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EMPLOYEES' CLAIMS FOR CONCURRENT PAYMENT OF TEMPORARY DISABILITY AND RETRAINING BENEFITS

by THOMAS W. WALSH†

Injured employees eligible for workers' compensation benefits sometimes are eligible to receive temporary disability and retraining benefits simultaneously. In this Article, Judge Walsh examines the circumstances under which these benefits can be paid concurrently and assesses the impact of a 1979 amendment by the Minnesota Legislature that will resolve this problem in the future.

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I. INTRODUCTION

In an effort to provide a comprehensive rehabilitation program¹

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1. In 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.20 (1976), Professor Larson points out a number of factors upon which a rehabilitation program depends. Professor Larson states:

From the moment of injury forward, rehabilitation is affected by the character of medical care, the impact of compensation practices on the mental attitudes of employees, the question whether the compensation administrative system is equipped to maintain constant surveillance of the case, the extent to which the act pays for medical expenses, prosthetic devices and the like, the extent to which the act affords extended cash benefits during rehabilitation, as well as travel, living, and instructional expenses, the convenient availability of vocation rehabilitation and placement services, the extent to which the compensation

for employees injured on the job, the 1979 Minnesota Legislature amended the workers' compensation law² (Minnesota law). The Legislature's recent adoption of a specific rehabilitation program³ indicates an intent to hold the compensation system responsible for both the physical and vocational restoration of the injured employee.⁴ This conviction is shared with many other states.⁵

Providing a system of compensation and rehabilitation that satisfies both employers and employees has been difficult because of the competing interests involved.⁶ One example that has been the subject of considerable litigation is the eligibility of an injured

act provides special funds to finance the costs of rehabilitation, the extent to which the provision, termination or suspension of benefits provide incentives and disincentives to the rehabilitation process acting upon both the employer and the employee, and the extent to which second injury funds and various compensation decisions affecting hiring incentives encourage or discourage the hiring of handicapped workers.

Id. at 10-480 to -481.

2. MINN. STAT. §§ 176.011-.82 (1978 & Supp. 1979), as amended by Act of Mar. 28, 1980, ch. 384, § 2, 1980 Minn. Sess. Law Serv. 100, 100 (West), as amended by Act of Mar. 28, 1980, ch. 385, 1980 Minn. Sess. Law Serv. 102 (West), as amended by Act of Mar. 28, 1980, ch. 389, 1980 Minn. Sess. Law Serv. 104 (West), as amended by Act of Mar. 28, 1980, ch. 392, 1980 Minn. Sess. Law Serv. 107 (West), as amended by Act of Mar. 31, 1980, ch. 414, § 2, 1980 Minn. Sess. Law Serv. 130, 130 (West), as amended by Act of Apr. 11, 1980, ch. 556, § 12, 1980 Minn. Sess. Law Serv. 715, 721 (West).

3. Act of June 7, 1979, ch. 3, § 36, 1979 Minn. Laws Ex. Sess. 1256, 1278-81 (codified at MINN. STAT. § 176.102 (Supp. 1979)). The 1979 amendment provides a much more lengthy and comprehensive rehabilitation program than its predecessor. Compare *id.* with Act of June 2, 1967, ch. 40, § 11, 1967 Minn. Laws Ex. Sess. 2225, 2235-36 (repealed 1979).

4. See 2 A. LARSON, *supra* note 1, § 61.20, at 10-479. According to Professor Larson, "The conviction is gradually gaining ground that the compensation job is not done when the immediate wound has been dressed and healed. There remains the task of restoring the man himself to the maximum usefulness that he can attain under his physical impairment." *Id.*

5. According to Professor Larson, statutes in 38 states have adopted some kind of special rehabilitation provision. See *id.* at 10-482.

6. See *id.* at 10-483. The problems attendant in satisfying the interests of both employer and employee are aptly pointed out by Professor Larson:

The principal decisional issues affecting rehabilitation are those that, intentionally or unintentionally, have an incentive or disincentive effect on rehabilitation. What makes this area a hard one to handle by the judicial process is that usually a rule that forms an incentive for the employee forms a disincentive for the employer, and vice versa. Moreover, if one or the other is under a disincentive, it may be difficult in practice to make rehabilitation effective. To take the most obvious example: If after a worker is restored to some earning capacity by rehabilitation, his compensation is reduced by the amount of his earnings, his financial incentive to make the efforts required for rehabilitation is largely destroyed; yet if full benefits continue to be paid to him as if he were not earning, the financial incentive to the employer to put up the money necessary for the rehabilitation is equally destroyed.

Id.

worker to receive temporary disability benefits⁷ and retraining benefits concurrently.⁸ Because of the employee's unavailability

7. The term "temporary disability benefits," as used in this Article, includes both temporary total disability benefits and temporary partial disability benefits. Compare MINN. STAT. § 176.101(1) (Supp. 1979) (temporary total disability compensation) with *id.* § 176.101(2) (1978) (temporary partial disability compensation). Because the statute does not provide a method for determining the extent of an injured employee's disability for purposes of awarding compensation benefits, disability must be determined by the trier of fact. See, e.g., *Casey v. Northern States Power Co.*, 247 Minn. 295, 297, 77 N.W.2d 67, 69-70 (1956) (affirming Industrial Commission because finding of disability reasonably supported by evidence); *Gurtin v. Overland-Knight Co.*, 179 Minn. 38, 39, 228 N.W. 169, 169 (1929) (extent of disability ultimate fact question for Commission). In *Enrico v. Oliver Iron Mining Co.*, 199 Minn. 190, 271 N.W. 456 (1937), the Minnesota Supreme Court elucidated the meaning of disability:

[T]he compensation to be awarded may not be computed on the basis of what was actually earned or what could have been earned during the particular period since the date of the accident, . . . for the actual amount that an employee earns after an accident is not necessarily a fair measure of his earning capacity. . . . It is his ability to earn, not his actual earnings, that should be the basis of the award.

Id. at 192, 271 N.W. at 457 (citations omitted).

A finding of temporary total disability is based upon the employee's ability to earn rather than the employee's physical condition. See, e.g., *Schulte v. C.H. Peterson Constr. Co.*, 278 Minn. 79, 83-84, 153 N.W.2d 130, 134 (1967) (employee with sporadic unemployment had temporary total disability despite permanence of injury); *Castle v. City of Stillwater*, 235 Minn. 502, 506, 51 N.W.2d 370, 372 (1952) (total disability relates not to loss of bodily function, but to ability to earn an income). Although the court has defined a totally disabled person as one whose "physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an unsubstantial income," *Schulte v. C.H. Peterson Constr. Co.*, 278 Minn. at 83, 153 N.W.2d at 133-34 (footnote omitted), a total disability is considered temporary when likely to exist only for a limited time. See *id.* at 83, 153 N.W.2d at 134.

For a determination of temporary partial disability, the Minnesota court has enumerated a minimum of four factors that are necessary. See *Dorn v. A.J. Chromy Constr. Co.*, 310 Minn. 42, 47, 245 N.W.2d 451, 454 (1976). According to the *Dorn* court:

There has been no definitive statement in the case or statutory law of the requisite elements of temporary partial disability. . . . First, there must be a physical disability. Second, the disability must be temporary rather than permanent in nature. Third, it must be partial, or in other words, the employee must be able to work subject to the disability. Finally, there must be an actual loss of earning capacity that is causally related to the disability.

Id. at 46-47, 245 N.W.2d at 454.

8. See, e.g., *Spangrud v. Precision Grinding Co.*, 281 N.W.2d 362, 366 (Minn. 1979) (*per curiam*) (Minnesota statute grants "employees disabled by occupational disease the right to receive concurrent disability and retraining benefits"); *Adams v. Nadave*, 309 Minn. 536, 540, 245 N.W.2d 227, 230 (1976) (*per curiam*) (Legislature intended to encourage retraining); *Morrison v. Merrick's Super Mkt., Inc.*, 300 Minn. 535, 536, 220 N.W.2d 344, 345 (1974) (*per curiam*) ("because employee was precluded from accepting work offered by employer while engaged in a retraining course, he should be entitled to receive temporary partial disability benefits"); *Nelson v. National Biscuit Co.*, 300 Minn. 46, 51, 217 N.W.2d 734, 737 (1974) (*per curiam*) (Legislature intended to allow concurrent benefits). See generally notes 19-45 *infra* and accompanying text.

for full-time, and in some cases, even part-time employment while engaged in a retraining program, this issue frequently has been disputed. Employees typically have argued that since retraining benefits alone are never equivalent to the injured employee's former wages, the employee is often forced to cease retraining and rehabilitation efforts if concurrent benefits are not granted.⁹ The primary concern of employers, on the other hand, is that they should not have to provide both disability and retraining benefits to an employee who is capable of working.¹⁰

By Minnesota's recent enactment of subdivision 11 of section 176.102,¹¹ the controversy over the injured employee's eligibility to receive concurrent benefits for temporary disability and retraining has been settled for employees injured on or after October 1, 1979.¹² Under subdivision 11, the injured employee is entitled to

9. See note 6 *supra*.

10. See MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR 16 (1979) [hereinafter cited as STUDY COMM'N]. In making its recommendation, the Commission noted:

[R]etraining compensation currently operates as a disincentive to return to work since a person who is in a certified retraining program may presently receive a concurrent weekly retraining benefit, in addition to and equal to the amount received for temporary total disability. This "double" payment often results in more real income during the period of disability than was earned while employed.

Id.; cf. note 6 *supra* (discussing employer's disincentives).

11. Act of June 7, 1979, ch. 3, § 36(11), 1979 Minn. Laws Ex. Sess. 1256, 1281 (codified at MINN. STAT. § 176.102(11) (Supp. 1979)).

12. An informal memorandum from the Attorney General's office concludes that the effective date of the new retraining benefits section is October 1, 1979. See Advisory Memorandum from Winston Ehlmann, Assistant Attorney General, to Harry D. Peterson, Commissioner of Department of Labor and Industry (Jan. 18, 1980) (on file at William Mitchell Law Review office).

The effective date of section 176.102 is, however, subject to dispute. Subdivision 11 states that it is not applicable "to retraining benefits for which liability has been established prior to July 1, 1979." MINN. STAT. § 176.102(11) (Supp. 1979). Several sections must be examined to determine the effective date of subdivision 11, because the Act that created section 176.102 did not provide a specific effective date for that section. See Act of June 7, 1979, ch. 3, § 71, 1979 Minn. Laws Ex. Sess. 1256, 1297 (providing effective date only for some of the sections in chapter 3). Statutes not containing a specific effective date are governed by section 645.02. See MINN. STAT. § 645.02 (1978). Because the 1979 amendments to the Minnesota law included several appropriation items, see, e.g., Act of June 7, 1979, ch. 3, § 40, 1979 Minn. Laws Ex. Sess. 1256, 1282 (codified at MINN. STAT. § 176.131(10) (Supp. 1979)), it is arguable that the portion of section 645.02 that provides "[a]n appropriation act or act having appropriation items . . . takes effect at the beginning of the first day of July next following its enactment, unless a different date is specified in the act" governs the effective date of subdivision 11. MINN. STAT. § 645.02 (1978). If this provision governs, the effective date of subdivision 11 was July 1, 1979.

Because subdivision 11 represents a change in workers' compensation benefits, see *id.* § 176.102(11) (Supp. 1979) (providing 125% of employee's temporary total disability rate

125% of the employee's compensation rate for temporary total disability during the retraining period.¹³ The statute specifically provides that payments made under it are in lieu of payments for temporary total, temporary partial, or permanent total disability.¹⁴ The net effect of this change is that a temporarily-disabled employee who is also in a retraining program will receive only a 25% increase¹⁵ over his ordinary temporary total compensation rate.

Because Minnesota workers' compensation claims are governed

during rehabilitation), an argument may be made that section 176.1321 governs. Section 176.1321 provides that the October 1 immediately following enactment is the effective date of any workers' compensation benefit change for which an effective date is not specified. *See id.* § 176.1321. If this provision governs, the effective date of subdivision 11 was October 1, 1979. This provision was part of the same Act that created subdivision 11. *Compare* Act of June 7, 1979, ch. 3, § 36, 1979 Minn. Laws Ex. Sess. 1256, 1278 (includes subdivision 11 retraining benefits) (codified at MINN. STAT. § 176.102 (Supp. 1979)) *with id.* § 42, 1979 Minn. Laws Ex. Sess. at 1284-85 (new effective date provision for workers' compensation benefit changes) (codified at MINN. STAT. § 176.1321 (Supp. 1979)).

13. Subdivision 11 states:

The insurer or employer shall pay up to 156 weeks of compensation during rehabilitation under a plan in an amount equal to 125 percent of the employee's rate for temporary total disability. This payment is in lieu of payment for temporary total, temporary partial, or permanent total disability to which the employee might otherwise be entitled for this period under this chapter, but shall be considered to be the equivalent of temporary total disability for the purposes of section 176.132. If on the job training is part of the rehabilitation program, the weeks during which the insurer or employer pays compensation pursuant to subdivision 5 shall be subtracted from the 156 weeks of retraining compensation which has been paid, if any, pursuant to this subdivision. This subdivision shall not apply to retraining benefits for which liability has been established prior to July 1, 1979.

MINN. STAT. § 176.102(11) (Supp. 1979). As a result of the last sentence in subdivision 11, it can be argued that the subdivision is applicable to injuries occurring before July 1, 1979 if liability has not been established by a fact finder prior to July 1, 1979.

14. *See id.*

15. By a vote of twelve to two, the Minnesota Workers' Compensation Study Commission passed a recommendation that the Legislature eliminate the payment of concurrent disability and retraining benefits, and instead increase the amount of weekly retraining benefits by 15%. *See* STUDY COMM'N, *supra* note 10, at 16. The rationale given by the Commission was that:

[R]etraining compensation currently operates as a disincentive to return to work since a person who is in a certified retraining program may presently receive a concurrent weekly retraining benefit, in addition to and equal to the amount received for temporary total disability. This "double" payment often results in more real income during the period of disability than was earned while employed. However, it is the view of the commission that some incentive should be provided to encourage retraining which will assist the employee in returning to gainful employment. This incentive should be in the form of supplemental compensation of 15% of the weekly benefit amount.

Id.

by the law in existence at the time of injury,¹⁶ several years may elapse before the Minnesota courts will have occasion to apply the 1979 legislative changes. Injuries occurring prior to October 1, 1979 will be governed by prior statutes and case law.

This Article examines the Minnesota cases interpreting the law governing claims for concurrent benefits for injuries occurring prior to October 1, 1979. As the cases indicate, the approach taken by Minnesota courts has shifted from generally allowing claims for concurrent benefits¹⁷ to allowing such benefits only in very limited situations.¹⁸ It is hoped that this Article will aid the practitioner in determining whether an employee has a sufficiently severe work-related disability for which he may be allowed concurrent temporary disability and retraining payments.

II. SURVEY OF MINNESOTA CASES

A. *Origins of Recovery*

The early Minnesota cases granted injured employees concurrent benefits on the basis of the language in the retraining benefits statute¹⁹ and the belief that retraining benefits were intended as an

16. The rights of an employee to workers' compensation are fixed by the law in effect at the time of the compensable injury or accident. *See, e.g.*, *Lakics v. Lane Bryant Dep't Store*, 263 N.W.2d 608, 609 (Minn. 1978) (per curiam); *Schwartz v. Talmo*, 295 Minn. 356, 359, 205 N.W.2d 318, 321, *appeal dismissed*, 414 U.S. 803 (1973); *Fink v. Cold Spring Granite Co.*, 262 Minn. 393, 400-01, 115 N.W.2d 22, 28 (1962); *Kress v. Minneapolis-Moline Co.*, 258 Minn. 1, 3, 102 N.W.2d 497, 499 (1960); *Bergstrom v. O'Brien Sheet Metal Co.*, 251 Minn. 32, 34, 86 N.W.2d 82, 84 (1957).

17. *See* notes 21-27 *infra* and accompanying text.

18. *See* note 44 *infra* and accompanying text.

19. The retraining benefits statute has a lengthy history which can be traced back to 1917. In that year, the Minnesota Legislature created a state board for vocational training. *See* Act of Apr. 21, 1917, ch. 491, §§ 1-2, 1917 Minn. Laws 830, 830 (repealed 1941). The purpose of that Act was to promote vocational education in the state. *See id.* In 1919 the Legislature established a division, under the State Board for Vocational Education, for training persons whose ability to earn a living had been destroyed or reduced by an industrial or other accident. *See* Act of Apr. 23, 1919, ch. 365, § 1, 1919 Minn. Laws 389, 389 (repealed 1941). The board, in cooperation with the Department of Labor and Industry, was directed to aid disabled persons in obtaining "such education, training, and employment as will tend to restore their capacity to earn a livelihood." *Id.* §§ 3-4, 1919 Minn. Laws at 389-90.

Employers were first required to provide injured employees with retraining benefits in 1921. *See* Act of Mar. 15, 1921, ch. 82, § 14(c), 1921 Minn. Laws 90, 97-98 (current version at MINN. STAT. § 176.102 (Supp. 1979)). Additional compensation was to be paid to the disabled employee for vocational reeducation under the 1921 Act. *See id.* The wording of the provision stipulating the amount of compensation to be paid has changed four times from 1921 until 1967. *See* Act of June 2, 1967, ch. 40, § 11, 1967 Minn. Laws Ex. Sess. 2225, 2235-36 (employee entitled to 104 weeks of compensation to be paid ac-

incentive to encourage rehabilitation.²⁰ The 1963 decision of *Vreeman v. Kahler Corp.*²¹ was one of the earlier cases considering a claim for concurrent disability and retraining benefits. Relying on the phrase "in addition to" in the statute,²² the Industrial Com-

ording to provision providing compensation for temporary total disability) (current version at MINN. STAT. § 176.102 (Supp. 1979)); Act of Apr. 20, 1955, ch. 615, § 3, 1955 Minn. Laws 932, 937 (employee entitled to 66⅔% of daily wage at time of injury, not to exceed 52 weeks); Act of Apr. 24, 1953, ch. 755, § 10(45), 1953 Minn. Laws 1108, 1113 (employee entitled to 66⅔% of daily wage at time of injury, not to exceed 25 weeks); Act of Mar. 15, 1921, ch. 82, § 14(c), 1921 Minn. Laws 90, 97-98 (employee entitled to 66⅔% of daily wage at time of injury, not to exceed 25 weeks provided employee entitled to compensation for at least 75 weeks for permanent impairments). The 1967 version remained in effect until 1979 when the Legislature replaced it with the current retraining statute. See Act of June 7, 1979, ch. 3, § 36(11), 1979 Minn. Laws Ex. Sess. 1256, 1281 (codified at MINN. STAT. § 176.102(11) (Supp. 1979)).

The current statute provides for compensation during retraining as follows:

The insurer or employer shall pay up to 156 weeks of compensation during rehabilitation under a plan in an amount equal to 125 percent of the employee's rate for temporary total disability. This payment is in lieu of payment for temporary total, temporary partial, or permanent total disability to which the employee might otherwise be entitled for this period under this chapter, but shall be considered to be the equivalent of temporary total disability for the purposes of section 176.132. If on the job training is part of the rehabilitation program, the weeks during which the insurer or employer pays compensation pursuant to subdivision 5 shall be subtracted from the 156 weeks of retraining compensation which has been paid, if any, pursuant to this subdivision. This subdivision shall not apply to retraining benefits for which liability has been established prior to July 1, 1979.

Id.

20. Two early cases, *Vierling v. Spencer, Kellogg & Sons, Inc.*, 187 Minn. 252, 245 N.W. 150 (1932) and *Tibbitts v. E.G. Staude Mfg. Co.*, 166 Minn. 139, 207 N.W. 202 (1926), interpreted the word "necessary" in the 1921 statute as meaning that retraining benefits were necessary when they would "materially assist the employe in restoring his impaired capacity to earn a livelihood." *Vierling v. Spencer, Kellogg & Sons, Inc.*, 187 Minn. at 255, 245 N.W. at 151-52; *accord*, *Tibbitts v. E.G. Staude Mfg. Co.*, 166 Minn. at 141-42, 207 N.W. at 203; *cf.* *Graves v. Glen Lake State Sanitorium*, 277 N.W.2d 196, 197 (Minn. 1979) (purpose of statute providing retraining benefits for employee under temporary total disability was to encourage injured workers to increase their employability through retraining); *Vreeman v. Kahler Corp.*, 23 Minn. Workmen's Comp. Dec. 1, 3 (1963) (retraining benefits intended as incentive to encourage retraining).

21. 23 Minn. Workmen's Comp. Dec. 1 (1963).

22. The retraining benefits provision in effect at the time the employee was injured read as follows:

In addition to the compensation provided in this chapter, the compensation during the period of retraining for a new occupation, as certified by the division of vocational rehabilitation, Department of Education, shall be 66⅔ percent of the daily wage, subject to the maximum compensation provided in this act, at the time of the injury, not beyond 25 weeks, provided the commission, after consultation with its bureau of workmen's rehabilitation, finds that the retraining is necessary and makes an order for such compensation.

Act of Apr. 24, 1953, ch. 755, § 10, subd. 3(45), 1953 Minn. Laws 1099, 1113 (emphasis added) (current version at MINN. STAT. § 176.102 (Supp. 1979)).

mission²³ stated that a claimant engaged in a retraining program certified by the Division of Vocational Rehabilitation was entitled to retraining benefits concurrently with any disability payments under the retraining benefits section of the statute.²⁴

Because the *Vreeman* decision was not appealed, the Minnesota Supreme Court was not confronted with the question of when an injured employee is entitled to concurrent benefits until the 1974 case of *Nelson v. National Biscuit Co.*²⁵ Prior to *Nelson*, however, the 1967 Legislature revised the retraining benefits section of the statute. Although the *Nelson* court stated that it had some reservations about the intent of the 1967 Legislature when it revised the retraining benefits section,²⁶ the court concluded that the failure of

23. The name "Industrial Commission" has been changed several times. See Act of Mar. 15, 1921, ch. 82, § 66(k)(1), 1921 Minn. Laws 90, 126 (Industrial Commission), as amended by Act of May 27, 1967, ch. 1, § 7, 1967 Minn. Laws Ex. Sess. 1991, 1993 (Workmen's Compensation Commission), as amended by Act of June 2, 1975, ch. 271, § 3(47), 1975 Minn. Laws 742, 746 (Workmen's Compensation Board), as amended by Act of June 4, 1975, ch. 359, § 23, 1975 Minn. Laws 1168, 1189 (workmen's changed to workers'), as amended by Act of Apr. 3, 1976, ch. 134, § 78, 1976 Minn. Laws 316, 345 (Workmen's Compensation Court of Appeals) (current version at MINN. STAT. § 176.011, subd. 6(1) (1978) (Workers' Compensation Court of Appeals)).

24. See 23 Minn. Workmen's Comp. Dec. at 3. The Commission stated:

The rehabilitation and retraining section of the law ought especially to be construed liberally to effectuate its purpose—the return as soon as possible of the injured worker to gainful employment. To delay the payments is to deny help when it is most needed. The statute should not be interpreted so as to bring about an absurd result.

Id. In the view of the Commission, allowing concurrent retraining benefits would act as an incentive to the employee to begin retraining "at the earliest possible time after he is injured." *Id.*

25. 300 Minn. 46, 217 N.W.2d 734 (1974) (per curiam).

26. See *id.* at 51, 217 N.W.2d at 736-37. The *Nelson* court was troubled by the last sentence of the 1967 revised retraining section that read: "However, the total additional compensation provided by this subdivision shall not be greater than an amount equal to that payable for the injury as compensation for temporary and permanent disability." Act of June 2, 1967, ch. 40, § 11, 1967 Minn. Laws Ex. Sess. 2225, 2235 (current version at MINN. STAT. § 176.102 (Supp. 1979)). The employer contended that this indicated a legislative intention to prevent concurrent payment of benefits. See 300 Minn. at 51, 217 N.W.2d at 736-37. The employee, however, argued that the sentence should be viewed not as a prohibition of concurrent benefits but merely as a limitation, in addition to the 104 week limitation, on the total amount the employee could receive for retraining. See *id.* at 51, 217 N.W.2d at 737. The *Nelson* court, while acknowledging the merit of the employer's contention, chose to follow the employee's interpretation for several reasons. See *id.* First, the court found that the Legislature clearly intended to allow concurrent benefits because of the use of the word "additional" in the phrase "the employer shall pay up to 104 weeks of 'additional' compensation during the actual period of retraining." See *id.* at 51, 217 N.W.2d at 736. Second, the court assumed that because the Commission in *Vreeman v. Kahler Corp.*, 23 Minn. Workmen's Comp. Dec. 1 (1963), had interpreted the retraining benefits section as granting concurrent payments, see note 24 *supra* and accom-

the Legislature to clearly forbid concurrent payments should constitute an adoption of the *Vreeman* decision.²⁷

B. Limitations on Recovery

After it had been clearly established that the Minnesota courts would allow injured employees to recover concurrent disability and retraining benefits, the court was confronted with the question of whether an injured employee could recover concurrent payments when he had refused suitable employment offered by the employer prior to entering a retraining program. In the landmark case of *Morrison v. Merrick's Super Market, Inc.*,²⁸ an employee sustained a work-related back injury. Subsequent to the injury, the employer offered the employee work that the employee could perform in his partially-disabled condition at no wage loss.²⁹ The employee refused this offer of work and thereafter entered a retraining course.³⁰

Although the *Morrison* court ruled that the employee was not entitled to temporary partial disability benefits during the period when he had refused the employment offered by the employer, the court found that the employee was entitled to temporary partial disability benefits from the time he commenced retraining because he was unavailable to accept the job offered by the employer during the retraining period.³¹ The *Morrison* court based its decision on the fact that the employee clearly would have been entitled to concurrent benefits had he commenced retraining prior to the offer of employment and because the purpose of the Minnesota law was to encourage injured workers to increase their employability through retraining.³²

panying text, had the Legislature wished a different interpretation, it would have made its intention clear when it revised the provision. *See* 300 Minn. at 51, 217 N.W.2d at 736. Its failure to do so meant that it had adopted the Commission's view. *See id.*

27. *See* 300 Minn. at 51, 217 N.W.2d at 736.

28. 300 Minn. 535, 220 N.W.2d 344 (1974) (per curiam).

29. *See id.* at 536, 220 N.W.2d at 345.

30. *See id.* The employee, formerly a meatcutter, took a retraining course in business administration. *See id.* at 535-36, 220 N.W.2d at 344-45.

31. *See id.* at 536, 220 N.W.2d at 345. The fact that the employee was not allowed concurrent benefits previously because of his refusal to accept alternate employment offered by his employer should not preclude him from later receiving such benefits when circumstances change to prevent him from accepting the proffered employment. *See id.* at 536-37, 220 N.W.2d at 345.

32. *See id.* at 537, 220 N.W.2d at 345. The court looked to the remedial nature of the Minnesota Act, with the view that the Act should therefore be liberally construed. *See id.* at 536, 220 N.W.2d at 345.

After *Morrison*, the argument was made that the simple presence of an employee in a retraining course might automatically entitle the employee to concurrent benefits.³³ In *Adams v. Nadave*,³⁴ the Minnesota Supreme Court rejected this contention. When the employee in *Adams* was removed from his employment because of an occupational disease, the employee claimed that he was entitled to concurrent benefits on the basis that he was unavailable for at least full-time work.³⁵ Ruling that participation in a retraining course was not in itself a disability,³⁶ the *Adams* court disallowed concurrent benefits.³⁷ In the aftermath of *Adams*, it appears that the *Morrison* decision has been limited to its facts by the *Adams* court's decision that concurrent benefits should not be allowed absent an underlying temporary total or temporary partial disability existing during the period of retraining.

C. Recovery in the Future

In a number of recent cases, the Minnesota Workers' Compensation Court of Appeals has denied concurrent temporary disability and retraining benefits. In each case, the court of appeals noted that the employees had been capable of working in addition to participating in a retraining program, but failed to do so.³⁸ These

33. See, e.g., Respondent's Brief & Appendix at 12, 18-19, *Adams v. Nadave*, 309 Minn. 536, 245 N.W.2d 227 (1976) (per curiam).

34. 309 Minn. 536, 245 N.W.2d 227 (1976) (per curiam).

35. See *id.* at 539, 245 N.W.2d at 229. Relying on the court's language in *Morrison v. Merrick's Super Mkt., Inc.*, 300 Minn. 535, 536, 220 N.W.2d 344, 345 (1974) that "because employee was precluded from accepting work offered by employer while engaged in a retraining course, he should be entitled to receive temporary partial disability benefits," the employee in *Adams* argued that for practical purposes, he was also disabled during the retraining period. See 309 Minn. at 539-40, 245 N.W.2d at 229.

36. See 309 Minn. at 540, 245 N.W.2d at 230.

37. See *id.* at 540-41, 245 N.W.2d at 230.

38. See *Norwood v. Maynard Mun. Store*, No. 474-70-9854, slip op. at 2 (Minn. Workers' Comp. Ct. App. Nov. 8, 1979) (employee never really looked for work; if it were not for retraining, employee would be employable); *Richards v. Electric Mach. Mfg. Co.*, No. 471-66-9596, slip op. at 3 (Minn. Workers' Comp. Ct. App. June 8, 1978) (mem.) (employee declined offer of employment tailor made to his capabilities); *Nordstrom v. Minnesota Farm Bldgs.*, No. 476-36-4472, slip op. at 3 (Minn. Workers' Comp. Ct. App. Oct. 13, 1977) (mem.) (employee capable of gainful employment while in retraining program); *LaBelle v. Greg's Body Shop*, No. 477-60-1375, slip op. at 3 (Minn. Workers' Comp. Ct. App. June 22, 1977) (per curiam) (employee admitted ability to work); *Conrad v. Harold Chevrolet, Inc.*, 29 Minn. Workers' Comp. Dec. 471, 473 (1977) (employee capable of being employed when retraining only requires seven hours and 40 minutes per week); *Fontaine v. Barko Hydraulics, Inc.*, No. 473-64-4483, slip op. at 2 (Minn. Workers' Comp. Ct. App. Mar. 2, 1977) (per curiam) (employee worked both part-time and full-time prior to retraining program).

decisions denying concurrent benefits should not be construed to mean that an injured employee will never be entitled to concurrent benefits. If an employee is unable to work because of a truly severe and massive disability, his chances for recovery will be greatly enhanced.³⁹ For example, in another recent case, *Bartels v. Kloster Madsen, Inc.*,⁴⁰ an injured employee was granted concurrent benefits. The distinguishing feature of *Bartels* was that the employee had made a reasonably diligent effort to secure employment prior to commencing a retraining course.⁴¹ Because the search for employment was unsuccessful, it demonstrated that the employee's earning capacity was impaired, and that retraining was therefore necessary.⁴² Thus, it appears that until the 1979 law takes effect,⁴³ an injured employee will have to show a truly severe work-related disability⁴⁴ and a reasonable effort to find alternative employment prior to starting a retraining program to be entitled to recover temporary disability and retraining benefits concurrently. Employees receiving work-related injuries after October 1, 1979, however, will only be entitled to 125% of their compensation rate for temporary total disability during the retraining period.⁴⁵

39. *Cf., e.g.*, Spangrud v. Precision Grinding Co., 281 N.W.2d 362, 365-66 (Minn. 1979) (per curiam) (severe disability; concurrent benefits upheld); *Bartels v. Kloster Madsen, Inc.*, No. 477-30-8122, slip op. at 4 (Minn. Workers' Comp. Ct. App. Nov. 5, 1979) (same; retraining benefits necessary to restore earning capacity).

40. No. 477-30-8122 (Minn. Workers' Comp. Ct. App. Nov. 5, 1979).

41. *See id.*, slip op. at 3. The *Bartels* court stated that:

[A]t least up to the date he entered school full time, the employee diligently sought employment. He sought them [*sic*] in the skill area that he knew the best—peripheral jobs in the construction business. He sought them through Union Halls, Manpower Services, ads, rehabilitation service, etc. As [the employee] pointed out, as soon as the would be employer heard of his injuries, there was an "automatic turn off." . . . It was with all of these obstacles facing him that Mr. Jackson of the Minnesota State Division of Vocational Rehabilitation embarked the employee upon a retraining course which was contested by the employer and insurer.

Id.

42. *See id.*, slip op. at 4 (doubtful that employee could find a job at more than a minimal wage, retraining benefits necessary to restore earning capacity).

43. *See* note 12 *supra*.

44. A disability warranting an award of concurrent benefits apparently must be severe enough to impair demonstrably the employee's earning capacity. *Compare, e.g.*, *Bartels v. Kloster Madsen, Inc.*, No. 477-30-8122, slip op. at 4 (Minn. Workers' Comp. Ct. App. Nov. 5, 1979) (earning capacity impaired) *with, e.g.*, *Norwood v. Maynard Mun. Store*, No. 474-70-9854, slip op. at 2 (Minn. Workers' Comp. Ct. App. Nov. 8, 1979) (employee could work if she were not in retraining course). *But cf.* *Gilmore v. Little Jack's Steak House*, 292 N.W.2d 14, 16 (Minn. 1980) (without addressing test applied in court of appeals cases, court implies that concurrent benefits awarded if employee cannot return to work for which he has training).

45. *See* MINN. STAT. § 176.102(11) (Supp. 1979), *quoted in* note 13 *supra*.

III. CONCLUSION

This Article has focused on the eligibility of injured employees to recover concurrent temporary disability and retraining benefits under the Minnesota law. The change in the courts' approach over the years is indicative of the problems inherent in the compensation system when trying to satisfy the competing interests of employers and employees. While Minnesota courts will not have occasion to apply the 1979 amendments for several years, the new law appears to lend more certainty to the question of when concurrent benefits will be allowed for injuries occurring on or after October 1, 1979. In the interim, recent Minnesota Workers' Compensation Court of Appeals cases indicate that injured workers seeking retraining benefits may obtain concurrent temporary disability benefits if a two-fold test is satisfied.⁴⁶

46. See notes 43-44 *supra* and accompanying text.