1980

Workers' Compensation—Intervenors' Right to Reimbursement—Brooks v. A.M.F., Inc., 278 N.W.2d 310 (Minn. 1979)

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Recommended Citation
(1980) "Workers' Compensation—Intervenors' Right to Reimbursement—Brooks v. A.M.F., Inc., 278 N.W.2d 310 (Minn. 1979),"
William Mitchell Law Review: Vol. 6: Iss. 1, Article 8.
Available at: http://open.mitchellhamline.edu/wmlr/vol6/iss1/8

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The Convery court echoes New York case law in refusing to find a separate cause of action for negligent supervision, but it does recognize a cause of action within the limits of reasonable foreseeability against persons with a special relationship to the child. Under this analysis, a parent will be "liable for failure to exercise reasonable care, precaution and vigilance" as measured by the child's understanding of the risks of injury and their foreseeability by the parent. Therefore, under the Convery approach, parents will continue to be immunized for most injuries resulting from daily occurrences, yet the child will be protected from situations involving inherent danger.

Although the Romanik court's decision to delay resolution of the parental supervision issue may lead to less confusion in Minnesota than now exists in Michigan and Wisconsin, Minnesota presently has no clear rule to follow. It is hoped that the court will consider the Convery approach in arriving at a definitive solution. Meanwhile, Romanik evinces the principle that parental instruction sufficiently negligent to constitute an affirmative act endangering a child is outside both exceptions to the abrogation of the parent-child immunity doctrine.


Many Minnesota workers covered by workers' compensation also

59. Id.

1. Under the Minnesota workers' compensation law, MINN. STAT. §§ 176.011-.82 (1978 & Supp. 1979), an injured employee is entitled to compensation from the employer's compensation carrier for an injury shown to be work related. See id. § 176.021(1) (1978) ("arising out of and in the course of employment"). Nearly all Minnesota workers are covered under the Minnesota workers' compensation law for work-related illness and injury. See id. § 176.041(1) (Supp. 1979) (excluding employees of railroads engaged in interstate commerce, family farm employees, various other agricultural workers, and certain other occupations from coverage by workers' compensation). In 1973, 38,953 work-related injuries were reported in Minnesota. By 1978, this number had increased to 55,536. See MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR 205 (1979) [hereinafter cited as STUDY COMM'N].

Workers' compensation statutes were enacted by state legislatures throughout the nation starting in 1902. See 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.20 (1978). Their purpose was to assure speedy compensation by employers to workers for work-related injuries. See, e.g., New York C.R.R. v. White, 243 U.S. 188, 201 (1917). By 1920, all but eight states had adopted compensation acts. See 1 A. LARSON, supra, § 5.30,
carry private health insurance.2 Private health insurance policies often exclude coverage for claims compensable by workers' compensation.3 Thus, the private health insurer has an obvious interest in how the proceeds of a compensation award are to be distributed.4 For this reason, the Minnesota court has long recognized the right of health insurers to intervene for possible reimbursement in workers' compensation proceedings when the insured carries a policy that excludes payment for occupational sickness or injury.5

2. According to the court in Lemmer v. Batzli Elec. Co., 267 Minn. 8, 125 N.W.2d 434 (1963), "[i]t has become a somewhat common practice for an employee to insure against injury arising outside his employment, thus complementing the protection provided him under the Workmen's Compensation Act." Id. at 18, 125 N.W.2d at 441.

3. See, e.g., Vetsch v. Schwan's Sales Enterprises, 283 N.W.2d 884, 885 (Minn. 1979); Brooks v. A.M.F., Inc., 278 N.W.2d 310, 311 (Minn. 1979).

4. See, e.g., Vetsch v. Schwan's Sales Enterprises, 283 N.W.2d 884, 886 (Minn. 1979) (health insurer not a party to settlement entitled to full reimbursement of money paid on behalf of employee under insurance policy that excluded claims covered by workers' compensation); Brooks v. A.M.F., Inc., 278 N.W.2d at 311 (workers' compensation procedures whereby intervenor, excluded from settlement negotiations, received reimbursement only after proving employee's injuries were work related, held to be inadequate); Repo v. Capitol Elevator Co., 312 Minn. 364, 367-70, 252 N.W.2d 248, 250-51 (1977) (health insurer entitled to reimbursement for benefits paid under policy that excluded coverage of claims compensable under workers' compensation); Tatro v. Hartmann's Store, 295 Minn. 282, 286, 204 N.W.2d 125, 127-28 (1973) (denying health insurer's right to intervene after settlement because substantial prejudice could result to employee; urging adoption of new procedures to protect intervenors); Lemmer v. Batzli Elec. Co., 267 Minn. 8, 20-21, 125 N.W.2d 434, 442 (1963) (health insurer entitled to intervene in workers' compensation proceeding to obtain reimbursement from employee's award when insurance policy excluded coverage for work-related illness or injury); Equitable Life Assurance Soc'y v. Bachrach, 265 Minn. 83, 90-91, 120 N.W.2d 327, 332-33 (1963) (health insurer entitled to restitution from employee's compensation award for benefits paid under policy that excluded occupational injury).

5. See Equitable Life Assurance Soc'y v. Bachrach, 265 Minn. 83, 89, 120 N.W.2d 327, 332 (1963). In Bachrach, the defendant-worker received private health insurance benefits after asserting that his injury was not work related. See id. at 84, 120 N.W.2d at 329. Later, the defendant, in seeking payment from his employer under the workers' compensation law, successfully claimed that his injury was work related. See id. at 84-85, 120 N.W.2d at 329. A compensation referee directed that the employer's liability should be offset by amounts that the private insurer previously had paid, but the Industrial Commis-
The right of health insurers to intervene may be exercised in two circumstances. First, health insurers that have paid benefits may intervene in any court proceeding involving workers' compensation claims. If the injury is shown to be work related at trial, the injured worker is awarded compensation and the health insurer is reimbursed from the award.

The second situation occurs when the injured worker and the compensation carrier settle the claim. In this case, the health insurer's remedy is intervention and participation in an out-of-court stipulation of settlement. Before Brooks v. A.M.F., Inc., if the worker and the compensa-

sion, a precursor of the Workers' Compensation Board, rejected this determination on the grounds that it was outside of the Commission's jurisdiction. See id. at 87, 120 N.W.2d at 330-31. The plaintiff-insurer then petitioned for and received a favorable summary judgment in the district court. See id. at 83, 120 N.W.2d at 329. The supreme court affirmed the insurer's summary judgment for reimbursement. See id. at 91, 120 N.W.2d at 333.

According to the supreme court in Brooks v. A.M.F., Inc., 278 N.W.2d 310 (Minn. 1979), "Bachrach made clear that once it is established that a sickness or injury is occupational, a health insurer is entitled to reimbursement of payments made to its insured under a policy excluding such claims." Id. at 313.

6. See, e.g., Lemmer v. Batzli Elec. Co., 267 Minn. 8, 17-18, 125 N.W.2d 434, 441 (1963). The Lemmer court recognized that the advantages of this type of relief were preventing multiple litigation, providing the insurer with greater certainty of reimbursement, eliminating the possibility of double recovery by the worker, and encouraging the insurer to pay health benefits promptly. See id. at 19, 125 N.W.2d at 441.

Minnesota workers' compensation law provides a right of intervention to any person who has an interest in the outcome of a compensation order or decision. See Minn. Stat. § 176.361 (1978). Rules have been promulgated to govern intervention in workers' compensation proceedings. See Minn. Work. Comp. Prac. R. 18.


7. As a prerequisite to liability for a compensation award, the injury must be shown to arise "out of and in the course of employment." Minn. Stat. § 176.021(1) (1978).


tion carrier settled, the health insurance intervenor was forced to either forego reimbursement or prove in a separate proceeding that the injury was work related. The Brooks court established new procedures to be followed in allowing reimbursement to health insurers upon intervention and subsequent out-of-court settlement of workers' compensation claims.

Brooks was a consolidation of two actions brought on appeal by several injured workers and intervenors, and approved by the Workers' Compensation Division; MINN. WORK. COMP. PRAC. R. 23 (establishing procedure for filing and approving settlement stipulations).

From 1973 through 1978, 75% of the cases (17,165 of 22,747) filed for hearing before the Workers' Compensation Division were settled by stipulation. See STUDY COMM'N, supra note 1, at 205. The judiciary generally encourages out-of-court settlements as a way to save the litigants expense and lighten the court's caseload. See, e.g., Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910) (courts favor compromises of disputed claims); Pfizer, Inc. v. Lord, 456 F.2d 532, 543 (8th Cir.) ("The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto.''), cert. denied, 406 U.S. 976 (1972); Hent schel v. Smith, 278 Minn. 86, 92, 153 N.W.2d 199, 204 (1967) ("This court has always supported a strong public policy favoring the settlement of disputed claims without litigation.'").

10. 278 N.W.2d 310 (Minn. 1979).
11. In Equitable Life Assurance Soc'y v. Bachrach, 265 Minn. 83, 120 N.W.2d 327 (1963), the Minnesota Supreme Court recognized that health insurers are entitled to reimbursement when an injured worker establishes the work-related nature of an injury before a workers' compensation tribunal. See note 5 supra and accompanying text. Subsequently, in Lemmer v. Batzli Elec. Co., 267 Minn. 8, 125 N.W.2d 434 (1963), the court further recognized the right of health insurers to intervene in workers' compensation proceedings and to be reimbursed from the proceeds of the award. See note 6 supra and accompanying text.

The rights of intervenors under circumstances in which the employee has settled the claim were first addressed by the Minnesota court in Tatro v. Hartmann's Store, 295 Minn. 282, 204 N.W.2d 125 (1973). Although Tatro denied the health insurer the right to intervene after the claim had been settled, see id. at 286, 204 N.W.2d at 127-28, the supreme court did call for procedures to be instituted to prevent the reoccurrence of the situation in Tatro. See id. at 286, 204 N.W.2d at 128. Following Tatro, procedures were instituted to ensure that interested parties would be notified of their right to intervene. See Brooks v. A.M.F., Inc., 278 N.W.2d at 314; MINN. WORK. COMP. PRAC. R. 17-18.

In Repo v. Capitol Elevator Co., 312 Minn. 364, 252 N.W.2d 248 (1977), an injured worker settled his claim with the employer-insurer. See id. at 365-66, 252 N.W.2d at 249. Successfully proving in a separate proceeding that the injury was work related, the intervening health insurer was reimbursed. See id. at 366-67, 252 N.W.2d at 250. The Repo court upheld the reimbursement and approved the new procedures that the commission had adopted. See id. at 368-69, 252 N.W.2d at 251.

According to the Brooks court, under pre-Brooks law "an intervenor who has not been included as a participant in settlement negotiation between the employee and employer-insurer is awarded reimbursement only after it proves that the employee's injuries are work related." 278 N.W.2d at 311.

12. See 278 N.W.2d at 312. One of the injured workers, Myles Brooks, allegedly suffered permanent injury when he fell and severely fractured his right wrist in July of 1976 while working as a tile and linoleum remover. See Relator-Intervenor's Brief and Appendix (Brooks) at 2. Elmer Hendrickson, the other injured worker, suffered a severe heart
eral health insurance intervenors.¹³ Both injured employees received health insurance benefits for their injuries and subsequently filed claims for workers’ compensation benefits.¹⁴ The employees’ health insurance policies excluded coverage of occupational injuries covered by workers’ compensation laws.¹⁵ Instead of proceeding before the Workers’ Compensation Division, the injured employees settled their claims with the compensation carriers.¹⁶ After the Workers’ Compensation Division approved the settlements,¹⁷ the intervening health insurers, challenging the fairness of the pre-Brooks procedure,¹⁸ appealed to the Workers’ Compen-

¹³. See 278 N.W.2d at 311. The intervenors were joined by the attorney general as amicus curiae on behalf of the Department of Public Welfare. See id. at 312. Under Minnesota’s Medicaid program, MINN. STAT. §§ 256B.01-.40 (1978 & Supp. 1979), an estimated 26% of the claims paid by the Department of Public Welfare ultimately went to workers’ compensation recipients. See Amicus Curiae Brief at 4-5. The Department is required to collect reimbursement from any third party whose liability is subsequently established in order to qualify for federal financial assistance under the program. See Social Security Amendments of 1967, § 229(a), 42 U.S.C. § 1396(a)(25)(C) (1976).

¹⁴. See 278 N.W.2d at 311-12. On behalf of the injured employee Myles Brooks, Prudential Insurance Company paid medical bills totaling $2605.90 and Blue Cross and Blue Shield of Minnesota paid hospital bills totaling $1425.70. See id. at 311. On behalf of Elmer Hendrickson, General American Life Insurance Company paid $3394.55 in medical expenses. See id. at 312.

¹⁵. See id. at 311-12.

¹⁶. See id. After Myles Brooks filed his claim for compensation, Blue Cross and Prudential were notified of their right to intervene in order to obtain reimbursement. See id. at 311. Blue Cross intervened at that time, but Prudential did not, relying upon assurances from Brooks’ attorney that reimbursement would follow when the Workers’ Compensation Division ruled in favor of the injured worker. See id. Although Brooks entered into a written stipulation of settlement with his employer and the compensation carrier, both Prudential and Blue Cross were excluded from participating in the settlement negotiation. See id. at 311-12. Prudential intervened after it received notice that the Workers’ Compensation Division had approved the settlement. See id. at 312.

General American Life Insurance Company intervened in Elmer Hendrickson’s compensation claim after the claim had been filed. See id. The compensation carrier attempted to include General American in a separate settlement for 25% reimbursement, but this attempt failed. See id. Hendrickson and the compensation carrier reached a settlement, ultimately approved by the Workers’ Compensation Division, to which General American was not a party. See id.

¹⁷. See id. at 311-12. Workers’ compensation settlements, to be valid, must be approved by the Workers’ Compensation Division of the Department of Labor and Industry. See MINN. STAT. § 176.521(1) (Supp. 1979); id. § 176.521(2) (settlement must be ‘‘reasonable, fair, and in conformity with [law]’’).

¹⁸. See 278 N.W.2d at 311. In Brooks, the court framed the controversy as follows: At issue is the adequacy of procedures employed by the Workers’ Compensation Division and the court of appeals, by which an intervenor who has not been included as a participant in settlement negotiation between the employee and the employer-insurer is awarded reimbursement only after it proves that the employee’s injuries are work related.

Id. These procedures had their genesis in an earlier workers’ compensation case, Tatro v.
After the court of appeals affirmed, the Minnesota Supreme Court reversed and ordered full reimbursement for each of the health insurers. The court held that the separate-proceeding requirement gave inadequate protection to the rights of intervenors in workers' compensation settlement negotiations. The court observed that under pre-Brooks law, it was often economically unfeasible for the health insurer to conduct an extensive investigation into the injury because the reimbursement sought was insignificant compared to investigation costs. In addition, an injured worker who has received a settlement award has little incentive to cooperate with the intervenor in proving the work-relatedness of the injury. Because these factors often compel intervenors to forego their claims, resulting in the accrual of unjust enrichment to the worker or the compensation carrier, the court concluded that it was "incongruous" to place upon the intervenor the burden of proving that the injury was work related. Furthermore, the court found that the separate-proceeding requirement

Hartmann's Store, 295 Minn. 282, 204 N.W.2d 125 (1973). For a history of the pre-Brooks rule, see note 11 supra.

Although these procedures had been approved by the court in Repo v. Capitol Elevator Co., 312 Minn. 364, 252 N.W.2d 248 (1977), in its discussion of the involvement of intervenors in the settlement process, the Repo court stated: "The employee can, of course, choose to settle without the sickness and accident insurer's consent, but the insurer will then be entitled to full reimbursement from the proceeds of the settlement." Id. at 369, 252 N.W.2d at 251. This language in Repo was the source of some confusion, which the Brooks court sought to clarify. See 278 N.W.2d at 314-15; notes 38-39 infra and accompanying text.

19. See 278 N.W.2d at 312. Workers' compensation claims that are settled must be approved by the Workers' Compensation Division. See note 17 supra. Otherwise, claims must be presented at a hearing before a compensation judge. See Minn. Stat. § 176.371 (1978). Settlements may be set aside by, or compensation awards appealed to the Workers' Compensation Court of Appeals. See id. §§ 176.421-.442. From there, appeals are taken to the Minnesota Supreme Court. See id. §§ 176.471-491.

20. See 278 N.W.2d at 312.
21. See id. at 311, 316.
22. See id. at 311.
23. See id. at 315.
24. See id.

25. See id. ("Where the reimbursement sought in relationship to the offered settlement is not substantial, as is the usual case, . . . it is not economically feasible for an intervenor to make an adequate investigation to permit a fair appraisal of the strength or weakness of the employee's claim.").

26. See id. In Lemmer v. Batzli Elec. Co., 267 Minn. 8, 125 N.W.2d 434 (1963), the court noted that permitting health insurers to intervene in workers' compensation proceedings helped prevent unjust enrichment in the form of double recovery by the worker. Id. at 19, 125 N.W.2d at 441.

27. 278 N.W.2d at 315; cf. Relator-Intervenor's Brief and Appendix (Brooks) at 16 ("A doctor with a $200.00 bill, or a pharmacy with a $50.00 bill, will of necessity go unpaid as the economics would not justify intervention and attempting to prove that the disinterested employee's claim arose out of or in the course of his employment.").
offends the basic principle of workers' compensation "to place upon industry the burden of economic loss resulting from work-related injuries or death."28

The precise scope of the Brooks holding is summarized in the following statement by the court: "an intervenor who is excluded from participating in negotiations resulting in a final settlement and who is not a party to the settlement stipulation should, on principles of equity and public policy, be awarded full reimbursement by the settlement award."29 A reading of this language indicates that an intervenor is entitled to reimbursement only when the intervenor is both excluded from settlement negotiations and is not a party to the award.30 The rights of the intervenor who participates in negotiations but does not agree to the settlement, however, are unclear.

The Brooks decision indicates that an intervenor who participates in settlement negotiations, but does not agree to settle, might not be entitled to reimbursement.31 The court states that intervenors who participate can better decide whether to join the settlement or litigate the issue of the injury being work related.32 This clearly implies that intervenors

29. 278 N.W.2d at 315 (emphasis added).
30. Prudential and Blue Cross were neither parties to the settlement stipulation nor included in the settlement negotiations. See id. at 312. General American, while not a party to Hendrickson's settlement stipulation, was given an offer of settlement by the employer-insurer. See note 16 infra. Apparently, this involvement did not constitute participation "in negotiations resulting in a final settlement," 278 N.W.2d at 315, one of the two elements required by Brooks before the intervenor is entitled to reimbursement. See id.
31. See 278 N.W.2d at 314-15 (discussing Repo v. Capitol Elevator Co., 312 Minn. 364, 252 N.W.2d 248, 251 (1977)).
who participate in negotiations will not receive automatic reimbursement. By requiring both exclusion of the intervenor from participation in negotiations and final agreement on the settlement as a prerequisite to automatic reimbursement, the court struck a just balance between protection of intervenors' rights and protection of the worker's claim from the unreasonable refusal of an intervenor to settle.

Only weeks after the *Brooks* decision, the delicate balance established by the court was upset by the 1979 Minnesota Legislature. In special session, the Legislature amended the workers' compensation law to require that a settlement agreement must be signed by the intervenor before it can be approved by the Workers' Compensation Division. The amendment makes no provision for the possibility of unreasonable refusal to settle a claim. Apparently, an intervenor now has the power

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33. *See* 278 N.W.2d at 314-15.  
34. *See* 278 N.W.2d at 314-15. Recently, the Workers' Compensation Court of Appeals recognized that *Brooks* does not mandate reimbursement of intervenors under every circumstance:

> The Supreme Court has not said that an intervenor may sit by, wait and later claim full reimbursement. These are matters of equity and policy. I would hold, therefore, that in the circumstances in the instant case, the failure of the intervenor to intervene until July 28, 1978, and failure to make any attempt to enter into the settlement negotiations at any time prior to the filing of the Supplemental Award . . . tips the delicate balance against the intervenor's interest.  


> An agreement between an employee or his dependent and the employer or insurer to settle any claim, which is not upon appeal before the workers' compensation court of appeals, for compensation under this chapter is valid where it has been executed in writing and signed by the parties, and intervenors in the matter, and the division has approved the settlement and made an award thereon. If the matter is upon appeal before the workers' compensation court of appeals, the workers' compensation court of appeals is the approving body.

*Id.* (emphasis added).

This amendment was passed in a special session called, in part, to act upon a proposal for comprehensive revision of the Minnesota workers' compensation law. *See* Act of June 7, 1979, ch. 3, 1979 Minn. Laws Ex. Sess. 1256 (to be codified in scattered sections of *MINN. STAT.* ch. 176). The section concerning the validity of compensation claim settlements was but one of the amended sections.

36. *See* Act of June 7, 1979, ch. 3, § 60, 1979 Minn. Laws Ex. Sess. 1256, 1295 (amending *MINN. STAT.* § 176.521(1) (1978)). The Workers' Compensation Court of Appeals has recommended that a special rule covering this contingency be engrafted upon the amended statute:

> The intervenor would further have to establish that it has in fact entered into such negotiations in good faith toward compromising its claim; it would not be allowed to wait the employee and employer-insurer out, as it were, and then claim full reimbursement; it would have the burden of establishing that it has
to compel the injured worker and the compensation carrier to go to trial over the claim, whether they wish to or not.

By departing from Brooks, the amendment may give too much protection to health insurers. Brooks recognized that intervenors would be protected adequately if they were permitted to participate in settlement negotiations. In clarifying the language of a previous decision, the Brooks court emphasized that it did not intend to fully reimburse intervenors who participate in negotiations but rigidly refuse to compromise their claim for full reimbursement. Because the amendment does not address this possibility, there is now no restraint upon the intervenor’s discretion in choosing whether to settle a claim.

While this legislation raises an important concern, the realities facing intervenors in the settlement process provide some limitation on the possibility of unreasonable refusal to settle a claim. Recovery by the intervenor hinges upon the compensation claim of the worker. By compelling litigation of the workers’ claim, the intervenor risks losing everything if

... entered fully into the proceeding in order to strike a proper balance among the interests of all parties. . . .

... The employee must be allowed to settle his claim. The intervenor must not be allowed to wait it out and be paid in full. . . .

The recently enacted Workers’ Compensation law provides that intervenors shall sign the stipulation, but goes no further. The new Rule here suggested is compatible with both previously effective Workers’ Compensation laws and the recently enacted legislation. It would permit effective handling of all cases involving settlements.

Blanchard v. Pearson Candy Co., No. 330-20-3537, slip op. at 5-6 (Minn. Workers’ Comp. Ct. App. Aug. 21, 1979) (dictum). The amended statute does not, however, provide for placing upon intervenors the burden of proof in establishing good faith efforts to settle, nor does it provide remedial measures when intervenors attempt to wait out the other parties. Thus, it remains to be seen whether such a rule would be adopted, and if adopted, whether it would be upheld by the Minnesota Supreme Court.

37. See 278 N.W.2d at 314-15; note 30 supra and accompanying text.

38. In Repo v. Capitol Elevator Co., 312 Minn. 364, 252 N.W.2d 248 (1977), the Minnesota court upheld reimbursement for an intervening health insurer after it successfully proved in a separate proceeding that the injury was work related. See id. at 367-70, 252 N.W.2d at 250-51. According to the Repo court, “[t]he employee can, of course, choose to settle without the sickness and accident insurer’s consent, but the insurer will then be entitled to full reimbursement from the proceeds of the settlement.” Id. at 369, 252 N.W.2d at 251.

The health insurers in Brooks argued that this language from Repo entitled them to automatic reimbursement when the employee settled the compensation claim. See Relator-Intervener’s Brief and Appendix (Brooks) at 7-8. Commenting on this language from Repo, the Brooks court stated:

Nor, as the language may arguably be understood, did we intend that if settlement is made without the health insurer’s agreement, where it has been given notice of the negotiations for settlement, participates in them and in the proceeding for approval, but adamantly refuses to agree to compromise its claim for full reimbursement or to agree to an approval of the settlement, that the health insurer should nevertheless be entitled to full reimbursement.

278 N.W.2d at 314-15. For a discussion of Repo, see notes 11, 18 supra.
the decision does not favor the worker. On the other hand, if the intervenor compels trial of the claim, the intervenor's gamble might result in a higher award for the worker and full-dollar reimbursement for the intervenor. Thus, without incurring attorney's fees, the intervenor, by refusing to settle, can force the employee to prove at trial the intervenor's claim that the injury was work related.

The real consequences of Brooks and the 1979 amendment are clear. Settlement of the claim by the worker constitutes an admission or irrebuttable presumption with respect to the health insurer that the injury was occupational in nature. In effect, intervenors are made necessary

39. The intervenor is entitled to reimbursement only "if there is a successful workers' compensation proceeding." Repo v. Capitol Elevator Co., 312 Minn. 364, 369, 252 N.W.2d 248, 251 (1977).

40. The Minnesota Supreme Court has recognized the possible unfairness of compelling an injured worker to try the claim. In Lang v. William Bros. Boiler & Mfg. Co., 250 Minn. 521, 85 N.W.2d 412 (1957), in which a workers' compensation insurer intervened in the employee's third-party tort action, the supreme court denied the insurer's right of subrogation to the employee's settlement award, stating:

The vice of preventing settlement at all without the consent of the employer or his insurer is that the employee may then be put in a position where, against his will, he must face the uncertainties of a trial. While both employer and employee face the risk that the result of the trial will not equal the amounts offered in settlement or the amount which must be paid in compensation, the employee's burden probably is greater than that of the employer in that ordinarily the employee has no great resources upon which to rely if the gamble of a trial fails, whereas the insurer not only has greater resources but the case as to it is only one of many.

Id. at 528, 85 N.W.2d at 418.

In Brooks, the Workers' Compensation Court of Appeals also recognized this potential for unfairness, emphasizing that intervening health insurers have no right to compel the injured worker to try the claim at the worker's own expense. According to the court of appeals:

[It is [intervenors'] obligation to submit proof of their claims and to also prove compensability of the employee's claim, and the liability of the respective parties. The employee cannot be forced to do this at the risk of loss of his case. As intervenors they have a right to proceed. They cannot expect somebody else to prove their claim for them.


41. Vetsch v. Schwan's Sales Enterprises, 283 N.W.2d 884, 887 (Minn. 1979). The employee in Vetsch had received more than $4500 in benefits from his health insurer, under an insurance policy that excluded injuries covered by any workers' compensation law. See id. at 885. Four months after his injury, the employee filed a claim for workers' compensation benefits. See id. Before approval of settlement of the compensation claim, the health insurer intervened seeking reimbursement. See id. at 886. The intervenor's claim was denied on the grounds that there was no evidence indicating that the claim "arose out of the course and scope of [the worker's] employment;" id., and the supreme court reversed. See id. at 885. Expressly relying on Brooks, the Vetsch court held that the intervenor became automatically entitled to full reimbursement once it was excluded from settlement negotiations and award proceedings. See id. at 886. According to the court, "it does not strain logic to consider that this election [to seek workers' compensation benefits]
parties to settlement negotiations and award proceedings. On the positive side, by compelling the parties to include the intervenor in settlement negotiations, the health insurer is less dependent on cooperation of the worker in a separate proceeding and the likelihood of expensive investigations into the work-related nature of the injury is diminished. Compromise is encouraged when the work-related nature of an injury is uncertain and the likelihood of double recovery is diminished. Because of the greater certainty of reimbursement for health insurers, immediate payment of medical and hospital bills is encouraged. Finally, by the employee constitutes an admission or irrebuttable presumption, with respect to the health insurer only, that the injury was occupational in nature.”

The Vetsch court did not discuss the possibility of an intervenor’s unreasonable refusal to settle because the issue was not presented to the court and because the holding in Vetsch was expressly predicated upon the earlier decision in Brooks. See id. at 886. Similarly, the Vetsch court did not consider the effect of the 1979 amendment, because the decision was rendered before the effective date of the amendment. Compare id. at 884 (decision rendered on July 6, 1979) with Act of June 7, 1979, ch. 3, § 71, 1979 Minn. Laws Ex. Sess. 1256, 1297 (no effective date provided for section 60) and MINN. STAT. § 645.02 (1978) (each act becomes effective on August 1 next following enactment unless different date specified in act).

42. Cf. Vetsch v. Schwan’s Sales Enterprises, 283 N.W.2d 884, 886 (Minn. 1979) (“Once [the intervenor] was excluded from these [negotiation and award] proceedings, it became automatically entitled, under Brooks, to full reimbursement of the costs incurred on behalf of the employee.”); Brooks v. A.M.F., Inc., 278 N.W.2d at 316 (“It is hoped that our holding will motivate the employer-insurer and the employee to include the intervenor in all settlement negotiations, knowing that the intervenor may be fully reimbursed if excluded.”).

43. The Brooks court recognized that under pre-Brooks law, health insurers were dependent upon the worker’s cooperation. See 278 N.W.2d at 315 (“Realistically, the employee, who has already received benefits from both the health insurer and workers’ compensation, may have little reason to cooperate with the health insurer in proving that his injury was work related.”).

44. See id.

45. See id.

46. See id.; note 26 supra and accompanying text.

47. The intervenor in Brooks argued that health insurance benefits might be withheld in a doubtful case until the issue of whether the injury was work related had been determined. See Relator-Intervenor’s Brief and Appendix (Brooks) at 11. Recognizing the possible creation of an advantage for intervenors by its decision, the Brooks court stated that “health insurers are encouraged to continue to promptly pay doubtful claims.” 278 N.W.2d at 316; accord, Lemmer v. Batzli Elec. Co., 267 Minn. 8, 19, 125 N.W.2d 434, 441 (1963).

A 1979 amendment to the workers’ compensation law resolves the problem by requiring health insurers to make immediate payment of medical benefits, even though the injury may be work related. See Act of June 7, 1979, ch. 3, § 52, 1979 Minn. Laws Ex. Sess. 1256, 1290-91 (amending MINN. STAT. § 176.191(3) (1978)).

If a health insurer does not make immediate payment of health insurance benefits, and such benefits are wrongfully withheld, the health insurer may risk liability for punitive damages. See Bradt, Third Party Actions, in WORKERS’ COMPENSATION SKILLS AND PRACTICE 81 (Minn. Continuing Legal Education 1979); cf. MINN. STAT. § 549.20(1)
the burden of economic loss from work-related injury is shifted out of the private insurance sector and back into industry.48

*Brooks* and the 1979 amendment may also adversely affect the interests of workers. Because the intervenor will be reimbursed, a higher settlement will be required for the worker to receive the same benefit that might have been available under pre-*Brooks* law. A worker may be hesitant to settle if a substantial portion of the settlement offer goes to the intervenor. This effect directly contravenes the judicial policy of encouraging out-of-court settlements.49 Further, once the injured worker has received health insurance benefits, if the potential workers' compensation award does not exceed the health insurer's reimbursement, the worker might be discouraged from filing a claim. The intervenor would then be relegated to proving that the injury was work related in a separate court proceeding.50 Health insurers would again face the pre-*Brooks* dilemma; many small claims are not worth litigating in a separate court proceeding. The effect of this would be to remove the burden of economic loss caused by work-related injury from industry and place it upon the worker and private health insurer, an effect that the *Brooks* procedure was specifically designed to prevent.51

With respect to compensation carriers, the effect of *Brooks* and the 1979 amendment may be to distort the industrial burden of paying for work-related injury. To the extent injured employees must now seek higher awards,52 industry will be paying larger awards than under pre-*Brooks* law. If a large potential for reimbursement to health insurers dissuades injured workers from pursuing their compensation claims,53 industry will, in effect, receive a windfall advantage by not paying otherwise valid claims. Finally, because settlements can be obtained only with the permission of the intervening health insurer,54 compensation carriers will have less freedom to choose whether to settle a claim.

The Legislature's amendment was made with undue haste. The dust of *Brooks* had not yet settled and the full impact of the decision, as it affects compensation settlements, was not given time to be appreciated.55 While the amendment codifies the *Brooks* result in many respects, it does

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48. *Cf.* 278 N.W.2d at 315 (basic principle of workers' compensation is to place burden of loss on industry).

49. *See generally* note 28 *supra* and accompanying text.

50. *Cf.* MINN. STAT. § 555.02 (1978) (Minnesota's Uniform Declaratory Judgments Act permits any interested party to a written contract to seek declaratory relief determining rights or other legal relations under the contract.).

51. *See* 278 N.W.2d at 315.

52. *See* text accompanying note 49 *supra*.

53. *See* notes 49-51 *supra* and accompanying text.

54. *See* note 35 *supra* and accompanying text.

55. *Brooks* was decided on March 30, 1979. *See* 278 N.W.2d at 310. Less than three
not deal with the possibility of unreasonable refusal to settle. Perhaps the Legislature will find it prudent to evaluate the impact of Brooks and the 1979 amendment in the future. An alternative is needed to restore the balance that Brooks attempted to strike. A practical solution would be for the Legislature to devise a means by which the reasonableness of a settlement offer to an intervenor could be determined. Such a mecha-

months later, on June 7, the Legislature's amendment was approved. See Act of June 7, 1979, ch. 3, § 60, 1979 Minn. Laws Ex. Sess. 1256, 1295.

The provision requiring intervenors to sign the settlement agreement before it could be validated by the Workers' Compensation Division was inserted on April 16, 1979, as an amendment to S.F. 1047, 71st Minn. Legis., 1st Sess. (1979). See Minn. S. Jour. 890-91 (1979). This bill, as amended, was passed by the Senate on April 26. See Minn. S. Jour. 1314 (1979).

On May 16, the House of Representatives deleted the amendment from S.F. 1047, and then passed the bill. See Minn. H.R. Jour. 2486-88 (1979).

The Senate's version of a comprehensive workers' compensation bill, S.F. 917, 71st Minn. Legis., 1st Sess. (1979), was also amended to require that intervenors sign a settlement agreement before it could be validated by the Workers' Compensation Division. See Minn. S. Jour. 901, 911 (1979). S.F. 917, as amended, was passed by the Senate on May 17. See Minn. S. Jour. 2566-67 (1979).


The Conference Committee retained the intervenor signature provision, which was approved by the Senate on May 21. See Minn. S. Jour. 3555 (1979). The House of Representatives failed to vote on the bill during the 1979 regular session. Both the Senate and the House approved the Conference Committee version, S.F. 1, 71st Minn. Legis., Ex. Sess. (1979), on May 24. See Minn. S. Jour. 3590 (1979); Minn. H.R. Jour. 27-28 (Ex. Sess. 1979).

56. The Brooks court apparently envisioned the possibility of having the Workers' Compensation Division determine what amount the intervenor should be reimbursed. See 278 N.W.2d at 316 n.4 ("It is conceivable that the parties participating in the approval proceedings could agree that the approving officer determine the issue of the amount of the intervenor's reimbursement conclusively or subject to further review by the court of appeals.").

One commentator had proposed a solution to the problems faced by intervenors before Brooks was decided. See Bradt, supra note 47, at 84-85. Mr. Bradt notes that "the intervenor should not be allowed, by its refusal to acquiesce, to prevent a compromise settlement by the employee." Id. at 85. He proposes the following solution:

Where the intervenor refuses to acquiesce and accept a compromise of its own claims, the judge to whom the Stipulation for Settlement is submitted for approval should determine the percentage of the employee's total claim represented by the settlement, and award to the intervenor from such settlement a percentage of intervenor's claim proportionate to that received by the employee. Id. Under this proposal, an intervenor does not become entitled automatically to full reimbursement when the worker and the compensation carrier settle a claim. Instead, if a worker has a claim reasonably worth $10,000, and settles the claim for 70% of that amount, or $7,000, the intervening health insurer will be entitled to reimbursement of 70% of the amount it previously paid under its health insurance policy.

This solution would apply only when the intervening health insurer unreasonably
nism could be used to prevent intervenors from receiving undue benefits because of their unreasonable refusal to settle a workers' compensation claim.

Brooks represents a trend, culminated by the 1979 amendment, that has markedly increased the protection accorded health insurers who intervene in workers' compensation proceedings. Whether intervenors have been overprotected at the expense of the worker and the compensation carrier is a matter still to be resolved. It will be important for future legislation and judicial decisions to make certain that intervenors' newly established rights are exercised with restraint.

refuses to settle the claim. See id. Partial reimbursement for the health insurer seems justifiable under the theory that a settlement does not establish liability under workers' compensation law. See, e.g., 278 N.W.2d at 311 ("In the stipulation, each of the employers denied primary liability, and Brooks expressly acknowledged that the injury complained of did not arise in the course of his employment."). But see Vetsch v. Schwan's Sales Enterprises, 283 N.W.2d 884, 887 (Minn. 1979) ("[I]t does not strain logic to consider that this election [to settle] by the employee constitutes an admission or irrebuttable presumption, with respect to the health insurer only, that the injury was occupational in nature.").

California has adopted a solution to this problem that is similar to that envisioned by Mr. William Bradt. Compare CAL. LAB. CODE § 4903.1(c) (West Cum. Supp. 1979) with Bradt, supra note 47, at 85. In a 1974 decision, the California Supreme Court ruled that the Workmen's Compensation Appeals Board had no authority to reduce a hospital's lien against a compensation award after the award had been settled out of court. See Kaiser Foundation Hosps. v. Workmen's Compensation Appeals Bd., 13 Cal. 3d 20, 21, 528 P.2d 766, 767, 117 Cal. Rptr. 678, 679 (1974). Perhaps in response to Kaiser, California now has a statute permitting a workers' compensation referee to reduce lien claims on a pro rata basis, if the lien claimant refuses to agree to the out-of-court settlement. CAL. LAB. CODE § 4903.1(c) (West Cum. Supp. 1979) provides:

When the parties propose that the case be disposed of by way of a compromise and release agreement, in the event the lien claimant [health insurer] does not agree to the amount allocated to it, then the referee shall determine the potential recovery and reduce the amount of the lien [against the employee's recovery] in the ratio of the applicant's recovery to the potential recovery in full satisfaction of its lien claim.

Pennsylvania law permits health insurers to be subrogated to compensation awards, if this right is agreed upon by the parties, or established at a hearing before the workers' compensation board. See PA. STAT. ANN. tit. 77, § 671 (Purdon Cum. Supp. 1979-1980).