WORKMEN'S COMPENSATION

The Nebraska Supreme Court decided four significant workmen's compensation cases during the survey period. Crosby v. American Stores held that carpal tunnel syndrome is an accidental injury. Rowan v. University of Nebraska made an anomalous determination that injuries sustained at home by an art professor performing his duties as an art professor were not injuries within the scope of his employment. Duffy Brothers Construction Co. v. Pistone Builders, Inc. allowed a general contractor, who was jointly and severally liable by statute for injuries sustained by a subcontractor's employee, indemnification from the subcontractor. Finally, Novotny v. City of Omaha disallowed the City of Omaha the opportunity to offset its workmen's compensation benefits against its disability pension payments for civilian employees.

CROSBY v. AMERICAN STORES: REFINING THE DEFINITION OF ACCIDENT

INTRODUCTION

In Crosby v. American Stores, the Nebraska Supreme Court decided whether carpal tunnel syndrome is an accidental injury or an occupational disease. The court affirmed the lower court's finding that carpal tunnel syndrome is an accidental injury and officially adopted the repeated-trauma doctrine.

BACKGROUND

Carpal tunnel syndrome is a condition caused by repeated minor impacts which occur over a period of time and develop into a disabling injury. It is often difficult to determine under workmen's compensation laws whether such a condition should be clas-
sified as an accidental injury or occupational disease. Depending on which part of the statute is involved, the condition may fit either category or it may fit neither.

The problem of classification becomes evident considering the definitions of accidental injury and occupational disease. The elements of an accidental injury are the unexpectedness of the cause and result, and the definite time of cause and result. If both subparts, cause and result, of both elements, unexpectedness and definite time are present, accidental injury is clear. On the other hand, if no subpart of either element is present, the disability will be considered the result of an occupational disease. Between the polar situations of clear accidental injury and clear occupational disease there are many disabilities which resemble both accidental injuries and occupational diseases. The characterization of such disabilities has been frequently litigated in the workmen's compensation courts.

The repeated-impact doctrine has allowed many courts to treat such disabilities as accidental injuries. When both the cause and the effect of a disability are gradual, courts applying this doctrine have found accidental injury by treating each impact as a small accident which ultimately results in disability.

FACTS AND HOLDING

Donna Crosby had been employed in a Lincoln Nebraska meatpacking plant since 1963. On October 1, 1978, she was transferred to stack and record, where she was required to assemble boxes, to unload filled boxes, and to load those boxes onto wooden pallets. After the first day on the job, her hands grew sore and swollen and by December, she was experiencing numbness in her hands. In January 1979, she consulted a neurologist who diagnosed her condition as carpal tunnel syndrome.

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14. See Neb. Rev. Stat. § 48-101 (Reissue 1978); Neb. Rev. Stat. §§ 48-151(2) to -151(3) (Reissue 1978). The classification in this case would not have affected the recovery. However, the significance of the problem is highlighted when classifying similar types of injury. See note 25 and accompanying text supra.


17. 1B A. Larson, supra note 16, § 37.20 at 7-7.

18. That is, the disability is expected in certain kinds of work and is gradual in onset.

19. 1B A. Larson, supra note 16, § 37.20 at 7-7.

20. Id., § 39.40 at 7-310. The inception of the repeated-impact doctrine was in England in 1921. Id.

21. Id., § 39.10 at 7-278.

22. 207 Neb. at 252-53, 298 N.W.2d at 158.
She filed a workman's compensation claim and the evidence showed that the injury was caused by the use of her hands to strike the pallets and boxes in connection with her duties.\textsuperscript{23} The single-judge court classified the condition as an occupational disease and awarded compensation on that basis. Upon rehearing, the award was affirmed, but the court found the condition was an accidental injury resulting from repeated trauma to the plaintiff's hands, not an occupational disease.\textsuperscript{24}

\textbf{ANALYSIS}

Viewed from an historical perspective, the supreme court's adoption of the repeated impact doctrine appears to be the next logical step for Nebraska.\textsuperscript{25} In \textit{Brokaw v. Robinson},\textsuperscript{26} the first element in the definition of accidental injury, unexpectedness, was interpreted to mean either unexpected cause or unexpected result. The second element, definite time to establish suddenness,\textsuperscript{27} was clarified in \textit{Hayes v. McMullen},\textsuperscript{28} where snow blindness which developed over several hours was held to be a sufficiently sudden result to constitute an accident.\textsuperscript{29} The only remaining subpart, suddenness of cause, has been clarified in \textit{Crosby} by the court's adoption of the repeated-trauma doctrine.\textsuperscript{30} The court's decision in \textit{Crosby} seems to accord with the legislative intent to allow cover-

\begin{itemize}
\item \textsuperscript{23} \textit{Id.} at 253, 298 N.W.2d at 158.
\item \textsuperscript{24} \textit{Id.} at 253-54, 298 N.W.2d at 159.
\item \textsuperscript{25} In 1935, the Nebraska Supreme Court decided that when snow blindness resulted after twelve hours of clearing snow on a sunny day, the blindness was found to have been sufficiently sudden to constitute an accident, even though it took several hours for the condition to develop. \textit{Hayes v. McMullen}, 128 Neb. 432, 259 N.W. 165 (1935).
\item In 1963, \textit{NEB. REV. STAT.} § 48-151 (Reissue 1960) was amended, changing the definition of accident from "unexpected or unforeseen event" to "unexpected or unforeseen injury." L.B. 497, § 1(2) (4), 1963 Neb. Laws 1702-03 (emphasis added).
\item In 1969, when a farm laborer suffered a stroke after moving a portable cattle chute, the stroke was found to have been the result of accidental injury. Concerning the accident requirement, the Nebraska Supreme Court in \textit{Brokaw v. Robinson}, 183 Neb. 760, 164 N.W.2d 461 (1969) stated:

The change in the workmen's compensation statute clearly removes the necessity of finding a single, traumatic event as the cause of the injury. The "by accident" requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of accidental character, or if the effect was unforeseen, and happened suddenly and violently.
\item \textit{Id.} at 763, 164 N.W.2d at 464.
\item \textsuperscript{26} 183 Neb. at 763, 164 N.W.2d at 464.
\item \textsuperscript{27} See notes 6-7 and accompanying text \textit{supra}.
\item \textsuperscript{28} 128 Neb. 432, 259 N.W. 165 (1935).
\item \textsuperscript{29} \textit{Id.} at 436, 259 N.W. at 167.
\item \textsuperscript{30} 207 Neb. at 255, 298 N.W.2d at 159.
\end{itemize}
Adoption of the repeated-trauma doctrine, while it clarifies injury coverage does not lessen the plaintiff's burden of proving, first, that an injury occurred, second, that it was the proximate cause of the disability, and third, that it arose out of and in the course of employment. As the court stated in Brokaw and Crosby, "it is no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury." It seems unlikely, then that the court will apply the repeated-trauma doctrine in cases involving condition such as tendonitis, heart condition, or even carpal tunnel syndrome unless it is fairly clear that the injury was proximately caused by and was the result of the work activity.

ROWAN v. UNIVERSITY OF NEBRASKA: EMPLOYMENT ACTIVITIES IN EMPLOYEE'S HOME

INTRODUCTION

The court’s historically liberal construction of workmen's compensation policies were not broad enough to include a disability claim of a college art professor in Rowan v. University of Nebraska. The Supreme Court decided that injuries sustained in a home art studio did not come within the scope of employment, but not without a vigorous dissent.

BACKGROUND

A compensable injury must arise within a certain time, space, and course of activity in order to come within the scope of employment. Under the modern decisions, activities of employees are viewed in light of the employment environment, the customs of a particular employment, and the characteristics of human nature.

31. See Gradwohl, Workmen's Compensation: An Analysis of Nebraska's Revised "Accident" Requirement, 43 Neb. L. Rev. 27 (1963):

The overwhelming legislative purpose behind the 1963 amendment was to eliminate the arbitrary factual situations arising under the slip, trip or fall rules. . . . The injured workman who can prove factually that his employment caused him injury should be entitled to compensation regardless of whether the injury involved an internal body failure or external cause.

34. 207 Neb. 588, 299 N.W.2d 774 (1980).
35. Id. at 591, 299 N.W.2d at 776.
36. 1A A. LARSON, supra note 16, § 20.00 at 5-1.
37. Id.
Nebraska's decisions follow this trend to the extent that "whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved."38

When employment activities take place at home, rather than at the employer's business location, the work-relatedness of an injury presents significant evidentiary problems. Courts tend to view the situation with greater scrutiny. In viewing the home as a work place setting, it is fair to say that the home is within the course of employment activity, if it has become a regular situs of employment or if the injury occurs while some business activity is being carried on there.39

To establish the home as a place of employment generally, as opposed to the place where a particular work assignment is being done, courts which have considered the question examine three criteria: the quantity and regularity of work performed at home; the continuing presence of work equipment at home; and special circumstances that make it necessary to work at home.40

When work is being performed at home, the appropriateness of compensability is evident because of the direct link between the employment-related acts and the injury.41 For example, in *American Red Cross v. Wilson*,42 compensation was awarded by the Arkansas Supreme Court when a Red Cross director fell down her attic stairs.43 Among her duties was responsibility for providing Christmas decorations to various nursing homes.44 The court found that she was in the attic because of her duties and that the decorations would have had to be carried down sooner or later as part of her job.45 A more unusual situation was presented in *Ready's Shell Station & Cafe v. Ready*,46 decided by the Mississippi Supreme Court. In addition to the plaintiff's regular duties, she performed bookkeeping duties for her employer. She did the bookkeeping at home, with her employer's approval, and had a habit of doing the work on a sofa in the living room. One evening, while she was moving a gun from the sofa so that she could sit down, the gun went off and injured her hand.47 Even in those cir-

39. 1 A. Larson, supra note 16, § 18.34 at 4-278-79.
40. Id., § 18.32 at 4-267 (1978).
41. Id., § 18.34 at 4-276.
42. 257 Ark. 647, 519 S.W.2d 60 (1975).
43. Id. at —, 519 S.W.2d at 62.
44. Id.
45. Id. at —, 519 S.W.2d at 63.
46. 218 Miss. 80, 65 So. 2d 268 (1953).
47. Id. at —, 65 So. 2d at 269.
cumstances, the court affirmed the compensation award, albeit by a four to four decision. Once it has been established that the home premises are also the work premises, it follows that the hazards of the home become the hazards of employment.

FACTS AND HOLDING

Patrick Rowan was an art professor at the University of Nebraska at Lincoln (UNL), and was injured in a fall from a ladder while working in his private studio located in his home. As part of his employment, Rowan was required to do as much creative work as possible and was expected to devote approximately fifty hours a week to creative research, advising, and committee assignments. UNL did not require art professors to do creative work in any particular place. Rowan had used a UNL classroom for that purpose from 1976 to 1978. However, this was not a satisfactory arrangement for several reasons. In 1978, Rowan purchased a home with a separate art studio and began doing his work there. Rowan's supervisors knew he had begun to do the work at home and had made no objection. The issue before the supreme court was whether the evidence supported the lower court's decision that Rowan's injuries did not arise out of and in the course of employment. The court affirmed the decision of the lower court, holding as a matter of law that Professor Rowan's injury was not compensable.

ANALYSIS

The facts in the Rowan case were undisputed. Thus, it seems curious that the court chose to restrict the coverage of the Workmen's Compensation Act, since the court has consistently acknowledged the remedial nature of workmen's compensation law, and has sought to accomplish the act's purposes through liberal construction.

The basis for the Rowan decision is section 48-151(6) of the

48. Id. at —, 65 So. 2d at 272.
49. 1 A. Larson, supra note 16, § 18.34 at 4-277.
50. 207 Neb. at 589, 299 N.W.2d at 774.
51. Id. at 592, 299 N.W.2d at 776.
52. Id. at 590, 299 N.W.2d at 775.
53. Id. at 589, 299 N.W.2d at 775.
54. Id. at 590, 299 N.W.2d at 775.
55. Id. at 589, 299 N.W.2d at 775.
56. Id. at 592, 299 N.W.2d at 776.
Nebraska Revised Statutes. That provision essentially allows coverage for workmen so long as they are “in, on or about the premises where their duties are being performed, or where their service requires their presence. . . .” The court did not state that Rowan was not performing his duties in the studio when the injury occurred. It held only that Rowan's duties did not require him to work there. It is possible, then, that the statute was read by the court as “where duties are being performed and where their service requires their presence.” However, there seems to be no discernible basis for reading the limitation conjunctively when the statute clearly says “or.”

Aside from possible misconstruction of the word “or” in the statute, the facts clearly demonstrated that Rowan was required to do creative work and that his supervisors had no preference as to where the work was to be done. Yet, the court reasoned that Rowan could not be compensated because UNL did not require him to do the work at home, noting that Rowan had used classroom space for a time, unsatisfactory as it was.

The difficulty with the court's reasoning is two-fold. First, if his supervisors did not care where, how, or when Rowan did his creative work, it follows that it was also unconcerned with any liability flowing from the place or method Rowan selected. His supervisors knew that Rowan was working at home and that he had been working there since 1978. By imposing a restriction on Rowan that his employer did not impose, the majority comes very close to writing a contract for the parties which they did not write themselves. Second, the court seems to say that Rowan, having once improvised with unsatisfactory facilities, is forever relegated to them. Even under the best of conditions, such a conclusion is simply unrealistic.

Finally, the court's reliance on Meyer v. First National United Methodist Church is misplaced. The facts of Meyer are easily

58. 207 Neb. at 590, 299 N.W.2d at 775. Neb. Rev. Stat. § 48-151(6) (Reissue 1978) provides in pertinent part:

[P]ersonal injuries arising out of and in the course of employment [are declared] not to cover workmen except while engaged in, on or about the premises where their duties are being performed or where their service requires their presence as part of such service at the time of injury, and during the hours of service of such workmen.

Id.

60. 207 Neb. at 591, 299 N.W.2d at 776 (1980).
61. See note 58 supra.
62. 207 Neb. at 590, 299 N.W.2d at 775 (1980).
63. Id.
64. 206 Neb. 607, 294 N.W.2d 611 (1980).
distinguishable from Rowan. In Meyer, a lay pastor was required by the national church organization, but not by her employer, to meet certain educational requirements. During a leave of absence from her employment in Nebraska to attend a course in Kansas City, Meyer was struck by a car. The Nebraska employer had not set the educational requirements, had not required her attendance, and had not paid any of her expenses. In affirming dismissal of Meyer's claim, the court focused on the idea that educational and training programs have only indirect and incidental benefit to the employer. That was not the case in Rowan. Rowan's activity can hardly be considered indirect or incidental when UNL required him to do it, and indicated that approximately fifty hours a week should be spent to meet the requirement. The creative work was clearly substantial. UNL itself set the requirement, not a national board or council, and UNL paid shipping expenses to exhibit Rowan's work. Moreover it seems questionable whether an educational or training requirement like the one in Meyer can be viewed as analogous to the requirement made of Rowan.

The court emphasized that Rowan was not required by his employer to be at the place where the accident occurred. However, a specific rule of the employer is not necessary when the home is deemed a situs of employment, or when work is actually being done at home.

One explanation for the court's decision may be that the majority wanted to prevent a wave of future litigation demanding liability for injury in any work-activity nexus imaginable. Alternately, the majority may simply have been unwilling to thrust liability on an employer for the hazards of a place over which it neither had control nor had specifically approved. If UNL were required to extend protection to Rowan at home, then the same protection must be afforded all art professors. Problems would have been created in other areas: a history professor might find his

65. 207 Neb. at 591, 299 N.W.2d at 775.  
66. Id. at 608, 294 N.W.2d at 612.  
67. Id. at 609, 294 N.W.2d at 613.  
68. Id. at 611-12, 294 N.W.2d at 614.  
69. Part of Rowan's job was to show his work as often as possible, which demanded intense creativity.  
70. Of Rowan's 70-hour workweek, 18 to 21 hours were devoted to student contact. The remainder was to be spent in creative research, advising, and committee assignments.  
71. Id. at 590, 299 N.W.2d at 775.  
72. Id.  
73. See note 40 and accompanying text supra.  
74. See notes 41-46 and accompanying text supra.
home library more satisfactory for research than the UNL library, a secretary might find her home typewriter more satisfactory than the one provided by UNL, or a bookkeeper might acquire the habit of taking her ledgers home at night to work on the sofa. Obviously, UNL should not be expected to shoulder such extensive liability. Any concerns the majority may have had about extending liability too far, too fast may have been justified. However, since those concerns are absent from the opinion, it is impossible to say whether they were warranted in Rowan.

**DUFFY BROTHERS CONSTRUCTION CO. v. PISTONE BUILDERS, INC.: SUBCONTRACTOR'S INDEMNIFICATION OF CONTRACTOR FOR EMPLOYEE INJURIES**

**INTRODUCTION**

The decision in Duffy Brothers Construction Co. v. Pistone Builders, Inc. is a surprising development in Nebraska workmen's compensation law. The issue in Duffy was whether a general contractor, who was jointly and severally liable by statute for injuries sustained by a subcontractor's employee, was entitled to indemnification from the subcontractor.

**BACKGROUND**

The issue in the case turns on Nebraska's "statutory employer" provision. Nebraska is one of forty-three states with either a "statutory employer" or "contractor-under" statute. These statutes usually hold general contractors liable to the subcontractor's employer, or vice versa, to the subcontractor's employee.

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75. See notes 46-48 and accompanying text supra.
76. 207 Neb. 380, 299 N.W.2d 170 (1980).
77. NEB. REV. STAT. § 48-116 (Reissue 1978) provides that "employer," for workmen's compensation purposes, includes:

[Any] person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this act . . . and with the immediate employer [this person, firm or corporation] shall be jointly and severally liable to pay the compensation . . . and be subject to all the provisions of this act . . . [except when] the owner or principle contractor as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this act to injured workmen.

_Id._

78. 2A A. LARSON, supra note 16, § 72.31 at 14-47.
The general contractor's statutory liability is sometimes joint, sometimes primary, but usually secondary. Most statutes allow the general contractor who has been required to pay compensation to obtain reimbursement from the subcontractor.

Nebraska's "statutory employer" provision specifically calls for joint and several liability. While there is no provision for reimbursement, the statute does provide that a general contractor can protect himself from liability simply by requiring his subcontractor to obtain insurance.

The meaning of the statute becomes clear when the purposes behind the statute are examined. A primary purpose is to prevent evasion of compensation coverage by subcontracting the employer's work, sometimes called the antifraud objective. In other jurisdictions, the purpose is to protect employees of irresponsible and uninsured subcontractors. The responsible contractor has the power in choosing subcontractors to insist upon appropriate protection for their workers. Some statutes are viewed as designating the general contractor as a type of insurer or guarantor, having none of the immunities that go with the employer status such as immunity from common law suit. Another state regards its statute simply as part of the risk allocation in the construction process.

80. 1C A. Larson, supra note 16, § 49.11 at 9-2-3.
81. Id. at 9-3.
83. Id. This part of the Nebraska statute is unlike other "statutory employer" statutes which provide that the general contractor is liable but do not include a method of employer protection. See, e.g., Tennessee Workmen's Compensation Act, Tenn. Code Ann. § 50-915 (Bobbs-Merrill 1977): "A principal, or intermediate contractor, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors and engaged upon the subject matter of the contract to the same extent as the immediate employer. Id.

Nebraska's statutory language is unique. One treatise does not include it in the same classifications as the other "statutory employer" statutes, though it is acknowledged as achieving "roughly the same result." 1C A. Larson, supra note 16, § 49.11 at 9-3, n.1.
84. 1C A. Larson, supra note 16, § 49.00 at 9-1.
85. Note, Worker's Compensation Liability of Principal Employer for Injuries to Employees of His Contractors or Subcontractors, 1977 Wis. L. Rev. 185, 189.
86. 1C A. Larson, supra note 16, § 49.11 at 9-2, n.1.
87. Id. at 9-12.
88. Id. at 9-5.
FACTS AND HOLDING

Harry Spencer was employed by Pistone, the subcontractor, which had been hired on a job by Duffy, the general contractor.\footnote{207 Neb. at 361, 299 N.W.2d at 171.} Duffy did not require his subcontractor to obtain insurance.\footnote{Id. at 362.} After Spencer was injured on the job and was unable to work for fifteen weeks, Pistone continued to pay his full wages of $240 per week for the fifteen week period. Spencer filed a claim after learning Duffy carried workmen's compensation insurance. As a result, Spencer was awarded fifteen weeks of total temporary disability at $140 a week plus $2,140.33 in medical expenses.\footnote{Id. at 361.} Duffy then entered into an agreement with Spencer, under which Duffy paid him $2,140.33 in medical expenses awarded by the court and also paid him a lump sum of $3,339.00 in exchange for Spencer's assignment to Duffy of all rights stemming from the injury. Based upon that agreement and assignment, Duffy filed suit in district court, seeking indemnification against Pistone for the $5,529.33 it had paid to settle Spencer's claim.\footnote{Id. at 362.} The district court dismissed Duffy's petition, and Duffy appealed to the supreme court which upheld Duffy's claim.

ANALYSIS

The court noted that the Nebraska Workmen's Compensation Act contains no indemnification provision.\footnote{Id. at 363.} While it is true that Nebraska has no statutory provision regarding the indemnification of a general contractor, the absence of such a provision does not mean employer protection was overlooked by the legislature. The court failed to focus on the fact that Duffy did not require his subcontractor to carry workmen's compensation insurance. Had Duffy taken advantage of the provision allowing him to do so, the statute would have protected him from liability.

In the past, the court has consistently grounded its decisions upon the literal terms of the workmen's compensation statute. It has stated that the act creates new rights, remedies, and liabilities, and that the manner in which it operates is to be found within the legislation itself.\footnote{Shada v. Whitney, 172 Neb. 220, 109 N.W.2d 167 (1961).} The court has also noted that the act creates rights which did not exist at common law and that the legislature...
may place upon those rights such restrictions as it sees fit. Finally, the court has specifically interpreted section 48-116 of the act to mean that an owner-employer had a statutory duty to require a contractor to provide insurance protection.

Because of this long history of strict statutory construction, it is surprising that the court allowed indemnity as a remedy in this case. The court stated, however, that section 48-116 deals only with liability to the employee and in no way determines, as between employers, which one is primarily liable. In drawing that conclusion, the court relied on a 1929 Connecticut case, Johnson v. Mortenson and a 1963 Tennessee case, Tayloe Paper Co. v. Jameson. It is unclear why the court cited these cases for authority. At the time Tayloe Paper was decided, Tennessee contractors were held liable for injuries to an uninsured subcontractor's employee to the same extent that the subcontractor would be liable. Without adding an indemnification provision, there was no statutory method for the contractor to protect himself. That is not true of the Nebraska statute. At the time of the Johnson v. Mortenson decision, the Connecticut court noted that its statute imposed primary liability on both the contractor and the subcontractor, without any liability distinction between them. The court also noted that statutes from other jurisdictions provide that liability would attach to the principal, here the general contractor, only if the immediate employer, the subcontractor, were uninsured. However, this was not the case in Connecticut's statute at that time. On this basis, the court in Johnson held that indemnity would be allowed since "otherwise [the contractor] and his insurer have been obligated by the award... to pay compensation which logically and equitably should be made by... [the subcontractor], the only actual employer of the claimant." A similar rationale is used in Duffy. The principal contractor's liability attaches in Nebraska only if he fails to require insurance from his subcontractor, an occurrence which the contractor himself is able to con-

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98. 207 Neb. at 365, 299 N.W.2d at 173.
99. 110 Conn. 221, 147 A. 705 (1929).
100. 211 Tenn. 232, 364 S.W.2d 882 (1963).
101. See note 83 supra.
102. 110 Conn. at —, 147 A. at 707.
103. Id.
104. Id. at 708.
105. 207 Neb. at 365, 299 N.W.2d at 173.
To the extent that the Nebraska statute is dissimilar to those in Johnson and Tayloe Paper, there is little reason to follow them.

The Nebraska Legislature could have provided for indemnity or restitution among employers, but did not. If the remedies and liabilities under the act are exclusive, and if a method of protecting principals is present within the statute itself, it is difficult to understand why the court found it necessary to formulate still another protection in equity.107

The principle underlying a court's equity power is essentially justice by fairness rather than by strict legal rules.108 The inference is that when legal rules do not provide an adequate remedy, equitable remedies may be employed to prevent an unjust result.109 That was not the case in Pistone. The court awarded $2,140.33 in medical expenses and $2,100.00 for a total temporary disability. The subcontractor, Pistone, had paid full wages for the entire fifteen weeks, amounting to far more than the $2,100.00 court award for disability.110 That left Duffy responsible for the balance, $2,140.33.111 Had Duffy shared responsibility jointly with Pistone, each should have paid $2,120.17.

Duffy settled with Spencer for $5,479.33, believing that this amount included a settlement for permanent and temporary disabilities.112 But Duffy failed to file this settlement with the Workmen's Compensation Court, which is required for private compensation agreements to be given effect. Consequently, Duffy's right to indemnification from Pistone was limited to the amount of the unpaid award for medical bills.113 This amount represented the expense of Spencer's temporary disabilities only. Since Pistone had paid Spencer his salary, which was greater than the temporary disability award, Duffy could not be indemnified for the $5,479.33.114 Duffy's indemnification was limited to the $2,140.33 in medical expenses,115 and Spencer was allowed a windfall

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106. NEB. REV. STAT. § 48-116 makes the contractor liable to the workman except when he requires the subcontractor to obtain insurance. It follows that the subcontractor will meet such a demand if he wants the job. Otherwise, the contractor is free to select a different subcontractor. See note 80 supra.
107. See 207 Neb. at 365, 299 N.W.2d at 173.
108. BLACK'S LAW DICTIONARY 484 (5th ed. 1979).
109. Id.
110. See note 92 and accompanying text supra.
111. 207 Neb. at 366, 299 N.W.2d at 174.
112. Id. at 361-62, 299 N.W.2d at 171.
113. Id. at 366, 299 N.W.2d at 173.
114. Id. at 366-67, 299 N.W.2d at 174.
115. Id. at 366, 299 N.W.2d at 174.
It seems clear that Duffy's failure to file the settlement with the Workmen's Compensation Court prevented the court from indemnifying it for any disability paid under the settlement agreement, and resulted in Spencer's windfall. Furthermore, Duffy's omission may also allow Spencer to seek and receive additional money for permanent partial disability. In light of these circumstances, it appears inappropriate to grant relief based on equity to Duffy since Duffy acted in disregard of his statutory obligations, first, in failing to require insurance from Pistone and, second, by failing to have the settlement approved by the Workmen's Compensation Court. Based upon Duffy's omissions, there would have been no inequity in leaving the losses where the statute put them.

Given that the duty to insure and the duty to require insurance are both statutorily imposed, it is not clear how the omission of the duty to demand insurance is different in "character or kind of wrong" from the omission of the duty to seek court approval of a settlement so as to warrant indemnification. Nor is it clear why it was determined that Pistone was the only actual employer. It may have been because Pistone was Spencer's immediate employer and paid his wages. Alternatively, it may have been because Pistone controlled the workman, controlled the injury equipment, or controlled the workplace in general. It is unclear from the opinion whether indemnity would still apply if a contractor had more control over the workplace than Duffy had.

From a procedural standpoint, it is not clear whether the

116. Duffy's Net Cost After Indemnity:
$2140.33 medical expenses paid to Spencer,
minus $2140.33 indemnification fixed by the court,
plus $3339.00 lump sum paid to Spencer in exchange for right to sue Pistone,
Total, $3339.00, plus costs connected with litigation.

Pistone's Net Cost After Indemnity:
$3600.00 salary paid to Spencer during disability (though Pistone received credit for only $2100),
plus $2140.33 indemnification of Duffy fixed by the court,
Total, $5740.33.

Spencer's Benefit Before and After Indemnity:
$3600.00 full salary from Pistone during disability,
plus $2140.33 medical expenses awarded by the court,
plus $3339.00 lump sum payment from Duffy,
Total, $9079.33, compared with total court award of $4240.33.

These figures indicate that Spencer received a windfall of $4839.00 over the compensation award because Duffy paid $3339.00 in its settlement for permanent and partial disability while Pistone paid $3600.00 to Spencer in salary.

117. See notes 77 and 83 and accompanying text supra.

118. 207 Neb. at 364, 299 N.W.2d at 172.

119. Id. at 365, 299 N.W.2d at 173.
Workmen's Compensation Court will determine indemnity requests in future cases or whether that must be left to courts of general jurisdiction. The supreme court has simply articulated an equitable principle to be used in workmen's compensation cases. If the party claiming to be only secondarily liable must seek his remedy in a separate court action, as Duffy did, such a result seems inefficient and burdensome for all concerned. Moreover, the indemnity principle introduced may open the door to the very type of "fraud" (i.e., uninsured employers and contractors) that the statute seeks to prevent.

**NOVOTNY v. CITY OF OMAHA: OFFSETTING WAGE-LOSS BENEFITS**

**INTRODUCTION**

The issue in *Novotny v. City of Omaha* was the propriety of Omaha's attempts to offset its workmen's compensation payments against its disability pension payments for civilian employees. This case highlights a difficult problem in all types of wage-loss legislation: coordinating workmen's compensation acts with other wage-loss protections to form a single, harmonious system.

**BACKGROUND**

Workmen's compensation acts, being the forerunners of wage-loss legislation, do not provide for coordination with other wage-loss systems. Today, however, workmen's compensation is only one part of wage protection plan. The overall plan is designed to restore to a worker some portion—usually one-half to two-thirds—of his wages. Without coordination of the various systems, a worker may receive several sets of benefits at the same time and for the same loss, allowing him to receive more than his actual wage. The duplication of benefits can be controlled by offsetting benefits from one source against benefits from another source, the net result being no greater benefit than a worker's present wage.

At the federal level, social security disability benefits are offset by workmen's compensation benefits so that the total amount received by the disabled worker for any month does not exceed

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120. 207 Neb. 535, 299 N.W.2d 757 (1980).
121. *Id.*, at 539, 299 N.W.2d at 759.
123. See id.
124. *Id.,* § 97.10 at 18-9.
125. *Id.*
eighty percent of his average current earnings. At the state level, offsetting various wage protections by the amount of workmen's compensation benefits is also an accepted practice. Like many states, Nebraska's Workmen's Compensation Act was drafted with broad language prohibiting the reduction of workmen's compensation because of benefits received from other sources. In 1934, the Nebraska Supreme Court held that payment of pensions to firemen by metropolitan cities did not affect their benefits under the workmen's compensation act. In 1938, the court held that a Lincoln fireman was entitled to benefits under both the Workmen's Compensation Act and the Firemen's Pension Act, without regard to which benefits he chose to accept first. However, the Nebraska Legislature subsequently allowed fire and police pension benefits in primary cities and police pension ben-

127. 4 A. Larson, supra note 16, § 97.41 at 18.32.
No savings or insurance of the injured employee, or any contributions made by him to any benefit fund or protection association independent of this act shall be taken into consideration in determining the compensation to be paid thereunder; nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided, be considered in fixing compensation under this act.

Id.

Neb. Rev. Stat. § 48-147 (Reissue 1978) provides:
Nothing in this act shall affect any existing contract for employer's liability insurance, or affect the organization of any mutual or other insurance company, or any arrangement existing between employers and employees, providing for payment to such employees, their families, dependents or representatives, sick, accident or death benefit in addition to the compensation provided for by this act; but liability for compensation under this act shall not be reduced or affected by any insurance of the injured employee, or any contribution or other benefit whatsoever, due to or receive by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer, and in addition thereto, the right to enforce in his own name in the manner provided in section 48-146 the liability for such compensation; . . . No agreement by an employee to pay any portion of premium paid by his employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation as required by this act shall be valid . . .

In case of the temporary total disability of a firefighter or police officer received while in the line of duty . . . the disabled person shall be entitled to the benefits of the provisions with reference to pensions. All payments of pension or salary provided by this section shall be subject to deduction of amounts paid under the Nebraska Workmen's Compensation Act.

Id.
enefits in first-class cities (plans established by state statute) to be reduced by amounts received as workmen's compensation benefits. The offsetting of benefits has also been allowed in Nebraska when a provision of an automobile insurance policy excluded coverage to the extent that medical expenses were paid under any compensation or disability benefits law.

**FACTS AND HOLDING**

The City of Omaha is a self-insurer for workmen's compensation purposes and also provides its civilian employees with disability and service retirement pension benefits. Robert Novotny was a plumbing inspector for the city, earning $7.50 an hour, and was totally disabled in a work-related accident. The Workmen's Compensation Court awarded Novotny $100 a week for as long as he remained disabled. The city made injury-on-duty payments to him from January 28, 1977 to October 5, 1978; the city then began paying $100 a week as workmen's compensation. Novotny then applied for, and received, a disability pension from the city amounting to $889.84 a month, under a provision of the plan which stated that the disability "pension and other benefits, being in excess of benefits under workmen's compensation act, shall be in lieu thereof." When the city began making disability pension payments, it stopped making workmen's compensation payments. As a result, Novotny brought this action to enforce the compensation payments in addition to the disability pension payments already being made. The court held that Novotny was entitled to

132. **NEB. REV. STAT. § 16-335 (Cum. Supp. 1980)** provides in part:
In case any such police officer shall become permanently and totally disabled from accident or other cause, while in the line of duty . . . such police officer shall forthwith be placed on the roll of pensioned police officers at the regular retirement pension of fifty per cent of regular pay . . . . All payments of pension or salary provided by this section shall be subject to deduction of amounts paid under the Nebraska Workmen's Compensation Act.

**Id.**

134. **Id. at 535, 299 N.W.2d at 758.**
135. **Id. at 536, 299 N.W.2d at 758.**
136. **OMAHA, NEB. CODE § 22-35(b) (1980)** provides:
If it is medically demonstrated that the disability was sustained due to injuries or sickness arising out of the immediate or direct performance of a member's employment with the city, the member shall be paid, by the city, from its general fund, in addition to the disability retirement pension, all medical, surgical, and hospital expenses incurred as a result of such sickness or injury, but the pension and other benefits, being in excess of benefits under workmen's compensation act, shall be in lieu thereof.

**Id.**

137. **207 Neb. at 536, 299 N.W.2d at 758.**
both the $889.84 pension and workmen's compensation benefits.\textsuperscript{138}

\textbf{Analysis}

The disability pension provision of Omaha's city ordinance, specifically those provisions for disability benefits arising out of a work-related accident or sickness, were poorly drafted when compared to similar schemes.\textsuperscript{139} Omaha's disability plan calls for disability payments to be "in lieu of" workmen's compensation.\textsuperscript{140} Notwithstanding the misleading nature of that phrase, the Omaha plan did attempt to coordinate workmen's compensation benefits with the disability pension system since greater pension benefits are paid for work-related disabilities.\textsuperscript{141} It would seem that under the Omaha plan, regardless of whether Novotny received pension benefits reduced by workmen's compensation and then workmen's compensation by separate payment or both pension and workmen's compensation in one payment, he should still end up with $889.94, the amount determined by the city to fully compensate Novotny for his disability. Yet, neither the end result to Novotny nor the city's attempt to offset workmen's compensation benefits was ever discussed by the court.

Instead, the technical framework of the disability plan became the focal point of the opinion.\textsuperscript{142} The court seemed to indicate that the city's convoluted method of protecting disabled workers was

\textsuperscript{138} Id. at 539, 299 N.W.2d at 759.
\textsuperscript{139} See notes 126-33 and accompanying text supra.
\textsuperscript{140} Omaha, Neb. Code § 22-35(b) (1980); see note 136 supra.
\textsuperscript{141} Omaha, Neb. Code § 7.24125 (1979) provides in part:
\begin{quote}
Any member of the system who, while in the line of duty, has sustained or shall sustain injuries or sickness, arising out of the immediate or direct performance or discharge of his duty... shall receive a monthly accident disability pension... equal to fifty percent of his average final monthly compensation... but the pension... being in excess of benefits under the Workmen's Compensation Act, shall be in lieu thereof.
\end{quote}
\textit{Id.} Omaha Neb. Code § 7.24126 (1979) provides in part:
\begin{quote}
Any member of the system who has at least ten (10) years of service credit and has sustained or shall sustain injuries or sickness not arising out of the immediate or direct performance or discharge of his duty... shall receive a monthly disability pension... equal to the actuarial equivalent of the service retirement pension accrued as of the date of disability retirement.
\end{quote}
\textit{Id.}
\textsuperscript{142} The court specifically found that combining "disability retirement pension with service retirement pension and intermingling both with workmen's compensation payments, with all payments to be made from commingled contributions of employees and employer fails to protect and maintain the full and separate protection of the workmen's compensation act." 207 Neb. at 539, 299 N.W.2d at 759. Stated in this way, the obvious conclusion is that Omaha's plan unlawfully denies workmen's compensation benefits to its civilian employees in some way. This reading of the ordinance as a total denial of workmen's compensation benefits clearly makes the ordinance invalid under both the \textit{Shandy} and \textit{Steffensmeyer} cases. See notes
unacceptable because it did not specifically provide for workmen's compensation as a completely separate protection.\footnote{129-30 and accompanying text \textit{supra}. Furthermore, the court cited both of these cases with approval.} The court did not object to compensation given to Novotny but to the semantics of the plan.\footnote{207 Neb. at 539, 299 N.W.2d at 759.} As a result of the court's focus, Novotny ultimately received twenty-three dollars more a month in benefits than he had received in gross salary prior to the accident.\footnote{Id.}

The principle behind compensating individuals for lost wages was never intended to achieve such a result.\footnote{43. Novotny received $7.50 an hour at the time of the injury. See note 134 and accompanying text \textit{supra}. Based upon a 40-hour week, his gross monthly salary was $1,300.00. With this decision, his disability payment amounted to $433.33 a month for workmen's compensation ($100 a week x 4.33 weeks) plus $889.84 for disability pension, making a total disability benefit of $1323.17 each month.} It is reasonable to assume that there will be little incentive for a worker to rehabilitate himself in order to return to work when he can receive more money by being disabled.

Faced with nearly the identical double recovery situation, other jurisdictions resolved the problem differently. For example, the California workmen's compensation statute contains a provision which prohibits employees from contributing to the cost of compensation.\footnote{44. Id.} In \textit{City of Los Angeles v. Industrial Accident Commission},\footnote{47. See note 122-25 and accompanying text \textit{supra}.} the City of Los Angeles, like Omaha, had a pension and disability plan which provided that disability payments were to be "construed to be and shall be" payments of workmen's compensation.\footnote{45. Id. at 242, 464 P.2d 801, 46 Cal. Rptr. at 97 (1965).} Under the plan, deductions from employees' salaries, together with tax money, combined to supply the fund out of which benefits were paid.\footnote{48. 63 Cal. 2d 242, 404 P.2d 801, 46 Cal. Rptr. 97 (1965).} The California Supreme Court held that, because of the noncontributory language of the state law, the city could not offset that part of the disability payment that came from employee contributions. However, the city was allowed an offset equal to its percentage of contribution to the total pension fund.\footnote{49. Id. at --, 404 P.2d at 803, 46 Cal. Rptr. at 99.} The California result mirrors the British viewpoint expressed at a similar stage in the history of its wage-loss legislation. The British act provided only for deduction of benefits received from the employer in fixing compensation, including benefits supplied

\footnote{50. Id. at --, 404 P.2d at 803, 46 Cal. Rptr. at 99.}
from a pension plan unilaterally financed by the employer. Never-
theless, judicial allowance was made for the employer's portion of
the contribution when the pension fund was comprised of both em-
ployer and employee contributions.\textsuperscript{152}

To understand what the court found so offensive about
Omaha's disability plan, it is helpful to compare Omaha's disabil-
ity plan with one that is statutorily acceptable in Nebraska (fire-
men and policemen pensions)\textsuperscript{153} and one that is federally
acceptable (social security).\textsuperscript{154} By comparing the state and federal
disability plans with each other and then with the court's objection
to the Omaha scheme,\textsuperscript{155} it becomes clear that the Omaha plan is
not as unreasonable as the court found it to be.

The court objected to the Omaha plan because it intermingles
both pension plans with the workmen compensation payments.
The Omaha plan is unique in this respect, at least when compared
with the other two. Nevertheless, both the firemen's disability
pension and social security disability pension,\textsuperscript{156} like the Omaha
pension, are reduced by the amount of any workmen's compensa-
tion award. Thus, a fireman seems to be penalized by not receiving
full pension benefits because of the workmen's compensation de-
duction. Likewise, a disabled social security recipient is penalized
when workmen's compensation benefits are deducted from the to-
tal social security benefit. Such a person would end up receiving
less directly from the pension fund (or social security disability
fund) than would another whose disability was not work-re-
related.\textsuperscript{157} Yet, the constitutionality of this reduction of benefits has
been upheld. This difference in treatment can be readily ex-
plained once it is recognized that workmen's compensation is one
part of a system designed to prevent total wage loss, rather than
something resembling a recovery in tort or a private accident
policy.\textsuperscript{158}

If the purpose of the system is to restore a portion of lost

\begin{itemize}
  \item \textsuperscript{152} A. Larson, supra note 16, § 97.51 at 18-52.
  \item \textsuperscript{153} Neb. Rev. Stat. §§ 15-1001 to -1006 (Reissue 1978).
  \item \textsuperscript{154} See note 126 and accompanying text supra.
  \item \textsuperscript{155} See note 142 supra. Essentially, the court found three flaws in the Omaha
Plan: (1) disability and service retirement pensions were combined; (2) both pen-
sions were combined with workmen's compensation; and (3) all payments were to
be made from joint employer-employee contributions. 207 Neb. at 539, 299 N.W.2d at
759.
  \item \textsuperscript{156} See note 136 and accompanying text supra.
  \item \textsuperscript{157} A work-related disability would result in less return on the overall em-
ployee contribution than would a nonwork-related disability. Such a result gives
the appearance of a penalty until it is viewed in light of the underlying purpose of
legislative wage protections.
  \item \textsuperscript{158} See notes 122-25 and accompanying text supra.
\end{itemize}
workmen’s compensation purposes, it makes little practical difference whether its share of pension contributions and its reserve for compensation claims are kept in separate accounts or commingled. By separating them, the pension account would simply be reduced by the amount paid as workmen’s compensation through offset. By integrating them, a single equitable benefit is paid which produces the same result with more efficient administration.

The third part of the court’s objection, then commingled contributions of employer and employee are used to make all benefit payments, is confusing. Commingled contributions are used for each of the three plans being compared. Under social security, for example, both employer and employee contribute 50% to the fund. Contributions under the Omaha plan, however, are graduated, which in Novotny’s case resulted in a 69% employer – 31% employee contribution ratio. Recognizing that under the social security plan, benefits are reduced by workmen’s compensation payments, even though the employee’s contribution to the social security fund is equal to that of the employer, it is not clear why an offset was not proper in the city’s plan, particularly when the ratio of Omaha’s contribution was twice that of Novotny’s.

At the very least, a solution such as that used in City of Los Angeles v. Industrial Accident Commission is appropriate here. It does seem that Omaha’s plan can be interpreted as being harmonious with the workmen’s compensation act, and thus it remains unclear why the court would allow double recovery to Novotny.

Had the city reduced its contribution to the pension fund so that the result was a fifty-fifty ratio by employer and employee, it could have placed the remaining amount in a separate account for workmen’s compensation claims only. This may have eliminated the commingled contribution problem in the court’s mind. Then the total pension fund would be smaller, which would mean proportionately smaller benefits to the employee and further reduction for the amount paid as workmen’s compensation, if applicable.

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159. 4 A. Larson, supra note 16, § 97.32 at 18-17.
Because of this decision, a change in the plan may be in order concerning those employees whose rights have not yet vested.

A literal reading of the Omaha ordinance, when compared to the state statute, does make it incompatible with the state's provisions.\(^{162}\) By drafting the ordinance as it did, however, Omaha placed the court in an awkward position. It is curious why the city allowed itself to give even the facial appearance of trying to supplant workmen's compensation by using the words "in lieu of." The plan appears to have attempted an offset provision and although this attempt is convoluted, offset is an accepted concept in this state.\(^{163}\)

The court's reaction to the Omaha disability provision,\(^{164}\) though technically justified, seems to twist the idea of fairness. The ramifications of the *Novotny* decision could be staggering. Those city employees currently receiving work-related disability pensions may also be entitled to recover all back payments awarded for workmen's compensation, even though the workmen's compensation award was figured into the pension benefit they received. If there is a substantial number of individuals in this situation or if they have been disabled for many years the city's financial burden may be great. The City of Omaha should heed the warning in this case before further change is imposed on the compensation principle.\(^{165}\)

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162. Compare note 128 with note 136 supra.
163. See notes 131-33 and accompanying text supra.
164. See note 122 and accompanying text supra.
165. See note 122 and accompanying text supra.