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Leslie Altman
Jay Benanav
Steve Keefe
Joan Volz

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MINNESOTA'S WORKERS' COMPENSATION SCHEME: THE EFFECTS AND EFFECTIVENESS OF THE 1983 AMENDMENTS

In 1983, the Minnesota Legislature made massive changes in the Minnesota workers' compensation law. It was the first major overhaul to the system since its original enactment in 1913, made in response to widespread criticism on all fronts of the pre-1983 law. This article provides a comprehensive overview of those changes. The bulk of the article details the entire new Two-Tier system of benefits and how it functions. Considerable attention is focused upon the new Permanent Partial Disability Benefit system and the administrative conference procedures initiated under the new act. Follow-up studies, designed and carried out by the Department of Labor and Industry to assess whether the changes have succeeded in addressing the concerns leading to their enactment, are included.

Leslie Altman, Jay Benanav, Steve Keefe, Joan Volz

† Leslie Altman received her JD degree in 1983 from the University of Minnesota. From 1983 she served as a staff attorney at the Minnesota Attorney General’s office, and was assigned to the Department of Commerce, Division of Labor and Industry. She has served as a judge on the Workers’ Compensation Court of Appeals since 1985.

†† Jay Benanav received his JD degree from St. John’s University in New York. From 1976 to 1980 he worked as Senate Counsel for the Minnesota Senate, and then moved into private law practice from 1980 to 1983. In 1983 Mr. Benanav became Deputy Commissioner at the Division of Labor and Industry, Minnesota Department of Commerce, and served in that capacity until 1987. He is currently Executive Director of the Workers’ Compensation Reinsurance Association.

††† Steve Keefe served as a Minnesota State Senator from Minneapolis from 1972 to 1980. From 1981 to 1983 he was Vice President of Government Relations for Norwest Bank. Commencing in 1983, Mr. Keefe served as Commissioner of the Division of Labor and Industry in the Minnesota Department of Commerce. He served in that capacity through 1986. He is currently Chairman of the Metropolitan Council in the Twin Cities.

†††† Joan Volz received her JD degree from the University of Minnesota in 1974. She became a staff attorney at the Minnesota Attorney General’s office, serving in that capacity until 1981. Ms. Volz then moved to the Minnesota Department of Commerce, becoming Deputy Commissioner in the Department of Securities and Real Estate. From 1982 to 1983 she was affiliated with the Workers’ Compensation Reinsurance Association in the capacity of General Counsel. From there she moved to a
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position as Chief Counsel for the Division of Labor and Industry, Minnesota Department of Commerce. Ms. Volz left the department in 1986, and is currently counsel at Northwestern Bell Telephone Company.
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INTRODUCTION

A. Early Studies

Beginning in 1975, the Minnesota workers' compensation system came under intense criticism and study. In particular, it was argued that Minnesota's system was too expensive for employers especially when compared to neighboring states which had comparable benefit levels. As a result of these criticisms,
the Minnesota Legislature created the Workers' Compensation Study Commission to examine four specific areas of workers' compensation. Acting on the Study Commission Report, the legislature, in 1979, made major changes to the law. As part of the amendments in 1979, the legislature established another study commission.

While the charge of this commission was much more limited in scope than that of the previous commission, it was nonetheless established because of the belief that the 1979 reforms would not resolve the problems in the workers' compensation system. Following this legislative report, the Citizens League conducted a study which was designed "to study Minnesota's Workers' Compensation System comprehensively." In 1982, the Minnesota Insurance Division issued a report in which it comprehensively studied the law and administration of the system. Finally, the University of Minnesota issued its report.

1. Act approved May 27, 1977, ch. 342, § 27, 1977 Minn. Laws 697, 714. See also MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR 1 (1979) [hereinafter 1979 STUDY COMMISSION]. The Commission was to study and report on:
   (a) the procedure by which workers' compensation insurance premium rates are established;
   (b) the level of Minnesota workers' compensation premiums as compared to premium levels in other jurisdictions;
   (c) the various methods of providing workers' compensation insurance to employers in other jurisdictions;
   (d) the administration of the law by the department of labor and industry and workers' compensation court of appeals; and
   in 1978 the legislature added a fifth charge,
   (e) the expense factor in the rate in terms of whether the factor is inadequate or excessive.


3. Act approved June 7, 1979, ch. 3, § 67, 1979 Minn. Laws Ex. Sess. 1256, 1296. The new Commission was limited to studying and reporting on the feasibility of a state run workers' compensation insurance fund which would compete in the market place against private insurers. On January 1, 1981, this commission recommended the establishment of such a state fund. This fund was finally created in the Act approved June 7, 1983, ch. 287, art. 3, 1983 Minn. Laws 1231, 1235.


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

6. See C. WILLIAMS, R. AZEVEDO, M. BOGNANNO & P. SCHUMANN, UNIVERSITY OF...
Each of these reports concluded that, in one way or another, the Minnesota Workers' Compensation System needed reform. Much of the focus was on the nature of the permanent partial disability benefit in Minnesota. The Insurance Division concluded that permanent partial disability benefits were unreasonably large in comparison to the rest of the system.7 The University of Minnesota report recommended that the state adopt a "two-tier system."8 The Citizens League Report also suggested a "two-tier" approach to the payment of permanent partial disability benefits.9

The effect of the payment rate of temporary total disability benefits on the system was examined in addition to a restructuring of permanent partial disability benefits. Both the University of Minnesota report and the Citizens League report recommended a limit to the duration of temporary total disability benefits.10 The Citizens League Report also discussed a limited duration of temporary total disability or income re-
placement benefits. Based on these recommendations, the 1983 legislature enacted what is without doubt the most major reform of the workers' compensation law in Minnesota since its enactment over seventy years ago.

B. Political Considerations

Commencing in 1975, when it became a hot political issue, the debate over workers' compensation in Minnesota was characterized by more heat than light. Employers' complaints about high costs were supported primarily by anecdotal information of abuses in individual cases. Upon examination, anecdotal stories of abuses frequently were imprecise. One collection of twenty-four "horror stories," presented by employers to a legislative committee in 1977 as evidence of excessive liberality of Minnesota judges, led to an investigation which discovered that fourteen out of the twenty-five cases had never been before judges. Rather, they had been decided without litigation by insurance companies.

Proposed solutions were intuitive and lacked any coherent strategy to address high cost areas. Intuitive solutions frequently turned out, upon adoption, to have no substantial im-

11. See CITIZENS LEAGUE REPORT, supra note 4, at 43. The Citizens League was "concerned about the effect of the open-ended nature of eligibility." Id. at 35. Further, the Report stated that "some people believe that the absence of a cutoff point, or healing period . . . combined with the fact that workers can receive both income replacement and permanent partial awards concurrently, discourages workers from returning to work . . . ." Id. at 24.

12. See Act approved June 7, 1983, ch. 290, 1983 Minn. Laws 1310 for the changes enacted by the 1983 legislature. The first workers' compensation law was enacted in 1913. See Act approved Apr. 24, 1913, ch. 467, 1913 Minn. Laws 675. The 1913 law was divided into two major parts. The first part modified the common law principles as applicable to employers and employees who did not elect to be covered by the Act. See id. §§ 1-7, 1913 Minn. Laws 675, 675-77. The second part consisted of an elective compensation scheme. Id. at §§ 8-36, 1913 Minn. Laws at 677-94.

In 1921, the legislature essentially reenacted the provisions of the 1913 Act with noticeable expansion of the schedule of compensation and of procedural requirements. See Act approved Mar. 15, 1921, ch. 82, 1921 Minn. Laws 90. The elective portion of the 1921 Act was abolished in 1937, and coverage under the workers' compensation act became compulsory. See Act approved Mar. 12, 1937, ch. 64, 1937 Minn. Laws 109.

In 1953, the legislature undertook a revision of the workers' compensation act, but few changes of major significance were made. See Act approved Apr. 24, 1953, ch. 755, 1953 Minn. Laws 1099.
pact on costs. For example, a list of proposals by the insurance industry in 1979 was adopted in 1981 without any apparent impact on costs. Further, the solutions did not specifically address the complaints. For example, complaints focused on payments to undeserving individuals, whereas proposed solutions tended to focus on across-the-board benefit cuts.

By the early 1980's, several studies became available which provided an understanding of the cost of the Minnesota system as compared to systems in other states. The studies identified several problems, including the particularly troublesome problem of poor service to injured workers.

At first, comparisons of average workers' compensation rates from state to state were used to determine the extent of the Minnesota problem. It was quickly discovered that these comparisons were misleading due to differences from state to state in industrial mix and socio-economic conditions which have varying effects on system utilization and litigation. State to state comparisons ignored the real competitive problems that face individual businesses. Nationwide average workers' compensation rates are far less important to individual employers than are the actual workers' compensation rates for particular classifications in states where their competition is located.

More detailed examination of rates on a classification basis in 1981 showed that while Minnesota workers' compensation rates were substantially higher than rates in surrounding states, they were not higher than rates in more heavily industrialized states on the east and west coasts. In fact, workers' compensation rates averaged seventy percent higher in Minnesota than in Wisconsin, even though Wisconsin has a similar industrial and socio-economic mix, and a similar average benefit level. Differences in compensation rates tended to be more pronounced in those industries with higher rates. Although the average difference in Minnesota's rate levels over Wisconsin's is seventy percent, a number of rate classifica-

13. See supra notes 1, 3-7.
14. See Insurance Division Report, supra note 5, at 45-62; University of Minnesota Report, supra note 6, at 5, 9, 14-16.
15. Citizens League Report, supra note 4, at 9-10, 24-26; see also University of Minnesota Report, supra note 6, at 5, 9, 14-16 (comparing premium rates and classification rates).
17. See id. at 48.
tions had differences as high as one-hundred percent and one-hundred fifty percent.\textsuperscript{18}

Analysis of the reasons for these differences between Minnesota and Wisconsin revealed interesting information about the impact of benefit levels. Maximum weekly benefit levels in both states are similar.\textsuperscript{19} The Citizens League study showed that scheduled awards for various bodily parts are similar for an average wage-earner in each state, although there is a broader rate and, therefore, a higher maximum and a lower minimum in Minnesota than in Wisconsin.\textsuperscript{20} The Minnesota cost-of-living escalator turns out to have an impact on rates of only one or two percent once investment income is taken into consideration.\textsuperscript{21}

The Study Commission suggested one reason for the differences. It found a strong correlation between average workers' compensation rate levels and litigation rates in various states, including Minnesota and Wisconsin.\textsuperscript{22} As of 1977, the Minnesota litigation rate was approximately two and one-half times that of Wisconsin.\textsuperscript{23}

The Insurance Division report indentified more precisely the reasons for the substantially higher costs in Minnesota. It discovered that the Minnesota system has the following important differences in frequency and severity of disability from the Wisconsin system:

1. The rate of permanent total disability cases per lost time injury is approximately twenty times higher in

\textsuperscript{18} See id.
\textsuperscript{19} See CITIZENS LEAGUE REPORT, supra note 4, at 23-24.
\textsuperscript{20} Id. at 24, 26.
\textsuperscript{21} Interview between Michael Markman, Commissioner of Insurance, and Tom Nelson, State Senator, Florian Chiemelewski, State Senator and Paul Hyduke, Senate Researcher (March 1982).
\textsuperscript{22} 1979 STUDY COMMISSION, supra note 1, at 199-207; see also CITIZENS LEAGUE REPORT, supra note 4, at 13-15. The INSURANCE DIVISION REPORT, supra note 5, at 66, stated that “controversy, litigation, and uncertainty are particularly important because they contribute greatly to the cost of workers’ compensation.” Id.; see also UNIVERSITY OF MINNESOTA REPORT, supra note 6, at 208. The Study Commission concluded that “high litigation rates are associated with high workers’ compensation costs [and that a]part from differences in statutory benefit levels no other single factor is as closely correlated with high costs.” 1979 STUDY COMMISSION, supra note 1, at 212.
\textsuperscript{23} 1979 STUDY COMMISSION, supra note 1, at 201-05. By 1981, the Minnesota rate had increased to 11.1% while Wisconsin had increased to 6.1%. UNIVERSITY OF MINNESOTA REPORT, supra note 6, at 209; CITIZENS LEAGUE REPORT, supra note 4, at 13.
Minnesota than in Wisconsin.\textsuperscript{24}

2. The average duration of temporary total disability in Minnesota was approximately twenty-nine percent longer than in Wisconsin.\textsuperscript{25}

3. The average payment for permanent partial disability was just over fifty percent higher in Minnesota than in Wisconsin, despite the apparent equivalency of the two states’ schedules.\textsuperscript{26}

4. The average medical cost per case was approximately fifty percent higher in Minnesota than in Wisconsin.\textsuperscript{27}

Apparently, the main reason for the difference in the cost of compensation for work-related disability between Minnesota and Wisconsin is not the level of compensation as much as the amount of disability being compensated.

In order to determine the reasons for the difference in the amount of disability actually being compensated in Minnesota, a great deal of attention has been given to comparisons of Minnesota’s system with that of Wisconsin, and to the methods used by some Minnesota businesses. These businesses have managed to substantially reduce the cost of their workers’ compensation programs within the structure of the existing Minnesota law and benefit levels, by modifying their internal company practices.

In Minnesota, a significant number of private companies, usually larger self-insuring employers, have recently reformed their internal workers’ compensation programs and accomplished significant savings in their workers’ compensation costs.\textsuperscript{28} These company-sponsored programs usually contain an important safety component. Company-wide commitments to preventing accidents are extremely effective in dealing with workers’ compensation costs.\textsuperscript{29}

Modern loss control methods adopted after an accident seem to have a substantial impact on reducing the actual disa-
bility in need of compensation.\textsuperscript{30} The most cost effective claim management, however, is not what employers first consider. When employers first notice a rapid rise in workers' compensation costs, they often think the solution is to get tougher with injured workers. They assume that malingerers are the cause of increased costs, and that the only way to regain control is to conduct investigations, hire attorneys, and find other ways to fight employees claiming benefits from the workers' compensation system.

Experience shows that this is not the best way to solve the problem. The best way to save money is by responding sympathetically and quickly to employees' problems, and by treating employees not as potential adversaries who are trying to steal from the company, but rather as loyal workers temporarily disabled as a result of an injury, who are wanted and needed back on the job.\textsuperscript{31} Permanent total disability is much less frequent under such programs, and the average duration of temporary disability and medical costs are substantially reduced.\textsuperscript{32} These programs also seem to result in improved employer/employee relations and significantly reduced litigation rates.\textsuperscript{33}

Wisconsin seemed to accomplish results similar to those experienced by Minnesota's self-insured employers by having administration of the Wisconsin workers' compensation law emphasize an active; early intervention philosophy.\textsuperscript{34} Although Wisconsin employers may not be particularly sympathetic and helpful to their employees, injured workers in Wisconsin can get a fast, sympathetic response from the Department of Labor, Industry and Human Relations. As a result, they rarely need to become involved in the extensive complications of litigation.

The experience of large private employers in Minnesota and the experience of the effects of good administration in Wisconsin show that there is a strong correlation between litigation

\textsuperscript{30} See id. at 21. One insurance broker achieved a savings of 35\% for an employer through an early intervention program, returning injured employees to work and avoiding "pain syndrome" which fosters prolonged disability.

\textsuperscript{31} See \textsc{Citizens League Report}, supra note 4, at 21-22 (stating that early intervention and good loss management can save money, and "employers are the key persons in managing losses").

\textsuperscript{32} See id.

\textsuperscript{33} See id.

\textsuperscript{34} Id. at 22-23.
rate, as identified by the Study Commission, increased cost in workers' compensation, and increased disability to be compensated as identified by the Insurance Division report. This is consistent with the results of the study done by the California Workers' Compensation Institute in 1977.\footnote{CALIFORNIA WORKERS' COMPENSATION INSTITUTE, LITIGATION IN WORKERS' COMPENSATION: A REPORT TO THE INDUSTRY (San Francisco, 1977) [hereinafter LITIGATION IN WORKERS' COMPENSATION].} The California study showed a high correlation between litigation and increased disability both in the degree of permanent partial disability and the duration of temporary total disability.\footnote{Id.} It is well known that litigation raises medical costs because of adverse medical examinations and medical testimony in court, which are expensive but make no contribution to treatment.

C. Rehabilitation Model for Workers' Compensation

This understanding of the workers' compensation problem in Minnesota was somewhat slow in coming to policy makers and practitioners. Most of them were oriented toward a workers' compensation system developed on a legal model, in which the basic concern is equity and the formal due process rights of the participants. It did not come, however, as a surprise to experts in rehabilitation. People who have professional expertise in helping people with various kinds of disability, whether workers' compensation related or not, understand very well the contribution that various disability compensation systems make to the disability itself. Psychological and motivational factors that have no direct relationship to physical impairment are frequently the keys to the success of rehabilitation. With modern rehabilitation techniques, individuals with severe impairments can frequently be rapidly returned to productive, satisfying lives if psychological and motivational factors are properly addressed. Testimony of rehabilitation experts before the Study Commission pointed out that all compensation systems, particularly those involving a lot of litigation, actually increase the amount of disability by adversely affecting these psychological and motivational aspects of rehabilitation.

There are several key factors in the workers' compensation
system that undermine rehabilitation efforts and increase the amount of disability needing compensation:

1. Employee focus is on the workers’ compensation system rather than on the job of getting well. 37
2. Employees’ credibility and self respect are undermined. 38
3. Disability is maximized. 39
4. Disability is rewarded. 40

All four of these problems are more serious in Minnesota than in Wisconsin because of the differences in state administration.

The current trend in workers’ compensation law is to make rehabilitation play a more important role in the system. That approach is widely supported by both business and labor as a humane way to control workers’ compensation costs. Nevertheless, the workers’ compensation system in Minnesota and in most other states was designed on a legal model, to which re-

37. Such delays create antagonism on the part of the employee, making him or her suspicious of insurance company employees who may be trying to help with rehabilitation, or of the employer upon whom he or she is likely to depend for an opportunity to return to work when rehabilitation has reached that point.

38. For example, the employee rarely understands why the employer is unwilling to accept his or her treating physician’s estimate of the degree of disability and is quite suspicious of doctors assigned for adverse examinations. The employee may become obsessed with proving that he or she is not malingering, and as a result may unconsciously exaggerate the disability. All this works against the basic principles of rehabilitation, which are to teach the employee to minimize the disability and maximize his or her abilities. By undermining the employee’s self-image, the confidence needed to overcome the trauma of a work-related injury and return to productive employment is undermined.

39. Litigation and the delays, hostility, and loss of income that frequently accompany it are the most destructive aspects of the workers’ compensation system. It is a truism among rehabilitation professionals that “no one ever gets well while his case is pending.” It is not a question of employees malingering in order to maximize the litigation award. By questioning his or her claim, the employer questions the employee’s honesty. The employee who finds that it is necessary to sue in order to get what he or she thinks is rightfully owed will consciously or unconsciously try to maximize his or her disability to vindicate his or her honesty in the process.

There is virtually no hope of successful rehabilitation proceeding during this process. The employee is too distracted by the battle with a larger, more resourceful, adversary to concentrate on rehabilitation. The employee who spends years trying to prove he or she is really disabled will be disabled by the time he or she is finished, even if he or she was not disabled at the beginning.

40. All systems for compensating disability, whether unemployment compensation, social security, welfare, private disability insurance, or workers’ compensation will create more disability than would be present if such programs were not available. It is not an acceptable social policy to let those who cannot work starve, but it is necessary to design systems of compensation so that, to the extent possible, they minimize the impact of removing traditional economic incentives.
habilitation is an after-the-fact add on. The purpose of the 1983 legislation was to redesign the workers' compensation system from the ground up, paying careful attention to rehabilitation principles as well as to legal principles.

The point is not that the workers' compensation system based on a legal model does not successfully protect the rights of both the employer and the employee. Rather, the cumbersome process of litigation, which is necessary to secure one's rights under the system, is so demanding in terms of its impact on the amount of disability to be compensated and the likelihood of rehabilitative success, that the employee whose rights have been assured by the process may find that his life has been ruined in the meantime.

Testimony by rehabilitation experts before the Study Commission indicated that the likelihood of successful rehabilitation efforts decreases dramatically as the time since the injury increases. Rehabilitation efforts begun within thirty days of the injury have a much greater likelihood of success. Rehabilitation efforts begun more than six months after the injury had a likelihood of success near zero. Since litigation takes a minimum of six months, and often as much as fifteen months to two years, it substantially reduces the likelihood of successful rehabilitation efforts.

This is illustrated by a closed claim study of rehabilitation cases in Minnesota in 1982 which found an overall return to work rate of eighty-two percent. For cases where the first referral to rehabilitation occurred within ninety days, the success rate was nearly one-hundred percent.

A particularly tragic outcome of the old litigation system was the result of disputes over the discontinuance of workers' compensation benefits once they commenced. Employees whose benefits were discontinued for reasons other than return to

41. 1979 Study Commission, supra note 1, at 311-12. See also Fox, The Study of Rehabilitation Services in Connection with the Minnesota State Law on Workers' Compensation - Chapter 176 at 12 (Dec. 1982) (prepared for the Committee on Labor-Management Relations Minnesota House of Representatives).

42. This was supported in the study done by the California Workers' Compensation Institute in 1977 that showed that costs of litigation are not just the increased costs of attorneys' fees, court costs, etc., but also the likelihood of much more extreme disability, compared with cases that are resolved amicably. Litigation in Workers' Compensation, supra note 35, at forward.

43. Fox, supra note 41, at 12.

44. Id. at 11.
work were entitled to petition a workers’ compensation judge for a hearing to determine whether the discontinuance was appropriate. These hearings were given priority and were processed by the system more rapidly than ordinary petitions for benefits. Employees won seventy-five to eighty percent of those cases. Unfortunately, even under the new system, it has taken up to nine months to get a hearing. 45

The solution to this problem is not to sacrifice the employee’s rights in favor of paternalistic state intervention designed to protect the employee’s chances for rehabilitation. Rather, the solution is to design a system that considers rehabilitation principles without sacrificing the employee’s right to seek redress from the courts.

The analysis outlined above suggests a solution to the political problem surrounding workers’ compensation, as well as to the policy problem of how to control employers’ workers’ compensation costs. At the same time, the system is improved from the workers’ point of view. Since attention to the amount of disability in the system seems to offer much more promise for controlling workers’ compensation costs, and since the level of disability is equally of concern to employees and their union representatives, it should be possible to develop a coalition of business and labor support for programs designed to reduce costs and improve service.

D. Perpich Administrative Approach

The Perpich administration adopted a strategy to develop a program to reform the workers’ compensation system. The reform focused on improved service, reorganization of the benefit structure, and cost reduction. 46 The goal was to change the

45. Nine months is just long enough for an employee without a source of income, who has been on workers’ compensation for some time, and as a result has little or no savings, to lose a house, a car, and (although there are no statistics to support this) in our experience, with remarkable frequency, a spouse. The number of individual cases of discontinuance that lead to divorce is startling. Apparently, severe stress on marriages is created by the combination of loss of income, disability, and questioning by employers and insurers over the credibility of the employee’s disability and whether or not he or she is malingering.

46. Reorganization of the benefit structure was aimed towards encouraging return-to-work programs, both on the part of employers and injured employees. Employers were to realize cost reduction by reducing the amount of disability that needs to be compensated.
system from a closed, win/lose system to an open system in which a win/win solution is possible.

In fact, it was believed that the amount of political warfare waged during the past several years over the problems in the system was actually contributing to the problem. It exaggerated the perception of employers and employees that the system is an adversarial one in which employees and employers are necessarily at odds. Successful workers' compensation administrators emphasize the necessity of good employer/employee relations, and a mutual sense of trust in order to accomplish effective rehabilitation and return-to-work programs, particularly in the case of serious or difficult injuries.

The Perpich administration initially sought support for the reorganization plan from key leaders in business, labor, insurance, legal, medical, and rehabilitation groups. The reorganization was to be based on good activist management and a redesign of the benefit structure.

The credibility of the recent workers' compensation system studies was particularly helpful in gaining business and insurance support for this strategy. The studies were viewed with more suspicion by organized labor. Preliminary agreement, however, in the form of a business-labor compromise proposal was obtained from that sector as well. Various service groups involved in workers' compensation were particularly receptive.

In an attempt to follow the Wisconsin model, the Workers' Compensation Advisory Council was reactivated and populated with key leaders from business, labor, and insurance groups, as well as experts from the medical and legal communities. This group spent many hours working over detailed

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47. If premiums are to go down, benefits must go down.
48. The win/win situation is one in which premium costs go down while injured workers enjoy an increase in the sum of benefits and wages as a result of less frequent and less severe disability.
49. This would not cut overall benefit levels but would provide increased incentives for employers to provide return to work programs and for employees to accept jobs offered.
50. Service groups include defense attorneys, rehabilitation consultants, and medical personnel.
51. The Trial Lawyers Association is an exception. The Association viewed the proposed changes in the benefit structure with suspicion and hostility.
52. Minn. Stat. § 175.007 (1986).
proposals to reform and improve administration, to introduce nonadversarial means of resolving disputes, and to provide a more objective means to establish compensation for permanent partial disabilities.

The reform proposals developed and agreed to by the advisory council were designed to address three of the four major areas in which the workers' compensation system works against the rehabilitation principles. First, delays were addressed by recommending improvements in the staff of the Workers' Compensation Division, and by recommending an administration patterned after that of Wisconsin. Second, in order to avoid disputes, the council recommended that authority be given to the Department of Labor and Industry to develop rules making aspects of the law more specific, such as definitions of independent contractors,53 and schedules for determining degree of disability. Finally, alternative, nonadversarial means of dispute resolution were developed for the purpose of reducing litigation.54

Change in the structure of the benefit systems to accommodate rehabilitation principles was the only area in which the Workers' Compensation Advisory Council was unable to agree through the normal process. The public nature of the advisory council, combined with the high degree of hostility and mistrust engendered by recent bitter political battles seemed to make it impossible for the council to come to grips with benefit issues. Talks were initiated between a business representative and a labor representative in an attempt to put together a compromise package on the benefit issues. Although discussion proceeded productively for some time, it eventually broke down over a fundamental quandry in the political positions of the two groups. The solution proposed at the time by the Perpich administration was essentially the recommendation of the Citizens League Study. It was designed to reform the benefit structure without cutting benefit levels.

Although the compromise was ultimately rejected by important elements of organized labor, its original intent was maintained by both the administration and the legislature in the bill that ultimately passed. That intent was to design a benefit structure

53. Rules for this purpose were adopted in 1985. See Minn. R. 5222.0200 (Supp. 1986).
structure that would encourage employers to bring employees back to work, to encourage employees to go back to work, and to provide improved benefits to more seriously disabled employees while ensuring no net change in the values of the benefit system as a whole. The resulting system is referred to as the Minnesota two-tier system for compensating permanent partial disability.

II. Two-Tier System in Minnesota

A. Pre-1983 Law

Prior to discussing the operation of the two-tier system, a general overview of the system of payment of temporary total disability benefits and permanent partial disability benefits will be helpful. These were the benefits focused on by the various studies, and the benefits most radically changed by the legislature.

1. Temporary Total Disability Benefits

The majority of the 1983 changes in Minnesota's benefits affect workers with permanent partial disabilities. Some, however, will affect the more numerous temporary total disability cases.55

Prior to the 1983 Minnesota amendments, after a three-day waiting period,56 a Minnesota worker who was totally and presumably, temporarily disabled received a weekly benefit equal to two-thirds of his or her prior earnings,57 subject to a minimum and maximum amount. The weekly maximum benefit was one-hundred percent of the latest available measure of the state average weekly wage (SAWW).58 The weekly minimum benefit was fifty percent of the SAWW or the workers' actual weekly wage, if less, but in no case less than twenty percent of the SAWW.59 If the worker was disabled at least ten days, he or she received retroactive benefits for the first three days of disability.60 If the worker was disabled at least one year, on

55. In 1979 temporary total disability payments generated 22.41% of the total indemnity payments. UNIVERSITY OF MINNESOTA REPORT, supra note 6, at 29.
58. Id.
59. Id.
each anniversary date the weekly benefit was increased by the same percentage as the maximum weekly benefit was increased the previous October. In no case, however, was this adjustment permitted to exceed six percent. For workers disabled 104 weeks or more, the minimum weekly benefit was increased to sixty-five percent of the SAWW. This higher minimum weekly benefit was called the supplementary minimum weekly benefit. After the disabled worker had received $25,000 in weekly total disability benefits, the weekly benefit paid by the employer was reduced by any benefit paid for the same injury or disease by any government disability program.

2. Permanent Partial Disability

Permanent partial disability claims accounted for only fifteen percent of the indemnity claims in policy year 1979, but the persons filing these claims recovered over forty-one percent of the total indemnity benefits paid. It is not surprising, therefore, that the Minnesota State Legislature focused on these claims as a way to cut costs. Minnesota formerly provided two types of permanent partial disability benefits: scheduled benefits and non-scheduled benefits.

a. Scheduled Benefits

To receive a scheduled benefit a worker had to suffer (1) one of the specific impairments listed in the statute, such as the complete or partial loss of use of an arm, an eye, or a leg;

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61. Id. § 176.645, subd. 1 (1982).
62. Id.
63. Id. § 176.132, subd. 1 (1982).
64. Id. at subd. 2.
65. Id. § 176.101, subd. 4. Benefits were paid for about 130 weeks for a person disabled in early 1983 who was earning SAWW.
66. CITIZENS LEAGUE REPORT, supra note 4, at 33.
67. MINN. STAT. § 176.101, subd. 3(1-48) (1982).
68. Id. at subd. 3(49).
69. E.g., id. at subd. 3(14) (for loss of an arm, scheduled compensation was 66 2/3 % of the individual's daily wage at the time of injury for 270 weeks).
70. E.g., id. at subd. 3(21) (for loss of an eye, scheduled compensation was 66 2/3 % of the individual's daily wage at the time of injury for 160 weeks).
71. E.g., id. at subd. 3(17-19) (for loss of a foot, loss of a foot including ankle movement, or loss of a leg so close to the hip that no artificial member could be used, scheduled compensation was 66 2/3 % of the individual's daily wage during the time of the injury for 165 weeks, 195 weeks, or 220 weeks respectively).
or (2) an injury to the head or internal organs. The permanent partial disability award payable to workers in the first category who suffered a complete loss was calculated pursuant to statutory formula. For example, the number of weeks stated for the complete loss or loss of use of an arm was 270 weeks, an eye 160 weeks, and a leg 220 weeks. For workers suffering a partial loss of use instead of total loss, the number of weeks was proportionately reduced. For example, if the worker suffered a sixty percent loss of use, the number of weeks used in the calculation was 162 for an arm, 96 for an eye, and 132 for a leg. Back injuries were given special treatment, the number of weeks being 350 weeks, times the percentage loss of use.

For workers in the second category, the calculation was the same except that the number of weeks was not specified in the statute. Instead, this number was based on the proportionate impairment to the total body, subject to a maximum of 500 weeks. Thus, if an injury to the head or to internal organs was determined to cause a twenty percent impairment to the whole body, the number of weeks was 100.

A worker with a permanent partial disability received this scheduled award in a lump sum if he or she (1) returned to work, (2) completed a rehabilitation plan but was unable to find work with the previous employer or any other employer, or (3) was declared eligible for permanent total disability benefits. Temporary total disability benefits stopped if the person returned to work or was declared permanently and totally dis-

72. E.g., id. at subd. 3(39) (for head injuries, scheduled compensation was 66 2/3% of the individual's daily wage at the time of injury for 500 weeks).

73. E.g., id. at subd. 3(40).

74. The statutory formula is: two-thirds of the workers's prior weekly earnings, subject to a maximum (100% of the SAWW) but no minimum, times the number of weeks specified in the statute for the impairment. See supra notes 71-73.

75. See MINN. STAT. § 176.101, subd. 3(42) (1982). Back injuries have been the source of growing concern over the past decade. Most experts in workers' compensation acknowledge that back injuries make up the largest percentage of work injuries. The Insurance Division Report stated that "Minnesota has a high percentage of lower back injuries . . . [and that] claims for these injuries . . . are increasing in frequency and severity . . . ." INSURANCE DIVISION REPORT, supra note 5, at 180.

76. MINN. STAT. § 176.021, subd. 3a (1982). Prior to this amendment, permanent partial disability compensation was paid concurrently with temporary total disability compensation. The Study Commission proposed that permanent partial disability benefits be delayed until the employee returns to work rather than paid concurrently in order to create an incentive to return to work. STUDY COMMISSION, supra note 1, at 16-17.
abled. The temporary disability benefits were continued if a rehabilitated worker was unable to find a job.

If a worker with a permanent partial disability did not return to work, had not completed a rehabilitation plan, and was not declared permanently and totally disabled, the permanent partial disability benefit was paid in weekly installments after the temporary disability benefits stopped.77 In many such cases, however, these temporary disability benefits were continued for many months or even years following the worker's attainment of maximum medical improvement.

Certain cases of multiple injuries were provided for in the schedule.78 For example, if a worker suffered the loss of an eye and a leg, the stated number of weeks was 475.79 In other cases, the number of weeks for each injury was determined separately, added together, and increased by fifteen percent.80 For example, if a worker suffered a loss of an arm and a forty percent impairment of his or her back, the number of weeks would have been 471.5.81 This "stacking" of benefits was a matter of great concern because, even without the fifteen percent increase, it could produce a total number of weeks that substantially exceeded 500, the number that presumably would be paid if a head or internal organ injury caused total impairment of the whole body.82

b. Non-scheduled Benefits

If the impairment causing the permanent partial disability was not listed in the schedule, the worker received a weekly

77. MINN. STAT. § 176.021, subd. 3a(d) (1982).
78. See infra notes 79-82 and accompanying text.
79. MINN. STAT. § 176.101, subd. 3(24) (1982).
80. Id. at subd. 3(46).
81. $1.15[270 + 0.40(350)] = 1.15(410) = 471.5.
82. See Mack v. Minneapolis, 33 W.C.D. 289 (1980). The Workers' Compensation Court of Appeals in the Mack case awarded 3142.5 weeks of permanent partial disability for a total award of $721,013. Id. at 291. It arrived at this award by "stacking" the disability suffered by the employee who was in a persistent vegetative state. The stacking was calculated as follows: a) 0.90% of the brain for 450 weeks; b) 100 percent of the left arm for 270 weeks; c) 100% of the right arm for 270 weeks; d) 100% of the right leg for 220 weeks; e) 100% of the left leg for 220 weeks; f) 100% of the back for 350 weeks; g) 100% loss of vision for 320 weeks; h) 100% of sexual organs for 50 weeks; j) 100% of the voice mechanism for 500 weeks; and j) 100% hearing - both ears for 170 weeks. Id.; at 293. It then applied the 15 percent simultaneous injury factor to everything but the brain, sexual organs, and hearing for a total of 3142.5 weeks. Id.; see also INSURANCE DIVISION REPORT, supra note 5, at 186.
benefit equal to two-thirds of the difference between the daily wage at the time of injury and any wage received after becoming eligible for this permanent partial benefit, subject to the usual weekly maximum.83 This benefit was paid weekly until the difference disappeared, but in no case for more than 350 weeks.84 Unlike scheduled benefits, non-scheduled benefits depended only upon lost earnings. No payment was made for the impairment itself. The worker received a temporary total disability benefit until he or she was determined to be eligible for a permanent partial disability benefit.

B. Post-1983 Law - New Law

1. Introduction to Two-Tier System of Benefits

The most controversial and radical change in the workers' compensation area made by the 1983 legislature was the so-called "two-tier" system.85 The term "two-tier" does not appear anywhere in the statute, but was coined because of the way in which the structure operates. Depending on a variety of factors, compensation for permanent partial disability is paid at one level, or tier, or another. The two-tier system only applies to injuries occurring on or after January 1, 1984.86

2. Theoretical Underpinnings of Two-Tier System

The two-tier benefit structure was a recommendation of the Citizens League Study. It was designed to be a major reform in the benefits structure without being a major cut in benefit levels.87 Two-tier was designed to restructure the permanent partial disability compensation system to make it more consis-

83. MINN. STAT. § 176.101, subd. 3(49) (1982).
84. Id.
85. See Act approved June 7, 1983, ch. 290, 1983 Minn. Laws 1310, which contains the 1983 amendments that will be discussed throughout.
86. Id. at §§ 44-45 (codified at MINN. STAT. § 176.101, subd. 3a-b(1986)). The amendment provides that the new system of permanent partial disability benefits applies to disabilities incurred on or after the adoption of the permanent partial disability rules that the Commissioner was authorized to adopt pursuant to § 86 of the Act (codified at MINN. STAT. § 176.105, subd. 4). The temporary rules became effective on January 1, 1984 and were codified in 8 MCAR 1.9001-9025. The temporary rules were permanently adopted with minor clarifications in November, 1985 and are currently codified at MINN. R. 5223.0010-.0250 (1987). See also Act approved April 23, 1985, ch. 432, §§ 1-2, 1984 Minn. Laws 101.
87. See CITIZENS LEAGUE REPORT, supra note 4, at 30-42 (the introduction to the report states that "our primary aim is to reduce costs by reducing disability, while preserving fair and adequate benefits for injured workers").
tent with good rehabilitation principles. The system is intended to be a synthesis of the best points of the newer wage loss systems and the more traditional lump sum schedule systems used in most states, including Minnesota and Wisconsin.

Although wage loss systems are touted by some as a way to save workers’ compensation costs, academic designers of wage loss systems do not promise a substantial cost reduction. Rather, they present wage loss systems as a way of solving a fundamental equity problem created by schedule systems. Studies by Dr. John Burton of Cornell have shown that, although workers’ compensation benefits in most states are “adequate” to replace the total amount of actual wages lost by the employees who are injured in on-the-job accidents, the compensation for lost wages tends to be “inequitable” in that some employees suffer relatively large wage losses and receive relatively small compensation in return, while other employees suffer relatively small wage losses and enjoy relatively large compensation awards. These inequities tend to be consistent: those employees with the most severe injuries and the greatest long-term disabilities are those who are least likely to be adequately compensated.

Unfortunately, wage loss systems adopt a legal approach to solving the problem, that like most legal model systems, gives heavy emphasis to issues of equity but inadequate emphasis to principles of rehabilitation theory. A pure wage loss system provides ongoing escalated temporary partial disability benefits for life in place of a permanent partial disability award so that any employee who suffers any wage loss at any time in the future will have that loss at least partially compensated by the workers’ compensation system. Equity is accomplished by not trying to predict disability in advance from the nature of the injury, as scheduled systems do, but by actually following the employee for the rest of his or her life to compensate his or her wage loss.

91. In practice, actual wage loss systems do not adhere very closely to this princi-
Even modified wage loss systems create an ongoing incentive for litigation and disability on the part of both the employee and the insurer. Although wage loss systems are designed to reduce litigation, some think that they do so by eliminating the attraction of a lump sum award to both to the employee and the plaintiff’s attorney. If disputes continue to exist, but the employee cannot litigate because he or she cannot get an attorney to take his or her case, the real problems, of which litigation is only a symptom, have not been solved.

Nevertheless, the fundamental argument of wage loss proponents, that schedule systems are inequitable, is correct. Schedule systems usually fail to take into consideration the effects of occupation and education on the extent of disability. For example, a right-handed carpenter who loses his right hand has a much more serious disability than a left-handed lawyer who loses his right hand, even though they both have the same impairment. Simple schedule systems do not take these distinctions into consideration. 92

3. Goals of Two-Tier System

The two-tier system attempts to redesign the delivery of permanent partial disability benefits so that positive incentives are provided to the various participants in the system to do what is

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92. See UNIVERSITY OF MINNESOTA REPORT, supra note 6, at 98-99. In a discussion of the different approaches to the payment of benefits, Williams separates the approaches into four categories:

1) Impairment - In this approach, “a worker who sustains a work related injury simply shows the injury; there is no need to demonstrate functional limitation, lost earning capacity or nonwork disability.” Id. at 98.

2) Functional Limitations - “[A] worker who sustains a work related injury shows that the injury resulted in a loss of function.” Id.

3) Lost Earning Capacity - “[A] worker who sustains a work related injury shows that the injury resulted in a potential reduction in the ability of the worker to earn income.” Id.

4) Actual Loss of Earnings - “[A] worker . . . shows that the injury resulted in lowered earnings.” Id. at 99.
good for themselves and for the system as a whole. It is based on three fundamental principles. First, it creates an economic incentive for employers/insurers to find a suitable job for the employee. Second, it eliminates the open-ended nature of weekly temporary total disability benefits. Third, it creates an incentive for employees to accept a suitable job offer by financially rewarding them for returning to work.

4. General Overview of Two-Tier System

After long and heated debate, the Minnesota legislature passed the bill which among other things, contained the two-tier system. These amendments changed significantly the benefits paid to a worker with a permanent partial disability. Under the new law, such a worker will receive temporary total disability benefits for up to ninety days after he or she reaches maximum medical improvement, or completes an approved retraining program, whichever is later. If, during that ninety days, the worker receives a suitable job offer from the employer, he or she has fourteen days to accept or reject that offer. If a rehabilitation plan has been approved, the job offer must be consistent with that plan. If no such plan has been approved, the job offered must be one that “the employee can do in the employee’s physical condition,” and must produce for the worker “an economic status as close as possible to that the employee would have enjoyed without the disability.” If the employee accepts the job offer and returns to work, the temporary total disability benefit ceases, even if the ninety days has not yet expired. Thirty days later, the worker receives a lump sum impairment compensation. The amount of the lump sum is determined by use of a schedule that tailors the award to the proportion that the loss of function of the disabled part bears to the loss of function of the whole body.

If the employee rejects the job offer, he or she receives the

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94. MINN. STAT. § 176.101, subd. 3e(b), (d) (1984).
95. Id. at subd. 3e(b).
96. Id.
97. Id. at subd. 3e(d).
98. Id. at subd. 3g.
99. Id. at subd. 3b. The schedule is not indexed over time. See infra note 114 for an analysis of the mechanics of calculation.
same impairment compensation but not in a lump sum.\textsuperscript{100} Instead, the employee receives the impairment compensation in weekly amounts until the amount the employee is entitled to receive is paid.\textsuperscript{101}

If, during the ninety days following maximum medical improvement or the completion of an approved retraining program, the worker does not receive a suitable job offer, at the end of that ninety days the temporary total disability compensation ceases and the worker begins to receive weekly economic recovery compensation.\textsuperscript{102} The weekly payment is sixty-six and two-thirds percent of the worker's prior earnings, but no more than the statewide average weekly wage.\textsuperscript{103} These payments continue for a number of weeks, that number being determined by use of a schedule that relates the duration to the proportion that the loss of function of the disabled part bears to the loss of function of the whole body.\textsuperscript{104}

Economic recovery compensation thus differs from impair-

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\begin{tabular}{|c|c|}
\hline
Percent of Disability & Duration in Weeks \\
\hline
0-25 & 600 \\
26-30 & 640 \\
31-35 & 680 \\
36-40 & 720 \\
41-45 & 760 \\
46-50 & 800 \\
51-55 & 880 \\
56-60 & 960 \\
61-65 & 1,040 \\
66-70 & 1,120 \\
71-100 & 1,200 \\
\hline
\end{tabular}
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\textsuperscript{100} Minn. Stat. § 176.101, subd. 3g.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at subd. 3p.
\textsuperscript{103} Id. at subd. 3a.
\textsuperscript{104} Id. The relationship is as follows:

The number of weeks of economic recovery compensation for any specified percentage is obtained by multiplying the number of weeks shown in the schedule by the specified proportion. For example, if the proportion is 15\%, the number of weeks is \(0.15(600) = 90\). If the specified proportion is 80\%, the number of weeks is \(0.80(1200) = 960\). For lower-paid workers this formula will produce a smaller dollar outlay than the impairment compensation amounts. The law states, however, that in no case should the undiscounted economic recovery compensation be less than 120\% of the corresponding impairment compensation. Minn. Stat. § 176.101, subd. 3t (1986). The Citizens League Report, \textit{supra} note 4, at 44, recommended that the "permanent partial award . . . be calculated as a percent of the worker's pre-injury wage, up to a maximum dollar amount, just as permanent partial awards are calculated today." \textit{Id.} It also recommended "that the numbers be set in such a way that the employers have a substantial incentive to return employees to work, and that employees do not have an incentive to prolong their disability." \textit{Id.}
ment compensation in four ways. First, economic recovery compensation is a weekly benefit; impairment compensation is usually a lump sum award. Second, economic recovery compensation depends upon the worker’s wage and the percent of disability; impairment compensation depends only on the percent of disability. Third, the undiscounted economic recovery compensation benefit, which more closely resembles in concept the former permanent partial disability award, will always be at least twenty percent higher than the corresponding impairment compensation award. Because economic recovery compensation will thus cost employers more than impairment compensation, they have an economic incentive to provide or find jobs for their work-impaired employees. Fourth, as average wages increase over time, the average economic recovery compensation, which is tied to wages, will increase. The average impairment compensation will not be affected by increases in average wages.

5. The Two-Tier System in Detail

a. Temporary Total Compensation

(i) Suitable Job Offer Made

Under the provision of the new law an employee who is injured in the course and scope of employment shall receive temporary total compensation pursuant to Minnesota Statutes section 176.101, subdivision 1. This temporary total compensation is paid for up to ninety days after the employee has reached maximum medical improvement. The definition of Maximum Medical Improvement (MMI) was patterned after FLORIDA STAT. § 440.02, subd. 22 (1981). MMI is the point in an injured employee’s recovery after which no further significant recovery or lasting improvement can be anticipated based upon reasonable medical probability. MINN. STAT. § 176.011, subd. 25.

105. MINN. STAT. § 176.011, subd. 16 (1986) defines personal injury under the workers’ compensation law as an “injury arising out of and in the course of employment . . . .” The Minnesota Supreme Court has held that the term “arising out of employment” refers to the causal connection between employment and injury, whereas the term “in the course of” refers to the time, place, and circumstances of the accident causing the injury. Snyder v. General Paper Corp., 277 Minn. 376, 379, 152 N.W.2d 743, 745 (1967) (citing Lange v. Minneapolis-St. Paul Metropolitan Airports Comm’n, 257 Minn. 54, 56, 99 N.W.2d 915, 917 (1959)); see also Swenson v. Zacher, 264 Minn. 203, 207-08, 118 N.W.2d 786, 789 (1962). See generally Bradt, An Examination of the “Arising Out of” and the “in the Course of” Requirements Under the Minnesota Worker’s Compensation Law, 6 WM. MITCHELL L. REV. 533 (1980).

106. Act approved June 7, 1983, ch. 290, § 29, 1983 Minn. Laws 1310, 1327 (codified at MINN. STAT. § 176.011, subd. 25 (1984)). The definition of Maximum Medical Improvement (MMI) was patterned after FLORIDA STAT. § 440.02, subd. 22 (1981).
an approved retraining course,\textsuperscript{107} whichever is later.\textsuperscript{108} However, if at any time prior to the end of this ninety day period, the employer makes the employee an offer of a suitable job,\textsuperscript{109}

an injured employee is as well as he or she will get. It does not require a finding that the employee is in the same physical condition that he or she was before the injury occurred.

MMI will vary between individuals because of different healing rates, even though the injuries may be the same. The Minnesota Medical Association Disability Duration-Guide describes the usual duration for many conditions. Insurance companies use this guide to determine the point at which a case should be reviewed to see whether MMI has been reached.

The determination of MMI should be based on objective findings and the patient's rate of recovery. The key concept in MMI is \textit{maximum} improvement. MMI may have been reached even though a patient's condition may deteriorate steadily. A patient's condition can also fluctuate, as in cases of chronic back pain, when the patient has good and bad days. The determination of MMI \textit{should not} be based on arbitrary time periods, such as one year past surgery. Each case should be analyzed separately and a conclusion formed about MMI based on the specifics of the case.

For a general discussion of the factors that should be considered in determining when MMI is reached, see \textit{Minnesota Department of Labor and Industry, Health Care Providers' Guide to the Minnesota Workers' Compensation System} (July, 1985) \cite{health-care-providers-guide}.

\textsuperscript{107} Act approved June 7, 1983, ch. 290, § 27, 1983 Minn. Laws 1310, 1323 (codified at \textit{Minn. Stat.} § 176.011, subd. 25 (1986)) defines "retraining" as a "formal course of study in a \textit{school setting} which is designed to train an employee to return to suitable gainful employment." \textit{Id.} (emphasis added). Retraining should not be confused with nor is it synonymous with "rehabilitation." \textit{Minnesota Statutes} section 176.102, subdivision 1 defines "rehabilitation" as "intended to restore the injured employee, through physical and vocational rehabilitation, so the employee may return to a \textit{suitable} job. . . ." \textit{Id.} While "retraining" may at one time have been a part of a rehabilitation plan, that is not generally the case today. Prior to 1979, rehabilitation usually consisted of "retraining." \textit{University of Minnesota Report, supra note 6, at § 30.}

\textsuperscript{108} Act approved June 7, 1983, ch. 290, § 48, 1983 Minn. Laws 1310, 1341 (codified as amended at \textit{Minn. Stat.} § 176.101, subd. 3e(a)(1986)).

\textsuperscript{109} "Suitable job offer" is an important concept in the two-tier system. Until 1986, the Workers' Compensation Act, with one exception, did not specifically mention the term "suitable job" or "suitable job offer." However, it is a term that has been widely used in Minnesota practice since the adoption of the mandatory rehabilitation system in 1979. Under the two-tier system, a suitable job offer is one "that is consistent with an approved plan of rehabilitation," or if no plan has been approved, one that the "employee can do in the employee's physical condition and that job produces an economic status as close as possible to that the employee would have enjoyed without the disability . . . ." \textit{Minn. Stat.} § 176.101, subd. 3e(b) (1986). An approved plan of rehabilitation is designed to return an employee to an economic status as close as possible to that enjoyed prior to the disability. \textit{Minn. Stat.} § 176.102, subd. 1 (1986). There is no difference between a suitable job for an employee who has been in rehabilitation and one who has not. The determination of whether a job is suitable is, at times, difficult. A variety of factors must be weighed. For example, the employee's age is a factor to consider, as is the employee's education, previous work experience, economic circumstances, and the geographical area in which the employee lives. \textit{Study Commission Report, supra note 1, at 24. A job
the temporary total compensation ceases. Temporary total compensation also ends before reaching the ninety day period if the employer finds the employee a suitable job with another employer. The crucial factor in discontinuing temporary total compensation is not whether the employee accepts the suitable job offer, but rather, that the offer was made.

(ii) Light Duty or Modified Job Offer

Temporary total compensation also ceases if the employee is offered a light duty or modified job which the employee can do in his or her physical condition. Unlike a suitable job, a job under subdivision 3f need not necessarily produce an economic status similar to the job held at the time of the injury.

which may be suitable for a 55-year old who has little education would not be suitable for a 25-year old with a high school education. The job should be one which comes as close as possible to the job held at the time of the injury in terms of income. Not only should the income or salary of the job be as close as possible to the previous job, but further income potential in that job should be considered. While temporary partial disability compensation, as defined in Minnesota Statutes section 176.101, subdivision 2 (1986), is appropriate and must be considered in determining whether a job is suitable, the payment of temporary partial disability compensation must be examined closely. For example, an employee earning $450 per week at the time of the injury who returns to a job paying $200 per week, would receive $167.50 in temporary partial disability compensation for a combined new wage and compensation of $376.50. Based on other factors, this job may be suitable even though the new wage is substantially lower. However, in order for this job to be considered suitable, it should be one that will have an economic potential similar to that of the previous job. Specifically, the statute states that the "[e]conomic status is to be measured not only by opportunity for immediate income but also by opportunity for future income." Minn. Stat. § 176.102, subd. 1 (1986). Once again, it should be noted that this would only be one of many factors to consider in determining whether a job is suitable. In order to determine the suitability of a job, each employee must be assessed individually.

An employee who returns to the same job held at the time of injury has returned to a suitable job. If that is not possible, the best alternative is a job with the same employer very similar to the previous job. The next best alternative is a less similar job with the same employer or a more similar job with a different employer, and so on.

110. Act approved June 7, 1983, ch. 290, § 48, 1983 Minn. Law 1310, 1341 (codified at Minn. Stat. § 176.101, subd. 3e(b) (1986)). In 1984, the legislature amended the law in order to clarify that the employer may make a suitable job offer to an employee at any time prior to the end of 90 days post MMI, including prior to the employee reaching MMI. Act approved Apr. 23, 1984, ch. 432, art. 2, § 3, 1984 Minn. Laws 97, 102 (codified at Minn. Stat. § 176.101, subd. 3e(b), (c) (1986)).

111. Act approved June 7, 1983, ch. 290, § 48, 1983 Minn. Laws 1310, 1341 (codified at Minn. Stat. § 176.101, subd. 3e(b)).

Again, the important factor to consider here is not whether the job offered has been accepted, but simply whether it was offered.

(iii) Released to Work Without Restrictions

Sometimes an injured employee is released to work without restrictions and no permanency is present. In these cases, temporary total compensation may be discontinued since the employee is no longer temporarily totally disabled. Minnesota Statutes section 176.101, subdivision 1 provides in part that "[f]or injury producing temporary total disability, the compensation is 66-2/3 percent of the weekly wage . . ." and that "this compensation shall be paid during the period of disability . . ." 113 Once an employee is no longer temporarily totally disabled, compensation should end. Even if the employee has a permanent partial disability, but is released to work without restrictions prior to maximum medical improvement, temporary total compensation should end since the employee is not temporarily totally disabled. This is particularly a problem in the case of minor permanent injuries. For example, an employee may injure a finger which requires medical treatment and which produces a permanent partial disability, but which does not hinder the employee's ability to do the job.

b. Payment of Impairment Compensation

Where a suitable job offer is made to the employee, the employee is eligible to receive payment of impairment compensation. 114 Whether or not the employee actually accepted the suitable job offer is irrelevant in the determination of the amount of impairment compensation payable. The making of a suitable job offer is all that is required of the employer to fix its obligation to pay impairment compensation. The acceptance or rejection of the offer affects only the manner in which the impairment compensation is paid and not the amount payable. The employer thus has a strong incentive to make a suitable job offer, since its obligation to pay permanent partial disability is fixed at this point. Impairment compensation is always less than economic recovery compensation in each case.

114. Id. at subd. 3e(b). The impairment compensation is determined by multiplying the percent of disability by the corresponding dollar amount found below:
An employer can control costs by working to get the employee back to a suitable job either with it or another employer.

(i) Acceptance of Suitable Job Offer

Where the employee accepts the suitable job offer, temporary total compensation is discontinued upon the return to work. The impairment compensation is paid "in a lump sum thirty calendar days after the employee actually commences work if the employment has not been substantially interrupted by the injury for any part of thirty days, and the employee is still employed . . . at the end of the period." By accepting

<table>
<thead>
<tr>
<th>Percent of Disability</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-25</td>
<td>$75,000</td>
</tr>
<tr>
<td>26-30</td>
<td>80,000</td>
</tr>
<tr>
<td>31-35</td>
<td>85,000</td>
</tr>
<tr>
<td>36-40</td>
<td>90,000</td>
</tr>
<tr>
<td>41-45</td>
<td>95,000</td>
</tr>
<tr>
<td>46-50</td>
<td>100,000</td>
</tr>
<tr>
<td>51-55</td>
<td>120,000</td>
</tr>
<tr>
<td>56-60</td>
<td>140,000</td>
</tr>
<tr>
<td>61-65</td>
<td>160,000</td>
</tr>
<tr>
<td>66-70</td>
<td>180,000</td>
</tr>
<tr>
<td>71-75</td>
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<td>240,000</td>
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<td>81-85</td>
<td>280,000</td>
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<tr>
<td>86-90</td>
<td>320,000</td>
</tr>
<tr>
<td>91-95</td>
<td>360,000</td>
</tr>
<tr>
<td>96-100</td>
<td>400,000</td>
</tr>
</tbody>
</table>

Id. at subd. 3b.

For example, the impairment compensation for a 20% disability is equal to 20% X $75,000 or $15,000. Unlike the economic recovery compensation, the employee's compensation rate based on the weekly wage is not a factor in determining the award. It was the clear legislative intent to compensate an injured employee who was offered a suitable job the same regardless of previous income. This was based on the belief that one permanent impairment is not worth more to one employee than another, as long as no wage loss is present. For example, an employee making $300 per week who loses an index finger should receive the same amount for that loss as an employee making $1000 per week. The previous law implied "a policy judgment that the hand, for example, of a low income worker is worth less than the hand of a higher paid worker." Citizens League Report, supra note 4, at 30. Conversely, if one of those employees is offered suitable work and the other is not, the one not offered a job should be compensated for the wage loss to the extent provided by the economic recovery compensation schedule. See supra note 104 and accompanying text.

115. Minn. Stat. § 176.101, subd. 3g (1986). In 1984, the Minnesota Legislature added the requirement that the employment be "substantially interrupted by the injury for any part of the 30 days and that the employee is still employed at the job at the end of the period." Act approved Apr. 23, 1984, ch. 432, art. 2, § 8, 1984 Minn. Laws 97, 105. While "substantially interrupted" is not defined, the intent was to assure that the employee was able to do the work before impairment compensation is
the suitable job offer, the employee will enjoy the benefits of a lump sum award in addition to earning an income at the job. If the new job pays less than the old, the employee will, in addition to the lump sum and job income, receive temporary partial disability benefits. Combined, this creates a tremendous incentive to return to work.

(ii) Rejection of Suitable Job Offer

Where the employee has rejected the suitable job offer for any reason, the temporary total compensation ceases on the date of the refusal. The employee is still entitled to receive impairment compensation rather than economic recovery compensation. The impairment compensation, however, is paid periodically in the same intervals as temporary total was initially paid. When the employee has exhausted the impairment compensation payable to him or her as determined by Minnesota Statutes section 176.101, subdivision 3a, all compensation ceases. At this time, the employee cannot resume temporary total compensation or any other compensation unless the employee can show that he or she has a greater work-related disability than already compensated.

Even if the employee subsequently finds a job after the refusal of a suitable job offer, he or she is not eligible to receive temporary partial compensation, nor may rehabilitation be given. These penalties are quite harsh and should result in an employee thinking twice about refusing a job.

paid and that the employee does not accept any job simply to collect the compensation in a lump sum.

116. See Minn. Stat. § 176.101, subd. 3f (1986).
117. Id. The statute provides no incentive to reject the job. When temporary total disability benefits are cut off, and only impairment compensation is due the employee, the employee will likely consider the job offer seriously.
118. Id. These weekly impairment benefits are not escalated by the adjustment factor in Minnesota Statutes section 176.645 (1986), even if they are paid for an extended period of time. Act approved Apr. 23, 1984, ch. 432, art 2, § 7, 1984 Minn. Laws 97, 105.
119. See Minn. Stat. § 176.101, subd. 3f (1986).
120. Id. at subd. 3n. The language specifically provides that the worker who has been offered a job under subdivision 3e and has refused that offer and who subsequently returns to work shall not receive temporary partial compensation pursuant to subdivision 2 if the job the employee returns to provides a wage less than the wage at the time of the injury. No rehabilitation shall be provided to this employee.

Id.
121. Id.
Where the employee has rejected the suitable job offer and is receiving impairment compensation in periodic amounts, the employee may still receive the impairment compensation in a lump sum if he or she is employed at a different job. The same requirement exists that exists in the return to the suitable job situation. That is, in order for the employee to receive the remaining impairment compensation, he or she must remain employed at the job for thirty days, without substantial interruption because of the injury.

An employee who has rejected a suitable job offer but has subsequently returned to work at another job may receive the remaining impairment compensation in a lump sum as discussed above. However, this employee is not eligible to receive temporary partial compensation if the job to which the employee returns pays the employee less than he or she was earning at the time of the injury.

(iii) Rejection of Light-Duty or Modified Job

The statute anticipates a return to work prior to maximum medical improvement (MMI). There is no requirement that an employee be paid temporary total compensation until MMI is reached. Minnesota Statutes section 176.101, subdivision 3f outlines the situation in which it is not yet clear what a suitable job is, or the employer cannot yet offer a suitable job. It allows an employer to offer a job that the employee can physically perform or, if the employee is in a rehabilitation program, one which is consistent with the plan. A job consistent with a plan may simply be a job the employee can do physically in order to achieve work hardening.

Where a job is offered prior to reaching MMI and that job is not necessarily "suitable" but is within the physical limitations of the employee, temporary total disability compensation may be discontinued, even where the employee is refusing the job. Obviously, if the employee accepts the job, temporary total

122. See Act approved June 7, 1983, ch. 290, § 56, 1983 Minn. Laws 1310, 1345 (codified at Minn. Stat. § 176.101, subd. 3m (1986)).

123. Act of Apr. 23, 1984, ch. 432, art. 2, § 8, 1984 Minn. Laws 97, 105 (codified at Minn. Stat. § 176.101, subd. 3m (1986)). The language of the change specifies that this sum will be returned at this time "if the employment has not been substantially interrupted by the injury for any part of the 30 days and the employee is still employed at that job at the end of the period." Id.

disability compensation is ended. At this time, certain obligations regarding the payment of impairment compensation arise. In the case of either acceptance or rejection of the job, "the employee shall receive impairment compensation for the permanent partial disability which is ascertainable at that time." 125 The compensation is paid periodically "at the same rate that temporary total compensation was last paid." 126 By paying impairment compensation even if the job is rejected, the employer is doing no more than paying the compensation it will ultimately be liable for in any case. There is, therefore, little danger of overpayment.

Secondly, if the employee continues to receive some sort of compensation, hostility which might otherwise arise when temporary total disability compensation is discontinued, is avoided. Consequently, the possibility of successfully rehabilitating the employee remains. Moreover, if a dispute exists regarding whether the job was, in fact, within the employee’s physical limitations and temporary total disability compensation is discontinued during the resolution of the dispute, the employee will not be without income while the dispute is being resolved. 127 If the job was, in fact, inappropriate, any impairment compensation paid can be considered to have been temporary total disability compensation to which the employee had a right. If the job was appropriate, the insurer has only paid the impairment compensation the employee would, eventually, be due.

Minnesota Statutes section 176.101, subdivision 3f also provides that if the employee accepts the light duty or modified job, the impairment compensation is also payable periodically at the same rate temporary total disability compensation was last paid. The employee will, therefore, receive a wage, impairment compensation. If the job pays less than the job at the time of the injury, temporary partial disability is also payable. 128

125. Id. at subd. 3f.
126. Id.
127. See Citizens League Report, supra note 4, at 44.
6. Payment of Economic Recovery Compensation

a. General

In cases where an employee has suffered a permanent partial disability and the employer is not able to make the employee a suitable job offer or provide such an offer with another employer, the employee shall receive economic recovery compensation.129 The employer has ninety days following MMI or the end of an approved retraining program, whichever is later, to make this offer.130 Failure to do so will result in the employer's liability to pay economic recovery compensation. It should be noted that the job offer must be made no later than the end of the ninety-day period. The job, however, does not have to commence at this time.131 Should the offered job commence at a time later than the offer, the employee will receive impairment compensation rather than economic recovery compensation.132 Also, contrary to the general rule that temporary total compensation ceases no later than ninety days after reaching MMI or end of retraining, temporary total compensation continues until the job is available if the offer is made prior to the end of the ninety day period.133

129. The economic recovery compensation is calculated by multiplying the percent of disability by the corresponding number of weeks in the statute, times the employee's weekly compensation rate. Minn. Stat. § 176.101, subd. 3a (1986). The rate is 66-2/3% of the weekly wage at the time of injury subject to a maximum equal to the statewide average weekly wage (SAWW). That schedule is as follows:

<table>
<thead>
<tr>
<th>Percent of Disability</th>
<th>Weeks of Compensation</th>
</tr>
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<tbody>
<tr>
<td>0-25</td>
<td>600</td>
</tr>
<tr>
<td>26-30</td>
<td>640</td>
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<tr>
<td>51-55</td>
<td>880</td>
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<tr>
<td>56-60</td>
<td>960</td>
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<tr>
<td>61-65</td>
<td>1040</td>
</tr>
<tr>
<td>66-70</td>
<td>1120</td>
</tr>
<tr>
<td>71-100</td>
<td>1200</td>
</tr>
</tbody>
</table>

Id.

For example, the economic recovery compensation for an employee with a 20% disability whose weekly workers' compensation rate was $300 per week (based on a weekly wage of $450 per week) would be: 20% X 600 weeks X $300 = $36,000.

130. at subd. 3e(a) (1986).
131. Id. at subd. 3e(d).
132. Id. at subd. 3e(b), (d).
133. Id. at subd. 3e(d).
The primary obligation to find a suitable job lies with the employer. The employer stands to reduce its liability by paying a smaller impairment compensation rather than economic recovery compensation if a suitable job is made. This does not mean, however, that the employee does not have to cooperate in efforts to find a suitable job. An employee who is in a rehabilitation plan must make a good faith effort to participate in the plan. Failure to make this good faith effort subjects an employee to serious consequences. The statute provides in part that: “All benefits payable under Chapter 176 may . . . be discontinued or forfeited for any time during which the employee . . . does not make a good faith effort to participate in a rehabilitation plan.”

If, therefore, the rehabilitation plan requires the employee to make a diligent job search for a suitable job and the employee does not do so, the compensation due the employee may be forfeited. A strict reading of this section might lead one to the conclusion that an employee who, contrary to a rehabilitation plan, failed to make a diligent job search, could forfeit his or her right to receive impairment compensation. This interpretation, however, cannot be made after a careful analysis of the law. The purpose of impairment compensation is to compensate an employee for the permanent partial disability following a work-related injury. By definition, it is for “impairment” of the body. Failure to cooperate with a rehabilitation plan does not in any way diminish the employee’s impairment. If the employee can reject a suitable job offer and still receive impairment compensation, then the employee should also be free to refuse to cooperate in rehabilitation or make a diligent job search with the same result. That is, refusal to cooperate results in forfeiture of economic recovery compensation; the right to receive impairment compensation remains. Although Minnesota Statutes section 176.101, subdivision 2 was amended by deleting the “diligent job search” requirement, this does not relieve the employee of the requirement to engage in such a search.

134. Id. at § 176.102, subd. 13.
135. Impairment compensation is for impairment per se. See Citizens League Report, supra note 4, at 45.
Assuming that no suitable job offer is made by the end of the ninety day period, the employee is entitled to receive economic recovery compensation. The temporary total compensation ceases ninety days after reaching MMI or the end of retraining, if it has not already been discontinued because of an earlier event. The employee then begins to receive economic recovery compensation.

b. Method of Payment of Economic Recovery Compensation

(i) No Return to Another Job During Payment of Economic Recovery Compensation

The statute provides, in part, that "[e]conomic recovery compensation is payable at the same intervals and in the same amount as temporary total compensation was initially paid." The amount due the employee is governed by Minnesota Statutes section 176.101, subdivision 3a and as previously described. Minnesota Statutes section 176.101, subdivision 3s also provides that the economic recovery compensation will be paid until the amount due to the employee is reached. At that time, the employee is no longer entitled to any further compensation unless the employee's disability is greater than was compensated.

(ii) Return to Another Job During Payment of Economic Recovery Compensation

If the employee is receiving periodic economic recovery compensation payments because of the failure of the employer to offer a suitable job, but that employee is able to find another job of any type, the employee shall receive any remaining economic recovery compensation in a lump sum. This lump sum will be paid if the employee remains employed at that job for thirty days, if the employment has not been substantially interrupted by the injury for any part of the thirty days. There is no requirement in the law that this job "be suitable."

138. Minn. Stat. § 176.101, subd. 3e(a) (1986). For example, temporary total compensation may be discontinued when the worker commences a light duty job. Id. at subd. 3f.
139. Id. at subd. 3q.
140. Id.
(iii) Return to Work - Medically Unable to Continue

(a) Prior to Thirty Days

There may be instances in which an employee is offered a suitable job, accepts the job and, after working at that job for some period of time, realizes that he or she is unable to do the job because of the work-related disability. If the required thirty days has not yet elapsed, the employee has not yet received the impairment compensation and the employer is not obligated at this time to pay the impairment compensation. Rather, if the employee has not yet reached MMI, the employee should once again receive temporary total compensation until up to ninety days after reaching MMI or the end of retraining. If the employee returned to work after reaching MMI and was then unable to continue prior to working for thirty days, no temporary total compensation is payable unless the employee has had a recurrence of the injury and a new period of MMI is present. Rather, the issue is whether the job was, in fact, suitable.

At the time the job was offered it must have appeared suitable, thereby obligating the employer to pay impairment compensation. If, however, the job is not in fact suitable, the employer should be given another opportunity and additional time to offer a suitable job. Failure to offer the employer another opportunity would be unfair to both the employee and the employer. Since the employee has already shown a willingness and desire to return to work, and since the employer has made every effort to return the employee to suitable employment, the employer should not be penalized by the failure of the job. Even if the ninety days after MMI has run by the time the employee and employer realize that the job is not suitable, the employer should be given any time left in the ninety day period subsequent to when the initial offer was made. At the end of that time, if a suitable job offer is made, then the mechanics of the impairment compensation system are once again implemented. If no suitable job offer is made, economic recovery compensation is then payable.

(b) After Thirty Days

When the employee has been offered a suitable job, has suc-
cessfully completed thirty days of work, has received a lump sum impairment compensation, and is then unable to continue work because of the work related medical problems, a somewhat different track is followed. Once again, if the employee has not yet reached MMI, the employee receives temporary total compensation until up to ninety days after MMI or retraining. If, at any time prior to the end of this period, the employee receives a suitable job offer, the employee will be eligible for impairment compensation. However, any previous impairment compensation paid for the same disability must be offset. This means that no additional impairment compensation is payable unless the employee has a greater degree of permanency than was compensated by the payment of the first impairment compensation. If no suitable job offer is made within the appropriate time, economic recovery compensation is payable. Again, the impairment compensation previously paid should be offset. If the employee had already reached MMI by the time that it was determined that the job was in fact not suitable, the employer should be given additional time to offer the employee another suitable job.

(iv) Job Prior to MMI

Doctors usually recommend a return to activity long before MMI for most kinds of injuries because it speeds the healing process.\(^{142}\) It is, therefore, anticipated that the majority of the suitable job offers will be made well in advance of an employee reaching MMI. Even though the employee may not yet have fully recovered from the injury, it is likely that the employer will be able to take the employee back to the job at the time of the injury with a few job modifications. It is also likely that another suitable job may be found for the employee, either with the same employer or a different employer. There may, however, be cases in which the employee has not reached MMI and no suitable job exists. To continue paying temporary total compensation until the employee reaches MMI serves no one’s best interest. The employee is in all likelihood eager to return to work as quickly as possible. The employer is anxious to find work for the employee in order to reduce its temporary total compensation liability. What then can be done where the em-

ployer simply does not have a suitable job, but the employee is physically able to do some sort of work?

To aid in the quick return to work, the employer should offer some type of a modified job or light duty work. If the employee is in a rehabilitation plan, the job must be consistent with the plan. If rehabilitation is not present, the job must be within the employee's physical restrictions. There is no economic status test outlined in Minnesota Statutes section 176.101, subdivision 3f.

If the employee accepts the job, temporary total compensation is discontinued. If the employee rejects the light duty job, temporary total compensation is also discontinued. In this instance, the employee begins to receive his or her impairment compensation at the same interval and rate that temporary total was last paid. The impairment compensation is paid based on the permanent partial disability which is ascertainable at the time the job offer is rejected. By paying impairment compensation at this time, the employee does not wait a long period of time without compensation. If there is a dispute regarding whether the job was within the employee's restrictions and it is subsequently determined that the job was in fact appropriate, then the employee has only received the impairment compensation that might otherwise be due later, and overpayment is not a problem. If the job was not appropriate, then the compensation paid following the discontinuance of the temporary total compensation is considered to have been temporary total, and the employee's right to impairment compensation or economic recovery compensation is reinstated.

The incentive to the employee to accept a light duty job is evident. First, the employee earns an income. In addition, temporary partial disability is payable. Finally, the employee will receive weekly impairment compensation payments for any permanent partial disability ascertainable at the time he or she returns to the light duty job. By accepting the job the employee will be financially well off.

143. MINN. STAT. § 176.101, subd. 3f (1986).
144. See id.
145. See id.
146. See id.
147. Id. at subd. 3j.
148. Id.
The offer to an employee of a light duty job does not, by itself, fulfill the obligation of the employer to make a suitable job offer no later than ninety days after MMI. It simply ends the obligation to continue temporary total compensation. An employer still has the obligation to make a suitable job offer to the employee. For example, if an employee returns to a light duty job prior to MMI but is not offered a suitable job upon reaching MMI, the employee will receive economic recovery compensation. However, if the employer offers a suitable job at that point, impairment compensation will be paid with an offset for impairment compensation paid up until that time.  

(v) Return to Work - Layoff Because of Economic Conditions

An employee who accepts a suitable job offer, begins work at the job, and who subsequently is unemployed because of economic conditions other than seasonal conditions, may be entitled to a new form of workers' compensation not previously found in the law. This additional compensation is known as "monitoring period compensation." The Citizens League Report contained a reference to such a concept when it asked the question: "What would happen if the employer offered the employee a new job, but soon after the employee started work, the employee had to be laid off by the employer in a general work slowdown?" The Citizens League answered the question by stating that:

In such cases the employee would already have received his impairment award. He might also have been receiving a temporary partial benefit. Upon being laid off, he also would be entitled to receive a weekly benefit for a number of weeks equal to the difference between the larger permanent partial and the smaller impairment award, minus the value of weeks actually worked.

The purpose of monitoring period compensation is to assure that employers, in an attempt to reduce their liability for paying for a permanent partial disability, do not make the employee a suitable job offer, or offer to pay impairment compensation, and then lay the employee off shortly thereafter.

149. Id. at subd. 3f.
150. See id. at subd. 3i.
151. CITIZENS LEAGUE REPORT, supra note 4, at 44.
152. Id.
To determine whether the employee is eligible for monitoring period compensation after a layoff, it must first be determined that the layoff was caused through no fault of the employee but rather, that the layoff was due to economic conditions. Next, the layoff must not be a seasonal layoff. If the layoff was due to economic conditions, it would then be determined whether the layoff occurred within the monitoring period. To do this, the calculation of the weeks during which economic recovery compensation would have been payable must be made. For example, if an employee had a twenty percent permanent partial disability, that employee would have received economic recovery compensation for 120 weeks calculated by multiplying the twenty percent permanent partial disability by 600 weeks. It should be noted that the employee did not actually receive economic recovery compensation since he or she returned to a suitable job and received impairment compensation. Once this calculation is made, it is a simple matter to determine if monitoring period compensation is payable. If the employee returned to work and was laid off prior to the end of this 120 week period, monitoring period compensation is payable.

Following the determination that monitoring period compensation is payable, the amount and period during which it is payable must be calculated. "This compensation shall be paid until (1) the monitoring period expires, or (2) the sum of monitoring period compensation paid and impairment compensation paid or payable is equal to the amount of economic recovery compensation that would have been paid if that compensation were payable, whichever occurs first." In all cases in which monitoring period compensation is being paid, the compensation ends before the end of the monitoring period if

153. See Minn. Stat. § 176.011, subd. 26. Monitoring period is defined as “the number of weeks during which economic recovery compensation . . . would have been paid if that compensation were payable.” Id.

154. See supra note 104 and accompanying text for a discussion of the calculation of economic recovery compensation.

155. See Act approved July 1, 1985, ch. 234, § 6, 1985 Minn. Laws 739, 747-48 (codified at Minn. Stat. § 176.101, subd.3i (1986)). This 1985 Act amended the 1983 Act’s calculation of monitoring period benefits. These amendments do not result in a different monitoring period compensation, but were an attempt to clarify the calculation.

156. Id.
the employee returns to work.\textsuperscript{157} 

\textsuperscript{157} Since the concept of monitoring period compensation is a new one and does not exist in the law of other states, some examples are useful.

\textit{Example \#1}

Disability = 20\% whole body.
Impairment compensation (IC) = 20\% \times \$75,000 = \$15,000.
Monitoring period (MP) = 20\% \times 600 weeks = 120 weeks.
Employee's compensation rate = \$200.
Employee laid off after 50 weeks of work.

Economic Recovery Compensation (ERC) that would have been paid = 20\% \times 600 weeks \times \$200 = \$24,000.

Monitoring period compensation paid until (1) monitoring period expires = 120 weeks - 50 weeks = 70 weeks; or (2) sum of MP paid and IC paid equals ERC that would have been paid, whichever occurs first: \$24,000 (ERC) - \$15,000 (IC paid) = \$9,000 divided by \$200 (comp. rate) = 45 weeks.

The event which occurs first in this example is payment of monitoring period compensation (for 45 weeks). This amount, added to IC already paid, equals the ERC that would have been paid. If the full 70 weeks of monitoring period compensation were paid at the compensation rate of \$200, the employee would receive \$14,000 in addition to IC already paid. The total MP and IC would equal \$29,000. Since the total MP and IC cannot exceed the ERC that would have been paid (\$24,000), MP compensation is paid only for 45 weeks.

\textit{Example \#2}

Disability = 20\% whole body.
IC = 20\% \times \$75,000 = \$15,000.
MP = 20\% \times 600 weeks = 120 weeks.
Employee's comp. rate = \$300/week.
Employee laid off after 50 weeks of work.

ERC that would have been paid = 20\% \times 600 weeks \times \$300 = \$36,000.

MP comp. paid until (1) monitoring period expires: 120 weeks - 50 weeks = 70 weeks; or (2) sum of MP and IC paid equals ERC that would have been paid, whichever occurs first: \$36,000 (ERC) - \$15,000 (IC) = \$21,000 divided by \$300 (comp. rate) = 70 weeks.

Note that in both calculations above, the result is 70 weeks. MP comp. is not subject to escalation under Minn. Stat. \$ 176.645 (1986).

\textit{Example \#3}

Disability = 30\% whole body.
IC = \$80,000 \times 30\% = \$24,000.
MP = 640 weeks \times 30\% = 192 weeks.
Employee's comp. rate = \$250/week.
Employee laid off after 25 weeks of work.

ERC that would have been paid = 30\% \times 640 weeks \times \$250 = \$48,000.

MP comp. paid until (1) MP expires: 192 - 25 = 167 weeks; or (2) sum of MP plus IC = ERC that would have been paid, whichever comes first: \$48,000 (ERC) - \$24,000 (IC) = \$24,000 divided by \$250 (comp. rate) = 96 weeks.

The lesser of the above totals 96 weeks of MP comp. due at the same intervals and rate that temporary total was last paid.

If the employee above had received ERC initially, that employee would have received \$48,000 (192 weeks \times \$250). The additional 96 weeks of MP comp. at \$250 a week = \$24,000. If unemployed for the remainder of MP, the employee receives what he or she would have received if no suitable job offer had been made.
(vi) Return to a Suitable Job - Unemployment Due to Seasonal Conditions

Generally, an employee who has accepted a suitable job and who is subsequently unemployed due to poor economic conditions is eligible for compensation if that layoff occurs within the monitoring period. An exception occurs when the layoff results from the seasonal nature of the job. Rather than receive monitoring period compensation, the employee instead receives any unemployment compensation to which he or she is otherwise entitled, plus temporary partial compensation in the amount that the employee was receiving at the time of the layoff.

(ii) Inability to Return to Work - No Permanent Partial Disability

The payment of impairment compensation or economic recovery compensation benefits is intended to pay for the permanent partial disability of an injured employee. An employee who returns to work after an injury but who has no permanent partial disability does not receive these benefits, with one important exception. The employee who is "unable to return to his former employment for medical reasons attributable to the injury . . . shall receive 26 weeks of economic recovery compensation" where no permanent partial disability is present. This situation most commonly occurs in cases of allergic reactions, such as dermatitis. Apparently, this twenty-six week payment is not due when there is no permanent partial disability, and the employee does not return to work for reasons uncon-
nected with the injury, such as a plant closing or other economic conditions.

The statute does not require payment of twenty-six weeks of economic recovery compensation only where no suitable job offer is made and there is no permanent partial disability. Rather, it requires payment to an employee unable to return to the former job for medical reasons attributable to the injury even if the employer takes the employee back in another capacity, or finds another job for the employee with another employer, or if the employee finds his or her own job. 162

(viii) Permanent Total Disability

While the vast majority of work injuries result in no permanent disability, or at worst some permanent partial disability, it is inevitable that some injuries will result in permanent total disability for the employee. To compensate for this, the two-tier system provides in part that: "An employee who is permanently totally disabled . . . shall receive impairment compensation . . . in addition to permanent total compensation . . . and [the impairment compensation] is payable concurrently [with the permanent total compensation]." 163 Essentially, the permanently totally disabled employee will receive weekly permanent total benefits along with periodic impairment compensation. Once the impairment compensation is exhausted, the employee continues to receive permanent total compensation.

An employer is under no obligation to offer a suitable job to the permanently totally disabled employee, and failure to do so does not result in payment of economic recovery compensation. Since the employee is permanently totally disabled, it is not expected that he or she will return to work and, therefore, no suitable job need be offered. However, unlike other cases where no suitable job offer is made, the employee who is permanently totally disabled will not receive economic recovery compensation.

These rules apply where the permanent total disability status

162. Id. The language found in the 1982 Act, which required payment of the 26 weeks if no suitable job was offered, was stricken.
163. Minn. Stat. § 176.101, subd. 30 (1986). The Citizens League Report, supra note 4, at 43, states that an employee who is permanently totally disabled "would receive an impairment award, plus a permanent total income replacement benefit . . . ."
of the employee is made soon after the injury, such as statutorily defined permanent total disability contained in Minnesota Statutes section 176.101, subdivision 5. There will, however, undoubtedly be cases in which it will not be apparent until sometime into the future that the employee is permanently totally disabled. This may occur after the employee is receiving or has already received economic recovery compensation.

Section 176.101, subdivision 30 provides in part that if the employee has been injured, did not receive a suitable job offer, is receiving economic recovery compensation and is then determined to be permanently totally disabled, the economic recovery compensation is discontinued even if the full amount of economic recovery compensation has been paid. At that time, weekly permanent total benefits commence. Previous economic recovery payments may not be used to offset future permanent total disability benefits, and no permanent total benefits are payable for the employee's past disability. Any temporary total benefits previously paid also may not be used as an offset. Finally, the employee shall receive impairment compensation for the disability just as he or she would have received if the permanent total determination was made shortly after the injury.

Employers should be aware that simply because they did not make a suitable job offer and are paying economic recovery compensation, their liability may not be ended. The employee who is receiving economic recovery compensation may yet be determined to be permanently totally disabled, at which time the employer would have the additional liability previously discussed. The liability the insurer may incur in this case, that is, the payment of economic recovery compensation followed by a permanent total determination triggering the payment of impairment compensation, is the only exception to the law which prohibits payment of impairment compensation and economic recovery compensation for the same injury.

164. In Ford v. Willis J. Kruckeberg Roofing & Sheet Metal, 308 Minn. 271, 241 N.W.2d 653 (1976), the Minnesota Supreme Court held that there are some injuries which by themselves are permanent and total under the law and that an "employee is entitled to recover without regard to whether he is working at another occupation." Id. at 273, 241 N.W.2d at 654.

165. "This impairment compensation is in lieu of economic recovery compensation . . . and the employee shall not receive both economic recovery compensation and impairment compensation." Minn. Stat. § 176.101, subd. 3e(b) (1986).
(ix) Minimum Economic Recovery Compensation

If the general economic recovery and impairment compensation schedule contained in Minnesota Statutes section 176.101, subdivisions 3a and 3b were applied in all cases, a situation would arise that would create a disincentive for some employers to offer a suitable job to some employees. To avoid this problem, Minnesota Statutes section 176.101, subdivision 3t, clause a, provides that economic recovery compensation "shall be at least 120 percent of the impairment compensation the employee would receive if that compensation were payable."  

(x) Payment of Compensation at Death

Upon the death of an employee from causes unrelated to the disability, the payment of impairment compensation or economic recovery compensation is to be made in some instances to a surviving spouse or surviving child.

(a) Surviving Dependent Spouse - No Dependent Children

Where there is a surviving dependent spouse and no dependent children, the economic recovery compensation or impairment compensation which was being paid to the employee upon his or her death shall continue to be made to the spouse "for a period of up to ten years after the date of death at which time payments and future entitlement to it ceases." Minnesota Statutes section 176.101, subdivision 3r, clause 2, provides that the payment of impairment compensation or economic recovery compensation shall cease before the end of

166. For example, an employee who has a 5% whole body disability and who was earning the state minimum wage of $134 a week for a compensation rate of $89.78, would receive less for economic recovery compensation than for impairment compensation. The economic recovery compensation calculation is as follows: 5% × 600 weeks × $89.78 = $2,693.40. The same employee would receive impairment compensation of $3,750 (5% × $75,000). This is, of course, because the employee's wage is a factor in calculating economic recovery compensation, while it is not considered in impairment compensation.

167. Minn. Stat. § 176.101, subd. 3t, cl. a (1986). In the example above, 120% of the impairment compensation equals $4,500. Failure to offer a suitable job in this case would mean that the employee would receive $4,500 in economic recovery compensation rather than $2,693 if the economic recovery compensation calculation were strictly applied.

168. See id. at subd. 3r (1986). For a definition of dependent spouse or child see id. § 176.111, subd. 1 (1986).

169. Id. § 176.101, subd. 3r(a) (1986).
the ten year period if the amount to which the employee would have been entitled to is reached prior to the end of ten years.\textsuperscript{170} In short, a surviving dependent spouse will receive compensation for no more than ten years after the death, and that period may be less if the employee’s entitlement would have expired.

\textit{(b) Surviving Dependent Spouse - Dependent Children}

Where the deceased employee leaves a dependent spouse and one or more dependent children, impairment compensation or economic recovery compensation is to be paid “for up to ten years after the last child is no longer dependent after which time payments and future entitlement to the compensation ceases.”\textsuperscript{171} As in the previous case, the compensation will be discontinued before the running of ten years if it would have been paid out to the employee at an earlier time if he or she had lived.

\textit{(c) No Dependent Spouse - Dependent Children}

When the legislature enacted the 1983 amendments, a provision to cover the situation in which an employee who is receiving impairment compensation or economic recovery compensation dies and leaves a dependent child, but not a dependent spouse, was inadvertently omitted. The 1984 legislature corrected this mistake.\textsuperscript{172} Unlike the prior cases, a dependent child will continue to receive compensation until he or she is no longer dependent even if that is longer than the employee would have received the compensation if he or she had not died. Notice, however, that there is no mention of ten years in this case. As soon as the child is no longer dependent, benefits cease. An additional ten years is not required.\textsuperscript{173}

\begin{footnotes}
\item[170] Id. at subd. 3r, cl. 2.
\item[171] Id. at subd. 3r(b).
\item[172] “If the deceased employee leaves a dependent child, . . . and no dependent spouse, the periodic economic recovery or impairment compensation shall continue to be paid to the child until the child is no longer dependent or until the amount to which the employee was entitled to receive is exhausted, \textit{whichever is later}.” Act approved Apr. 23, 1984, ch. 432, art. 2, § 11, 1984 Minn. Laws 97, 107 (codified at Minn. Stat. § 176.101, subd. 3r(c) (1986)) (emphasis added).
\item[173] For example, if an employee leaves no dependent spouse, but does leave a five year-old dependent child, the child will continue to receive benefits until no longer dependent, even if the economic recovery compensation or impairment compensation would have run out in five years Minn. Stat. § 176.111, subd. 1, (1986).
\end{footnotes}
Under this section, no other relatives, except a spouse or child, are eligible to receive impairment compensation or economic recovery compensation that was being paid to the employee at the time of death. If there is no spouse or child, the obligation to pay impairment compensation or economic recovery compensation ends. 174

(d) Death as a Result of the Injury

No further payments of impairment compensation or economic recovery compensation are required if the employee dies from causes attributable to the injury. 175 In this case, Minnesota Statutes section 176.111 applies, and death benefits are payable accordingly.

III. PERMANENT PARTIAL DISABILITY

A. Introduction

About five percent of workers' compensation injuries in Minnesota result in claims for permanent partial disability compensation. 176 Permanent partial disability compensation, also referred to as PPD, is the compensation paid for permanent impairment resulting from a work injury. Permanent partial disability is present when, after reaching maximum medical improvement (MMI), the injured worker has not returned to his or her pre-injury physical condition.

Unlike a tort recovery, evidence of age, occupation, or the effect of the disability on earning capacity and the employee's daily activities is not relevant to a determination of PPD compensation. Permanent partial disability compensation is "scheduled" so that all employees with the same injury are considered to have the same degree of PPD.

The merits of the scheduling approach are several. Scheduling promotes consistency and predictability in the rating process, as well as insurer accuracy in reserving and pricing

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On the other hand, if the economic recovery compensation or impairment compensation had 12 years to run and a dependent child was 17 at the time of death, the payment would cease prior to 12 years and at the time the child was no longer dependent.

174. *Id.* § 176.101, subd. 3r(d) (1986).
175. *Id.* at subd. 3r(e).
176. MINNESOTA WORKERS' COMPENSATION INSURERS' ASSOCIATION, 1987 RATERMAKING REPORT [hereinafter 1987 RATERMAKING REPORT]. This figure includes those injuries for which no lost time is reported.
practices. Scheduling also promotes promptness and certainty of awards, helps to avoid disputes which may interfere with the process of recovery of earning capacity, and makes it much more likely that the employee will be able to obtain compensation without costly and lengthy litigation. These are key goals of the workers' compensation system.\(^{177}\)

### B. Historical Background

Permanent partial disability compensation has been scheduled in Minnesota since 1913, when the first workers' compensation act was enacted.\(^{178}\) The basic format of the schedule remained unchanged until its repeal in 1983.\(^{179}\) During the intervening seventy years, additional disabilities were added to the schedule and the scheduled compensation was increased.

The statutory method for compensating PPD has been criticized as contributing to high workers' compensation costs in three respects. First, permanent partial disability benefits are large in comparison to other states.\(^{180}\) Second, permanent partial disability benefits are inequitably distributed. In multiple injury situations, the potential for unusually high awards was increased in the past by stacking.\(^{181}\) Moreover, Minnesota...

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\(^{177}\) On the other hand, scheduling may be unfair in particular cases. The typical unfairness example is that of the concert pianist and the attorney, each of whom loses a little finger. Considering the actual effects on earning ability in their respective occupations, PPD alone appears to overcompensate the attorney and undercompensate the pianist. The disability, however, is compensated by the sum of all indemnity benefits. The pianist will receive substantially more in temporary total disability, and possibly temporary partial disability, in addition to PPD. The pianist would also be eligible for rehabilitation and retraining benefits to restore lost earning capacity. Because the attorney would return to his previous job, the total dollar amount of PPD (impairment compensation) would be less than the amount of PPD (economic recovery compensation) received by the pianist. Furthermore, both impairment and economic recovery schedules are set to provide relatively more compensation for more serious injuries, based on studies indicating that actual economic losses tended to be undercompensated for more serious injuries and overcompensated for less serious injuries. Permanent partial disability alone is not adequate to compensate disability in most cases.

\(^{178}\) Act approved Apr. 24, 1913, ch. 467, § 13, 1913 Minn. Laws 675, 678.


\(^{180}\) INSURANCE DIVISION REPORT, supra note 5, at 12. The average impairment award in Minnesota was $5,600, compared with $3,100 in Wisconsin. Id.

\(^{181}\) Id. For example, spinal injury could result in stacking benefits for back impairment, arm impairment, and leg impairment. See, e.g., Lerich v. Thermo Systems, 292 N.W.2d 741 (Minn. 1980) (employee entitled to have disability benefits for simultaneous injuries computed as loss of separate members instead of double disability schedules).
Statutes section 176.101, subdivision 3 (43) increased compensation by fifteen percent in multiple injury cases. Finally, litigation of PPD benefits was high, thereby increasing the processing cost of the system.\textsuperscript{182}

\textbf{C. Legislative Intent}

The 1983 legislature authorized the promulgation of a new schedule by rule and repealed the existing schedule.\textsuperscript{183} Several aspects of the legislative directive regarding promulgation of the new schedule are instructive in determining the legislative intent.

First, the schedule was to be a whole body schedule, based on the percentage of disability to the body as a whole.\textsuperscript{184} The statutory schedule, on the other hand, was expressed in terms of weeks of compensation payable for the disability.\textsuperscript{185}

Second, a ceiling was placed on the maximum PPD amount.\textsuperscript{186} So long as one assumed that 500 weeks was the maximum number of weeks payable to an employee, the statutory schedule approximated a whole body schedule. The assumption, while commonly held, was never legislatively expressed. In some cases, PPD compensation in excess of 500 weeks was awarded, culminating in the \textit{Mack v. City of Minneapolis}\textsuperscript{187} award of 2,820 weeks. At a weekly wage of $225, the award exceeded $600,000. The maximum PPD award under the new schedule is one-hundred percent of the whole body or $480,000.\textsuperscript{188}

\textsuperscript{182.} \textit{INSURANCE DIVISION REPORT, supra} note 5, at 12.
\textsuperscript{183.} Act approved June 7, 1983, ch. 290, §§ 86, 173, 1983 Minn. Laws 1310, 1358, 1404-05. The old schedule was contained in \textit{MINN. STAT.} § 176.101, subd. 3 (1982). In 1979, the Commissioner was authorized to establish by rule a schedule for internal organs. \textit{MINN. STAT.} § 176.105, subd. 2 (1978 & Supp. 1979). These rules, which were not promulgated, were intended to expand rather than to replace the statutory schedule.
\textsuperscript{184.} \textit{MINN. R.} 5223.0010, subp. 1 (Supp. 1986).
\textsuperscript{185.} \textit{Compare} \textit{MINN. R.} 5223.0010-.0250 (Supp. 1986) \textit{with} \textit{MINN. STAT.} § 176.101, subd. 3 (1982).
\textsuperscript{186.} \textit{See infra} note 191 and accompanying text.
\textsuperscript{187.} 33 W.C.D. 289 (1980).
\textsuperscript{188.} Depending on the employee’s weekly wage, the monetary amount for 100\% whole body disability under the ERC schedule varies from $79,200 to $396,000 at the 1984 statutory maximum weekly wage of $330 and the minimum wage of $66. Minnesota Statute section 176.101, subdivision 3t requires that economic recovery compensation be at least 120\% of impairment compensation. Since impairment compensation for 100\% disability is $400,000, the economic recovery compensation is 120\% of that amount. Assuming no other statutory changes, $480,000 will be
Third, the rules were required to promote objectivity and consistency in disability evaluations and ratings.\textsuperscript{189} One of the perceived problems with disability determinations was the extent to which medical judgment was relied upon in determining the percentages of disability in each case.\textsuperscript{190} It was not unusual to see one doctor opine that a back injury caused an employee a twenty-five percent disability to the back, while another doctor would conclude the employee’s back was ten percent disabled. The rating discrepancies encouraged litigation and delayed resolution of the employee’s claim.\textsuperscript{191} The wide variability in ratings underscored the imprecision of the rating procedure. By requiring objectivity and consistency, the legislature reduced the role of medical judgment in the assignment of ratings, so that incentives to litigate are reduced. Moreover, the directive embodies the legislative rejection of the tort system’s case-by-case approach to compensating for disability.

Fourth, the new schedule was to maintain the total pay-out of PPD benefits from a system perspective. The legislature required an actuarial evaluation of the new schedule so that the aggregate total of PPD benefits under the new schedule was approximately equal to the aggregate total of PPD benefits payable under the old schedule.\textsuperscript{192} While awards for specific injuries could vary between the new and old schedules, the overall system pay-out was to remain unchanged. Thus, consistency and objectivity were not to be attained at the expense of benefits.

Finally, the factors considered in promulgating the rules give additional indications of the legislative purpose in the new disability schedule.\textsuperscript{193} Of these additional legislative concerns,
several merit comment. First, clause 6, regarding pre-existing disabilities, must be read in conjunction with Minnesota Statutes section 176.101, subdivision 4a regarding apportionment for a pre-existing medical condition. The apportionment rule in the new disability schedule is specifically limited to disabilities subject to apportionment. Under the 1983 amendment to Minnesota Statutes section 176.101, subdivision 4a, apportionment is available where: (1) a medical report preceding the injury documents the pre-existing disability; and (2) the pre-existing disability arises from a congenital condition or is the result of a traumatic injury or incident. Thus, pre-existing disabilities due to age or nonspecific degeneration cannot be apportioned. In effect then, apportionment is available in any case where a medical report pre-dating the injury objectively documents the pre-existing disability, and the pre-existing disability is congenital or traumatic.

Second, clause 5, reduction of litigation, repeats one of the prime objectives of the 1983 reform act. The new disability schedule is designed to promote this objective with the specificity and detail of its rating systems, and by eliminating the need for expert opinion in establishing the disability rating.

Finally, clauses 2, 3, and 4 evince a legislative desire to utilize the expertise of other states or organizations in the development of the new schedule. As a result, the new schedule resembles that of Wisconsin, and the American Medical Association Guides to the Evaluation of Permanent Impairment and the Manual for Orthopaedic Surgeons in Evaluating Permanent

d bound by the degree of disability in these sources but shall adjust the relative degree of disability to conform to the expressed intent of clause (a);
(4) rules, guidelines, and schedules that have been developed by associations of health care providers or organizations provided that the commissioner is not bound by the degree of disability in these sources but shall adjust the relative degree of disability to conform to the expressed intent of clause (a);
(5) the effect the rules may have on reducing litigation;
(6) the treatment of preexisting disability with respect to the evaluation of permanent functional disability provided that any preexisting disabilities must be objectively determined by medical evidence; and
(7) symptomatology and loss of function and use of the injured member.

Id. at subd. 4b (1986).

194. See Minn. R. 5223.0250 (Supp. 1986).


196. See also Minn. Stat. § 176.021, subd. 3 (1986) (providing that ratings are to be based on objective medical evidence).
D. Interpretation of the New Schedules

The development of the schedules involved the cooperative efforts of the Department of Labor and Industry, the Minnesota Medical Association, the National Council on Compensation Insurance, and several other parties. The Medical Association organized a task force of approximately forty doctors in various fields of expertise. These doctors reviewed existing schedules and methods for rating disability, and proposed schedules for inclusion in the new schedule. Actuaries from the Minnesota Department of Commerce and the National Council on Compensation Insurance reviewed the proposed draft schedules and concluded that the aggregate total of impairment and economic recovery compensation under the new schedule would be approximately equal to the aggregate amount payable for permanent partial disability under the statutory schedule.

The new disability schedules are arranged by body parts. For each body part or system, impaired conditions are described in diagnostic terms and a percent of whole body disability assigned to each condition. The diagnostic description and the corresponding percent of whole body disability is termed a category. The listing of categories in the rules is exhaustive. Unlike the statutory schedule, the new disability schedules contain no catch-all provisions for impairments or categories not listed in the schedule. The catch-all provision was specifically excluded from the rules because of the comprehensive detail of the new schedule, and because of the concern for abuse. The new schedules contain thousands of categories, compared with

197. Hearing Record for Temporary Rules [hereinafter Hearing Record] Exhibit M.
198. See id.; see also Statement of Need and Reasonableness for Temporary Rules for the study of other states' schedules, and the references to the medical impairment guides that were utilized.
199. Hearing Record, supra note 197, at Exhibit J.
201. See generally id. at 5223.0030-.0250.
202. Id. at 5223.0020, subp. 9.
203. Id. at 5223.0010, subp. 3; see also Minn. Stat. § 176.101, subd. 3(a) (1986).
approximately fifty in the old statutory schedule. The limited nature of the old statutory schedule clearly warranted the catch-all provision for disabilities not included.

The categories included in the new schedules represent a consideration of the impact of the disability on employability and ability to work and function in the workplace. The schedule may be amended so that additional categories can be added or deleted.

Another important aspect of the schedule is the requirement that only the categories listed in the schedule will be used when rating the extent of disability. Where a condition seems to fall between two categories in the schedule and neither diagnostic condition in the category accurately and completely describes the employee's condition, the diagnostic description which best describes the employee's condition is to be selected. This requirement of the new schedule is another attempt to limit the need for discretionary judgment and to reduce disputes.

For example, if a cervical spine injury is treated by surgery, the three possible disability ratings for the resulting impairment are nine percent, eleven percent and thirteen percent. The doctor cannot rate the disability at eight percent, ten percent or twelve percent. The category selected depends on whether the doctor considers the surgical results to be excellent, average, poor, or to have resulted in persisting symptoms. The rating is dictated by the diagnosis, and does not require the doctor to make an additional judgment regarding the percent of whole body disability based upon the diagnosis. Thus, the function of the expert under the new schedule is to diagnose the condition, not to make a judgment regarding the percent of whole body disability. The restricted medical involvement is intended to reduce opportunities for litigation and to promote equity in the ratings.
The rules also prohibit cumulation of categories to obtain a higher award. "Where a category represents the disabling condition, the disability determination shall not be based on the cumulation of lesser included categories."\textsuperscript{210} The problem of cumulation of lesser included categories was the subject of case law determinations under the old statutory schedule.\textsuperscript{211} The prohibition in the new schedule essentially continues the existing case law regarding cumulation.

In those cases where cumulation is necessary to rate the disability, the rules require the ratings of the various categories to be combined using the statutory combination formula of Minnesota Statutes section 176.105, subdivision 4(c).\textsuperscript{212} This statutory formula is the formula used in the AMA Guides to generate the combined values table.\textsuperscript{213} The combined values formula operates to cap the maximum whole body disability in any situation at one-hundred percent. The rule prescribes use of the combined values formula when two or more categories are necessary to describe the disabling condition. The ratings of the categories may not be arithmetically added.\textsuperscript{214}

The rule also incorporates by reference several standard medical texts and references.\textsuperscript{215} The incorporations reduce the physical size of the rules, and point to appropriate interpretation guides. Documents are incorporated by reference only to the extent necessary for definition or to the extent spe-

\textsuperscript{210} Id. at 5223.0010, subp. 2.

\textsuperscript{211} See, e.g., Hanson v. Hayes, 225 Minn. 48, 54, 29 N.W.2d 473, 476-77 (1947) (legislature intended that compensation for loss of more than one finger, in a single accident, should be aggregate of compensation for specific fingers, so as not to exceed compensation for loss of hand); State ex rel Kennedy v. District Court, 129 Minn. 91, 93-94, 151 N.W. 530, 531 (1915) (court should not have attempted to separate injuries to arm above the elbow from those to hand, but should have found percentage of total disability to arm as a whole).

\textsuperscript{212} While the statute requires the formula for only simultaneous injuries, the rules have adopted the combination formula regardless of simultaneity. Minn. Stat. § 176.105, subd. 4(c) (1986).

\textsuperscript{213} American Medical Association, Committee on Rating of Mental and Physical Impairment, Guides to the Evaluation of Permanent Impairment, 158-60 (2d ed. 1984) [hereinafter AMA Guides] (available at the University of Minnesota, Biomedical Library).

\textsuperscript{214} For example, the employee's accident resulted in impairment of the back, 10.5% under Minnesota Rules 5223.0070, and of the elbow, 30% under Minnesota Rules 5223.0120, subpart 2A. Applying the statutory combination formula, the combined whole body disability is 37.35%. See Minn. Stat. § 176.105, subd. 4(c) (1986).

\textsuperscript{215} Minn. R. 5223.0010, subp. 4 (Supp. 1986).

http://open.mitchellhamline.edu/wmlr/vol13/iss4/6
specifically referenced in a schedule.\textsuperscript{216}

The definition section of the rules contains definitions of terms used in the rules.\textsuperscript{217} Most of these definitions are medical terms. The rule provides that terms not defined are used as defined in Dorland's Illustrated Dictionary or other documents incorporated by reference.\textsuperscript{218} Several of these defined terms are critical to the application of the schedule.\textsuperscript{219}

\textbf{E. Conclusion}

As the new schedules apply only to injuries occurring on or after January 1, 1984, it is too early to assess their full impact. Further, the learning process of familiarizing claims personnel, medical practitioners, and attorneys will require experience and time. Anecdotal evidence, however, indicates that the schedules are beginning to fulfill their intended purposes. Because the schedules are in rule form, a rulemaking proceeding

\begin{itemize}
  \item \textsuperscript{216} See id. at 5223.0030, subp. 4C. For example, the motility chart in the eye section of the AMA Guide is specifically incorporated into the eye schedule. Snellen Charts and the AMA rating reading card, standard charts for determining sight loss, are also incorporated into the eye schedule. See id. at 5223.0030. Dorland's Illustrated Dictionary is incorporated for definitional purposes. See id. at 5223.0020, subp. 1.
  \item \textsuperscript{217} For example, terms from the back schedule which are defined in the definition section include demonstrable degenerative changes, objective clinical finds, and postural abnormality. See Minn. R. 5223.0020, subps. 11, 30, 31 (1986).
  \item \textsuperscript{218} Id. at subp. 1.
  \item \textsuperscript{219} See, e.g., id. 5223.0030 (Supp. 1986) (revised eye schedule corrects inadequacies of statutory schedule by determining visual impairment consistent with present medical practice); id. 5223.0040 (use of defined terms in ear schedule compensates for loss to hearing system rather than loss to ear, consistent with AMA Guides and practicing otolaryngologists); id. 5223.0040, subp. 6 (ear schedule disallowing adjustment for hearing loss due to aging, although adjustment may be allowed if condition documented as a preexisting impairment); id. 5223.0040, subp. 7 (ear schedule disallowing adjustment for complaint of ringing in ear, based on subjective nature of complaint); id. 5223.0050 (excluding skull fractures and distinguishing between filled defects, or artificially replaced skull areas, and unfilled defects); id. 5223.0060 (central nervous system schedule addresses impairments in terms of disorders of the cranial nerves, the spinal cord, and the brain); id. 5223.0070-.0170 (musculo-skeletal schedules dividing impairments into those of the back, the upper extremities, and the lower extremities); id. 5223.0080, 5223.0150 (amputation schedules for upper and lower extremities include calculation of motor and sensory loss); id. 5223.0180-.0220 (internal organ schedules based generally on AMA Guide); id. 5223.0230 (skin disorder schedule evaluating disability according to the effect of the disorder on ability to function, perform activities of daily living, and degree of treatment required, without compensation for disfigurement or scarring); id. 5223.0240 (burn schedule providing method for determining percentage of body surface area affected, but limiting maximum disability to the whole body due to burns to 70%); id. 5223.0250 (apportionment for preexisting impairment).
\end{itemize}
under the Administrative Procedure Act, rather than legislative action, is available to correct any deficiencies which may arise. In 1985, the commissioner replaced the temporary rules with permanent rules. The permanent rules corrected deficiencies noted under the temporary rules and added several clarifying categories. As experience with the schedules increases, additional areas where improvement is needed will probably be found. It is therefore likely that the rules will be refined as their use increases.

IV. Administrative Conference Procedures Under the New Workers' Compensation Law

A. Introduction

One of the prominent features of the workers' compensation reform was the creation of informal administrative conferences. Rehabilitation conferences were conceived in 1979 to resolve disputes regarding rehabilitation issues with a minimal disruption to the employee's rehabilitation progress. These were followed in 1983 by medical and discontinuance conferences.

B. Discontinuance Conferences Under Minnesota Statutes Section 176.242

1. Overview

The legislature significantly altered the procedure for discontinuing workers' compensation benefits in 1983. Until 1985, benefits were subject to immediate discontinuance with the service of a Notice of Intention to Discontinue Benefits (NOID). In 1983, the legislature created administrative conferences to screen proposed discontinuances.

2. Statutory Framework

Prior to 1983, Minnesota Statutes section 176.241 governed the procedure for discontinuing workers' compensation benefits. The legislature then added Minnesota Statutes section 176.242 in 1983. Operating in tandem, sections 176.241 and 176.242...
176.242 prescribe the method for discontinuance of benefits.\textsuperscript{223}

In 1982, Minnesota Statutes section 176.241 required the employer and insurer to follow a few simple steps in order to discontinue benefits. First, they were to file a NOID with the Department of Labor and Industry, serving a copy upon the employee.\textsuperscript{224} The NOID stated the date and the reason for the proposed discontinuance, and was accompanied by relevant medical reports. Under Minnesota Statutes section 176.241, subdivision 2, the filing of this information immediately suspended the obligation of the employer and insurer to pay benefits. The only remedy available to the employee was to file an objection to discontinuance with the Commissioner.\textsuperscript{225} The Commissioner then referred the matter to the Office of Administrative Hearings (OAH) for a hearing before a compensation judge. Pending the outcome of the hearing, nearly a year later, the employee received no benefits. The decision of the compensation judge was appealable to the Workers' Compensation Court of Appeals (WCCA).\textsuperscript{226} Section 176.471 vested jurisdiction in the Minnesota Supreme Court to review decisions of the WCCA.

The adoption of Minnesota Statutes section 176.242 superimposes upon this automatic discontinuance procedure a mechanism for screening proposed discontinuances before they take effect. Under subdivision 1, the employer and insurer continue to initiate the discontinuance by filing the NOID with the Commissioner and serving a copy on the employee. Section 176.241 previously permitted the employer and insurer to automatically suspend benefits at this point. However, the filing of the NOID now confers on the employee the right to request an administrative conference to determine the appropriateness of the proposed discontinuance.\textsuperscript{227} The employee's request for a conference must be received by the


\textsuperscript{224} See \textit{Minn. Stat.} § 176.241, subd. 1 (1982).

\textsuperscript{225} \textit{Id.} at subd. 3.

\textsuperscript{226} \textit{Id.} § 176.241.

\textsuperscript{227} See \textit{id.} § 176.242, subd. 2(a) (1986).
Department within ten days after the filing of the NOID.\textsuperscript{228}

Under Minnesota Statutes section 176.242, subdivision 2(a) the Commissioner is required to schedule an administrative conference within ten days after timely receipt of the employee’s request.\textsuperscript{229} The purpose of the conference is to determine whether “reasonable grounds exist for a discontinuance.”\textsuperscript{230}

Within five working days after the conference, the Commissioner must issue a decision either granting or denying the requested discontinuance.\textsuperscript{231} This decision is binding on all parties.\textsuperscript{232} As under the old system, an employee who is dissatisfied can file an objection to discontinuance with the Commissioner.\textsuperscript{233} Similarly, an aggrieved employer and insurer can file a petition to discontinue benefits with the Commissioner.\textsuperscript{234} The matter will then be referred to a compensation judge for a hearing \textit{de novo}.\textsuperscript{235} Minnesota Statutes section 176.242, subdivision 6 provides that the Commissioner’s decision continues in effect, notwithstanding the filing of an objection or petition.\textsuperscript{236}

Generally, the filing of a NOID entitles the employee to an administrative conference before the discontinuance of benefits. There are three exceptions to this rule. Where the employee fails to file a timely request for a conference, the employer and insurer may suspend payments.\textsuperscript{237} Similarly, benefits may be stopped if the employee timely requests a conference but fails to appear without good cause.\textsuperscript{238} Finally, the Commissioner may determine that a conference is not neces-

\textsuperscript{228} Originally the service, not the filing, of the NOID triggered this 10-day period. \textit{See} Act approved Apr. 23, 1984, ch. 432, § 39, 1984 Minn. Laws 120.

\textsuperscript{229} If the conference is requested by an employer or insurer, it must be scheduled within 30 calendar days. \textit{See} id.

\textsuperscript{230} \textit{Minn. Stat.} § 176.242, subd. 2(e) (1986).

\textsuperscript{231} \textit{Id.} at subd. 4.

\textsuperscript{232} \textit{Id.}

\textsuperscript{233} \textit{See} id. § 176.241, subd. 3(a) (1986).

\textsuperscript{234} \textit{Id.} § 176.242, subd. 5; \textit{see} id. § 176.241, subd. 3(b).

\textsuperscript{235} \textit{Id.} § 176.241, subds. 3(a), (b) (1986).

\textsuperscript{236} Where the Commissioner disallows the discontinuance, the insurer may recover the overpayment in the manner prescribed by Minnesota Statutes section 176.179 (1986). \textit{See} Act approved Apr. 23, 1984, ch. 432, § 41, 1984 Minn. Laws 121.

\textsuperscript{237} \textit{Minn. Stat.} § 176.242, subd. 2(b) (1986).

\textsuperscript{238} \textit{See} id.
In each of these circumstances, the employee’s remedy is to file an objection to discontinuance with the Commissioner. The matter will then be heard *de novo* by a compensation judge.

3. Purposes of Discontinuance Conferences

Administrative conferences correct several deficiencies in the prior discontinuance procedure. First, administrative conferences speed up the resolution of discontinuance disputes. Under the rigid deadlines established by Minnesota Statutes section 176.242, the Commissioner must issue an interim decision allowing or denying the requested discontinuance within approximately twenty-five days after the filing of the NOID. Previously, it could take over a year to obtain a hearing on a discontinuance. The new system thus shortens interruptions in benefits. It also assists in the employee’s successful return to work, primarily because disputes regarding noncooperation with rehabilitation are often resolved with the disposition of the discontinuance issue.

Administrative conferences also promote integrity in the discontinuance procedure. The discontinuance may be permitted only upon a showing, by a preponderance of the evidence, that reasonable grounds exist for the discontinuance. In effect, the Commissioner subjects the proposed action to the same type of scrutiny that a compensation judge would. This screening now occurs prior to discontinuance rather than months after benefits have been suspended. Early screening of proposed discontinuances avoids the improper discontinuances that were pervasive under the old, automatic procedure.

Finally, in order to minimize any damage to the relationship between the employee and employer, the format of administrative conferences is designed to be nonadversarial. Confer-

239. *Id.* at subd. 3.
240. *Id.* § 176.241, subd. 3(a).
241. *See id.*
242. *Id.* § 176.021, subd. 1(a).
243. Under the old system, compensation judges granted as many as 80% of the objections to discontinuance. This suggests that benefits were often improperly suspended. From December, 1983, to May, 1985, only 18% of the Commissioner’s decisions resulted in either petitions or objections to discontinuance under Minnesota Statutes section 176.241 (1986).
ences are conducted informally by a rehabilitation and medical specialist at the Department of Labor and Industry. Rehabilitation and medical specialists, who are vocational and medical experts, are expected to objectively evaluate the disputed issues. Parties may bring their attorneys, but most find it unnecessary to do so. At the conference, the specialist invites all parties to state the issues in dispute, explain their viewpoints, and submit any information that they wish. While discussion is encouraged, cross-examination is not allowed, parties are not sworn, formal rules of evidence are not followed, and no verbatim record is prepared. Every effort is made to preserve the informality of conferences in order to promote frank discussion and resolution of issues.244

The specialist attempts to help parties reach agreement whenever possible. Where parties are unable to agree, the specialist determines the issues on the basis of oral and written information available to the parties.

4. Legal Challenges to Discontinuance Conferences

Since their inception in July, 1983, discontinuance conferences have been subject to many lawsuits in several courts. Notably, the conferences have thus far survived each legal challenge asserted.245

The legal attacks on the discontinuance system fall into two categories. Some lawsuits challenged the constitutionality of Minnesota Statutes section 176.242 as a violation of procedural due process.246 Others attacked the conference procedure by challenging the method of review of administrative decisions.247 The latter group of lawsuits were by far the more numerous. They were litigated in the workers’ compensation system.

a. Constitutional Challenges

Minnesota Statutes section 176.242 has been attacked as a violation of procedural due process. In Great Central Insurance

244. See Minn. R. 5220.0800 (Supp. 1986).
245. See infra notes 248-304 and accompanying text.
Company v. Emory Emerson and Steve Keefe, the insurer sought preliminary injunctive relief on the grounds that: (1) the decision-maker was not a lawyer, (2) formal rules of evidence were not applied, (3) no verbatim record was maintained, and (4) overpayments can be recovered only as a credit against future benefits. In Pauly v. MV Gas Company and New Hampshire Insurance Company, the insurer raised many of the same issues in support of its petition for a writ of prohibition. The insurer also asserted that the Commissioner had exceeded his statutory authority by applying the "preponderance of the evidence" test rather than the "prima facie case" test. Neither lawsuit was successful.

It is well-settled that due process requires notice and an opportunity to be heard prior to the deprivation of a protected property interest. The nature of the process due depends on "the decision to be made [and] the capacities and circumstances of those who are to be heard." Although the procedure must be tailored to the circumstances of each case, the general rule is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." In Mathews v. Eldridge, the United States Supreme Court applied a three-part test to determine precisely what process is due. The Mathews test requires three factors to be balanced: (1) the nature and weight of the private interest affected by the official action, (2) the risk of erroneous deprivation of such an interest through the procedures used, and (3) the public interest in requiring additional safeguards. Courts first inquire into the nature and weight of the private interest to determine

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251. The issues raised were: (1) the decision-maker is not an attorney; (2) no verbatim record is maintained; and (3) administrative decisions are not appealable, but subject to de novo review. Id.
256. The Minnesota Supreme Court recognized this three-part test in Heddan v. Dirkswager, 336 N.W.2d 54, 59-60 (Minn. 1983).
257. Mathews, 424 U.S. at 335.
what hardship would result from erroneous deprivation. Under the second element of the test, the risk of erroneous deprivation, courts examine the reliability of safeguards built into the hearing procedure. Finally, the public interest served by existing procedures is balanced against the burdens to the State in adding additional safeguards.

With respect to the first prong of the test, the recipient of benefits is usually presumed to have the requisite property interest in the continuing receipt of benefits. This is because the disabled employee who is without benefits obviously sustains a greater hardship than the large insurer who pays benefits. However, all of the challenges to the discontinuance procedure have been brought by insurers whose property interest is in the discontinuance of benefits. Employees have probably not contested the discontinuance conference procedure because it affords them greater protection than the automatic termination system which it replaced.

Discontinuance conferences provide considerably more process than is due under the Mathews test. In Mathews the United States Supreme Court approved a procedure for terminating Social Security disability benefits which provided no hearing before termination. The recipient could only object in writing and explain why benefits should continue. A formal hearing followed the termination of benefits.

Administrative conferences, on the other hand, occur prior to the termination of benefits. They also conform to the other characteristics of evidentiary hearings set forth in Mathews. These include timely and adequate notice with reasons for the proposed termination, presentation of oral evidence, counsel, if desired, an impartial decision maker, and a statement of reasons for the decision and evidence considered. Contrary to the claims in the Emerson and Pauly lawsuits, due process does not require that decision-makers have legal training. In Mathews, the person deciding whether to terminate benefits was not a lawyer. Because over seventy percent of the discontinuance conferences involve rehabilitation issues, reha-

258. See Goldberg, 397 U.S. at 266.
259. Mathews, 424 U.S. at 349.
260. See Minn. Stat. § 176.242, subd. 8 (1986) (an administrative conference prior to discontinuance of workers' compensation benefits is required).
261. See Mathews, 424 U.S. at 325 n.4; see also Goldberg, 397 U.S. at 266-71.
bilitation expertise is perhaps more desirable than legal expertise. Similarly, as in all administrative proceedings, formal rules of evidence are not required by due process. In *Kahl v. Minnesota Wood Speciality, Inc.*, the Minnesota Supreme Court expressly supported the rejection of strict rules of evidence in workers' compensation proceedings.

Finally, a verbatim record is unnecessary, precisely because administrative decisions are not appealable. A *de novo* hearing before a compensation judge is the only remedy available to a party aggrieved by an administrative decision under Minnesota Statutes section 176.241. Because the hearing is *de novo*, the compensation judge should not rely on any record of the conference. A *de novo* hearing is actually fairer than an appeal, as the petitioner need not prove that the prior decision is unsupported by substantial evidence. The judge makes entirely new findings without regard to the Commissioner's decision.

The real issue raised by these lawsuits is insurers' difficulty recovering erroneous payments. This occurs where the Commissioner orders the continuation of benefits but the compensation judge later permits the discontinuance. As only approximately eighteen percent of the Commissioner's decisions are pursued to a hearing *de novo*, insurers rarely need to recover overpayments. Further, the insurer can minimize overpayments by promptly filing for an expedited hearing. Where overpayments occur, however, they may be offset against future benefit payments.

Beyond the constitutional objections, the *Pauly* case also challenged the Commissioner's use of the "preponderance of the evidence" test and rejection of the "prima facie case test." Section 176.242, subdivision 2(e) directs the Commissioner to determine "whether reasonable grounds exist for a discontinu-


263. 277 N.W.2d 395, 398 (Minn. 1979). Minnesota Statutes section 176.411, subdivision 1 (1986) also allows judges to conduct an independent investigation to ascertain the substantial rights of the parties. See *Moes v. City of St. Paul*, 402 N.W.2d 520 (Minn. 1987).

264. See infra notes 278-309 and accompanying text; Minn. Stat. § 176.421, subd. 6 (1984); see also *Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54 (Minn. 1984).


266. Minn. Stat. § 176.242, subd. 8 (1986). This may not be an available remedy where the insurer is not primarily liable for the injury so that no future benefits are payable. See *Allmendinger v. Camelot*, No. 365-98-9237 (WCCA Mar. 18, 1985).
The Commissioner is further required by subdivision 4 to consider the information provided by the parties at the conference. Finally, section 176.021, subdivision 1a prescribes that "[a]ll disputed issues of fact arising under [Chapter 176] shall be determined by a preponderance of evidence." Thus, the legislative mandate is to determine whether reasonable grounds exist by a preponderance of evidence. This means that all evidence submitted in support of and in opposition to disputed facts must be weighed. The Commissioner must find in favor of the party whose position is more probably true than not.

The "preponderance of the evidence" test is significantly different from the "prima facie case" test. Under the prima facie case test, the Commissioner would have to find for the insurer after a prima facie case is made. The Commissioner would ignore any evidence produced by the employee once a prima facie case is made. This contravenes the requirement that the Commissioner consider all information presented by the parties.

The prima facie case test also conflicts with the policy underlying section 176.242. Discontinuance conferences were intended to bring all parties together to discuss their differences. They were also designed to replace the former automatic discontinuance system. To consider only the insurer's information for the purpose of establishing a prima facie case would signify a return to the unilateral discontinuance system.

In another substantive challenge, the insurer charged that the Commissioner exceeded his statutory authority under section 176.242 by determining the primary liability of the insurer. The Commissioner asserted jurisdiction on the basis of the insurer's NOID, stating that the insurer was denying primary liability.

267. MINN. STAT. § 176.242, subd. 2(e) (1986).
268. Id. at subd. 4.
269. Id. § 176.021, subd. 1a.
271. Under Minnesota Statutes section 176.221, subdivision 1 (1986), an insurer is required to commence the payment of workers' compensation benefits after 14 days' notice or knowledge of an injury. If the insurer determines after 30 days' notice or knowledge that the injury is not compensable, the insurer may summarily terminate benefits by filing a Denial of Liability form. After this 30-day period, a NOID must be filed in order to discontinue benefits, after which the employee may be enti-
After unsuccessfully seeking direct review by the WCCA, the insurer moved for injunctive relief in Ramsey County District Court. Finding that the insurer's filing of a NOID conferred jurisdiction on the Commissioner, the judge denied the motion for a temporary injunction. In essence, the judge referred the insurer to its remedy before a compensation judge.

At the same time the judge granted the Commissioner's cross-motion for an order compelling obedience with the Commissioner's decision under section 176.351, subdivision 4. Because it disagreed with the Commissioner's decision, the insurer had unilaterally discontinued benefits in defiance of the decision. Thus, in International Insurance Co. v. Keefe, the district court confirmed that the parties must comply with the Commissioner's decisions even if they disagree with those decisions.

The International Insurance Co. result significantly contributes to the viability of the discontinuance procedure. Insurers are required to pay benefits under an interim decision despite the possibility that a compensation judge may later permit the discontinuance. This brings into clearer focus the chief question about the discontinuance procedure that remains unanswered by the International Insurance Co. case. Under what circumstances may the insurer recover its overpayments? In 1984, the legislature provided a partial answer to the question by specifying that insurers may reduce future benefit payments by the amount of the overpayment. As in International Insurance Co., however, this remedy is of no value where the insurer is later relieved of primary liability and thus owes no future benefits. While the Ramsey County District Court suggested in International Insurance Co. that Minnesota Statutes section 176.179 did not preclude restitution from the employee, this remedy

tied to a discontinuance conference. To promote prompt investigation of claims, untimely denials of liability are subject to greater scrutiny than timely denials.


274. Id.

275. See also Cigelski v. Valley Concrete, 37 W.C.D. 757 (1985).

has not been pursued to date, probably because restitution is rarely granted in workers' compensation. 277

b. Statutory Challenges

Most challenges to the discontinuance procedure were litigated in the workers' compensation system. As with the substantive challenges discussed in the prior section, these cases were usually brought by insurers who were searching for a method to avoid overpayments that were not subject to recovery. Gran v. Bituminous Consulting and Contracting Co. 278 was the first of these lawsuits. That case raised a narrow, technical issue with far-reaching implications for the discontinuance system. In Gran, the insurer appealed an interim decision issued pursuant to section 176.242, subdivision 5 directly to the WCCA. 279 This required the WCCA to determine whether as, a matter of statutory construction, de novo review before a compensation judge was the sole method of review.

Gran was also the first in a series of cases in which the Commissioner of Labor and Industry petitioned to intervene as a party. The WCCA granted the Commissioner's motion to intervene, recognizing for the first time that administrative as well as monetary interests are an adequate basis for intervention under section 176.242. 280 Since then, the Commissioner has intervened in many other cases to protect his interest in ensuring that the Workers' Compensation Act is properly administered. 281

In Gran, the Commissioner relied on section 176.242, subdivision 5 to argue that a formal hearing de novo before a compensation judge was the sole remedy available to aggrieved

277. Where an employer or insurer pays benefits to an employee through a mistake of fact or law, and the employee receives the benefits in good faith, an insurer may recover the overpayment only by taking a credit against future benefits for the same injury. Minn. Stat. § 176.179 (1986). Restitution is available to recover benefits received in bad faith. Lovett v. Honeywell, Inc., 35 W.C.D. 378 (1982); see Middendorf v. Tri-City Paving, No. 477-28-0999 (WCCA Feb. 18, 1987).

279. Id. at 677; Minn. Stat. § 176.242, subd. 5 (1986).
280. 36 W.C.D. at 678.
281. See Minn. Stat. §§ 175.17 (1) and 175.101, subd. 1 (1986). In 1984, section 176.361 was amended to permit the Commissioner to intervene as of right to protect his administrative interests. See Act approved Apr. 23, 1984, ch. 432, art. 2, § 45, 1984 Minn. Laws 97, 123; see also Act approved Mar. 25, 1986, ch. 461, §§ 30, 31, 1986 Minn. Laws 942, 957-59.
If the Commissioner grants the employer’s or insurer’s request to discontinue compensation and the employee objects to discontinuance, the employee may file an objection to discontinuance under section 176.241. If the Commissioner denies the request to discontinue compensation, the employer or insurer may file a Petition to Discontinue under Section 176.241.283

Under the Commissioner’s interpretation the decision of the compensation judge was then appealable to the WCCA pursuant to section 176.241.284 The insurer contended that while de novo review was available, a direct appeal to the WCCA could also be taken under section 176.442.285

Gran thus required the WCCA to analyze section 176.242, subdivision 5 under the principles of statutory interpretation in order to determine what method of review of administrative decisions was available. The purpose of statutory interpretation is to “discover and effectuate the legislative intent.”286 Some of the indicators of legislative intent are the object to be attained,287 the consequences of a particular interpretation,288 and legislative and administrative interpretations of the statute.289 In addition, under section 645.26, subdivision 1, specific provisions prevail over general provisions, and those enacted later in time supersede earlier provisions.

Applying these criteria to Gran,290 a de novo hearing under section 176.242, subdivision 5 was determined to be the sole remedy available.291 Section 176.242, subdivision 5 was more specific and enacted later than section 176.442.292 While sec-
tion 176.242, subdivision 5 applied only to decisions arising from discontinuance conferences, section 176.442 governed all decisions of the Commissioner.

The "object to be attained" further supported the decision of the WCCA in *Gran*, interpreting section 176.242, subdivision 5 to be a sole remedy. The court stated that section 176.242 was intended to complement the existing formal discontinuance procedure provided by section 176.241 by adding an informal preliminary screening procedure for proposed discontinuances. The statutory sections interact in at least five different sets of circumstances. For example, if the employee fails to make a timely request for a conference after the NOID is filed, section 176.242, subdivision 2(b) refers the employee to the workers' compensation court under section 176.241. Similarly, section 176.242, subdivision 6 prescribes that the interim decision is binding, subject to a later determination by a compensation judge. Another allusion to the de novo hearing remedy appears in section 176.242, subdivision 7 which states that the Commissioner's decision qualifies as notice which meets the requirements for a proceeding under section 176.241. Moreover, section 176.242 contained repeated references to section 176.241, but no reference to section 176.442, the direct appeal provision. The interdependence of sections 176.241 and 176.242, thus strongly suggests that the object to be attained is for the de novo hearing to be the exclusive remedy.

Aside from the "object to be attained," a court must consider the "consequences of a particular interpretation" in determining the intention of the legislature. As noted earlier, the new discontinuance procedure was instituted partly to reduce litigation. Litigation is costly and time consuming, while administrative conferences facilitate the quick disposition of discontinuance disputes.

If administrative decisions were directly appealable under section 176.442, discontinuance conferences would quickly evolve into the formal hearings that they were intended to re-
place. At a minimum, a verbatim record would be required by subdivision 7 of section 176.421. The presence of recording equipment would inevitably lead to formal evidentiary rules to ensure an accurate record, and the uninhibited discussion that is necessary for agreement would dissolve as parties hardened their adversarial positions. Soon, administrative conferences would be indistinguishable from the formal evidentiary hearings conducted by a compensation judge under section 176.241. It was clearly not the purpose of section 176.242 to create a second, identical hearing procedure.

Direct appeals would also invite a return to the unilateral discontinuance system where benefits ended with the filing of the NOID. Under section 176.242, subdivision 8, an insurer must continue benefits at least until a conference is held. To ensure the uninterrupted flow of benefits, subdivision 6 of section 176.242 further provides that interim decisions are legally binding, pending a later determination by a compensation judge. If interim decisions were directly appealable, there would be no need for later determination by a compensation judge. Because an appeal stays proceedings below, an insurer could suspend benefits upon the initiation of an appeal.296

The WCCA dismissed Gran, holding that it lacked jurisdiction over an appeal from an administrative conference.297 The court concluded that direct appealability would contravene the intent of the legislature, which was to achieve the quick disposition of discontinuance disputes and to end the unilateral discontinuance procedure. During the pendency of the Gran appeal, many other direct appeals of administrative decisions were filed. To expedite the disposition of these matters, the Commissioner filed Motions to Dismiss for lack of subject matter jurisdiction. These motions were granted without a hearing.298

Subsequent to the Gran decision, the legislature enacted amendments to underscore that de novo review is the sole method of review of interim decisions.299 Notwithstanding this

296. An appeal to the supreme court stays the proceedings below. See Minn. Stat. § 176.491. This same rule has been applied to appeals that are pending before the WCCA.
additional statutory prohibition of direct appeals, aggrieved parties continued to file direct appeals to the WCCA. In *Allmendinger v. Camelot, Inc.*³⁰⁰ the insurer challenged the Commissioner's jurisdiction to conduct a conference.³⁰¹ While conceding that it had filed a NOID, the insurer claimed that the Commissioner had committed an error of law in determining its primary liability.³⁰² The insurer distinguished prior cases proscribing direct appeals on the basis that its appeal involved only purported errors of law, for which a verbatim record was unnecessary on appeal.³⁰³ The WCCA rejected this claim, finding that the *de novo* hearing was exclusive and that no exceptions were permitted by law.³⁰⁴

C. *Return to Work Conferences Under Minnesota Statutes Section 176.243*

At the same time that it created discontinuance conferences, the legislature also established "return to work" conferences. Under Minnesota Statutes section 176.243, these conferences are targeted toward certain employees who return to work after being disabled, but are medically unable to continue.³⁰⁵ The purpose of the conferences is to determine whether benefits should be restored to the employee.

1. *Statutory Framework*

Minnesota Statutes section 176.243 sets out the requirements and procedure for a return to work conference. To qualify for a conference an employee must meet several jurisdictional requirements. Two of the requirements appear in section 176.243, subdivision 9: "This section applies only

³⁰¹. See id.
³⁰². See id.
³⁰³. See id. This is the companion case to *International Ins. Co.* See supra notes 274-77 and accompanying text.
³⁰⁴. See id; see also *Glynn v. Acrometal Prod.*, No. 474-68-7956 (WCCA July 10, 1985) (another direct appeal alleging errors of law which was dismissed by the WCCA).
³⁰⁵. See MINN. STAT. § 176.243 (1986). This section requires the insurer to determine whether the employee has successfully returned to work, and it allows the employee to appeal from that determination. In 1985, the legislature added section 176.2421 to make administrative conferences available to a larger number of employees who are medically unable to return to work. See Act approved May 22, 1985, ch. 234, § 15, 1985 Minn. Laws 789, 753.
when the employee has received at least 45 days of temporary total or temporary partial compensation prior to return to work and if no rehabilitation plan has been approved.”

The third requirement appears in section 176.243, subdivision 1:

If an insurer has discontinued compensation to an employee because the employee has returned to work, the insurer shall contact the employee 14 calendar days after return to work. The insurer shall determine whether the employee is still employed after 14 days and shall also ascertain the wages being paid to the employee.

If the employee is still working on the fourteenth day and earning at least as much as at the time of injury, the insurer’s obligation ends. If the employee is not working when the contact is made, or if the employee is working at a lesser wage, the insurer must send written notice of such fact to the Commissioner. This notice, which must also be served on the employee, states whether the insurer intends to voluntarily resume payments. Section 176.243, subdivision 7 permits the insurer to decline to reinstate benefits unless and until the Commissioner orders that they be restored following an administrative conference. The third jurisdictional requirement, then, is that the employee has returned to work for less than fourteen calendar days.

An employee who meets these three requirements may request a conference to discuss the reinstatement of benefits. Under section 176.243, subdivision 3, the employee must make the request within ten calendar days after service of the insurer’s notice. The Commissioner must conduct the conference within fourteen calendar days after receipt of a timely request.

The format of these conferences is identical to the format used for discontinuance conferences. They are conducted by rehabilitation and medical specialists who invite the parties to

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307. Id. at subd. 1.
308. See id. at subd. 2 (requiring the insurer to act only if the employee is not working or is not earning as much as before the injury).
309. Id.
310. Id.
311. Id. at subd. 7.
312. Id. at subd. 3.
313. Id.
discuss their viewpoints. Formal rules of evidence are not applied, nor is cross-examination permitted. The purpose of the conference is solely to determine whether the employee's benefits should be restored. The specialist tries to help the parties reach agreement, but when the parties cannot agree, the specialist decides the matter. This decision is legally binding on the parties. It remains in effect pending a hearing de novo before a compensation judge under section 176.241. Again, de novo review is the sole method of review available.

Few return to work conferences have been held because the procedure is designed to accommodate only a small, specialized, group of injured workers. Most employees who unsuccessfully return to work must still file a claim petition to restore their benefits.

2. Purpose of Return to Work Conferences

The purpose of these conferences is to determine whether benefits should be restored where an employee previously received benefits, then returned to work, but was medically unable to continue. Before the enactment of section 176.243, all disabled employees who unsuccessfully returned to work were required to file a claim petition in order for benefits to be reinstated. Many employees did not want to risk returning to work and losing their benefits because it could take over a year to obtain a hearing and a decision on the petition if they were unable to continue. Administrative conferences, which are held less than a month after the employee stops work, were designed to encourage employees to attempt to return to work by expediting the restoration of benefits to employees who are medically unable to continue.

While providing an alternate remedy for certain injured workers, administrative conferences were not designed to replace the claim petition procedure. Section 176.243 established the jurisdictional requirements described earlier to

314. In the year ending December 1983, about half of these conferences ended in settlement. Department of Labor and Industry Statistics. (available at WCCA).
316. Id. at subd. 5.
target administrative conferences to seriously disabled employees who need a special incentive to try to return to work. An employee must have received forty-five days of benefits prior to returning to work to qualify as seriously disabled. As most employees return to work in less than a month, an employee who has been off the job for forty-five days is likely to have been quite severely disabled.

In addition, the employee must have returned to work for a maximum of fourteen calendar days to qualify for a conference. This requirement was added to ensure that conferences reached only employees who are medically unable to continue working due to a pre-existing disability. The legislature deemed fourteen days to be ample time for the employee to test whether the job is within medical capabilities. This also limited the duty of the insurer to monitor the employee for fourteen days. A longer period would have been difficult for the insurer to administer.

Finally, an employee with a rehabilitation plan is not eligible for a conference. Rehabilitation plans are developed and monitored by a qualified rehabilitation consultant (QRC). The plan specifies the method by which the QRC will help the employee find a suitable job. It may include a search for a similar position, retraining for a new type of job, medical treatment, or other services. With the professional assistance of a QRC in finding a suitable job, the employee is not in danger of returning to a job which may exceed medical restrictions. After the employee returns to work, the QRC continues monitoring for thirty days. If problems develop, a discontinuance conference may be available under section 176.242. Administrative conferences are thus intended for select employees whose risk of an unsuccessful return to work inhibits them from accepting a job offer. Administrative conferences reduce the risk by making possible the quick resumption of benefits in the event that the employee is medically unable to remain on the job. Most employees must still file a claim petition for the restoration of benefits.

3. Case Law Developments

The jurisdictional restrictions in section 175.243 have been
subject to only one legal challenge. In *Kissell v. Keefe*, an employee petitioned for a writ of mandamus to compel the Commissioner to conduct an administrative conference. The Commissioner declined because the employee did not satisfy the three jurisdictional requirements contained in section 176.243.

In *Kissell*, the employee had received only two continuous days of benefits, but had received intermittent benefits in excess of forty-five days. He had returned to work for over ten months, instead of fourteen days. While the employee had no approved rehabilitation plan when he requested a conference, the self-insured employer subsequently agreed to provide rehabilitation services. Based on these criteria, the Commissioner concluded that an administrative conference was not available to the employee.

The employee contended that administrative conferences should be available to all employees who unsuccessfully return to work regardless of the length of their return to work. He stated that forty-five days of intermittent benefits was adequate proof of the employee’s medical disability.

The court denied the writ of mandamus, finding that the employee met none of the jurisdictional prerequisites set forth in section 176.243. He had not received forty-five continuous days of benefits, had returned to work for over fourteen days, and had been approved for rehabilitation consultation. His remedy was to file a claim petition. The court thus legitimated each of the jurisdictional prerequisites to conferences.

**D. Rehabilitation Conferences Under Minnesota Statutes**

**Section 176.102**

1. **Statutory Framework**

In 1979, the legislature delegated to the Commissioner the responsibility to administer the mandatory rehabilitation system. Minnesota Statutes section 176.102, subdivision 6 elaborates on the scope of the Commissioner's authority:

The commissioner shall determine eligibility for rehabilita-

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321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
tion services and shall review, approve, modify or reject rehabilitation plans developed under subdivision 4. The commissioner shall also make determinations regarding rehabilitation issues not necessarily part of a plan including, but not limited to determinations regarding whether an employee is eligible for further rehabilitation and the benefits under subdivisions 9 and 11 to which an employee is entitled . . . .

The use of the words "including but not limited to" requires the Commissioner's authority to be construed to include all rehabilitation and retraining issues. Recently the WCCA construed this language to permit the Commissioner to decide whether a requested change in QRC is in the best interest of the parties. After the Commissioner approves the change, however, the employee can select the QRC of his choice.

The Commissioner's authority over rehabilitation is exclusive:

The commissioner has the sole authority under this chapter to determine eligibility for rehabilitation services under this section and to review, approve, modify, or reject rehabilitation plans and make other rehabilitation determinations pursuant to this chapter. These determinations shall not be made by a compensation judge but may be appealed to the rehabilitation review panel and workers' compensation court of appeals as provided by subdivision 6.

The Commissioner's exclusive jurisdiction thus extends to all rehabilitation determinations. Under Kurowski v. Kittson Memorial Hospital, however, the Commissioner's authority does not extend to causation questions, which must be referred to a compensation judge. Under Minnesota Rules part 5220.0800, these determinations are made in rehabilitation conferences. As noted above, section 176.102, subdivision 6a

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325. Minn. Stat. § 176.102, subd. 6 (1986).
326. See also id. at subd. 2 (requires the Commissioner to "monitor and supervise rehabilitation services").
327. See Minn. R. 5220.0700 (Supp. 1986).
328. See Paulas v. Rugby Indus., No. 093-24-1828 (WCCA Dec. 10, 1986); see also Minn. Stat. § 176.102, subd. 4(a) (1986) (this can only occur after the employee notifies the employer and Commissioner in writing).
329. Minn. Stat. § 176.102, subd. 6a (1986).
330. 396 N.W.2d 827, 831 (Minn. 1986).
331. Minn. R. 5220.0800 provides that "[w]here questions exist concerning an employee's entitlement to rehabilitation services, or where a rehabilitation plan is not acceptable to the employee or to the employer, or in case of any other dispute involv-
prescribes that the Commissioner's rehabilitation decisions are reviewable by the Rehabilitation Review Panel. Appeals from the panel proceed to the Workers' Compensation Court of Appeals and then to the Minnesota Supreme Court.\textsuperscript{332}

Compensation judges are expressly prohibited from exercising any authority over rehabilitation issues.\textsuperscript{333} Until 1979, retraining was the only method of rehabilitation available, and compensation judges did make rehabilitation determinations.\textsuperscript{334}

2. Purpose of Rehabilitation Conferences

Early intervention is integral to the success of a mandatory rehabilitation system.\textsuperscript{335} Accordingly, Minnesota Statutes section 176.102, subdivision 4 requires referral for rehabilitation consultation within a maximum of thirty to sixty days of lost work time.\textsuperscript{336}

To implement a system of early rehabilitation, rehabilitation conferences were devised as a method of quickly resolving disputes regarding the delivery of rehabilitation services. Conferences are conducted by rehabilitation specialists at the Department of Labor and Industry who have rehabilitation background. This expertise is necessary for a proper resolution of rehabilitation issues.\textsuperscript{337} As at other administrative conferences, formal rules of evidence are not followed, nor is a verbatim record prepared. Parties are encouraged to informally discuss their differences and to reach agreement on the issues. The specialist issues a determination if an agreement is

\textsuperscript{332} These appeals proceed in the same manner as other appeals in the workers' compensation system, including the same standard of review. See Gutz v. Honeywell, Inc., 399 N.W.2d 557, 562 (Minn. 1987); see also Minn. Stat. § 176.102, subd. 6 (1986).

\textsuperscript{333} Minn. Stat. § 176.102, subd. 6a (1986).

\textsuperscript{334} See id. § 176.101, subd. 7 (1978).

\textsuperscript{335} Studies show that where rehabilitation is initiated quickly, the period of disability is shortened and the probability that the employee will return to work is enhanced. See Fox, supra note 41, at 7; Citizens League Report, supra note 4, at 34; Insurance Division Report, supra note 5, at 141.

\textsuperscript{336} A referral is required within 30 days for back injuries. Minn. Stat. § 176.102, subd. 4(a) (1986).

\textsuperscript{337} See 1979 Study Commission, supra note 1, at 23.
not reached. The Commissioner's decisions are reviewable by the panel under section 176.102, subdivision 6a. The panel is comprised of rehabilitation experts such as physicians, rehabilitation consultants, and others prescribed by subdivision 3. At the panel's hearings, parties may offer all relevant competent evidence, including evidence not offered at the rehabilitation conference, and may cross-examine witnesses. A verbatim transcript of the proceedings is prepared. The panel's decision includes findings of fact and an order determining the issues, accompanied by an explanatory memorandum.

3. Case Law Developments

Litigation regarding the mandatory rehabilitation system has centered on several areas: the scope of Commissioner's jurisdiction over rehabilitation, the procedure for review of decisions, the amount of retraining benefits payable, and the effective dates of changes in the rehabilitation law.

a. Scope of Commissioner's Jurisdiction and Procedure for Review

Soon after the mandatory rehabilitation law was enacted, several unintended gaps in the Commissioner's jurisdiction over rehabilitation were established through litigation. Minnesota Statutes section 176.102 was then amended to fill those holes.

Related to the scope of the Commissioner's jurisdiction is the proper method of review of the Commissioner's rehabilitation decisions. In Zanmiller v. Montgomery Ward, the Commissioner issued a rehabilitation decision pursuant to section 176.102, subdivision 6. The self-insured employer attempted to appeal directly to the WCCA. As in the case of the discontinuance decisions, the self-insured relied on section 176.442

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338. The process usually takes two months, but may take less time if the issues are urgent. Department of Labor and Industry Statistics, supra note 314.

339. See Minn. Stat. § 176.102, subd. 3a (1986); see also Minn. R. 5217.0210 (1985).

340. See Minn. Stat. § 176.102, subd. 3a (1986).


as authority for its direct appeal. 344

The WCCA applied the principles of statutory construction specified in Minnesota Statutes Chapter 645. 345 It determined that a hearing de novo before the Rehabilitation Review Panel as required by section 176.102, subdivision 6a is the sole method of review. This result is necessitated by section 645.16. If rehabilitation decisions were directly appealable, section 176.421, subdivision 7 would require a verbatim record to be prepared at the rehabilitation conference. As with discontinuance conferences, rehabilitation conferences would then acquire the other characteristics of formal adversarial hearings.

As noted earlier, this would compromise the effectiveness of rehabilitation. The Minnesota Supreme Court also acknowledged the Commissioner’s sole authority over rehabilitation and retraining issues. The Commissioner’s directions are appealable first to the Rehabilitation Review Panel, and then to the WCCA. 346

b. Amount of Retraining Benefits Payable

The amount of retraining benefits payable has been a recurring subject of litigation. Indeed, the high cost of retraining precipitated the overhaul of the rehabilitation system that began in 1979.

The retraining law has evolved through three stages. Minnesota Statutes section 176.101, subdivision 7 originally provided that if retraining is necessary “the employer shall pay up to 156 weeks of additional compensation during the actual period of retraining . . . .” 347 This was interpreted to mean that an employee in an approved retraining program was eligible for benefits at two-hundred percent of the weekly benefit rate. 348

In 1979 the legislature enacted section 176.102, subdivision 11 to limit retraining benefits 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

344. Id. at 653.
345. See id. at 653-54.
347. MINN. STAT. § 176.101, subd. 7 (1978) (repealed by Act approved June 7, 1979, ch. 3, § 70, 1979 Minn. Laws 1256, 1297) (emphasis added).
total disability. This payment is *in lieu of* payment . . . to which the employee might otherwise be entitled for the period . . . .*349*

This language was intended to eliminate the double benefit previously permitted.*350* The maximum retraining benefit available was thus one-hundred twenty-five percent not two-hundred percent.

Minnesota Statutes section 176.102, subdivision 11 was amended again in 1983 to further limit the amount of retraining benefits: "Retraining is limited to 156 weeks. An employee who has been approved for retraining may petition the commissioner for additional compensation not to exceed 25 percent of the compensation otherwise payable . . . ."*351* The present law thus typically permits the payment of no additional retraining benefits. An additional twenty-five percent is available only in special circumstances.*352*

c. Effective Dates of Changes in Minnesota Statutes

Section 176.102

Frequent changes in the rehabilitation law have triggered litigation regarding which law applies to a claim. The general rule is that procedural changes may be given retroactive effect while substantive changes may be applied only prospectively.

Legislative changes which affect an employee's right to monetary benefits are substantive.*353* As substantive changes have a direct impact on entitlement to a property interest, due process prohibits the denial of entitlement to a property interest after it has vested.*354* The rule as to the application of substantive change is that the "law in effect on the date of injury governs, absent a clear manifestation of a contrary legislative intent."*355* Substantive rights typically vest on the date of injury.*356* However, the legislature can specify that substantive

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350. Solberg v. FMC Corp., 325 N.W.2d 807, 809 (Minn. 1982).


353. See Leahy, 339 N.W.2d at 267.


355. *Leahy, 339 N.W.2d at 267; see also Minn. Stat.* § 645.21 (1986).

rights vest at any time, such as when the employer's liability for benefits is established.\(^{357}\)

This contrasts with the rule applicable to procedural changes. Procedural changes apply to all cases pending on their effective date, regardless of the date of injury.\(^{358}\) These changes affect only the decision-maker or the decision-making procedure, not the recipient of benefits or the amount of benefits due. Because procedural changes have no effect on entitlement to property interests, the time of vesting is of no importance. The supreme court has said, "[t]here is no such thing as a vested right in a rule of evidence."\(^{359}\) Procedural change need not contain an expression of legislative intent to be given retroactive effect, notwithstanding Minnesota Statutes section 645.21.\(^{360}\)

\[\text{[T]here is no vested right in any particular remedy or method of procedure, and . . . while generally statutes will not be construed to give them a retrospective operation unless it clearly appears that such was the legislative intent, . . . nevertheless, when a change of law merely affects the remedy or law of procedure, all rights of action will be enforceable under the new procedure without regard to whether they accrued before or after such a change of law . . . .}\(^{361}\)

Minnesota Statutes section 176.102, subdivision 11a, enacted in 1983, constitutes the legislature's present expression of intent regarding which rehabilitation law to apply. "This section is applicable to all employees injured prior to or on and after October 1, 1979, except for those provisions which affect an employee's monetary benefits."\(^{362}\)

The legislature declined to prescribe when an employee's substantive rights to monetary benefits vest under the present law. Under *Leahy v. St. Mary's Hospital*, the amount and duration of benefits are substantive.\(^{363}\) Presumably, entitlement to those benefits is also substantive.\(^{364}\) In the absence of an ex-

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357. *Solberg*, 325 N.W.2d at 809; *see also* Jones v. Honeywell, Inc., 281 N.W.2d 696, 698 (Minn. 1979); *Minn. Stat.* § 176.102, subd. 11 (1980).


359. *Id.* at 563, 18 N.W.2d at 539.


361. *Id.* (citing *Nelson v. Miller*, 11 Ill. 2d 378, 382, 143 N.E.2d 673, 676 (1957)).


364. This has not yet been litigated.
pression of contrary legislative intent, the law in effect on the
date of injury thus determines entitlement, amount, and dura-
tion of benefits.

In interpreting the meaning of subdivision 11a, the key
question that arises is what constitutes a monetary benefit
under section 176.102? In Sherman v. Whirlpool Corp., the
supreme court held that rehabilitation consultation is not a
monetary benefit. Contrary to monetary benefits which are
paid directly to employees, no monetary gain accrues to the
employee in connection with rehabilitation consultation.
Under this analysis, retraining benefits appear to be the only
monetary benefit available in the rehabilitation system. Ac-
cordingly, entitlement, amount, and duration of retraining are
subject to the law in effect at the time of the employee’s injury.
With respect to other rehabilitation issues, the present law
governs all claims regardless of the date of injury.

This is consistent with Zanmiller v. Montgomery Ward, an ear-
lier decision of the WCCA, which held that the new procedure
for deciding rehabilitation issues was applicable to all employ-
ees regardless of the injury date. In Zanmiller, the self-insured
employer contended that a compensation judge should
decide the employee’s entitlement to retraining, as he was in-
jured in 1979, prior to the effective date of subdivision 11a.
The Commissioner intervened to argue that the procedure
that was in effect at the time of litigation should be applied.
Contrary to provisions affecting monetary benefits, changes in
procedure affect only the mechanism for deciding who receives
benefits. For this reason the WCCA decided that the jurisdic-
tional transfer from the compensation judge to the Commis-
sioner was procedural. Consequently, all rehabilitation cases
pending on or after the effective date of section 176.102, sub-
division 11a would be heard by the Commissioner.

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365. 386 N.W.2d 221 (Minn. 1986).
366. Id. at 224.
367. In Sherman, 386 N.W.2d at 225, the supreme court also denied the insurer’s
claim that it was unconstitutional as a violation of due process to retroactively apply
the new rehabilitation law to employees injured prior to the enactment of the statute.
369. Id. at 653.
370. Id. at 654.
371. The new procedure was even applied in Bergstrom v. Lewis Truck Lines, 36
W.C.D. 282 (1983), which was pending before the supreme court when subdivision
11a was enacted.
The policy significance of these cases is that procedural aspects of the new law can be rapidly implemented, as they apply to all pending cases on their effective date. Legislative changes that apply only to employees injured after the effective date take much longer to have an impact. Nonetheless, the legislature has been more reluctant to retroactively apply provisions affecting monetary benefits to avoid possible inequities to recipients and payers. As noted above, constitutional limitations impose additional restrictions on the quick implementation of benefit changes. To the extent that rehabilitation services continue to be viewed as non-monetary benefits, however, early mandatory rehabilitation will continue to be available to all employees regardless of injury date.

E. Medical Conferences Under Minnesota Statutes Section 176.103

1. Overview

The creation of a comprehensive medical monitoring system for injured workers was an integral component of the 1983 changes to the Workers' Compensation Act. This system, which is patterned after the mandatory rehabilitation system, reflects the legislature's judgment that rehabilitation of injured workers encompasses not only vocational rehabilitation, but also medical treatment of work-related disabilities. The cost of providing medical services can also be controlled through successful rehabilitation.

2. Statutory Framework

The medical monitoring system arises from three different provisions in the law. The scope of the Commissioner's authority over medical monitoring is specified by section 176.103, subdivision 2 as follows:

The commissioner shall monitor the medical and surgical treatment provided to injured employees, the services of other health care providers and shall also monitor hospital utilization as it relates to the treatment of injured employees. This monitoring shall include determinations concerning the appropriateness of the service, whether the treatment is necessary and effective, the proper cost of services, the quality of the treatment, the right of providers to receive payment under this chapter for services rendered or the right to receive payment under this chapter for future services . . . . The commissioner's authority under this sec-
tion also includes authority to make determinations regarding any other activity involving the questions of utilization of medical services and any other determination the commissioner deems necessary for the proper administration of this section.\footnote{372}{Minn. Stat. § 176.103, subd. 2 (1986).}

The Commissioner is thus expressly authorized to decide medical monitoring issues. Subdivision 2 also specifies that this authority is exclusive.\footnote{373}{Id.} Compensation judges, who previously decided medical issues, are now precluded from exercising any authority in this area.\footnote{374}{Id.}

Section 176.103, subdivision 3 establishes the method of review of the Commissioner’s medical monitoring decisions. They are appealable first to the Medical Services Review Board.\footnote{375}{Id. at subd. 3(a).} The Board is comprised of health care experts from specialties involved in the treatment of injured workers, and employee and employer representatives.\footnote{376}{Id. at subd. 3(b).} The Board conducts formal \textit{de novo} hearings and issues decisions which are appealable to the Workers’ Compensation Court of Appeals.\footnote{377}{Id.} Medical monitoring includes jurisdiction to order health care treatment or supplies “as may reasonably be required at the time of the injury and at any time thereafter to cure and relieve from the effect of the injury.”\footnote{378}{Minn. Stat. § 176.135, subd. 1 (1986).} Under section 176.135, subdivision 2, the Commissioner is also permitted to decide whether surgery is reasonably required.

The final element of medical monitoring is specifically directed toward controlling workers’ compensation medical costs. Pursuant to section 176.136, subdivision 1, the Commissioner promulgated rules limiting charges for medical services to the “75th percentile of usual and customary fees or charges based upon billings for each class of health care provider during all of the calendar year preceding the year in

\footnote{372}{Minn. Stat. § 176.103, subd. 2 (1986).}
\footnote{373}{Id.}
\footnote{374}{Id.}
\footnote{375}{Id. at subd. 3(a).}
\footnote{376}{Id. at subd. 3(b).}
\footnote{377}{Hearings conducted by the Medical Services Review Board are subject to the same procedural rules as the Rehabilitation Review Panel. See Minn. Stat. § 176.103, subd. 3(b) (1986); see also Minn. R. ch. 5217 (Supp. 1986). Appeals from the Panel and Board to the WCCA proceed in the same manner as other workers’ compensation appeals, and are subject to the same standard of review. Gutz v. Honeywell, 399 N.W.2d 557, 562 (Minn. 1987).}
\footnote{378}{Minn. Stat. § 176.135, subd. 1 (1986).}
which the determination is made of the amount to be paid the
health care provider for the billing.”379 Minnesota Rules Part
5221.0500A thus defines as excessive any billing over the sev-
enty-fifth percentile limit, and sets forth a schedule of maxi-
mum charges for services. Section 176.135, subdivision 3
provides additional authority for the Commissioner to deter-
mine the “reasonable value of all such services and supplies”
provided where the seventy-fifth percentile amount is avail-
able. Billings are thus payable to the extent that they do not
exceed the scheduled seventy-fifth percentile amount. Where
a service is not scheduled, providers are entitled to be paid for
the “reasonable value” of their service.380 Finally, a billing is
deemed excessive and thus not payable where the service ren-
dered is not reasonably required to cure the effects of the work
injury.381 The provider is prohibited from collecting the
amount deemed excessive from the employee.

3. Purpose

Medical monitoring was envisioned as a necessary compo-
nent of rehabilitation. In most instances, medical monitoring
should thus be conducted concurrently with rehabilitation,
with the QRC monitoring the administration of a medical plan.
The Commissioner also provides “demand actuated” monitor-
ing in especially serious cases.382 As with rehabilitation, the
Commissioner implements medical monitoring in administra-
tive conferences.

The legislature placed the Commissioner in charge of medi-
cal monitoring for two primary reasons. First, medical moni-
toring disputes can be resolved more quickly in administrative
conferences than through litigation. Quick dispute resolution
is necessary to ensure that medical progress commences soon
after the disability occurs. Second, medical monitoring dis-
putes require medical expertise, the ability to understand med-
ical problems, to interpret medical information, and to
determine medical issues. Rehabilitation and medical special-
ists and members of the Medical Services Review Board are

379. Id. § 176.136, subd. 1 (1986).
380. Id.
381. Id.
382. This occurs, for example, where the matter is referred to the Commissioner
for medical monitoring by the WCCA.
required to have the necessary training and experience in health care.

4. Case Law Developments

*Jackson v. Red Owl Stores, Inc.*\(^{383}\) was the most significant substantive test of the Commissioner's medical monitoring authority. The employee in *Jackson* had sustained several work-related neck injuries for which the insurer had admitted primary liability.\(^{384}\) The employee subsequently received medical treatment for a shoulder condition and depression which she claimed were caused by her work-related injuries.\(^{385}\) The insurer refused to pay these medical bills on the basis that there was no causal connection between the neck injuries and the shoulder and emotional conditions for which the employee had been treated.\(^{386}\) To reach the ultimate issue regarding the insurer's liability for the medical bills thus required a threshold determination that the employee's neck and emotional problems were causally related to her work-related neck condition. Finding that these issues came within the Commissioner's medical monitoring authority, a compensation judge refused to hear the matter.\(^{387}\) This was affirmed by the WCCA.\(^{388}\)

On appeal to the Minnesota Supreme Court, the employee contended that the causation issue should have been decided by the compensation judge, after which any dispute regarding the need and reasonableness, as well as the cost of the treatment would be referred to the Commissioner.\(^{389}\) The Commissioner relied chiefly on section 176.103, subdivision 2 to argue that he had sole authority to decide the causation question as well as issues regarding the need, reasonableness, and cost of medical treatment.\(^{390}\) "The commissioner's authority under this section also includes the authority to make determinations regarding any other activity involving the questions of

\(^{383}\) 375 N.W.2d 13 (Minn. 1985).
\(^{384}\) *Id.* at 14.
\(^{385}\) *Id.*
\(^{386}\) *Id.* at 14-15.
\(^{387}\) *Id.* at 15.
\(^{388}\) *Id.*
\(^{389}\) *Id.* at 17. This was also the position advanced by the employer and insurer.

*Id.*
\(^{390}\) *Id.*
utilization of medical services, and *any other determination the commissioner deems necessary for the proper administration of this section.* The Commissioner also agreed that the Department of Labor and Industry had the requisite medical expertise to decide medical issues, and that requiring referral to a compensation judge would be administratively cumbersome.

In the absence of a specific grant of authority, the supreme court declined to interpret this language to permit the Commissioner to decide questions of medical causation. Justice Yetka reasoned that "[q]uestions of law are quite properly decided by those learned in the law who can understand court decisions and apply legal precedent." While primary liability and medical causation issues must thus be decided by a compensation judge, the Commissioner is authorized to determine "all issues relative to the quality, cost and quantity of medical care." In response to *Jackson*, the Legislature added section 176.135, subdivision 1(b), which confers on the Commissioner specific authority to decide medical causation questions. Primary liability issues must still be decided by a compensation judge.

The procedure to be followed in litigating medical issues has been the focus of several other lawsuits. Prior to 1983, the

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391. *Jackson*, 375 N.W.2d at 16, (quoting MINN. STAT. § 176.103, subd. 2 (1984) (emphasis added)). It also allows the Commissioner to order the employer to furnish any medical treatment or supply "as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." *Id.* at 16-17, (quoting MINN. STAT. § 176.103, subd. 1 (1984)). This had previously been applied to cases involving medical causation. *See* Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 101, 109 N.W.2d 47, 50 (1961).

392. *Jackson*, 375 N.W.2d at 18.

393. While not relevant to the instant case, the Commissioner also argued unsuccessfully that Minnesota Statutes section 176.103, subdivision 2 also permitted him to decide primary liability. *Jackson*, 375 N.W.2d.

394. *Jackson*, 375 N.W.2d at 19. The court also held that the parties could stipulate to the Commissioner's jurisdiction. *Id.* This is an apparent contradiction to the axiom that parties cannot confer authority which is not granted by law. *See* Davidner v. Davidner, 304 Minn. 491, 493, 232 N.W.2d 5, 7 (1975).

395. *Jackson*, 375 N.W.2d at 19. The supreme court has reaffirmed the Commissioner's authority over the need, reasonableness, and cost of medical treatment in several cases since *Jackson*. *See* Rath v. Perlman Rocque Co., 384 N.W.2d 464, 466 (Minn. 1986); Dotolo v. FMC Corp., 375 N.W.2d 25 (Minn. 1985).

396. Act approved Mar. 25, 1986, ch. 46, § 20, 1986 Minn. Laws 943, 953. The Commissioner's decision is subject to *de novo* review by a compensation judge and appealable to the WCCA and supreme court.
compensation judges had jurisdiction to determine all medical issues. However, the enactment of sections 176.103, 176.135, and 176.136 transferred jurisdiction to make these same decisions to the Commissioner.397 The Commissioner’s decisions are reviewable by the Medical Services Review Board under sections 176.103, subdivision 3; 176.135, subdivision 2; and 176.136, subdivision 2. Medical causation decisions under section 176.135, subdivision 1(b) are subject to de novo review by a compensation judge.

Martin v. United States Steel Corp.398 presented the question of whether these changes were procedural or substantive.399 In Martin, the WCCA determined that amendments to sections 176.103, 176.135, and 176.136 transferred jurisdiction to decide medical issues to the Commissioner without affecting entitlement to benefits.400 As these changes were procedural, they could be applied to all pending cases on October 1, 1983 regardless of the employee’s date of injury.

The litigation involving the recent amendments to the Workers’ Compensation Act has centered on several key areas. First, the scope of the Commissioner’s jurisdiction has been tested. Second, the procedures to be exercised in obtaining review of the Commissioner’s decisions have also been litigated. Finally, the legal validity of the manner in which these decisions are being made has been challenged.

To date, most legislative changes have survived legal challenges. Where further clarification has been necessary to ascertain the intent of the 1983 amendments, the legislature has quickly responded with technical amendments, demonstrating its continued commitment to the medical management model for treating and compensating the victims of industrial accidents and diseases.

V. CONCLUSION

Since the 1983 amendments went into effect in January 1984, there has been a great deal of interest in monitoring the system to determine how it is working. Whenever there has

397. Pursuant to Jackson, primary liability is decided by a compensation judge. See supra notes 383-96 and accompanying text.
399. See supra Section V for further discussion.
400. See Martin, 37 W.C.D. at 47-51.
been a major reform in public policy, as there was in 1983, it is important for policy-makers to be able to gauge the effects of that change as soon as possible. Studies by the Minnesota Department of Labor and Industry have attempted to isolate the impact of the 1983 reforms on some of the major cost factors in the system, and to provide information faster than would normally be available.

Both open claim and closed claim studies have been conducted. These studies focus upon duration of disability, the percentage of claims that are litigated, and the amount of disability benefits paid to injured workers. The results of these studies show substantial improvement in many of the factors affecting premium costs. Each study reveals a decline in litigation, in the duration of lost work time, and, as a result, in the cost of benefits for temporary total and permanent partial disability.

VI. APPENDIX OF STUDIES

A. Summary of Study Conclusions

In the past, an unusually long average duration of disability was a major reason for high workers' compensation costs in Minnesota. Both the closed claim and open claim studies show a consistent twenty-eight to thirty-one percent decrease in the average duration of disability (lost work time) due to a work-related injury. As a result, temporary total disability (TTD) benefits paid have decreased in both studies. Temporary total disability benefits paid for claims with permanent partial

401. An open claim study examines claims that are currently active.
402. A closed claim study examines claims that have been resolved by return to full health and work, litigation, settlement, or payment of all compensation benefits to which an injured employee is entitled.
404. See id. at 11.
405. See infra text and tables accompanying notes 417 and 430.
disability (PPD) have shown the most marked reduction.406 This is an encouraging development, since these are the claims which have traditionally been the most costly in the system.

The reduction in the average duration of disability for temporary total disability cases, especially in the reduction in the number of cases that last more than six to twelve months without return to work, also means that the size of the pool of claims that could lead to long-term disability has decreased. In fact, according to the open claims study, there are more claims from the 1985 sample resulting in return to work (RTW) within ninety days than claims from the 1983 sample resulting in return to work within one year.407 The frequency of long-term disability cases, therefore, should decrease significantly as time passes. This is an encouraging sign since these cases have been a key contributor to unusually high workers’ compensation costs. These cases are very expensive to the system as a whole, especially to the Special Compensation Fund and the Workers’ Compensation Reinsurance Association.

A recent study of the Special Compensation Fund by the Minnesota Department of Labor and Industry seems to confirm this conclusion.408 There has been a substantial reduction in both the number and the size of long term claims.

The frequency and size of permanent partial disability awards appear to have decreased as well. While it might be premature to accept this conclusion from the study numbers alone, the higher than expected percentage of claims resulting in return to work suggests that the reductions in the average permanent partial disability awards, as well as the number of claims with permanent partial disability, will continue since such awards are lower for claimants able to return promptly to work. In fact, these numbers probably will continue to decrease as the significant number of old-law claims that are still open work their way out of the system. At the same time, the number of claims with temporary partial disability (TPD) benefits has increased somewhat, presumably as a result of a greater

406. See id. at 14–16.  
407. See infra text accompanying note 414.  
percentage of injured workers being returned to light-duty jobs.

Another encouraging trend found consistently in both studies is a substantial drop in litigation. Litigation is a major cost factor in all workers' compensation systems; a high litigation rate is usually associated with high costs. The closed claim study shows litigation down thirty percent, while the open claim study shows a twenty-four percent drop.409

Even though the reduction is noteworthy, it is not as dramatic as originally anticipated, particularly in the open claim study. One possible explanation for this is that the administrative changes in the 1983 law took effect on July 1, 1983, and resulted in a significant reduction in litigation, even in 1983 old-law claims.

This theory is supported by the disparity between the open and closed claim study results. The open claim study found litigation rates from six to eight percent for claims with permanent partial disability. The closed claim study found rates for these same types of claims from forty to sixty percent. The closed claim study includes primarily old-law claims, and this high rate of litigation is typical of past experience. The 1983 sample of the open claim study is also composed entirely of old-law claims. The fact that the studies show a much lower litigation rate suggests that the new law has worked to reduce litigation on those more recent old-law claims. This is due to administrative reforms and the availability of the permanent partial disability schedules for doctors to use at their discretion. The Minnesota Department of Labor and Industry plans to conduct a thorough study of litigation during the summer of 1987.

The Department is also concerned by study results showing a surprisingly high rate of referral to rehabilitation, and a lower than expected return to work rate for open claims. Because of the inadequacy of the studies' sample size it is difficult to draw more detailed conclusions. For this reason, the Department plans to conduct further detailed study of the rehabilitation system.

The reductions in duration of disability and litigation, and the increase in return to work revealed by these studies, are

strong indications that the reformed workers' compensation system is doing what the Minnesota Legislature intended in 1983. The new system is realizing savings for employers and better service for injured workers. Maintaining and expanding this success should be possible with continued attention to the health of the system.

B. Impact of Changing Loss Experience on Workers' Compensation Insurance Rates

The impact of the reduction in losses identified by the studies presented in this report on workers' compensation insurance rates is neither immediate nor direct. Workers' compensation rates are affected in part by workers' compensation insurance losses occurring in Minnesota which reflect the legislative changes made to the workers' compensation system and in part by market forces operating nationwide, over which the Minnesota Legislature has little influence. Over the past several years, the business insurance climate has been stormy. The commercial property and casualty insurance industry had its worst year in history in 1984. As a result, many business property casualty insurers nationwide face serious financial difficulties and terrible upward pressure on rates in all lines of business insurance.

Although these rate increases have been ameliorated somewhat in Minnesota by increased insurer confidence in the workers' compensation market due to the 1983 amendments, actual policy year statistics reflecting the effect of the law on loss experience were not available until late 1986. Even then, preliminary figures did not show the full effects of the law on workers' compensation losses. A major goal of the 1983 amendments was to reduce the tendency of relatively minor workers' compensation claims to grow into long-term expensive claims, a factor measured by the insurance industry as part of loss development. Although loss development and overall losses are declining in recent rate-making reports, the full impact of the new law is not expected to be felt for several more years. Until that time, studies like these conducted by the Department are critical to monitoring the new system, to determine

whether it is working, and to determine where further reforms may be needed.

1. Open Claim Study\(^{412}\)

The Department’s open claim study examined claims at different times in their development. It compared open claims of the same age. Claims with a date of injury (DOI) in March 1983, March 1984, or March 1985, were evaluated at each year end. The terms “first report,” “second report,” and “third report,” refer to these year-end evaluations. First report refers to the claim as of the January 1 immediately following the date of injury, second report the January 1 one year later, and so on.\(^{413}\)

a. Study Results: Released to Return to Work\(^{414}\)

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<th>1st Report:</th>
<th>DOI March ‘83</th>
<th>DOI March ‘84</th>
<th>DOI March ‘85</th>
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<tr>
<td>Total # released to RTW</td>
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<td>2755</td>
<td>2709</td>
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<tr>
<td>Total</td>
<td>%</td>
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<td>%</td>
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<td>66.3</td>
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<td>2359</td>
<td>2324</td>
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<td>80.5</td>
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<td>2646</td>
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<td>2745</td>
<td>2703</td>
</tr>
<tr>
<td>%</td>
<td>84.4</td>
<td>90.2</td>
<td>93.4</td>
</tr>
<tr>
<td>More than 12 mos.</td>
<td>5</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>%</td>
<td>0.2</td>
<td>0.33</td>
<td>0.2</td>
</tr>
<tr>
<td>Still open</td>
<td>388</td>
<td>288</td>
<td>184</td>
</tr>
<tr>
<td>%</td>
<td>15.2</td>
<td>9.5</td>
<td>6.4</td>
</tr>
</tbody>
</table>

\(^{412}\) Effects 1986, supra note 403.
\(^{413}\) Id. at 4.
\(^{414}\) Id. at 6-7.
2nd Report:

<table>
<thead>
<tr>
<th>Total # released to RTW</th>
<th>2418</th>
<th>90.9</th>
<th>2934</th>
<th>95.2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 30 days</td>
<td>1719</td>
<td>64.6</td>
<td>1988</td>
<td>64.5</td>
</tr>
<tr>
<td>Less than 60 days</td>
<td>2068</td>
<td>77.7</td>
<td>2421</td>
<td>78.6</td>
</tr>
<tr>
<td>Less than 90 days</td>
<td>2183</td>
<td>82.0</td>
<td>2606</td>
<td>84.6</td>
</tr>
<tr>
<td>Less than 6 mos.</td>
<td>2302</td>
<td>86.5</td>
<td>2786</td>
<td>90.4</td>
</tr>
<tr>
<td>Less than 9 mos.</td>
<td>2353</td>
<td>88.4</td>
<td>2855</td>
<td>92.8</td>
</tr>
<tr>
<td>Less than 12 mos.</td>
<td>2376</td>
<td>89.3</td>
<td>2888</td>
<td>93.7</td>
</tr>
<tr>
<td>More than 12 mos.</td>
<td>42</td>
<td>1.6</td>
<td>46</td>
<td>1.5</td>
</tr>
<tr>
<td>Still open</td>
<td>243</td>
<td>9.1</td>
<td>147</td>
<td>4.8</td>
</tr>
</tbody>
</table>

3rd Report:

<table>
<thead>
<tr>
<th>Total # released to return to work</th>
<th>2534</th>
<th>95.1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 30 days</td>
<td>1749</td>
<td>65.6</td>
</tr>
<tr>
<td>Less than 60 days</td>
<td>2107</td>
<td>79.1</td>
</tr>
<tr>
<td>Less than 90 days</td>
<td>2230</td>
<td>83.7</td>
</tr>
<tr>
<td>Less than 6 mos.</td>
<td>2368</td>
<td>88.8</td>
</tr>
<tr>
<td>Less than 9 mos.</td>
<td>2430</td>
<td>91.2</td>
</tr>
<tr>
<td>Less than 12 mos.</td>
<td>2462</td>
<td>92.4</td>
</tr>
<tr>
<td>More than 12 mos.</td>
<td>72</td>
<td>2.7</td>
</tr>
<tr>
<td>Still open</td>
<td>131</td>
<td>5.1</td>
</tr>
</tbody>
</table>

Striking differences are apparent between the three years in the number of claims that have been released to return to work as the time from the date of injury increases. The number of claims closing rapidly has gone up dramatically. A higher proportion of claimants in the 1985 sample had been released to return to work within ninety days from the date of injury than had been released in twelve months from the date of injury in the 1983 sample.

Although the most drastic improvement in the data appears between 1983 and 1984 when the new law went into effect, there has also been a significant improvement from 1984 to
1985.\textsuperscript{415}

\textbf{b. Claims with Return to Work}\textsuperscript{416}

\begin{tabular}{lcccc}
  & DOI March '83 & DOI March '84 & DOI March '85 \\
  Total & Total & Total & Total \\
Claims with return to work: & & & & \\
1st report & 1995 & 78.2 & 2620 & 86.1 & 2554 & 88.2 \\
2nd report & 2199 & 82.6 & 2776 & 90.1 & & \\
3rd report & 2200 & 82.6 & & & & \\
\end{tabular}

Claims in this category are those lost-time claims on which the Department has actual return-to-work data. The fact that there has been a steady increase in the number of these claims from 1983 to 1985 suggests that the 1983 law and the administrative changes that accompanied it are succeeding in encouraging more rapid return to work.

\textbf{c. Truncated Sample Data}\textsuperscript{417}

\begin{tabular}{lcccc}
  & DOI March '83 & DOI March '84 & DOI March '85 \\
  Total & Total & Total & Total \\
Truncated sample data & & & & \\
1st Report: 84.4\% & & & & \\
Average Duration of Disability & 28.4 days & 22.1 days & 20.1 days \\
Average TTD & $887 & $667 & $604 \\
2nd Report: 88\% & & & & \\
Average Duration of Disability & 41.1 days & 28.7 days & \\
Average TTD & $1254 & $865 & \\
3rd Report: 95\% & & & & \\
Average Duration of Disability & 41.9 days & & \\
Average TTD & $1218.17 & & \\
\end{tabular}

These two averages were obtained from a truncated version of the data base in an attempt to compensate for the immaturity of the data in the samples.\textsuperscript{418} This created comparable samples of closed claims for each report from which to draw

\textsuperscript{415} Id.
\textsuperscript{416} Id. at 7-8.
\textsuperscript{417} Id. at 11-12.
\textsuperscript{418} Id. at 11.
meaningful comparisons. The comparisons show that there has been a substantial reduction in the amount of temporary disability being compensated.419 "In both the first and second reports the average duration of disability and the average temporary total disability benefit dropped between twenty-nine and thirty-two percent from 1983 to 1985."420 The 1985 report broke down return-to-work success by size of business to see if even small businesses were able to take advantage of the return-to-work incentives.

d. *Lost Time in Days*421

<table>
<thead>
<tr>
<th></th>
<th>DOI March 83</th>
<th>DOI March '84</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>%</td>
</tr>
<tr>
<td>1. Average for</td>
<td></td>
<td></td>
</tr>
<tr>
<td>all claims</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>a. Small business</td>
<td>67</td>
<td>41</td>
</tr>
<tr>
<td>b. Medium business</td>
<td>51</td>
<td>29</td>
</tr>
<tr>
<td>c. Large business</td>
<td>37</td>
<td>32</td>
</tr>
</tbody>
</table>

The average duration of lost work time due to a work-related injury has dropped to thirty-four days for March 1984 from fifty days for March 1983 injuries. This same thirty-two percent decrease in the amount of disability in the system was seen in the truncated sample data.

All three business size categories experienced a reduction in lost work time. However, small and medium-size businesses experienced a much larger reduction than did large-size businesses. Although large businesses enjoy a faster return to work time than small businesses in both samples, their results are already much better even before the law reform. Since the law change, small businesses have improved more, if from a poorer base. Therefore, the fear that small businesses would not benefit from the new law because of difficulties they would have returning their injured workers to work seems unfounded. If anything, small businesses may enjoy greater percentage savings than larger businesses.422

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419. See id.
420. Id.
422. Id. at 8-9.
e. Employee Benefits Discontinued Without Return to Work

A key measure of the success of the system is the number of workers whose benefits come to an end without actually returning to suitable gainful employment. Such discontinuance can occur as a result of the expiration of benefits, a refusal to cooperate with rehabilitation, an unrestricted release by a physician to return to work, a refused job offer, or a legal settlement. Although such discontinuances on occasion may be appropriate, a well-designed system should keep their frequency to a minimum. The study examining the number of employees whose cases ended without a return to work found substantial reductions for all cases. Eight and two-tenths percent of March 1983 injuries had closed without a return to work twenty-one months after the injury. For March 1984 injuries covered by the new law, the comparable percentage was 5.1%.423

The numbers are even more startling for cases with permanent partial disability. Of 1983 injuries which resulted in some permanent partial disability and presumably some ongoing work restrictions, approximately twenty-five percent of the cases were closed without an actual return to work twenty-one months later. From the 1985 injury sample, approximately eleven percent had closed without a return to work.424 These substantially improved performances occurred in spite of the fact that more 1985 injury claims closed in the time period in question than in 1983 because of faster resolution of cases.

f. Litigated Claims425

<table>
<thead>
<tr>
<th>DOI March '83</th>
<th>DOI March '84</th>
<th>DOI March '85</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total %</td>
<td>Total %</td>
</tr>
<tr>
<td>1st report</td>
<td></td>
<td></td>
</tr>
<tr>
<td>* * *</td>
<td>65 2.5</td>
<td>78 2.6</td>
</tr>
<tr>
<td>2nd report</td>
<td>146 5.5</td>
<td>167 5.4</td>
</tr>
<tr>
<td>* * *</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd report</td>
<td>204 7.6</td>
<td></td>
</tr>
</tbody>
</table>

423. Id.
424. Id. at 15. For additional details, see id. at 14-16.
425. Id. at 11-12.
Permanent partial disability (PPD) benefits were a major cost factor in the Minnesota workers' compensation system before the 1983 Reform Act. In fact, a 1982 Minnesota Insurance Division Study found the average cost of permanent partial disability claims was fifty-one percent higher and the average duration of such cases, forty-four and nine-tenths percent longer than they were in Wisconsin, a state with similar benefit levels and a similar industrial mix. Minnesota's litigation rate was twice that of Wisconsin. These striking differences between the two states contributed to an approximately seventy percent higher average workers' compensation rate in Minnesota than in Wisconsin in 1980.427

The goal of this schedule is to prevent litigation over the degree of disability which at one time accounted for about half

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426. Id. at 14-16.
427. Id. at 16.
of the workers' compensation litigation in Minnesota. The 1983 two-tier benefit system applies only to cases where there is some permanent partial disability. It is also designed to reduce litigation and the duration of disability in those cases.\(^{428}\)

As a rule, injuries with permanent partial disability are more serious, requiring more time to heal, be rated, and work through the system. Therefore, the second and third report data are more reliable and meaningful for study purposes.

The average amount of permanent partial disability benefits was reduced substantially to $4415 in 1984 from $5240 in 1983. This is undoubtedly the result of the much higher return-to-work rate for these claims in 1984.

When the new law was first proposed, actuaries projecting the costs of the new system assumed that 80 percent of those workers with permanent partial disability would return to work and 20 percent would not. Therefore, it was expected that in 20 percent of the permanent partial disability claims, Economic Recovery Compensation would be paid. According to the 1984 second report data, Economic Recovery Compensation has been paid in only 2 percent of the March 1984 permanent partial disability claims. This better-than-expected return to work success has saved employers the higher costs of ERC benefits for these cases.\(^{429}\)

The frequency of permanent partial disability claims dropped slightly from 1983 to 1984 as well. Permanent partial disability benefits should be awarded much earlier in a claim under the new law than under the old law. Therefore, it is probable that this reduction is somewhat understated and that the actual number of permanent partial disability awards will be significantly lower in 1984 than in 1983. The reduction in frequency is probably due to the requirement that there be objective medical evidence of permanency to establish the right to an award. As a result, insurers are probably paying fewer nuisance awards for questionable claims.

\section{Closed Claim Study\(^{430}\)}

Although an open claim study is the most direct way to compare undiluted data from before and after the law was

\begin{footnotes}
\footnote{428. \textit{Id}.}
\footnote{429. \textit{Id. at 17}.}
\footnote{430. \textit{Id. at 19-27}.}
\end{footnotes}
changed, it has serious limitations because of the immaturity of the data. Some of the most serious cases still remain open, even after some time, so averages underestimate the ultimate costs.

In a closed claim study, a sample is chosen of claims that close in a given period of time, instead of claims with similar dates of injury. Such a sample will include many minor cases with relatively recent dates of injury, but it will also include older and larger claims, including some very old and very serious injuries that would not appear in an open claim study of recent dates of injury.

* * *
<table>
<thead>
<tr>
<th>Study Results</th>
<th>Litigated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>1. 1. Oct '83</td>
<td>311</td>
</tr>
<tr>
<td></td>
<td>8.1</td>
</tr>
<tr>
<td>2. Oct '84</td>
<td>302</td>
</tr>
<tr>
<td></td>
<td>8.2</td>
</tr>
<tr>
<td>3. Oct '85</td>
<td>302</td>
</tr>
<tr>
<td></td>
<td>8.1</td>
</tr>
</tbody>
</table>
Because a high litigation rate is one of the major causes of high workers' compensation costs, this section of the study attempts to determine the rate and causes of litigation for each of the months in the study. For the purposes of this study, a litigated case is defined as a claim in which a Claim Petition, an Objection to Discontinuance, or a Petition to Discontinue a Petition for Contribution has been filed on it, even if the dispute is settled without a formal hearing.

The data shows a thirty percent reduction in litigation from April 1983 to October 1985. A reduction in litigation rates was also noted in the business-size open claim study. However, because the closed claim study analyzes mature data, these results are much more significant and reliable. This is a very promising sign that the costs of workers' compensation in Minnesota should be declining.

In the first three sample months, the percentage of new-law cases in the system as a whole is very low. Therefore, the reduction in litigation may be assumed to be the result of administrative changes that accompanied the new law, including alternative dispute resolution methods which went into effect in July 1983, or of better claims management by employers and insurers. Even the October 1985 data, which includes many new-law cases, shows mostly old-law litigation. This is a hopeful sign that as these old-law litigated cases work their way through the system they will not replace new-law litigation.

A majority of the litigated claims are cases with permanent partial disability. Since we are seeing a very low litigation rate for new-law permanent partial disability claims according to the open-claim study, it is reasonable to hope that as time goes on, the objectivity of the permanent partial disability schedules and the incentives found in the new two-tier benefit structure should contribute to an even greater reduction in litigation.
<table>
<thead>
<tr>
<th>Month</th>
<th>Total</th>
<th>%</th>
<th>Oct '85</th>
<th>Total</th>
<th>%</th>
<th>Oct '84</th>
<th>Total</th>
<th>%</th>
<th>Oct '83</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases with TTD</td>
<td>2.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Average duration (days)</td>
<td>128.5</td>
<td></td>
<td>$201.27</td>
<td></td>
<td>$9032</td>
<td></td>
<td>182</td>
<td></td>
<td>8.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average rate</td>
<td>220.5</td>
<td></td>
<td>$212.12</td>
<td></td>
<td>$2937</td>
<td></td>
<td>215</td>
<td></td>
<td>5.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average amount</td>
<td>2733</td>
<td></td>
<td>$2765</td>
<td></td>
<td>$2801</td>
<td></td>
<td>160</td>
<td></td>
<td>6.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>W/ TTD Over 12 mos</td>
<td>179</td>
<td></td>
<td>5.7</td>
<td></td>
<td>163</td>
<td></td>
<td>4.9</td>
<td></td>
<td>198</td>
<td></td>
<td>5.5</td>
</tr>
</tbody>
</table>
This section of the study describes the behavior of claims on which temporary total disability was reported. Because this is a closed claim study the frequency of claims with temporary total disability benefits paid is not meaningful. This section of the study attempts to highlight the characteristics of these claims which are meaningful and reflect the behavior of the workers' compensation system.

Duration of disability has dropped substantially to 91.3 days in October 1985 from 128.5 days in April 1983. This 28.9% reduction parallels the reduction found in the open-claim study but, by the nature of this study, is much more significant and reliable.

In fact, there is reason to believe that this reduction will actually be even greater as time goes on. A recent study of the Special Compensation Fund by the Department showed a fifty percent increase in the settlement rate in 1984 and 1985 for older long-term workers' compensation claims. Insurance companies appear to be actively using the tools included in the 1983 Workers' Compensation Law (such as medication and administrative conferences), in a large number of old cases to encourage workers to follow rehabilitation plans and return to work.

An unusually high proportion of long-term claims closing in the more recent study months has probably inflated the average duration of disability for these periods. When these long-term claims are settled and move out of the workers' compensation system, it is reasonable to hope that they will not be replaced and that the average length of lost time due to a work-related injury will be further reduced.

The average weekly compensation rate is included in this data as a reference point. It has risen gradually over the thirty months spanned by this study. This suggests that reductions in the amount of benefits reflect a lower average duration of disability rather than some unrelated factor. The reduction in the average amount of temporary total disability benefits, was fourteen percent from April 1983 to October 1985.
### 3. Cases with PPD

<table>
<thead>
<tr>
<th></th>
<th>April '83</th>
<th>Oct '83</th>
<th>April '84</th>
<th>Oct '84</th>
<th>April '85</th>
<th>Oct '85</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>%</td>
<td>Total</td>
<td>%</td>
<td>Total</td>
<td>%</td>
</tr>
<tr>
<td>Old law</td>
<td>484</td>
<td>21.2</td>
<td>563</td>
<td>91.8</td>
<td>683</td>
<td>13.8</td>
</tr>
<tr>
<td>New law</td>
<td>526</td>
<td>92.1</td>
<td>563</td>
<td>82.4</td>
<td>425</td>
<td>67.2</td>
</tr>
<tr>
<td>Avg PPD</td>
<td>$7543</td>
<td></td>
<td>$7808</td>
<td></td>
<td>$7222</td>
<td></td>
</tr>
<tr>
<td>W/TTD</td>
<td>429</td>
<td>88.6</td>
<td>511</td>
<td>90.8</td>
<td>628</td>
<td>91.9</td>
</tr>
<tr>
<td>Avg TTD</td>
<td>$11664</td>
<td></td>
<td>$11239</td>
<td></td>
<td>$11119</td>
<td></td>
</tr>
</tbody>
</table>

* * *

<table>
<thead>
<tr>
<th></th>
<th>Litigated</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>April '83</td>
<td>%</td>
<td>October '83</td>
<td>%</td>
<td>April '84</td>
<td>%</td>
</tr>
<tr>
<td>Old law</td>
<td>221</td>
<td>45.7</td>
<td>230</td>
<td>40.8</td>
<td>174</td>
<td>30.5</td>
</tr>
<tr>
<td>New law</td>
<td>221</td>
<td>45.7</td>
<td>230</td>
<td>40.8</td>
<td>174</td>
<td>30.5</td>
</tr>
</tbody>
</table>

<p>| | | | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>April '83</td>
<td>%</td>
<td>October '83</td>
<td>%</td>
<td>April '84</td>
<td>%</td>
</tr>
<tr>
<td>Old law</td>
<td>221</td>
<td>45.7</td>
<td>230</td>
<td>40.8</td>
<td>174</td>
<td>30.5</td>
</tr>
<tr>
<td>New law</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The relative frequency of claims with permanent partial disability dropped nineteen percent from April 1983 to October 1985. This is probably due to the more objective standards for rating disability under the new law.

The disability schedules do not permit ratings when there is no objective medical evidence of permanent injury. They are also expected to reduce the frequency of "nuisance" awards paid by insurers fearful of the uncertain outcome of litigation in cases where there is no real permanent partial disability by making outcomes much more predictable.

The average amount of permanent partial disability benefits also came down significantly to $6448 in October 1985 from $7543 in April 1983. Part of this reduction is probably due to the decrease in litigation and faster, more successful, returns to work. The largest reduction in these costs came in October 1985, a month with the highest percentage of new-law awards in it. This is probably the result of the relative frequency of impairment awards being greater than the predicted eighty percent due to the better-than-expected experience of employers and insurers in returning injured workers to suitable, gainful employment.

Although the reduction in benefits would seem to leave injured employees with less compensation, this condition is ameliorated in two ways. First, more employees are getting suitable, gainful, employment and will become self-sufficient again. Benefits in no state are high enough to compensate an employee adequately for a lifetime of disability created by an unresponsive system. Secondly, permanent partial disability awards are being obtained without litigation in many more cases with a resultant savings to the employee in attorney's fees. The attorney's fee on the average permanent partial disability award (if litigated) is significantly more than the drop in the average size of the award. The savings to an employee from not having to hire an attorney exceeds the reduction in the average size of the award.

The average amount of temporary total disability is down substantially for the permanent partial disability claims in October 1985. This reduction is somewhat unexpectedly not greater than that found for claims without permanent partial disability (those claims not covered by the two-tier benefit system). This suggests that the administrative changes included...
in the 1983 law that affect all cases have been as effective in returning injured workers to work as the benefit changes which affect only these PPD cases.

The litigation rate for cases with permanent partial disability awards has decreased ten percent from April 1983 to October 1985. Cases with permanent partial disability awards usually involve more serious injuries, so the decline in litigation for these claims is a very promising sign. Since 85.8% of permanent partial disability litigation in October 1985 is still over old-law claims.\textsuperscript{431} It is too early to assign credit for this reduction to the new-law benefit changes alone. Most probably, it is due to the new administrative procedures, which were instituted in July 1983, and to better claims handling by insurers.

The most important factor to note about this data is that a majority of the permanent partial disability cases in this study are old-law claims. Even in October 1985, the study month with the highest percentage of new-law claims, there is still a fifty-eight percent majority of old-law cases in the sample. This is a very promising sign that the full effect of the 1983 workers' compensation law on factors which influence the cost of the system has yet to be felt. It is expected, that as these old-law claims close and are worked out of the workers' compensation system the effects of the new law on permanent partial disability claims and litigation will become more apparent and will increase the positive trends identified in this study.

\textsuperscript{431} Id.