or not, based on the average cost of supplying all independents; likewise, fixed allowances were allotted to all chains, warranted or not. Thus an independent which conceivably could be a larger operation than an individual store of a chain is a priori discriminated against. Therefore, no matter how voluminous the cost study is in attempting to justify the price differences, it will be to no avail since the defense is defective conceptually.

Cost justification, by its nature, is a difficult defense. As Mr. Justice Frankfurter said in *Automatic Canteen v. FTC*, "Cost Justification, being what it is, too often no one can ascertain whether a price is cost justified."[13] The statement appears amply justified by the realistic problems of cost accounting. Functional costs, for example, may be allocated to customer groups if three principles are followed: (1) The discount class must not be too large; (2) The boundaries between the customer classes must be reasonably placed, *i.e.*, where costs change most conspicuously; (3) No class should receive a discount which is excessive as compared with another class.[14] These costs, however, which are to be compared for defense purposes are not always apparent. They should take into account every allowance, rebate, discount, etc., or in sum, all financial considerations which pass from seller to buyer. The accounting problems, therefore, are visibly superimposed on the basic legal problems underlying the cost justification proviso.

The impact of the *Borden* decision is that *no* cost analysis constructed on the basis of a customer classification by ownership and providing *average* costs for the resulting groups can be used to justify discriminations among customers regardless of the actual costs of doing business with each. No matter how detailed the accounting justification, the defense will fail because of the incipient defect.

J. NORMAN BAKER

Workmen's Compensation—Second Injury Fund—Accessibility Requirements When Second Injury Follows Latent Disability.—*Pittson Stevedoring Corp. v. Hughes*.[1]—The claimant, while employed as a longshoreman by Nessa Corp., sustained an injury to his back. A compensation order found him to be totally disabled from January 30 until February 26, 1952 and partially disabled from February 27, 1952 to June 14, 1953. On June 13, 1953 the claimant, while working as a longshoreman for the Pittson Company, sustained a second injury to his back and in a subsequent compensation order was found to be totally disabled from June 15, 1953 to November 25, 1954 and partially disabled from November 26, 1954 to April 4, 1957. Each of the insurance carriers, on behalf of its insured employer, continued to make bi-weekly payments pursuant to the compensation award until each had paid to the claimant the sum of $10,000, the statutory limit at the time of the accident for permanent partial disability. The claimant then made applica-

[13] 346 U.S. 61, 79 (1953).

[14] See Freer, Accounting Problems Under the Robinson-Patman Act, 65 J. Accountancy 480 (1938).

[1] 198 F. Supp. 657 (E.D.N.Y. 1961).

tion for a reconsideration of his case claiming that he was permanently and totally disabled due to a change in his physical condition which occurred since the hearing of April 4, 1957. The Deputy Commissioner found that "as a result of the combined effects of" the two injuries the claimant was permanently and totally disabled from engaging in gainful employment. He held the two employers or insurance carriers jointly liable for permanent total disability and directed each to pay the claimant fifty per cent of the maximum weekly compensation from that date, and during the continuance of the claimant's total disability. The employers contended that by reason of the fact that claimant's total disability is the combined result of both accidents, each of which resulted in only partial disability, the permanent total disability payments should be paid out of the Second Injury Fund pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.[2] HELD: The Deputy Commissioner erred when he directed that both employers were jointly liable for permanent total disability. Awards should be made from the Second Injury Fund where an injury aggravates disability caused by a prior injury of any kind.

Second Injury Fund provisions have found their way into the workmen's compensation schemes of some forty-four states.[3] Their primary purpose is to facilitate the employment of the physically handicapped by means of economic incentives offered to the employer.[4] Second Injury Fund laws

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[2] 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-45, 947-50 (1958).

[3] Ala. Code tit. 26, § 288(1) (1958); Ariz. Rev. Stat. Ann. § 23-1065(3) (1956); Ark. Stat. § 81-1313f (1947); Cal. Lab. Code Ann. § 4755 (1955); Colo. Rev. Stat. Ann. § 81-12-7 (1953); Conn. Gen. Stat. Ann. § 31-216 (1958); Del. Code Ann. tit. 19, § 2327 (1953); Fla. Stat. Ann. § 440.15(5)(d) (1959); Hawaii Rev. Laws § 97-27 (Supp. 1957); Idaho Code Ann. § 72-314 (1949); Ill. Ann. Stat. ch. 48, § 138.8 (Supp. 1961); Ind. Stat. Ann. § 40-1308 (Supp. 1962); Iowa Code Ann. § 85.64 (Supp. 1961); Kan. Gen. Stat. Ann. § 44-568 (1949); Ky. Rev. Stat. Ann. § 342.122(7) (Supp. 1962); Me. Rev. Stat. Ann. ch. 31, § 14 (1954); Md. Ann. Code art. 101,66 (1957); Mass. Ann. Laws ch. 152, §§ 37, 37A, 65 (1957); Mich. Stat. Ann. § 17.158(1) (Supp. 1961); Minn. Stat. Ann. § 176.13 (Supp. 1961); Miss. Code Ann. § 6998-37 (Supp. 1960); Mo. Ann. Stat. § 287.220 (Supp. 1961); Mont. Rev. Codes Ann. § 92-709A (Supp. 1961); Neb. Rev. Stat. § 48-128 (1960); N.H. Rev. Stat. Ann. ch. 281, § 48 (1955); N.J. Stat. Ann. §§ 34:15-94 to -95 (1959); N.M. Stat. Ann. § 59-10-129 (Supp. 1961); N.Y. Workmen's Comp. Laws § 15.8h (1960); N.C. Gen. Stat. §§ 97-35 to -40.1 (1958); N.D. Cent. Code § 65-04-18 (1960); Ohio Rev. Code Ann. § 4123.34.3 (Supp. 1961); Okla. Stat. Ann. tit. 85 §§ 171-73 (Supp. 1961); Ore. Rev. Stat. §§ 656.224 to .460 (1955); Pa. Stat. Ann. tit. 77, § 516 (Supp. 1961); R.I. Gen. Laws Ann. § 28-37-1-4 (1956); S.C. Code § 72-189 (1952); S.D. Code § 64.0112 (Supp. 1960); Tenn. Code Ann. § 50-1027 (Supp. 1962); Tex. Rev. Civ. Stat. Ann. art. 8306, § 12c (1956); Utah Code Ann. § 35-1-68 (Supp. 1961); Wash. Rev. Code §§ 51.16.120 to .44.040 (Supp. 1961); W. Va. Code Ann. § 2523 (1961); Wis. Stat. § 102.59 (1957); Wyo. Stat. Ann. § 27-149-155 (1957).

[4] The Supreme Court in Lawson v. Suwanne S.S. Co., 336 U.S. 198, 202 (1949), indicated this to be the legislative intent behind the Second Injury Fund provisions of the Longshoremen's and Harbor Workers' Compensation Act:

> We must look to the explanation of congressional intent behind the subsection. A witness at a hearing on the measure outlined his reasons for favoring the provision in the following manner: 'The second injury proposition is as much to the advantage of the employer and his interests as it is for the benefit of the employee. It protects that employer who has hired, say, a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing would have to pay total permanent disability com-

typically provide that prospective employers shall be liable only for the disability caused by an injury which is incurred in *their* employment without taking into consideration pre-existing physical impairments. The balance of any compensation which may be due as a result of the combination of both disabilities is payable out of the Second Injury Fund to which industry, as a whole, contributes directly or indirectly. More simply, a man with no hands has suffered greater total damage than the mere loss of his second hand, but where Second Injury Fund provisions exist, the second employer merely pays for the loss of one hand and the difference between the loss of that hand and total disability is absorbed by the fund.

The case at bar is interesting because it places the federal Second Injury Fund provision in a rather dubious position with respect to accessability requirements. The court in the instant case held that in order to shift the burden of total disability payments to the fund the second employer need only allege that the second injury aggravated a disability caused by a prior injury of *any kind*.[5] Under this holding, the employer is not required to

> pensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of his being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also.' Hearings before Committee on the Judiciary, House of Representatives on S. 3170, 69th Cong., 1st Sess., 208 (1926).

To the same effect see New York Workmen's Comp. Law, § 15(8)(a) (1960) (Declaration of policy and legislative intent).

[5] The ramifications of this position are interesting. As pointed out in Subsequent Injuries Fund v. Industrial Acc. Comm'n. of Cal., 135 Cal. App. 2d 544, 553, 288 P.2d 31, 36 (1955) in the "Subsequent Injuries Fund Report of the Sub-committee of the Assembly Interim Committee on Finance and Insurance" of the California Legislature (vol. 15, no. 7, 1953-55, Assembly Interim Committee Report) attention is called to the wide variety of pathologies (most of them asymptomatic, i.e., unmanifested) which have been urged as a basis for commission awards against the Subsequent Injuries Fund. Among those mentioned were: syphilis, hysteria and other forms of mental derangement, hairlip, speech impediments, nervousness, decreased mental capacity, hemorrhoids, false teeth, flat feet, knock knees and schizophrenia of the paranoid type. Claims such as these prompted the California Legislature to amend its statute in 1955 so that only certain enumerated types of injuries can now serve as the basis of a claim against the Subsequent Injury Fund. (Cal. Lab. Code, § 4751(a)-(b)). See Ferguson v. Industrial Acc. Bd. 50 Cal. 2d 469, 326 P.2d 145 (1958).

The California experience is precluded to some extent in the administration of the Second Injury Fund provision of the Longshoremen's and Harbor Workers' Compensation Act by the Bureau regulation which states that, "Awards from the special fund will not be made in cases where an injury increases or aggravates disability due to disease, congenital defects or causes other than a prior injury." Bureau of Employee's Compensation, Department of Labor, 20 C.F.R. 31.19 (1961).

This regulation is an inadequate safeguard for two reasons. First, the adequacy of the regulation depends to a great extent, on the unfortunate term "prior injury." In Lawson v. Suwanne, supra note 4, at 204, the Supreme Court held that "prior injury" need not be an industrial injury to come within the meaning of the instant statute. Also, "prior injuries" may give rise to latent disabilities, such as the back injury in the case at bar, which constitute no obstacle to general employment and, absent the "employer knowledge" requirement, were not intended to be compensable under the Second Injury Fund provision.

Second, the regulation is unduly restrictive in the sense that it fails to recognize that a latent disability or disease can constitute an obstacle to employment, a "handicap" within the *Lawson v. Suwanne* meaning of the term. Fabing and Barrow, Encouragement allege that he knew he had a handicapped worker in his employ nor is any evidence required that the employee's handicap constituted an obstacle to employment.

Since the Longshoremen's and Harbor Workers' Compensation Act was taken almost in toto from the New York Workmen's Compensation Law as it existed in 1927, decisions interpreting the New York act should, at least, be persuasive in the construction of the federal statute.[6] Since the primary objective of the New York Second Injury Fund is to encourage the employment of the handicapped, the New York courts have considered it essential that the employer allege that he had knowledge of the handicapped condition, and thereby gain an appreciation of the "risk" he was taking, before he will be entitled to the "reward" of the Second Injury Fund.[7] The court, in the leading case of *Zyla v. Julliard*,[8] reasoned:

> The statute does not in express terms require that the parties know of the existence of the permanent physical impairment. But knowledge on the part of the employer . . . is required by the implication of the statutory formula.
>
> That knowledge by the employer of the impairment, arising either from its obvious nature or from actual knowledge of a latent impairment, is essential, is suggested by the fact the Legislature would have no need to encourage the employment of persons whose impairments are so obscure as not to be apparent, because they would meet no special barriers to general employment. . . . The disabilities that come within the definition are not merely those that are permanent, but those that also are or may be likely to hinder employment or be an obstacle to employment.
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> This necessarily requires an informed decision one way or the other by a present or prospective employer. The whole purpose of the statute is to encourage the employment of persons known to be physically handicapped.

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of Employment of the Handicapped-Extension of Second Injury Fund Principles to Persons Having Latent Impairments, 8 Vand. L. Rev. 575 (1955).

A skillfully drawn Second Injury Fund provision can encourage the employment of all the handicapped and still retain the essential safeguards which the "employer knowledge requirement" provides. The Ohio provision is a good illustration of such a statute. This statute requires the employer to notify the industrial commission prior to the occurrence of the second injury that it has in its employ a handicapped employee. The statute then goes on to specify some twenty-two disabilities which constitute a "handicap" within the meaning of the statute. Among these are included: (1) Epilepsy, (2) Diabetes; (7) Residual disability from poliomylitis; (12) Tuberculosis; (14) Psychoneurotic disability following treatment in a recognized medical or mental institutition, (15) Hemophilia; (16) Chronic osteomylitis; (18) Hyperinsulinism, (20) Arterio-sclerosis; (21) Thrombo-phlebitis. Ohio Rev. Code Ann., § 4123.34.3 (A)-(C) (Supp. 1961).

6 Iacone v. Cardillo, 208 F.2d 696 (2d Cir. 1953); see Lawson v. Suwanne S.S. Co., supra note 3, at 205.

7 Tucci v. J. F. Carey & Co., 15 App. Div. 2d 622, 222 N.Y.S.2d 358 (1961); Lucro v. Tronolone, 1 App. Div. 2d 713, 146 N.Y.S.2d 881 (1955); Dugan v. Muller Dairies Inc., 282 App. Div. 590, 125 N.Y.S.2d 530 (1953); Zyla v. Julliard & Co., 277 App. Div. 604, 102 N.Y.S.2d 255 (1951).

8 277 App. Div. at 605, 102 N.Y.S.2d at 257 (1951).

In the instant case there was no evidence that the employer knew that the claimant had a pre-existing disability. We might safely assume, however, that due to the nature of the injury and the rather informal hiring practices in the stevedoring trade that the second employer would have had a very heavy burden of proving knowledge of pre-existing disability. The government argued the instant case on the theory that the statute was intended to compensate for "scheduled" injuries only.[9] The argument is logical since the original New York statute specified the types of injuries compensable by the Second Injury Fund,[10] and at present, some twenty-six states make similar specifications.[11] The court held, however, that since the federal statute makes no such specification it should be applied literally and the "reward" of the Second Injury Fund should be granted in any case where two partial disabilities add up to permanent total disability. The knowledge issue was not passed upon.

But even if we ignore the genetics of the federal statute, the absence of federal case law or a federal statutory requirement of "knowledge of previous disability" seems anomalous. The clear purpose of the Second Injury Fund is to encourage the employment of the handicapped. The second employer can hardly allege that he was encouraged to take the "risk" of hiring a handicapped person if he was ignorant of the risk, *i.e.*, ignorant of the fact that he was, in fact, hiring a handicapped person.[12] Absent federal case law or a statutory requirement of "knowledge" the Second Injury Fund will instead reward the employer who is merely resourceful enough to make a subsequent search through the disabled employee's history for a pathological connection between a past injury and the present total disability.[13]

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[9] Supra note 1, at 659.

[10] N.Y. Workmen's Comp. Law, § 15(8) (1927).

[11] See, in supra note 3, Alabama, Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont and Wyoming.

Additional states have other specific statutory limitations on the type of prior disability prerequisite to bringing the second injury within the operation of the fund. Such limitations evidence an attempt to place some limit on the types of compensable disabilities in order to further the purpose of the statute. Delaware (permanent injuries only), Kentucky (all injuries except those resulting from disease), Nebraska (all injuries except those resulting from disease), North Dakota (personal injuries and/or occupational diseases), Oklahoma (injuries apparent to laymen or adjudged by Industrial Commission), Texas (injuries to include certain occupational diseases), and Washington (all disabilities resulting from injuries).

[12] There has been some opposition to the statutory construction which implies the knowledge requirement.

"Such a construction penalized the employer who attempted to discover any impairment but failed to do so because the impairment was not readily discoverable and the employee, if he knew of the impairment, failed to disclose." Fabing and Barrow, Encouragement of Employment of the Handicapped-Extension of Second Injury Fund Principles to Persons Having Latent Impairments, 8 Vand. L. Rev. 575, 587 (1955).

When we consider that the Second Injury Fund was set up to reward an employer who hired a handicapped person it is difficult to see how an employer, ignorant of the fact that he has employed a handicapped person, is "penalized" when he is denied access to the fund. In actuality he has merely failed to qualify for the "reward."

[13] One writer, while treating the "knowledge" requirement in the Mississippi apportionment statute, stated the case quite succinctly: "In other words the legislature

Federal case law may yet follow the New York example and imply this "employer knowledge" requirement into the federal statutory formula.[14] However, an explicit statutory requirement that the employer prove that he at least understood that he had hired a handicapped person before permitting him to shift the burden of total disability payments to the fund would seem to be a preferable alternative.[15]

H. Wayne Judge
Contributor

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desired to give the employers a break, but only if he gave the handicapped worker a break—with full knowledge that he was a handicapped worker. It was not the intention of this provision to open the gates for a belated sweeping inquiry into the medical history of an employee whenever he or she made a claim for compensation benefits." Shanahan, Amendments to the Workmen's Compensation Act 1956-1958, 30 Miss. L.J. 105, 169 (1959).

[14] Florida has implied the "employer knowledge" requirement into its statute by case law. Wall v. Speh, 133 So. 2d 304 (Sup. Ct., Fla. 1961). But see Ferguson v. Industrial Acc. Bd., 50 Cal. 2d 469, 326 P.2d 145 (1958).

Some federal courts have threatened to take this course. See the dissent in National Homeopathic Hosp. Ass'n v. Britton, 147 F.2d 561, 566 (D.C. Cir. 1945).

In Scott v. Alaska Industrial Bd., 91 F. Supp. 201 (D.C. Alaska 1950) the court stated at 203:

> . . . the term "prior disability," as used in second injury provisions, is not to be construed as including prior unmanifested disability. Nor is this view inconsistent with the social aim of such statutory provisions to encourage the hiring of the partially disabled, for obviously where the prior condition does not manifest itself, no ground for discrimination in hiring would exist.

But see Vanderver v. Voris, 147 F. Supp. 447 (S.D. Tex. 1956).

[15] New Mexico's recently enacted statute is a good illustration of such an approach:

> After January 1, 1962, the Subsequent Injury Act shall be applicable only in those cases where there has been filed with the superintendent of insurance *prior to the injury or occurrence causing the subsequent disability* a certificate of existing physical impairment. . . . (Emphasis added.)

The statute goes on to provide that the certificate does not have to be filed with the superintendent if the employer retains, in his own files, a certified medical history, signed by him, the employee and a doctor and executed prior to the second injury. N.M. Stat. Ann. § 59-10-133 (Supp. 1961). This second alternative seems preferable because it will minimize the administration costs of the provision.

Minnesota has a similar statute. Minn. Stat. Ann. § 176.13 (Supp. 1961).