1980

Workers' Compensation Amendments of the 1979 Minnesota Legislature

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WORKERS' COMPENSATION AMENDMENTS OF THE 1979 MINNESOTA LEGISLATURE

by JAY Y. BenANAV†

The Minnesota workers' compensation statute was amended extensively during the 1979 extra session. The reform was undertaken both to solve specific problems created by the former law and to formulate answers for problems that were not addressed by the former law. In this Article, Mr. BenAnav provides a detailed outline of the major provisions of the 1979 Workers' Compensation Act and a synopsis of other workers' compensation legislation enacted during the 1979 session. Mr. BenAnav discusses the effect of the new laws on previous case law and offers his views regarding future ramifications of the legislation.

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I. INTRODUCTION

The 1979 Minnesota Legislature enacted what many consider to be the most beneficial reform of the workers' compensation law since 1913. The legislation was based on the report of the Work-

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2. The first such workers' compensation law was enacted in 1913. See Act of Apr. 24, 1913, ch. 467, 1913 Minn. Laws 675. The 1913 law was divided into two major parts. The first part modified the common-law principles as applicable to employers and employees who did not elect to be covered by the Act. See id. §§ 1-7. The second part consisted of an elective compensation scheme. See id. §§ 8-36. In 1921 the Legislature essentially reenacted the provisions of the 1913 Act with noticeable expansion of the schedule of compensation and of procedural requirements. See Act of Mar. 15, 1921, ch. 82, 1921 Minn. Laws 90. The elective portion of the 1921 Act was abolished in 1937 and coverage under the workers' compensation act became compulsory. See Act of Mar. 12,
ers' Compensation Study Commission, which contained fifty-seven recommendations for revision of the workers' compensation statute.

The 1979 Act contains a multitude of provisions that will have a significant impact in numerous areas of the workers' compensation field. Some of the provisions overturn judicial case law, while others reverse in full or in part prior legislation. Still others address issues that have surfaced only during the last few years. The intended purpose of the changes is quite clear: "[T]o improve the system of providing workers' compensation insurance at fair and reasonable rates to employers within the state." Whether or not this purpose has actually been achieved will not be immediately apparent, and there is no doubt that given its major changes, the statute will require some fine tuning during the next few years in order to achieve its stated purpose.

What follows is an analysis of the major provisions of the omnibus Workers' Compensation Act. In addition, other important workers' compensation legislation enacted separately during the 1979 legislative session is considered.

II. REHABILITATION

A great deal of concern regarding vocational rehabilitation and retraining of injured employees was evident during hearings on the

1937, ch. 64, § 1, 1937 Minn. Laws 109. In 1953 the Legislature undertook a revision of the workers' compensation law, but few changes of major significance were made. See Act of Apr. 24, 1953, ch. 755, 1953 Minn. Laws 1099.

3. The Workers' Compensation Study Commission (hereinafter Study Commission) was created in 1977. See Act of May 27, 1977, ch. 342, § 27, 1977 Minn. Laws 697, 714. The task of the Study Commission, as defined by the Legislature, was to study and report on:

- the procedure by which workers' compensation insurance premium rates are established;
- the level of Minnesota workers' compensation premiums as compared to premium levels in other jurisdictions;
- the various methods of providing workers' compensation insurance to employers in other jurisdictions; and
- the administration of the law by the department of labor and industry and workers' compensation court of appeals.

Id.


1979 Act. It was almost unanimously agreed that the success of a workers' compensation system was dependent upon assuring that a severely injured employee be retrained as quickly as possible in a field in which the employee could return to gainful employment. However, that is where the agreement ended. Employer and insurer representatives contended that vocational rehabilitation had been a failure and had cost more money than it had saved. This, they argued, was the result of a number of factors. One alleged shortcoming of the rehabilitation system was the allegation that some employees were being retrained for positions beyond their capability or for which no jobs were available. It was argued that the division of vocational rehabilitation did not place enough emphasis in on-the-job training programs and gave little or no consideration to retraining an employee in a field related to the employee's previous occupation or in a field that would produce a similar economic status. Rather, employers and insurers contended that most employees were being retrained in occupations that were likely to produce economic status far above that held by the employee prior to the injury. The division of vocational rehabilitation countered with the argument that it was their responsibility and duty to rehabilitate the employee to the highest possible level that the employee was capable of achieving even if it meant retraining in a field that would result in a much higher economic status than the employee had at the time of the accident. The most scathing criticism, however, was reserved for the compensation an employee was eligible to receive during the period of retraining. Commonly known as the "double dip," this compensation was equal to twice the employee's regular rate for temporary total compensation as well as expenses for tuition, books, and "any other expense determined as reasonably necessary to restore former earning capacity . . . ." Moreover, this level of

6. MINN. STAT. § 176.101(7) (1978); see Nelson v. National Biscuit Co., 300 Minn. 46, 217 N.W.2d 734 (1974). In Nelson the supreme court interpreted the language of section 176.101, subdivision 7 of the 1974 Minnesota Statutes to allow for concurrent payment of retraining and disability benefits. In its holding, the court looked to Vreeman v. Kahler Corp., 23 Minn. Workmen's Comp. Dec. 1 (1963), a case that was not appealed to the supreme court. In Vreeman the workers' compensation commission interpreted section 176.101, subdivision 3(45) of the 1953 Minnesota Statutes, the predecessor of section 176.101, subdivision 7. That section provided in part that "[i]n addition to the compensation provided in this chapter, the compensation during the period of retraining . . . shall be 661/2 percent of the daily wage . . . at the time of the injury." Act of Apr. 24, 1953, ch. 755, § 10, 1953 Minn. Laws 1099, 1113. The commission held that the words "in addition to" and its belief that retraining benefits were intended to encourage retraining allowed
compensation could be paid for as long as 156 weeks. Critics of this system were of the opinion that some employees entered retraining programs not because they had any interest in returning to work or because they were interested in the field in which they were being retrained, but simply to receive this "double dip," which in many cases resulted in benefits far exceeding the employee's income prior to the disability.

The 1979 Act directly addresses the concerns raised. First, the statute now provides that "[v]ocational rehabilitation shall train an employee so he may be returned to a job related to his former employment or to a job in another work area which produces an economic status as close as possible to that he would have enjoyed without disability." In order to allow a certain amount of flexibility, however, the statute also permits retraining to a job with a higher economic status "if it can be demonstrated that this rehabilitation is necessary to increase the likelihood of reemployment."

Second, the responsibility for supervising the rehabilitation of an employee is transferred from the division of vocational rehabilitation to the Department of Labor and Industry.

Third, the statute states that the employer must provide rehabilit-

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10. Id.
11. See id., 1979 Minn. Ex. Sess. at 1279 (codified at MINN. STAT. § 176.102(2) (Supp. 1979)).
itation consultation for the employee within thirty days from the
time medical information is received showing that the employee
will not be able to return to the job held at the time of the injury.\textsuperscript{12}
The consultation is to be done by a person or by a public or pri-
vate institution approved by the Commissioner.\textsuperscript{13} However, the
employee retains the final decision as to which agency is to be con-
sulted.\textsuperscript{14} If the employer or insurer fails to provide rehabilitation
consultation, the commission must notify the employer/insurer
that if they fail to provide such consultation within fifteen days,
the division of vocational rehabilitation will be authorized to do
so.\textsuperscript{15}

If, upon consultation, it is determined that vocational rehabili-
tation will "significantly reduce or eliminate the decrease in em-
ployability, the employer or insurer in conjunction with the
rehabilitation consultant shall submit a specific plan of rehabilita-
tion to the commissioner."\textsuperscript{16} Factors to be included in the develop-
ment of a plan include "the employee's age, education, previous
work history, interests and skills."\textsuperscript{17} Also, consideration is to be
given to on-the-job training in cases in which it would produce an
economic status similar to that of the employee's at the time of the
accident.\textsuperscript{18}

Fourth, the actual rehabilitation plan is subject to approval or
rejection by the Commissioner of Labor and Industry.\textsuperscript{19} In in-
stances in which the employee or employer/insurer disagree with
the Commissioner's decision, an appeal to a rehabilitation review
panel is permitted.\textsuperscript{20} The panel is comprised of the Commissioner
of Labor and Industry, who serves as an ex officio member, two
representatives of labor, two representatives of employers, two rep-
resentatives of insurers, two vocational rehabilitation representa-
tives, two representing the medical profession, and one
representing chiropractors.\textsuperscript{21} The panel may approve or reject the

\begin{footnotes}
\footnote{12. See id. (codified at \textsc{Minn. Stat.} § 176.102(4) (Supp. 1979)).}
\footnote{13. See id.}
\footnote{14. See id.}
\footnote{15. See id.}
\footnote{16. Id.}
\footnote{17. Id.}
\footnote{18. See id., 1979 Minn. Laws Ex. Sess. at 1280 (codified at \textsc{Minn. Stat.} § 176.102(5)
(Supp. 1979)).}
\footnote{19. See id. (codified at \textsc{Minn. Stat.} § 176.102(6) (Supp. 1979)).}
\footnote{20. See id.}
\footnote{21. See id., 1979 Minn. Laws Ex. Sess. at 1279 (codified at \textsc{Minn. Stat.} § 176.102(3)
(Supp. 1979)).}
\end{footnotes}
Commissioner's decision and may formulate its own rehabilitation plan.  

Finally, the so-called “double dip” is repealed and replaced with a section providing that, during the period of retraining, compensation shall be in an amount equal to 125% of the employee’s rate for temporary total disability. Also, the employer/insurer is liable for the reasonable cost of tuition, books, and travel, and for the reasonable cost of board and lodging if the rehabilitation requires the employee to take up residence elsewhere. In an attempt to assure that no additional compensation is paid during this time, the statute explicitly states that “[t]his payment is in lieu of payment for temporary total, temporary partial, or permanent total disability to which the employee might otherwise be entitled for this period . . . .”

While this change in compensation during the period of rehabilitation may at first glance appear to reduce substantially the cost of rehabilitation, such may not be the case. The “double dip,” while it resulted in double compensation for some employees, was not awarded to all employees in a rehabilitation program. Rather, its use was left to the discretion of the compensation judge. According to the Workers’ Compensation Insurers Rating Association of Minnesota (Rating Association), 180 of the 601 employees in a rehabilitation program received the “double dip” during 1978. In contrast to this statistic, the recently-enacted statute

22. See id., 1979 Minn. Laws Ex. Sess. at 1280 (codified at MINN. STAT. § 176.102(6) (Supp. 1979)).

23. See id. § 70, 1979 Minn. Laws Ex. Sess. at 1297 (repealing section 176.101, subdivision 7 of the 1978 Minnesota Statutes, which controlled the amount of compensation to be paid during retraining as well as the other aspects of retraining).

24. See id. § 36, 1979 Minn. Laws Ex. Sess. at 1281 (codified at MINN. STAT. § 176.102(11) (Supp. 1979)).

25. See note 6 supra (discussing the supreme court's holding regarding concurrent rehabilitation payments).


27. The rating association, formerly known as the Workers’ Compensation Bureau, received its current title in 1979. See id. § 1, 1979 Minn. Laws Ex. Sess. at 1256 (amending MINN. STAT. § 79.01(6) (1978)). The association, which is a private entity composed of all workers’ compensation insurers in the state, was created to “assist the commissioner [of insurance] and insurers in approving rates, determining hazards and other material facts in connection with compensation risks . . . .” MINN. STAT. § 79.11(2) (1978).

provides that 125% of the otherwise payable compensation shall be paid to all employees in a program of vocational rehabilitation. The Rating Association has estimated that this change would save $232,761, not a large savings in a system that collected $384,000,000 in premiums during 1978 and anticipated premiums of $500,000,000 in 1980.

Compensation during the period of retraining that involves on-the-job training is somewhat different from the 125% described above. The employee is to receive compensation in an amount equal to his after-tax wage at the time of the injury. The compensation is to be paid in part by the insurer with the amount that the insurer is liable for to be determined by the rehabilitation plan. In cases in which the insurer is paying only part of the compensation, the on-the-job employer is required to pay the difference up to the employee's after-tax wage at the time of the injury, but in no case will the employer be required to pay more than the prevailing wage for the job. In fact, the Legislature expressly provided that an incentive should be created to induce employers to take on injured employees by authorizing the rehabilitation plan to allow the employer to pay less than the prevailing wage for the job. Also, by providing that the compensation due an employee who aggravates an injury for which he is in an on-the-job training program is not the responsibility of the on-the-job employer, the Legislature has attempted to eliminate the fear expressed by some employers that they will be held liable for an injury that existed prior to beginning the on-the-job training and which is not one of the specified conditions that may be listed with the special fund. Since an employer is currently liable for the entire compensation due an employee as a result of a work-related injury, even if the employee has a preexisting disability not attributable to

29. See id. at Minnesota Law Memo—Exhibit V-5.
31. See id.
32. See id.
33. See id.
34. See id. § 38, 1979 Minn. Laws Ex. Sess. at 1282 (codified at MINN. STAT. § 176.131(1a) (Supp. 1979)).
35. See note 83 infra.
the employer, the Legislature enacted this section.

III. VESTING OF BENEFITS

Prior to 1975, workers' compensation benefits that accrued to an employee but which were not paid to the employee prior to the employee's death, were payable to the dependents or heirs of the employee. In 1975, however, the Legislature repealed the statutory language that provided for such payment of accrued benefits. The statute was amended once again in 1977 to provide that under limited circumstances accrued benefits shall be paid to an employee's dependents or heirs following the death of the employee. The 1977 amendment provided that if the employee's death was not compensable under the workers' compensation law, permanent partial disability compensation that had not been paid to the employee prior to his death would be paid to the dependents or heirs of the employee.

36. See Vanda v. Minnesota Mining & Mfg. Co., 300 Minn. 515, 218 N.W.2d 458 (1974), in which the court reiterated its longstanding rule "that when the usual tasks ordinary to an employee's work substantially aggravate, accelerate, or combine with a preexisting disease or latent condition to produce a disability, the entire disability is compensable, no apportionment being made on the basis of relative causal contribution of the preexisting condition and the work activities." Id. at 516, 218 N.W.2d at 458. See also Forseen v. Tire Retread Co., 271 Minn. 399, 136 N.W.2d 75 (1965); Larson v. Davidson-Boutell Co., 258 Minn. 64, 102 N.W.2d 712 (1960); Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200 (1960). In Wallace v. Hanson Silo Co., 305 Minn. 395, 235 N.W.2d 363 (1975), the court continued to adhere "to the rule that we will not apportion disabilities in the absence of statutory authority, but we deem it appropriate to call to the attention of the legislature what may be a highly inequitable omission from the statute." Id. at 396, 235 N.W.2d at 364. The court concluded by stating "Where ... a work-related injury has aggravated a preexisting condition, we are of the opinion that it is unjust to burden the employer with the responsibility for that part of the disability which was not work related." Id. at 397, 235 N.W.2d at 364.

Section 28 of chapter 3 does not completely address the issue of apportionment since it only applies to employees who aggravate an injury while in an on-the-job program. The injury of an employee who aggravates a preexisting injury in any other work situation will still be the full responsibility of the employer, unless the injury is one which is registerable under the special fund. See note 83 infra. The Legislature considered, but did not enact, a bill during the 1979 session that would have permitted apportionment of liability in all situations. See S.F. 915, 71st Minn. Legis., 1979 Ex. Sess.

37. The law provided that "[i]n case a worker sustains an injury arising out of and in the course of employment, and during the period of disability caused thereby death results ... accrued compensation due to the deceased prior to his death but not paid is payable to such dependent persons or legal heirs of the worker." See Act of June 2, 1967, ch. 40, § 10, 1967 Minn. Laws Ex. Sess. 2225, 2235 (repealed 1975).


dents or heirs of the employee. The statute did not include the right to receive any other compensation, such as temporary total, permanent total, or temporary partial compensation, following the death of the employee.

In *Lakics v. Lane Bryant Department Store*, the Minnesota Supreme Court was faced with deciding whether the compensation court properly awarded temporary total disability benefits to the brothers and sisters of an employee who died prior to collecting those benefits. The court ruled that "the compensation court had no authority to order payment of the compensation award to employee's brothers and sisters." The court concluded by declaring that "[i]n the light of this consequence, it seems to us that the legislature may wish to reexamine the wisdom of repealing Minn. St. 1974 § 176.101, Subd. 6."

The 1979 Legislature did in fact reconsider its earlier repeal of Minnesota Statutes section 176.101, subdivision 6; it amended the statute by providing that in addition to the vesting of permanent partial disability compensation, which it provided for in 1977, the right to receive temporary total, temporary partial, or permanent total disability compensation vests in the employee at the time the disability is ascertained and the right to receive such compensation shall belong to the dependents or heirs of the employee if the employee dies prior to receiving the compensation. The same amendment removed language from the statute providing that only "[i]n the event that an employee's death is not compensable under this chapter [the workers' compensation statute]" do the benefits vest. While the effect of this change is far from cer-

40. See id. This amendment specifically limited the vesting of permanent partial benefits to situations in which the death of the employee was not compensable under the workers' compensation statute in an effort to prevent a double compensation payment. If such a limitation did not exist, it might be possible for the dependent of a deceased employee to collect accrued but not paid permanent partial benefits as well as death benefits under section 176.111 of the Minnesota Statutes. However, if an employee's death was not work related and therefore not compensable under section 176.111, the Legislature clearly intended to allow accrued permanent partial compensation to be paid to the dependent or the heir.

41. 263 N.W.2d 608 (Minn. 1978).
42. Id. at 609.
43. Id. at 610.
44. See Act of May 27, 1977, ch. 342, § 4, 1977 Minn. Laws 697, 699 (amending MINN. STAT. § 176.021(3) (1976)).
46. Id.
tain, it may result in the payment of a double award. In repealing this language, the Legislature was attempting to address the problems arising from the fact that some insurers were delaying in making the compensation payments due a severely injured employee. If the delay was long enough and the employee was injured so severely that death from the injury resulted prior to receipt of the compensation, the dependents of the employee would not be entitled to both the compensation for the injury and for the death but only for the death, thereby resulting in a savings for the insurer. Even if an insurer had no intention of denying an employee’s permanent partial disability benefits and simply mailed a check to the employee for the permanent partial disability while the employee was still alive, the dependent would not be entitled to the permanent partial disability compensation if the employee died from the injury prior to receiving the check. Had the check been mailed a few days earlier and cashed by the injured employee who then died, the dependents would have the permanent partial compensation and be entitled to death benefits. Therefore, in order to negate the effect of fortuitous events, the Legislature made the necessary change.

IV. COMMENCEMENT OF PAYMENT FOR PERMANENT PARTIAL DISABILITY

An amendment that may prove to be of little significance, despite the belief on the part of many legislators that it will have a major impact, concerns the time at which permanent partial compensation is payable. This amendment provides that in cases in which an employee returns to work prior to four weeks from the date of the injury, permanent partial compensation shall be made in a lump sum upon the employee’s return to work. When the employee does not return to work within four weeks of the injury, payment of permanent partial compensation is to be made in increments of twenty-five percent of the compensation due at four week intervals until the entire amount due is paid sixteen weeks from the date of the injury. As originally introduced, the legislation provided that permanent partial compensation was to be deferred completely until the employee’s return to work and

47. See note 40 supra.
cessation of payments for temporary total disability. This earlier version was predicated on the concern on the part of many legislators that the statutory directive that permitted the payment of temporary total disability compensation concurrently with compensation for permanent partial disability was creating a disincentive to return to work. They reasoned that if permanent partial compensation was delayed until an employee returned to work, the employee would make every effort to work in order to collect the permanent partial compensation to which he was entitled. This concept of prohibiting concurrent payment of compensation would have been a reversion to the status of the law as it existed prior to 1974.

The amendment, as adopted, will not create an incentive to return to work in most cases. Since the employee knows he will receive the full amount of permanent partial compensation within four months even if he does not return to work, the employee who was content not to return to work under the old law, which permitted concurrent payment from the outset, will most likely be content to stay home under the new law. A delay of such short duration does not appear to be an overwhelming incentive to return to work since the employee, in all likelihood, would continue to receive temporary total compensation for sixteen weeks prior to the time the full permanent partial compensation is paid.

In addition, an employee who suffers an injury that results in a permanent partial disability will most likely not have recovered sufficiently to return to work within four weeks after the accident and probably not even after sixteen weeks from the accident.

49. See S.F. 917, § 10, 71st Minn. Legis., 1979 Sess.
50. See Study Comm'n, supra note 4, at 16-17.
51. See, e.g., Pramschiefer v. Windom Hosp., 297 Minn. 212, 211 N.W.2d 365 (1973). In Pramschiefer the court, in interpreting Minn. Stat. § 176.021(3), held that "[s]ince temporary total disability is . . . for loss of earnings, simultaneous payments for permanent partial disability and for temporary total disability constitute double payments for lost earnings." 297 Minn. at 215, 211 N.W.2d at 368. The court went on to hold that "the legislature did not intend that benefits should be paid simultaneously because that would result in double payments." Id. The court concluded that "permanent partial disability payments should await the cessation of payments for temporary total disability." Id.

In response to Pramschiefer, the Legislature amended the statute to provide that "[c]ompensation for permanent partial disability is payable concurrently and in addition to compensation for temporary total disability . . . and such compensation for permanent partial disability shall not be deferred pending completion of payment for temporary disability or permanent total disability . . . ." Act of Apr. 12, 1974, ch. 486, § 1, 1974 Minn. Laws 1230, 1231.
Since a permanent partial disability results from a rather serious accident, and often results in the loss of a member, the healing period is generally longer than sixteen weeks. Therefore, even if the employee wanted to receive the full permanent partial compensation prior to sixteen weeks from the accident by returning to work, he would not be able to do so.

Finally, the extent of an employee's permanent partial disability is often not ascertainable within sixteen weeks following an accident. It would, therefore, be difficult to calculate the permanent partial compensation one would be entitled to within the sixteen weeks following the accident. Thus, the statutory directive to pay one-fourth of the compensation due at four week intervals appears somewhat unrealistic.

V. Recovery of Mistaken Payments

Prior to 1974, disability compensation that was mistakenly paid to an employee was fully recoverable by the insurer under common-law principles. At times an insurer would seek to attach the wages of the employee to whom the compensation had been paid until full recovery was made, or if the employee was still receiving compensation for an injury, the insurer would reduce or cease the payments until the excess compensation was fully recovered. A 1974 enactment provided that no disability compensation that was voluntarily paid to an employee in apparent accord with the workers' compensation statute and accepted in good faith could be recovered by the insurer.52

In what may be considered a balanced approach to the pre and post-1974 position, the 1979 Legislature amended the statute to provide that under certain circumstances, and in a limited amount, mistakenly paid compensation is recoverable by the insurer.53 The amendment limits recovery to instances in which the employee is continuing to receive compensation for the same injury for which the mistaken compensation was paid. It further limits the amount that the insurer may recover to twenty percent of the weekly benefits being received by the employee. The purpose behind the twenty-percent limitation is simply to assure that

the injured employee is left with an amount sufficient to meet personal expenses.

VI. PRESUMPTION OF DEPENDENCY

Since 1915 a widow has been conclusively presumed to be wholly dependent on her husband unless it was shown that she was voluntarily living apart from her husband at the time of his injury or death.54 Thus, a wife who lived with her husband was automatically entitled to death benefits upon the death of her husband resulting from an industrial accident.55 However, no such conclusive presumption existed for husbands. In order to collect death benefits for the death of his wife due to an industrial accident, a husband was required to prove the extent of his dependency upon his wife at the time of her death. It appeared to many that this unequal treatment of spouses was a constitutional violation.56 As a result of this concern, the Legislature amended the statute by providing that any spouse, male or female, is conclusively presumed wholly dependent unless the spouse and decedent were voluntarily living apart at the time of injury or death.57

While the impact of this amendment may not immediately be felt, concern has been expressed regarding its future impact. The Department of Labor and Industry currently estimates that women suffer less than one percent of all industrial-related deaths.


55. The amount to which a dependent spouse is entitled varies. If the deceased employee leaves a dependent spouse and no dependent children, the death benefit is 50% of the employee's wage at the time of injury. See MINN. STAT. § 176.111(6) (1978 & Supp. 1979). The benefit is increased to 60% of the wage if there is a spouse and one dependent child, see id. § 176.111(7), and to 66⅔% of the wage if the deceased employee left a dependent spouse and two dependent children. See id. § 176.111(8).

56. See STUDY COMM’N, supra note 4, at 20 (Recommendation 10).


As initially introduced, and pursuant to the Study Commission recommendation, the legislation would have amended the conclusive presumption of dependency statute by providing a conclusive presumption of dependency for widowers while keeping the presumption for widows. Any similarity with the statute as passed ends here, however, since the initial legislation and Study Commission recommendation would have ended the conclusive presumption two years after the date of death at which time an offset for income earned would be applied. For every dollar earned, the Study Commission recommended that the death benefit be reduced by fifty cents until such time as the offset resulted in a cessation of benefits. STUDY COMM’N, supra note 4, at 20-21 (Recommendation 10); see S.F. 917, § 18, 71st Minn. Legis., 1979 Sess.
Therefore, even if husbands are conclusively presumed dependent, the cost to insurers in the near future may not be very large. With the rapid entry of women into the job market, however, including entry into the more hazardous occupations, the potential for many more women being killed in industrial accidents is apparent. Every husband of a woman who is killed on the job will now receive death benefits for the rest of his life or until remarriage just as every wife has been doing in the past.

The only other conclusive dependency presumption that existed prior to the most recent legislation was one for children under eighteen years of age or a child under the age of twenty-one who was a full-time student. In an attempt to address developments in recent years that have made it necessary in many cases to continue one's education for a longer period than was once contemplated, the Legislature extended the conclusive presumption of dependency for full-time students to age twenty-five.

VII. OCCUPATIONAL DISEASE PREJUMPION

Contrary to the Study Commission's recommendation urging the repeal of the statutory presumption for certain occupational diseases as applied to peace officers, conservation officers, and others, the Legislature expanded the application of the presumption. As a result, forest officers employed by the Department of Natural Resources are covered by the presumption. This amendment, however, will not result in any major change, given the ease with which the presumption may be rebutted. The Minnesota Supreme Court on numerous occasions has held that the presumption is simply a rule of law that should be used in dictating a decision unless rebutted by the introduction of opposing facts. Following the introduction of opposing evidence, the employee

60. Study Comm'n, supra note 4, at 20 (Recommendation 9).
63. See, e.g., Jerabek v. Teleprompter Corp., 255 N.W.2d 377 (Minn. 1977); Jensen v. City of Duluth, 269 Minn. 241, 130 N.W.2d 515 (1964); Ogren v. City of Duluth, 219 Minn. 555, 18 N.W.2d 535 (1945).
must prove the case in the usual manner.64

VIII. SUPPLEMENTARY BENEFITS

According to the workers' compensation law, an employee who has been temporarily totally disabled or permanently totally disabled for more than 104 weeks, or is totally disabled four years from the date of an injury even if that person has returned to work at some point and has not been totally disabled for 104 weeks, is eligible to receive supplementary benefits.65 These supplementary benefits are designed to assure that employees disabled for the requisite period receive a minimum level of compensation even if their regular compensation66 would not amount to the minimum.

The Legislature had amended the supplementary benefits provision three times since its enactment67 by increasing the minimum compensation an eligible employee is entitled to receive.68 The 1979 Legislature once again increased the supplementary compensation to sixty-five percent of the state average weekly wage.69

IX. MEDICAL

A. Second Surgical Opinion

Second surgical opinions to confirm the advisability of elective

64. See Jerabek v. Teleprompter Corp., 255 N.W.2d 377, 380 (Minn. 1977) (when substantial evidence is introduced rebutting presumption, "presumption should properly have disappeared"). For a discussion of occupational disease, see Kirwin, Compensation for Disease Under the Minnesota Workers' Compensation Law, 6 WM. MITCHELL L. REV. 619 (1980).


66. Compensation is provided in cases of temporary total disability, temporary partial disability, permanent partial disability, and permanent total disability in an amount equal to two-thirds of the employee's wage at the time of injury, subject to a maximum of the state average weekly wage for the period ending December 31 of the preceding year. See MINN. STAT. § 176.101(1)-(4) (1978).


68. In 1974 the supplementary compensation was increased from $60 to $70 per week. See Act of Apr. 10, 1974, ch. 431, § 1, 1974 Minn. Laws 919, 919. In 1975 the dollar amount of $70 was replaced with a provision that guaranteed no less than 50% of the state average weekly wage to eligible employees. See Act of June 4, 1975, ch. 359, § 18, 1975 Minn. Laws 1168, 1185. This amount was subsequently increased to 60% of the state average weekly wage. See Act of May 27, 1977, ch. 342, § 17, 1977 Minn. Laws 697, 710.

surgical procedures have become common in the health insurance context as a means to avoid unnecessary elective surgery, defined generally as other than emergency surgery.\textsuperscript{70}

The workers' compensation system in Minnesota covered $43,277,348 in medical expenses in 1976, an increase of more than 260% over 1969.\textsuperscript{71} The contention was made during the deliberations on the 1979 Act that a mandatory second opinion program could realize considerable savings in this area and in indemnity benefits following operations, as well as preventing the unnecessary discomfort and pain associated with surgery. These contentions were persuasive enough to result in an amendment that requires an injured employee to obtain two surgical opinions concerning whether the surgery is reasonably required.\textsuperscript{72} If at least one of the opinions confirms the need for surgery, the surgery may be performed at the option of the employee and at the expense of the insurer. In cases in which the employee and employer agree that the second opinion is not necessary, or in the case of emergency surgery, the employee need not obtain such an opinion.\textsuperscript{73}

\textbf{B. Neutral Physician}

The 1979 Act also provides for the mandatory appointment of a neutral physician in cases in which an interested party requests such an appointment at least thirty days prior to a scheduled pre-hearing conference.\textsuperscript{74} Prior to the enactment of this provision, the statute permitted a workers' compensation judge to appoint a neutral physician on his own motion or on the motion of an interested party. The physician could render an opinion on the medical issues in a litigated workers' compensation claim, whether these issues related to causation or to the degree and character of the disability. The judge, however, was not required to appoint a neutral physician when an interested party requested; there was only an option to do so.\textsuperscript{75}

The impetus behind this change came from the Study Commis-
sion, which contended that the opinion of a neutral physician would provide a check on the inconsistency of medical testimony and a means to provide a resolution of genuinely disputed medical issues that are beyond the capacity of the court to resolve. According to the new statute, the selection of the neutral physician would be made from a list of neutral physicians developed by the Commissioner of Labor.

Opponents of this amendment contended that by making the appointment of a neutral physician mandatory in certain situations, the resolution of the disputed claim would be slowed down. Testimony heard by the legislative committees considering the new statute indicated that following the appointment of a neutral physician, the examination of an employee takes six to seven months, thereby delaying the case by at least that long. The opponents unsuccessfully argued that it would be better to leave the appointment to the judge’s discretion.

C. Medical Fee Review

With the soaring cost of medical treatment for injured employees, the Legislature determined there was a need for the existence of some control of medical fees. The Legislature therefore provided that the Commissioner of Labor and Industry shall promulgate rules for determining if a charge for health service is excessive. Upon adoption of these rules, the Commissioner is authorized to determine if a charge is excessive, and he may then limit payment to a reasonable charge for that service. Such a fee limitation for professional services has statutory precedent, as can be seen by the limitation of attorney’s fees in workers’ compensation cases.

76. See Study Comm’n, supra note 4, at 37-38, 243-44 (Recommendation 34).
78. See id. § 45, 1979 Minn. Laws Ex. Sess. at 1286 (codified at Minn. Stat. § 176.136 (Supp. 1979)).
79. See id.
80. Attorney's fees are limited to an amount of up to 25% of the first $4,000 of compensation and up to 20% of the next $20,000 [for a maximum of $5,000]. See Minn. Stat. § 176.081(1) (1978).
X. REGISTRATION OF PREEXISTING IMPAIRMENTS WITH THE SPECIAL FUND

The Minnesota Supreme Court has stated that "[i]t is undisputed that the historical purpose of the special fund as it has developed since 1913 is to encourage the employment of physically impaired persons by relieving employers of part of their liability for an aggravation of an employee's preexisting disability, due either to a prior industrial injury or otherwise . . . ." By registering the impairments listed in the statute prior to a work-related injury, an employer may be reimbursed from the special fund to the extent permitted by statute. Failure to preregister resulted in

82. Koski v. Erie Mining Co., 300 Minn. 1, 5-6, 223 N.W.2d 470, 473 (1973); see Haverland v. Twin Cities Milk Producers Ass'n, 273 Minn. 481, 489, 142 N.W.2d 274, 280 (1966); Beson v. Carleton College, 271 Minn. 268, 273, 136 N.W.2d 82, 86-87 (1965).
83. The list of registerable impairments is found in Minn. Stat. § 176.131(8) (1978 & Supp. 1979). That subdivision reads in part: "Physical impairment" means any physical or mental condition that is permanent in nature, whether congenital or due to injury, disease or surgery and which is or is likely to be a hinderance or obstacle to obtaining employment provided that, physical impairment as used herein is limited to the following:

(a) Epilepsy,
(b) Diabetes,
(c) Hemophilia,
(d) Cardiac disease,
(e) Partial or entire absence of thumb, finger, foot, arm or leg,
(f) Lack of sight in one or both eyes or vision in either eye not correctable to 20/40,
(g) Residual disability from poliomyelitis,
(h) Cerebral Palsy,
(i) Multiple Sclerosis,
(j) Parkinson's disease,
(k) Cerebral vascular accident,
(l) Chronic Osteomyelitis,
(m) Muscular Dystrophy,
(n) Thrombophlebitis,
(o) Any other physical impairment for which at least 50 weeks or more of weekly benefits would be payable as permanent partial disability if the physical impairment were evaluated according to standards used in workers' compensation proceedings, and
(p) Any other physical impairments of a permanent nature which the workers' compensation court of appeals may by rule prescribe . . . .

Id.

Pursuant to clause (p), the workers' compensation court of appeals has promulgated rules that permit the registration of additional impairments: "In addition to those impairments set forth in M.S. 176.131, Subd. 8, the following additional impairments shall be registerable: A. Brain tumors B. Pott's Disease C. Seizures D. Cancer of the Bone E. Leukemia." Minn. Work. Comp. Prac. R. 19(1).
84. See Minn. Stat. § 176.131(1) (1978 & Supp. 1979). This section provides for reimbursement from the special compensation fund if an impairment has been registered and the employee "suffers disability that is substantially greater, because of a pre-existing
an employer being fully liable for the injury. Concern was expressed throughout the Study Commission's hearings and report that the requirement of preregistration was confusing and not known by many employers, thereby resulting in the inadvertent failure to preregister impairments. This result conflicted with the purpose of the special fund. The Legislature expressed its agreement with these contentions by permitting registration of preexisting physical impairments following notice of a work-related injury, if the registration is made within 180 days from the injury and the preexisting impairment is based on a medical report made prior to the injury that indicates the existence of a preexisting impairment.

XI. SCHEDULE FOR INTERNAL ORGANS

At the time the 1979 Act was introduced, there existed within the legislation a schedule for the loss of an internal organ. That list specified how many weeks of disability various organs would be compensated for if they were damaged in a work-related injury. This schedule was intended to replace the then existing language contained in section 176.101, subdivision 3 of Minnesota Statutes, which provided:

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

(40) For permanent partial disability resulting from injury to any organ, including the heart, 66 2/3 percent of the physical impairment, than what would have resulted from the personal injury alone . . ." Id. This section further provides that an employer may receive full reimbursement rather than partial payment if an employee suffers a work-related injury which results in disability or death "if the injury, death, or disability would not have occurred except for the pre-existing physical impairment . . . [but] only where the permanent physical impairment contributing to the second injury is diabetes, hemophilia or seizures." Id. § 176.131(2).

85. See STUDY COMM'N, supra note 4, at 36 (Recommendation 30).
87. The original bill provided in part that:

[f]or permanent partial disability resulting from injury to any of the internal organs listed below [the employee shall receive] 66% percent of the daily wage at time of injury for that proportion of the 500 or 300 weeks maximum entitlement, as set out in clauses (a) and (b), which is the proportionate amount of permanent partial disability caused to the entire body by the injury as is determined from

http://open.mitchellhamline.edu/wmlr/vol6/iss3/6
daily wage at the time of injury for that proportion of 500 weeks which is the proportionate amount of permanent partial disability caused to the entire body by the injury.\textsuperscript{88}

According to the report of the Study Commission "[t]his language has resulted in inconsistent, confusing and subjective compensation awards and an increase in litigation.\textsuperscript{89} The report went on to state that a schedule of internal organs "would provide workers' compensation judges, claimants and insurers with an objective method of evaluating the effect the loss of an organ has on the person, and reduce litigation."\textsuperscript{90} However, the schedule contained in the bill was short lived. The relative importance of each organ as well as which organs should be included could not be agreed upon in the time available to the Legislature prior to adjournment. As a compromise, the bill was amended to provide that the Commissioner of Labor and Industry promulgate through his rulemaking authority a schedule of internal organs. Until that schedule is promulgated, the existing statute shall be retained.\textsuperscript{91}

\begin{itemize}
\item \textbf{(a)} For disability resulting from injury to one of the following organs, up to 500 weeks entitlement:
  \begin{itemize}
  \item Heart;
  \item Lungs;
  \item Kidneys;
  \item Pancreas with islet of langerhans;
  \item Lymphatic system including the spleen;
  \item Liver.
  \end{itemize}
\item \textbf{(b)} For disability resulting from injury to one of the following organs, up to 300 weeks entitlement:
  \begin{itemize}
  \item Gall bladder;
  \item Digestive system;
  \item Reproductive system;
  \item Any one of the endocrine glands;
  \item Any one of the exocrine glands;
  \item Bladder;
  \item Bowel.
  \end{itemize}
\end{itemize}

S.F. 917, 71st Minn. Legis., 1979 Sess.

\textsuperscript{88} MINN. STAT. § 176.101, subd. 3(40) (1978).

\textsuperscript{89} STUDY COMM'N, supra note 4, at 19 (Recommendation 8).

\textsuperscript{90} Id. at 19-20.

\textsuperscript{91} See Act of June 7, 1979, ch. 3, § 34, 1979 Minn. Laws Ex. Sess. 1256, 1276 (amending MINN. STAT. § 176.101, subd. 3 (40) (1978)). This amendment provides:

For permanent partial disability resulting from injury to any internal organ until such time as the commissioner of labor and industry shall promulgate a schedule of internal organs and thereafter for internal organs covered by the schedule of internal organs established by the commissioner of labor and industry, [the employee shall receive] 66\% percent of the daily wage at time of injury for that proportion of 500 weeks, not to exceed 500 weeks, as determined by the commissioner of labor and industry, which is the proportionate amount of permanent partial disability caused to the entire body by the injury as is determined...
XII. COEMPLOYEE LIABILITY

The 1979 Act contains a provision that gives a degree of protection to coemployees of an injured employee. That section holds a coemployee harmless for a personal injury incurred by another employee if the coemployee is working for the same employer unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee. Simple negligence by the coemployee is not sufficient to subject the coemployee to liability.

The Legislature adopted the rationale of the Study Commission in enacting this section. In its report, the Study Commission argued that allowing an employee to sue a coemployee for negligence and receive a portion of any recovery which is less than the total of workers' compensation benefits due, and all of the excess, while the employer is reimbursed from the recovery for any workers' compensation benefits paid, tends to shift tort liability from employer to fellow employee in a manner never intended by the workers' compensation system.

The report indicated that workers' compensation was originally conceived as an exclusive remedy for industrial injuries, thereby resulting in the inability of the employee to sue in tort for an accident. In return, however, the employee was given the security of workers' compensation benefits, even in the absence of employer fault. The Study Commission concluded that "it is anomalous to remove tort liability from employers, while retaining it for the simple negligence of co-workers of the injured employee."

XIII. INTERVENORS' ROLE IN SETTLEMENT OF CLAIMS

The rights of intervenors in workers' compensation claims were
addressed by the 1979 Legislature. Legislation was enacted providing that a settlement agreement must be signed by the parties and the intervenors in the matter in order for it to be approved by the Department of Labor and Industry. This amendment appears to be no more than a codification of the case law in Brooks v. A.M.F., Inc. In Brooks the Minnesota Supreme Court was faced with a situation in which two health insurance carriers were excluded from participating in negotiations for settlement and were notified only after the stipulation for settlement was approved by the workers' compensation division. The stipulation stated that the injury complained of did not arise in the course of employment, and further that the employer was to pay the injured employee $14,750 in full, final, and complete settlement of all claims. Following approval of the settlement, the health insurers were notified that they would have to prove that the employee's injury was work-related if they desired to be reimbursed for medical benefits they had already paid. The health insurers contended that their interests were not adequately protected by being forced to prove their claim for reimbursement after having been excluded from the settlement negotiations and award proceedings.

The court, in upholding the intervenors' contention, declared that "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." Moreover, the court stated that "[n]o legitimate reasons occur to us why an intervenor should not be included as a participant in the settlement negotiations or award proceedings." The court appeared to indicate, however, that if the intervenor unreasonably refuses to agree to the settlement arrived at by the employer and employee, the agreement may still be approved and the intervenor will then have to prove its claim prior to being reimbursed. The 1979 amendment does not provide

97. 278 N.W.2d 310 (Minn. 1979), noted in 6 WM. MITCHELL L. REV. 228 (1980).
98. Id. at 312.
99. Id. at 311.
100. Id. at 312-13.
101. Id. at 315.
102. Id.
103. See id. at 316.
for this contingency.

XIV. DISPUTE BETWEEN INSURERS OR EMPLOYERS RE: LIABILITY

It was apparent from testimony during the legislative and Study Commission hearings that many employees are often caught in the middle of a dispute between employers or insurers concerning liability for an injury. At times a workers’ compensation insurer will deny liability, contending that an employee’s injury is not work related. At the same time, the employee may be covered by a group or individual accident and health policy. Some accident and health carriers, however, refuse to pay medical expenses if there is a possibility that the accident may be work related. Therefore, while liability is being determined, the employee’s medical care may be neglected and costs for health care rendered may not be paid. To assure that this void is filled, a new subdivision requires an accident and health insurer to pay any medical costs incurred by an employee for an injury when the workers’ compensation insurer is disputing liability.104 If it is subsequently determined that the workers’ compensation insurer is liable, however, it must reimburse the accident and health carrier for payments made plus interest at a rate of twelve percent a year.105

Another new subdivision provides that “[w]here [workers’] compensation benefits are payable . . . and a dispute exists between two or more employers or two or more insurers as to which is liable for payment, the Commissioner of Labor and Industry may authorize the special compensation fund . . . to make payment of the benefits pending a determination of liability.”106

Even though the special fund107 is limited in its other uses to certain specified injuries, this subdivision expressly states that “[t]he personal injury for which the commissioner may order compensation . . . is not limited by [the provisions of] section 176.131, subdivision 8.”108 Therefore, benefits may be paid from the special fund for any work-related injury so long as the question of its work

105. Id.
106. Id. (codified at MINN. STAT. § 176.191(2) (Supp. 1979)).
107. See notes 81-86 supra and accompanying text.
relatedness is not an issue; only a question of which insurer or employer is liable.

Unlike the previously described provision dealing with payment of medical costs by an accident and health carrier, this provision is not limited to payment of medical costs, but also envisions the special fund paying an employee his disability compensation until liability is determined. Again, once liability is determined, the special fund is to be reimbursed for all benefits paid, including twelve percent interest.

XV. PENALTIES FOR FAILURE TO MAKE MEDICAL AND REHABILITATION PAYMENTS

In an effort to speed up the payment of medical and rehabilitation benefits due the employee, the 1979 Legislature amended the statute to provide that these benefits must be paid within thirty days from the date the employer has knowledge that the employee has suffered a compensable injury.\textsuperscript{109} However, such payments do not have to be made within the time prescribed if the employer or insurer files a denial of liability or requests an extension of time.\textsuperscript{110} If an employer or insurer fails to deny liability or to request an extension and fails to make the payments for medical treatment or rehabilitation, it must pay to the special fund an amount equal to the compensation that the employee is entitled to and must continue to pay into the special fund until the employee receives the compensation.\textsuperscript{111} Failure to pay this amount into the special fund within sixty days results in an additional penalty of twice the amount of compensation to which the employee is entitled to be paid into the fund.\textsuperscript{112}

XVI. NOTICE OF EMPLOYEES' AND EMPLOYERS' RIGHTS AND OBLIGATIONS UNDER THE WORKERS' COMPENSATION ACT

A major factor contributing to the high cost of workers' compensation insurance in Minnesota, as well as other states, is the high

\textsuperscript{109} See id. § 53, 1979 Minn. Laws Ex. Sess. at 1291 (amending MINN. STAT. § 176.221(1), (3)-(7) (1978)). The amended statute had long imposed a penalty for delay in the payments of disability compensation, such as temporary total, permanent partial, permanent total, and temporary partial disability compensation.


\textsuperscript{111} Id. § 176.221(3).

\textsuperscript{112} Id. § 176.221(5).
rate of litigation of workers' compensation claims. Both the Study Commission and the Legislature concluded that a misunderstanding of or little or no understanding of the workers' compensation system, especially among injured employees, is a prime reason for the high rate of litigation in Minnesota. It was the conclusion of the Study Commission that by informing an employee of his rights and the compensation he may be entitled to, the employee would be less likely to seek the advice of an attorney, thereby perhaps resulting in fewer contested cases.

In its study of Wisconsin's litigation rate, the Study Commission's report stated that "Wisconsin's low litigation rate seems to be due to early contact with the employee by the state agency and the employer or insurer, and the availability of unbiased information about the system... Wisconsin's experience seems to prove... that litigation rates can be dramatically reduced by such early intervention."

To test the accuracy of this conclusion, the 1979 Act provides for a number of reforms that are intended to educate employees of the operation of the workers' compensation system. First, each employer is required to post in a conspicuous place a notice approved by the Commissioner of Labor and Industry advising employees of their rights and obligations if they are injured. Second, upon receiving a notice of injury, the Commissioner of Labor and Industry must mail to the injured employee a "brochure, written in language easily readable and understandable by a person of average intelligence and education... explaining the rights and obligations of the employee, the assistance available to the employee, the operation of the workers' compensation system, and whatever other relevant information the commissioner... deems necessary." Finally, in order to apprise employers of the operation of the system, the Commissioner is required to supply them with a brochure with relevant information.

113. See Study Comm'n, supra note 4, at 32, 212.
114. See id. at 32, 207.
115. Id. at 207.
117. Id. § 56, 1979 Minn. Laws Ex. Sess. at 1292 (codified at Minn. Stat. § 176.235(1) (Supp. 1979)).
118. See id. (codified at Minn. Stat. § 176.235(2) (Supp. 1979)).
XVII. INITIATION OF PROCEEDINGS NOTICE

In another effort to reduce litigation, the Legislature provided that prior to the filing of a petition with the Department of Labor and Industry, which formally begins the contested case process, an additional notice must be given by the party contemplating the proceeding.119 The party contemplating the action is required to notify the parties against whom the action will be directed and state the relief to be sought. This notification is not, however, required when the statute of limitations would bar the claim during the intervening period. The party to whom the notice is directed then has fifteen days from the receipt of the notice to respond. If no response is received within that time, or the response does not satisfy the party contemplating the proceeding, the formal petition may be filed.120

While this additional notice may appear to delay and simply complicate matters, the legislative intent is clear. It is not uncommon to be served with a petition initiating an action without ever having had prior contact with the petitioner and no attempt ever having been made to settle the matter without a formal hearing. This additional notice, therefore, is intended to acquaint the parties to the issues and allow them to settle prior to the initiation of a proceeding.

XVIII. WORKERS' COMPENSATION COURT OF APPEALS

Concern had been expressed throughout the Study Commission's hearings regarding various aspects of the operation of the workers' compensation court of appeals. It was clear to the Study Commission and the Legislature that the work load of the court necessitated an increase in the number of judges on the court.121 While there was no actual evidence presented, the Legislature apparently felt that the time it takes a case to be heard at the court of appeals level following a decision by the compensation judge was

119. See id. § 58, 1979 Minn. Laws Ex. Sess. at 1294 (codified at MINN. STAT. § 176.271(2) (Supp. 1979)).

120. See id. The formal petition is filed in accordance with MINN. STAT. § 176.271(1) (Supp. 1979) ("all proceedings before the division [of workers' compensation] are initiated by the filing of a written petition on a prescribed form with the commissioner of labor and industry").

far too long. Therefore, an increase in the number of appeals judges appeared to be one way of speeding up the process. Prior to the enactment of the 1979 Act, the court consisted of three judges. The Study Commission recommended an increase in the number of judges to five,122 a recommendation that the Legislature adopted.123 The Legislature, however, failed to adopt the Study Commission’s recommendation to create a court with judges who would be designated to represent employers, employees, and the public. Such a representational court would have been a reversion to the pre-1969 statute.124 Also, the 1979 Act prohibits the workers’ compensation court of appeals from having its offices in the same building as the Department of Labor and Industry125 in what can be perceived to be an attempt to soften the rumblings of too close an association between the judges and the Department of Labor and Industry.

While the Legislature increased the number of judges on the court, it dropped the requirement that all the judges be learned in the law and required that "at least three shall be learned in the law,"126 thereby permitting two judges to be lay members. Governor Quie, however, in making his appointments to the court selected two attorneys to fill the two new positions.127 Currently, therefore, all judges in the workers’ compensation court of appeals are attorneys.

XIX. CONSIDERATIONS IN AWARDING ATTORNEY’S FEES

The fee that an attorney may charge an injured employee is

122. See id. at 33 (Recommendation 25).
124. See Act of Mar. 14, 1921, ch. 81, § 2, 1921 Minn. Laws 85, 86 (repealed 1969). The Act, providing for an industrial commission composed of three commissioners, stated in part that:

Inasmuch as the duties to be performed by such Commission vitally concern the employers, employees, as well as the whole people of the state, it is hereby declared to be the purpose of this act that persons be appointed as Commissioners who shall fairly represent the interests of all concerned in its administration.

Id. This language was interpreted by the Department of Labor and Industry to require representation on the commission by employer, employee, and public representatives.
125. See Act of June 7, 1979, ch. 3, § 27, 1979 Minn. Laws Ex. Sess. 1256, 1268 (amending MINN. STAT. § 175.08 (1978)).
126. Id. § 26, 1979 Minn. Laws Ex. Sess. at 1268 (amending MINN. STAT. § 175.006(1) (1978)).
127. See Interview with Carol Magee, Administrative Assistant to Minnesota Governor Quie, in St. Paul (Oct. 21, 1980).
subject to statutory regulation. Among the list of factors to be considered in determining attorneys' fees are the amount of compensation involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the difficulties of the issues involved, and the results. These factors do not purport to be exclusive or exhaustive and are described as "principles" to be applied in fee determinations. Therefore, many judges making fee determinations have taken other factors into consideration, such as the expertise of the employee's attorney in workers' compensation matters. Nonetheless, the Legislature added "the expertise of counsel in the workers' compensation field" as a specific factor in the existing list with the belief that such an addition might encourage attorneys to develop a better understanding of workers' compensation, thereby resulting in attorneys who are better prepared, fewer and better reasoned appeals, and a just result for the parties.

**XX. SELF-INSURANCE**

Self-insurance is the only present alternative to commercial workers' compensation insurance in Minnesota. Self-insurance simply means that the employer pays all workers' compensation claims, up to a specified amount, by itself rather than purchasing insurance coverage from a private insurer. Most self-insurers generally purchase "reinsurance" or "excess insurance" that would pay large claims above the limit for which the self-insurer is liable. In Minnesota, self-insured employers typically carry between $100,000 and $200,000 themselves, with reinsurance purchased for claims above that figure. In the past, however, self-insurance has only been utilized by the largest businesses in Minnesota as a result of the stringent requirement for self-insurance set out by the Commissioner of Labor and Industry. Those firms that the Commissioner determines are good self-insurance risks have been required to post at least $50,000 in negotiable securities and an annual

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128. **Minn. Stat.** § 176.081(1) (1978 & Supp. 1979). This section provides that "a fee of up to 25 percent of the first $4,000 of compensation awarded to the employee and up to 20 percent of the next $20,000 of compensation awarded" may be approved. *Id.*

129. *Id.* § 176.081(5)(d).

130. *Id.* § 176.081(5).


132. See **Study Comm'n**, supra note 4, at 34 (Recommendation 28).
surety bond equivalent to total outstanding workers' compensation liability plus one full year's projected liability, as a guarantee that claims will be honored. Bonds currently range from the minimum of $100,000 to $2,000,000. As a result of these requirements, only 100 employers were self-insured in Minnesota in 1977. Of the self-insurers, only approximately fifteen percent of them had payrolls of less than $1,000,000 in 1976, while almost a third had payrolls in excess of $20,000,000.

The primary reason for self-insurance, according to its proponents, is the savings over the cost of purchasing commercial insurance. The fact that smaller employers have been unable to meet the bonding requirements, of course, leaves them with no option but to purchase workers' compensation coverage at whatever rate is being charged. Therefore, in an effort to make it practical for the smaller employer to self-insure, representatives of small employers sought to have the self-insurance statute amended. In response, the Legislature provided that two or more employers in the same industry are permitted to enter into agreements to pool their liabilities in order to qualify as group self-insurers. The entire responsibility for regulating self-insurers was transferred from the jurisdiction of the Commissioner of Labor and Industry to the Commissioner of Insurance. Finally, the Commissioner of Insurance was given authority to promulgate rules to regulate group self-insurers. These amendments are designed to permit smaller employers to pool resources that would allow them to meet the financial requirements of the insurance commissioner. Combined with the reinsurance association, the smaller employer or group.

133. See id. at 247-48.
134. Id. at 248.
135. See Act of June 7, 1979, ch. 3, § 50, 1979 Minn. Laws Ex. Sess. 1256, 1287 (amending Minn. Stat. § 176.181(2) (1978)). A portion of section 176.181, subdivision 2 that was amended by the 1979 Act had not yet come into effect at the time of the passage of the 1979 Act. In 1978 the Legislature provided that two or more employers could be approved as self-insurers at the discretion of the Commissioner of Insurance. See Act of Apr. 7, 1978, ch. 797, § 4, 1978 Minn. Laws 1245, 1247. However, the effective date of section 4 of chapter 797 was delayed until August 1, 1979. The 1979 Act amended the 1978 legislation prior to its effective date by providing that two or more employers "in the same industry" are permitted to become group self-insurers if the rules of the Commissioner are met. See Act of June 7, 1979, ch. 3, § 50, 1979 Minn. Laws Ex. Sess. 1256, 1287 (amending Minn. Stat. § 176.181(2) (1978)).
137. See id.
138. See notes 139-44 infra and accompanying text.
of employers may find it possible to self-insure their workers’ compensation risk.

XXI. REINSURANCE ASSOCIATION

The 1979 Act established what may be the first workers’ compensation reinsurance association of its kind in the nation. The reinsurance association is a private, nonprofit organization. Participation in the association is mandatory and its members include all workers’ compensation insurers in the state and all self-insurers. The association is liable for all workers’ compensation payments over $300,000 for a single occurrence or, at the option of the member, the association would be liable for all payments over $100,000 for each occurrence. These amounts are to be indexed to increases in the state average weekly wage.

The reinsurance association is designed primarily to address three issues: (1) the difficulty in obtaining adequate reinsurance; (2) the expense of commercial workers’ compensation reinsurance; and (3) the problem of “long tails,” the potential of long term liability on a given workers’ compensation claim.

Workers’ compensation insurance is sometimes carried in layers. For example, one insurer, or a self-insuring employer, will assume liability for up to $100,000 in claims arising from a single incident, with additional insurers assuming responsibility for amounts between $100,000 and $1,000,000, $1,000,000 and $5,000,000, and so on. Reinsurance refers to the insurance above the first layer, whether carried directly by the employer or by the employer’s basic workers’ compensation insurer. Companies issuing reinsurance coverage have declined in number during the last few years because the risks are considerable. This shortage of suppliers reduces the number of firms who self-insure, since some of them are financially unable or are simply unwilling to increase their liability to large claims that were previously the liability of the reinsurer. However, the reduction in reinsurance suppliers may also have the effect of making involuntary self-insurers of many employers whose insurers cannot obtain reinsurance at the upper end of their liability exposure.


140. See id. § 17, 1979 Minn. Laws Ex. Sess. at 1263 (codified at MINN. STAT. § 79.34(2) (Supp. 1979)).
The problem of "long tails" is related to the problem of reinsurance. "Long tails" is a problem of the potentially long duration of claims. Reinsurance addresses the problem of large dollar amounts of a claim. A workers' compensation claim may potentially result in benefits being paid for decades. Since the benefits involved are subject to a cost of living escalation, and may be increased by future legislation or court interpretation as well, insurers face the prospect of long-term and increasing payments on a given claim, and reserve accordingly. This produces considerable upward pressure on premiums.

The creation of the reinsurance association is intended to alleviate the shortage of commercial reinsurance and reduce the burden on insurers and self-insurers of long term escalating claim liability. Theoretically, employers will be better able to self-insure and will not be forced to involuntarily carry their own exposure for large claims. The carriers' workers' compensation premiums may be reduced since insurers will be able to reserve in a much less conservative fashion with liability limited to the opted-for threshold. The association may be better able to assume the risk of expensive long-term claims than individual reinsurers since the liability will be spread among all workers' compensation insurers and self-insurers in the state. The reinsurance association may also be able to provide effective coverage at lower reserve levels than private reinsurers. Its expenses might be less, and investment income available from reserves might also reduce cost to employers.

Coupled with the change in the law that permits group self-insurance, the reinsurance association may make it possible for small employers to self-insure rather than purchase commercial workers' compensation insurance, since the liability of the group self-insurer would be limited.

141. See Minn. Stat. § 176.645 (1978). This section provides that benefits paid for temporary total disability, temporary partial disability, or permanent total disability occurring after October 1, 1975, shall be adjusted each year under a formula that approximates the increase in the cost of living. The adjustment is limited, however, to a maximum increase of six percent per year. Id.

142. Although the Association is required to provide coverage up to $500,000, it is permitted to charge expenses and payments to members making claims above $500,000. See Act of June 7, 1979, ch. 3, § 18, 1979 Minn. Laws Ex. Sess. 1256, 1264 (codified at Minn. Stat. § 79.35(d) (Supp. 1979)).

143. The Commissioner of Insurance testified on December 12, 1979, at a Senate Labor Subcommittee hearing that the Reinsurance Association is anticipating a 3.5% after-tax return on invested assets of the Association.

144. See notes 135-38 supra and accompanying text.
XXII. REOPENED CASE FUND

The absence of a statute of limitations barring the reopening of a workers' compensation case was a cause of much concern on the part of many employers and insurers. The uncertainty of whether a case would be reopened at anytime in the future created a potential liability that was accounted for in the reserves insurers set aside for future claim payments. These additional reserves, it was argued, resulted in an increase in the cost of workers' compensation insurance. The reopened case fund was therefore established to alleviate the need for additional reserves, thereby reducing the premiums of employers.

The fund is liable for compensation paid to an employee or the heirs of an employee, in cases in which no compensation has previously been paid, if the case is reopened after seven years from the date of the injury or work-related death. When compensation has previously been paid, the fund is liable if the claim is made after seven years from the injury or death or after three years from the date of the last payment of compensation, whichever date is later. Rather than creating a reserve for possible future liability, the Commissioner of Labor and Industry is to assess insurers and self-insured employers an amount necessary to pay current liabilities.

As initially introduced, an eighteen year statute of limitations on the reopening of cases against the fund was proposed in order to establish some certainty in the fund’s liability. However, this statute of limitations was not enacted in the final version.

Following the passage of the fund provision, questions were

145. Such a statute of limitations did exist between 1967 and 1975. See Act of June 2, 1967, ch. 40, § 14, 1967 Minn. Laws Ex. Sess. 2225, 2236 (repealed 1975). This statute, which became effective on September 1, 1967, required an action for additional compensation to be brought within eight years from the date compensation was last paid. Id. Since fewer than eight years elapsed from the date the act took effect to the date it was repealed, the limitation was never applied.


148. See id. § 43(2), 1979 Minn. Laws Ex. Sess. at 1285 (codified at MINN. STAT. § 176.134(2) (Supp. 1979)).

149. Id.

raised concerning the need for such a fund in light of the creation of the reinsurance association.\textsuperscript{151} Since the reinsurance association is to be liable for compensation above the threshold opted for by the insurer ($100,000 or $300,000), the need for reserving by insurers, which may have existed prior to the creation of the association, no longer exists. Therefore, even without the reopened case fund, the reserving practices of insurers may be altered. Long term and expensive claims now become the liability of the reinsurance association. In light of the creation of the reinsurance association, the sole purpose of the reopened case fund would be liability for cases reopened after the time specified but which cost less than the threshold amount chosen by the insurer. For example, an employee may collect $10,000 in benefits for an injury and return to work, at which time compensation ceases. Ten years later the employee files a petition to reopen the claim. In such a situation, the reinsurance association would not be liable for compensation since the threshold had not yet been reached. Since the reopening occurred more than seven years from the accident or three years from the last payment of compensation, the reopened case fund would be liable for any compensation awarded to the employee. While these cases may exist, it is questionable whether a fund should be established to cover the liabilities involved, given the administrative cost that might be required to operate such a fund. Private insurers already have the mechanism in place to handle such claims and, given their limited liability, the fear of over-reserving on their part may no longer be a real issue.

\textbf{XXIII. Rate Hearings}

The process by which workers' compensation rates charged by insurers are to be set has been the center of some controversy. The former version of the statute gave the Commissioner of Insurance the sole authority to establish a "minimum, adequate, fair and reasonable rate . . . for each classification under which such business is written" and to similarly establish the exclusive system of merit and experience rating to be used for the application of the established rate schedule to individual risks.\textsuperscript{152} In interpreting this requirement, the Commissioner of Insurance has historically provided a public hearing to allow interested parties the opportu-
nity to review the proposed rates submitted by the insurance industry and to comment thereon. The controversy arose over whether the hearing ordered by the Commissioner should be held pursuant to the contested case procedures of the state Administrative Procedure Act. The Commissioner of Insurance argued successfully in the past that the rate hearing was not to be conducted as a contested case but rather that the hearing was a discretionary hearing since he was in fact engaged in a legislative fact finding process and that the trial-type procedures required by the Administrative Procedure Act were ill suited for such fact finding.

Reacting to this contention during the 1978 session, the Legislature amended the law to require that “approval of rates shall be upon hearings under and pursuant to the administrative procedure act . . . .” Before any rate hearings were conducted pursuant to this amendment, however, the 1979 Legislature once again made changes in the way the rate hearing was to be conducted. These changes acknowledge the Commissioner’s contention that the contested case proceeding was not totally proper for approving rates. Therefore, while it continues to require rate hearings to be conducted as contested cases, the legislation also provides for departures from the procedures required by the Administrative Procedure Act. Also, a procedure for rehearing and for judicial review of rate determinations and other actions by the Commissioner regarding workers’ compensation is provided.

XXIV. STATE COMPETITIVE FUND

One provision that was not ultimately enacted into law, but which deserves mention, is the state competitive fund. This fund would be a state-operated insurance company that would compete with private insurers in selling workers’ compensation insurance to Minnesota employers. The fund was the most controversial


156. See id. §§ 3-4, 1979 Minn. Laws Ex. Sess. at 1258 (codified at Minn. Stat. §§ 79.072-.073 (Supp. 1979)).

157. There are two major types of state funds. One type is an exclusive state fund that
workers’ compensation issue during the 1979 legislative session, as well as during the Study Commission’s hearings.\textsuperscript{158}

The Senate version of what subsequently was enacted as the 1979 Act contained a provision creating a state competitive fund,\textsuperscript{159} while the House version contained no such provision. When it became clear that under no circumstances would the House agree to the establishment of a state fund and that no bill would be passed if the Senate continued its support for such a fund, that provision was dropped by the Senate conferees. There was more intense lobbying on this issue than any other; the insurance industry adamantly and unanimously opposed it along with many employer representatives, while labor representatives voiced strong support for the creation of a state competitive fund.

While the Senate gave in to the House position during the conference committee, the issue is by no means a dead one. In exchange for acceding to the House position, the Senate added a provision that establishes a commission “to study and report on the feasibility of a state competitive fund to provide workers’ compensation insurance.”\textsuperscript{160} The impetus for the creation of a state fund will come from the insurance rates that insurers propose during the next few years.\textsuperscript{161} Continuing requests for higher rates

\textsuperscript{158} See Study Comm’n, supra note 4, at 63 (showing results of the commission vote on a state fund). The Study Commission failed to recommend a competitive fund on a seven to seven vote. \textit{Id}. A minority recommendation supported the establishment of a state competitive fund. See \textit{id}. at 68-74 (Minority Recommendation 1).

\textsuperscript{159} See S.F. 917, § 36, 71st Minn. Legis., 1979 Sess.


may result in the conversion of some who are now skeptical on the necessity of such a fund. A slowdown in the rate requests, however, will no doubt relegate the idea of the fund into obscurity for some time to come—at least until rates once again begin skyrocketing.

XXV. OTHER LEGISLATION

While the major amendments to the workers’ compensation statute were contained in the 1979 Act, the Legislature did enact other bills in 1979 that had a substantive effect on the law. A description of these bills and their importance follows.

A. Employers’ Action Against Third Parties for Recovery of Insurance Premiums

From the inception of the workers’ compensation system, employers have attempted to recover the costs associated with an employee injury. In *Northern States Contracting Co. v. Oakes*, the Minnesota Supreme Court held that an employer could not recover from a negligent third party for insurance premiums that increased as a result of an injury to a worker since the damages sought by the employer were “too remote.”

A 1953 provision permitted an employer to seek recovery from a third party who is at fault for an injury that results in payment of workers’ compensation benefits. This law not only made sure that an injured worker would be properly compensated, but also that the ultimate responsibility for the costs associated with such compensation would be borne by the party who caused the injury.

It was not until 1979 that the Legislature elected to overrule the result in *Northern States Contracting Co*. The Legislature amended the statute to permit an employer to recover an increase in premiums that are the consequence of a third party’s negligent acts.

B. Settlements Presumed Reasonable

Any settlement agreement between parties to a workers’ com-

162. 191 Minn. 88, 253 N.W. 371 (1934).
163. Id. at 91, 253 N.W. at 372.
165. See Act of May 14, 1979, ch. 81, § 1, 1979 Minn. Laws 113, 114 (amending MINN. STAT. § 176.061(5) (1978)).
pensation action must be approved by the division of workers’ compensation of the Department of Labor and Industry or, if the case is on appeal to the workers’ compensation court of appeals, by the court.\textsuperscript{166} The parties to such a settlement have the burden of proof regarding the reasonableness, fairness, and conformity of the settlement to the statute.\textsuperscript{167} In order to assist the parties with this burden, the statute was amended to provide for a presumption of reasonableness, fairness, and conformity in all cases in which the parties are represented by an attorney.\textsuperscript{168} This, however, should not be interpreted to mean an automatic approval of all settlements in which the parties were represented by attorneys. If the approving authority is able to introduce evidence that casts doubt on the reasonableness, fairness, or conformity to the statute, the presumption would be negated and the parties would have the burden of proof.

\textbf{C. Extra-Territorial Application}

The application of the state’s workers’ compensation statute was narrowed somewhat during the recent legislative session.\textsuperscript{169} The provisions of the law were made inapplicable in cases in which an employee is hired within the state but is subsequently permanently transferred outside of the state. Prior to this change, an employee fell within the scope of the law if he was hired within the state, even if the employee was permanently transferred outside of the state, if the employee was required to travel extensively out of the state to which the employee was transferred.\textsuperscript{170} As a result of this amendment, such an injured employee will have to look to the law of the jurisdiction in which the injury occurs.

\textbf{XXVI. Conclusion}

While major changes were made in the workers’ compensation laws of Minnesota during the 1979 legislative session, many areas exist within the system that are extremely controversial and which

\begin{itemize}
\item \textsuperscript{167} See id. § 176.521(2).
\item \textsuperscript{168} See Act of May 30, 1979, ch. 271, § 1, 1979 Minn. Laws 14, 14 (amending Minn. Stat. § 176.521(2) (1978)).
\item \textsuperscript{169} See Act of Apr. 3, 1979, ch. 15, § 1, 1979 Minn. Laws 14, 14 (amending Minn. Stat. § 176.041(2) (1978)).
\item \textsuperscript{170} See Act of June 2, 1967, ch. 40, § 6, 1967 Minn. Laws 2225, 2228 (current version at Minn. Stat. § 176.041(2) (1978 & Supp. 1979)).
\end{itemize}
may yet be the subject of further legislative action. One potential change would involve setting a maximum dollar amount on the compensation awarded for a permanent partial disability in place of the current figure, which is tied into the state average weekly wage. 171 Another area for future consideration is the proposal to delay the commencement of the yearly adjustment of benefits provided by statute 172 to injured employees. 173 Perhaps one of the most controversial unresolved issues is apportionment of compensation when an employee’s injury is only in part a result of a work-related injury. 174 While the Legislature did not act favorably on a proposal that would have permitted the court to apportion liability in all cases in which an employee had a preexisting injury, 175 it did provide for a form of apportionment when it limited the liability of an on-the-job employer to a new injury incurred on the job and placed the liability for an aggravation of a preexisting injury on the employer who was the employer at the time of the original injury. 176 Although this is far from apportionment in all cases, it may prove to be the forerunner of apportionment that the supreme court has called for in many of its decisions. 177

The level of benefits is always an issue and will probably con-

171. See Study Comm’n, supra note 4, at 86-88 (Minority Recommendation 9). This recommendation proposed a maximum $200 per week allowance for permanent partial disability in place of the current allowance of 100% of the state average weekly wage. See Minn. Stat. § 176.101(3) (1978).


173. See S.F. 917, § 35, 71st Minn. Legis., 1979 Sess. As originally introduced, Senate File 917 provided that the adjustment of benefits pursuant to section 176.645 not begin until an employee had been disabled for 104 weeks. Id.; see Minn. Stat. § 176.645 (1978). See also Study Comm’n, supra note 4, at 18-19 (Recommendation 7) (concluding that the effect of applying the adjustment immediately was to create a disincentive to return to work).

174. See notes 36, 83 supra. See also Robin v. Royal Improvement Co., 289 N.W.2d 76 (Minn. 1979). In Robin the supreme court refused to apportion compensation for an occupational disease as it had done in the past for personal injuries and once again called on the Legislature to look at what the court considered to be a "highly inequitable omission from the statute." Id. at 78 (quoting Wallace v. Hanson Silo Co., 305 Minn. 395, 235 N.W.2d 363, 364 (1975)).

175. See S.F. 917, 71st Minn. Legis., 1979 Sess.

176. See notes 34-36 supra and accompanying text.

177. See, e.g., Wallace v. Hanson Silo Co., 305 Minn. 395, 235 N.W.2d 363 (1975). In Wallace the Workmen’s Compensation Commission denied apportionment due to "the absence of express statutory authority for allowing deductions for prior disabilities which were not work related." Id. at 396, 235 N.W.2d at 363. Although there was apparently no claim for reimbursement from the Special Fund, see Minn. Stat. § 176.131 (1978 & Supp. 1979), the commission’s conclusion was that an employer would not be entitled to reimbursement from the Special Fund, regardless of whether or not he had registered the pre-
continue to be one in the future. During the 1979 session, labor representatives sought an increase in the maximum weekly compensation that may be paid to an employee from 100% of the state average weekly wage to 200% of the state average weekly wage. On the other hand, some business representatives attempted to decrease the minimum benefit paid for temporary total disability. Neither proposal was successful but they are very likely to reappear.

While many major changes were made in the workers' compensation statute, the controversy and furor over the operation and cost of the system will no doubt continue. With workers' compensation insurance being a major cost to employers, the pressure for further modification to reduce costs will be an on-going process.

existing nonoccupational condition. In light of the commission's interpretation, the court stated:

Where, as here, the commission has found that a work-related injury has aggravated a preexisting condition, we are of the opinion that it is unjust to burden the employer with responsibility for that part of the disability which was not work related. In recognition of the understandable reluctance of employers to hire workers with physical defects, the statute encourages the hiring of handicapped persons by permitting employers to be reimbursed under the conditions set forth in § 176.131. If the statute denies access to the special fund for prior nonoccupational injuries, it tends to defeat legislative policy by making it more difficult for partially disabled employees to continue working in positions which they are capable of handling. Accordingly, it seems advisable to suggest that the legislature amend the law to prevent a result which is not only unfair to employers but detrimental to those employees the statute is designed to protect.

305 Minn. at 397, 235 N.W.2d at 364.

178. See S.F. 917, § 13, 71st Minn. Legis., 1979 Sess. As introduced, this bill increased the maximum compensation for all disabilities to "an amount equal to two times the statewide average weekly wage for the period ending December 31 of the preceding year."

Id.

179. S.F. 917, § 13, 71st Minn. Legis., 1979 Sess., as introduced, proposed replacing the existing minimum compensation for temporary total benefits. That minimum was, and continues to be, since this section was not enacted, 50% of the state average weekly wage or the employee's actual wage, whichever is less, but in no case less than 20% of the state average weekly wage. See MINN. STAT. § 176.101(2) (1978 & Supp. 1979). As of October 1, 1979, the state average weekly wage was $226. Fifty percent of this is $113.50. Twenty percent equals $45.20. The effect of this statute is that those employees earning between $113 and $150 per week while employed nonetheless receive more than two-thirds of that income while injured. Those earning less than $113 but more than $45.20 per week receive 100% of that wage while disabled, while those earning less than $45.20 per week receive more than 100% of their working wage. The proposed amendment provided for compensation in an amount equal to 662% of the wage at the time of injury in all cases with no minimum. See also STUDY COMM'N, supra note 4, at 17 (Recommendation 3).