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Workmen's Compensation: Florida Subsequent Injury Law and Special Disability Fund

Christopher H. Cook

E. C. Deeno Kitchen

The adoption of the minimal contacts test by the above statute will not solve all problems. In the past the full potential of this test has not been utilized because of superficial judicial reasoning. The courts have emphasized the factual contacts and refused to recognize and balance the underlying interests that are the heart of any test of fairness or reasonableness. The Florida courts have interpreted the due process test to contain a strict arising-out-of requirement despite the fact that such a requirement is not a part of the test and causes underlying interests to be disregarded. These failures cannot be remedied by any statute since the technique of judicial reasoning required by the minimal contacts test cannot be formulated in statutory language. One can only hope for a growing realization among the judiciary that the minimal contacts test is not a test of set rules but a process of reasoning, seeking a fair result in each case.

DUDLEY DEAN ALLEN

EDITOR'S NOTE. The 1967 Florida Legislature apparently has abolished the "arising-out-of" requirement in factual situations similar to *Illinois Cent. R.R. v. Simari*, 191 So. 2d 427 (Fla. 1966), by the following amendment to §47.18: "(8) Where a corporation has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent, resident in the state, may personally be made, pursuant to this section, and it is not necessary in such case, that the action, suit or proceeding against the corporation shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state." Fla. Laws 1967, ch. 67-399 (Fla. Sess. Law Service No. 3, at 787).

WORKMEN'S COMPENSATION: FLORIDA SUBSEQUENT INJURY LAW AND SPECIAL DISABILITY FUND

Workmen's compensation legislation originated in Germany in 1884. By 1908, social pressure had precipitated similar statutory provisions in the United States for government employees. The first state statute was enacted by New York as early as 1910, and within eleven years all but a few states had such legislation. By 1963, workmen's compensation statutes existed in every state.[1]

Prior to workmen's compensation, an employee often was forced to litigate to be recompensed for his injury. Thus, the employer could compel a settlement for lower compensation by intentional delay tactics. Further, harsh common law rules such as assumption of risk, contributory negligence, and the fellow-servant rule were major obstacles to recovery. Even if a judgment were obtained, it was inevitably diminished by attorney's fees and other expenses of litigation. As a result, a great portion of industrial accidents went uncompensated.[2] Workmen's compensation legislation was designed to remedy

1. W. PROSSER, TORTS §82, at 554 (3d ed. 1964).
2. Estimated at 70%. 1 W. SCHNEIDER, WORKMEN'S COMPENSATION §1, at 1 (1932).

this problem by lifting the cost burden of industrial accidents from the shoulders of the injured worker and spreading this cost over the entire consumer market. The underlying rationale was that since accidents are statistically inevitable, they should be treated as an ordinary expense of doing business and thus be reflected in the cost of the finished product.

In short, workmen's compensation statutes impose strict liability. The employer must pay for any injury to his employee regardless of the negligence of either party. When injury occurs, there remain but two questions for determination: (1) whether the workman and his injury are contemplated by the applicable workmen's compensation act and (2) the amount of compensation to be paid. It uniformly is held that when the injury is covered by the act, statutory compensation is the sole remedy available to the employee, and the common law claim is barred.[3] The compensation provided is thus a compromise. Although the worker receives less than a jury would award for the particular injury, the worker benefits from the assurance that he will always be compensated.

The seemingly simple equation of workmen's compensation, however, has created a serious problem where the employee who is injured has a preexisting disability. In such instances the later injury usually combines with the preexisting disability, which results in a more serious impairment than would have been sustained in the absence of the former disability. For example, the loss of an arm may cause only twenty-five per cent partial disability to a normal man, but would cause total disability to a man who previously had lost the other arm.[4]

Compensation to the worker for the entire injury is the primary goal of workmen's compensation. But if the employer must pay for the combined disability, he probably will not hire handicapped workers.[5] Nevertheless, some states impose *full responsibility* upon the employer.[6] Others *apportion* the cost of the compounded injury pursuant to statutes. Both full responsibility and apportionment states may, at times, reimburse the employer for added liability by means of second-injury funds. Florida has attempted to solve the dilemma through apportionment and a second-injury fund. Unfortunately, however, the current Florida solution is inadequate to protect the interests of the injured worker and the employer. The purpose of this note is to survey Florida law with regard to the above alternatives and, more importantly, to analyze Florida's interpretation of the primary goals of workmen's compensation.

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3. W. PROSSER, TORTS §82, at 555 (3d ed. 1964).

4. 2 A. LARSON, WORKMEN'S COMPENSATION §59 (1961).

5. Within thirty days following the Oklahoma court's refusal to allow apportionment of a subsequent injury in Rease v. Hughes Stone Co., 114 Okla. 170, 244 P. 778 (1926), 7,000 to 8,000 employees with permanent, partial disabilities were released from Oklahoma employment. This problem is especially acute immediately after a war when many handicapped veterans return to the American labor market. U. S. Bureau of Labor Statistics, Dep't of Labor. Bull. No. 536, at 272 (1931).

6. This approach is similar to the "eggshell skull rule" of torts — the employer takes his employee as he finds him, thus becoming liable for the entire injury. W. PROSSER, TORTS §50, at 301 (3d ed. 1964).

THE USUAL OPERATION OF APPORTIONMENT AND SECOND-INJURY FUNDS

Apportionment

Under apportionment statutes, an injured employee generally is compensated by his employer for only the second injury.[7] The portion of resulting disability attributable to the *first* injury and the increase in disability attributable to the combined effect of both injuries is apportioned — that is to say the employer does not have to pay, nor does the employee receive compensation, for this amount. Consequently, though discrimination against handicapped workers in hiring is prevented, the handicapped worker who sustains a second injury receives less than full compensation for his resulting disability.

Apportionment statutes usually do not apply when the prior condition was not causing impairment to earning capacity at the time of the second injury and was not being compensated under the general workmen's compensation statute.[8] A distinction is made, therefore, between a permanent impairment to the body, which is disabling, and a preexisting defect, which is not independently disabling. Generally the *entire* resulting disability is compensated when a subsequent injury aggravates latent, nondisabling conditions such as heart disease, cancer, back weakness,[9] or infirmities due to old age.[10]

Second-Injury Funds

Second-injury funds accomplish the same purpose as apportionment statutes, though usually in more limited disability circumstances;[11] that is, they prevent hiring-discrimination against the handicapped. The fund usually operates in this manner: the employer pays his employee for that portion of the resulting injury for which he is liable under existing law; the employer then initiates a *de novo* action against the fund. The amount of the employer's reimbursement generally is equal to the compensation that the employer was required to pay his employee minus that compensation attributable to the second injury considered by itself.[12] In effect, the employer's liability is no greater than if the worker had not been handicapped when

7. 2 A. LARSON, WORKMEN'S COMPENSATION §59.20, at 55 (1961).

8. *E.g.*, Lee Moor Contracting Co. v. Industrial Comm'n, 61 Ariz. 52, 143 P.2d 888 (1943) (something that affects his earning power); Tweten v. North Dakota Workmen's Compensation Bureau, 69 N.D. 369, 287 N.W. 304 (1939).

9. 2 A. LARSON, WORKMEN'S COMPENSATION §59.20, at 56 (1961). Only a few states apportion in the case of preexisting diseases — Florida is one of these. FLA. STAT. §440.02 (19) (1965).

10. Eagle Indem. Co. v. Hadley, 70 Ariz. 179, 218 P.2d 488 (1950).

11. Originally, second-injury funds applied only to certain major disabilities such as amputations and sight losses, and even today only a few statutes encompass any previous, permanent disability without limitation as to type or cause. Address by Patrick H. Mears, Deputy Director Fla. Indus. Comm'n, Conference of Deputy Comm'rs, Workmen's Compensation Div., Fla. Indus. Comm'n, Tallahassee, Fla., July 1, 1957.

12. 2 A. LARSON, WORKMEN'S COMPENSATION §59.32, at 59 (1961).

injured. Moreover, unlike the situation under apportionment statutes, the handicapped employee receives compensation for substantially all of his resulting injury.[13]

THE FLORIDA SOLUTION TO THE SECOND-INJURY PROBLEM

Florida's solution to the second-injury problem, at one time, was full responsibility.[14] In a recent case, however, Florida was characterized as an apportionment state with a Special Disability Fund.[15] The employer and employee now must look to the apportionment and fund provisions to determine their respective legal positions.

Apportionment

Florida has two apportionment statutes.[16] Both have been reinterpreted[17] in great detail by recent decisions. *Evans v. Florida Industrial Commission*[18] held that when a *preexisting disease* is aggravated by a subsequent injury, the employer, pursuant to Florida Statutes, section 440.02 (19), must pay his employee for that portion of the total injury represented by (1) the disability that would have resulted from the injury alone had there been no preexisting disease and (2) the disability that results from the acceleration and aggravation of the preexisting disease. Thus, the employer is liable for only the resulting disability that is not attributable to the normal progress of the disease.[19] *Stephens v. Winn-Dixie Stores, Inc.*,[20] construing Florida Statutes, section 440.15 (5) (c), formulated a similar determination of the employer's liability in cases where a subsequent injury combines with a *prior disabling injury*. The employer in this case must compensate his employee for the entire disability resulting from the combined injuries less the percentage of prior disability manifesting itself at the time of the award for the second injury.[21]

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13. *Id.*

14. *See* Davis v. Artley Constr. Co., 18 So. 2d 255 (Fla. 1954) (preexisting disease combined with a subsequent accident); Alexander v. Peoples Ice Co., 85 So. 2d 846 (Fla. 1955) (prior industrial disability combined with a subsequent injury to cause total permanent disability).

15. Stephens v. Winn-Dixie Stores, Inc., 201 So. 2d 731 (Fla. 1967).

16. FLA. STAT. §440.02 (19), .15 (5) (c) (1965). The former section provides: "[W]here a pre-existing disease or anomaly is accelerated or aggravated by accident arising out of and in the course of employment, only acceleration of death or the acceleration or aggravation of disability reasonably attributable to the accident shall be compensable with respect to permanent disability or death." Section 440.15 (5) (c) provides: "[A]n employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation for such injury when considered by itself and not in conjunction with the previous disability."

17. For previous interpretations of these statutes see Unit Wall Co. v. Speh, 133 So. 2d 304 (Fla. 1961) (FLA. STAT. §440.02 (19) (1965)); Dorsey v. L & A Contracting Co., 155 So. 2d 357 (Fla. 1963) (FLA. STAT. §440.15 (5) (c) (1965)).

18. 196 So. 2d 748 (Fla. 1967).

19. *Id.* at 752.

20. 201 So. 2d 731 (Fla. 1967).

21. *Id.* at 13. This interpretation presents at least two difficulties: (1) determination of

As a result of *Evans* and *Stephens*, it is difficult to imagine many instances in which apportionment can now occur in Florida. Most preexisting diseases, such as diabetes, do not cause an employment disability.[22] Thus, in most cases, where a preexisting disease compounds the subsequent injury, there will be nothing to apportion. Furthermore, many employees may be able to adjust to their prior disabling injuries and thus reestablish some, if not all, of their former earning capacity. In this event, very little disability will be manifesting itself to be apportioned at the time of the second injury.

Indeed, by way of dicta, *Stephens* seems to have left room for a strong argument that the resulting disability should *never* be apportioned in Florida. The court in *Stephens* reasoned that if the prior injury were disabling at the time of the second accident, "it must have had the effect of reducing the employee's earning capacity, in which case there seems to be no justification for again charging its effect to the employee through apportionment."[23] Although it may not seem so at first glance, there is a substantial relationship between "charging the effect" of a prior injury to the employee by the reduction of his wage and "charging the effect" to the employee's compensation award. *Stephens* noted that award for second injury is determined by the loss of the wage-earning capacity that the employee had at the time of the second accident. The amount of the award is thus directly related to the current employee's wage-earning capacity. If the employee is now working for a lower wage due to prior injury, the amount the employer will have to pay for a second injury will also be lower. In this sense, the disability attributable to the prior injury, and manifesting itself at the time of the second injury, has already been apportioned out by the lower wage. Thus, there is no justification for again relieving the employer of that liability, or for "charging its effect to the employee through apportionment." This reasoning also should apply to subsequent injuries that aggravate preexisting diseases. For a preexisting disease, which was independently causing disability — the component that *Evans* ruled to be subject to apportionment, would also have caused a lower wage and thus would already have been "apportioned."

The Special Disability Fund

To complicate matters, Florida also has a second-injury fund.[24] The fund is available only if all statutory prerequisites are met.[25] If the fund is not

the prior disability when there has been no original adjudication and (2) determination of the prior disability still manifesting itself at the time of the second injury.

22. An example of one of the few instances where preexisting diseases may still be apportionable is found in Tanenbaum v. Industrial Accident Comm'n, 4 Cal. 2d 615, 52 P.2d 215 (1935), where an arthritic back was found disabling, irrespective of the subsequent injury.

23. 201 So. 2d at 737.

24. FLA. STAT. §440.49 (4) (1965), *formerly* FLA. STAT. §440.15 (5) (d) (2) (1961).

25. There are three prerequisites for the Fund's applicability. First, an employee having a "permanent physical impairment" must incur a subsequent permanent disability from an injury or occupational disease connected with his employment. FLA. STAT. §440.49 (4) (c) (1965). The preexisting impairment is any permanent condition arising out of a previous

available, the employee's compensation is computed in accordance with the apportionment statutes, and the fund cannot be used by the employer for any reimbursement. If the fund is available, *Stephens* held that the employee is to be compensated for the *entire* disability resulting from the merger of the first and second injuries.[26] Full responsibility thus is imposed initially in all cases upon the employer. The employer can then institute a *de novo* action against the fund for reimbursement equal to the amount that *would* have been apportioned out had the apportionment statutes been operating.[27] In effect, the fund is used to give the employee compensation benefits in excess of the compensation he would have received if the injury had been apportioned.

To better understand the *Stephens* case, it would be helpful to trace the judicial move and legislative countermove that preceded it. The Florida Supreme Court first announced its interpretation of the fund in *Sharer v. Hotel Corp. of America.*[28] In that case, decided in 1962, a worker suffered a partial, permanent disability, which resulted from the compounding of successive injuries to different hands. The legislature's intended purpose for the fund was expressly delineated at that time in an amendment to the original statute.[29] The fund was enacted to encourage employment of handicapped workers by protecting employers from "excess liability" when a second injury combined with a prior disability to cause a greater resulting impairment. The fund provisions were to be determinative of only the amount the employer could recover in a *de novo* action; they were expressly not to be used to confer benefits upon the employee in addition to those recoverable under the law existing at that time. The court in *Sharer* acknowledged this legislative intent but directed attention to the last clause of Florida Statutes, section 440.15 (5) (c), which required apportionment *except* as provided in the fund. To the court, this "except" clause seemed to mean that either the fund or apportionment, but not both, was to be used to *determine compensation* due to the employee. Thus, it obviously conflicted with the expressed legislative intent that the fund was not to be used to determine the employee's compensation.[30] The court further noted that, according to the legislature, the fund was to relieve the employer from "excess liability." But if the fund was not used to determine employee compensation, then in all

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accident or disease or any congenital condition that is a hindrance or obstacle to employment and is known to the employer prior to the subquent injury or occupational disease. FLA. STAT. §440.49 (4) (b) (1965). Permanent physical impairment is interpreted to include preexisting diseases. Unit Wall Co. v. Speh, 133 So. 2d 304 (Fla. 1961). The second requirement for the Fund's applicability is that the second injury must result in a permanent disability that is "materially and substantially greater" than that which would have resulted from the subsequent injury alone. FLA. STAT. §440.49 (4) (c) (1965). The third requirement is that the employer must "know" of the prior disability or disease. FLA. STAT. §440.49 (4) (b) (1965).

26. *See* 201 So. 2d at 736.

27. *Id.*

28. 144 So. 2d 813 (Fla. 1962).

29. FLA. STAT. §440.15 (5) (d) (5) (1959). This identical statutory language now appears as FLA. STAT. §440.49 (4) (a) (1965).

30. Sharer v. Hotel Corp. of America, 144 So. 2d 813, 816 (Fla. 1962).

cases, employee compensation would be computed pursuant to the apportionment statutes. Since apportionment, in theory, also relieves the employer from "excess liability," there would never be any "excess liability" imposed upon the employer, and thus the fund would never be used.[31] Rather than hold that the legislature had done a useless act in enacting the fund, the *Sharer* court concluded that the fund must exist for the sole purpose of providing the employee with benefits in addition to those provided under apportionment.

Immediately following the *Sharer* decision, the 1963 legislature moved the Special Disability Fund from section 440.15 (5) (d) (5), the employee compensation section, to section 440.19 (4) of the Florida Statutes — the section encompassing rehabilitation of injured employees. The "except" clause was deleted, and the legislative intent paragraph was placed at the beginning of the fund provision. The legislature apparently intended these changes to negate the *Sharer* rule for use of the fund.[32]

But when the issue again was faced in *Stephens*, the Florida Supreme Court reaffirmed *Sharer*. *Stephens* held that the "except" clause had not been essential in *Sharer*. The fundamental reason behind the *Sharer* rule was that Florida is an apportionment state, not a full responsibility state. Apportionment, in theory, is designed to do the very same thing a fund would do — eliminate discrimination in hiring the handicapped. Thus, there is no need for a fund in Florida unless, notwithstanding express legislative intent, the fund is to be used to provide compensation benefits to the employee in addition to those provided by apportionment.[33] The very existence of the fund demanded that a use be assigned to it, and what better use than to give the employee the additional compensation needed to compensate completely for the resulting disability?

Although *Stephens* may be commended for achieving full compensation for the employee — the primary goal of workmen's compensation — the decision must be criticized for its disregard of express legislative intent. Furthermore, due to the construction of the apportionment statutes in *Evans* and *Stephens*, the court's interpretation of the employer's reimbursement from the fund will result in continued discrimination against handicapped workers in hiring practices. The amount of reimbursement from the fund permitted by *Stephens* was the amount that would have been apportioned had the apportionment statutes been operating.[34] Since now there are few instances where there will be anything to apportion, in most cases the employer will pay for the entire resulting disability without reimbursement, although all the prerequisites for application to the fund are met. But more important, even though the fund applies and the employer is reimbursed for the apportioned amount, the employer will have to bear without reimbursement the cost of that portion of the resulting injury attributable to the aggravation of preexisting disease or to the increased disability due to compounding

31. *Id.* at 817.
32. Stephens v. Winn-Dixie Stores, Inc., 201 So. 2d 731, 733 (Fla. 1967).
33. *Id.* at 736.
34. *Id.*

of two injuries because that component of the resulting injury, according to *Stephens* and *Evans*, is not to be apportioned. In other words, the employer will still risk more unreimbursable liability when he employs the handicapped worker than when he employs the uninjured worker.

Stephens asserted that its interpretation of the fund was the only one possible. Two other constructions of the fund's purpose, however, more consistent with legislative intent and more effective in preventing discrimination, were available to the *Stephens* court.

The fund was created by the legislature immediately following a decision[35] that had imposed full responsibility upon the employer when a second injury resulted in *total* permanent disability. Thus, when Florida Statutes, section 440.15 (5) (c), was enacted, commanding apportionment *except* when the fund applied, the legislature might well have intended that the fund apply only when full responsibility was required.[36] Thus, in cases of *partial*, permanent disability, the employer would pay his employee pursuant to apportionment computation, and the fund would not be available for reimbursement. But in full responsibility situations involving *total* permanent disability, if the prerequisites of the fund were met, the employer could seek reimbursement from the fund equal to, as expressed in the fund statute, the "excess liability." Two interpretations of excess liability might then have been possible. The court might have reasoned that since apportionment was the norm, the "excess" was the amount by which full responsibility liability exceeded apportionment liability. Interpretation of apportionment liability would thus be the deciding factor in determining the employer's reimbursement from the fund. On the other hand, excess liability might have been construed as all liability imposed upon the employer above the second injury considered alone, for this liability is "excess" in the sense that it would not have been imposed upon the employer if the worker had not already been handicapped.

Although this is one alternative, consistent with legislative intent, that could have been utilized by *Stephens*, it is not recommended because of the current interpretation of the apportionment statutes. Under present apportionment, the employer must still pay his employee for the increased disability due to the combining of two injuries. Without access to the fund under this alternative, the employer would bear this cost in cases of partial, permanent disability. In cases of total, permanent disability, if "excess liability" were interpreted to mean the amount by which full responsibility exceeded apportionment liability, the employer again would not be reimbursed from the fund for the portion that he paid to his employee attributable to increased disability due to compounding. Thus, the employer would still risk greater liability by hiring a handicapped worker, and discrimination would inevitably follow. Moreover, though the employee would be fully recompensed if his resulting injury were total, he would not be compensated completely if his injury were partial, for his injury would then be apportioned.

35. Alexander v. Peoples Ice Co., 85 So. 2d 846 (Fla. 1955).

36. This argument was made in Sharer v. Hotel Corp. of America, 144 So. 2d 813, 815-

A second interpretation of the fund would seem to have been more appropriate. *Stephens* reasoned that the fund and apportionment must be mutually exclusive because each is designed to do the same job — prevent discrimination against handicapped workers. In light of the construction given to Florida's apportionment statutes by *Evans* and *Stephens*, however, this conclusion seems questionable. True, in most states apportionment does eliminate the possibility of discrimination in hiring. But this is because in these states under apportionment, the employer must pay his employee only for the second injury considered separately. As far as the liability of the employer in these states is concerned, it is as if the employee were not handicapped. As has been noted, however, Florida apportionment still saddles the employer with increased liability when a handicapped worker receives a second injury. Thus, since apportionment in Florida does not prevent discrimination, the fund and apportionment should not be mutually exclusive. In fact, both the Florida Special Disability Fund and the statute that apportions in cases of prior disabling injuries were patterned after similar New York statutes.[37] Since a New York decision has allowed both apportionment and access to the fund,[38] it is reasonable to assume that the Florida Legislature intended its courts to reach a similar result. Indeed, the legislature has impliedly stated that the fund is to be used to prevent discrimination by reimbursing the employer the excess liability *after* that liability has been determined under existing law. Thus, under a second interpretation of the fund, after the employer has paid his employee as required by either full responsibility or Florida's method of apportionment, the employer would be reimbursed for all amounts paid in excess of the second injury considered separately. As a result, in apportionment situations, the employer would no longer bear without reimbursement that portion of the resulting injury attributable either to the aggravation of preexisting disease or to the increase in disability due to combining of the prior injury and the second injury. The handicapped worker, however, would still not receive full compensation for *partial*, permanent disability, for this would be apportioned.

CONCLUSION

A legislative reaction to *Stephens* is expected. The legislature could retaliate by revamping the apportionment statutes and the fund, so that no mistake could be made that Florida's second injury cases should be governed by one of the two methods outlined above. It is hoped, however, that rather than abrogate the salutary results of these cases of full compensation for the

16 (Fla. 1962), and was summarily rejected by the court.

37. *See* Unit Wall Co. v. Speh, 133 So. 2d 304, 308 (Fla. 1961). The model New York statute referred to is now N.Y. WORKMEN'S COMP. LAW §15 (8) (McKinney 1965).

38. Bechler v. Hecht's, 238 App. Div. 901, 130 N.Y.S.2d 26 (1954). In this case claimant lost his left index finger after previously losing his thumb and little finger. He had received compensation for the prior 45% loss of his hand, and upon a determination that the current injury caused a 95% loss of his hand, he was allowed recovery for the difference. The employer was also allowed to go against the Special Disability Fund for everything in excess of the loss of an index finger.

injured worker, the legislature will act only to alleviate the danger of discrimination in hiring by relieving the employer of added liability. One way would be to provide expressly that the fund is to be used to reimburse the employer for all liability in excess of the second injury considered separately. This would overrule the *Stephens* interpretation of the use of the fund, and yet it would not disturb the *Stephens* rule that where the fund applied, the employee would receive full compensation from his employer regardless of whether his injury were partial or total. Thus, as long as the prerequisites of the fund were met,[39] the employee would receive full compensation and the employer would not have to bear liability in excess of the second injury considered separately. If the fund were not applicable due to the absence of a prerequisite,[40] however, the employee would still face apportionment and thus the goal of workmen's compensation — full compensation — would not be fully realized.

In the final analysis, Florida's second-injury problems are attributable to the apportionment statutes. Apportionment is an unmitigated evil. It is true that, in theory, apportionment of prior disabling injuries prevents discrimination in hiring by relieving the employer of all liability in excess of the second injury considered separately. There seems to be no justification, however, for apportioning preexisting diseases,[41] for how can it be said that apportionment of preexisting diseases prevents discrimination in hiring when in most cases the preexisting disease is hidden and not known to the employer when he hires the employee? Holding the employer liable in this case for the entire injury — holding the employer responsible for the employee "as he finds him" — is logically no more unfair than holding the employer strictly liable in the first place. Furthermore, as noted above, it is also illogical to reduce the employee's award by apportionment when that award is already less due to his lower current wage.[42] And even if apportionment does prevent hiring discrimination, it does so only by "robbing Peter to pay Paul"; the employer's relief is at the expense of the handicapped worker who must bear a large portion of his second injury without compensation. The Florida Supreme Court has done its best to compromise this result in *Evans* and *Stephens* by holding the employer liable to his employee for more than the second injury considered separately. But the result of compromise is the continuation of both problems. The ideal solution, therefore, would be to repeal the apportionment statutes so as to make Florida a full responsibility state in all cases. With the abolition of apportionment, the tangled skein of apportionment precedent would be discarded. Thus, the employee would

39. See note 25 *supra*.

40. For the Fund to apply, the employer must know of the employee's prior injury. FLA. STAT. §440.49 (4) (b) (1965). The reasoning is that in the absence of knowledge, the employer will not discriminate and there is, therefore, no reason to relieve him of the excess liability by allowing access to the Fund. Although this may be logical with regard to the employer, it does not fully compensate the employee because the injury will be apportioned if the Fund is not applicable.

41. *See* 2 A. LARSON, WORKMEN'S COMPENSATION §59.20, at 56 (1961). States apportioning preexisting diseases are in an extreme minority. *Id.*

42. Stephens v. Winn-Dixie Stores, Inc., 201 So. 2d 731, 737 (Fla. 1967).