

1986

The Plight of the Displaced Employee Improves: An Analysis of the 1983 Changes to Minnesota's Workers' Compensation System

Paul G. Crochiere

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Crochiere, Paul G. (1986) "The Plight of the Displaced Employee Improves: An Analysis of the 1983 Changes to Minnesota's Workers' Compensation System," *William Mitchell Law Review*: Vol. 12: Iss. 3, Article 7.

Available at: <http://open.mitchellhamline.edu/wmlr/vol12/iss3/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

THE PLIGHT OF THE DISPLACED EMPLOYEE IMPROVES: AN ANALYSIS OF THE 1983 CHANGES TO MINNESOTA'S WORKERS' COMPENSATION SYSTEM

PAUL G. CROCHIERE†

The Minnesota Workers' Compensation system has been the subject of considerable criticism over the past several years. Specifically, Minnesota's benefit and rehabilitation program for permanently partially disabled workers was the brunt of much of this criticism. This criticism led to several studies which recommended a variety of changes in Minnesota's workers' compensation scheme. These studies led to the 1983 amendments of the Minnesota's Workers' Compensation Act. This Article discusses the problems posed by the previous statute, the recommended changes, and the 1983 enactment. This Article also explains how the benefit and rehabilitation scheme functions under the recent amendments.

| | |
|--|-----|
| INTRODUCTION | 624 |
| I. PRIOR TO THE 1983 AMENDMENTS | 629 |
| A. <i>What the System Provided</i> | 629 |
| B. <i>Unwritten Strategies Under the Former Law</i> | 633 |
| 1. <i>Employer Strategies</i> | 633 |
| 2. <i>Employee Strategies</i> | 637 |
| C. <i>Problems and Costs of the Former System</i> | 639 |
| 1. <i>Study Groups' Criticisms</i> | 639 |
| 2. <i>Confusion Regarding Diligent Search for Work</i> .. | 640 |
| 3. <i>Delayed Recovery Syndrome</i> | 642 |
| II. STUDY GROUPS' RECOMMENDATIONS | 642 |
| A. <i>Workers' Compensation Study Commission</i> <i>Recommendations</i> | 643 |
| B. <i>Insurance Division Recommendations</i> | 643 |
| C. <i>Citizens League Recommendations</i> | 644 |
| D. <i>University of Minnesota Recommendations</i> | 645 |

† Mr. Crochiere received his B.A., cum laude from Middlebury College in 1980, and his J.D., magna cum laude from William Mitchell College of Law in 1985. Mr. Crochiere is currently associated with the law firm of Lutin & Englander, Burlington, Massachusetts.

| | | |
|------|--|-----|
| III. | LEGISLATIVE RESPONSE TO PERCEIVED PROBLEMS . . . | 646 |
| | A. <i>Overhaul of Section 176.101</i> | 646 |
| | B. <i>New Standard for Search for Work</i> | 649 |
| | C. <i>Increased Role of Rehabilitation</i> | 649 |
| | D. <i>Incentives Regarding Loss of Function Benefits</i> | 651 |
| | E. <i>Revised Standards for Permanent Partial Disability</i> . . | 653 |
| IV. | PRACTICAL EFFECTS OF THE CHANGES TO THE SYSTEM | 654 |
| | A. <i>Effect on Litigation</i> | 655 |
| | 1. <i>Permanent Partial Disability Rating</i> | 655 |
| | 2. <i>Duration of Indemnity Benefits</i> | 657 |
| | B. <i>Effect on the Delayed Recovery Syndrome Victim</i> | 659 |
| | C. <i>Increased Aggressiveness in Case Management</i> | 660 |
| | D. <i>Increased Permanent Total Disability Claims</i> | 661 |
| | E. <i>Cost Savings</i> | 662 |
| | 1. <i>The Displaced Employee</i> | 662 |
| | 2. <i>The Employer</i> | 663 |
| V. | UNRESOLVED ISSUES | 665 |
| | A. <i>Interpretive Issues</i> | 665 |
| | B. <i>Will QRCs Remain Independent?</i> | 668 |
| | C. <i>Will Attitudes Change?</i> | 669 |
| | 1. <i>Employee Attitudes</i> | 669 |
| | 2. <i>Employer Attitudes</i> | 670 |
| | CONCLUSION | 671 |

INTRODUCTION

A "displaced employee" is an employee who, as a result of permanent disability caused by a work-related injury, cannot return to his pre-injury job, but can perform other work within medical restrictions. The displaced employee is an expensive problem. The most obvious cost to the employee is the physical injury itself. Other costs, though, are also very real. A physical injury or illness may result in extended disability from work and home activities. With physical disability often comes emotional disability in the forms of fear, frustration, anger, and confusion. A severely disabled worker may have to change careers if he cannot return to the pre-injury job and compete for a new job. While statutory workers' compensation benefits are designed to provide an injured employee with a decent standard of living during recuperation, theory and practice do not always coincide, and some employees become destitute as a result of their work-related injuries. If an injured employee

encounters resistance to a claim for benefits, that employee suffers the added costs of paying attorney's fees and developing an adversarial relationship with the employer.

An employer also suffers significant costs when an employee is injured on the job. First, the employer must replace the employee during the disability period. Replacing an employee requires training a new hiree or transferring another employee from a different function. The interruption in the work flow and the retraining time cause inefficiency and a loss of productivity. An employer also incurs expense for the injured employee's medical, rehabilitation, indemnity, and other workers' compensation benefits. To the extent the employer is insured for workers' compensation losses, the employer's insurance premiums will likely rise after a work-related injury. If an employer disputes the compensability of an employee's claim, the employer may incur legal expense, including not only attorney fees, but also time the employer and key employees must spend preparing for and testifying in litigation. Finally, a disputed workers' compensation claim can lead to distrust between the employer and its employees, as well as general deterioration of labor relations.

When a worker is injured on the job, society pays for the injury in several ways. First, because workers' compensation is based on the enterprise liability principle,¹ consumers pay a higher price for the employer's product. Also, taxpayers directly support the Department of Labor and Industry and the Office of Administrative Hearings, the agencies responsible for processing workers' compensation claims. The more injuries and litigation processed through state agencies, the higher the tax cost. To the extent high workers' compensation insurance costs and benefit costs drive employers from the state, the public suffers through lost jobs and tax revenue. If workers' compensation benefits are not payable and the employee does not

1. Enterprise liability theory provides that the consumer price of a product should reflect all costs, including workers' compensation costs, attributable to the product. Thus, if Widget A and Widget B are comparable in every respect except that the process for making Widget A generates more workers' compensation costs than does the process for making Widget B, then the consumer price for Widget A should exceed that of Widget B. *See generally* L. DARLING-HAMMOND & R. KNIESNER, *THE LAW AND ECONOMICS OF WORKERS' COMPENSATION* 3-4 (1980); I. A. LARSON, *WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH* § 2-20 (Desk ed. 1985).

return to work, society supports the employee and her dependents through social security or other government assistance. Finally, society suffers from a human perspective when some of its own members become disabled and can no longer participate in life as fully as before.²

Obviously, a displaced employee is entitled to compensation from the employer. However, reasonable questions may arise as to the amount of compensation, the type of compensation, and the purpose for which the compensation is given. Should the employee's wages be replaced totally or should the employee be placed at a level just above that of destitution?³ How should the timing of the benefits be regulated? Should the benefits be received on a weekly basis or in a lump sum?⁴ If the employee's compensation benefits are too high, will this create a disincentive for the employee to return to work? If the benefits are too low, will the employee be unable to maintain a decent standard of living? Should consumer interest in low product prices and employer concerns about minimizing workers' compensation costs be considered?

Few would dispute that a displaced worker is entitled to be reimbursed for all medical costs related to the work injury. A separate issue is whether the displaced employee is entitled to rehabilitation or retraining benefits. At what point in the employee's disability should these benefits commence? Should the benefits be mandatory or optional? Are rehabilitation or retraining always necessary? Are they cost effective? Who should monitor rehabilitation and retraining programs?

Since a disabled employee is unable to return to his pre-injury job, a return to work with the pre-injury employer would require the employer to either modify the original job, create a new job to fit the employee's restrictions, or take another employee off a light duty job. An employer may not want a displaced employee back on any job. If the displaced employee

2. See MINNESOTA INSURANCE DIVISION, WORKERS' COMPENSATION IN MINNESOTA: AN ANALYSIS WITH RECOMMENDATIONS (1982) [hereinafter cited as INSURANCE DIVISION RECOMMENDATIONS].

3. According to Professor Arthur Larson, in classic workers' compensation theory, benefits are designed to forestall destitution by supplying regular periodic income. Larson, *The Wage-Loss Principle in Workers' Compensation*, 6 WM. MITCHELL L. REV. 501, 512 (1980).

4. See *id.* at 512-13; Kirwin, *Analysis of Recent Workers' Compensation Developments*, 8 WM. MITCHELL L. REV. 847, 929-31 (1982); Kirwin, *Workers' Compensation Benefit Ideas*, 39 BENCH & B. MINN. Dec. 1982, at 31, 32.

does not return to work with the original employer, the next option is to look to other employers. A prospective employer will be concerned about being responsible for an aggravation or reinjury. A second employer might infer from the refusal of the original employer to take the employee back to work that the employee is a problem worker. The displaced employee may have to forfeit skills developed in the pre-injury job, and consequently be forced to reenter the job market as an unskilled, entry-level applicant.

Responsibility for the employee's retraining and reentry into the job market is another problem posed by the displaced employee issue. If no one takes responsibility, the employee will continue to be without a job and without all the financial, emotional, and social benefits that come with it. Arguably, the employer should be responsible for the employee's recovery because the injury would not have happened but for the employment situation. Since workers' compensation benefits are awarded in a no-fault system, however, placing full responsibility on the employer for the employee's recovery hardly seems fair. The employer has no opportunity to show that the injury was not the employer's fault.

Logically, the employee and employer must share the responsibility for recovery. The government as a representative of society also has a role in the employee's recovery. The government can monitor the recovery process and monitor the efforts of the employee and employer. Further, the government has available to it resources that may be unavailable to an employee or employer. To the extent these resources enable an employee to return to work and recover more quickly, society benefits by their application.

Minnesota's treatment in the 1970s and the early 1980s of the displaced employee was criticized widely. Detailed studies of the problems of the pre-1983 Minnesota workers' compensation system were conducted by a specially commissioned state Workers' Compensation Study Commission,⁵ the Minne-

5. MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR (1979) [hereinafter cited as STUDY COMMISSION RECOMMENDATIONS]. The Workers' Compensation Study Commission was established in order to improve the system of providing workers' compensation insurance at fair and reasonable rates to employers within the state. *Id.* at 1. The Commission was given charge to study and report on:

(a) the procedure by which workers' compensation insurance premium rates

sota Insurance Division,⁶ the Citizens League,⁷ and the University of Minnesota Industrial Relations Center.⁸ Although these studies concentrated on diverse areas of the system, common conclusions were that the workers' compensation system in Minnesota was inefficient, expensive, confusing, and at times, misguided. The critics made specific recommendations for improvement.

Based on the findings of the various studies as well as on intense political pressure from the business sector to reduce the costs of workers' compensation in Minnesota, the legislature made major revisions to the Workers' Compensation Act in 1983.⁹ This Article will review the criticism of the pre-1983 statute, explain the 1983 statutory changes as they affect the displaced employee, and discuss the practical implications of the new law with respect to the displaced employee.¹⁰ The analysis will consider the system's treatment of the displaced employee from the perspectives of the employee, the employer,¹¹ and society as a whole.

are established; (b) the level of Minnesota workers' compensation premiums as compared to premium levels in other jurisdictions; (c) the various methods of providing workers' compensation insurance to employers in other jurisdictions; (d) the administration of the law by the department of labor and industry and workers' compensation court of appeals; and (e) the expense factor in the rate in terms of whether the factor is inadequate or excessive.

Id. at 2.

6. INSURANCE DIVISION RECOMMENDATIONS, *supra* note 2, at 55. The report discusses benefit operations.

7. CITIZENS LEAGUE, WORKERS' COMPENSATION REFORM: GET THE EMPLOYEES BACK ON THE JOB (1982) [hereinafter cited as GET THE EMPLOYEES BACK ON THE JOB].

8. C. ARTHUR WILLIAMS, JR., R. AZEVEDO, M. GONANNO, AND P. SCHUMANN, MINNESOTA WORKERS' COMPENSATION BENEFITS AND COSTS: AN OBJECTIVE ANALYSIS (1983) [hereinafter cited as UNIV. OF MINN. REPORT].

9. See Act of June 7, 1983, ch. 290, 1983 Minn. Laws 1310 (codified in scattered sections of MINN. STAT. ch. 43A, 79, 147, 148, 175, 176, 176A, 268, 471, 346 (1984)).

10. Excluded from the scope of this paper are discussions of detailed procedural issues regarding administrative conferences and appellate procedures, insurance rate issues and other insurance matters, workers' compensation systems of other states, and the intricate permanent partial disability schedules and medical fee schedules. Also excluded from the scope of this Article are several relatively minor changes to the workers' compensation statute passed subsequent to the 1983 amendments. See Act of April 23, 1984, ch. 432, 1984 Minn. Laws 97; Act of May 22, 1985, ch. 234, §§ 3-18, 1985 Minn. Laws 739, 745-54; Act of June 27, 1985, ch. 13, § 273, 1985 Minn. Laws 2072, 2253 (First Special Session).

11. Because most of Minnesota's employees work for self-insured employers, references to employers will assume self-insured status, unless otherwise indicated.

I. PRIOR TO THE 1983 AMENDMENTS

A. *What the System Provided*

Prior to 1984, Minnesota's Workers' Compensation Act was intended to "assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of chapter 176."¹² The workers' compensation law was deemed remedial social legislation which was to be liberally construed on behalf of the worker.¹³

Under the former statute, a displaced employee was eligible for weekly indemnity benefits to compensate for lost earning capacity as a result of the work-related injury. For an injury producing temporary total disability, the employee was entitled to two-thirds of his daily wage at the time of injury. This payment was subject to a maximum indemnity payment of the statewide average weekly wage and a minimum payment of twenty percent of the statewide average weekly wage.¹⁴ Temporary total disability could be unlimited in duration; it was payable during the entire period of disability, with payments to be made at the intervals when the wage was payable. While the statute defined total disability as an "injury which totally incapacitates the employee from working at an occupation which brings him an income,"¹⁵ the functional test to determine temporary total disability was set forth in *Schulte v. C.H. Peterson Construction Co.*¹⁶ *Schulte* required employees to prove inability

12. Act of June 1, 1981, ch. 346, § 52, 1981 Minn. Laws 1611, 1641 (current version at MINN. STAT. § 176.001 (1984)).

13. See, e.g., *Savina v. Litton Indus./Litton Medical Sys.*, 330 N.W.2d 456, 457-58 (Minn. 1983) (statute of limitations); *Fuller v. Farmers' Coop. Oil Ass'n*, 322 N.W.2d 359, 360-61 (Minn. 1982) (procedural rules to be liberally construed); *Chillstrom v. Trojan Seed Co.*, 242 Minn. 471, 480, 65 N.W.2d 888, 894 (1954) (admission of evidence); *Kaletha v. Hall Merchantile Co.*, 157 Minn. 290, 293, 196 N.W. 261, 262 (1923) (injury caused by cigarette smoking held to arise out of and in the course of employment). But see *Kaste v. Mark Sand & Gravel*, 37 Minn. Workers' Comp. Dec. 226, 228 (1984) (liberal construction rule deals only with the kind of activities and injuries to which the workers' compensation law applies, not with the weight to be given evidence nor with the burden of proof).

14. Act of May 27, 1977, ch. 342, § 12, 1977 Minn. Laws 697, 703-09 (codified as amended at MINN. STAT. § 176.101, subd. 1 (1984)).

15. *Id.* (codified at MINN. STAT. § 176.101, subd. 5 (1984)).

16. *Schulte v. C.H. Peterson Constr. Co.*, 278 Minn. 79, 153 N.W.2d 130 (1967). The court stated that an employee was temporarily totally disabled if: his physical condition, in combination with his age, training, and experience, and the type of work available in the community, cause[d] him to be

to find and hold a job. Thus, employees were required to make a reasonably diligent search for work to prove entitlement to benefits. If an employee did not search for work, the court had no basis upon which to determine whether the employee was temporarily totally disabled.¹⁷

If an injury *permanently* and *totally* incapacitated an employee from working at any occupation which could bring him an income, the employee was eligible for permanent total disability benefits.¹⁸ Permanent total disability benefits were paid weekly in the same amount as temporary total disability benefits. Permanent total benefits lasted for the lifetime of the employee and were subject to annual escalations,¹⁹ supplementary benefits adjustments,²⁰ and social security offsets.²¹

The third type of indemnity benefits available under the former statute were temporary partial disability benefits. Temporary partial disability benefits represented two-thirds of the difference between the daily wage of the employee at the time of injury and the rate the employee is able to earn in the partially disabled condition.²² Temporary partial disability payments were paid at the intervals when the wage was payable and were subject to the same maximum limit as temporary total disability benefits.²³ An employee entitled to temporary partial disability benefits typically is able to work, but is subject to certain medical restrictions.

unable to secure anything more than sporadic employment resulting in insubstantial income The concept of temporary total disability is primarily dependent upon the employee's ability to find and hold a job, not his physical condition.

Id. at 83, 153 N.W.2d at 133-34.

17. See *Ryan v. MTC Transit Operating Div.*, 32 Minn. Workers' Comp. Dec. 97, 100 (1979).

18. Act of May 26, 1977, ch. 342, § 12, 1977 Minn. Laws 697, 703-09 (codified at MINN. STAT. § 176.101 subds. 4-5 (1984)). The permanent total disability provisions were not changed significantly by the 1983 amendments.

19. Act of June 1, 1981, ch. 346, § 137, 1981 Minn. Laws 1611, 1687-88 (codified at MINN. STAT. § 176.645 (1984)). Temporary total and temporary partial disability benefits were and are also subject to escalation. *Id.*

20. *Id.* § 85, 1981 Minn. Laws at 1663 (codified as amended at MINN. STAT. § 176.132, subd. 2 (1984)).

21. Act of May 27, 1977, ch. 342, 1977 Minn. Laws 697, 703-09 (codified as amended at MINN. STAT. § 176.101, subd. 2 (1984)).

22. *Id.* § 12, 1977 Minn. Laws at 703-09 (codified as amended at MINN. STAT. § 176.101 subd. 2 (1984)).

23. *Id.*

An important and troublesome provision in the former temporary partial disability statute provided:

If the employer does not furnish the worker with work which he can do in his temporary partially disabled condition and he is unable to procure such work with another employer, after reasonably diligent effort, the employee shall be paid at the full compensation rate for his or her temporary total disability.²⁴

The above-quoted language resulted in some theoretical blurring of the distinction between temporary partial and temporary total disability. An employee was required to perform a reasonably diligent search for work under *Schulte* to qualify for temporary total benefits, and the employee was required to do the same pursuant to the temporary partial statute to obtain temporary partial benefits at the temporary total rate. In practice, most people termed the benefits "temporary partial" when the employee returned to a lower paying job after injury and "temporary total" when the employee returned to no job at all.²⁵

In addition to indemnity benefits, the former statute provided for loss of function benefits, or permanent partial disability benefits.²⁶ Permanent partial disability was payable in a lump sum if the employee returned to work, received permanent total disability payments, retired from the work force, or completed a rehabilitation plan, but was not offered suitable work by the pre-injury employer and could not procure such work elsewhere.²⁷ This last category led to disputes over the diligence of the employee's efforts to find work with other employers. Permanent partial disability benefits were payable at the same intervals as temporary total payments if temporary total payments had ceased but the employee had not returned

24. Act of June 4, 1975, ch. 358, § 8, 1975 Minn. Laws 1168, 1174-81, amended by Act of June 7, 1983, ch. 290, § 43, 1983 Minn. Laws 1310, 1339 (eliminating the troublesome language).

25. For a discussion of the temporary total disability/temporary partial disability at the temporary total rate controversy, see separate opinions of Workers' Compensation Court of Appeals Judges Hanson and Adel in *Feilen v. Whirlpool Corp.*, No. 470-34-8032, slip op. at 7-9 (Minn. Workers' Comp. Ct. App. June 25, 1985).

26. Act of June 4, 1975, ch. 359, § 8, 1975 Minn. Laws 1168, 1174-81, repealed by Act of June 7, 1983, ch. 290, § 173, 1983 Minn. Laws 1310, 1404-05.

27. Act of June 1, 1981, ch. 346, § 58, 1981 Minn. Laws 1611, 1646 (codified at MINN. STAT. § 176.021, subd. 3a (1984)).

to work.²⁸

Under the former statute, permanent partial disability benefits were fixed amounts. The amount of permanent partial disability payable depended only on the percent of disability to a specific body part²⁹ and the number of weeks of compensation attributable to such disability according to the schedule set forth in the statute.³⁰

Under both the prior law and the current law, the displaced employee was entitled to reimbursement for all medical costs reasonable and necessary to cure and relieve the employee from the effects of the work-related injury.³¹ The displaced employee was also entitled to rehabilitation or retraining benefits.³² The statute provided that "vocational rehabilitation shall train an employee so he may be returned to a job related to his former employment or to a job in another work area which produces an economic status as close as possible to that he would have enjoyed without disability."³³ Within 30 days of an employer's receipt of medical information that the employee was unable due to a personal injury or occupational disease to return to the pre-injury occupation, the employer had to provide rehabilitation consultation for the employee.³⁴ If the consultant determined rehabilitation would significantly increase the injured employee's employability, the employer and rehabilitation consultant submitted a specific rehabilitation plan to the commissioner. The Department of Vocational Rehabilitation was temporarily responsible for rehabilitation if the employer refused to provide it to the employee. By failing to submit to any reasonable examinations and evaluative pro-

28. *Id.*

29. Disability ratings were left entirely to the discretion of medical providers. For a discussion of problems resulting from the lack of disability standards, see *infra* text accompanying notes 163-64.

30. Act of June 4, 1975, ch. 359, § 8, 1975 Minn. Laws 1168, 1174-81, *repealed by* Act of June 7, 1983, ch. 290, § 173, 1983 Minn. Laws 1310, 1404-05.

31. MINN. STAT. § 176.135 (1984), *amended by* Act of Mar. 25 1986, ch. 461, § 20, 1986 Minn. Sess. Law Serv. 544, 562-63 (West).

32. Act of June 7, 1979, ch. 3, § 36, 1979 Minn. Laws 1268, 1278-81 (extra session) (current version at MINN. STAT. § 176.102 (1984)).

33. *Id.* § 36, 1979 Minn. Laws at 1278-79, (extra session) *amended by* Act of June 7, 1983, ch. 290, § 69, 1983 Minn. Laws 1310, 1349 (codified at MINN. STAT. § 176.102, subd. 1 (1984)).

34. *Id.* § 36, 1979 Minn. Laws at 1279 (extra session) *amended by* Act of June 7, 1983, ch. 290, § 73, 1983 Minn. Laws 1310, 1350-52 (codified at MINN. STAT. § 176.102, subd. 4 (1984)).

cedures necessary to determine the need for and details of a rehabilitation plan, the employee risked reduction in the amount of compensation or suspension of the right to compensation.³⁵

The former statute contained a special provision guaranteeing the employee who participated in on-the-job training a wage equal to the after-tax wage the employee earned before the injury and provided incentives for a second employer to hire the injured employee permanently.³⁶ The former statute also provided special retraining benefits for the displaced employee. While participating in an approved retraining program, an employee was eligible for up to 156 weeks of compensation at an amount equal to 125% of his temporary total disability rate.³⁷

B. Unwritten Strategies Under the Former Law

1. Employer Strategies

All employers seek to reduce workers' compensation costs. When confronted with a displaced employee under the former system, faced responsibility for indemnity benefits, loss of function benefits, medical benefits, and possibly rehabilitation benefits. To reduce costs, employers sought to limit these benefits whenever possible.

Employers could do little to limit loss of function benefits other than to send the employee to a "defense oriented" doctor who typically would give the employee a low disability rating. To reduce medical costs, some employers actively discouraged employees from seeing chiropractors. Certain employers questioned the effectiveness of chiropractic treatment. Other employers objected to the number of treatments some chiropractors claimed were necessary. Employers also kept medical costs down by falsely instructing employees that only the cost of a specified doctor would be reimbursed.³⁸ The company would then send the employee to "its" doctor, and

35. *Id.*

36. *Id.* § 36, 1979 Minn. Laws at 1280 (extra session), amended by Act of June 7, 1983, ch. 290, § 74, 1983 Minn. Laws 1310, 1352-53 (codified at MINN. STAT. § 176.102, subd. 5 (1984 & Supp. 1985)).

37. Act of June 7, 1979, ch. 3, § 36, 1979 Minn. Laws 1256, 1281 (extra session), amended by Act of June 7, 1983, ch. 290, § 81, 1983 Minn. Laws 1310, 1355 (codified at MINN. STAT. § 176.102, subd. 11 (1984)).

38. This, of course, was not true. MINN. STAT. § 176.135, subd. 1 (1982) pro-

hope the doctor would indicate that further medical treatment was unnecessary and that the employee could return to work. The practice of keeping a "defense" doctor on retainer provided the employer with fast, predictable service at a known cost. It also discouraged employees from seeing "liberal" doctors whose findings and conclusions could prove expensive for the employer.

To reduce or avoid rehabilitation or retraining costs, many employers resisted scheduling rehabilitation consultations with employees until required by law to do so. Some employers did not actively encourage rehabilitation because it meant additional costs in the short run and because questioned its long term effectiveness of rehabilitation.³⁹ There also was confusion as to what "rehabilitation" involved. Before 1979, "rehabilitation" meant "retraining."⁴⁰ Retraining was often expensive, time-consuming, and ineffective.⁴¹ Not all employers understood that "rehabilitation" under the 1979 amendments also included medical evaluation, physical rehabilitation, work evaluation and counseling, job modification, and other measures short of actual retraining programs.⁴² To employers who were not self-insured, it was often easier to refuse to bring a displaced employee back to work and let the insurance company worry about future job placement than to get involved with extensive retraining programs. To self-insured employers, the uncertain effectiveness of rehabilitation and its very certain costs made it unattractive.

Retraining was unattractive to employers for two reasons. First, an employee in a retraining program was eligible for 125% of the compensation that would be due if the employee were receiving temporary total disability benefits.⁴³ Second, retraining programs often took from several months to several years to complete.⁴⁴ Employers were reluctant to admit that the employee could not find some other job within the time it

vided for reimbursement of any health care costs reasonably required to "cure and relieve from the effects of the injury."

39. UNIV. OF MINN. REPORT, *supra* note 8, at 190-91.

40. J. BENANAV & S. KEEFE, TWO TIER IN MINNESOTA 61 (1984).

41. See GET THE EMPLOYEES BACK ON THE JOB, *supra* note 7, at 30.

42. See INSURANCE DIVISION RECOMMENDATIONS, *supra* note 2, at 144.

43. Act of June 7, 1979, ch. 3, § 36, 1979 Minn. Laws 1256, 1281 (extra session) (current version at MINN. STAT. § 176.102, subd. 11 (1984)).

44. J. BENANAV & S. KEEFE, *supra* note 39, at 62; see UNIV. OF MINN. REPORT, *supra* note 8, at 196.

took the employee to complete a retraining program. These generalizations did not apply in every case. To the extent they did apply, however, they frustrated the system.

The most elaborate cost avoidance efforts were made by employers in the area of indemnity benefits. The displaced employee typically received temporary total disability benefits. The employer could reduce indemnity costs several ways. The most obvious was by providing the employee a job at the same wage rate. Presuming that the displaced employee was unable to return to the pre-injury job, the employer had to offer a different or modified job to the employee. While many employers did offer legitimate modified jobs to displaced employees, other employers found techniques to shortcut the system. For example, the employer might offer a job which on its face was within the employee's restrictions, but which actually required exertions beyond those approved by the employee's doctor.⁴⁵ The employee might attempt to perform the job temporarily, but be unable to continue in it. The employer would then assert that it owed no further indemnity benefits to the employee because it had offered the employee a job within the restrictions and the employee had voluntarily quit the job. Similar results would occur when the employer would pressure the employee or make the job uncomfortable for the employee through subtle means.⁴⁶ Certain employers seemed to believe that as long as they offered the employee a job which was generally within medical restrictions, they would be able to discontinue benefits forever.

Another technique employers used to terminate indemnity benefits was to build a record to show that the employee was not as disabled as the employee claimed. Employers hired private investigators to monitor the employees' activities. Investigators used elaborate means to catch employees in activities inconsistent with the alleged disability. Forms of entrapment were sometimes employed,⁴⁷ and videotaping of the em-

45. See, e.g., *Koenig v. Northern Insulation Co.*, 358 N.W.2d 644, 646 (Minn. 1984); *Paulson v. Ceco Corp.*, 265 N.W.2d 647, 647-48 (Minn. 1978); *Johnson v. Red Wing Shoe Co.*, 37 Minn. Workers' Comp. Dec. 522, 525 (1984), *sum aff'd, id.* at 529 (1985).

46. See, e.g., *Shogren v. Bethesda Lutheran Medical Center*, 359 N.W.2d 595, 597 (Minn. 1984); *Wessling v. Briggs Transp. Co.*, No. 468-34-1729, slip op. at 2 (Minn. Workers' Comp. Ct. App. June 6, 1985).

47. *Rhoades v. Nabisco, Inc.*, No. 475-38-4315, slip op. at 4 (Minn. Workers'

ployee's activities at home or elsewhere was common.⁴⁸

Employers attempted to discontinue indemnity benefits by trying to show that employees did not conduct diligent searches for work. Instead of offering rehabilitation assistance to enable the employee to find a job, some employers preferred to monitor secretly the employee's search for work. Once the employer felt the search efforts were not diligent, the employer would discontinue benefits.⁴⁹

Of course, not all instances of employers failing to reinstate displaced employees were attributable to employers' "dirty tricks." Bringing the employee back to work involved certain obstacles for the original employer. Some employers could not or would not reinstate the employee because of the nature of the disability. Small employers in particular had few light-duty jobs available to offer displaced employees. Presumably, an employer had to replace the displaced employee during the period of temporary total disability. Returning the employee to the old job required shuffling another employee, causing further disruption to the work force. Occasionally, union rules precluded an employer from putting the displaced employee in an appropriate light-duty job because the job was held by a more senior worker.

Despite the open-ended nature of temporary total benefits under the former system, once an employer determined that it would not rehire a displaced employee in any job, the employer often showed little concern about the employee's return to work. Many employers simply seemed to write this employee off as a loss unless information became available that the employee was doing something inconsistent with medical restrictions or was not searching for work. By ignoring the employee, the employer not only suffered increased indemnity losses, but also did nothing to expedite the employee's rehabilitation effort.

Comp. Ct. App. May 14, 1985) ("The principles of entrapment . . . do not apply to workers' compensation cases.").

48. See, e.g., *Cavanaugh v. Frederick Willys, Inc.*, 361 N.W.2d 49, 52 (Minn. 1985); *Rhoades*, No. 475-38-4315, slip op. at 4; *Ryan*, 32 Minn. Workers' Comp. Dec. at 102 (1979) (Otto, J., dissenting).

49. E.g., *Welch v. Sport Port, Inc.*, No. 473-60-6549, slip op. at 2-3 (Minn. Workers' Comp. Ct. App. July 30, 1985); *Lynch v. Flour City Architectural Metals*, No. 474-52-8855, slip op. at 2-3 (Minn. Workers' Comp. Ct. App. Feb. 14, 1985); *Westcott v. Formac Corp.*, 37 Minn. Workers' Comp. Dec. 79, 81-82 (1984).

2. Employee Strategies

Just as employers tried to minimize costs, the employees attempted to maximize benefits. For some employees, temporary total benefits came close to or even exceeded pre-injury after-tax income.⁵⁰ Because they experienced little or no reduction in disposable income by “going on compensation,” some employees made the seemingly logical decision to continue receiving compensation benefits for longer than absolutely necessary. They tried accomplishing this by staying away from the employer, by continuing to complain of pain when most of the pain had actually subsided, and by simply not making an effort to return to work. Not all employees guilty of the above conduct were necessarily “bad.” Many were unaware of their specific duties under the system. Many believed they deserved some “paid vacation” for having been hurt on the job.

Although most workers' compensation claims were paid voluntarily by employers under the former law, a significant number of Minnesota claims involved the assistance of an attorney for the employee.⁵¹ Once the employee hired an attorney, the process became adversarial. If the claim went to hearing, the employee knew, or was informed by counsel, that disability would have to be proved. Some employees believed, not illogically, that obtaining a job shortly before trial could cause a judge to question the diligence of the prior work search and the severity of the alleged disability. Thus, the focus before trial at times was on sufficiently documenting disability rather than seriously seeking an appropriate job. Employees' attorneys, who of course received larger fees for larger recoveries, played a significant role in this phenomenon.⁵²

Employees were to prove they could not find work, and they

50. See UNIV. OF MINN. REPORT, *supra* note 8, at 38-41.

51. Minnesota's litigation rate as compared to first Reports of Injury was 8.9% in 1975, 8.4% in 1977, 10.4% in 1980, and 11.1% in 1981. GET THE EMPLOYEES BACK ON THE JOB, *supra* note 7, at 13; UNIV. OF MINN. REPORT, *supra* note 8, at 208-10.

52. For example, a 1982 publication by a workers' compensation attorney provided a form for employees' attorneys to give to clients to explain the employee's obligations regarding a diligent search for work. See generally J. HERBULOCK, A GUIDE TO MINNESOTA WORKERS' COMPENSATION (1982). The form told the employees:

You cannot assume that no one will give you work. That is what you are trying to prove. The only way you can prove it is by asking them. If you don't have this evidence, the lawyer will not be able to prove your entitle-

dutifully did whatever they could to do so. For example, some employees made mechanical, uninspired, and well-documented contacts with a certain number of employers each week.⁵³ The contacts often were cold calls to companies unlikely to offer employment. Another tactic was to register with public or private employment agencies and call the agencies periodically to check on the market.⁵⁴ While some employees did obtain work through agencies, other employees simply waited for the agencies to place them in jobs; not surprisingly, this seldom happened.

Just as employers sent employees to "defense doctors," employees' attorneys sent their clients to "plaintiff's doctors." "Plaintiff's doctors" typically gave high disability ratings and assigned substantial restrictions to injured employees. The high disability ratings were used to claim higher permanent partial disability benefits. The substantial restrictions, often combined with instructions to avoid all work for a certain period, enhanced employees' chances of receiving temporary total benefits for longer periods of time. Unfortunately, employees seldom received a truly neutral evaluation of their medical condition when the only doctors they saw were doctors reputed to be either conservative or liberal.⁵⁵

ment to disability to benefits after the doctor says you are capable of doing some work. With the evidence you can prove your entitlement.

Id. at 80. Without further explanation by an attorney, an injured employee reading such a form could understand his role was not to affirmatively seek employment, but rather, to obtain sufficient documentation for job refusals in order to prevail in court. The subtle distinction affected the employee's entire approach and success at a "diligent search for work."

53. See, e.g., *Welch*, No. 473-60-6549, slip op. at 3 (despite numerous contacts, employee failed to exhibit a truly sincere desire to return to work); *Willis v. Mathy Constr. Co.*, No. 471-64-4127, slip op. at 2 (Minn. Workers' Comp. Ct. App. Feb. 15, 1985) (114 telephone contacts in 6 months); *Engebrit v. Control Data Corp.*, No. 472-46-3537 (Minn. Workers' Comp. Ct. App. March 29, 1984) ("mere recitation of the number of pages and the number of contacts claimed to have been made is not adequate." Employee produced 46 pages listing 297 potential employers contacted).

54. See, e.g., *Woelfel v. Plastics, Inc.*, No. 470-54-0313 (Minn. Workers' Comp. Ct. App. Jan. 28, 1985), *sum aff'd*, 371 N.W.2d 215 (1985) (four visits to Minn. Employment Services); *Smith v. County Seat*, No. 253-76-8678 (Minn. Workers' Comp. Ct. App. Sept. 12, 1984) (contacted one employment agency); *Roland v. Southwest Minnesota Opportunity Council*, 36 Minn. Workers' Comp. Dec. 446, 449 (1984) (contacted Dept. of Vocational Rehabilitation and Minn. Employment Services).

55. According to a source employed by the Department of Labor and Industry, a well-known "plaintiff's doctor" once explained to a compensation judge his reason for always giving high disability ratings. The doctor's rationale was that, through litigation or settlement, disability ratings of "defense" and "plaintiff" doctors always

The tactical games played by employers and employees in workers' compensation litigation usually caused animosity between parties, delayed recovery, and worked against the best interests of the system as a whole.

C. *Problems and Costs of the Former System*

1. *Study Groups' Criticisms*

Pressure from employers, insurers, labor, and citizens' groups to revise workers' compensation in the late 1970's and early 1980's gave rise to several studies of Minnesota's system.⁵⁶ These studies identified numerous problems with the system. Minnesota's cost of workers' compensation insurance was the highest in the region.⁵⁷ A related phenomenon was that Minnesota also had an unusually high litigation rate.⁵⁸ Many criticisms concerned treatment of displaced employees. Critics complained that Minnesota's system did not properly provide incentives for employees to return to work, and instead actually provided disincentives.⁵⁹ The incentives that did exist were often unclear and inadequate.⁶⁰ The open-ended

seemed to be averaged to reach the ultimate disability award. In order for his patient to be awarded the disability rating this doctor believed appropriate, the doctor would assign a disability rating 5% to 10% above the true disability. As long as the "defense" doctor did the opposite to appease her client, the final award to the employee would be fairly indicative of the employee's condition.

56. See *supra* notes 5-8 and accompanying text. Leading the criticism of the Minnesota system was Professor Arthur Larson in a 1980 law review article published in the *William Mitchell Law Review*. Larson, *supra* note 3. Larson's criticism centered on the philosophy behind the permanent partial disability benefits in Minnesota. Professor Larson favored a strict wage loss system as opposed to a system that compensated for both wage loss and functional loss. See *id.* at 522-23. He suggested that compensation for functional loss serves no purpose in encouraging an employee to return to work and often yields inequitable results between workers with the same basic injury. See *id.* at 515-16. Professor Larson found Minnesota's permanent partial disability system which incorporates wage loss and functional loss to be unduly expensive, litigious, inequitable, and time-consuming. See *id.* at 522, 532.

57. GET THE EMPLOYEES BACK ON THE JOB, *supra* note 7, at 9 (Minnesota's insurance rates ranked 12th highest in a study of 43 states. Minnesota's rates were 91% higher than South Dakota's, 70% higher than Wisconsin's, 38% higher than Iowa's, and 26% higher than the national average).

58. MINNESOTA DEPARTMENT OF LABOR & INDUSTRY, CONTROLLING WORKERS' COMPENSATION COSTS: A GUIDE FOR EMPLOYERS 19 (1984) [hereinafter cited as EMPLOYERS' GUIDE]. See UNIV. OF MINN. REPORT, *supra* note 8, at 71-72, 216-17.

59. See GET THE EMPLOYEES BACK ON THE JOB, *supra* note 7, at i (discussing the incentives for some workers to prolong disability rather than return to work).

60. See *id.*

nature of the disability system,⁶¹ as well as the fact that employees with relatively low income often received over ninety percent of their pre-injury take home pay in indemnity benefits,⁶² discouraged employees from returning to work promptly.

The studies also found that the method of delivery for benefits was inefficient and encouraged litigation and adversarial relationships between employers and employees.⁶³ Another contributor to the high litigation rate in Minnesota was the uncertainty regarding a displaced employee's continuing eligibility for indemnity benefits.⁶⁴ Neither employers nor employees could be certain if they had complied with their duties and taken advantage of their rights. Due to the system's complexity, parties had to hire lawyers to handle even relatively simple matters.

The rehabilitation system also received criticism. The 125% compensation rate for retraining encouraged displaced employees to spend several months to several years in retraining programs. Critics charged that retraining was the least effective and most expensive method of rehabilitation, but was the one the statute made most attractive to employees.⁶⁵ Opponents also criticized the lack of incentives for employers to provide proper rehabilitation and for employees to cooperate with rehabilitation.⁶⁶

2. Confusion Regarding Diligent Search for Work

A major uncertainty of the former system was what constituted a diligent search for work. A huge but unpredictable body of law developed as various courts struggled to define diligent search for work. As a result, any claim involving substantial dollars or any hint of a diligent search for work issue

61. See *id.* at 35 ("open ended eligibility encouraged workers to gradually develop a dependency upon workers' compensation benefits").

62. See UNIV. OF MINN. REPORT, *supra* note 8, at 39. For example, a single totally disabled worker previously grossing \$200 per week, with spendable earnings of \$152, would receive \$145 per week in benefits or 95% of workers' prior net earnings. *Id.*

63. INSURANCE DIVISION RECOMMENDATIONS, *supra* note 2, at 205.

64. See *id.* at 127; GET THE EMPLOYEES BACK ON THE JOB, *supra* note 7, at 15 (the law is not certain as to when benefits cut off); UNIV. OF MINN. REPORT, *supra* note 8, at 211-13.

65. GET THE EMPLOYEES BACK ON THE JOB, *supra* note 7, at 30.

66. INSURANCE DIVISION RECOMMENDATIONS, *supra* note 2, at 146; UNIV. OF MINN. REPORT, *supra* note 8, at 190, 199-200.

was litigated. In evaluating an employee's search, courts made case-by-case determinations and looked to such factors as the employee's disability, work searching technique, age, job skills, education, and geographic location.⁶⁷ On close diligent search issues, courts may have been influenced by the liberal construction rule.⁶⁸

The Workers' Compensation Court of Appeals (WCCA) has at times attempted to approach "diligent search for work" issues using quantitative analyses. The WCCA has looked at the number of job contacts per week an employee has made.⁶⁹ The WCCA has also considered the quality of job contacts made.⁷⁰ Cases have been decided on whether an employee filed out job applications or just made phone calls,⁷¹ whether an employee looked for work outside her immediate community,⁷² and whether an employee moved from one community to another.⁷³ The reasonableness of self-employment in lieu of a diligent search with established employers has also been considered,⁷⁴ as has the issue of voluntary or forced retirement.⁷⁵ On each of these issues, judicial standards were un-

67. See, e.g., *Schulte*, 278 Minn. at 83, 153 N.W.2d at 133-34; see also *Cavanaugh*, 361 N.W.2d at 53 (job skills and education); *Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54, 62 (Minn. 1984) (age and nature of disability); *Paine v. Beek's Pizza*, 323 N.W.2d 812, 816 (Minn. 1982) (geographic location); *Schlief v. ITT Continental Baking Co.*, 36 Minn. Workers' Comp. Dec. 82, 84 (1983) (work searching technique).

68. Although this proposition is not explicitly set forth in published cases, it is a widely held belief among workers' compensation defense attorneys.

69. See, e.g., *Willis*, No. 471-64-4127 (4 telephone calls per week insufficient); *Engelbrit*, No. 472-46-3537 (Minn. Workers' Comp. Ct. App. Mar. 29, 1984) (1.25 contacts per week insufficient; 10 contacts per week sufficient).

70. See, e.g., *Welch*, No. 473-60-6549 (important that "the factfinder can infer a truly sincere desire and endeavor on the part of an employee to return to the labor market").

71. See, e.g., *Willis*, No. 471-64-4127, slip op. at 2 (telephone calls alone do not constitute diligent search); *Schlief*, 36 Minn. Workers' Comp. Dec. at 83-84 (telephone calls do not constitute diligent search).

72. See *Petschl v. Britton Motor Serv.*, 323 N.W.2d 788, 789-90 (Minn. 1982) (no diligent search when employee able to drive 60 miles to metropolitan area, but fails to include metropolitan area in job search). *But cf.* *Fredenburg v. Control Data Corp.*, 311 N.W.2d 860, 864 (Minn. 1981) (employee not required to drive into metropolitan area where employee's back condition would make drive painful).

73. See *Paine*, 323 N.W.2d at 815 (no diligence when employee removed self from metropolitan area to "low employment opportunity area").

74. See generally *LeMicux v. M.A. Mortenson*, 306 Minn. 50, 234 N.W.2d 897, 900 (1975); *Pitzer v. Capp Homes/Midwest Drivers*, No. 473-36-6760, slip op. at 2 (Minn. Workers' Comp. Ct. App. May 7, 1984).

75. See *Henry v. Sears Roebuck & Co.*, 286 N.W.2d 720, 723 (Minn. 1979).

clear, largely because of differing views of what was "diligent" in a particular employee's circumstances.

3. *Delayed Recovery Syndrome*

The following excerpt describes the delayed recovery syndrome, an unfortunate but common problem facing the displaced employee:

An employee with a work-related back injury has been off of work for three months. His doctor prescribed the usual treatments, but the employee has not appeared to improve and the doctor can find no objective evidence of a continuing physical problem. Doctor refers the employee to an orthopedic surgeon who also finds nothing physically wrong. Yet the employee complains that he had terrible pain and insists he cannot go back to work.⁷⁶

The delayed recovery syndrome can arise when an injured worker's benefits from an injury outweigh the benefits of getting well and returning to work.⁷⁷

The injury provides reinforcers for staying disabled. Such reinforcers can include sympathy and attention, income from workers' compensation benefits, escape from responsibility, revenge against the company, or resolutions of internal conflicts.⁷⁸ In any event, an employee with delayed recovery syndrome will not return to work soon after injury.

The pre-1983 workers' compensation system, with its possibility for indefinite indemnity benefits without having to prove permanent total disability, contributed to the delayed recovery syndrome problem. The open-ended system allowed employees some luxury in pursuing a job. This luxury provided fertile soil for the delayed recovery syndrome to take root. Moreover, the delayed recovery syndrome had ample time to become established when displaced employees did not receive especially prompt rehabilitation assistance and were sometimes ignored by employers who had written them off as insurance losses.

II. STUDY GROUPS' RECOMMENDATIONS

Groups studying Minnesota's workers' compensation situa-

76. EMPLOYERS' GUIDE, *supra* note 57, at 79.

77. *Id.*

78. *Id.*

tion in the late 1970's and early 1980's proposed various revisions to the system. While the specific proposals are too numerous to discuss in this Article, major themes of the studies are addressed below.

A. *Workers' Compensation Study Commission Recommendations*

The Minnesota Legislature formed the Workers' Compensation Study Commission (WCSC) in 1979. The purpose of the WCSC was "to improve the system of providing workers' compensation insurance at fair and reasonable rates to employers within the state."⁷⁹ The WCSC was formed in response to employer concern with workers' compensation insurance costs, which averaged approximately three percent of payroll in the state.⁸⁰ Another concern was that neighboring states had competitive advantages in workers' compensation insurance rates, and employers threatened to leave Minnesota if something was not done.⁸¹

Recommendations of the WCSC focused on providing better information to employees and employers regarding rights and duties under the system,⁸² reducing the litigation rate,⁸³ and revising the benefit and rehabilitation structures to improve the fairness of the system and to encourage a prompt return to work.⁸⁴ Although many WCSC recommendations were adopted in 1979,⁸⁵ many problems identified by the group remained in the early 1980's.

B. *Insurance Division Recommendations*

In January 1982, the Minnesota Insurance Division published a study entitled *Workers' Compensation in Minnesota: An*

79. STUDY COMMISSION RECOMMENDATIONS, *supra* note 5, at 1.

80. *Id.*

81. *Id.*

82. *Id.* at 31-32.

83. *Id.* at 32 (the Workers' Compensation Study Commission found Minnesota's litigation rate to be a major factor in workers' compensation costs).

84. See generally Note, *The Minnesota Workers' Compensation Study Commission: Its Impact Upon the 1979 Amendments*, 6 WM. MITCHELL L. REV. 783, 792-98 (1980).

85. See generally Act of June 7, 1979, ch. 3, 1979 Minn. Laws 1257 (extra session) (codified in scattered sections of MINN. STAT. § 176 (1984 & Supp. 1985)). For discussions of the 1979 legislation, see also Benanav, *Workers' Compensation Amendments of the 1979 Minnesota Legislature*, 6 WM. MITCHELL L. REV. 743 (1980); Note, *supra* note 84, at 783.

*Analysis with Recommendations.*⁸⁶ This report paid special attention to the relatively high insurance rates in Minnesota and the reasons therefor. The Insurance Division concluded that Minnesota's workers' compensation system was deficient in nearly every respect. The report recommended changes that would encourage a faster return to work and reduce awards of huge benefits where injuries were not severe.⁸⁷ As expected, the Insurance Division was particularly sensitive to the problem of the delayed recovery syndrome and its resultant long-term indemnity exposure.⁸⁸

The Insurance Division believed that the possibility of substantial permanent partial disability benefits encouraged litigation and discouraged recovery by the employee. The Insurance Division, therefore, suggested reducing the significance of the permanent partial disability awarded.⁸⁹ Other recommendations called for improvements to the fairness and balance of the whole system.⁹⁰ Generally, the Insurance Division recommendations aimed to reduce the system's costs and litigation.⁹¹

C. Citizens League Recommendations

On December 15, 1982, the Citizens League issued a report entitled *Workers' Compensation Reform: Get the Employees Back on the Job*.⁹² The report was prepared by the Citizens League Workers' Compensation Committee. According to the Citizens League, "the main problem with Minnesota's workers' compensation system is that the incentives in it are either inadequate to promote the system's goals or actually encourage people to do things that are contrary to the goals."⁹³ The report recommended that existing incentives be changed or new incentives added to do the following:

- 1) Give employers clear and significant incentives to prevent injuries and illnesses and take injured workers back to work.

86. INSURANCE DIVISION RECOMMENDATIONS, *supra* note 2.

87. *Id.* at 13, 205-06.

88. *See id.* at 205-06.

89. *Id.* at 207-08.

90. *Id.* at 13.

91. *Id.*

92. GET THE EMPLOYEES BACK ON THE JOB, *supra* note 7.

93. *Id.* at i.

- 2) Reward employees for returning to work, not for being disabled.
- 3) Encourage medical cost control while promoting quality medical service.
- 4) Discourage unnecessary litigation, without preventing litigation in cases of unresolvable disputes.⁹⁴

Generally, the Citizens League recommended establishing standard permanent partial disability ratings, reducing litigation, reducing uncertainty in the system, and reducing legal and administrative shortcomings by providing information about workers' compensation to employees and employers through seminars sponsored by the Department of Labor and Industry.⁹⁵ The Citizens League was concerned that the former system replaced too much of the pre-injury take-home pay for certain employees, and therefore provided disincentives for returning to work. It suggested that Minnesota replace most, but not all, of an employee's take-home pay with indemnity benefits.⁹⁶

D. University of Minnesota Recommendations

Professor C. Arthur Williams and others of the Industrial Relations Center at the University of Minnesota prepared a 1983 report entitled *Minnesota Workers' Compensation Benefits and Costs: An Objective Analysis*.⁹⁷ This report attempted to cut through the political mudslinging and rhetoric about the workers' compensation system in order to determine its true relative costs. The University of Minnesota Report criticized the open-ended nature of temporary total disability benefits under the statute; it recommended that indemnity benefits be terminated at maximum medical improvement and it supported a 350 week limit for temporary total disability benefits.⁹⁸ It also proposed a two-tier system for impairment compensation. The two-tier system was designed to give employers incentives to offer jobs to injured employees, reduce costs, and guarantee

94. *Id.*

95. *Id.* at 39-42.

96. *See id.* at 39.

97. UNIV. OF MINN. REPORT, *supra* note 8.

98. *Id.* at 86-87. Prior to 1974, temporary total and temporary partial disability benefits were limited to 350 weeks. *See* MINN. STAT. § 176.101 (1967) (operative language regarding 350 week limits repealed by Act of June 4, 1975, ch. 359, § 8, 1975 Minn. Laws 1168, 1174.).

pure impairment benefit tied directly to the severity of the disability.⁹⁹

III. LEGISLATIVE RESPONSE TO PERCEIVED PROBLEMS

Pressure from business to reduce costs of the system and pressure from labor and business to make the system more equitable caused Minnesota's Legislature to enact major revisions to the workers' compensation act in 1983. Many revisions directly affected the displaced employee. In general, the changes emphasized reducing disability by expediting the displaced employee's return to work through (1) the prompt involvement of a Qualified Rehabilitation Consultants (QRC);¹⁰⁰ (2) a system of incentives for the employee and employer; and (3) the termination of the open-ended indemnity system. The new statute attempted to clarify and allocate responsibilities for both the employer and employee in returning the displaced employee to work. Finally, the legislature sought to reduce uncertainty in the law and thereby reduce litigation, which was recognized as adversely affecting the psychological and motivational aspects of rehabilitation.¹⁰¹

The tenor of the statutory changes was reflected in the revised statement of legislative intent. To appease disgruntled employers, the legislature specifically stated that "workers' compensation cases shall be decided on their merits and that the common law rule of 'liberal construction' based on the supposed 'remedial' basis of workers' compensation legislation shall not apply"¹⁰²

A. Overhaul of Section 176.101

The most significant changes of the workers' compensation act in 1983 with respect to the displaced employee were the

99. UNIV. OF MINN. REPORT, *supra* note 8, at 126-27.

100. A Qualified Rehabilitation Consultant is "a person who is professionally trained and experienced and who is approved by the commissioner to develop and monitor an appropriate plan for evaluation and provision of physical and vocational rehabilitation services for an employee entitled to rehabilitation benefits under Minnesota Statutes, section 176.102." 6 MINN. CODE AGENCY R. 5220.0100(5) (1985).

101. See generally KEEFE, INTRODUCTION TO THE 1983 WORKER'S COMPENSATION ACT (1984) (discussing legislative changes implemented in the Act).

102. Act of June 7, 1983, ch. 290, § 25, 1983 Minn. Laws 1310, 1324 (codified at MINN. STAT. § 176.001 (1984)).

revisions to Minnesota Statutes section 176.101.¹⁰³ Subdivision 3e of section 176.101 became the central provision for indemnity benefits. The open-ended system of indemnity benefits, at least for temporary total disability benefits, gave way to a provision automatically terminating temporary total disability ninety days after an employee reaches maximum medical improvement (MMI) or ninety days after the end of an approved retraining program, whichever is later.¹⁰⁴ MMI is the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated based upon reasonable medical probability.¹⁰⁵

The 1983 amendments provide that temporary total compensation can cease during the ninety-day period under several circumstances. Compensation ceases if (1) the employee retires; (2) the employer furnishes work to the employee that is consistent with an approved rehabilitation plan; or (3) the employee accepts a job with another employer.¹⁰⁶ A job offered pursuant to Minnesota Statutes section 176.101, subdivision 3e is commonly referred to as a "suitable job offer."¹⁰⁷

The employee has fourteen days within which to accept or reject a job offer.¹⁰⁸ If the job offered is not the job the employee had at the time of injury, the offer must be in writing and must state the nature of the job, the rate of pay, the physical requirements of the job, and any other information necessary to completely inform the employee of the job duties and responsibilities.¹⁰⁹ The employee has the opportunity after receiving a written job description to bring it to a doctor or QRC

103. *Id.* § 42-68, 1983 Minn. Laws at 1338-49 (codified at MINN. STAT. § 176.101 (1984)).

104. *Id.* § 48, 1983 Minn. Laws 1310, 1341-42 (codified at MINN. STAT. § 176.101, subd. 3e (Supp. 1985)), amended by Act of Mar. 25, 1986, ch. 461, § 8, 1986 Minn. Sess. Law Serv. 544, 551-53 (West).

105. *Id.* § 29, 1983 Minn. Laws at 1327 (codified at MINN. STAT. § 176.011, subd. 25 (1984)).

106. *Id.* § 48, 1983 Minn. Laws at 1341-42, amended by Act of April 23, 1984, ch. 432, § 3, 1984 Minn. Laws 97, 102-03 (current version at MINN. STAT. § 176.101, subd. 3e(b) (Supp. 1985)).

107. J. BENANEV & S. KEEFE, *supra* note 39, at 10-11. To be a "suitable job offer" under MINN. STAT. § 176.101, subd. 3(e), the job must produce an economic status as close as possible to that the employee would have enjoyed without the disability.

108. MINN. STAT. § 176.101, subd. 3e (Supp. 1985).

109. Act of June 7, 1983, ch. 290, § 48, 1983 Minn. Laws 1310, 1341-42 (current version at MINN. STAT. § 176.101, subd. 3e(e) (Supp. 1985)), amended by Act of Mar. 25, 1986, ch. 461, § 8, 1986 Minn. Sess. Law Serv. 544, 552-53 (West).

for an objective determination of the job's suitability. If the employee questions a job's suitability, the employee can call for an administrative conference to get a ruling from the Department of Labor and Industry.¹¹⁰ An employee offered a job pursuant to subdivision 3e is eligible for temporary partial compensation.¹¹¹

Consistent with the former law, temporary total disability ceases if the employer provides the employee with an appropriate job before MMI.¹¹² The pre-MMI job offer does not have to be a "suitable job offer," in that it does not have to produce an economic status as close as possible to that the employee enjoyed before injury. A job within the employee's restrictions, but at a lower wage than the employee received prior to the injury, is called "light-duty" by the Department of Labor and Industry.¹¹³ The difference between a suitable job and a light-duty job is only whether the job would bring the employee to the economic status the employee enjoyed before injury; the common phrases describing the job have nothing to do with the physical requirements of the job. An employee who accepts either a suitable or a light-duty job offer prior to MMI is entitled to temporary partial disability benefits when appropriate.¹¹⁴ If the job offer prior to MMI is a suitable job offer, no further temporary total benefits are payable.¹¹⁵ After MMI or the end of retraining, though, any job offer by the employer must be a suitable job offer for the employer to benefit from lower loss of function payments.¹¹⁶

If an employee has been offered a job under subdivision 3e

110. An administrative conference to determine the suitability of a job offer is provided for in Act of April 23, 1984, ch. 432, § 40, 1984 Minn. Laws 97, 121 (codified at MINN. STAT. § 176.242, subd. 6(b) (1984)).

111. Act of June 7, 1983, ch. 290, § 51, 1983 Minn. Laws 1310, 1343 (codified at MINN. STAT. § 176.101, subd. 3h (1984)).

112. Act of April 23, 1984, ch. 432, § 3, 1984 Minn. Laws 97, 102-03 (codified at MINN. STAT. § 176.101, subd. 3e(b) (Supp. 1985)). See also Act of June 7, 1983, ch. 290, § 49, 1983 Minn. Laws 1310, 1342 (codified at MINN. STAT. § 176.101, subd. 3f (1984)), amended by Act of Mar. 25, 1986, ch. 461, § 8, 1986 Minn. Sess. Law Serv. 544, 553-54 (West).

113. J. BENANEV & S. KEEFE, *supra* note 39, at 23.

114. Act of June 7, 1983, ch. 290, § 51, 1983 Minn. Laws 1310, 1343 (codified at MINN. STAT. § 176.101, subd. 3h (1984)).

115. *Id.* § 49, 1983 Minn. Laws at 1342 (codified at MINN. STAT. § 176.101, subd. 3f (1984)).

116. See *id.* § 48, 1983 Minn. Laws at 1341-42 (codified at MINN. STAT. § 176.101, subd. 3e (1984)).

and refuses the offer, temporary total compensation ceases and no further or additional temporary total compensation is payable for that injury.¹¹⁷ Moreover, an employee who refuses a suitable job offer under subdivision 3e and subsequently returns to work may not receive temporary partial compensation or rehabilitation benefits.¹¹⁸

B. *New Standard for Search for Work*

The 1983 revisions completely deleted the diligent search for work language from the temporary partial disability provision.¹¹⁹ Consistent with the emphasis of other statutory revisions, the diligent search for work standard was transferred to the rehabilitation provision of the act. The statute now provides that all workers' compensation benefits may:

be discontinued or forfeited for any time during which the employee refuses to submit to any reasonable examinations and evaluative procedures ordered by the commissioner to determine the need for and the details of the plan of rehabilitation, or refuses to participate in rehabilitation evaluation as required by this section [Section 102] or *does not make a good faith effort to participate in a rehabilitation plan.*¹²⁰

Rather than leaving the reasonably diligent search for work responsibility in the hands of the displaced employee alone, by this the legislature change assured the employee the assistance of a QRC in the job search.

C. *Increased Role of Rehabilitation*

The legislature in 1983 also made significant changes to the rehabilitation provision.¹²¹ The changes replaced retraining as the apparent goal of rehabilitation with a policy of restoring the injured employee through physical and vocational rehabilitation to enable the employee to return to a job related in type

117. *Id.* § 55, 1983 Minn. Laws at 1344-45 (codified at MINN. STAT. § 176.101, subd. 3l (1984)).

118. *Id.* § 57, 1983 Minn. Laws at 1345 (codified at MINN. STAT. § 176.101, subd. 3n (1984)).

119. *Id.* § 43, 1983 Minn. Laws at 1339 (codified at MINN. STAT. § 176.101, subd. 2 (1984)).

120. *Id.* § 83, 1983 Minn. Laws at 1355 (codified at MINN. STAT. § 176.102, subd. 13 (1984)) (emphasis added).

121. *See generally id.* § 69, 1983 Minn. Laws at 1349 (codified at MINN. STAT. § 176.102, subd. 1 (1984)).

and salary to his former job.¹²² The legislature repealed the special benefits for on-the-job training and retraining benefits to reduce the attractiveness of these options.¹²³

A new provision in the rehabilitation section allows for reimbursement of reasonable costs for moving expenses of the employee and family. The reimbursement is given if a job is found in a geographic area beyond reasonable commuting distance, after the employee has made a diligent search within the present community.¹²⁴ This relocation cost provision is in response to the difficult "diligent search" cases in which the employee risked forfeiting benefits or risked a lifetime of unemployment because of a poor job market in a rural area.¹²⁵ The relocation provision is optional for the employee, and a refusal to relocate will not result in a suspension or termination of compensation.¹²⁶

The standard for commencement of rehabilitation services was revised to ensure prompt rehabilitative attention to an injured employee when the need for rehabilitation becomes apparent. The former statute provided that a rehabilitation consultation had to be scheduled by an employer within thirty days of the time the employer received medical information that an employee was unable to return to the pre-injury occupation.¹²⁷ The standard now is not whether the employee can return to the pre-injury employment, but whether the employee misses sixty days of work (thirty days for back injuries) because of the personal injury.¹²⁸ Once this objective test is

122. See Act of April 23, 1984, ch. 432, § 3, 1984 Minn. Laws 97, 102-03 (codified at MINN. STAT. § 176.101, subd. 3e(b) (Supp. 1985)); see also Act of June 7, 1983, ch. 290, § 49, 1983 Minn. Laws 1310, 1342 (codified at MINN. STAT. § 176.101, subd. 3f (1984)).

123. See Act of June 7, 1983, ch. 290, § 74, 1983 Minn. Laws 1310, 1352 (codified at MINN. STAT. § 176.102, subd. 5 (1984)). An employee is no longer automatically entitled to 125% of the temporary total compensation rate during the retraining period. The 125% special rate is now available only in unusual circumstances.

124. *Id.* § 79, 1983 Minn. Laws 1310, 1354 (codified at MINN. STAT. § 176.102, subd. 9(e) (1984)).

125. See, e.g., *Paine*, 323 N.W.2d at 815-16; *Petschl*, 323 N.W.2d at 789-90; *Fredenburg*, 311 N.W.2d at 864.

126. Act of June 7, 1983, ch. 290, § 79, 1983 Minn. Laws 1310, 1354 (codified at MINN. STAT. § 176.102, subd. 9(e) (1984)).

127. Act of June 7, 1979, ch. 3, § 36, 1979 Minn. Laws 1256, 1279 (extra session), amended by Act of June 7, 1983, ch. 290, § 73, 1983 Minn. Laws 1310, 1350-51 (current version at MINN. STAT. § 176.102, subd. 4 (1984)).

128. Act of June 7, 1983, ch. 290, § 73, 1979 Minn. Laws 1310, 1350-51 (codified at MINN. STAT. § 176.102, subd. 4 (1984)).

met, the employer has five days in which to provide rehabilitation consultation by a QRC. If an employer has medical information prior to the time specified above that the employee will be unable to return to the job the employee held at the time of injury, rehabilitation consultation must be provided immediately.¹²⁹ By using both an objective time test and a displaced employee test, the legislature sought to provide the employee with a career adjustment expert as soon as it becomes apparent that the employee's career will be altered by the injury.

D. Incentives Regarding Loss of Function Benefits

In addition to substantially changing provisions for indemnity benefits under the workers' compensation act, the 1983 legislative revisions had significant impact on the loss of function benefits. The entire disability ratings structure under the former law was discarded.¹³⁰ In its place, the legislature instituted a "two-tier system." Under the two-tier system, permanent partial disability benefits are divided into two types: economic recovery compensation (ERC)¹³¹ and impairment compensation (IC).¹³²

IC and ERC are payable for permanent partial disability of the body as a whole.¹³³ The monetary award for each is determined by multiplying the percent of disability by statutory formulas.¹³⁴ IC and ERC are mutually exclusive. ERC benefits for the same percent disability must "be at least 120 percent of the impairment compensation."¹³⁵ However, IC is usually payable in a lump sum in addition to earnings, whereas ERC is usually payable on a weekly basis in lieu of earnings.¹³⁶ Under the new statutory scheme, both the employer and displaced

129. *Id.*

130. *Id.* § 173, 1983 Minn. Laws at 1404-05 (former version at MINN. STAT. § 176.101, subd. 3 (1982)).

131. *Id.* § 44, 1983 Minn. Laws at 1339-40 (codified at MINN. STAT. § 176.101, subd. 3b (1984)).

132. *Id.* § 45, 1983 Minn. Laws at 1340-41 (codified at MINN. STAT. § 176.101, subd. 3b (1984)).

133. *Id.* §§ 44-45, 1983 Minn. Laws at 1339-41 (codified at MINN. STAT. § 176.101, subds. 3a, 3b (1984)).

134. *Id.*

135. *Id.* § 63, 1983 Minn. Laws at 1347 (codified at MINN. STAT. § 176.101, subd. 3t(a) (1984)).

136. See *supra* notes 127-34 and accompanying text.

employee have substantial control over which type of loss of function benefit will be payable.

An injured employee who receives a suitable job offer before ninety days after reaching MMI or completing a rehabilitation program is entitled to IC for permanent partial disability. If the employee accepts the suitable job offer and returns to work for at least thirty days, the employee receives the impairment award as a lump sum payment at the end of the thirty days.¹³⁷ If the employee does not accept the job offer, IC is paid as a weekly benefit in the same amount as temporary total benefits until the IC fund is exhausted, and the employee may not receive any other benefits unless the employee has greater permanent partial disability than already compensated.¹³⁸ Thus, by timely offering the displaced employee a suitable job, an employer can limit liability for loss of function compensation to IC. By accepting the offer, the employee receives the IC benefits in a lump sum, in addition to his regular wage associated with the new job.

An employee who is not offered a suitable job before ninety days after reaching MMI or completing a rehabilitation program is entitled to ERC for permanent partial disability.¹³⁹ ERC is paid weekly in the same amount as temporary total disability benefits, and continues until the employee returns to work or until the statutory amount of the ERC is exhausted.¹⁴⁰ If the employee finds a job, suitable or light-duty, and works successfully on the job for thirty days, the employee receives the remainder of ERC benefits due as a lump sum payment after thirty days of work.¹⁴¹ Consequently, the employee has incentive to return to work even if no job had been offered within ninety days of retraining or the end of MMI. By returning to work as soon as possible, the employee receives a

137. Act of June 7, 1983, ch. 290, § 50, 1983 Minn. Laws 1310, 1343, amended by Act of April 23, 1984, ch. 432, § 4, 1984 Minn. Laws 97, 103-04 (codified at MINN. STAT. § 176.101, subd. 3g (1984)). The 1984 amendments further require that the 30 day employment period is not substantially interrupted by the injury and the employee is still employed at the end of the period. *Id.*

138. *Id.* § 55, 1983 Minn. Laws, at 1344-45 (codified as amended at MINN. STAT. § 176.101, subd. 3l (1984)).

139. *Id.* § 59, 1983 Minn. Laws at 1346 (codified as amended at MINN. STAT. § 176.101, subd. 3p (1984)).

140. *Id.* § 60, 1983 Minn. Laws at 1346 (codified at MINN. STAT. § 176.101, subd. 3q(a) (1984)).

141. *Id.*

larger lump sum payment of ERC benefits to overlap with the earnings at the new job.

A displaced employee who returns to work and is subsequently unemployed because of economic conditions other than seasonal conditions may receive indemnity benefits in the form of monitoring period compensation.¹⁴² This compensation is paid until the monitoring period expires or until the sum of the monitoring period compensation paid and IC paid or payable equals the amount of ERC that would have been paid if ERC were payable, whichever occurs first.¹⁴³ The monitoring period is calculated by multiplying the percent of disability by the corresponding number of weeks in the economic recovery schedule. The monitoring period concept protects the returning employee from accepting a job and thereby terminating indemnity benefits, only to have the job vanish for causes beyond the employee's control.

The new provisions are designed to provide clear incentives for the employee and employer to get the displaced employee back on the job. The employer will save money by paying IC rather than ERC. The employee will receive more money to the extent he receives loss of function benefits in a lump sum. When the employee's functional loss compensation is paid weekly, the employee loses the opportunity for an overlap of loss of function benefits with actual wages.

Finally, an employee who has suffered a personal injury for which temporary total compensation is payable, but which produces no permanent partial disability, and who is unable to return to the former employment for medical reasons attributable to the injury is eligible for twenty-six weeks of ERC.¹⁴⁴

E. Revised Standards for Permanent Partial Disability

Another major revision to the statute is the new permanent partial disability schedule. Under the former law, a permanent

142. Act of June 7, 1983, ch. 290, § 52, 1983 Minn. Laws 1310, 1343-44, *amended* by Act of April 23, 1984, ch. 432, § 5, 1984 Minn. Laws 97, 104 (codified at MINN. STAT. § 176.101, subd. 3i(a) (1984)).

143. Act of June 7, 1983, ch. 290, § 52, 1983 Minn. Laws 1310, 1343-44, *amended* by Act of April 23, 1984, ch. 432, § 5, 1985 Minn. Laws 97, 104 (codified at MINN. STAT. § 176.101, subd. 3i(b) (1984)).

144. Act of June 7, 1983, ch. 290, § 63, 1983 Minn. Laws 1310, 1347, *amended* by Act of April 23, 1984 ch. 432, § 12, 1984 Minn. Laws 97, 107-08 (codified at MINN. STAT. § 176.101, subd. 3i(b) (1984)).

partial disability award was a function of the disability rating, the employee's pre-injury wage and the statutory benefit schedule.¹⁴⁵ "Doctor shopping" and litigation over permanent partial disability ratings were common under the former law because permanent partial disability ratings were often subjective and varied widely among providers. The new functional loss system incorporates the ERC and IC schedules to determine the dollar amount of benefits and the Commissioner's detailed permanent partial disability schedule¹⁴⁶ to determine amount of the disability.

Under the new disability schedules, loss of function benefits can be awarded only if the employee has objective medical findings.¹⁴⁷ No longer do medical providers both identify a malady and estimate the amount of permanent partial disability resulting therefrom. Under the new system, medical providers simply report their objective findings. Once the objective medical information is documented, the extent of permanent partial disability is determined from the disability schedule. The new schedule is intended to "promote objectivity and consistency in the evaluation of permanent functional impairment due to personal injury and in the assignment of a numerical rating to the functional impairment."¹⁴⁸

IV. PRACTICAL EFFECTS OF THE CHANGES TO THE SYSTEM

The goals of the 1983 amendments and subsequent legislative changes were to reduce costs in the system, to make the system more equitable, and to encourage a faster return to work for the displaced employee. The legislature also sought to make the system less uncertain, thereby reducing litigation. The following section analyzes the practical effects of the legislative changes on the displaced employee.

145. Act of June 1, 1981, ch. 346, § 75, 1981 Minn. Laws 1611, 1653-57 (*repealed* 1983).

146. The commissioner was authorized to make rules governing disability ratings by Act of June 7, 1983, ch. 290, § 86, 1983 Minn. Laws 1310, 1358-60 (codified at MINN. STAT. § 176.105, subd. 4 (1984)). The commissioner's rules are set forth at 8 MCAR § 1.9001-1.9025 (1985) (adopted Feb. 6, 1984).

147. Act of June 7, 1983, ch. 290, § 33, 1983 Minn. Laws 1310, 1329-30 (codified at MINN. STAT. § 176.021, subd. 3 (1984)).

148. Act of June 7, 1983, ch. 290, § 86, 1983 Minn. Laws 1310, 1358-60 (codified at MINN. STAT. § 176.105, subd. 4b (1984)), *amended* by Act of Mar. 25, 1986, ch. 461, § 12, 1986 Minn. Sess. Law Serv. 544, 555-59 (West).

A. *Effect on Litigation*

Excessive litigation in the former system caused increased costs, animosity between parties, and delays in employee medical recovery, return to work, and receipt of benefits. The 1983 amendments were "designed to completely rework the law based on principles of avoiding litigation and minimizing disability."¹⁴⁹

1. *Permanent Partial Disability Rating*

Under the former system, much litigation involved permanent partial disability ratings.¹⁵⁰ When the injury was admitted, as with the displaced employee, primary reasons for permanent partial disability litigation were: (1) the amount of money at stake; and (2) the subjective nature of disability ratings by health care providers.

For the system as a whole, the amount of money at stake has not changed drastically. The IC and ERC schedules were designed to result in roughly the same amount of loss of function benefit as was paid under the former system.¹⁵¹ However, a specific employee is not interested in the "big picture." While direct comparison between systems is difficult a particular injury, in some instances, would have resulted in greater loss of function benefits under the former statute than it will under the current law. Nevertheless, employee demand for litigation over loss of function benefits should remain strong. Even though it may be lower than before, the potential recovery is still substantial, especially to employees. Employees who believe that a substantial amount of money has been wrongfully withheld from them will continue to sue to recover it. These employees may have trouble finding lawyers to represent them on a contingent fee basis if recoveries are too small.

149. EMPLOYERS' GUIDE, *supra* note 57, at 19.

150. UNIV. OF MINN. REPORT, *supra* note 8, at 216-17.

151. See MINNESOTA DEPARTMENT OF LABOR & INDUSTRY, EFFECTS OF THE 1983 WORKERS' COMPENSATION REFORMS: BUSINESS-SIZE OPEN CLAIM STUDY, PERMANENT PARTIAL DISABILITY OPEN CLAIM STUDY, AND CLOSED CLAIM STUDY 19 (1985) [hereinafter cited as EFFECTS OF REFORMS]. Preliminary statistics reveal that 96% of employees with permanent partial disability claims in 1983 either lost no time or returned to work. *Id.* If similar percentages hold up consistently, the benefit level itself will decrease. See also Act of June 7, 1983, ch. 290, § 86, 1983 Minn. Laws 1310, 1358-60 (codified at MINN. STAT. § 176.105, subd. 4 (1984)) (requiring aggregate total of IC and ERC benefits to be approximately equal to aggregate permanent partial disability benefits under old law).

Moreover, employers may be more willing to pay claims voluntarily if the recovery is relatively small, just to be rid of the administrative nuisance of disputing a claim.¹⁵²

The litigation rate with respect to functional loss will be affected much more noticeably by the changes in the method of determining permanent partial disability. Many litigated disputes under the former system involved situations in which the employee's doctor assigned a permanency rating based on the employee's subjective complaints, but the employer's doctor determined there was no permanent disability because there were no objective findings.¹⁵³ Since subjective complaints are no longer sufficient to entitle an employee to loss of function benefits,¹⁵⁴ litigation of this nature should eventually disappear.

The new disability rating schedule should also eliminate much litigation based on discrepancies between disability ratings when doctors agree as to objective findings. Under the former system, doctors not only diagnosed an employee's condition, but they also determined (on whatever basis they chose) the extent of disability attributable to the condition. Even when two doctors agreed as to the patient's general condition, they sometimes disagreed substantially as to the permanent partial disability rating. Under the new statute, a doctor diagnoses and documents the employee's condition; the disability rating is provided by the Commissioner's schedule.¹⁵⁵ Although there is still room for some variance in disability ratings with the new schedule,¹⁵⁶ any disparity between ratings

152. MINN. STAT. § 176.081, subd. 1 (a) (1984) provides in part that attorneys representing employees generally are permitted to receive a contingent fee of 25% of the first \$4,000 of recovery and 20% of the next \$27,500 of recovery by the employee. In most cases, attorney fees for employees' attorneys are subject to a \$6,500 maximum, amended by Act of Mar. 25, 1986, ch. 461, § 7, 1986 Minn. Sess. Law Serv. 544, 549-50 (West).

153. See, e.g., *McQuade v. Snyder Drug*, 36 Minn. Workers' Comp. Dec. 436, 437 (1984) (determining permanent partial disability rating involves examining subjective factors as well as objective findings); *Lund v. Maxson, Inc.*, 36 Minn. Workers' Comp. Dec. 146, 148-49 (1983) ("Pain as it limits functional use is a proper factor to be considered in rating permanent partial disability.").

154. See *supra* note 147 and accompanying text.

155. See *supra* notes 145-47 and accompanying text.

156. For example, if an employee has been treated surgically for a single herniated intervertebral cervical disc, one doctor may find excellent surgical results ("mild neck pain, no arm pain, and no neurological deficit") while another doctor would find average surgical results ("mild increase in symptoms with neck motion or lifting, and mild to moderate restriction of activities related to neck and arm pain.").

would be minimal, and parties would likely settle such a dispute before spending money on litigation.

2. *Duration of Indemnity Benefits*

A second major source of litigation under the former system involved disputes regarding an employee's diligent search for work. The unpredictable standards for diligent search for work and the stakes involved—indefinite indemnity benefits—made it worthwhile for parties to litigate diligent search issues.

The repeal of the diligent search requirement¹⁵⁷ and the substitution of the “cooperate with rehabilitation” requirement¹⁵⁸ as the standard for employees' continuing right to indemnity benefits should reduce litigation for several reasons. In most situations, the rehabilitation plan with which the employee must cooperate will still require a search for work. However, an employee's work search will now be conducted under the guidance and expertise of a QRC. The problems of inadequately designed search strategies should be eliminated. If a QRC is functioning as expected, the employee's search for work will be logically structured and closely monitored. The QRC should be able to determine when the employee needs additional training to acquire skills necessary to be re-employed. With the prompt intervention of rehabilitative services, the earlier problem of an employee failing to appreciate fully the necessity for a search for work should be alleviated.

Recent decisions indicate that the diligent search for work standard by itself (i.e., without QRC assistance) is no longer available to employers seeking to discontinue indemnity benefits.¹⁵⁹ Citing the emphasis of the new law on rehabilitation and employer cooperation in the return to work effort, courts have shown little patience with employers who do not provide rehabilitation when an injury is admitted.¹⁶⁰ Since rehabilita-

In this example, the disability rating to the body as a whole would be 9% using the first doctor's evaluation or 11% using that of the second doctor. MINN. RULES 5223.0070 (1985).

157. See *supra* notes 119-20 and accompanying text.

158. *Id.*

159. *E.g.*, *Campeau v. Connolly Cartage Co.*, 37 Minn. Workers' Comp. Dec. 784, 787-88 (1985); *Kaste*, 37 Minn. Workers' Comp. Dec. at 228; *Westcott*, 37 Minn. Workers' Comp. Dec. at 81.

160. See, *e.g.*, *Campeau*, 37 Minn. Workers' Comp. Dec. at 787 (“The employer and insurer take great risk in such a refusal to offer the necessary [rehabilitation] assistance.”) (quoting *Westcott*, 37 Minn. Workers' Comp. Dec. at 81.

tion plans must be approved by the Commissioner¹⁶¹ and since QRCs are licensed and monitored by the Department of Labor and Industry,¹⁶² the rehabilitation process has become a quasi-official function.

Although the new system will reduce litigation by eliminating the confusing search for work standard and the potential for indefinite temporary total benefits, employers will not cease trying to discontinue benefits from employees they believe are not keeping their end of the bargain. However, to terminate indemnity benefits early, employers must now either offer the employee a suitable job or prove the employee is not cooperating with the rehabilitation.¹⁶³ Assuming the employer does not offer a suitable job, an employer's best strategy for "catching" an uncooperative employee is to develop with a QRC a highly structured, aggressive and monitorable rehabilitation plan. Such a plan not only provides a basis by which to measure the employee's cooperation, but it also greatly improves the employee's chances to return to work. With more displaced employees returning to work, the litigation rate will decrease.

Another reason indemnity benefit litigation should decrease is that fewer dollars are at stake. Employers will not prematurely discontinue benefits and thereby invite litigation if their potential savings are relatively small in comparison with litigation costs. Without the prospect of indefinite indemnity benefits, the cost and risk of litigation simply do not warrant challenging every questionable case.

According to early studies conducted by the Minnesota Department of Labor and Industry,¹⁶⁴ the litigation rate under the new system has decreased markedly. Prior to the new law, Minnesota's litigation rate exceeded ten percent.¹⁶⁵ A study of cases closed in October 1984 showed that the litigation rate had dropped to 6.6 percent.¹⁶⁶ The Department of Labor and Industry attributes some of the decline in litigation to administrative changes in the new law, better claims management by

161. MINN. STAT. § 176.102, subd. 6 (1984).

162. MINN. STAT. § 176.102, subd. 2 (1984).

163. See *supra* notes 117-30 and accompanying text.

164. EFFECTS OF REFORMS, *supra* note 151, at 19.

165. *Id.* at 3.

166. *Id.* at 26.

employers, and the objectivity of the disability schedules.¹⁶⁷ The Department of Labor and Industry predicts continued reductions in the litigation rate as cases under the former law are closed.¹⁶⁸

B. Effect on the Delayed Recovery Syndrome Victim

Under the new system, fewer displaced employees should succumb to the delayed recovery syndrome. Two major causes of the syndrome are that the employee expects to receive a net gain from being disabled and that the employee has emotional or mental problems in dealing with the disability.¹⁶⁹ Several aspects of the new system will help prevent future delayed recovery syndrome cases. The termination of indemnity benefits ninety days after MMI or the end of a retraining program makes "life-long disability" a less attractive career option. The monetary gain from being disabled is no longer as lucrative as it once was. The well-informed employee will realize the relatively short duration of indemnity benefits as well as the monetary attractiveness of returning to work quickly and receiving IC as a lump sum. Not only the delayed recovery syndrome victim, but also the true malingerer, will have less incentive to remain "disabled."

An active QRC will also play a major role in reducing the number of delayed recovery syndrome cases. Under the rehabilitation provisions,¹⁷⁰ the QRC will meet with the displaced employee relatively soon after the extent of the disability is apparent. Prompt intervention by the QRC will serve several purposes that will help the potential delayed recovery syndrome victim. The QRC will inform the employee of his rights and obligations under the system. The employee will not be ignored or left to imagine how "the system" will treat her. Further, the QRC should be able to detect emotional or psychological symptoms that would indicate a potential delayed recovery syndrome case. Upon recognizing the symptoms, the QRC can refer the employee to appropriate counselors to treat the condition in its early stages. Perhaps most importantly, a

167. *Id.* at 29.

168. *Id.* at 3.

169. EMPLOYER'S GUIDE, *supra* note 58, at 79.

170. Act of June 7, 1983, ch. 290, §§ 69-83, 1983 Minn. Laws 1310, 1349-55 (codified as amended at MINN. STAT. § 176.102 (1984 & Supp. 1985)).

QRC will provide a structured rehabilitation plan that will not allow the employee to remain away from the return to work process for long periods of time.

Of course, the structure of a workers' compensation system can not eliminate all cases of delayed recovery syndrome. There will continue to be employees whose complaints of pain baffle medical providers and whose emotional and psychological conditions effectively preclude them from ever returning to work. To the extent these victims continue to exist and do not qualify for permanent total disability, employers will benefit by the limitations on indemnity payments. Employers will spend less money on these individuals and will be able to dismiss them as society's problems after a relatively short period of time.

On the other hand, the victims themselves will have to find support elsewhere after the workers' compensation system ceases its benefits. Presumably, that support would come from state welfare or unemployment agencies. The economic burden of the victim would then be spread among the state's taxpayers rather than only among purchasers of the employer's product. The victims may have benefitted from their exposure to rehabilitation aspects of the worker's compensation system. Once these victims leave the workers' compensation system, though, it becomes increasingly unlikely they will return to work or be productive members of society.

C. Increased Aggressiveness in Case Management

The new system provides employer incentives to maintain active involvement in workers' compensation cases. Because of the difference between IC and ERC benefits, an employer can save money by offering or finding a displaced employee a suitable job within ninety days of MMI or the end of a retraining program. Moreover, an employer can minimize indemnity exposure by requesting and participating in a rehabilitation program soon after the employee's injury. The sooner the employee returns to work, the sooner the compensation benefits stop.

Employers will also pressure medical providers to get employees to maximum medical improvement. Under the former system, maximum medical improvement was not a particularly relevant date in the scheme of the workers' compensation sys-

tem. Now, however, employers have a specific interest in documenting when employees reach MMI. The goal of the system has become getting the employee to MMI.

There are advantages and disadvantages of emphasizing MMI as a goal of the system. The advantages are that the employee may receive better and faster medical assistance if the employer is financially interested in the employee's recovery. A potential problem, though, is that disputes will arise over the time at which the employee in fact reaches MMI. The Minnesota Medical Association has published a schedule of estimated recovery periods for certain types of injuries,¹⁷¹ but the schedule is merely advisory. Undoubtedly, doctors will disagree as to when an employee has reached MMI. A subjective standard like MMI inevitably leads to doctor shopping and litigation. Because the extent and consequences of variances in medical providers' opinions regarding the date of MMI have yet to be adequately tested, the magnitude of the potential problem is unknown.

D. Increased Permanent Total Disability Claims

Under the former system, Minnesota had significantly more permanent total disability claims than did Wisconsin.¹⁷² This situation may worsen as a result of the 1983 changes. Employees who under the former law received temporary total disability or temporary partial disability at the temporary total rate for long periods of time had no special need to claim permanent total disability. Their benefits would not change substantially, and bringing suit to prove permanent total disability meant hiring a lawyer and thereby giving up some benefits. Undoubtedly, some employees under the former system who qualified for permanent total disability never applied for that status because they felt adequately compensated as they were.

With the termination of indemnity benefits ninety days after MMI or the retraining program, employees with long-term and total disability under the *Schulte* test¹⁷³ will now apply for per-

171. Minnesota Medical Association, Revised Temporary Disability Duration Guide (January 1984).

172. UNIV. OF MINN. REPORT, *supra* note 8, at 216-17. From October 1, 1979 to September 30, 1980, Minnesota had 53 permanent total disability cases to Wisconsin's 19. *Id.* at 216 For the same period one year later, Minnesota had 25 permanent total disability cases to Wisconsin's 7. *Id.* at 217.

173. See *Schulte*, at 83, 153 N.W.2d at 133-34.

manent total disability benefits after their temporary total disability benefits expire. Whether the judicial standard for permanent total disability will change as a result of the expected influx of cases is uncertain. The new statute has not been in effect long enough for this type of case to reach the court system. It is likely, though, that the number of permanent total disability cases in the system will rise as the new statute matures.

E. Cost Savings

The new statute has resulted in cost savings and increased efficiency for all parties. The savings seem to benefit employers the most. Unfortunately, certain new provisions may actually increase the cost of the system.

1. The Displaced Employee

The costs to a displaced employee of a work-related injury include his loss of function, lost wages, lost employability, and physical and emotional pain. If the employer resists paying benefits, the employee may incur additional costs in the form of attorney fees needed to recover benefits and delays in receiving benefits.

The most important savings for the employee under the new system result from the emphasis on a quick return to work. Both monetarily and in human terms, the major cost of a work-related injury to the employee is the period of unemployment following the injury. Indemnity benefits do not fully replace lost wages. Unemployment's forced inactivity is unhealthy mentally and emotionally. An employee recovers physically more quickly if she returns to work than if she has time to remain at home and think about the injury.¹⁷⁴ Therefore, to the extent that faster rehabilitation services, cost incentives for employers, and employee benefit structure incentives bring about a faster return to work, employees benefit.

The new system appears to be working. Preliminary studies indicate a twenty-eight to thirty-two percent increase in lost work time for 1984 cases.¹⁷⁵ The average duration for lost work time dropped to thirty-four days for March, 1984 injuries

174. EMPLOYERS' GUIDE, *supra* note 58, at 73.

175. EFFECTS OF REFORMS, *supra* note 151, at 2.

from fifty days for March, 1983 injuries.¹⁷⁶ In a study of cases involving permanent partial disability injuries, the number of claimants in the 1984 sample who returned to work within six months exceeded the number of employees in the 1983 sample who returned to work within twelve months.¹⁷⁷

The new indemnity provisions may result in prompter distribution of benefits to the displaced employee because the new statute addresses many situations that previously were left to the courts. On the other hand, these provisions have become so complex that an average employee has little chance of understanding the scope of benefits available and the rights and duties of a party in each particular situation. The uncertainty caused by the system's complexity detracts from recovery. If parties do not understand the system and benefits are not timely paid because of misunderstandings, the employee will either forego compensation due or be forced to hire a lawyer to recover the benefits long after they are overdue. An employee might even forfeit his rights to future compensation and significant loss of function benefits as a result of not appreciating the significance of rejecting a suitable job offer within ninety days of MMI.¹⁷⁸

The most significant potential cost to the displaced employee is the risk of destitution through no fault of his own. With indemnity benefits limited, the displaced employee who does not qualify for permanent total disability benefits and who cooperates with rehabilitation efforts but is unable to procure any job offer will lose indemnity benefits ninety days after MMI and will lose all weekly benefits after ERC payments are exhausted.¹⁷⁹ The legislature simply decided that certain employees with legitimate long-term unemployment could "fall through the cracks" of the workers' compensation system.

2. *The Employer*

In many ways, the statutory changes favor employers over other parties in the system. Employers and insurers exerted strong pressure on the legislature to reform the system in

176. *Id.* at 8.

177. *Id.* at 12.

178. See *supra* notes 103-18 and accompanying text.

179. *Id.*

1983.¹⁸⁰ Judging from the changes made, the pressure was largely successful.

Some savings to employers under the new system are fairly obvious. Like employees, employers will benefit from a lower litigation rate. In addition to incurring smaller legal fees, employers benefit by not having to waste management time and resources preparing for trial, meeting with lawyers, and attending various administrative hearings. Employers will also save money to the extent employees return to work faster because of the new system. Moreover, non-monetary benefits accrue to employers when employees return to work promptly; employers experience less disruption to the work force and enjoy improved productivity when the returning worker has skills or talents unavailable in a replacement. Obviously, employers will save money by not having to pay indemnity benefits indefinitely for employees who do not qualify for permanent total disability benefits. Finally, employers can lower workers' compensation costs by offering a suitable job, thereby taking advantage of twenty percent or better savings of IC over ERC for loss of function benefits.¹⁸¹

Perhaps more satisfying to some employers than the monetary savings available is the degree of control the new system provides employers. Under the former system, the risk of having to pay indefinite indemnity benefits even if the employee was not permanently totally disabled, forced some employers to provide jobs for displaced employees whom the employers would not have rehired otherwise. The uncertainty and potential cost of indefinite indemnity exposure made employers uncomfortable. With the detailed structure of the indemnity provisions under the new law,¹⁸² employers can predict the monetary costs and benefits of not taking back a displaced employee. Compared to its potential exposure under the former statute, an employer can "be rid of" a displaced employee relatively inexpensively¹⁸³ under the new statute. If for any reason the employer does not want to deal with the displaced employee again, the employer can simply pay indemnity bene-

180. See CITIZENS LEAGUE, *supra* note 7, at 9.

181. See Act of June 7, 1983, ch. 290, § 63, 1983 Minn. Laws 1310, 1347 (codified as amended at MINN. STAT. § 176.101, subd. 3t(a) (1984 & Supp. 1985)).

182. See generally *supra* notes 106-18 and accompanying text.

183. This statement assumes that the displaced employee does not qualify for permanent total disability benefits.

fits until ninety days after MMI and accept the twenty percent "penalty" of ERC. To many employers, a twenty percent premium on loss of function benefits is a small price to pay for the opportunity to permanently dispose of an unwanted employee.

V. UNRESOLVED ISSUES

Because of the relative immaturity of the present workers' compensation statute, certain questions basic to the system remain unanswered. Some of the questions will be answered judicially. Other questions can not be answered so easily. Only after its participants have had sufficient time to test the new system will anyone be able to assess whether the 1983 changes have had their desired effects on the attitudes and behavior of employees and employers.

A. Interpretative Issues

Since 1967, *Schulte v. C.H. Peterson Construction Co.*,¹⁸⁴ has been the leading case defining temporary total disability. *Schulte* established that temporary total disability was primarily an economic concept based on the employee's ability to find and hold a job, given the employee's physical restrictions and other life circumstances.¹⁸⁵ In order to prove temporary total disability under *Schulte*, an employee had to perform a diligent search for work. As was mentioned earlier, the legislature specifically repealed the requirement that an employee perform a diligent effort to find employment following a work-related injury. The principal question now is: how is temporary total disability defined under the new statute? Will the *Schulte* test be modified to reflect the necessary role of the QRC in the employee's work search? Is *Schulte* useless for the employer who does not provide rehabilitation assistance but who attempts to discontinue indemnity benefits?

Is temporary total disability now solely a medical condition? If an employer and employee dispute temporary total disability status, and each had a medical report supporting its argument, what standard will a court use to decide the dispute? Is an employee necessarily temporarily totally disabled until she reaches MMI? How will the courts handle the situation in

184. 278 Minn. 79, 153 N.W.2d 130 (1967).

185. *Id.* at 83, 153 N.W.2d at 133-34.

which doctors disagree on MMI? Will disputes as to MMI fill court dockets? Should subconscious emotional and mental complications be relevant in determining MMI? If so, would the system revert to *de facto* indefinite temporary total disability?

What minimal level of cooperation with rehabilitation efforts is sufficient for an employee to continue receiving indemnity benefits? Should the search for work within a rehabilitation framework be evaluated by mechanical and objective standards (for example, the number and type of job inquiries per week)? Should a chemically dependent employee be required to cure that disease as part of a rehabilitation plan? If neither the employer nor the employee does anything to comply with the statutory requirements regarding return to work, will the court find temporary total disability?

It seems unlikely that temporary total disability will become solely a medical concept. The statutory definitions of total disability upon which the *Schulte* court relied for authority¹⁸⁶ were unscathed by the 1983 legislature. The court must still find that the injury "totally incapacitates the employee from working at an occupation which brings him income."¹⁸⁷ Many of the decisions following *Schulte* will have little precedential value under the new law because the rules of the game have changed. Nevertheless, the basic theory of *Schulte*— that total disability is an economic concept— should survive the statutory changes. A series of transitional cases— cases involving former law injuries, but decided by applying the spirit of the new law— may foretell how the courts will define temporary total disability for injuries occurring on or after January 1, 1984.

Schulte is not dead yet. The Minnesota Supreme Court has applied a *Schulte* test to determine temporary total disability in two recent cases.¹⁸⁸ In *Cavanaugh v. Frederick Willys, Inc.*,¹⁸⁹ the supreme court reversed the WCCA's finding that the employee had not diligently searched for work.¹⁹⁰ The supreme court concluded that the unsuccessful efforts by two rehabilitation

186. MINN. STAT. § 176.101, subd. 5 (1967).

187. *Id.*

188. *Cavanaugh*, 361 N.W.2d at 50; *Hengemuhle*, 358 N.W.2d 54.

189. 361 N.W.2d 48 (Minn. 1985).

190. *Id.* at 53.

specialists to find suitable work, combined with testimony that the employee could not return to a job without assistance, constituted sufficient evidence that the employee was totally disabled.¹⁹¹ The court's emphasis in its reasoning on the failed rehabilitation efforts may suggest that an employee's search for work when conducted in conjunction with rehabilitation assistance will be presumed adequate for *Schulte* purposes.

Employer and employee responsibilities in the return to work process were discussed in several other transitional cases. In *Johnson v. Red Wing Shoe Co.*,¹⁹² the WCCA held that an employee who requests rehabilitation services and is refused those services by the employer still must make a diligent search for work.¹⁹³ *Westacott v. Formac Corp.*,¹⁹⁴ elaborated on the *Johnson* holding. In *Westacott*, the WCCA scolded an employer who failed to provide required rehabilitation assistance but nevertheless attempted to discontinue indemnity benefits on the grounds the employee had not diligently searched for work. The WCCA stated that efforts by employees must still be reasonable and diligent, but those efforts should be conducted primarily "within the framework of a rehabilitation plan developed through the cooperation and support of the employer and insurer."¹⁹⁵

Westacott implies that search for work standards may be relaxed when an employer fails to provide rehabilitation services. When the employer does provide those services, however, the employee is obligated to use them. In *Mayer v. Erickson Decorators*,¹⁹⁶ the employee accepted a low-paying job after his injury and refused to cooperate with a QRC who tried to return the employee to a job with a wage scale similar to that of the pre-injury job. The Minnesota Supreme Court rejected the employee's claim for temporary partial disability benefits, stating:

an employee is obligated to cooperate with appropriate rehabilitation efforts and, when those efforts are aimed at returning him to employment, to make reasonably diligent efforts to obtain such employment if he is to remain entitled to receive temporary disability compensation under section

191. *Id.*

192. 37 Minn. Workers' Comp. Dec. 522 (1984), *sum aff'd, id.* at 529 (1985).

193. *Id.* at 526.

194. 37 Minn. Workers' Comp. Dec. 79 (1984).

195. *Id.* at 81.

196. 372 N.W.2d 729 (Minn. 1985).

176.101, subd. 2.¹⁹⁷

The above cases suggest that temporary total disability will remain primarily an economic concept, as it must for the incentives of the new system to function properly. The standard for determining temporary total disability will shift from a pure *Schulte* test, which focused solely on the employee's activities, to a test evaluating the contributions of both the employee and employer in the search for work effort. The trend of recent decisions has hints of the maxim that one who seeks equity must do equity. Each party must perform certain obligations before it can expect judicial relief for improper acts or omissions of the other. If the equitable maxim indeed becomes the basis for determining temporary total disability under the new law, the parties will have the additional incentive to perform their duties under the statute.

B. *Will QRCs Remain Independent?*

A basic premise of the new system is that QRCs will be neutral parties with responsibility to facilitate the return to work of the displaced employee. The Department of Labor and Industry licenses and monitors QRCs to try to assure quality services.¹⁹⁸ However, tensions in the system threaten QRC neutrality. QRCs are private entrepreneurs. They understand who pays them (the employer) and what the paying party wants to hear. On the other hand, the employee has the final decision as to her own QRC.¹⁹⁹ If a QRC wants referrals from the employee or the employee's attorney, that QRC may develop an employee bias.

Since an employee must cooperate with rehabilitation to remain eligible for indemnity benefits, the testimony of a QRC at trial will be crucial in an indemnity eligibility dispute. If the QRC testifies against the employee, prospects for further cooperation by the employee with that QRC are dim. If the QRC testifies against the employer, the party paying the QRC, the QRC may not receive business from that employer again. Of course, QRCs have professional standards and undoubtedly have good intentions. However, few would dispute that certain health care providers, another group of critical and theo-

197. *Id.* at 731.

198. See *supra* notes 161-62 and accompanying text.

199. See MINN. STAT. § 176.103, subd. 4 (1984).

retically neutral cogs in the workers' compensation system, have predictable biases and are retained by parties to litigation because of those biases.

The conflict between private enterprise and neutrality may be irreconcilable. The state has made the decision that QRCs will be more aggressive and more effective as entrepreneurs than as government bureaucrats. If the system succeeds in general—i.e., if on the average employees return to work quickly—the risks involved in having private QRCs may be acceptable.

C. *Will Attitudes Change?*

Another basic premise of the new system is that participants will accept its principles and respond to its incentives. For this to happen, the Department of Labor and Industry first has to educate employees and employers about the system. The Department has published informational booklets for employers and employee organizations.²⁰⁰ Members of the Department also speak to interested groups about the new law. Despite these efforts, logistical difficulties in reaching even a majority of the state's employees means that the people for whom the system is designed are mostly ignorant of its basic principles, not to mention its complex intricacies and incentives, until after the injury, when attitudes have already been established.

1. *Employee Attitudes*

For the system to function optimally, displaced employees must accept and actively use the rehabilitation process to return to work. The displaced employee is somewhat at the mercy of the system, since benefits may expire before the employee has found a job, despite a diligent search for work. To protect from "falling through the cracks" and to maximize loss of function recovery, a displaced employee must strive to procure a suitable job offer as quickly as possible. Since the pre-injury employer is the most likely source of such an offer,²⁰¹ the employee must avoid, or at least suppress, any animosity toward the employer. The luxury that existed under the former system of waiting to find a job elsewhere is not as certain now; there is no "safety net" for an employee whose feelings against

200. See generally EMPLOYERS' GUIDE, *supra* note 58.

201. J. BENANEV & S. KEEFE, *supra* note 39, at 8.

the pre-injury employer interfere with returning to work. In addition to accepting and using QRC assistance to return to work quickly, employees must cooperate with QRCs in order to remain eligible for full indemnity benefits.²⁰²

Because they have little to lose and much to gain by cooperating with rehabilitation, most employees should adapt to the rehabilitation concept with little resistance. Whether employees use the rehabilitation system whole-heartedly depends on how they perceive its effectiveness. Some employees may “go through the motions” to remain eligible for indemnity benefits in the short term, but may not fully cooperate with QRCs. The group of recalcitrants should be small, however, because rational employees will understand the advantages of returning to work quickly.

A larger problem than that of recalcitrant employees will be that of inflexible employee organizations. Certain unions have historically made job placement of junior displaced employees difficult by allocating “easy” or light-duty jobs to senior union members.²⁰³ The conflict between appeasing senior members and making allowances for disabled employees still exists for unions. The 1983 statutory changes added some urgency to the displaced employees’ need for available jobs, but it is uncertain whether this increased urgency will be sufficient to affect union policies.

2. *Employer Attitudes*

The “correct” attitude for employers under the new statute is to return displaced employees to work at modified jobs as quickly as possible. Where necessary, employers should retain QRCs for the displaced employees and cooperate with the QRCs to expedite the return to work process. Finally, employers should maintain an active and conscientious interest in the displaced employee’s return to work. The primary tools for shaping the desired attitudes are the two-tier system of loss of function benefits and the indemnity provisions of the new statute.

Certainly, employers will benefit by adopting the attitudes and taking the actions necessary for a prompt return to work by a displaced employee. By so doing, employers take advan-

202. See *supra* note 120 and accompanying text.

203. CITIZENS LEAGUE, *supra* note 7, at 22, 36, 41.

tage of the difference between IC and ERC and are able to discontinue indemnity benefits before they would expire by statute. Many employers will adopt the "correct" attitudes and behaviors for these reasons.

Unfortunately, the new statute has also made the opposite behavior an attractive option. Under the former statute, the penalty for not returning the displaced employee to work was the prospect of indefinite indemnity benefits for a moderately disabled employee.²⁰⁴ The penalty under the current statute is limited to increased loss of function benefits²⁰⁵ and a maximum indemnity benefit period of MMI or retraining plus ninety days.²⁰⁶ For many employers, the new statute makes it much less expensive in many situations to abandon a displaced employee. Not only will abandonment costs be less under the new system than under the former in most situations, they will also be more predictable. Employers and managers are less intimidated by abandoning a displaced employee if the risks involved are predictable and controllable. Consequently, it is not at all certain that employers will choose to reinstate employees more frequently than they did before. It is likely, though, that if employers do reinstate displaced employees, they will do so quickly to take advantage of the IC/ERC difference.

CONCLUSION

The current workers' compensation system for dealing with the displaced employee is not perfect. Some employees will "fall through the cracks" when economic conditions are such that a suitable job is simply not available within ninety days of MMI or the end of retraining. The system provides opportunities for employers to rather inexpensively ignore the displaced employees. The statute is probably too complex for most lay people to understand, with the result that many people will incur legal fees just to comprehend basic rights. The complexity also invites errors caused by ignorance, and provides opportunities for those who know the system to take advantage of those who do not. As with any statutory system, certain provisions are vague and will require interpretative litigation before

204. See *supra* notes 13-16 and accompanying text.

205. See *supra* notes 130-44 and accompanying text.

206. See *supra* notes 103-18 and accompanying text.

employees and employers will be able to predict the consequences of certain actions.

Despite its faults, however, the new workers' compensation system should, in the long run, improve the plight of the displaced employee. The principal advantage to the displaced employee is that the new system requires employees, employers, and rehabilitation personnel to take notice of, and to respond to, the displaced employee quickly. The former system had no comparable premium on urgency, and consequently, displaced employees were often ignored and attention to their problems postponed. Under the new system, employers save money by acting promptly, QRCs earn money by acting promptly, and employees maximize recovery by acting promptly. The new system's ancillary effects of reduced litigation, greater objectivity, and less system-wide cost also benefit employees, employers, and society as a whole.

For the displaced employee, though, the most important feature of Minnesota's new workers' compensation system is its direction. For the first time, Minnesota has taken drastic affirmative steps to address the special problems confronting this worker. By recognizing these problems and by focusing great energy toward their resolution, Minnesota has made a commitment to reducing the human, social, and monetary costs associated with the displaced employee situation.