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Disability and Income Loss Benefits Under the Minnesota No-Fault Act

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Abstract
The Minnesota No-Fault Automobile Insurance Act was intended to ensure the "prompt payment of specific basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident," to prevent overcompensation of less seriously injured people by the interposition of tort thresholds, and to encourage appropriate medical and rehabilitation treatment by assuring prompt payment for that treatment. It seems clear that at least some of the initial promise of the Act has not been fulfilled. Payment of basic economic loss benefits, which the legislature intended to be paid promptly, has become bogged down in a quagmire of litigation as lawyers have wrestled with the terms and conditions of payment of those benefits. This Article analyzes the right to recover disability and income loss benefits under the Act. After explaining the statutory framework that governs the payment of basic economic loss benefits, the article explains the statutory evolution of the disability and income loss statute, analyzes the decisions construing it, and attempts to reconcile some apparently irreconcilable cases involving claims for those benefits.

Keywords
Minnesota, torts, motor vehicle, burden of proof, no-fault act, inability to work, automobile accident, proof of loss, auto insurance

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DISABILITY AND INCOME LOSS BENEFITS UNDER THE MINNESOTA NO-FAULT ACT

Mike Steenson†

I. INTRODUCTION

The Minnesota No-Fault Automobile Insurance Act was adopted almost twenty-five years ago, with high expectations.[1] The Act was intended to ensure the "prompt payment of specific basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident," to prevent overcompensation of less seriously injured people by the interposition of tort thresholds, and to encourage appropriate medical and rehabilitation treatment by assuring prompt payment for that treatment.[2] The broad statement of purpose reflected those expectations.

It seems clear that at least some of the initial promise of the Act has not been fulfilled. Payment of basic economic loss benefits,

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1. *See* Act of April 11, 1974, ch. 408, 1974 Minn. Laws 762, 786 (current version at Minn. Stat. §§ 65B.41-.71 (1996)).

2. *See id.* 1974 Minn. Laws 762, 763 (current version at MINN. STAT. § 65B.42 (1996)).

which the legislature intended to be paid promptly, has become bogged down in a quagmire of litigation as lawyers have wrestled with the terms and conditions of payment of those benefits. One of the promises implicit in the no-fault concept—cost savings—has not occurred as expected.

One of the earliest proponents of no-fault automobile insurance, Professor Jeffrey O'Connell, has suggested a modification of no-fault choice automobile insurance, leaving it up to the individual whether to remain part of the tort-litigation system or to opt out of that system in favor of exchanging recovery of damages for pain and suffering for significantly reduced automobile insurance premiums. However, even Professor O'Connell recognizes that the choice plan would not have a significant impact on the remainder of the structure that governs the payment of no-fault benefits. The problems that exist will have to be worked out in other ways. The basic operation of the no-fault system will continue to work as it has in the past, which means working and living with the complexities of a compensation system.

Disability and income loss benefits, the primary focus of this article, have not been visited with the same sorts of problems that plague other areas of no-fault, such as underinsured motorist law. It may be that the questions involving the payment of disability and income loss benefits are more straightforward and less easily questioned than other expenses, medical expenses payments for chiropractic expenses, for example. However, even the disability and income loss benefits provision left shadows that had to be illuminated in the courts, sometimes successfully and sometimes questionably.

The purpose of this Article is to analyze the right to recover disability and income loss benefits under the Act. After explaining the statutory framework that governs the payment of basic economic loss benefits, the article explains the statutory evolution of the disability and income loss statute, analyzes the decisions construing it, and attempts to reconcile some apparently irreconcilable cases involving claims for those benefits.

II. THE STATUTORY FRAMEWORK FOR BENEFITS PAYMENTS

The statutory framework that governs the payment of basic economic loss benefits is simple. Its application is not. First, Minnesota Statutes section 65B.46, subdivision 1, the trigger provision of the No-Fault Act, states the conditions that must be established before benefits will be payable:

> If the accident causing injury occurs in this state, every person suffering loss from injury arising out of the maintenance or use of a motor vehicle or as a result of being struck as a pedestrian by a motorcycle has a right to basic economic loss benefits.[3]

There are five requirements. There must be an "accident," that causes "injury,"[4] which in turn causes "loss."[5] Furthermore, the injury must arise out of the "maintenance or use"[6] of a "motor vehicle."[7] All the terms except "accident" are defined in the No-Fault Act. The last requirement, that the injury result in loss, must be qualified by the specific requirements for each type of benefit payable under section 65B.44. The benefits are subject to ceilings and limitations, which are essential for purposes of cost control. The maximum payable benefits are $40,000.[8] Medical expense benefits are limited to $20,000.[9] Disability and income loss benefits are limited to $250 per week,[10] replacement service and loss to $200 per week,[11] funeral expenses to $2,000,[12] and survivors economic and replacement service and loss to $200 per week.[13]

III. DISABILITY AND INCOME LOSS BENEFITS

There are several potential sticking points in establishing a claim for disability and income loss benefits. One deals with the burden of proof of establishing a claim for income loss benefits. The second concerns the definition of "inability to work" in the No-Fault Act. The third concerns the definition of "income." The fourth involves the concept of income loss and what sorts of losses fit that definition. The fifth concerns the issue of how income loss is proven. The sixth involves the calculation of benefits when the injured person engages in substitute work. After setting out a brief history of the disability and income loss provision, this article deals with those questions in order.

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3. MINN. STAT. § 65B.46, subd. 1 (1996).
4. *Id.* § 65B.43, subd. 11.
5. *Id.* § 65B.43, subd. 7.
6. *Id.* § 65B.43, subd. 3.
7. *Id.* § 65B.43, subd. 2.
8. *See id.* §65B.44, subd. 1.
9. *See id.*
10. *See id.*, subd. 3.
11. *See id.*, subd. 7.
12. *See id.*, subd. 4.
13. *See id.*, subd. 6.

A. *A Concise History*

Senate File 96, the Senate no-fault bill in 1974, tracked the Uniform Motor Vehicle Accident Reparations Act, which had been adopted by the Conference of Commissioners on Uniform Laws, of which Jack Davies was a member, along with Professors Keeton and O'Connell.[14] The Uniform Motor Vehicle Reparations Act defines "loss" to include "work loss," which, in turn, is defined as:

> [L]oss of income from work the injured person would have performed if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake.[15]

The comments to UMVARA's work loss section fleshed out the barebones in the black letter. First, the comment to the work loss definition makes it clear that work loss benefits will only be paid for accrued loss and will cover only actual loss of earnings as opposed to loss of earning capacity.[16]

Second, work loss benefits are not limited to an injured person's wage level at the time of the accident:

> For example, an unemployed college student who was permanently disabled could claim loss, at an appropriate time after the injury, for work he would then be performing had he not been injured. Conversely, an employed person's claim for work loss would be appropriately adjusted at the time he would have retired from his employment.[17]

Third, benefits are payable not only for lost wages, but also lost profits caused by the cost of hiring a substitute to perform self-employment services or the lost profits attributable to personal effort in self-employment.[18]

Last, the comments are clear that the doctrine of avoidable

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14. *See* Michael K. Steenson, *No-Fault in a Fault Context*, 2 WM. MITCHELL L. REV. 109, 136 (1976) (discussing S.F. 96, 68th Minn. Legis., 1st Sess (1973)).

15. UNIF. MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 1(a)(5)(ii), 14 U.L.A. 43 (1990).

16. *See id.*, cmt. at 46.

17. *Id.*

18. *See id.*

consequences applies, so that work loss will be computed by subtracting income from actual work the injured person decided to undertake, but also from income the person might have earned.[19] However, the alternative work would have to be "appropriate" and the refusal of the injured person would also have to be "unreasonable."[20]

The Senate version was amended in conference committee to add a definition of "inability to work." With that addition, subdivision 3 as enacted in 1975 was substantially similar to UMVARA's work loss definition:

> Disability and income loss benefits shall reimburse 85 percent of the injured person's loss of present and future gross income from inability to work proximately caused by the nonfatal injury subject to a maximum of $200 per week. Compensation for loss of income from work shall be reduced by any income from substitute work actually performed by the injured person or by income the injured person would have earned in available appropriate substitute work which he was capable of performing but unreasonably failed to undertake.
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> For the purposes of this section 'inability to work' shall mean disability which continuously prevents the injured person from engaging in any substantial gainful occupation or employment, for wage or profit, for which he is or may by training become reasonably qualified.[21]

The basic principles that were established in the No-Fault Act as it was initially enacted, and that flow from UMVARA, are relatively simple:

1. Benefits are payable only for actual loss. There is no compensation for loss of earning capacity. This element of loss should be construed in a common sense way and should include the cost of hiring a substitute to perpetuate income while the claimant is injured.
2. Benefits must be reduced by any substitute work the injured person is actually able to perform, or work that the person unreasonably failed to undertake. The injured person is required to mitigate damages, if reasonably possible.
3. The claimant must actually lose income because of an in-

19. *See id.*
20. *Id.*
21. *See* Act of April 11, 1974, ch. 408, 1974 Minn. Laws 762, 763.

ability to work.

In subsequent sessions the legislature filled in some of the gaps in the disability and income loss provision. A 1977 amendment provided that loss of income includes the costs incurred by a self-employed person to hire substitute employees and, in the first sentence of the second paragraph, deleted "continuously" as descriptive of "inability to work", and inserted "on a regular basis" as descriptive of the same phrase.[22] The cost of hiring a substitute employee tracks the comments to UMVARA. The amendment also added an additional qualification at the end of the fourth paragraph of subdivision 3, stating that "if the injured person returns to his employment and is unable by reason of his injury to work continuously, compensation for lost income shall be reduced by the income received while he is actually able to work."[23]

In 1979 the section was amended to provide that a person who loses unemployment benefits as a result of injuries sustained in an automobile accident.[24]

A 1983 amendment added the last sentence to paragraph four of subdivision 3. It prohibits the proration of the weekly maximums to arrive at a daily maximum in cases where the injured person does not incur lost income for a full week.[25]

In 1985 the benefits in section 65B.44 were increased to $40,000, from $30,000, and the weekly benefits for disability and income loss were increased from $200 per week to $250 per week.[26] That was the last the time the benefits were increased.

The last change in subdivision 3 was the addition in 1989 of the last paragraph of subdivision 3, which defines the term "unable by reason of the injury to work continuously."[27]

With the amendments, section 65B.44, subdivision 3, now reads as follows:

> Disability and income loss benefits. Disability and income loss benefits shall provide compensation for 85 percent of the injured person's loss of present and future gross income from inability to work proximately caused by the nonfatal injury subject to a maximum of $250 per week. Loss of income includes the costs incurred by a

22. *See* Act of May 25, 1977, ch. 266, § 1, 1977 Minn. Laws 437.
23. *Id.*
24. *See* Act of May 25, 1979, ch. 221, §§ 1, 2, 1979 Minn. Laws 465.
25. *See* Act of June 14, 1983, ch. 345, § 1, 1983 Minn. Laws 2382.
26. *See* Act of May 21, 1985, ch. 168, §§ 6, 7, 1985 Minn. Laws 456.
27. *See* Act of May 23, 1989, ch. 260, § 14, 1989 Minn. Laws 886, 887.

> self-employed person to hire substitute employees to perform tasks which are necessary to maintain the income of the injured person, which are normally performed by the injured person, and which cannot be performed because of the injury.
>
> If the injured person is unemployed at the time of injury and is receiving or is eligible to receive unemployment benefits under chapter 268, but the injured person loses eligibility for those benefits because of inability to work caused by the injury, disability and income loss benefits shall provide compensation for the lost benefits in an amount equal to the unemployment benefits which otherwise would have been payable, subject to a maximum of $250 per week.
>
> Compensation under this subdivision shall be reduced by any income from substitute work actually performed by the injured person or by income the injured person would have earned in available appropriate substitute work which the injured person was capable of performing but unreasonably failed to undertake.
>
> For the purposes of this section "inability to work" means disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit, for which the injured person is or may by training become reasonably qualified. If the injured person returns to employment and is unable by reason of the injury to work continuously, compensation for lost income shall be reduced by the income received while the injured person is actually able to work. The weekly maximums may not be prorated to arrive at a daily maximum, even if the injured person does not incur loss of income for a full week.
>
> For the purposes of this section, an injured person who is "unable by reason of the injury to work continuously" includes, but is not limited to, a person who misses time from work, including reasonable travel time, and loses income, vacation, or sick leave benefits, to obtain medical treatment for an injury arising out of the maintenance or use of a motor vehicle.[28]

The remainder of the article examines some of the primary issues that arise in determining the payability of disability and income loss

28. MINN. STAT. § 65B.44, subd. 3 (1996).

benefits.

B. Burden of Proof

The court of appeals has addressed the issue of burden of proof of benefits on three occasions. The first case, *Wolf v. State Farm Insurance Co.*,[29] involved a claim for medical expense benefits. In discussing the burden of proof issue the court said:

> We do not agree with State Farm's position that the *initial* burden of proof was on Wolf to establish her entitlement to benefits by presenting evidence on the issues of causation and necessity. An insured has a *right* to basic economic loss benefits under the No-Fault Act. Minn. Stat. § 65B.46, subdivision 1. Once an insurer receives reasonable proof of the fact and amount of loss realized, it has a *duty* to respond to an insured's claims in a timely manner. Minn. Stat. § 65B.54. Assuming State Farm received reasonable proof of Wolf's losses, the burden was on it to establish Wolf was not entitled to benefits. *See Ruppert v. Milwaukee Mutual Insurance Co.*, 392 N.W.2d 550, 556, 557 (Minn. Ct. App. 1986), *pet. for rev. denied* (Minn. Oct. 22, 1986) (suggesting benefits may be terminated only if insured has been cured and thus requires no further treatment or if insured is receiving treatment for preexisting condition). Generally, an insured may meet that burden with evidence obtained during an adverse medical examination. *See* Minn. Stat. § 65B.56, subdivision 1. Assuming State Farm meets its burden on retrial with Smookler's deposition testimony, the burden may then shift to Wolf to establish her entitlement to benefits.[30]

The court of appeals has construed *Wolf* twice. In *Kelly v. American Family Insurance Co.*,[31] an unpublished opinion, the plaintiff argued that the trial court erred in submitting his claim of loss of gross income to the jury. He argued that the burden of proof had shifted upon his presentation to American Family of documents showing a reduction of his gross income from 1987 to 1988, relying on *Wolf* for that proposition.

The court of appeals disagreed with the plaintiff's assessment of *Wolf's* discussion on the burden of proof issue:

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29. 450 N.W.2d 359 (Minn. Ct. App.), *review denied*, (Minn. 1990).
30. *Id.* at 362 (emphasis in original).
31. No. CO-93-449, 1993 WL 369050 (Minn. Ct. App. Sept. 21, 1993).

> Kelly here confuses proof of loss with the burden of proof at trial. Kelly must show loss of income to launch a cognizable claim at all. He did not successfully carry this burden: the record shows that his income increased in the year following the accident and did not fall until after a full year of recovery.[32]

The court's language might be read one of two ways. The plaintiff may have failed to meet even the minimum of *Wolf* in failing to introduce any evidence of income loss whatsoever, given the fact that his income actually increased in the year after the accident, and that it did not fall until after a full year of recovery. Or, it may be that the plaintiff simply retains the burden of proof with respect to disability and income loss benefits, particularly in the face of the introduction of conflicting evidence by the insured on the income loss issue.

In *LaValley v. National Family Insurance Corp.*,[33] the court of appeals also limited the application of *Wolf*. The case arose out of a claim for no-fault benefits by the surviving spouse of a man who died as a result of a heart attack, although there was a dispute as to whether the heart attack caused the automobile accident or whether the accident caused the heart attack.

Of course, a predicate to any claim for no-fault benefits is proof "that there was an accident and that the accident arose out of the operation, use or maintenance of a motor vehicle."[34] The claimant has the burden of proof on the issue.

The claimant argued that the burden of proof issue was controlled by *Wolf*. The insurer argued that the supreme court's 1992 decision in *McIntosh v. State Farm Mutual Automobile Insurance Co.*,[35] applied, placing the burden of proof on the plaintiff to establish the existence of an accident arising out of the maintenance or use of a motor vehicle.

Had the court applied *Wolf* literally, reasonable proof of the fact and amount of loss would have shifted the burden of proof to the defendant to establish that the plaintiff was not entitled to the benefits. However, the court of appeals concluded that *McIntosh* controlled, and that the plaintiff had the burden of proof on the accident and maintenance or use issues.

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32. *Id.* at *2.
33. 517 N.W.2d 602 (Minn. Ct. App.), *review denied*, (Minn. 1994).
34. *Id.* at 604.
35. 488 N.W.2d 476 (Minn. 1992).

The court distinguished *Wolf* because in that case the fact of the accident and the maintenance or use issues were assumed. The issue in that case was whether the injured party was entitled to medical expense benefits. The court of appeals in *LaValley* then explained what it meant in *Wolf*:

> The *Wolf* court did not question the fact of the accident; it questioned only whether the accident had caused the injuries about which she complained. . . . The trial court in *Wolf* had granted a directed verdict for the insured. This court reversed and remanded, indicating the presence of a fact issue on causation for the jury to decide. It is in this context that the *Wolf* court indicated its disagreement with the insurer's position that the insured had the initial burden of proof to establish entitlement to benefits by presenting evidence on the issues of causation and necessity. . . . Under *Wolf*, the insured is not relieved of all responsibility to present proof of loss. Instead, the *Wolf* court indicated that:
>
> > Once an insurer receives reasonable proof of the fact and amount of loss realized, it has a duty to respond to an insured's claims in a timely manner. . . .
>
> "Reasonable proof" means more than mere notice of a motor vehicle accident.[36]

Wolf, decided in the medical expense benefits context, has limited utility in cases involving disability and income loss claims, where the claimant appears to retain the burden of proof of establishing inability to work, the fact and amount of income loss, and the existence of an accident arising out of the use of a motor vehicle that results in that loss.

C. *Inability to Work*

In order to sustain a claim for disability and income loss benefits, the claimant must establish that the loss flows from an inability to work. Section 65B.44, subdivision 3, defines the term as follows:

> For purposes of this section "inability to work" means disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit, for which the injured person is or may by training become reasonably

36. 517 N.W.2d at 605 (citing Wolf v. State Farm Ins. Co., 450 N.W.2d 359, 361-62 (Minn. Ct. App.), *review denied*, (Minn. 1990)).

> qualified. If the injured person returns to employment and is unable by reason of the injury to work continuously, compensation for lost income shall be reduced by the income received while the injured person is actually able to work. . . .[37]

The last paragraph of subdivision 3 rounds out the right to recover for disability and income loss benefits by defining the phrase "unable by reason of the injury to work continuously" to include, although it is not limited to, "a person who misses time from work, including reasonable travel time, and loses income, vacation, or sick leave benefits, to obtain medical treatment for an injury arising out of the maintenance or use of a vehicle."[38]

Chacos v. State Farm Mutual Automobile Insurance Co.,[39] considered the definition of "inability to work," but in the context of the lapse provision. The trial court instructed the jury on "inability to work" by reading the special verdict form, which asked whether Mr. Chacos had "a disability which prevented him from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit for which he is or may by training become reasonably qualified?"[40]

Chacos had also requested an additional instruction on disability. The requested instruction reads as follows:

> The words "totally disabled" are not to be literally construed so as to mean a state of absolute helplessness, but rather a state of inability to do all the substantial and material acts necessary to the carrying on of the insured's calling in substantially his customary and usual manner.[41]

The court of appeals held that the trial court was correct in refusing the instruction because it may have confused the jurors insofar as they may have believed a total disability was required.

As to mitigation, Chacos also requested an instruction stating that "A disabled person is not required to seek substitute employment outside his own community."[42] The court of appeals held that the trial court also properly refused to give that instruction:

> It is not the availability of work but the existence of a disability preventing work which determines the right to

37. MINN. STAT. § 65B.43, subd. 3 (1996).
38. *Id.*
39. 368 N.W.2d 343 (Minn. Ct. App.), *review denied*, (Minn. 1985).
40. *Id.* at 346.
41. *Id.*
42. *Id.*

> income loss benefits. Partially disabled people who are unable to work full-time or return to the same type of work are "unable to work" within the meaning of the statute and thus are eligible for no-fault benefits.[43]

The court of appeals concluded that although the trial court properly rejected the plaintiff's two additional requested instructions, the trial court nonetheless gave an incomplete instruction by reading only that paragraph of the statute that defined "inability to work."[44] The instruction should have told the jury that partially disabled persons may be unable to work within the meaning of the statute. The instruction also should have made it clear that the availability of substitute work is material only in computing the amount of income loss benefits rather than the determination of disability.

In *Latzig v. Transamerica Insurance Co.*,[45] the plaintiff was injured in an automobile accident. The injuries prevented her from returning to her regular job as a quality control inspector, although she was able to work at various jobs, including retail sales, bartendress, and production line work. She said that the production line work was only temporary. She left that job to begin a two-year paralegal program.

The insurer argued that she was not entitled to recover disability and income loss benefits because she was able to do some type of work for which she was qualified, and that she was not prevented by the injury from "engaging in any substantial gainful occupation" and therefore could not meet the definition of "inability to work" under the statute.[46] The insurer based its argument on *Darby v. American Family Insurance Co.*[47] In *Darby*, the injured insured would have begun employment a day after his injury, but was unable to do so because of the accident. Five and a half months later, his doctor released him to work but he was unable to go to work because his employer told him that the position was no longer available. Darby argued that he should be entitled to disability and income loss benefits, but the court of appeals rejected the claim, holding that Darby was unable to recover because the income loss was not due to his disability but rather was due to the unavailability of work.

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43. *Id.* at 347.
44. *Id.*
45. 412 N.W.2d 329 (Minn. Ct. App. 1987).
46 *Id.* at 331.
47. 356 N.W.2d 838 (Minn. Ct. App. 1984), *review denied*, (Minn. 1985).

Rejecting the *Darby* argument, the court of appeals affirmed the trial court's grant of summary judgment in favor of the claimant. The trial court relied on *Chacos* and *Koller v. American Family Mutual Insurance Co.*,[48] for the proposition that a person could return to work yet still be unable to work within the meaning of the statute. In *Koller* the plaintiff, a truck driver, suffered a permanent loss of motion in his left wrist and left foot because of an automobile accident. Koller was unable to return to work as a truck driver, but he had applied to various schools for retraining in photography or furnace repair. His physician had released him to return to work and the insurer terminated his benefits. In a suit to recover benefits the trial court held that he was entitled to recover benefits until he was retrained. Although Koller had not made an extraordinary effort to obtain retraining, he had made some effort. The court of appeals held that the trial court's conclusion that he was entitled to benefits implied that "Koller's benefits were not unreasonable," a conclusion supported by the record.[49]

In *Latzig*, unlike *Darby*, there was no doubt about the claimant's disability.

The cases are clear that even though a person is able to return to some work, the disability may still persist. The logic of the provision on disability and income loss benefits, which provides that income from substitute work must be deducted from the disability and income loss benefits that would otherwise be due under the statute, is a clear reflection of the fact that a person may be able to work yet still be entitled to benefits.

Also, as *Koller* points out, simply because an injured person is cleared to return to some work does not mean that benefits may be terminated by the insurer in cases where the person is engaged in

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48. 366 N.W.2d 684 (Minn. Ct. App. 1985).

49. *Id.* at 685. The No-Fault Act's provision on disability and income loss benefits says that:

> Compensation under this subdivision shall be reduced by any income from substitute work actually performed by the injured person or by income the injured person would have earned in available appropriate substitute work which he was capable of performing but unreasonably failed to undertake.
>
> For the purposes of this section "inability to work" means disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit, for which the injured person is *or may by training become reasonably qualified*. . . .

MINN. STAT. § 65B.44, subd. 3 (1996) (emphasis added).

retraining efforts, assuming that those efforts are reasonable.

Finally, any income loss that occurs must be the product of an inability to work, rather than the lack of an available job.

D. Income and Income Loss

The definition of "income" is critical to the question of recoverable benefits. "Income" is defined in section 65B.43, subdivision 6 to mean

> salary, wages, tips, commissions, professional fees, and other earnings from work or tangible things of economic value produced through work in individually owned businesses, farms, ranches or other work.[50]

Disability and income loss benefits provide compensation for loss of a person's "present and future gross income."[51] There are several cases that cover the question of when disability and income loss benefits are compensable. The cases involve a range of issues, including what types of losses constitute income loss, what proof is necessary to establish the loss, and how the loss is calculated, particularly in situations where the injured person worked at two or more jobs before the accident and is able to return to only a single job after the accident.

In general, the concept of income loss requires some tangible economic impact. In the usual case where the injured person loses time from work because of an automobile accident, the wage loss clearly falls within the definition of income in the Act. Other cases that stray from the definition may present problems, however. The next three cases discuss income loss in three different settings. The first, *Rindahl v. National Farmers Union Insurance Cos.*,[52] addresses the problem of income loss of a self-employed individual. The second, *Cloud v. Allstate Insurance Co.*,[53] focuses on the issue of whether loss of a mileage allowance is income loss. The third, *Guenther v. Austin Mutual Insurance Co.*,[54] raised the question of whether room, board, and educational allowances lost by the plaintiff because of an automobile accident constituted income loss.

In *Rindahl*, the plaintiff, a farm wife, was injured in an automobile accident. At the time of her injury she held a full-time job

50. *Id.* § 65B.43, subd. 6.
51 *Id.* § 65B.44, subd. 3.
52. 373 N.W.2d 294 (Minn. 1985).
53. No. CO-94-641, 1994 WL 586928 (Minn. Ct. App. Oct. 25, 1994).
54. 398 N.W.2d 80 (Minn. Ct. App. 1986), *review denied*, (Minn. 1987).

in town and also worked in the home and helped with the farm work.

At the time of the accident the plaintiff worked 40 hours a week at her job in town, in addition to working 28 hours a week taking care of the household and some 7 hours a week helping with the farm work. For over a year after the accident she was unable to return to her town job. Her right to recover income loss benefits for the wages lost during that time was not disputed by the insurer.

The parties stipulated that her injuries prevented her from performing the farm work she had previously performed prior to the accident. The trial court held that she was entitled to the reasonable value of her lost services, at $5.00 per hour.

The insurer argued that the plaintiff was not unable to work within the meaning of subdivision 3 of section 65B.44. The plaintiff argued that she was unable to perform the farm work she previously had done, and that she was therefore unable to work.

The plaintiff argued that as a co-owner of the farm, she was a self-employed person. In discussing her right to benefits, the court said:

> How the legislature intended the No-Fault Act to compensate for income loss is not as clear as it might be. We perceive a legislative concern that benefits be calculated on some direct, certain basis which will discourage abuse and will enable benefits to be paid promptly and with a minimum of fuss. We also think it is clear that the legislature did not intend to penalize a self-employed person by denying her or him benefits if that person did not elect to take a salary or wage from the business. Further, we are persuaded that the legislature did not intend income loss, in the absence of a salary or wage, to be limited to costs incurred in hiring substitute help. Having said this, it would appear that the self-employed person who takes no salary or wage from the business may recover income loss benefits by proving either (1) costs incurred for substitute employees, or (2) loss of tangible things of economic value, or (3) loss of "other earnings from work." Which method applies depends on which is appropriate to the claimant's situation.[55]

55. It is important to note that the issue of wage loss in a no-fault proceeding differs from the issue in the context of a tort action. The methods set out in *Rindahl* for proving income loss are inapplicable to restrict a claim for lost earnings in a tort action. In a tort action, the plaintiff is entitled to "recover loss of earnings

As already noted, Mrs. Rindahl argues that her farm work is a tangible thing of economic value, and, therefore, she should recover income loss benefits for the reasonable value of her services to the farm operation. We disagree. Mrs. Rindahl seeks to recover for her work, not for things produced by her work. The two are not the same. Her work, for which she wants to be paid its reasonable value, is an activity which causes something to be produced, but it is not the thing produced. Moreover, the statute defines income as "tangible things of economic value produced through work." By equating her work with the tangible things produced thereby, Mrs. Rindahl reduces the statutory definition of income to the tautology of "work produced through work." If the legislature had intended "income" to include the reasonable value of one's services to one's business, we believe it would have said so. . . . We hold, therefore, that income loss benefits cannot be based on the reasonable value of the injured self-employed person's services, and that the trial court erred in making such an award.

If self-employed persons are not entitled to the reasonable value of their services, claimant then argues that they should be entitled to income loss benefits measured by lost profits. Our No-Fault Act speaks only cryptically of "profits." In defining "income," however, section 65B.46, subdivision 6, includes within the term, in addition to salary, wages, tips, commissions, and professional fees, "other earnings from work." We think the business earnings of a self-employed person, when not paid out to that person in salary, may constitute "other earnings from work." This would seem to be the kind of economic detriment caused by disability that the No-Fault Act intends to cover. We hold, therefore, that to the extent it can be shown that gross income produced by a self-owned business has decreased during the period of the self-employed owner's disability, and the decrease is attributable directly and solely to the owner's disability, that decrease, in the absence of any salary or wage paid, represents "other earnings from work." For this kind of economic detriment, in-

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for the value of working time lost as a result of an injury." *See* Kissoondath v. Ammerman, Nos. CO-95-1346, C7-95-128, 1995 WL 756840, at *4 (Minn. Ct. App. Dec. 26, 1995), *review granted*, (Minn. Feb. 12, 1996), *review vacated*, (Minn. June 19, 1996).

come loss benefits are payable.[56]

The court concluded that the plaintiff was not entitled to recover because as a matter of law she had not shown that the gross income of the farm operation decreased during the period of her disability.

In *Cloud* the issue was whether the plaintiff was entitled to disability and income loss benefits for the loss of the mileage allowance she received for her work as a volunteer providing driving services for a county social services agency. As a result of injuries sustained in an automobile accident, she lost an average of $280.81 in mileage expenses. She argued that the mileage reimbursement constituted "gross income" and that she was entitled to 85 percent of that loss pursuant to section 65B.44, subdivision 3. The court of appeals rejected the claim:

> The principle of ejusdem generis mandates excluding reimbursement as gross income since it does not share the common characteristic of salary, wages, tips, commissions, or professional fees: they are all provided in exchange for work performed, while reimbursement is provided to replace money spent. Although mileage reimbursement may constitute "gross receipts," it clearly is not "gross income" within the meaning of subdivision 3. Appellant must prove that her gross receipts exceeded her expenses in order to receive any compensation under the No-Fault Act. . . .[57]

The court also rejected the insurer's claim that mileage reimbursement is not compensable as a matter of law under the No-Fault Act, although the insurer suggested in oral argument that there should be a rebuttable presumption that it is not wage loss. "Thus it appears that respondent suggests that if appellant is able to prove that she actually lost income once expenses are deducted, she will be able to overcome the presumption that her mileage reimbursement was not income."[58]

In *Guenther*, the plaintiff asked for income loss benefits for losses she sustained because of her inability to work due to injuries sustained in an automobile-train accident. The trial court in the case held that she was entitled to receive disability and income loss benefits for the "room, board, and financial aid" she received from

56. *Rindahl*, 373 N.W.2d at 299-300.
57. *Cloud*, 1994 WL 586928, at *2 (citations omitted).
58. *Id.*

her parents for her education.[59] The court relied on the definition of income in section 65B.43, subdivision 6, which includes "tangible things of economic value produced through work."[60] But the trial court denied her claim for income loss benefits because it found no actual loss of income and that under the circumstances, "speculation and conjecture would necessarily have to be the basis for a determination of 'loss of income' and such a basis is prohibited."[61] The court of appeals reversed on the basis that summary judgment was inappropriate because of the existence of a genuine issue of material fact on the issue.

The trial court applied *Rindahl*, which involved a self-employed person who took no salary from a business and whose work was performed at no cost by other family members after she was injured. The supreme court in that case held that an injured self-employed person could not claim income loss benefits based on the reasonable value of services provided, but instead had to prove costs incurred to pay substitute help, loss of tangible things of economic value, or loss of other earnings from work.

The plaintiff asked the court of appeals to limit *Rindahl* to self-employed persons, but the court of appeals found it unnecessary to apply *Rindahl*:

> It is undisputed that appellant's inability to work on the farm did not cause her parents to cease providing her with the same benefits that they had previously given her in exchange for her work. The trial court found that these benefits were income before the accident and the court similarly treated the benefits provided after the accident. Whether those benefits continued to constitute income, however, is a disputed question of material fact. The statutory definition of income requires that the benefits received be "produced through work." . . . When appellant's injuries forced her to stop working, the benefits she continued to receive from her parents may have been income for work performed before she was injured or may have been their gift to her while she recuperated, or both. Until this question has been answered, determination of appellant's actual income loss cannot be made.
>
> We also note that the statute does not limit recovery of loss of income benefits to losses connected to the em-

59. 398 N.W.2d 80, 83 (Minn. Ct. App. 1986).
60. *Id.* (citing MINN. STAT. § 65B.43, subd. 6 (1984)).
61. *Id.* at 84.

> ployment held at the time of the injury. *See* Minn. Stat. § 65B.54, subdivision 1 (1984) ("[l]oss accrues not when injury occurs, but as income loss . . . is incurred"). The question of whether appellant's disabilities have continued to prevent her from "engaging in any substantial gainful occupation or employment on a regular basis" for which she "is or may by training become reasonably qualified" has not been addressed. . . . The resolution of these issues is critical to appellant's eligibility for income loss benefits. . . [62]

The important point to be gathered from these cases is that the concept of income loss transcends loss of salary or wages. *Rindahl* establishes that the business earnings of a self-employed person may be compensable as "other earnings from work." If the gross income that is produced by a self-employed business owner has declined during the period of the owner's disability, and the decline is attributable to the disability, the decrease is compensable as "other earnings from work," *in the absence of any salary or wage paid.*

The disability and income loss claims for the lost mileage allowance claimed as lost income in *Cloud* and the room, board, and financial aid loss claimed in *Guenther* are creative claims that stray from the usual claim for wage loss, yet focus on the critical question of whether there are losses of tangible things of economic value to the injured person.

E. Proof of Loss

Deciding what constitutes income loss for purposes of the No-Fault Act is the first step in establishing a claim for disability and income loss benefits. The second, proof of the loss, creates additional problems in various cases. This section focuses on two recurring problems, proof of income loss in cases involving claims for disability and income loss benefits by self-employed persons, and second, proof of income loss in cases where the claim is based primarily on the prospect of future employment.

1. The Self-Employed Person

In *Rotation Engineering & Manufacturing Co. v. Secura Insurance*

62. 398 N.W.2d at 84.

Co.,[63] the issue concerned an income loss claim in the case of a self-employed businessman, James Lorence, who was the sole shareholder of Rotation Engineering. He was injured in an automobile accident in May of 1987, while driving a company vehicle. Between the time of the accident and November of 1988 he missed 339 hours of work, principally for doctors' appointments and medical treatment. His salary was not docked for any of those hours and Rotation, as a company, did not have any provable loss of revenue during his medical absence, nor did it claim any. Lorence brought an action seeking "wage loss" benefits from his insurer. The trial court held on a motion for summary judgment that he was not entitled to benefits because he had not shown that the accident resulted in any actual economic loss to him.

Citing its decision in *Erickson v. Great American Insurance Cos.*,[64], the court of appeals noted that an insured is not entitled to income loss benefits unless the insured has actually lost income. The court characterized his claim as an attempt by Lorence to recover for lost "work." However, the court interpreted *Rindahl* to mean that "it is lost income, not just lost work, that is compensable. If Lorence can show that the earnings of his corporation decreased as a direct result of his lost work, income loss benefits would be payable. But he cannot, and concedes no direct loss can be shown."[65]

To oppose his insurer's motion for summary judgment, the court noted that he was required to produce evidence of his income loss that would be admissible at trial, but that he was only able to offer speculation that because he did not receive a bonus, he has lost income. He admitted that there was no way to determine whether Rotation lost income as a result of the hours of work he missed while seeing a doctor. The court affirmed the trial court's grant of summary judgment.

In *Walden v. Western National Insurance Co.*,[66] the plaintiff was a self-employed cosmetologist who was injured in an automobile accident. On July 7 of 1992 she began working at a new location, where she raised the prices for the services she performed. She had previously worked at a different location in a business arrangement that differed from the new one. She was injured in an

63. 497 N.W.2d 292 (Minn. Ct. App. 1993).
64. 466 N.W.2d 430 (Minn. Ct. App. 1991).
65. *Rotation Eng'g*, 497 N.W.2d at 295.
66. No. C3-95-529, 1995 WL 479697 (Minn. Ct. App. Aug. 15, 1995), *review denied*, (Minn. Sept. 28, 1995).

accident at the end of July. Her physician restricted her work to 32 hours per week. Prior to the accident she usually worked 40 hours a week.

She was paid income loss benefits through the end of September of 1992, but then the insurer denied further benefits, claiming that although she only worked 32 hours a week, she was making approximately the same amount of money that she earned before the accident. The reason was that she had raised her prices at her new location.

The plaintiff was awarded $5,675.40 by the arbitrator in her no fault arbitration. The district court vacated the arbitration award, concluding that the arbitrator erred in considering the plaintiff's loss of earning potential.

The court of appeals reversed. The insurer noted the principle in *Erickson* that no-fault recovery for income loss "is limited to income actually lost," and argued that the plaintiff should not be entitled to recover income loss benefits because she made approximately the same amount of money after the accident that she made before, so that she did not actually sustain any income loss as a result of the accident.[67]

The court of appeals noted that the issue of whether a claimant would have obtained full-time employment is generally a question for the trier of fact, and that the question should be taken from the trier of fact only where the issue of whether the claimant would have worked more hours but for the accident is merely speculative. The court also noted that the question of the amount of income loss is also a factual question to be decided by the arbitrator.

The court concluded that the arbitrator in the case implicitly found that the plaintiff would have worked full-time but for the accident, and that the finding was adequately supported by her track record of full employment. The court held that there was no basis for reversing the arbitrator's determination that she was entitled to income loss in the specified amount.

The insurer argued that the claimant was not an hourly employee. As a self-employed person, it is arguable that unless she could establish a decline in her income, *Rindahl* and *Rotation Engineering* should control and she should be denied benefits. However, the court held that although she was self-employed, she was

67. *Id.* at *1.

more like an hourly employee because she performed services that take a short time and she was paid immediately for those services. Like an hourly employee, the more she works, the higher her earnings.

The key finding is that she would have worked full-time but for the accident. At the time of the accident she was working under a business arrangement that paid her more for her time. The proper measure of her loss would thus be the difference between what she was making under the new price arrangements working part-time and what she would make if she worked full-time under that arrangement, not the difference between her income under the new arrangement and her income under her previous job.

Walden highlights the importance, in any situation involving an income loss claim by a self-employed person, of focusing on what is actually lost by the injured person. Labels should be unimportant, and it makes no difference whether the person is self-employed or an hourly wage earner.

Banishoraka v. Credit General Insurance Co.,[68] reinforces the point. The case involved a somewhat more straightforward situation involving substitute work engaged in by a claimant who was self-employed as a taxi cab driver before his injury and self-employed in his own limousine business after, but at a lower income. After the accident he was unable to continue his cab business because he could not do the heavy lifting that cab driving required. The insurer argued that self-employed persons are able to recover disability and income loss benefits only where they incur costs in hiring substitute employees or suffer a decrease in gross income of the self-owned business directly attributable to the injury, and that neither method applied to the case. The court of appeals rejected the argument:

> First, Banishoraka did not need to hire substitute employees because he could perform the work required by his second self-owned business, the limousine service. Logically, this statutory method of proof is intended for income loss in a self-owned business where the owner can't perform the work because of the disability from the accident but the self-owned business continues and earns less money. Second, Banishoraka cannot prove, through documentary evidence or otherwise, the decrease in the limousine company's gross income directly attributable to

68. No. CX-95-611, 1995 WL 450496 (Minn. Ct. App. Aug. 1, 1995).

> Banishoraka's disability because the company did not exist prior to the accident which caused the disability. The only way Banishoraka could prove actual lost income was to compare the income earned as a taxi cab driver to the income earned with the limousine service, which is what Banishoraka did.[69]

In *Arons v. Allstate Insurance Co.*,[70] the plaintiff, who was injured in an automobile accident, claimed a gross income loss of $240 per week from the date of the accident to the date of trial, based upon her allegation that she was unable to carry on her work in dog grooming and breeding. Her insurer argued that she was able to work within approximately six months of the injury and also that the business was unprofitable before her injury, so that there was no loss of income because of the injury. The trial court concluded that she was unable to continue the grooming aspect of the business, but that she had an uncertain income loss. The plaintiff's husband continued to operate the breeding and selling aspects of the business and the plaintiff continued to be involved in the business in a managerial capacity.

Prior to the accident the business had gross receipts of approximately $6,000 per year. Profit and loss statements introduced at trial showed that the business as a whole operated at a net loss. Although the profit and loss statements itemized the receipts from the business as attributable to grooming or dog sales, the expenses were not itemized. The court noted that the before tax net income of the grooming business could not be determined with reasonable certainty because the net income, or net loss, for the business each year was attributable to receipts and expenses for all aspects of the business. The plaintiff did not introduce any other evidence from which the income solely attributable to the grooming business could be determined and she did not introduce evidence of the value of her labor or the cost of securing replacement labor. The court of appeals affirmed the trial court's decision, concluding that "[a] finder of fact may not base an award of damages on speculation or conjecture."[71]

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69. *Id.* at *3.
70. 363 N.W.2d 832 (Minn. Ct. App. 1985).
71. *Id.* at 833.

2. Future Employment

In *McKenzie v. State Farm Mutual Automobile Insurance Co.*,[72] the plaintiff worked full time as a legal secretary for two years until she had a child. She entered the University of Minnesota in 1975 as a full-time student, working only part time as a legal secretary, averaging 20 hours per week from 1975 through February of 1978. In the first week of February of 1978 she began a three-month leave of absence to focus on her schoolwork. Her intention was to return to her position as a part-time legal secretary at the end of the three months and to continue as a full-time student at the University until mid or late 1979, when she would have graduated from the legal assistant program.

In late February of 1978 she was injured in a motor vehicle accident. She was temporarily totally disabled as a result of the accident and unable to work or attend school until June of 1978. In 1979 she discontinued her studies and worked part time, but sporadically. From 1980 until 1987 she worked intermittently as a legal secretary and legal assistant, always less than full time. She returned to school in 1984, part time, until she graduated from the legal assistant program in 1986.

The issue in the case was whether the trial court erred in its implicit determination that but for the accident, the plaintiff would have earned more income than she earned before the accident. The court of appeals concluded that the plaintiff suffered from an "inability to work" between 1979 and 1987.[73] Her medical records showed a disability and the disability prevented her from working continuously, although it did not prevent her from engaging in any substantial gainful occupation. The critical issue was whether her inability to work resulted in any income loss to her.

The plaintiff argued that she did suffer income loss because she would eventually have worked full time and earned correspondingly more income but for the accident. The insurer argued that because she was working part time before the accident, and was able to continue working the same amount of time at the same type of job after the accident, she did not suffer an income loss. The precise issue was whether a court may award disability and income loss benefits "based on an anticipated, higher income than what

72. 441 N.W.2d 832 (Minn Ct. App. 1989).
73. *Id.* at 834.

the claimant made prior to the accident."[74]

The court of appeals reasoned that she should be entitled to recover:

> We agree that McKenzie can recover only income that she *would* have earned and not what she merely *could* have earned. We also agree that the appropriate way to distinguish what she would have earned from what she could have earned is to determine whether the chances of her working full time after the accident were probable or merely speculative.
>
> The question of whether a claimant would, as opposed to could, have obtained full-time employment is generally one for the trier of fact. . . . We believe this question should be taken from the fact-finder and decided as a matter of law only in those cases where the chances that the claimant would have obtained work (or worked more hours) but for the accident are merely speculative.
>
> Such is not the case here; McKenzie's assertion she would have worked full time but for the accident is more than speculation. Contrary to State Farm's claims, McKenzie had a "track record" of full-time employment in the past: she worked full time for three years prior to her daughter's birth; even after her daughter was born, McKenzie worked nearly full time; and although McKenzie cut back to part-time work when she entered college, she was still spending more than 40 hours a week on career pursuits. In addition, she was in fact offered full-time work after the accident which she said she declined because of her disability.
>
> Because McKenzie established the chances of her working full time were more than speculative, the question of whether she would have worked full time was properly considered by the trial court in its factfinding capacity. The trial court's finding that McKenzie would have worked full time and earned greater income but for the accident is not clearly erroneous and will not be upset on appeal. . . . As pointed out, there was substantial evidence of McKenzie's past full-time employment from which the trial court could reasonably infer she would have returned to full-time work after her anticipated graduation in

74 *Id.* at 834-35.

1979.[75]

The court distinguished *Darby* and *Latzig*:

> *Latzig* and *Darby* are not controlling because they address the issue of whether income loss was caused by a disability or by the unavailability of work (regardless of the disability); they do not address the pertinent issue here of whether the claimant's income level would have risen but for the accident and resulting disability.[76]

In *Keim v. Farm Bureau Insurance Co.*,[77] the plaintiff was injured in an automobile accident on April 16, 1990. The insurer acknowledged that he was unable to obtain gainful employment from the accident date to December 6, 1990, but argued that he was not entitled to receive income loss benefits because he was unemployed when the accident occurred. He had been laid off from his job for a construction company in November of 1989, but he expected to be rehired in the spring of 1990. He had also worked in the trucking business at various jobs most of his adult life. The plaintiff did not notify his prior employer of either the accident or his intent to return to work. He was dismissed from his employment in January of 1990 because his "paperwork for 1989 season not done well."[78] The plaintiff said that no one from the company told him he would not be rehired.

He petitioned for mandatory arbitration and the arbitrator awarded him over six thousand dollars in benefits, but made no findings. The trial court vacated the award, based on its conclusion that the arbitrator applied the wrong legal standard in determining that the claimant was entitled to benefits.

The court of appeals concluded that the trial court correctly stated the legal standard for determining the availability of income loss benefits:

> The trial court concluded that in order for Keim to be eligible for income loss benefits he must show at the time of his injury he (1) was employed, (2) had a definite offer of employment, or (3) had consistently been employed such that a specific future period of employment could reasonably be predicted. . . .
>
> In this case Keim was neither employed nor had a defi-

75. *Id.* at 835.
76. *Id.* at 836.
77. 482 N.W.2d 823 (Minn. Ct. App.), *review denied*, (Minn. 1992).
78. *Id.* at 824.

> nite offer of employment at the time of his accident. Hence, if Keim does qualify for income loss benefits from Farm Bureau, then it is under the third standard: Keim must show proof of consistent employment in the past so that a future period of employment can be reasonably predicted.[79]

The court of appeals noted that the question of whether his employment could be reasonably predicted and the amount of income loss are factual questions, and that the arbitrator's findings in the clarification memorandum supported the award:

> First, he found Keim had been employed in the trucking business for eleven years before the accident. Second, the arbitrator found Keim would have returned to work except for the April injury: "[t]his injury prevented [Keim], who had always been employed, from finding a job at which he would have been able to work." Third, the arbitrator found Keim would have been able to work 40 hours per week, which he had done in the past, at $5.50 per hour, the standard wage he had earned in the past. Finally, the arbitrator found Keim was only entitled to income loss benefits from the date of his injury to December 6, 1990, the date medical testimony indicated Keim could return to sedentary work.[80]

The court of appeals agreed that the arbitrator applied the wrong legal standard in determining whether the claimant was entitled to benefits. The arbitrator concluded that the standard was whether "the disability prevented Keim from obtaining 'gainful employment.'"[81] However, the court of appeals noted that the correct legal standard in such a case

> is whether, in addition to a disability that prevents employment, there is proof of consistent past employment by the insured so that a future period of employment could be reasonably predicted.[82]

However, the court of appeals concluded that if the trial court had applied the arbitrator's findings, "then the inescapable conclusion was that Keim's future employment was reasonably predictable."[83]

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79. *Id.* at 825.
80. *Id.* at 825-26.
81. *Id.*
82. *Id.*
83. *Id.*

Pulju v. Metropolitan Property & Casualty[84] is a combination of two issues, one concerning the definition of "inability to work" and the other the impact on a claimant's right to recover benefits where she was unable to pursue a business interest because of her injuries, even though able to work full time at her previous job. The case was an appeal from a district court's vacation of an arbitrator's award of income loss compensation to a claimant who made a claim for income loss based on the cost of hiring substitute employees at a business she and her husband had decided to buy before the accident, but began operating after the accident, and after the claimant had returned to her regular full time employment with a life insurance company.

The court of appeals noted that "several factors in section 65B.44" were present in the case.[85] The plaintiff "was injured and unable to work, she incurred expenses while self-employed, and the expenses were for replacement services that [she] would have performed had she not been injured."[86] However, the court characterized the "real issue" as whether, when she incurred the costs, she was "unable to work" within the meaning of the statute.[87] Citing *Latzig* and *Rindahl*, the court of appeals noted that "[w]hen interpreting 'inability to work,' the court focuses on whether the injury has prevented the claimant from returning to the job she held before the injury occurred."[88]

The court of appeals seems to be right in its statement that an injured person will be entitled to benefits if the injury prevents the person from returning to the job she held before the injury, but wrong in implying that the sufficient condition is also a necessary condition for obtaining benefits.

The court distinguished *Latzig*, because Pulju was able to return to her pre-accident employment. However, the plaintiff argued that but for her injuries, she would have operated the store, relying on other court of appeals decisions that support the award

84. No. CX-95-723, 1996 WL 91655 (Minn. Ct. App. March 5, 1996).
85. *Id.* at *2.
86. *Id.*
87. *Id.*
88. *Id.* The court of appeals noted its decision in *Latzig*, which quoted with approval the trial court's holding that "injury which prevents a return to the prior job is an injury that is compensable." 412 N.W.2d at 331. The court also noted *Rindahl*, parenthetically indicating that the court held that "in order for claimant to be eligible for benefits, her injury would have had to have prevented her from returning to her pre-injury employment." 1996 WL 91655, at *2.

of benefits based on a higher anticipated income that the injured person would have obtained but for her injuries. The court of appeals rejected the argument:

> This argument is not persuasive, because, even if appellant had not had the accident, she could not have operated her store as her full-time occupation when she was still formally employed full time at Northwestern National Life at the time of the accident. Despite appellant's concrete plans to purchase and operate the store in the future, all facts on record show that after the accident she returned to the job she had held before the accident occurred. These facts show that appellant was not unable to work and, thus, was not eligible for income loss benefits . . .[89]

The court's opinion in *Pulju* is a troublesome fit in the cases involving future anticipated income. A series of hypotheticals should help to illustrate the problem. Assume that an insured is injured while working at a full time clerical job that pays her $500 per week, but that she had a construction job waiting that required different physical skills that would have paid her $1,000 per week, and that she would have commenced that employment at a date certain, in one month, but for an automobile accident that injures her and prevents her from working at all for a period of time. Then assume that she is able to return to her regular job on a full time basis, receiving the same $500 per week that she was previously received. However, she is unable to work at the higher paying job because her injuries prevent her from engaging in the physical work necessary to perform the job.

There are two ways to look at the hypothetical. First, it is arguable that when the plaintiff is able to return to her regular full time job that she previously held, she is no longer "unable to work" within the meaning of the statute. However, the appellate decisions in Minnesota unquestionably establish that simply because a person is able to return to work does not mean that the person is "unable to work" for purposes of making a claim for disability and income loss benefits. It could be argued that *Erickson* would prevent her from recovering benefits because her post-accident income equals her pre-accident income. But, that ignores *McKenzie*, which gives the injured person the right to recover benefits at the higher anticipated income, assuming that she is able to prove that

89. *Id.* at *3.

she would have earned that income.

The result should not differ if the claimant takes the construction job, but is able to work only half-time at the job, earning $500 per week. The income she gets from the construction job equals the income from the pre-accident construction job, but she would have received a higher income, $1,000, had she not been injured, and she should be entitled to the difference as disability and income loss benefits.

Now assume that the claimant, instead of working at a construction job, has decided to purchase a business that would pay her $1,000 per week, but that because of her injuries she is unable to operate the business at all. Her anticipated income loss of $1,000 should be treated no differently than the income loss in the construction work hypothetical. She is still able to perform the clerical work, for $500 per week, and that amount would be deducted from the $1,000 projected gross income of the business. She should thus be entitled to disability and income loss benefits in the amount of $250.

If, instead of not being able to work at all at the new job, what if the claimant is able to make some income, totaling, say $500, at the store? In that situation the plaintiff should be able to recover the difference between the projected income, $1,000, and the actual income, $500. If so, is it any different than the construction hypothetical? There is still a clearly identifiable income loss, so whether the claimant is earning a wage or is self-employed, it should make no difference.

Now, what if the claimant's projected income of $1,000 is met, but she has to hire a substitute employee, at $500 per week, to meet that income goal. The plaintiff's loss is still $500 per week. The loss is still an income loss within the meaning of the statute. It is no answer to say that the plaintiff is not entitled to recover that loss because she is able to work at the job she previously held. That would not bar recovery in the construction hypotheticals and it should not bar recovery if the loss is a business loss.

But, there is a question as to whether the result would change if the plaintiff's post-accident income at the new job would be the same as the pre-accident job. If the plaintiff made $500 before and $500 after, there is no wage loss, and to that extent, *Erickson* would bar recovery. So, if post-accident, the plaintiff makes $500 at the store, but has to pay a substitute to run the store, at a cost of $250 per week, it is arguable that the plaintiff should not be entitled to

recover.

The argument is that the plaintiff who voluntarily works at a job that pays her less than her regular full time job is not entitled to recover. A contrary result seemingly would conflict with a plaintiff's duty to mitigate damages.

By analogy, the clerical worker who is able to earn $500 per week, and who is able to work at the job, should not be able to take the construction job, which pays the same amount, $500, and then work half-time, and claim a loss of $250 per week.

The difficulty with *Pulju* is that the facts do not clearly establish where the case falls. If the store would have paid a higher income than the job the claimant previously held, the court of appeals' own precedent would dictate that the claimant should be entitled to recover the difference. If that income, less the substitute work payments, was still higher than the previous job, there should have been recovery.

F. Calculation of Benefits—Substitute Work

The calculation of benefits presents problems when the plaintiff engages in substitute work, or when the plaintiff works two jobs but is able to return to only one of them after an automobile accident. *Prax v. State Farm Mutual Automobile Insurance Co.*,[90] establishes that the basic method of calculation when the plaintiff performs substitute work is to reduce the gross weekly wage loss by the income from the substitute work, and then give the plaintiff 85 percent of that wage loss up to the weekly maximum. The problem is more difficult when the plaintiff had more than one job before the accident and post-accident is able to return to one of the jobs, but not both. That was the basic problem in *Rindahl*, where the supreme court intimated that the plaintiff would have been able to recover for her lost farm labor, had she been able to show lost income due to her inability to perform the work.

A variation on the problem, with a questionable outcome, was addressed by the court of appeals in *Erickson v. Great American Insurance Cos.*[91] The plaintiff in the case made a claim for disability and income loss benefits based on the loss of income from a part-time housekeeping job that she was no longer able to perform because of an automobile accident, although she was able to obtain

90. 322 N.W.2d 752 (Minn. 1982).
91. 466 N.W.2d 430 (Minn. Ct. App. 1991).

substitute work that actually paid her more than her previous wage at her regular job.

She worked at one job 22 hours a week for 20 weeks out of the year as a clerk, and during the peak season, 28 hours a week. Her earnings were $203.50 for a 22-hour week and $259.00 for a 28-hour week. She earned $55 per week as a house cleaner, making her total income $258.50 when she worked a 22-hour week and $314 when she worked a 28-hour week. A little more than three months after the accident, the plaintiff began working full time at another job, which paid her $277.20 per week.

The plaintiff would have continued her job as a house cleaner but for the accident, and her new job was intended to replace only her former job at Canterbury Downs. The arbitrator concluded that she would have continued that job and awarded her $2,034.94 in benefits. Great American moved to vacate the award and the trial court granted the motion and vacated the award.

The court of appeals affirmed. There was no dispute over the question of whether the plaintiff would have continued her work as a house cleaner, but the court nonetheless determined that the benefits should not have been awarded by the arbitrator. The court applied section 65B.44, subdivision 3, which requires an injured person to mitigate income loss by undertaking substitute work.

The plaintiff argued that *Prax*,[92] which requires that substitute earnings be subtracted from the weekly wage loss at the time of injury, should be limited to single job situations, but the court of appeals held that it applies "whenever substitute work is involved to determine loss of income."[93] The court's reasoning is as follows:

> Recovery under the income loss provisions of the No-fault Act is limited to income actually lost. . . . A recovery of income loss benefits is not limited to the income the claimant was making at the time of the injury. . . .
>
> The twist in the present case is that Erickson is not seeking to recover income loss benefits based on a foregone opportunity to work at a higher income. Erickson is working at a higher income.
>
> The No-Fault Act defines "loss" as "economic detriment resulting from the accident causing the injury." . . . The

92. 322 N.W.2d 752 (Minn. 1982).
93. 466 N.W.2d at 433 (footnote omitted).

> substitute-work provision of section 65B.44, subdivision 3 reflects the legislature's intent to limit payment of income loss benefits to the amount of money necessary to bring the insured's post-accident gross income up to 85% of the insured's pre-accident gross income.
>
> We believe this showing of legislative intent precludes recovery by Erickson. Her post-accident gross income is greater than her pre-accident gross income, except for the seven-week peak season. Erickson has been fully compensated for her peak-season income loss.
>
> Erickson asserts the trial court erred in looking only to her pre-accident and post-accident gross income figures. The arbitrator found Erickson would have continued her housecleaning but for the accident, and Erickson contends she should be compensated for the $55 per week she would have made but for the accident.
>
> The No-Fault Act does not make express provisions for a person in Erickson's situation. We cannot create such a provision. Instead, we must apply the statute as it is written.[94]

The court of appeals decision in *Erickson* conflicts conceptually with its unpublished decision in *Walden*.[95] In *Walden*, the court of appeals affirmed an arbitrator's award of income loss benefits to a self-employed person who made the same amount of money post-accident, even though she was working fewer hours.

IV. CONCLUSION

The claimant has the burden of establishing disability and income loss because of an accident arising out of the maintenance or use of a motor vehicle, and that the income loss is directly attributable to the inability to work. It is important to understand that inability to work does not mean total inability to perform work. The cases involving income loss claims by persons who have been able to work, yet still claim income loss benefits, clearly establish that proposition. Perhaps the most important point to be drawn from this brief survey of the Minnesota decisions on disability and income loss is that it is critical to have a clear focus on what the claimant has lost because of the injury. The claim for income loss

94. *Id.*

95. No. C3-95-529, 1995 WL 479697 (Minn. Ct. App. Aug. 15, 1995), *review denied*, (Minn. Sept. 28, 1995).

transcends lost salary or wages and applies not only to gross income loss sustained by self-employed persons, but also to the loss of tangible things of economic value. Even if the loss does not fit the standard understanding of income loss, it may be compensable. The claims in *Cloud* and *Guenther* are good examples.

It is also important to understand that the calculation issues that arise when substitute work is performed should track the same principle. The *Erickson* decision, which is a mechanical application of *Prax*, failed to focus on the actual income loss the plaintiff sustained because of the accident. Subsequent, unpublished court of appeals decisions have raised serious doubts about the court of appeals decision in *Erickson*, and they also provide a road map of how the decision might be circumvented.