89

7. Subject to certain monetary maximums, a limitation of 415 weeks payable for temporary total and permanent total was removed.

8. All the scheduled entries were changed to provide that the weekly benefit would go up from 60% to 66% of the average weekly wage.

9. Also set in place was a hearing designated as a preliminary hearing, which is a summary proceeding, whereby an employee can file a claim and within a couple of weeks get a hearing on his application for medical and temporary total. Those are the only questions to be heard at the preliminary hearing and if the employee comes in and testifies that he needs medical care and can't work, with very few exceptions, he will be awarded some temporary total disability and medical benefits.

10. Also brought into the picture were both physical and vocational rehabilitation.

In 1977:

11. We increased the allowance for burial benefits to $2,000.

12. We changed the law so that an employee could continue to draw workers' compensation benefits even though he went on social security.

13. We also removed the provision in the law which cut down on death benefits when social security was paying social security benefits.

In 1979:

14. We increased the death benefit to a maximum of $100,000. Actually, by the wording in the statute, it is possible to draw more than a $100,000 death benefit if you have minor children.

15. We increased the maximum compensation rate to 75% of the states average weekly wage, from 66 2/3% of the states average weekly wage. (This was done in two steps.)

16. We also increased the total disability and total temporary disability to $100,000 and permanent partial to $75,000.

17. We also put the assistant director and administrative law judges under civil service statutes, so that they could not be removed simply because the

employer or employee did not like a particular decision.

In 1981:

18. We increased the unauthorized medical allowance to $350.00 from $150.00.

In 1982:

19. We cut down the employer subrogation rights when the employer was negligent.

In 1983:

20. We expanded the definition of children to include any natural or adopted child, as well as any dependent child related by marriage or blood.

In 1985:

21. We limited the right of employees to sue certain design professionals in situations where they had no contractual right to stop construction projects.

In 1986:

22. We took out qualified real estate agents performing service as an independent contractor. Frankly I did not agree with this change, but I was over run by the real estate bone crusher. We also set up a workers' compensation system for individuals assigned to community correction programs or suspension of sentence as a condition of probation or in lieu of a fine imposed by court order.

C. BACKGROUND FOR 1987 CHANGES

1. Senate Bill 365 passed out of the Senate in 1986, but was not acceptable to the House. Members of your association spoke against the bill. Required compulsory rehabilitation, except in special circumstances, would have resulted in endless hearings. Terms were ambiguous. Brought in the fund early in regard to the litigation process. Established another fund referred to as the Workers Rehabilitation Fund.

2. Concern of various groups.
   Impetus for change was generated by various groups.
   (a) Employers
       (1) No fair hearing.

(2) No incentive for putting the employee back to work.

(3) No reason to get involved in rehabilitation. Ploutz v. Ell, 234 Kan. 953.
9 Kan. App.2d 9
Antwi v. C.E. Industry Group, 5 Kan. App.2d 53.

(4) Bilateral tunnel syndrome awards were shaking certain industries, considered bodily disability not scheduled injuries see Murphy v. I.B.P., 240 Kan. 141 and Downs v. I.B.P., 10 Kan. App.2d 39.

(5) Court decision which appeared to wholly disregard statutory language, see Assay v. American Dry Wall, 11 Kan. App.2d 122. This case involved a situation where employee received an award and then returned to his job as a dry wall hanger in a commercial setting, as contrasted to being a dry wall hanger in a residential setting. He was earning more than at the time of his injury. The court indicated that regardless of the language in K.S.A.44-528 the test was still the employees ability to return to same or similar type of employment. K.S.A.44-528(b) provides that if the employee is capable of earning the same or higher wages that he did at the time of accident, then the director could cancel award and end the compensation. The directors office has gone a lot further even than that. I have seen awards entered in which the employee has returned to work for the same employer, doing the same job and yet gets 100% disability. The basis was that the man came in and testified that he was using eight aspirins a day to keep him on the job and the employee's attorney got a doctor to come in and say he really should not be doing that work.

(b) By employes and their representatives.

(1) Benefit levels not adequate, although indexed to wages each year.
For example where you had a high wage rate and a fairly substantial disability rating of permanent partial the $75,000 would be used up in a lot less than eight years.

(2) Employees getting sued on bills not paid for by the employer or the carrier.

(3) Requirement for continued demands, even though the carrier has failed to pay on time.
So what did we do and what didn't we do?

II. CHANGES

A. Bear in mind that there were a great number of proposals, some of which were turned down, some which were adopted, and some which were changed. The change process continued as it went through the House Labor and Industry Committee. Mike O'Neal and Ed Bideau sat with me for many a luncheon hour. We had several weeks of hearings, your representatives were present at all times in the Legislative hearings. Mr. Mason was always in touch. Gary Jordan kept in touch and convinced me on a number of things to change certain matters.

We utilized two bills to make the changes. House Bill 2186 and House Bill 2573. House Bill 2573 dealt with the problem of rehabilitation and changed a number of terms so as to agree with the word changes in House Bill 2186.

I have attached a hand out which summarized the various changes in the various bills and I might go over some of them with you.

B. BENEFITS

1. Maximum death benefits were increased from $100,000 to $200,000. How may deaths in Kansas occur each year arising out of in the course of employment? Approximately 100 each year. See Statistical Reports Division of Workers' Compensation. This could well build up to $10,000,000 a year.
2. Permanent total was increased from $100,000 to $125,000.
3. Temporary total was increased from $75,000 to $100,000.
4. Permanent partial was increased from $75,000 to $10[illegible],000.

C. DEFINITION OF PERMANENT PARTIAL.

We left untouched the wording with respect to total permanent, but changed the present language relating to the definition of permanent partial. The test is no longer the reduction in the ability of the worker to perform work of the same type and character, but the extent to which the ability of the employee to perform work in the open labor market and to earn comparable

wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that the extent of permanent partial general disability shall not be less than functional disability as determined by competent medical testimony.

We created a presumption that employee has no work disability if he engages in any work for wages comparable to the average gross weekly wage employee was earning at the time of his injury. Someone had put in the word "conclusive" presumption, but that word was stricken from the proposed language.

What about the situation where employer puts the employee back to work at a comparable wage and then fires him six months later. We hope that the Review and Modification Statute should be in order.

The Review and Modification Statute, K.S.A. 44-528 as well as K.S.A. 44-510(e), refer to work disability as well as functional disability. So we have endorsed the concept of two types of disability, functional and work. We have also made it clear that work disability is to be limited if employee is back earning a comparable wage, but we give the director more authority by inserting "modify" the award and so under the modification statute the director is not required to end the award simply because the employee is earning the same wage or is capable of gaining an income equal to or greater than what he was earning at the time of the accident.

We have also taken care of the objection that modification should not be limited to the date the application has been filed, but that the director can go back six months prior to the filing of the application. Hopefully this change will not be abused. We hope that the director will issue regulations so that the process is not abused. The employer should be put on notice or should have some notice and yet has failed to act.

D. REPETITIVE USE CONDITIONS

K.S.A. 44-510(d) is amended to provide that when employee is entitled to compensation for repetitive use, compensation shall be computed as separate scheduled injuries to each extremity and then the percentage of loss of use thereof increased by 20% of the determined loss of each extremity. This item was quite controversial because of a political situation involving labor and a particular segment of the industry. One proposal would have made the date of

accident for repetitive use condition the date of onset of symptoms. According to Gary Jordan, this would have eliminated most repetitive use syndrome injuries and this provision was stricken from the bill.

E. DEFINITION OF DEPENDENT.

There were a number of instances in which a child would be over eighteen at the time of the death of employee, but would still be in school. Under the old definition of wholly dependent child that child would not be entitled to death benefits. We now provide that if that child is between eighteen and twenty three years old and is a full time student death benefits will be payable to that child.

F. STAY OF JUDGMENT

We received a number of complaints that employees were being sued and judgments rendered against them with respect to medical services and materials that should have been paid by the workers' compensation carrier. K.S.A. 44-510 has been amended to provide that judgment would be stayed until final litigation of the claim for compensation. Provision is also made for the amounts to be payable directly to the provider with interest.

G. DEMAND FOR COMPENSATION

How many of you, in the past, have had to make a series of demands in order to keep compensation going. We have now provided that service of written demand shall be required only once after the final award and that subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for a civil penalty without demand.

H. ATTORNEY FEES

You all should have received a notice regarding attorney fees from the directors office and if you haven't you ought to get a copy of the notice, together with the required statement regarding attorney fees.

Originally there were some very strict proposals with respect to attorney fees, all of which would have limited attorney fees to a certain percentage less than the 25% which is now allowed. Under the new law there will be more accountability, especially with respect to settlement agreements and lump sum settlements.

I. TECHNICAL

1. Look at the whole record K.S.A. 44-501 and 44-608(g).

2. Impartial - K.S.A. 44-510(g).

3. Extended the Compensation Act to protect persons on public assistance and performing public or community services.

4. Costs and charges for medical records and testimony are subject to approval of the director.

5. Made it clear that employee get medical advise and treatment without application or approval, limit $350.00.

6. Definition of wage does not include social security taxes paid by employer.

7. Authorizes medical preventative treatment for emergency personnel exposed to hepatitis.

REHABILITATION

Comment:

House Bill 2573 was a vehicle used to amend the rehabilitation provisions of the law. K.S.A. 44-510(g) is a rehabilitation statute and we simply amended that statute to provide for the changes.

I. Rehabilitation may take one of two forms or a combination of both. These measures are:

A. Medical - Physical

Measures all designed to restore the individual physically and mentally. These measures could include such things as:

1. Medication
2. Physical Therapy
3. Speech Therapy
4. Occupational Therapy
5. Psychological Therapy
6. Prosthetic fitting and training.

B. Vocational Training

This term has reference to retraining in old work or training in some other type of work. Could involve employee returning to work for the same employer with accommodation or without accommodation.

II. ENTITLEMENT

A. Previously the director was given broad discretion as to who would be entitled to appropriate medical, physical or vocational rehabilitation. Employee was entitled to such combination of therapy upon a finding by the director that:

1. Employee was unable to perform work for which employee had previous training, education, qualifications or experience.

2. When employee was unable to perform other substantial or gainful employment.

3. Such therapy could increase his earning capacity when it was for the best interest of such person to undertake rehabilitative re-education or training. The amendment to the law now provides that employee may be entitled to vocational rehabilitation or training, as may be reasonably necessary to restore to employee the ability to perform work in the open labor market and to earn comparable wages. Rehabilitation not limited to restoring the employee to gainful employment, which appears to be the test that has generally been applied and which appears to be the rule announced by vocational rehabilitation personnel.

III. PROCEDURE

A. Informal

1. Minor injuries involve some type of therapy, usually physical therapy in the form of whirlpool, manipulative exercises or heat. The employer and employee may agree as to what must be done or should be done and work out a mutually agreeable plan. Conservative physical therapy may be the only requirement and that can be easily arranged. However, in such cases as;
    a. Amputation,
    b. Spinal cord or brain damage or other severe disabling injuries, contact must be made with the Rehabilitative Administrator in the Director's office and reports both initial and follow up, furnished to the Administrator who has the responsibility of working with the employer to insure that only fully accredited and authorized rehabilitative agencies are utilized.

B. Formal

1. If employee has been off work for ninety days, or if it appears to the director that employee requires vocational rehabilitation, the director on his own motion, upon application of any party, may refer employee to a qualified public agency, if employee is eligible or private agency or to the employer's own rehabilitation services for evaluation and report as to the practicality of the need for and the kind of service, treatment, or training which may be necessary to render employee able to perform work in the open labor market and earn comparable wage. The cost is to be born by the employer. There is no need to set up a hearing and present evidence. The director has authority to make this order.

C. Rehabilitation Plan

1. Within fifty days after the referral the report shall be submitted and reviewed by the Rehabilitation Administrator, copies to all parties. If no agreement, Rehabilitation Administrator mets with all the parties, including the proposed rehabilitation service provider, and tries to get the parties together. Within twenty days after the initial review the Rehabilitation Administrator shall deliver copies of the report, together with the Rehabilitation Administrator's recommendations and any revisions of or objections to the plan, to each party, to the director, and to the assigned administrative law judge, if there is one. Any party then can, within ten days, request a hearing, after which an opportunity is afforded to all to present any evidence.

   The director then can order the employer to pay temporary total disability compensation or temporary partial disability compensation during the period of rehabilitation evaluation continuing through the date the rehabilitation plan is delivered to the director, however, it is not payable for more than seventy days from the date of evaluation. In exceptional cases thirty additional days may be authorized.

   If vocational rehabilitation, re-education, or training is recommended, the director may direct the employee to the appropriate Federal, State, or other public facility for such services, or at the request of the employer, to a qualified rehabilitation service program provided directly by the employer. If the employee is not eligible

for vocational rehabilitation through such a facility, or there are none available, then the director may provide that the services are to be provided at the expense of the employer.

D. Cost and Allowances

1. Vocational rehabilitation, re-education, or training has been extended from twenty six weeks to thirty six weeks and in extremely unusual cases may extend for an additional thirty six weeks. Employer has a right to appeal to the District Court with respect to such orders. Clintsman v. St. Joseph Hospital 11 Kan. App.2d 199. There is no intent to change the rule as outlined in the Clintsman case.

If the employee has to reside away from his customary residence, then he is entitled to a maximum of $3,500 for room and board for a thirty six week period and by special order entitled to an additional $2,000. Employee is also entitled to temporary total disability compensation during the period of vocational rehabilitation. The first twenty six weeks temporary total disability compensation is not to be deducted from the number of weeks due for scheduled injuries while in rehabilitation. All payments of temporary disability still deducted for general bodily disability.

2. EMPLOYEES RESPONSIBILITY

Employee is responsible for co-operating in the evaluation and rehabilitation process if the director determines that it is in his best interest to do so. If he fails to co-operate and refusal is not due to employees physical or mental ability to do so, then the director can suspend the payment of any disability compensation and could, in some cases, reduce the disability compensation if the refusal persists for a period in excess of ninety days. Disability compensation may not be reduced to less than that which is payable for scheduled or for functional impairment.

3. MODIFICATION

Once rehabilitation, re-education, or training has been completed the employer has a right to seek modification of any award. All parties must be put on notice and the director is given authority to modify the award of compensation if

any, if he determines that employee has been rehabilitated and is able to perform work in the open labor market and to earn comparable wages. Any modification is still subject to the provisions of K.S.A. 44-510(d) and K.S.A. 44-510(e) which relate to scheduled injuries and bodily injuries.

AN ANALYSIS OF ISSUES RELATIVE TO VOCATIONAL REHABILITATION SINCE THE JULY 1, 1987 LEGISLATIVE CHANGES OF THE KANSAS WORKERS' COMPENSATION ACT

Prepared for
THE HOUSE LABOR AND INDUSTRY COMMITTEE
For Presentation on
January 26, 1989

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AN ANALYSIS OF ISSUES RELATIVE TO VOCATIONAL REHABILITATION SINCE THE JULY 1, 1987 LEGISLATIVE CHANGES OF THE KANSAS WORKERS' COMPENSATION ACT

USE OF "ABILITY" TO PERFORM WORK AS THE SOLE CONSIDERATION IN INTERPRETING K.S.A. 44-510e AND K.S.A. 44-510g(d) IS THE NARROWEST POSSIBLE CONSTRUCTION AND DEFEATS LEGISLATIVE INTENT AND ALL ASPECTS OF VOCATIONAL REHABILITATION

The primary motivating force presumably involved in changing the law for accidents occurring after July 1, 1987 was to return workers to the work force. The praiseworthy concept was that getting the worker back to employment was a long-term goal which would serve the worker better than a lump sum settlement. With stronger vocational rehabilitation benefits, the worker would hopefully achieve comparable wages and in exchange give up large work disability awards of compensation.

The goal would be accomplished in two broad ways:

a) There would be incentives for the employer to take the worker back, with or without accomodations, and;

b) Where the worker could not return to work for the employer, the worker would be automatically "triggered into" a close working relationship with a rehabilitation specialist.

Unfortunately, it has apparently become the position within certain circles (the Division of Workers' Compensation, insurance carriers, and some vendors), that all that need be shown is a

"physical ability" to perform a given job. That upon that showing, it matters not whether the claimant is actually working.

The realities and practicalities of getting a job in the open labor market with a physical handicap are ignored. This interpretation changes the goal and focus of the voc-rehab statutes. The goal of getting the worker back to employment at comparable wage is subordinated by the goal of limiting work comp awards through a simplistic theoretical approach.

In demonstrating the "ability" to perform work at a certain wage one of the following scenarios takes place. First, the company approved and chosen physician could clear the worker to a specific job with the employer in question. At that point, regardless of physical handicap and loss of employment, the worker is completely barred from vocational rehabilitation, and presumably will have his resultant functional disability. Understanding that the employer initially gets to choose the doctor in every case, the incidents of this occurrence is high.

Alternatively, the worker could be released with restrictions that clearly bar him from employment with the former employer. Then, the worker is sent to the vocational expert chosen by the insurance carrier. Criteria is elicited from the injured worker relative to age, physical limitations, formal

education, previous work history, transferrable skills, etcetera. That information is run through a computer which contains listings from the Dictionary of Occupational Titles (D.O.T.). The computer then lists jobs which the injured worker allegedly has the "ability" to perform. This is the same system utilized by Social Security in determining disability.

It is respectfully suggested that the **acid test** for ability to perform a job in the open market is the performance of that job. One does not have the ability to perform a job that does not exist through lack of openings or is unobtainable for a myriad of possible other reasons (e.g., discrimination against the handicap caused by the injury, the job is only filled by promotions from within, the worker cannot put together a resume, etc.). There is a difference between having the ability and doing the act. We cannot today start shooting our criminals because the legislature has the "ability" to pass a death penalty.

Theoretical dollars from theoretical jobs can only purchase theoretical food. Theoretical food does not satisfy the real hunger of children of injured workers.

A few case examples will illustrate the problem of stating that it "makes no difference in the analysis whether the claimant is actually working." It is always important to remember that at the time of injury, the worker had a job. The point may seem

obvious, but if he did not have a job, he would not have a workers compensation claim. Since the worker has legislatively "exchanged" some rights and benefits, does it not seem appropriate to at least make efforts to restore him to the minimal status of having employment? This is not to suggest that there are not appropriate perimeters, or that the respondent and insurance carrier become an employment agency. (There are already provisions for limiting awards when the claimant fails to cooperate with vocational rehabilitation.) It is however when the **efforts at restoration** are unilaterally cut off on an **ability only determination** that vocational rehabilitation (and legislative intent) becomes a sad joke on the injured worker.

I.

It was mentioned earlier that one of the ways, (and perhaps the primary way) that workers were to be returned to employment was through "incentives" to the employer. Particularly, that work disability would be avoided to a large extent if the employer took the injured worker back with or without accomodations. **If it makes no difference whether the worker has a job, the incentive is completely gone.**

In other words, all an employer has to do is show an ability to perform a job, and the employee is limited to his functional disability. As noted, this ability can be shown through the company physician or the hand-picked vocational rehabilitation

expert. Why should an employer go through the problems of accomodating a worker, and working around his handicap, if there is absolutely no penalty for not returning him to work? Recall that the worker allegedly "exchanged" his work disability, for some bargaining power to get back to work.

II.

Even worse than the fact that the employer loses the incentive to take a worker back if we only look at hypothetical ability to perform the work, is the fact that the claimant also does not get vocational rehabilitation. This <u>is</u> the stated position of the Division of Workers' Compensation:

> "1. Question: If employee is 'able' to perform the same work for the same employer but the employer will not take the employee back, is the employee entitled to a referral for an evaluation to determine the need for vocational rehabilitation servces?
>
> "Response: No. Section 44-510g in subsection (a) provides: 'A primary purpose of the workers' compensation act shall be to restore to the injured employee the ability to perform work in the open labor market and to earn comparable wages...' The theme and goal of vocational rehabilitation in workers' compensation is to restore to the employee the <u>ability</u> to return to comparable wage work. If the physicians' reports indicate that the employee still has the ability to return to the same job and earn comparable wages, there is nothing to 'restore' to

> the employee. The fact that the employer does not want to re-employ the claimant does not alter the fact that the employee has the ability to perform the work without accomodation." (Division of Workers' Compensation Seminar, 1988.)

It was also stated by the Director's office that in the analysis of making work disability awards, the fact that claimant was working or not working would have little relevance. Again, that loss of earning capacity would be measured on claimant's "ability" to perform certain work.

Consider the ramifications of I and II above. Joe Worker has a back injury while working for XYZ Corporation whom he has worked for for ten years. The injury leaves him with a 10% anatomical disability and a lifting limit of 25 pounds repetitively and 50 pounds occasionally. Under these restrictions, Joe could perform his old job.

XYZ Corporation will not hire Joe to do his old job because they feel he is a risk, and they also filled his job while Joe was having surgery. The new worker is younger, has a strong back, no accumulated vacation, and accepts lower wages. XYZ Corporation has other positions that they could give Joe with accomodations, but they will not do so.

Joe strenuously searches for work, but is unable to find it. It is hard to find work with a bad back, and as an older worker with only one "type" of past employment for the past ten

years, Joe has no real transferrable skills. Although Joe has been knocked out of work by injury, and wants to work, Joe does **not** get any benefits from vocational rehabilitation. Joe does **not** get any work disability, because the employer has been able to point Joe's theoretical ability to do a job. Is this what the legislature intended?

While being repetitious note again what is happening. Joe had a job and no **effort at restoration** has taken place. No penalty or incentive is attached to the employer's action in returning the worker to employment. Joe does not even receive threshold considerations for vocational rehabilitation services; much less does he get consideration for retraining, job placement, resume preparation, or other services. He is on the unemployment heap, and because it is irrelevant as to whether he is actually working, he will likely receive his functional anatomical disability. The "presumption" of work disability is a one-way street. Why is there no "presumption" when an injured worker pleads for work in the open-labor market but cannot find it?

III.

Assuming that in the case scenario just presented (number II above), Joe had been off of work for 90 days, and accordingly had been "triggered in" to vocational rehabilitation. A vendor is assigned by the insurance carrier to meet and deal with Joe's problems. This occurs because either the employer is unable to

"point to" a job Joe can perform at comparable wage, or because the employer cannot accomodate. ((It is problematical why the Division makes reference to the employee being able to return to his same job. This is an old law standard. There is no real distinction between the ability to do one's old job at comparable wage, and the ability to do any job at comparable wage. (See respondent's argument re: Doug Downey attached).))

Since Joe is now in the hands of vocational rehabilitation, is his plight better? Probably not. As those who have experience with Social Security know, no matter what a person's background or handicap, theoretical jobs "in significant numbers" can easily be found. Furthermore, the pay ranges for each theoretical job can be quite diverse. For example, a stock clerk D.O.T. code 222.137-034 has a pay range from $3.35 to $12.34 an hour. A stock clerk is also classified as "light work". (See attached Transferrable Skills Analysis).

Based on these statistical studies, Joe could be told that he has the ability to be a stock clerk and earn comparable wage. As such, it is the end of Joe's vocational rehabilitation. Again, "what's wrong with this picture?"

Because the vendor is able to theoretically identify a job, Joe is given an exit interview. The legislative intent is simply not fulfilled of returning people to work.

IV.

Circumventing of vocational rehabilitation and work

disability is also clearly occurring when the employer takes the worker back for a short period of time or with "unreasonable" accomodations. The employer then terminates the employee for a bogus or ancillary reason and is able to state that were it not for claimant's own activities, he would be employed. (See attachment, Mario Luna).

The employer also has the ability to determine working conditions and hours. Employees are given menial tasks (but at comparable wage), until they are degraded or bored into quitting.

If the stated proposition is accepted that an actual return to work is irrelevant, these prevalent practices will probably cease. In other words, there will not even be reason for the employer to engage in this gamesmanship, since all that he need to is point to an unavailable position which matches the worker's ability.

Injured workers are also removed from vocational rehabilitation if they take temporary jobs at or near their old wage. The argument is they have demonstrated their ability. (See attachment, Pat Simons).

V.

Assuming that there was an incentive for the employer to return the worker to work (which is in serious question), it is a long-term education process. In essence, there is natural conflict between injured workers and their employers. Over the

years the gap has probably widened; and the new Act attempts to restore harmony through legislation.

The employers need to be educated that if they accomodate the worker, it is in their best interests. ((It will be repetitiously stated again that this incentive is destroyed if the employer can merely point to jobs within his facility that the displaced worker has the ability to do.)) This education process is left to the vendors. The vendors' initial reports must state that the employer will not rehire before voc-rehab can proceed.

Certain vendors have already promoted the insurance carrier's interests by establishing a claimant's "ability" to do certain work within the facility; thus circumventing vocational rehabilitation and work disability. Other vendors have promoted their interests by not making a sincere effort to get the worker back with the employer thus "creating" a rehabilitation case.

There is an inherent conflict of interest. If the vendor presents the injured worker in the best possible light, with an appropriate discussion of work accomodations; and is successful, his job is done, and his paycheck ends. The vendor also has the option of not explaining the benefits of rehire; thereby creating a need for rehab.

Legislative intent seems to indicate a strongest case possible should be made for rehire. Legitimately the vendor

would have a difficult time emphasizing rehire if the outcome to the employer and worker is not effected.

VI.

As with issues of rehire, there is an inherent conflict of interest in having vendors assigned by insurance carriers. The absolute power to pick vendors has a trickle-down effect throughout the rehabilitation system. The same process that affects which physician is picked affects which vendor is selected. One board certified orthopedic surgeon is not chosen over another based upon surgical skills. It is based on the economics that one is more conservative in functional disability ratings.

One vendor is not chosen over another based on equity in administering vocational rehabilitation benefits. Running an insurance company is an economic process. A vendor is chosen who serves the economic interests of the insurance carrier. This means that the claimants' needs are a lower priority. The vendor who can show that the claimant has "hypothetical ability" to find work is the vendor best serving the economic interests of the carrier.

As has been previously noted, it is a simple task to match qualifications and disqualifications with the D.O.T. If one does not have to validate said "computer dating game" by placing the claimant in employment, it is particularly easy. There is no

accountability or real responsibility and legislative intent is again frustrated.

Certainly, a vendor falls into disfavor with the insurance carrier when a plan is formulated which costs the insurance carrier money in terms of training or temporary total disability. And while a physician has multiple sources of income, a vendor may have a substantial portion of business with a particular insurance company. Consider that many vendors are wholly owned subsidiaries of insurance companies.

While a claimant may find some relief from a conservative physician by use of unauthorized medical, no similar provision exists for vocational rehabilitation. It is expensive and perhaps futile to seek independent rehabilitation. Even removal from one vendor subjects the claimant to a second vendor not of his choosing. By the time a second vendor is involved his 100 days of temporary total have surely run, as has his stamina to be involved in this system.

The Division has noted an "increase in settlements for functional impairments" which is attributed to "a perception of consistent application, and enforcement of statutory mandates." (Executive Summary from Robert A. Anderson to Senate Labor, Industry and Small Business Committee, 1/18/89). Since there has not been a significant increase in injured workers returning to their former employment, or being successfully rehabilitated, the

increase in functional impairment settlements can equally be attributed to the frustration of the workers in dealing with an "ability only" standard.

VII.

Other problems include:

a) vocational rehabilitation reports not being freely and promptly exchanged whether in "rough or final";

b) lack of solution when conflict of medical limitations exists (acceptance of greater limitations produces greater need for VR services, and visa versa);

c) definitional conflict of unemployment law, i.e. inability to receive unemployment comp and TTD when TTD is being received for VR;

d) reports are continuously late from VR and the 100 days of TTD is therefore insufficient; there is a lack of police power over VR, the insurance carrier does not care about late reports, and claimant has no control over the vendor;

e) clarification that temporary total is to be paid during both evaluation process and plan development.

CONCLUSION

It is believed that the language is already there to show mere ability to return to work is not the sole criteria for vocational rehabilitation and work disability. The law speaks to being able to perform a job in the open market. One cannot perform a job that one does not have. To avoid hardship and confusion, it should be clarified now that actually having work is relevant.

There should be bifurcation of duties and the vendor should not be responsible for attempting to return claimant to his old employer. This will further the "educational process" and eliminate a conflict of interest situation. Furthermore, individual rehab counselors should be reviewed (as opposed to vendors), and assignments should be made on a pure rotational basis. Allowing the carrier to pick the vendor is abusive.

Employees who are retained for only short periods of time, obtain temporary employment, or who are given unreasonable accomodations should be freely returned to the vocational rehabilitation pool. Temporary total should be paid for all periods of evaluation and plan development. This would enhance pressure from the insurance carrier on the vendors to comply with the time requirements.

It is believed that these items will effectuate the original legislative intent and aid claimants such that the diminuation of work disability does act as an exchange of benefits rather than pure forfeiture.

R87-3d, 11-87

KANSAS DEPARTMENT OF HUMAN RESOURCES
DIVISION OF WORKERS COMPENSATION

PLAN REVIEW AND APPROVAL FORM

(To be completed by the Division)

CLAIMANT: Douglas Downey SSN 513-52-2619

_____ COMMENTS:
_____ RECOMMENDATION:
XXXXX MEDIATION:
_____ APPROVAL:

A mediation was held January 9th, 1989 at the request of John D. Jurcyk, respondent attorney. Those participating were: Doug Downey, David Allegria, John Jurcyk, Janice Hastert and Robin O'Dell.

Mr. Juryck requested mediation as he disagrees to the need for a plan stating the vocational assessment identified jobs within Mr. Downey's restrictions. He believes Mr. Downey has the ability to obtain employment at comparable wage in the open labor market.

Mr. Juryck raised an additional concern. He interprets the law to read that benefits should be paid during the plan only if retraining is involved. This can only be decided by an Administrative Law Judge.

In making the following recommendation I have taken into consideration the vocational assessment, plan and progress reports submitted by KRCC and the opinions provided at this mediation.

Workers Compensation approves the vocational plan through 1-10-89. The services (GED, Referral to Job Service and establishing a list of employers for a job search) are necessary to provide Mr. Downing the ability to work in the open labor market at comparable wage. These services have been provided and now Mr. Downing should be prepared to followup on these job leads. The GED should also enhance his employability. The decision to terminate additional services is based on Ms. Hastert's opinion that further vocational assistance would not be necessary.

If any party disagrees with the results of this mediation, you have the right to request a hearing.

Signature of Reviewer Robin O'Dell Date 1-12-89

Copies to: Doug Downey
David Allegria, Attorney for Claimant
Janice Hastert, KRCC
John D. Juryck, Attorney for Respondent,
Marsha Phillips, Aetna
Robert Foerschler, Administrative Law Judge

TRANSFERABLE SKILLS ANALYSIS

Most recently Mr. Simmons reported he was employed as an ironworker, Dictionary of Occupational Titles: #801.361-014, for Ironworkers Union Local 10, Kansas City, MO from July 1976 to present earning $15.00 to $18.00 per hour depending on the job site. Mr. Simmon's experience as an Ironworker would be classified under Craft Technology: Metal Fabrication and Repair (05.05.06). Skills and abilites required of occupations within this occupational group include: knowledge of tools, machines, materials, and methods used in the trade; reading scale drawing or blue prints; mathmatical comprehension to calculate object dimensions, material amounts needed, and material costs; eye/hand/foot and bimanual coordination to use hand tools or machines in construction, making or repairing objects, adhering to object specifications or standards; work consistency and concentration; ability to organize material and plan work acitivity; spatial and form perception; reading compehension; acceptance of supervision; the ability to work independently as well as with other and working in hazardous and noisy conditions.

Also while employed by the Ironworkers Union Local 10, Mr. Simmons stated his job responsibilities as Supervisor, ironworking (D.O.T. #801.134-010) which is classified under Production Work: Supervision (06.02.01). Skills and abilities required of occupations within this occupational group include ability to follow oral and written instructions; decision making and problem solving skills; and supervisory skills; an ability to lead and give direction, accept responsibility and motivate others.

Prior to working as an Ironworker, Mr. Simmons reported he was employed as a Department Manager, sales clerk and stockboy at Davids Department Store, Emporia, Kansas from 1975-1976 earning #3.00 per hour. As Department Manager (D.O.T. #229.137-010) Mr. Simmons work experiences would be classified under Business Management: Wholesale - Retail (11.11.05). Skills and abilities required of occupations within this group usually include applying math skills to read and interpret business and statistical reports and records; analyzing and interpreting administrative policy and procedures; planning and organizing work of others; speaking and writing clearly, keeping records and inventory stock and dealing tactfully and courteously with the public and employees.

As a small appliance/hardware sales person (D.O.T. #270.357-034, 279.357-050) Mr. Simmon's work experiences would be classified under Sales Technology : Retail (08.02.02). Skills and abilities required include applying knowledge and familiarity of equipment and products; discussing features of products convincingly to gain trust and confidence of potential buyers; computing costs, mark-ups and profit margins, preparing sales contracts and purchase orders; and attention to detail.

As a stockboy (222.387-034) which is classified under Materials Control: Verifying, recording and marking (05.09.03). Skills and abilities required include: applying basic math skills and visual abilities to maintain records conduct inventories and estimate quantities; verifying completeness of articles shipped or received; hand and finger dexterity and coordination to pack, store and sort articles, and an ability to accept supervision.

Mr. Simmons also reported a variety of short-term work experiences from 1974 to 1984 including: Janitorial work (D.O.T. #382.664-010); Painter (D.O.T. #840.381-010); Warehouse Manager (D.O.T. #184.167-114); Siding Laborer (D.O.T. #863.684-014); Welder (D.O.,T. #810.384-010, 811.684-014); Counter Attendant (311.477-014); and Paper Delivery (D.O.T. #292.457-010).

A review of Mr. Simmons educational and vocational experiences, transferrable skills and physical capabilities it appears a variety of occupation groups provide probable return to work alternative for the injured worker including: (It may be noted this is not a conclusive list of return to work options rather a target list of probable return to work alternatives for further exploration.)

05.05 Craft Technology

801.134-010 Supervisor, Reinforced Steel-Placing

06.02 Production Work

613.362-018 Rougher
512.682-010 Charging Machine Operator
613.585-010 Bed Operator
613.362-010 Heater
613.682-010 Manipulator
813.684-010 Brazer
814.382-010 Welding Machine Operator
815.682-010 Laser Beam Machine Operator

11.11 Business Management

185.167-026 Manager, Machinery or Equipment
299.137-010 Manager, Department
182.167-010 Contractor

08.02 General Sales

270.375-014 Sales Representative Household Appliances
274.357-034 Sales Representative Hardware Supplies
276.357-010 Sales Representative Architectural and Engineering Supplies

05.09 Materials Control

222.137-030 Shipping and Receiving Supervisor
222.137-034 Stock Supervisor
929.137-022 Warehouse Supervisor
299.137-014 Yard Supervisor
849.137-014 Dispatcher, Ready Mix Plant

It may be noted all occupations indicated as possible return to work alternatives for Mr. Simmons are designated as "light" work by the Dictionary of Occupational Titles requiring lifting up to 10 pounds frequently, 20 pounds occassionally.

In addition, Mr. Simmons reported an interest in utilizing his knowledge and experiences as an iron worker, as well as previous coursework to explore construction/engineering/structural drafting as a possible return to work option. A review of the drafting occupations indicated sedentary physical demands of lifting up to 10 pounds.

It may be noted, it is this Rehabilitation Specialist's recommendation that labor market research and clarification of Mr. Simmons current medical status, would need to be assessed to fully evaluate his employability within his physical capabilities, transferrable skills and in his current area of residence. Further, this Specialist recommends medical approval of a return to work position to facilitate a successful return to work for the injured worker.

/kb

BEFORE THE DIVISION OF WORKERS COMPENSATION
STATE OF KANSAS

MARIO LUNA
Claimant,

vs. Docket No. 129,258

IBP, INC.
Respondent,

and

SELF-INSURED
Insurance Carrier.

ORDER DENYING EVALUATION

NOW on this 20th day of September, 1988, this matter comes on upon the Motion of Claimant for a Vocational Evaluation before Administrative Law Judge Thomas F. Richardson. After hearing the evidence and arguments of counsel, it is found:

1. That Claimant is not employed by Respondent because he was terminated for reasons not associated with his claim for compensation, even though he is physically able to perform work with accommodation. **

2. That vocational rehabilitation are available pursuant to KSA 44-510g(e) only "when as a result of an injury...which is compensable...the employee is unable to perform work for the same employer with accommodation... such employee shall be entitled to such vocational rehabilitation services..."(emphasis supplied).

3. That Claimant's Motion should be and is hereby denied.

IT IS SO ORDERED.

Thomas F. Richardson
ADMINISTRATIVE LAW JUDGE

Original to: Robert Anderson, Director
Copies to: Beth Foerster, Gary Korte

**Mr. Luna went for a medical appointment and treatment associated with his injury. He was restricted from doing his regular work. Following his medical treatment, he had approximately 1.5 hours left on his shift. He did not feel well, and went directly home. He additionally took his daughter to the doctor, and failed to report in. Because of his error in judgment, he was terminated. He has permanent physical restrictions, and after being unemployed for several months, he could only find work at approximately 50% of his previous wage.

(Factual summary provided, not part of Court Order)

KANSAS DEPARTMENT OF HUMAN RESOURCES
DIVISION OF WORKERS COMPENSATION

PLAN REVIEW AND APPROVAL FORM

(To be completed by the Division)

CLAIMANT: Pat Simons SSN 509-62-1303

_____ COMMENTS:
_____ RECOMMENDATION:
XXX MEDIATION:
_____ APPROVAL:

A mediation took place December 12, 1988 at the request of Patrick Salisbury, Respondent Attorney. Those in attendance were: Pat Simons, claimant; John Ostrowski, claimant attorney; Ann Nunn, St. Paul; Pat Salisbury, respondent attorney; Kathy Schauwecker, Intracorp; Bruce Smith, PRC of Kansas, Inc.; and Robin O'Dell, Workers Compensation.

Mr. Salisbury raised two primary concerns. The first concern was in regard to Workers Compensation selecting a vendor to assist Mr. Simons although PRC of Kansas, Inc. was involved with the case. The second concern was that Mr. Simons has demonstrated the ability to return to work at comparable wage and therefore is not eligible for further services.

This section shall address Mr. Salisbury's concern on the referral issue.

PRC submitted a vendor referral report December 28, 1987 notifying Workers Compensation that St. Paul referred Mr. Simons for medical management on 12-23-87. The report stated at the bottom that the case was in medical management and not stable. Another Vendor Referral Report was submitted February 4th, 1988 stating Mr. Simons was released to return to the same job. No progress reports were received from PRC. On June 6th an Order for a Vocational Assessment was received. On the same day an Insurance Carrier Status Report was submitted showing the referral 12-23-87 to PRC but also stating Mr. Simons had not been referred for an evaluation as he returned to work, 1-26-88. Robin O'Dell called St. Paul 7-7-88 asking if the case had been referred to a vendor for an assessment and was informed that there was no record and Division referral should be made. Work Capacities was called and agreed to accept the referral. Work Capacities and the vendor they have subcontracted; Intracorp, are approved to handle this case. Following the court order information from other vendors cannot be considered.

The second concern raised was Mr. Simons was employed(temporary position) at comparable wage and therefore has demonstrated the ability to earn at comparable wage.

Mr. Simons was briefly employed as a welder at comparable wage. He stated this is one portion of a journeyman ironworker's position and was a specialized position as a machine offered assistance with lifting. Mr. Salisbury contends that union work is temporary in nature. Mr. Simons stated he worked the majority of the year due to this skills.

Ms. Schauwecker stated she felt Mr. Simons was restricted from return to work at comparable wage. She stated the important factors considered are: assessing one's ability to sustain employment at comparable wage and availability of comparable wage employment in the open labor market. Her assessment recommended the need for a vocational plan.

Signature of Reviewer Robin O'Dell Date 12-15-88

Copies to:

CONTINUED

R87-3d, 11-87

KANSAS DEPARTMENT OF HUMAN RESOURCES
DIVISION OF WORKERS COMPENSATION

PLAN REVIEW AND APPROVAL FORM

(To be completed by the Division)

CLAIMANT: Pat Simons SSN 509-62-1303

_____ COMMENTS:
_____ RECOMMENDATION:
XXX MEDIATION:
_____ APPROVAL:

This reviewer provides the following recommendations.

Work Capacities continues to be the approved vendor for Mr. Simons case and feels the Division acted corrected in selecting a vendor to complete the court ordered evaluation.

It is this reviewers opinion that a temporary position that includes only a small portion of the claimants occupation does not constitute the ability to obtain employment in the open labor market at comparable wage. Ms Schauwecker's assessment identifies the need for continued vocational services through the development of a plan. This reviewer recommends Ms. Schauwecker continue her work with Mr. Simons and pursue the development of a vocational plan.

The functional capacity assessment must be reviewed and approved by a physican prior to further services.

If any party does not agree with this mediation they may request a hearing within 10 days.

cc: Kevin Flattery, Work Capacities, 8000 Reeder, Lenexa, Kansas 66214
Kathy Schauwecker, Intracorp, 6701 W. 64th St., Suite 220, Shawnee Mission, KS 66202
Pat Simons, Claimant, PO Box 132, Hoyt, Kansas 66440
John Ostrowski, Attorney for Claimant, PO Box 1453, Topeka, KS 66601
Pat Salisbury, Attorney for Respondent, 215 E. 8th, Topeka, KS 66603
Ann Nunn, St. Paul, PO Box 2954, Overland Park, KS 66201
Bruce Smith, PRC, 400 N. Woodlawn, Suite 18, Wichita, KS 67208
James R. Ward, Administrative Law Judge

Signature of Reviewer Robin O'Dell Date 12-15-88

Copies to:

Testimony

of

Bud Langston

Kansas Rehabilitation

and Clinical Consultants

HOUSE LABOR AND INDUSTRY
Attachment #3
01-26-89

Testimony
for the
House Labor and Industry Committee
January 26, 1989

Regulation of Rehabilitation Vendors
Under the Workers Compensation Statute

Definitions: (a) "Vendor" means a vocational rehabilitation facility, institution, agency or employer program provided for by K.S.A. 44-510g, as amended by 1987 HB 2573. Any person, firm, or corporation proposing to qualify as a vendor in vocational rehabilitation cases under the Kansas Workers Compensation Act, shall file an application with the director. The application shall be updated as changes occur which may effect the standing of the applicant to become or remain qualified and shall include: (a) a statement that the person, firm or corporation will maintain an office in the State of Kansas or in the metropolitan Kansas City area, staffed with personnel capable of responding to written or telephone inquiries related to cases referred to that vendor; (b) the addresses and telephone numbers of the offices within and without the State of Kansas from which vocational rehabilitation services will be performed for cases under the Workers Compensation Act; (c) a listing of each person employed to perform services as a medical manager, counselor, evaluator or job placement specialist for cases referred to that vendor and an indication of each person's discipline; (d) a statement that the person, firm or corporation will employ or contract with persons qualified to perform work as medical manager, counselor, evaluator or job placement specialist as necessary to carry out the purpose of the referral; (e) a statement that the person, firm or corporation will be responsible for the appropriateness and timeliness of the delivery of service by each medical manager, counselor, evaluator and job placement specialist employed or under contract to carry out the purpose of the referral; (f) a statement indicating whether the person, firm or corporation wants to be included in the list of vendors qualified and requesting to receive referrals from employers or the director; (g) a statement that the person, firm or corporation will report to the vocational rehabilitation administrator each referral received from an employer or insurance carrier and the date of the referral; (h) a statement that the person, firm or corporation will report the status of each evaluation 30 days after the referral and will report the status of each evaluation and plan on each occasion changes occur which affect the status of the evaluation or plan. The report shall be in a form prescribed by the director.

(b) A "vocational rehabilitation counselor" or "counselor" means a person has provided the director with the necessary proof of eligibility for qualifications under K.A.R. 51-24-5 (a) and who has received a certification of qualification from the director.

(c) "Vocational rehabilitation evaluator" or "evaluator" means a person who has provided the director with the necessary proof of eligibility for qualification under K.A.R. 51-24-5 (b) and who has received a certification of qualification from the director.

(d) "Job placement specialist" means a person who has provided the director of the necessary proof of eligibility for qualification under K.A.R. 51-24-5 (c) and who has received a certification of qualification from the director.

We shall include 51-24-5 as qualification for counselor evaluator and job placement. (see attached)

Listings of Educational Requirements

Problems: As can be seen from the enclosed description and qualification requirements of vendors and individual practitioners of the 3 prescribed disciplines, there is very little other than education and experience that would allow someone to come into the State of Kansas and set up a practice of rehabilitation provider or vendor. There is nothing in the regulations or statute that addresses quality of the work performed by each individual practitioner. The number of vendors in the state currently causes great difficulty in the ability to monitor their work by the Division of Workers Compensation. As there is absolutely no limit on the number of vendors that can request and be qualified by the director's office, our list of vendors could be at any number and create even more problems with regulation. The Division of Workers Compensation has no real authority to direct services except timeliness of filing and to make sure that there is a staffed office maintained by the vendor and that the individual disciplines meet the required education.

Recommendations: Adopt standards for quality and ethics. The National Association of Rehabilitation Providers in the Private Sector (NARRPS) code of ethics could be adopted to give the director's office some guideline as to the manner in which the rehabilitation vendor will approach provision of services under the Kansas Workers Compensation Statute. This would allow the director's office to observe any deviation in quality and ethical delivery of services provided by each individual vendor and then take appropriate action. We should cap the number of vendors at the current level, as the numbers are great enough to handle the work. This would allow the division greater ability to monitor these vendors and to maintain a high quality of service for injured workers. This would also tend to reduce the competitiveness in the market place and would allow a vendor more latitude in resisting unethical or substandard delivery of services that may be suggested by a referring source. There should also be established a peer review committee to help determine the appropriateness, timeliness, and the ethical delivery of services by vendors in the state. This peer review committee could consist of a panel of 5 professionals; 3 of which would be from the rehabilitation profession, 2 of which could be from the legal profession representing each side of the workers compensation matter, and chaired by the rehabilitation administrator of the Division of Workers Compensation. Any complaint or irregularity in provision of services to injured Kansas workers, would be reviewed by this peer review committee and appropriate action recommended to the director's office. The rehabilitation administrator, although chairing the peer review committee, would have no vote in the findings of the committee. Upon reviewing the alleged infraction by the vendor, the peer review committee may recommend a probationary period, a suspension from receiving referrals for 3 months; or upon second offense by any professional within the vendor's employ, a 1 year suspension from receiving any new referrals; or upon a third infraction and determination of unethical or poor quality service, the vendor may be forever barred from doing business in Kansas. The list of vendors will be maintained by the director's office and their application to provide services in Kansas

will be reviewed annually for their continued right to perform rehabilitation services within the State of Kansas. Should a vendor be denied a renewal or found guilty of 3 infractions which would bar that particular vendor from any further receipt of referrals in the state, a reserve list of vendors can be maintained and invited to replace the vendor that no longer is qualified in Kansas.

It has been suggested that a peer rotational basis be utilized for referring in order to lessen the control the insurance carrier may have over any specific vendor. I feel that if quality control is implemented and the number of vendors in the state is maintained at current level, unethical practices to gain a referral will be reduced. The marketing of each firm should be maintained and a vendor should be chosen by the respective referral source. It has also been suggested that the vendor system be abolished and that individuals be allowed the right to provide these services on a purely rotational basis. In theory, this would appear to be a somewhat viable application of the referral system, but in reality, it would be far too costly for one person to cover the state and provide timely services to workers while being cost effective to the employer in these cases. Therefore, I recommend that our current vendor status be maintained, but with more regulation by the director's office to insure appropriate and timely delivery of services.

51-24-5. Qualifications for counselor, evaluator, and job placement specialist. (a) Each person seeking to qualify as a vocational rehabilitation counselor for cases under the Kansas workers compensation act shall:

(1) furnish proof to the director that the person has:

(A) a masters degree from a nationally accredited program in rehabilitation counselor education; or

(B)(i) a masters degree based on a curriculum and coursework designed to fully prepare a person to practice vocational rehabilitation counseling; and

(ii) one year of experience as a vocational rehabilitation counselor or completion of a nationally accredited rehabilitation counselor internship program from a college or university; or

(C) a masters degree with at least 32 postgraduate hours including all of the following courses:

(i) medical aspects of disability
(ii) counseling theories
(iii) individual and group appraisal
(iv) career information service
(v) evaluation techniques in rehabilitation
(vi) placement process in rehabilitation
(vii) psychological aspects of disability
(viii) case management in rehabilitation
(ix) utilization of community resources
(x) survey of rehabilitation
(xi) supervised practicum in rehabilitation;

or

(D) a bachelors degree in rehabilitation services and three years of experience as a vocational rehabilitation counselor; and

(2) furnish the director with the addresses and telephone numbers of that person's offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(b) Each person seeking to qualify as a vocational rehabilitation evaluator shall:

(1) furnish proof to the director that the person has:

(A) a masters or doctoral degree in vocational evaluation, rehabilitation counseling, work adjustment, counseling and guidance, psychology or counselor education and one year of experience as a vocational evaluator; or

(B) a bachelors degree in vocational rehabilitation evaluation, psychology, special education or rehabilitation services and three years of experience as a vocational evaluator under the supervision of a masters degree vocational evaluator; and

(2) furnish the director with the addresses and telephone numbers of that person's offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(c) Each person seeking to qualify as a vocational rehabilitation job placement specialist shall:

(1) furnish proof to the director that the person has:

(A) a bachelors degree in vocational rehabilitation, vocational counseling, sociology, psychology, rehabilitation services or social work, and one year of experience as a job placement specialist of disabled individuals; or

(B) at least two years of college level education and three years of experience as a job placement specialist of disabled individuals; and

(2) furnish the director with the addresses and telephone numbers of the person's offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(d) Each person employed by or working under contract as a counselor, evaluator or job placement specialist for the Kansas department of rehabilitation services shall be considered qualified in that person's discipline while working for that agency.