

## Comment

### INJURY TO THE DECEASED OR DISABLED EMPLOYEE UNDER THE CALIFORNIA WORKMEN'S COMPENSATION LAWS

The principle followed under the early workmen's compensation laws was "the employer takes the employee as he finds him."<sup>1</sup> Under this rule the employer was responsible for the entire disability which the industrial injury caused the employee without regard to the contributing effects of previous disabilities which the employee may have had.<sup>2</sup> The classic example for this approach is the one-eyed worker who loses his good eye in an industrial injury. The employer or his insurance carrier must pay disability benefits for total loss of vision despite the fact that the employer would have had to pay only for the loss of one eye if the employee had been physically normal. That this result is in consonance with the social policy of compensation for disabilities arising out of industrial injury cannot be denied; yet this scope of relief might in the long range result in socially undesirable effects because handicapped workers become employment hazards and, as a consequence, have a difficult time finding employment due to the increased compensation or insurance premiums the employer may be forced to pay in the event of an industrial injury.<sup>3</sup>

To allow handicapped workers to compete equally on the labor market California since 1917 has included in its workmen's compensation law provisions for apportionment of the employer's compensation liability, limiting his liability to that portion of the industrially caused disability which is attributable to the industrial injury without taking into account the employee's pre-existing disability.<sup>4</sup> To provide for the handicapped worker who is prevented by these statutes from receiving full compensation for his disability, a subsequent injury plan was adopted whereby the cost of this excess disability is borne by the state.<sup>5</sup> It is the present California apportionment provisions<sup>6</sup> and the recently amended subsequent injury regime<sup>7</sup> with which this Comment is concerned.

#### APPORTIONMENT OF DISABILITY

An injury to a diseased or disabled employee within the scope of the California workmen's compensation law calls into play three basic statutory provisions<sup>8</sup>

<sup>1</sup> *Killisnoo Packing Co. v. Scott*, 14 F.2d 86 (9th Cir. 1926); *Wabash Ry. Co. v. Industrial Comm'n*, 286 Ill. 194, 121 N.E. 569 (1918); *Congoleum Nairn, Inc. v. Brown*, 158 Md. 285, 148 Atl. 220 (1930).

<sup>2</sup> DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 664 (1936).

<sup>3</sup> It has been estimated that following the non-apportionment rule announced in *Nease v. Hughes*, 114 Okla. 170, 244 Pac. 778 (1926), between seven and eight thousand one-eyed, one-legged or one-armed men lost their jobs in Oklahoma. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 536 at 272 (1931).

<sup>4</sup> Cal. Stat. 1917, c. 586, § 9(10).

<sup>5</sup> Cal. Stat. 1945, c. 1162, § 2. CAL. LAB. CODE 4751. In the forty-two states where subsequent injury fund provisions exist only three, California, Pennsylvania, and Washington, make subsequent injury payments from state funds. An industry-supported fund was declared unconstitutional in California. See note 55 *infra*.

<sup>6</sup> CAL. LAB. CODE §§ 4663, 4750.

<sup>7</sup> CAL. LAB. CODE §§ 4751, 4753.

<sup>8</sup> CAL. LAB. CODE §§ 4663, 4750, 4751.

which fix and apportion the burden of the resulting disability between the employee, the employer and the state-supported subsequent injury fund. Section 4751 of the Labor Code determines the liability of the subsequent injury fund and will be considered later in this Comment. The two remaining provisions determine the scope of the employer's liability for the industrial disability. Section 4663 of the Labor Code contains the following rule:

In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury.

Section 4750 of the Labor Code reads as follows:

An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.

The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.

When these statutes are read together it is evident that the wording of section 4750 stating that the employer is liable "only for that portion [of the disability] due to the later injury as though no prior disability or impairment had existed" is not in congruity with the wording of section 4663 when there is an aggravation of a pre-existing disease. The conflict in these code sections has been resolved by a series of judicial decisions<sup>9</sup> defining the areas of statutory application and apportioning the burden for disability arising out of industrial injury.

#### *Where Both Sections 4663 and 4750 Apply*

Sections 4663 and 4750 will overlap in their application only when a pre-existing *symptomatic* disease is *aggravated* by a subsequent industrial injury.<sup>10</sup> The statutes will be read together and the percentage of disability due to the subsequent industrial injury will be computed without reference to any injury previously suffered or any permanent disability caused thereby, except that the proportion of the disability due to aggravation of a prior disease as may be reasonably attributed to the later injury will be considered.<sup>11</sup>

The method of apportionment where an aggravation of a pre-existing disability occurs is set forth in *Subsequent Injuries Fund v. Industrial Accident Comm'n.*<sup>12</sup> The first step consists in rating the combined disability. Next, determination must be made of the portion of disability which is caused by the second injury itself and of the aggravating effects reasonably attributable to the second injury.

<sup>9</sup> *Subsequent Injuries Fund v. Industrial Accident Comm'n.*, 44 Cal.2d 604, 283 P.2d 1039 (1955); *Tannenbaum v. Industrial Accident Comm'n.*, 4 Cal.2d 615, 52 P.2d 215 (1935); *Idaho Maryland Mines Corp. v. Industrial Accident Comm'n.*, 104 Cal. App.2d 567, 232 P.2d 11 (1951).

<sup>10</sup> Section 4750 is limited in its application to situations where an employee is suffering from a "previous permanent disability or physical impairment" which is the equivalent of a limitation to a pre-existing *symptomatic* disease or disability. Section 4750 has no application where the previous condition has not manifested itself before the subsequent injury is suffered. See *Idaho Maryland Mines Corp. v. Industrial Accident Comm'n.*, 104 Cal. App.2d 567, 570-71, 232 P.2d 11, 13 and the discussion of this point in the text at note 28 *infra*.

<sup>11</sup> *Subsequent Injuries Fund v. Industrial Accident Comm'n.*, 44 Cal.2d 604, 283 P.2d 1039 (1955); *Edson v. Industrial Accident Comm'n.*, 206 Cal. 134, 273 Pac. 572 (1928).

<sup>12</sup> 44 Cal.2d 604, 608, 283 P.2d 1039, 1041 (1955).

The liability for this amount is allocated to the employer. Liability for the balance of the combined disability is assigned to the subsequent injury fund, or the burden must be shouldered by the employee if the requirements for compensation from the subsequent injury fund are not met.<sup>13</sup>

*Where Only Section 4750 Applies*

Only section 4750 will apply when an employee with a pre-existing symptomatic disability receives a subsequent industrial injury which is independent in its effects and does not aggravate the pre-existing disability. The employer is liable only for the disability which the second injury would have caused if there had been no previous disability.<sup>14</sup> The subsequent injury fund is liable for the balance of the combined disability if the statutory conditions for such responsibility are met; otherwise, the employee himself must bear the burden of the excess disability.

*Where Only Section 4663 Applies*

Section 4663 applies alone only when there is an aggravation of a pre-existing asymptomatic<sup>15</sup> disease by an industrial injury. The statute makes the employer or his insurance carrier liable for that portion of the disability "reasonably attributed to the injury." The employee must bear the balance of the disability as the subsequent injury fund provision, section 4751, is only applicable when the employee was previously "permanently partially disabled"<sup>16</sup> and is not applicable when his pre-existing condition was asymptomatic.

Two recent district court of appeal decisions in the situation of an aggravation of a pre-existing asymptomatic condition, *Bowler v. Industrial Accident Comm'n*<sup>17</sup> and *State of California v. Industrial Accident Comm'n*,<sup>18</sup> seem to have deviated from the proper application of the law in this area in two respects: by giving the impression that both sections 4663 and 4750 may apply even though the previous condition was asymptomatic, and by upholding as being based on substantial evidence apportionments made by the Industrial Accident Commission in applying section 4663. If the trend initiated by these cases is followed, the scope of the liability of the employer or his insurance carrier for aggravation of a pre-existing condition by an industrial injury will be considerably narrowed from that so far believed to be imposed by the act. When considered with the reduction of the liability of the subsequent injury fund, discussed below,<sup>19</sup> the employee will bear a substantially greater burden of the disability from an industrial injury.

*A Criticism of the Bowler and State Decisions*

In *Bowler v. Industrial Accident Comm'n*<sup>20</sup> Bowler, the employee, suffered a heart attack while engaged in heavy physical labor incident to his employment.

<sup>13</sup> CAL. LAB. CODE § 4751 requires that the combined disability from the previous disability and the subsequent injury be greater than that disability which would have resulted from the subsequent injury alone and that the combined disability be rated at 70 per cent or more. Further requirements for subsequent injury fund liability were added by a 1955 amendment to § 4751, discussed in text at note 62 *infra*.

<sup>14</sup> *Wolski v. Industrial Accident Comm'n*, 70 Cal.App.2d 427, 161 P.2d 283 (1945).

<sup>15</sup> For the purposes of this Comment, "asymptomatic" is defined as absence of any characteristic signs or indications of a particular disease.

<sup>16</sup> *State of California v. Industrial Accident Comm'n*, 135 Cal.App.2d 544, 288 P.2d 31 (1955); 2 HANNA, THE LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION 269 (1954).

<sup>17</sup> 135 Cal.App.2d 534, 287 P.2d 562 (1955).

<sup>18</sup> 135 Cal.App.2d 544, 288 P.2d 31 (1955).

<sup>19</sup> See the text at note 62 *infra*.

<sup>20</sup> 135 Cal.App.2d 534, 287 P.2d 562 (1955).

Prior to this attack Bowler had exhibited no symptoms or difficulties indicating a heart weakness. The rating board of the Industrial Accident Commission evaluated the resulting disability at 78 per cent and this determination was not challenged on appeal. After a hearing the commission determined that one-fourth of the disability incurred (or 19½ per cent permanent disability) was chargeable to the industrial injury and therefore compensable and that three-fourths were attributable to a pre-existing asymptomatic cardiac condition of the employee and thus not compensable. The validity of this apportionment was questioned on appeal.<sup>21</sup> In *State v. Industrial Accident Comm'n*<sup>22</sup> again the employee suffered from a pre-existing asymptomatic cardiac weakness which became disabling as the employee was loading packages in connection with his employment. The resulting disability was rated at 90 per cent and the commission determined that one-half thereof would be apportioned to the industrial injury and one-half to the pre-existing condition. In affirming the apportionment the court said:<sup>23</sup>

There is substantial medical evidence here to support the commission's finding that although the industrial injury lightened up and aggravated the preexisting condition, the present disability is not entirely due to the injury, but partially to it and partially to the disease without reference to the injury.

In the *Bowler* and *State* decisions it is not made clear under which statute the apportionment was made; the opinions mention both statutes as relevant. It is submitted that section 4663 is the sole apportionment statute to be used when there is an aggravation of an asymptomatic condition. Any attempt to apportion liability under section 4750 in this situation is contrary to the plain meaning of that statute<sup>24</sup> and will find no substantial support in the case law. Section 4750 relieves the employer from liability for the portion of the employee's total disability which is attributable to "a previous permanent disability or physical impairment." A "disability or physical impairment" is plainly something which patently reduces the effectiveness or fitness of a person in performing particular tasks and not an asymptomatic condition<sup>25</sup> which gives no warning to the employee or

<sup>21</sup> The court found substantial evidence to support the apportionment and the decision of the Industrial Accident Commission was affirmed. CAL. LAB. CODE § 5952 sets the scope of judicial review as follows: "The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the commission, whether:

- (a) The commission acted without or in excess of its powers.
- (b) The order, decision, or award was procured by fraud.
- (c) The order, decision, or award was unreasonable.
- (d) The order, decision, or award was not supported by substantial evidence.
- (e) If findings of fact are made, such findings of fact support the order, decision, or award

under review."

<sup>22</sup> 135 Cal. App.2d 544, 288 P.2d 31 (1955).

<sup>23</sup> *Id.* at 554, 288 P.2d at 37. The court also rejected the petitioner-employee's contention that the subsequent injury fund should be liable for the remaining one-half of the disability. In rejecting this contention the court held that "permanently partially disabled" in section 4751 means a known physical disability and not an asymptomatic condition. *State of California v. Industrial Accident Comm'n*, 135 Cal. App.2d 544, 553, 288 P.2d 31, 37 (1955). No reason was given nor can one be found why the synonymous wording in section 4750 ("previous permanent disability or physical impairment") should not be given the same interpretation.

<sup>24</sup> Section 4750 is derived from Cal. Stat. 1917, c. 586, § 9(10). This statute as first enacted was clearly intended to apply to symptomatic disabilities only as shown by its wording: "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby." (Emphasis added.)

<sup>25</sup> See note 23 *supra*.

the employer of a susceptibility to injury or of a proneness to greater disability from an injury.<sup>26</sup>

*Idaho Maryland Mines Corp. v. Industrial Accident Comm'n*<sup>27</sup> expressly states that section 4750 does not apply to asymptomatic conditions.<sup>28</sup> In both the *Bowler* and the *State* decisions this holding is said to be in conflict with an earlier supreme court case, *Tanenbaum v. Industrial Accident Comm'n*.<sup>29</sup> In the latter case the employee, who had a pre-existing condition of asymptomatic arthritis, suffered an industrial injury. The total disability was rated at 32¾ per cent and apportioned by the Industrial Accident Commission one-third to "pre-existing disease" and two-thirds to the industrial injury. The court in affirming the apportionment found the disability to be made up of three parts: (1) the disability directly caused by the injury; (2) the disability resulting from the aggravation or lighting up of the pre-existing dormant arthritic condition;<sup>30</sup> and (3) the disability due to the "normal progress of the pre-existing arthritis." In speaking of the third factor the court gave its rationale for the apportionment:<sup>31</sup>

It is this latter or nonindustrial disability, resulting from the natural and normal progress of the pre-existing condition, that underlies the finding that petitioner's permanent disability is "partly caused by pre-existing dormant disease and partly by said injury" and requires the apportionment here made.

It is clear then that the decision affirming the apportionment in the *Tanenbaum* case gives no authority for the proposition that section 4750 applies to asymptomatic pre-existing conditions as well as symptomatic ones and, further, that that decision does not conflict with the statement in the *Idaho Maryland* case that section 4750 does not apply to asymptomatic conditions. Not only was the *Tanenbaum* court relying on the predecessor of the present section 4663, but the apportionment made therein proceeded on the basis of the "natural progress" of the disease which would have occurred without any industrial injury<sup>32</sup> and not on the basis of any pre-existing disability or physical impairment.

<sup>26</sup> This is not to suggest that handicapped employees in general are more susceptible to industrial injury, but only the obvious fact that workers with asymptomatic diseases are more likely to be disabled by the normal strains of their occupations than are workers in normal physical condition. Many studies have found that handicapped workers have a lower accident rate than workers in possession of their full functions. See Fabing and Barrow, *Encouragement of Employment of the Handicapped*, 8 VAND. L. REV. 575 (1955).

<sup>27</sup> 104 Cal.App.2d 567, 232 P.2d 11 (1951).

<sup>28</sup> *Id.* at 570-71, 232 P.2d at 13. "[S]ection [4750] applies only to cases where the employee presently 'is suffering from a previous permanent disability or physical impairment.' Here, although the evidence shows that Duncan had a latent heart disease prior to his injury, his as well as the medical testimony establishes without conflict that he had no 'permanent disability or physical impairment' prior thereto."

<sup>29</sup> 4 Cal.2d 615, 52 P.2d 215 (1935).

<sup>30</sup> It is a settled rule that the acceleration, aggravation or lighting up of a pre-existing disease is an injury in the occupation causing the same. Full compensation for the entire disability suffered is recoverable although the physical condition of the employee contributed to and increased the disability caused by the injury or prolonged and interfered with healing and recovery. *Pacific Indemnity Co. v. Industrial Accident Comm'n*, 34 Cal.2d 726, 214 P.2d 530 (1950); *Tanenbaum v. Industrial Accident Comm'n*, 4 Cal.2d 615, 52 P.2d 215 (1935); *Hendrickson v. Industrial Accident Comm'n*, 215 Cal. 82, 8 P.2d 833 (1932); *George L. Eastman Co. v. Industrial Accident Comm'n*, 186 Cal. 587, 200 Pac. 17 (1921); *Firestone Tire and Rubber Co. v. Industrial Accident Comm'n*, 93 Cal.App.2d 23, 208 P.2d 44 (1949); *Liberty Mutual Ins. Co. v. Industrial Accident Comm'n*, 73 Cal.App.2d 555, 166 P.2d 908 (1946).

<sup>31</sup> 4 Cal.2d at 618, 52 P.2d at 216. (Emphasis added.)

<sup>32</sup> This "natural progress" is the portion of the disability which the present section 4663 relieves from the responsibility of the employer. See *Industrial Indemnity Co. v. Industrial Accident Comm'n*, 95 Cal.App.2d 443, 213 P.2d 11 (1949). A medical report relied upon in

Two other cases where no apportionment was made when the pre-existing condition was asymptomatic, *Mullane v. Industrial Accident Comm'n*<sup>33</sup> and *G. L. Eastman Co. v. Industrial Accident Comm'n*,<sup>34</sup> are distinguished in the *Bowler* and *State* decisions on the ground that different rules apply where the injury results in death of the employee. No authority is cited for applying different rules in death cases save the *Mullane* and *Eastman Co.* cases themselves. These cases, however, did not hold that there shall be no apportionment in death cases but only allowed a full award against the employer under their particular facts. No apportionment could possibly have been made in the *Eastman Co.* case because it was held that the proximate cause of the death was being run over by a truck and not the employee's pre-existing heart condition. The *Mullane* case is stronger authority for the proposition that in death cases there *can* be apportionment in a proper situation than for the contrary.<sup>35</sup> In that case the court found that the evidence established the proximate cause of Mullane's death to be the aggravation of a pre-existing disease and annulled the order denying any death benefits. The brief of the employer, which asked for an apportionment, was quoted<sup>36</sup> and the case was remanded for further proceedings. In the opinion the court stated explicitly that the new action of the commission "will be . . . in complete harmony with the position taken by the [employer]."<sup>37</sup> Pursuant to the mandate of the court, the commission then found the employer liable for the complete death benefit. When this determination by the commission came up for review,<sup>38</sup> the appealed point was the lack of apportionment which the appellant thought was directed by the previous remittitur. In affirming the finding made by the commission, the court said<sup>39</sup> "[T]here was no evidence before the defendant commission on which an apportionment could have been based."<sup>40</sup> This is a strong indication that had there been the requisite evidence an apportionment by the commission would have been sustained even though the accident resulted in the death of the employee.

A second major difficulty with the *Bowler* and *State* cases concerns the findings of substantial evidence to support the apportionments made. The well-established interpretation of section 4663 is that the employer is responsible for the disability due to the aggravation of the prior disease which is reasonably attributed to the

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the *Tanenbaum* case stated: "[A]rthritis . . . could be expected to limit [the employee's] ability to do work . . . even if she had not sustained an injury." 4 Cal.2d at 618, 52 P.2d at 216.

<sup>33</sup> 118 Cal. App. 283, 5 P.2d 483 (1931).

<sup>34</sup> 186 Cal. 587, 200 Pac. 17 (1921).

<sup>35</sup> 2 HANNA, THE LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION 272 (1954). The statements in the *Bowler* and *State* cases that there is no apportionment where death results probably derives from a statement to that effect in CAMPBELL, WORKMEN'S COMPENSATION § 108 (1935). See also *Gauslin v. Butzer Planning Mill*, 10 I.A.C. 58 (1923).

<sup>36</sup> 118 Cal. App. at 289-90, 5 P.2d at 486.

<sup>37</sup> 118 Cal. App. at 289, 5 P.2d at 485.

<sup>38</sup> *Pacific Gas & Electric Co. v. Industrial Accident Comm'n*, 125 Cal. App. 774, 14 P.2d 310 (1932).

<sup>39</sup> *Id.* at 776, 14 P.2d at 311.

<sup>40</sup> There have been many other California cases where there would have been a different result had § 4750 been applicable to allow apportionment for a pre-existing asymptomatic condition. See, e.g., *Industrial Indemnity Co. v. Industrial Accident Comm'n*, 95 Cal. App.2d 443, 213 P.2d 11 (1949); *Liberty Mut. Ins. Co. v. Industrial Accident Comm'n*, 73 Cal. App.2d 555, 166 P.2d 908 (1946); *Phoenix Indemnity Co. v. Industrial Accident Comm'n*, 41 Cal. App.2d 858, 107 P.2d 935 (1940).

injury but not for the natural progress of the disease.<sup>41</sup> It is also clear under California law that, apart from the two apportionment statutes (sections 4663 and 4750), the employer takes the employee as he finds him.<sup>42</sup> The conclusion which this analysis draws us to is that the apportionments made in the *Bowler* case (three-fourths of disability non-compensable) and the *State* case (one-half of disability non-compensable) rested on the finding that the non-compensable portion of the final disability was ascribable to the "natural progress" which the disease would have made up to the time of rating without the injury—a rather surprising result in view of the asymptomatic pre-injury condition.

The commission based its findings relative to the apportionment on the opinion of expert witnesses, and it is settled that in the face of conflicting testimony the determination of the commission is final if based on substantial evidence.<sup>43</sup> We are thus faced with the necessity of discovering substantial evidence for a finding that one-half (in *State*) or three-fourths (in *Bowler*) of an employee's disability would have developed without an industrial injury and was not in any way attributable to the industrial injury. The expert testimony in the *Bowler* and *State* cases was for the most part phrased in the terms of ultimate conclusions, such as:<sup>44</sup>

Dr. Jacks reported that the disability "should be apportioned at twenty-five per cent disability as a result of the coronary occlusion and seventy-five per cent due to the pre-existing disease of atherosclerosis."

Under this type of finding it is not clear that the commission is following the "natural progress" doctrine or that the physicians have grasped the proper standard upon which to make their apportionment. It is natural that a considerable proportion of the resulting disability is going to be "due to" the pre-existing condition, but the law is clear that that fact in itself does not justify reduction of compensation:<sup>45</sup>

Industry takes the employee as it finds him. A person suffering from a preexisting disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event.

<sup>41</sup> *Tanenbaum v. Industrial Accident Comm'n*, 4 Cal.2d 615, 52 P.2d 215 (1935); *Idaho Maryland Mines Corp. v. Industrial Accident Comm'n*, 104 Cal.App.2d 567, 232 P.2d 11 (1951); *Industrial Indemnity Co. v. Industrial Accident Comm'n*, 95 Cal.App.2d 443, 213 P.2d 11 (1949); *Jenkins v. Industrial Accident Comm'n*, 17 C.C.C. 131 (1952); *Pacific Employers' Ins. Co. v. Industrial Accident Comm'n*, 8 C.C.C. 239 (1943); *Aetna Cas. & Surety Co. v. Industrial Accident Comm'n*, 5 C.C.C. 11 (1940); *Fernandez v. Market Street Ry. Co.*, 4 C.C.C. 119 (1939); *Farino v. Industrial Accident Comm'n*, 1 C.C.C. 72 (1936).

<sup>42</sup> *Colonial Ins. Co. v. Industrial Accident Comm'n*, 29 Cal.2d 79, 172 P.2d 884 (1946), and cases cited in note 30 *supra*.

<sup>43</sup> *Liberty Mutual Ins. Co. v. Industrial Accident Comm'n*, 73 Cal.App.2d 555, 166 P.2d 908 (1946); *Idaho Maryland Mines Corp. v. Industrial Accident Comm'n*, 104 Cal.App.2d 567, 232 P.2d 11 (1951).

<sup>44</sup> *Bowler v. Industrial Accident Comm'n*, 135 Cal.App.2d 534, 538, 287 P.2d 562, 564 (1955). There is considerable difference in medical opinion as to whether certain kinds of cardiac conditions are caused by strain or exertion or whether they would have occurred regardless of the strain or exertion from the physiological condition of the victim. See GREY, ATTORNEY'S TEXTBOOK OF MEDICINE 277-300 (1934). Thus the testimony of some doctors may not reflect the portion of the disability reasonably attributed to the aggravation of the pre-existing condition but rather may be an estimate of the probability that the strain was the cause of any disability.

<sup>45</sup> *Liberty Mut. Ins. Co. v. Industrial Accident Comm'n*, 73 Cal.App.2d 555, 559, 166 P.2d 908, 911 (1946).

It is submitted that the decisions in the *State* and *Bowler* cases failed to take proper cognizance of this principle in evaluating the expert testimony.<sup>46</sup>

*Suggested Solutions for the Apportionment Problem*

It cannot be overlooked that if the correct California law is to be followed, the employee with an asymptomatic disability who suffers an industrial injury is likely to cost the employer or his insurance carrier greater compensation payments than if the industrial injury were to a healthy worker or to a worker with manifest disability. This result gives added impetus to the current hiring practice of giving job applicants a thorough medical examination and of inquiring into their past medical history for the purpose of discovering latent physical conditions.<sup>47</sup> Manifestly the consequent exclusion of workers with latent disabilities from the labor market is inimical to the best interests of society and requires legislative attention. Passing over the possibility of leaving the law in its present form and making employers bear the burden by legislating circumscribed hiring and firing policies, two practicable approaches are available.

The solution suggested by the study of the California Senate Committee on Labor<sup>48</sup> is a tightening of the apportionment statutes to exclude from the liability of the employer all disability except that proximately caused by the industrial injury when considered by itself. The committee objected to the policy which considers the disability resulting from the aggravation of a pre-existing condition to be proximately caused by the aggravating injury.<sup>49</sup> This view would leave to the various existing state welfare measures, such as unemployment disability compensation and the subsequent injury fund,<sup>50</sup> to provide, in whatever measure they are available, for the injured worker who is not adequately compensated for his disability.

The second solution is that put forth by section 14 of the Discussion Draft of the Proposed Model Workmen's Compensation Law.<sup>51</sup> The basic rule under this proposed model statute requires the employer to pay compensation for all disability "arising out of employment." If the disability from the industrial injury is made substantially greater by a permanent pre-existing condition which was or was likely to be a hindrance or obstacle to the employee obtaining employment and the employer has registered this pre-existing condition with the proper author-

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<sup>46</sup> Compare, e.g., *Thoreau v. Industrial Accident Comm'n*, 120 Cal.App. 67, 7 P.2d 767 (1932), where the employee suffered total disability immediately after a strong blow to his stomach and the commission's decision denying all compensation was annulled even though based on a medical report stating the disability was due entirely to a pre-existing ulcerous condition which was not exacerbated by the blow. The court held as a matter of law that this report did not state a sufficient conflict in the evidence where immediately before the blow the employee had no disablement or symptoms of disease and immediately after the blow the employee was totally disabled and there was competent medical testimony to the effect that the injury aggravated the pre-existing ulcerous condition. See also *Industrial Indemnity Co. v. Industrial Accident Comm'n*, 95 Cal.App.2d 443, 213 P.2d 11 (1949).

<sup>47</sup> CALIFORNIA SENATE COMMITTEE ON LABOR, SECOND PARTIAL REPORT RELATING TO WORKMEN'S COMPENSATION 19 (1955).

<sup>48</sup> *Id.* at 20.

<sup>49</sup> *Id.* at 19.

<sup>50</sup> This same committee recommended the changes which led to a substantial narrowing of the scope of the subsequent injury fund. *Id.* at 9; see text at note 62 *infra*. Discussion of the adequacy and coverage of social welfare measures other than the subsequent injury fund is beyond the scope of this Comment.

<sup>51</sup> Prepared by the U.S. Department of Labor and as yet unpublished.



ity before the subsequent injury,<sup>52</sup> then the employer is reimbursed from the subsequent injuries fund for all compensation subsequent to that payable for the first 104 weeks of disability. As suggested in the Model Law this solution is a complete subsequent injuries law. However, its provisions could be limited to non-disabling pre-existing conditions to settle the difficult apportionment problems in this area of California law. It is to be noted that the Model Law is a compromise recognizing the difficulty of fixing exact responsibility for disablements which are contributed to by latent diseases. It assures the injured worker of adequate compensation without a disproportionate award against the employer.

#### STATUTORY CHANGES IN THE LIABILITY OF THE SUBSEQUENT INJURY FUND

##### *Statutory Analysis*

When considered in conjunction with the California apportionment statutes, discussed above, the purpose of the provisions for a subsequent injury fund<sup>53</sup> is to alleviate the plight of the handicapped worker who is unfortunate enough to receive an industrial injury which, because of a previous permanent disability, causes a greater disablement than is compensable by the employer. The first recognition of social responsibility for this uncompensated disability came in 1929 when the legislature established a fund to be contributed to by employers whenever one of their employees suffered a fatal industrial injury and left no dependents entitled to the death benefit.<sup>54</sup> This plan was found to violate the California constitution and was declared invalid before it ever got into full operation.<sup>55</sup>

The basic act establishing the present subsequent injuries plan was passed in 1945.<sup>56</sup> It amended section 4750 and added sections 4751-54 of the California Labor Code. This law survived constitutional challenge in *Subsequent Injury Fund v. Industrial Accident Comm'n*,<sup>57</sup> where it was held that payment by the state of subsequent injury benefits did not amount to a gift of public funds and that there was no requirement that only employers may provide payments to injured workers.

Because of a preoccupation with the demands on the fund the 1955 legislature enacted amendments to sections 4751 and 4753 of the Labor Code which materially narrowed the coverage of the subsequent injury provisions and placed a proportionally greater burden on the injured worker.<sup>58</sup> These amendments are

<sup>52</sup> If the employer does not know of the pre-existing condition of the employee then it is not likely to be a hindrance to his employment and the employer is liable for full compensation in case there is an aggravation of a pre-existing condition. See *Zyla v. A. D. Juilliard & Co.*, 277 App. Div. 604, 102 N.Y.S.2d 255 (1951), where under a similar New York statute this result was reached.

<sup>53</sup> There is no independent entity called the "subsequent injury fund" but the term is commonly used for purposes of convenience. Benefits from the subsequent injury fund are paid by the state (CAL. LAB. CODE § 4755) and the Attorney General represents the subsequent injury fund in proceedings before the Industrial Accident Commission (CAL. LAB. CODE § 4753.5).

<sup>54</sup> Cal. Stat. 1929, c. 222, § 1.

<sup>55</sup> The main basis for the constitutional attack was that there was no provision in the California constitution creating a liability on the part of an employer to pay compensation for disabilities to workmen not employed by him. This contention was sustained in *People v. Standard Oil Co.*, 132 Cal. App. 563, 23 P.2d 86 (1933). See also *Commercial Cas. Ins. Co. v. Industrial Accident Comm'n*, 211 Cal. 210, 295 Pac. 11 (1930), holding there was no authority for the collection of the supporting fees from the employer.

<sup>56</sup> Cal. Stat. 1945, c. 1161, § 2.

<sup>57</sup> 39 Cal.2d 83, 244 P.2d 889 (1952).

<sup>58</sup> Cal. Stat. 1955, c. 1092, §§ 1-2.

expressly temporary in effect<sup>59</sup> and were passed as "stop-gap" measures to avert consequences from the old statutes which the legislature felt were undesirable.

Section 4751 read as follows before the 1955 amendment:

If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article.

The 1955 amendment replaced the ending period with a semi-colon and added this proviso:

provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, or (b) the permanent disability resulting from the subsequent injury when considered alone and without regard to the age of the employee, is equal to 40 percent or more of total.

*Smith v. Industrial Accident Comm'n*<sup>60</sup> is typical of the type of recovery under the old statute which this new amendment (among other aims) is designed to prevent. On June 6, 1949, Smith sustained compensable injury resulting in 38½ per cent permanent disability. On August 14, 1952, Smith suffered the loss of a finger which, considered alone, would receive a permanent disability rating of 5¼ per cent. The rating bureau determined that immediately before the August 14 injury Smith's disability would have been rated at 100 per cent<sup>61</sup> due to an advanced condition of arthritis. Under the old statute Smith's employer had to pay him compensation for 5¼ per cent disability and the subsequent injury fund was liable for the balance, 94¾ per cent of the disability, to compensate Smith for his 100 per cent disability. This result was felt to be undesirable because a small subsequent industrial injury could lead to a large recovery against the subsequent injury fund for a situation which was not caused by industry and had no connection with the employee's employment. It was felt that this type of an award was health insurance and not workmen's compensation.<sup>62</sup> Section 4751 as amended would allow Smith no award against the subsequent injury fund because a minimum

<sup>59</sup> The amendments to §§ 4751 and 4753 are effective from the 91st day after the close of the 1955 legislative session to the 91st day after adjournment of the 1957 Regular Session of the legislature. After the amendments are no longer effective, the old statutes shall have the same force as though such amendments had not been enacted. CAL. LAB. CODE § 4753.

<sup>60</sup> 44 Cal.2d 364, 282 P.2d 64 (1955).

<sup>61</sup> The attorney general raised the point that an employee was not "permanently partially disabled" under § 4751 if his disability was rated at 100 per cent before the subsequent injury. The court rejected this argument stating, "[I]t is permissible and desirable to distinguish between a formula or rule-established '100 per cent disability' for certain rating purposes and actual total disability insofar as productive work or compensated employment is concerned." 44 Cal.2d at 367-68, 282 P.2d at 67. This is a logical extension of the rule established in *Frankfort General Ins. Co. v. Pillsbury*, 173 Cal. 56, 159 Pac. 150 (1916), that a 20¼ per cent permanent disability rating will stand despite a stipulation that the injured employee was doing the same work at the same wage as before the accident. The basis for workmen's compensation payments is loss of earning capacity—real, presumed or potential.

<sup>62</sup> CALIFORNIA SENATE COMMITTEE ON LABOR, SECOND PARTIAL REPORT RELATING TO WORKMEN'S COMPENSATION 9 (1955).

severity of 40 per cent disability is needed for the subsequent injury standing by itself before the pre-existing disability will be compensable. If the subsequent injury is disastrous enough to reach the threshold level, then the law is the same as before the amendments (except for the effects of the new section 4753, discussed *infra*) and all pre-existing disabling diseases or injuries are compensable if the combined disability is 70 per cent or higher.

Under the newly amended section 4751 the threshold requirement need not be met in the narrow situation where the previous disability affected a hand, arm, leg, foot or eye and the subsequent injury caused disability to the opposite and corresponding member.<sup>63</sup> Evidently this exception to the threshold requirement was enacted because a previous injury of this type is easily recognized and clearly inhibitory to job opportunity, and, when the second injury is to the opposite and corresponding member, there is a great likelihood that the combined disability will be greater than would the sum of the disabilities if considered separately, making a strong case for subsequent injury fund liability.

Section 4753 read as follows before the 1955 amendment:

Such additional compensation is not in addition to but shall be reduced to the extent of any monetary payments the employee is receiving from any federal or state fund to which he has not directly contributed . . . .

The 1955 amendment rewrote the statute to read in part as follows:

Such additional compensation is not in addition to but shall be reduced by the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of said pre-existing disability or impairment . . . and excluding from such monetary payments received by the employee for or on account of said pre-existing disability or impairment a sum equal to all sums reasonably and necessarily expended by the employee for or on account of attorney's fees, costs and expenses incidental to the recovery of such monetary payments.<sup>64</sup>

The change in this statute is aimed at eliminating multiple recoveries for the same injury. Under the pre-amendment form of the statute benefits from the subsequent injury fund were reduced by payments the employee was receiving from a federal or state fund to which he had not directly contributed. Since the compensation for the first injury was received from the employer or his insurance carrier, a duplicate payment from the subsequent injury fund for the first injury was permissible if the employee suffered a second injury and the combined disability reached 70 per cent.<sup>65</sup> It was a possible interpretation that in the event of third or fourth injuries the employee could get third or fourth payments from the subsequent injury fund and they would only be reduced by the amount the em-

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<sup>63</sup> This provision harks back to the enactment of the subsequent injury legislation in 1945. The 1945 statute required the previous disability to be to one of the same specific members but was considerably more liberal than the 1955 amendment in that the subsequent injury was not restricted to any specific members as long as it caused "additional permanent partial disability." Cal. Stat. 1945, c. 1161, § 2. In 1949 the requirement that the previous disability be to a specific member was deleted. Cal. Stat. 1949, c. 1525, § 1.

<sup>64</sup> Two additional paragraphs relating to the application and duration of the 1955 amendments are omitted.

<sup>65</sup> In *Dahlbeck v. Industrial Accident Comm'n*, 135 Cal. App.2d 394, 287 P.2d 353 (1955), Dahlbeck suffered three successive industrial injuries. After the second injury, he received a duplicate compensation from the subsequent injury fund for the first injury. In the next proceeding the appeals court annulled a decision of the Industrial Accident Commission which decision denied him a third compensation for the first injury and a second compensation for the second injury. See also *State v. Warnock*, 15 C.C.C. 211 (1950).

ployee was receiving from the fund.<sup>66</sup> The 1955 amendment to section 4753 reduces the compensation of the employee by payments received "from any source whatsoever" for the previous disability and thus will eliminate double recovery for the same injury.

Considering the amendments to sections 4751 and 4753 in general, it is evident that they materially reduce the responsibility which the state has heretofore assumed in providing compensation for the disability the worker receives from an industrial injury without causing discrimination in job opportunities for handicapped workers. Unless the subsequent injury reaches a separate rating of 40 per cent disability, the requirement that both the previous and subsequent injuries be to specific members so narrows the subsequent injury covers that it will be invoked only on rare occasions when chance causes the correct combination of injuries. There is no plausible reason why the employee with a lame back or a debilitating heart condition or arrested tuberculosis should bear the whole burden of the excess disability caused by an industrial injury, while the employee with arthritis in his wrist or an amputated finger receives subsequent injury payments from the state. Even if the 40 per cent threshold requirement for the subsequent injury is met, serious problems are still raised by the amendment to section 4753 concerning credits against subsequent injury payments. Reduction by payments received from "any source whatsoever" includes tort damages and settlements for prior injuries which frequently will be large enough to nullify all subsequent injury liability because they include as elements of damage not only loss of earning power but pain, suffering and disfigurement.<sup>67</sup> Also any insurance benefits the employee may have received for prior injuries from a personal accident policy will be credited against his payments from the subsequent injury fund.<sup>68</sup> The size of these benefits depends for the most part on a contract and not on loss of earning power.

### *Recommendations*

One of the basic purposes behind the amendments to sections 4751 and 4753 was to reduce the increasing costs of the subsequent injury fund to the state.<sup>69</sup> But the legislature in its zeal to prevent unreasonably excessive recoveries in a few extreme cases has thrown a dark cloud over the record of California in recognizing the social responsibility of the state to its people. The following recommendations are submitted in recognition of the fact that by making the 1955 amendments temporary in nature<sup>70</sup> the legislature expects to reconsider the problem of injury to the diseased or disabled employee.

(1) The problems of apportionment for a pre-existing condition should be considered as an integral part of the subsequent injuries problem and a comprehensive program, such as section 14 of the Proposed Model Workmen's Compensation Law,<sup>71</sup> should be devised to encompass the entire situation.

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<sup>66</sup> There were no judicial interpretations of the pre-amendment statute.

<sup>67</sup> The costs which the employee underwent to gain the payments for his previous injury do not go to reduce subsequent injury payments. CAL. LAB. CODE § 4753.

<sup>68</sup> A question of statutory interpretation is presented as to whether the premium payments on the policy will be deducted before the credit against the subsequent injury fund is made. See CAL. LAB. CODE § 4753.

<sup>69</sup> CALIFORNIA SENATE COMMITTEE ON LABOR, PARTIAL REPORT RELATING TO WORKMEN'S COMPENSATION 87 (1955).

<sup>70</sup> See note 59 *supra*.

<sup>71</sup> See note 51 *supra*.

(2) All mention of specific members should be expunged from section 4751.<sup>72</sup> The requirement should be that the pre-existing condition is such as to actually and permanently reduce the worker's opportunity to compete in the labor market.

(3) Some threshold requirement for disability produced by the subsequent injury is desirable to prevent a small subsequent injury leading to a large recovery due to extensive pre-existing non-compensable disabilities. The present 40 per cent threshold is too high and causes unnecessary hardships. The threshold could be reduced to a smaller percentage, or the subsequent injury payments could be limited to a multiple of the disability caused by the second injury when considered alone.

(4) The change in section 4753 is much too severe and will nullify subsequent injury fund payments in many cases. The reduction in subsequent injury fund payments to prevent multiple recoveries for the same injury should be limited to the amount which would be payable as compensation if the pre-existing disability was an industrial injury without regard to the amount actually received from tort damages and insurance benefits.

*Marshall W. Krause\**

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<sup>72</sup> Cf. U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 180, WORKMEN'S COMPENSATION—PROBLEMS 85 (1954), where it is said that restricting subsequent injury liability to injury to specific members defeats the basic function and purpose of subsequent injury funds.

\* Member, Second-Year Class.