just, speedy, and inexpensive determination of every action."[29] The application of Rule 4(f) serves this purpose without serious inconvenience to corporate defendants.

Workmen's Compensation Acts—Compensation—Right of Claimant Previously Compensated by Lump Sum Settlement for Permanent Total Disability to Compensation for Subsequent Injury—[Washington].—The claimant sustained a serious injury to his back in 1933 while engaged in extrahazardous employment and in 1938 was classified under the Washington Workmen's Compensation Act as permanently and totally disabled.[1] A monthly pension was awarded,[2] but upon the petition of the claimant and his wife this pension was converted into a lump sum payment under Section 7681 of the act.[3] Although this settlement was made in good faith, the claimant subsequently recovered sufficiently to return to extrahazardous employment with another employer, in whose service he received an injury to his hand in 1939. The Supervisor of Industrial Insurance rejected his claim for compensation for the hand injury, but upon a rehearing the Joint Board of the Department of Labor and Industries reversed this decision. The superior court affirmed the Joint Board's finding for the claimant. On appeal the supreme court *held*, that the claimant could not, in legal effect, be further disabled, since he had already received the "highest disability rating" and the maximum compensation allowable under the act. Judgment reversed, one justice dissenting. *Harrington v. Dept. of Labor and Industries.*[4]

Consideration of the Washington Workmen's Compensation Act is particularly important because the few cases from other states involving the same problem were decided under diverse statutes.[5] The claimant in the instant case requested an additional

[29] 28 U.S.C.A. foll. § 723c (1941).

[1] The provision under which the claimant was classified defines permanent total disability as ". . . . loss of both legs, or arms, of one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation." Wash. Rev. Stat. Ann. (Remington, 1932) § 7679(b).

[2] Such a monthly pension award is payable only during the period of disability. Wash. Rev. Stat. Ann. (Remington, 1932) § 7679(b).

[3] Upon the written application of the beneficiary and within the discretion of the Department of Labor and Industries, a monthly pension for permanent total disability may be converted to a lump sum payment which shall be equal or proportionate to the value of the annuity then remaining, but in no case to exceed the sum of $4,000. Wash. Rev. Stat. Ann. (Remington, 1932) § 7681. The claimant received a permanent partial disability award of $600.00, a pension payment of $36.56, and a permanent total disability award of $3,363.43, making a total of $3,999.99.

[4] 113 P. (2d) 518 (Wash. 1941).

[5] Compensation for further injuries was denied claimants still receiving pension payments under prior permanent total disability awards in Ingram v. Rainey, Inc., 127 Pa. Super. 481, 193 Atl. 335 (1937), construing Pa. Stat. Ann. (Purdon, 1939) tit. 77, §§ 511–13, and in Van Tassel v. Basic Refractories Corp., 216 App. Div. 774, 214 N.Y. Supp. 491 (1926), construing the New York Workmen's Compensation Law, N.Y.L. 1922, c. 615, discussed note 11 infra. But a workman previously awarded the maximum payments allowable under the Oklahoma Workmen's Compensation Act nevertheless received an award for temporary total disability upon a second injury. Asplund Construction Co. v. State Industrial Com'n, 185 Okla. 171, 90

award under Section 7679(g), which provides: "Should a further accident occur to a workman who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries and his past receipt of money under this act." The description of the workman to whom this section applies is somewhat ambiguous because lump sum payments are authorized, "under this act," for both permanent partial disability, in Section 7679(f), and permanent total disability, in Section 7681. Although the court is not troubled by this ambiguity, it may be argued that the legislature did not intend that the recipient of a lump sum award under Section 7681 should receive a subsequent award, because it defined permanent total disability as permanent incapacity for "performing any work at any gainful occupation."[6] Had the legislature really intended such a restriction, however, it seems that the phrase "under this *section*" would have been substituted for "under this *act*" in the first and last clauses of Section 7679(g).[7]

The provision that future compensation shall be awarded to a workman ". . . . with regard to the combined effect of his injuries and his past receipt of money under this act" appears to be a test which the department must apply,[8] subject to court review.[9]

P. (2d) 642 (1939). The Oklahoma act provided: "The fact that an employee has suffered previous disability, or received compensation therefor, shall not preclude him from compensation for a later injury; but in determining compensation for the later injury his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury." Okla. Stat. (Harlow, 1931) § 13356(6). It is noteworthy that this provision distinguishes between previous disability and previous receipt of compensation, but permits an award for a later injury in either case.

[6] The term "permanent total disability" is somewhat misleading, since several provisions of the Washington act indicate that such disability may be neither permanent nor total. This is indicated by the section which provides that monthly pension payments for permanent total disability shall continue during the "period of such disability." Wash. Rev. Stat. Ann. (Remington, 1932) § 7679(b). Furthermore, the first portion of the definition of permanent total disability as the loss of specified limbs or functions is inconsistent with the latter portion of the definition as any disability resulting in permanent incapacity for gainful employment. For instance, a workman might be disabled by the loss of both legs and still be able to perform some work in a gainful employment. Note 1 supra.

[7] The requirement that "future compensation shall be adjudged according to the other provisions of this section" seems to indicate, not that one of the awards described in § 7679 must be made, but that if an award is made the schedules of that section shall determine its amount.

[8] The instant case represents the first application of this test to the claim of the recipient of a previous lump sum award for permanent total disability for compensation for a later injury. Previous applications of this test by the Washington supreme court had been made only to claims for additional compensation by recipients of lump sum awards for permanent partial disability. For instance, it has been held that the recovery of one award for permanent partial disability does not preclude the recovery of a second award for a subsequent injury to another member, causing further permanent partial disability. Klippert v. Industrial Insurance Dept., 114 Wash. 525, 196 Pac. 17 (1921).

[9] An appeal from the department's disposition of a compensation claim may be taken, within a specified period, to a superior court. Only those questions of law or fact included in the application for the rehearing by the department or in the record of the department may be presented on appeal, but the proceedings as to such questions are "de novo," except that evi-

In determining the "effect of his injuries" the court held, in the principal case, that the legal effect of the previous injury was to render the claimant permanently and totally disabled. A more realistic conclusion would seem to be that the previous injury created the illusion of permanent total disability when only temporary total disability existed. In considering the claimant's "past receipt of money" the court held that the statutory maximum had already been awarded. But it may be urged that a lump sum payment for permanent total disability was not intended to be the statutory maximum, since Section 7679(g) also provides that a full pension for permanent total disability shall be given despite a prior lump sum award for permanent partial disability resulting from a previous injury.[10] The court emphasized that an additional award would constitute double recovery.[11] It might even have been argued that the claimant had already received more than his due. But it is improbable that the department could have reopened the case to regain the claimant's "windfall."[12] Moreover, it has been

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dence not offered at the hearing or contained in the department's record may not be considered. Upon such appeal, "If the court shall determine that the department has acted within its power and has correctly construed the law and found the facts, the decision of the department shall be confirmed; otherwise, it shall be reversed or modified." The department's decision shall be prima facie correct and the burden of proof shall be upon the party attacking it. Wash. Rev. Stat. Ann. (Remington, 1932) § 7697.

[10] Since no deduction of a previous lump sum award for permanent partial disability can be made from a pension award for permanent total disability, it would seem that none could be made from a lump sum payment for permanent total disability, since the amount of the latter lump sum payment depends upon the value of the pension awarded. This section has been held to preclude deducting a previous permanent partial disability award from a permanent total disability award when the same injury was responsible for both disabilities. Arnold v. Dept. of Labor and Industries, 168 Wash. 300, 11 P. (2d) 825 (1932); Dry v. Dept. of Labor and Industries, 180 Wash. 92, 39 P. (2d) 609 (1934); Seagraves v. Dept. of Labor and Industries, 185 Wash. 333, 54 P. (2d) 1010 (1936). In the instant case, however, an award for permanent partial disability was deducted from the maximum lump sum payment which the claimant could have received. Note 3 supra.

[11] Similar arguments have been emphasized in analogous cases supporting the court's position. It has been held that a claimant still receiving periodic compensation for a prior permanent total disability award was ". . . . obviously . . . . incapable of being again totally disabled" and that as long as the first award stood no further award could be made. Van Tassel v. Basic Refractories Corp., 216 App. Div. 774, 214 N.Y. Supp. 491 (1926). Cf. Ingram v. Rainey, Inc., 127 Pa. Super. 481, 193 Atl. 335 (1937). In both these cases periodic compensation payments were being made at the time of the second injury, and an additional award would have brought the total payments for both awards above the statutory maximum. However, an Oklahoma workman receiving weekly payments under a permanent partial disability award was given an award for a subsequent injury although the weekly payments then exceeded the statutory maximum. Constantin Refining Co. v. Crockett, 87 Okla. 24, 208 Pac. 788 (1922).

[12] An effort by the department to reopen another case on the ground that a mistake of fact had led to an excessive lump sum payment for permanent partial disability was unsuccessful. The court emphasized that the department's proceedings under the statute were quasi-judicial and that there was no showing that the department lacked the facilities, at the time of the prior award, for determining the extent and duration of disability. State ex rel. Dunbar v. Olson, 172 Wash. 424, 20 P. (2d) 850 (1933).

held under a similar statute that the retention of a similar windfall does not preclude compensation for a subsequent injury.[13]

The court's decision in the instant case may reflect a distrust of lump sum settlements.[14] It may be contended that an opposite holding would encourage fraudulent lump sum settlements since such an award to a malingerer would not preclude additional awards for subsequent "injuries." Such an abuse would be less likely under a monthly pension award, which could be terminated upon the claimant's recovery.[15] Although the claimant in the principal case acted in good faith in electing a lump sum settlement it may be said that he accepted the risk of a non-compensable injury in the event of returning to extrahazardous employment upon recovery.[16]

The court's decision may be criticized, on the other hand, as a probable deterrent to future manifestations of initiative such as that indicated by the claimant's return to work. While the inadequacy of the income from an invested lump sum settlement would be an incentive to return to work if possible, this effect might be more than offset by the risk of incurring an expensive injury. Although a workman might seek work despite such a risk, employers might well hesitate to employ him because of the burden of defending even an unsuccessful common law action brought by the workman after receiving a non-compensable injury.[17] Should such a workman secure employment, as did the claimant, it would seem that the payments to the state insurance fund by his second employer, like the payments on a second private insurance policy, entitle him to compensation if injured.[18] This argument seems stronger if the workman

[13] A recipient of a lump sum payment for the complete loss of an eye has later been allowed a second award for the loss of the same eye in a subsequent injury. His attempt to obtain the second award did not violate equity's requirement of "clean hands" because the first award was made for a different injury, received in the service of a different employer. Williams v. S. & W. Construction Co., 167 Tenn. 84, 66 S.W. (2d) 992 (1934).

[14] For a discussion of the general distrust of lump sum settlements when periodic compensation is an available alternative, consult Dodd, Administration of Workmen's Compensation 719–36 (1936); Zorbaugh, Recent Tendencies in Administration of Lump Sum Settlements under Workmen's Compensation Laws, 18 Am. Lab. Legis. Rev. 112 (1928).

[15] Two provisions of the act indicate that upon a workman's recovery his monthly pension award could be decreased or terminated. Monthly pension payments for permanent total disability are payable only "during the period of such disability." Wash. Rev. Stat. Ann. (Remington, 1932) § 7679(b). It is also provided that "if aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated," the Director of Labor and Industries may readjust the rate of compensation for further application. Wash. Rev. Stat. Ann. (Remington, 1932) § 7679(h).

[16] If the claimant had accepted the monthly pension award and this award had been terminated upon his return to work, it seems that a subsequent injury should be compensable, since the court's objections to recovery in the instant case would be inapplicable.

[17] If an injury is within the scope of the Workmen's Compensation Act, the common law rights of the parties are thereby superseded. A claim for which no expressed or implied statutory provision can be found may be prosecuted outside the Workmen's Compensation Act. Cf. Francis v. Carolina Wood Turning Co., 208 N.C. 517, 181 S.E. 628 (1935), noted in 14 N.C. L. Rev. 199 (1936); Murray v. Wasatch Grading Co., 73 Utah 430, 274 Pac. 940 (1929).

[18] If a workman were to insure against the risk of becoming permanently and totally disabled, and later, in good faith, to accept payment under the mistaken assumption that such

is hired by a different employer,[19] but even if he were re-hired by the employer in whose service he was first injured it would seem that upon a second injury he should receive the compensation to which a new employee in his place would have been entitled.[20]

The workmen's compensation acts of several states contain provisions for the physical and vocational rehabilitation of disabled workmen.[21] If such provisions were combined with the prohibition of a lump sum settlement in any case in which the possibility of recovery remained, the undesirable results of mistake as to the duration and extent of disability would be avoided.

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disability had been incurred, it should then be possible, upon recovery, to insure against the occurrence of another disability and upon its occurrence to receive payment for it.

[19] Authority for distinguishing between successive injuries in the service of the same employer and of different employers and for allowing compensation in the latter situation can be found in Williams v. S. & W. Construction Co., 167 Tenn. 84, 66 S.W. (2d) 992 (1934), discussed note 13 supra.

[20] Washington employers engaged in extrahazardous occupations make payments to a state insurance fund on the basis of their total payroll and cost experience. Wash. Rev. Stat. Ann. (Remington, 1932) § 7676. It might seem unfair that the rate of an employer's payments to the state insurance fund, already increased by an employee's receipt of a permanent total disability award, should be again increased following the same employee's return to work and subsequent injury. Since this result would follow the injury of a different employee, however, there seems to be no justification for discriminating against an employee who returns to work after recovering from a previous injury in the service of the same employer.

[21] Dodd, Administration of Workmen's Compensation 712–19 (1936); Kessler, Accidental Injuries 662–96 (1932).