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November 30, 2024

Senator Michael Tipping, Chair
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Joint Standing Committee on Labor and Housing
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Re: Resolves 2023, c. 139; November Update

Resolves 2023, c. 139 requires the Board to examine "whether the Maine Workers' Compensation Act of 1992 provides substantial protection for workers who have suffered work-related injuries and diseases at an affordable cost to employers . . . ." The September and October monthly updates to this Committee discussed these two "equally important" objectives that were identified by the Blue Ribbon Commission in 1992. (*Report of the Blue Ribbon Commission to Examine Alternatives to the Workers' Compensation System and to Make Recommendations Concerning Replacement of the Present System*, August 31, 1992, p. 3.)

While these are often seen as competing objectives, this is not always the case. One such example is the focus of this report. Specifically, returning injured employees to work as soon as possible after an injury.

I. Benefits of returning to work as soon as possible after an injury

Most injured employees can return to the same job without losing any time or after a short recovery period. Others need temporary accommodations or may require more extensive services including employment rehabilitation. Limiting, or eliminating, time lost from work after an injury directly benefits the employer and the employee.

A. Employers' perspective

As discussed in the October update, most employers provide workers' compensation coverage for their employees by purchasing a policy from an insurance company. Insurance premiums are primarily based on an employer's payroll and the type of jobs that insured workers perform. The final premium is also subject to merit or experience rating. Merit and experience rating plans are processes that adjust an employer's premium based on their claim experience.

To simplify, lower claim costs will result in lower premiums; higher claim costs will result in higher premiums.[1]

An employer can improve its experience rating by reducing lost wage benefits that are paid to injured workers. This can be achieved by limiting the amount of time an employee is absent from work after a work injury. Maine's Workers' Compensation Act (the "Act") has a seven-day waiting period for weekly compensation benefits. 39-A M.R.S.A. § 204. Employees who return to work within the waiting period are not entitled to compensation for the incapacity. Returning an employee to work as soon as possible will lower claim costs and help create a favorable experience rating.

Employers have other reasons for bringing employees back to work as soon as possible. "For example, an employer that takes pride in taking care of its workers might put more effort into keeping workers who experience work disabilities attached to the firm, simply because that is part of the firm's mission." Epstein, et al., *Synthesis of SAW/RTW Programs, Efforts, Models and Definitions,* (Prepared for the US Department of Labor), 2020, p.8. Also, employers that bring employees back to work avoid costs associated with lost productivity as well as recruitment and training to replace the injured employee.

B. Employees' perspective

The most obvious incentive for an injured employee to return to work is to prevent loss of income. Because of the waiting period (described above), an injured employee will not receive any benefits for the first seven-days of incapacity. This means that an employee who does not want, or cannot afford, to lose a week of pay must use sick leave, vacation pay or earned time off, if available, to replace lost wages. As discussed in the September update, some injured workers who do not return to work earning their pre-injury wage may, depending on their level of incapacity, experience a significant loss of income if their workers' compensation benefit does not keep pace with inflation.

Also, similar to employers, " . . . workers often take pride in their work and may prefer working to not working even when the financial returns are quite small." Epstein, et al., p. 8. Returning to work can also mitigate other impacts on an employee's financial well-being. For example, employees may lose access to employer funded (partially or wholly) benefits like health insurance. An employee who is not working or has reduced earnings will either not contribute, or will have reduced contributions, to retirement programs like Social Security. This can have a negative effect in the long term on an employee's wealth.

II. Return to work and accommodations

The Act provides streamlined procedures for an insurer to reduce or discontinue lost wage benefits when an employee returns to work for the same employer following a work-related disabling injury.

[1] It is our understanding that employers in self-insured groups pay contributions instead of premiums and that member contributions are based, in part, on claims history.

A. Return to work for the same employer

Pursuant to §205(9)(A), an employer can automatically reduce or discontinue lost time benefits when an employee returns to work with, or receives an increase in pay from, the employer paying benefits.

B. Reasons other than return to work for the same employer

If benefits are being paid pursuant to an award, order or compensation scheme, the insurer may only terminate or reduce benefits by filing a petition pursuant to §205(9)(B)(2) and obtaining an order that allows the benefit reduction. Alternatively, if benefits are being paid without an award, order or compensation scheme, benefits may be reduced or discontinued by filing a 21-day certificate and unilaterally reduce or terminate benefits under §205(9)(B)(1).

C. Employee's petition to return to work

Pursuant to 39-A M.R.S.A. § 218, an employer's obligation to reinstate its injured worker and to make reasonable accommodations for an employee only arises after an employee files a petition with the Board. If an employee cannot return to their pre-injury job, §218 establishes an employer's obligation, under certain circumstances, to reinstate and make reasonable accommodations for the physical condition of an injured employee. Before this responsibility is imposed, the employee must file a petition seeking reinstatement. *See Jandreau v. Shaw's Supermarkets, Inc*., 2003 ME 134, ¶¶ 14-16.

Requiring litigation before the obligation to explore reasonable accommodations arises necessarily slows down the process and may be counterproductive in terms of getting injured employees back to work. It also seems to run counter to the Board's mission statement which is "to serve the employees and employers of the State fairly and expeditiously by ensuring compliance with the workers' compensation laws, ensuring the prompt delivery of benefits legally due, promoting the prevention of disputes, utilizing dispute resolution to reduce litigation and facilitating labor-management cooperation." 39-A M.R.S.A. § 151-A.

III. Employment rehabilitation

There will, of course, be situations where it is not possible for an injured worker to return to the same employer or, perhaps, the same type of work. In such situations, an employee may need employment rehabilitation. Entitlement to employment rehabilitation is governed by 39-A M.R.S.A. § 217 and Workers' Compensation Board Rule chapter 6.

The process can be cumbersome in part because of the opportunities for litigation – first, on the issue of whether an evaluation for suitability should be completed and, second, on the issue of whether a recommended plan should be implemented. Perhaps because it is cumbersome, the process outlined in § 217 is rarely utilized.

The Board began publishing the number of employment rehabilitation requests in the 2012 Annual Report on the Status of the Maine Workers' Compensation System. The following chart shows that the number of applications received by the Board has dropped precipitously since applications reached their peak in 2013.

Calendar Year	Applications Received
2011	31
2012	42
2013	66
2014	60
2015	52
2016	47
2017	45
2018	44
2019	32
2020	15
2021	10
2022	7
2023	8

IV. Hiring incentives

The Act contains incentives for employers to bring back to work or hire employees who have completed rehabilitation programs pursuant to § 217. These include reimbursement pursuant to 39-A M.R.S.A. §355 in certain situations for weekly wage replacement benefits due to a subsequent work injury if the employee returns to work for the same employer, and a wage credit for subsequent employers (i.e., an employer other than the one for whom the employee was working when injured) that hire employees who have completed rehabilitation programs under §217. Given the scarcity of vocational rehabilitation requests under §217, it is not surprising that the reimbursement provisions are rarely invoked.

V. Next steps

Bringing injured workers back to work as soon as possible after a period of incapacity is an important objective of the workers' compensation system. The Board needs more data to understand how well Maine's workers' compensation system is performing in this regard. For example, while very few vocational rehabilitation requests are filed with the Board, it would be helpful to know if injured employees are availing themselves of employment rehabilitation programs outside of the Act.

Injured workers may be taking advantage of the Maine Department of Labor's rehabilitation services. Others may be receiving services directly from workers' compensation insurers. This was the case in 2019 when, pursuant to P.L. 2019, c. 344, § 17 (L.D. 756), the Board convened a group of stakeholders to study whether the employment rehabilitation process should or could be improved. Ultimately, the stakeholder group did not make a recommendation.[2] Instead, there was general agreement that it was premature because recent rule changes had not been in effect sufficiently long enough to create a track record. There was

[2] The relevant section of the report filed in 2020 is attached as Appendix A.

also agreement that further examination was warranted to find out why the Board's vocational rehabilitation process was not being used more frequently and that further substantive changes should not be considered until after that.

With respect to services provided by insurance companies, the Board does not have any data with respect to the amount or types of services provided and how successful those services are in terms of returning injured workers to employment. The Board will examine its data collection practices to ensure it is receiving the information it needs – how many employees return to work for the same employer, how many return to work for different employers, how long does it take for employees to return to work, how long do they stay in jobs they return to, how often do rehabilitation services cause an injured employee to successfully return to work, and, how do post-injury wages compare to pre-injury earnings.

VI. Conclusion

The undersigned management member and labor member have extensive experience with the issues discussed in this report. Experience which underscores the importance to both employers and employees of early and successful return to work strategies. They, and the entire Board, will continue to explore how to improve return-to-work provisions of the Act to ensure that employers and employees receive the full benefits of effective return to work/retraining strategies.

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APPENDIX A

Excerpt from January 29, 2020 Report of the Working Group Established by the Board Pursuant to LD 756, § 17

III. VOCATIONAL REHABILITATION

A. Purpose

The value of vocational rehabilitation in workers' compensation is widely recognized, as explained in the following excerpt from the leading workers' compensation treatise:

> Until comparatively recently, the industrial accident problem had two major phases: prevention and cure. The spotlight is now on a third: rehabilitation. The conviction is gradually gaining ground that the compensation job is not done when the immediate wound has been dressed and healed. There remains the task of restoring the person to the maximum usefulness that he or she can attain given the physical impairment.
>
> As a matter of underlying philosophy, it is not difficult to demonstrate that rehabilitation is properly an inherent part of the workers' compensation system's function, and this is now universally accepted in principle by all interested groups. Even as a purely legal concept, one could put the matter this way: Restitution is the proper remedy when money damages will not restore something that is unique. How much clearer is it that, when the loss is the loss of use of a limb rather than of mere chattels, restitution is the most appropriate remedy.

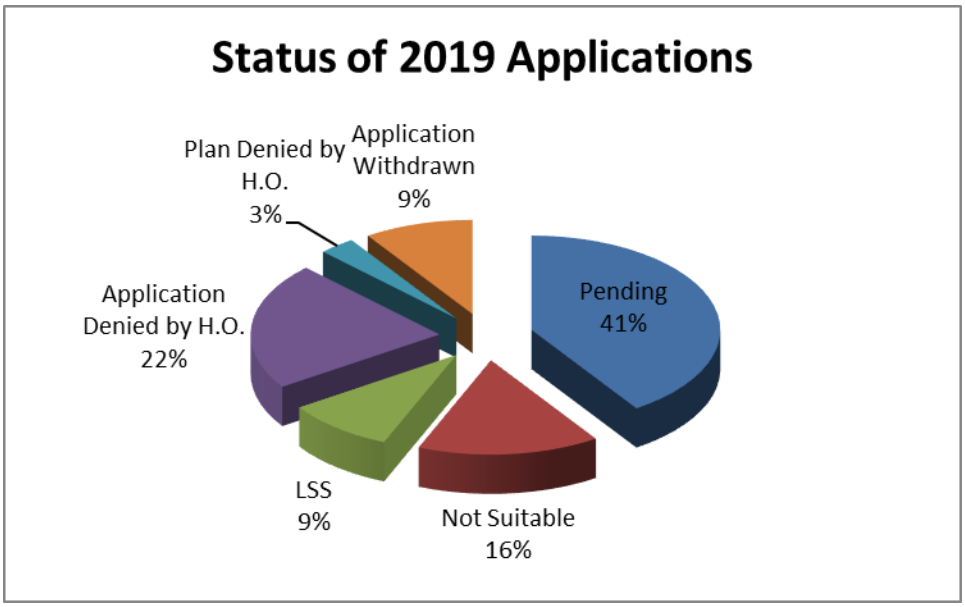
8 Larson's Workers' Compensation Law § 95.01.

B. Data

To provide context for the vocational rehabilitation discussion, the working group examined the number of vocational rehabilitation requests received by the Board and the number of lost time claims received each year.

1. Number of vocational rehabilitation requests from 2015 to 2019.

The following charts show the status of vocational rehabilitation requests from 2015 to 2019.



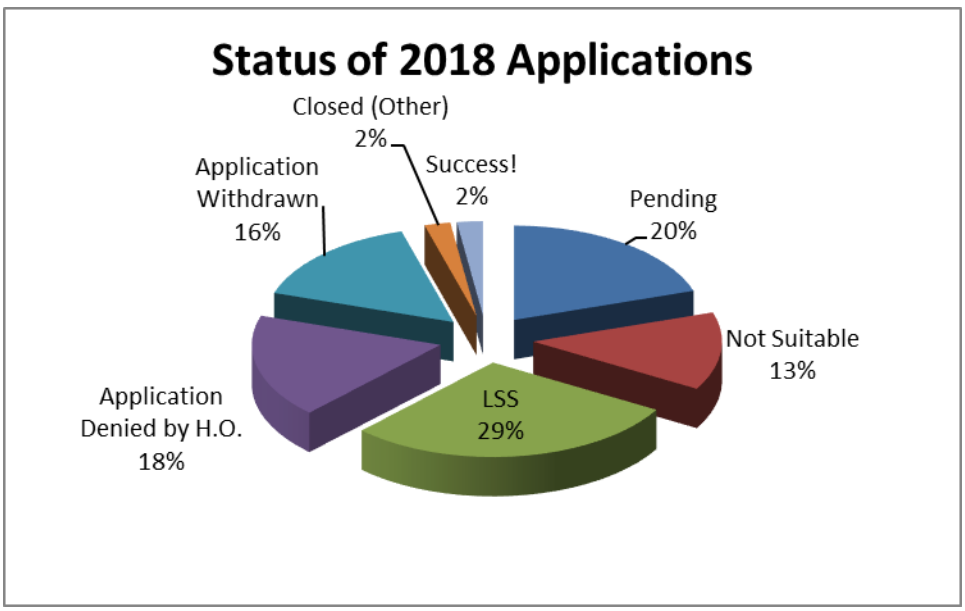
2019:

32 Applications Total

26 by EE

3 by ER/IR

3 by ALJ



2018:

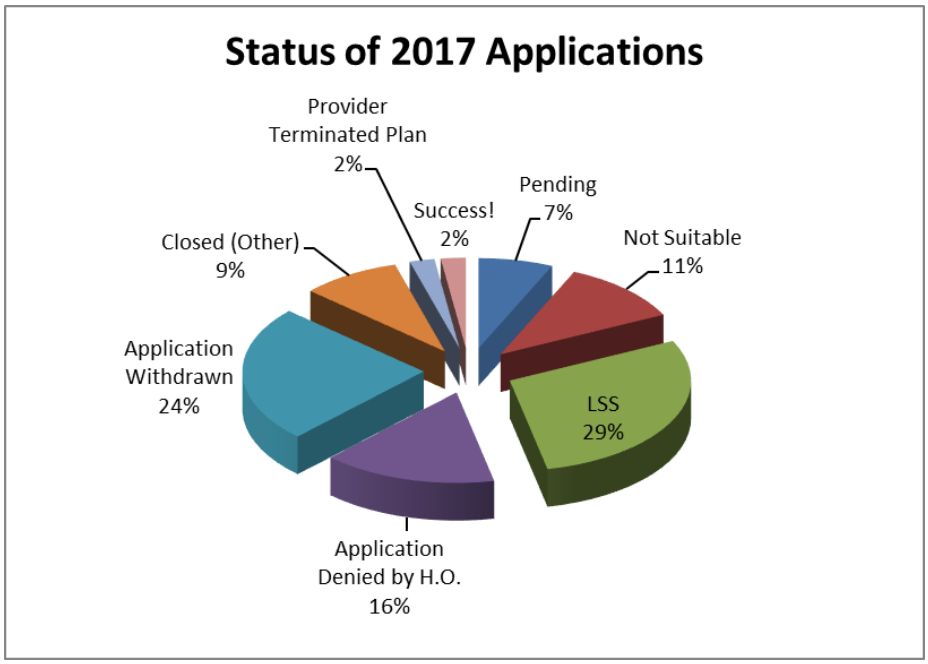
45 Applications Total

36 by EE

8 by ER/IR

1 by ALJ

2017:



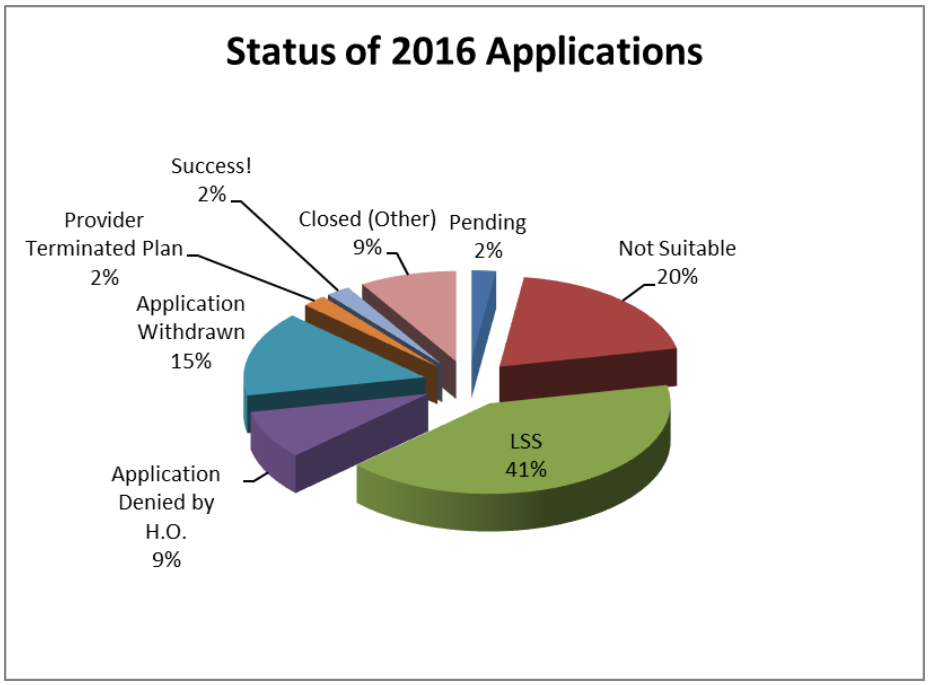
45 Applications Total

41 by EE

0 by ER/IR

4 by ALJ

2016:

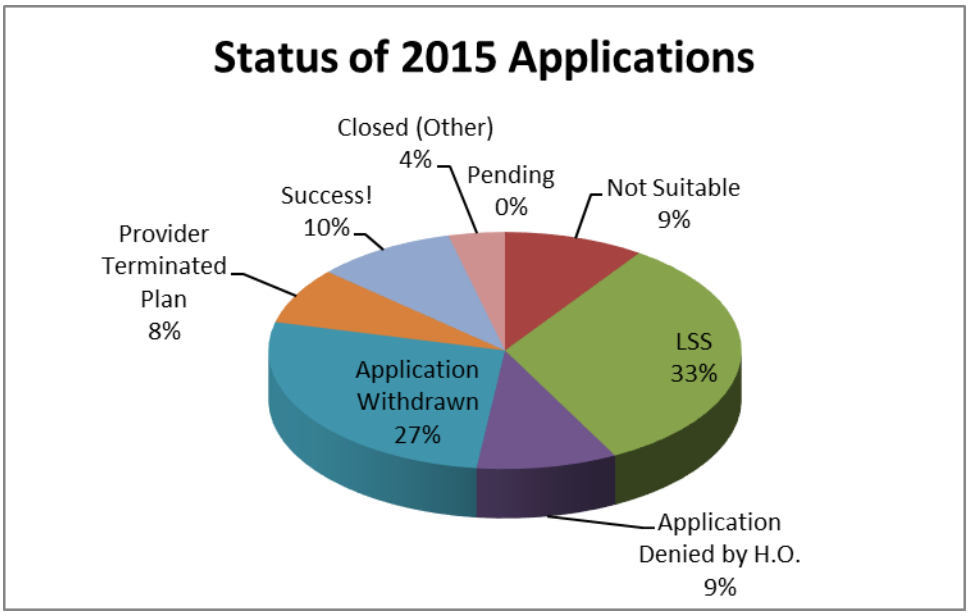


47 Applications Total

39 by EE

6 by ER/IR

2 by ALJ



2015:

53 Applications Total

53 by EE

0 by ER/IR

0 by ALJ

2. Number of lost time claims per year

The following chart - produced by the Department of Labor Bureau of Labor Standards – for the Board's 2019 Annual Compliance Report, shows the number of lost time claims reported from 2013 to 2017.

			Year of First Report			
Claim Status	2013	2014	2015	2016	2017	Total
Lost Time (LT) Claims	5,152	5,134	4,940	4,561	4,779	24,566
Open LT Claims	241	295	416	512	663	2,127
% Open	4.7%	5.7%	8.4%	11.2%	13.9%	8.8%
Closed LT Claims	4,911	4,839	4,524	4,049	4,116	22,439
Resumed Work	3,120	3,200	3,093	3,205	3,096	15,714
% Resumed Work	60.6%	62.3%	62.6%	70.3%	64.8%	64.1%

2019 Annual Report on the Status of the Maine Workers' Compensation System, p. C-28.

3. Comparison

A comparison of the number of lost time claims to the number of vocational rehabilitation applications shows the Act's vocational rehabilitation process is infrequently used. In contrast, the Department of Labor's Division of Vocational Rehabilitation reported that it received 107 applications in fiscal year 2018-2019 from individuals who were receiving workers' compensation benefits.

C. Streamline process

Over the years, the Board has received feedback that the procedures associated with requesting vocational rehabilitation services is cumbersome and unclear. In 2018, the Board adopted a rule designed to ameliorate some of these concerns. The working group discussed whether or not it would be worthwhile to incorporate the rule changes into the Workers' Compensation Act (the "Act"). The following draft language, which merges 39-A M.R.S.A. §217 with the changes adopted by the Board in 2018, was presented to the working group.

§217. EMPLOYMENT REHABILITATION

When as a result of injury the employee is unable to perform work for which the employee has previous training or experience, the employee is entitled to such employment rehabilitation services, including retraining and job placement, as reasonably necessary to restore the employee to suitable employment.

1. Services. If employment rehabilitation services are not voluntarily offered and accepted, the board on its own motion or upon application of the employee, carrier or employer, after affording the parties an opportunity to be heard, may refer the employee to a board-approved facility for evaluation of the need for and kind of service, treatment or training necessary and appropriate to return the employee to suitable employment. The board's determination under this subsection is final. Neither party may appeal the determination of the board under this subsection.

2. Plan ordered. Upon receipt of an evaluation report pursuant to subsection 1, if the board finds that the proposed plan complies with this Act and that the implementation of the proposed plan is likely to return the injured employee to suitable employment at a reasonable cost, it may order the implementation of the plan. Implementation costs of a plan ordered under this subsection must be paid from the Employment Rehabilitation Fund as provided in section 355, subsection 7. The board's determination under this subsection is final. Neither party may appeal the determination of the board under this subsection.

3. Order of implementation costs recovery. If an injured employee returns to suitable employment after completing a rehabilitation plan ordered under subsection 2, the board shall order the employer who refused to agree to implement the plan to pay reimbursement to the Employment Rehabilitation Fund as provided in section 355, subsection 7.

The employer/insurer shall, no later than 30 days after the Board issues an order pursuant to section 355, subsection 7, either pay the amount ordered by the Board or file a petition objecting to the order.

If a timely petition is received, the matter shall be referred to mediation.

If the matter is not resolved during mediation, the matter will be referred for hearing.

The employer/insurer may raise all issues and defenses that were, or could have been raised, in any prior proceeding conducted under this section.

The board's decision under this subsection is subject to appeal as set forth in section 321-B.

4. Additional payments. The board may order that any employee participating in employment rehabilitation receive additional payments for transportation or any extra and necessary expenses during the period and arising out of the employee's program of employment rehabilitation.

5. Limitation. Employment rehabilitation training, treatment or service may not extend for a period of more than 52 weeks except in cases when, by special order, the board extends the period up to an additional 52 weeks.

6. Loss of or reduction in benefits. If an employee unjustifiably refuses to accept rehabilitation pursuant to an order of the board, the board shall order a loss or reduction of compensation in an amount determined by the board for each week of the period of refusal, except for specific compensation payable under section 212, subsection 3.

7. Hearing. ~~If a dispute arises between the parties concerning application of any of the provisions of subsections 1 to 6, any of the parties may apply for a hearing before the board.~~ The board shall adopt rules establishing procedures to resolve disputes between parties concerning the application of any of the provisions of subsections 1, 2, 4, 5 and 6.

8. Presumption.

9. Reduction of benefits. If an employee is actively participating in a rehabilitation plan ordered pursuant to subsection 2, benefits may not be reduced except:

A. Under section 205, subsection 9, paragraph A, upon the employee's return to work with or an increase in pay from an employer who is paying the employee compensation under this Act;

B. Under section 205, subsection 9, paragraph B, based on the amount of actual documented earnings paid to the employee; or

C. When the employee reaches the durational limit of benefits paid under section 213.

D. Summary of working group activity

In calendar year 2019, the Board received 32 applications for employment rehabilitation – down from approximately 45 in prior years. In Fiscal Year 2018-19 the Department of Labor's Division of Vocational Rehabilitation received 107 applications from employees who were receiving workers compensation benefits and had not been referred by the Board. The group

discussed whether it is appropriate/desirable for these costs to be shifted to DOL instead of being absorbed by the workers' compensation system.

It is not clear why fewer applications were received this year, nor is it entirely clear why employees go directly to DOL as opposed to exercising their rights under the Act. With respect to the latter point, it is possible the procedures in place at the Board encourage litigation. Additional litigation slows down the vocational rehabilitation process and may make the Board's process less attractive to injured workers.

That said, there was general agreement that it is premature to decide that the recently adopted rule changes will not alleviate the concerns related to vocational rehabilitation procedures. Also, given the small number of applications in 2019, there is agreement that further study is warranted as to why the Board's vocational rehabilitation process is not used more frequently before considering any substantive changes.