# WORKMEN'S COMPENSATION: CREDIT OR NO CREDIT FOR OVERPAYMENT OF HEALING PERIOD BENEFITS AGAINST A PERMANENT PARTIAL AWARD; THE SEARCH FOR AN EQUITABLE ANSWER

## I. INTRODUCTION

Workmen's compensation[1] presents serious questions not only to the injured worker, but also to the employer who administers the program and the insurance carrier who provides the payments from the premiums collected. In establishing the National Commission on State Workmen's Compensation Laws, Congress noted the serious questions concerning the present workmen's compensation laws have become more prominent

> in light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety and increases in the general level of wages and the cost of living.[2]

Consequently, workmen's compensation appears to be entering a period of expanding litigation[3] in an attempt to remedy the deficiencies and to define

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1. Workmen's compensation has been defined as "a mechanism for providing cash wage benefits and medical care to victims of work connected injuries, and for placing the costs of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product." A. LARSON, LARSON'S WORKMEN'S COMPENSATION, DESK EDITION § 1.00 [hereinafter cited as LARSON'S DESK EDITION]. It should be noted that the Iowa act is called "Workers' Compensation" rather than "Work*men's* Compensation." IOWA CODE ch. 85 (1981). For convenience the more widely used "Workmen's Compensation" will be used in this Note.

2. NATIONAL COMM. ON STATE WORKMENS' COMPENSATION LAWS, REPORT 13 (1972) [hereinafter cited as NATIONAL COMMISSION REPORT].

3. Anticipating a multitude of litigation, Congress made the following statement in the Occupational Safety and Health Act of 1970:

> [I]n recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation law in light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risk to health in safety and increases in the general level of wages and the cost of living . . . . [F]ull protection of American workers from job related injury or death requires an adequate, prompt and equitable system of workmen's compensation.

*See* NATIONAL COMMISSION REPORT, *supra* note 2, at 13. It was for these reasons that the National Commission on State Workmen's Compensation Laws was established; its purpose being to "undertake a comprehensive study and evaluation of State Workmen's Compensation Laws in order to determine if such laws provide adequate, prompt, and equitable system of compensation." *Id.*

the ambiguous portions of various outdated state acts. It is Iowa's ambiguous statute[4] that gives rise to the issue addressed in this Note. Yet the problems presented by permanent partial disability benefits are far deeper than this single statute.[5] The *Commission's Report* stated that permanent partial disability benefits issues "are so critical to the future of Workman's Compensation that the subject warrants the highest priority"[6] and recommended that "[t]hese apparent inconsistencies and deficiencies warrant a separate study and report."[7]

One inconsistency that exists throughout various state acts, including the Iowa act,[8] is whether a credit should be provided to the insurance carrier for overpayment of healing period or temporary benefits.[9] If a credit is given, premiums must be recalculated, with the employer's premium likely

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4. IOWA CODE §85.34 (1981) reads in relevant part:

Permanent disabilities. Compensation for permanent disabilities and during a healing period for permanent partial disability shall be payable to an employee as provided in this section. In the event weekly compensation under § 85.33 had been paid to any person for the same injury producing a permanent partial disability, and such amount so paid shall be deducted from the amount of compensation payable for the healing period.

1. *Healing period.* If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

2. *Permanent partial disabilities.*

Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1 hereof. Such compensation shall be in addition to the benefits provided by sections 85.27 and 85.28.

. . . .

5. "Permanent partial disabilities" refers to those injuries which partly hamper or restrict a worker from his normal employment for the rest of his working days. The loss of a finger is a typical permanent partial injury. When an injury causing permanent partial disability occurs the worker is usually entitled to benefits during a healing period until the permanency determination can be made. These "healing period benefits" as they are referred to in the Iowa act are referred to in other statutes as "temporary total benefits." Both terms will be used interchangably.

6. NATIONAL COMMISSION REPORT, *supra* note 2, at 616.

7. *Id.* at 618.

8. *See* note 4 *supra.*

9. The following illustration should further define the problem: an employee, X, injures his leg in a work related accident on June 15, 1976. B, the employer, through his insurance carrier, begins paying temporary total/healing period benefits. On December 15, 1977, upon B's petition, a hearing is held to determine the extent of X's disability. Based on competent medical evidence, it is determined that X is permanently partially disabled with a 30% loss of use of his leg. It is also determined that X reached his maximum recovery on January 15, 1977. B has, therefore, paid eleven (11) months of healing benefits which he was not obligated to pay. A dispute arises between X and B because B believes he is entitled to a credit for the overpayment, while X does not believe that he should lose out on those benefits to which he is entitled.

being reduced. Theoretically, that reduction should be passed on to the consumer who should pay less for the employer's product. Whatever the reduction is, employees are further pressed into finding suitable employment or, if none can be found, they often end up on the welfare payroll.

Should a credit be disallowed, a greater premium would need to be collected, potentially causing higher consumer prices. The injured workers would have more income for a longer, continuous period allowing them a better chance of finding suitable employment while keeping them off social insurance programs.

Besides the credit/no credit problem arising in the temporary total and permanent partial area, problems have also arisen with regard to other insurance programs similar to workmen's compensation such as unemployment benefits,[10] earnings of an employee re-employed,[11] pensions, insurance, gratuities[12] and payments made under invalid settlements.[13]

The purpose of this Note is limited to the question of whether a credit should be given towards a permanent partial disability award for overpayment of healing or temporary total benefits.[14] While the Iowa Supreme Court might decide the issue in the case of *Cherry v. Wilson Foods Corp.*,[15] the problem will ultimately have to be resolved by legislative enactment. Initially, this Note will focus on theories various courts have explored in deciding whether a credit should be given. After laying this groundwork, a survey of the state acts can next be undertaken and their findings more readily understood. Finally, a look at general workmen's compensation theory will be examined in order to suggest some possible solutions to the question of whether a credit should be allowed.

## II. Case Law - Theories, Justifications, Arguments

### A. *Allowance of a Credit*

As a general rule, credit is given for overpayments made in a workmen's compensation case.[16] Several reasons have been found by courts to justify such a rule.

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10. *See* Annot., 96 A.L.R.2d 941 (1964).

11. *See* Annot., 84 A.L.R.2d 1108 (1962).

12. *See* Annot., 119 A.L.R. 920 (1939).

13. *See* Annot., 10 A.L.R. 1016 (1921).

14. It should be noted at the outset of this Note that the question of credit or no credit for healing period benefits as opposed to a permanent partial award is a very narrow issue in the area of workmen's compensation.

15. No. CL-01206895 (Polk County Dist. Ct. Iowa 1980).

16. 82 Am. Jur. 2d *Workmen's Compensation* § 365 (1976); 99 C.J.S. *Workmen's Compensation* § 330(b) (1958); E. Blair, Reference Guide to Workmen's Compensation Law § 13, at 13-1 (1972); 11 W. Schneider, Workmen's Compensation Text, § 2319, at 521 (3d ed. 1957).

1. *Equity Considerations*

The basis of this argument lies in the fact the employer has already paid more than he was required to pay, and consequently should be able to set off this amount against any future award. Relying on this general rationale[17] courts have held that equity requires credit be given for overpayments. Less superficial equitable reasons have also been found by courts. For example, the employer must be encouraged to comply swiftly with the requirements of the act so as to provide the employee with a continuous income. The employer should not be penalized — denied credit[18] — for timely compliance with the act. Additionally, the employer should not be penalized by allowing the claimant to draw more benefits from the employer by delaying as long as possible the permanency determination. If both the healing period and the permanent partial benefits are paid, the claimant has an incentive to draw the healing benefits as long as possible.[19] Yet, the claimant should receive no more than he is entitled to under the act.[20]

2. *Pervasiveness in the Workmen's Compensation Area; Providing Credits*

The basic premise of this argument is that because credits are readily provided for in both statutes and case law in other sections of workmen's compensation acts they should also be given in permanent partial awards. The Iowa act expressly provides for credits in certain situations,[21] but the

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17. *See, e.g.*, Streff v. Goodyear Tire & Rubber Co., 211 Kan. 898, 508 P.2d 495 (1973); Morgan v. J. H. Campbell Constr. Co., 229 Miss. 289, 90 So. 2d 663 (1956). Shirley v. Mysch, No. 21205 (Freemont County Dist. Ct. Iowa 1980).

18. *See, e.g.* Cowan v. Southwestern Bell Tel. Co., 529 S.W.2d 485, 488 (Mo. 1975) where the court stated:

> An employer who has paid an employee at the time of that employee's greatest need, more than he was obligated to pay should not be penalized by being denied full credit for the amount paid above the requirements of the act as against the amount which might subsequently be determined to be due the employee. To do so would inevitably cause employers to be less generous.

*Id.* at 441. *See also* Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

19. This theory was recognized in *Morgan v. J.H. Campbell Constr. Co.*, 229 Miss. at 289, 90 So. 2d at 666-67. The court also recognized that the claimant who delayed the longest would receive the most total benefits. This leads to an unfair compensation schedule and does not treat workmen similarly situated alike under the law.

20. Samels v. Goodyear Tire & Rubber Co., 323 Mich. 251, ___, 35 N.W.2d 265, 268 (1948). *See also* Kirchner v. Michigan Sugar Co., 206 Mich. 459, ___, 173 N.W. 193, 195 (1919). *Kirchner* is also an example of a case that gave credit for overpayment in part so the total award would not exceed the maximum allowance recovery permitted by law. This theory has validity, but the act should not allow the maximum healing benefits recoverable coupled with the maximum permanent partial recoverable to exceed the statutory maximum recovery allowance. *See also* Sakarnoto v. Kemmerer Coal Co., 36 Wyo, 325, 255 P.356 (1927).

21. The Iowa Code Section 85.34, provides two instances for credits. In the opening paragraph the statute states: "In the event weekly compensation under section 85.33 [temporary disability] has been paid to any person for the same injury producing permanent partial disa-

Iowa Supreme Court has neither interpreted these provisions nor given any meaningful indication as to its position concerning credits.[22] A number of other courts have, however, given credits in the area of workmen's compensation in a wide variety of contexts.

Besides the provisions in the Iowa statute,[23] courts have allowed credits within the frame of temporary total, permanent total, and permanent partial awards. Thus, a permanent partial award has been deducted from a subsequent permanent total award,[24] a permanent disability award deducted from an additional permanent disability award, and a permanent award reducing a subsequent temporary award.[25] In essence, courts have provided for credits in any possible combination of awards contemplated by Iowa Code section 85.34. Additionally, where a permanent partial disability is concurrent with a temporary total disability, credit has been awarded.[26] If the worker has suffered more than one injury but the injuries are not concurrent, a credit has also been given by apportioning the benefits.[27] This apportionment usually occurs when an employer hires an employee with an existing compensable injury and the employee receives further injury.[28]

Another instance in which credit is generally given occurs when the employer voluntarily makes payments[29] to an injured worker.[30] Furthermore,

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bility, any such amount so paid shall be deducted from the amount of compensation payable for the healing period." *Id.* The final paragraph of subheading (3) regarding permanent total disability provides that credit be given. The subheading reads in relevant part:

> In the event compensation has been paid to any person under any provision of this chapter or chapter 85A [Occupational Disease Compensation] for the same injury producing a total permanent disability, any such amounts so paid shall be deducted from the total amount of compensation payable for such permanent total disability.

*Id.* at (3).

22. However, if the Iowa Court would carry out their apparent intention expressed in *Moses v. National Union Coal Mining Co.*, 194 Iowa 819, 184 N.W. 746 (1921) the court presumably would allow a credit.

23. IOWA CODE § 85.34(3) (1981). For case law supporting the position taken regarding credits provided on awards of permanent total disability, see Dunlap v. State Compensation Director, 149 W. Va. 266, 140 S.E.2d 448 (1965) holding that the temporary total benefits were required to be deducted from a total permanent award.

24. *E.g.*, Phelps Dodge Corp. v. Industrial Comm'r, 1 Ariz. App. 70, 399 P.2d 691 (1965); Endicott v. Potlach Forest Inc., 69 Idaho 450, 208 P.2d 803 (1949).

25. Employers Mut. Liability v. Industrial Comm'r, 121 Ariz. 558, ___, 592 P.2d 392, 396 (1979).

26. *E.g.*, Wilborn Constr. Co. v. Parker, 281 Ala. 626, 206 So. 2d 872 (1968); *Ex Parte* A. Diniaco & Bros., 207 Ala. 685, 93 So. 388 (1922).

27. *E.g.*, Davis Stearns v. Rogers Constr. Co., 248 Ark. 344, 451 S.W.2d 469 (1970); Cockrell Banana Co. v. Harris, 212 So. 2d 581 (Miss. 1968). In *Davis Stearns*, the claimant had a 75% disability rating and was re-injured in the employ of another making him 100% disabled. The court apportioned payments between the employer so that the second employer would not be required to pay completely the 100% disability. This negates the idea that the employer takes the employee as he finds him.

28. *Id.*

29. Payments may come under the term "advances." *See Schneider, supra* note 16, §

credit has been given if the employer enters into an agreement or stipulation to provide benefits to the injured worker.[31] Where payments have been made by mistake or error,[32] by an attempted settlement,[33] pursuant to a self-insured employer's disability plan[34] and even where the claimant's attorney concedes credit should be given,[35] credits have been allowed.

### 3. *Policy Against Double Recovery*

The argument against allowing a claimant to make a double recovery at the expense of the employer and/or insurance carrier is self-evident. Courts couple this argument with that of legislative intent[36] and summarily state that the "legislature did not intend . . . double compensation."[37] Further, it is a well established principle that one should not recover twice for a single civil wrong. Accordingly, payment of benefits for the overlapping time of healing period and permanent partial determination is a double recovery for that time period and should not be allowed.

### 4. *Legislative Intent*

The argument that the legislative intent was to provide credits even

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23.19. *Schneider* recognizes that there must be evidence that the payments were intended as advances, or in the form of wages voluntarily paid. *See also* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.44, at 164.10 to .11 (1981).

30. *See Schneider, supra* note 16 and cases cited therein. *See, e.g.*, Huston v. Worker's Compensation Appeals Bd., 95 Cal. App. 3d 856, 157 Cal. Rptr. 355 (1979). In that case the California court found that the employer and/or carrier was entitled to a credit for benefits voluntarily made whether in error or even if there was negligence. By "voluntarily paying compensation, the employer does not thereby admit that he is under any legal obligation to pay or continue to pay benefits. The statute is designed to protect the employer who might make such payments by mistake and to encourage prompt payments of benefits." *Id.* at 866, 157 Cal. Rptr. at 361.

31. *E.g.*, Durante v. Atlantic Tubing & Rubber Co., 110 R.I. 465, 294 A.2d 190 (1972); Moses v. National Union Coal Mining Co., 194 Iowa 819, 184 N.W. 746 (1921). In *Moses* the court allowed a reopening of a case previously settled and made an award, but never did state whether the amount paid under the stipulation would be credited against the permanent partial disability award.

32. Huston v. Worker's Compensation Appeals Bd., 95 Cal. App. 3d at 866, 157 Cal. Rptr. at 360. *See also* Shirley v. Mysch, No. 21205 (Freemont County Dist. Ct. Iowa 1980)(court took a novel approach in using a mistake analysis on the part of the insurance carrier in finding a credit for healing benefits overpaid against a permanent partial award).

33. *See* Streff v. Goodyear Tire & Rubber Co., 211 Kan. 898, 898, 508 P.2d 495, 495.

34. *E.g.*, Cowan v. Southwestern Bell Tel. Co., 529 S.W.2d 485 (Mo. Ct. App. 1975); Strohmeyer v. Southwestern Bell Tel. Co., 396 S.W.2d 1 (Mo. 1965).

35. Holmes v. Traders & Gen. Ins. Co., 94 So. 2d 537 (La. Ct. App. 1957). This situation may arise more often than expected as some cases hint that the credit is just accepted and not challenged. *See, e.g.*, Charles Pierce Oil Co. v. Merriman, 567 P.2d 991 (Okla. 1977).

36. *See* text accompanying notes 38-51 *infra*.

37. *Accord*, State Highway Dep't v. Crossland, 391 P.2d 801, 807 (Okla. 1964); Marsh v. Aljoe, 41 Wyo. 230, ___, 284 P. 260, 263 (1930).

though they were not expressly provided for in the statute is most often coupled with one of the arguments previously discussed. Legislative intent arises in almost every case, directly or indirectly, particularly when the statute is ambiguous, like the Iowa statute. Perhaps the best example of the application of this argument is evident in *Cherry v. Wilson Foods Corp.*[38] In that case the court held that the employer could credit overpayments of healing period benefits toward the permanent partial disability award.[39] The district court judge approached the problem as one of statutory construction,[40] emphasizing that the whole legislative scheme of the workmen's compensation act must be considered. He concluded that "the legislature would logically of [sic] chosen an affirmative method to eliminate credit for over payment . . . rather than the negative and ambiguous manner of the legislation urged here . . . ."[41] An earlier Iowa case, *Moses v. National Union Coal Mining Co.*,[42] involving the same type[43] of statutory construction problem, held that an award for temporary disability is exclusive[44] from a permanent partial disability award and that compensation cannot be received under both sections.[45] This concept of a credit on temporary disability payments is now essentially a part of Iowa Code section 85.34.[46] Other courts have also applied a statutory construction analysis to resolve this issue.[47]

The legislative intent argument involves more than just examining the whole legislative scheme to resolve the issue. Courts have recognized that a

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38. No. CL-01206895 (Polk County Dist. Ct. Iowa 1980).

39. *Id.*

40. *Id.*

41. *Id.* See note 79 *infra* for the Industrial Commissioner's reasoning in this same case for *not* finding a legislative intent to provide credit for healing period overpayment.

42. 194 Iowa 819, 184 N.W. 746 (1921).

43. While the statute relied on by the court was different than the current statute, the essential ideas of temporary disability and permanent partial disability were still present. The temporary disability statute relied on by the court read as follows:

> For injury producing temporary disability, fifty percent of the average weekly wages received at the time of injury subject to a maximum compensation of fifteen dollars and a minimum of six dollars per week; provided, that at the time of the injury the employee received wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond 300 weeks.

*Id.* at 821, 184 N.W. at 747.

44. "The compensation fixed and allowed under subdivision (h) is 'for injury producing temporary disability' and that allowed for loss of a member, or the use thereof, is 'for disability partial in character and permanent in quality,' and compensation under one clause precludes compensation under the other." 194 Iowa at 824, 184 N.W. at 748.

45. *Id.*

46. Section 85.34 reads in relevant part: "In the event weekly compensation under section 85.33 [temporary disability] had been paid to any person for the same injury producing a permanent partial disability, any such amount so paid shall be deducted from the amount of compensation payable for the healing period." Note that the Act at the time of the *Moses* case did not provide for healing period or temporary total benefits.

47. *See, e.g.*, Kirchner v. Michigan Sugar Co., 206 Mich. 459, 173 N.W. 193 (1919).

workmen's compensation act should be liberally construed so that it accomplishes its beneficial purpose and promotes the public welfare.[48] To do so requires that the claimant receive benefits only in the manner and to the extent authorized by statute[49] and not provide an improper inducement for either the employer or employee that would not promote the act's beneficial purpose.[50] While the legislative intent argument is a valid one for the issue presented here, it must be remembered that it is also an encompassing catch-all. A proper disposition of this issue requires much more than the sole resort to finding the intent of the legislature in passing a workmen's compensation act.[51]

### B. *Disallowance of a Credit*

#### 1. *Continuous, Uninterrupted Income*

One of the objectives[52] of the workmen's compensation program is to "provide steady weekly incomes to replace lost wages,"[53] or in other words, to provide income insurance.[54] Workmen's compensation is an income maintenance and not an income support program.[55] Generally, there are no serious challenges to the worker's need for a continuous uninterrupted income even from the insurance carriers,[56] although the court in *Moses*[57] com-

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48. *E.g.*, Point v. Westinghouse Electric Corp., 382 S.W.2d 436 (Mo. Ct. App. 1964); Dunlap v. State Compensation Director, 149 W. Va. ___, 140 S.E.2d 448 (1965).

49. Dunlap, 149 W. Va. at ___, 140 S.E.2d at 452.

50. *E.g.*, Marsh v. Aljoe, 41 Wyo. 230, ___, 284 P. 260, 264.

51. Well reasoned legislative intent arguments exist for both sides on whether the Iowa legislature intended to provide credit for overpayment of healing period benefits. *See* text accompanying notes 38-51, 72-82 *infra*.

52. *Id.*

53. Larson, *Basic Concepts & Objectives of Workmen's Compensation*, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, 134 (Vol. I 1973) [hereinafter cited as Larson Article].

54. *Id.* at 1.

55. Berkowitz, *Workmen's Compensation Income Benefits: Their Adequacy & Equity*, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 189 (Vol. I 1973).

56. In interviews with two of the leading authorities on Iowa workmen's compensation law, who have represented both claimant's and employers and/or insurance carriers, each agreed that continuous, uninterrupted income, to the injured worker is a requirement. Harry W. Dahl, former Iowa Industrial Commissioner, founder of the International Association of Industrial Accident Boards and Commissions, member of the Advisory Committee to the Model Act and author of several articles on workmen's compensation stated that steady income is a "must" and a requirement that cannot be done away with. Interview with Harry W. Dahl, in Des Moines (Oct. 2, 1981). Additionally, a member of the law firm of Hansen, McClintock & Riley, counsel for a number of workmen's compensation insurance carriers stated that there is "no question" that the injured worker is entitled to steady disability benefits and that the carriers realize this fact. Interview with William D. Scherle, in Des Moines (Oct. 4, 1980).

57. 194 Iowa 819, 184 N.W. 746 (1921).

mented briefly on its importance.[58] Even when a court has found a credit should be allowed, it has recognized the need to require the employer to continue paying benefits to the claimant during the disposition of the particular case in the courts.[59]

Besides theoretical justification, a practical view reveals that the injured worker and his family are dependent upon that income to some extent for their livelihood. To provide a credit so that the claimant will receive, for example, benefits for only eights months after the hearing rather than the two years as the family had planned, works an extreme hardship on the family. From the claimant's point of view, the income is not "continuous."

The theoretical objectives of workmen's compensation coupled with the practical effect clearly illustrate the intention and necessity of providing a continuous income to the injured worker. This argument must be afforded significant weight in resolving the issue.

### 2. *Separate and Distinct Awards*

This argument refutes the double recovery argument. An award made for temporary total disability is separate and distinct from a permanent partial award and consequently both awards should be recovered by the claimant in their full amounts.[60] The Iowa Supreme Court recognized this concept in *Moses*.[61] Among the justifications advanced for the separate and distinct position are: the two awards are separate and distinct;[62] the employee is entitled to each under the act;[63] and the temporary total benefits are for loss of earning power, while permanent partial benefits compensate for the loss of use or impairment of a body member or function.[64] In a pro-

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58. The Iowa Supreme Court stated: "It may be that the compensation awarded by the Commissioner will not compensate appellant for the full period of his disability, but this, regrettable as it may be, is without controlling importance." *Id.* at 824, 184 N.W. at 748.

59. Samels v. Goodyear Tire & Rubber Co., 323 Mich. 251, ___, 35 N.W. 2d 265, 268.

60. *E.g.*, Industrial Comm'r. v. Ocean Accident & Guarantee Corp., 67 Colo. 427, 180 P. 568 (1919); Western Steel Erecting Co. v. Lukenbill, 143 Okla. 92, 287 P. 724 (1930).

61. *See* note 44 *supra*. *See also* Supplemental Brief for Appellants at 2, Cherry v. Wilson Food Corp., 34 Biennial Report, Iowa Indus. Comm'r 70 (1980) arguing "[t]emporary total/healing period and permanent partial disability benefits are separate and distinct and provide for two entirely different types of relief under the compensation statute."

62. Ocean Accident, 67 Colo. at 427, 287 P. at 568.

63. The Minnesota Court in *Parmschiefer v. Windom Hosp.* has recognized that "temporary total disability and permanent partial disability . . . are distinct and different benefits, to each of which an employee is entitled to at some point in time." 297 Minn. 212, ___, 211 N.W.2d 365, 368 (1973).

64. The Court in *In re* McConnell 45 Wyo. 289, 18 P.2d 629 (1933) stated:

> These awards are for different things. The total disability award is given by the law, as we read it, to recompense the employee for inability to work. The permanent partial disability award, however, has regard primarily to the loss of impairment of a body member or function. This loss or impairment may or it may not result in reduction of earning power. It does deprive the employee of something of great value to

ceeding to review a previous award, any modification has also been treated as a new award, separate and distinct from the one it modifies and thus credit is denied.[65]

3. *Workmen's Compensation Benefits are a Vested Property Right and Cannot be Taken Away Without Due Process*

The argument that workmen's compensation benefits are a vested property right is similar to the "separate and distinct" argument discussed above. A recent Iowa case, *Auxier v. Woodward State Hospital*,[66] held that a claimant's interest in workmen's compensation benefits is a property right which cannot be taken away without due process and accompanying notice.[67] Generally, the argument follows that the act entitles[68] a claimant to his healing period *and* permanent partial benefits and, therefore, the act should not also give the employer a credit thereby taking away the healing benefits.[69] If the credit is provided for in the statute, the claimant will be denied the opportunity to challenge the denial of a full permanent partial award.[70] Even though this argument can be circumvented by requiring benefits to be paid up through the disposition of the case,[71] it should be helpful in persuading a court that the healing period and permanent partial benefits are separate and distinct awards.

4. *Legislative Intent - Liberal Construction of the Act in Favor of the Claimant*

Generally, a workmen's compensation act is to be construed liberally in

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him, and hence the Legislature deemed it proper that the industry should make compensation therefor.

65. In *Brown v. Goodyear Tire & Rubber Co.*, 211 Kan. 742, 508 P.2d 492, the Court did not allow the employer to recover back payments made as a temporary partial disability award after the award was modified, finding a 10% permanent partial disability.

66. 266 N.W.2d 139 (Iowa 1978).

67. *Id.* 142-43. Due Process notice as required by *Auxier* includes the following:

(1) The contemplated termination,

(2) that the termination of benefits was to occur at a specified time not less than 30 days after notice,

(3) the reason or reasons for the termination,

(4) that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,

(5) that the recipient have the right to petition for Review-Reopening under Section 86.34.

68. *See, e.g.*, Tompkins v. George Rinner Constr. Co., 196 Kan. at ___, 409 P.2d at 1002.

69. *Id.*

70. *See* Strohmeyer v. Southwestern Bell Tel. Co., 396 S.W.2d 1 (Mo. Ct. App. 1965) (court found no vested right to workmen's compensation benefits for a claimant who, under the self-insured employer's plan, released all other potential claims he could make).

71. *See* Sameles v. Goodyear Tire & Rubber Co., 323 Mich. 251, 251, 35 N.W.2d 265, 265.

favor of the claimant[72] so as to compensate him for the resulting loss of earning power.[73] This rule becomes important in interpretating an ambiguous statute such as Iowa's,[74] but as noted earlier,[75] should not be controlling in resolving the present issue.

Because of the failure of the Iowa legislature to comment on the allowance of credit for overpayment of healing period benefits,[76] the legislative intent argument has some merit. The *Cherry*[77] case is helpful in exemplifying the claimant's interpretation of legislative intent. In *Cherry* the Iowa Industrial Commissioner[78] relied on a previous decision and found no intent by the legislature to provide credit because the legislature had intentionally omitted a provision providing for credit.[79] Other rules of construction can be applied in attempting to find legislative intent from an omission[80] by the legislative body but[81] the language must not be construed so as to frustrate that intent.[82]

5. *Other Arguments*

There are other justifications argued by counsel or relied on by courts in denying a credit for overpayments that can be applied to the healing period/permanent partial dispute. Although these arguments have not been widely used, they do deserve mention.[83]

It has been argued by counsel and noted by the Kansas Supreme Court[84] that the Commissioner should not be allowed to make a retroactive award. While this theory is tenuous, it has been held to be justified for two

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72. Cedar Rapids Community School v. Cady, 278 N.W.2d 298. 299 (Iowa 1979).

73. Kelting v. Columbia Brewing Co., 294 S.W.2d 572 (Mo. Ct. App. 1956).

74. *See* note 4 *supra.*

75. *See* note 51 *supra.*

76. Dahl says he does not know why the legislature did not expressly comment on the credit idea but speculated it was assumed credit would be given. Interview with Harry W. Dahl, *supra* note 56.

77. 34th Biennial Report, Iowa Indus. Comm'r 70 (1980).

78. *Id.*

79. The Commissioner quoted the following language from *McCombs v. Mercy Hosp.*, 34th Biennial Report, Iowa Indus. Comm'r 193 (1980):

> The law does not specifically provide for credit for overpayment of healing period benefits against permanent partial disability benefits. Since the legislature specifically provided for such credit when a permanent total disability is involved, it must be assumed such a credit was not intended of permanent partial disability. Thus, the Defendants are not entitled to a credit for an overpayment of healing period benefits.

*Id.*

80. "Legislative intent is expressed by omission as well as inclusion." *In re* Estate of Wilson, 202 N.W.2d 41 (Iowa 1972).

81. *See* IOWA CODE § 4.6 (1981).

82. State v. Jennie Coulter Day Nursey, 218 N.W.2d 579, 582 (Iowa 1974).

83. *See e.g.*, Samels v. Goodyear Tire & Rubber Co., 323 Mich. 251, 35 N.W.2d 265 (1948).

84. Ratzlaff v. Friedeman Serv. Store, 200 Kan. 430, ___, 436 P.2d 389, 395 (1968).

reasons. First, the Commissioner may not have the power to make retroactive awards.[85] Second, the claimant is entitled to receive and keep the benefits already paid him; the effect of this retroactive award being that it would take away those benefits.[86]

Another justification advanced is that the employer should be estopped from receiving any credit for overpayment.[87] The employer has in his possession all the claimant's medical records and can require the employee to see a doctor (usually the employer's doctor).[88] The employer also has before him all the information he needs to make a determination as to when the claimant has reached the maximum point of recovery. Consequently, the employer should be estopped from receiving credit as he knew or should have known when the healing period had stopped and when a disability determination could have been properly made.[89]

Pervasiveness of disallowing a credit also exists in other areas connected to workmen's compensation.[90] A credit is usually not provided for:

> [U]nauthorized payments of funeral items; sick leave benefits; benefits received for military-service-connected disabilities; unemployment benefits; additional benefits paid pursuant to a union contract; accumulated vacation pay; or authorized leaves-of-absence pay. Similarly, the payor is not entitled to a credit for benefits received from the employer's public liability carrier, group insurance and Blue Cross benefits, payments from a company-owned death and accident benefit policy, nor from any fund to which the employee contributes.[91]

The Iowa act expressly disallows credits for previous professional and hospital services, burial expense,[92] and contributions from the employees or donations from any source.[93]

Finally, the position that equity, good conscience and fairness in promotion of the humanitarian objectives of the workmen's compensation acts precludes the taking away of benefits.[94] This argument is at least implicit in every position discussed in this section and is phrased in various ways. Broadly speaking, if the act provides that benefits be paid and has that as its primary objective, it would be unfair to take those benefits away.

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85. Ratzlaff, 200 Kan. at ___, 436 P.2d at 395.

86. *See* Samels, 323 Mich. at ___, 35 N.W.2d at 268.

87. Huston v. Worker's Compensation Appeals Bd., 95 Cal. App. 3d 856, 863, 157 Cal. Rptr. 355, 358 (1979).

88. IOWA CODE § 85.39 (1981).

89. This argument would provide employers with an incentive to better manage their workmen's compensation files.

90. *See* text accompanying notes 23-35 *supra*.

91. *See* E. BLAIR *supra* note 16, at 13-1.

92. IOWA CODE § 85.34 (1981).

93. *Id.* § 85.38.

94. *See, e.g.*, Tompkins v. George Rinner Constr. Co., 196 Kan. 244, 409 P.2d 1001 (1966).

## III. Workmen's Compensation Acts - A Survey

Now that the general justifications, theories and arguments for and against allowing credit for overpayment of temporary total disability benefits have been presented, a better understanding of the rationale behind the acts can be accomplished. Consequently, the purpose of this section will be to survey various state workmen's compensation acts as well as the Model Act[95] to discover whether credit for overpayment of the temporary total/healing period benefits should be allowed against a permanent partial award.

### A. *History*

Workmen's compensation did not develop from the common law or employer's liability legislation, but was an expression of an entirely new social principle having its origin in Germany.[96] In the early twentieth century, as a result of increasing work related injuries in the expanding industrial America and the decreasing remedies available to these injured workers, workmen's compensation acts began creeping into legislation.[97] In 1913 New York adopted a compulsory law. In 1917 this compulsory law[98] as well as Iowa's elective law were held constitutional by the United States Supreme Court.[99] With the removal of constitutional objection, this new form of compensation caught on quickly with all but eight states adopting workmen's compensation acts by 1920.[100]

The rapid passage of these acts, coupled with the novel no fault compensation approach, produced numerous problems. One of the first problems encountered was whether an injured worker could recover both temporary and permanent partial benefits.[101] Case law immediately split on this issue. The dichotomy resulted from the statutory construction of the "in lieu of"[102] clause and whether it allowed recovery for both temporary total disability and permanent partial disability.[103] As the dilemma continued and more

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95. Workmen's Compensation and Rehabilitation Law (1975) *reprinted in* 4 A. Larson, The Law of Workmen's Compensation 629 app. (1981) [hereinafter cited Model Act].

96. Larson's Desk Edition, *supra* note 1, § 5 at 2-11.

97. The first enactment was a miner's compensation act providing for a narrow cooperative accident fund for miners passed by Maryland in 1902.

98. New York Central R.R. v. White, 243 U.S. 188 (1917).

99. Hawkins v. Bleakley, 243 U.S. 210 (1917).

100. Larson's Desk Edition, *supra* note 1, § 5.30, at 2-17 to 2-20.

101. For a review of the early cases on this issue see the discussion in *In re* McConnell, 45 Wyo. 289, 18 P.2d 629 (1933).

102. The "in lieu of" clause was found in the permanent partial disability or payment for loss of member section of the acts. It typically read, "the compensation so paid for such injury shall be specified therein, and shall be in lieu of all other compensation." Ga. Code Ann. § 32 (1920).

103. *E.g.*, Georgia Casualty Co. v. Jones, 156 Ga. 664, 119 S.E. 721 (1923); Reay v. Elmira Coal Co., 225 Mo. App. 102, 345 S.W. 1015 (1930)(clause controlling, forbidding compensation

cases were litigated, many state legislatures responded by amending their acts to provide compensation for temporary total disability "in addition to" compensation for permanent partial disability despite their respective court's strict construction of the "in lieu of" clause.[104]

A case exemplifying the debate typical of this issue is *In re McConnel*.[105] After an extensive review of the relevant case law[106] and the trend in the statutes, the court concluded that it "generally favored" an award for both temporary total and permanent partial disabilities.[107] The Iowa Supreme Court in *Moses*, heard during this same time period, held essentially the same way. Although no "in lieu of" clause was present, the court found exclusivity, but did not allow recovery for both temporary disability and permanent partial disability.[108] It must be remembered however that this case arose before healing period benefits were provided for in the act. At present, the Iowa legislature has not enacted any express provisions to resolve the present issue.

The "in lieu of" and "in addition to" issue was the foundation for the allowance of credits. Initially, most statutes did not expressly provide for credits in the permanent partial area. Consequently, when the issue was presented courts relied on the "in addition to" or "in lieu of" language with no credit and credit provided respectively. By this time, however, the workmen's compensation acts had become much more complex than the simpler versions construed in the early cases. The problem is now one of such great importance that it must be expressly resolved by state legislatures.

### B. *Iowa's Workmen's Compensation Act*

Unfortunately, the Iowa legislature has not spoken to the issue of whether a credit should be allowed.[109] Moreover, no comment can be found in the legislative history[110] of the current provision in question which was passed in 1959[111] and amended in 1976.[112] There are no recorded documents

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for both). *Contra*, Jack v. Knoxville Fertilizer Co., 154 Tenn. 292, 289 S.W. 500 (1926)(clause not controlling because a construction would do violence to the spirit of the act and defeat its purpose); Crawford v. Virginia Iron, Coal & Coke Co., 136 Va. 266, 118 S.E. 229 (1923).

104. *See, e.g.*, Kramer v. Sargent & Co., 93 Conn. 26, 104 A. 490 (1918); Spring Cayon Coal Co. v. Industrial Comm'n, 60 Utah 553, 210 P. 611 (1922).

105. 45 Wyo. 289, 18 P.2d 629 (1933).

106. *Id.*

107. *Id.* at ___, 18 P.2d at 623.

108. 194 Iowa 819, 825, 184 N.W. 746, 748 (1921).

109. IOWA CODE ch. 85 (1981).

110. The preamble to House File 690 reads as follows: "[A] bill for an act to amend chapter eighty-five (85), Code 1958 relating to workmen's compensation, so as to increase the maximum weekly compensation for death, for permanent total disabilities and permanent partial disabilities . . . ." H. F. 690, 58th G. A. (Iowa 1959). *See also* S. J. 1197, 58th G. A. (Iowa 1959).

111. 1959 IOWA ACTS.

which explain the omission by the legislature in 1959 or in 1976.

### C. *Current Acts of Other States*

A random sampling of workmen's compensation statutes indicates that some states have dealt with the issue directly while others appear to have left the question open.

As previously discussed, the foundation of the credit issue is found in the "in addition to" and "in lieu of" statutory language and corresponding theories. As of July, 1978 twenty-two of the fifty states provided for payment of permanent partial benefits "in addition to" temporary total benefits.[113] California,[114] Nebraska,[115] South Dakota[116] and Illinois[117] are examples of these types of statutes. Additionally, a state may have an "in addition to" statute and a separate statute addressing the credit issue. For example a Missouri statute provides that "[t]he employer shall be entitled to credit . . . for any sum paid to or for the employee . . . ."[118] It is arguable whether these two types of statutes can be reconciled.[119]

Where the "in addition to" language is not present legislatures have at times provided for a credit, or a reduction of the permanent partial award. For example, the Kansas legislature created a presumption that permanent partial disability exists immediately after the injury,[120] while later in its act expressly allowed a credit to an employer for "any amount or amounts paid by him to the employee as compensation prior to the date of the award."[121] Conversely, disallowance of a credit of a permanent partial award is also apparent in some states.[122] The Minnesota statute for example, takes most

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112. 1976 IOWA ACTS.

113. The states include the following: California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Maryland, Mississippi, Missouri, Montana, New Jersey, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Wisconsin and Wyoming. *See* 4 A. LARSON DESK EDITION, *supra* note 1, at 554 app. (Table 9.)

114. CAL. LAB. CODE § 4661 (West 1971).

115. NEB. REV. STAT. § 48-121(3) (1978).

116. S.D. CODIFIED LAWS ANN. § 62-4-6 (1978).

117. ILL. ANN. STAT. ch. 48, § 138.3(e) (Smith-Hurd Supp. 1980).

118. MO. ANN. STAT. § 287.160(3) (Vernon Supp. 1981). Kansas also provides credit for any amount previously paid. *See* KAN. STAT. ANN. § 44-525(b) (Supp. 1980).

119. A claimant is entitled to both forms of compensation to their full extent as provided by the statute. The statute must be construed liberally to promote its beneficial purpose, that being to compensate the injured worker for his loss of earning power. On the other hand "in addition to" should be narrowly limited to provide that both compensations may be recovered and by its natural meaning and language does not preclude the application of credit to overpayments.

120. KAN. STAT. ANN. § 44-510(d) (Supp. 1980).

121. *Id.* § 44-525(b). For case application *see* 200 Kan. 430, 436 P.2d 389 (1968).

122. *E.g.*, W. VA. CODE § 23-4-6 (Supp. 1980). The statute reads in relevant portion: "Temporary total disability benefits payment under subdivision (b) of this section shall not be deductible from permanent partial disability awards . . . ." Note this recent statutory change

of the arguments advanced above for disallowing a credit and incorporates them into its statute, and expressly disallows a credit.[123]

Iowa's statute[124] is not the only one that appears to be ambiguous on the credit issue. For example, the only indication of whether credit is allowed in the New York statute is if the temporary total disability becomes protracted.[125] In that instance any temporary total disability "in excess of such number of weeks shall be added to the compensation provided . . . " for permanent partial disability.[126] There is no other indication of the credit issue in any other sections of that act.

The Wisconsin act, similar to the Model Act,[127] provides a novel approach to the problem. These acts dispense with the temporary total/healing period and permanent partial labels thereby simplifying the determination of whether the injury was total or partial.[128] Consequently, the Wisconsin act provides that for injuries which are "at times total and at times partial" benefits "during each total or partial disability shall be in accordance" with the total and partial disabilities provisions.[129] Similarly, the Model Act provides "[f]or total permanent bodily loss or losses herein scheduled, [typical permanent partial schedule] after and in addition to the income benefits payable during the period of recovery,[130] schedule income benefits in the amount of 55% of the average weekly wages follows: [schedule]."[131]

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was in response to cases such as *Dunlap v. State Compensation Director*, 149 W. Va. 266, 140 S.E.2d 448 (1965).

123. The Minnesota statute reads as follows:

> Compensation for permanent partial disability is payable concurrently and in addition to compensation for temporary total disability . . . and such compensation for permanent partial disability shall not be deferred pending completion of payment for temporary disability . . . [The statute provides for temporary total and temporary partial disability and therefore temporary disability is used to encompass both possibilities] . . . . Permanent partial disability is payable for functional loss of use or impairment of function, permanent in nature, and payment therefore shall be in separate, distinct and in addition to payment for any other compensation. The right to receive temporary total, temporary partial, permanent partial or permanent total disability payments shall vest in the injured employee or his dependents . . . .

MINN. STAT. ANN. § 176.021(3) (West Supp. 1981).

124. *See* note 4 *supra*.

125. N.Y. WORK COMP. LAW § 15(4-a) (McKinney) (1965).

126. *Id.*

127. The MODEL ACT, *supra* note 95, is based to a large extent on the Wisconsin Act. Interview with Harry W. Dahl, *supra* note 56.

128. MODEL ACT, *supra* note 95 § 16, at 661; WIS. STAT. ANN. § 102.43 (West Supp. 1980-81).

129. WIS. STAT. ANN. § 102.43 (West Supp. 1980-81).

130. Presumably this will generally be the healing period and therefore total disability under the act. MODEL ACT *supra* note 95 § 16a at 661. However, benefits could also be recovered for temporary partial disability under the partial section of the act. *Id.* at 662. Therefore, no matter what the injury, it can easily be determined if the injury is total, or partial, or whether the worker can or cannot function in the same capacity.

131. *Id.*, § 16(c) at 662.

The various state acts discussed above illustrate the wide diversity associated with the credit/no credit problem in the temporary and permanent partial context. Those states enacting specific legislation should be praised for journeying forward to tackle the issue while those states lagging behind and not addressing the problem should take note of which forerunner's position is most equitable. In this manner they can properly consider the issue when they are finally forced to remedy the ambiguity.

## IV. Practical Considerations and Theories of Workmen's Compensation

As a result of the split of authority on the credit/no credit issue, an examination of the principal objectives of workmen's compensation must be conducted for a proper disposition of the issue.[132] Perhaps the greatest consideration today is the expense and the burdens on the system.[133] In these times of double-digit inflation,[134] everyone in the workmen's compensation system needs more money. This demand only further fuels inflation. The recently injured worker is always seeking the maximum benefits allowable,[135] while the worker drawing disability wants increased benefits to keep up with inflation.[136] Consequently, premiums must increase significantly in order to pay for both classes of workers and therefore the costs of goods and services to the consumer rise, perpetuating the vicious circle. As a result, it is doubtful whether the system as it presently exists can survive.

Another important consideration is the proper placement of incentives to promote the act's intended purpose. This involves a projection of possible ramifications of legislative reform or judicial decision. For example, if a credit is not given to employers for overpayment of healing period benefits, then the employer is encouraged to prematurely terminate the claimant's benefits.[137] On the other hand, if credit is allowed, the practical effect may be to suddenly deprive the claimant of income he depended upon until suitable work could be found.

## V. Solutions

In light of the equally credible justifications found in the case law for and against providing credit for overpayment of temporary total benefits and considering the seemingly no-win situation inherent in the theory as

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132. Larson Article, *supra* note 53, at 133.

133. Interview with Harry W. Dahl, *supra* note 56.

134. The estimated yearly rate of inflation announced in October, 1980 was 13%.

135. Interview with Harry W. Dahl, *supra* note 56. No doubt the instances of fraudulent claims further burden the system.

136. Dahl indicates that perhaps these injured workers may be the hardest hit and recognizes the need for continually updating benefits. *Id.*

137. *Id.*

well as the practical considerations of workmen's compensation, a solution to the issue is difficult. Yet some possibilities do exist. An examination of some of the possible solutions should aid the decision makers, whether they be judicial or legislative, in determining the approach their respective states should follow.

### A. *The Florida Act - Wage/Loss Benefits*

The Florida Act[138] and its computation of benefits for permanent partial disability[139] presents a novel and as yet an untested approach to the problem.[140] The act provides that in case of temporary total disability, the injured worker will receive 66.6% of his or her average weekly wage not to exceed 350 weeks,[141] and will receive a rehabilitation period in case of the loss of a member.[142] In regard to permanent partial disability, the worker may receive impairment benefits[143] and wage/loss benefits.[144] These wage/loss benefits are based on actual wages[145] and are equal to "95 percent of the difference between 85 percent of the employee's average monthly wage and the salary, wages and other remuneration the employee is able to earn after reaching maximum medical improvement," but cannot exceed 66.6% of the employee's average monthly wage at the time of the injury.[146] This particular statute does not expressly address the credit issue; however, the unique wage/loss benefit scheme eliminates an "award" and consequently eliminates any reduction thereof once the worker returns to work no longer being totally disabled.[147] In theory the claimant would receive the benefits through this simpler mathematical determination rather than by an "award" thereby eliminating the credit problem.

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138. FLA. STAT. ANN. § 440 (West Supp. 1981).

139. *Id.* § 440.15(3).

140. The Florida Act went into effect on July 1, 1979. As a result of the Act's unique approach to workmen's compensation as a whole, a careful watch of its progress is warranted. Interview with Harry W. Dahl, *supra* note 56.

141. FLA. STAT. ANN. § 440.15(2)(a) (West Supp. 1981).

142. *Id.* § 440.15(2)(b). The injured worker receives 80% of his average weekly wage during this period.

143. *Id.* § 440.15(3)(a). These are paid in cases of amputation, 80% loss of vision and facial or head disfigurement and amounts to lump sum payments. Fifty dollars is paid for each percent of permanent impairment from one to fifty percent and one hundred dollars for each percent above fifty percent. *Id.*

144. *Id.* § 440.15(3)(b).

145. Actual wages are used as opposed to gross wages upon which a number of states compute their benefits.

146. FLA. STAT. ANN. § 440.15(3)(b)(1) (West Supp. 1981).

147. The Act provides that should the employee "voluntarily limit" his or her income or fail to accept suitable employment, the salary wages or renumeration shall be based on what his or her income would be if he or she had accepted appropriate employment. *See* note 138 *supra*.

### B. *The Model Act*

As noted earlier,[148] the Model Act simplifies the area of workmen's compensation by eliminating the temporary and permanent labels and providing that no credit be allowed by using the "in addition to" language. By eliminating these labels and relying on the total or partial determination, the employer's decision on the amount of compensation depends on whether the injured employee can work or not. If the injured employee can work, the decision of how much to pay him is predicated upon his decrease in wage earning capacity[149] as established by the schedule of injuries. As in the Florida act, the worker could move easily from total to partial in a shorter period of time thereby eliminating the chance of a buildup of overpayments.

### C. *Expressly Providing No Credit - Placing the Burden of Proper Administration on the Insurance Carriers*

If an express provision of no credit is promulgated the insurance carrier would have an incentive to scrutinize its files carefully to ensure that an accurate determination of recovery is computed. Since the carriers have within their knowledge all medical reports, opinions and other information to make that determination, should they fail to keep proper case control they would end up paying for their own negligence.

### D. *A Panel Determination*

Perhaps the maximum recovery determination should be taken out of the hands of the interested parties and given to a disinterested panel of the medical profession. This panel's function would be to review all medical reports, to generally oversee the healing period and to monitor the permanent partial period. The panel's determination would be final and binding on the parties with the case being remanded to the Commissioner for issuance of the final award. This determination should be both reliable and timely so that in essence, no overpayments would be made, thereby eliminating the credit/no credit problem. A similar procedure has been implemented by Mercy Hospital in Des Moines.[150]

## VI. Conclusion

The question of whether credit for overpayment of temporary total benefits should be allowed against a permanent partial award has long been in the making. Beginning with the existence of the "in lieu of" and the "in

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148. *See* text accompanying notes 113-136 *supra*.

149. This determination would seem to be outside the scope of this note for both of these scheduled and unscheduled injuries.

150. At the time of this writing no information was available as to the success or failure of this program from Mercy Hospital.

addition to" statutory language, a split of authority developed and has continued throughout the development of workmen's compensation. While some of the states have expressly addressed the issue of whether a credit should be allowed, others such as Iowa, have not. Consequently, most states will be confronted with this issue in the near future.

Since equally persuasive justifications exist for the allowance or disallowance of a credit, a proper disposition of the issue requires consideration of the overall objectives of the workmen's compensation system.[151] The main purpose of the system is to provide an income to an injured worker due to a work related accident. This goal must always remain paramount.

For a state such as Iowa, that is not ready to adopt an inventive approach such as is exemplified by the Florida or Model Acts, an amendment expressly denying credit might be the best solution. Placing the burden on those responsible for the administration of the program, the insurance carriers, would eliminate the incentive to make overpayments. However, a control system to eliminate any premature cut-off of benefits is necessary. Some controls are present today. For example, the due process requirement found in *Auxier*[152] give claimants at least thirty days to obtain competent medical evidence and prepare their case. Moreover, a tort action based on outrageous conduct has also been successfully brought in the case of a premature termination of payments.[153] Perhaps a requirement that payments continue while the case is before the Commissioner or the court should also be coupled with these controls. Other checks and balances could be enacted or may naturally arise.

The pressures from all aspects of society, particularly those generated by the economy, will force states to legislate on this issue. It is clear that the answer to the present issue is far deeper than a superficial legislative intent argument. Only after a proper consideration of all factors, theories and arguments can the matter be properly resolved.

*Robert A. Royal*

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151. *See generally* Larson Article, supra note 53, at 33.
152. 266 N.W.2d 139 (Iowa), *cert. denied*, 439 U.S. 930 (1978).
153. Interview with Harry W. Dahl, *supra* note 56.