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Encouragement of Employment of the Handicapped

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ENCOURAGEMENT OF EMPLOYMENT OF THE HANDICAPPED —EXTENSION OF SECOND INJURY FUND PRINCIPLES TO PERSONS HAVING LATENT IMPAIRMENTS

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INTRODUCTION

Six million[1] Americans of employable age have a physical impairment which is sufficiently serious to hinder them in finding employment. Included among the handicapped[2] are orthopedics, those having defective vision, hearing or speech, cardiacs, diabetics, epileptics, and others. Employment of handicapped persons is in the interest of society. Employed, the handicapped are tax-payers; unemployed, they are tax-spenders. If they are not given the employment which they desire the handicapped are forced to become a charge on society. To secure their employment, however, is a problem of great magnitude, requiring the cooperation of employers, employees, interested civic organizations and governmental agencies seeking rehabilitation of the handicapped.

Enactment in most states of Second Injury Fund[3] legislation has aided in overcoming resistance to employment of persons handicapped by loss of an arm or other member. However, this legislation is inappli-

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1. U.S. DEP'T OF LABOR, BULL. No. 923, THE PERFORMANCE OF PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING INDUSTRIES 1, hereinafter cited as PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING.

2. By "handicap" is meant an impairment which hinders employment. The six million figure may be conservative. Other sources have estimated the number of handicapped adults and children in the United States as high as 28,000,000. See ASSOCIATION OF CASUALTY AND SURETY COMPANIES, THE PHYSICALLY IMPAIRED A GUIDEBOOK TO THEIR EMPLOYMENT (1952).

3. For a discussion of this legislation, see *infra*, at p. 580. Second Injury Fund legislation has not, of course, achieved full employment of persons who have lost a member. This problem receives the constant attention of the Federal and State Offices of Vocational Rehabilitation and the President's Committee on Employment of the Handicapped. For an extensive bibliography, see U.S. DEP'T OF LABOR, BULL. No. 146, EMPLOYING THE PHYSICALLY HANDICAPPED (rev. ed.).

cable to persons with latent physical impairments such as cardiacs, diabetics and epileptics. Resistance to employing persons having latent physical impairments is based on the belief that these handicapped persons are more accident-prone than unimpaired employees, and that employment of the handicapped would increase Workmen's Compensation costs.[4] While available studies do not support this belief,[5] this excuse for denying employment to the handicapped must be obviated if employment and rehabilitation of the handicapped are to be secured. The excuse could be avoided by extending Second Injury Fund principles to cover persons with latent physical impairments. To meet semantic objections, the name of such legislation might well be changed to Encouragement of Employment of the Handicapped Laws.

This article considers the problems incident to such extended coverage, recommends that compensation awards for disability which a latent physical impairment caused or contributed to be defrayed from a separate Workmen's Compensation fund supported by taxation, and suggests statutory language to effect this purpose.

This study was prompted by progress in recent years in treating one of the important latent physical impairments—epilepsy. Treatment of epilepsy with anti-convulsants[6] effects complete control of seizures in fifty per cent of cases and reduces seizures to the extent that patients may be vocationally rehabilitated in an additional thirty per cent of cases.[7] In view of this medical progress, it was anticipated that the problem of employment and rehabilitation of the epileptic would be solved. However, the strong resistance to employment of epileptics continues.[8]

4. WORKMEN'S COMPENSATION AND THE EMPLOYMENT OF DISABLED WORKERS 1-2 (Report of the States' Vocational Rehabilitation Council Committee on Relations with Workmen's Compensation); PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING, *op. cit. supra* note 1, at 8-9.

5. THE PHYSICALLY IMPAIRED A GUIDEBOOK TO THEIR EMPLOYMENT, *op. cit. supra* note 2, at 1-2; see *infra*, note 9.

6. Among these are dilantin, mesantoin, tridione, paradione, mysoline, mylontin, etc.

7. PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE PHYSICALLY HANDICAPPED, PERFORMANCE 9 (April 1954).

8. It is well known that, as a rule, employers do not knowingly employ an epileptic. THE AMERICAN MUSEUM OF SAFETY AND THE CENTER FOR SAFETY EDUCATION, NEW YORK UNIVERSITY, INDUSTRIAL REHABILITATION 32 (1945). Only 12% of epileptics applying for jobs through the Division of Vocational Rehabilitation of New York City are placed. See COMMITTEE FOR PUBLIC UNDERSTANDING OF EPILEPSY, NEW YORK, N.Y. EPILEPSY, THE LAST OF THE HUSH-HUSH DISEASES. In 1952 only 1,281 epileptics were placed through State Offices of Vocational Rehabilitation. See *Hearings Before the Special Subcommittee of the House Committee on Education and Labor*, 83d Cong., 1st Sess. H. R. REP. No. 115, pp. 5 and 8. And see PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING, *op. cit. supra* note 1 at 117. The social stigma attaching to epilepsy is a factor in the denial of employment to epileptics. "An . . . obstacle to employment of epileptic cases is the reaction on the part of other employees when the impaired person has a seizure during working hours. Instances were encountered in the study in which plants had attempted to use epileptic cases but had discontinued the practice because of unfavorable reaction on the part of other workers."

Accident Experience of the Handicapped

It may be that conclusive information regarding the comparative performance and accident experiences of the handicapped employees and unimpaired workers has not been compiled. Such studies as are available indicate that, when properly placed, the performance and accident experience of the handicapped is just as favorable as that of unimpaired workers.[9] A United States Department of Labor study of 11,000 impaired workers and 18,000 matched unimpaired workers revealed no significant difference between the groups either as to performance or accident experience. Comparing performance, the report concludes: "When given reasonable job placement consideration—that is, the individual's abilities balanced against the job requirements—the physically impaired workers as a group were fully able to compete successfully with unimpaired workers similarly placed. . . . Based upon the record, it seems reasonable to conclude that physical impairment did not produce an adverse effect on either the quantity of work produced or the quality of the work performance."[10] Relative to nondisabling injuries the report found: ". . . nondisabling injuries of the same nature and severity were experienced with equal frequency by these groups of impaired and unimpaired workers matched on identical jobs and exposed to the same hazards."[11] In view of the excuse usually given for denying employment to impaired persons—that they are more accident-prone—the comparison of disabling injury experience is of particular importance. As to this factor, the report concludes: "If the impaired person is placed intelligently, then (1) The likelihood of an injury, which will result in permanent total disability when superimposed on an existing impairment, is very small. This is shown by this study and the experience of various state second-injury funds. (2) The impaired worker was no more likely—if anything, perhaps, a little less likely—to experience a disabling work injury than an unimpaired worker exposed to the identical hazards. (3) The impaired

Ibid. The stigma dates from ancient times and is born of ignorance of the true nature of epilepsy. Removal of the stigma through education of our people in the true nature of epilepsy will be facilitated greatly by amendment of our eugenic laws to render them inapplicable to epileptics. Fabing and Barrow, *Medical Discovery as a Legal Catalyst: Modernization of Epilepsy Laws to Reflect Medical Progress, supra* note †. While persons having other impairments do not bear the additional burden of a social stigma, they are seriously handicapped in finding employment.

9. PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKMEN'S COMPENSATION AND REHABILITATION 19 (U.S. DEP'T OF LABOR BULL. No. 122). This is substantiated by studies conducted by the U. S. Department of Labor (see note 1, *supra seriatim.*), and by the Accident Prevention Department of the Association of Casualty and Surety Companies, which represents underwriters of many of the state Workmen's Compensation program (see ASSOCIATION OF CASUALTY AND SURETY COMPANIES, THE PHYSICALLY IMPAIRED CAN BE INSURED WITHOUT PENALTY.)

10. PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING, *op. cit. supra* note 1, at 3, 4.

11. *Id.* at 8.

worker was not a source of danger to his fellow workers. (4) The average time lost as the result of disabling injuries was somewhat less among the impaired workers than among their unimpaired co-workers."[12]

The belief that persons subject to convulsive disorders,[13] such as epilepsy, are more accident-prone than unimpaired persons is understandable. However, in the fifty per cent of cases in which complete control is achieved, obviously the incidence of accidents would not be greater. Even as to the thirty per cent of cases in which substantial control is achieved, it is questionable that the accident rate is higher. The Department of Labor study, referred to above, compared the accident experience of epileptic employees and matched unimpaired workers and found no significant difference.[14]

The reason why the performance and accident experience of handicapped persons compares so favorably with that of unimpaired workers is that, knowing his infirmity will be regarded as a handicap, the impaired worker, in the competition for jobs, compensates for this by hard work, regular attendance, and precaution against accidents.[15] Also, a handicapped person appreciates the need for conserving his remaining ability. Such additional tendency to accidents as the handicapped may have, is apparently balanced by the special care exercised in their work.

Employment of the handicapped does not, of course, result in increase of Workmen's Compensation costs *per se*. The premium which

12. *Id.* at 10.

13. Such disorders are numerous. Examples are hypoglycemia, carotid sinus syncope, porphyria, so-called Vasa-Vagal Attacks, Stokes-Adams syndrome, hyperventilation syndrome, and hypertensive encephalopathy. PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING, *op. cit. supra* note 1, at 118.

14. This study is based on a limited number of cases ond on that ground the findings may be questioned. The report contains the following statements relative to the comparison of the accident experience of epileptics and unimpaired workers: "As a group the epileptic cases experienced a slightly higher incidence of non-disabling injuries than the matched unimpaired workers. The rates for the two groups were 5.5 and 4.0, respectively. The difference is small and considering the type of injury involved is probably not significant." With regard to disabling injuries, defined as an injury which "resulted in a permanent impairment or in a time loss of at least one full day beyond the day or shift on which the injury occurred," the report concluded. ". . . the frequency rate was slightly higher for the epileptic cases, 8.3 against 7.6 for the uniinpaired group. The difference of less than one injury per million exposure-hours does not appear significant." "The time-lost rate was 0.02 days and 0.13 days per hundred scheduled workdays for the impaired and unimpaired, respectively." *Id.* at 118. These conclusions are supported by other studies. See *supra*, note 9. Some indication of the infrequency of accidents among epileptics and their minor character is given by the low death rate among epileptics. This is reported as 1.3 annually per 100,000 population by METROPOLITAN LIFE INSURANCE COMPANY, STATISTICAL BULLETIN, Vol. 32, No. 8 (August, 1951). See also the report of Harry Sands, Ph.D., on a study of accidents among epileptics at White Special School in Detroit. EPILEPSY NEWS, Vol. 2, No. 4 (June-July, 1954). Dr. Sands concludes that the accidents were few in number, minor in character, and only 15.9% of the accidents were attributable to seizures.

15. See *supra* note 9.

a particular employer pays is determined by two factors: relative hazard of the particular employer's business and the accident experience of the particular employer. If an employer hires handicapped persons, he is not by reason of that fact alone assessed a larger premium. Only if the handicapped employees should suffer accidents more frequently than unimpaired employees would have, would this accident experience result in an increase in the employer's premium rate.[16]

Whether or not employment of the handicapped leads to increased Workmen's Compensation costs, it must be recognized that this excuse commonly bars the door to employment of the handicapped. It is necessary, therefore, that this excuse be avoided. To accomplish this, Workmen's Compensation Laws should be amended to relieve employers of costs of awards attributable to the handicap. Employers who, except for the fear of increased Workmen's Compensation costs, would respond to the humanitarian impulse to offer employment to the handicapped would then feel free to do so.

Existing Workmen's Compensation Provisions Relating to the Handicapped

In two-thirds of the states, Workmen's Compensation Laws are elective both as to the employer and the employee.[17] The typical act makes the employer subject to common-law liability without benefit of the defenses of fellow servant, assumption of risk and contributory negligence, thus encouraging the employer to elect coverage. Since the employee can elect not to accept coverage in these states, a handicapped person, in an effort to secure employment, could elect to forego the benefits of the Workmen's Compensation Law. However, an employer who had elected coverage probably would reject the application of such a person rather than to assume the burden of common-law liability without the usual defenses.

Another approach to the problem is that of waiver of an injury caused by the pre-existing impairment. To some extent an employee of a complying employer can elect coverage and waive his rights with respect to existing disabilities. Ten states provide for such partial waiver of benefits.[18] The objection to this approach is that, in the event

16. See THE PHYSICALLY IMPAIRED CAN BE INSURED WITHOUT PENALTY *supra* note 9, at 2.

17. 2 LARSON, WORKMEN'S COMPENSATION LAW § 67.10 (1952). For an excellent summary of state Workmen's Compensation Laws, see U. S. DEP'T OF LABOR, BULL. No. 125.

18. Disabled persons: CONN. GEN. STAT. § 7465 (1949); IOWA CODE ANN. §85.55 (Supp. 1954); MD. ANN. CODE art. 101, § 52 (1951); and MASS. ANN. LAWS c. 152, § 46 (Supp. 1954). Certain occupational diseases: MICH. STAT. ANN. § 17.230(3) (1951); MINN. STAT. § 176.663 (1949); OKLA. STAT. ANN. tit. 85, § 47.1 (Supp. 1953); and VA. CODE § 65-50 (1950). Blind persons: OHIO REV. CODE ANN. § 4123.80 (1953); WIS. STAT. § 102.08 (1953). Hernia: MICH. STAT. ANN. § 17.230(3) (1951).

of injury following a waiver, the epileptic is denied compensation in circumstances of great need. Thus, it violates the spirit and purpose of the Workmen's Compensation Laws.

Still another approach is the Second Injury Fund, adopted in forty-three states.[19] The object of this legislation is to spread the risk of employing the handicapped over all employers and, thus, to avoid the excuse that employment of the handicapped would increase Workmen's Compensation costs to the particular employer who hires a handicapped person. Under Second Injury Fund provisions, the amount of the payments charged to the employer for the loss by an employee of one arm, or other member, is the same, whether it is the first loss of an arm in a first accident or the loss of the second arm in a second accident. The difference in the compensation payable upon the loss of one member, resulting in partial disability, and upon the loss of the second member, rendering disability total, is defrayed from the Second Injury Fund.

Existing Second Injury Fund legislation does not cover persons having latent physical impairments, such as rehabilitated tuberculosis patients, cardiacs, and epileptics. The coverage of the legislation is limited in respect to the nature and extent of the first injury. In 25 states the first injury must have been the loss of a member, such as an eye, leg, foot, arm or hand.[20] Additional states have other limitations on the type of prior disability prerequisite to bringing the second injury within the operation of the fund, which would preclude the application of these statutes to latent impairments.[21] Second, the com-

19. ALA. CODE tit. 26, § 288(1) (Supp. 1953); ARIZ. CODE ANN. § 56-955c (Supp. 1951); ARK. STAT. § 81-1313f (1947); CAL. LABOR CODE ANN. § 4755 (1953); COLO. REV. STAT. c. 97, § 355 (1935); CONN. GEN. STAT. § 7489 (1949); DEL. CODE ANN. tit. 19, § 2327 (1953); IDAHO CODE ANN. § 72-314 (1949); ILL. ANN. STAT. c. 48, § 138.8f (Supp. 1954); IND. STAT. ANN. § 40-1308 (1952); IOWA CODE ANN. § 85.64 (Supp. 1954); KAN. GEN. STAT. § 44-568 (1950); KY. REV. STAT. ANN. §§ 342.121, 342.122 (Supp. 1955); ME. REV. STAT. c. 31, § 14 (1954); MD. ANN. CODE art. 101, § 66A (1951); MASS. ANN. LAWS c. 152, §§ 37, 37A, 65 (1953); MICH. STAT. ANN. § 17.158(1) (1951); MINN. STAT. ANN. § 176.13 (Supp. 1954); MISS. CODE ANN. § 6998-37 (1942); MO. REV. STAT. § 287.220 (1949); MONT. REV. CODES ANN. § 97-709A (Supp. 1953); NEB. REV. STAT. § 48-128 (1952); N.H. REV. LAWS c. 266, § 45 (1947); N.J. STAT. ANN. §§ 34:15-94, 34:15-95 (Supp. 1954); N.Y. WORK. COMP. LAW § 15.8h; N.C. GEN. STAT. §§ 97-35, 97-40.1 (Supp. 1953); N.D. REV. CODE § 65-0418 (Supp. 1947); OHIO REV. CODE ANN. §§ 4123.34, 4123.35, 4123.63 (1953); OKLA. STAT. ANN. tit. 85, §§ 171-73 (Supp. 1953); ORE. COMP. LAWS ANN. § 102.1735 (1940); PA. STAT. ANN. tit. 77, § 516 (Supp. 1954); R.I. GEN. LAWS c. 1363, art. IIA, § 1 (1943); S.C. CODE §§ 72-165, 72-189 (1952); TENN. CODE ANN. § 6871 (Williams Supp. 1952); TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (1948); UTAH CODE ANN. § 35-1-68 (1953); WASH. REV. CODE §§ 51.16.120, 51.44.040 (Supp. 1953); W. VA. CODE ANN. § 2523 (1949); WIS. STAT. § 102.59 (1953); WYO. COMP. STAT. ANN. § 72.201 (1945).

20. Alabama, Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts (including military incurred disabilities), Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, and Wyoming.

21. Delaware (permanent injuries only), Kentucky (all injuries except those resulting from disease), Nebraska (all injuries except those resulting from disease), North Dakota (personal injuries and/or occupational diseases), Okla-

bined effect of the first and second injuries must, under the statutes of 35 states,[22] meet the test of total and permanent disability. Thus, persons having latent impairments who sustain injury rendering them partially and permanently disabled would not be covered by the Second Injury Fund. Third, in several states[23] the pre-existing disability must have occurred in an employment covered by Workmen's Compensation and must have been a compensable injury in order for the second injury to be covered by the Second Injury Fund. Obviously, persons with latent impairments, such as cardiacs and epileptics, cannot meet this test.

In view of the foregoing discussion, it is clear that existing Workmen's Compensation Laws discourage employment of persons having latent physical impairments.

Recommendation

If the employer is to be encouraged to hire the handicapped, he must be assured that employment of the handicapped will not increase his Workmen's Compensation costs. The primary concern of the employer is that the handicapped employee is accident-prone and will suffer a compensable injury. Hence, there must be assurance that the employer will not be merit-rated i.e., have this accident experience reflected in his Workmen's Compensation premium, for an injury which would not have occurred except for the employee's pre-existing impairment. The employer also is concerned that the pre-existing impairment, even though not the cause of an accident, may combine with an injury to make a greater degree of disability than would have resulted from the injury alone.[24] Recommended legislation to encourage employment of the handicapped should, therefore, assure the employer that he will not be merit-rated for such portion of the disability resulting from an injury, not sustained as a result of a pre-existing impairment, as is attributable to the pre-existing impairment. A further concern frequently voiced by employers who are asked to hire the handicapped is that the handicap may be responsible for an accident resulting in a compensable injury to unimpaired fellow employees.[25] Any effective

homa (injuries apparent to laymen or adjudged by Industrial Commission), Texas (injuries, to include certain occupational diseases), and Washington (all disabilities resulting from injuries).

22. Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming.

23. *In employment*: Alabama, Arkansas, North Carolina and North Dakota. *In employment covered by workmen's compensation*: Maryland.

24. Second Injury Fund legislation was enacted to meet this basis of objection to employment of persons handicapped by loss of a member.

25. PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING, *op. cit. supra* note 1, at 9. A possible further objection on the ground of property damage resulting from an accident caused by an employee's handicap might also be raised. How-

legislation to encourage employment of the handicapped should include this additional protection to the employer.

Definition of the handicapped persons to be covered by encouragement-of-employment-of-the-handicapped legislation poses a substantial problem. Second Injury Fund legislation currently is, in general,[26] limited to persons who have lost a member. Such handicaps are specific and patent and applicants having such handicaps are readily identified. There is little problem for the Industrial Commission in determining whether an award comes under the Second Injury Fund. Broadening the scope of such legislation to include latent impairments may well raise fears that too great a proportion of Workmen's Compensation costs will be defrayed from the Encouragement of Employment of the Handicapped Fund. The latent physical handicaps to be covered by such a fund must be defined with sufficient definiteness that pre-existing conditions which are not recognized handicaps to employment are not covered. Many cases may be supposed in which one person will sustain injury performing a task which a stronger person would have performed without injury. Such a case is not a handicap to employment and should not, of course, be covered by Encouragement to Employment of the Handicapped legislation. Other cases may arise in which close judgment is required. For example, if an employee with a pre-existing osteomyelitis of the leg were to fall and break this leg, it would be necessary to determine whether the weakened leg caused the fall or whether the fall caused the break in the leg. However, a person may suffer injury because of a heart disorder, diabetes or epilepsy which would not have occurred except for a heart attack, diabetic coma, or a convulsion. Similarly, such conditions, though not a cause of injury, may contribute a percentage of the resulting disability. Such latent impairments, which would prevent the applicant from obtaining or holding employment if known to the employer, are clearly "handicaps" and should be covered by Encouragement of Employment of the Handicapped legislation. To list all such conditions by their medical terms is not feasible. A more practical definition would establish an appropriate standard, and authorize the Workmen's Compensation Commission to determine whether a pre-existing impairment meets the test. Such a definition might read as follows:

ever, it is doubtful that this contingency occurs with sufficient frequency to become a substantial factor in employment. Also, existing Workmen's Compensation procedures have not been shaped to handle property claims, and to render such claims compensable would create new problems and procedures for industrial commissions.

26. The only state having a Second Injury Fund provision sufficiently broad to cover persons having latent impairments, such as epileptics, is New York. N.Y. WORK. COMP. LAW § 15.8(d). However, as the employer remains directly liable for the first 104 weeks of disability, the statute would not substantially encourage employment of persons with latent impairments. Some disabilities other than loss of a member are covered in other states: Arkansas, California, Delaware, Kentucky, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Rhode Island, South Carolina, Texas, Utah, and Washington.

> "As used in this section, 'handicapped employee' means any employee who is afflicted with or subject to any permanent physical impairment, whether congenital or due to an injury or disease, including periodic impairment of consciousness or muscular control, of such character that the impairment, if known to an employer, would, except for the provisions of this section, have prevented the employee from obtaining or retaining employment."[27]

The requirements that the condition be permanent and of a character which would prevent the employee from obtaining or retaining employment are standards which the Industrial Commission may apply so as to make certain that only those impairments which are recognized as handicaps to employment would be covered by the Encouragement of Employment of the Handicapped Fund. The Commission's decision would be based on objective evidence, such as the practice in the industry involved and the practice of the individual employer, in granting or denying employment to persons having the handicap involved. Admittedly, the impairments usually deemed handicaps to employment are numerous and, unless the standards are upheld, could result in substantial charges to the special fund. However, the standards are sufficiently definite to prevent abuse by charging to this special fund claims for injuries which a worker would have sustained in the absence of a handicap and for which the employer should be merit-rated.

The most important protection in encouraging employment of the handicapped is to relieve the employer from liability for any claim for disability or death resulting from an injury caused by the handicap. Statutory language to effectuate this protection might read as follows:

> "If a handicapped employee incurs an injury, arising out of and in the course of his employment, resulting in disability or death of such employee, and the Industrial Commission awards compensation therefor, the Commission shall determine whether the injury would have been sustained or suffered without regard to the handicap. If it is found that the injury would not have been sustained except for the handicap, all compensation payable on account of the death or disability resulting from such injury shall be paid from the Encouragement of Employment of the Handicapped Fund and shall not be merit rated or otherwise treated as a part of the accident experience of the employer of such employee."[27]

A further desired protection to the employer, in the interest of employing the handicapped, is to relieve the employer, in the case of an injury to a handicapped person not caused by the handicap, from payment of such part of an award as may have been made because of a degree of disability contributed by the pre-existing impairment. To accomplish this, the following language might be employed:

> "If it is found that the injury so sustained would have been suffered without regard to the employee's handicap, the Commission shall further

27. Substantially this provision was incorporated in bills introduced in Illinois and Ohio. See State of Illinois, 68th General Assembly, Senate Bill No. 569; State of Ohio, 101st General Assembly, Regular Session, H.B. No. 642.

> determine whether the resulting disability was substantially greater by reason of the handicap and, if so, the amount of disability attributable to the handicap. If it is found that the injury so sustained would have been suffered without regard to the employee's handicap, and the employee died as a result of the injury, the Commission shall also determine whether the pre-existing impairment substantially contributed to the death. Compensation for the amount of disability attributable to the employee's pre-existing impairment or, in the event of death to which the impairment substantially contributed, all awards resulting from the death, shall be paid from the Encouragement of Employment of the Handicapped Fund and shall not be merit-rated or otherwise treated as a part of the accident experience of the employer of such employee."[28]

An additional encouragement to employment of the handicapped would be protection to the employer from claims for injuries to non-impaired fellow employees resulting from an act or omission of a handicapped employee which was caused by the handicapped employee's impairment. Suggested language to effect this purpose is as follows:

> "When an employee of an employer sustains or suffers an injury arising out of and in the course of his employment which results in disability or death and compensation is awarded therefor, if the Industrial Commission determines that such injury or death would not have occurred except for the act or omission of a handicapped employee of such employer and that such act or omission of the handicapped employee would not have occurred except for the impairment of such handicapped employee, all compensation payable to such employee or his dependents on account of the injury, or death of such employee shall be paid from the Encouragement of Employment of the Handicapped Fund and shall not be merit-rated or otherwise treated as part of the accident experience of the employer of such employee."[29]

Statutory provision for initiating the procedure contemplated by the foregoing sections might read as follows:

> "Any employer of an employee who claims or has received an award of compensation or whose dependents have claimed or received an award of compensation may file an application with the Industrial Commission requesting the commission to determine whether such employee was a handicapped employee and, if so, to make all other determinations required by this section. The industrial commission shall hold a hearing on such application in accordance with rules which shall be promulgated by the commission."

The foregoing provisions, with minor modifications, could be integrated with existing Second Injury Fund legislation in most states.

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28. The bills cited *supra*, note 27, contain substantially this provision. However, the Illinois bill would apply only to injures, not caused by the handicap, which result in total or permanent disability or death. The employer should be protected, as well, from such part of a partial disability as is allocable to the handicap.

29. Substantially this provision is included in the Ohio bill cited *supra*, note 27 but is omitted from the Illinois bill there cited.

The recommendation for encouragement of employment of the handicapped is a broad step beyond existing Workmen's Compensation legislation. Substantial education of employers, and other groups as well, regarding the effect of such a statute on Workmen's Compensation costs may be necessary before the groups concerned are ready to take this step.

Employers who have established careful personnel selection policies for the purpose of excluding handicapped persons believed to be accident-prone, may object to legislation which would spread over all employers the risk of injury to handicapped persons hired by a more humanitarian employer. As shown above, available studies of the accident experience of handicapped persons question that they are more accident-prone than unimpaired employees. However, the belief that handicapped employees are accident-prone is deep-rooted. Even if the employer is exempted from direct liability for Compensation Awards for injury which the handicap caused or to which the handicap contributed, he may be concerned if he is required to contribute, through an Encouragement of Employment of the Handicapped Fund, to the cost of injuries to the handicapped hired by other employers.

This raises a question as to the appropriate source of funds to finance such a program. Available evidence relative to the performance and accident-proneness of handicapped persons and unimpaired persons, while not conclusive, indicates no significant difference. Under ordinary personnel policies, to a considerable extent any person, whether handicapped or unimpaired, must be selected for the particular job involved. A handicapped employee, appropriately placed and adding no additional risk of accident attributable to the handicap, should be covered under ordinary Workmen's Compensation Laws. However, the impression of accident-proneness must be reckoned with. If the available studies regarding performance and accident-proneness are not conclusive, it is unlikely that additional studies along this line will be conclusive. Employment of the handicapped, however, will provide a basis on which final conclusions may be drawn. That system of support for the Fund which offers the greatest promise of securing employment of the handicapped should be adopted.

It would not be unreasonable to provide a substantial part, or even all, of the support for the Encouragement of Employment of the Handicapped program from tax funds. Employment of the handicapped is a matter which affects the welfare of the whole state. Handicapped persons who are not employed may become public charges. Hence, an expenditure which encourages employment of the handicapped relieves the state of a heavy economic burden. Those handicapped persons who are employed pay taxes and make a full economic contribution to society. Apart from the economic factor, there are strong moral and

social values for society as well as for the handicapped individual in securing employment of the handicapped. The economic and social gains resulting from such legislation suggests that taxation is an appropriate source of support for Encouragement of Employment of the Handicapped legislation. Moreover, a handicap which is not a result of an industrial accident is not a product of Industry, and the cost of overcoming the handicap should not be borne by it. In four states[30] the cost of the Second Injury Fund is borne in whole or in part from taxation. The benefits derived by the state in terms of rehabilitation of persons who otherwise would be social charges would be many times greater than the tax contribution necessary to support such a fund.

In most states[31] the source of the Second Injury Fund is limited to contributions by employers covered by Workmen's Compensation Laws. Changing the source of funds to support the extended coverage of the proposed Encouragement for Employment of the Handicapped Law to taxation would be difficult under the tax policy of many states. In such states, consideration might be given to a sharing of the cost by the employer and the state. A possible procedure to be followed would be to provide in the initial law that the fund would be entirely tax supported for a specified number of years. The law might further provide that at the end of that trial period the accident experience would be appraised and if the cost of administering this program were found to be in line with the cost of existing Second Injury Funds, the entire program might thereafter be handled as the Second Injury Fund program is currently handled. However, if the cost were found to be out of line with the cost of Second Injury Fund program, but not greatly out of line, provision might be made for a substantial portion, such as two-thirds of the cost, to be supplied by taxation and the remaining portion to be supplied by the individual employer.

If no tax support for the Encouragement of Employment of the Handicapped Law can be obtained in a state, the law should, nevertheless, be adopted and the source of funds be contributions from all employers.[32] It should be noted that compensation awards under

30. CAL. LABOR CODE ANN. § 4755 (1953); KAN. GEN. STAT. § 44-568 (1950); MASS. ANN. LAWS c. 152, § 65 (1953); and PA. STAT. ANN. tit. 77, § 516 (Supp. 1954).

31. The source of the funds is as follows: taxation (in whole or in part): California, Kansas, Massachusetts and Pennsylvania; "windfall" (occurring when an employee having no dependents meets with sudden death in his employment): Alabama, Arizona, Arkansas, Colorado, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, and Wyoming; a percentage of total Workmen's Compensation payments: Connecticut, Delaware, Idaho, Indiana, Kentucky, Minnesota, New Jersey, New York, Oklahoma, Rhode Island, South Dakota, and Washington; a percentage of payroll: North Dakota, Ohio, and West Virginia.

32. In a few states, employers who are self-insurers are not required to maintain a Second Injury Fund or to maintain a reserve for such risk. WORK-

Second Injury Fund provisions have been, in terms of the number persons employed, infinitesimal.[33] Since existing studies suggest that there is no significant difference between the accident experience of handicapped employees and unimpaired workers, the probability is that the contribution necessary to support an Encouragement of Employment of the Handicapped Law would not be great. Evidence in terms of employment of the handicapped outweighs the fears which many employers have that employment of the handicapped would result in greatly increased Workmen's Compensation costs.

Enactment of the recommended program would not, of course, provide for the making of compensation awards in circumstances under which an award would not be granted under existing legislation. Handicaps may result in injury which is compensable under the current laws. If the handicap is a latent impairment, the employer may not discover it until an injury occurs. When they cause a compensable award, the employer is merit-rated for this accident experience. The recommendation here made would simply move this type of award under a separate fund and the employer would not be merit-rated for this experience.

One further problem which should receive consideration is whether the Encouragement of Employment of the Handicapped Laws should apply to persons who, knowing that they had a latent physical impairment, did not disclose it when employed. Placement of a handicapped person in a job appropriate to the handicap is an important factor in reducing accidents. The applicant should, therefore, disclose the impairment. Realizing, however, that such a disclosure may result in a denial of employment, there is a strong incentive for the handicapped to conceal the impairment. The New York Second Injury Fund statute which applies to a "permanent physical impairment" has been construed to deny reimbursement to an employer who did not know of the employee's condition when he was hired.[34] Such a construction penalizes the employer who attempted to discover any impairment but failed to do so because the impairment was not readily discoverable and the employee, if he knew of the impairment, failed to disclose it. Of course, the employee may not be aware that he has some impairment which would be included in the coverage of the proposed legisla-

MEN'S COMPENSATION AND THE EMPLOYMENT OF DISABLED WORKERS, *op. cit. supra* note 4, at 4. If legislation adopted requires contribution by employers, statutes in these states would require amendment to provide for contribution by self-insurers to the extent that this is required of other employers. Unless this is done, self-insurers will lack the incentive provided other employers to employ handicapped persons.

33. WORKMEN'S COMPENSATION AND THE EMPLOYMENT OF DISABLED WORKERS, *op. cit. supra* note 4, at 5 and Table 2.

34. Zyla v. Julliard & Co., 277 App. Div. 604, 102 N.Y.S.2d 255 (1951). The court reasoned that if the employer lacked knowledge of the impairment when the employee was hired, the Second Injury Fund did not encourage the hiring and so the award should not be borne by the Fund.

tion. In order to induce disclosure by the employee of impairments of which he has knowledge, the employee might be denied all[35] or part of the award otherwise payable for injury covered by the impairment if he willfully concealed the impairment from an employer who expressly requested such disclosure. However, that laudable objective, "To let the punishment fit the crime," is not attained in this handling of the matter. The employee, who, fearing denial of employment because of an impairment, conceals the condition, and sustains a total and permanent disability would, under such a provision, probably become a charge on the state. Inducement to disclosure of impairments is highly desirable in the interest of appropriate placement. Probably sufficient inducement might be achieved by providing for reasonably diminished awards for injuries resulting from impairment which were concealed.

Conclusion

Belief that handicapped persons are accident-prone and that employment of them would increase Workmen's Compensation costs tends to discourage employment of the handicapped. Whether handicapped persons, when properly placed, are more accident-prone than unimpaired workers is questionable. However, to encourage employment of handicapped persons, employers should be assured that compensation awards for disability resulting from injury caused by the impairment, or to which the impairment contributed, should be defrayed from a separate fund, such as the existing Second Injury Fund. Contributions to such an Encouragement of Employment of the Handicapped Fund should include appropriation of tax funds, since the purpose of the legislation is to solve a social problem. Adoption of such legislation would facilitate greatly employment of the handicapped.

35. See OHIO REV. CODE ANN. § 4123.70 (1953).