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In order to encourage the hiring of handicapped persons,[1] most states have amended their workmen's compensation laws and have created so-called "second injury funds."[2] These statutes differ in operation from the general workmen's compensation scheme in one major respect, and it is this difference that provides the encouragement for employers to hire the handicapped. Ordinarily, an employer who hires a worker will be subject to full liability for the entire disability resulting from a compensable accident, regardless

1. For an exhaustive bibliography of works on the problems related to employment of the handicapped, *see* EMPLOYING THE PHYSICALLY HANDICAPPED (U.S. Bureau of Labor Standards Bull. No. 146, Revised).

2. The only states which have not enacted statutes creating such funds are Georgia, Louisiana, Nevada, and Virginia. Other names given to these funds include: Subsequent Claim Fund, Special Indemnity Fund, Special Compensation Fund, Special Disability Fund, Subsequent Injuries Fund, Second Injury Account, Second Injury Reserve, Second Injury and Compensation Assurance Fund, One Percent Fund.

of that employee's prior physical condition. For example, a particular employee may sustain a compensable injury which results in total permanent disability because he has a pre-existing physical defect, although by ordinary medical standards the same injury would not be expected to result in any permanent disability to a physically sound person. The resulting disability is obviously a function of a physiological abnormality of the injured employee, but under such circumstances, the employer or his insurer will nevertheless incur liability for the total permanent disability. This is known as the rule of strict nonapportionment or the "full responsibility" rule.[3]

Second injury fund provisions create a general exception to the rule of strict nonapportionment. The relevant portion of the Michigan second injury fund statute, first enacted in 1943,[4] presently provides:

> If an employee has at the time of injury permanent disability in the form of the loss of a hand or arm or foot or leg or eye and at the time of such injury incurs further permanent disability in the form of the loss of a hand or arm or foot, or leg or eye, he shall be deemed to be totally and permanently disabled and shall be paid, from the funds provided in this section, compensation for total and permanent disability after subtracting the amount of compensation received by the employee for both such losses. The payment of compensation shall begin at the conclusion of the payments made for the second permanent disability.[5]

Under this statute, an employer who hires a person who is missing one eye need not fear that in the event of a subsequent accident resulting in the loss of the other eye he will incur liability for the resulting total permanent disability. Rather, the liability for total disability will be apportioned, and the employer or his insurer will pay the scheduled benefits as if only one eye had been lost. The second injury fund will be liable for the difference between the amount of compensation awarded for the loss of one eye and the scheduled amount for total blindness. By apportioning the liability in this manner, the employer is relieved of the burden of paying for that degree of disability which is not directly attributable to an accident arising out of the employment relationship. The employer is liable only to the extent that he would be liable if the injured person had been in perfect physical condition when the accident occurred. The theory is, of course, that the protection afforded by the fund will eliminate any economic disincentive to

3. 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 59.10 (1961). This is analogous to the common-law rule of tortfeasor liability: "You take your victim as you find him." The rule of strict nonapportionment of work disabilities is in effect a caveat to workmen's compensation employers: "You take your employee as you find him."

4. P.A. 1943 No. 245.

5. MICH. COMP. LAWS § 412.8a (1948).

employing handicapped workers which employers would have under the rule of strict nonapportionment.

While the Michigan second injury fund operates effectively in terms of its present coverage, its scope is too narrow. And, to the extent that this is so, the fund fails to realize its chief objective—encouraging employment of the handicapped. The purpose of this Note is to examine critically the arguments for maintaining the present scope of the fund's coverage and to propose legislative revision designed to achieve more effectively the purposes of second injury funds.[6]

The first major inadequacy of the statute centers around the degree of employee disability which must result from an accident in order to secure relief from the fund. Under the present provisions of the statute, a handicapped person is entitled to relief from the fund only if the second injury results in total permanent disability, defined as the additional loss of an arm, hand, foot, leg, or eye.[7] The statute does not permit any recovery in cases resulting in *partial* permanent disability. Thus, employers are assured that if a subsequent accident renders a handicapped employee totally disabled as the result of the loss of a specified member, full liability for total permanent disability will not be incurred. Yet, if the same accident results in ninety per cent disability to the employee, no relief may be obtained from the fund. Since the entire burden of the costs for partial disability accidents falls upon the employer, he retains some economic justification for not hiring handicapped workers. A number of states have recognized this problem and presently allow recovery in all cases resulting in any degree of disability so long as the disability resulting from the second injury is greater than would have occurred if the employee did not have a pre-existing handicap.[8]

One probable reason for limiting recovery as does the Michigan statute is to protect against unwarranted and fraudulent claims against the fund. To effect this end, the statute allows recovery only in situations where the handicap is so obvious that no problem of proof exists. Although this fear is justified to some extent, it should also be realized that imposing narrow limitations upon the fund's

6. Though the arguments advanced throughout this Note are directed primarily at the deficiencies in the language of the current Michigan statute, they are of course of broader application.

7. It is interesting to note that this definition of total permanent disability is even *more* restrictive than the parallel definition applicable to the general workmen's compensation provisions. MICH. COMP. LAWS § 412.10(b) defines total permanent disability to include "permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm," "incurable insanity or imbecility," and "permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm." Section 412.8a, in addition, makes no explicit provision for recovery from the fund in injuries resulting in *death*. This, presumably, is an oversight. There are no cases on point.

8. *See, e.g.*, ALASKA STAT. § 23.30.205 (1962); KAN. STAT. ANN. § 44-567 (1967 Supp.).

coverage may be self-defeating if the effect of such limitations is to reduce substantially the willingness of employers to hire the handicapped. It is certainly arguable that the problems of proof of disability are best left to the fact-finding process, and that the workmen's compensation board and the reviewing courts are competent to expose fraudulent or unwarranted claims. At the very least, a better approach to the problem would be to balance the competing policy considerations and limit recovery from the fund to cases resulting in a high degree of permanent partial disability. One state, for instance, allows recovery for partial disability only in cases where the second injury *alone* constitutes at least thirty-five per cent of statutory total disability.[9] Such a provision would be a significant improvement of the present Michigan second injury fund statute; it would presumably result in few unwarranted claims and would increase the scope of the fund's coverage.

Thus far this Note has stressed the need to expand coverage of the Michigan second injury fund statute only with respect to those cases where the subsequent injury to a handicapped person is unrelated to the handicap and results in a degree of disability greater than would have occurred if the employee were not afflicted with the pre-existing handicap. A major related shortcoming of the present Michigan statute is that it entirely fails to provide recovery from the fund in cases where the subsequent injury would not have occurred *but for* the existence of the pre-existing handicap. These two situations should be carefully distinguished. The former involves cases in which the cause of the second injury is *unrelated* to the pre-existing handicap. This results—as has already been indicated—in an apportionment of liability between the second injury fund and the employer; that is, a scheme of *risk division.* On the other hand, when the second injury is *directly caused* by the prior handicap, a number of states allow full recovery from the fund; that is, a scheme of *risk shifting.*[10]

The risk-division aspect of the scheme is necessary to overcome concern on the part of employers that hiring a handicapped person poses an unjustifiable economic risk of greater workmen's compensation liability. Allowing full recovery from the fund in the situation where the second injury is directly caused by a pre-existing handicap is necessary to overcome another prevalent employer fear. Many employers deny employment to handicapped persons in the belief that the incidence of accidents among handicapped employees is greater than among nonhandicapped workers. These employers feel that hiring handicapped workers can be ex-

9. CAL. LABOR CODE § 4751 (1967 Supp.). Ideally, a system should provide that that the necessary degree of resulting partial disability fall by one or two per cent each year until such time as the legislature freezes this percentage. This would enable the legislature to establish empirically the level, if any, at which the fund becomes burdened with frivolous or unwarranted claims.

10. *See, e.g.,* MINN. STAT. § 176.131 (1965); ORE. REV. STAT. § 656.638 (1967)

pected to increase workmen's compensation costs.[11] However, a number of studies have revealed that the incidence of accidents among handicapped employees is not greater than among nonhandicapped workers.[12] Despite this fact, employers are hesitant to employ handicapped persons, and this irrational or uninformed attitude does prejudice handicapped persons seeking employment. Therefore, it is submitted that the Michigan second injury fund statute—if it is to serve as an effective inducement to the employment of handicapped persons—must take into account some employers' mistaken conception that handicapped workers are more accident prone.[13]

However, quite apart from this prevalent unfounded belief, some employers may reason that it is unwarranted for them to assume the risk of *any* liability for situations in which the injury-producing accident is caused solely by an employee's pre-existing handicap, since such accidents are impossible for them to foresee or prevent through in-plant safety programs. To illustrate this point, assume that an employer hires *A*, who is missing an eye. While *A* is performing his job as a light machine operator, another employee, *B*, is engaged in hauling a pallet load of freight through the plant. *B* enters a door which is on the side of *A*'s missing eye. Because of his limited breadth of vision *A* does not see *B* moving the freight past him. As *B* approaches *A* from behind, *A* steps back into the path of the pallet truck and is injured. In such a case the employer would be liable under the Michigan statute for injuries to *A* despite the fact that the accident would not have occurred if *A* had normal eyesight. Thus, an employer may reason that, because of the difficulty of preventing such accidents by in-plant safety programs, this type of accident constitutes an unjustifiable business risk. This is true in spite of the fact that the statistical

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11. WORKMEN'S COMPENSATION AND THE PHYSICALLY HANDICAPPED WORKER 5-14 (U.S. Bureau of Labor Standards Bull. No. 234, 1967). Strictly speaking, *employment* of the handicapped can never cause an increase in workmen's compensation costs. These costs can rise only as a result of an *accident* suffered by such a worker. What employers *do* fear is being *merit rated* as a result of such an accident, *i.e.*, the accident cost will be reflected in higher premiums under a competitive insurance system as in Michigan. Higher expenditures will of course result if the employer is self-insured.

12. *Id.* at 28-39; THE PERFORMANCE OF PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING INDUSTRIES (U.S. Dept. of Labor Statistics Bull. No. 923, 1948); R. BARROW & H. FABING, EPILEPSY AND THE LAW 94-96 (2d ed. 1966). This favorable accident record of handicapped workers is explained in part by the fact that the handicapped worker, cognizant of his limitations, is extremely conscious of the necessity of avoiding accidents in order to preserve his remaining abilities. WORKMEN'S COMPENSATION AND THE PHYSICALLY HANDICAPPED WORKER, *supra* note 11, at 3; 1950 PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKMEN'S COMPENSATION AND REHABILITATION 19 (U.S. Bureau of Labor Standards Bull. No. 122).

13. Fabing & Barrow, *Encouragement of Employment of the Handicapped—Extension of Second Injury Fund Principles to Persons Having Latent Impairments*, 8 VAND. L. REV. 575, 579 (1955).

probability of such an accident occurring is no greater than that of any industrial accident.[14]

The best way to accommodate both the rational and irrational employer fears is to provide that the second injury will assume full workmen's compensation liability for a handicapped employee's injuries which would not have occurred *but for* the existence of the prior handicap.[15] Relieving the employers of liability in such instances rests upon sound policy considerations. So long as employers are held liable in situations in which the handicap itself rather than the conditions of employment is responsible for the injury-producing accident, they can be expected to prevent such liability by not hiring the handicapped.[16] Shifting full liability for such accidents to the second injury fund would therefore assign the risk of liability for these accidents to a socially more appropriate entity.

A third inadequacy of the present Michigan second injury fund statute is that it severely limits the kinds of pre-existing handicaps that are covered. There are, of course, many identifiable handicaps which are serious enough to bar employment of the afflicted persons. Handicaps can be classified into two major categories. The first group of afflictions includes all patent handicaps—those that are visible. The Michigan statute covers only persons who have certain patent handicaps: a missing hand, arm, leg, foot, or eye. Thus, persons who have lost a minor member or who suffer from general congenital or disease-related physical malformities are excluded. The second group includes latent handicaps—the nonobvious afflictions such as arthritis, cardiac disease, or epilepsy, which may severely limit their victims in actual or potential work productivity.[17] Latent handicaps may also result from prior industrial accidents, service in the armed forces,[18] or from congenital diseases or conditions. The person who has a latent handicap may

14. Some accidents caused by handicaps are avoidable through the use of in-plant precautions. In the example given in the text, care might have been taken to station *A* in such a way that no danger could approach him from the direction of his blind spot. Such a solution, however, would not obviate the possibility of injury-producing danger approaching on his blind side when he was away from his usual place of work.

15. It has been suggested that the fund should also assume liability for injuries caused to *other* employees and even for property damage to the employer in such accidents. Fabing & Barrow, *supra* note 13, at 581-82 n.25, 584. Although the effect of such a provision in inducing employers to hire handicapped persons would probably be marginal, the cost of implementing it should also be marginal.

16. This same argument, of course, can be used to criticize the rationale of the general rule of strict nonapportionment of liability. However, the policy issue in the nonapportionment rule is compensation *vel non* for the injured employee, while with the handicapped the issue is employment *vel non*.

17. Other major latent handicpas include diabetes, cerebral palsy, multiple sclerosis, Parkinson's disease, tuberculosis, hemophelia, ankylosis of joints, and varicose veins.

18. In the case of disabilities connected with military service, some states have enacted special second-injury-type funds, *e.g.*, OHIO REV. CODE § 4123.63 (1953).

be frustrated to an even greater extent than his patently handicapped counterpart in his efforts to obtain employment.[19] The reasons advanced by employers for denying employment to such persons are generally the same as the reasons advanced for denying employment to patently handicapped persons; employers can also be expected to harbor fears about increased workmen's compensation liability when a job applicant is afflicted with a latent handicap such as arthritis or epilepsy.[20] Although the same policy considerations discussed above indicate a need to provide coverage for these people, latent handicaps are wholly outside the scope of the present Michigan statute. It is therefore submitted that if the Michigan statute is to encourage the employment of handicapped persons, it must be expanded to cover all persons having handicaps, both patent and latent, which are serious enough to constitute an obstacle to employment.

Several commentators have suggested this change,[21] and seventeen states have enacted legislation extending the scope of second injury fund coverage to include most pre-existing patent and latent handicaps.[22] Two different approaches have been adopted by states seeking to extend the coverage of their statutes to include latent handicaps. The first approach is to enumerate specifically the types of pre-existing handicaps to be covered by the statute.[23] The basic advantage of this method is that it is certain: the exact kinds of claims that may be paid from the fund are set forth. This assures that the fund's resources will not be diverted to pay questionable or fraudulent claims that are based on injuries and disabilities allegedly caused by pre-existing handicaps. On the other hand, this approach may be criticized because the legislative enumeration of pre-existing handicap conditions may become crystallized; timely

19. Fabing & Barrow, *supra* note 13.

20. Of all handicapped persons, epileptics have the greatest difficulty in obtaining employment. The age-old barriers of misunderstanding seizures, and the social stigma attached to epilepsy often bar the employment even of epileptics whose seizures are under complete control. R. BARROW & H. FABING, *supra* note 12, ch. VII. The actual accident experience of epileptics compared with that of nonhandicapped workers in matched employment is not significantly higher. THE PERFORMANCE OF PHYSICALLY IMPAIRED WORKERS IN MANUFACTURING INDUSTRIES, *supra* note 12, at 3, 4, 8, 10.

21. *E.g.*, Fabing & Barrow, *supra* note 13.

22. ALASKA STAT. § 23.30.205 (1962); CAL. LABOR CODE § 4751 (West 1955); CONN. GEN. STAT. REV. § 31-216 (1958); DEL. CODE ANN. tit. 19, § 2327 (1953); FLA. STAT. § 440.49 (1967); HAWAII REV. LAWS § 97-27 (1955); KAN. STAT. ANN. § 44-566 (1964); KY. REV. STAT. § 342.120 (1962); MINN. STAT. § 176.131 (1965); MO. REV. STAT. § 287.220 (1959); N.M. STAT. ANN. § 59-10-126 (1961); N.Y. WORKMEN'S COMP. LAW § 15(8) (McKINNEY, 1965); OHIO REV. CODE § 4123.343 (1964); ORE. REV. STAT. § 656.638 (1967); UTAH CODE ANN. § 35-1-69 (1953 replacement vol.); WASH. REV. CODE § 51.16.120 (1967 Supp.); WIS. STAT. § 102.59 (1965). There are, in addition, many states which have expanded second injury fund coverage substantially beyond that provided in Michigan but do not provide coverage that is as broad as in the states listed above. *See, e.g.*, W. VA. CODE § 23-3-1 (1966): "definitely ascertainable physical impairment caused by a physical injury."

23. The Kansas and Ohio statutes are of this type.

amendment of the statute to include newly discovered or recognized handicap conditions may be difficult to secure from a busy state legislature, especially if it meets infrequently.[24]

The majority of the states with broadened coverage rely upon the more flexible alternative of defining the term "handicap" with sufficient generality so that it includes almost all conceivable patent and latent handicaps.[25] For example, the statute could define a handicap as "any physical or mental condition due to a previous accident, disease, or congenital condition, which if known to the employer, would constitute an obstacle or hindrance to obtaining, maintaining, or regaining employment."[26] The latter method is preferable since it permits the state workmen's compensation agency to define handicaps in light of both changing medical knowledge and employer attitudes. Instead of adopting the relatively inflexible legislative enumeration approach, it seems wiser to leave the final determination of what constitutes a handicap to an expert administrative body. The state agency presumably would be better able to make the necessary determination in each instance than the legislature would be. A provision requiring advance agency approval of the eligibility of a particular employee's handicap as a condition precedent to employer recovery from the fund should eliminate any concern about diverting the fund's resources to cases which should be chargeable against the accident experience of the employer.[27]

Assuming that the Michigan second injury fund statute is to be revised in the manner suggested by this Note, two additional problems remain to be considered. The first problem is whether to require prior reporting of the hiring of a handicapped person by the employer as a condition precedent to the employer's protection by the fund. This is not a problem under the present Michigan statutory provisions because the scope of coverage has been limited to employees having major pre-existing physical handicaps which are obvious to employers at the time of hiring and which can easily be verified in the event of a subsequent claim. The notice procedure that should be used with a broader and more complex second injury fund statute is a problem that has vexed the commentators and the state courts and legislatures[28] which have sought to resolve

24. In Ohio, however, this approach has apparently worked well. The general assembly has twice amended the list of specified disabilities that are covered since the statute was enacted in 1955.

25. *E.g.*, "a previous disability," ALASKA STAT. § 23.30.205 (1962); "previous incapacity by accidental injury, disease or congenital causes," UTAH CODE ANN. § 35-1-69 (1953 repl. vol.).

26. *E.g.*, ORE. REV. STAT. § 656.638 (1967); FLA. STAT. ANN. § 440.49 (1966).

27. *See* discussion of proposed prior notice requirement, notes 28-32 *infra* and accompanying text.

28. By express statutory language or judicial interpretation, the states of Kansas, Minnesota, New Mexico, and New York require such notice as a condition precedent to recovery from the fund. KAN. STAT. ANN. § 44-566 (1964); MINN. STAT. § 176.131

it. The better view is that if an employer lacked knowledge of the employee's impairment when he hired the worker, no claim should subsequently be permitted against the fund because the fund's existence did not in any way induce the employer to hire such person.[29] Therefore, a solution that is consistent with the purposes of the fund is to require employers—if they want to bring an employee within the coverage of the statute—to give notice to the workmen's compensation agency as soon as handicapped persons are employed. The notice should specify the nature of each employee's handicap condition and should be certified for accuracy by a licensed physician. The statute should further provide that unless the agency rejects the notice within a specified number of days because the employee's condition does not constitute a handicap within the meaning of the second injury fund statute, coverage will automatically be guaranteed in the event of a subsequent accident.[30] One advantage of such a procedure is that the legislature will be able at all times to scrutinize the kinds of handicap conditions which the agency brings within the scope of the statute. In addition, the requirement of notice will induce employers to conduct a thorough medical examination of all job applicants. The advantage to be gained by this procedure is that early recognition of a particular job applicant's handicap should result in the placement of that employee in a position that is well suited to any actual or potential limitation related to the physical impairment.[31] It should also be recognized, however, that an em-

(1965); N.M. STAT. ANN. § 59-10-126 (1961); Zyla v. Juliard & Co., 277 App. Div. 604, 102 N.Y.S.2d 255 (1951).

29. A. LARSON, *supra* note 3, at § 59.33.

30. The state workmen's compensation department would determine in each case whether or not the specific impairment constitutes a handicap within the meaning of the statute. This of course should pose little difficulty for employees having one of the many recognized patent and latent handicaps. In order to avoid delaying the start of the employment relationship, the statute should provide that coverage will be guaranteed from the time the employer files the notice until such time as the department may, within prescribed statutory time limits, reject the notice. The ability to foster an immedate employment relationship, leaving an employer unhampered by any delay caused by red tape, will be a significant aid to handicapped job applicants. From the standpoint of the fund, the probability of an accident occurring during this brief time period is very slight. The statute should further provide that in the event of a rejection either the employee or the employer may petition the department for reconsideration, and that each shall have the privilege to submit additional relevant evidence. Final resort to the courts should be permitted; employee or employer should be granted the right to seek a declaratory judgment that, *as a matter of law*, an employee's particular impairment constitutes a "handicap" within the scope of the statute.

31. Since the proposed statutory revisions call for the fund to assume considerable contingent liabilities, a strong argument can be advanced that department approval of *individual job assignment* should also be required. However, there are several reasons why this should not be necessary. Most employers would not be expected knowingly to place an employee in a position in which his physical impairment would be likely to cause a subsequent injury. In addition, handicapped employees are extremely unlikely to permit themselves to be placed in a position of such danger for reasons stated in note 12 *supra*. Finally, the costs of funding the bureaucratic machinery to pass judgments on such matters would probably be greater than any

ployee who fears that disclosure would result in a denial of employment may attempt to conceal the existence of his handicap.[32] The problems created when such a person later suffers an industrial injury in which the pre-existing handicap either causes the accident or aggravates the resulting disability are largely outside the scope of this Note. This situation does, however, require legislative attention and requires consideration of particularly difficult policy choices.[33]

The final problem to be considered is the appropriate means of financing the proposed expanded coverage of the Michigan second injury fund. There are at present several methods by which these funds are financed. The present Michigan statute provides, in essence, that each insurance carrier and self-insured employer will be assessed one half of one per cent of its total compensation payments (excluding medical payments) made during the preceding calendar year whenever the fund falls below a 100,000 dollar statutory floor.[34] This is the "industry pays as a whole" method. If this were the only way in which the fund's expanded coverage was to be financed, Michigan would undoubtedly be required to increase its present percentage assessment. Other states which have expanded the scope of second injury fund coverage to include persons with latent handicaps presently assess up to two per cent of annual total compensation benefits paid by carriers and self-insured employers.[35] A second method used to finance fund expenditures is to rely upon so-called death-dependency payments. Each employer (or his insurer) is assessed a lump sum payment when an employee dies as a result of a compensable injury and leaves no legally eligible dependents

savings to the fund that might result from this degree of supervision. No second injury fund statute presently contains such a provision.

32. R. BARROW & H. FABING, *supra* note 12, at 111-12.

33. There are essentially three methods of dealing with concealment of a handicap: (1) To allow recovery to be obtained from the fund notwithstanding the concealment. This, however, would divert the fund's resources to claims for which the fund has not in fact been an inducement to the hiring. (2) To provide for a partial or complete waiver of benefits should the concealed impairment cause the accident or aggravate the resulting disability. This is presently done with respect to occupational diseases in Michigan. MICH. COMP. LAWS § 417.8 (1948). The objection to this approach is that the employee is denied compensation at the time of his greatest need. Fabing & Barrow, *supra* note 13, at 579-80. (3) To allow the employee to collect normal workmen's compensation benefits as in the case of any compensable injury. This leaves unchanged the general caveat to all employers that "you take your employee as you find him." Employers and insurers can of course be expected to oppose strongly any scheme that allows an employee to benefit despite his wrongdoing. None of these methods is entirely satisfactory. The third, however, seems to be the best of the three, since the entire workmen's compensation system rests on the notion of *compensation* for work-related injuries. It can be argued further that if the employee's impairment remains undetected by the employer it is more akin to any general nonhandicap weakness an employee may possess and that the difference therefore is one of degree, not of substance.

34. MICH. COMP. LAWS § 412.8a (1948).

35. *E.g.*, Kentucky—¾ of 1%, Connecticut—1%, Minnesota—2%.

to claim death benefits.[36] The third method—used by two states—is to finance fund costs exclusively out of general taxation revenues.[37] Of course, this places the entire financial burden of fund operations upon the state, while a percentage levy upon compensation benefits places the burden on industry as a whole because the tax is reflected in higher insurance premiums[38] or borne directly if the employer is a self-insurer. The burden of death dependency assessments falls directly upon individual employers. Since each of these groups—the state, individual employers, and industry as a whole—derives certain benefit from the employment of handicapped persons, it is appropriate to use each of these methods to some degree in order to provide the necessary resources for the second injury fund. From a social cost accounting standpoint, an optimal apportionment of the burden of supporting the fund among these revenue sources should reflect the relative benefits derived by each group.

Because the state interest in employment of its handicapped citizens is strong and the benefits it derives therefrom are great,[39] it is submitted that any truly equitable financing scheme would of necessity require that general taxation provide a significant portion of the fund's required resources. It would be particularly appropriate to shift to the state the expense of providing benefits to employees who make claims based upon pre-existing handicaps which are not the product of prior industrial accidents or occupational diseases. Since these handicaps are not related to previous work activity, and since they were not subject to prevention by improved industrial safety programs, it is incorrect to impose the costs of this aspect of the fund's coverage upon industry as a whole or upon individual employers.[40] If these costs were charged to industry as a whole or to the accident experience of the individual employer, the result would be a distortion of general industrial or individual firm costs.[41] Accordingly, it is submitted that the state should reimburse the second injury fund for payments made to claimants whose pre-existing handicaps are not industrially related. This can be accomplished procedurally by requiring the state workmen's compensation agency to make a determination at the time an employer

36. *E.g.*, Utah provides that a $5,000 death-dependency payment be made for each such occurrence. Prior to 1960 the Michigan second injury fund was financed solely through death-dependency payments. *See* note 48 *infra*.

37. CAL. LABOR CODE § 4754 (1953); PA. STAT. ANN. tit. 77, § 516 (Purdon 1952).

38. This is true since most employers are covered by insurance companies. Any tax on benefits paid by an insurance company is an increase in its general costs which will be passed on to all related insurance subscribers through increased premiums.

39. *See* text accompanying notes 46-47 infra.

40. Fabing & Barrow, *supra* note 13, at 586.

41. An employer may not be able to pass the additional cost imposed upon him on to the consumer because increased price could place the product at a price disadvantage compared to the same or substitute products manufactured in other states with different arrangements for financing the second injury fund.

files notice for fund coverage of a handicapped employee, classifying each employee's handicap as either "industrially related" or "non-industrially related."[42]

On the other hand, the benefits derived by industry as a whole from a broad second injury fund scheme are also significant. A large number of handicapped persons available for employment of course increases the size of the labor pool; employed handicapped persons are also consumers. Since industry does benefit from an effective second injury fund statute, it is reasonable to assess part of the costs of maintaining the fund to it. It seems proper to charge industry for that proportion of fund expenses for which it is most liable: claims predicated upon pre-existing handicaps that are industrially related. Therefore Michigan's present method of financing the second injury fund should be maintained; the state contribution discussed above would be added to the industry contribution. Because it will require some experience to determine the balance of industrial and state contributions necessary to maintain the fund's solvency under the proposed revision, it is submitted that the 100,000 dollar statutory floor should be eliminated in favor of allowing the director of the state workmen's compensation department to assess such payments when he feels that the fund's resources are insufficient to meet its estimated expenses. Under the revision suggested in this Note, since the state will assume considerable responsibility for financing the fund's increased coverage, the present rate assessed against employers' compensation payments—one half of one per cent—should be sufficient to finance expenditures for claims based upon pre-existing industrially related handicaps.[43]

The benefits that individual employers derive from an increase in the number of employed handicapped persons are more limited. A particular employer may or may not choose to avail himself of the direct benefit of expanded fund coverage by hiring handicapped persons for his work force. Depending upon the nature of his enterprise he may or may not experience an increase in demand for his product as the result of the higher employment rate for hand-

42. The notice required of the employer should also include a statement of the employee as to the origin of the handicap condition. The statement could be verified by the physician. If the workmen's compensation department deemed it necessary, it could require further documentation or evidence.

43. It is assumed, furthermore, that this industry contribution will continue to finance the so-called differential payments for which the second injury fund is presently liable. These payments are totally unrelated to the fund's primary purpose of encouraging the employment of the handicapped, but are in effect a workmen's compensation cost of living allowance paid to a certain class of workmen's compensation recipients. *See* MICH. COMP. LAWS § 412.9a. This section was enacted by the legislature in 1955. It provides for payment from the second injury fund for persons permanently and totally disabled in an amount equal to the difference between current benefits and present scheduled statutory benefits.

icapped persons in the state. Moreover, under the proposed revision the individual employer already pays for the fund both as a general taxpayer and through paying workmen's compensation insurance premiums, which reflect the cost of the annual fund assessments. (Self-insured employers pay a direct assessment to the fund.) Thus it is submitted that no additional general assessment of individual employers is warranted. However, it would appear reasonable to re-enact a provision permitting the fund to collect death-dependency payments for deceased employees without dependents. Under the present statute, employers or their insurers experience a windfall when compensable accidents result in employees' death without eligible dependents; their liability for death benefits is eradicated. The only apparent reason that the former Michigan death dependency payment provision was repealed was that it provided insufficient revenue to finance fund expenditures.[44] While it is uncertain that additional revenue derived from this source will be necessary for fund operations, the extra resources that it would provide would be helpful to avert any immediate threat to the solvency of the fund. The legislature would also be able to forestall some increases in the rates assessed if the present one half of one per cent proves inadequate to finance the proposed additional coverage.

Though some individual employers may not realize any benefit from the operation of the fund, some certainly will. Therefore, in the absence of a better way in which to use these funds, the second injury fund is a more worthy beneficiary than are the employers or their insurers who presently reap the windfall.

Immediate steps should be taken to bring Michigan into line with other states that have broadened second injury fund coverage. The experience of these states has demonstrated that the costs of such expanded programs are entirely feasible.[45] The arguments advanced in this Note indicate that an employer who is assured that the unwarranted risk of any additional workmen's compensation liability has been foreclosed will be more willing to hire handicapped workers. One survey indicates that following the enactment of a broad second injury fund statute in Ohio, no less than seventeen per cent of the employers of that state had liberalized their policies regarding employment of handicapped workers.[46]

Employment of the handicapped is clearly a proper concern

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44. "Disbursements for claims were very much greater than receipts to the Fund with the result that the assets of the Fund are at an all time low and will be depleted completely if an increase in the amount paid into the Fund is not enacted by the Legislature." STATE OF MICHIGAN WORKMEN'S COMPENSATION DEPT., 1958-59 ANNUAL REPORT 3.

45. No state cited in this Note assesses more than 2% of total compensation benefits paid annually. *See* note 35 *supra*.

46. R. BARROW & H. FABING, *supra* note 12, at 114-16.

of the state. Unemployed, such a person is a burden on his family and on the state; welfare and relief payments to such a person needlessly increase costs to both the state and local governments supporting such programs. Employed, the handicapped person is a self-supporting, stable member of the community; he becomes a taxpayer rather than a tax consumer. There are also important moral and social considerations which may be simply summarized stating that no person who is able to work should be needlessly denied employment.[47] In short, any continued waste of human resources in Michigan due to failure to amend the second injury fund statute in order to provide much broader coverage is a social wrong.

Unfortunately, the legislative history indicates that no such revision has ever been considered. In fact, the substantive provisions defining the scope and coverage of the Michigan statute have remained unchanged for almost a quarter of a century.[48] A second injury fund with broad coverage is necessary to encourage the employment of *all* handicapped persons who may have difficulty finding work;[49] to achieve this goal most effectively, it is recommended that the Michigan legislature immediately enact new legislation containing the proposals advanced in this Note.[50]

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47. Preamble to the New York Second Injury Fund Statute. *Cf.* N.Y. WORKMEN'S COMP. LAW § 15(8) (McKinney, 1965):

> As a guide to the interpretation and application of this section, the policy and intent of the legislature is declared to be that every person in this state is entitled to maintain his independence and self-respect through self support regardless of any impairment or handicap he may possess.

48. The section creating the second injury fund was enacted in 1943, P.A. 1943 No. 245 (Senate Bill 182). Since that time it has been amended four times. P.A. 1951 No. 20 (House Bill 37) made only minor technical changes and added a paragraph regarding indemnification against third persons responsible for industrial accidents. P.A. 1955 No. 250 (Senate Bill 1178) raised the death-dependency contribution from $1,000 to $1,500 and incorporated other minor technical changes. In addition, the same act amended MICH. COMP. LAWS § 412.9 to include differential payments from the second injury fund. *See* note 43 *supra*. P.A. No. 74 (House Bill 385) changed the method of financing from death-dependency payments to an assessment of ½ of 1% of total compensation benefits paid, excluding medical payments, by employers covered by the workmen's compensation system. These payments were scheduled to be made when the fund fell below a minimum of $125,000 and to cease from the time the fund reached $200,000 until the statutory floor was again reached. P.A. 1965 No. 32 (Senate Bill 254) changed the assessment procedure whereby payments are to be made if the fund falls below $100,000. Nothing in the original bills proposed nor anything reported in the applicable annual house and senate journals indicates that consideration has ever been given to the question of extending the scope of the section to include a wider category of pre-existing handicaps or broadening the coverage of benefits to include more than total permanent disability as presently defined.

49. This has been recognized by the International Association of Industrial Accident Boards and Commissions which, as early as 1954, took the position that a broad-coverage second injury fund is a desirable and necessary part of every good workmen's compensation system. WORKMEN'S COMPENSATION AND THE PHYSICALLY HANDICAPPED WORKER *supra*, note 11, at 51.

50. *See also* the model statute endorsed by the Council of State Governments in 1959 in *id.* at 95-97, and proposed statutory language throughout Fabing & Barrow, *supra* note 13, at 575-88.