1982

Analysis of Recent Workers' Compensation Developments

Kenneth F. Kirwin

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol8/iss3/7
ANALYSIS OF RECENT WORKERS’ COMPENSATION DEVELOPMENTS

KENNETH F. KIRWIN†

I. INTRODUCTION ..................................... 848

II. CONSTITUTIONAL VALIDITY ISSUES ....................... 849
  A. Peace Officer Heart Attack Deaths ....................... 849
  B. Notice to Employer Regarding Third Party Settlement ......... 851
  C. Benefits Received in Good Faith .......................... 857
  D. Conclusion ........................................... 859

III. EMPLOYMENT RELATIONSHIP ............................... 860
  A. Trial Period ........................................... 860
  B. Employee v. Independent Contractor ....................... 861
  C. Identifying Employer ................................... 865

IV. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT .............. 873
  A. Conduct During Layover .................................. 873
  B. Idiopathic Falls ........................................ 880
  C. Stress Injuries .......................................... 882
  D. Peace Officer-Firefighter Presumption ..................... 888

V. EXCLUSIONS ............................................... 890

VI. NONWORK INJURY SUBSEQUENT TO WORK INJURY ............... 891

VII. BENEFITS ............................................... 894
  A. Treatment ............................................... 894
     1. Attorney Fees ......................................... 894
     2. Reasonableness of Charges .............................. 898
     3. Family Member's Nursing Services ....................... 900
  B. Rehabilitation ........................................... 904
  C. Disability Benefits ...................................... 905
     1. Temporary Total and Permanent Total ................... 905

I. INTRODUCTION

The past several years have been marked by many important developments in Minnesota's workers' compensation law. This Article will analyze some of the more significant decisions of the Minnesota Supreme Court and the Minnesota Workers' Compensation Court of Appeals of the last few years,1 and will proffer some ob-

II. CONSTITUTIONAL VALIDITY ISSUES

Minnesota statutes had a .333 batting average in the three recent Minnesota Supreme Court cases addressing workers' compensation provisions' constitutional validity. The court struck down two provisions on equal protection grounds, but upheld a third against contract clause, remedy-for-every-wrong, and due process challenges.

A. Peace Officer Heart Attack Deaths

In Dependents of Ondler v. Peace Officers Benefit Fund, the supreme court struck down a provision that denied benefits to the survivors of peace officers killed by heart attack in the line of duty while allowing benefits to survivors of peace officers killed in the line of duty by any other cause. The court found no rational basis for distinguishing fatal heart attacks from all other fatal injuries peace officers might incur in the line of duty. After noting that "a classification which treats one class of persons differently from another must, under even minimal judicial scrutiny, be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that similarly situated persons will be treated alike," the court

2. 289 N.W.2d 486 (Minn. 1980).
3. MINN. STAT. § 352E.04(e) (1982) ("For the purpose of sections 352E.01 to 352E.045, killed in the line of duty shall not include any peace officer who dies as a result of a heart attack.")
4. See id. §§ 352E.01-.045. These provisions, deriving from Act of May 15, 1973, ch. 248, 1973 Minn. Laws 489-90, provide $50,000 awards to spouses, children, or parents of certain officers, firefighters and good samaritans requested to aid peace officers, who are killed in the line of duty.
5. 289 N.W.2d at 488. The court accepted the dependents' arguments "that 'killed in the line of duty' was not used to require that the death be the result of the application of external violence or accident, but was used more broadly to include a death occurring while the peace officer was in the line of duty" and "that in common understanding people are 'killed' by strokes, acute respiratory disorders, aneurysms, and heart attacks." Id.
6. Id. at 489 (citing Reed v. Reed, 404 U.S. 71, 76 (1971), and other United States Supreme Court cases). The court further quoted what it called "three criteria which a legislative classification must meet if it is to withstand an equal protection challenge" as follows:

(1) the classification uniformly, without discrimination applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation;
(2) the distinctions which separate those who are included within the classifications from those who are excluded are not manifestly arbitrary or fanciful, but are genuine and substantial so as to provide a natural and reasonable basis
reasoned:

Medical testimony in this case indicated that the same stresses which triggered Ondler's heart attack could have caused respiratory failure, such as an acute asthma attack, and several types of strokes, including aneurysms, in persons susceptible to such occurrences. Had Ondler's death resulted from any of these other causes, however, he would have been entitled to the benefits. We fail to see any reason to distinguish between heart attack victims and victims of the same stresses who die in other ways. Furthermore, such a distinction subverts the purpose of the statute, which was to provide additional benefits to dependents of peace officers because of the unusual risks they face in their work.7

The court concluded that the exclusion denied equal protection under both the federal and state8 constitutions.

7. 289 N.W.2d at 489. The court rather lamely distinguished a prior 4-3 decision wherein it had upheld a provision excluding workers' compensation for suicides. The court said that in that case, Schwartz v. Talmo, 295 Minn. 356, 205 N.W.2d 318 (1973), "this court was called upon to review the legislature's decision to exclude suicide victims from workers' compensation death benefits of any kind," whereas in the case at hand "the legislature has already permitted recovery of death benefits by Otis Ondler's dependents." Id. at 489-90. Interestingly, the court included a footnote stating, "Three months after our decision in Schwartz, the legislature amended Minn. Stat. § 176.021, subd. 1, striking out the language excluding suicide victims from compensation, which Schwartz enforced." Id. at 490 n.5.

8. The court stated that the provision "denies equal protection under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 2 of the Minnesota Constitution." Id. at 490. The Minnesota Constitution does not have a specific equal protection clause, but its "law of the land" provision, MINN. CONST. art. 1, § 2, is often referred to as guaranteeing equal protection. See Wegan v. Village of Lexington, 309 N.W.2d 273, 278 n.7, 281 & n.14 (Minn. 1981); Minneapolis Fed'n of Teachers, Local 39 v. Obermeyer, 275 Minn. 347, 354, 147 N.W.2d 358, 363 (1966); G. Thomas Stores Sales
B. Notice to Employer Regarding Third Party Settlement

In *Nelson v. State*, the supreme court found the federal constitution's equal protection clause violated by Minnesota Statutes section 176.061, subdivision 8's distinction between employees of the state and employees of other employers regarding the employee's duty to notify the employer of a settlement with a third party tortfeasor.

This constitutional issue arose in a very unusual fashion. A widow's action against a third party tortfeasor for the death of a state employee was settled for $130,000. Upon petition of the widow, who had remarried twenty-two months after the employee's death, the district court apportioned the settlement proceeds so that the widow netted $58,040.20 and each of the minor children (ages three and five) netted $4,450. Since the widow had remarried, only the amounts apportioned to the children could be used for the state's credit against future dependency compensation. The state asserted that it should not be bound by the

Sys. v. Spaeth, 209 Minn. 504, 514, 297 N.W. 9, 16 (1941); Dimke v. Finke, 209 Minn. 29, 33, 295 N.W. 75, 78 (1940).

By grounding its decision upon a state constitutional provision, a state court insulates its determination of a state provision's unconstitutionality from United States Supreme Court review. See *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (law office search where lawyer not suspect and no threat of evidence destruction violates both fourth amendment and Minnesota Constitution), noted in 7 WM. MITCHELL L. REV. 253 (1981); Note, *Rights of Criminal Defendants: The Emerging Independence of State Courts*, 1979 HAMLINEL. REV. 83.

10. The court made no reference to the state constitution.
11. MINN. STAT. § 176.061(8) (1982) provides:
   In every case arising under subdivision 5 when the state is the employer and a settlement between the third party and the employee is made it is not valid unless prior notice thereof is given to the state within a reasonable time. If the state pays compensation to the employee under the provisions of this chapter and becomes subrogated to the rights of the employee or his dependents any settlement between the employee or his dependents and the third party is void as against the state's right of subrogation. When an action at law is instituted by an employee or his dependents against a third party for recovery of damages a copy of the complaint and notice of trial or note of issue in such action shall be served on the state. Any judgment rendered therein is subject to a lien of the state for the amount to which it is entitled to be subrogated under the provisions of subdivision 5.
12. 305 N.W.2d at 318.
14. Id. at A-10. This was after deduction of $46,219.80 attorney fees and costs and $16,840 for employer's subrogation for workers' compensation already paid. Id.
district court’s order apportioning the settlement proceeds because it was not served with notice of the petition seeking the apportionment. 16 Apparently under the apprehension that the state’s right-to-notice claim derived from Minnesota Statutes section 176.061, subdivision 8’s provision that when the state is the employer, a settlement between the employee and the third party tortfeasor is not valid unless the state is given prior notice within a reasonable time, 17 the widow asserted that a statute requiring notice only when the state is the employer violates equal protection by failing to treat employees of the state and all other employees uniformly. 18 The court agreed that this differential treatment violated equal protection. 19 It stated that section 176.061, subdivision 8 was unconstitutional, 20 and held that failure to serve any employer with notice of a petition to apportion wrongful death settlement proceeds may invalidate the apportionment obtained. 21

It is remarkable that the Nelson court would have reached out as it did to strike down a provision not directly involved in the case. 22 Since the employer is bound by a district court’s apportionment of wrongful death proceeds 23 but not by an employee’s settlement

16. 305 N.W.2d at 319.
17. Actually, Relator’s Brief made no mention of section 176.061, subdivision 8. However, its argument that the state “was an omitted indispensable party,” Relator’s Brief at 4, Nelson v. State, 305 N.W.2d 317 (Minn. 1981), might indicate the relevance of section 176.061(8)’s third sentence, requiring that the state be served with a copy of the complaint when a third party action is instituted. For the text of MINN. STAT. § 176.061(8) (1982), see supra note 11.
18. 305 N.W.2d at 319.
19. Id. at 320.
20. Id. at 319.
21. See id. (“we hold that failure to provide an interested employer with notice of a petition to distribute the proceeds of a wrongful death action may invalidate the distribution obtained”); id. at 320 (“upon a proper showing by an employer, a district court should invalidate any distribution order obtained without service of this requisite notice”).

However, since the state conceded that it had actual notice within 30 days after the district court’s order apportioning the proceeds, the supreme court remanded the proceedings to the district court to determine whether the state had waived its right to complain about any lack of notice by failing to petition to reopen the proceedings within 30 days after the order. Id. On remand, the district court found that the state had so waived its rights. Discussion with Mr. Mark Hallberg (the widow’s attorney) at William Mitchell College of Law, Sept. 25, 1981.

22. The court clearly could have held that lack of notice to an employer will invalidate a district court’s apportionment of wrongful death action proceeds without addressing itself to MINN. STAT. § 176.061(8). See supra note 17; infra note 25.
23. See 305 N.W.2d at 319; Valois v. Escort Serv., Inc., 279 Minn. 293, 296-97, 156 N.W.2d 754, 756-57 (1968).
with a third party tortfeasor, there is a much stronger case for requiring notice to the employer of an apportionment than of a settlement. Perhaps this led the court to feel that section 176.061, subdivision 8's requirement to notify the state of a settlement must include a duty to provide notice of a petition to apportion the settlement proceeds. Perhaps the court felt the statute's unconstitutionality was so clear and flagrant that a bit of reaching was justified.

At any rate, the court had little difficulty in discerning the subdivision's invalidity, reasoning:

The classification set out by that statute does not apply uniformly to a similarly situated group, employees, and instead distinguishes the state as an employer from all other employers and accords its interests greater protection. Additionally, we find no genuine or substantial distinctions between the state as an employer and all other employers and that the purposes of the Workers' Compensation Act, Minn. Stat. § 176.011, et seq. (1980), are not advanced by elevating the rights of the state to a position of greater protection than that accorded other employers. The classification is not rationally related to a legitimate governmental purpose and its implementing legislation must therefore be declared unconstitutional.

The Nelson decision's holding that lack of notice to an employer will invalidate a district court's apportionment of wrongful death action proceeds is quite clear. But the decision's impact on subdivision 8 which it declares unconstitutional is very unclear. Although the opinion repeatedly refers to section 176.061, subdivision 8 as a whole in striking down the subdivision's distinc-

25. Perhaps the case is strong enough to show that it would violate due process to bind an employer with consequences as severe as those that can result for apportioning wrongful death proceeds without giving the employer notice and opportunity to be heard. Cf. McKinney v. Alabama, 424 U.S. 699 (1976) (obscenity defendant cannot be bound by determination of material's obscenity made in proceeding to which he was not party and of which he had no notice). If so, the court could have used procedural due process rather than equal protection as the basis for its decision. The state's brief had argued in terms of the "right to appear and be heard." Relator's Brief at 5, Nelson v. State, 305 N.W.2d 317 (Minn. 1981).
26. 305 N.W.2d at 319-20.
27. See infra note 21 and accompanying text. The court would probably extend this to the kind of district court allocation involved in Henning v. Wineman, 306 N.W.2d 550 (Minn. 1981). See infra text accompanying notes 41-43. If so, lack of notice to an employer will invalidate a district court's allocation of an employee's settlement proceeds between amounts recoverable and not recoverable under workers' compensation.
tion between the state and other employers,\textsuperscript{28} it does not specify as to each sentence in the subdivision whether the unconstitutionality is to be remedied by striking down the provision or by extending it to all employers.

Subdivision 8's first sentence provides, "In every case arising under subdivision 5 when the state is the employer and a settlement between the third party and the employee is made it is not valid unless prior notice thereof is given to the state within a reasonable time."\textsuperscript{29}

One might suppose that since the \textit{Nelson} holding requires notice of an apportionment petition to any employer, this sentence on notice of settlement should be extended to all employers. But, as noted above,\textsuperscript{30} unlike a district court's apportionment, an employee's settlement with a third party tortfeasor does not bind the employer. The Minnesota court recently reaffirmed this principle in \textit{Aetna Life \& Casualty v. Anderson},\textsuperscript{31} where it held that if an employee settles with a tortfeasor without the employer's consent, the employer may (1) take a credit against the settlement proceeds for compensation payable, and (2) sue the tortfeasor for the amount by which employer's compensation liability exceeds the credit.\textsuperscript{32}

A conclusion that a settlement with a tortfeasor is not valid absent prior notice to the employer would be inconsistent with the 1957 decision of \textit{Lang v. William Bros Boiler \& Manufacturing Co.}\textsuperscript{33}

In \textit{Lang}, the supreme court held that an employee's settlement

\textsuperscript{28} The court's references to the statute were as follows:

Our attention is then directed to Minn. Stat. § 176.061, subd. 8 (1980) which provides that a failure to give notice to the state, as an interested employer, of a settlement reached between an employee and a third-party tortfeasor renders the settlement invalid. The respondent ... argues that a statute requiring notice only when the state is the employer is constitutionally infirm because it fails to treat all employees uniformly. In its view, that section distinguishes between employees of the state and all other employees and violates respondent's right to equal protection under the laws. U.S. Const. Amend. XIV.

... An examination of [certain] factors requires the conclusion that Minn. Stat. § 176.061, subd. 8 (1980) is unconstitutional. The classification set out by that statute does not apply uniformly to a similarly situated group, employees, and instead distinguishes the state as an employer from all other employers and accords its interests greater protection. ... The classification is not rationally related to a legitimate governmental purpose and its implementing legislation must therefore be declared unconstitutional.

305 N.W.2d at 319-20.

\textsuperscript{29} MINN. STAT. § 176.061(8) (1982).

\textsuperscript{30} See supra notes 23-24 and accompanying text.

31. 310 N.W.2d 91 (Minn. 1981).

32. \textit{Id.} at 95.

33. 250 Minn. 521, 85 N.W.2d 412 (1957).
with a third party tortfeasor without the employer's knowledge was valid—but did not affect the employer's subrogation rights against the tortfeasor. The Nelson court's only reference to Lang was to cite it for the proposition, "We have previously commented upon the critical nature of notice in cases involving pending settlements between recipients of compensation benefits and third party tortfeasors."

Thus, it is hard to say whether Nelson's effect is to strike down subdivision 8's first sentence or to extend that sentence's effect to all employers. Until this is clarified, it is prudent for employee's counsel to notify the employer before settling with a tortfeasor.

Next to be considered is Nelson's impact upon subdivision 8's second and fourth sentences. They specify:

If the State pays compensation to the employee under the provisions of this chapter and becomes subrogated to the rights of the employee or his dependents any settlement between the employee or his dependents and the third party is void as against the State's right of subrogation. Any judgment rendered therein [in an action by an employee or dependents against a third party] is subject to a lien of the state for the amount to

34. Id. at 531, 85 N.W.2d at 419.
35. 305 N.W.2d at 319. The court also cited Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977). The Naig court, in the course of holding that an employee could validly formulate a settlement with a tortfeasor covering "everything other than the subrogated interest of the compensation carrier" the proceeds of which would not be subject to division under MINN. STAT. § 176.061(6) (1982), noted that through certain telephone conversations with its attorney, "the compensation insurer was put on notice that the employee intended to negotiate a settlement which would not include any items for which the insurer might have a compensation claim under the Workers' Compensation statute," 258 N.W.2d at 893, and that when the stipulation of settlement was read into the district court record, the employer and compensation insurer, although not present or a party to the settlement, "were aware that they were no longer represented by [employee's] attorney," id., and stated:

So long as the employer is notified of negotiations leading to such a settlement so that it can appear or intervene to protect its interests and so long as the employee demonstrates that the settlement concerns only damages not recoverable under worker's compensation, or allocates the settlement into recoverable and nonrecoverable claims, the employer cannot credit the nonrecoverable portion of the settlement against compensation payments.

Id. at 894 (emphasis added) (footnotes omitted).

36. See Sargent v. Johnson, 323 N.W.2d 767, 770 (Minn. 1982) ("Naig requires that the employer be 'notified of the negotiations leading to such a settlement so that it can appear or intervene to protect its interest.'"); Easterlin v. State, 34 Minn. Workers' Comp. Dec. 718 (1982) (proceeds subject to division where employer not notified of settlement negotiations); Bartlett v. Northwest Exhibition, Inc., No. 483-62-7328 (Minn. Workers' Comp. Ct. App. July 21, 1982) (special fund entitled to division of proceeds where it was not notified of impending Naig settlement although the uninsured employer was notified).
which it is entitled to be subrogated under the provisions of subdivision 5.\textsuperscript{37}

Insofar as these provisions purport to reach "any" settlement or judgment, the Nelson decision probably strikes them down, rather than extending them to all employers.

Extending the second sentence to "any" settlement would conflict with a 1977 case, Naig \textit{v. Bloomington Sanitation},\textsuperscript{38} where the supreme court held that if the employee notifies the employer of the settlement negotiations, the employee may validly formulate a settlement with a tortfeasor covering "everything other than the subrogated interest of the compensation carrier" with the proceeds not subject to division under section 176.061, subdivision 6.\textsuperscript{39} The court has referred approvingly to the Naig holding in a post-Nelson case.\textsuperscript{40}

Extension of the fourth sentence to "any" judgment would run counter to a 1981 case decided six weeks before Nelson, Henning \textit{v. Wineman}.\textsuperscript{41} In Henning, the court held that a district court may allocate settlement proceeds between amounts recoverable and not recoverable under workers’ compensation, with the latter not being subject to division under section 176.061, subdivision 6.\textsuperscript{42}

Although there is a good argument that Naig and Henning are in clear conflict with the statute’s mandate that "[t]he proceeds of all actions for damages or settlement thereof under this section . . . shall be divided as” specified in section 176.061, subdivision 6,\textsuperscript{43} so that much can be said for a result that would overrule Naig and Henning, it is doubtful that the Nelson court intended to silently overrule such significant recent decisions.

If it did not overrule Naig and Henning, the Nelson decision has the effect of striking down rather than extending subdivision 8’s second and fourth sentences, so that, with reasonable prior notice to the employer,\textsuperscript{44} state employees like other employees may make Naig settlements and obtain Henning allocations not subject to the division specified in section 176.061, subdivision 6.

\begin{itemize}
\item \textsuperscript{37} MINN. STAT. § 176.061(8) (1982).
\item \textsuperscript{38} 258 N.W.2d 891 (Minn. 1977).
\item \textsuperscript{39} Id. at 893-94.
\item \textsuperscript{40} See Jones \textit{v. Fisher}, 309 N.W.2d 726, 732 n.10 (Minn. 1981) ("In settlements of the kind at issue in the instant case [claims against liquor and 3.2 beer vendors] the parties should consider the use of a Naig-type release.").
\item \textsuperscript{41} 306 N.W.2d 550 (Minn. 1981).
\item \textsuperscript{42} Id. at 551-52.
\item \textsuperscript{43} MINN. STAT. § 176.061(6) (1982).
\item \textsuperscript{44} See supra notes 27, 29-39 and accompanying text.
\end{itemize}
Finally, subdivision 8's third sentence provides, "When an action at law is instituted by an employee or his dependents against a third party for recovery of damages a copy of the complaint and notice of trial or note of issue in such action shall be served on the state." Nelson's emphasis upon the desirability of notice indicates that the decision's effect is to extend this provision to cases involving employers other than the state rather than striking it down. Unless and until it becomes clear that this is not so, it is prudent and good practice for employee's counsel to serve the specified documents upon the employer.

C. Benefits Received in Good Faith

The Minnesota Supreme Court did not strike down every workers' compensation provision challenged before it in the last two years. Affirming a judgment against a compensation insurer which had sued for restitution of a $4,751 check issued through clerical error for additional permanent partial disability, the supreme court in Tri-State Insurance Co. v. Bouma rejected contract clause, remedy-for-every-wrong, and due process challenges to section 176.179's protection from having to refund compensation payments made by mistake but in apparent or seeming accordance with the law and received in good faith.

45. MINN. STAT. § 176.061(8) (1982).
46. The Nelson court stated:

We have previously commented upon the critical nature of notice in cases involving pending settlements between recipients of compensation benefits and third party tortfeasors. . . . It is our view that notice to interested employers is no less important when a petition to distribute proceeds is involved.

305 N.W.2d at 319 (citations omitted).
47. 306 N.W.2d 564 (Minn. 1981).
48. The first sentence of MINN. STAT. § 176.179 (1982), enacted in Act of Apr. 12, 1974, ch. 486, § 5, 1974 Minn. Laws 1237, provides:

Notwithstanding section 176.521, subdivision 3, or any other provision of this chapter to the contrary, except as provided in this section, no lump sum or weekly payment, or settlement, which is voluntarily paid to an injured employee or the survivors of a deceased employee in apparent or seeming accordance with the provisions of this chapter by an employer or insurer, or is paid pursuant to an order of the workers' compensation division or court of appeals relative to a claim by an injured employee or his survivors, and received in good faith by the employee or his survivors shall be refunded to the paying employer or insurer in the event that it is subsequently determined that the payment was made under a mistake in fact or law by the employer or insurer.

The balance of § 176.179 was not involved in Bouma since it was enacted after the case's facts arose. See Act of June 7, 1979, ch. 3, § 49, 1979 Minn. Laws Ex. Sess. 1287. The 1979 amendment provides:

When the payments have been made to a person who is entitled to receive further payments of compensation for the same injury, the mistaken compensation
The *Tri-State* court found no contract clause violation in applying this 1974 provision to a 1975 payment for a 1973 work injury.\(^49\) It said, "The fact that the mistaken payment was made subsequent to the effective date of the statute . . . destroys plaintiff's argument that its application results in an impairment of a contract obligation in violation of Minn. Const. Art. 1, § 11."\(^50\)

As to the state constitution provision specifying that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character,"\(^51\) the court first said:

It cannot be denied that when the conditions prescribed in the statute are satisfied, an employer or insurer who makes a payment through mistake is denied the remedy of an action founded on unjust enrichment. But this court refused many years ago to hold that this constitutional provision was an absolute limitation on the legislature's power to determine both the form and the measure of the remedy for a wrong. *Allen v. Pioneer-Press Co.*, 40 Minn. 117, 41 N.W. 936 (1889). It is obvious that the statute, by setting forth the specific conditions under which a refund of a mistaken payment cannot be required, leaves the remedy of restitution available in many, perhaps most, cases.\(^52\)

Then the *Tri-State* court added reasoning addressed not just to
the remedy-for-every-wrong point but also the substantive due process claim. After pointing out that it had recognized "that the legislature could constitutionally abrogate a common-law right without providing a reasonable substitute if it is pursuing a permissible, legitimate legislative objective," the court concluded:

Consideration of section 176.179, which appears to represent the judgment of the legislature that the general welfare is promoted by not placing upon an injured employee the probable hardship of reimbursing an overpayment received in good faith due to a mistake over which he had no control, leads us to the conclusion that it embodies a permissible legislative objective which does not contravene Minn. Const. Art. 1, § 8, nor transgress the requirement of fundamental fairness inherent in the due process requirements of the fourteenth amendment of the United States Constitution and Article 1, § 7, of the Minnesota Constitution.

D. Conclusion

The foregoing cases indicate that the Minnesota Supreme Court remains a more hospitable place than the federal courts to chal-

53. Id. at 566, citing Tracy v. Streater/Litton Indus., 283 N.W.2d 909 (Minn. 1979) and Haney v. International Harvester Co., 294 Minn. 375, 201 N.W.2d 140 (1972).

54. Id.


Aside from a case subsequently overruled, Morey v. Doud, 354 U.S. 457 (1957), overruled by New Orleans v. Dukes, 427 U.S. 297 (1976), only twice in the last 45 years has the United States Supreme Court stricken down a provision merely because it was not rationally related to any legitimate legislative purpose. See United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (denying food stamps to household just because it contains unrelated persons is not rationally related to any legitimate governmental interest); Lindsey v. Normet, 405 U.S. 56, 76-77 (1972) (requiring double bond from tenant appealing eviction judgment but not other appellants violates equal protection because it bears "no reasonable relationship to any valid state objective"); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 449, 1245-58, 1480 (5th ed. 1980).

Regarding state courts' greater willingness to strike down legislation for lack of ra-
lenge a statutory provision on the ground—which may be asserted under the state constitution remedy-for-every-wrong provision,\textsuperscript{56} substantive\textsuperscript{57} due process,\textsuperscript{58} or equal protection\textsuperscript{59}—that the provision (or a classification therein) is not rationally related to any legitimate legislative purpose.

### III. Employment Relationship

#### A. Tryout Period

In *Erickson v. Holland*,\textsuperscript{60} the supreme court entered the intricate area of the employment relationship during tryout periods.\textsuperscript{61} In *Erickson*, claimant was injured while engaged in a truck driving "performance test" which a trucking company required prospective employees to pass.\textsuperscript{62} *Erickson* was not a typical tryout period case posing the issue whether an employment relationship had commenced, because the court upheld the conclusion that claimant had already commenced a contract of hire by hauling a trailer for the company while on the way to the performance test location.\textsuperscript{63} Instead, the court directed itself to the company's "in the course of" claim "that [claimant] was not performing substantial services for [the company] when he was injured" because of "the admitted fact that he did not expect payment for taking the


\textsuperscript{57}. Because of the disparagement that has been heaped upon the concept, see, e.g., North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 164-67 (1973); Ferguson v. Skrupa, 372 U.S. 726, 728-32 (1963); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949), it may be prudent not to emphasize that it is "substantive" due process that is being asserted.

\textsuperscript{58}. See supra text accompanying notes 2-26.

\textsuperscript{59}. See supra text accompanying notes 2-26.

\textsuperscript{60}. 295 N.W.2d 576 (Minn. 1980).

At the workers' compensation court of appeals, the case also involved an "identifying employer" issue, with the court of appeals ruling that claimant was the employee of the truck tractor's lessee rather than its lessor. *Id*. at 579. The determination that the lessor was not claimant's employer was not in issue before the supreme court. See *id*. at 577, 579; Brief of Curtis of Iowa, Inc., Erickson v. Holland, 295 N.W.2d 576 (Minn. 1980); see also infra note 119.

\textsuperscript{61}. See IC A. Larson, The Law of Workmen's Compensation § 47.42(b) (1980).

\textsuperscript{62}. 295 N.W.2d at 577, 579.

\textsuperscript{63}. See *id*. at 579. The court upheld the further conclusion that this contract of hire would not terminate unless claimant failed to pass the company's tests. *Id*.
However, the court's reasoning rejecting that claim is broad enough to cover a situation posing the issue whether the employment relationship had commenced:

[The company's] interest in obtaining well-qualified drivers was plainly furthered by [claimant's] participation in the tests... and it is reasonable to infer that his doing so conferred a substantial benefit upon [the company] in view of their objective. The fact that he did not expect payment for the tests does not seem significant in light of the fact that they were preliminary to work for which he did expect payment.

The court's approach of finding coverage for the tryout situation is sound. Since an enterprise receives a substantial benefit from candidates undergoing tryouts, it should respond with compensation for resulting injuries.

B. Employee v. Independent Contractor

In Holton v. Jenkins Truck Lines, the Workers' Compensation Court of Appeals found that a truck driver, who drove exclusively for the company which owned and maintained the truck, was paid twenty-seven percent of gross receipts, and could choose his own routes, was an employee rather than an independent contractor. Although this is not a remarkable result, several facets of the opinion are interesting.

First, the court of appeals rejected the company's argument that the opposite result was compelled by IRS approval, upon its deter-

64. Id. at 579-80.
65. Id. at 580.

The court's reference to the company's receiving a "substantial benefit" is similar to its approach to employer-sponsored event cases, where it finds coverage only if the employee's attendance is required, is rewarded by something understood to be more than a gift or gratuity, or is of direct and substantial benefit to the employer "'beyond the intangible value of improvement in the employee's health or morale that is common to all kinds of recreation and social life.'" Tietz v. Hastings Lumber Mart, Inc., 297 Minn. 230, 231, 210 N.W.2d 236, 237 (1973) (per curiam), quoting Youngberg v. The Donlin Co., 264 Minn. 421, 427, 119 N.W.2d 746, 750 (1963); see also Ethan v. Franklin Mfg. Co., 286 Minn. 371, 176 N.W.2d 72 (1970).

66. 35 Minn. Workers' Comp. Dec. 321 (1982), aff'd mem., No. 82-613 (Minn. Nov. 1, 1982).

Regarding the new prohibition on citing summary dispositions, see infra Notes 290-94 and accompanying text.

67. See 1C A. Larson, supra note 61, § 44.34 (when principal furnishes valuable equipment, relationship is almost invariably that of employment); see also Firkus v. Murphy, 311 Minn. 85, 87, 246 N.W.2d 864, 866 (1976) ("presumption that one injured while in another's service is an employee... is useful in distinguishing an employee from an independent contractor").
mination that the driver was an independent contractor, of the company's nonwithholding of income taxes or social security. The court of appeals reasoned:

We find that this so-called approval has no bearing on the matter before us. First, we have no knowledge or evidence of the criteria used by the IRS in making such a determination, and whether or not it is the same or different than used in workers' compensation cases. Second, we have no authority to delegate our duty to determine employee or independent contractor relations to the IRS or any other administrative agency.\(^6\)

The other interesting aspect of the Holton opinion is its emphasis upon the non-exclusiveness of the familiar five-factor employee v. independent contractor test which looks to "(1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of materials or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge."\(^7\) After listing these factors as criteria that should be employed, the court of appeals noted that the Minnesota Supreme Court has cautioned that the determination should not be restricted specifically to these factors and that "tests which determine the legal relationship of the parties must be used as guide posts and not as hitching posts."\(^8\) And after discussing the application of the five factors,\(^9\) the court of appeals said:

Other factors we consider of some significance are the fact that while [the driver] was hauling for [the trucking company] he did no such work for any other organization such as independent contractors often do. In his other work in the same field he always worked for one trucking company at a time. There is no evidence that he in any manner held himself out as being a contractor with any of the trucking companies he worked for or spoke to about work.\(^10\)

\(^6\) 35 Minn. Workers' Comp. Dec. at 323.
\(^7\) Id.
\(^8\) Id. at 323-24, citing Christopherson v. Security State Bank, 256 Minn. 191, 194, 97 N.W.2d 649, 651 (1959).
\(^9\) The court of appeals found that (1) although the company may not have exercised control over the means and manner of performance, a review of all the evidence showed it retained the right to do so, (2) the mode of payment, which was fairly common in the trucking industry, was not of great significance, (3) the company furnished the truck, (4) "the work of truck driving is not done on any particular premises," and (5) the company retained the right to discharge. Id. at 324-25.
\(^10\) Id. at 324.
The court of appeals' emphasis upon the non-exclusiveness of the five-factor test is highly appropriate.

The supreme court has employed the five-factor test in a number of recent cases.73 It apparently derives from a formulation set forth in its opinion in the 1941 case of *Lemkuhl v. Clark*.74

In the 1946 case of *Castner v. Christgau*,75 the supreme court quoted and relied upon the much longer list of factors in *Restatement of Agency* section 220(2), looking to (a) right to control details, (b) whether the agent is engaged in a distinct business, (c) whether the kind of work is *usually* done in the locality by an employee or by an independent contractor, (d) the skill required, (e) who supplies the instrumentalities, tools and place, (f) the length of time involved,76 (g) the method of payment, whether by the time or by the job,77 (h) whether the work is a part of the principal's regular business, and (i) whether the parties *believe* they are creating an employment relationship. *Restatement (Second) of Agency* section 220(2) adds "(j) whether the principal is or is not in business."78

The court quoted and relied upon the *Restatement* list again in

---


74. 209 Minn. 276, 277, 296 N.W. 28, 29 (1941).

75. 222 Minn. 61, 66-67, 24 N.W.2d 228, 231 (1946).

76. It would seem this factor has at least three aspects: (1) the anticipated duration of the overall relationship between the parties; (2) the amount of time the agent must expend actually performing the work; and (3) whether the relationship is terminable at will without liability.

77. It would seem that when payment is per *unit*, the issue is whether under all circumstances it is more similar to payment per time or payment per job.

78. *Restatement (Second) of Agency* § 220 (1958) specifies:

1. A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

2. In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality,
the 1951 case of Graf v. Montgomery Ward & Co.\textsuperscript{79} In the 1963 case of Lindberg v. J.A. Danens & Son,\textsuperscript{80} the supreme court cited the Restatement provision, Castner, and Graf, and said, "In determining whether a particular relationship is that of an employee or an independent contractor we have been guided by the rules suggested in the Restatement."\textsuperscript{81} Later cases have not expressed any disapproval of the Restatement list, but they inexplicably omit reference to it in favor of the five-part list.

The Restatement list, which Professor Larson says is "one on which practically every court in the Anglo-American world would agree,"\textsuperscript{82} is superior to the five-factor test in focusing upon a greater number of relevant criteria. Significantly, Minnesota cases decided both before and after development of the five-part test have relied upon criteria covered by the Restatement list but not the five-part test—(b) whether the agent is engaged in a distinct business,\textsuperscript{83} (c) whether the kind of work is usually done by an employee or by an independent contractor,\textsuperscript{84} (d) the skill required,\textsuperscript{85} (f) the

\begin{itemize}
  \item the work is usually done under the direction of the employer or by a specialist without supervision;
  \item (d) the skill required in the particular occupation;
  \item (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  \item (f) the length of time for which the person is employed;
  \item (g) the method of payment, whether by the time or by the job;
  \item (h) whether or not the work is a part of the regular business of the employer;
  \item (i) whether or not the parties believe they are creating the relation of master and servant; and
  \item (j) whether the principal is or is not in business.
\end{itemize}

\textsuperscript{79} 234 Minn. 485, 491-92, 49 N.W.2d 797, 801 (1951).
\textsuperscript{80} 266 Minn. 420, 123 N.W.2d 695 (1963).
\textsuperscript{81} Id. at 422, 123 N.W.2d at 696-97.
\textsuperscript{82} 1 C A. LARSON, supra note 61, § 43.10.
\textsuperscript{83} Compare Wangen v. City of Fountain, 255 N.W.2d 813, 816 (Minn. 1977) (plumber who had own business held independent contractor as matter of law) and Lemkuhl v. Clark, 209 Minn. 276, 277, 296 N.W. 28, 29 (1941) (decedent who with partner engaged in painting and repairing buildings over large area extending into three states could be found independent contractor) with Farnam v. Linden Hills Congregational Church, 276 Minn. 84, 91, 149 N.W.2d 689, 694 (1967) ("The facts are not such as to support a claim that the two boys were conducting a distinct business of their own as independent contractors.") and Carter v. W.J. Dyer & Bros., 186 Minn. 413, 415, 243 N.W. 436, 438 (1932) (window washer who "had no place of business" could be found employee). But cf. Myers v. Villard Creamery Co., 189 Minn. 244, 246, 248 N.W. 824, 825 (1933) ("The fact that respondent had a shop should not as a matter of law exclude him from the benefits of the compensation act.").
\textsuperscript{84} See Carter v. W.J. Dyer & Bros., 186 Minn. 413, 415, 243 N.W. 436, 437 (1932) ("Window washing . . . is usually done by servants.").
\textsuperscript{85} Compare Wangen v. City of Fountain, 255 N.W.2d 813, 816 (Minn. 1977) (plumber was a "skilled artisan") with Farnam v. Linden Hills Congregational Church,
length of time involved,\textsuperscript{86} (h) whether the work is part of the principal's regular business,\textsuperscript{87} (i) whether the parties believe they are creating an employment relationship,\textsuperscript{88} (j) and whether the principal is or is not in business.\textsuperscript{89}

The additional factors relied upon by the court of appeals in \textit{Holton} correspond to some of these \textit{Restatement} criteria. The fact that "while [the driver] was hauling for [the trucking company] he did no such work for any other organization as independent contractors often do" shows that the driver was not engaged in a distinct business. The fact that "[t]here is no evidence that he in any manner held himself out as being a contractor with any of the trucking companies he worked for or spoke to about work" indicates that he believed he was in an employment rather than independent contractor relationship.

Although the \textit{Holton} opinion does not cite the \textit{Restatement} list, one may hope that its emphasis upon the non-exclusiveness of the five-part list and its reliance upon criteria corresponding to \textit{Restatement} factors can be used as a stepping stone back to express reliance upon the superior \textit{Restatement} list.

\section{Identifying Employer}

The recent case of \textit{Newland v. Overland Express, Inc.}\textsuperscript{90} involved the question whether a truck driver was the employee of a truck tractor's lessor, or of both the lessor and lessee. Lessee claimed the latter, in order to preclude the driver's common law action against the lessee for injuries caused by his fellow driver's negligently

\begin{footnotesize}
\begin{itemize}
\item 276 Minn. 84, 91, 149 N.W.2d 689, 694 (1967) ("the work being done did not require specialized experience or skill") and Carter v. W.J. Dyer & Bros., 186 Minn. 413, 415, 243 N.W. 436, 437 (1932) ("Window washing is humble work, performed mostly by hand labor") and Anderson v. J.J. Enters., 35 Minn. Workers' Comp. Dec. 174, 175 (1982) (performing "menial tasks" does not require skill).
\item 86. \textit{See} Carter v. W.J. Dyer & Bros., 186 Minn. 413, 416, 243 N.W. 436, 438 (1932) ("There was no time fixed.").
\item 87. \textit{See} Myers v. Villard Creamery Co., 189 Minn. 244, 245, 248 N.W. 824, 825 (1933) ("To have that heating device [which claimant helped repair] function properly was perhaps as needful to the operation of business of the creamery as that of a churn therein.").
\item 88. \textit{See} Wangen v. City of Fountain, 255 N.W.2d 813, 816 (Minn. 1977) (plumber held "himself out to the public as an independent businessman willing to work for anyone").
\item 89. \textit{See} Carter v. W.J. Dyer & Bros., 186 Minn. 413, 416, 243 N.W. 436, 438 (1932) (principal was "in the business of buying and selling musical instruments, radios, and things incident thereto.").
\item 90. 295 N.W.2d 615 (Minn. 1980).
\end{itemize}
\end{footnotesize}
crashing the truck while plaintiff slept in the sleeper cab.\textsuperscript{91}

Plaintiff and the other driver were employed by lessor, who had no intrastate or interstate authority from the ICC to transport goods and so, for some years, had been leasing his tractors to various trucking companies, including lessee. At the time in question, lessor owned eleven tractors, all of which were leased to lessee, and had fourteen truck driver employees.\textsuperscript{92}

Lessee was an irregular-route common carrier hauling freight in several states. It owned no tractors and, according to one of its officers, had no truck driver employees.\textsuperscript{93}

Lessor's normal hiring procedure was that a prospective driver would come to him and fill out an application. After lessor approved the application, he would take it to lessee's safety depart-

\textsuperscript{91} Id. at 616-17. Plaintiff proceeded on the basis that lessee had "contractually assumed liability for tortious injuries to the lessor's employees," see Respondent's Brief at 9, Newland v. Overland Express, Inc., 295 N.W.2d 615 (Minn. 1980), apparently relying on the lease provision, required by federal regulations, that "the lessee shall have the exclusive control, possession and use of said equipment, and shall assume full and complete responsibility to the public, the shippers, and to all regulatory bodies or authorities having jurisdiction during the entire period of the lease." See Relator's Brief and Appendix at A-26, Newland v. Overland Express, Inc., 295 N.W.2d 615 (Minn. 1980); infra text accompanying note 99.

Neither the court's opinion or the parties' briefs in Newland addressed the possible applicability of the fellow servant rule as a defense to the lessee's liability. Traditionally, the fellow servant rule exempts a master from liability to a servant for injury caused by negligence of a fellow servant. See Novotny v. Bouley, 223 Minn. 592, 601, 27 N.W.2d 813, 818 (1947); Brown v. Winona & St. Peter R.R., 27 Minn. 162, 165, 6 N.W. 484, 485 (1880); Foster v. Minnesota Cent. Ry., 14 Minn. 277, 14 Gil. 36 (1869). Arguably the rule should not apply in Newland because the lessee was not plaintiff's "master" (inasmuch as the court held lessee was not plaintiff's "employer" for workers' compensation purposes). One might also argue that the Minnesota court should abrogate the fellow servant rule as a complete defense to a master's liability. Having recognized that "[t]he injustice of making this exception to the rule of respondeat superior is obvious, thus compelling those who receive the least from an industry to assume its hazards to life and limb from the negligence of those over whom they have no control and in whose selection they have no voice," Headline v. Great N. Ry., 113 Minn. 74, 77-78, 128 N.W. 1115, 1116 (1910), the court might follow the lead of the New York Court of Appeals which has ruled that the fellow servant rule is no longer to be followed in New York. See Buckley v. City of New York, 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982). Or it might conclude that since the fellow servant rule is based upon assumption of risk, see Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 60 (1943) (reference to "fellow servant-assumption of risk rule"); Brown v. Winona & St. Peter R.R., 27 Minn. 162, 166, 6 N.W. 484, 486 (1880) (servant "assumes the risks from negligence of . . . servants"), under the comparative fault statute, MINN. STAT. § 604.01 (1982), assumption of the risk of fellow servant negligence, if unreasonable, should only diminish (rather than completely bar) a servant's recovery unless it constitutes fault greater than that of the master.

\textsuperscript{92} 295 N.W.2d at 617.

\textsuperscript{93} Id.
ment. There lessee would check out the driver's record to see if he met all requirements of the ICC, the Minnesota Department of Transportation (DOT), and lessee. If so, lessee would notify lessor that the driver could be sent to lessee for a day of tests and an orientation speech. When the driver passed all these requirements, he could begin hauling lessee's trailers. He was given a copy of lessee's standard operating procedures and told he must comply with these rules while hauling lessee's trailers.94

When lessee needed a tractor, it contacted lessor, who could accept or reject any particular shipment. If lessor accepted the shipment, he selected the tractor and drivers and sent them to pick up the trailer. Lessee never specified which driver should drive the tractor. If a driver failed to meet ICC, DOT, or lessee requirements, lessee could tell lessor not to employ that driver hauling lessee's trailers, but lessor could still use the driver for any other company, as long as the driver met the other company's requirements.95

Lessor and lessee's lease agreement at several points referred to lessor as an independent contractor, and it provided that lessor had "sole power and authority to select, engage and control all employees" lessor used in performing the contract.96 Although lessee reimbursed lessor for maintenance and fuel purchased for its trailers,97 lessor had to pay all expenses related to the tractor. In the event of a breakdown, lessor authorized repairs. Lessor, not lessee, paid the drivers so much per mile, withheld income taxes and social security, and provided workers' compensation and unemployment compensation benefits.98 The lessee included a provision, pursuant to federal regulations, that lessee had exclusive control, possession and use of the leased equipment and accepted full and complete responsibility to the public, shippers, and regulatory bodies. On one occasion lessee paid plaintiff a cash bonus for safe driving.99

On these facts, the Newland court upheld the trial court's ruling

94. Id.
95. Id. But at the time in question all 11 of lessor's tractors were leased to lessee. See supra text accompanying note 92.
96. 295 N.W.2d at 617.
97. This referred to fuel for refrigerated trailers. See Relator's Brief and Appendix at A-27, A-33, Newland v. Overland Express, Inc., 295 N.W.2d 615 (Minn. 1980).
98. 295 N.W.2d at 617.
99. Id. at 618.
as a matter of law that plaintiff was an employee only of lessor.\footnote{The trial court granted plaintiff's motion for partial summary judgment and to strike lessee's asserted defense that plaintiff's sole remedy was under the Workers' Compensation Act. \textit{Id.} at 616.}

After setting forth the factors it has generally specified for determining whether an employer-employee relationship exists\footnote{The court also upheld the trial court's ruling that lessor and lessee were not engaged in furtherance of a common enterprise or the accomplishment of the same or related purposes within the meaning of \textsc{Minn. Stat.} \textsection{176.061}(4) (1982), as to make plaintiff's receipt of compensation from lessor a barrier to his lawsuit against lessee. \textit{See} 295 N.W.2d at 616, 619-20. The court reasoned: To be applicable, this defense must meet three requirements: (1) the employers must be engaged in the same project; (2) the employees must be working together (common activity); and (3) in such fashion that they are subject to the same or similar hazards. \textit{McCourt v. United States Steel Corp.}, 253 Minn. 501, 506, 93 N.W.2d 552, 556 (1958). These requirements are not met in the instant case. Since [lessee] owns no tractors and hires no truck drivers directly, the employees of [lessor] and [lessee] are not working together, nor are they subject to the same hazards. [Lessor's] employees are subject to the risks of traffic accidents. [Lessee's] employees are subject to the hazards incident to clerical work and truck-loading. Therefore, the trial court did not err by striking the defense under Minn. Stat. \textsection{176.061} (1978). \textit{Id.} at 620 (footnote omitted).} and stating that the most important factor was right to control performance, the court held that the evidence of lessee's control over plaintiff was "not sufficient . . . to conclude that an employer-employee relationship existed at the time of the accident."\footnote{\textit{Id.} at 619.} The court pointed out that although the lease provided, pursuant to federal regulations, that lessee had exclusive control, possession and use of the leased equipment and accepted full responsibility to the public, shippers, and regulatory bodies, the court had previously held that this language was not determinative of employee status for workers' compensation purposes.\footnote{\textit{Id.}, citing \textit{Gibson v. Moore Motor Freight Lines, Inc.}, 246 Minn. 359, 75 N.W.2d 212 (1956); Tretter v. Dart Transit Co., 271 Minn. 131, 135 N.W.2d 484 (1965).} The court further emphasized that lessee had no authority to hire drivers, that its authority to fire was limited to prohibiting a driver from driving for lessee and did not prevent lessee from using the driver wherever

\footnote{100. The trial court granted plaintiff's motion for partial summary judgment and to strike lessee's asserted defense that plaintiff's sole remedy was under the Workers' Compensation Act. \textit{Id.} at 616.}

\footnote{101. \textit{Id.} at 619.}

\footnote{102. The court specified "(1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of materials or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge." 295 N.W.2d at 617; \textit{see supra} notes 69-89 and accompanying text.}

\footnote{103. 295 N.W.2d at 618.}

\footnote{104. \textit{Id.}, citing \textit{Gibson v. Moore Motor Freight Lines, Inc.}, 246 Minn. 359, 75 N.W.2d 212 (1956); Tretter v. Dart Transit Co., 271 Minn. 131, 135 N.W.2d 484 (1965).}
he wanted, that lessee paid no wages and provided no benefits to plaintiff except for the single cash bonus it awarded plaintiff for safe driving, the lessee had no control over which tractor and driver would be used on any trip, and that there was no evidence lessee dictated what routes to follow or controlled details of the trips, other than those related to the freight itself.

The Newland court then confronted lessee's claim that it was a co-employer along with lessor under the loaned servant doctrine, which provides that a special employer becomes a co-employer along with the general employer if three conditions are satisfied:

1. the employee has made a contract for hire, express or implied, with the special employer;
2. the work being done is essentially that of the special employer; and
3. the special employer has the right to control the details of the work.

The court said that in addition to these three conditions, the employee's consent, express or implied, must be found in order to establish the employment relationship, that such consent, while easily implied from submission to the employer's right to control where the question is whether one is an employee as opposed to an independent contractor, "is not so easily implied by submission to control in the loaned employee context, because apparent submission may be no more than continued obedience to the general employer," and that when a defendant raises the loaned servant doctrine as an affirmative defense to a plaintiff's tort claim, the defendant has the burden of proving that there was consent to the

---

105. 295 N.W.2d at 618. But as stated above, at the time in question all eleven of lessor's tractors were leased to lessee. See supra text accompanying note 93.

106. 295 N.W.2d at 618.

107. Id., citing Danek v. Meldrum Mfg. & Eng'r Co., 312 Minn. 404, 408, 252 N.W.2d 255, 258 (1977). The Danek court had obtained this formulation from Professor Larson's treatise. See 1 C. A. Larson, supra note 61, § 47.00.

108. In Danek, the court had treated this employee consent requirement as part of the first condition's requirement of a contract for hire. See Danek v. Meldrum Mfg. & Eng'r Co., 312 Minn. 404, 408, 252 N.W.2d 255, 259 (1977).

109. In Danek, the court had pointed out, "Consent is of primary importance since the application of the loaned-servant doctrine in workers' compensation cases causes an employee to relinquish the right to sue his special employer at common law for negligence," and had noted, "Workers' compensation cases differ from those where an injured party seeks to impose vicarious liability on the special employer of a loaned employee who caused his injury since the loaned employee himself loses no personal rights under those circumstances." Id. at 408-09 & n.2, 252 N.W.2d at 259 & n.2.

110. 295 N.W.2d at 618, citing Rademaker v. Archer Daniels Midland Co., 310 Minn. 240, 247 N.W.2d 28 (1976).
alleged special employment relationship.\textsuperscript{111}

Applying these criteria, the \textit{Newland} court found that there was no express contract for hire between plaintiff and lessee, that the work being done, driving tractor-trucks leased to another, was that of \textit{lessor}, that lessee did not have the right to control the selection of drivers or the manner in which drivers handled lessor’s tractors, and “More importantly, there is no evidence that the plaintiff consented to any control by [lessee] when he accepted employment by [lessor].”\textsuperscript{112}

The court went on to say that it was “this important element of consent” that distinguished \textit{Newland} from the 1977 case of \textit{Danek v. Meldrum Manufacturing & Engineering Co.},\textsuperscript{113} wherein the court had held as a matter of law\textsuperscript{114} under the criteria discussed above that an employee of a temporary manpower service was also employed by the company to which the manpower service had sent her, so that she was barred from suing the latter company in tort.\textsuperscript{115} The \textit{Newland} court explained:

\begin{quote}
[C]onsent to the special employment relationship could be implied as a matter of law in the labor broker context, because when plaintiff was hired by Labor Pool she knew that all of her work would actually be performed for, and controlled by, various customers of Labor Pool.

[Lessor], however, is not a labor broker, and such consent cannot be implied under the facts of this case. [Lessor] provides [lessee] with equipment in addition to labor, and under his contract with [lessee] he, rather than [lessee], has the right to control his tractors, their drivers, and the manner in which the tractors are operated. . . . There is nothing inherent in the nature of the relationship between [lessor, plaintiff, and lessee] which makes it reasonable to imply consent as a matter of law as there was in the labor broker context.\textsuperscript{116}
\end{quote}

The court cited a number of cases in which it had held under facts very similar to those in \textit{Newland} that “no employment relationship exists between the lessees of trucks and drivers,”\textsuperscript{117} de-

\begin{itemize}
\item \textsuperscript{111} 295 N.W.2d at 618.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} 312 Minn. 404, 252 N.W.2d 255 (1977).
\item \textsuperscript{114} The court affirmed a summary judgment in favor of the defendant. \textit{Id.} at 405, 252 N.W.2d at 257.
\item \textsuperscript{115} \textit{Id.} at 412, 252 N.W.2d at 260.
\item \textsuperscript{116} 295 N.W.2d at 619.
\item \textsuperscript{117} \textit{Id.}, citing \textit{Brinkman v. Page Trucking Co.}, 270 N.W.2d 278 (Minn. 1978); \textit{Tretter v. Dart Transit Co.}, 271 Minn. 131, 135 N.W.2d 484 (1965); \textit{Guhlke v. Roberts Truck
\end{itemize}
scribed several cases where an employer-employee relationship was found as distinguishable from *Newland*, 118 and concluded that "though the case is a close one, . . . the facts support the trial court's determination that [plaintiff] was employed by [lessor], and not by [lessee], at the time of the injury." 119

In *Krug v. Schanno Transportation*, 120 decided a month and a half after but not citing *Newland*, the Workers' Compensation Court of Appeals found a driver to be the lessee's special employee where the lessee advertised for, interviewed and hired the drivers, owned the trailers and logbooks, made the assignments, and furnished expense money and the lessor merely owned the tractor and issued the paychecks, 121 and the driver testified that he believed or understood that he was working for the lessee. 122 *Krug* is distinguishable from *Newland*, particularly in light of the employee's explicit testimony bearing on the very important issue of employee consent, and the holding that the lessee was a special employer is reliable precedent.

The court of appeals in *Krug* went on to hold, however, that as between the lessor as general employer and the lessee as special employer, the lessee should pay compensation, 123 citing the Minnesota Supreme Court's 1951 decision, *Pocrmzch v. Snyder Mining Lines*, 268 Minn. 141, 128 N.W.2d 324 (1964); *Gibson v. Moore Motor Freight Lines, Inc.*, 246 Minn. 359, 75 N.W.2d 212 (1956); *Turner v. Schumacher Motor Express, Inc.*, 230 Minn. 172, 41 N.W.2d 182 (1950).

118. 295 N.W.2d at 619.

119. 295 N.W.2d at 619.

120. 33 Minn. Workers' Comp. Dec. 138 (1980).

121. *Id.* at 139-40.

122. *Id.* at 143.

123. *Id.* at 144.
This part of the *Krug* decision appears incorrect. *Pocznich* was not a situation of a general employer and a special employer, but one where the court upheld a finding that the employee had terminated his employment with the first employer and entered into a new employment agreement with the second employer.\(^{125}\) It seems that the governing authority for this part of *Krug* was not *Pocznich*, but Minnesota Statutes section 176.071, which provides:

> When compensation is payable under this chapter for the injury or death of an employee employed and paid jointly by two or more employers at the time of the injury or death these employers shall contribute to the payment of the compensation in the proportion of their wage liabilities to the employee. If any such employer is excluded from the provisions of this chapter and is not liable for compensation, the liability of those employers who are liable for compensation is the proportion of the entire compensation which their wage liability bears to the employee's entire wages. As between themselves such employers may arrange for a different distribution of payment of the compensation for which they are liable.\(^{126}\)

This provision indicates that the lessor in *Krug* should have paid compensation since it paid employee's wages, and the facts did not show that the lessor and lessee had a different arrangement between themselves. This approach would more likely accord with the lessor's, the lessee's, and their insurers' expectation.

Also relevant to the issue of ultimate responsibility as between general employer and special employer is the 1982 case of *Bilotta v. Labor Pool, Inc.*\(^{127}\) In *Bilotta*, the Minnesota Supreme Court upheld a finding that Labor Pool rather than a special employer was ultimately responsible to pay the compensation, but it did not rely upon the fact that it was Labor Pool that issued pay to the employee. Rather, it held that Labor Pool's representing to the special employer that Labor Pool would be responsible for carrying workers' compensation insurance and its using part of the fee it charged the special employer to pay for workers' compensation premiums showed that, within the meaning of section 176.071's last sentence, Labor Pool and the special employer had agreed that Labor Pool would be responsible for workers' compensation

---

124. 233 Minn. 81, 45 N.W.2d 794 (1951).
125. See id. at 86, 45 N.W.2d at 797; cf. Otten v. University Hosps., 229 Minn. 488, 493, 40 N.W.2d 81, 85 (1949) ("the employer-employee relation is not terminated unless the employer surrenders to such third person all control over the employee").
126. MINN. STAT. § 176.071 (1982).
127. 321 N.W.2d 888 (Minn. 1982).
benefits.\textsuperscript{128} The \textit{Bilotta} court reached the correct result. But rather than struggle with the question whether the general employer and special employer had made an arrangement within the meaning of section 176.071's last sentence, the court should have relied simply upon the fact that the general employer had the entire liability for wages within the meaning of that section’s first sentence.

The Minnesota Supreme Court has effectively limited the \textit{Danek} approach of implying employee consent to employment by a special employer to the labor broker situation. In all other situations actual direct or circumstantial evidence of employee consent should be required.

IV. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

A. Conduct During Layover

The case of major significance\textsuperscript{129} in the area of “arising out of and in the course of employment”\textsuperscript{130} is \textit{Voight v. Rettinger Transportation, Inc.},\textsuperscript{131} addressing the matter of coverage of an employee’s conduct during a layover.\textsuperscript{132}

In \textit{Voight}, a five-two court ordered compensation as a matter of law\textsuperscript{133} for a school bus driver accidentally shot on a Saturday night in Detroit Lakes, fourteen miles from the camp to which he and three other drivers had driven buses. Drivers received a flat rate of seventy-five dollars to make a weekend charter run, and were provided meals and lodging at the camp. They were to transport

\textsuperscript{128} Id. at 890.

\textsuperscript{129} Less significant, although interesting, is Kahn v. State, 289 N.W.2d 737, 742-44 (Minn. 1980), where the court upheld compensation for an injury to an employee traveling from her workplace to her home which she regularly used, and intended to use that evening, as an additional workplace. The employee “was so preoccupied with her plans for the presentation that she missed her exit from Highway 12 on her way home” and was on an alternate route when injured. Id. at 740.

Another somewhat less significant “arising out of and in the course of” case is Fenton v. Murphy Motor Freight Lines, Inc., 297 N.W.2d 294 (Minn. 1980), holding that the evidence compelled a finding that a truck driver's work aggravated his arthritis into disability.

\textsuperscript{130} See generally Bradt, An Examination of the “Arising out of” and the “in the Course of” Requirements Under the Minnesota Workers’ Compensation Law, 6 WM. MITCHELL L. REV. 533 (1980).

\textsuperscript{131} 306 N.W.2d 133 (1981).

\textsuperscript{132} See also Bradt, supra note 130, at 562-64.

\textsuperscript{133} The court reversed the workers' compensation court of appeals' denial of compensation and remanded the matter with directions to reinstate the compensation judge’s findings and award. 306 N.W.2d at 134.
campers to the camp on Friday evening, sweep out and refuel the 
buses Saturday morning at Detroit Lakes, and make the return 
trip Sunday at noon. It was customary for drivers to go to Detroit 
Lakes for dinner, drinks, shopping or a movie on lay-over time. 
The employer knew of and acquiesced in this, but did not reim-
burse any expense.134

On the Saturday evening in question, the drivers agreed to go 
into town for dinner instead of eating at the camp. Because the 
employer prohibited the drivers from taking buses into town other 
than for refueling, one of the drivers borrowed a vehicle, and they 
got to a bar-restaurant at about 6 p.m. After drinks and dinner, 
two of the drivers decided to go to a movie, and claimant and the 
other driver chose to stay at the bar, where they would be picked 
up around 11 p.m. or midnight for the ride back to the camp.135

At the bar, claimant and the other driver met two deer hunters, 
who agreed to give the two drivers a ride to a local bar that had 
live music. At about 10:30, as they were in the second bar’s park-
ing lot preparing to return to the first bar, one of the deer hunters 
inaudently shot claimant with a pistol.136 The claimant testified 
that but for the charter trip to the camp, he would not have been 
at the bar in Detroit Lakes on the night he was shot.137

By way of general principles, the court pointed out:

The “arising out of” and “in the course of” requirements have 
been liberally applied in traveling employee cases. The general 
rule is that an employee whose work entails travel away from 
the employer’s premises is, in most circumstances, under con-
tinuous workers’ compensation coverage from the time he 
leaves home until he returns. . . . A bus driver who is re-
quired to be away from home overnight is in a position substan-
tially analogous to that of a traveling salesperson and therefore 
comes within the general rule of continuous coverage.138

134. Id. at 135.
135. Id.
136. Id. This deer hunter, to whom the bartender by this time refused to serve any 
more drinks, sat in the car while the other deer hunter and claimant’s fellow bus driver, 
having noticed that claimant was not with them in the parking lot, went back into the bar 
and told claimant that they were ready to leave. As claimant approached the right rear 
doors of the auto and was about to enter, the deer hunter “leaned out the door and began 
firing a pistol in an attempt to generate some excitement and inadvertently shot the em-
ployee.” Id.
137. Id.
138. Id. at 136-37 (citations to Snyder v. General Paper Corp., 277 Minn. 376, 379, 152 
N.W.2d 743, 746 (1976); 1A A. LARSON, supra note 61 § 25.00, omitted); see also Larson v.
The court then confronted the employer’s argument that claimant was not in the course of his employment because his trip to the second bar was for personal recreation rather than for business purposes. The court considered this argument in light of the rule enunciated in *Epp v. Midwestern Machinery Co.*, a 1973 case wherein it had upheld compensation when an over-the-road truck driver, required to lay over at his employer’s expense because his return shipment was not ready, was killed at 2:30 a.m. walking back from a tavern to his motel. The *Voight* court quoted the *Epp* decision’s rationale as follows:

> Where . . . an employee is directed by his employer to remain at a certain locale on behalf of the employer for a specified time or until directed otherwise, “the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any reasonable activity at that place, and if he does so the risk inherent in such activity is an incident of his employment.”

After reviewing decisions from other jurisdictions, the *Voight* court concluded:

> An employee who is required to be out-of-town overnight has no choice but to eat, sleep and conduct all his activities away from home. Just as injuries sustained as a consequence of the necessity of sleeping in hotels . . . or traveling between a restaurant and a hotel, *Epp*, are compensable, we are of the

---

United States Steelworkers of Am., 34 Minn. Workers’ Comp. Dec. 16 (1981). In *Larson* compensation was awarded to an employee paid to attend a week-long educational program at a resort. He decided to skip a presentation that duplicated one he had previously attended so he could bring his motorcycle to town to get gas and make sure it was in proper working order for the return trip the next day. In addition, he was going to pick up some wine for a friend. He was injured in an accident on the way back to the resort. *Id.* at 17-19.

139. 306 N.W.2d at 137.

140. 296 Minn. 231, 208 N.W.2d 87 (1973).

141. The *Epp* court had stated, “The employer confirmed that its policy was to reimburse employee for all expenses of lodging, food and drinks incurred while traveling on employer’s behalf. . . . [I]t was not established that the purchase of such food or refreshment was limited to purchases made at or near mealtime.” *Id.* at 234, 208 N.W.2d at 89.

142. *Id.* at 232-35, 208 N.W.2d at 88-89.


144. 306 N.W.2d at 137-38 n.5.

145. At this point, the court cited Stansberry v. Monitor Stove Co., 150 Minn. 1, 183 N.W. 977 (1921), wherein the court upheld compensation when a traveling salesman
view that an employee does not leave the course of his employment while engaging in reasonable relaxation or recreational activities after working hours. Reasonable activities are those which may normally be expected of a traveling employee as opposed to those which are clearly unanticipated, unforeseeable and extraordinary. In so holding, we note that traveling employees have a *sui generis* status since their work necessarily requires that they be away from home.

The employee's trip to the [second bar] for recreational purposes was a reasonable activity. We note that the record is devoid of any evidence indicating that the employee was intoxicated at the time of the accident, the injury took place at a relatively early hour, the employee was proceeding to the first restaurant to meet the other drivers for a ride back to the camp when he was injured and the bar was located a reasonable distance from the camp. Moreover, the employer had acquiesced in the employees' trips to town for meals and recreation.

We limit this decision to cases involving traveling employees. It must be stressed that in all other situations, the question of coverage must still turn on whether the injury arose out of and in the course of employment without regard to tort concepts of reasonableness or foreseeability.

Justice Peterson's dissent, joined by Justice Otis, took issue with the majority's "in the course of" ruling as follows:

The unique factual situation in *Epp* . . . is clearly distinguish-

whose work required him to stay at a hotel was killed while attempting to escape a fire that broke out one night at the hotel. 306 N.W.2d at 138.

146. At this point, the court included a footnote acknowledging the existence of contrary authority from several other jurisdictions. 306 N.W.2d at 138 n.6.

147. At this point, the court included a footnote stating:

*See e.g. Howell Tractor & Equip. Co. v. Industrial Comm'n.*, 78 Ill.2d 567, 38 Ill. Dec. 127, 403 N.E.2d 215 (1980) (employee's conduct in walking back to motel alone in unfamiliar town after drinking at tavern constituted unreasonable action); *Humphrey v. Industrial Comm'n.*, 76 Ill.2d 333, 29 Ill. Dec. 464, 392 N.E.2d 21 (1979) (denial of compensation upheld where employee was injured while returning to his motel after party on working day); *U.S. Industries v. Industrial Comm'n.*, 40 Ill.2d 469, 240 N.E.2d 637 (1968) (employee injured on midnight pleasure drive in unfamiliar, mountainous terrain was engaged in unreasonable activity); *Hebrank v. Parsons*, 88 N.J. Super. 406, 212 A.2d 579 (1965) (claimant's return trip at 3 a.m. from tavern 25 miles away and in different state from motel not covered).

306 N.W.2d at 138 n.7.

148. 306 N.W.2d at 138-39. At this point, the court included a footnote stating in part: "Injuries that result from reasonable or foreseeable conduct are not compensable if they do not arise out of and in the course of employment. Conversely, injuries that result from unreasonable or unforeseeable conduct are compensable if they do arise out of and in the course of employment." *Id.* at 139 n.8.
able from that in the instant case. The employer in Epp expressly authorized and assumed the expense of the employee’s motel bill, food, and alcoholic beverages. By necessity, the employee, an over-the-road truckdriver, was required to eat or drink at public restaurants.

It is clear that the majority opinion’s reasoning is inconsistent with prior decisions of this court that have held that the reasonableness or negligence of the employee’s conduct is irrelevant in determining whether the injury arose out of and in the course of employment. The majority opinion creates an exception for traveling employees, based on reasonable conduct, that will inject uncertainty into the workers’ compensation statute.

Any further attempts to expand the classification of employees subject to this artificial distinction would establish a defense of contributory negligence specifically prohibited by our case law and by Minn. Stat. § 176.021(1) (1980).

The Voight majority did not refer separately to the “arising out of” issue, except to observe early in the opinion, “The phrase ‘arising out of’ refers to the causal connection between the employment and the injury whereas the phrase ‘in the course of’ refers to the causal connection between the employment and the injury whereas the phrase ‘in the course of’ refers to time, place and circumstances of the accident.”

Justice Peterson’s dissent, joined by Justice Otis, protested:

The majority opinion fails to apply the statutory requirements of “arising out of and in the course of employment” in determining whether compensation is appropriate in this case. Rather, the majority opinion concludes that because the employee’s activities at the time of injury were “reasonable,” recovery should be allowed.

An injury “arises out of” employment when it appears from all the facts and circumstances that there is a causal connection between the employment and the employee’s injury. The requisite causal connection exists if the employment, by reason of its nature, obligations, or incidents, is the source of the injury-producing hazard.

The shooting incident which resulted in employee’s injury outside the tavern was entirely unconnected with his employment. There was no hazard associated with employee’s duties as a busdriver that increased his risk of injury beyond that

149. See supra note 141.
150. 306 N.W.2d at 140-41 (Peterson, J., dissenting) (citations omitted).
151. Id. at 136; see supra note 138 and accompanying text.
shared by the general public. See Auman v. Breckenridge Telephone Co., 188 Minn. 256, 246 N.W. 889 (1933). The risk of being injured by bullets fired at random by an intoxicated person outside a tavern was not an incident of the exposure occasioned by the nature of employee's work. . . . Since employee failed to demonstrate a causal connection between the hazard producing his injury and his employment, it cannot be said that his injury arose out of his employment. 152

The Voight court's conclusion that claimant's injury was "in the course of" his employment is appropriate, on the ground that an employee whose work necessitates standing by at a place other than the employee's home is, in a sense, serving the employer continuously by standing by. Claimant was doing so although he had decided to eat in town at his own expense rather than stay at the camp.

Although the dissenters properly question the relevance of the reasonableness of claimant's conduct to the "in the course of" issue, the majority's approach was not unprecedented. In an unduly strict 1973 decision, Elfelt v. Red Owl Stores,153 the court's basis for affirming a denial of compensation to an employee who jumped to touch a rafter as he was leaving the work premises and caught his finger between two bolts was that "[e]mployee's unfortunate, but improvident, act created a hazard in an otherwise safe route" and "took him outside the scope of his employment."154

Theoretically, the nature of the claimant's conduct should not be deemed relevant to the "in the course of" (as opposed to the "arising out of") issue unless it is so great a departure from the work "that an intent to abandon the job temporarily may be inferred."156 At least it is comforting that the Voight court now indi-

152. 306 N.W.2d at 139 (Peterson, J., dissenting) (citations omitted).
153. 296 Minn. 41, 206 N.W.2d 370 (1973).
154. Id. at 42, 206 N.W.2d at 371.
155. See Bradt, supra note 130, at 564. For example, in Kerpen v. Bill Boyer Ford, Inc., 305 Minn. 47, 232 N.W.2d 21 (1975), the court relied upon a lack of "arising out of" rather than "in the course of" in affirming a denial to an employee injured when he submitted to a co-employee's "amateur chiropractic" massage of his back. The court reasoned:

[We] have held . . . that the term "arising out of" employment refers to a causal connection between the employment and the injury. We think the commission could conclude, as it did, that there was no reasonable relationship between the employment as a used-car salesman and this episode of amateur chiropractic between two adult employees.

Id. at 48, 233 N.W.2d at 22.
156. See IA A. LARSON, supra note 61, § 21.00, stating:

Employees who, within the time and space limits of their employment,
icates that it will not deem the reasonableness or foreseeability of claimant's conduct to be relevant in cases other than those involving traveling employees.\textsuperscript{157}

The \textit{Voight} court's conclusion that claimant's injury "arose out of" his employment may have been correct also, although, as the dissent emphasizes, the court should have focused separately on the "arising out of" requirement and demanded that it be satisfied under the increased-risk test.\textsuperscript{158} (Since the injury here occurred in a parking lot, it probably does not fit within the street-risk test.\textsuperscript{159})

The increased-risk test requires that something about the employment—not necessarily its "nature" but perhaps a condition, obligation, or incident of the employment\textsuperscript{160}—exposed the employee to the injury to a greater degree than the public generally\textsuperscript{161} or than the employee apart from work.\textsuperscript{162}

In \textit{Voight} the only thing about the employment that could be

\textsuperscript{157} See supra note 148 and accompanying text.
\textsuperscript{158} See 306 N.W.2d at 139 (Peterson, J., dissenting).
\textsuperscript{159} See Auman v. Breckenridge Tel. Co., 188 Minn. 256, 246 N.W. 889 (1933). The \textit{Auman} court, affirming denial of compensation, found the street-risk test inapplicable when a telephone company employee who had just returned from a service call was walking on the employer's property from the garage to his office when he was hit by a bullet accidentally fired by a boy in a nearby apartment. The court said:

\begin{quote}
\textit{[A]ccidents. . . . where compensation has been awarded to servants whose services required them to be upon streets and public highways, are attributed to the risks and hazards originating upon or connected with the use of public streets. . . . They do not relate to accidents or incidents which neither originate upon nor are referable to the use of public ways. In the instant case the gun was not fired from the street, but from a private apartment. It did not even pass across a public street. Nor was relator hit or injured when traveling a public street in performance of his duties.}
\end{quote}

\textit{Id.} at 260, 246 N.W. at 890. See generally Bradt, supra note 130, at 546 n.48.

\textsuperscript{160} See Swenson v. Zacher, 264 Minn. 203, 118 N.W.2d 786 (1963), where the court said, "[w]e have held that an injury arises out of the employment if it arises out of the nature, conditions, obligations, or incidents of the employment; in other words, out of the employment looked at in any of its aspects." \textit{Id.} at 207, 118 N.W.2d at 789.

\textsuperscript{161} See Lickfett v. Jorgenson, 179 Minn. 321, 323, 229 N.W. 138, 138 (1930) ("not. . . . the same as the public generally"); \textit{State ex rel. People's Coal & Ice Co. v. District Court, 129 Minn. 502, 503, 153 N.W. 119, 119 (1915) (more than the normal risk to which all are subject").

\textsuperscript{162} See Snyder v. General Paper Corp., 277 Minn. 376, 385, 152 N.W.2d 743, 749 (1967) (greater "than if he had been pursuing his ordinary personal affairs"); Olson v. Trinity Lodge No. 282, A.F. & A.M., 226 Minn. 141, 147, 32 N.W.2d 255, 259 (1948) (same); Dunnigan v. Clinton Falls Nursery Co., 155 Minn. 286, 289, 193 N.W. 466, 467 (1923) (not "equally exposed to the same danger apart from his employment").
argued to have increased the risk was the enforced idleness away from home. Arguably this increased the risk of being near a bar where a possibly-intoxicated patron would be firing bullets, beyond what that risk was to the public generally or to claimant apart from work. If so, the Voight majority's ordering of compensation was correct.

B. Idiopathic Falls

In Arone v. Arone's Bar, Inc., the court of appeals apparently disregarded the "arising out of" requirement by awarding benefits for a hip fracture from a fall at work without requiring a showing that anything about the employment increased the risk of the fall or aggravated its effects. The court of appeals' action was in line with a 1943 Minnesota Supreme Court case cited by the court of appeals, but was inconsistent with a 1979 Minnesota Supreme Court decision wherein the court indicated it was upholding benefits for an employee's death from an idiopathic fall only because employment conditions aggravated the fall's effects.

The Arone court of appeals' awarding benefits merely because the evidence revealed "that the employee's knee gave out causing him to fall and fracture his hip while he was performing employ-

---

163. Idiopathic falls are those caused by a purely personal, innate condition of the employee, such as a heart attack, epileptic seizure, or trick knee. See 1 A. LARSON, supra note 61, § 12.11; Bradt, supra note 106, at 604.


165. Id., slip op. at 2; see Frye v. United States Steel Corp., No. 476-16-4614 (Minn. Workers' Comp. Ct. App. Oct. 11, 1982) (similar); cf. Seils v. Westlund Provisions, 35 Minn. Workers' Comp. Dec. 260, 261-62 (back injury "could have happened at home or any other place" but employee had "rather heavy job").


The Arone court of appeals also cited Stenberg v. Raymond Co-op. Creamery, 209 Minn. 366, 296 N.W. 498 (1941), but the increased-risk test was satisfied in that case. The Stenberg court upheld a finding that the fall caused by decedent's weak heart or trick knee "resulted in a fracture at the base of the skull when he struck an iron stand or the concrete floor, both of which were instrumentalities of the employment." Id. at 372, 296 N.W. at 501. The evidence showed that as employee fell, he struck "the corner of the typewriter stand with his head just about the left eye" and "then struck the floor smack on his face," and that he died 25 minutes later from a hemorrhage from a ruptured artery caused by a comminuted fracture at the base of the skull. Id. at 368, 296 N.W. at 499.

167. O'Rourke v. North Star Chems., Inc., 281 N.W.2d 192, 194 (Minn. 1979); see Bradt, supra note 130, at 607.
ment activity" was in line with the 1943 Minnesota Supreme Court case of *Barlau v. Minneapolis Moline Power Implement Co.* In *Barlau*, the court upheld compensation for an epileptic employee's injury from a fall while working in employer's machine shop, without referring to anything about the employment increasing the risk of the fall or aggravating its effects. However, the court did specify that "the evidence showed that the employee, in doing his work, reached over to the right for castings and that when he was through drilling them, he reached over to the left to place them in the tray." This might justify explaining *Barlau* on the ground that the employment-related need to reach back and forth increased the risk of falling for the epileptic employee. Or perhaps *Barlau* may be explained on the assumption that the machine shop cement floor, a harder-than-average surface onto which to fall, increases the risk of a fall's effects beyond those confronted on the average by the public generally or the employee apart from work.\(^{172}\)

The *Arone* decision is inconsistent with the 1979 case of *O'Rourke v. North Star Chemicals, Inc.* where the Minnesota Supreme Court indicated it was only because employment conditions aggravated the fall's effects that it was upholding compensation for the death of an employee who, because of a brain hemorrhage, fell into a boxcar containing bauxite and suffocated on the bauxite. The *O'Rourke* court said:

[The employee's] fall itself was caused by an idiopathic condition not shown to have had any relation to his employment. It is generally agreed, however, that if an employee who falls because of such a condition is placed by his employment in a position which aggravates the effects of the fall, resultant injury and death are causally related to and arise out of his employment. . . . Thus, if employee's death was caused by suffocation and the inability to obtain prompt resuscitative measures, because of his employment conditions, it arose out of his

---

169. 214 Minn. 564, 9 N.W.2d 6 (1943).
170. *Id.* at 578-79, 9 N.W.2d at 12-13.
171. *Id.* at 579, 9 N.W.2d at 13.
172. *Cf.* *Stenberg v. Raymond Co-op. Creamery*, 209 Minn. 366, 372, 296 N.W. 498, 501 (1941) (reliance upon finding that when employee fell his head "struck an iron stand or the concrete floor, both of which were instrumentalities of the employment") (emphasis added); see also supra note 166.
173. 281 N.W.2d 192 (Minn. 1979).
174. *Id.* at 193-94.
employment.\textsuperscript{175}

The "arising out of" requirement should be maintained in fall cases as well as other cases. Except for death cases where "arising out of" may be satisfied by the presumption that a death during the hours of and at the place of work arose out of as well as in the course of employment,\textsuperscript{176} an employer should be liable for an employee's injury from a fall at work only if the claimant shows that something about the employment either increased the risk of the fall or aggravated its effects.

\textbf{C. Stress Injuries}

Although the Minnesota Supreme Court has upheld compensation when a physical work injury produced emotional effects\textsuperscript{177} and when emotional stress at work produced physical effects,\textsuperscript{178} in \textit{Lockwood v. Independent School District No. 877}\textsuperscript{179} it refused to allow compensation when work-related mental stress without physical trauma produced only mental disability.\textsuperscript{180}

In \textit{Lockwood}, claimant was a senior high school principal in one of the state's fastest growing school districts. The district's growth caused a significant increase in claimant's duties, and his average workday extended to 11 p.m. His duties made him feel increasingly nervous and the pit of his stomach felt like a knot. He began to lose weight, to have trouble sleeping, and to fall behind in his work. He became unable to control his temper, and started using excessive violence in disciplining students. Finally, he was accused of using school funds to purchase items unrelated to school business and, when he sent back many of the items, the superintendent criticized him for using school funds to pay the postage. He left

\footnotesize{\textsuperscript{175} Id. at 194 (citations omitted).}

\footnotesize{\textsuperscript{176} See Lange v. Minneapolis-St. Paul Metropolitan Airports Comm'n, 257 Minn. 54, 57 n.4, 99 N.W.2d 915, 918 n.4 (1959).}

\footnotesize{\textsuperscript{177} Kirwin, Compensation for Disease Under the Minnesota Workers' Compensation Law, 6 WM. MITCHELL L. REV. 619, 678 n.300 (1980). Regarding recovery from traumatic neurosis under the permanent partial disability schedule for the brain as an internal organ, see infra notes 465-75 and accompanying text.}

\footnotesize{\textsuperscript{178} Id. at 678 n.301; see Mack v. Pilgrim Lutheran Church, No. 51036 (Minn. Mar. 11, 1981), aff'g mem. 32 Minn. Workers' Comp. Dec. 534 (1980) (stress from schism within church was substantial contributing cause of pastor's fatal heart attack).}

\footnotesize{Regarding the new prohibition on citing summary dispositions, see infra notes 290-94 and accompanying text.}

\footnotesize{\textsuperscript{179} 312 N.W.2d 924 (Minn. 1980), noted in 5 HAMLING L. REV. 439 (1982) and 66 MINN. L. REV. 1194 (1982).}

\footnotesize{\textsuperscript{180} Id' at 927. Justice Yetka dissented.}

http://open.mitchellhamline.edu/wmlr/vol8/iss3/7
his job and began to consult a psychiatrist. The psychiatrist testified that claimant suffered from a manic depressive disorder, that there is a genetic predisposition to the disorder but that stress triggers the biochemical reaction causing it, and that in his opinion the stress of claimant's job caused his mental disorder. The court of appeals awarded temporary total disability compensation.

In reversing the court of appeals' award, the supreme court recognized that the majority of other jurisdictions confronting the issue have allowed compensation, and that several courts which have denied compensability have done so "based on their interpretation of particular statutory requirements." (The cases cited as

181. Id. at 924-25.

After claimant left his job the school board voted to conduct an audit which resulted in claimant being indicted by a grand jury, but the criminal charges were later dismissed. Employer's psychiatrist testified that claimant's mental disorder was precipitated by the criminal action, but claimant's psychiatrist opined that its process had commenced some months before claimant left his job. Id. at 925.

Compare Cooley v. Construction Laborers Union, 25 Minn. Workmens' Comp. Dec. 12 (1969), aff'd, 287 Minn. 559, 178 N.W.2d 697 (1970), where the Commission denied compensation for a suicide committed at home by an employee apparently possessed of an uncontrollable impulse because of depression from (1) his non-job-related heart attack, (2) the union's having reduced his pay from $125 to $47 per week, (3) the probable loss of his job, and (4) an audit of the union's financial records. The Commission reasoned:

[W]e cannot legally conclude that the employee's death arose out of and in the course of his employment. The employee's concern did not arise out of conditions of employment—worry over loss of pay, loss of a job, defalcation, are worry over loss of the employment itself. There must be a reasonable relationship between the employee's depression and the duties of the job. Here the depression occurred because of the worry about the possible termination of the job.

182. 312 N.W.2d at 925 (Minn. 1981).

The same day as it decided Lockwood, the court handed down Taylor v. Aqua Boats, No. 52086 (Minn. Dec. 4, 1981), rev'd mem. 33 Minn. Workers' Comp. Dec. 265 (1980). In that case the court of appeals had awarded temporary total disability benefits on the ground that the preexisting paranoid schizophrenia claimant had had since being in the Army in Korea was aggravated into disability by stressful events at work including the employer's (1) giving claimant stock which proved to be worthless, (2) refusing to pay claimant any of his wages which caused him to sue employer and collect a $9,000 judgment which was uncollectable, and (3) using claimant's tools (valued at $7-8,000) as collateral for a loan. 33 Minn. Workers' Comp. Dec. at 268-69. The supreme court "summarily reversed under our opinion in Lockwood." Justice Yetka dissented.

Regarding the new prohibition on citing summary dispositions, see infra notes 290-94 and accompanying text.


184. 312 N.W.2d at 926.
denying compensation were a Montana case\textsuperscript{185} under a statute defining "injury" as "a tangible happening of a traumatic nature from an unexpected cause, or unusual strain, resulting in either external or internal physical harm, and such physical condition as a result therefrom,"\textsuperscript{186} a Tennessee case\textsuperscript{187} under a statute confining recovery to "injury by accident,"\textsuperscript{188} and a Texas case\textsuperscript{189} under a statute with "personal injury" and "occupational disease" definitions requiring "damage or harm to the physical structure of the body."\textsuperscript{190}

The court also recognized that "[u]nquestionably, disablement resulting from a mental illness caused by mental stimulus is as real as any other kind of disablement,"\textsuperscript{191} and said, "Nor do we quarrel with Professor Larson's position that there can be no medically valid distinction made between physical and nervous injuries."\textsuperscript{192} The majority nevertheless denied compensability on the ground that it was "unable to determine . . . whether the legislature . . . intended to impose on employers liability for compensation for an employee's disabling mental condition resulting from work-related mental stress"\textsuperscript{193} when in 1953 it removed from the "personal injury" definition the requirement that the injury be "caused . . . by accident,"\textsuperscript{194} and accordingly omitted the definition of "accident," i.e., "a sudden or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body."\textsuperscript{195} The court stated:

Under the prior law no employee had claimed compensation for such a disability, and it seems unlikely that the legislature contemplated the possibility of such claims when it enacted the 1953 revision. Undoubtedly, sound medical opinion can often relate mental injury to employment stresses, whether unusual or minor daily stresses. Until recently workers' compensation

\textsuperscript{186} See id. at 377, 546 P.2d at 1057.
\textsuperscript{187} Jose v. Equifax, Inc., 556 S.W.2d 82 (Tenn. 1977).
\textsuperscript{188} See id. at 84.
\textsuperscript{189} Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979).
\textsuperscript{190} See id. at 336.
\textsuperscript{191} 312 N.W.2d at 926.
\textsuperscript{192} Id., citing Larson, supra note 183, at 1253.
\textsuperscript{193} Id. at 926-27.
\textsuperscript{194} Act of Apr. 24, 1913, ch. 467, § 9, 1913 Minn. Laws 675, 677 (repealed 1953); see Kirwin, supra note 177, at 624 & n.35, 629 & n.50, 677-82, 692-701.
\textsuperscript{195} Act of Apr. 24, 1913, ch. 467, § 34(h), 1913 Minn. Laws 675, 693 (repealed 1953) (emphasis added).
has not extended to such injuries, and historically health disability insurance has provided benefits for them. Reallocating the costs resulting from stress-related disability between health insurance and workers’ compensation insurance is a major policy determination. In the absence of proof that the legislature considered the far-reaching ramifications of extending workers’ compensation coverage to employees who are mentally disabled by employment-related stress, we decline to construe the Workers’ Compensation Act in a manner probably not intended by that body. . . . If [the legislature] wishes to extend workers’ compensation coverage to mental disability caused by work-related mental stress without physical trauma, it is free to articulate that intent clearly.196

Justice Yetka dissented, finding “mental disability caused by work-related mental stress . . . clearly within the purview of the definition of personal injury in Minn. Stat. § 176.011, subd. 16 (1980).”197

It is difficult to understand how the majority could resist Justice Yetka’s conclusion that mental harm from work-related mental stress falls within the “personal injury” definition as amended in 1953 to delete the “by accident” and “physical structure of the body” requirements.198 In the cases the court cited as denying compensability, the denials were only because of such requirements, not anything inherent in the words “personal injury.”199 For example, in a Tennessee case,200 the state supreme court made clear that it was not denying recovery because the injury was “mental,” but only because it was not “caused by accident”:

This Court is not inclined to limit recovery to cases involving physical, traumatic injury or to impose any other artificial limitation upon the coverage afforded by the compensation statutes. In proper cases, we are of the opinion that a mental stimulus, such a fright, shock or even excessive, unexpected anxiety could amount to an “accident” sufficient to justify an award for a resulting mental or nervous disorder.201

196. 312 N.W.2d at 927.
197. Id. at 927 (Yetka, J., dissenting). Justice Yetka advocated the approach of the Wisconsin Supreme Court, “that this type of injury is compensable if the employee can show that he was exposed to stresses and strains beyond the ordinary day-to-day stresses and strains to which all the employees were exposed.” Id., citing Swiss Colony, Inc. v. Department of Indus., Labor & Human Relations, 72 Wis. 2d 46, 240 N.W.2d 128 (1976).
198. See supra notes 194 and 195 and accompanying text.
199. See cases cited supra notes 185, 187, 189.
201. Id. at 84.
There is nothing inherent in the phrase "personal injury" that excludes mental harm from work-related mental stress. Given the majority's recognition that disablement from such harm is as real as any other kind of disablement and that "there can be no medically valid distinction made between physical and nervous injuries," the court should not have construed the phrase to make just such a distinction. In fact, in light of the court's recent earlier action declaring unconstitutional a provision which excluded heart attack deaths from peace officer deaths covered by a statutory compensation award on the ground that there was no rational basis for excluding a peace officer killed by a heart attack while making an award for a peace officer killed in any other way, the Lockwood court's distinction raises a serious constitutional question. A court should construe a statute in a manner that avoids serious doubt as to its constitutionality. The court in the peace officer case observed that medical testimony indicated that the same stresses which triggered the peace officer's heart attack could have caused respiratory failure or a stroke, and could see no reason to exclude compensation merely because the officer instead suffered a heart attack. By the same token, it would be inconsistent to allow compensation when emotional stress at work produces physical effects but deny it when similar emotional stress produces only emotional effects. For example, in the 1960 case of Anderson v. Armour & Co., the supreme court upheld death benefits when a truck driver's worry about having hit a pedestrian caused a psychotic depressive reaction resulting in suicide. The court hardly could have denied medical and disability benefits if the truck driver had been able to curb his "uncontrollable impulse" toward suicide and required hospitalization for his mental disorder. Similarly, in Aker v. State, the supreme court upheld death

203. See supra note 191 and accompanying text.
204. See supra note 192 and accompanying text.
205. See supra note 2-8 and accompanying text.
206. See Califano v. Yamaski, 442 U.S. 682, 692-93 (1979); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); State v. Rawland, 294 Minn. 17, 38, 199 N.W.2d 774, 786 (1972) ("if a statute can reasonably be given two constructions, one which would render it valid and one which would render it invalid, it is our duty to accept the first alternative and construe the statute so as to obviate constitutional objections"); Zochrison v. Redemption Gold Corp., 200 Minn. 383, 390, 274 N.W. 536, 540 (1937) (interpretation rejected because, inter alia, it "might well lead to grave constitutional questions").
207. See supra note 7 and accompanying text.
208. 257 Minn. 281, 101 N.W.2d 435 (1960).
209. 282 N.W.2d 533 (Minn. 1979).
benefits when a Department of Natural Resources employee's emotional stress from handling badly decomposed bodies and transporting them some miles by canoe produced a heart attack that, in turn, caused a fatal second heart attack two weeks later. It is hard to believe that the court would have denied medical and disability benefits if the "ordeal" of handling and transporting the bodies had resulted in a nervous breakdown instead of a heart attack.  

Thus, New York's highest court has observed:

[A]s noted in the psychiatric testimony there is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The determinative factor is the particular vulnerability of an individual by virtue of his physical makeup. In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same—the individual is incapable of functioning properly . . . and should be compensated under the Workmen's Compensation Law.

There is no valid basis for excluding compensation for mental harm from work-related stress. Like other personal injury, it should be compensable as long as it arises out of and in the course of employment. The increased-risk test would require that the work-related stress be greater than the stress normally endured by the public generally or the employee apart from work.

Unless the court corrects its position, the legislature should respond by amending the opening words of the "personal injury" definition to make it read, "Personal injury' means mental or physical harm to an employee arising out of and in the course of employment."

---

210. See Kirwin, supra note 177, at 681-82. Given Lockwood, the author turned out to be a poor prophet.


212. The reasons given for the common law's failure to impose liability for negligence resulting only in emotional disturbance do not justify this exclusion from workers' compensation. See Kirwin, supra note 177, at 679-80.

213. See supra notes 160-62 and accompanying text.

214. Compare the Wisconsin Supreme Court's approach advocated by Justice Yetka's dissent. See supra note 197.

215. See Wis. Stat. Ann. § 102.01(2)(c) (West. 1981) ("'Injury' means mental or physical harm to an employee. . . ."); Mich. Comp. Laws Ann. § 418.401(2)(b) (Supp. 1981), discussed in Joseph, supra note 183, at 1084, 1134-46 (mental disabilities compensable "if contributed to or aggravated or accelerated by the employment in a significant man-
D. Peace Officer-Firefighter Presumption

In *Linnell v. City of St. Louis Park*,216 remanding a case because the court of appeals had erroneously failed to consider Minnesota Statutes section 176.011, subdivision 15’s presumption that a police officer’s coronary sclerosis was an occupational disease and was due to the nature of his employment,217 the court indicated that it was willing to give the presumption a much greater effect than it theretofore had indicated.218 As recently as 1977 the court had reversed a firefighter’s heart attack award, saying that the pre-

216. 305 N.W.2d 599 (Minn. 1981).

217. The last sentence of MINN. STAT. § 176.011(15) (1982) sets forth the presumption in question:

“Occupational disease” means a disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment and shall include undulant fever. Ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard. A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment. An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or which results from a hazard to which the worker would have been equally exposed outside of the employment. If immediately preceding the date of his disablement or death, an employee was employed on active duty with an organized fire or police department of any municipality, as a member of the Minnesota highway patrol, conservation officer service, state crime bureau, as a forest officer by the department of natural resources, or sheriff or full time deputy sheriff of any county, and his disease is that of myocarditis, coronary sclerosis, pneumonia or its sequel, and at the time of his employment such employee was given a thorough physical examination by a licensed doctor of medicine, and a written report thereof has been made and filed with such organized fire or police department, with the Minnesota highway patrol, conservation officer service, state crime bureau, department of natural resources, or sheriff's department of any county, which examination and report negatived any evidence of myocarditis, coronary sclerosis, pneumonia or its sequel, the disease is presumptively an occupational disease and shall be presumed to have been due to the nature of his employment.

The court of appeals in *Linnell* apparently considered the presumption inapplicable because the police department had no report on file showing employee had received a thorough preemployment physical examination. See 305 N.W.2d at 600. The supreme court held that this was overcome by the fact that claimant presented uncontroverted evidence that employer required a preemployment examination, that employee underwent such an examination, and that he would not have been hired if he had not undergone it and received “a clean bill of health.” Id. at 600-01.

218. See *Kirwin*, supra note 177, at 702-03.
sumption is not evidence and that "[b]ecause substantial evidence to rebut the presumption was introduced in this case, the presumption should properly have disappeared."219 But in Linnell the court stated:

We recognize that our past decisions have perhaps not articulated [the presumption's] force and effect beyond stating that it governs decision on unopposed facts and that it is rebuttable but only by substantial proof to the contrary. . . . We construe section 176.011(15), however, to embody the legislature's presumably informed acceptance of the thesis that the occupations of firemen, policemen, and the other occupations specified in that provision are likely to involve greater stress, whether physical or emotional, or both, than other occupations and its acceptance also of the thesis, widely but not uniformly held, that such stress is causative of or contributory to the development of the specified heart and lung diseases. . . . It would seem that the presumption, if it is to have its intended effect, should not be rebuttable by medical opinion denying generally the correctness of either thesis accepted by the legislature. . . . In our view, the presumption is something more than a procedural device initially relieving the employee of proving causal relationship between the stress of his occupation and the disease which results in his disability in that, to rebut the presumption, an employer is required to make a strong showing either that the particular claimant's duties were significantly less stressful than those of most employees in his occupation or that his disease and disability were the result of recognized causative factors which are not related to his occupation.220

Although one might argue the statute should not treat the few specified employees and disease differently from other employees and diseases,221 as long as the statute includes the presumption the court acted appropriately in endeavoring to give it some real meaning.

The court of appeals applied the Linnell holding in Minogue v. City of St. Paul,222 where it awarded benefits for a police officer's death saying:

220. 305 N.W.2d at 601 (citations omitted).
221. See Kirwin, supra note 177, at 704; MINNESOTA WORKERS' COMP. STUDY COMM., A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR 20 (1979) (urging removal of the presumption).
222. No. 477-09-3144 (Minn. Worker's Comp. Ct. Aug. 10, 1981), aff'd in part, remanded in part on other grounds, 320 N.W.2d 90 (Minn. 1982).
After a careful review of the record, we determine that the employer has not made "a strong showing either that the particular claimant's duties were significantly less stressful than those of most employees in his occupation or that his disease and disability were the result of recognized causative factors which are not related to his occupation." (Linnell, supra)

Taking into consideration our determination that the employer has not overcome the statutory presumption of Minn. St. 176.011(15) and further reviewing the entire evidence of record relating to the causal relationship of the employee's heart condition to his employment, we conclude that the employee's employment was a substantial contributing cause of the employee's heart attack of June 21, 1976 and his death on July 12, 1978.223

The court of appeals in Minogue appears to have effected appropriate implementation of Linnell.

V. EXCLUSIONS

The case of significance in the area of exclusions from coverage is Manthey v. Charles E. Bernick, Inc., involving the provision which excludes coverage when the employer proves that "the intoxication of the employee is the proximate cause of the injury." Decedent's blood alcohol level was .16, but he did not act intoxicated and was reputedly able to handle his liquor, and his uneven loading of his beer truck may have contributed to the accident. A six-three court affirmed a death award, saying, "Over a period of many years this court has construed the statute narrowly, holding that intoxication is a bar to compensation 'only when shown to

223. Id., slip op. at 2.
224. Much less significant is that part of Voight v. Rettinger Transp., Inc., 306 N.W.2d 133 (Minn. 1981), holding that coverage for being shot inadvertently by a possibly intoxicated person is not excluded by MINN. STAT. § 176.011(16)'s provision on "injury caused by the employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment." The court noted that the evidence was "undisputed that the shooting was inadvertent and not motivated by personal animosity" and cited State ex rel. Anseth v. District Court, 134 Minn. 16, 158 N.W. 713 (1916) (bartender awarded compensation when struck by glass thrown by patron who was so drunk he did not know nature of his act and no personal altercation preceded injury). 306 N.W.2d at 136 & n.3.
225. 306 N.W.2d 544 (Minn. 1981).
227. 306 N.W.2d at 546.
be the proximate, as distinguished from the contributory, cause of the injury complained of.'

Justice Otis, joined by Justices Peterson and Simonett, dissenting, objected to looking to decedent's uneven loading of the truck as a cause, saying that this overlooked "the fact that the problem was of decedent's own making at a time when he was intoxicated." But it is not clear that his being intoxicated proximately caused him to load the truck as he did. It is at least equally probable that he loaded the heavy full kegs on one side and the empties on the other merely because it was easier. This "would be negligence not related to his intoxication."

The majority proceeded appropriately in continuing to give the intoxication defense a narrow construction and application.

VI. NONWORK INJURY SUBSEQUENT TO WORK INJURY

In *Schander v. Northern States Power Co.*, the supreme court held that a claimant is not entitled to workers' compensation for an injury sustained on the way home from a retraining class. The court of appeals, while recognizing that the supreme court in *Hendrickson v. George Madsen Construction Co.* ruled out compensation for a heart attack caused by the stress of testifying at one's compensation hearing, had nevertheless awarded compensation. The court of appeals reasoned that the case was governed by the supreme court's cases allowing compensation for injuries sustained while returning from medical treatment for a compensable in-

---

228. *Id.* at 545 (quoting State ex rel. Green v. District Court, 145 Minn. 96, 98, 176 N.W. 155, 156 (1920), and citing Olson v. Felix, 275 Minn. 335, 146 N.W.2d 866 (1966)).
229. *Id.* at 548 (Otis, J., dissenting).
230. See *id.* at 547.
231. *Id.*
234. 281 N.W.2d 672 (Minn. 1979).
235. 33 Minn Workers' Comp. Dec. at 350.
jury,\textsuperscript{236} one of which was a summary affirmation subsequent to Hendrickson.\textsuperscript{237} Judge Pomush concurred, noting that the Hendrickson court had referred to the seeking of medical care for a compensable injury as a special errand and concluding that "[i]f the employee is engaged in a special errand while seeking medical care, he is just as much on a special errand while seeking retraining."\textsuperscript{238} (Actually, the situation in Schander did not fit Minnesota's "special errand" approach because the retraining was a seventy-eight-week auto mechanics course at a vo-tech institute,\textsuperscript{239} and the Minnesota court has held that travel is not a special errand if the task is "regular and recurring during the normal hours of employment."\textsuperscript{240} However, the employer in Schander paid mileage for the claimant's travel to the retraining class,\textsuperscript{241} and travel has been held to be in the course of employment when the employer pays mileage.\textsuperscript{242}) The supreme court reversed the court of appeals' award, reasoning:

It is well settled that personal injuries suffered by an employee while traveling between his home and his work premises

\begin{footnotes}
\item\textsuperscript{236} Pedersen v. Maple Island Inc., 256 Minn. 21, 97 N.W.2d 285 (1959); Fitzgibbons v. Clarke, 205 Minn. 235, 285 N.W. 528 (1939).
\item Regarding the new prohibition on citing summary dispositions, see infra notes 290-94 and accompanying text.
\item\textsuperscript{238} 33 Minn. Workers' Comp. Dec. at 352 n.2 (Pomush, J., concurring). In Hendrickson v. George Madsen Constr. Co., 281 N.W.2d 672, 674-75 (Minn. 1979), the court had stated:

Pursuing a compensation claim against the employer . . . is not analogous to traveling to or from the medical doctor for treatment of a compensable injury. The rationale of cases allowing compensation for injuries during trips to or from the doctor is frequently stated in terms of the employer's obligation to provide medical treatment (often authorized on company time), and the employee's obligation to receive treatment and thereby avoid further medical complications. Thus, in many cases the travel is actually a "special errand." These considerations are not involved when a person pursues a compensation claim and undertakes a lawsuit against the employer.
\item\textsuperscript{239} See 33 Minn. Workers' Comp. Dec. at 347.
\item\textsuperscript{240} See Youngberg v. Donlin Co., 246 Minn. 421, 425, 119 N.W.2d 746, 749 (1963) (affirming denial for injury while returning from company team bowling which "was a regularly scheduled weekly event and there was nothing about it to characterize it as a special job or errand or the trip itself as an integral part of the employment"); cf. Jonas v. Lillyblad, 272 Minn. 299, 307, 137 N.W.2d 370, 375 (1965) (affirming award for injury while returning from turning on employer's furnace, which employee had to do on many but not all nights during spring months—Commission could find employee "was not engaged in daily, regular, recurring trips").
\item\textsuperscript{241} See 33 Minn. Workers' Comp. Dec. at 347.
\item\textsuperscript{242} See Lundgaard v. State, 306 Minn. 421, 237 N.W.2d 617 (1975); 1 A. Larson, supra note 61, § 16.30.
\end{footnotes}
do not fall within the coverage of workers' compensation. . . . Despite this general rule, the Court of Appeals determined that employee's injuries were compensable in reliance on decisions holding that injuries sustained by an employee while traveling to or from a doctor for medical treatment of a compensable injury are also compensable. . . . We pointed out in Hendrickson . . . that the usual rationale advanced for allowing compensation for injuries which occur during trips to or from a doctor is that the employer has an obligation to provide medical treatment and the employee has an obligation to receive such treatment and thereby avoid further medical complications.

Here, the Court of Appeals pointed out that, when necessary, an employee has as much right to receive retraining as he does to receive medical treatment. It may be added that retraining, when necessary to restore an employee to gainful employment, is also in the interests of both employer and employee. We are not convinced, however, that there is a sufficiently direct relationship between employment and injuries sustained by an employee while returning from his retraining course to his home to justify the conclusion that during that time he is in the course of employment. Obviously, the employer exercises no control over, and derives no benefit from, the employee's choice of route. Moreover, the employee during the course of his travel is exposed to the same risks as all other members of the general public and in the absence of exceptional circumstances the coverage of the Workers' Compensation Act does not extend to such risks. In Hendrickson we recognized that workers' compensation is a "pure creature of the legislature" and declined judicially to extend coverage to a nonwork-related event. . . . We again decline to do so. 

243. 320 N.W.2d at 85 (citations omitted).
244. "See Rau v. Crest Fiberglass Indus., 275 Minn. 483, 485-86, 148 N.W.2d 149, 151-
“street risk” doctrine allows coverage of traveling employees even though other members of the public are equally exposed to the injurious street risk.245

The claimant’s travel to and from retraining was like travel to and from medical treatment for the work injury but unlike the testifying at the compensation hearing in Hendrickson because it actually served the employer by mitigating the employer’s future compensation liability. Accordingly, the Supreme Court should have allowed compensation under Professor Larson’s approach, quoted with approval in an earlier case,246 which extends coverage “[w]hen the injury following the initial compensable injury arises out of a quasi-course activity, such as a trip to the doctor’s office.”247

VII. BENEFITS248

A. Treatment

1. Attorney Fees

In the 1980 case of Roraff v. State,249 the Minnesota Supreme Court held that the employer is liable for the employee’s attorney fees necessitated to make the employer pay medical expenses.250 The court found attorneys’ fees covered by that part of the medical benefits section which states, “In case of [employer’s] inability or refusal seasonably to [furnish medical treatment] the employer shall be liable for the reasonable expense incurred by or on behalf of the employee in providing the same.”251 The court held the medical benefits provision governed, rather than the attorney fees section,252 which the court said “was intended to govern awards of attorneys’ fees in proceedings in which an employee is awarded disability compensation, but was not meant to apply to awards of

52 (1976) (alternative route chosen because it had less traffic); Falkum v. Daniel Starch & Staff, 271 Minn. 277, 135 N.W.2d 693 (1965) (no compensation for injury during deviation from employment trip); Bradt, supra note 130, at 581-85.
245. See Bookman v. Lyle Culvert & Road Equip. Co., 153 Minn. 479, 481, 190 N.W. 984, 984 (1922); Bradt, supra note 130, at 545-46.

247. 1 A. Larson, supra note 61, § 13.11, at 3-366.
249. 288 N.W.2d 15 (Minn. 1980).
250. Id. at 16.
252. See id. § 176.081.
attorneys' fees in proceedings brought solely to recover medical expenses." 253

The court did not explain how this squared with subdivision 7 of the attorney fees section, which provides for making the employer pay twenty-five percent of that part of the attorneys' fees which exceeds $250 if the employer, inter alia, "shall fail to make payment of compensation or medical expenses within the statutory period . . . or shall otherwise resist unsuccessfully the payment of compensation or medical expenses." 254 No doubt the court was proceeding upon the assumption either (1) that medical benefits were not "compensation" within the meaning of subdivision 1 of the attorney fee section, providing for approval of attorney fees "up to 25 percent of the first $4,000 of compensation awarded to the employee and up to 20 percent of the next $27,500 of compensation awarded to the employee," 255 or (2) that the value of medical benefits would often be so low that fees thus computed would be inadequate.

The first assumption ignores the fact that the Act's definitions section specifies that "'Compensation' includes all benefits provided by this chapter on account of injury or death" 256 and the fact that the supreme court has specifically held medical benefits to constitute "compensation" within the meaning of the Act. 257 The second assumption ignores the fact that subdivision 2 of the attorney fee section authorizes the court of appeals to approve attorney fees in excess of the amount authorized in subdivision 1. 258

With regard to the medical benefits provision stating, "In case of [employer's] inability or refusal seasonably to [furnish medical treatment] the employer shall be liable for the reasonable expense incurred by or on behalf of the employee in providing the same," the court reasoned:

[W]e believe that "reasonable expenses" was, in all likelihood, intended to include attorneys' fees for two reasons. One is that the words "reasonable expenses" would otherwise have little

253. 288 N.W.2d at 15-16.
255. See id. § 176.081(1).
256. See id. § 176.011(8) (emphasis added).
257. See Livgard v. Cornelius Co., 308 Minn. 467, 469, 243 N.W.2d 309, 311 (1976); Frank v. Anderson Bros., 236 Minn. 81, 84, 51 N.W.2d 805, 807 (1962).
258. See Saari v. McFarland, 319 N.W.2d 706 (Minn. 1982) (evidence did not support giving lawyer who requested $15,000 only $7,500); Lennartson v. Fairway Foods, Inc., 310 N.W.2d 673 (Minn. 1981) (25/20 formula does not limit fees awarded under subdivision 2).
meaning. The statute obligates the employer to furnish medical treatment and supplies in the first sentence so this language clearly imposes an additional obligation to pay the additional reasonable expenses necessarily incurred by an employee who is required to commence a proceeding to obtain payment of the cost of his medical treatment and supplies. The other reason is that this construction furthers the basic purpose inherent in workers' compensation legislation...of imposing on industry the cost of workers' injuries for which it is responsible.259

The court's first reason seems unsound. The plain meaning of "reasonable expense incurred by or on behalf of the employee in providing [medical care]" after employer has failed to furnish it, is the cost of the medical care, for which the employee or whoever paid for the medical care should be reimbursed.260 The court's second reason is weightier, but seems insufficient to outweigh the strong inference from subdivision 7 of the attorney fees section that only part, rather than all, of employee's attorneys' fee is to be imposed on the employer as part of "the cost of workers' injuries for which it is responsible."

The Roraff result is equitable, in that attorneys' fees necessitated in order to recover any kind of workers' compensation benefits are part of "the cost of workers' injuries" which arguably should be imposed on industry. Nevertheless, the Roraff result seems inconsistent with the statute.

In Walraven v. State,261 an evenly divided court of appeals held that the employer's liability for attorney fees under Roraff was not limited to situations where medical benefits were the only issue.262 In Walraven, in addition to obtaining certain medical benefits, claimant's attorney assisted employee in contesting termination of disability benefits and obtaining an award of permanent total disability benefits.263 Judge McCarthy's lead opinion concluded, "I believe the case of Roraff to be self-explanatory and that the Compensation Judge's award of $150.00 of additional attorneys' fees to petitioner's attorney for securing certain medical benefits, is well within the prerogative outlined by Mr. Justice Yetka in Roraff."264 Judge Gard concurred in the result, saying that he agreed "with

259. 288 N.W.2d at 16.
260. See Carmody v. City of St. Paul, 207 Minn. 419, 291 N.W. 895 (1940); Lading v. City of Duluth, 153 Minn. 464, 190 N.W. 981 (1922).
262. Judge Reike took no part.
264. Id. slip op. at 3.
the award of attorney fees for unpaid bill collection upon the facts in this case."\textsuperscript{265}

Judges Wallraff and Adel dissented. Judge Wallraff stated that in his opinion "attorney's fees, per Roraff . . . should only be awarded when medical bills are the only issue."\textsuperscript{266} Judge Adel reasoned:

I agree with Judge Wallraff that attorney fees should not be awarded on the medical expense in this case. The \textit{Roraff} case dealt with a situation where no compensation was due the employee but only medical expense was at issue. The Supreme Court held that reasonable attorney fees should be awarded in that situation. Though \textit{Roraff} involved a situation where medical expense only was an issue, I believe that it could be applied also where the compensation was small in amount so that the fee developed from compensation would be too small. In that case a fee could be awarded partially against the compensation and partially with regard to the medical. . . .

In this case a fee of $5,000.00 was awarded against the compensation. I believe that is a reasonable fee. I believe it is not necessary or proper to award a fee with regard to the medical expense in this case since a reasonable fee has already been awarded.\textsuperscript{267}

It is very hard to say which of the approaches in the \textit{Wallraven} opinions the supreme court would adopt. The fact that the \textit{Roraff} court said that the attorney fees section "was intended to govern awards of attorneys' fees in proceedings in which an employee is awarded disability compensation, but was not meant to apply to awards of attorneys' fees in proceedings brought solely to recover medical expenses," points in the direction of Judge Wallraff's position that attorneys' fees should be awarded under the medical benefits section only "when medical bills are the only issue," although it is easy to foresee the court preferring Judge Adel's somewhat less stringent approach. On the other hand, the \textit{Roraff} court's rationale that attorney fees were part of the "expense incurred . . . in providing [medical benefits]" under the medical benefits section, justifies the approach of Judges McCarthy and Gard. Since the \textit{Roraff} result is barely (if at all) justifiable under the statute, arguably it should be given the narrow yet equitable interpretation specified by Judge Adel.

\textsuperscript{265} Id. (Gard, J., concurring).
\textsuperscript{266} Id. slip op. at 4 (Wallraff, J., concurring in part, dissenting in part).
\textsuperscript{267} Id. slip op. at 5 (Adel, J., concurring in part, dissenting in part).
2. Reasonableness of Charges

The court of appeals has decided several recent cases dealing with the reasonableness of charges for chiropractic treatment. In *Rosalez v. 3M Co.*, it held that the reasonable and necessary charge for chiropractic care was $1,416, as testified by a consulting chiropractor, not the $5,825 claimed by the treating chiropractor who in 18 1/2 months gave the employee between 175 and 200 examinations and treatments—sometimes two treatments per day.

But in *Hagle v. State*, a four-one court of appeals upheld charges for chiropractic treatment, saying:

The Court conclude[s] that the treatment rendered was necessary and reasonable *based upon the record submitted*. There is insufficient evidence of record to indicate the treatments rendered by the chiropractor were unreasonable or unnecessary. No adverse chiropractor was called to testify and the testimony of the orthopedic specialist contributes little to the determination of this issue due to his lack of knowledge of chiropractic treatment and his opinion that the employee has no

---


The commissioner of labor and industry insurance shall by rule establish procedures for determining whether or not the charge for a health service is excessive. In order to accomplish this purpose, the commissioner of insurance shall consult with insurers, associations and organizations representing the medical and other providers of treatment services and other appropriate groups. The procedures established by the commissioner of insurance shall limit the charges allowable for medical, chiropractic, podiatric, surgical, hospital and other health care provider treatment or services, as defined and compensable under section 176.135, 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 which the determination is made of the amount to be paid the health care provider for the billing. The procedures established by the commissioner for determining whether or not the charge for a health service is excessive shall be structured to encourage providers to develop and deliver services for rehabilitation of injured workers. If the commissioner of insurance, a compensation judge, the workers' compensation court of appeals or a district court determines that the charge for a health service or medical service is excessive, he may limit no payment to in excess of the reasonable charge for that service shall be made under this chapter nor may the provider collect or attempt to collect from the injured employee or any other insurer or government amounts in excess of the amount payable under this chapter; however, the commissioner of insurance shall by rule establish procedures allowing for a provider to appeal such determination...


270. *Id.*, slip op. at 2.

disability. Judge Adel dissented on grounds that the chiropractor’s credibility was undercut by the fact he (1) was proved wrong in his opinion regarding employee’s ability to work by the employee’s returning to work, (2) purported to determine functional loss to the back to the nearest one-tenth of one percent, which was “impossible and incredible,” (3) gave “responses to simple questions that defy comprehension,” (4) used “words and terms that cannot be located in standard dictionaries or medical dictionaries,” and (5) had problems with the Board of Chiropractic Examiners causing suspension from practice and probation.

Four days later, in *Neilan v. Target Stores*, the court of appeals upheld only $595 of a $2,282.90 bill from the same chiropractor. Judge Adel’s lead opinion, joined only by Judge Pomush, listed the same five points as his dissent in the previous case. Judges Rieke and Wallraff concurred in the result.

Finally, in *Wright v. Kimro, Inc.*, the court of appeals found that reasonable and necessary chiropractic care was $1,704, pursuant to the testimony of a chiropractor who reviewed the charges, rather than the $3,514 billed by the treating chiropractor. The

272. *Id.*, slip op. at 4 (emphasis in original).

Compare Lair v. Energy Savers Unlimited, No. 476-52-5434 (Minn. Workers’ Comp. Ct. App. Feb. 24, 1981), where a three-two court of appeals held an employee entitled to further chiropractic treatment. The majority relied on the chiropractor’s testimony that further chiropractic treatment was needed, the employee’s testimony that she received considerable help and experienced considerable improvement during the treatment, the fact that the chiropractor was experienced and well qualified and had “demonstrated some element of his character by treating [employee] with no charge to her after the insurer cut her off.” *Id.*, slip op. at 3-4.

Judge Adel stated, “Dr. Proetz testified that the employee was totally disabled from work during a period totaling one year and eleven weeks during which the employee was employed full time.” *Id.*, slip op. at 3 (Adel, J., dissenting).

Judge Adel noted as examples of words Dr. Proetz used which were not in standard or medical dictionaries “stressology,” “stressologist,” “nervoscope,” “opsiometer,” and “internal drag.” *Id.* slip op. at 3 n.2.

The employee testified that Dr. Proetz told her not to return to work in May, 1979. Dr. Boxall told her she should return to work. The employee returned to work on May 22, 1979 and worked continuously thereafter until the hearing. This, we conclude, does not add any weight to the opinions of Dr. Proetz.

*Id.*

Judge Adel noted as examples of words Dr. Proetz used which were not in standard or medical dictionaries “stressology,” “stressologist,” “nervoscope,” “opsiometer,” and “internal drag.” *Id.* slip op. at 3 n.2.

277. *Id.* slip op. 3 (McCarthy, J., took no part).

278. 34 Minn. Worker’s Comp. Dec. 702 (1982).

279. *Id.* at 704.
court of appeals also relied upon testimony by medical doctors who did not see the need for chiropractic treatments to the extent the treating chiropractor had been giving them.\textsuperscript{280} The court of appeals concluded, "Reasonableness and necessity of health care services must be proved; it is not to be assumed merely because it has been rendered."\textsuperscript{281}

The recent court of appeals decisions on reasonableness of charges for chiropractic care show that the court of appeals is applying some scrutiny in this area. This seems appropriate, and this approach should be applied to all kinds of health care covered by workers' compensation.

3. Family Member's Nursing Services

Several recent decisions deal with the employer's duty to "pay for the reasonable value of nursing services by a member of the employee's family in cases of permanent total disability."\textsuperscript{282}

In \textit{Alexander v. Kenneth R. LaLonde Enterprises},\textsuperscript{283} the supreme court upheld an award for a wife's nursing services based on the wage of a licensed practical nurse for an eight-hour day, over the employer's objection that the wife was not a licensed practical nurse and over the wife's objection that she had to be available on a twenty-four-hour basis.\textsuperscript{284} As to the employer's objection, the court pointed out that the employer suggested no better yardstick for ascertaining the services' value, that the wife's services had some similarities to those of a licensed practical nurse, that she had received training from the Kenny Institute to perform some of the tasks, and that "only hourly wage rates, exclusive of substantial 'fringe benefits' were used as a measurement."\textsuperscript{285} As to the wife's

\textsuperscript{280} \textit{Id.}.
\textsuperscript{281} \textit{Id.} at 705.
\textsuperscript{283} 288 N.W.2d 18 (Minn. 1980).
\textsuperscript{284} \textit{Id.} at 20-21.
\textsuperscript{285} \textit{Id.} Regarding the wife's services, the court said:

Petitioner can do little for himself; so, during a typical day, his wife undresses him, bathes him, washes his hair, helps him brush and clean his dentures, serves him meals on a tray, cuts his food and aids in feeding him, helps him out of chairs and into and out of automobiles, affixes his leg brace, places a splint on his hand 10 to 12 times a day, and exercises his arm and leg. Petitioner must frequently use the bathroom, both during the day and during the night, and his wife must assist him in getting out of bed, walking to the bathroom, and going back to bed, where he must be placed in a certain position in the bed in order to
objection, the court noted that her services were not full time, that an institutional nurse would have constant duty during the regular workday, performing services for numerous patients, and that some of her services were "attributable to the marital status itself."\textsuperscript{286}

Lest too much emphasis be put on the last point, it should be noted that subsequent to \textit{Alexander} the Minnesota Supreme Court summarily affirmed an award in \textit{Vicars v. Marquette National Bank},\textsuperscript{287} wherein the court of appeals had stated:

[The wife] is not asking for . . . payment for ordinary household tasks such as preparation of meals, washing of employee's clothes, etc. . . . [T]he insurer's argument that [it is] in effect subrogated to the husband and wife's marriage vows and that she thereby must put in a 24 hour vigil of the employee, free of charge for an injury compensable under the Workers' Compensation Act, is without merit. Before the injury, she was free to come and go, sleep a restful night without having to be awake to see that her husband got back to bed safely and not have to perform for her husband anything more than her wifely duties.\textsuperscript{288} Now she is bound to a 24 hour constant supervision of the employee's activities.\textsuperscript{289}

Regarding the fact that the supreme court summarily affirmed in \textit{Vicars}, it should be pointed out that on December 17, 1981, the supreme court amended the Rules of Civil Appellate Procedure by adding a sentence to Rule 133.01, subdivision 1, stating, "Summary dispositions have no precendential value and shall not be cited." It is unfortunate that the supreme court adopted this amendment. It is not accurate for the court's rules to state that

\textit{Id.} at 20.

\textit{Id.} at 21.

\textit{Id.} at 21.

\textit{Id.} at 20.

\textit{Id.} at 300-01. It should be noted that the supreme court's affirming the award does not necessarily indicate approval of the court of appeals' reasoning. \textit{See} Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 920-21 (1976) (Brennan, J., dissenting); Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

sleep. As a result of this need for nighttime assistance, petitioner's wife averages 4 hours of interrupted sleep.

33 Minn. Workers' Comp. Dec. at 304 n.4.

summary dispositions have no precedential value, and a prohibition on citing them seems to unconstitutionally abridge freedom of speech and of the press. The new provision is particularly troublesome in the area of workers' compensation, where court of appeals decisions are disseminated both in slip opinion form and in the service entitled Minnesota Workers' Compensation Decisions, published by the state. The latter publication reports the supreme court's summary dispositions and court of appeals opinions refer to them. A litigant is entitled to know if it is not worthwhile to seek review because the supreme court has summarily decided a similar case.

If the new provision denying that summary dispositions have precedential value and barring their citation is not stricken down, at least it should be narrowly construed to apply only to practice before the supreme court. It should not be applied to practice before the court of appeals, and certainly not to law review articles like this one. Construing it to apply only to practice before the supreme court is consistent with the principle of construing a provision in a manner that avoids serious doubt as to its constitutionality and with the fact that Rule 101 of the Rules of Civil Appellate Procedure, entitled "Scope of Rules," specifies that the rules "govern procedure in the Supreme Court of Minnesota."


292. Regarding the principle of construing a provision to avoid serious doubt as to constitutionality, see supra note 206 and accompanying text.

In McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 542 n.4 (Minn. 1983), the supreme court itself cited a summary affirmanice, but only to point out that relator's reliance upon it was misplaced because "[t]he summary affirmanice indicates that the case has no precedential value and should not be cited in briefs." See Hoff v. Kempton, 317 N.W.2d 361, 365-66 (Minn. 1982).
The State Register and Public Documents Division and the court of appeals apparently have not construed the new provision to be applicable to them. *Minnesota Workers' Compensation Decisions* has continued to report the supreme court summary dispositions after December 17, 1981, and court of appeals opinions after that date continue to refer to supreme court summary dispositions.

Relying upon the fact that its award in *Vicars* had been summarily affirmed, the court of appeals in *Server v. State* held that a wife's assistance to her work-injured husband constituted "nursing services" within the meaning of the statute. Applying the dictionary definition of the verb "to nurse," *i.e.*, "to take care of or attend, as an invalid, to care for tenderly or sedulously, to cherish, foster," the court of appeals ordered the employer to pay for the wife's services, saying:

The record discloses that the employee has made some progress in his physical capabilities since his injury. Nevertheless, the evidence revealed that at the time of hearing the employee's wife still washed his hair, tied his shoes, clipped his nails, assisted in his shaving, poured his coffee, cut up his food for him and regulated his medication.

Most importantly, the employee's wife must almost continually observe the employee due to his mental condition. The record reveals that the employee becomes easily confused and at times becomes "lost" and does not remember his phone number or the address of his residence. The employee, when left alone, has attempted to fix a water faucet without turning the water off either below or in the basement and has tried to do electrical work in his house without turning the power off. The record clearly demonstrates that the employee could not be expected to be relied upon to take his medication at the appropriate times.

The court of appeals seems to be proceeding appropriately in


296. *Id.* at 333-34.


298. 33 Minn. Workers' Comp. Dec. at 333.
giving a liberal interpretation to the provision on family members' nursing services.

B. Rehabilitation

In *Rippentrop v. Imperial Chemical Co.* the supreme court held that under the rehabilitation section adopted in 1979, a claimant engaged in job hunting under a "rehabilitation plan" is not entitled to the 125% compensation rate. The statute requires the employer to pay "up to 156 weeks of compensation during rehabilitation under a plan in an amount equal to 125% of the employee's rate for temporary total disability." The court concluded that this does not apply to job hunting under a rehabilitation plan because (1) subsequent language in the same subdivision...
sion refers to "the 156 weeks of retraining compensation,"\(^{304}\) (2) the subdivision’s legislative history shows that it was designed to replace the practice under which claimants could sometimes "double dip" by receiving retraining benefits concurrently with temporary total disability benefits,\(^{305}\) (3) the subdivision’s headnote in the bill before the legislature specified "Compensation During Retraining,"\(^{306}\) and (4) "providing the 125\% benefit only as an incentive to formal vocational retraining . . . seems reasonable in that an employee who does not succeed in direct job placement efforts may then be encouraged to obtain formal vocational training through the incentive of increased compensation."\(^{307}\)

The Rippentrop court’s conclusion was correct, for the reasons the court specified and for the additional reason which had been given by the court of appeals, that "[t]here is no indication that the legislature intended to allow dissipation of the 156 weeks by the time spent in direct placement—which if unsuccessful would, of course, leave the employee with none or a reduced portion of his 156 weeks for possible needed formal vocational training."\(^{308}\)

C. Disability Benefits

1. Temporary Total and Permanent Total

a. Time of Injury

In Blegen v. Data Dispatch, Inc.,\(^{309}\) the employee hurt his knee at work on January 6, 1978 but this did not cause him to lose time from work until July 31, 1979. The court of appeals held that dis-

---

304. 316 N.W.2d at 516; see supra note 303.
305. Id.; see MINNESOTA WORKERS' COMP. STUDY COMM’N, supra note 163, at 16; Walsh, supra note 301, at 734-35.
306. 316 N.W.2d at 516. This subdivision was denominated "Compensation during retraining" in Act of June 7, 1979, ch. 3, § 36, 1979 Minn. Laws Ex. Sess. 1281, and in MINN. STAT. § 176.102(11) (Supp. 1979). It was only changed to "Compensation during rehabilitation" in MINN. STAT. § 176.102(11) (1980). The court said "the headnote . . . in the bill before the legislature . . . is intrinsic evidence of the legislative author's own understanding of its purpose and intent," and noted that "the headnote [now] appearing in the statute, is not part of the statute." 316 N.W.2d at 516 & n.1, quoting In re Contest of Gen. Election, 264 N.W.2d 401, 404 n.5 (Minn. 1978), and citing MINN. STAT. § 648.36 (1982). Section 648.36 specifies:

The headnotes of the sections of any edition of the Minnesota Statutes printed in black-face type are intended to be mere catch words to indicate the contents of the section and are not any part of the statute, nor shall they be so deemed when any of such sections, including the headnotes, are amended or reenacted, unless expressly so provided.

307. 316 N.W.2d at 516.
308. 33 Minn. Workers' Comp. Dec. at 457.
ability benefits were to be based on employee's wage on the earlier date. It stated:

The employee argues that the interpretation of "time of injury" as a matter of law means the date upon which disablement or lost wages begins. He cites cases in his brief from other jurisdictions as Minnesota apparently has not construed M.S. 176.011, Subd. 3, referring to the daily wage at the time of injury. A review of these cases reveals that the majority involved an occupational disease. In the instant case we are not dealing with an occupational disease.

It is axiomatic under Minnesota Law that the date of the injury controls the benefits that the employee is to receive under the Minnesota Workers' Compensation Law.

The statutes should be construed so that the words are given their common meaning. It is clear that the time of injury should be interpreted to mean the actual date upon which the injury occurs.

The court of appeals' approach seems inappropriate for three reasons. First, since the 1953 legislature deleted the "caused by accident" element from the definition of "personal injury," it often will be difficult to pinpoint the time of injury other than with reference to the time of disablement. Particularly will this be so in cases of aggravation of an underlying disorder or repetitive minute trauma.

310. *Id.* , slip op. at 3; cf. Crepeau v. Krost Insulation Co., 332 N.W.2d 191, 195 (Minn. 1983) ("While employee did not sustain compensable disability until February 1980, he had sustained the underlying injury through exposure to asbestos by June 14, 1978, and the compensation judge correctly used that date in determining the amount of dependency compensation").

311. *Blegen*, slip op. at 3.


314. See 1B. A. LARSON, supra note 61, § 42.00 ("'Personal injury' includes any harmful change in the body. It need not involve physical trauma, but may include such injuries as disease, sunstroke, nervous collapse, traumatic neurosis, hysterical paralysis, and neurasthenia."); V ENCYCLOPEDIA BRITANNICA MICROPEDIA 357 (1974) ("any damage done the body, particularly by an outside force"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED) 1164 (1976) ("hurt, damage, or loss sustained"); cf. B. MALOY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS 323 (2d ed. 1951) ("A hurt suffered by a person or a thing; a hurt or damage sustained, as a severe injury. A hurt of any sort; a wound, a maim, a lesion"); STEDMAN'S MEDICAL DICTIONARY 709 (4th unabridged lawyers' ed. 1976) ("Damage; trauma; an accidental or inflicted wound.").


316. See, e.g., Jensen v. Kronick's Floor Covering Serv., 309 Minn. 541, 245 N.W.2d 230 (1976) (per curiam). The *Jensen* court held that impairment from repetitive minute trauma...
Second, there is considerable authority for equating injury with disability. The Minnesota Supreme Court made disability relevant to "time of injury" in *Balow v. Kellogg Cooper Creamery Association*, where it held, under the provision requiring notice of injury within a certain time "after the occurrence of the injury," that the time for notice "commences to run when the disability occurs or when it becomes reasonably apparent that it is likely to occur." The supreme court equated disablement of a member with "injury to" the member in *Tracy v. Streater/Litton Industries*. In *Tracy*, claimant injured his spinal cord at work on August 5, he experienced sensory loss and some weakness in his legs by August 26 and by September 8 his legs were paralyzed. The court upheld the application to claimant's benefits of the fifteen percent increase provided for permanent partial disability "caused by simultaneous injury to two or more members."

Third, with respect to occupational disease, the statute specifies, "The disablement of an employee resulting from an occupational disease shall be regarded as a personal injury within the meaning of the workers' compensation law." The *Blegen* court of appeals should have accepted claimant's contention that the "time of injury" for "daily wage" purposes was July 31, 1979, when disability commenced. Claimant's injury did not really culminate or take hold to affect his earning ability until that time. Since the compensation is for disability, it should be measured by the wage when the disability commenced.

The court of appeals *did* take this approach in a later case involving, not a single employer's liability for total disability, but apportionment of liability between several employers for temporary partial disability. In *Brink v. Metropolitan Waste Control Commission*, claimant was temporarily partially disabled in 1981 as a
result of three injuries: a 1979 injury while working for Employer A at $371 per week, a 1980 injury while working for Employer B at $437 per week; and a 1981 injury while working for Employer C at $671 per week. In his temporarily partially disabled condition claimant was able to earn over $450 per week. Responsibility was apportioned to fifty percent to the Employer A injury and twenty-five percent each to the Employer B and Employer C injuries. Employer A protested that it should not be liable for any temporary partial disability benefits because those benefits are based on two-thirds of the difference "between the daily wage of the worker at the time of injury and the wage he is able to earn in his partially disabled condition," and claimant here was making more now than at the time of his Employer A injury. The court of appeals rejected Employer A's argument and held it liable for fifty percent of two-thirds of the difference between $671 and $450, saying:

The employee's claimed wage loss occurred subsequent to his last work injury . . . in 1981 and it is this period that demonstrates his entitlement to benefits. The . . . 1979 injury established the liability of [Employer A] . . . for so long as this injury contributes to the employee's disability.

The court of appeals' approach in Brink is basically inconsistent with and vastly superior to its approach in Blegen. One may hope that in some future case the court of appeals will reconsider and overrule Blegen.

b. "Community"

With regard to work available in a totally disabled employee's

325. Id. at 745-46. Claimant's earnings in February 1981 were $450.80 and in October 1981 $527.91. Id. at 746.
326. Id. at 747.
329. From February until October 1981 and 50% of two-thirds of the difference between $671 and $527.91 after October 1981. Id. at 746-47, 750; see supra note 325. The court of appeals added:

Obviously, the amount payable by [Employer A] for the employee's . . . 1979 injury should never exceed that which would equal its maximum compensation liability rate for this . . . 1979 date of injury and in this case it would appear that the appellant is only responsible for approximately half of that maximum compensation rate.

34 Minn. Workers' Comp. Dec. at 750.
330. 34 Minn. Workers' Comp. Dec. at 749.
"community," the Minnesota Supreme Court has decided several interesting recent cases. Two of the cases concerned claimants who moved to communities other than where they were employed when injured, and two with the size of the "community" in which claimant must seek work.

In *Paine v. Beek's Pizza*, a six-three court held as a matter of law that when a claimant injured while working in a metropolitan area leaves that area, which has employment opportunities within his physical restrictions, and, allegedly hoping to better himself, moves to an area with few, if any, employment opportunities, the claimant is not entitled to total disability benefits. The claimant, who had lived in the Twin Cities for some time, sustained back and neck injuries in a multi-vehicle accident while working as a pizza deliverer for the employer. Thereafter, he worked for two weeks as a janitor for a different Twin Cities employer, but quit because he wanted to find another job. Subsequently he obtained a settlement from the other driver who had been involved in the accident, began receiving social security disability benefits, and married a woman with two teenage children who also received social security. The family moved to a farm near Glencoe, Minnesota, then to a farm near Badger, Minnesota, and finally to a farm in Roseau County, Minnesota, on which the claimant's wife gardens and he raises chickens and a few pigs. The claimant made a few unsuccessful attempts to find work in nearby small towns. Reversing the court of appeals' award of total disability benefits, the court reasoned:

In the case at bar, from an objective standpoint as distinguished from the self-serving statement of [claimant] saying that he hoped to "better himself" by making the move, there was no evidence to sustain the conclusion that a reasonable person in the employee's place would have quit a job in the metropolitan area to make a move expecting to earn his livelihood from extremely marginal farming or by obtaining employment in the area of the move.

334. 323 N.W.2d 812 (Minn. 1982).
335. *Id.* at 815-16.
336. *Id.* at 813-14.
Moreover . . . this case involves an employee who, at the time of the injury and for [a] considerable time before, had lived in the metropolitan area, but after the injury he had voluntarily removed himself from that job market to an area of low employment opportunity . . . .

The employee, of course, has the right to choose where he will live. It does not follow, however, that if an employee chooses to live in an area where employment opportunities for him are virtually non-existent, an employer-insurer must subsidize him by continued payment of total disability benefits . . . .

. . . [I]n our view, it cannot be said that a reasonable person in the employee’s place would have made the move expecting to earn any reasonable livelihood either from the source of farming under the circumstances here existing or by obtaining outside employment in the area of Badger. More correctly, it seems to us, this move is to be viewed as a withdrawal from the labor market . . . .

In reaching its decision, the Paine court distinguished a case it had decided only a month earlier, Kurrell v. National Con Rod, Inc. In Kurrell, the court upheld a ruling of entitlement to rehabilitation benefits for a claimant who, while recovering from surgery from an injury sustained working for a Twin Cities employer, decided that she could not afford to stay in the Twin Cities on disability benefits and, after arranging for work as a fry cook there, moved 150 miles to Walnut Grove, Minnesota, where she had once lived and still had relatives. She was unable to perform the fry cook job, had to quit after two weeks, and was unable to find other work in Walnut Grove. Her former employer, however, offered her light duty employment under a rehabilitation plan in the Twin Cities. Upholding the court of appeals’ determination that the claimant was entitled to rehabilitation benefits while remaining in Walnut Grove, the court said:

Indeed, Kurrell’s motivations in moving to Walnut Grove may be viewed as “merely personal,” but the relevant inquiry is whether the actions were antithetical to the purposes of the statute. It would be a harsh and rigid rule that allowed an employee to better her personal situation only at the expense of her statutory right to rehabilitation benefits . . . .

The standard employed by the Workers’ Compensation

337. Id. at 815, 816.
338. 322 N.W.2d 199 (Minn. 1982).
339. Id. at 200-02.
Court of Appeals examines whether an employee’s actions advance or impede the return to gainful employment. In determining that Kurrell’s relocation was not part of a plan to retire from the labor market, the Court of Appeals found that “she looked for and did find work at her new location, indicating not an intent to retire, but the very opposite.” . . . There is substantial evidence that Kurrell made an earnest effort to return to the work force by accepting the job as a frycook. When this failed, she made a diligent search for other employment in the Walnut Grove area. 340

The *Paine* court distinguished *Kurrell* on the ground that in *Kurrell* the evidence showed that the claimant made extensive efforts to return to the work force and had actually found work at her new location. 341

The *Paine* court’s distinguishing of *Kurrell* was appropriate, and *Kurrell* should continue to be viewed as reliable precedent. First, it should be emphasized that the issue in *Kurrell* was rehabilitation, and the claimant’s moving to an area of less employment opportunity did not negate the fact that she had suffered a “decrease in employability” that would be “significantly reduce[d]” by the rehabilitation. 342

Moreover, with regard to disability benefits, defining the relevant job availability community should involve a reasonableness standard. Thus it could be found that a claimant should not have to make a job search in a metropolitan area when she moved to a small town feeling she could no longer afford to live in the metropolitan area and reasonably expecting to be able to work in the small town, and yet that a claimant like *Paine* should have to make such a job search when his moves were not accompanied by such justifications.

That defining the relevant job availability community involves a reasonableness standard is further indicated by the Minnesota Supreme Court’s recent decisions in *Petschl v. Britton Motor Service* 343 and *Fredenburg v. Control Data Corp.* 344

In *Petschl*, the court held as a matter of law that an employee injured while working in a metropolitan area to which he commuted sixty miles may not receive disability benefits if he fails to

---

340. *Id.* at 202.
342. See MINN. STAT. § 176.102(4) (1982).
343. 323 N.W.2d 788 (Minn. 1982).
344. 311 N.W.2d 860 (Minn. 1981).
make a diligent job hunt in the metropolitan area, when his work injury does not prevent him from commuting in the same manner as before the injury.\textsuperscript{345} The court distinguished Fredenburg, wherein ten months earlier it had required disability benefits as a matter of law for a claimant who, after his injury while working for a Twin Cities employer, did not seek work in the Twin Cities but only in the area near his Waterville, Minnesota, home, sixty miles from the Twin Cities.\textsuperscript{346} Basing its distinction of Fredenburg upon a point the Fredenburg court had made only in footnote,\textsuperscript{347} that Fredenburg's post-injury physical condition contraindicated lengthy commuting,\textsuperscript{348} the Petschl court reasoned:

In Fredenburg . . . [w]e . . . held that under the unique circumstances of that case the employee was not required to seek substitute employment outside the community in which he lived. That conclusion rested on the evidence of employee's back pain and his low tolerance for physical activities, factors leading us to conclude that the Court of Appeals had erred as a matter of law in requiring the employee to seek employment which would necessitate his spending over an hour each way in traveling to his work and from it. In this case, there is no claim and no evidence that employee is physically incapable of driving the 60 miles to the Twin Cities as a consequence of his work-related injury. He clearly regarded the metropolitan work area as his employment community prior to the injury, and it is only reasonable that he should still do so, particularly when there are few if any job opportunities in the community where he lives.\textsuperscript{349}

The court's approach in Petschl was sound. Fredenburg is reliable

\textsuperscript{345} 323 N.W.2d at 789.

\textsuperscript{346} \textit{id.} at 789-80; see Fredenburg v. Control Data Corp., 311 N.W.2d 860, 864-65 (Minn. 1981).

\textsuperscript{347} See 311 N.W.2d at 864 n.2:

Moreover, the medical testimony indicates that such a trip was not recommended for the employee unless he could stop enroute and walk about. Given the evidence of the employee's pain and his low tolerance for physical activities, it is unreasonable to require the employee to add several painful hours of travel to his ordinary workday in order to commute to his workplace.

\textsuperscript{348} Only one of the four experts involved in the case referred to any restriction on Fredenburg's ability to travel. Fredenburg's chiropractor testified that he should be restricted from riding in a vehicle more than 30 minutes. See id. at 862-63.

\textsuperscript{349} Petschl v. Britton Motor Serv., 323 N.W.2d at 789-90.

Justice Wahl, joined by Justices Todd, Yetka, and Scott, dissented from the reversal of the award. She did not dispute claimant's duty to make a diligent job hunt in the metropolitan area, but felt that the evidence showed, contrary to the compensation judge's finding, that claimant \textit{had} made a sufficient effort to find work in both the metropolitan area and his home area. See id. at 790 (Wahl, J., dissenting).
precedent only subject to the narrow interpretation placed upon it by the *Petschl* court. The court is proceeding appropriately in using a reasonableness standard to identify and delineate each claimant’s job availability “community.”

**c. Economic Unemployment**

In *Johnson v. Rochester Silo, Inc.*, the court of appeals dealt with the issue of distinguishing unemployment caused by disability from unemployment caused by economic conditions. The supreme court has indicated the possibility that an employer should be able to defeat a total disability claim by proving that there would normally be a market for claimant’s services, and that it is only temporary economic conditions that prevent claimant from finding work. The court of appeals, however, refused to apply this approach to the situation in *Johnson*. Claimant, who in August, 1979, sustained a work injury producing a thirty-five percent leg disability, returned to work with employer from January until mid-February 1980, when he was laid off along with other workers because of an economic decline in employer’s business. Thereafter he sought work elsewhere, but was unsuccessful. Finally, in November 1980, employer offered him a job at his compensation

---

350. The court of appeals evinced a similar “reasonableness” approach regarding the issue whether work is “available” in *Salmon v. Southland Corp.*, 34 Minn. Workers’ Comp. Dec. 655 (1981), aff’d mem. No. 81-1311 (Minn. May 26, 1982). In that case a four-one court of appeals awarded total disability, saying:

> Although an employment position existed as a telephone operator . . . that the employee might have been able to perform, the circumstances surrounding the hours of employment, transportation, and child care arrangements made this employment position unreasonable for the employee to attempt.

*Id.* at 658 (footnote omitted). Judge Adel dissented, stating:

> Minn. Stat. 176.101, subd. 2 does not provide any excuses for the employee not working in this case. The hours were not unusual work hours. The employee could arrange for a babysitter, as many working parents do. Similarly, public transportation or ride sharing are utilized by many people in going to work.

> If there were some unreasonable condition or conditions, such as the job being outside the employee’s community, dangerous work for a frail person (such as a night guard in a tough neighborhood) and so forth, it could make this refusal a different matter.

*Id.* at 659 (Adel, J., dissenting) (footnote omitted).

Regarding the recent prohibition on citing summary dispositions, see *supra* notes 290-94 and accompanying text.


353. 34 Minn. Workers’ Comp. Dec. at 20.
hearing and he readily accepted. Rejecting the compensation judge's determination that claimant was not entitled to compensation because his inability to work was not due to his injury but to the general layoff caused by the nature of the employer's business and the winter slowdown, the court of appeals said:

The work injury to the employee's leg establishes that the employee has sustained a significant impairment of earning capacity. The fact that he was able to return to work for a month and a half before he was laid off does not relieve the employer-insurer of future responsibility for further workers' compensation benefits. The real questions in this case concern the employee's ability to earn and whether or not the employee, after being laid off, made a reasonable diligent effort to find employment within his physical restrictions. There is no evidence to contraindicate a reasonable job search, and, therefore, temporary total disability benefits should have been awarded.

Judge McCarthy dissented, stating:

Like the Compensation Judge, I find the employer in the instant case to have done almost everything humanly possible to rehire the employee. In fact, the employer did. Unfortunately, due to circumstances beyond anyone's control, the employer and employee included, economic conditions dictated a layoff of workers (not uncommon in the economy at this time). The employee was a victim of same along with others in the employ of the employer, many with more seniority than the employee.

This layoff was not dictated by the employee's work-related injuries. To now place this burden on the employer to me under the peculiar facts herein seems to be an adulteration of the Workers' Compensation Act.

At first glance, [denying compensation] may seem a harsh result. This is particularly true in view of employee's inability to draw unemployment compensation due to a short tenure at employer's place of business, namely less than one week. However, the Workers' Compensation Act, as I understand it, was to place the burden of work-related injuries on the employer. It was not meant to be a substitution for welfare or unemployment compensation. Therefore, I concur with Compensation Judge Leigh J. Gard on the termination of temporary total or temporary partial disability in February of 1980. To do otherwise, would shift the burden of recession to the employer, something not contemplated in the enactment of workers' compensation.
compensation statutes.\textsuperscript{356}

The majority's approach is preferable. With claimant sustaining a thirty-five percent leg disability and making a diligent job search, the court of appeals could fairly determine that employer had not proven that it was only temporary economic conditions that kept claimant from finding work.

d. Retirement

In \textit{Prekker v. Mastermotive, Inc.},\textsuperscript{357} the Minnesota Supreme Court cleared up confusion caused by language in its earlier opinion in \textit{Gaston v. North Star Lanes},\textsuperscript{358} and held that to cause total disability benefits to cease on the ground of the claimant's voluntary retirement, the employer need not "unequivocally establish" but only establish by a preponderance of the evidence that claimant intended to and did retire at a specific time.\textsuperscript{359} In line with this standard are \textit{Nibbe v. City of St. Paul},\textsuperscript{360} where the court held that the evidence did not support the court of appeals' finding that the claimant had retired, but rather showed that he was forced to retire by a mandatory retirement policy and intended to and but for his work injury would have moved on to other employment,\textsuperscript{361} and other cases allowing compensation where disabled claimants' decisions to retire were caused by their work injuries.\textsuperscript{362} The court's approach in these cases seems appropriate.

\textsuperscript{356} \textit{Id.} at 23-24 (McCarthy, J., dissenting) (emphasis in original).
\textsuperscript{357} 314 N.W.2d 841 (Minn. 1982).
\textsuperscript{358} 295 N.W.2d 623 (Minn. 1980). The \textit{Gaston} court had distinguished \textit{Joens v. Campbell Soup Co.}, 281 N.W.2d 695 (Minn. 1979), by pointing out that in \textit{Joens} there had been "evidence unequivocally establishing employee's intent to retire on a specific date regardless of her disability." 295 N.W.2d at 626. The \textit{Prekker} court explained, "That statement was not intended to suggest that only such evidence can establish such intent on the part of an employee nor that the issue requires greater proof than any other question of fact." 314 N.W.2d at 841.
\textsuperscript{359} 314 N.W.2d at 841.
\textsuperscript{360} 320 N.W.2d 92 (Minn. 1982).
\textsuperscript{361} \textit{Id.} at 93-94.

Regarding the recent prohibition on citing summary dispositions, see \textit{supra} notes 290-94 and accompanying text.
A claimant with a reduced (as opposed to destroyed) ability to earn has several incentives for seeking temporary partial disability benefits rather than (just) unenumerated permanent partial disability benefits. Unlike unenumerated permanent partial

363. Regarding apportionment of liability between several employers for temporary partial disability, see supra notes 325-30 and accompanying text.

Regarding temporary partial disability benefits for injury to a minor, see Kokesh v. Methodist Hosp., No. 474-74-3294 (Minn. Workers’ Comp. Ct. App. Jan. 11, 1982). In that case, the court of appeals held that under Minn. Stat. § 176.101(6) (1982), when a minor sustains a work injury that produces both permanent partial disability and temporary partial disability, the temporary partial disability is compensable on the basis of two-thirds of the difference between either the statewide average weekly wage or claimant's actual pre-injury wage, and what the claimant is able to earn in his or her partially disabled condition. The majority accepted claimant's argument “that the statute is in recognition of the difficulty of determining the earning capacity of a minor and treats the minor as if he or she has the earning capacity of making the statewide average weekly wage,” and said:

The minor has been prevented from attaining his full capacity to earn because of the permanent injury. The legislature has relieved the employee and other minors from such inequity caused by permanent injury before the minor has been able to reach full earning capacity upon reaching majority.

Id. slip op. at 3. Judge Adel dissented, stating:

[Minn. Stat. § 176.101(6)] provides for the compensation rate to be used for minors in cases of temporary total, temporary partial, etc. It does not relate to the wage of the employee.

If the employee does show a wage loss, as required by M.S. 101, Subd. 2, for entitlement to temporary partial disability, then the compensation rate of the employee is to be determined as provided in M.S. 176.101, Subd. 6.

Id. slip op. at 4 (Adel, J., dissenting).

Although Judge Adel's approach has textual support, the majority's holding better effectuates the evident over-all purpose of Minn. Stat. § 176.101(6) (1982).


In all cases of temporary partial disability the compensation shall be 66-2/3 percent of the difference between the daily wage of the worker at the time of injury and the wage he is able to earn in his partially disabled condition. This compensation shall be paid during the period of disability, payment to be made at the intervals when the wage was payable, as nearly as may be, and subject to a maximum compensation equal to the statewide average weekly wage. If the employer does not furnish the worker with work which he can do in his temporary partially disabled condition and he is unable to procure such work with another employer, after reasonably diligent effort, the employee shall be paid at the full compensation rate for his or her temporary total disability.

See Eisinger v. Eisinger Sanitation Serv., 33 Minn. Workers’ Comp. Dec. 344, aff’d mem., No. 81-163 (Minn. Sept. 9, 1981) (temporary partial benefits measured by wages paid to extra part-time employee necessitated by claimant’s reduced ability).

Regarding the recent prohibition on citing summary dispositions, see supra notes 290-94 and accompanying text.

366. Regarding the possibility of seeking both temporary partial and unenumerated permanent partial benefits, see infra notes 395-407 and accompanying text.

367. Minn. Stat. § 176.101, subd. 3(49) (1982) provides:
benefits, temporary partial benefits (1) have no 350-week limit,\(^\text{368}\) (2) may be recovered in addition to enumerated permanent partial benefits,\(^\text{369}\) and (3) are included in the statute's adjustment of benefits "escalator clause."\(^\text{370}\)

In Morehouse v. Geo. A. Hormel & Co.,\(^\text{371}\) the supreme court held

\begin{quote}
In all cases of permanent partial disability not enumerated in this schedule the compensation shall be 66 2/3 percent of the difference between the daily wage of the worker at the time of the injury and the daily wage he is able to earn in his partially disabled condition, subject to a maximum equal to the statewide average weekly wage, and continue during disability, not to exceed 350 weeks; and if the employer does not furnish the worker with work which he can do in his permanently partially disabled condition and he is unable to secure such work with another employer after a reasonably diligent effort, the employee shall be paid at his or her maximum rate of compensation for total disability.
\end{quote}

\(^{368}\) Compare MINN. STAT. § 176.101(2) (1982) (quoted supra note 365) with id. § 176.101, subd. 3(49) (quoted supra note 367).

The temporary partial provision had a 350-week limit like that in the unenumerated permanent partial provision until it was deleted by Act of May 27, 1977, ch. 342, § 12, 1977 Minn. Laws 703.

At first blush, this may appear to be a legislative determination that "temporary" may be longer than "permanent." Further reflection suggests that it was appropriate to remove the arbitrary limit from the provision that compensates for reduction in earning ability while leaving the limitation in a provision that compensates for impairment of bodily function. See infra notes 383-87 and accompanying text.

\(^{369}\) Compare MINN. STAT. 176.101, subd. 3(49) (1982); (quoted supra note 367) with id. § 176.021(3) ("Compensation for permanent partial disability is payable in addition to compensation for . . . temporary partial disability . . . as provided in subdivision 3a"); see also infra notes 378-94 and accompanying text.

\(^{370}\) See MINN. STAT. § 176.645 (1982) (adjustment of benefits "payable under section 176.101, subdivisions 1, 2 and 4, and section 176.111, subdivision 5"). Subject to certain limitations, including a six percent limit on increases, the provision specifies:

\begin{quote}
[O]n the anniversary of the date of the employee’s injury the total benefits due shall be adjusted by multiplying the total benefits due prior to each adjustment by a fraction, the denominator of which is the statewide average weekly wage for December 31 of the year two years previous to the adjustment and the numerator of which is the statewide average weekly wage for December 31 of the year previous to the adjustment . . . .
\end{quote}

It is odd to apply an inflationary adjustment to a benefit measured by the difference between the claimant's wage when injured and what the claimant is able to earn now, since the latter will vary from time to time. But application of the statutory adjustment partially compensates for the Minnesota court's refusal to factor out inflation in determining what a claimant is able to earn now. See Mathison v. Thermal Co., 308 Minn. 471, 473, 243 N.W.2d 110, 112 (1976), criticized in 4 WM. MITCHELL L. REV. 268, 274-75 (1978); see also 2 A. LARSON, supra note 50, § 57.32 ("In determining loss of earning capacity, earnings after the injury must be corrected to correspond with the general wage level in force at the time preinjury earnings were calculated."). Mathison should be overruled. The legislature could do this by adding to section 176.101(2)'s first sentence language stating that the wage employee is able to earn in his or her partially disabled condition shall be "corrected to correspond with the wage level for the work at the time of injury." If this were done, the section 176.645 escalator provision should be amended to not apply to section 176.101(2) benefits.

\(^{371}\) 313 N.W.2d 8 (Minn. 1981).
that in cases arising after August 1, 1974, recovery of temporary partial disability benefits does not necessitate showing that claimant’s physical impairment is “temporary rather than permanent in nature.”

In Morehouse, claimant sustained injuries to her back for which she was awarded ten percent permanent partial disability benefits and was thereafter continuously employed at a wage loss. Employer countered claimant’s quest for temporary partial disability benefits by pointing out that the supreme court in Dorn v. A.J. Chromy Construction Co. and Kuehn v. State had set out as one of the requirements for temporary partial disability benefits that “the disability must be temporary rather than permanent in nature.”

The court responded that Dorn and Kuehn were decided under the pre-August 1, 1974 statute before an amendment provided for permanent partial disability benefits to be paid in addition to temporary partial benefits. It emphasized that whereas the 1974

---

372. Id. at 9.
373. Id. at 9-10.
374. 310 Minn. 42, 245 N.W.2d 451 (1976).
375. 271 N.W.2d 308 (Minn. 1978) (per curiam).
376. See 313 N.W.2d at 9.

In Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 46-47, 245 N.W.2d 451, 454 (1976), the court had stated:

> There has been no definitive statement in the case or statutory law of the requisite elements of temporary partial disability. This is probably due to the relative scarcity of cases involving awards of this type and the fact that the term temporary partial disability appears to be self-defining. At a minimum, four necessary factors appear. First, there must be a physical disability. Second, the disability must be temporary rather than permanent in nature. Third, it must be partial, or in other words, the employee must be able to work subject to the disability. Finally, there must be an actual loss of earning capacity that is causally related to the disability.

Only the last requirement was in dispute in Dorn, and the court upheld benefits. Id. In Kuehn v. State, 271 N.W.2d 308, 309 (Minn. 1978), the court reiterated the four requirements, but was not very strict about the second one. Although claimant’s condition had remained the same for the five years since his injury and the employer argued that his disability was permanent, the court in upholding benefits apparently found the second requirement met merely by testimony that many cases like claimant’s improve over a long period, that the neurosis need not be permanent, and that six to eighteen months of psychotherapy would help. Id.

The court also reiterated the requirements in Bliss v. Minneapolis Star & Tribune Co., 303 N.W.2d 460, 461 (Minn. 1981). Only the last requirement was in dispute. The court held as a matter of law that the requirements were satisfied, and reversed a denial of benefits. Id.

377. Act of Apr. 12, 1974, ch. 486, § 1, 1974 Minn. Laws 1230, 1231, added the following to MINN. STAT. § 176.021(3):

> Compensation for permanent partial disability is payable concurrently and in addition to compensation for temporary total disability and temporary partial disability as set forth in Minnesota Statutes Section 176.101, Subdivisions 1 and
amendment provides that permanent partial disability is payable for "functional loss of use or impairment of function, permanent in

2, and for permanent total disability as defined in Minnesota Statutes Section 176.101, Subdivision 5; and such compensation for permanent partial disability shall not be deferred pending completion of payment for temporary disability or permanent total disability, and no credit shall be taken for payment of permanent partial disability against liability for permanent total disability. Liability on the part of an employee or his insurer for disability of a temporary total, temporary partial, and permanent total nature shall be considered as a continuing product and part of the employee's inability to earn or reduction in earning capacity due to injury or occupational disease and shall be payable accordingly. Permanent partial disability is payable for functional loss of use or impairment of function, permanent in nature, and payment therefore shall be separate, distinct, and in addition to payment for any other compensation.

Act of June 1, 1981, ch. 346, § 57, 1981 Minn. Laws 1611, 1645, changes this language as follows:

Compensation for permanent partial disability is payable in addition to compensation for temporary total disability and temporary partial disability pursuant to section 176.101, subdivisions 1 and 2, as provided in subdivision 3a. Compensation for permanent partial disability is payable concurrently and in addition to compensation for permanent total disability pursuant to section 176.101, subdivision 5, as provided in subdivision 3a. Compensation for permanent partial disability shall be withheld pending completion of payment for temporary total and temporary partial disability but shall not be withheld pending payment of compensation for permanent total disability, and no credit shall be taken for payment of permanent partial disability, against liability for temporary total or permanent total disability. Liability on the part of an employer or his insurer for disability of a temporary total, temporary partial, and permanent total nature shall be considered as a continuing product and part of the employee's inability to earn or reduction in earning capacity due to injury or occupational disease and shall be payable accordingly, subject to subdivision 3a. Permanent partial disability is payable for functional loss of use or impairment of function, permanent in nature, and payment therefore shall be separate, distinct, and in addition to payment for any other compensation, subject to subdivision 3a.

The 1981 amendment adds the following:

Payments for permanent partial disability as provided in section 176.101, subdivision 3, shall be made in the following manner:

(a) If the employee returns to work, payment shall be made by lump sum;
(b) If temporary total payments have ceased, but the employee has not returned to work, payment shall be made at the same intervals as temporary total payments were made;
(c) If temporary total disability payments cease because the employee is receiving payments for permanent total disability or because the employee is retiring or has retired from the work force, then payment shall be made by lump sum;
(d) If the employee completes a rehabilitation plan pursuant to section 176.102, but the employer does not furnish the employee with work he can do in his permanently partially disabled condition, and the employee is unable to procure such work with another employer, then payment shall be made by lump sum.

Id. § 58, 1981 Minn. Law at 1646 (codified as MINN. STAT. § 176.021(3a) (1982)).

Until 1967, permanent partial benefits were payable at the same intervals as temporary total benefits unless special approval was obtained for a lump sum payment. See Act of Apr. 24, 1953, ch. 753, §§ 2(3), 19, 1953 Minn. Laws 1099, 1102-03, 1124. In 1967, the legislature provided that "payments for permanent partial disability shall be made by lump sum." See Act of June 2, 1967, ch. 40, § 5, 1967 Minn. Laws Ex. Sess. 2225, 2227-28.
nature," the amended statute specifies that liability for temporary partial disability "shall be considered as a continuing product and part of the employee's . . . reduction in earning capacity due to injury or occupational disease and shall be payable accordingly." The court concluded:

The unambiguous language of this amendatory act requires rejection of relator's claim that the Dorn requirement of a temporary physical disability has survived the amendment. With respect to claims for temporary partial disability benefits arising out of injuries sustained subsequent to August 1, 1974, it is obvious that an employee is entitled to such benefits so long as he has a "reduction in earning capacity due to injury or occupational disease," and whether his physical condition has stabilized and resulted in a permanent partial disability is no longer relevant to his right to receive compensation for temporary partial disability.\textsuperscript{379}

In Act of June 7, 1979, ch. 3, § 30, 1979 Minn. Laws Ex. Sess. 1256, 1271, the legislature substituted language, deleted in 1981, which provided:

\begin{quote}
[P]ayments for permanent partial disability in cases in which return to work occurs prior to four weeks from the date of injury shall be made by lump sum payment. . . . In cases in which return to work does not occur prior to four weeks after injury, payments for permanent partial disability shall be made according to the following schedule: 25 percent of the amount due after four weeks from the date of injury, 25 percent after eight weeks, 25 percent after 12 weeks and 25 percent after 16 weeks, provided that any and all payments remaining shall be paid upon the cessation of payments for temporary total disability and upon the employee's return to work.
\end{quote}


Although Dorn and Kuehn were decided under the pre-1974 statute, Bliss v. Minneapolis Star & Tribune, 303 N.W.2d 460, 461 (Minn. 1981), setting forth the same requirement that temporary partial disability be temporary rather than permanent in nature, apparently involved a 1977 injury. But the requirement was not in issue in that the evidence clearly established that it was satisfied. \textit{See id.}


Regarding the recent prohibition on citing summary dispositions, \textit{see supra} notes 290-94 and accompanying text.

\textsuperscript{378} \textit{See Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 10 (Minn. 1981).}

\textsuperscript{379} \textit{Id.} at 10.
The *Morehouse* result is sound. First, the court was correct in indicating that "disability" in the provision for compensation in "cases of temporary partial disability" should mean impairment of earning ability rather than physical bodily impairment. Impairment of earning ability probably will most often be "temporary rather than permanent in nature," given opportunities for rehabilitation and inflation (in light of the Minnesota court's refusal to factor out inflation in computing temporary partial benefits).

Second, even if a claimant did have a permanent rather than temporary impairment of earning ability, the claimant should be able to recover temporary partial disability benefits. With section 176.021, subdivision 3 providing since 1974 that "[p]ermanent partial disability is payable for functional loss of use or impairment of function, permanent in nature, and payment therefor shall be separate, distinct, and in addition to payment for any other compensation," the "temporary partial disability" provision has become the only provision in the statute compensating for reduction in earning ability. To deny an employee such compensation because his reduction in earning ability is permanent while compensating employees with temporary earning ability reduction is an absurd and unreasonable result. The legislature has instructed courts interpreting statutes to presume that the legislature does not intend an absurd or unreasonable result. In fact, the result is unreasonable enough to raise a serious equal protection issue, making relevant the principle of construing a statute in a manner that avoids serious doubt as to its constitutionality.

In sum, the *Morehouse* court properly upheld temporary partial benefits to a claimant whose scheduled permanent partial disability reduced her ability to earn.

380. *See supra* text accompanying note 378.
381. *See Minn. Stat. § 176.102 (1982).*
382. *See supra note 370.*
383. *See Minn. Stat. § 176.021(3) (1982).* For a more complete quotation, see *supra* note 377.
385. *See Minn. Stat. § 645.17(1) (1982) ("In ascertaining the intention of the legislature the courts may be guided by the following presumptions: (1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable").
386. *See supra* notes 3-26, 55-59 and accompanying text.
387. *See supra* note 206 and accompanying text.
The 1981 amendment to section 176.021, subdivision 3 probably does not affect the Morehouse result. Its provision that "[c]ompensation for permanent partial disability shall be withheld pending completion of payment for . . . temporary partial disability" is in conflict with the provision in section 176.021's subdivision 3a (added in 1981) that "[i]f the employee returns to work, [permanent partial disability] payment shall be made by lump sum." The latter should control because it is later in the statute, more specific, and more in line with the 1981 amendment's manifest purpose to encourage claimants to return to work.

Even if subdivision 3 did control, it would not preclude a claimant's recovering scheduled permanent partial benefits in addition to temporary partial benefits, but would only delay claimant's doing so until after payments for temporary partial ceased (which they would do when advancement, rehabilitation and/or inflation brought claimant's wage up to what it was at the time of injury).

Thus, under Morehouse, temporary partial benefits—based on two-thirds of the difference between the wage at the time of injury and the wage claimant is able to earn in his partially disabled condition—are payable to a claimant whose ability to earn is reduced by a scheduled permanent partial disability.

If an unenumerated permanent partial disability reduced a claimant's ability to earn, the claimant should be able to recover two-
thirds of the difference between the wage at the time of injury and the wage claimant is able to earn in his partially disabled condition under both the provision on temporary partial disability\textsuperscript{395} and the provision on unenumerated permanent partial disability,\textsuperscript{396} the duplication not persisting, however, beyond the first 350 weeks.\textsuperscript{397} Although the measure of both benefits is the same, the purposes are different—one is to compensate for reduction in earning ability,\textsuperscript{398} the other to compensate for impairment of bodily function.\textsuperscript{399}

\textsuperscript{395} MINN. STAT. § 176.101(2) (1982) (quoted supra note 365).

\textsuperscript{396} Id. § 176.101, subd. 3(49) (quoted supra note 367). In Mitchell v. White Castle Sys., Inc., 290 N.W.2d 753, 757 (Minn. 1980), the court held that if an unenumerated disability destroyed claimant's earning capacity, she could recover under both the provision for temporary total disability, see MINN. STAT. § 176.101(1) (1982), and the provision for unenumerated permanent partial disability.

Few disabilities would fall outside section 176.101(3)'s enumerations. A permanent skin condition on the chest that was not a burn, disfiguring or scarring but produced pain reducing earning capacity would qualify. So would fractured ribs that would not heal because of some incurable disease, if they produced pain reducing earning capacity. The Mitchell court proceeded on the assumption that traumatic neurosis was unenumerated where the injury occurred before the addition of the provision on "head injuries," see id. § 176.101, subd. 3(39), but other cases have held that injury to the brain or "emotional system" is compensated under the internal organ provision, see id. § 176.101, subd. 3(40), rather than the "head injuries" provision. See Tracy v. Streeter/Litton Indus., 293 N.W.2d 909, 912, 918 (Minn. 1979) (organic damage to emotional system); Mack v. City of Minneapolis, 33 Minn. Workers' Comp. Dec. 289, 292-93 (1980) (organic damage to brain); Crowson v. Valley Park, Inc., 33 Minn. Workers' Comp. Dec. 127, 137 n.1 (1980) (organic damage to brain destroying intellectual processes); see also Tidwell v. Allstate Ins. Co., 35 Minn. Workers' Comp. Dec. 170 (1982) (discussed infra notes 465-75 and accompanying text) (traumatic neurosis); cf. Fleming v. Minnesota River Coop. Vocational School, 35 Minn. Workers' Comp. Dec. 229, 230-31 (1982) (3-2) (five percent under head schedule for loss of "two upper front central incisor teeth"); Joy v. Superior Mach. Co., No. 473-72-8756 (Minn. Workers' Comp. Ct. App. July 29, 1981) (five percent under head schedule for damage to three teeth); Schaefer v. North Star Steel Co., No. 477-32-6191 (Minn. Workers' Comp. Ct. App. Sept. 8, 1980) (seven percent under head schedule for deviated septum in left nostril and loss of smell). But see Johnson v. Par-Z Contracting, Inc., No. 343-24-6470 (Minn. Workers' Comp. Ct. App. Feb. 18, 1981) (33% under head schedule for loss of mental function from rupture of aneurysm in brain).

\textsuperscript{397} See supra notes 367-68 and accompanying text; see also Larson, The Wage-Loss Principle in Workers' Compensation, 6 WM. MITCHELL L. REV. 501, 520 (1980) (decrying fact that Minnesota statute may allow such "duplicate benefits both measured by loss of earning capacity").

\textsuperscript{398} See supra notes 380, 383-84 and accompanying text.

\textsuperscript{399} See id.

Clearly it would make more sense for MINN. STAT. § 176.101, subd. 3(49) (1982) to be measured by impairment of bodily function. For example, it could provide as the internal organ provision does for "that proportion of 500 weeks . . . which is the proportionate amount of permanent partial disability caused to the entire body by the injury as is determined from competent testimony." See id. § 176.101, subd. 3(40).
For reasons similar to those stated above\textsuperscript{400} in reference to \textit{Morehouse}, the 1981 amendment to section 176.021, subdivision 3, stating that "[c]ompensation for permanent partial disability shall be withheld pending completion of payment for . . . temporary partial disability,"\textsuperscript{401} should not affect a claimant's ability to recover unenumerated permanent partial benefits simultaneously with temporary partial benefits. Section 176.021, subdivision 3a's provision that "[i]f the employee returns to work, [permanent partial disability] payment shall be made by lump sum"\textsuperscript{402} should be read to require payment of unenumerated permanent partial disability when claimant returns to work even though the nature of the payment—two-thirds of the difference between claimant's wage when injured and the wage claimant can earn now—may preclude payment by lump sum.\textsuperscript{403}

It is interesting to contemplate how subdivision 3 would operate in a situation of unenumerated permanent partial disability and temporary partial disability if it \textit{did} control. Unlike scheduled permanent partial benefits,\textsuperscript{404} unenumerated permanent partial benefits would be \textit{precluded} rather than merely delayed, if they had to be measured by difference in wage at time of injury and the wage claimant is able to earn during the weeks after temporary partial benefits cease, because temporary partial benefits do not cease until claimant is able to earn as much as the wage at time of injury.\textsuperscript{405} But perhaps the unenumerated permanent partial benefits should not be measured according to the weeks after temporary partial benefits cease, but according to the same weeks used to measure the temporary partial benefits.\textsuperscript{406} If this were the case, after claimant's reduction in earning ability ceased, claimant would recover unenumerated permanent partial benefits based on the first 350 weeks of claimant's partially disabled condition. In this way, claimant could be paid in a lump sum, consistently with

\textsuperscript{400} See supra notes 388-92 and accompanying text.

\textsuperscript{401} Act of June 1, 1981, ch. 346, § 57, 1981 Minn. Laws 1611, 1645 (codified as \textsc{Minn. Stat.} § 176.021(3) (1982)). For a more complete quotation, see supra note 377.

\textsuperscript{402} \textsc{Minn. Stat.} § 176.021(3a) (1982). For a more complete quotation, see supra note 377.

\textsuperscript{403} See infra note 407 and accompanying text.

\textsuperscript{404} See supra note 393 and accompanying text.

\textsuperscript{405} See supra notes 368, 370 and accompanying text.

\textsuperscript{406} Because of the effects of advancement, rehabilitation and/or inflation, the wage difference will probably be larger in the earlier weeks than in the later ones. If so, it would be to the claimant's advantage to measure according to the first 350 weeks of reduced earning capacity.
the statute's general scheme of paying permanent partial benefits in that fashion.407

3. Permanent Partial408

a. Paralysis or Coma

Three recent cases demonstrate that in paralysis and coma situations, large awards are possible because of cumulation of loss of use amounts.

In *Lerich v. Thermo Systems, Inc.*,409 where a work back injury rendered employee a quadraplegic, the supreme court upheld permanent partial benefits410 of $152,950 plus interest for 1,529.5 weeks based on 100% loss of use of each arm, each leg, and the back, all plus 15% under the "simultaneous injury" provision.411

In *Crowson v. Valley Park, Inc.*,412 where brain damage from nearly drowning while cleaning the "Flume" ride rendered em-
ployee permanently comatose, the court of appeals awarded $428,869 plus interest for 2,177 weeks. This was based on 100% loss of use of each arm, each leg and the voice mechanism, all plus 15% and 95% under the internal organ provision for injury to the brain.

Finally, in *Mack v. City of Minneapolis*, where choking on vomit after being shot in the course of duty caused brain damage which left a thirty-six-year-old police officer in a permanent vegetative state, the court of appeals awarded $712,013 for 3,142.5 weeks (over sixty years) of permanent partial disability. This was based on 100% loss of use of each arm, each leg, each eye, the back, and the voice mechanism, all plus 15%, and 90% under the internal organ provision for brain damage, another 10% under the internal organ provision for loss of use of internal sexual organs, and 100% loss of hearing. The court of appeals’ award for loss of hearing and loss of use of the voice mechanism was based on unrefuted medical testimony that the officer had sustained 100% loss of function of hearing and 100% loss of function of the voice mecha-

413. Id. at 127-28. As explained by the court of appeals:

The employee is in a condition that is called decorticate rigidity. The employee’s cerebral cortex, the thinking part of the brain, has been severely damaged and because of this, he is in an abnormal posture with his legs extended, his toes pointed down, and with his arms very tightly in contracture pulling up to his chest. Medical opinion indicated that the employee lost use of 50% of his brain mass and that all that was functioning with the employee were “a few vegetative functions.”

Id. at 128.


415. 33 Minn. Worker’s Comp. Dec. at 133.

The court of appeals made no award under the “head injuries” provision on the view that damage to an employee’s “brain” or “intellectual processes” should be compensated instead under the internal organ provision. Id. at 133, 137 n.1. (For further discussion of the brain and head injuries, see supra note 396.) The *Crowson* court of appeals decided not to make awards under the loss of hearing or loss of sight provisions because “no one has been able to demonstrate how much or how little the employee is able to see or hear.” Id. at 136. The *Crowson* court of appeals did not mention the possibility of an award under the provision for “disability resulting from injury to the back.” See Minn. Stat. § 176.101, subd. 3(42) (1982). For additional discussion of the “injury to the back” provision, see infra note 420.


417. Id. at 289-90.

418. Order at 2, Mack v. City of Minneapolis, 33 Workers’ Comp. Dec. 289 (1980). This was “in addition to compensation for permanent total disability paid and payable herein.” Id.

419. The *Mack* court of appeals set forth the following schedule:
nism, both due to the brain injury.\textsuperscript{420}

Today permanent partial benefits for 3,142.5 weeks would amount to $911,325. If this were invested at ten percent interest, it would produce an income of over $1,752 per week (six times the maximum rate for total disability), none of which would have to be used for medical expenses for which the employer is liable under section 176.135.\textsuperscript{421} This would be in addition to permanent total disability benefits which would give claimant a nontaxable income starting at $290 per week\textsuperscript{422} ($15,080 per year) with annual

<table>
<thead>
<tr>
<th>Percentage of Member</th>
<th>Weeks</th>
<th>1.15 *</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>90 percent of Brain</td>
<td>450</td>
<td>Not</td>
<td>$226.00</td>
<td>$101,700.00</td>
</tr>
<tr>
<td>(Under M.S. 176.101</td>
<td></td>
<td>applicable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subd. 3, (40)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>100 percent of Left Arm</td>
<td>270</td>
<td>310.5</td>
<td>$226.00</td>
<td>$70,173.00</td>
</tr>
<tr>
<td>100 percent of Right Arm</td>
<td>270</td>
<td>310.5</td>
<td>$226.00</td>
<td>$70,173.00</td>
</tr>
<tr>
<td>100 percent of Left Leg</td>
<td>220</td>
<td>253</td>
<td>$226.00</td>
<td>$57,178.00</td>
</tr>
<tr>
<td>100 percent of Right Leg</td>
<td>220</td>
<td>253</td>
<td>$226.00</td>
<td>$57,178.00</td>
</tr>
<tr>
<td>100 percent of the Back</td>
<td>350</td>
<td>402.5</td>
<td>$226.00</td>
<td>$90,956.00</td>
</tr>
<tr>
<td>100 percent Loss of Vision</td>
<td>320</td>
<td>368</td>
<td>$226.00</td>
<td>$83,168.00</td>
</tr>
<tr>
<td>100 percent of Sexual Organs (10 percent of the body as a whole under M.S. 176.101 Subd. 3 (40))</td>
<td>50</td>
<td>Not applicable</td>
<td>$226.00</td>
<td>$11,300.00</td>
</tr>
<tr>
<td>100 percent of Voice Mechanism</td>
<td>500</td>
<td>575</td>
<td>$226.00</td>
<td>$129,950.00</td>
</tr>
<tr>
<td>100 percent Hearing-Both Ears</td>
<td>170</td>
<td>Not applicable</td>
<td>$226.00</td>
<td>$40,228.00</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td></td>
<td>$226.00</td>
<td>$710,205.00</td>
</tr>
</tbody>
</table>

\textsuperscript{*}Includes simultaneous injury factor

\textit{Id.} It may be noted that there is a mathematical mistake in the last entry, where 170 times $226 should have been $38,420 (the $40,228 figure apparently resulted from taking 178 rather than 170 times $226). With this mistake corrected, the TOTAL is $710,205.

\textsuperscript{420} 33 Minn. Workers' Comp. Dec. at 294. For additional discussion of brain injuries, see \textit{supra} note 415.

The \textit{Mack} court of appeals' award under the provision for "disability resulting from \textit{injury to} the back," see \texttt{MINN. STAT.} § 176.101, subd. 3(42) (1982) (emphasis added), implicitly equates loss of use of a member with "\textit{injury to}" the member. This is in line with Tracy v. Streater/Litton Indus., 283 N.W.2d 909, 917 (Minn. 1979), where a work injury to employee's spinal cord later caused paralysis to his legs and the court upheld the application of the 15% increase provided for permanent partial disability "caused by simultaneous \textit{injury to} two or more members." See \textit{supra} notes 321-23 and accompanying text.

\textsuperscript{421} \texttt{MINN. STAT.} § 176.135 (1982).


\textsuperscript{422} The maximum rate for the year commencing October 1, 1982 is $290. For the year commencing October 1, 1979 (involved in \textit{Mack}) it was $226; for the year commenc-
six percent increases. 423

ing October 1, 1980 it was $244; and for the year commencing October 1, 1981 it was $267.

423. MINN. STAT. § 176.645 (1982), with underlining and strikeouts to show the effect of the amendment in Act of June 1, 1981, ch. 346, § 137, 1981 Minn. Laws 1611, 1687-88, provides:

Subdivision 1. AMOUNT. For injuries occurring after October 1, 1975 for which benefits are payable under section 176.101, subdivisions 1, 2 and 4, and section 176.111, subdivision 5, the amount total benefits due the employee or any dependents shall be adjusted in accordance with this section. On October 1, 1976, 1981, and each October thereon on the anniversary of the date of the employee's injury the amount total benefits due the employee or any dependents shall be adjusted in accordance with this section. On October 1, 1976, 1981, and each October thereon on the anniversary of the date of the employee's injury the amount total benefits due shall be adjusted by multiplying the total benefits due prior to each adjustment by a fraction, the denominator of which is the statewide average weekly wage for December 31, 21 months prior of the year two years previous to the adjustment and the numerator of which is the statewide average weekly wage for December 31, nine months prior of the year previous to the adjustment. For injuries occurring after October 1, 1975, all adjustments provided for in this section shall be included in computing any benefit due under this section. No adjustment increase made on October 1, 1977 or thereafter under this section shall exceed six percent a year. In those instances where the adjustment under the formula of this section would exceed this maximum the increase shall be deemed to be six percent.

Subd. 2. TIME OF FIRST ADJUSTMENT. For injuries occurring on or after October 1, 1981, the initial adjustment made pursuant to subdivision 1 shall be deferred until the first anniversary of the date of the injury.

It would appear that in Mack, claimant's benefits for permanent total disability would be $226 per week from the December 13, 1979 date of injury until September 30, 1980; $239.56 per week from October 1, 1980 to September 30, 1981; $254 per week from October 1, 1981 to December 12, 1982 (under MINN. STAT. § 176.021(8) (1982) specifying that "[a]mounts of compensation payable by an employer or his insurer under this chapter may be rounded to the nearest dollar amount"); and $269 per week ($13,988 per year) from December 13, 1982 until December 12, 1983.

Although MINN. STAT. § 176.645 on its face appears to provide for pre-October 1, 1981 injury benefits being adjusted twice within the year following October 1, 1981 (unless injury occurred precisely on October 1 of 1976, 1977, 1978, 1979 or 1980), a three-two court of appeals rejected this construction in Northrop v. House of Hope Presbyterian Church, No. 327-34-1848 (Minn. Workers’ Comp. Ct. App. Dec. 9, 1982). Ruling that an October 1, 1981 adjustment should not be followed by another on December 1, 1981, the majority reasoned:

The 1981 change in the law provides that on October 1, 1981 and thereafter on the anniversary of the date of the employee's injury the total benefits due shall be adjusted. Subd. 1 then goes on to say: "No adjustment increase made on October 1, 1977 or thereafter under this section shall exceed 6% a year. In those instances where the adjustment under the formula of this section would exceed this maximum the increase shall be deemed to be 6%.”

Minn. Stat. § 645.44, subd. 13 provides that the word "year" means a calendar year, unless otherwise expressed.

Based upon the clear statutory provisions, we find that since a 6% adjustment was made on October 1, 1981, another adjustment cannot be required to be made on December 1, 1981.
b. Short Survival

Because of the interaction of the permanent partial lump sum provision\(^424\) and the accrued compensation provision,\(^425\) survivors of an employee who died after a short work-induced severe coma

\(^Id.\) slip op. at 2.

Judge Wallraff, joined by Judge McCarthy, dissented, saying:

The statute clearly sets forth that the total benefits due the employee or any dependents shall be adjusted in accordance with this section on October 1, 1981 and thereafter on the anniversary date of the employee's injury. We agree with the Compensation Judge that the language in subdivision 1 limits the individual adjustment increase. Thus, if there were two adjustment increases in the same year, each of the increases cannot exceed 6%, but the two could total 12%. If this was not intended by the legislature, it would have been so stated, as the legislature stated in Minn. Stat. § 176.645, Subd. 2 (Laws of 1981), that: "For injuries occurring on or after October 1, 1981, the initial adjustment made pursuant to subdivision 1 shall be deferred until the first anniversary of the date of the injury."

\(^Id.\) at 3 (Wallraff, J., dissenting) (emphasis in original).

The majority's construction barring two adjustments in a single calendar year appears to yield these results:

<table>
<thead>
<tr>
<th>Injury date</th>
<th>Adjustment dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>9/30/80</td>
<td>10/1/80, 10/1/81, 9/30/82</td>
</tr>
<tr>
<td>10/1/80</td>
<td>10/1/81, 10/1/82</td>
</tr>
<tr>
<td>10/2/80</td>
<td>10/1/81, 10/2/82</td>
</tr>
<tr>
<td>12/31/80</td>
<td>10/1/81, 12/31/82</td>
</tr>
<tr>
<td>1/1/81</td>
<td>10/1/81, 1/1/82, 1/1/83</td>
</tr>
<tr>
<td>9/30/81</td>
<td>10/1/81, 9/30/82</td>
</tr>
<tr>
<td>10/1/81</td>
<td>10/1/82, 10/1/83</td>
</tr>
<tr>
<td>10/2/81</td>
<td>10/2/82, 10/2/83</td>
</tr>
</tbody>
</table>

It will be noted that benefits for pre-October 1, 1981 injuries are limited to two adjustments within the two years following injury only if the injury occurred between October 1 and December 31. See Allison v. Herald Belan Constr. Co., No. 395-34-3639 (Minn. Workers’ Comp. Ct. App. Mar. 3, 1983) (October 1, 1981 adjustment may be followed by February 24, 1982 adjustment).

\(^424\) MINN. STAT. § 176.021(3a) (1982) (quoted supra note 377).

This provision on lump summing permanent partial disability benefits is to be distinguished from MINN. STAT. § 176.165 (1982), which provides:

The amounts of compensation payable periodically may be commuted to one or more lump sum payments only by order of the commissioner of the department of labor and industry, compensation judge, or workers' compensation court of appeals in cases upon appeal, and on such terms and conditions as the commissioner of the department of labor and industry, compensation judge, or workers' compensation court of appeals prescribes. In making these commutations the lump sum payments shall amount, in the aggregate, to a sum equal to the present value of all future installments of the compensation calculated on a five percent basis.

\(^Id.; see infra note 433.\)

\(^425\) MINN. STAT. § 176.021(3) (1982) provides in part that:

The right to receive temporary total, temporary partial, a permanent partial or permanent total disability payments shall vest in the injured employee or his dependents under this chapter or, if none, in his legal heirs at the time the disability can be ascertained and the right shall not be abrogated by the employee's death prior to the making of the payment.
may be able to recover the kind of permanent partial disability award just discussed (in addition to death benefits if the survivors were dependent\footnote{426}) as long as the permanent partial "disability can be ascertained."\footnote{427} The \textit{Crowson} court of appeals referred to a Massachusetts decision, \textit{Bagges Case},\footnote{428} wherein dependents of an employee who lived only seventeen to twenty-four minutes after the work accident recovered the compensation the employee would have received had he survived.\footnote{429} Professor Larson uses \textit{Bagges Case} as an example of the shortcomings in a system that compensates functional bodily impairment rather than wage loss.\footnote{430} He raises the possibility that this type of claim might be made in almost every death case:

Suppose instead of seventeen or twenty-four minutes, the employee lives one minute. Should this random fact of sixty-second survival rather than instantaneous death determine whether relatives get a $400,000\footnote{431} windfall? Or if one minute, why not one second? How often, one wonders, is accidental death absolutely instantaneous?\footnote{432}

The legislature should respond to this problem by abolishing mandatory lump summing of permanent partial disability benefits.\footnote{433} Lump sum payment of workers' compensation benefits gen-

\footnote{426. See MINN. STAT. § 176.111 (1982).}
\footnote{427. See id. § 176.021(3) (quoted supra note 425); Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43 (Minn. 1983) (widow who claimed benefits for permanent partial disability to employee's back and leg after employee died from unrelated causes eight months after work injury may recover "if the employee's permanent partial disability is determined to have been capable of ascertainment prior to the employee's death and the claimant successfully establishes the extent of disability"). \textit{But see} Stevens v. Asleson's Whole Food, No. 472-46-9251 (Minn. Workers' Comp. Ct. App. Mar. 23, 1983) (widow may not recover for permanent partial disability of various members or organs where employee died from work injury three and one-quarter hours after it occurred; \textit{Erickson} applies only where employee died from unrelated cause). Stevens is difficult to square with MINN. STAT. § 176.021(3) (1982).}
\footnote{428. 369 Mass. 129, 338 N.E.2d 346 (1975).}
\footnote{430. Larson, supra note 397, at 521-22.}
\footnote{431. Actually, the amount would be much greater. For example, with 3,142.5 weeks, as in \textit{Mack}, supra notes 416-20 and accompanying text, at the current $290 rate, the amount would be $911,325.}
\footnote{432. Larson, supra note 397, at 521-22.}
\footnote{433. This would be accomplished by repealing MINN. STAT. § 176.021(3a) (1982) and deleting all references to subdivision 3a or lump sum from MINN. STAT. § 176.021(3)}
generally has very little justification, and when it produces results like this it clearly should be abolished. Permanent partial disability payments, like other disability payments, should be paid periodically, and when an employee dies before receiving payments for ascertainable permanent partial disability, the survivors should receive compensation only for the weeks elapsing between the time of injury and the time of death.

Further, the legislature should convert compensation for bodily impairment to a system of periodic payments not based upon the claimant's previous wage, which payments would be for life (as long as the bodily impairment lasts), so that a claimant would actually be compensated on an ongoing basis for having to endure the bodily impairment. This would eliminate the current law's irrationality of paying identical permanent partial compensation to a very old worker who will suffer the impairment only for a few years as to the very young worker who must endure it for an entire adult lifetime. If this kind of system were adopted, it should not be based on the completely irrational jerry-built existing schedule which, for example, provides almost three times as much compen-

434. See Larson, supra note 397, at 512-13; 3 A. Larson, supra note 61, §§ 82.71-.72.


435. As Professor Larson explains (with examples of how the Minnesota law could give a high-earning recluse twice as much for loss of voice mechanism as a low-earning amateur opera singer, or a high-earning executive five times as much for loss of testicles as a low-earning manual worker), there is no rational basis for compensating functional bodily impairment on the basis of previous wage. Larson, supra note 397, at 515-16.

Statewide average weekly wage, as defined in Minn. Stat. § 176.011(20) (1982), could be used as a component, merely to provide a benchmark that would not need constant legislative modification.
sation for loss of voice mechanism as for loss of hearing.\textsuperscript{436} It should have medical evidence rate the claimant's impairment as a percentage of the body as a whole in each case, and then provide a weekly benefit\textsuperscript{437} equal to some percentage, for example one percent, of statewide average weekly wage\textsuperscript{438} for each percent of impairment of the body as a whole. It should exclude whatever percent the employer can prove was caused other than by the employment injury, and should exclude some percentage, for example five percent, to give the employer some quid pro quo in return for being subjected to non-fault liability and being stripped of the common law defenses and to save the benefit and administrative expenses of minor cases.\textsuperscript{439} This idea could be effectuated by a subdivision like the following:

\textit{Bodily impairment.} For personal injury producing permanent bodily impairment, compensation shall be one percent of the statewide average weekly wage for each one percent of impairment caused to the entire body by the injury less (a) five percent and (b) whatever percent the employer proves was caused other than by the employment injury. Payments shall be made during the period of bodily impairment, nearly as possible at the intervals when the wage was payable, except that they may be made less frequently to cause each payment to exceed $100.\textsuperscript{440}

The money saved from benefits and administrative expenses would enable not only premium reduction but such reforms as abolishing the 100\% of statewide average weekly wage maximum on disability and death benefits\textsuperscript{441} which works a severe injustice upon high-earning workers and their dependents. For example, a claimant injured just before October 1, 1982 who earned $1,000 per week ($25 per hour, $52,000 per year) is limited to the same $267 per week as a claimant who earned $400 per week ($10 per hour, $20,800 per year). The first claimant gets 26.7\% of wage loss, the second 66.7\%. It is completely indefensible to pay so liber-

\textsuperscript{436} See Minn. Stat. § 176.101, subd. 3(23), (38) (1982) (170 weeks for loss of hearing; 500 weeks for loss of voice mechanism).
\textsuperscript{437} Such a benefit should be subject to the "escalator provision" of Minn. Stat. § 176.645 (1982).
\textsuperscript{438} Defined at id. § 176.011(20).
\textsuperscript{440} See id. at 38.
\textsuperscript{441} See Minn. Stat. §§ 176.011(20), 101(1)-(4) (1982).
ally for bodily impairment while so inadequately compensating some workers' wage losses.

The Minnesota Workers' Compensation Study Commission and the National Commission on State Workmen's Compensation Laws have recommended increasing the maximum to (at least) 200% of the statewide average weekly wage, and some jurisdictions have done this. Minnesota should follow suit and (in order to prevent benefits from exceeding take-home pay) should replace the current 66\(\frac{2}{3}\)% of gross wage measure with a "spendable earnings" measure as recommended by the National Commission on State Workmen's Compensation Laws and the "Markman Report" and as utilized in Iowa and Michigan for example, 90% of spendable earnings. (Spendable earnings are those after deduction of social security and income tax under withholding tables as though the employee had claimed the maximum number of exemptions to which the employee was entitled.)

This proposal could be effectuated by the following amendments:

176.011 DEFINITIONS

Subd. 15a. Partial disability. "Partial disability" means re-

442. See Minnesota Workers' Comp. Study Comm'n, supra note 222, at 17-18 (Recommendation 5) (legislature should raise maximum to 200% of state average weekly wage; present limit is unfair to some employees and change could prevent financial disaster); Report of Nat'l Comm'n on State Workmen's Comp. Laws 62, 65 (1972) (Recommendations 3.9, 3.16; maximum should be at least 200% of state average weekly wage by July 1, 1981) [hereinafter cited as Report of Nat'l Comm'n].


445. See Report of Nat'l Comm'n, supra note 442, at 56, 60, 64, 71 (Recommendations 3.1, 3.13, 3.20; at least 80% of spendable earnings).

446. Minnesota Insurance Division, Workers' Compensation in Minnesota: An Analysis with Recommendations 128 (1982) (Recommendation 4; basis should be spendable earnings).


449. Although compensation at an amount less than 100% of spendable earnings is justifiable because of claimant's savings in commuting and clothing expenses and to give claimant an incentive to return to work, the 80% figure specified in the Iowa and Michigan laws seems inadequate. Since Minn. Stat. § 65B.44(3) (1982) provides no-fault auto accident benefits at 85% of gross, it is appropriate to fix workers' compensation total disability benefits at 90% of spendable earnings.

duction in ability to earn.

Subd. 17a. *Spendable earnings.* "Spendable earnings" means weekly wage after deduction of social security and income tax under withholding tables as though the employee had claimed the maximum number of exemptions to which the employee was entitled.

Subd. 17b. *Total disability.* "Total disability" means incapacity to work at an occupation which brings the employee an income.\(^{451}\)

176.101 DISABILITY BENEFITS

Subdivision 1. *Total disability.* For personal injury producing total disability, compensation shall be 90 percent of spendable earnings. Payments shall be made during the period of total disability, as nearly as possible at the intervals when the wage was payable.

Subd. 2. *Partial disability.* For personal injury producing partial disability, compensation shall be 90 percent of the difference between spendable earnings at the time of injury and spendable earnings employee is able to earn in employee's partially disabled condition, the latter being corrected to correspond with wage level for the work at the time of injury. Payments shall be made during the period of partial disability, as nearly as possible at the intervals when the wage was payable.

Subd. 3. *Maximum compensation.* During the year commencing October 1, 1983, and each year thereafter, commencing on October 1, maximum compensation for total disability and for partial disability shall be 200% of the preceding calendar year's statewide weekly wage.\(^{452}\)

c. *Simultaneous Injury*

One might argue that it was improper to apply the simultaneous injury fifteen percent increase provision to the back benefits in *Lerich* and *Mack* and the voice mechanism benefits in *Crowson* and *Mack*. The simultaneous injury provision specifies in relevant part, "In cases of permanent partial disability caused by simulta-

---

\(^{451}\) This derives from current MINN. STAT. § 176.101(5) (1982), and is not intended to change the meaning of total disability.

\(^{452}\) Further subdivisions could be added regarding minimum compensation, offsets, and inmate of public institution. See Kirwin, *supra* note 439, at 38.
neous injury to two or more members, the applicable schedules in this subdivision shall be increased by 15%. This clause shall not apply when the injuries are compensated under paragraphs 22 to 37 inclusive, of this subdivision." The latter "double schedule" paragraphs compensate for loss of hearing, an eye and a leg, an eye and a hand, an eye and a foot, two arms other than at the shoulder, two hands, two legs other than so close to the hips that no effective artificial member can be used, two feet, one arm and the other hand, a hand and a foot, one leg and the other foot, a leg and a hand, an arm and a foot, or an arm and a leg.

In *Tracy v. Streater/Litton Industries*, holding that the fifteen percent increase does not apply to the section 176.101, subdivision 3(40) internal organ provision, the supreme court reasoned:

> The claim for simultaneous injury benefits applies to injuries to two or more "members" when the injuries are not compensated under the provisions relating to ears, eyes, legs, arms, hands and feet. Since those provisions do not include internal organs . . . the 15 percent multiple would not apply in this case.

This seems to focus not so much on the fact that an internal organ is not a "member" as on the fact that it is not covered by paragraphs 22 through 37 of schedule.

On that analysis it was improper to apply the fifteen percent increase provision to paragraph 38 voice mechanism benefits in *Crowson* and *Mack* and to paragraph 42 back benefits in *Lerich* and *Mack*.

454. See Jacobson v. Stone & Webster, 177 Minn. 589, 591, 225 N.W. 895, 895 (1929).
456. 283 N.W.2d 909 (Minn. 1979).
457. Id. at 918; see Mack v. City of Minneapolis, 33 Minn. Workers' Comp. Dec. 289, 293 (1980) (per curiam).
458. 283 N.W.2d at 918.
459. Minn. Stat. § 176.011(14) (1982) ("Member" includes leg, toe, hand, finger, thumb, arm, back, eye, and ear when used with reference to the anatomy.").
460. It may be noted that even though the court in one of the cases decided in the *Tracy* opinion held that the 15% increase does not apply to the internal organ provision, see supra notes 456-58 and accompanying text, in another of the cases decided in that opinion, where neither party raised any issue about this point, the court upheld an award in which the 15% increase had been applied to internal organ and back benefits. See 283 N.W.2d at 911, 917; Relator's Brief and Appendix at A-24, A-25, Tracy v. Streater/Litton Indus., 283 N.W.2d 909 (Minn. 1979); see also Bisson v. Minnesota Bearing, Inc., No. 474-26-7105 (Minn. Workers' Comp. Ct. App. Oct. 12, 1981) (3-2) (15% increase does not apply to head provision).
d. Internal Organs

It was also questionable for the *Mack* court of appeals to award ninety percent under the internal organ provision for brain damage and another ten percent under that provision for loss of use of internal sexual organs.461

In one of the cases decided in *Tracy*, the employee was initially awarded fifty percent permanent partial disability of the respiratory system. After he submitted additional claims for thirty percent disability to the circulatory system and twenty percent to the emotional system, the award changed to specify fifty percent "due to injury to the pulmonary system, an internal organ," accompanied by a statement that the pulmonary system damage had affected the circulatory system and emotional system, and the fifty percent disability was to the body function as a whole.462 The supreme court rejected the employee's contention that he was entitled to separate, aggregated ratings for the circulatory system and the emotional system, saying that "an overall rating of disability to body function as a whole" was required and that "Aggregation of separate ratings is inappropriate because the degree of disability to an organ does not necessarily equal the degree of disability to the body as a whole, and aggregation could easily result in the impossible situation where whole disability would be more than 100 percent."463

This indicates that the court of appeals in *Mack* erred in giving separate ratings of ninety percent for brain damage and ten percent for loss of internal sexual organs.464

---

461. *See supra* note 419 and accompanying text.

Regarding compensation for injury to the brain or "emotional system" under the internal organ provision and regarding compensation under the head schedule, see *supra* note 396.

Regarding compensation under the internal organ provision for loss or loss of use of internal sex organs, the *Mack* court of appeals made its award of 50 weeks for loss of use to a 36-year-old male in reliance on the fact that the same award was made in *Tracy* to a 28-year-old male. 33 Minn. Workers' Comp. Dec. at 294; *see* Anderson v. Husky Hydraulics, Inc., No. 396-36-4999 (Minn. Workers' Comp. Ct. App. Dec. 23, 1976) (100 weeks for loss of testicle); Garcia v. Twin City Monorail, No. 474-64-4501 (Minn. Workers' Comp. Ct. App. Dec. 16, 1976) (125 weeks for loss of testicle). *Anderson* and *Garcia* are cited with apparent approval in Getter v. Travel Lodge, 260 N.W.2d 177, 180 (Minn. 1977).

462. 283 N.W.2d at 912.

463. *Id.* at 918.


Here, the Compensation Judge instructed the parties that it was necessary to
Another significant ruling under the internal organ provision came in *Tidwell v. Allstate Insurance Co.*, wherein the court of appeals held that a claimant may recover under the internal organ schedule for post-traumatic neurosis. Affirming the compensation judge's award for ten percent loss of function of the body as a whole attributable to claimant's brain as an internal organ, the court of appeals reasoned:

We find that the evidence warrants the disability awarded by the Compensation Judge for it establishes that the employee's injury has caused a post-traumatic neurosis resulting in a permanent loss of function to her body as a whole. This psychological disability within the mental processes of the employee has for an extended time manifested itself by depression, anxiety, nervousness, inability to concentrate and forgetfulness. Our Supreme Court has previously determined in the case of *Mitchell vs. White Castle Systems, Inc.* that permanent partial disability can be awarded for a disability of a purely psychological nature.

The *Tidwell* holding is appropriate, and must be understood to overrule pro tanto the court of appeals' rationale in a case it decided.

Id. slip op. at 6 (Gard, J., dissenting).


Regarding the recent prohibition on citing summary dispositions, see supra notes 290-94 and accompanying text.

466. 290 N.W.2d 753 (Minn. 1980); see supra note 396.

467. 35 Minn. Workers' Comp. Dec. at 172 (citation omitted). The court of appeals went on to provide an additional, alternative ground, saying, In addition, we determine that there is sufficient [evidence] based upon the circumstances of the employee's injury and the resulting symptoms and expert findings that the employee has sustained some organic brain damage. The employee fell and hit her head and has symptoms described in part as headaches, dizziness, incoordination, slurring of speech and loss of vision. This coupled with a review of the medical opinion of record and the fact that the employee was functioning well before her injury leads the Court to find that certain organic brain injury has probably occurred.

Id. at 172-73.
eight months earlier, *Bendel v. ALC Madison Lutheran Home*. In *Bendel*, the court of appeals denied permanent partial disability compensation for traumatic neurosis, on two grounds:

(1) Claimant had not proven that the condition was permanent. (Two psychiatrist-neurologists opined that her neurosis was treatable; only one thought it was not. The court of appeals said, “Therefore, the preponderance of the evidence dictates that the traumatic neurosis is not permanent,” and added, “This case demonstrates why awarding permanent partial disability for an emotional disturbance is not feasible due to the uncertainty of the prognosis.”)

(2) There was no functional damage to claimant’s brain.

(In this connection, the court of appeals distinguished *Crowson* and *Mack*, each of which involved organic brain damage from interruption of oxygen.)

*Tidwell* must be understood to restrict the *Bendel* rationale to the point that the claimant therein had not proved that her traumatic neurosis was permanent. (This was the only ground upon which Judge Rieke, the author of the unanimous *Tidwell* opinion, concurred specially in *Bendel*.) *Tidwell’s* result is inconsistent with *Bendel’s* dictum that “awarding permanent partial disability for an emotional disturbance is not feasible due to the uncertainty of the prognosis”; the *Tidwell* result shows that this is not always true. *Tidwell* also implicitly overrules *Bendel’s* requirement of functional or organic damage to the brain. As noted above, in this regard the court of appeals relied upon the supreme court’s decision in *Mitchell v. White Castle Systems, Inc.*, a case not cited or discussed in the *Bendel* opinion.

---

469. *Id.* slip op. at 2.
470. *Id.* slip op. at 2-3.
474. *See id.* slip op. at 3 (separate opinion of Reike, J.). Judge Wallraff, the author of the majority opinion in *Bendel*, took no part in *Tidwell*.
475. It should be noted that in *Mitchell, Bendel*, and *Tidwell*, mental disability was caused by a physical injury, so that the holding in *Lockwood v. Independent School Dist. No. 877, 312 N.W.2d 924 (Minn. 1981)*, precluding (total) disability compensation when work-related mental stress without physical trauma produced only mental disability, is inapplicable. *See supra* notes 178-214 and accompanying text.
e. Loss of Vision

The *Mack* court of appeals, without discussing the matter, made an award for 100% loss of vision under paragraphs 21, 44, and 46 (first sentence) of the schedule\(^{476}\) ("loss of an eye," loss of use, and 15% increase) \((160 \times 2 = 320 + 15\% = 368\) weeks\) rather than under paragraph 46's last sentence which provides for "disability due to injury to both eyes resulting in less than total loss of vision" that proportion of 450 weeks "which the extent of the combined injury to both eyes bears to the complete loss of industrial vision."

This is difficult to square with a 1962 case\(^{478}\) wherein the supreme court upheld a 100% award under the latter provision when the employee did not have a total loss of vision—indeed, he could see 20/20 with glasses—on the ground that he had less than 20/200, complete loss of industrial vision, without glasses.\(^{479}\)

Either the *Mack* court of appeals simply overlooked paragraph 46's last sentence or it found it inapplicable because it specifies "less than total loss of vision."

The latter approach produces the absurd result of providing

\(476.\) MINN. STAT. § 176.101, subd. 3(21), (44), (46) (1982). These provisions specify in relevant part:

For permanent partial disability compensation shall be that named in the following schedule, subject to a maximum compensation equal to the statewide weekly wage:

\[
\begin{align*}
(21) & \quad \text{For the loss of an eye, } 66 \frac{2}{3} \text{ percent of the daily wage at the time of injury during } 160 \text{ weeks}; \\
(44) & \quad \text{In all cases of permanent partial disability it is considered that the permanent loss of the use of a member is equivalent to and draws the same compensation as the loss of that member . . . ;}
\end{align*}
\]

\(477.\) MINN. STAT. § 176.101, subd. 3(46) (1982). The last sentence specifies:

In cases of partial disability due to injury to both eyes resulting in less than total loss of vision in one or both eyes compensation shall be paid at the prescribed rate during that part of 450 weeks which the extent of the combined injury to both eyes bears to the complete loss of industrial vision.

\(478.\) Yureko v. Prospect Foundry Co., 262 Minn. 480, 115 N.W.2d 477 (1962).

\(479.\) Id. at 485, 115 N.W.2d at 481.

\(480.\) The fact that it covers disability from "injury to" the eyes did not make it inapplicable. *See supra* note 420; Johnson v. Par-Z Contracting, Inc., No. 343-24-6470 (Minn. Workers' Comp. Ct. App. Feb. 20, 1981) (award under this provision for 49% disability to both eyes caused by rupture of aneurysm in brain).
eighty-two weeks more\textsuperscript{481} permanent partial\textsuperscript{482} compensation for being \textit{almost} blind than for being totally blind.

\textbf{C. Death Benefits}

In \textit{Chandler v. Minneapolis Star \\& Tribune},\textsuperscript{483} the court of appeals stated that, for purposes of death benefits, the term "foster child"\textsuperscript{484} may include a child of employee’s wife’s daughter by a previous marriage.\textsuperscript{485} Although it denied benefits on the ground that decedent’s employment was not a significant contributing factor in his fatal heart attack,\textsuperscript{486} the court of appeals specified that if the death were compensable employee’s wife’s daughter’s son would be entitled to partial dependency benefits.\textsuperscript{487} It said, “The facts reveal that [the child], although not blood-related to the deceased, lived for extended periods of time with [employee and his wife] and was provided partial support by the employee, including lodging, money, meals and clothes.”\textsuperscript{488}

This result seems consistent with the liberal approach normally pursued respecting issues of this kind.\textsuperscript{489}

\textsuperscript{481} Four hundred fifty weeks under paragraph 46’s last sentence in a situation like \textit{Yureko} versus the 368 weeks awarded in \textit{Mack}.

\textsuperscript{482} It should be noted that MINN. STAT. § 176.101(5) (1982) provides permanent total disability benefits for total loss of sight without regard to actual earning capacity. That provision specifies:

The total and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial members can be used, complete and permanent paralysis, total and permanent loss of mental faculties, or any other injury which totally incapacitates the employee from working at an occupation which brings him an income constitutes total disability.

\textit{Id.}; \textit{see} \textit{Ford v. Willis J. Kruckeberg Roofing \\& Sheet Metal}, 308 Minn. 371, 241 N.W.2d 653 (1976) (employee who lost use of legs from paralysis is entitled to permanent total benefits notwithstanding return to work).

\textsuperscript{483} 33 Minn. Workers’ Comp. Dec. 525 (1980), \textit{aff’d mem.}, No. 51334 (Minn. Apr. 20, 1981).

Regarding the recent prohibition on citing summary dispositions, see \textit{supra} notes 290-94 and accompanying text.

\textsuperscript{484} \textit{See} MINN. STAT. § 176.011(2) (1982).

“Child” includes a posthumous child, a child entitled by law to inherit as a child of a deceased person, a child of a person adjudged by a court of competent jurisdiction to be the father of the child, and a stepchild, grandchild, or foster child who was a member of the family of a deceased employee at the time of his injury and dependent upon him for support.

\textsuperscript{485} 33 Minn. Workers’ Comp. Dec. at 529-30.

\textsuperscript{486} \textit{Id.} at 528-29.

\textsuperscript{487} \textit{Id.} at 529-30.

\textsuperscript{488} \textit{Id.} at 529.

\textsuperscript{489} \textit{See} \textit{Lunceford v. Fegles Constr. Co.}, 185 Minn. 31, 239 N.W. 673 (1931) (“stepchild” includes spouse’s illegitimate child as well as spouse’s child by previous mar-
VIII. EXCLUSIVITY OF REMEDY AND THIRD PARTY ACTIONS

A. Employer's Subrogation to Third Party Action Proceeds

In *Kealy v. St. Paul Housing & Redevelopment Authority*, the Minnesota Supreme Court dealt with the construction of section 176.061, subdivision 6, which specifies in relevant part that pro-

riage); Jansen v. Mid-Continent Freight Lines, Inc., 23 Minn. Workmen's Comp. Dec. 343, 350 (1964) (even if relationship was not valid common law marriage under law of other state, children would be entitled to dependency benefits as foster children). *See generally Minn. Stat. § 518.055 (1982) (putative spouse statute); Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978) (action to establish paternity may be brought after alleged father's death, but paternity must be proved by clear and convincing evidence); 2 A. Larson, supra note 61, §§ 62.21-.23.


As to notice to employer regarding third party settlement, see *supra* notes 9-46 and accompanying text.

In *Teske v. Young*, 309 N.W.2d 753 (Minn. 1981), the court held that compensation liability for which an employer obtains reimbursement and credit under Minn. Stat. § 176.061(6)(c), (d) (1982) does not count toward the “25,000 of weekly compensation . . . paid” after which social security disability benefits are subtracted from workers' compensation benefits under § 176.101(4).

In *Kordosky v. Gambles/Red Owl*, 34 Minn. Workers' Comp. Dec. 372 (1981), aff'd mem., No. 81-1299 (Minn. Feb. 5, 1982), the court of appeals held that for purposes of § 176.061(6) allocation, “proceeds” includes interest. (Regarding the recent prohibition on citing summary dispositions, see *supra* notes 290-94 and accompanying text.)

In *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795 (Minn. 1982), a seven-two court held that the trial court correctly refused to aggregate the merely concurrent fault of the tortfeasor (20%) and the employer (45%) to compare with the employee's fault (35%).

In *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149 (Minn. 1982), a seven-one court held that a tortfeasor may recover contribution from an employer even though the comparative fault statute would have barred the employee from recovering directly from the employer. Thus a tortfeasor 35% at fault and a tortfeasor 25% at fault were able to recover contribution from an employer whose 20% fault equaled the employee's fault, in a case arising when contributory fault barred recovering if it was "as great as" that of the person against whom recovery is sought. It should be noted that contributory fault now bars recovery only if it was "greater than" that of the person against whom recovery is sought. *See Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 836, 839-40 (codified as Minn. Stat. § 604.01(1) (1982)).


492. Minn. Stat. § 176.061(6) (1982) specifies (with strikeouts and underlining to
ceeds of third party actions be divided as follows:

(a) After deducting the reasonable cost of collection...
then
(b) One-third of the remainder shall...be paid to the injured employee...
(c) Out of the balance remaining, the employer...shall be reimbursed in an amount equal to all [compensation] paid...
less the product of the costs...divided by the total proceeds received by the employee...
multiplied by all [compensation] paid...
(d) Any balance remaining shall be paid to the employee...
and shall be a credit [against future compensation]

show the effect of the amendment in Act of June 1, 1981, ch. 346, § 65, 1981 Minn. Laws 1611, 1649) that:

The proceeds of all actions for damages or settlement thereof under this section, except for damages received under subdivision 5, clause (b) received by the injured employee or his dependents or by the employer, or the special compensation fund, as provided by subdivision 5, shall be divided as follows:

(a) After deducting the reasonable cost of collection, including but not limited to attorneys fees and burial expense in excess of the statutory liability, then
(b) One-third of the remainder shall in any event be paid to the injured employee or his dependents, without being subject to any right of subrogation.
(c) Out of the balance remaining, the employer, or the special compensation fund, shall be reimbursed in an amount equal to all compensation benefits paid under this chapter to or on behalf of the employee or his dependents by the employer, or special compensation fund, less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or his dependents from the other party multiplied by all compensation benefits paid by the employer or the special compensation fund, to the employee or his dependents.
(d) Any balance remaining shall be paid the employee or his dependents, and shall be a credit to employer, and the special compensation fund, for any compensation benefits which employer is obligated to pay, but has not paid, and for any compensation benefits that such employer shall be obligated to make in the future.

There shall be no reimbursement or credit to the employer, or the special compensation fund, for interest or penalties.

Regarding the 1981 amendment's addition of references to the special fund, see Lehn v. Kladt, 34 Minn. Workers' Comp. Dec. 571 (1981), aff'd mem., No. 81-1015 (Minn. Apr. 20, 1982), where the court of appeals held that previous to the amendment the special fund as subrogor to an uninsured employer's rights could share in a third party settlement as provided in § 176.061. (Regarding the new prohibition on citing summary dispositions, see supra notes 290-94 and accompanying text.) See Bartlett v. Northwest Exhibition, Inc., No. 483-62-7328 (Minn. Workers' Comp. Ct. App. July 21, 1982) (special fund entitled to division of proceeds where it was not notified of impending Naig settlement although uninsured employer was notified). Also noteworthy is Stahel v. St. Paul Yellow Cab Co., 34 Minn. Workers' Comp. Dec. 642 (1982), in which the court of appeals equated the special fund with an employer regarding Metropolitan Transit Comm'n v. Bachman's, 311 N.W.2d 852 (Minn. 1981), barring employers suing tortfeasors for reimbursement of disability (as opposed to medical) compensation.
In *Kealy*, employer had paid $30,283 compensation previously to employee's $49,000 tort recovery. The court held that the allocation was to be as follows:

<table>
<thead>
<tr>
<th>Proceeds</th>
<th>$49,000</th>
<th>Lawyer</th>
<th>Employee</th>
<th>Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(a)</strong> Costs</td>
<td>16,788</td>
<td>16,788</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Remainder</td>
<td>32,212</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>(b)</strong> One-third to employee</td>
<td>10,737</td>
<td></td>
<td>10,737</td>
<td></td>
</tr>
<tr>
<td>Balance remaining</td>
<td></td>
<td></td>
<td>21,475</td>
<td></td>
</tr>
<tr>
<td><strong>(c)</strong> $30,283 less 10,375 (16,788/49,000 × 30,283)</td>
<td>19,908</td>
<td></td>
<td>19,908</td>
<td></td>
</tr>
<tr>
<td><strong>(d)</strong> Balance and credit</td>
<td>1,567</td>
<td></td>
<td>1,567</td>
<td></td>
</tr>
</tbody>
</table>

The court rejected the court of appeals' approach to clauses (c) and (d) of section 176.061, subdivision 6, which was:

<table>
<thead>
<tr>
<th><strong>(c)</strong> $21,475 less (16,788/49,000 × 21,475)</th>
<th>Employee</th>
<th>Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>21,475</td>
<td>7,357</td>
<td>14,118</td>
</tr>
<tr>
<td><strong>(d)</strong> Balance and credit</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>

It will be noted that the differences in applying clause (c) respected:

1. the "compensation paid" by which the cost/proceeds fraction is to be multiplied and from which the product of that multiplication is to be subtracted, and

2. the figure to be deducted from the "balance remaining" after clause (b)'s allocation of one-third to the employee.

As to the "compensation paid" by which the cost/proceeds fraction is to be multiplied and from which the product of that multiplication is to be subtracted, the court determined that the statute's specification "all compensation paid" left no choice other than $30,283, the total amount of compensation employer had paid previously to the employee's tort recovery.

The court of appeals, however, chose $21,475, all compensation

---

494. 303 N.W.2d at 470. (All amounts in this discussion are rounded to the nearest dollar).
495. See id. at 471-73.
496. See id. at 471.
497. See id. at 472-74.

The court referred to the statutory construction provision specifying, "When the words of a law . . . are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Id. at 473 n.4, quoting Minn. Stat. § 645.16 (1982).
paid capable of reimbursement under clause (c), on the view that the obvious purpose of clause (c) is to charge the employer's subrogation recovery with a proportional share of the cost of collecting the proceeds, and that that purpose is frustrated by the construction the supreme court ultimately adopted whenever the compensation paid exceeds the "balance remaining" after clause (b)'s allocation of one-third to the employee. 498 (For example, if employer had paid $32,667 compensation previously, it would pay no part of the cost of collection. 499)

The court of appeals' view seems vastly superior, as better effectuating clause (c)'s overall purpose. But the supreme court's view is the law.

As to the figure to be deducted from the "balance remaining" after clause (b) allocates one-third to the employee, the court, again reasoning that the wording of the statute left no choice, 500 ruled that it was $49,908, employer's subrogation after subtracting the cost-over-proceeds-times-compensation-paid figure. 501

The court of appeals' approach, which again seems superior in better effectuating the provision's apparent overall purpose, chose $21,475, all compensation paid capable of reimbursement under clause (c). 502 The court of appeals' rationale was that employer is reimbursed for all of that amount, but is required to pay employee a proportional share of the cost of collecting the proceeds. 503

The supreme court's construction of section 176.061, subdivision 6 makes the amount of collection costs an employer bears vary depending on the happenstance of whether the compensation was paid before or after the tort recovery. For example, in Kealy, if employer had paid $32,667 compensation before the tort recovery, it would have been reimbursed $21,475 without paying any part of the costs of collection, 504 whereas if it had been responsible for $32,667 worth of compensation after the tort recovery, $7,357 would be deducted from its $21,475 credit by virtue of the holding, reaffirmed in Kealy, 505 of Cronen v. Wegdahl Cooperative Elevator Asso-

498. See 303 N.W.2d at 473-74; 32 Minn. Workers' Comp. Dec. at 436-42.
499. $32,667 less $11,192 \((16,788/49,000) \times 32,667\), equals $21,475 (the total amount of the "balance remaining").
500. See 303 N.W.2d at 475.
501. See id.
502. See id. at 471-72; 32 Minn. Workers' Comp. Dec. at 435, 438, 442.
503. See 32 Minn. Workers' Comp. Dec. at 437.
504. See supra note 498.
505. 303 N.W.2d at 475.
that a proportionate share of costs of collection should be deducted from employer’s credit. As it was in *Kealy*, where employer paid $30,283 previously to the tort recovery, it paid no part of the costs of collection on its $19,908 reimbursement, but the *Kealy* court recognized that it would have to deduct $537 from its $1,567 credit. Thus, depending on the timing of payment of compensation, employer would bear $0, $7,357, or $537 of the costs of collection.

The supreme court’s construction of section 176.061, subdivision 6 is inappropriate. The legislature should amend the provision to adopt the court of appeals’ approach, e.g., by having clause (c) specify:

(c) Out of the balance remaining, the employer shall be reimbursed in an amount equal to all benefits paid. The employer shall then pay the employee or dependents, from the reimbursement, a pro rata share of the costs. That share shall be the product of the costs divided by the proceeds multiplied by the reimbursement.

If the legislature adopted this approach on subrogation under clause (c), it would make sense to pursue the same approach for credit under clause (d) by providing, for example:

(d) Any balance remaining shall be paid to the employee or dependents and shall be a credit to the employer against future compensation obligations. As the employer uses the credit, the employer shall pay the employee or dependents, at the time each compensation payment would have been made but for the credit, a pro rata share of the costs. The pro rata share shall be the product of the costs divided by the proceeds multiplied by the compensation payment that would have been made but for the credit.

It should be noted that instead of this “pay as you go” method of having employer pay employee a pro rata share of the costs periodically as employer utilizes the credit, the *Kealy* opinion indicates a “deferred payment” method of having the entire amount of

---

506. 278 N.W.2d 102 (Minn. 1979).
507. *Id.* at 105.
508. *See* 303 N.W.2d at 475 (credit to be “reduced by 34.26%” (16,788/49,000)).
509. Instead of repetitiously adding “or the special compensation fund” after “employer” as the 1981 amendment does, *see supra* note 492, it would be preferable to either omit this as unnecessary, *see id.*, or to add a provision saying that for purposes of the subdivision, “employer” includes the special fund.
510. *See* Steenson, *supra* note 1, at 297, 301.
credit reduced by a pro rata share. Under the latter method, employer actually bears its full share of the costs only when (and if!) it uses all of its credit.

B. Third Party Contribution from Employer

In Kordosky v. Conway Fire & Safety, Inc., the Minnesota Supreme Court held that in an employee v. tortfeasor v. employer action, where damages were $70,000, tortfeasor's negligence was 40% and employer's negligence was 60% and employer had paid $21,948 compensation, employer had to pay tortfeasor $21,948 contribution but, because of section 176.061, subdivision 6(c)'s deduction for costs of collection could recover only $14,632 in subrogation. The court recognized that employer ended up paying more than its compensation liability, but could find no better solution consistent with the statute.

The court rejected the solution suggested in an article by Professor Steenson, that employer be required to pay tortfeasor only the amount it recovers in subrogation, saying:

If the court adopted Professor Steenson's solution, the contribution that the third party is able to obtain from the employer, already severely limited in many cases, will be further reduced. Moreover, since the reduction mandated by [Minn. Stat. § 176.061(6)(c)] reflects attorneys fees expended by the employee to obtain the recovery from the third party, to pass this reduction on to the third party would be to require the third party to pay for the privilege of being sued.

511. In Kealy v. St. Paul Hous. & Redevelop. Auth., 303 N.W.2d 468, 475 (Minn. 1981), the court said:

[F]or every dollar of benefits paid in the future, the subdivision 6(d) credit should be reduced by 34.26%, the percentage derived in the subdivision 6(c) computation. Therefore, in addition to the $19,908.19 [employer is] entitled to under the subdivision 6(c) computation, [it] will receive as a credit under subdivision 6(c) the sum of $1,566.68, reduced by 34.26%, as mandated by Cronen. [Employer is] liable for 100% of all workers' compensation benefits payable thereafter.

See Cronen v. Wegdahl Coop. Elevator Ass'n, 278 N.W.2d 102, 103, 105 (Minn. 1979).

512. See Steenson, supra note 1, at 297.

513. 304 N.W.2d 616 (Minn. 1981), noted in 8 WM. MITCHELL L. REV. 283 (1982).

514. See supra note 492 and accompanying text.

515. 304 N.W.2d at 617-18, 620. (All amounts in this discussion are rounded to the nearest dollar.)

516. See id. at 620-21.

517. Steenson, supra note 1.

518. Id. at 306.

519. 304 N.W.2d at 621.
The *Kordosky* court's result may be as good as can be achieved without changing the statute, but it has the shortcoming of requiring *employer* in effect to pay for the privilege of being sued (although technically employer is helping pay the attorney fees of employee, not of tortfeasor who sued employer for contribution or indemnity).

Although there may be objection to taking anything away from employee, it would seem appropriate to restrict employee's ability to require employer to pay a pro rata share of costs of collection where this in effect makes employer pay for the privilege of being sued. This could be accomplished by adding a new clause to section 176.061, subdivision 6 which, assuming clauses (c) and (d) were amended as recommended above, would specify:

(e) When the employer is liable to the other party for contribution or indemnity, reimbursement and credit shall be as provided in clauses (c) and (d) except:

1. The employer's payment of costs under clause (c) shall be reduced by a contribution offset. The offset shall be the product of the employer's contribution or indemnity liability divided by compensation paid multiplied by the employer's payment of costs under clause (c).

2. The employer shall not pay costs to the employee or dependents under clause (d) when making a contribution or indemnity payment to the other party equal to the payment that would have been made to the employee or dependents but for the credit under clause (d).

It will be noted that part (2) of the above proposal contemplates the employer making contribution payments to the tortfeasor while utilizing the credit under section 176.061, subdivision 6(d). It is quite clear that employer should do so.

More questionable is whether employer should be required to keep making contribution payments to the tortfeasor after the

520. See supra text accompanying note 509.

521. Credit for this formula goes to Phil Powell, J.D., William Mitchell College of Law, 1981, who developed it while writing a research paper as a student in the author's workers' compensation course.

Under the formula, employer would be fully relieved of the duty to pay a pro rata share of costs only in cases like *Kordosky*, where the employer's contribution liability is as large as the amount of compensation paid. Where it is less, employer should be relieved from paying part of the costs only to the extent that the costs are, in effect, "for the privilege of being sued." If a miniscule amount of contribution liability fully relieved employer from paying a pro rata share of costs, employer would have an incentive to be found a bit negligent.

522. See Steenson, supra note 1, at 300-02.
clause (d) credit is exhausted, if employee remains disabled or needs further medical treatment or dependents remain dependent, and employer has not yet paid its percentage of damages to tortfeasor. Because of section 176.061, subdivision 6's removal of attorney fees and costs and one-third of the remainder to employee from the amount available for subrogation and credit, it is quite possible that an employer charged with a high percentage of fault would exhaust the credit before paying its percentage of damages to tortfeasor. The Kordosky court's approach requiring employer to pay tortfeasor more in contribution than it can recover in subrogation indicates that an employer in certain circumstances may have to make simultaneous payments of compensation and contribution after the clause (d) credit is exhausted.

This may be illustrated using the figures from Kordosky, damages $70,000, compensation already paid $21,948, tortfeasor negligence 40%, and employer negligence 60%, and assuming costs one-third ($23,333). The district court would give employee a judgment against tortfeasor for $70,000 and tortfeasor a judgment against employer for contribution of up to $42,000 or compensation liability. Employer would pay tortfeasor $21,948 (present compensation liability). Tortfeasor would pay $70,000 allocated as follows:

<table>
<thead>
<tr>
<th>Proceeds</th>
<th>Lawyer</th>
<th>Employee</th>
<th>Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs</td>
<td>$23,333</td>
<td>$23,333</td>
<td></td>
</tr>
<tr>
<td>Remainder</td>
<td></td>
<td></td>
<td>46,667</td>
</tr>
<tr>
<td>One-third to employee</td>
<td>15,556</td>
<td>15,556</td>
<td></td>
</tr>
<tr>
<td>Balance remaining</td>
<td>31,111</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$21,948 less 7,316</td>
<td>14,632</td>
<td>14,632</td>
<td></td>
</tr>
<tr>
<td>(23,333/70,000 x 21,948)</td>
<td>14,632</td>
<td>14,632</td>
<td></td>
</tr>
<tr>
<td>Balance and credit</td>
<td>16,479</td>
<td>16,479</td>
<td>[Credit 10,986]</td>
</tr>
</tbody>
</table>

While utilizing the $10,986 credit (e.g., if employee remained disabled), employer would have to make periodic payments to tortfeasor of the amounts employer would have made to employee but for the credit. When the $10,986 credit is exhausted, employer will have had $32,934 compensation liability, compared to its $42,000 percentage share of damages. Accordingly, if employee's disability persists, employer will have to resume paying compensa-

523. See supra note 492 and accompanying text.
524. $16,479 less 5,493 (23,333/70,000 x 16,479). See supra note 511 and accompanying text.
A party whose lia-

525. 295 N.W.2d 659 (Minn. 1980).

526. Actually, it was employee v. two alleged tortfeasors v. employer and another. Employee, injured by electricity coming from a power line through a crane cable, sued the crane operator and the crane owner. Defendants impleaded employer and the power line owner. The crane owner and operator settled with employee for $120,000, but continued their third party action against employer and the power line owner. The jury found employee 10% negligent, employer 40%, and the power line owner 50%. The jury also found that employer was acting as the power line owner's agent. Based on that finding, the trial court imputed employee's and employer's negligence to the power line owner, and allowed the crane owner to recover the full amount of the settlement from the power line owner. Id. at 661-62.

The supreme court held that the evidence did not support the finding that employer was acting as the power line owner's agent, and that it was thus erroneous to impute employee's and employer's negligence to the power line owner, and so reversed and remanded with instructions to adjust the allocation of the parties' liability accordingly. Id. at 664-65.

Regarding settling defendants' right to recover where they are ultimately found not to have any liability, see Lemmer v. IDS Properties, Inc., 304 N.W.2d 864, 869-70 (Minn. 1980).


As pointed out in Steenson, Comparative Fault and Loss Reallocation, 6 MINN. TRIAL LAW. 8, 32 n.25 (July-Aug. 1981), "the reallocation statute would not apply to the [Vieths] case because the causes of action arose prior to April 15, 1978, the effective date of the comparative fault act." The comparative negligence act, which the comparative fault act replaced, did not have a loss reallocation provision. See id. at 8.

528. See generally Steenson, supra note 1, at 333-51; Steenson, supra note 527, at 8.

For a quotation from MINN. STAT. § 604.01(1) (1982), see infra note 533.
bility is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment. 529

The issue raised in the Vieths footnote, then, is whether the uncollectibility covered by this provision should include uncollectibility resulting from an employer's immunity from contribution greater than its workers' compensation liability. As Professor Steenson concludes, "[I]t is difficult to argue that reallocation should not work in this situation as well as in situations involving uncollectibility due to either insolvency or nonliability." 530

It should be noted, however, that employer's workers' compensation liability may extend beyond the amount of compensation paid previously to the tort recovery. 531 An employee's disability may continue or recur, employee may need further medical treatment, or a dependent's dependency may persist. Accordingly, only in a death case where dependency has ended or in a case where it is otherwise clear that employer will have no further compensation liability should the district court reallocate under section 604.02, subdivision 2. Otherwise, assuming the motion is made not later than one year after judgment, 532 the court should retain jurisdiction of the matter until such time as it becomes clear employer will have no further compensation liability.

This may be illustrated using figures from Kordosky—damages $70,000, compensation already paid $21,948, and employer negligence 60%—but instead of tortfeasor negligence 40% assume employee negligence 20% and tortfeasor negligence 20%. Tortfeasor's judgment against employer would be for contribution of up to $42,000 or compensation liability. 533 Employer would pay tortfeasor $21,948 (present compensation liability).

If employee by this time has died from an unrelated cause 534 or if employee died from the work injury but no dependents remain dependent or if it otherwise is clear that employer will have no further compensation liability, the district court should determine that $20,052 ($42,000 less $21,948) of employer's equitable share of

529. MINN. STAT. § 604.02(2) (1982).
530. Steenson, supra note 527, at 26.
531. See supra notes 522-24 and accompanying text.
532. See MINN. STAT. § 604.02(2) (1982) (quoted supra text accompanying note 529).
533. See id. § 604.01(1) ("Contributory fault shall not bar recovery . . . if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering").
534. This would rule out dependency benefits. See id. § 176.021(1) (employer liable for compensation for death arising out of and in course of employment).
the damages is uncollectible and reallocate it between the remaining parties, including employee, "according to their respective percentages of fault." Since employee and tortfeasor were equally negligent, $10,026 would be allocated to each. Thus the amount employee can recover from tortfeasor would be reduced $10,026, from $56,000 to $45,974.

If this reallocation is accomplished previously to the section 176.061, subdivision 6 division of proceeds, employee's reduced recovery ($45,974) should be deemed the "proceeds." If the reallocation is accomplished subsequently (which may entail employee making a partial refund), it seems that the section 176.061, subdivision 6 division of proceeds should be recomputed, with appropriate adjustments to attorney fees, employee's one-third share, and employer's subrogation and credit.

---

535. See id. § 604.02(2) (quoted supra text accompanying note 529).
536. It will be noted that tortfeasor, whose percentage share of damages is $14,000, has a net liability of $24,026 ($45,974 less $21,948).
537. See supra notes 491-94 and accompanying text.
538. For example, assuming costs at one-third, division of $56,000 would be as follows:

<table>
<thead>
<tr>
<th>Proceeds</th>
<th>Lawyer</th>
<th>Employee</th>
<th>Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Costs</td>
<td>18,667</td>
<td>18,667</td>
<td></td>
</tr>
<tr>
<td>Remainder</td>
<td>37,333</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) One-third to employee</td>
<td>12,444</td>
<td>12,444</td>
<td></td>
</tr>
<tr>
<td>Balance remaining</td>
<td>24,889</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) $21,948 less 7,316 (18,667/56,000 x 21,948)</td>
<td>14,632</td>
<td></td>
<td>14,632</td>
</tr>
<tr>
<td>(d) Balance and credit</td>
<td>10,257</td>
<td>10,257</td>
<td>[Credit 6,838]</td>
</tr>
</tbody>
</table>

By contrast, division of $45,974 would be:

<table>
<thead>
<tr>
<th>Proceeds</th>
<th>Lawyer</th>
<th>Employee</th>
<th>Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Costs</td>
<td>15,325</td>
<td>15,325</td>
<td></td>
</tr>
<tr>
<td>Remainder</td>
<td>30,649</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) One-third to employee</td>
<td>10,216</td>
<td>10,216</td>
<td></td>
</tr>
<tr>
<td>Balance remaining</td>
<td>20,433</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) $21,948 less 7,316 (15,325/45,974 x 21,948)</td>
<td>14,632</td>
<td></td>
<td>14,632</td>
</tr>
<tr>
<td>(d) Balance and credit</td>
<td>5,801</td>
<td>5,801</td>
<td>[Credit 3,867]</td>
</tr>
</tbody>
</table>

In this situation, lawyer would refund $3,342 to employee and employee would refund $10,026 (the $3,342 from the lawyer plus an additional $6,684) to tortfeasor.
IX. Conflict of Laws

A. In-State Injuries

In *Stolpa v. Swanson Heavy Moving Co.*,539 a unanimous Minnesota Supreme Court held that a Wisconsin employee injured in Minnesota who accepted voluntarily paid Wisconsin workers’ compensation benefits could seek benefits under the Minnesota law without first returning the Wisconsin benefits, under section 176.041, subdivision 4, which specifies:

If an employee who regularly performs the primary duties of his employment outside of this state or is hired to perform the primary duties of his employment outside of this state, receives an injury within this state in the employ of the same employer, such injury shall be covered within the provisions of this chapter if the employee chooses to forego any workers’ compensation claim resulting from the injury that he may have a right to pursue in some other state.540

Rather than focusing on the “forego” language which had led the court of appeals to bar recovery on the view that to “forego” benefits a claimant “must make a positive, affirmative election by returning the compensation benefits he has received,” the Minnesota court focused on the word “pursue,” and reasoned, “Mere acceptance of the Wisconsin benefits is not equivalent to a choice of law on the part of the employee or to his pursuing a claim for benefits in that state.”541 The court went on to say:

Moreover, the obvious hardship facing a disabled employee if he must return out-of-state benefits before he can seek compensation under the Minnesota statute persuades us that the interpretation given the statute by the majority of the Court of Appeals is contrary to the remedial construction historically accorded compensation legislation. . . . We hold that the statutory language itself warrants a construction which permits an injured employee, in spite of his acceptance of compensation voluntarily paid by a compensation insurer pursuant to the laws of another state, to make an affirmative election of Minnesota coverage by filing a claim petition in this state after obtaining legal advice concerning his rights. The filing of that petition is, in effect, an intelligent choice on the employee’s part “to forego any workers’ compensation claim resulting from the injury that he may have a right to pursue in some other state.”

539. 315 N.W.2d 615 (Minn. 1982).
540. MINN. STAT. § 176.041(4) (1982); 315 N.W.2d at 617.
541. 315 N.W.2d at 617.
Then the *Stolpa* court referred to a 1980 case, *Flink v. K & K Construction & Repair, Inc.*, wherein the court of appeals had allowed a North Dakota employee to seek Minnesota benefits after filing a North Dakota claim which was dismissed when the employee did not appear at the hearing, and said,

If an employee who files and abandons a claim in another state can be viewed as having foregone any claim he had a right to pursue there by the act of filing a claim petition in this state, the employee who has never filed a claim petition in another state should as reasonably be viewed as having foregone any claim he had a right to pursue in that state by filing a claim petition in Minnesota.

Finally, the *Stolpa* court concluded:

We recognize that the majority of the Court of Appeals may have construed the statute to contain the repayment requirement so that an employee would not obtain excessive compensation by receiving benefits from more than one state. There is no reason, however, to impose so onerous a burden on an injured employee in order to avoid that outcome since any benefits voluntarily paid him pursuant to the laws of another state can be deducted from the compensation awarded in a proceeding in Minnesota.

The *Stolpa* decision is sound. The court reached an appropriate result upon appropriate reasoning.

More troublesome is the court's recent decision in *Pauli v. Pneumatic Systems, Inc.* In *Pauli*, an Oregon employee of an Oregon employer was injured in Minnesota. He received chiropractic treatment under the Oregon statute. Subsequently, after petitioning for permanent partial disability benefits under the Minne-
WILLIAM MITCHELL LAW REVIEW

sota law, he filed a request for hearing with the Oregon Workers’ Compensation Board because he wanted to preserve jurisdiction under the Oregon law pending a ruling on his Minnesota petition.548 He also filed an affidavit in the Minnesota proceeding stating that he elected to forego any Oregon compensation benefits.549 A five-four court held that he could not proceed in Minnesota because he had not chosen to “forego” his Oregon claim as required by Minnesota Statutes section 176.041, subdivision 4. The court said:

[W]hen, with advice and assistance of counsel, an employee files legal papers to request a hearing in another state, he chooses to “forego” any workers’ compensation claim here. In effect, what the employee seeks to do is “hedge”—if he loses in Minnesota, he will continue his claim in Oregon; if he wins in Minnesota, he says in his affidavit he will dismiss his appeal in Oregon. This, we hold, Minn. Stat. § 176.041, subd. 4 does not permit.

[R]eliance on . . . on . . . Stolpa . . . is misplaced. There, the insurer had voluntarily paid some small medical expenses and a small amount of total disability pursuant to the Wisconsin Workers’ Compensation Act. The employee had accepted those payments, but had taken no affirmative action, either by himself or through counsel, to pursue his claim further in Wisconsin before the Wisconsin Compensation Board. Had Mr. Pauli only accepted reimbursement of his chiropractic and other medical expense in Oregon, Stolpa would be dispositive, but here he did more by affirmatively making a claim, with aid of counsel, before the Oregon Workers’ Compensation Board, and at the time of the hearing on these motions had not dismissed his pending appeal before that board.550

Justice Todd, joined by Justices Yetka, Scott, and Wahl, dissented, saying:

The claimant has now filed an affidavit agreeing to forego any benefits under the Oregon proceedings. This is exactly what the statute requires. In Stolpa . . . we cited with approval a decision of [the] Workers’ Compensation Court of Appeals, Flink v. K & K Construction & Repair, 33 WCD 9 (1980), which involves the same facts as this case with the exception that a

549. 328 N.W.2d at 745.
550. Id. at 745-46.
dismissal and not an affidavit was used to establish that the claimant would forego benefits in the foreign jurisdiction. I fail to perceive any difference. Obviously, if claimant attempted to proceed in the foreign jurisdiction, his affidavit is an admission against interest and would preclude further proceedings. Further, the decision of the compensation case in this state would be res judicata.  

As indicated by Justice Todd, the Pauli majority opinion may make it essential for an out-of-state employee striving to proceed under section 176.041, subdivision 4 to take action to dismiss any pending out-of-state proceedings the employee may have commenced after consulting a lawyer.  

Stolpa probably undercuts the continued validity of the court of appeals' pre-Stolpa ruling in Koshen v. Froemke Builders & Distributors that a North Dakota employee who filed for and received North Dakota benefits could not proceed in Minnesota for the $2,400 difference between Minnesota's and North Dakota's benefits. The facts did not indicate that in filing for and receiving the North Dakota benefits the employee acted with legal advice concerning his rights as specified in Stolpa and Pauli. In a similar situation, Judge Adel recently stated:

The stipulated facts . . . make no reference to the dependents' knowledge of their rights at the time [their] claim was made in North Dakota.

I infer that, had the dependents known of their Minnesota rights and the benefits available, which are several thousands of dollars greater than in North Dakota, they would not have elected to file their claim in North Dakota and preclude themselves from Minnesota benefits.  

551. Id. at 746 (Todd, J., dissenting).  
Justice Todd went on to decry the fact that the majority opinion was inconsistent with the Stolpa court's statement that it believed the legislative intent was to deny an out-of-state employee coverage for an in-state injury "only if, with full knowledge of his rights, he has filed a claim and pursued it to an award, settlement, or denial of compensation in another state." Id.; see supra note 544; cf. Tierney v. Hardee Food Sys., Inc., No. 482-78-5244 (Minn. Workers' Comp. Ct. App. Apr. 19, 1983) (employee regularly employed in Iowa but injured in Minnesota may proceed in Minnesota where he did no more than file petition in Iowa to preserve claim because of statute of limitations and would dismiss Iowa claim if Minnesota accepted jurisdiction).  

553. Id. at 519-21.  
554. Souers v. Agassiz Nursery, Inc., 35 Minn. Workers' Comp. Dec. 183, 185 (1982) (Adel, J., concurring). The Souers majority thought it unnecessary to consider the question of coverage under § 176.041(4) because "where a Minnesota resident received an injury . . . in Minnesota . . . we need not consider the M.S. 176.041 provisions of the statute at
It should be noted that the court of appeals has recently held that payments of compensation under another state's law do not toll the section 176.151 statute of limitations. 555

B. Out-of-State Injuries

In *Hutchins v. Murphy Motor Freight Lines, Inc.* 556 the Minnesota Supreme Court held that in a case arising after the 1974 repeal of section 176.041, subdivision 5, which had stated, “Except as specifically provided by subdivisions 2 and 3 of this section, injuries occurring outside of this state are not subject to the provisions of this chapter,” 557 injuries may be covered under the judicially-developed “business localization” test 558 even though they do not fit within subdivision 2 or 3 of section 176.041. 559 The court all, since clearly Minnesota’s interests and the Workers’ Compensation Law of Minnesota apply.” *Id.* at 183. See generally infra notes 556-60 and accompanying text. Judge Adel disagreed, stating:

> I believe we must apply Minn. St. 176.041, subd. 4 in this case. This is so even though we have a Minnesota resident who was injured in Minnesota, which may confer jurisdiction under the common law theory of “legitimate governmental interest” or under a statutory provision. A specific statute, when applicable, prevails over common law and over general statutes covering the same subject matter.

*Id.* at 185 (Adel, J., concurring). Judge McCarthy dissented, but his opinion did not rule out compensation if the claimant applied for and received North Dakota compensation without full knowledge of her rights; he called for a remand for, inter alia, “the taking of proper evidence to ascertain exactly what the employee’s widow knew at the time of the acceptance of the benefits from the State of North Dakota.” *Id.* at 188 (McCarthy, J., dissenting).


556. 331 N.W.2d 761 (Minn. 1983).


558. *See* Marrier v. National Painting Corp., 249 Minn. 382, 386, 82 N.W.2d 356, 358 (1957); Aleckson v. Kennedy Motor Sales Co., 238 Minn. 110, 117-19, 55 N.W.2d 696, 701-02 (1952); State ex rel. Chambers v. District Court, 139 Minn. 205, 209, 166 N.W. 185, 187 (1918).


559. *Hutchins*, 331 N.W.2d at 763-64. MINN. STAT. § 176.041(2), (3) (1982) specifies:

Subd. 2. EXTRA-TERRITORIAL APPLICATION. If an employee who regularly performs the primary duties of his employment within this state, or who is hired within this state, receives an injury while outside of this state in the employ of the same employer, the provisions of this chapter shall apply to such injury unless the transfer is normally considered to be permanent. If a resident of this state is transferred outside the territorial limits of the United States as an

http://open.mitchellhamline.edu/wmlr/vol8/iss3/7
reasoned:

Respondent has successfully argued below that the effect of repealing subdivision 5 was to expand the scope of extraterritorial jurisdiction beyond the previously exclusive subdivisions 2 and 3, and to reinstate the business localization test. Relators' main argument before us is that the repeal had no effect whatsoever and that subdivisions 2 and 3 are still exclusive.

It is difficult to believe that the legislature intended the repeal of subdivision 5 to be utterly without meaning, especially when the main thrust of the bill containing the repealer was the expansion of worker's compensation benefits.

We believe that the repeal of Minn. Stat. § 176.041, subd. 5 (1971) should be held to end the exclusivity of subdivisions 2 and 3 of the same section and to revive the common-law business localization test. 560

The Hutchins ruling is eminently appropriate for the reasons stated by the court.

X. CONCLUSION

By and large, the Minnesota Workers' Compensation Court of Appeals and the Minnesota Supreme Court have proceeded appropriately in construing and applying the workers' compensation law. The general quality of consideration in court of appeals opinions seems to have improved somewhat with that body's 1979 increase from three to five judges. 561 The supreme court opinions, on the other hand, sometimes indicate that the court has not had

---

employee of a Minnesota employer, he shall be presumed to be temporarily employed outside of this state while so employed.

Subd. 3. TEMPORARY OUT-OF-STATE EMPLOYMENT. If an employee hired in this state by a Minnesota employer, receives an injury while temporarily employed outside of this state, such injury shall be subject to the provisions of this chapter. If the employer's business is in Minnesota and the employee's residence is in Minnesota, employment outside of this state shall be considered temporary.

See Butrimas v. North Am. Van Lines, No. 465-38-4159 (Minn. Workers' Comp. Ct. App. July 30, 1979) (alternative ground; Minnesota resident who worked for nationwide moving company that "tried to keep [truckers] operating out of the area in which they lived and [returning] to the same" and who drove about 10.5% of his mileage in Minnesota could be found to "regularly [perform] the primary duties of his employment within [Minnesota]" under subdivision 2).

560. Hutchins, 331 N.W.2d at 763. As evidence that the employer met the business localization test, the court noted that the company was headquartered in Minnesota and had 15 terminals, including one of its largest terminals, in Minnesota. Id. at 762.

adequate time to study all the issues in great depth. One may hope that adoption of an intermediate court of appeals machinery will ameliorate this.