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The Minnesota Workers' Compensation Act: Amendments by the 1995 Minnesota Legislature

Thomas L. Johnson

Catherine J. Wasson

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THE MINNESOTA WORKERS' COMPENSATION ACT: 
AMENDMENTS BY THE 1995 MINNESOTA LEGISLATURE

Honorable Thomas L. Johnson† & Catherine J. Wasson††

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† Thomas L. Johnson is a graduate of St. Thomas University and the University of Minnesota Law School. He was in private practice until 1987, when he joined the Office of Administrative Hearings. In 1992, Judge Johnson was appointed to the Workers' Compensation Court of Appeals.

†† Catherine J. Wasson received her J.D. degree from William Mitchell College of Law in 1988. She served as a law clerk for the Honorable Harriet Lansing, Minnesota Court of Appeals, from 1988 to 1989, then was self-employed as an appellate researcher and writer from 1990 to 1993. She has been an adjunct professor at William Mitchell College of Law since 1992, and has worked as a staff attorney at the Workers' Compensation Court of Appeals since 1994.

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Workers' compensation legislation was first enacted in Minnesota in 1913. The original legislation established an elective compensation scheme whereby an employer could choose to be covered by the new legislation or could opt out of the system and remain subject to somewhat modified common law principles which had traditionally governed the relationship between employer and employee. In 1921 the schedule of compensation was expanded and new procedural requirements were enacted, but the nature of the Act remained essentially unchanged. In 1937 the elective provision of the Act was abolished, and since that time coverage under the Workers' Compensation Act has been compulsory for almost all Minnesota employers.

The Minnesota Legislature has made substantial revisions to the Workers' Compensation Act since 1937, and the present Act bears little resemblance to the original legislation. A major revision of the Act was undertaken in 1953, but resulted in few changes of real significance. In the mid-1970s, however, the state's workers' compensation system became the subject of increased scrutiny and criticism, and in 1977 the Minnesota Legislature created a commission to study the system and make recommendations for change. While some significant changes
were made to the Act in 1979 in response to the commission's report, there was widespread feeling that these changes were not sufficient. In 1983, therefore, the legislature enacted the first comprehensive overhaul of the Workers' Compensation Act since its enactment in 1913.

As far-reaching as any of the substantive changes resulting from the 1983 amendment of the Act was the legislature's new statement of the intent of the Act and the manner in which it was to be interpreted. Prior to 1983, the Act was considered remedial and was construed in favor of the injured employee. The 1983 legislation expressly rejected this view, stating:

It is the specific intent of the legislature 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 in such cases. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the

8. Law of June 7, 1979, ch. 3, 1979 Minn. Laws Exec. Sess. 1256 (providing for vocational training that would secure a similar job or economic status and reducing compensation during training from twice the employee's rate for compensation to 125% of the employee's rate for temporary total disability). See generally Jay Benanav, Workers' Compensation Amendments of the 1979 Minnesota Legislature, 6 WM. MITCHELL L. REV. 743 (1980).

9. See, e.g., CITIZENS LEAGUE WORKERS' COMPENSATION COMMITTEE, WORKERS' COMPENSATION REFORM: GET THE EMPLOYEES BACK ON THE JOB (1982) (stating that Minnesota's system does not return workers to their jobs as quickly as other states', secondary benefits are disproportionately large, and most workers' needs go unfulfilled); MINNESOTA INSURANCE DIVISION, WORKERS' COMPENSATION IN MINNESOTA: AN ANALYSIS WITH RECOMMENDATIONS (1982); C. WILLIAMS ET AL., UNIVERSITY OF MINNESOTA INDUSTRIAL RELATIONS CENTER, MINNESOTA WORKERS' COMPENSATION BENEFITS AND COSTS: AN OBJECTIVE ANALYSIS (1983) (finding Minnesota to have some of the highest workers' compensation costs in the nation).

10. Law of June 7, 1983, ch. 290, 1983 Minn. Laws 1310. For a comprehensive analysis of the 1983 Amendments of the Workers' Compensation Act, including historical and political background, see generally Leslie Altman et al., Minnesota's Workers' Compensation Scheme: The Effects and Effectiveness of the 1983 Amendments, 13 WM. MITCHELL L. REV. 843 (1987) (stating that the most radical change in the 1983 Amendments was the adoption of the "two-tier" system in which compensation for permanent partial disability is paid at one level, or tier, or another).

11. See, e.g., Jonas v. Lillyblad, 272 Minn. 299, 301, 137 N.W.2d 370, 372, 23 W.C.D. 659, 662 (1965) (stating that "the act is highly remedial and should not be construed so as to exclude any employee from the benefits thereof unless it clearly appears that he does not come within the protection of the act.")
employer to be favored over those of the employee on the other hand.¹²

This change in the purpose and construction of workers' compensation laws in Minnesota, together with the increased authority granted to the Department of Labor and Industry,¹³ are perhaps the two most significant philosophical changes flowing from the 1983 legislation. In addition, the 1983 Act introduced new concepts governing receipt of benefits such as the so-called "two-tier" system and maximum medical improvement.¹⁴

In 1992, the Act was again amended.¹⁵ For injuries occurring on or after October 1, 1992, temporary partial disability benefits were subject to a 225-week limit with no benefits payable more than 450 weeks after the date of injury.¹⁶ The attorney fee statute was also amended to increase the permissible contingent fee from $6,500 to $13,000, but provided that the fee is computed on a "per injury" basis.¹⁷ Finally, the legislature provided that certain entities could establish managed care plans to provide medical services to injured workers.¹⁸

Business and insurance interests continued to maintain that Minnesota's workers' compensation rates were significantly

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¹³. Prior to the 1983 Amendments, the Department of Labor and Industry had only one set of rules relating to workers' compensation. Minnesota Rule 5220 (1983) contained rules relating to rehabilitation services (MINN. R. 5220.0100 to .1700), general workers' compensation practice and procedure (MINN. R. 5220.2500 to .4200), and the Workers' Compensation Court of Appeals (MINN. R. 5220.6500 to .7200). The 1983 Amendments gave the Department of Labor and Industry authority to promulgate rules relating to several areas including: the Assigned Risk Plan; evaluation and rating of permanent partial disability; fees for medical and rehabilitation services; rehabilitation services; certification of health care providers; the Special Compensation Fund; supplementary benefits; administrative conferences; allocation of dependency benefits; change of physicians; intervention; general practice and procedure; claims processing; standards for qualified rehabilitation consultants; and standards for workers' compensation claims adjusters. See 1983 Minn. Laws ch. 290, §§ 6, 86, 108, 165. The Department did, however, have broad rulemaking authority with regard to procedure prior to the 1983 Amendments. MINN. STAT. § 176.669, subd. 2 (1982).


¹⁶. Id. art. 1, sec. 4, at 593.

¹⁷. Id. art. 2, sec. 1, at 598.

¹⁸. Id. art. 4, sec. 13, at 635.
higher than the rates in neighboring states, putting Minnesota businesses at a competitive disadvantage. Labor and consumer groups maintained that Minnesota's workers' compensation rates and benefits were below the national average, and advocated for regulation of the insurance industry.

On March 14, 1995, a group of Minnesota legislators from both the House and Senate announced that they planned to draft a bill designed to cut workers' compensation costs. Representative Becky Kelso, DFL - Shakopee, predicted "broad-based support . . . will keep special interests from interfering with true reforms of workers' compensation." Proposed amendments to House File 642 were introduced and passed as amended by the Minnesota House of Representatives on May 9, 1995. A slightly amended version of the bill passed the Minnesota Senate on May 19, 1995, then returned to the House for passage on May 22, 1995. The bill was signed by the Governor on May 25, 1995.

The purpose of this article is to provide an overview of the 1995 Amendments to the Minnesota Workers' Compensation Act. The authors do not attempt to address every change effected by that legislation, and failure to address a particular issue does not in any way mean that the authors view that issue as insignificant. They have chosen to highlight those changes in the law that they suspect will have the greatest impact on workers' compensation practice in Minnesota, and will thus be of particular interest to the practicing bar. It is not the purpose of this article to suggest answers to the numerous questions raised by the 1995 Amendments, and it should not be relied upon for that purpose. Rather, the authors intend to "flag" key issues and encourage practitioners to consider the impact the 1995 Amendments may have on their practice so that the interests of their clients can be served successfully and efficiently.

20. DAVE OLMSCHEID, MINNESOTA CONSUMER ALLIANCE, DISPELLING THE MYTHS: FACTS ABOUT MINNESOTA WORKERS' COMPENSATION (undated).
22. H.F. 642, 79th Leg., MINN HOUSE J. 3920, 4121 (May 9, 1995).
23. H.F. 642, 79th Leg., MINN. SENATE J. 4114, 4208-09 (May 19, 1995) (house file 642 was heard as a special order and the text of amended house file 642 is identical to S.F. No. 1020); H.F. 642, 79th Leg., MINN. HOUSE J. 5331 (May 22, 1995).
The questions presented by the amended Act will ultimately be resolved as individual cases work their way through the workers' compensation system, and readers are reminded that, in the time between the completion of this article and its publication, some of these questions may already have been litigated and possibly decided by the Workers' Compensation Court of Appeals (WCCA) or the Minnesota Supreme Court.

It must also be noted that the effective date of the various provisions of the 1995 Amendments may be the subject of considerable discussion. As a general rule, an act is effective on the first of August following its final enactment, unless a different effective date is specified in the legislation.\(^\text{25}\) However, "any workers' compensation benefit change shall be effective on the October 1 next following its final enactment."\(^\text{26}\) Thus, absent a specified effective date, amendments to the statute that affect benefits will be effective October 1, 1995, while other changes will be effective August 1, 1995. It is not always clear, however, whether an amendment constitutes a "benefit change," and disputes regarding such questions will likely have to be resolved by the WCCA and the Minnesota Supreme Court. Similarly, those courts may have to determine the impact of certain provisions in the 1995 Amendments on employees injured prior to the effective date of the provision in question. Whether a statute may be applied retroactively generally depends upon whether the statute is considered to be a procedural rather than a substantive change in the law.\(^\text{27}\)

II. WAGE LOSS BENEFITS

The 1995 legislation made a variety of significant changes

27.  Statutory amendments generally will be applied to all injuries, including those occurring before the effective date of the legislation, when the change is procedural versus substantive in nature. See Kahn v. State, 327 N.W.2d 21, 27, 35 W.C.D. 425, 434 (Minn. 1982); see also Yaeger v. Delano Granite Works, 250 Minn. 303, 84 N.W.2d 368, 366, 20 W.C.D. 27 (1957) (stating that a statute may be constitutionally retroactive where it relates to a remedial or procedural right, but when a right has arisen on a contract and becomes vested, repeal of a statute does not affect that right or an action for its enforcement). But see Joyce v. Lewis Bolt & Nut Co., 412 N.W.2d 304, 308, 40 W.C.D. 209, 213-14 (Minn. 1987) (finding that where a worker is injured prior to amendment, and sustains a new injury after amendment, "that new injury supersedes the earlier injury as the controlling event, and the law in effect on the date of the new injury supersedes the law in effect at the time of the earlier injury.").
1995 WORKERS' COMPENSATION AMENDMENTS affecting compensation for wage loss. First, permanent total benefits are now available only to an employee who has significant ratable permanent partial disability. Moreover, an employee must meet specific threshold criteria before the traditional factors used to determine entitlement to permanent total disability benefits may be considered. Supplementary benefits have also been eliminated. Second, limits have been established for the duration of temporary total benefits, and the maximum and minimum compensation rates have been changed. Perhaps the most significant change is that the receipt of temporary total benefits is now controlled by specific "cessation and recommencement" events.

A. Permanent Total Disability and Supplementary Benefits

1. Permanent Total Disability Benefits

The five conditions constituting statutory permanent total disability (PTD) were not changed by the 1995 legislation. However, the test for determining whether an employee falls into a sixth PTD category has been substantially rewritten. Prior to the 1995 Amendments, an employee could be found permanently and totally disabled if he or she suffered from an injury "which totally and permanently incapacitates the employee from working at an occupation which brings the employee an income." The meaning of "totally and permanently incapacitated" was first defined in cases such as Schulte v. C.H. Peterson Constr. Co., and later codified in a statute requiring an employee to establish that his or her physical condition, in combination with his or her age, training, experience, and the work available in the community, caused the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. This test has been retained in the 1995 legislation, but new threshold showings are now required.

28. See Minn. Stat. § 176.101, subd. 5(a)(1) (1994) (establishing an irrebuttable statutory presumption of permanent total disability where an employee sustains: (1) permanent and total loss of sight in both eyes; (2) loss of both arms at the shoulder; (3) loss of both legs so that no prosthetic devices may be used; (4) complete and permanent paralysis; or (5) total and permanent loss of mental faculties).


before the Schulte test can be applied.

The new threshold requires that an employee less than fifty years old at the time of injury must have at least a seventeen percent permanent partial disability (PPD) rating of the whole body before entitlement to PTD benefits will be considered. An employee between fifty and fifty-five years old at the time of injury must have at least a fifteen percent permanent partial rating. Finally, an employee fifty-five years old or older at the time of injury who has not completed high school or obtained a GED must have at least a thirteen percent PPD rating. The traditional Schulte test may now be considered only after the employee meets the appropriate threshold criterion, but "[t]he employee's age, level of physical disability, or education may not be considered to the extent the factor is inconsistent with the disability, age and education factors specified" in the threshold criteria.

These threshold requirements raise several questions. First, must the required percentage of PPD be derived from a single work-related injury, or may the percentage of permanency attributable to multiple work-related injuries be combined to reach the required thirteen, fifteen, or seventeen percent? May non-work-related permanency be combined with work-related disability to reach the required threshold? Second, what are the constitutional implications of the differential treatment that apparently will be accorded similarly-situated employees under the new threshold requirements? Pursuant to the amended law, an employee with a fifteen percent PPD who was injured at age fifty will meet the threshold requirements. However, a similarly situated claimant with a fifteen percent permanent partial rating will not meet those requirements if he was injured at age forty-nine. One can also consider the case of the employee with an eighth-grade education who is injured at age fifty-five, but who has only a twelve percent permanency rating.

The purpose of graduated PPD ratings dependent on the employee's age on the date of injury is unclear. If an employee has a thirteen or fifteen percent rating and is totally disabled, should he or she be barred from receiving permanent total benefits if he or she was forty-five on the date of injury rather than fifty or fifty-five? If the purpose of PTD compensation is to

33. Id. at subd. 5(2).
compensate an employee for the permanent loss of his or her ability to work, it is unclear why the employee's age at the time of injury should be a threshold requirement for receipt of benefits. One can speculate that the impetus to require significant ratable permanent partial disability before an employee can be deemed permanently totally disabled came, at least in part, from cases upholding a finding of PTD where employees had only minimal PPD ratings. However, these decisions clearly were not based solely on the employee's age. The application of the new threshold requirements appears to be an area ripe for litigation and possible constitutional challenge. It might be reasonable to predict an increase in disputes over the proper PPD rating accorded an employee, especially when the potential ratings fall within the range covered by the new thresholds. Attorneys may also feel compelled to get expert opinions on ratings applicable to non-work-related conditions, and to litigate that issue, unless and until it is determined that non-work ratings are irrelevant to the thresholds. Litigating non-work-related PPD ratings, however, will obviously increase the time and expense necessary to resolve claims. In the case of younger workers unable to meet the age thresholds, the amended Act may result in more claims for retaining benefits under Minnesota Statutes section 176.102, subdivision 11.

Prior to the 1995 Amendments, permanent total compensation rates were calculated with reference to the maximum and minimum rates of compensation for temporary total disability. Effective October 1, 1995, for injuries occurring on or after that date the maximum compensation for permanent total disability is calculated in the same way, and is set at sixty-six-and-two-thirds

34. See, e.g., Schulte, 278 Minn. at 83, 153 N.W.2d at 133-34, 24 W.C.D. at 295.
35. See, e.g., Fields v. Paper & Graphics, 52 W.C.D. 545 (WCCA 1995) (finding a 60-year-old employee with a sixth-grade education and limited work experience, but with a capacity for sedentary work and a PPD rating of only 3% to be permanently and totally disabled); Showman v. Bud Chapman's Restaurant, No. 566-60-8060 (WCCA Aug. 2, 1994) (deciding that an employee with a 3.5% PPD and pre-existing alcoholism was permanently and totally disabled).
36. For example, whether an employee with an injury to the lumbar spine is rated at 11% or 13% under Minnesota Rule 5223.0070, subd. 1, will now dictate not just the amount of permanent partial compensation to which the employee is entitled under Minnesota Statutes § 176.101, subdivision 2a, but, if the employee was at least 55 on the date of injury, will determine whether the employee will be able to meet the statutory threshold for permanent total compensation.
37. See MINN. STAT. § 176.101, subd. 4 (1994).
percent of the employee’s daily wage, subject to a maximum of $615 per week.\textsuperscript{38} The minimum compensation rate, however, is not tied to the minimum rate for a temporary total disability, but is fixed at sixty-five percent of the statewide average weekly wage (SAWW).\textsuperscript{39} For injuries occurring on or after October 1, 1995, the permanent total compensation rate may be adjusted by no more than two percent per year.\textsuperscript{40} The first adjustment is deferred until the fourth anniversary of the injury, and shall be that of the last year only.\textsuperscript{41}

2. \textit{Supplementary Benefits}

Pursuant to legislation enacted in 1971, an employee became entitled to supplementary benefits after a specified number of weeks of total disability or receipt of temporary total or permanent total benefits.\textsuperscript{42} Supplementary benefits were intended, as the name implies, to supplement temporary total or permanent total benefits to ensure a minimum level of weekly compensation to a totally disabled employee,\textsuperscript{43} and to ensure that the wage loss benefits “of employees disabled for lengthy periods fairly correspond to wages of other employees at the time of payment of the benefit.”\textsuperscript{44} When supplementary benefits are available, Minnesota Statutes section 176.132, subdivision 2, “requires that the employee’s base compensation

\begin{itemize}
\item \textsuperscript{38} MINN. STAT. § 176.101, subds. 1(b)(1), 4 (Supp. 1995); see 1995 Minn. Laws ch. 231, art. 1, sec. 37 (regarding effective date).
\item \textsuperscript{39} MINN. STAT. § 176.101, subd. 4 (Supp. 1995). While this section now fixes the minimum compensation rate for PTD at 65\% of the SAWW (approximately $328), the compensation rate for temporary total disability is set at $104 or the employee’s actual wage, whichever is less. MINN. STAT. § 176.101, subd. 1(c) (Supp. 1995).
\item \textsuperscript{40} MINN. STAT. § 176.645, subdiv. 1 (Supp. 1995).
\item \textsuperscript{41} Id. at subd. 2.
\item \textsuperscript{42} 1971 Minn. Laws ch. 883, sec. 1 (effective January 1, 1972). Supplementary benefits were originally available to eligible employees whose temporary total or permanent total benefit was less than $60.00 per week, but was later increased to the difference between the amount the employee received under Minnesota Statute § 176.101 and 65\% of the SAWW. This was the formula used prior to the 1995 Amendments. \textit{See} MINN. STAT. § 176.192 (1994).
\item \textsuperscript{43} McBride v. Leon Joyce Blacktop, 422 N.W.2d 255, 259-60, 40 W.C.D. 1058, 1064-66 (Minn. 1988).
\item \textsuperscript{44} Cook v. Hiawatha Grain Co., 44 W.C.D. 152, 157 n.4 (WCCA 1990) (stating that “[t]he statute eradicated situations where a severely injured employee’s weekly benefit rate remained unchanged for years, even decades, notwithstanding the fact that the employee was unable to return to work ... and notwithstanding the fact that the dollar value of the benefit had been significantly eroded.”).
rate be adjusted pursuant to Minnesota Statutes section 176.645 before being subtracted from sixty-five percent of the SAWW, when calculating the amount of supplementary benefits payable. The 1995 legislation repealed the section of the Act which provided for supplementary benefits. Because the legislation did not provide a specific effective date, it would appear that the effective date of the repeal was October 1, 1995. It is also unclear whether the repeal applies only to supplementary benefits for injuries sustained on or after the effective date of the repeal, or to all claims for supplementary benefits brought on or after that date, regardless of the date of injury. If the repeal of the supplementary benefits provisions constitutes a substantive change in a worker’s entitlement to benefits rather than a mere procedural change, supplementary benefits will still be available for injuries pre-dating the effective date of the repeal. This is the position currently taken by the Special Compensation Fund. However, amendments repealing a prior provision of an act have been held to apply to an employee with a pre-repeal date of injury if the employee’s entitlement to the benefit had not vested by the repeal date. Thus, if an employee was still within the prescribed 208-week “waiting period” at the time of the repeal, the repeal may apply to bar the employee’s receipt of supplementary benefits.

The repeal of supplementary benefits is balanced by the new increase in the minimum compensation rate for PTD which, at sixty-five percent of the SAWW, correlates to the former

45. Kopish v. Sivertson Fisheries, 538 N.W.2d 139 (Minn. 1995).
46. 1995 Minn. Laws ch. 231, art. 1, sec. 35; 1995 Minn. Laws ch. 231, art. 2, sec. 110 (repealing MINN. STAT. § 176.132).
47. See supra note 26 and accompanying text.
48. See supra note 27 and accompanying text.
49. Telephone interview with Brandon Miller, Director of the Special Compensation Fund (Apr. 8, 1996). The Department of Labor and Industry appears to agree with this position. See MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY, A BRIEF OVERVIEW OF MINNESOTA SESSION LAWS, CHAPTER 231 3 (undated) (changes in supplementary benefits are “effective for injuries occurring on or after October 1, 1995”).
50. See, e.g., Schreiner v. C.S. McCrossan, Inc., 465 N.W.2d 917, 919-20, 44 W.C.D. 50, 52-55 (Minn. 1991) (stating that the right to reimbursement is contingent until the employee sustains a second injury despite the fact that an employer’s right to reimbursement vests at the time of registration); Marose v. Maislin Transp., 413 N.W.2d 507, 512-13, 40 W.C.D. 175, 182-83 (Minn. 1987) (holding that if a proceeding is commenced within the time limitations of the repealed section, an employee may go forward with his claim resulting from those injuries).
51. See MINN. STAT. § 176.132, subd. 1 (1994).
supplementary benefit rate. Moreover, while an employee formerly was not entitled to supplementary benefits until a waiting period had elapsed, a permanently totally disabled employee is now entitled to receive a minimum benefit equal to sixty-five percent of the SAWW "during the permanent total disability." This minimum PTD rate is payable by the employer and insurer, whereas supplementary benefits were reimbursed by the Special Compensation Fund. Thus, while the new minimum PTD benefit protects the employee, it may encourage employers and insurers to oppose PTD claims more vigorously as the payments will not be reimbursed.

3. Retirement Defense

The Minnesota Legislature first enacted a retirement presumption as part of the 1983 overhaul of the Workers' Compensation Act. The presumption could be rebutted quite easily by the employee’s own testimony or other lay testimony regarding the employee’s intent to retire. In 1992, section 176.101, subdivision 8 was amended to provide that an employee’s statement could be considered but would not suffice, in and of itself, to rebut the retirement presumption. The amendment also provided that “[t]emporary total disability payments shall cease at retirement,” but made no reference to permanent total benefits. In Behrens v. City of Fairmont, a decision issued in July 1995, the supreme court stated that although permanent total benefits may be subject to an offset for federal

52. See MINN. STAT. § 176.101, subd. 4 (1994 & Supp. 1995). The offset allowed against permanent total benefits in Minnesota Statute § 176.101, subd. 4, however, may result in an effective permanent total rate below the 65% minimum.

53. MINN. STAT. § 176.101, subd. 4 (Supp. 1995).

54. 1983 Minn. Laws, ch. 290, secs. 42-68 (effective January 1, 1984) (codified at MINN. STAT. § 176.101, subd. 8 (1994)). The law provided that for injuries occurring after the effective date of the legislation, an employee who received social security retirement benefits was presumed retired from the labor market. Id. This presumption was rebuttable by a preponderance of the evidence. Id.

55. See, e.g., Grunst v. Immanuel-St. Joseph Hosp., 424 N.W.2d 66, 69, 40 W.C.D. 1130, 1135 (Minn. 1988) (testimony of the employee that, but for her injury, she did not intend to retire when she began receiving social security survivor’s insurance retirement benefits is “significant as rebuttal evidence,” but other evidence, “if available,” is also to be considered).


57. Id.

58. 533 N.W.2d 854, 58 W.C.D. 41 (Minn. 1995).
disability benefits received, "permanent total benefits do not cease altogether when the social security benefits are converted to old age benefits or when the employee attains the age at which he had hoped to retire had he not been injured."

The 1995 Amendments left the retirement presumption essentially unchanged as it applies to temporary total disability payments. The statute has been amended, however, to specifically address permanent total disability payments, and now provides that "[p]ermanent total disability shall cease at age 67 because the employee is presumed retired from the labor market." As is the case with temporary total benefits, this is a rebuttable presumption, but the employee must provide more evidence than a mere statement that he did not intend to retire.

Thus, for injuries occurring on or after October 1, 1995, payment of PTD benefits will cease at age sixty-seven, unless the employee can rebut the presumption of retirement. For injuries occurring prior to that date, the result is unclear. If the date of injury is deemed the controlling date, then Behrens appears to prohibit assertion of the retirement defense to limit the duration of PTD payments. However, if the date the employee attains age sixty-seven is deemed the controlling date, then an employee who reaches age sixty-seven before October 1, 1995, may continue to receive permanent total benefits pursuant to Behrens, while an employee who reaches sixty-seven on or after October 1, 1995, may be presumed to have retired and benefits will cease unless the presumption is successfully rebutted by the employee.

B. Temporary Total Disability Benefits

The 1995 Act contains significant changes to Minnesota Statute section 176.101 governing receipt of temporary total disability compensation (TTD). Initially, the maximum compensation rate was increased to $615 per week commencing

59. Id. at 857, 53 W.C.D. at 44-45.
60. See MINN. STAT. § 176.101, subd. 8 (Supp. 1995). An employee who receives social security retirement benefits is presumed retired from the labor market. Id. "This presumption is rebuttable by a preponderance of the evidence." Id.
61. MINN. STAT. § 176.101, subd. 4 (Supp. 1995).
62. Id.
63. See 1995 Minn. Laws ch. 231, art. 1, § 17 (codified at MINN. STAT. § 176.101 (Supp. 1995)).
on October 1, 1995.\textsuperscript{64} Minnesota Statute section 176.645, which governs adjustment of benefits, was also amended to provide that no adjustment may exceed two percent per year. Adjustments for injuries after October 1, 1995, however, are deferred until the fourth anniversary of the injury. The Workers’ Compensation Advisory Council may make recommendations to the legislature to adjust both the maximum compensation rate and the adjustment factor.\textsuperscript{65} The minimum compensation rate has been changed from twenty percent of the statewide average weekly wage to $104 per week or the employee’s actual weekly wage, whichever is less.\textsuperscript{66}

In cases governed by the 1995 Amendments, receipt of TTD is now controlled by certain “cessation and recommencement conditions” as set forth in paragraphs (e) and (e)(1) of section 176.101, subdivision 1. First of all, TTD shall cease entirely after 104 weeks of benefits have been paid for that injury.\textsuperscript{67} This is not a time limitation but is a durational limitation. However, retraining compensation paid pursuant to Minnesota Statutes section 176.102, subdivision 11(b), does not reduce the 104 weeks of temporary total disability compensation otherwise payable.\textsuperscript{68} All of the recommencement events set forth in the statute are subject to this 104-week limit on the payment of TTD.\textsuperscript{69}

Next, temporary total disability compensation shall cease when the employee returns to work. This is not a change from prior law.\textsuperscript{70} Once TTD ceases due to a return to work, it may be recommenced in two situations. First, TTD may recommence if the employee is laid off or terminated for reasons other than misconduct within one year after returning to work if the layoff or termination occurs prior to ninety days after the employee has reached maximum medical improvement.\textsuperscript{71} Except for the issue of misconduct, this provision does not appear to be a significant departure from prior law. Under existing case law, a

\begin{footnotes}
\item[64] MINN. STAT. § 176.101, subd. 1(b)(1) (Supp. 1995).
\item[65] MINN. STAT. §§ 176.101, subd. 1(b)(2), 176.645, subd. 1 (Supp. 1995).
\item[66] MINN. STAT. § 176.101, subd. 1(c) (Supp. 1995).
\item[67] MINN. STAT. § 176.101, subd. 1(k) (Supp. 1995).
\item[68] Id.
\item[69] Id.
\item[70] Compare MINN. STAT. § 176.101, subd. 8e(b) (Supp. 1983) \textit{with} MINN. STAT. § 176.101, subd. 1(e) (Supp. 1995).
\item[71] MINN. STAT. § 176.101, subd. 1(e)(1) (Supp. 1995).
\end{footnotes}
discharge for misconduct was not a bar to further receipt of TTD benefits. Rather, the benefits of an employee discharged for misconduct could be suspended until such time as the employee again proved a causal connection between the personal injury and the wage loss.\(^{72}\) How misconduct is defined for purposes of the amended subdivision 1(e)(1) will undoubtedly be the subject of litigation.\(^{73}\)

The second recommencement event under subdivision 1(e) is if the employee becomes "medically unable to continue working due to the injury."\(^{74}\) TTD may not be recommenced under this clause, however, if the employee "is not actively employed when the employee becomes medically unable to work." The phrase "actively employed" is not defined.\(^{75}\)

The next cessation event occurs if the employee "withdraws from the labor market."\(^{76}\) Again, this provision does not appear to be more than a codification of existing case law.\(^{77}\) If the

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73. The obligations of an employee to an employer may, in some cases, be set forth in a collective bargaining agreement, in a contract of employment, in work rules, or in an employee handbook. Violations by an employee of such contractual provisions may give the employer the right to terminate an employee. Whether violations of such provisions are specifically defined as misconduct will depend on the particular contract. Whether a violation of such a provision will constitute misconduct under Minnesota Statute § 176.101, subd. 1(e)(1) is an open question. An employee may be disqualified from unemployment compensation benefits if the "individual was discharged for misconduct, not amounting to gross misconduct connected with work or for misconduct which interferes with and adversely affects employment." MINN. STAT. § 268.09, subd. 1(b) (1996). There is a significant body of case law in this field dealing with the issue of misconduct. MINN. STAT. ANN. § 268.09, nn. 33-71 (West 1992 & Supp. 1996). Under workers' compensation law, benefits may be barred if the employee performs a prohibited act resulting in injury, on the theory that the injury does not then arise out of or in the scope of employment. See, e.g., Bartley v. C.H. Riding Stables, Inc., 296 Minn. 115, 119, 206 N.W.2d 660, 663, 26 W.C.D. 675, 679 (1973) (citing Walsh v. Chas. Olson & Sons, 285 Minn. 260, 264, 172 N.W.2d 745, 748, 25 W.C.D. 42, 46 (1969) (holding that since the employee was injured as a result of riding a horse, an act forbidden by the employer, the injuries were outside the scope of employment).

74. MINN. STAT. § 176.101, subd. 1(e)(2) (Supp. 1995).

75. Query whether this language was a response to the case of Wills v. Kratz Farm, 519 N.W.2d 162, 49 W.C.D. 417 (Minn. 1993), in which the court held that an employee who was on layoff status from his job and became medically disabled from working was entitled to TTD benefits under Minnesota Statutes § 176.101, subdivision 3j (Supp. 1983).

76. MINN. STAT. § 176.101, subd. 1(f) (Supp. 1995).

77. See, e.g., Paine v. Beck's Pizza, 323 N.W.2d 812, 816, 35 W.C.D. 199, 206 (Minn. 1982) (stating that where the injured worker voluntarily removed himself from the metropolitan labor market where there were greater employment opportunities, he
employee reenters the labor market, TTD may be recommenced. Presumably, this requires at a minimum a reasonable and diligent job search.\textsuperscript{78}

Temporary total disability compensation also "shall cease if the total disability ends and the employee fails to diligently search for work within the employee's physical restrictions."\textsuperscript{79} This provision appears to codify the longstanding Schulte\textsuperscript{80} doctrine that an employee who is medically released to return to work must conduct a reasonable and diligent job search for employment as a prerequisite to an award of TTD.\textsuperscript{81} Whether the doctrine of Scott v. Southview Chevrolet Co. remains good law, however, is unanswered.\textsuperscript{82}

Temporary total disability compensation is not payable if the employee has been released to return to work without any physical restrictions caused by the personal injury.\textsuperscript{83} This provision only restates prior law that no wage loss benefits are due unless the personal injury causes some decrease in an employee’s ability to work.\textsuperscript{84}

Section 176.101, subdivision 1(i), does contain a significant change from prior law. It first provides that TTD shall cease if an employee refuses a job that is consistent with a plan of rehabilitation filed with the Commissioner of the Department of Labor and Industry (DOLI) which meets the requirements of Minnesota Statute section 176.102, subdivision 4. This is not a

effectively and voluntarily withdrew from the labor market); LeMieux v. M.A. Mortenson, 306 Minn. 50, 54, 234 N.W.2d 897, 900, 28 W.C.D. 91, 95-96 (1975) (finding that an employee who became inappropriately self-employed rather than seeking other employment was not entitled to a continuation of benefits because he had withdrawn from the labor market).

\textsuperscript{78} See Redgate v. Sroga’s Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 983, 987 (Minn. 1988) (holding that an injured employee who has not yet reached full recovery must make a diligent search for light-duty work).

\textsuperscript{79} MINN. STAT. § 176.101, subd. 1(g) (Supp. 1995).


\textsuperscript{81} Id. at 83, 153 N.W.2d at 134, 24 W.C.D. at 295 (stating that the concept of temporary total disability depends primarily on an employee’s ability to find and hold a job, not on physical condition).

\textsuperscript{82} Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 188-89, 30 W.C.D. 426, 432 (Minn. 1978).

\textsuperscript{83} MINN. STAT. § 176.101, subd. 1(h) (Supp. 1995).

\textsuperscript{84} Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987).
change from prior law. However, if no rehabilitation plan has been filed, TTD shall also cease if the employee refuses an offer of "gainful employment" that the employee can do in the employee’s physical condition. The phrase “gainful employment” introduces a new concept into workers’ compensation law. If TTD benefits cease because the employee refuses such a job offer, they may not be recommenced.

The 1983 Act defined two types of job offers: a light-duty, or 3f, job and a suitable, or 3e, job. The penalty for refusing a 3f job was determined by case law to be a suspension of benefits until such time as the employee again proved a causal relationship between the personal injury and the wage loss. In practice, the proof required to recommence TTD after refusal of a 3f job offer was evidence of a reasonable and diligent job search. In contrast, refusal of a 3e job resulted in a forfeiture of further TTD, TPD, and rehabilitation benefits. If, however, the 3e job offered under the 1983 Act was not the job the employee had at the time of the injury, the employer was statutorily required to offer and describe the job in writing. An employee had fourteen days from the date of the written offer, or fourteen days from the date of a final judicial determination that the job offer was one defined by subdivision 3e, within which to accept or refuse the job. This 3f and 3e distinction was eliminated by the 1995 Amendment to section 176.101, subdivision 1. Further, the 1995 Act no longer requires a written job offer from the employer describing the job.

A 3f or 3e job offer under the 1983 Act had to be one that the employee could physically perform in his physical condi-

87. Id. at subd. 3f.
88. Id. at subd. 3e.
91. Id. at subd. 3(n). But see Boryca v. Marvin Lumber & Cedar, 487 N.W.2d 876, 878-79, 47 W.C.D. 196, 141-42 (Minn. 1992) (holding that entitlement to PTD is not affected by employee’s refusal of a 3e job).
tion. Section 176.101, subdivision 1(i) retains this requirement since, for obvious reasons, an employee cannot be expected to accept a job that the employee cannot physically perform. More significantly, however, a 3e job had to be one "that produces an economic status as close as possible to that which the employee would have enjoyed without the disability." Whether a particular job offer met this requirement was the subject of repeated litigation. The amended statute, however, only requires that an employer offer "gainful employment." That phrase is not defined by the amended Act. Is a minimum wage job gainful employment or must there be an element of economic suitability as with a 3e job? If an employee takes what is considered "gainful employment" under this provision, may an employer resist payment of temporary partial benefits on the grounds that this "gainful employment" is not representative of the employee's earning capacity? Are fringe benefits to be considered in determining whether an offered job constitutes gainful employment?

Another question arises as to whether factors typically considered in rehabilitation matters are to be considered in defining gainful employment. Rehabilitation is intended to return an injured employee to a job "which produces an economic status as close as possible to that the employee would have enjoyed without disability." If the employee is receiving vocational rehabilitation, in developing the rehabilitation plan "consideration shall be given to the employee's qualifications, including but not limited to age, education, previous work history, interest, transferable skills, and present and future labor market conditions." Are these factors to be considered in defining "gainful employment?" It is probable that this phrase

95. Id. at subd. 3e(b).
96. See, e.g., Keklah v. Gebert's Floor Coverings, 511 N.W.2d 437, 50 W.C.D. 80 (Minn. 1994) (litigating the distinction between a pre-injury construction job with post-injury electronic position).
98. In Jerde v. Adolfsen & Peterson, 484 N.W.2d 793, 46 W.C.D. 620 (Minn. 1992) the court approached the question of whether the job was economically suitable under subdivision 3e as primarily a rehabilitation issue. Thus all those factors typically relevant in rehabilitation matters should be considered. See, e.g., Minn. R. 5220.0110, subp. 13 (1991).
100. Id. at subdiv. 4(g).
will be the subject of repeated litigation since the consequence for refusal of a job offer under this subparagraph may be dramatic.\textsuperscript{101} Whether the Manderfeld case remains good law may also be challenged.

Temporary total disability compensation ends ninety days after the employee has reached maximum medical improvement (MMI) unless the employee is in a retraining program pursuant to Minnesota Statute section 176.102, subdivision 11 (b). This is not a change from prior case law.\textsuperscript{102} Like the 104-week cap, the attainment of MMI plus ninety days is also an absolute limit on the receipt of TTD, subject only to the medically-unable-to-continue-to-work provision.\textsuperscript{103} The definition of MMI, however, has been amended. The 1983 Act defined MMI as being "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."\textsuperscript{104} The 1995 Amendment adds the phrase "irrespective and regardless of subjective complaints of pain."\textsuperscript{105} Under existing case law, pain is a factor which the compensation judge may consider in determining whether MMI has been reached.\textsuperscript{106} The amended statute further provides that except in the case of a medical inability to continue working under section 176.101, subdivision 1 (e)(2), there may be only one MMI. The Amendment goes on to provide that an MMI determination cannot be rendered ineffective if the employee's medical condition worsens after an MMI determination.\textsuperscript{107} The intent of this Amendment is unclear.\textsuperscript{108}

The 1995 Amendment also removes the requirement that an MMI report be filed with DOLI to be effective. It further

\textsuperscript{101} Note, however, that refusal of gainful employment results only in a forfeiture of TTD and not TPD and rehabilitation as with the refusal of a 3e job.

\textsuperscript{102} MINN. STAT. § 176.101, subd. 3e(a) (Supp. 1983).

\textsuperscript{103} MINN. STAT. § 176.101, subd. 1(e)(2) (Supp. 1995).

\textsuperscript{104} MINN. STAT. § 176.011, subd. 25 (Supp. 1983).

\textsuperscript{105} MINN. STAT. § 176.011, subd. 25 (Supp. 1995).

\textsuperscript{106} See, e.g., Scheiterlein v. Lantz Lenses, 50 W.C.D. 447 (WCCA 1994) (finding no MMI where doctor had made strong recommendations that the employee have a chronic pain assessment with possible treatment).

\textsuperscript{107} MINN. STAT. § 176.011, subd. 25 (Supp. 1995).

\textsuperscript{108} The authors are unaware of any WCCA or supreme court case allowing more than one MMI determination, except in the case of a medical inability to continue working under Minnesota Statutes § 176.101, subdivision 3j (1993), or in the case of multiple injuries.
provides that MMI is reached when the employee receives a written medical report stating that MMI has been reached whether or not served by the employer and insurer.109

C. Temporary Partial Disability Benefits

The 1992 Act established a limitation on receipt of temporary partial disability benefits as to 225 weeks or 450 weeks after the date of injury, whichever occurs first.110 The 1995 Act retains this limitation. However, the 1995 Amendment eliminates the prior entitlement to TPD if an employee becomes unemployed from a 3e job due to seasonal conditions.111

III. PERMANENT PARTIAL DISABILITY

Chief among the revisions made in 1983 was the creation of the “two-tier” system of benefits for permanent partial disability (PPD).112 This system was adopted in an attempt to provide adequate compensation for injured workers with permanent disabilities, while encouraging employers to provide, and employees to accept, suitable work.113 The system provided for PPD payments to be made either: (1) as economic recovery compensation (ERC);114 or (2) as impairment compensation (IC).115 Both ERC and IC were calculated based on the percentage of PPD sustained in relation to the body as a whole.

Whether an employee received ERC or IC depended primarily on the employee’s employment status ninety days after service of MMI or ninety days after completion of an approved retraining plan.116 In keeping with the rehabilitative goals of the 1983 Amendments, an employee who was offered or returned to work at a suitable job was entitled to IC, while an employee who did not was entitled to ERC. Depending on an employee’s wage rate, ERC benefits could be significantly more

110. MINN. STAT. § 176.101, subd. 2(b) (Supp. 1993).
111. See 1995 Minn. Laws ch. 231, art. 1, § 36, para. (b) (repealing MINN. STAT. § 176.101, subd. 3k).
114. MINN. STAT. § 176.101, subd. 3a (1984).
115. Id. at subd. 3b.
116. See id. at subd. 3e.
expensive for the employer and insurer.\textsuperscript{117} At a minimum, the statute required that ERC "be at least 120\% of the impairment compensation the employee would receive if that compensation were payable."\textsuperscript{118}

The 1995 Amendments eliminate the two-tier system. For injuries occurring on or after October 1, 1995, an employee is entitled to "permanent partial compensation"\textsuperscript{119} based on the proportion that the loss of function of the disabled part bears to the whole body. This proportion is then multiplied by the dollar amount specified in the statute.\textsuperscript{120} This compensation is payable "upon cessation of temporary total disability," and is payable "in installments at the same intervals and in the same amount as the employee's temporary total disability rate on the date of injury."\textsuperscript{121} Lump sum PPD payments are no longer permitted.\textsuperscript{122}

With the elimination of the two-tier system, if an employee is entitled to permanent partial benefits, that benefit is payable at a single rate, regardless of the employee's employment status at any particular time. Thus, to the extent that the 1983 Act provided an incentive for an employer to offer a job to a disabled employee, the 1995 Amendments removed that incentive.\textsuperscript{123} Moreover, the benefit is payable on the cessation of temporary total payments, regardless of the circumstances under which the cessation occurs. Thus, the amount and method of payment of permanent partial benefits are no longer directly linked to or dependent upon the attainment of MMI, the acceptance of a "suitable job," or the completion of a

\begin{thebibliography}{99}
\item \textsuperscript{117} Id. at subds. 3e, 3p.
\item \textsuperscript{118} Id. at subd. 3t(a).
\item \textsuperscript{119} \textsc{Minn. Stat.} § 176.021, subd. 3 (Supp. 1995).
\item \textsuperscript{120} The statutory schedule to be used when calculating the amount of permanent partial compensation due is identical to the pre-amendment schedule for calculating impairment compensation. \textit{Compare} \textsc{Minn. Stat.} § 176.101, subd. 2a (Supp. 1995) \textit{with} \textsc{Minn. Stat.} § 176.101, subd. 3b (1984).
\item \textsuperscript{121} \textsc{Minn. Stat.} § 176.101, subd. 2a(b) (Supp. 1995); \textit{see also} \textsc{Minn. Stat.} § 176.021, subd. 3a (Supp. 1995). Some references to ERC and IC appear to have been inadvertently retained in the amended § 176.021, subd. 3a.
\item \textsuperscript{122} \textit{See} \textsc{Minn. Stat.} § 176.101, subd. 3g (1984) (providing for payment of impairment compensation in a lump sum if an employee successfully returned to a suitable job pursuant to \textsc{Minn. Stat.} § 176.101, subd. 3e).
\item \textsuperscript{123} \textit{But see} discussion \textit{infra} Part VII.B. regarding the 1995 legislation's creation of a civil action for damages for an employer's refusal to offer continued employment to a disabled employee.
\end{thebibliography}
retraining plan. There does, however, remain an indirect connection insofar as these events relate to the cessation of temporary total payments.\textsuperscript{124}

\section*{IV. Apportionment, Contribution and Reimbursement}

In a dispute between multiple employers and insurers, the 1995 Amendments prohibit equitable apportionment of liability for injury except in two instances: (1) "apportionment among employers and insurers is allowed in a settlement agreement filed pursuant to section 176.521;"\textsuperscript{125} and (2) "an employer or insurer may request equitable apportionment of liability for workers' compensation benefits among employer and insurers by arbitration pursuant to subdivision 5."\textsuperscript{126} The phrase "equitable apportionment of liability" is defined by the statute to "include all attempts to obtain contribution and/or reimbursement from other employers or insurers" and, but for the exceptions noted, "contribution and reimbursement actions based on equitable apportionment are not allowed under this chapter."\textsuperscript{127} The new subdivision applies "without regard to whether one or more of the injuries results from a cumulative trauma or a specific injury."\textsuperscript{128} However, the subdivision does not apply to occupational disease\textsuperscript{129} or to apportionment against a preexisting disability.\textsuperscript{130}

Absent a voluntary settlement between employers and insurers pursuant to section 176.521, disputes among employers and insurers regarding apportionment of liability may only be settled by binding arbitration under section 176.191, subdivision 5. If a party has paid more than $10,000 in medical benefits or

\begin{thebibliography}{9}
\item \textsuperscript{124} See discussion \textit{supra} Part II.B.
\item \textsuperscript{125} 1995 Minn. Laws ch. 231, art. 2, § 77 (codified at \textsc{Minn. Stat.} § 176.191, subd. 1a (Supp. 1995)). Minnesota Statutes § 176.521 governs stipulations for settlement.
\item \textsuperscript{126} \textsc{Minn. Stat.} § 176.191, subd. 1a (Supp. 1995).
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Liability for an occupational disease is governed by \textsc{Minn. Stat.} § 176.66, subd. 10, which provides that the employer liable for compensation for an occupational disease is "the employer in whose employment the employee was last exposed in a significant way to the hazard of the occupational disease." \textsc{Minn. Stat.} § 176.66, subd. 10 (1994). This section was not changed by the 1995 legislation.
\item \textsuperscript{130} Minnesota Statute § 176.191, subdivision 1a, provides that apportionment of liability for a "preexisting disability is allowed only for permanent partial disability as provided in section 176.101, subdivision 4a." \textsc{Minn. Stat.} § 176.191, subd. 1a (Supp. 1995). The latter section was not changed by the 1995 legislation.
\end{thebibliography}
fifty-two weeks of indemnity benefits, and makes the request within one year thereafter, that party may require that the dispute be submitted to arbitration. The arbitrator's decision is conclusive on the issue of apportionment between employers and insurers. The amended section 176.191, subdivisions 1a and 5, "are effective for apportionment proceedings instituted after July 1, 1995," and rules governing this process have already been promulgated and adopted effective March 18, 1996.

The statute's failure to clearly define "equitable apportionment of liability" may be problematic. The definition in subdivision 1a states only that it "includes" all contribution and reimbursement actions between employers and insurers. While the statute clearly intends to limit employer/insurer actions for contribution and/or reimbursement, the use of the word "includes" implies that apportionment proceedings are not limited to such actions. It is thus unclear how the legislation may affect claims brought by an employee directly against multiple employers and/or insurers. While it is arguable that employee actions are unaffected, since section 176.191 specifically addresses liability disputes between employers and insurers only, there is no "bright line" separating employee actions from issues of apportionment between employers and/or insurers. There are instances where an employer's or insurer's claim for reimbursement or contribution affects an employee's rights.

For example, Employer A, who is or has been paying benefits to an employee, alleges that the employee sustained a second injury while working for Employer B and files a claim for contribution. The employee would typically have an interest in the outcome of this litigation, because in some cases the employee's wage while working for Employer B may be a real consideration. Does the statute prohibit a compensation judge from determining this claim? What is the result of an arbitrator's finding that the employee did (or did not) sustain an injury with Employer B? Similarly, in the case of two or more admitted injuries, there may not have been a determination of the

131. 1995 Minn. Laws ch. 231, art. 2, sec. 78 (codified at MINN. STAT. § 176.191, subd. 5 (Supp. 1995)).
132. Id.
133. 1995 Minn. Laws ch. 231, art. 2, sec. 112.
134. See infra note 230.
employee's wage on the dates of injury. In order to apportion liability for wage loss benefits, however, there may need to be a determination regarding the employee's wage. Does the statute prohibit a compensation judge from making such a determination? Must a compensation judge advise the last employer or insurer to submit any contribution or reimbursement dispute to arbitration even when the compensation judge is prepared to hear and decide all other issues in the case? It is arguable that such a process does not provide for an efficient use of judicial resources.

Moreover, the amended statute requires that apportionment disputes between employers and insurers must now be either settled via a stipulation for settlement pursuant to section 176.521 or submitted to binding arbitration. However, the statute's apparent "removal" of employer/insurer apportionment disputes from the jurisdiction of the compensation judge appears to be inconsistent with other sections of the Workers' Compensation Act. For example, amended section 176.191, subdivision 1a, appears to be inconsistent with the immediately-preceding subdivision 1. Subdivision 1 provides that, when a temporary order is issued pending resolution of a multi-employer/insurer dispute regarding liability for payment, the party ultimately determined to be liable "shall be ordered to reimburse any other party for payments which the latter has made." 135 A reimbursement order necessarily presupposes a determination of the percentage of liability attributable to the respective employers and insurers. Subdivision 1a also appears to conflict with section 176.081, subdivision 1(b), which indicates that in a claim for multiple injuries, a compensation judge must determine the amount of attorney fees attributable to each injury. 136 Such a determination may involve an apportionment of liability between multiple employers and/or insurers.

The new statutory thresholds in section 176.191, subdivision 5, may also be problematic. An employer or insurer apparently has no right to require arbitration to settle an apportionment dispute if it does not satisfy the statutory thresholds in subdivi-

136. Minn. Stat. § 176.081, subd. 1(b) (Supp. 1995). This section provides that if multiple injuries are the subject of a dispute, the commissioner, compensation judge or WCCA may determine the attorney fees attributable to each injury. Id.
sion 5 and make the request within one year of paying either $10,000 in medical benefits or fifty-two weeks of indemnity benefits. Assuming a case involving multiple injuries and a request for medical benefits only, the employer and insurer at the time of the last injury may pay benefits and meet the statutory thresholds relatively quickly. If the insurer then seeks arbitration to resolve apportionment issues, the arbitrator's decision is conclusive and binding on the employers and insurers. If the employee later brings a claim petition against all employers and insurers, is the compensation judge bound by the arbitrator's prior apportionment of liability? If not, what is the result if the compensation judge arrives at a different conclusion than the arbitrator? Given the possibility that inconsistent results may be reached in these two different forums, insurers may well be reluctant to voluntarily pay benefits under a temporary order or otherwise. This reluctance could have an impact on the payment of benefits to the employee and may lead to an increase in petitions by employees for temporary orders under section 176.191, subdivision 1. Assuming equitable apportionment is still available in cases where an employee has a direct claim against two or more employers and/or insurers, the employee also may gain settlement leverage by refusing to join all potentially liable parties.

Problems may also arise in cases involving apportionment of PPD. Pursuant to section 176.101, subdivision 4a, compensation payable for PPD which is attributable in part to a preexisting disability is reduced by the proportion of the disability "which is attributable only to the preexisting disability." This provision was not changed by the 1995 legislation. The WCCA has long held that only "statutory apportionment" under section 176.101, subdivision 4a is available for PPD; equitable apportionment is not available. However, the supreme court has

137. MINN. STAT. § 176.191, subd. 5 (Supp. 1995).
138. Section 176.191, subdivision 1 provides that, where benefits are payable and a dispute exists as to which employers and/or insurers are liable for payment, one of the employers or insurers, or the Special Compensation Fund, may be ordered to make payments pending a determination of which has liability. Payments made pursuant to the order may be reimbursed as appropriate after the liability determination has been made. MINN. STAT. § 176.191, subd. 1 (Supp. 1995).
139. MINN. STAT. § 176.101, subd. 4a (1994).
140. See, e.g., Everett v. Iten Chevrolet, No. 476-82-8054, 6 (WCCA May 9, 1995) (stating that equitable apportionment is not available for permanent partial disability);
recently held that when "benefits are appropriately awarded on the basis of a single permanency rating of the disability resulting from more than one compensable injury, the situation seems to us better served by application of the principles of equitable apportionment." The effect, if any, of the 1995 legislation on the Stone decision is unclear. As noted above, the statute’s express subject—liability disputes between employers and insurers—may mean that the abolition of equitable apportionment in this section does not affect an employee's claim against multiple employers and/or insurers.

Finally, what is the import of the July 1, 1995, effective date for all apportionment proceedings, regardless of the date of injury? If the right to contribution or reimbursement vests at the time of an employee’s second injury, the amendments to section 176.191 may not affect that right.

V. ATTORNEY FEES

A. Contingent Attorney Fees

Contingent attorney fees in workers' compensation cases are governed by Minnesota Statutes section 176.081, subdivision 1. In 1992, this statute was amended to increase the permissible contingent fee from $6,500 to $13,000. As amended in 1992, a contingent fee of twenty-five percent of the first $4,000 of compensation awarded to the employee and twenty percent of the next $60,000 of compensation awarded to the employee was permissible. The 1995 Amendment retains the 25/20 formula and the $13,000 contingency fee.

Prior to the 1992 Amendments to section 176.081, contingent fees were typically computed on a “per case” basis. Where

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143. See supra note 27 and accompanying text; MINN. STAT. § 176.191 (Supp. 1995).
144. 1992 Minn. Laws, ch. 510, art. 2, sec. 1. The $6,500 limit on contingent fees had been in effect since 1975. MINN. STAT. § 176.081, subd. 1 (Supp. 1975). The formula was then 25% of the first $4,000 and 20% of the next $20,000 of compensation awarded to the employee. Id. For purposes of brevity, this will be referred to as the 25/20 formula.
successive claims were brought by an employee for benefits due to a single injury, the 25/20 formula was normally used to compute the contingency fee in each successive case. In 1992, section 176.081, subdivision 1(b), was amended to limit all fees for legal services to $13,000 "per injury." The 1992 Amendment, however, permitted an employee's attorney to petition for what are commonly called "excess fees" under section 176.081, subdivision 2. The 1995 Amendments eliminated the words "except as provided by subdivision 2" from subdivision 1(b) of the statute, and repealed the excess fee statute. The legislature also amended subdivision 1 to provide that $13,000 is the "maximum permissible fee" for all legal services related to the same injury. The 1995 Amendments further require that retainer agreements contain language notifying the employee that the cumulative maximum fee is $13,000 for "fees related to the same injury" and that an employee "is under no legal or moral obligation to pay any fee for legal services in excess of the foregoing maximum fee."

These Amendments raise numerous issues. It is not uncommon in workers' compensation matters that a single injury may give rise to multiple claims brought serially. For example, an employee represented by counsel may assert a claim for temporary total disability benefits, permanent partial disability benefits, and medical expenses resulting from a work injury. If the employee prevails or the case is settled, the attorney normally would be entitled to a contingency fee under the 25/20 formula up to the maximum of $13,000. If sometime after the resolution of those claims the employee undergoes major surgery due to the original work injury and again becomes totally disabled, the employee may have another claim for benefits. Pursuant to the

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145. Minnesota Statute § 176.081, subd. 1(b) (1992), provided, in part: "All fees for legal services related to the same injury are cumulative and may not exceed $13,000, except as provided by subdivision 2." Id. Subdivision 2 provides that an application for excess attorney's fees may be made. Id. at subd. 2.

146. 1995 Minn. Laws, ch. 291, art. 2, sec. 45 (codified at MINN. STAT. § 176.081, subd. 1 (Supp. 1995)).

147. Id. § 110 (repealing MINN. STAT. § 176.081, subd. 2).

148. Id. § 45.

149. Id. § 48 (codified at MINN. STAT. § 176.081, subd. 9 (Supp. 1995)). An attorney hired by an employee is required to prepare, have signed by the employee, and file a retainer agreement. Id. No fee may be awarded without a signed retainer agreement. Id.
1995 Amendments, if the $13,000 maximum fee was totally or nearly all paid in the first case, will the employee be able to obtain representation for a second claim? Does the attorney who represented the employee in the first proceeding have any continuing obligation to the employee? Before agreeing to represent an employee for an injury to which the 1995 statute applies, should the attorney first determine whether fees have been paid to another attorney for claims arising out of the same injury? Before receiving any fee for a case in which the 1995 Amendments apply, must the attorney make such an inquiry? It is not the purpose of this article to suggest answers to these issues. Ultimately, that may be the task of the Minnesota Supreme Court.

B. Roraff and Heaton Fees

In 1980, the supreme court decided the case of *Roraff v. State.* The version of Minnesota Statute section 176.081 then in effect provided only for contingent fees based on the 25/20 formula payable from benefits recovered for the employee. The claim in the Roraff case was solely one for medical expenses under Minnesota Statute section 176.135. Thus, there were no benefits flowing directly to the employee that could be subject to a contingency fee. In its decision, the supreme court quoted the statute: "In case of his inability or refusal seasonably to [furnish medical treatment and supplies to an injured employee] the employer shall be liable for the reasonable expense incurred by or on behalf of the employee in providing the same," and interpreted "reasonable expense" to include attorney fees. This principle was later expanded to include claims for rehabilitation assistance under Minnesota Statute section 176.102 where there were no claims for benefits flowing directly to the employee from which the attorney could claim a contingency fee.

In 1992, these cases were codified in section 176.081, 

150. See Minn. Stat. § 176.081, subd. 10 (1994). This section makes it a gross misdemeanor for an attorney to knowingly violate any of the provisions of section 176.081 with respect to authorized fees for legal services. Id.

151. 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

152. Roraff, 288 N.W.2d at 16, 32 W.C.D. at 298.

subdivision 1(a), to provide for an hourly fee for representing the employee for recovery of medical expenses or rehabilitation benefits. Many workers' compensation cases involve both claims for benefits and claims for medical expenses and/or rehabilitation benefits. In Kopish v. Sivertson Fisheries, the WCCA held that an attorney may be entitled to Roraff or Heaton fees if the contingency fee alone is inadequate to reasonably compensate the attorney for representing the employee on the medical or rehabilitation issues. This principle was codified in the 1995 Amendments to section 176.081.

A determination of the amount of an award of Roraff or Heaton fees was previously based on the factors set forth in section 176.081, subdivision 5. Effective August 1, 1995, subdivision 5 was repealed. In cases governed by the 1995 Amendments, the method of calculation of Roraff and Heaton fees has been changed. All fees, including fees for obtaining medical and rehabilitation benefits, must be calculated by applying the 25/20 formula to the dollar value of the medical or rehabilitation benefit awarded, where ascertainable. If the dollar value is not reasonably ascertainable, the maximum fee for which the employer and insurer are liable is the lesser of the hourly fee charged or $500. These provisions apply both to cases where the sole issue is medical or rehabilitation benefits and cases previously governed by Kopish. The amended statute further requires the employee's attorney to concurrently file "all outstanding disputed issues." Failure to do so may result in a denial of attorney's fees relating to an issue which could not be calculated according to the [25/20] formula under this subdivision or earned in hourly fees for representation on rehabilitation or medical issues under section 176.102, 176.135, or 176.136." MINN. STAT. § 176.081, subd. 1(a)(1) (Supp. 1995). Prior to 1992, however, attorney fees, payable on an hourly basis, were available in medical disputes. See MINN. STAT. § 176.155, subd. 1 (1988).

154. MINN. STAT. § 176.081, subdivision 1(a), provided, in part: "All fees must be calculated according to the [25/20] formula under this subdivision or earned in hourly fees for representation . . . on rehabilitation or medical issues under section 176.102, 176.135, or 176.136." MINN. STAT. § 176.081, subd. 1(a) (1992). Prior to 1992, however, attorney fees, payable on an hourly basis, were available in medical disputes. See MINN. STAT. § 176.155, subd. 1 (1988).
155. 538 N.W.2d 199, 39 W.C.D. 627 (Minn. 1995).
156. "Attorney fees for recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute." MINN. STAT. § 176.081, subd. 1(a)(1) (Supp. 1995).
158. MINN. STAT. § 176.081, subd. 1(a)(1) (Supp. 1995).
159. Id. at subd. 1(a)(2).
160. Id. at subd. 1(a)(3).
reasonably have been addressed in a prior proceeding relating to the same injury. 161

The amended statute retains the principle that attorney's fees shall be awarded only on genuinely disputed claims or portions of claims. 162 New language was added, however, defining what constitutes a "dispute." There can be no dispute until the employer and insurer have "adequate time and information to take a position on liability." 163 This statute does not define what constitutes "adequate time or information." 164 Further, in cases where no other litigation is pending at DOLI or the Office of Administrative Hearings (OAH) in which the employee is represented, an attorney may not receive a fee on a medical or rehabilitation issue until the employee consults with DOLI and DOLI certifies that there is a dispute and that it has tried to resolve the dispute. 165 DOLI plans to have procedures in effect by June 1, 1996, to effectuate the legislative intent of these provisions. 166

These changes to the Roraff and Heaton fees also raise numerous questions. It is probably not unreasonable to assume that where the sole issue in dispute is a small medical bill, the employee will have some difficulty obtaining legal representation. In such cases, how will the interests of medical providers, health insurers, or agencies such as Human Services and Medicare be protected? Where the workers' compensation insurer denies liability for a medical bill, whether based on a primary denial or issues of reasonableness and necessity, the health carrier is obligated to make payment. 167 Governmental agencies typically

161. Id. Presumably, this provision is designed to prevent an attorney from "splitting" a claim so as to first receive a contingent fee and then Roraff or Heaton fees in a second case.

162. Id. at subd. 1(c).

163. Id.


165. MINN. STAT. § 176.081, subd. 1(c) (Supp. 1995).

166. Telephone interview with Tadd Jude, Department of Labor & Industry (Mar. 1996).

167. MINN. STAT. § 176.191, subd. 3 (1994).
make payment of medical bills as submitted. Since the claim of a third-party payor is one of subrogation only, the payor has no right to institute a direct claim against the workers' compensation insurer.\textsuperscript{168} Prior to the 1995 Amendments, attorneys would often accept cases where the sole issue was the medical bill because of the possibility of obtaining a Roraff fee. If an employee is unable to obtain representation, it remains to be seen how the interests of the interested parties will be accommodated.

\textbf{C. Other Fees}

Effective August 1, 1995, Minnesota Statutes section 176.081, subdivision 8, was repealed.\textsuperscript{169} The law previously provided for payment of fees to the employee's attorney by an employer and insurer when benefits were payable to the employee, a dispute existed between two or more employers or insurers as to liability, and litigation ensued to resolve the dispute. As amended, an employee's attorney remains eligible for a fee only where a dispute exists between employers and insurers as to which is liable for payment and a temporary order is issued.\textsuperscript{170} An attorney fee in such case must be reasonable. Previously, a determination of what constituted a reasonable fee was made using the factors of Minnesota Statute section 176.081, subdivision 5. Since that section has now been repealed, there now exists no statutory framework within which to determine what constitutes a reasonable fee. Presumably, it will be left to the WCCA and the Minnesota Supreme Court to develop guidelines.

The amended Act also retains the $13,000 "per case" limitation on defense attorney fees or wages.\textsuperscript{171} It is unclear whether the term "per case" applicable to defense fees and the term "per injury" applicable to employee's attorney's fees both carry the same meaning. If these terms are different, there may be constitutional implications. However, this difference in the terms applicable to employee's and defense attorney fees

\footnotesize{\textsuperscript{168} MINN. STAT. § 176.361, subd. 1 (1994); Freeman v. Armour Food Co., 380 N.W.2d 816, 820, 38 W.C.D. 445 (Minn. 1986).
\textsuperscript{169} 1995 Minn. Laws ch. 231, art. 2, § 110.
\textsuperscript{170} See MINN. STAT. § 176.191, subd. 1 (Supp. 1995).
\textsuperscript{171} Compare MINN. STAT. § 176.081, subd. 1(e) (1994) with MINN. STAT. § 176.081, subd. 1(e) (Supp. 1995).}
predates the 1995 Amendments.172

D. Effective Date

Changes to the statutory provisions regarding attorney fees have, in the past, been deemed procedural changes and thus have been applied to all attorney fee determinations made after the effective date of the legislation, regardless of the date of injury.173 Generally, however, the cases dealt with an increase in attorney fees. Would the result be the same if an injured employee requires legal services today due to an injury, but has previously paid $13,000 in fees for services arising out of the same injury? Again, it remains to be seen how an interested party will be accommodated.

VI. PRACTICE AND PROCEDURE

A. Rates and Interest

The maximum and minimum compensation rates have been changed from the former 105% maximum and twenty percent minimum of the SAWW,174 to a maximum of $615 and a minimum of $104 or the employee's actual wage, whichever is less.175 Future adjustments to these rates are not yet established, but will be made by the legislature at the recommendation of the Workers' Compensation Advisory Council.176 Adjustments for injuries occurring on or after October 1, 1995, are limited to two percent per year and are deferred until the fourth anniversary of the injury.177

Interest on workers' compensation payments, including payments for wage loss, medical treatment and rehabilitation

172. See MINN. STAT. § 176.081, subds. 1(b), 1(c) (1992) (stating the availability of legal fees).

173. Engman v. Metalcote Grease & Oil, 48 W.C.D. 327 (WCCA 1993) (applying the 1992 legislative changes in attorney fee provisions); see also Guerrero v. Wagner, 246 N.W.2d 838, 840-41, 29 W.C.D. 190, 194-95 (Minn. 1976) (stating that the law governing attorney fees is the law in effect at the time of the determination of the fees); Larson v. National Car Rental Co., 35 W.C.D. 37, 39 (WCCA 1982) (holding that the increase in maximum attorney fees is a procedural rather than a substantive change).


175. MINN. STAT. § 176.101, subd. 1 (Supp. 1995). But see MINN. STAT. § 176.101, subd. 4 (Supp. 1995) (setting the minimum rate for PTD at 65% of the SAWW).

176. MINN. STAT. § 176.101, subd. 1(b)(2) (Supp. 1995).

177. MINN. STAT. § 176.645, subds. 1, 2 (Supp. 1995).
expenses, had been set at eight percent per year, or the amount set under Minnesota Statute section 549.09, whichever was greater.\textsuperscript{178} Now the rate will float with the rate set for district court judgments in section 549.09, subdivision 1,\textsuperscript{179} and may sometimes make interest calculations more difficult. However, the statute retains the provision that interest on payments ordered to be paid but not paid when due and not appealed will be set at twelve percent.\textsuperscript{180}

B. Sanctions and Penalties

The 1995 Amendments added a new section to the Workers’ Compensation Act, providing for the imposition of sanctions if a party or a party’s attorney fails to appear at a scheduled conference or hearing, is “substantially unprepared to participate” or “fails to participate in good faith.”\textsuperscript{181} In such case the party and/or the party’s attorney may be ordered to pay the reasonable expenses, including attorney fees, of the other party. The DOLI and the OAH are authorized to establish additional sanctions by rulemaking.\textsuperscript{182} The statute provides little guidance concerning the criteria to be used when determining whether a party or attorney has violated this section. Moreover, it is questionable that this provision will be used to tax costs against an employee or employee’s attorney.\textsuperscript{183}

\begin{itemize}
  \item 178. MINN. STAT. § 176.221, subd. 7 (1994). But see MINN. STAT. § 176.191, subd. 3 (1994) (setting the interest rate at 12% in cases involving certain payments made by medical insurers).
  \item 179. MINN. STAT. § 176.221, subd. 7 (Supp. 1995).
  \item 180. MINN. STAT. § 176.221, subd. 5 (1994 & Supp. 1995).
  \item 181. 1995 Minn. Laws ch. 231, art. 2, § 49 (codified at MINN. STAT. § 176.081, subd. 12 (Supp. 1995)).
  \item 182. MINN. STAT. § 176.081, subd. 12 (Supp. 1995).
  \item 183. Id. Taxation of costs against an employee can deter injured employees from pursuing their claims and is therefore generally not appropriate. Schenkler v. Dick Hume & Assoc., 49 W.C.D. 96, 106 (WCCA 1993). However, under certain circumstances a calendar judge may strike a case from the trial calendar or ultimately dismiss a case for failure to prosecute. MINN. STAT. § 176.305, subd. 4 (1994). See also DeMars v. Robinson King Floors, Inc., 256 N.W.2d 501, 504, 30 W.C.D. 109, 114 (Minn. 1977) (stating that a judge “has the discretion to dismiss a suit where the plaintiff's failure to exercise reasonable diligence is unexcused, and the nature of the claim requires the exercise of such diligence”). Similarly, the WCCA has jurisdiction to impose appropriate sanctions when a party fails to comply with a provision of the Act. Rath v. Perlman Rocque Co., 384 N.W.2d 464, 466, 38 W.C.D. 535, 537-38 (Minn. 1986). Clearly, inherent in the authority of the commissioner, compensation judges, and the WCCA to issue orders is the authority to enforce them.
\end{itemize}
Several changes have also been made to many of the penalty provisions of the Workers' Compensation Act, including the following:

(1) The penalty for an employer's failure to make a prescribed payment for the benefit of the Special Compensation Fund remains at fifteen percent of the amount due, but the minimum penalty has been increased from $500 to $1,000. Imposition of this penalty is discretionary.\(^{184}\)

(2) Minnesota Statutes section 176.185, subdivision 5, prohibits an employer from requiring an employee to pay any part of the costs of the employer's workers' compensation insurance coverage. The penalty for an employer's wilful withholding in violation of this prohibition has been increased from 200\% to 400\% of the amount withheld. Sixty percent of the penalty is payable to the employee, the remaining forty percent is payable to the assigned risk safety account. Imposition of this penalty is mandatory.\(^{185}\)

(3) If an employer fails to begin payment of compensation (including medical and rehabilitation payments and compensation for PPD) within the time prescribed by section 176.221, penalties may be assessed ranging from thirty percent of the compensation due (not to exceed $500) to 105\% of the compensation due (not to exceed $5,000), depending upon the number of days that payment is delayed. This constitutes an increase from the amounts formerly in effect.\(^{186}\) In the alternative, a penalty of up to $2,000 for each instance of failure to pay benefits or file a notice of denial of liability within the time prescribed by the statute may be imposed.\(^{187}\) These two alternative penalty provisions are both discretionary.

(4) The 1995 Amendments made four changes to section 176.225, which provides for an additional award of compensation where an employer or insurer fails to pay or delays payment of

\(^{184}\) 1995 Minn. Laws ch. 231, art. 2, § 59 (codified at MINN. STAT. § 176.129, subd. 10 (Supp. 1995)).

\(^{185}\) 1995 Minn. Laws ch. 231, art. 2, § 75 (codified at MINN. STAT. § 176.185, subd. 5a (Supp. 1995)).

\(^{186}\) Compare MINN. STAT. § 176.221, subd. 3 (1994) with § 176.221, subd. 3 (Supp. 1995).

\(^{187}\) 1995 Minn. Laws ch. 231, art. 2, § 84 (codified at MINN. STAT. § 176.221, subd. 3a (Supp. 1995)).
First, such penalties are now mandatory rather than discretionary. Second, the amount of additional compensation awarded may be up to thirty percent of the compensation due, an increase from the former limit of twenty-five percent. Third, a new ground for imposition of a penalty has been added: frivolous denial of a claim. Finally, if an employer is guilty of inexcusable delay in making payments, the payments found to be delayed shall be increased by twenty-five percent, as opposed to the former ten percent.

(5) The penalty for an employer, insurer or healthcare provider who fails to file any report required by the workers' compensation law, has been increased from $200 to $500 for each failure. These penalties are discretionary.

(6) Penalties for prohibited conduct by an insurer, self-insurer, adjuster, or third-party administrator have been increased as much as $1,000 per violation, depending on the specific conduct and the number of occurrences. These penalties remain discretionary and may be imposed in addition to any other penalties that might apply for the same conduct. Further, a self-insured entity which knowingly violates a provision of section 186.181, subdivision 2, governing self-insureds, is now subject to a $10,000 "civil penalty," an increase from the former $5,000, for each offense.

(7) Minnesota Statute sections 176.238 and 176.239, governing discontinuance of compensation, provide for a fine payable to the Special Compensation Fund if an employer
violates the requirements of either section. The 1995 legislation increased the maximum fine from $500 to $1,000 per violation.196

C. Appeal and Review

A party may still file a request for a formal hearing within thirty days of a decision in a settlement or administrative conference at DOLI.197 However, two significant changes have been made affecting a party’s right to review of such decisions. First, decisions regarding a claim for medical benefits of $1500 or less are reviewable only by the commissioner, whose decision is apparently final and unappealable.198 Second, review hearings on issues involving liability for past treatment or services that have no affect on an employee’s entitlement to ongoing or future medical or rehabilitation benefits need not be held within the sixty-day limit established by the statute for other matters.199 The statute establishes no time limit within which these cases must be heard. A party’s right to an expedited hearing on a discontinuance has also been retained, but the time within which a hearing must be held has been extended from thirty to sixty days.200

Finally, the statute governing DOLI small claims court actions has been amended to provide that there is no appeal and no request for a formal hearing allowed from a settlement judge’s decision in those cases. The statute also now specifically provides that such decisions “shall be res judicata in subsequent proceedings.”201

D. Other Amendments

Pursuant to amended section 176.291,202 an employee’s

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196. 1995 Minn. Laws ch. 231, art. 2, § 91 (codified at MINN. STAT. § 176.238, subd. 10 (Supp. 1995)).
198. MINN. STAT. § 176.106, subd. 7 (Supp. 1995).
199. Id.
201. MINN. STAT. § 176.2615, subd. 7 (Supp. 1995); see also MINN. STAT. § 176.305, subd. 1a (Supp. 1995) (stating that “[i]n proceedings under § 176.2615, the summary decision is final and not subject to appeal or de novo proceedings.”); cf. MINN. STAT. § 176.2615, subd. 7 (1994), (allowing a request for a formal hearing and stating that such decisions “are not res judicata.”).
claim petition need no longer be notarized, but must only be signed by the petitioner. Further, if an employee has lost fewer than three days from work, any document filed under the Workers' Compensation Act must have a copy of the First Report of Injury attached.203

An employer or insurer now has sixty days from the date of injury to file a denial of liability after payment of compensation has begun, rather than the thirty days formerly provided.204 A notice of denial also must now state in detail "the facts forming the basis for the denial" as well as the specific reasons explaining the denial.205

The Act now also provides that when an electronic filing of a document marks the beginning of a prescribed time limit for another party to assert a right, the time limit will be extended by two days if it can be shown that the other party was served by mail.206 Where an electronic filing is made, the statute also provides for the use of digitized signatures, provided that the signature is certified by DOLI within five business days of the filing.207 A new provision allowing telephone, audio or visual "teleconferencing" of mediation sessions, conferences and hearings has been added to the Act.208

Finally, the amended statute contains a new requirement that any request for retraining must be filed "before 104 weeks of any combination of temporary total or temporary partial compensation have been paid."209 After that time, retraining "shall not be available" unless the request was made within the prescribed time period.210 The employer or insurer must notify the employee of this time limit in writing before eighty weeks of temporary benefits have been paid, regardless of the number of weeks that have elapsed since the date of injury.

203. 1995 Minn. Laws ch. 231, art. 2, § 94 (amending MINN. STAT. § 176.275, subd. 1).
204. Compare MINN. STAT. § 176.221, subd. 1 (1994) with MINN. STAT. § 176.221, subd. 1 (Supp. 1995).
205. MINN. STAT. § 176.221, subd. 1 (Supp. 1995).
207. Id.
208. 1995 Minn. Laws ch. 231, art. 2, § 56 (codified at MINN. STAT. § 176.107 (Supp. 1995)).
209. 1995 Minn. Laws ch. 231, art. 2, § 51 (codified at MINN. STAT. § 176.102, subd. 11(c) (Supp. 1995)).
210. Id.
Failure to comply with this requirement may result in a penalty of $25 per day that the notice is late, up to a maximum of $2,000. In addition, the time to file the retraining request is extended by the number of days that the notice is late. In no case may a request be filed more than 225 weeks after any combination of temporary benefits has been paid.\(^\text{211}\) This is a significant departure from prior law regarding retraining.

It seems logical to expect that retraining requests may now be routinely filed in almost all cases, lest the right to seek retraining be lost. It is unclear, however, whether any sort of justification for retraining should accompany the request, or whether a simple request is sufficient. If the need for retraining is not foreseeable within the statutory period, it would appear that many employees—including those who may ultimately prove to be the best candidates for retraining—may not anticipate that need and make the statutory request.

VII. MISCELLANEOUS PROVISIONS

A. Collective Bargaining Agreements

The 1995 legislature enacted new legislation allowing for the recognition of certain provisions in a collective bargaining agreement between employers and employees in the construction trades.\(^\text{212}\) In order for such agreements to be recognized by the agencies and courts in the workers' compensation system, an employer must give notice to its workers' compensation insurance carrier.\(^\text{213}\) A collective bargaining agreement will not be recognized if this notice is not given. Further, a collective bargaining agreement that "diminishes an employee's entitlement to benefits" under the Workers' Compensation Act is "null and void."\(^\text{214}\)

To be recognized as valid, a collective bargaining agreement may establish obligations and procedures relating to workers' compensation only in the following areas: (1) alternative dispute resolution; (2) use of an agreed list of medical providers; (3) use of a limited list of impartial physicians to conduct independent

\(^{211}\) MINN. STAT. § 176.102, subd. 11(d) (Supp. 1995).

\(^{212}\) 1995 Minn. Laws ch. 231, art. 2, § 71 (codified at MINN. STAT. § 176.1812 (Supp. 1995)).

\(^{213}\) MINN. STAT. § 176.1812, subd. 5 (Supp. 1995).

\(^{214}\) Id. at subd. 4.
medical examinations; (4) creation of a light-duty, modified job, or return to work program; (5) use of a limited list of rehabilitation and retraining providers; (6) establishment of safety committees and safety procedures; or (7) adoption of a twenty-four-hour health care coverage program if a twenty-four-hour plan pilot project is authorized by law. 215

The Department of Labor and Industry has been authorized to adopt rules to implement this section. 216 The commissioner will also establish a pilot program involving up to ten private and ten public employers, which shall end on December 31, 2001. 217

B. Civil Action

An employee has long been able to file a civil action for damages for retaliatory discharge if he or she was discharged, threatened with discharge or intentionally obstructed from seeking workers’ compensation benefits. 218 The 1995 Amendments to the statute retain that cause of action and add a new civil cause of action against an employer who, “without reasonable cause, refuses to offer continued employment to its employee when employment is available within the employee’s physical limitations.” 219 The new cause of action is not available against employers with fifteen or fewer full-time equivalent employees. This section may serve, at least to some degree, to provide some incentive for an employer to offer a job to a disabled employee, and thereby balance the removal of the incentive provided by the two-tier system of payment for PPD. 220

Section 176.82 provides for damages equal to one year’s wages, up to a maximum of $15,000. The damages payable pursuant to subdivision 2 are to be paid in addition to any other payments to which an employee is entitled under the worker’s compensation laws, and may not be covered by an insurance contract. While this provision in and of itself seems clear, these

215. Id. at subd. 1(b)-(g).
216. Id. at subd. 7; see infra note 229.
217. Id. at subd. 6.
218. See 1975 Minn. Laws ch. 359, § 21 (codified at MINN. STAT. § 176.82 (1994)).
219. 1995 Minn. Laws ch. 231, art. 1, § 30 (codified at MINN. STAT. § 176.82, subd. 2 (Supp. 1995)).
220. See discussion supra part III.
damages are only payable "from the date of the refusal to offer continued employment . . . to continue during the period of the refusal." Establishing a specific beginning and end for an employer's refusal to offer a job to a disabled employee, especially when combined with the requirement that the refusal be "without reasonable cause," may prove difficult. The statute does, however, list three criteria to be used when determining whether employment was available: (1) the employer's continuance in business; (2) the employer's written rules on seniority; and (3) the provisions of any collective bargaining agreement.

Several questions concerning the application of this subdivision will doubtless arise, for example: When does an employer's exposure to suit under this subdivision end? Must a compensation judge consider this issue when appropriate, and will findings in a workers' compensation proceeding have any impact on a subsequent civil action? Does the employee have any obligation to mitigate damages, and is he or she entitled to an award for attorney fees and costs? These questions will be resolved only with time.

C. The Role of the Department of Labor & Industry

The 1995 legislature granted DOLI the authority to promulgate several new sets of administrative rules. Areas for rulemaking include: (1) a merit rating plan for small businesses in the Assigned Risk Plan; (2) "commercial self-insurance groups" established to govern groups of employers self-insured for workers' compensation liability; (3) sanctions for a party or party's attorney for failure to appear, prepare for or participate in good faith in a conference or hearing; (4) formation of "light-duty work pools" to promote a disabled employee's return to work; (5) certification of managed care plans;

221. MINN. STAT. § 176.82, subd. 2 (Supp. 1995).
222. Id.
223. 1995 Minn. Laws ch. 231, art. 2, § 6 (codified at MINN. STAT. § 79.251, subd. 2 (Supp. 1995)).
225. 1995 Minn. Laws ch. 231, art. 2, § 49 (codified at MINN. STAT. § 176.081, subd. 12 (Supp. 1995)).
226. 1995 Minn. Laws ch. 231, art. 2, § 57 (codified at MINN. STAT. § 176.108 (Supp. 1995)).
(6) the value of medical services provided by hospitals with “100 or fewer licensed beds”; 228 (7) recognition of collective bargaining agreements establishing obligations and procedures relating to workers’ compensation; 229 (8) arbitration of apportionment disputes between multiple employers and/or insurers; 230 (9) electronic filing of documents and the use of digitized signatures; 231 and (10) establishment and administration of joint labor-management safety committees by employers of more than twenty-five employees. 232

Pursuant to Minnesota Statutes section 175.16, subdivision 1, the Commissioner of the DOLI is now “the administrator and supervisor of all of the department’s dispute resolution functions and ... may delegate authority to settlement judges and others to make determinations.” 233 This authority extends to administrative conferences under section 176.106, administrative conferences concerning discontinuances under sections 176.238 and 176.239, and the approval of settlements pursuant to section 176.521. It is unclear whether this authority to delegate decision-making power to “others” may lead to the establishment of a new level of hearings in addition to the settlement and administrative conferences presided over by a settlement judge. Moreover, there is no information in the statute regarding the experience and qualifications that these possible new decision-makers must possess.

Finally, Minnesota Statutes section 176.261 authorizes DOLI to act for and advise parties to a workers’ compensation proceed-

227. 1995 Minn. Laws ch. 231, art. 2, § 63 (codified at Minn. Stat. § 176.1351, subd. 5(b) (Supp. 1995)).
228. 1995 Minn. Laws ch. 231, art. 2, § 65 (codified at Minn. Stat. § 176.136, subd. 1b(a)-(b) (Supp. 1995)).
230. 1995 Minn. Laws ch. 231, art. 2, §§ 77-78 (codified at Minn. Stat. § 176.191, subds. 1a and 5 (Supp. 1995)). Rules governing apportionment arbitration were proposed on November 27, 1995. 20 Minn. Reg. 1236. Notice of their adoption as modified was given on March 11, 1996. 20 Minn. Reg. 2286; Minn. R. 5229.0100 to .0700 (effective Mar. 18, 1996).
233. 1995 Minn. Laws ch. 231, art. 2, § 43 (codified at Minn. Stat. § 175.16 (Supp. 1995)).
ing, to represent a party in workers' compensation proceedings, and to make efforts to resolve disputes. 234 The 1995 legislation expanded this authority, stating that the department's "obliga-
tion to make efforts to settle problems exists whether or not a
formal claim has been filed with the department." 235 The
intended scope of this authority is also unclear.

VIII. CONCLUSION

Sponsors of the 1995 Amendments to the Minnesota
Workers' Compensation Act stated that "Minnesota has lost
control of a system that should be simple but is not. We are
foolishly allowing this state not to be as competitive as we could be." 236 The goal of the legislation was "to keep and expand
our state's number of good jobs. The status quo should not be
acceptable." 237 Opponents of the 1995 Amendments argued
that the state's workers' compensation system did not need to be
overhauled, that the 1992 Amendments had helped reduce
insurance costs and that costs would continue to decrease
without further amendment of the Act. 238 Labor leaders were
concerned, however, that the 1995 Amendments would cut
benefits to injured workers, and predicted that provisions of the
amended law will not reduce insurance costs. 239

Whether the 1995 legislation will achieve the stated goals is
impossible to predict. In any event, that is a discussion better
suited to the political arena. As stated at the outset, the purpose
of this article is to provide an overview of the 1995 Amendments
and highlight changes that the authors anticipate may have an
impact on workers' compensation practice, and not to resolve
the issues.

1995)).
238. Carlson, supra note 19, at E3.
239. Carlson, supra note 19, at E3.