WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS—NEBRASKA SUPREME COURT APPLIES DISCOVERY RULE ANALYSIS TO DENY EMPLOYEE'S CLAIM—*Novak v. Triangle Steel Co.*, 197 Neb. 783, 251 N.W.2d 158 (1977).

INTRODUCTION

In *Novak v. Triangle Steel Co.*,[1] the Nebraska Supreme Court faced the novel issue of whether the statute of limitations of the Nebraska Workmen's Compensation Act[2] barred a workmen's compensation claim where an employee who had suffered a second injury was mistaken as to the effect of a lump sum payment and release of liability for an earlier injury. The court held that this was a mistake of law[3] which did not suspend the running of the one year period. Moreover, the court applied to so-called "discovery rule,"[4] which prevents the statute of limitations from running until a compensable disability is or reasonably should have been discovered. The court held, however, that the application of this rule did not save the employee's claim. The compensable nature of his injury should have been discovered because in the court's view the employee had a duty to inquire at the time of his second surgery as to the nature of his injury.[5] Thus the statute began to run more than one year before the petition was filed.

The focus of this article is on the Nebraska court's application of the mistake of law analysis and discovery rule in light of the general purposes of the Nebraska Workmen's Compensation Act and the history of the discovery rule.

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1. 197 Neb. 783, 251 N.W.2d 158 (1977).
2. NEB. REV. STAT. § 48-137 (Reissue 1974). The statute provides: "In case of personal injury, all claims for compensation shall be forever barred unless, within one year after the accident, . . . one of the parties shall have filed a petition . . . ." *Id.*

In 1977, shortly after the decision in *Novak*, the limitation period was changed to two years. NEB. REV. STAT. § 48-137 (Supp. 1977).

3. 197 Neb. at 788, 251 N.W.2d at 161. *See* notes 96-104 and accompanying text *infra*.
4. Although the court never used the "discovery rule" language, it will be used in this casenote for the sake of convenience. *See generally* Kelley, *Statutes of Limitations in the Era of Workmen's Compensation Systems: Workmen's Compensation Limitations Provisions for Accidental Injury Claims*, 1974 WASH. U. L. Q. 541 (1974) [hereinafter cited as Kelley].
5. 197 Neb. at 789, 251 N.W.2d at 162.

FACTS AND HOLDING

In November of 1972, plaintiff Donald Novak injured his back while working for defendant Triangle Steel Company. The following month Novak underwent surgery for the injury.[6] To compensate Novak for his injury, Triangle Steel agreed to a lump sum settlement.[7] A provision in this settlement released Triangle Steel from further liability arising out of that injury.[8]

Novak was injured a second time in October of 1973,[9] again while working for the defendant Triangle Steel. This injury led to another back operation in January of 1974. Although performed in approximately the same area of the back as the first surgery, the second surgery involved a different portion of his spine.[10] Novak, however, mistakenly believed that the second surgery stemmed from an aggravation of his prior back injury. Thus, because of the provision in the settlement releasing Triangle Steel from further liability arising out of the earlier injury, Novak believed he was precluded from obtaining compensation for the second injury.[11]

In November of 1974, Novak realized he had a compensable claim, and shortly thereafter notified Triangle Steel of his possible claim. The petition was filed on February 6, 1975, fifteen months

6. The injury, diagnosed as a herniated disc between the fourth and fifth lumbar vertebrae, led to vertebral surgery on December 7, 1972. *Id.* at 784, 251 N.W.2d at 159.

7. *Id.* Nebraska law allows a lump sum settlement to be made, subject to approval of the workmen's compensation court. NEB. REV. STAT. § 48-138 (Reissue 1974). Whether a lump sum is justified in a particular case depends on whether "[t]he settlement is made in conformity with the compensation schedule and for the best interests of the employee or his dependents under all the circumstances . . . ." NEB. REV. STAT. § 48-139 (Reissue 1974).

A leading commentator on workmen's compensation points out that "[i]n some jurisdictions, the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system." 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 82.71 (1976) [hereinafter cited as LARSON]. Instead of a "best interests" test, which offers little guidance, Larson suggests that lump sum settlements be limited to cases where they would promote the rehabilitation of the worker, as determined by a rehabilitation panel. *Id.*

8. 197 Neb. at 784, 251 N.W.2d at 159, NEB. REV. STAT. § 48-138 (Reissue 1974) provides in pertinent part:

> Upon paying [the lump sum], the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment, the liability of such employer under any agreement, award, findings, or decree shall be discharged of record.

9. Novak fell on his right hip and shoulder while stepping off a crane. 197 Neb. at 784, 251 N.W.2d at 159.

10. The second operation involved the disc between the fifth lumbar and the sacrum, whereas the prior operation involved the disc between the fourth and fifth lumbar vertebrae. *Id.* at 784-85, 251 N.W.2d at 159.

11. *Id.* at 785, 251 N.W.2d at 160.

after the second accident, and thirteen months after the second back operation.[12]

The workmen's compensation court found in favor of Novak, holding that since he had reasonably believed his second back injury to be a reoccurrence of his earlier injury, the statute did not begin to run until November 1, 1974, when Novak became aware that his claim was compensable.[13] Thus, the claim was timely made. The district court affirmed, pointing out that Novak had made a reasonable mistake of fact.[14] On appeal, however, the Nebraska Supreme Court reversed the district court and held that the claim was barred by the one year limitations period.[15] In addition, the court pointed out that a mere inquiry at the time of the second operation would have revealed the compensable nature of his in-

12. *Id.* at 785-86, 251 N.W.2d at 160.

13. 197 Neb. at 791, 251 N.W.2d at 163 (McCown, J., dissenting).

14. *Id.* at 791-92, 251 N.W.2d at 163 (McCown, J., dissenting).

15. *Id.* at 790, 251 N.W.2d at 162. *See* note 2 *supra*.

Until the time of its repeal in 1977, another statute of limitations existed for workmen's compensation claims in Nebraska. The notice provision, NEB. REV. STAT. § 48-133 (Reissue 1974), first required that notice of the injury be given to the employer "as soon as practicable" after the injury. The statute then provided that no action should be brought "unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same . . . ." *Id.*

It is unclear why the legislature allowed two statutes of limitations for the making of claims to exist simultaneously. In an early case, the Nebraska Supreme Court attempted to distinguish between the two limitations by stating that the six month provision involved an informal demand on the employer for compensation, see Good v. City of Omaha, 102 Neb. 654, 655-56, 168 N.W. 639, 639 (1918), whereas the one year provision applied to the formal filing of a petition with the workmen's compensation court. NEB. REV. STAT. § 48-137 (Reissue 1974). *Cf.* Good v. City of Omaha, 102 Neb. 654, 656, 168 N.W. 639, 639 (1918). However, it seems more likely that the existence of the two limitations periods was the result of legislative oversight, a conclusion bolstered by the fact that the six month claims provision was repealed in 1977. NEB. REV. STAT. § 48-133 (Supp. 1977).

The "informal demand" interpretation of the six month statute was apparently abandoned by the Nebraska Supreme Court. In Traveler's Ins. Co. v. Ohler, 119 Neb. 121, 127, 227 N.W. 449, 451 (1929), the court cited McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N.W. 615 (1924) as applying the six month provision to the giving of notice rather than the making of a claim. This interpretation was followed in several subsequent cases. *See, e.g.*, Flesch v. Phillips Petroleum Co., 124 Neb. 1, 6, 244 N.W. 925, 927 (1932); Webb v. Consumers Coop. Ass'n, 171 Neb. 758, 762, 107 N.W.2d 737, 740 (1961). In Selders v. Cornhusker Oil Co., 111 Neb. 300, 301, 196 N.W. 316, 317 (1923), the court appeared to apply the six month provision to the formal filing of the petition.

In *Novak* the court mentioned only the one year statute. No reference to the six month provision was made, notwithstanding the court's reliance on Raymond v. Buckridge, Inc., 195 Neb. 212, 237 N.W.2d 412 (1976), which dealt only with the shorter limitation. *See* text at notes 24-27 *infra*. No reasons were given in either case why one statute rather than the other applied. With the deletion of the six month provision in 1977, NEB. REV. STAT. § 48-133 (Supp. 1977), the confusion hopefully has been eliminated.

jury.[16]

BACKGROUND

MISTAKE OF LAW

Generally, a mistake of law is involved in the situation where a person knows the facts as they really are, but is ignorant as to the legal consequences of those facts.[17] The doctrine that a mistake of law does not toll the statute of limitations for a workmen's compensation claim has its roots in *Roles v. Pascall & Sons*,[18] an English case which dealt with the notice provision of the workmen's compensation act.[19] The employee in *Roles* had claimed that "he did not know of the existence of the Act or that he was entitled to compensation for injury by accident arising out of and in the course of his employment."[20] The court held that ignorance of the law was not a "mistake" or "reasonable cause" which would excuse late notice.[21] This ignorance of the law reasoning was later followed in the United States,[22] and in one case was extended to the late filing of claims.[23]

Raymond v. Buckridge, Inc.[24] was the only Nebraska case prior to *Novak* in the workmen's compensation setting in which this mistake of law approach was employed. The claimant in *Raymond* had scraped his ankle while getting out of his car in his employer's parking lot.[25] Because of the claimant's diabetic condition, the injury worsened and eventually led to the amputation of his foot. The court held that the claim was barred by the six

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16. 197 Neb. at 789, 251 N.W.2d at 161-62.
17. *See* cases cited at note 98 *infra*.
18. [1911] 1 K.B. 982.
19. *See* note 21 *infra*.
20. [1911] K.B. 982, 983.
21. *Id.* at 985. The Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, § 2 provides in pertinent part:

> (1) Proceedings for the recovery under this act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof . . . .
>
> Provided always that—
>
> (a) the want of or any defect or inaccuracy in notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that . . . such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause . . . .

Id.

22. *In re* McLean, 223 Mass. 342, 345, 111 N.E. 783, 784 (1916); Bucuk v. Edward A. Zusi Brass Foundry, 49 N.J. Super. 187, —, 139 A.2d 436, 451 (1958).
23. *In re* McLean, 223 Mass. 342, 345, 111 N.E. 783, 784 (1916).
24. 195 Neb. 212, 237 N.W.2d 412 (1976).
25. *Id.* at 212, 237 N.W.2d at 413.

month limitations period.[26] In the syllabus by the court it was stated: "When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation."[27] In *Novak* the Nebraska Supreme Court held that this statement was dispositive of the case.[28]

DISCOVERY RULE

The effect of the discovery rule is to suspend the running of the statute of limitations until the employee discovers or can be reasonably expected to discover a compensable disability.[29] The adoption of this rule in a particular state depended largely upon the language used in the workmen's compensation statute.

There are two main types of statutes of limitations for workmen's compensation claims. One is the "accident" type, that is, the date of the "accident" is the starting point for the limitations period. Approximately one half of the jurisdictions in the United States have enacted this type of statute.[30] Twenty states and the District of Columbia, however, have adopted statutes which date the filing of the claim from the time of the "injury."[31]

In states with statutes of the "injury" type, the courts have generally construed "injury" liberally, so that the statute of limitations does not begin to run until a compensable injury is or reasonably should have been discovered. In other words, the courts apply the discovery rule.[32] This application has usually been jus-

26. *Id.* at 215, 347 N.W.2d at 414. For background reference to the six month limitations period see note 15 *supra*.

27. 195 Neb. at 212, 237 N.W.2d at 412.

28. *See* text at note 51 *infra*.

29. The rule has been stated in a variety of ways. Professor Larson states the rule as follows: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." 3 LARSON § 78.41, at 15-65,-66.

30. 3 LARSON § 78.42(a) at 15-102. *See also* Kelley, *supra* note 4, at 558, where the various statutes are listed.

31. *See* Kelley, *supra* note 4, at 574. The New Mexico statute unlike the "accident" or "injury" statutes, begins to run when the employer or insurer fails or refuses to pay compensation. N.M. STAT. ANN. § 59-10-13.6 (2d Replacement 1974). *See generally* Note, *"Accident" v. "Injury" in Workmen's Compensation: A Distinction with a Difference*, 58 YALE L.J. 495 (1949).

32. 3 LARSON § 7842(a) at 15-102. Some courts have interpreted "injury" to mean the initial injury received at the time of the accident. *See, e.g.*, Otis v. Parrott, 233 Iowa 1039, —, 8 N.W.2d 708, 711 (1943); Cooke v. Holland Furnace Co., 200 Mich. 192, 202, 166 N.W. 1013, 1016-17 (1918).

Other courts have interpreted "injury" to mean the date the employee's condition became compensable under the workmen's compensation statute. *See, e.g.*, Esposito v. Marlin-Rockwell Corp., 96 Conn. 414, —, 114 A. 92, 93 (1921); Guderian v.

tified by reference to the purposes of the workmen's compensation acts. These statutes were designed to relieve employees of the onerous burdens of industrial accidents by shifting the economic loss to the employer, who was better able to bear the loss.[33] This goal of compensating victims of industrial accidents could only be attained if the injured employee made a claim.[34] To aid the achievement of this goal, the statutes were to be liberally interpreted in favor of the employee.[35] It is this policy of liberal interpretation in the employee's favor which led to the discovery-rule interpretation of "injury."

Among the "accident" jurisdiction, however, only Nebraska and Tennessee have construed the statutes such that the limitations period begins when the injury is or should have been discovered.[36] The other jurisdictions have held that the statute begins to run from the date of the causative occurrence, the "accident," without regard to the employee's knowledge thereof.[37] The arguments made for this strict interpretation include: (1) "accident," as used in the statute, is clear and unequivocal, and thus cannot be construed so as to include a discovery rule;[38] (2) the weight of authority is in favor of a strict interpretation;[39] (3) the legislature apparently intended to prevent fraudulent or stale claims and to give employers assurance that their liability had ended;[40] and (4)

Sterling Sugar & Ry., 151 La. 59, —, 91 So. 546, 547 (1922). *See generally* Kelley, *supra* note 4, at 574-619.

33. English v. Industrial Comm'n, 73 Ariz. 86, —, 237 P.2d 815, 17 (1951).

34. Mulhall v. Nashua Mfg. Co., 80 N.H. 194, —, 115 A. 449, 453 (1921). *See also* Kelley, *supra* note 4, at 551-52.

35. Selders v. Cornhusker Oil Co., 111 Neb. 300, 301, 196 N.W. 316, 317 (1923); English v. Industrial Comm'n, 73 Ariz. 86, —, 237 P.2d 815, 817 (1951).

36. *See* text at notes 42-44 *infra*.

37. *See, e.g.*, Davis v. Standard Oil Co., 261 Ala. 410, —, 74 So. 2d 625, 629-30 (1954); Moody v. State Highway Dep't, 56 Idaho 21, —, 48 P.2d 1108, 1110 (1935); McKee v. Industrial Comm'n, 115 Utah 550, —, 206 P.2d 715, 717 (1949). *See also* Kelley, *supra* note 4, at 561-62 n.86.

Courts have avoided harsh results in various ways, one of which is application of the doctrine of equitable estoppel. *See* Clements v. Greenville County, — S.C. —, —, 142 S.E.2d 212, 214 (1965) (where an employer who led his employee-claimant to believe that his claim would be taken care of by the employer was estopped from asserting limitations bar thereafter). Another method has been to start the running of the limitations period on the date the employee was forced to cease work where the aggravation of the original injury was caused by continued employment. Mallory v. American Cas. Co., 114 Ga. App. 641, —, 152 S.E.2d 592, 594 (1966); Noles v. Aragon Mills, 114 Ga. App. 130, —, 150 S.E.2d 305, 306 (1966).

38. Moody v. State Highway Dep't, 56 Idaho 21, —, 48 P.2d 1108, 1110 (1935); Fiorella v. Clark, 298 Ky. 817, —, 184 S.W.2d 208, 211 (1944).

39. Davis v. Standard Oil Co., 261 Ala. 410, —, 74 So. 2d 625, 629-30 (1954); Landauer v. Industrial Acc. Comm'n, 175 Ore. 418, —, 154 P.2d 189, 201 (1944).

40. Dane v. Michigan United Traction Co., 200 Mich. 612, 614, 166 N.W. 1017, 1017 (1918) (assurance that liability ended); Long v. Watts, 129 Kan. 489, 491, 283 P. 654, 655 (1930) (fraudulent claims).

the remedy lies with the legislature.[41]

The Nebraska and Tennessee interpretations were influenced by a separate "injury" provision. The Nebraska court initially applied the discovery rule to the six month "injury" provision.[42] The court then extended the discovery rule to the one year "accident" provision, relying on the "injury" cases as authority.[43] This peculiar development also occurred in Tennessee,[44] and explains why the two states are unique among "accident" jurisdictions.

In its original form, the discovery rule in Nebraska required actual knowledge of the injury before the statute of limitations began to run.[45] However, in *Ohnmacht v. Peter Kiewit Sons Co.*,[46] the Nebraska Supreme Court reformulated the rule so that the claims period limitation commenced "from the time it becomes reasonably apparent, or should have become reasonably apparent, that [the employee] has a compensable disability . . . ."[47] The employee was told that the injury would not be permanent and thereafter failed to consult a physician until long after the permanent nature of the injury should have been apparent.[48] The court held that the claim was barred, since "it should have become reasonably apparent that the plaintiff had a compensable disability more than one year before filing his petition."[49] This application of the discovery rule in conjunction with the mistake of law doctrine formed the basis of the decision in *Novak*.

ANALYSIS OF THE COURT

Judge Spencer, writing for the majority, began his analysis by

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41. Central Locomotive & Car Works v. Industrial Comm'n, 290 Ill. 436, —, 125 N.E. 369, 370 (1919); Moody v. State Highway Dep't, 56 Idaho 21, 48 P.2d 1108, 1110 (1935).

42. Johansen v. Union Stock Yards Co., 99 Neb. 328, 330, 156 N.W. 511, 512 (1916), construing the predecessor of NEB. REV. STAT. § 48-133 (Reissue 1974). *See* note 15 *supra*, for a discussion on the six month provision.

43. City of Hastings v. Saunders, 114 Neb. 475, 476, 208 N.W. 122, 123 (1926), construing the predecessor of NEB. REV. STAT. § 48-137 (Reissue 1974).

44. *See* Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, —, 206 S.W.2d 909, 910 (1947). *See also* Kelley, *supra* note 4, at 565-66.

45. In Johansen v. Union Stock Yards Co., 99 Neb. 328, 330, 156 N.W. 511, 512 (1916), it was stated that "it cannot be said that the injury resulted from the accident, within the meaning of the statute, before the time it was discovered that it might become permanent . . . ." *Id.* *See also* Seymour v. Journal-Star Printing Co., 174 Neb. 150, 116 N.W.2d 297 (1962) where the court stated that "[the statute] does become applicable after the expiration of [one] year from the time the employee has knowledge that the accident has caused has caused a compensable disability." *Id.* at 160, 116 N.W.2d at 303-04.

46. 178 Neb. 741, 135 N.W.2d 237 (1965).

47. *Id.* at 746, 135 N.W.2d at 240.

48. *Id.* at 745-46, 135 N.W.2d at 239-40.

49. *Id.* at 746, 135 N.W.2d at 240.

citing *Raymond v. Buckridge, Inc.*,[50] as the controlling case.[51] He then noted that the district court was incorrect in finding that Novak's mistake was one of fact "which would prevent the statute of limitations from running until . . . plaintiff became aware that [he had a compensable disability]."[52] It was then pointed out that Novak had sufficient knowledge of facts to put a reasonable man on notice, since, after entering the hospital for the second time, Novak knew that he had suffered a disabling injury and that the injury was related to the second accident.[53] Novak knew that his back problem was aggravated by the second accident, but thought that the injury was not compensable, due to the lump sum settlement and release from liability. This was a mistake of law, the court concluded, which is "no more an excuse in connection with a late compensation claim than anywhere else, unless expressly made so by statute."[54]

The court then focused on the application of the discovery rule and, relying on language in *Ohnmacht*, pointed out that "[w]here an injury is latent and progressive, the tolled statute of limitations begins to run against an employee from the time it becomes reasonably apparent, or should have become reasonably apparent, that he has a compensable disability . . . ."[55] Judge Spencer then reemphasized that Novak had sufficient information at the time he entered the hospital the second time to raise a question as to the cause of his second back injury.[56] When Novak underwent surgery for the second time, it was then his obligation to inquire as to its nature. Had he done so it would have become apparent that the operation was not related to the first injury.[57]

The court then noted that if Novak were allowed to ignore these facts, the statute of limitations would be effectively repealed,[58] since a person could merely state that he did not know he had suffered a compensable claim in order to evade the application of the statute.[59]

50. 195 Neb. 212, 237 N.W.2d 412 (1976).
51. 197 Neb. at 786, 251 N.W.2d at 160.
52. *Id.* at 787, 251 N.W.2d at 160-61.
53. *Id.* at 787-88, 251 N.W.2d at 161.
54. *Id.* at 788, 251 N.W.2d at 161 (quoting 3 LARSON § 78.47 (1976)).
55. 197 Neb. at 789, 251 N.W.2d at 161.
56. *Id.*
57. *Id.* at 789, 251 N.W.2d at 161-62.
58. *Id.* at 790, 251 N.W.2d at 162. The same argument was stated in Roles v. Pascall & Sons, [1911] 1 K.B. 982: "To hold that ignorance of the existence of an Act or its consequences is a reasonable cause for failing to comply . . . would be tantamount to repealing that part of the Act." *Id.* at 986. *See* notes 18-21 and accompanying text *supra*.
59. 197 Neb. at 790, 251 N.W.2d at 162.

The opinion concluded by reaffirming *Raymond*: "When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and the filing of action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation."[60]

In his concurring opinion, Judge Clinton focused on the issue of whether Novak was required to make an inquiry at the time of his second surgery.[61] Emphasizing that "the statute begins to run from the time '[a compensable disability] becomes reasonably apparent *or should have become reasonably apparent*' . . . ,"[62] Judge Clinton argued that the dissenting opinion and the two lower courts erred by dealing only with the issue of whether Novak actually knew that a claim existed.[63] The essential question was whether in the exercise of reasonable care Novak should have known of a compensable claim.[64] Since a "mere inquiry" would have revealed that the second injury was not related to the first, a compensable disability should have been apparent to Novak "as a matter of law."[65]

In his dissent, Judge McCown argued that the issue was not whether Novak thought his second injury was compensable. Rather, he thought that the critical issue was one of fact, that is, whether Novak knew or should have known that his second back injury and operation were due to his second accident, rather than his first.[66] Both the workmen's compensation court and the district court had decided this factual issue in favor of Novak.[67]

60. *Id.*
61. *Id.* at 793, 251 N.W.2d at 162.
62. *Id.* at 794, 251 N.W.2d at 162.
63. *Id.* at 793-94, 251 N.W.2d at 162.
64. *Id.* at 794, 251 N.W.2d at 162.
65. *Id.* at 794, 251 N.W.2d at 162-63.
66. *Id.* at 791, 251 N.W.2d at 163.
67. *Id.* The workmen's compensation court held:

> [Novak] reasonably believed that the low back and toe numbness symptoms he experienced following his October 23, 1973, accident and injury were a reoccurrence of the back injury of November, 1972, since the same area of his low back was involved and did not know until November 1, 1974, that said symptoms were the result of the October 23, 1973, accident and injury and involved the L5-S1 area rather than the L4-L5 area of his low back . . . .

Id. The district court held:

> [Novak] reasonably did not know or suspect until November of 1974 that the second back injury was or might be compensable; that the plaintiff honestly, though mistakenly, thought the second back problem was an aggravation or result of the original injury for which he had been compensated; that plaintiff's mistake was one of fact . . . .

Id. at 791-92, 251 N.W.2d at 163.

Judge McCown reasoned that since findings of fact in either court are to be upheld unless there is no reasonable competent evidence to support them, the judgment of the district court should have been upheld.[68]

ANALYSIS

This analysis will focus primarily on the discovery rule and its application by the Nebraska Supreme Court, followed by a short inquiry into the court's mistake of law approach.

Three separate purposes are often given for statutes of limitations:

> (1) the evidentiary purpose—to prevent error or fraud that may result from deciding factual issues long after the events in question, when witnesses may have died, memories may have dimmed, and documents may have been lost or destroyed; (2) the personal certainty purpose—to assure a potential defendant that he will not be subject to court-imposed liability after a specified period of time; and (3) the diligence purpose—to discourage prospective claimants from "sleeping on their rights."[69]

If the discovery rule is analyzed vis-à-vis these purposes it appears that the rule is not inconsistent with the diligence purpose, since a claimant does not "sleep on his rights" if he neither knows nor should have known of a compensable disability.[70] The discovery rule clashes with the evidentiary purpose, since it may become necessary for a court to determine facts long after an occurrance took place.[71] There is also an inconsistency with the personal certainty purpose, because it may be virtually impossible for a prospective defendant to determine the time when an employee knew or should have known of a compensable injury.[72]

Some courts have justified the discovery rule by looking to the general purposes behind workmen's compensation acts.[73] Since those acts were designed to shift the burden of a work-related accident to the employer, who was better able to bear the cost, this goal could be facilitated through utilization of the discovery rule which allowed more claims to be made. A strict interpretation of the limitations would only hinder this purpose.

68. 197 Neb. at 793, 251 N.W.2d at 164.
69. *See* Kelley, *supra* note 4, at 545. *See generally* Jackson, *The Legal Effects of the Passing of Time*, 7 MELBOURNE U. L. REV. 407 (1970).
70. *See* Kelley, *supra* note 4, at 545.
71. *See* Kelley, *supra* note 4, at 545 n. 19.
72. *See* Kelley, *supra* note 4, at 545 n. 20.
73. *See* notes 33-34 and accompanying text *supra*.

Other courts have opted for a stricter interpretation of the limitation statutes and have refused to apply the discovery rule.[74] It has been argued that this interpretation comports with the evidentiary purpose of barring stale and fraudulent claims.[75] Another justification is that a strict interpretation is consistent with the personal certainty purpose.[76] Finally, it is often stressed that the statutes allow no room for construction and that the remedy lies with the legislature.[77] Arguably, the diligence purpose is also served by a strict interpretation since those employees aware of their compensable injuries would be discouraged from "sleeping on their rights." The problem is, of course, that many employees are not aware of a compensable disability until it is too late.[78]

Nebraska adopted the discovery rule in 1916.[79] Actual knowledge of a compensable injury was required before the one year period would start to run.[80] However, one commentator, Professor Kelley, has observed that in *Ohnmacht* the application of the rule was given a new twist; the discovery rule was used as a substantive standard by which the court evaluated the reasonableness of the claimant's actions.[81] No longer was actual knowledge the test.

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74. *See* note 37 and accompanying text *supra*.

75. *See, e.g.*, Long v. Watts, 129 Kan. 489, 491, 283 P. 654, 655 (1930).

76. *See, e.g.*, Dane v. Michigan United Traction Co., 200 Mich. 612, 614, 166 N.W. 1017, 1017 (1918).

77. *See, e.g.*, Central Car Works v. Indus. Comm'n, 290 Ill. 436, 439-40, 125 N.W. 369, 370 (1919); Moody v. State Highway Dep't, 56 Idaho 21, —, 48 P.2d 1108, 1110 (1935).

78. Professor Larson gives the classic example:

> A workman is struck in the eye by a metal chip, but both he and the company doctors dismiss the accident as a petty one, and of course no claim is made, since there is no present injury or disability. Eighteen months later a cataract develops as the direct result of the accident. If the statute bars claims filed more than one year after the "accident," and if the court applies the statutory language with medieval literalism, the workman can never collect for the injury no matter how diligent he is: He cannot claim during the year, because no compensable injury exists; he cannot claim after the year, because the statute runs from the accident.

3 LARSON, *supra* note 7, at § 78.42(a).

79. Johansen v. Union Stock Yards Co., 99 Neb. 328, 330-31, 156 N.W. 511, 512 (1916). *See* note 45 *supra*.

80. *See* note 45 *supra*.

81. *See* Kelley, *supra* note 4, at 611. The only other jurisdictions to apply the discovery rule as a substantive standard appear to be Texas and Iowa. In Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763 (Iowa 1969), the court stated:

> The conclusion is inescapable that claimant delayed for an unreasonable time consulting a skin specialist or other doctor for a diagnosis of the trouble he knew he was having . . . .
>
> It must be held that until claimant consulted Dr. Leiter he exercised virtually no care to discover the nature of his trouble.

Id. at 767.

Similarly, the Texas Supreme Court in Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969) held: "A person of ordinary prudence would not remain totally inactive

The court in *Novak* followed this application of the rule. Both the majority and concurring opinions charged Novak with constructive knowledge of the unrelated nature of his two back injuries by imposing upon him a duty to investigate.[82] The emphasis was not on whether Novak actually knew, but rather, on whether he reasonably should have known.[83]

The *Ohnmacht* decision, however, has been recently criticized as not following the logic or history of the discovery rule.[84] Professor Kelley observes:

> The courts have turned a simple rationale for excusing claimant's late claim in one kind of case into a standard of conduct that may preclude the employee if he fails to live up to that standard—if he is somehow at fault. In light of the basic compensation purposes of the workmen's compensation system, it makes little sense to use notions of fault . . . to preclude the late claimant.[85]

Moreover, the *Ohnmacht* limitation on the discovery rule cannot be justified by reference to the personal certainty and evidentiary purposes of statutes of limitations.[86] The discovery rule under *Ohnmacht* allows for no greater personal certainty than a discovery rule that looks only to actual knowledge.[87] Although arguably the *Ohnmacht* standard might allow fewer claims with evidentiary problems, Professor Kelley argues:

> The court should have a better reason for choosing the reasonable-man discovery rule over a more liberal rule than that the more liberal rule would let more cases with possible evidentiary problems go before the trier of fact. If the possibility of evidentiary problems were controlling, there would be no reason for any exception to the original strict limitations rule.[88]

Considering the above analysis, the crucial question then becomes: when did the employee actually discover that he had a compensable claim? Assuming that actual knowledge is the test, it can be asked how the discovery rule came to be formulated in terms of what a reasonable person should have discovered. Pro-

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and unconcerned about his rights as long as plaintiff did in sole reliance upon the employer's promise to file a claim." *Id.* at 604-05.

82. *See* notes 54-55 and 63-67 and accompanying text *supra*.

83. 197 Neb. at 789-90, 794, 251 N.W.2d at 161-62.

84. *See* Kelley, *supra* note 4, at 612.

85. *Id.* at 618.

86. *Id.*

87. *Id.* In other words, neither application of the rule gives much assurance to an employer that he will not be subjected to court-imposed liability after a specified period of time.

88. *Id.*

fessor Kelley suggests two reasons. First, many courts had originally interpreted "injury" in the limitations provision to mean "compensable injury,"[89] then later switched to an interpretation that emphasized the discoverability of the injury.[90] The "reasonableness" language provided continuity between these interpretations.[91] Second, in cases where the employee's injury was misdiagnosed, the courts in upholding the employee's claim often emphasized his dilemma by phrasing the rule in terms of reasonable diligence.[92]

If actual discovery had been the test in *Novak*, the claim would not have been barred, since Novak filed his petition three months after he found out that he had a compensable claim.[93] Indeed, it appears that both of the lower courts applied the actual-discovery test, since neither court specifically addressed the question of when Novak reasonably should have known of a compensable disability.[94] Thus, as the dissent pointed out, since a finding of fact is to be upheld unless there is no reasonable competent evidence to support it, the award of compensation should have been affirmed.[95]

The doctrine that a mistake of law is no excuse was also heavily relied upon in *Novak*.[96] Although few courts have discussed this issue, there is general consensus in the jurisdictions that have dealt with it.[97]

89. *Id.* at 612, *citing* Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N.W. 511 (1916); Hartford Acc. & Indem. Co. v. Industrial Comm'n, 43 Ariz. 50, 56, 29 P.2d 142, 144 (1934); Wheeler v. Missouri Pac. R.R., 328 Mo. 888, 894, 42 S.W.2d 579, 582 (1931). *Wheeler* is discussed in Kelley, *supra* note 4, at 583-89.

90. *See* Kelley, *supra* note 4, at 612, *citing* Clarey v. R.S. Proudfit Co., 124 Neb. 582, 247 N.W. 417 (1933); English v. Indus. Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951); Myers v. Rival Mfg. Co., 442 S.W.2d 138 (Mo. Ct. App. 1969). *See also* Kelley, *supra* note 4, at 596-600.

91. *See* Kelley, *supra* note 4, at 612.

92. *Id.* at 612-13, *citing* Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949); Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (1966).

93. 197 Neb. at 785-86, 251 N.W.2d at 160. *See* note 12 and accompanying text *supra*.

94. 197 Neb. at 789, 251 N.W.2d at 161-62. This conclusion is indicated by the district court's finding that "[Novak] honestly, though mistakenly, thought the second back problem was an aggravation or result of the original injury for which he had been compensated . . . ." *Id.* at 791, 251 N.W.2d at 163. (McCown, J., dissenting).

95. *Id.* at 793, 251 N.W.2d at 164.

96. *Id.* at 788, 251 N.W.2d 161.

97. Inland Gas Corp. v. Flint, 255 S.W.2d 1006, 1007-08 (Ky. 1953) (mistake as to the necessity of obtaining federal court permission to pursue a claim when employer is in receivership); *In re* Fells, 226 Mass. 380, 382-83, 115 N.E. 430, 430 (1917) (claimant was illiterate and ignorant of workmen's compensation law); Cinderella Motor Hotel, Inc. v. Wallace, 506 P.2d 556, 558 (Okla. 1973) (claimant did not know she was entitled to workmen's compensation benefits); Petroleum Cas. Co. v.

In the typical case, the employee is cognizant of all the facts, that is, she knows she is injured and that the injury is due to her employment, but she is ignorant of the application or existence of the workmen's compensation act. The maxim is generally expressed: a mistake of law occurs where a person knows the facts as they really are, but is ignorant of their legal consequences.[98]

In *Novak* the court's argument was that Novak knew that his second accident increased his back problem, but due to the lump sum settlement, he did not realize that he had a compensable claim.[99] However, a persuasive argument could be made that Novak did not know that his second back injury was unrelated to his prior back injury. In fact, the majority appeared to admit this when it stated that "[a]ny investigation *would have disclosed* that the second operation was not in any way related to the first one."[100]

CONCLUSION

When examined in light of the purposes of statutes of limitations the mistake of law doctrine appears to further only the evidentiary purpose: stale or fraudulent claims are prevented. The rule would not seem to serve the personal certainty purpose, since a particular situation is often difficult to classify as a mistake of law or as a mistake of fact.[101] Likewise, the doctrine is not supported by the diligence purpose, since someone who is ignorant of the law would not be encouraged by that law to file a claim.

Thus, the mistake of law rule, like the *Ohnmacht* application of the discovery rule,[102] puts a premium on the prevention of stale or fraudulent claims. But if the evidentiary problems were controlling, then, as Professor Kelley notes, there would be no reason

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Canales, 499 S.W.2d 734, 736 (Tex. Civ. App. 1973) ("ignorance of the six-months' filing requirement will not excuse a failure to comply therewith," *citing* Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969)); Lovell v. C.A. Timbes, Inc., 263 S.C. 384, —, 210 S.E.2d 610, 612 (1974) (fact that claimant may not have been aware of the requirement as to filing within one year does not furnish a legal excuse for not filing his claim). *Cf.* Buena Ventura Gardens v. Workers' Compensation Appeals Bd., 49 Cal. App. 3rd 410, —, 122 Cal. Rptr. 714, 717 (1975) (limitation did not run while employee was ignorant of her rights of which employer had duty to advise her).

98. People v. Kelley, 35 Cal. App. 2d 571, —, 96 P.2d 372, 373 (1939); Wendel Foundation v. Moredall Realty Corp., 176 Misc. 1006, —, 29 N.Y.S.2d 451, 454 (1941); O'Brien v. Det Forende Damphibs Selskab, 94 N.J.L. 244, —, 109 A. 517, 518 (1920).

99. 197 Neb. at 788, 251 N.W.2d at 161.

100. *Id.* at 789, 251 N.W.2d at 162 (emphasis added).

101. Indeed, one court has said that it is always possible to argue persuasively that a mistake is one of law, since few mistakes of material facts do not have legal consequences. Dixon v. Pacific Mut. Life Ins. Co., 268 F.2d 812, 814 (2d Cir. 1959).

102. *See* note 88 and accompanying text *supra*.

to have a discovery rule.[103] A strict interpretation of the limitations provision would suffice.[104]

It therefore seems inconsistent for the Nebraska Supreme Court to adopt a discovery rule, and then to substantially weaken that rule by both applying it as a substantive standard of conduct and applying the mistake of law doctrine. Apparently the court is trying to reconcile the purposes of the workmen's compensation system with the purposes of the statute of limitations. A clearer analysis, however, would be desirable.

Professor Kelley suggests that the most reasonable solution to the dilemma would be either: (1) a "no prejudice" exception, as Massachusetts has adopted, whereby the late claim is excused if the employee can show that the insurer was not prejudiced by the delay;[105] or (2) a scheme that, after a certain period of time has elapsed after the accident, would raise the employee's burden of proof and, on appeal, would eliminate the presumption favoring the trial court's factual findings.[106] Either solution or a combination of both may provide the court with the means of protecting itself from becoming an unwitting tool of fraud or oppression without precluding obviously meritorious claims."[107]

The Nebraska Legislature has recently indicated a concern that the purposes of the workmen's compensation statute ought to be fulfilled; the period for filing claims was increased from one year to two years,[108] and the bothersome six month claims provision was eliminated.[109] The Nebraska Supreme Court, on the other hand, after *Ohnmacht*, *Raymond*, and *Novak*, has shown a

103. *See* Kelley, *supra* note 4, at 618.

104. *Id.*

105. *Id.* at 624-26, 631.

106. *Id.* at 631.

107. *Id.* at 626.

108. *See* NEB. REV. STAT. § 48-137 (Supp. 1977).

109. *See* NEB. REV. STAT. § 48-133 (Supp. 1977). *See also* note 14 *supra*. It is interesting to note that the changes in § 48-137 and § 48-133 were largely a result of the Nebraska Supreme Court's decision in *Raymond*:

> The bill would eliminate the requirement for a claim but would still keep the notice requirement and would change the time in which to file a petition from one year to two years. What brought this up and made me think there was a need for the bill was in the past as I understand it, the Compensation Court ruled if an employer was aware of the accident, that was the same thing as a notice. The Supreme Court ruled in the opposite direction and some fellow who had lost his foot was out over it. A compensable accident except for the fact that the guy hadn't filed a formal notice wiihin six months . . . . I think this gentleman had diabetes and it started out a scratch and he was not aware of how much damage could have or would be done.

Hearing on LB 144 Before the Committee on Business and Labor, 85th Neb. Legis., 1st Sess. (1977) (statement of Senator Brennan).

tendency to emphasize the policies behind the limitations statutes. If the legislature hopes to overcome the court's proclivity, it may wish to consider Professor Kelley's suggestions.

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