1989

Parson v. Holman Erection Co.: The Anomalous Treatment of Unemployed Disabled Workers under Minnesota's Workers' Compensation Statute

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Comments

Parson v. Holman Erection Co.: The Anomalous Treatment of Unemployed Disabled Workers Under Minnesota's Workers' Compensation Statute

Eddie Parson, a construction worker with Holman Erection Company, injured his left knee while at work on August 20, 1984.[1] Parson no longer could do construction work as a result of the injury,[2] and despite a diligent search to find an alternative job, he remained unemployed.[3] Holman Erection Company, based on its understanding of Minnesota's workers' compensation law, paid Parson wage loss benefits[4] from the time of his injury until ninety days after he had improved as much as reasonably could be expected.[5] Parson, believing the law entitled him to receive wage loss benefits for as long as he

1. Parson v. Holman Erection Co., 428 N.W.2d 72, 74 (Minn. 1988). Before injuring his left knee while working for Holman Erection Company (Holman), Parson had injured his right knee on September 11, 1981, while working for L. H. Sowles, Inc. (Sowles). *Id.* Following surgery on his injured right knee, Parson returned to work for Sowles, but eventually was laid off. *Id.* When Parson sued his later employer, Holman, he also sued Sowles on the theory that Sowles was liable for 50% of his total injury. *Id.* The compensation judge found that Parson's injury while an employee of Sowles contributed to 50% of Parson's overall disability and held Sowles liable for 50% of the temporary total wage loss benefits. *Id.* On appeal, the Workers' Compensation Court of Appeals and the Minnesota Supreme Court affirmed this award. *Id.* at 77. The decision as to the liability of Sowles, however, is not the subject of this Comment.

2. *Id.* at 74.

3. *Id.*

4. *Id.* The wage loss benefits Holman paid Parson were in the form of temporary total compensation. See *infra* notes 28-30 and accompanying text for an explanation of the temporary total compensation provisions in the 1984 statute.

5. *Parson*, 428 N.W.2d at 74. When an employee has improved as much as reasonably can be expected, the employee is issued a maximum medical improvement (MMI) report. *See infra* note 29. Ninety days after Parson received this report, Holman ceased paying him temporary total wage loss compensation. At that time, Holman began paying Parson loss of function benefits in the form of economic recovery compensation. *See infra* notes 47-48 and accompanying text.

remained disabled, filed a claim against the company.[6]

The compensation judge ruled that the company had met its statutory obligations to Parson.[7] On appeal, the Workers' Compensation Court of Appeals disagreed[8] and ordered Holman to continue paying Parson wage loss benefits for the duration of his disability.[9] In *Parson v. Holman Erection Co.*,[10] the Minnesota Supreme Court reversed the appeals court, holding that Parson's entitlement to wage loss benefits ceased ninety days after he had reached his maximum level of medical improvement.[11]

If Parson's work injury had occurred prior to 1984, Minnesota's workers' compensation law would have required Holman Erection Company to pay Parson wage loss benefits for the duration of his disability.[12] In 1983, however, the Minnesota Legislature revised major portions of the state's workers' compensation law.[13] The effect of the 1983 revisions on the

6. 428 N.W.2d at 74.

7. *Id.* In so ruling, the compensation judge determined that Parson was totally disabled as of the date of the hearing. There was no appeal from that finding. Parson v. Holman Erection Co., No. 425-66-5224, at 4 (Workers' Comp. Ct. App. May 4, 1987).

8. Parson v. Holman Erection Co., No. 425-66-5224, at 4 (Workers' Comp. Ct. App. May 4, 1987). Holman's share of Parson's temporary total disability was 50% because Parson injured only his left knee while employed by Holman. *See supra* note 1. The court noted that the uncontroverted medical testimony in the case showed that Parson "was not permanently and totally disabled but that he could not return to work at his former occupation." *Parson*, No. 425-66-5224, at 4.

9. *Parson*, No. 425-66-5524, at 7. The Worker's Compensation Court of Appeals ruled that, although Parson's right to temporary total wage loss compensation ceased 90 days after he reached MMI, he was entitled to receive temporary partial wage loss compensation calculated at the temporary total compensation rate for the duration of his disability. *See infra* notes 38-39 and accompanying text.

10. 428 N.W.2d 72 (Minn. 1988).

11. *Id.* at 76. Sowles did not appeal. *Id.* at 77.

In his suit against Holman, Parson raised three additional issues. First, he challenged the constitutionality of MINN. STAT. § 176.101 (1984). Second, Parson argued that he was entitled to receive temporary total compensation after full payment of economic recovery compensation. Third, Parson asserted that if Holman did not have to pay him temporary partial compensation at the temporary total rate, Sowles then was liable for temporary total disability benefits at 100% of the compensation rate because the 1981 injury was a substantial contributing factor to his disability. The Supreme Court ruled against Parson on all three issues, none of which is the topic of this Comment. *See infra* note 75.

12. *See infra* notes 32-37 and accompanying text.

13. *See* Act of June 7, 1983, ch. 290, 1983 Minn. Laws 1310 (codified at MINN. STAT. chs. 43A, 79, 147, 148, 175, 176, 268, 346, 471 (1984)). Extensive

type and duration of benefits available to injured workers was not immediately clear.[14] *Parson* raised the issue whether, under the revised statute, partially disabled employees who cannot find alternative work despite diligent efforts are entitled to wage loss benefits beyond ninety days after reaching maximum medical improvement.[15] This issue frequently confronts injured workers.[16]

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criticism of Minnesota's pre-1984 workers' compensation law prompted the system overhaul. Critics noted the system's high cost to employers and insurers in comparison to the cost of workers' compensation in surrounding states, the high rate of litigation the system generated, the amount of disability the system compensated, the lack of incentives for employers to provide proper rehabilitation to injured employees, and the lack of incentives for employees to cooperate with rehabilitation. *See* C. WILLIAMS, JR., R. AZEVEDO, M. BOGNANO, & P. SCHUMANN, MINNESOTA WORKERS' COMPENSATION BENEFITS AND COSTS: AN OBJECTIVE ANALYSIS 74-97 (1983) (recommending the elimination of the open-ended nature of temporary total disability benefits); *see also* CITIZENS LEAGUE, WORKERS' COMPENSATION REFORM: GET THE EMPLOYEES BACK ON THE JOB 37-47 (1982) (recommending incentives for employers to prevent injuries and to take injured workers back to work, and rewards for employees who return to work quickly after injury); MINNESOTA INSURANCE DIVISION, WORKERS' COMPENSATION IN MINNESOTA: AN ANALYSIS WITH RECOMMENDATIONS 205-08 (1982) (recommending the addition of incentives which facilitate a faster return to work by injured workers); MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR 105-27 (1979) (including a comparison of Minnesota's workers' compensation insurance premium rates to those in other jurisdictions).

14. *See infra* notes 55-65 and accompanying text.

15. 428 N.W.2d at 74. The issue as framed in the plaintiff's brief was whether the 1983 amendments eliminate an unemployed injured worker's entitlement to temporary total compensation 90 days after service of a maximum medical improvement report. Brief for Respondent at 1, Parson v. Holman Erection Co., 428 N.W.2d 72 (Minn. 1988) (No. C5-87-1037). By its decision, however, the court not only answered the stated question but also answered the question whether the 1983 amendments eliminate an unemployed injured employee's entitlement to temporary partial benefits at a rate other than the temporary total compensation rate. *Parson*, 428 N.W.2d at 76.

16. Since deciding *Parson*, the Supreme Court repeatedly has relied on *Parson* to deny temporary partial wage loss benefits to unemployed injured workers after 90 days past maximum medical improvement. *See* Berard v. Johnson Greenline, Inc., 428 N.W.2d 389, 389 (Minn. 1988) (relying on *Parson* to deny employee concurrent economic recovery compensation and temporary partial compensation at the temporary total rate); Ryan v. Jorgenson Chevrolet, 426 N.W.2d 889, 889 (Minn. 1988) (same); Bue v. Saint Otto's Home, 427 N.W.2d 247, 247 (Minn. 1988) (relying on *Parson* to deny employee temporary partial compensation at the temporary total rate); Dengerud v. Utley-James, Inc., 427 N.W.2d 673, 674 (Minn. 1988) (same); Shipton v. George A. Hormel & Co., 426 N.W.2d 888, 888 (Minn. 1988) (same); Giese v. Green Giant Co., 426 N.W.2d 879, 880 (Minn. 1988) (same); Lamont v. Schmidt Brewing, 426 N.W.2d 883, 883 (Minn. 1988) (same); Tews v. George A. Hormel & Co., 430 N.W.2d 178, 180 (Minn. 1988) (same); Swenson v. SMA Elevator Constr., 430 N.W.2d 668, 668 (Minn. 1988) (same); Morrissey v. Country Club Markets, Inc., 430

This Comment disagrees with the *Parson* court's conclusion that the 1983 legislature intended to eliminate wage loss compensation for disabled workers who remain unemployed ninety days past maximum medical improvement. Part I summarizes pertinent provisions of Minnesota's workers' compensation statute prior to the 1983 amendments and related case law. Part I further summarizes the 1983 amendments relevant to compensation for injured employees and the Minnesota Supreme Court's interpretation of the new law's effect on disabled employees who secure other employment. Part II describes the *Parson* court's analysis of the new law's effect on disabled employees who remain unemployed despite a diligent search for work. Part III argues that the *Parson* majority incorrectly interpreted the new law's wage loss compensation provisions as applied to injured workers who remain unemployed. This Comment concludes that the Minnesota Legislature should amend its workers' compensation statute to clarify the wage loss compensation provisions for disabled workers who remain unemployed ninety days past maximum medical improvement.

I. STATUTORY AND CASE LAW BACKGROUND

Minnesota's workers' compensation statute provides injured employees two major types of benefits: wage loss benefits and loss of function benefits.[17] Wage loss benefits protect an employee against loss or reduction of earnings resulting from a work-related injury.[18] Loss of function benefits compensate an employee for any permanent physical impairment due to the work-related injury.[19] Wage loss and loss of function compen-

N.W.2d 169, 170 (Minn. 1988) (relying on *Parson* to deny employee temporary partial benefits for period of unemployment after reaching maximum medical improvement); Svenningsen v. Feinberg Distrib. Co., 432 N.W.2d 758, 758 (Minn. 1988) (same).

17. The workers' compensation statute also provides compensatory reimbursement for all reasonable and necessary medical costs resulting from the work-related injury (MINN. STAT. § 176.135 (1988)), rehabilitation or retraining benefits to injured employees (MINN. STAT. § 176.102 (1988)), and permanent total disability (MINN. STAT. § 176.101 subd. 4 (1988)). Permanent total disability benefits are available to employees whose injuries leave them totally incapacitated, thus unable to work at any occupation. MINN. STAT. § 176.101 subd. 5 (1988). These four provisions are not directly relevant to this Comment.

18. *See* MINN. STAT. § 176.021 subd. 3 (1988). Wage loss benefits include temporary total compensation and temporary partial compensation. MINN. STAT. § 176.101 subds. 1, 2 (1988).

19. MINN. STAT. § 176.021 subd. 3 (1988). The 1982 statute labeled loss of function benefits as "permanent partial disability" compensation. MINN. STAT.

sation thus are separate and distinct benefits.[20]

A. WAGE LOSS BENEFITS

Minnesota's workers' compensation statute sets forth two provisions governing wage loss benefits: temporary total benefits[21] (total benefits) and temporary partial benefits[22] (partial benefits).

Prior to the 1983 amendments, an injured employee qualified for total benefits when she was unable to engage in any substantial gainful employment.[23] An employee could demonstrate total incapacitation either by showing a physical impairment that prevented her from working,[24] or by demonstrating that a physical impairment combined with certain vocational factors resulted in a lack of available jobs.[25] Thus, although an

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§ 176.101 subd. 3 (1982). The statute now labels loss of function benefits as "economic recovery compensation" and "impairment compensation." MINN. STAT. § 176.101 subds. 3a, 3b (1988).

20. MINN. STAT. § 176.021 subd. 3 (1988).

21. MINN. STAT. § 176.101 subd. 1 (1988).

22. *Id.* subd. 2.

23. *Id.* subd. 5 (1982). An injured employee who qualified as temporarily totally disabled was entitled to two-thirds of her daily wage at the time of the injury subject to specified maximum and minimum payments. *Id.* subd. 1. The maximum weekly benefits payable were equal to the statewide average weekly wage (SAWW) for the preceding year. The minimum weekly benefits payable were to be not less than 50% of the SAWW or the injured employee's actual weekly wage, whichever was less. Payment was to be made as nearly as possible at the intervals when the wage was payable. *Id. See generally* Crochiere, *The Plight of the Displaced Employee Improves: An Analysis of the 1983 Changes to Minnesota's Workers' Compensation System*, 12 WM. MITCHELL L. REV. 623, 629-39 (1986) (discussing benefits under the pre-1983 statute); Altman, Benanav, Keefe & Volz, *Minnesota's Workers' Compensation Scheme: The Effects and Effectiveness of the 1983 Amendments*, 13 WM. MITCHELL L. REV. 843, 860-64 (1987)(same).

24. These injuries included the

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

MINN. STAT. § 176.101 subd. 5 (1982).

25. Relevant vocational factors included the injured employee's age, training, and work experience. *See, e.g.*, Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 82-83, 153 N.W.2d 130, 133-34 (1967) (holding that determination of total disability is not solely determined by the employee's physical condition); Castle v. City of Stillwater, 235 Minn. 502, 506, 51 N.W.2d 370, 372 (1952) (ruling that in defining total disability, losses in bodily function are important only as they relate to ability to earn an income).

To prove inability to find and hold a job, an injured employee must

employee was physically able to perform some types of work, she was considered totally disabled if there were no available jobs given her vocational profile. As long as an employee met the criteria for total disability, she could continue to receive total benefits for an indeterminate period.[26]

As amended in 1983,[27] Minnesota's workers' compensation law continues to provide total benefits to incapacitated workers.[28] The amended law, however, terminates an employee's total benefits ninety days after the employee achieves maximum medical improvement (MMI)[29] rather than continuing them

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demonstrate a reasonably diligent search for alternative employment. *See* Crochiere, *supra* note 23, at 629-30. *See infra* note 36 and accompanying text for court interpretation of "reasonably diligent search."

26. The statute provided that "compensation shall be paid during the period of disability." MINN. STAT. § 176.101 subd. 1 (1982). *See* Henry v. Sears, Roebuck & Co., 286 N.W.2d 720, 723 (Minn. 1979) (holding that "termination of temporary total disability benefits must be based either on a finding that the employee is no longer temporarily totally disabled . . . or on a finding that the employee intended to retire on a specific date regardless of his or her disability").

27. *See* Act of June 7, 1983, ch. 290, 1983 Minn. Laws 1310 (codified at MINN. STAT. chs. 43A, 79, 147-48, 175-76, 268, 346, 471 (1984). Commentators cite various legislative goals of the new system. *See, e.g.*, Crochiere, *supra* note 23, at 654 (citing four goals of the 1983 amendments: to reduce costs in the system, to make the system more equitable, to encourage a faster return to work for the displaced employee, and to make the system less uncertain); Altman, *supra* note 23, at 867 (citing three principles on which the new system was based: create an economic incentive for employers/insurers to find a suitable job for the injured employee; eliminate the open-ended system of weekly temporary total disability benefits; create incentives for injured employees to accept a suitable job by financially rewarding them for returning to work). For a general discussion of the benefits available under the revised statute see Crochiere, *supra* note 23, at 646-54, and Altman, *supra* note 23, at 869-99.

28. MINN. STAT. § 176.101 subd. 1 (1988). A temporarily totally disabled employee is entitled to two-thirds of her daily wage at the time of the injury. The maximum temporary total compensation available continues to be subject to the statewide average weekly wage (SAWW) for the preceding year with the minimum not to be less than 50% of the SAWW or the injured employee's actual weekly wage, whichever is less. The compensation is to be paid at the intervals when the wage was payable, or as nearly as may be. *Id.*

29. Maximum medical improvement (MMI) is the date "after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability." MINN. STAT. § 176.011 subd. 25 (1988). MMI is to be based on objective findings and the patient's rate of recovery and should not be based on arbitrary time periods. Because individual healing rates vary, two employees with identical injuries may achieve MMI at different rates. Each case thus should be analyzed separately. *See* Altman, *supra* note 23, at 869-870 n.106. After an employer receives a written medical report indicating that the employee has reached MMI, the employer serves a copy of the report upon the employee. MINN. STAT. § 176.101 subd. 3e(c) (1988).

indefinitely.[30]

Partial benefits,[31] the second type of wage loss compensation provided under the statute, extend to those employees who, despite their injuries, are able to work subject to certain medical restrictions.[32] Prior to the 1983 amendments, injured workers could qualify for partial benefits regardless of whether they were employed.[33] The rate of compensation varied, however, depending on the worker's employment status.[34] Workers who found alternative jobs received partial benefits calculated on the basis of their earning capacity in their disabled condition.[35] Workers who could not find jobs after a "reasonably dil-

30. MINN. STAT. § 176.101 subd. 3e(a) (1988). Alternatively, an employee's total benefits cease 90 days after he completes an approved retraining program, if that date is later. *Id.*

The statute further provides that an employer may cease paying an employee temporary total compensation *during* the 90-day period after MMI if the employee retires, if the employer furnishes the employee suitable work, or if the employee accepts a suitable job with another employer. MINN. STAT. § 176.101 subd. 3e(b) (1988). To be "suitable," the job must be consistent with an approved plan of rehabilitation or be one an injured employee can do in her physical condition, and it must produce an economic status as close as possible to the status the employee would have enjoyed without the disability. *Id.*

An employee who refuses an offer of suitable employment suffers several consequences. The employee loses her entitlement to temporary total compensation. MINN. STAT. § 176.101 subd. 3l (1988). Moreover, upon refusal the employee becomes ineligible for temporary partial benefits if she subsequently returns to work at a lower wage than her pre-injury employment. MINN. STAT. § 176.101 subd. 3n (1988). Additionally, the employee who refuses a suitable job offer loses her eligibility for any rehabilitation benefits offered under the statute. *Id.*

An employer also may cease paying temporary total benefits *before* the employee reaches MMI if the employer provides the employee with an appropriate job, or if the employee accepts an appropriate job from another employer. MINN. STAT. § 176.101 subd. 3f (1988).

31. MINN. STAT. § 176.101 subd. 2 (1988).

32. *Id.* Prior to the 1974 amendments, the Minnesota Supreme Court listed four factors necessary for an employee to qualify under the statute: there must be a physical disability; the disability must be temporary rather than permanent; the injury must be partial, allowing the employee to work subject to the disability; and the employee must suffer an actual loss of earning capacity that is causally related to the disability. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 47, 245 N.W.2d 451, 454 (1976). After amendments to the workers' compensation statute in 1974, the court revised its definition to exclude the requirement that the injury must be temporary rather than permanent. Morehouse v. George A. Hormel & Co., 313 N.W.2d 8, 10 (Minn. 1981).

33. The compensation was payable when the wage was payable, and was subject to a maximum amount equal to the statewide average weekly wage. MINN. STAT. § 176.101 subd. 2 (1982).

34. *Id.*

35. *Id.* Workers who found alternative jobs received two-thirds of the dif-

igent effort" to do so received partial benefits calculated on the basis of their pre-injury wage.[36] Both employed and unemployed workers thus received partial benefits for an indetermi-

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ference between their pre-injury wage and their post-injury wage. Actual earnings by an employee with a temporary partial disability created a presumption of earning capacity. When actual earnings and earning capacity were dissimilar, however, the actual earning capacity of the disabled worker remained the determining factor for calculation of benefits. *See, e.g.*, Owens v. Pako Corp., 386 N.W.2d 711, 715 (Minn. 1986) (finding that employee's actual earnings, divided by the number of weeks in which he earned that amount, equaled his earning capacity); Olson v. Midwest Printing Co., 347 N.W.2d 43, 47 (Minn. 1984) (holding that "a retrained commission salesperson's earning capacity be determined based on actual earnings, but only for a reasonable period of time during which the person is making a diligent effort to succeed in the occupation of retraining"). *Cf.* Roberts v. Motor Cargo, Inc., 258 Minn. 425, 430, 104 N.W.2d 546, 550 (1960) (acknowledging that the Minnesota Supreme Court has held that "it is not what the employee earns after the injury but what the employee is able to earn which is determinative" in temporary partial disability cases, but concluding that concrete evidence of earnings "creates a presumption of earning capacity").

36. MINN. STAT. § 176.101 subd. 2 (1982). The effect of paying unemployed injured workers partial benefits calculated on the basis of their pre-injury wage was to pay such workers "at the full compensation rate for his or her temporary total disability." *Id.* The statute thus classified a temporary partial disability as a temporary total disability for the purpose of wage loss compensation. Furthermore, "the distinction between temporary partial and temporary total disability" became blurred because the statute required an injured employee to perform a diligent search for work to qualify for temporary partial disability benefits at the temporary total rate, and the same search was required to qualify for temporary total disability. Crochiere, *supra* note 23, at 631. *See, e.g.*, Mayer v. Erickson Decorators, 372 N.W.2d 729, 731 (Minn. 1985) (holding that to remain entitled to receive temporary partial disability compensation, an employee must cooperate with rehabilitation efforts, including those aimed at returning him to employment through a reasonably diligent effort to obtain employment); Wesley v. City of Detroit Lakes, 344 N.W.2d 614, 617 (Minn. 1984) (holding that an employee is entitled to temporary partial disability benefits at the temporary total disability rate even though he refused an offer of employment within his physical limitations because he made a good-faith effort to accept the job offer within a reasonable time, and continued to make a good faith effort to find other work within his physical limitations); Paine v. Beek's Pizza, 323 N.W.2d 812, 816 (Minn. 1982) (finding that an employee who voluntarily removed himself from the labor market by moving from a metropolitan area to a rural area where no employment opportunities existed had not made a reasonably diligent effort to secure work and thus was not entitled to temporary partial disability benefits at the total disability rate). *Compare* Petschl v. Britton Motor Serv., 323 N.W.2d 788, 790 (Minn. 1982) (holding that an employee who lived 60 miles from a metropolitan area and was employed in that metropolitan area when he sustained his work-related injury was not entitled to temporary partial benefits at the temporary total disability rate if he refused to seek work in the metropolitan area) *with* Fredenburg v. Control Data Corp., 311 N.W.2d 860, 864-65 (Minn. 1981) (holding that temporary partial benefits at the temporary total rate shall continue because employee whose injury precludes commuting is not required to seek sub-

nate period, but the benefits received were calculated on a different basis.[37]

Under the statute as amended in 1983, eligible workers continue to receive partial benefits for an indeterminate period.[38] The only change the legislature made in the partial benefits provision was to delete the sentence providing that unemployed workers be compensated at the full compensation rate.[39] This change raised the issue, addressed in *Parson*, whether a disabled worker who remains unemployed after

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stitute employment that requires commuting, as long as he has made a reasonably diligent effort to find suitable work within his own community).

37. MINN. STAT. § 176.101 subd. 2 (1982). The statute provided that "compensation shall be paid during the period of disability." *Id. See, e.g.*, French v. Minnesota Cash Register, 341 N.W.2d 290, 292 (Minn. 1983) (finding that an employee who refused an offer of light work was entitled to continue receiving temporary partial disability payments because at the time the offer was made the seriousness of the injury was not recognized by the treating doctors or by the employer).

38. The statute, in pertinent part, provides that "[a]n employee who accepts a job under subdivision 3e or subdivision 3f and begins that job shall receive temporary partial compensation pursuant to subdivision 2, if appropriate." MINN. STAT. § 176.101 subd. 3h (1988). A subdivision 3e or 3f job is one that is consistent with an employee's rehabilitation plan, or one that the employee can do in her disabled condition and which produces an economic status as close as possible to that which the employee would have enjoyed without the disability. *Id.* subds. 3e(b), 3f.

The Minnesota Supreme Court has interpreted the language of subdivision 3h to mean that an employee's temporary partial compensation shall continue for as long as a new job pays less than the pre-injury wage. *See infra* notes 55-58 and accompanying text.

Temporary partial compensation for those injured employees who procure other employment continues to be two-thirds of the difference between the weekly wage of the employee at the time of injury and the wage the employee is able to earn in the employee's partially disabled condition. MINN. STAT. § 176.101 subd. 2 (1988).

39. The deleted sentence, as contained in the 1982 statute, read as follows:

> If the employer does not furnish the worker with work which he can do in his temporary partially disabled condition and he is unable to procure such work with another employer, after reasonably diligent effort, the employee shall be paid at the full compensation rate for his or her temporary total disability.

MINN. STAT. § 176.101 subd. 2 (1982).

As amended in 1983, subdivision 2 now provides:

> *Temporary partial disability* In all cases of temporary partial disability the compensation shall be 66-2/3 percent of the difference between the weekly wage of the employee at the time of injury and the wage the employee is able to earn in the employee's partially disabled condition. This compensation shall be paid during the period of disability except as provided in this section, payment to be made at the intervals when the wage was payable, as nearly as may be, and subject to a maximum compensation equal to the statewide average weekly wage.

MINN. STAT. § 176.101 subd. 2 (1988).

reaching maximum medical improvement despite diligent efforts to find an alternative job is entitled to receive partial wage loss benefits at the total benefit rate.

B. Loss of Function Benefits

Prior to the 1983 amendments, the workers' compensation statute provided loss of function benefits to employees who, due to their injury, permanently lost the use of one or more body parts.[40] Statutory formulas determined the amount and duration of the compensation,[41] and the same formulas were used for both employed and unemployed workers.[42] Disabled employees received this loss of function compensation in addition to their wage loss compensation.[43]

As amended in 1983, the law continues to provide loss of function compensation to employees who permanently lose the use of one or more body parts as a result of their injury.[44] Rather than using the same formula to calculate benefits for all workers, however, the revised statute incorporates a two-tiered system that distinguishes the employed from the unemployed worker.[45] Under this new two-tiered structure, a disabled

40. MINN. STAT. § 176.101 subd. 3 (1982). *See generally* Crochiere, *supra* note 23, at 632 (explaining Minnesota pre-1983 permanent partial disability benefits); Altman, *supra* note 23, at 861-64 (discussing permanent partial disability benefits).

41. MINN. STAT. § 176.101 subd. 3 (1982). The statute provided both scheduled and non-scheduled permanent partial disability benefits. Scheduled injuries were those listed in the statute. An employee who suffered one of the "scheduled" injuries received compensation calculated according to the statutory formula. The formula specified what percentage of the employee's daily wage at the time of the injury the employer was required to pay and the length of time that the employer was required to continue paying the compensation. *Id.* For example, an employee who lost a thumb received 66 2/3% of his daily wage at the time of the injury for a period of 65 weeks. *Id.* subd. 3(1). An employee who suffered a "non-scheduled" injury received two-thirds of the difference between the employee's daily wage at the time of the injury and the employee's daily wage in his disabled condition. *Id.* subd. 3(49). The amount of compensation was subject to a maximum equal to the statewide average weekly wage. *Id.* subd. 3.

42. The only difference between employed and unemployed permanently partially disabled workers was the treatment of "non-scheduled" injuries. *See supra* note 41. If the employer did not furnish work to an employee with a non-scheduled injury and the employee was unable to secure such work on his own after a reasonably diligent effort, the statute required an employer to pay the injured employee benefits at the maximum rate of compensation for total disability. MINN. STAT. § 176.101 subd. 3(49) (1982).

43. MINN. STAT. § 176.021 subd. 3 (1982).

44. MINN. STAT. § 176.101 subds. 3a, 3b (1988).

45. *Id.* subd. 3e.

worker who successfully finds alternative employment receives impairment compensation,[46] while a disabled worker who cannot find alternative work receives economic recovery compensation.[47] Economic recovery compensation, computed using a different formula from the impairment compensation formula, provides significantly higher loss of function benefits than does impairment compensation.[48]

Before the 1983 amendments, employed and unemployed workers received both wage loss benefits and loss of function benefits.[49] Under the revised law, an *employed* disabled worker who reaches maximum medical improvement can receive both wage loss benefits and loss of function benefits.[50] *Parson*, how-

46. *Id.* subds. 3b, 3e(b).

47. *Id.* subd. 3a. Impairment compensation and economic recovery compensation thus are mutually exclusive. *Id.* subd. 3e(b).

48. Both impairment compensation and economic recovery compensation are determined by statutory formulas. *Id.* subds. 3a, 3b. To calculate the amount of compensation an injured worker receives, the first step is to determine the percentage of disability that the loss of function of the disabled part bears to the whole body. MINN. STAT. § 176.105 subd. 4 (1988).

For economic recovery compensation, the percentage of disability is multiplied by the number of weeks aligned with that percentage in the statutory schedule, which then is multiplied by 66-2/3% of the employee's weekly wage at the time of the injury. MINN. STAT. § 176.101 subd. 3a (1988). For example, an injured worker who has suffered a 25% disability receives .25 (percent of disability) multiplied by 600 (weeks of compensation) multiplied by 66-2/3% of the pre-injury weekly wage. If the employee earned $200 a week at the time of her injury, the amount of the economic recovery compensation would be $20,000.

For impairment compensation, the percentage of disability is multiplied by the amount aligned with that percentage in the statutory schedule. *Id.* subd. 3b. For example, an injured worker who has suffered a 25% disability receives .25 (percent of disability) multiplied by $75,000 (amount aligned with that percent in the statutory schedule) for a total of $18,750. The employee's former weekly wage is not part of the impairment compensation formula. *See generally* Crochiere, *supra* note 23, at 651-53 (comparing impairment compensation to economic recovery compensation). Regardless of the statutory formulas, however, the statute provides that economic recovery compensation always will be at least 20% higher than impairment compensation. MINN. STAT. § 176.101 subd. 3t (1988).

Other major differences between impairment compensation and economic recovery compensation include the following: impairment compensation is usually paid in a lump sum, economic recovery compensation is paid as a weekly benefit; impairment compensation generally will not be affected by increases in average wages, whereas economic recovery will increase over time as average wages increase. *See* Altman, *supra* note 23, at 868-69. The statute prohibits an injured employee from receiving either economic recovery compensation or impairment compensation concurrently with temporary total compensation. MINN. STAT. § 176.101 subds. 3e(b), 3p (1988).

49. MINN. STAT. § 176.021 subd. 3 (1982).

50. *See infra* notes 59-65 and accompanying text.

ever, changed the system so that an *unemployed* disabled worker receives only loss of function benefits after reaching maximum medical improvement.[51]

C. COURT INTERPRETATION OF THE 1983 AMENDMENTS TO THE TEMPORARY PARTIAL COMPENSATION PROVISIONS

Prior to its *Parson* decision, the Minnesota Supreme Court consistently refused to find limitations on benefits that the statute did not specifically mandate.[52] The court held, for example, that the 1983 amendments to the workers' compensation statute provide no specific termination date for partial wage loss benefits and, consequently, did not judicially impose a limitation.[53] The court also broadly interpreted the amended statute to allow a worker with a permanent partial disability who secures alternative employment to receive both wage loss and loss of function benefits concurrently.[54]

In *Patton v. Thompson Electric Co.*,[55] the court ruled that a disabled employee who has found an alternative job is entitled to partial wage loss benefits for as long as his new job pays less than his pre-injury wage.[56] The *Patton* court explained that whenever a post-injury job pays less than a pre-injury wage, an employee is entitled to partial wage loss benefits to bring the job within the statutory requirement of economic suitability.[57] A job is economically suitable only if it allows the worker to

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51. *Parson*, 428 N.W.2d at 76.

52. *See* Gasper v. Northern Star Co., 422 N.W.2d 727 (Minn. 1988); Patton v. Thompson Elec. Co., 420 N.W.2d 596 (Minn. 1988); Winchester v. Pako Corp., 420 N.W.2d 587 (Minn. 1988).

53. *See Gasper*, 422 N.W.2d at 730; *Patton*, 420 N.W.2d at 598; *Winchester*, 420 N.W.2d at 588.

54. *See Gasper*, 422 N.W.2d at 731; *Patton*, 420 N.W.2d at 597; *Winchester*, 420 N.W.2d at 588.

55. 420 N.W.2d 596 (Minn. 1988).

56. *Id.* at 598. The court rejected the employer's argument that because MINN. STAT. § 176.101 subd. 3e(a) (1984) requires cessation of temporary total compensation 90 days after an injured employee reaches maximum medical improvement, temporary partial disability benefits also must cease at that time. *Id.* The court emphasized that the statute contains no specific provision for the cessation of temporary partial benefits as it does for the cessation of temporary total benefits. *Id.* The court further emphasized that "if the legislature had intended such a 'major change' in the way temporary partial benefits were to be paid, the legislature would have put that in the new law." *Id. See also Winchester*, 420 N.W.2d at 588 (holding that an employee who injured her back while working and who secured employment with another company at a reduced wage was entitled to temporary partial disability compensation "so long as the disability shall warrant").

57. *Patton*, 420 N.W.2d at 598.

enjoy an economic status "as close as possible" to the economic status he would have enjoyed without the injury.[58]

The *Patton* decision further held that an injured employee with an alternative job is entitled to impairment compensation for any permanent physical disability.[59] The court explained that wage loss benefits and loss of function benefits are separate benefits.[60] Therefore, an injured worker may receive partial wage loss benefits concurrently with impairment compensation benefits.[61]

In *Gasper v. Northern Star Co.*,[62] the court extended its reasoning in *Patton* and held that an injured employee who finds an alternative job is entitled to receive partial wage loss benefits concurrently with economic recovery compensation.[63] In *Gasper*, the court ignored the fact that economic recovery compensation, which normally goes to unemployed workers, provides significantly higher benefits than does impairment compensation, which goes to employed workers. The court instead focused on the distinct and separate purposes of wage loss benefits and loss of function benefits.[64] The court concluded that because wage loss benefits compensate an injured worker for lost or reduced wages, and economic recovery compensation pays the injured worker for functional loss, "the employee receives no double benefit" by receiving both benefits concurrently.[65]

Based on Minnesota Supreme Court decisions in *Patton* and *Gasper*, a partially disabled employee who finds some type of alternative employment is entitled to wage loss benefits *and*

58. MINN. STAT. § 176.101 subd. 3e(b) (1984).

59. *Patton*, 420 N.W.2d at 598. The court, citing MINN. STAT. § 176.101 subd. 3f (1984), noted that the employee started working at a suitable job before reaching MMI and thus was eligible under the statute for impairment compensation. *Id.* at 597. *See also Winchester*, 420 N.W.2d at 588 (upholding award of temporary partial compensation 90 days past MMI to employee who was working at a suitable job).

60. *Patton*, 420 N.W.2d at 597.

61. *Id.*

62. 422 N.W.2d 727 (Minn. 1988).

63. *Id.* at 731. Because none of the three jobs Gasper found met the criteria of suitability under subd. 3e, the parties agreed that Gasper was entitled to economic recovery compensation. *Id.*

64. *Id.*

65. *Id.* The court explained that the language of the statute defines economic recovery and impairment compensation as "separate, distinct, and in addition to payment for any other compensation." *Id. See* MINN. STAT. § 176.021 subd. 3 (1984) (explaining employers' duties regarding payment of compensation).

loss of function benefits. The wage loss benefits as provided under the partial compensation provision also may continue for an indeterminate period.[66] In *Parson*, the court considered whether wage loss benefits extend to a partially disabled employee who remains unemployed ninety days after reaching maximum medical improvement.[67] In other words, the court considered whether the employee is entitled to temporary partial benefits after the employee's right to total benefits expires.

II. THE *PARSON* COURT'S ANALYSIS

In *Parson v. Holman Erection Co.*, the Minnesota Supreme Court held that, under the 1983 amendments to Minnesota's workers' compensation statute, an injured worker who has not found a job within ninety days after reaching maximum medical improvement is not entitled to receive partial wage loss benefits at the total wage loss benefit rate.[68] In so holding, the court effectively prohibited any wage loss benefits for the unemployed injured employee ninety days after the employee reaches maximum medical improvement.

To reach its holding, the court acknowledged criticism of the pre-1984 law's open-ended availability of total wage loss benefits.[69] The court explained that, under the statute as amended in 1983, an injured employee's entitlement to total wage loss benefits is of limited duration.[70] The court emphasized that the plain language of the revised statute mandates termination of an employee's total wage loss benefits ninety days past maximum medical improvement.[71]

The court next determined that the 1983 legislature made only one substantive change in the old law's partial wage loss

66. *See supra* notes 56-58 and accompanying text.

67. 428 N.W.2d at 74.

68. *Id.* at 76.

69. *Id.* at 74-75. The court nevertheless acknowledged that in addition to eliminating the open-ended nature of temporary total compensation, other goals of the 1983 legislature included providing economic incentives for employers to provide suitable employment for injured employees and providing still other economic incentives encouraging employees to accept suitable employment. *Id.* at 76.

70. *Id.* at 75.

71. *Id.* The relevant part of subdivision 3e(a) states that "[n]inety days after an employee has reached maximum medical improvement or 90 days after the end of an approved retraining program, whichever is later, the employee's temporary total compensation shall cease." MINN. STAT. § 176.101 subd. 3e(a) (1984).

provision.[72] This change deleted the sentence providing partial wage loss benefits at the total compensation rate to workers who remain unemployed despite a diligent search to find alternative work.[73]

The court noted that the legislature amended the statute by removing the term "disability" from the statutory provisions describing temporary wage replacement benefits.[74] The court concluded from these two amendments that the legislature intended to preclude injured employees who are unable to find work from receiving partial wage loss benefits.[75] The court accordingly held that Minnesota law does not allow an unemployed injured worker to receive partial wage loss benefits at the total compensation rate because a contrary decision would render meaningless the statute's requirement that total compensation cease ninety days past maximum medical improvement.[76]

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72. 428 N.W.2d at 75. The provision is contained in MINN. STAT. § 176.101 subd. 2 (1984).

73. *Id.* For the text of the deleted sentence, see *supra* note 39.

74. *Id.* at 76. The court emphasized that the new law no longer includes the terms "temporary total disability compensation" and "temporary partial disability benefits" to describe temporary wage replacement benefits. The court pointed out that the new law uses the terms "temporary total compensation" and "temporary partial compensation." *Id. See* MINN. STAT. § 176.101 subds. 3a-3u (1984). Given that the legislature meant to establish a new format for workers' compensation, the court concluded that the changed language meant something different from the language of the old statute. 428 N.W.2d at 76. The court provided no explanation of the relevance of this change and none is apparent.

75. 428 N.W.2d at 76. The court also rejected all the plaintiff's other claims. The court rejected plaintiff's attack on the constitutionality of MINN. STAT. § 176.101 (1984), holding that "the statutory limitation of temporary total compensation does not violate the employee's rights under the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution or under Article I, § 8 of the Minnesota Constitution." 428 N.W.2d at 77. Citing express language in subd. 3e(b) limiting the payment of temporary total compensation, the court also rejected plaintiff's argument that he is entitled to receive temporary total compensation after payment in full of economic recovery compensation. *Id.* Finally, the court rejected plaintiff's argument that if Holman's obligation to pay temporary total compensation ended 90 days after Parson reached maximum medical improvement, Sowles (Parson's employer when he injured his right knee) then should be required to pay Parson temporary total benefits at 100% of the compensation rate because the first injury was a substantial contributing factor to his present disability. *Id.*

76. 428 N.W.2d at 76. In other words, an unemployed injured employee has no post-injury wage on which to compute partial benefits, and therefore when total benefits terminate 90 days past MMI, the employee is no longer entitled to any wage loss benefits. To continue to pay any wage loss benefits would mean a continuance of the total benefits since the employee is currently not earning any wage.

The court reached this holding despite its acknowledgement that the amended statute's limitations on partial wage loss benefits are not stated with "compelling clarity."[77] The court further recognized that, by mandating an employer's obligation to pay partial wage loss benefits to a disabled employee who secures other employment[78] and eliminating an employer's obligation to do the same for the disabled employee who remains unemployed, the legislature "may well have created an opportunity for employer abuse."[79] The court concluded, however, that the legislature, not the court, must make any needed adjustments or corrections.[80]

Justice Wahl, in a dissent joined by two other justices,[81] specifically noted that nothing in the revised statute limits partial wage loss benefits to those workers who find alternative employment.[82] The dissent rejected the majority's conclusion that, by deleting the sentence providing partial wage loss benefits to unemployed workers at the total compensation rate, the legislature intended to eliminate wage loss benefits for partially disabled workers who remain unemployed.[83] Justice Wahl instead reasoned that the amendment merely requires calculation of partial wage loss benefits for unemployed workers on the basis of earning capacity, rather than at the total rate as the old law required.[84] The dissent concluded that contrary to the ma-

77. *Id.*

78. *Id. See also* Gasper v. Northern Star Co., 422 N.W.2d 727, 730 (Minn. 1988) (holding employer must pay partial wage loss compensation to employees who secure other employment); Patton v. Thompson Elec. Co., 420 N.W.2d 596, 598 (Minn. 1988) (same); Winchester v. Pako Corp., 420 N.W.2d 587, 588 (Minn. 1988) (same); *supra* notes 55-65 and accompanying text (discussing *Patton* and *Gasper*).

79. *Parson*, 428 N.W.2d at 76.

80. *Id.*

81. The three dissenters were Justices Yetka, Wahl, and Popovich.

82. *Id.* at 78 (Wahl, J., dissenting). Justice Wahl specifically noted that the court had acknowledged in *Gasper* that "the legislature's intent with respect to temporary partial benefits is far from obvious." *Id.*

83. *Id.*

84. *Id.* Justice Wahl emphasized that the court has "consistently held the calculation of benefits under that portion of subdivision 2 left after amendment is to be based on earning capacity, not post-injury wages." *Id.*

Outlining the history of partial disability compensation, Justice Wahl pointed out that at one time partial disability was calculated on the basis of earning capacity. *Id.* After amendment of the statute, the commission fixed the rate of partial compensation for unemployed disabled workers based on the percentage of a worker's disability, but the rate for employed disabled workers continued to be calculated on the basis of earning capacity. *Id.* The 1974 amendments provided that unemployed partially disabled workers who made a diligent effort to find work received partial compensation calculated at

jority's assertion, reading the amended statute as providing partial benefits to all disabled workers does not frustrate the 1983 legislature's intent.[85] Rather, such a reading motivates employers to help re-integrate injured employees into the workforce or else pay "significantly greater benefits."[86]

III. THE *PARSON* COURT'S MISINTERPRETATION OF THE REVISED WORKERS' COMPENSATION STATUTE

Parson presents the issue whether an injured worker who is unsuccessful in finding alternative employment within ninety days after reaching maximum medical improvement is entitled to partial wage loss benefits at the total compensation rate.[87] No language in the 1983 amendments to Minnesota's workers' compensation statute directly answers the question.[88] Employing traditional methods of statutory construction,[89] the *Parson* majority held that Parson, a permanently partially disabled employee, was not entitled to partial wage loss benefits at the total compensation rate.[90] The effect of the court's holding is that injured workers who are unable to find alternative employment within ninety days after reaching maximum medical improvement are cut off from receiving any wage loss compensation. The *Parson* majority confused the issue of whether an unemployed injured worker who has not found alternative employment within ninety days after reaching maximum medical improvement may receive wage loss benefits at

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the temporary total rate. Employed disabled workers continued to receive partial compensation based on earning capacity. *Id.*

85. *Id.*

86. *Id.*

87. 428 N.W.2d at 74.

88. *See* MINN. STAT. § 176.101 subd. 3p (1988). This section provides that, upon reaching maximum medical improvement, a person with a permanent partial disability not offered a job meeting subdivision 3e criteria shall receive economic recovery compensation. Temporary total compensation ceases when payment of economic recovery compensation begins, and temporary total compensation cannot be paid concurrently with economic recovery compensation. *Id.* The Minnesota Supreme Court has determined that a partially disabled employee who attains re-employment may receive temporary partial compensation concurrently with economic recovery compensation. Gasper v. Northern Star Co., 422 N.W.2d 727, 731 (Minn. 1988). The court explained that, since temporary partial compensation replaces lost wages and economic recovery compensation is a loss of function benefit, the two payments are separate and distinct. *Id.* The issue in *Parson* regarding a worker who remains unemployed, remains unanswered.

89. *See supra* notes 68-80 and accompanying text.

90. 428 N.W.2d at 76.

the *total* compensation rate with whether that same employee may receive wage loss benefits at the *partial* compensation rate. In so doing, the court created an unnecessary loophole in Minnesota's workers' compensation statute allowing employers to avoid paying wage loss benefits to their injured workers simply because the injured workers are unable to find alternative employment. The court's decision is the result of misinterpretation of statutory language and misplaced emphasis on one legislative goal to the exclusion of other equally important legislative goals.

A. MISINTERPRETATION OF STATUTORY LANGUAGE

1. The Significance of Deleting Part of Subdivision 2 of the Act

The *Parson* majority correctly pointed out that the 1983 legislature deleted the sentence in subdivision 2 of the workers' compensation act that had provided temporary partial wage loss benefits at the temporary total rate to an unemployed injured worker.[91] As Justice Wahl noted in dissent, however, the majority did not explain its rationale for concluding that by this deletion the legislature intended to eliminate *all* temporary partial wage loss benefits for employees who remain unemployed ninety days past maximum medical improvement.[92]

An equally plausible construction, as Justice Wahl argued in her dissent, is that by deleting the subdivision 2 sentence the legislature merely wished to eliminate the reference to "at the temporary total rate" for the unemployed injured employee, not to extinguish all temporary partial compensation at another rate.[93] This alternative construction is consistent with the legislature's goal of limiting the duration of temporary total compensation. By deleting the reference to the temporary total rate, the legislature simply was assuring that no injured employee would receive *total* compensation benefits beyond the statutory period.[94]

The revised language of section 176.101 subdivision 2 sup-

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91. *Id.* at 75. *See supra* notes 72-73 and accompanying text.

92. *Id.* at 78 (Wahl, J., dissenting). The *Parson* dissent, authored by Justice Wahl, who also wrote the *Patton* and *Gasper* opinions, argued that "the legislature's intent with respect to temporary partial benefits is far from obvious." *Id.*

93. Justice Wahl argued that "nothing in the act specifically limits such benefits to only those partially disabled workers who are employed." *Id.*

94. All statutory references to cessation of an employee's disability compensation are to temporary total compensation. *See* MINN. STAT. § 176.101

ports the conclusion that the legislature did not intend to limit temporary partial compensation to employed workers.[95] Subdivision 2 provides that "[i]n all cases of temporary partial disability . . . [t]his compensation shall be paid during the period of disability except as provided in this section."[96] "All cases" thus includes the unemployed injured worker as well as the employed injured worker.

Subdivision 2 also provides that temporary partial compensation shall be determined on the basis of the difference between the injured employee's weekly wage at the time of the injury and the wage the employee "is able to earn in the employee's partially disabled condition."[97] The statute specifically says "able to earn," not "is earning."[98] One who is unemployed, while not earning a wage, still has the capacity to do so if given the opportunity. Under the old law the court consistently used an injured worker's earning capacity, not his post-injury wage, to calculate the amount an injured employee is able to earn.[99] As Justice Wahl correctly pointed out in dissent, nothing in the revised statute indicates a legislative intent to eliminate the use of earning capacity as the basis for calculating partial wage loss benefits of unemployed injured workers.[100]

2. Language in Related Subdivisions of the Statute

Subdivision 2 provides that temporary partial compensation "shall be paid during the period of disability except as provided in this section."[101] Only subdivision 3n of section 176.101 contains language limiting the availability of temporary partial compensation.[102] Pursuant to subdivision 3n, a partially dis-

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subds. 3d, e(a), e(b), e(d), f, j(b), l, p (1988). No provision in the revised statute refers to the cessation of temporary partial compensation.

95. *See supra* note 39.

96. MINN. STAT. § 176.101 subd. 2 (1988).

97. *Id.*

98. *Id.*

99. Parson v. Holman Erection Co., 428 N.W.2d 72, 78 (Minn. 1988) (Wahl, J., dissenting). *See supra* notes 35-36 (explaining calculation of partial wage loss benefits under the pre-1984 law).

100. 428 N.W.2d at 78 (Wahl, J., dissenting). The unemployed injured worker's qualified rehabilitation counselor could calculate the employee's earning capacity based on the employee's age, education, previous work history, interest, transferable skills, and present and future labor market conditions.

101. MINN. STAT. § 176.101 subd. 2 (1988).

102. Subdivision 3n provides:

No temporary partial compensation or rehabilitation if job offer refused. An employee who has been offered a job under subdivision 3e

abled employee loses her right to temporary partial compensation if she *refuses* an offer of a suitable job.[103] Subdivision 3n thus supports the view that an unemployed injured worker, like Parson, who does not refuse an offer of a suitable job, is entitled to temporary partial compensation.

A close reading of other subdivisions of section 176.101 further supports the conclusion that unemployed workers should not be denied partial wage loss benefits. Subdivision 3h affirmatively states that partial compensation benefits are available to an employee who accepts a suitable job before the ninety-day post-MMI period lapses.[104] The *Parson* majority concluded that subdivision 3h, by limiting partial compensation benefits to an employee who accepts a suitable job, supports its holding that only employed workers may receive temporary partial compensation.[105] Nothing in subdivision 3h, however, provides that *only* employed injured workers may receive temporary partial compensation. In fact, in its *Gasper* decision, the court itself refused to read subdivision 3h as providing that "only" when an injured employee has a "suitable" job may he receive temporary partial compensation.[106] The court emphasized that the legislature did not include express language denying temporary partial compensation to those injured employees with non-suitable jobs,[107] and further stressed that it would not supply a limitation that the legislature did not place in the statute.[108] The *Parson* majority nonetheless apparently read subdivision 3h as requiring that the *only* employees who may receive temporary partial compensation are those who accept and begin a job. The *Parson* court consequently did what it earlier had refused to do in *Gasper*: read a limitation into the statute.

Analysis of section 176.101 subdivision 3p further suggests

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and has refused that offer and who subsequently returns to work shall not receive temporary partial compensation pursuant to subdivision 2 if the job the employee returns to provides a wage less than the wage at the time of the injury. No rehabilitation shall be provided to this employee.

MINN. STAT. § 176.101 subd. 3n (1988).

103. *Id.*

104. *See supra* note 38.

105. 428 N.W.2d at 75.

106. Gasper v. Northern Star Co., 422 N.W.2d 727, 730 (Minn. 1988). *See supra* notes 62-65 and accompanying text.

107. *Id.* In the absence of a clear intent to the contrary, the court ruled that employers must pay temporary partial compensation to disabled employees who find jobs, whether the jobs do or do not meet the statutory qualifications of suitability. *See* MINN. STAT. § 176.101 subds. 3e, 3f (1988).

108. *Gasper*, 422 N.W.2d at 730.

that the revised statute does not preclude partial wage loss benefits for workers diligently seeking jobs.[109] Subdivision 3p provides that a permanently partially disabled employee without a job ninety days after reaching maximum medical improvement shall receive economic recovery compensation.[110] Noticeably absent from subdivision 3p is a provision denying temporary partial compensation to an injured employee who has no job when her temporary total compensation ceases.[111] Subdivision 3p also does not specify that economic recovery compensation is the *only* benefit available to an injured employee whose temporary total compensation has ceased.[112] The revised statute's language requires no such interpretation. If the legislature had intended economic recovery compensation to be the exclusive remedy for the unemployed partially disabled worker ninety days after maximum medical improvement, subdivision 3p would have been the logical place to indicate this restriction. *Gasper*, moreover, states that the statute provides just the opposite: economic recovery compensation and temporary partial benefits are payable concurrently.[113]

B. Misplaced Emphasis on the Cessation of Temporary Total Compensation

In reaching its holding in *Parson*, the court mistakenly placed too much emphasis on the 1983 legislature's goal of eliminating the open-endedness of temporary total wage loss compensation under the old law.[114] The elimination of open-ended

109. Subdivision 3p states:

> *No job offer.* Where the employee has a permanent partial disability and has reached maximum medical improvement or upon completion of an approved retraining program, whichever is later, that employee shall receive economic recovery compensation pursuant to subdivision 3a if no job offer meeting the criteria of the job in subdivision 3e is made within 90 days after reaching maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later.
>
> Temporary total compensation shall cease upon commencement of the payment of economic recovery compensation. Temporary total compensation shall not be paid concurrently with economic recovery compensation.

MINN. STAT. § 176.101 subd. 3p (1988).

110. *Id.*

111. *See Id.*

112. *See Id.*

113. 422 N.W.2d at 731. *See supra* notes 62-65 and accompanying text.

114. 428 N.W.2d at 76. *See supra* notes 69-74 and accompanying text. The court noted that eliminating the open-ended nature of temporary total compensation is an "integral" part of the new statute. 428 N.W.2d at 76.

temporary total compensation, however, was not the 1983 legislature's only goal in its revision of Minnesota's workers' compensation law.[115] The legislature also designed the new statute to include economic incentives that encourage employers to provide suitable employment for their injured workers,[116] and to include still other economic incentives that encourage employees to accept offered employment.[117] The *Parson* majority

115. *See supra* note 27.

116. *See* Crochiere, *supra* note 23, at 652. Each of the following subdivisions of § 176.101 demonstrates the legislature's attempt to incorporate economic incentives that encourage employers to provide suitable employment to their injured workers:

Subdivision 3a requires an employer to pay economic recovery compensation if the permanently partially disabled employee does not find alternative employment. Economic recovery compensation is at least 20% higher than impairment compensation. MINN. STAT. § 176.101 subd. 3a (1988).

Subdivision 3b requires an employer to pay impairment compensation, which is at least 20% lower than economic recovery compensation, if the permanently partially disabled employee secures alternative employment. *Id.* subd. 3b.

Subdivision 3c provides a maximum for impairment compensation and economic recovery compensation. *Id.* subd. 3c. The old statute allowed "stacking" of permanent partial disability benefits. MINN. STAT. § 176.101 subd. 3 (1979).

Subdivision 3e provides a cessation date for temporary total compensation. MINN. STAT. § 176.101 subd 3e (1988). The old statute provided no such termination date. MINN. STAT. § 176.101 subd. 3e (1982).

Subdivision 3f provides that if an employer offers an injured employee a job prior to maximum medical improvement, the employee's temporary total compensation ceases. MINN. STAT. § 176.101 subd. 3f (1988).

Subdivision 3h provides that if an employer offers an injured employee a subdivision 3e or 3f job, the employee's temporary total compensation ceases and temporary partial compensation begins at a lower rate than temporary total compensation as provided in subdivision 2. *Id.* subd. 3h.

Subdivision 3l provides that if an employer offers an injured employee a subdivision 3e job and the employee refuses the job, the employee's temporary total compensation ceases and the employer can pay impairment compensation at intervals instead of in a lump sum. *Id.* subd. 3l.

Subdivision 3n provides that if an employer offers an employee a subdivision 3e job and the employee refuses the job, the employee is ineligible for temporary partial compensation even if the employee later finds a job at a lower wage. The employer also no longer must provide rehabilitation to the employee. *Id.* subd. 3n.

117. *See* Crochiere, *supra* note 23, at 652-53. Each of the following subdivisions of § 176.101 demonstrates the legislature's attempt to incorporate economic incentives that encourage employees to accept employment offered to them:

Subdivision 3i provides that if an employee begins a subdivision 3e job but is laid off because of economic conditions, the employee receives monitoring period compensation. MINN. STAT. § 176.101 subd. 3i (1988). This provision

gave these latter two goals only cursory acknowledgement,[118] and instead focused on the legislature's goal of limiting the duration of temporary total compensation.[119]

The *Parson* majority's reliance on the goal of providing a termination point for temporary total compensation caused the court to create an unfortunate loophole in the workers' compensation statute. In previous cases the court held that employers must pay partial wage loss benefits to employed disabled workers if their post-injury job pays less than their pre-injury wage "for so long as the disability shall warrant."[120] *Parson* holds that employers do not have to pay partial wage loss benefits to disabled employees who have not secured alternative employment by the time their temporary total compensation ceases.[121]

The loophole for employers is obvious: provide a job or help your injured employee secure alternative employment and your obligation to pay temporary partial compensation could continue indefinitely; provide no job for your injured employee and your obligation to pay temporary partial compensation may never even begin.[122] *Parson*, therefore, is inconsistent with the

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eliminates the employee's fear of accepting a subdivision 3e job only to be laid off shortly after the job commences.

Subdivision 3j provides that if an employee begins a subdivision 3e job but cannot continue because of the original injury, the employee can again receive temporary total compensation. *Id.* subd. 3j. This provision eliminates the employee's fear of accepting a subdivision 3e job that she might later find did not fit her physical needs.

Subdivision 3k provides that if an employee begins a subdivision 3e job but is later unemployed because of seasonal layoffs, the employee can receive unemployment compensation in addition to, and concurrently with, temporary partial compensation. *Id.* subd. 3k.

Subdivision 3l provides that if an injured employee refuses a subdivision 3e job offer, temporary total compensation ceases and no further temporary total compensation is payable. *Id.* subd. 3l.

Subdivision 3m provides that if an injured employee refuses a subdivision 3e job offer, the employee's impairment compensation will be paid in intervals rather than a lump sum. *Id.* subd. 3m.

Subdivision 3n provides that an injured employee who refuses a subdivision 3e job offer and subsequently returns to work is ineligible for temporary partial compensation or rehabilitation. *Id.* subd. 3n.

118. *See supra* note 69.

119. *See supra* notes 69-71 and accompanying text.

120. Patton v. Thompson Elec. Co., 420 N.W.2d 596, 598 (Minn. 1988). *Accord* Gasper v. Northern Star Co., 422 N.W.2d 727, 730 (Minn. 1988); Winchester v. Pako Corp., 420 N.W.2d 587, 588 (Minn. 1988). *See supra* notes 55-65 and accompanying text.

121. *See supra* notes 69-75 and accompanying text.

122. The court acknowledged that *Parson* "discourages an employer from

legislature's goal of providing economic incentives that encourage employers to offer suitable employment to their injured workers. Employees cannot accept jobs that are not offered to them.

Furthermore, elimination of open-ended temporary total compensation in the new statute does not require a finding that the new statute also limits the availability of temporary partial compensation.[123] The revised statute provides that temporary partial compensation "shall be paid during the period of disability except as provided in this section."[124] No subdivision of section 176.101 contains time-limiting language as to temporary partial compensation. In *Patton*, the court interpreted the statute's language to provide temporary partial compensation to an injured employee "so long as the disability shall warrant."[125] Although the statute does not define "temporary partial disability," the court, both under the old statute[126] and the new,[127] has employed the designation in such a way as to suggest that an employee is temporarily partially disabled when her physical injury allows her to work but only at a job that pays a lower salary than her pre-injury employment.[128] This interpretation means that an injured employee is entitled to temporary partial compensation for as long as she is unable to return to employment at her pre-injury wage. The unemployed injured worker, like the employed injured worker, is unable to return to employment at her pre-injury wage and is entitled to temporary partial compensation. Elimination of open-ended temporary total compensation thus does not require that only an injured worker who finds alternative employment may receive temporary partial compensation.

A final problem with *Parson* is that it removes the

providing post-injury employment," but contended that such a result "does not justify judicial reconstruction of the Workers' Compensation Act." 428 N.W.2d at 76.

123. No language in the revised statute provides that temporary partial compensation is time-limited.

124. MINN. STAT. § 176.101 subd. 2 (1988).

125. Patton v. Thompson Elec. Co., 420 N.W.2d 596, 596 (Minn. 1988). *Accord* Gasper v. Northern Star Co., 422 N.W.2d 727, 730 (Minn. 1988); Winchester v. Pako Corp., 420 N.W.2d 587, 588 (Minn. 1988). *See supra* notes 55-65 and accompanying text.

126. See Morehouse v. George A. Hormel & Co., 313 N.W.2d 8, 10 (Minn. 1981).

127. *See Gasper*, 422 N.W.2d at 730; *Patton*, 420 N.W.2d at 598; *Winchester*, 420 N.W.2d at 588.

128. *See Gasper*, 422 N.W.2d at 730; *Patton*, 420 N.W.2d at 598; *Winchester*, 420 N.W.2d at 588; *Morehouse*, 313 N.W.2d at 10.

worker's incentive to continue trying to find alternative employment.[129] Interpreting the old workers' compensation statute, the court consistently distinguished between injured employees who diligently tried to find alternative employment and those who did not.[130] If the legislature intended to take away temporary partial compensation from injured employees who make a diligent effort to find alternative employment, it would have included such a provision in the revised statute. By tying continued temporary partial benefits to an employee's continued diligent search to find alternative employment, the legislature achieves its goal of creating incentives for the injured worker to secure alternative employment.[131]

C. A SOLUTION TO *PARSON*

Parson, together with the court's earlier decisions interpreting Minnesota's workers' compensation statute, creates a legal anomaly. Partially disabled workers who cannot find alternative employment may receive only loss of function benefits while partially disabled workers who find alternative employment may continue to receive both loss of function benefits and wage loss benefits. Although the Minnesota Legislature has amended the workers' compensation statute since *Parson*, none of the subsequent amendments corrects the problem that *Parson* creates.[132] In order to eliminate *Parson*'s legal

129. *See supra* note 69. Although one might argue that an unemployed injured worker would be motivated to find employment after wage loss compensation has ceased, the circumstances of an employee in such a situation refute that argument. An injured employee's temporary total compensation continues until 90 days past maximum medical improvement. MINN. STAT. § 176.101 subd. 3e(a) (1988). By that time the injured employee should have worked with a qualified rehabilitation consultant to develop a rehabilitation plan, including a plan for the employee to return to her original job or to secure alternative employment. MINN. STAT. § 176.102 subds. 1, 4(c) (1988). To continue receiving temporary total compensation for the 90 days after maximum medical improvement, the injured employee must "make a good faith effort to participate in a rehabilitation plan." *Id.* subd. 13. It belies human nature to believe that an injured employee, who has not received an offer of alternative employment from her employer by the time her temporary total compensation ceases and also has been unsuccessful in securing employment elsewhere even with the assistance of a qualified rehabilitation consultant, will be motivated to search for other employment on her own if all her wage loss compensation has already terminated.

130. *See supra* note 36 and accompanying text (citing cases interpreting pre-1984 workers' compensation law).

131. *See supra* note 69 (citing court acknowledgement of several legislative goals in enacting the 1984 statute).

132. *See* MINN. STAT. ANN. § 176.101 (Supp. 1989) (annotation discussing

loophole, the Minnesota Legislature should adopt the following amendment:[133]

A BILL

Be it enacted by the Minnesota Legislature that section 176.101, subdivision 2 is amended by the addition of the following language:

> A partially disabled employee (1) whose temporary total compensation ceases pursuant to subdivision 3e(a), *and* (2) whose employer does not provide work that he or she can do in a temporarily partially disabled condition, *and* (3) who, after reasonably diligent effort, is unable to procure such work with another employer, shall be paid sixty-six and two-thirds percent of the difference between the weekly wage of the employee at the time of injury and the wage the employee is able to earn in his or her partially disabled condition. Earning capacity of the unemployed temporarily partially disabled employee shall be determined by the employee's qualified rehabilitation counselor.

With this amendment, the unemployed partially disabled worker, like the employed partially disabled worker, receives temporary partial compensation as long as the disability continues.[134] The employed partially disabled worker receives 66 2/3% of the difference between the pre-injury weekly wage and the post-injury wage,[135] while a similar but unemployed worker receives 66 2/3% of the difference between the pre-injury wage and the wage the worker would earn if employed. The amendment thus corrects *Parson*'s loophole and provides incentives for employers to assist in re-employment of disabled employees. The proposed statute thus fulfills the goals of Minnesota's workers' compensation law in a logical and compassionate manner.

IV. CONCLUSION

In denying temporary partial wage loss benefits to an unemployed partially disabled worker, the *Parson* majority misin-

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1984-87 amendments). The 1984 amendments were not substantive in nature but rather clarified the legislative intent of the 1983 amendments. The 1985 amendments revised section 176.101, subds. 3e(b), 3i, and 3t. The 1986 amendments removed gender specific references and revised section 176.101 subd. 3e. The 1987 amendments repealed section 176.242 subd. 3v.

133. MINN. STAT. § 176.101 subd. 2 (1988); *see supra* note 39 (quoting subd. 2 as amended in 1983).

134. *Patton* held that temporary partial benefits continue for the employed partially disabled worker as long as disability continues. *See supra* notes 55-56 and accompanying text. The same rule should apply to the unemployed partially disabled worker.

135. *See supra* note 39.

terpreted Minnesota's workers' compensation statute. The court incorrectly placed great emphasis on the 1983 legislature's goal of limiting the duration of temporary total compensation and ignored the legislature's other goal of providing incentives for employers to assist in the re-employment of disabled workers. The court thereby created a legal loophole that does not encourage employers to provide alternative employment to their injured workers.

The legislature intended that its 1983 revision of Minnesota's workers' compensation statute would provide incentives for employers to help their injured employees return to work as quickly as possible, and that the new law would provide incentives for injured employees to accept the offered jobs. This Comment proposes legislative revision of the statute to overturn *Parson* and make clear that unemployed partially disabled workers are entitled to wage loss benefits as long as they diligently seek employment.

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