1980

Minnesota's Special Compensation Fund

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MINNESOTA'S SPECIAL COMPENSATION FUND

by Winston Ehlmann†

Workers' compensation benefits for second injuries have undergone frequent change as the Legislature has attempted to balance the responsibility to pay for an employee's second injury among insurers, employers, and the Minnesota Special Compensation Fund. In this Article, Mr. Ehlmann traces the development of Minnesota's second-injury law and explains some specific difficulties that arise when trying to reach a fair apportionment of liability. By comparing Minnesota's law to that of other states, the author explains why the Minnesota Fund pays out benefits that are significantly higher than other states.

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I. INTRODUCTION

The industrial revolution of the nineteenth century produced a dramatic increase in industrial accidents.1 Workers' compensation statutes were enacted in most states to ease the financial hardship on workers injured in employment-related accidents because inno-

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ervative employer defenses forced employees to shoulder the greater burden of economic loss. By 1949, every state had enacted a workers' compensation act. The basic scheme of such laws was to provide a comprehensive system for compensating injured employees regardless of fault or negligence. Strict liability was imposed

2. With the growth of industry arose new common-law defenses to employer liability for work-related injuries. From 19th century England came the three major defenses that barred recovery by injured employees. In Priestley v. Fowler, 150 Eng. Rep. 1030 (Exch. Ch. 1837), the fellow-servant rule was articulated. This rule provided that one servant, injured at the hand of another servant while both were engaged in their master's work, had no right of recovery against the master. Priestley also spawned the doctrine of assumed risk: a servant assumes the obvious risks of employment voluntarily and therefore has no right of recovery against his nonnegligent master for work-related injuries. Finally, from Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809), came the principle of contributory negligence: one who in any way contributed to his own injury had no cause of action. See generally I A. LARSON, supra note 1, § 4.30 (discussing common-law defenses).

These defenses crossed the Atlantic and settled into the American common law, their ready acceptance being attributed to judges' inclinations to encourage industrial enterprise by easing the burdens of the industrialist. See W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 7 (1936).

In Minnesota, the fellow-servant rule was adopted in 1869: "A master, guilty of no personal negligence or misconduct, is not responsible to his servant for injuries resulting to the latter from the negligence, carelessness or misconduct of a fellow servant engaged in the same general business." Foster v. Minnesota Cent. Ry., 14 Minn. 360, 362 (Gil. 277, 279-80) (1869); accord, Neal v. Northern Pac. R.R., 57 Minn. 365, 369, 59 N.W. 312, 313 (1894); Brown v. Winona & St. P.R.R., 27 Minn. 162, 163, 6 N.W. 484, 485 (1880). In 1880, the Minnesota court stated that an employee assumes the risk of employment when he can readily observe the hazardous custom of conducting the business. Hughes v. Winona & St. P.R.R., 27 Minn. 137, 140-41, 6 N.W. 553, 554 (1880); accord, Lawson v. Truesdale, 60 Minn. 410, 414-16, 62 N.W. 546, 547 (1895); Woods v. St. Paul & D.R.R., 39 Minn. 435, 436-37, 40 N.W. 510, 511-12 (1888); Russell v. Minneapolis & St. L. Ry., 32 Minn. 230, 234, 20 N.W. 147, 147-48 (1884); Clark v. St. Paul & S.C.R.R., 28 Minn. 128, 130-32, 9 N.W. 581, 582-83 (1881); Fleming v. St. Paul & D.R.R., 27 Minn. 111, 114-15, 6 N.W. 448, 449 (1880). By 1866, the principle of contributory negligence was well established. The Minnesota court stated that the common law denied recovery of damages to an employee whose injury was "attributable in any degree to his own negligence, and want of care . . . ." McMahon v. Davidson, 12 Minn. 357, 372 (Gil. 232, 249) (1867), appeal dismissed sub nom. Davidson v. Starcher, 154 U.S. 566 (1869); accord, Whittier v. Chicago, M. & St. P. Ry., 24 Minn. 394, 405 (1878); Donaldson v. Milwaukee & St. P. Ry., 21 Minn. 293, 297 (1875); Carroll v. Minnesota Valley R.R., 13 Minn. 30, 34 (Gil. 18, 21) (1868).


4. See 1 A. LARSON, supra note 1, § 1.10.
on the employer while the employee's recovery was limited by a fixed schedule. The rule evolved that the employer takes the employee as he finds him. The question of whether, under the circumstances, an average person would have been injured is not pertinent in determining employer liability. However, the general rule that the employer is strictly liable for the job-related injury was inadequate to deal with the situation in which an employee who is injured has a preexisting disability. Generally, the risk of employing a person with a preexisting disability rests on the employer, who is held liable for the entire disability resulting from the combination of the present compensable injury and the prior disability. The injury may merge with the preexisting infirmity to create a greater disability than would have occurred from the present injury alone. Hence, an employer may hesitate to

8. See 2 A. LARSON, supra note 1, § 59 (1976).
9. See Reinert, The Role of the Second Injury Fund in Occupational Diseases, 14 FORUM 495, 496 (1979); Note, supra note 5, at 809. A minority of states still apply the full-responsibility rule imposing complete liability for the entire combined disability upon the employer. See, e.g., Perry v. Workers' Compensation Appeals Bd., 66 Cal. App. 3d 887, 136 Cal. Rptr. 309 (1977) (employee entitled to compensation for hernia that was inoperable because of previous cardiac condition of nonindustrial origin); Raskoff v. Long Island Daily Press, 38 A.D.2d 644, 327 N.Y.S.2d 398 (1971) (mem.) (preexisting deafness in one ear was of no consequence in awarding damages for 100% binaural loss of hearing); Note, supra note 5, at 809-10. See generally 2 A. LARSON, supra note 1, § 59.10 (1976). Some states have attempted to resolve the employer's dilemma through apportionment statutes whereby the employer pays only for the disability from the second injury. See id. § 59.20. Apportionment does not apply, however, when the preexisting condition was not compensable. See, e.g., Carbonaro v. Chinatown Sea Food, Inc., 55 A.D.2d 756, 757, 389 N.Y.S.2d 640, 641 (1976) (mem.) (no apportionment because current disability unrelated to prior back injury).

The Minnesota court has refused to apportion liability absent statutory authority. See, e.g., Wallace v. Hansan Silo Co., 305 Minn. 395, 235 N.W.2d 363 (1975); Byrd v. State, 305 Minn. 398, 234 N.W.2d 589 (1975) (per curiam).
10. For example, if an employer hires an employee who is blind in one eye and the employee subsequently loses the other eye in a job-related injury, the employee then suffers a permanent and total disability. Under the Minnesota workers' compensation statute, the compensation for the loss of an eye is 66 2/3% of the daily wage at the time of injury.
hire a person suffering from a physical impairment. The employer's response was to administer strict pre-employment physiologicals and questionnaires to reduce the workers' compensation risk by selective hiring standards. Self insurers were more cautious in this regard. The effect was that those persons with congenital or acquired impairments were hindered in their search for employment, particularly with the more sophisticated employers.\textsuperscript{11}

Accordingly, pressure was exerted on the state legislatures by employers to limit their risk and by employees' organizations to encourage the hiring of the physically impaired. This pressure resulted in the enactment of the so-called second injury or special compensation fund statutes.\textsuperscript{12} If the risk assumed by the employer is lessened by a second injury law, so runs the rationale, the employee will benefit.

II. THE CONCEPT OF THE SECOND INJURY FUND

The basic purpose of the typical second injury law is to encourage employers to offer employment opportunities to individuals with an established physical impairment, due either to a prior industrial accident or to other causes.\textsuperscript{13} The statutory scheme imposes complete liability upon the employer of a person hired with a prior physical disability for a subsequent disability arising out of an industrial accident sustained in his employ. This scheme ensures that the employee receives full compensation under the act. The employer then has the right to seek reimbursement from the special fund once certain statutory requirements are met.\textsuperscript{14}

during 160 weeks. See Minn. Stat. § 176.101, subd. 3(21) (Supp. 1979). The combined effect of the injuries, however, results in compensation of 66 2/3% of the daily wage at the time of injury during the entire period of permanent total disability. See id. § 176.101(4).

11. The premium for workers' compensation insurance is affected by the "experience" of the employer, i.e., claims paid by the insurer, and by the relative hazard of the particular employer's business. See Fabing & Barrow, Encouragement of Employment of the Handicapped—Extension of Second Injury Fund Principles to Persons Having Latent Impairments, 8 Vand. L. Rev. 575, 578-79 (1955).


The payment from any state's second injury fund is a function of the workers' compensation law of that state. The variety of workers' compensation statutes has led to equally variegated second injury laws.\textsuperscript{15} Nearly all states have some form of second injury law.\textsuperscript{16} But to say that all states have a second injury law is to say nothing, because the laws vary from broad coverage to restrictive coverage.\textsuperscript{17} For example, in 1978, South Dakota had five

\textsuperscript{15} Because a second-injury fund is one feature of an integrated workers' compensation statute, the variety of compensation schedules for injury arising out of and in the course of employment is reflected in the compensation schedules for second injuries. For example, when an employee in South Dakota suffers added permanent partial disability from a subsequent injury, he is entitled to "one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." \textit{S.D. Codified Laws Ann.} § 62-4-5 (1978). But the award can be no greater than the "average weekly wage in the state." \textit{Id.} § 62-4-3.

In Kentucky, when an employee's second injury combines with a previous injury and causes permanent partial disability that would not have occurred had there been no pre-existing injury, the second-injury fund pays for the added disability. \textit{See Ky. Rev. Stat.} § 342.120 (1977). The employee receives altogether "66 2/3 percent of the [employee's] average weekly earnings . . . multiplied by the percentage of disability caused by the injury." \textit{Id.} § 342.730(b). Limitations on awards are imposed as follows:

The minimum weekly income benefits for disability shall not be less than 20 percent . . . and the maximum weekly income benefits shall not exceed 60 percent . . . of the average weekly wage of the state as defined herein. In any event, income benefits shall not exceed the average weekly wage of the injured employee.

\textit{Id.} § 342.740.

In Wisconsin, when the subsequent injury results in permanent partial disability, the employee shall receive "such proportion of the weekly indemnity rate for total disability as the actual wage loss of the injured employee bears to his average weekly wage at the time of his injury." \textit{Wis. Stat. Ann.} § 102.43(2) (West 1973 & Cum. Supp. 1980-1981).

\textsuperscript{16} \textit{See 2 A. Larson, supra note 1,} § 59.31, at 10-286 to -287 (1976).

\textsuperscript{17} Differing prerequisites for second-injury fund disbursement work to restrict or expand coverage. For example, the required previous injury or physical impairment varies from the restrictive loss, or loss of use of "one hand, one arm, one foot, one leg, or one eye," \textit{Iowa Code Ann.} § 85.64 (West Cum. Supp. 1979-1980), to a physical impairment due to "accident, disease, birth, military action, or any other cause," such that the impairment "is obvious and apparent from observation or examination by an ordinary layman," \textit{Okla. Stat. Ann. tit. 85,} § 171 (West Cum. Supp. 1979-1980), to "a known physical impairment which is due to any previous accident, disease or any congenital condition and is, or is likely to be, a hindrance or obstacle to . . . employment," \textit{Mass. Gen. Laws

Published by Mitchell Hamline Open Access, 1980
claims against its second injury fund and paid out nothing. Minnesota had about 400 claims and paid out over five million dollars. Given such a spectrum, there is no point in writing about second injury laws in general. This Article examines Minnesota’s Special Compensation Fund, specifically, the law after it was rewritten in 1965 and its subsequent amendments, the Legislature’s intent when passing the law, and its interpretation by the Minnesota Supreme Court.


Also, the requirement of knowledge of the employee’s previous physical impairment varies from at least some actual knowledge by the employer of the permanent and disabling nature to the preexisting impairment of the employee, see McCoy v. Perlite Concrete Co., 53 A.D.2d 749, 749, 384 N.Y.S.2d 234, 235 (1976) (mem.), to actual knowledge by someone, not necessarily the employer, that can be proved by prior medical records or by the employer within 30 days after the date of employment, see Mass. Gen. Laws Ann. ch. 152, § 37 (West Cum. Supp. 1980-1981), to registration of the employee’s preexisting physical impairment with the Commissioner of Labor and Industry, see Minn. Stat. § 176.131(3)(b) (Supp. 1979), to no requirement of previous knowledge by the employer, or even the employee. See Subsequent Injuries Fund v. Industrial Accident Comm’n, 56 Cal. 2d 842, 845-46, 366 P.2d 496, 497-98, 17 Cal. Rptr. 144, 145-46 (1961).

Of the 28 states responding to the Center for Public Representation’s study, the following was found to be characteristic of the high-claim states (those that pay out over $900,000 per year): broad coverage of preexisting conditions often coupled with a list of qualifying disabilities and broad coverage of resulting disabilities covering death as well as disability. See id. at 32-33. Only 29% of the high-claim states cover solely permanent total disability, whereas 66% of the low-claim states (disbursements under $100,000) and 50% of the medium-claim states (disbursements between $100,000 and $900,000) require a resulting permanent total disability. See id. at 33. The high-claim states also tend to cover disabilities caused by the preexisting condition, to cover medical as well as compensation benefits, to require the employer to apply to the fund for reimbursement, and to require the employer to have prior knowledge of the preexisting disability. See id.

An example of a state with a restrictive second-injury fund is Wisconsin. The applicable statute limits preexisting conditions and second injuries, prohibits coverage for death or medical expenses, requires application for benefits to be made by the employee, requires no prior knowledge by the employer, and the funding relies totally on special assessments against the employer. See id. at 35-36.

Minnesota first enacted a second-injury law in 1913. See Act of Apr. 24, 1913, ch. 467, § 15, 1913 Minn. Laws 675, 683 (repealed 1965). The historical development of Minnesota’s second-injury law is complex and beyond the scope of this Article. Basically, the 1913 law nibbled a bit at the problem. It consisted of one paragraph providing for employer liability for the second injury alone. See id. In 1919, payments were authorized from the special compensation fund. See Act of Apr. 22, 1919, ch. 358, § 1, 1919 Minn. Laws 382, 382 (repealed 1965). The 1965 statute was a fresh and vigorous departure from its predecessor. See Act of May 6, 1965, ch. 327, 1965 Minn. Laws 463 (current version at Minn. Stat. § 176.131 (1978 & Supp. 1979)).
III. THE MINNESOTA SECOND INJURY FUND

A. Basic Statutory Scheme

The Minnesota second injury law established in 1965 required the employer to pay all compensation due but the employer could be reimbursed from the Fund for compensation paid in excess of twenty-six weeks of benefits and $1,000 in medical expenses if the employee suffered a disability that was substantially greater because of a preexisting physical impairment than would have resulted from the injury alone. The law presently allows reimbursement for compensation paid in excess of fifty-two weeks and $2,000 in medical expenses.

Under subdivision 2 of the 1965 statute, if the disability or death would not have occurred except for the preexisting impairment, the employer paid all compensation due and was reimbursed from the Fund for all such compensation. This provision has been altered.

In order to be reimbursed, the injury had to be registered prior to the subsequent injury. Originally, the law provided for an automatic informal registration under which reimbursement was insured simply by filing a medical report after the industrial injury. The current statute requires a more formal registration of the impairment to be filed with the Department of Labor and Industry.

The term "physical impairment" was defined as "any physical or mental condition which is or is likely to be a hindrance or obstacle

20. See Act of May 6, 1965, ch. 327, § 1, 1965 Minn. Laws 463, 463 (current version at MINN. STAT. § 176.131(1) (1978)); cf. Osterkamp v. Craftsman Press, 312 Minn. 599, 600, 253 N.W.2d 147, 148 (1977) (per curiam) (if disability from subsequent injury not substantially greater because of prior physical impairment, special fund reimbursement will not be allowed). This provision was subject to an exception:

If the personal injury alone results in permanent partial disability to a schedule member under section 176.101, the monetary and medical expense limitations shall not apply and the employer shall be liable for such compensation, medical expense, and retraining attributable to the permanent partial disability, and he may be reimbursed from the compensation fund only for compensation paid in excess of such disability.


22. See Act of May 6, 1965, ch. 327, § 1, 1965 Minn. Laws 463, 463 (current version at MINN. STAT. § 176.131(2) (1978)).

23. See MINN. STAT. § 176.131(2) (1978) (complete reimbursement allowed only when prior injury is diabetes, hemophilia, or seizures).


to obtaining employment." 26 The present law specifically lists physical impairments that may be compensated by the Fund. 27

B. Judicial Interpretation of the Statute

1. The Role of the Expert Witness

The 1965 statute has been amended considerably. 28 Large sums of money were at stake and this guaranteed appeals. The Minnesota Supreme Court, in a number of decisions, has attempted to clarify the language and legislative intent of Minnesota's second injury law. Flansburg v. Giza 29 foreshadowed things to come, since it was the first of many reversals of the Workers' Compensation Court of Appeals by the Minnesota Supreme Court when construing the second injury law. In Flansburg the plaintiff had a preexisting knee injury and then sustained a second injury while working for another employer. The question was whether the insurer would pay a twenty-six week deductible under subdivision 1 or no deductible under subdivision 2. 30 The only medical witness testified that no injury would have occurred except for the impairment. 31 The Commission declined to credit fully the unopposed expert testimony of the sole medical witness, asserting that his opinion "must be interpreted and applied in light of the facts." 32 The Commission ordered reimbursement under subdivision 1 based upon its conclusion that the plaintiff had not established, as required by subdivision 2, that the first injury was the proximate


27. See MINN. STAT. § 176.131(8) (1978) (listing 14 specified impairments, permitting others to be prescribed by rule, and covering other impairments for which 50 weeks of permanent partial disability compensation would be payable).


29. 284 Minn. 199, 169 N.W.2d 744 (1969).

30. The 26 week deductible was applicable when the second injury would itself produce a disablement but was substantially greater because of the preexisting disability. See Flansburg v. Giza, 284 Minn. 201, 169 N.W.2d 744, 746 (1969); Act of May 6, 1965, ch. 327, § 1, 1965 Minn. Laws 463, 463 (current version at MINN. STAT. § 176.131(1) (1978)). The employer-insurer would have been reimbursed for all compensation if the second injury would not have occurred except for the preexisting physical impairment. See Flansburg v. Giza, 284 Minn. at 201, 169 N.W.2d at 746; Act of May 6, 1965, ch. 327, § 1, 1965 Minn. Laws 463, 463 (current version at MINN. STAT. § 176.131(2) (1978)).

31. See 284 Minn. at 201, 169 N.W.2d at 746.

32. Id.
cause of the second injury.33 The supreme court rejected the Commission’s restrictive reading of subdivision 2 and also stated that the Commission “was not free to disregard the unopposed medical testimony which supported a finding prerequisite to the application of subd. 2.”34 This approach gave the Commission less authority in factfinding than is given to juries.35 No authority was cited in Flansburg for the position taken by the court. Essentially, Flansburg held that whenever there is testimony as to a medical “’tis,” that side prevails, unless the other side can produce a medical “’tain’t,” in which case the factfinder may choose.

Some of the troops were evacuated from that judicial outpost in Tuomela v. Reserve Mining Co.36 In Tuomela, although the sole medical witness testified that the disability was substantially greater because of a preexisting injury, the court, in affirming the Commission, found sufficient evidence to support a finding that the subsequent injury alone was severe enough to cause the present disability.37 The court in Tuomela distinguished Flansburg by stating: “Furthermore, in Flansburg, we did not say that expert testimony was conclusive upon the trier of fact. We said that such testimony could not be disregarded.”38 It appears that Tuomela represents a departure from the strict position taken by the Flansburg court regarding unopposed expert medical testimony.

33. See id.; cf. Pittack v. Hanna Mining Co., 256 N.W.2d 637, 638-39 (Minn. 1977) (per curiam) (no reimbursement under subdivision 1 if employee’s work activities would not have produced disability in absence of prior injury).

34. 284 Minn. at 201-02, 169 N.W.2d at 746.

35. Compare id. (Workmen’s Compensation Commission cannot disregard unopposed medical testimony) with, e.g., Moratzky v. Wirth, 74 Minn. 146, 148, 76 N.W. 1032, 1033 (1898) (expert opinions not conclusive upon a jury, but are merely evidence for consideration).

36. 299 Minn. 203, 216 N.W.2d 638 (1974) (per curiam).

37. See id. at 203-05, 216 N.W.2d at 639-40. The rule governing review of the Industrial Commission’s decisions is that “the findings will not be disturbed unless manifestly contrary to the evidence or . . . the inferences permissible therefrom would require reasonable minds to adopt a contrary conclusion.” Richter v. Shoppe Plumbing & Heating Co., 257 Minn. 108, 112, 100 N.W.2d 96, 98 (1959); see, e.g., Strei v. Church of St. Joseph, 290 Minn. 565, 566, 188 N.W.2d 879, 879 (1971) (per curiam); Luthens v. Glencoe Red & White Store, 264 Minn. 26, 31, 117 N.W.2d 386, 389 (1962); Peterson v. Ruberoid Co., 261 Minn. 497, 499, 113 N.W.2d 85, 87 (1962); Powers v. Eddy’s Baking Co., 261 Minn. 363, 368-69, 112 N.W.2d 625, 629 (1961).

38. 299 Minn. at 204, 216 N.W.2d at 639. The Minnesota Supreme Court has not required that full credit be given to expert medical testimony concluding that a second injury was a continuation of a previous injury or a new injury when another expert presents conflicting testimony. See Grier v. Consumers Servs., Inc., 293 Minn. 270, 273, 198 N.W.2d 281, 283 (1972).
2. The Question of Apportionment

The subtle moves of Flansburg and Tuomela were merely a warm-up for the main event, Koski v. Erie Mining Co.\textsuperscript{39} Prior to Koski, the Minnesota Supreme Court had approved the apportionment of liability between successive insurers of the same employer\textsuperscript{40} and apportionment between successive employers when an employee's present compensable disability was due in part to a prior industrial accident under a former employer.\textsuperscript{41} The Minnesota Supreme Court, in Haverland v. Twin City Milk Producers Ass'n,\textsuperscript{42} went one step further and applied the apportionment theory to the pre-1965 second injury law. The court stated:

There is nothing in the language of Minn. St. 1961, § 176.13(a), which would bar an employee, suffering disability resulting in part from an industrial accident sustained under one employer and in part from a subsequent industrial accident sustained under a second employer, from seeking compensation from both such employers in proportion to their respective responsibility for his disability. It also seems clear that there is nothing in this section which would bar the last employer held solely liable for compensation under the provisions of § 176.13 from seeking contribution from a former employer for his proportionate share of the total liability for compensation due to the employee.\textsuperscript{43}

If a 200 week period of total disability was found to be thirty percent due to injury number one and seventy percent due to injury number two, then the insurer for injury number one would pay thirty percent of the cost of the 200 weeks and insurer number two

\textsuperscript{39} 300 Minn. 1, 223 N.W.2d 470 (1973).
\textsuperscript{42} 273 Minn. 481, 142 N.W.2d 274 (1966).
\textsuperscript{43} Id. at 487-88, 142 N.W.2d at 279 (footnote omitted).
would pay seventy percent of the cost. This is a simplification, since the weekly benefits might differ between the two injuries, but that was the general idea. The formula is complex.

Given this precedent, the Fund contended in *Koski* that subdivision 1 of section 176.131 should be interpreted to mean that the employer at the time of the second injury would pay its share, after apportionment between the first employer and the Fund, less the deductible. The employee in *Koski* had sustained four successive work-related back injuries that combined to produce permanent and total disability. It was found that the disability from the third and fourth injuries was, in each case, substantially greater because of the first and second injuries. The supreme court reversed the Commission, holding that apportionment based on causal contributions of the last two injuries was not authorized. The court stated: "The language of Minn. St. 1969, § 176.131, which is applicable here, is clear, unambiguous, and unequivocal. The statute not only makes no reference to apportionment but the language used negates any inference of intent that apportionment be applied." The court, in deciding as it did, stated that apportionment was not authorized because the language used negates any inference of intent that apportionment be applied. The court further argued that full reimbursement "would imperil the financial stability of the special fund, pervert its purpose, and conflict with our prior decisions which have recognized and applied the equitable principles of apportionment."
tionment would conflict with the purpose of providing an incentive to an employer "to hire or retain a physically impaired person without being deterred by incurring potentially greater liability for injuries which aggravate the preexisting infirmity."\(^{47}\)

Once decided, *Koski* altered the game considerably. Under *Koski*, when there is a second injury and the Fund is liable, the last insurer must pay all benefits and is reimbursed from the Fund (no apportionment) for everything over the deductible. As an illustration of the complexity of workers' compensation litigation after *Koski*, several possible problems are set out below:

*Problem 1*—Employers became altruistic beyond anyone's remembrance, helping those who would, in a less kindly time, have been permanently and totally disabled employees. They were returned to work, where they, to no one's astonishment, would have a final aggravation (i.e. second injury) and the employer would be free of liability after payment of the deductible.

*Problem 2*—Employers no longer needed to worry about finding an easier job for the employee returning to work after a back injury. If he was registered with the Fund, the total exposure was the deductible. It became wiser to have Joe, bad back and all, do the lifting than have healthy Harry do it. Harry, if he hurt his back, might cost countless dollars; Joe could only cost the amount of the deductible.

*Problem 3*—The courtroom ambience was altered. Everybody in the courtroom, except the reporter and the attorney for the Fund, now wanted to have the Fund found liable because if that happened:

- a. The hearing judge eluded the complexities of apportionment.
- b. The prior employer(s) escaped liability.
- c. The last employer was reimbursed from the Fund.
- d. The employee knew (or soon found out) that the last employer would not push him so hard to return to work if the employer was being reimbursed from the Fund.
- e. The employee's attorney knew that the latter in-

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47. *Koski v. Erie Mining Co.*, 300 Minn. at 8, 223 N.W.2d at 474 (footnote omitted); *see Hegdahl v. City of Minneapolis*, 268 Minn. 412, 416, 129 N.W.2d 798, 801 (1964).

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jury was at a higher rate and this affected his fee. His view was much like that of his client in d above. Sometimes the attorney had the idea first.

Certain strategies emerged because of Koski. For instance, if there was a question of whether or not there had been a second injury, the first insurer might pay the deductible to the second insurer and the second insurer would agree that there, indeed, had been a second injury. The Fund would then pay. The first insurer would now be safe because there would be no apportionment; the second insurer would not even have the deductible to pay.

C. Registration

1. Informal Registration

Another problem involving Minnesota's second injury law was the informal registration of rather vaguely defined physical impairments. The mere filing of a medical report after the initial injury qualified the employer for reimbursement following a second injury. The original 1965 version of section 176.131 of Minnesota Statutes, permitting automatic registration for "any physical or mental condition which is or is likely to be a hindrance or obstacle to obtaining employment,"48 proved too loose. Every deviation from perfection was seen as a registerable impairment.49 For example, a most interesting battle was whether obesity was a registerable impairment.50 Certainly obesity is an impairment but how does one define it? One physician's obesity is another physician's plumpness, perhaps depending on the physician's own physique. If it is a given fraction over the standard weight, then what standard should be used? Would employers be given a chance to fatten up a prospect who found himself not quite up to the point

49. See, e.g., DeHaan v. Farmers Union Marketing & Processing Ass'n, 302 Minn. 552, 225 N.W.2d 21 (1975) (per curiam) (physical impairment causing continuing obstacle to employment is registerable and can necessitate use of state's second-injury fund); cf. Equitable Equip. Co. v. Hardy, 558 F.2d 1192 (5th Cir. 1977) (although prior back injury was not manifest or causing economic disability, second-injury fund can be used because employer knew of back injuries that affected employee's condition).
when he becomes obese? Would the weight have to be maintained to the time of the second injury? Would dieting become a form of disloyalty to the employer, "unregistering" the employee? There is certainly some question of public policy in registering an impairment that is within the control of the employee.\(^5\)

The question of whether a medical report alone, indicating a temporary disability, was sufficient to comply with the statutory provisions relating to registration was specifically addressed in *DeHaan v. Farmers Union Marketing & Processing Ass'n*.\(^5\) The registration requirements at the time provided for registration of an injured employee: (1) by a formal document listing the impairment filed with the Commission; or (2) by reason of a prior injury for which medical reports showing the impairment had been filed with the Commission.\(^5\) In *DeHaan* the medical report stated "L5 disc syndrome" and "severely sore back," indicating a temporary total disability. No permanent partial disability benefits were paid and no other medical reports were filed. The Commission held that the physician's report did not constitute a medical report indicating a physical impairment and denied reimbursement from the Fund.\(^5\) The supreme court reversed, stating:

> If an employer, then, would significantly weigh a consideration of a prior injury in selecting an employee, the employee can be said to have an impairment to his employability. . . . [A]n employer could well regard someone with a previous "disc syndrome" as a bad risk . . . regardless of whether or not he was permanently partially disabled.\(^5\)

The supreme court also found that the physician's report was

\(^{51}\) Cf. Shirley v. Triangle Maintenance Corp., 41 A.D.2d 800, 801, 341 N.Y.S.2d 709, 711-12 (1973) (mem.) (if claimant can lose weight, obesity is not a permanent disability covered by the special fund).

\(^{52}\) 302 Minn. 552, 225 N.W.2d 21 (1975) (per curiam).

\(^{53}\) See Act of May 6, 1965, ch. 327, § 1, 1965 Minn. Laws 463, 463-64 (current version at Minn. Stat. § 176.131(3)-(4) (1978 & Supp. 1979)). The statute provided:

Subd. 3. To entitle the employer to secure reimbursement from the special compensation fund, the following provisions must be complied with:

\(\text{(b)}\) The employee with a pre-existing physical impairment must have been registered with the commission prior to the employee's personal injury.

Subd. 4. If the employee's pre-existing physical impairment has been caused by a personal injury for which medical reports, showing the impairment have been filed with the commission and for which compensation has been paid under Chapter 176, the employee shall be deemed to be registered.

\(^{54}\) 302 Minn. at 553, 225 N.W.2d at 22.

\(^{55}\) Id. at 554-55, 225 N.W.2d at 23.
clearly sufficient to register the impairment.56

2. Formal Registration

DeHaan became passé because a 1971 amendment eliminated this type of registration.57 Registration may now be made only by filing a formal registration of the impairment with the Department of Labor and Industry.58 In addition, the questions that arose over debatable impairments led to the precise setting out of those impairments that are registerable.59

Elimination of informal registration brought up a new problem. What if, after the elimination of this informal registration, an employee was injured who was not formally registered but whose medical reports, filed in a previous industrial injury during the time of the more generous statute, showed an impairment that made the second injury substantially greater? Was the employee still registered or did the change in the law require formal registration as a requisite for recovery from the Fund?

Lutz v. Spencer Packing Co.,60 Stangel v. Lakeland Construction Co.,61 and Miller v. Norris Creameries62 specifically addressed this issue. The question in these cases was simply what law would govern—the law relating to recovery from the Fund at the time of the second injury or the law at the time of the registration? The supreme court, in reversing the Commission, held that the law in effect at the time of the registration determined whether or not the employee was registered.63 Registration was held to vest a right to

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56. Id. at 555, 225 N.W.2d at 24.
58. See Minn. Stat. § 176.131(4) (1978) (“Any employer who hires or retains in his employment any person who has a physical impairment shall file a formal registration for each such employee with the commissioner of the department of labor and industry in such form as the commissioner may require.”).
59. See Act of May 27, 1971, ch. 589, § 4, 1971 Minn. Laws 1094, 1095-96 (codified at Minn. Stat. § 176.131(8) (1978)). About half of the states restrict the special fund to obvious impairments such as loss of eyes or members. See 2 A. Larson, supra note 1, § 59.30, at 10-303 (1976). The other half do not restrict the fund to such losses of members, but tend to cover general injuries as well. See id. at 10-303 to -305.
60. 304 Minn. 1, 229 N.W.2d 14 (1975).
61. 306 Minn. 86, 235 N.W.2d 200 (1975).
62. 311 Minn. 343, 250 N.W.2d 161 (1976) (per curiam).
63. See Miller v. Norris Creameries, 311 Minn. 343, 345, 250 N.W.2d 161, 162 (1976) (per curiam) (registration in compliance with law in existence when registration was filed is valid controlling event); Stangel v. Lakehead Constr. Co., 306 Minn. 86, 88, 235 N.W.2d 200, 202 (1975) (statutory amendment does not retroactively repeal previous registration);
reimbursement that will not be destroyed even though the Legislature amends the statute prior to the second injury. The court in Lutz rationalized that "the legislature did not intend to bring about the inequities which would result from giving retroactive effect to the 1969 amendment and, in effect, repealing retroactively the prior statutory provisions for automatic registration on which employers and compensation carriers have justifiably relied."

Another problem that arose from the elimination of informal registration was addressed in Amberg v. Olivia Nursing Home. The question was whether a formal registration, once accepted by the Commission, could be disregarded after the subsequent injury if it was found not to have complied with the rules of the Commission at the time of its filing. The supreme court, reversing the Commission, held that if the registration had not been objected to by the time of the second injury it was valid. The rationale was that the purpose of the second injury statute would be defeated if an employer could not rely on registration in its decision to employ handicapped persons.

D. Physical Impairment

As amended in 1971, the second injury statute set out certain physical impairments that could be registered, including "[a]ny other physical impairment for which at least 50 weeks or more of weekly benefits would be payable as permanent partial disability if the physical impairment were evaluated according to standards

Lutz v. Spencer Packing Co., 304 Minn. 1, 3, 229 N.W.2d 14, 16 (1975) (stricter requirements of statutory amendment do not apply retroactively to previously registered injury); cf., Jones v. Honeywell, Inc., 281 N.W.2d 696, 698 (Minn. 1979) (although employee deemed registered if medical report filed at time of first injury, reimbursement denied when employer filed medical report after formal registration was required); Fryhling v. Acrometal Prods., Inc., 269 N.W.2d 744, 748 (Minn. 1978) (reimbursement determined by statute in effect at time original disability was registered); Osterkamp v. Craftsman Press, 312 Minn. 599, 600, 253 N.W.2d 147, 148 (1977) (per curiam) (employee deemed registered under 1969 statute could not lose registration status upon statutory amendment with different registration requirements).

64. See Miller v. Norris Creameries, 311 Minn. 343, 345, 250 N.W.2d 161, 162 (1976) (per curiam); note 63 supra.
65. Lutz v. Spencer Packing Co., 304 Minn. 1, 3-4, 229 N.W.2d 14, 16 (1975).
66. 306 Minn. 330, 236 N.W.2d 785 (1975).
67. See id. at 332, 236 N.W.2d at 786.
68. See id.
used in workmen's compensation proceedings. The question of whether the term "physical impairment" was limited to an impairment of one member of one's body was addressed in Quirk v. Electric Machinery Manufacturing Co. In Quirk the employee sustained a personal injury resulting in ten percent permanent partial disability to both hands and wrists. Because of this injury, the employee sustained a second injury resulting in permanent total disability. The Commission denied reimbursement, ruling that the first injury was not a "physical impairment" within the statute. The workers' compensation law provided benefits of forty-four weeks for both hands and wrists, plus a fifteen percent increment for simultaneous injuries, totalling 50.6 weeks. No one member totalled fifty weeks. The Commission ruled that the employee had sustained two separate impairments to two separate members. It construed the statute to require fifty weeks of benefits to one scheduled member and held that the employee's prior injuries did not constitute a registerable impairment. The supreme court reversed, holding that the term "physical impairment" referred to the total impairment of one's body and was not limited to one member of the body.

The holding in Quirk brings up a purely philosophical point: almost any human, aged forty or so, who has not led a halcyon life, is registerable under the terms of Quirk. A trick elbow, say five percent of the arm (13.5 weeks) plus five percent of the back (everyone aged forty has five percent (twenty-five weeks) of the back) plus diminished lung capacity (city air plus cigarettes) say five percent because of damage to an internal organ (twenty-five weeks) totals 63.5 weeks. Over the line with weeks to spare!

E. Other Special Fund Questions

Reimbursement under section 176.131 creates other problems that increase as the number of Fund cases increase. The first problem is that an insurer, who, in a case of long-term disability, is being reimbursed by the Fund, has little financial incentive to urge

70. 306 Minn. 326, 236 N.W.2d 782 (1975).
71. Id. at 327, 236 N.W.2d at 783.
72. See id. at 328, 236 N.W.2d at 784; MINN. STAT. § 176.101, subd. 3(13), (46) (Supp. 1979).
73. See 306 Minn. at 327-29, 236 N.W.2d at 783-84.
74. See id. at 329-30, 236 N.W.2d at 784-85.
the employee back to work. There is some incentive due to the expense of keeping the file open and making payments, but there is not the same urgency as when the insurer is making unreimbursed payments. This problem, in large part, solved itself prior to Koski, for if the earlier insurer was paying some portion of the disability, without reimbursement, that insurer would often police the file more vigorously than the insurer who was being reimbursed. 75

Second, the deductible, fifty-two weeks and $2,000,76 should be adjusted so that the insurer will not prefer, in a clear Fund case, to pay the deductible rather than assert valid but expensive defenses. In considering this factor, one must not forget that, as the deductible gets larger, the employer is more reluctant to hire the impaired employee. At a moderate rate of $200.00 per week, the deductible of fifty-two weeks and $2,000 in medical expenses would total $12,400.00. Whether that is the proper figure is a subject for legislative debate.

A third problem is the ongoing question, "Who shall be registered?" The supreme court, in Quirk, construed the statute to allow almost any mature citizen with persistence and imagination to be registered. 77 If we register half the employees in the state, will we be helping the truly impaired? If the Legislature tightens the requirements for registration, those registered under the more generous law would remain registered. 78 This also is a subject for legislative debate.

IV. A COMPARISON OF OTHER STATE'S FUNDS

The cases outlined above are not an exhaustive list of Fund cases. They consist of the cases concerned with the philosophy of the Special Compensation Fund—what was it intended to do? What did the Legislature intend? In searching out this judicial will-o-the-wisp, the Minnesota Supreme Court and the Commis-

75. The supreme court in Koski held apportionment was not applicable. Thus, the first employer escaped liability after a subsequent injury and the last employer was held fully liable, subject to the applicable reimbursement from the Fund. See notes 46-47 supra and accompanying text.


77. See note 74 supra and accompanying text.

78. See Jones v. Honeywell, Inc., 281 N.W.2d 696, 698 (Minn. 1979); Osterkamp v. Craftsman Press, 312 Minn. 599, 600, 253 N.W.2d 147, 148 (1977) (per curiam); Miller v. Norris Creameries, 311 Minn. 343, 345-46, 250 N.W.2d 161, 162-63 (1976) (per curiam); Stangel v. Lakehead Constr. Co., 306 Minn. 86, 87-88, 235 N.W.2d 200, 201-02 (1975); Lutz v. Spencer Packing Co., 304 Minn. 1, 3-4, 229 N.W.2d 14, 16 (1975); note 63 supra and accompanying text.
sion explored different acreage, for in all except *Tuomela*, a per
curiam opinion, the supreme court reversed the Commission.
Further, each of the reversals expanded the pay-out from the
Fund. Of the twenty-eight states responding to the questionnaire
sent out by the Center for Public Representation, Minnesota's
Special Compensation Fund pays out the highest per capita.

The six highest reporting states are:

- Minnesota: $1.34 per capita
- New Jersey: $1.31 per capita
- Michigan: $0.92 per capita
- Kansas: $0.61 per capita
- New York: $0.51 per capita
- Oklahoma: $0.37 per capita

Certainly, it is not a fault or virtue to lead the group as Minne-
sota does. It also is not a fault or virtue to bring up the rear, for, as
stated above, the amount paid from a second injury fund is the
product of many variables. One thing is clear, however; section
176.131 of Minnesota Statutes plays an active part in the Minne-
sota workers' compensation drama. Certain courtroom problems
arise, as mentioned above, when the Special Compensation Fund
is involved.

V. CONCLUSION

All the foregoing is interesting enough, but facts are helpful only
when they allow us to reach conclusions and to alter our behavior.
If one only wants facts, the best source is a phone directory. One
can make certain pertinent observations, however, based on the
foregoing. The first is that the Minnesota Supreme Court has
viewed the second injury law as a *deus ex machina*. Anything enti-
tled “The Special Compensation Fund” is likely to be viewed as
having, in its deep pocket, something for everyone. On the basis of
the questions posed in the cases digested above, the thinking of the

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curiam).
80. *See notes 29-74 supra and accompanying text*
81. *See note 18 supra*
82. *See Center for Public Representation, supra note 14, at 26. The formula used is:
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payout per capita = \frac{\text{amount disbursed from the fund for calendar 1978}}{\text{population of state (1970 census)}}
\]
83. This chart is based upon data from the Center for Public Representation, *see id.*, compared with population figures from the 1970 census.
84. *See notes 15-18 supra and accompanying text*
Minnesota Supreme Court went beyond that of the Workers' Compensation Court of Appeals, a body generally considered liberal.

It is further certain that section 176.131 has evolved, by construction, into quite a different creature than its accoucheurs envisaged. Presently, the Special Compensation Fund is involved in about 500 second injury cases annually. That certainly makes the Fund an integral part of the system.

The foregoing are certainties. There are also some probabilities. The Fund has generally been a force for good. For example, those suffering from epilepsy have been helped, without a doubt. The fear that an employee may injure himself because of a seizure is grossly disproportionate to the risk. There are many people registered for epilepsy and in ten years representing the Fund the author has never seen an injury caused by an epileptic seizure that resulted in permanent partial disability. This particular fact has been spread as widely as possible through talks to employers' organizations and epilepsy-oriented groups. Many diabetics are registered and one may assume that the Fund is a substantial factor in their continued employment and was a factor, for many, in being considered for employment. Most second injury claims, however, concern back injuries, and here one cannot be so certain. Many companies will not hire a person with back problems until he is registered. No one can say whether he would have been hired if there were no Fund. One could quantify this by a study, which would impress those people who are impressed by studies, but one cannot honestly say more than that the Fund probably assists many persons with back problems to find work. Regrettably, it also encourages some employers to keep people in work too strenuous for them.

Further, the insurers and, to a lesser extent, the self insurers, have been very cooperative in defending Fund cases on questions of basic liability, extent of permanency, etc. This is necessary so that defense attorneys do not someday find that the Fund has taken over the entire defense of all Fund cases.

The Minnesota second injury law, in its application, falls far short of perfection. But it is helping many, and no other state is more aggressively seeking, in this way, to encourage the hiring of the physically impaired. A nice balance must be struck. As we try

to solve more problems through the Fund, we may cause problems elsewhere in the workers' compensation system. If Minnesota is to change its approach from its present orientation, from having the risk insured by private insurers to having some form of state fund, this should be done by legislation and not by expanding the role of the Fund. Most important, we must, in the midst of the tumult, constantly remind ourselves that the main purpose of the Special Compensation Fund is to encourage the hiring of the physically impaired. If legislators, insurers, attorneys, and assistant attorneys general keep that in mind, they cannot go far astray.