Natural Resources Journal

7 Nat Resources J. 4 *(Fall 1967)*

Fall 1967

Workmen's Compensation in New Mexico: Pre-Existing Conditions and the Subsequent Injury Act

Cleopatra Campbell

NOTE

WORKMEN'S COMPENSATION IN NEW MEXICO: PRE-EXISTING CONDITIONS AND THE SUBSEQUENT INJURY ACT

Fifty years ago New Mexico enacted its first workmen's compensation law,[1] a plan surprisingly similar to the plan in practice today.[2] During this fifty-year period, the New Mexico Legislature and the New Mexico Supreme Court have been required to give continual attention to the problems raised by workmen's compensation claimants. In 1961 both the legislature and the court recognized the need for a "second injury" or a "subsequent injury" fund.[3] The legislature responded by passing a Subsequent Injury Act.[4]

The New Mexico court has always had a liberal view toward compensation claims.[5] This liberal view extended to permit recovery by the worker whose injury was allegedly or actually precipitated by some physical or mental condition having no connection with his work. Pre-existing conditions were not bars to recovery. The purpose of this Note is to review the pre-existing condition cases in New

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1. N.M. Laws 1917, ch. 83 (superseded 1929).

2. For example, the first act included provisions for increasing compensation if the worker were injured or killed because the employer failed to provide safety appliances required by law; the first act included also provisions for decreasing compensation if the worker's injury or death resulted from his failure to use safety appliances provided. N.M. Laws 1917, ch. 83, § 7 (superseded 1929).

3. In Reynolds v. Ruidoso Racing Ass'n, 69 N.M. 248, 365 P.2d 671 (1961), the New Mexico court lamented that New Mexico was one of six states in the nation that had never established second injury funds. *Reynolds,* decided in August, 1961, overlooked the fact that the 1961 New Mexico Legislature had passed a Subsequent Injury Act providing that as of the effective date of July 1, 1961, there was established a subsequent injury fund. N.M. Laws 1961, ch. 134; N.M. Stat. Ann. § 59-10-26 to -138 (Supp. 1965).

The idea of a subsequent injury act was preceded by a provision allowing employers to limit their liability by requiring employees to certify the nature and extent of any pre-existing disability. N.M. Laws 1959, ch. 67, § 30; N.M. Stat. Ann. § 59-10-37 (Repl. 1960). Also, an employer whose employee had already lost a scheduled body member was not liable for total disability compensation if the employee lost the other body member in the course of his employment. N.M. Laws 1959, ch. 67, § 22; N.M. Stat. Ann. § 59-10-18.4 (Repl. 1960).

4. N.M. Laws 1961, ch. 134.

5. *E.g.,* Geeslin v. Goodno, Inc., 75 N.M. 174, 402 P.2d 156 (1965); Luvaul v. A. Ray Barker Motor Co., 72 N.M. 447, 384 P.2d 885 (1963).

Mexico, to discuss the Subsequent Injury Act, and to explore the interrelationship between recovery for pre-existing conditions and recovery under the Subsequent Injury Act.

I
INTRODUCTION TO NEW MEXICO WORKMEN'S COMPENSATION LAW

Under New Mexico law, the injured worker must prove three elements in order to recover for his injury: (1) there was an accidental injury; (2) it arose out of the employment, and (3) it arose in the course of the employment.[6] An "accident" may occur even though the injury developed over a period of months until one day the physical condition of the employee made him unable to work.[7] Catching pneumonia is an "accident."[8] Being bitten by a poisonous insect is an "accident."[9] In short, any " 'unlooked for mishap' " or " 'untoward event which is not expected or designed' " is an accident within the meaning of the workmen's compensation law.[10]

The requirement that the injury arise out of the employment refers to the cause of the injury.[11] For example, the workman who was killed during a storm when a tree fell on him suffered an injury arising out of his employment.[12] However, handling a forbidden object

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6. N.M. Stat. Ann. § 59-10-13.3 (Repl. 1960): A. Claims for workmen's compensation shall be allowed only: (1) when the workman has sustained an accidental injury arising out of, and in the course of his employment; (2) when the accident was reasonably incident to his employment; and (3) when the disability is a natural and direct result of the accident.

7. Webb v. New Mexico Pub. Co., 47 N.M. 279, 141 P.2d 333 (1943) (printer allergic to hand soap): "An injury may be gradual and progressive . . . ." *Id* at 286, 141 P.2d at 337.

8. Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342 (1941).

9. Barton v. Skelly Oil Co., 47 N.M. 127, 138 P.2d 263 (1943).

10. Stevenson v. Lee Moor Contracting Co., *supra* note 8, at 367, 115 P.2d at 350.

11. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954). In Berry v. J. C. Penny Co., 74 N.M. 484, 394 P.2d 996 (1964), the court said:

This court . . . has interpreted 'arising out of employment' to require a showing that the injury was caused by a peculiar or increased risk to which claimant, as distinguished from the general public, was subjected by his employment.

Id. at 485-86, 394 P.2d at 997.

12. Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 P. 72 (1922). The Merrill case seems to have started the New Mexico court's concern with distinguishing accidents common to the public generally (workman not entitled to compensation) from accidents made more likely by the employment (if other tests are met, workman is entitled to compensation).

while performing one's job removes the subsequent accident from the coverage of the Workmen's Compensation Act. Disobeying instructions means that the accompanying injury did not arise out of the employment.[13]

While "arising out of" refers to cause, "in the course of employment" refers to time, place, and circumstances surrounding the injury.[14] The debatable issue here often centers on the situation where the employee was en route to work or was en route home from work. If the employee was paid travel time or expenses or was planning to perform some errand for the employer, the New Mexico court is inclined to find that the employee was acting in the course of his employment although the accident occurred during nonworking hours[15] and although the Workmen's Compensation Act specificially excludes injuries suffered "going or coming" from work.[16]

Violent and unexplained deaths occurring on the premises of the employer are presumed to have arisen out of and in the course of employment, and are thus compensable.[17]

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13. Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954) (tear gas pistol in deputy sheriff's car discharged in face of filling station attendant who was inspecting it in violation of instructions). Justice Sadler, concurring specially, suggests that injuries suffered through violation of instructions are "wilfully suffered" and hence barred under N.M. Stat. Ann. § 59-10-8 (Repl. 1960) as "intentionally inflicted by himself." *Id.* at 185-86, 268 P.2d at 580-81.

14. *Ibid.*

15. Recovery allowed in: Cuellar v. American Employers' Ins. Co. of Boston, Mass., 36 N.M. 141, 9 P.2d 865 (1932); McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867 (1944); Barrington v. Johnn Drilling Co., 51 N.M. 172, 181 P.2d 166 (1947); Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950); Feldhut v. Latham, 60 N.M. 87, 287 P.2d 615 (1955) (in this case one employee who was asleep in the car when the accident occurred was denied recovery; the employees who were awake received compensation); Brown v. Arapahoe Drilling Co., 70 N.M. 99, 370 P.2d 816 (1962).

Recovery denied in: Martinez v. Fidel, 61 N.M. 6, 293 P.2d 654 (1956); Ross v. Marberry & Co., 66 N.M. 404, 349 P.2d 123 (1960); McDonald v. Artesia General Hospital, 73 N.M. 188, 386 P.2d 708 (1963); Rinehart v. Mossman-Gladden, Inc., 77 N.M. 470, 423 P.2d 991 (1967).

16. N.M. Stat. Ann. § 59-10-12.12 (Supp. 1965): "injuries" . . . shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties . . . .

17. Medina v. New Mexico Consolidated Min. Co., 51 N.M. 493, 188 P.2d 343 (1947) (worker killed by a dynamite explosion in mine); Houston v. Lovington Storage Co., 75 N.M. 60, 400 P.2d 476 (1965) (employee found crushed under storage tank); Ensley v. Grace, 76 N.M. 691, 417 P.2d 885 (1966) (worker murdered by fellow employee).

II
PRE-EXISTING DISABILITY

The New Mexico Supreme Court[18] has followed the generally accepted rule that previous disability, even though it caused or contributed to the accident for which compensation is claimed, is not a bar to recovery under workmen's compensation; acceleration or aggravation of a pre-existing condition is also a compensable event.[19]

Illuminative of the whole area is the solution of claims made when workmen fall while on the job. In *Christensen v. Dysart,*[20] the decedent worker suffered a heart attack while standing on a platform; in falling to the ground he broke two ribs, punctured a lung, and died. The trial court determined that the fall, not the heart attack, was the cause of death, and awarded compensation. The New Mexico Supreme Court affirmed, preferring the rule: "if the injury was due to the fall the employer is liable even though the fall was caused by a pre-existing idiopathic condition."[21] In essence, the court says that all events prior to the moment of death are inconsequential; it is the cause of death that determines whether the worker's dependents will receive compensation.

The second case where a workman fell was in *Luvaul v. A. Ray Barker Motor Co.*[22] Here the workman apparently experienced an epileptic seizure while standing in his employer's garage. When he fell to the concrete floor he fractured his skull. The worker was denied compensation. Obviously his mistake was that he failed to hit some object of machinery or related work instruments in the path of his fall. The court stated the test for fall cases: "In what manner did the employment contribute to the hazard of the fall?"[23]

This test for fall cases is a useful one for all cases involving pre-existing disability. It could be paraphrased: in what manner did the

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18. Under N.M. Stat. Ann. § 16-7-8 (Supp. 1966), future appeals of workmen's compensation claims will be heard by the Court of Appeals rather than by the New Mexico Supreme Court.

19. For a general review see Annots., 19 A.L.R. 95 (1922) and 28 A.L.R. 204 (1924).

20. 42 N.M. 107, 76 P.2d 1 (1938).

21. *Id.* at 111-12, 76 P.2d at 4. For a good discussion of idiopathic fall cases, with emphasis on New Jersey law, see Note, 20 Rutgers L. Rev. 599 (1966).

22. 72 N.M. 447, 348 P.2d 885 (1963).

23. *Id.* at 455, 384 P.2d at 890. For a recent discussion of both *Christensen* and *Luvaul,* see Williams v. City of Gallup, 77 N.M. 286, 421 P.2d 804 (1966).

employment contribute to the hazard created by the pre-existing condition? Seemingly a "but for" test, the factors are reversed: "but for" the employment, the pre-existing condition would not have been aggravated or the pre-existing condition would not have been able to cause an industrial accident. The employer, on the other hand, argues unsuccessfully that he should not be charged with liability: "but for" the pre-existing condition there would have never been an accident.

For example, in *Reynolds v. Ruidoso Racing Association*,[24] there would not have been an injury at all had there not been a pre-existing bone disease. Reynolds was allowed compensation because the disease "combined with" the incident at work to produce the disability. Recovery of compensation was permitted also in *Webb v. New Mexico Publishing Co.*[25] where the soap supplied by the employer created an allergic skin condition. One employee was affected by the soap. This one employee, Webb, then sued for compensation for the disability resulting from using the soap.

The acceleration and aggravation cases are other examples of injuries that would not have occurred "but for" the pre-existing condition. Yet acceleration and aggravation cases, almost without question, are handled as though there were no prior physical condition that made the injury possible.[26] It is difficult to understand the distinction between acceleration or aggravation of a pre-existing condition and disability brought on at least in part because of a pre-existing situation. What is the value in labeling one disability an "aggravated pre-existing condition" and another disability a pre-existing condition combined with an accidental injury? In either case there would not have been any injury "but for" the pre-existing condition. With such analysis it becomes incomprehensible why courts should have no hesitation in awarding full compensation in the aggravation cases but a mental struggle justifying recovery in the "combined with" cases.

There are three New Mexico cases involving the significance, if any, to be given the fact that the worker's injury is actually an aggravation or acceleration of a pre-existing condition: *Gilbert v. E.B.*

24. 69 N.M. 248, 365 P.2d 671 (1961).
25. 47 N.M. 279, 141 P.2d 333 (1943).
26. See generally Annots., 19 A.L.R. 95 (1922) and 28 A.L.R. 204 (1924).

Law and Son, [27] *Seay v. Lea County Sand and Gravel Co.,*[28] and *Lucero v. C.R. Davis Contracting Co.*[29]

Gilbert was a case where pneumonia was found to have hastened a death by lung cancer; death by cancer was inevitable. The employer's liability remained the same—he paid full compensation as though the cancer were not in its terminal stages.[30] In *Seay* the workman had a history of back injuries; the injury on which he based his workmen's compensation claim was an aggravation of earlier back injuries. The employer was liable for the total present disability.[31] Finally, in *Lucero,* the workman, a childhood tuberculosis victim, was disabled by lung hemorrhages after breathing dust-laden air while at work. The employer paid for the present disability.

The results in *Seay* and *Lucero* are justifiable: the record shows that in each instance the employee had performed similar manual labor for years free of any physical disability.[32] However, in *Gilbert* there is a tinge of the problem in the fall cases; the worker had the good fortune to get his non-job-connected cancer connected with a job-related incident. It is an unfortunate workman, indeed, whose aggravation of a pre-existing condition occurs while off the job. What is rarely, if ever, discussed in the cases is the probability that any particular disability will be aggravated, regardless of the cause of the aggravation. Underlying the question of whether or not the job aggravated a pre-existing condition is an issue of fairness—fairness to all workmen—as well as fairness to the employer.

Where the "accident" occurs seems to be of greater significance than what caused it. If this were not true, there would be more claims based on job-related accidents that culminated and displayed themselves while the employee was at home or elsewhere. This is especially true in the heart attack cases. As long as *Webb v. New Mexico Publishing Co.*[33] allows employees to recover for a disability that is a gradual development of job-related events, then it would seem that a heart attack occurring at home should be just as compen-

27. 60 N.M. 101, 287 P.2d 992 (1955).
28. 60 N.M. 399, 292 P.2d 93 (1956).
29. 71 N.M. 11, 375 P. 2d 327 (1962).
30. 60 N.M. at 110, 287 P.2d at 998.
31. This is the conclusion suggested by instruction No. 13, approved by the Supreme Court. 60 N.M. 402-03, 292 P.2d at 95.
32. Seay, 60 N.M. at 402, 292 P.2d at 95; Lucero, 71 N.M. at 13, 375 P.2d at 328.
33. 47 N.M. 279, 141 P.2d 333 (1943). This point is discussed in note 7 *supra,* and accompanying text.

sable as a heart attack occurring at work.[34] It is strange that no reported New Mexico case has been found where the heart attack occurred away from the job site.

There is one notable case, *Salazar v. County of Bernalillo*,[35] involving an ultimately fatal cerebral hemorrhage that occurred several hours after the employee had a temper tantrum at work. Salazar, "a dedicated public servant," was overworked and emotionally strained; the stroke occurred while he attended a night meeting of the American Legion. Great emphasis was made in the trial court that Salazar was in the scope of his employment when the stroke occurred.[36] Such emphasis seems entirely unnecessary. If Salazar's stroke occurred as a result of overwork, where the stroke occurred was unimportant. It is more likely that the elaborate proof that attending a night meeting was a part of Salazar's job was thought necessary to overcome a strong defense that Salazar's stroke was the result of a normal progression of a non-job-related disease.

III
SUBSEQUENT INJURIES

When an employer knows that he will be liable for an injury sustained by one of his employees in the course of employment, even if the injury is traceable to a pre-existing condition, it is not surprising that he hesitates to hire a person having a known disability. The state, on the other hand, has an interest in seeing that all persons desiring to work and able to perform some tasks be considered for jobs available. The state wants to provide opportunities for handicapped people. The solution proposed by many states has been the "second injury fund" or the similar "subsequent injury fund."

Under the second injury concept the statute typically provides that where the employee has lost an eye, hand, arm, foot or leg prior

34. The heart attack cases where compensation was allowed all pinpointed some event at work just prior to the employee's attack: Little v. J. Korber & Co., 71 N.M. 294, 378 P.2d 119 (1963) (supervisor became upset over error made by sales clerk); Gray v. J. P. (Bum) Gibbins, Inc., 75 N.M. 584, 408 P.2d 506 (1965) (employee's job of cranking a motor required extraordinary exertion); Hathaway v. New Mexico State Police, 57 N.M. 747, 263 P.2d 690 (1953) (police captain led search party for fugitive); Teal v. Potash Co. of America, 60 N.M. 409, 292 P.2d 99 (1956) (workman became overheated on an unusually hot day); Sanchez v. Board of County Commissioners, 63 N.M. 85, 313 P.2d 1055 (1957) (employee was moving heavy boxes). In *Little, Gray,* and *Sanchez* the workmen had histories of prior heart trouble.

35. 69 N.M. 464, 368 P.2d 141 (1962).

36. 69 N.M. at 470-71, 368 P.2d at 145-46.

to employment, and he incurs an injury on the job, his employer is liable only for the amount of disability suffered in the later accident without regard to the earlier disability.[37] For example, while the loss of one hand may permit compensation for 125 weeks, being without both hands is a total permanent disability entitling the worker to compensation for 500 weeks.[38] The employer, knowing he will be liable for 500 weeks of compensation if his employee loses both hands, will not hire a person who has already lost one hand. The second injury plan prevents this discrimination against handicapped workers by providing that if the employer does hire a one-handed person who subsequently in the course of his employment loses his other hand, the employer is liable for the scheduled injury (loss of one hand is compensable for 125 weeks) and the second injury fund pays the remainder (375 weeks of compensation).[39]

When New Mexico enacted its first comprehensive Subsequent Injury Act in 1961,[40] it wisely shied away from the wording "eye, leg, arm, hand, foot." Instead, the legislature provided that any permanent physical impairment could form the basis for operation of the Subsequent Injury Act.[41] "Permanent physical impairment" was defined as "a permanent physical condition which is, or which

37. *E.g.*, Tenn. Code Ann. § 50-1927 (Repl. 1966); Me. Rev. Stat. Ann. tit. 39, § 57 (1964).

38. This example is based on the New Mexico schedule of injuries. N.M. Stat. Ann. §§ 59-10-18.2, -18.4 (Repl. 1960, Supp. 1965).

39. For a description of the operation of second injury funds, see Maxwell, *The Second Injury Laws,* 1959 Ins. L. J. 305; Doran, *Second Injury Fund,* 27 Texas B. J. 231 (1964); Herrington, *Workmen's Compensation—The Second Injury Fund,* 35 J. Kan. B. Ass'n 167 (1966); 10 Kan. L. Rev. 347 (1961); 2 Larson, Workmen's Compensation Law §§ 59.30 to -.34 (1961).

40. N.M. Laws 1961, ch. 134. For mention of efforts in 1959 to establish the second injury principle, see note 3 *supra.*

41. N.M. Stat. Ann § 59-10-134 (Supp. 1965): A. When an employee of an employer subject to the provisions of the Workmen's Compensation Act [59-10-1 to 59-10-37] who has a permanent physical impairment and who incurs a subsequent disability by accident arising out of and in the course of his employment, which results in a permanent disability, that is materially and substantially greater than that which would have resulted from the subsequent injury alone, then the employer or his insurance carrier shall pay awards of compensation for the combined condition of disability as provided in section 11 of this Subsequent Injury Act [59-10-136] and all medical and related expenses provided by the Workmen's Compensation Act [59-10-1 to 59-10-37]. B. If the subsequent disability of an employee with a permanent physical impairment results in his death, the employer or his insurance carrier shall pay the compensation for death according to section 11 of this Subsequent Injury Act, and all medical and related expenses, including funeral expenses, provided by the Workmen's Compensation Act. N.M. Stat. Ann. § 59-10-136 (Supp. 1965) provides that the liability for injury shall be apportioned between the employer and the fund, and the employer shall be reimbursed for any excess paid.

is likely to be, an obstacle to employment."[42] Under the plan, a worker has the percentage of his pre-existing physical impairment certified to the superintendent of insurance.[43] If the worker is then injured on the job, the employer, after paying the first eight weeks compensation plus medical expenses, pays compensation only for the disability adjudged to have arisen out of the latest employment accident; the fund pays the remainder.[44] The fund itself is derived from a lump sum paid by an employer when one of his employees dies leaving no dependent to claim a workmen's compensation benefit and from a percentage levy on employers.[45]

Thus far there have been no cases decided by the New Mexico appellate courts that construe the Subsequent Injury Act. A number of questions are raised by the wording of the act. Perhaps most serious is one touched upon in the discussion of the New Mexico pre-existing condition cases: what is the liability of the employer if there would not have been any accident at all had the employee been without the pre-existing condition? The New Mexico act seems to be without an answer.[46]

The act provides, under "liability for payment," that:

> In the event compensation benefits to which the employee is entitled from the fund have not been reduced to judgment at the time the employer or his insurance carrier's liability for payment has ceased, the employer or his insurance carrier shall continue to make the payments to which the workman is entitled and the judgment shall provide reimbursement for such sums paid by the employer for which the fund is adjudged liable.[47]

This section sounds very much as though the employer is required to predict correctly the outcome of a workmen's compensation claim in the courts. In any disputed case the employer will not know whether the employee will be found entitled to any compensation; he certainly will not know the total percentage of disability that may

42. N.M. Stat. Ann. § 59-10-128 (Supp. 1965).
43. N.M. Stat. Ann. § 59-10-133 (Supp. 1965).
44. N.M. Stat. Ann. § 59-10-136 (Supp. 1965), quoted in part in note 60 *infra*.
45. N.M. Stat. Ann. § 59-10-129 (Supp. 1965).
46. See N.M. Stat. Ann § 59-10-134 (Supp. 1965) quoted in note 41 *supra*. For examples of statutes that specifically make the state fund totally liable in this situation, see Kan. Gen. Stat. Ann. § 44-567 (1964); Minn. Stat. Ann. § 176.131 (1966); Ohio
47. N.M. Stat. Ann. § 59-10-136 (D) (Supp. 1965).

be found by the court and apportioned between the fund and the employer's insurer.

Both the act and the related New Mexico case law suggest an answer to the question of the proper way to calculate percentage disability. For example, if an employee has a twenty-five per cent permanent disability because of a childhood accident, and as a result of a work-connected accident he becomes disabled an additional fifty per cent, only thirty per cent of the disability being attributable to the subsequent injury itself, does the fund pay forty-five per cent disability (total present disability minus employer's liability) or twenty per cent disability (total present disability minus employer's liability minus the pre-existing percentage of disability)? The answer in New Mexico clearly would appear to be that the fund pays forty-five per cent disability (total present disability minus employer's liability).[48]

A more basic question about the Subsequent Injury Act is: does it do what it was intended to do? It was intended to encourage the employment of handicapped workers.[49] Whether it actually does so is questionable. Perhaps it is not unreasonable to take some of the pre-existing condition cases discussed earlier and consider what would have happened if the Subsequent Injury Act had been in effect and pleaded.

In *Christensen,* where the decedent suffered a heart attack and fell from a platform[50] (assuming here as in all cases discussed under subsequent injury provisions that the workman had certified his disability)[51] it is very likely that the employer would have paid the total compensation claim just as though there had been no pre-existing heart condition and no Subsequent Injury Act. This is because of a principle expressed in states having subsequent injury acts: if the injury itself was sufficient to cause death or total disability, the fund is not liable for any part of the settlement.[52] By the New Mexico court's finding that Christensen's fall, and not his heart attack, caused death, the employer becomes liable for the death.

48. Ryder v. Sandlin, 70 N.M. 377, 374 P.2d 133 (1962).

49. N.M. Stat. Ann. § 59-10-127 (Supp. 1965).

50. 42 N.M. 107, 76 P.2d 1 (1938). See text accompanying note 20 *supra.*

51. See text accompanying note 43 *supra.*

52. Torelli v. Robert Hall Clothes, 9 App. Div. 2d. 147, 194 N.Y.S.2d 221 (1959); Petroleum Maintenance Co. v. Herron, 201 Okla. 393, 206 P.2d 182 (1949); Jussila v. Department of Labor and Industries, 59 Wash. 2d 772, 370 P.2d 582 (1962). Cf. Superior Cafeteria and Lunch Co., Inc. v. Britton, 307 F.2d 663 (D.C. Cir. 1962).

In *Luvaul,* where the claimant fell to the concrete floor during an epileptic seizure,[53] the Subsequent Injury Act, again, would have made no difference; the same result would have been expected.

The Subsequent Injury Act would have made very little difference in *Reynolds v. Ruidoso Racing Association*[54] because Reynolds' bone condition was not discovered until after his accident; apparently the disease could not have been discovered by the routine examination envisioned by the New Mexico act as a prerequisite to certifying a pre-existing disability. In this connection it might be suggested that a medical assignment of a percentage disability at the time of hiring is useful because of the certainty it adds in calculating the employer's liability after a subsequent compensable accident, but a "pre-need" determination is disadvantageous to the employer where, as in *Reynolds,* the workman's disability could not be discovered during an examination preparatory to filing a disability certification with the Commissioner of Insurance. In such a situation the workman may have been certified as having no disability or a very small percentage of disability whereas in truth his hidden ailment is going to cause or lead to an accident. The employer will have the whole bill to pay. If there were no required prior assignment of a disability percentage, the workman whose hidden ailment led to the injury could get his total compensation from the fund rather than from the employer. That is, of course, assuming that New Mexico courts will rule that where a pre-existing condition caused the accident or made possible the accident, the subsequent injury fund is liable for the entire compensation award.[55]

The *Reynolds* problem would have been presented also by *Webb v. New Mexico Publishing Co.,* the soap allergy claim.[56] Webb did not know he was allergic to the soap provided by his employer until after months of use. The Subsequent Injury Act would not have relieved the employer of any liability.

It is predictable that New Mexico's Subsequent Injury Act would not shift liability in injury cases where the current employment aggravated or accelerated an old disease.[57] The courts of other states having subsequent injury acts have ruled that the employer is still

53. 72 N.M. 447, 384 P.2d 885 (1963). See text accompanying note 22 *supra.*

54. 69 N.M. 248, 365 P.2d 671 (1961). See text accompanying note 24 *supra.*

55. See note 46 *supra* and accompanying text.

56. 47 N.M. 279, 141 P.2d 333 (1943). See text accompanying note 25 *supra.*

57. The three "aggravation" cases are discussed in the text beginning at note 27 *supra.*

totally liable if his job aggravates or accelerates a pre-existing condition.[58] Such a result seems inconsistent with the raison d'être of a subsequent injury fund. Had there not been a pre-existing condition, albeit dormant, there would have been nothing to aggravate or accelerate. Perhaps the solution is to calculate a table of probabilities that a dormant condition will be aggravated, and then to assign a percentage of disability based on that probability.

The employer in *Salazar,* the case involving a cerebral hemorrhage death,[59] could have benefited from the Subsequent Injury Act. As noted earlier, the biggest issue was whether or not Salazar's stroke resulted from a natural progression of his disease. There was no dispute that Salazar had suffered from hypertension for years. Had the Subsequent Injury Act been available, the jury could have assigned some liability to the fund and some liability to the employer; without the act the jury had the choice of making the employer totally liable or denying Salazar's dependents any compensation.

The speculation on how various pre-existing condition cases would have been settled had some claim been made under the Subsequent Injury Act suggests these weaknesses in the act: (1) there is no assurance that an injury caused by a pre-existing condition will be compensated out of the subsequent injury fund; (2) the employer loses the benefits of the subsequent injury scheme if the workman's pre-existing condition was not discovered and certified to the commissioner of insurance, and (3) it is possible, indeed likely, that the employer will remain totally liable when the workman suffers an aggravation or acceleration of a prior condition.

With these weaknesses evident, one can suspect that the New Mexico Subsequent Injury Act as it presently exists is not able to really promote the hiring of handicapped workers. The employer first of all wants protection in the situation where there never would have been an accident at all had there not been the pre-existing condition. Also, the employer must doubt the efficacy of an act where failure to discover a medical condition precludes sharing liability with the subsequent injury fund.

Finally, a subject not mentioned earlier is the manner in which claims are settled. If claims are to be apportioned between the

58. Balash v. Harper, 3 N.J. 437, 70 A.2d 747 (1950); Rikala v. Rundquist Construction Co., 247 Minn. 401, 77 N.W.2d 551 (1956). See Herrington, *supra* note 39, at 170, 197.

59. 69 N.M. 464, 368 P.2d 141 (1962). See text accompanying note 35 *supra.*

employer and the subsequent injury fund,[60] the need for expertise is even greater than in the days when the determination of liability did not require any apportioning of liability between two opposing parties. Certainly as the job of settling workmen's compensation claims becomes more complex, there is greater justification for an administrative body abled to develop expertise through continual study of the liability to be assessed to various factors combining to create an injury. Someday New Mexico must make a successful attempt[61] to establish an administrative board to hear claims arising under various provisions of workmen's compensation.

CONCLUSION

The lack of an appellate court decisions construing the Subsequent Injury Act suggests that the act has not been discovered by New Mexico employers. As the foregoing discussion shows, there are numerous situations in which the act could be called upon to share liability for a compensable injury. It is true that the present act leaves open many questions, and frequently seems to do little to change or shift the liability. However, as the provisions of the act are used, improvement can come. Consequently, there is the hope that the subsequent injury fund will become an integral part of the workmen's compensation plan.

CLEOPATRA CAMPBELL*

60. N.M. Stat. Ann. § 59-10-136 (Supp. 1965):

F. The term "liability shall be apportioned by the judgment" means a judicial determination of the extent of an employer's or his insurance carrier's liability under the Workmen's Compensation Act without regard to any further and additional liability imposed upon him or it by the Subsequent Injury Act [59-10-126 to 59-10-138] and a further judicial determination of the benefits to which the employee is entitled to receive as compensation for the combined condition of disability.

61. For the demise of an unsuccessful attempt, see State *ex rel.* Hovey Concrete Products Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957).

* Member, Board of Editors, *Natural Resources Journal,* 1966-1967.