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I. INTRODUCTION

Workers’ compensation statutes provide a form of mandatory insurance, guaranteeing compensation without regard to fault for employees who suffer injuries while in the course and scope of their employment. A benefit of this coverage is that employees who are injured while in the course of their employment are not required to prove negligence on the part of the employer in order to recover for injuries sustained. Regardless of the employer’s negligence, an employee covered under workers’ compensation statutes recovers compensation for all compensable injuries. The compensation granted to

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1. Decided per curiam.
employees varies from state to state. Benefits may include continued medical care for compensable injuries, lost wages, disability benefits, vocational rehabilitation benefits, survivor benefits for spouses and dependants, and burial allowances. In most states, employers are required to purchase workers' compensation coverage through private insurance companies. In some states, funds have been established through which employers may obtain workers' compensation coverage at competitive rates. Other states allow employers to "establish self-insurance funds subject to state regulation."4

Not all employees or employers, however, are protected by state workers' compensation statutes. In the first half of the 20th century, most jurisdictions enacted exclusions to the provisions of their workers' compensation statutes for agricultural operations or agricultural laborers. At the time these statutes were adopted, most agricultural production took place on small, family-operated farms. In 1900, for example, there were approximately 76 million people living in the United States, one-third of whom were engaged in farming. Although the rationale for excluding farm laborers from workers' compensation was varied, the predominant reason was the fear of overburdening small farmers by requiring them to comply with labor laws. Professors Arthur and Lex Larson, leading authorities on workers' compensation law, stated the following regarding the farm exception:

> Many reasons, of varying degrees of validity, have been given to explain the agricultural exception. The only one which seems to have much substance is the practical administrative difficulty that would be encountered by hundreds of thousands of small farms in handling the necessary records, insurance and accounting . . . . Less convincing is the argument that the farmer cannot, like the manufacturer, add compensation cost to the price of the product and pass it on to the consumer . . . . Least convincing of all is the assertion that farm laborers do not need this kind of protection. Whatever the compensation acts may say, agriculture is one of the most hazardous of all occupations.7

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Since the advent of commercialization of the traditional family farm, the application of the agricultural exception has become more difficult. Farms are no longer the traditional family operations they once were. More and more, traditional family farms are becoming commercial operations. This transformation has resulted in legal difficulties in determining whether a farm is the traditional farm operation which the workers' compensation statutes were initially intended to except, or whether it is a commercial operation falling within the parameters of the acts. Larsen v. D B Feedyards exemplifies this dilemma.

The defendant, D B Feedyards, initially operated as a traditional farming operation, one for the exclusive benefit of cattle owned by its shareholders, Daryl Broom and his son, Rodney Bromm. Then, between 1987 and 1990, D B Feedyards transitioned from an exclusively traditional farming operation to one that was partially commercial in nature. At that time, D B Feedyards began providing services for cattle owned by individuals other than the Bromms, charging a fixed amount per head per day. At the time of trial, D B Feedyards averaged 5,000 head of cattle, one-half to three-fourths owned by persons or entities other than the Bromms. In addition to its feedlot, D B Feedyards owned and farmed 440 acres of land. The defendant's feedlot and farm were not distinctive operations. Rather, the operations of each were intertwined: the crops raised on the farm were used to feed...
cattle on the feedlot and manure retrieved from the feedlot was used to fertilize the farmland.

Plaintiff Lyle D. Larsen, a professional roper, was hired by the defendant to provide general labor, including sorting and treating sick cattle. During his employment, Larsen sustained injuries to his thumb while roping a steer owned by an entity other than his employer. Larsen sought benefits for his work-related injury in the Nebraska Workers’ Compensation Court. In defense to Larsen's claim, D B Feedyards asserted that Larsen was not entitled to workers’ compensation benefits because he was employed as a farm laborer within the meaning of section 48-106(2) of the Nebraska Revised Statutes. As such, he was not a covered employee under the Nebraska Workers’ Compensation Act (hereinafter the “Act”).

After considering the entire character of Larsen’s employment, the Nebraska Workers’ Compensation Court concluded that Larsen was not a farm or ranch hand under the exception and, as a result, was entitled to workers' compensation benefits. Similarly, without issuing a written opinion, the three-judge Workers' Compensation Review Panel rejected D B Feedyards' argument that Larsen was an excepted worker under the Act.

On appeal to the Nebraska Supreme Court, D B Feedyards again argued that the farm laborer exclusion exempted Larsen from any entitlement to workers' compensation benefits. D B Feedyards claimed that “because it was an employer of farm or ranch laborers, it was excepted from the Act.”8 Relying on the standards propounded in Campos v. Tomoi9 and Leppert v. Parker,10 the Nebraska Supreme Court rejected D B Feedyards' assertion that it was an excepted employer. In Campos, an employee was hired to assist the defendants in the operation of a commercial hay grinder during the winter. After the winter had passed, the employee was to continue working on the defendants' farms. The Nebraska Supreme Court ultimately found that the employee, who was injured when his arm was caught in a shaft while putting canvas on the grinder, was not a farm laborer within the meaning the Act. In coming to this conclusion, the court first looked at the character of the employer's operation. The court found the operation to be commercial in nature, in part, because it had been established both mechanically and financially to operate for a profit.11 Next, the court examined the nature of the employee's employment and concluded that the job being performed by the employee at the time of his injury was contracted commercially for profit and

8. Larsen, 264 Neb. at 484, 648 N.W.2d at 307.
11. Campos, 175 Neb. at 558, 122 N.W.2d at 475.
additional contract operations were to continue over a ten-month period.\textsuperscript{12}

In \textit{Leppert}, the Nebraska Supreme Court faced the question of whether an employer who hires individuals to train horses on the employer's farm or ranch is an employer of farm or ranch laborers within the meaning of section 48-106(2) of the Nebraska Revised Statutes.\textsuperscript{13} Acknowledging the standard propounded in \textit{Campos}, the court stated that the approach used in Nebraska to determine the applicability of the farm and ranch exception is a case-by-case examination entailing a review of the nature of the work performed by the employee, where such work occurred, the purpose for which the employee was hired, and the nature of the employer's occupation. The court held, however, that the ultimate determination is the nature of the employer's business, rather than the work performed by the employee. Applying this standard, the court concluded that the plaintiff was a farm and ranch laborer.\textsuperscript{14}

In \textit{Campos} and \textit{Leppert}, the Nebraska Supreme Court firmly established that while the emphasis under section 48-106(2) analysis is on the employer's operation, a case-by-case examination, taking into account the entire relationship of the parties, is required.\textsuperscript{15} Moreover, in these cases, the court stated that while the task performed by the employee is relevant to the inquiry, the fact that an injury occurs on a farm or ranch and the fact that the work itself could be characterized as farm or ranch labor does not control whether the employee is cov-

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 559, 122 N.W.2d at 475. In addition to emphasizing a standard which takes into account the nature of the employer's operation and the employee's employment, the court established that employees engaged in commercial threshing are prima facie not farm laborers within the Act. Relying upon the holdings of two Minnesota cases, the Court stated the following conclusion: "An employee [sic] of a farmer engaged in threshing as a business, and not in doing his own threshing or in threshing for others casually or upon an exchange-work basis, is covered by the workmen's compensation act." 175 Neb. at 560, 122 N.W.2d at 476 (quoting \textit{Skreen v. Rauk}, 27 N.W.2d 869, 872 (Minn. 1947); \textit{Charpentier v. Cumming}, 227 N.W. 663 (Minn. 1929)).

\item \textsuperscript{13} \textit{Leppert}, 218 Neb. at 64, 353 N.W.2d at 181. At the time the plaintiff suffered her injury, the defendant was both a farmer and a rancher, owning approximately 22 quarter sections of land, 750 head of cattle, and 50 to 55 horses. At trial, the plaintiff maintained she was a horse trainer rather than a farm or ranch laborer. Although the record was in conflict regarding the plaintiff's actual job title, it appears that her duties primarily entailed "cleaning of the stalls and the barns, grooming the horses, hauling hay, and assisting in training the horses" and other areas where needed. \textit{Id.} at 65, 353 N.W.2d at 181.

\item \textsuperscript{14} \textit{Leppert}, 218 Neb. at 68, 352 N.W.2d at 183. In coming to its conclusion, the court stated, "[i]f 22 quarter sections of land devoted to growing sugar beets, corn, pinto beans, and alfalfa, and raising 750 head of cattle and 50 horses, do not qualify as a 'farm and ranch,' nothing, it would seem, could fall within the definition." \textit{Id.} at 67, 352 N.W.2d at 182.

\item \textsuperscript{15} \textit{Leppert}, 218 Neb. at 67, 352 N.W.2d at 182; \textit{Campos}, 175 Neb. at 557, 122 N.W.2d at 475.
\end{itemize}
erated under the Act. Applying the Campos and Leppert standards in Larsen, the court ultimately found that the tasks performed by Larsen when and where he was injured benefited D B Feedyards' commercial enterprise, rather than its farming operation. Consequently, the court, in a three to two decision, issued a per curiam finding that Larsen was not an excepted farm laborer.

The purpose of this Note is to analyze the consequences of the Nebraska Supreme Court's holding in Larsen. Part II of this Note discusses the background and development of the agriculture exception in Nebraska. Part III first assesses the Nebraska Supreme Court's analysis of Larsen v. D B Feedyards, then explores the consequences of the court's effective abrogation of the agricultural exception as it existed prior to August, 2003. Finally, this Note concludes by discussing the necessity of legislative action to clarify the exception and the Legislature's subsequent response.

II. BACKGROUND

In most cases dealing with agricultural exceptions to workers' compensation acts, the decisive question to determine whether an employee is covered by workers' compensation is the nature of the employee's employment, not the nature of the employer's business (i.e. whether it is agricultural or commercial in nature). As noted by Professors Arthur and Lex Larson, "[i]f the employee's work is agricultural in nature, it is no less so because the employer happens to be a factory or chemical company." Similarly, if an employer's business is agriculture, but the employee's work is nonagricultural or significantly disassociated from the normal routine of running a farm, the agricultural exception does not apply. In contrast, however, the decisive question in Nebraska has traditionally been the nature of the employer's business, rather than the nature of the employee's employment.

16. Larsen v. D B Feedyards, Inc., 264 Neb. 483, 490, 648 N.W.2d 306, 311 (2002) (per curiam). In Campos v. Tomoi, the Court stated: A workman is not a farm laborer simply because at the moment he is doing work on a farm; nor because the task on which he is engaged happens to be what is ordinarily considered farm labor. The employee of an implement dealer does not become a farm laborer while engaged in correcting the behavior of a self-binder in the grain field of the owner, a farm and customer of the dealer . . . . Neither the pending task nor the place where it is being performed is the test. The whole character of the employment must be looked to determine whether he is a farm laborer. Campos, 175 Neb. at 558, 122 N.W.2d at 475 (quoting Peterson v. Farmers State Bank, 230 N.W. 124, 124 (1930)) (emphasis in original).
19. Id.
In 1913, the Nebraska Legislature enacted its exception excluding employers of farm laborers from the protections of the Nebraska Workers' Compensation Act. Up until August of 2003, the farm exclusion, section 48-106(2), provided that "employers of farm or ranch laborers" are "declared not to be hazardous occupations and not within the provisions of the Nebraska Workers' Compensation Act." The Nebraska Supreme Court had acknowledged that the emphasis of this version of the exception was the minority view. In *Keefover v. Vasey*, the Supreme Court stated "it is worthy of note that in these other states the emphasis seems to be placed upon the exclusion of the laborer, while in this state it rests upon the exclusion of the employer of such labor." The court further noted that because Nebraska workers' compensation law is statutory, the focus of the farm labor exception is a legislative prerogative. Consequently, the court was bound by the statutory language, despite however unpopular, inappropriate, and outdated the statute's focus may have been.

Focusing the farm and ranch exemption on the employer resulted in an analysis of the nature of the employer's business operation when determining whether or not a claimant was covered by the provisions of the Act. Such an analysis has become more difficult, since the exemption was enacted around the turn of the twentieth century. No longer are farms the small, family enterprises they once were. By 1992, the number of people employed in farming had been reduced to an estimated 3.1 million. More and more, farms are becoming large commercial conglomerates. As one court commented, "[t]he modern farm is no longer a sole farmer with five to ten employees. Rather, many farms are just one cog in a giant structure that involves every process necessary to bring the goods to the supermarket. Some farming businesses even own the stores." The increase in farm size, constantly changing methods and machinery, and spiraling costs have "spawned a multitude of commercial business which provide equipment and specialized services for farmers and ranchers." An example of this result is seen in the animal production sector of agriculture. In 1970, two percent of hogs produced in the United States were

20. 1913 Neb. Laws, ch. 198, § 6(2), 580. In 1945, the statute was amended to exclude employers of ranch laborers as well. 1945 Neb. Laws, ch. 111, § 1, 358.
23. Id.
raised by farmers in a commercial context. By 1990, nearly 21 percent of hogs were produced in such operations. In these production systems, a great deal of agricultural production activity has moved from relatively small individual farmsteads to large, industrialized agricultural production facilities, [many of which] are divisions of sophisticated, well-financed businesses with management personnel and a large, relatively permanent labor force.\(^\text{27}\)

The commercialization of the modern farm has had a significant impact on workers' compensation. In some instances, modernized farms have spawned commercial businesses "separate and distinct from farming and ranching."\(^\text{28}\) Because these commercial oriented businesses have not eliminated the traditional farm operations altogether,\(^\text{29}\) in many situations, the farm and commercial operations coexist. A consequence of the intermingling of these two types of ventures is that in a growing number of cases, it has become more difficult for courts to make the distinction between the two. Professors Arthur and Lex Larson state that some agricultural activities are merely one stage in a commercial operation, which creates a "problem of determining where to draw the line between the last stages of the agricultural process and the first stage of the industrial process."\(^\text{30}\)

In Nebraska, as well as the majority of other states, the courts have repeatedly held that commercial operations, although occurring in an agricultural setting or agricultural in nature, are not exempt from the Act.\(^\text{31}\) However, simply because part of an employer's business is commercially oriented does not mean that its entire operation falls within the Act. In Nebraska, it has long been recognized that an employer can be engaged in two separate enterprises, one agricultural and one commercial; the agricultural enterprises excepted from the provisions of the Act, while the commercial enterprise not excepted.\(^\text{32}\)

\(^{27}\) Noble, \textit{supra} note 4, at 72 (citation omitted).
\(^{28}\) \textit{Larsen}, 264 Neb. at 489, 648 N.W.2d at 311.
\(^{29}\) \textit{See} \textit{Brown v. Leavitt Lane Farm}, 215 Neb. 522, 527, 340 N.W.2d 4, 8 (1983) (stating that "one employer may engage in two separate businesses, one subject to the workmen's compensation law and one exempt from that law").
\(^{30}\) \textit{LARSON'S WORKERS' COMPENSATION LAW} § 53.31, 9-219.
\(^{31}\) \textit{Hawthorne v. Hawthorne}, 184 Neb. 372, 378, 167 N.W.2d 564, 567 (1969). \textit{See}, \textit{e.g.}, \textit{LARSON'S WORKERS' COMPENSATION LAW} § 75.03(5), at 75-13 (1999) (stating that "[s]ometimes intensive specialization, if carried too far, is enough to transform agriculture to commerce").
\(^{32}\) \textit{Bartunek v. Becker}, 222 Neb. 126, 382 N.W.2d 300 (1986). In \textit{Bartunek}, the court stated that "[a]n employer may be engaged in two businesses is not unique or unheard of in the law. It has long been recognized in this jurisdiction." \textit{Id.} at 129, 382 N.W.2d at 301-02. The court further noted that is not uncommon for one of those two businesses to be a farming operation exempt from the Act and a non-farming operation covered by the Act. \textit{Id.} Ultimately, the court held that the claimant, who was injured while working in a body shop located on a farm, was covered under the provisions of the Act, despite the fact that, at other times, he was also compensated for doing farm labor. \textit{See also} Kaplan v. Gaskill, 108 Neb.
Often, a discernable separation exists between the operations, allowing the courts to easily determine to which operation the employee's services were directed. In other situations, like D B Feedyards', the farming and commercial operations are inherently intertwined, making it nearly impossible for a court to make a meaningful distinction between the two.33

III. LEGAL ANALYSIS

A. The Court's Treatment of Larsen v. D B Feedyards

In Larsen v. D B Feedyards, Inc., the Nebraska Supreme Court faced a situation where the distinction between the agricultural and commercial nature of the employer's business operations was nearly nonexistent. The feedlot operated by D B Feedyards serviced its own cattle as well as cattle owned by other individuals and entities. Although the feedlot originally serviced only cattle owned by the defendant, at the time Larsen sustained his personal injury, only one-half to one-fourth of the cattle fed and housed by D B Feedyards were owned by the corporation. At trial and on appeal to the Nebraska Supreme Court, Larsen argued that because the defendant was primarily engaged in a commercial enterprise, it was not an excepted employer and that, therefore, Larsen was covered by the Act.34 D B Feedyards, on the other hand, argued that "because it was engaged in the business of farming or ranching, it [was] an excepted employer under section 48-106(2)" and, as a result, Larsen was not covered by the Act.35

In order to distinguish between the two forms of employment, the court ultimately propounded a fact-intensive inquiry which, on its face, appeared to comport with the statutory requirements of the version of section 48-106(2) as it then existed, as well as established case law. The court, however, took the analysis one step further by employing an analysis where the decisive question was the nature of the employee's employment at the time of injury.

In its analysis, the Larsen court noted that recent case law, in keeping with the language of section 48-106(2), had emphasized that it is the nature of the employer's business, rather than the nature of the employee's activities, which determines the applicability of the exception. The court further stated that the Workers' Compensation court's analysis properly focused on the activities of the employer. In Leppert v. Parker, the Nebraska Supreme Court stated that the task

455, 459-60, 187 N.W. 943, 945 (1922) (concluding the workers' compensation act does not contemplate that a person be engaged in only one regular business).
33. Larsen, 264 Neb. at 492, 648 N.W.2d at 312 (Stephan, J., dissenting).
34. Larsen, 264 Neb. at 487-88, 648 N.W.2d at 310.
35. Id.
performed by the employee at the time of injury is relevant to the inquiry.\textsuperscript{36} While the \textit{Larsen} court acknowledged the relevancy of the employee's task, it was more than relevant evidence in its final determination. Despite D B Feedyards' contention to the contrary, the court found that it operated a commercial operation as well as a farm operation. Strong evidence in support of this finding was the fact that one-half to three-fourths of the cattle fed by the corporation were owned by customers of D B Feedyards. Having established that D B Feedyards ran two operations, the court's next objective was to establish for which operation Larsen was employed at the time he sustained his injury. To make this determination, the court looked at the tasks performed by Larsen when he was injured. The court emphasized that at the time of injury, Larsen was roping cattle owned by one of D B Feedyards' customers. This fact supported the trial court's finding that Larsen's employment at the time of injury was for the benefit of the commercial operation rather than the defendant's farm operation.

By focusing on the employee's activities at the time he was injured, the court set a new precedent for circumstances where the employer's business is comprised of more than one operation. After \textit{Larsen}, the analysis necessarily focused on more than the nature of the employer's operation. In the wake of the court's opinion, it was necessary for the workers' compensation and appellate courts to look at the work performed by the employee to determine which operation benefited from the employee's work. Consequently, when employers were engaged in farming and ranching of their own and others' land and livestock, the analysis took into consideration the nature of the employer's business, but the final determination ultimately turned on the work performed by the claimant at the time he or she was injured. In the words of Justice Gerrard, an employer's liability "turns not on whose ox was gored, but on whose steer was roped."\textsuperscript{37}

B. Consequences of \textit{Larsen v. D B Feedyards}

By differentiating the claimant's type of employment in \textit{Larsen} by the ownership of the particular cattle he was roping at the time he sustained his injury, the Nebraska Supreme Court brought Nebraska

\textsuperscript{36} Leppert v. Parker, 218 Neb. 63, 67, 352 N.W.2d 180, 182 (1984); see also Campos v. Tomoi, 175 Neb. 555, 122 N.W.2d 473 (1963). Taking into consideration the entire relationship of the parties, the \textit{Campos} court ultimately found that the plaintiff was employed to operate a bulldozer and thus not as a farm laborer. In its analysis, the court stated that "[t]he whole character of the employment must be looked at to determine whether he [the employee] is a farm laborer."). \textit{Id.} at 555, 122 N.W.2d at 475 (quoting Peterson v. Farmers' State Bank, 230 N.W. 124, 124 (1930)).

\textsuperscript{37} \textit{Larsen}, 264 Neb. at 494, 648 N.W.2d at 314 (Gerrard, J., dissenting).
in line with the majority farm exception analysis when an employer is comprised of two operations, one commercial and one farm oriented. The court's decision was adamantly rejected by Justices Stephan and Gerrard, who each wrote separate dissenting opinions. In the view of both Justices, the court was incorrect in distinguishing between D B Feedyards' two types of employment. In the initial paragraph of his dissent, Justice Stephan stated the following:

I cannot accept the majority's premise that D B Feedyards was engaged in two separate and distinct enterprises, one agricultural and one commercial, differentiated solely by the ownership of the cattle on feed. Nor can I accept the majority's decision to determine the applicability of the farm or ranch laborer based exemption upon the narrow and irrelevant question of whose steer was being roped at the time of injury.38

Justice Stephan went on to state that the "fact-intensive nature" of the inquiry employed by the majority in Larsen "benefits neither employers nor employees."39 Justice Stephan was entirely correct.

The analysis employed by the court in Larsen was a fact intensive inquiry which looked backward in time, rather than forward. In order to determine whether an employee was excluded from the statute, it was necessary for a court to look at the nature of the employee's activities at the time he suffered his injury. This requirement, however, poses significant problems. Because agriculture and its commercial counterparts are inherently unpredictable, the activities of any given employee on any given day are unforeseeable. Consequently, it is not within an employer's frame of knowledge to know whether an employee will be performing work which benefits the employer's agricultural operation or whether the employee's work will be for the benefit of the employer's commercial operation. This lack of knowledge means that an employer is unable to predict whether or not workers' compensation insurance must be carried to protect the employee. Even if an employee primarily works for the benefit of the farm operation, the sporadic occasions when he or she works for the commercial operation puts the employer at risk for tremendous personal liability if he has failed to obtain workers' compensation insurance.

Under workers' compensation, injured employees are entitled to medical expenses as well as lost wages. While wage replacement varies among the states, most provide injured employees with one-half to two-thirds their average weekly wage, tax free.40 In Nebraska, benefits are governed by Nebraska Revised Statute section 48-121 (Cum. Supp. 2002). Under section 48-121, if an employee is rendered totally disabled as a result of a compensable work-related injury, the em-

38. Id. at 491, 648 N.W.2d at 312 (Stephan, J., dissenting).
39. Id. at 493, 648 N.W.2d at 313 (Stephan J., dissenting).
ployee receives two-thirds his average weekly wage, not to exceed the statutory maximum specified in section 48-121.01 of the Nebraska Revised Statutes, for the duration of the disability. If an employee suffers only partial disability to his back, neck or head, he is entitled to two-thirds his average weekly wage multiplied by his loss of earning capacity for a total of 300 weeks. If an employee sustains permanent injury to a "scheduled member," which includes fingers, hands, arms, toes, feet, legs, eyes, ears, and nose, the employee receives two-thirds his average weekly wage for the statutorily specified number of weeks multiplied by his permanent impairment. In addition to the weekly wage benefits specified above, the Nebraska's Workers' Compensation Act provides that all medical expenses stemming from a compensable injury are the liability of the employer or its insurer.

42. Neb. Rev. Stat. § 48-121.01(1)(b) (Reissue 1998) provides that the maximum weekly benefit beginning January 1, 1996 and each January 1 thereafter shall be "computed to the next higher whole dollar of the state average weekly wage." The maximum weekly benefit for 1996 was $409.00, for 1997 it was $427.00, for 1998 it was $444.00, for 1999 it was $468.00, for 2000 it was $487.00, for 2001 it was $508.00, and for 2002, the maximum benefit was $528.00. Neb. Rev. Stat. § 48-121.01(2) provides that employees covered under the Act shall not receive a weekly benefit less than $49.00 per week. The minimum benefit to which employees are entitled has remained the same since mid-April of 1973. For the two years prior to 1973, the minimum benefit for the first 300 weeks of benefits was $40 and for the two years prior that, the minimum benefit was only $35.00. Nebraska Workers' Compensation Court, Table of Maximum/Minimum Compensation Benefits (March 8, 2004), available at www.nol.org/home/WC/misc/benefits.pdf.
43. See, e.g., Nordby v. Gould, Inc., 213 Neb. 372, 374, 329 N.W.2d 118, 119 (1983) (stating that impairments to the body as a whole are compensated in terms of loss of earning capacity while impairments to scheduled members are compensated on the basis of physical function loss).
44. The loss of a thumb entitles an employee to weekly benefits for 60 weeks, the first finger for 35 weeks, the second finger for 30 weeks, the third finger for 20 weeks, and the "little finger" for 15 weeks. Neb. Rev. Stat. § 48-121 (Reissue 1998 & Cum. Supp. 2002). If an employee loses a "great toe," they are entitled to 30 weeks of weekly benefits. Id. The loss of any other toe entitles them to benefits for 10 weeks. If a hand is lost, the employee receives 175 weeks of benefits and for the loss of an arm they receive benefits for 225 weeks. The loss of a foot entitles an employee to 150 weeks of benefits and a lost leg is worth 215 weeks of benefits. A lost eye or ear entitles the employee to 25 weeks of benefits while the loss of hearing in an ear entitles the employee to benefits for 50 weeks. If an employee loses his nose, he will receive benefits for 50 weeks. If an employee loses the use of more than one member, but is not rendered disabled, he will receive benefits for each member, with the periods of benefits running consecutively. If an employee loses either both hands, both arms, both feet, both legs, both eyes, hearing in both ears, or any two thereof in one accident, he is considered totally and permanently disabled and is compensated according to section 48-121(1). Neb. Rev. Stat. § 48-121 (Reissue 1998 & Cum. Supp. 2002).
Depending on the severity of the employee's injury, liability for medical expenses can be tremendous.

The immensity of potential total liability for a work related accident is best seen through a hypothetical illustration:

In 2002, employee A, a 35 year old tractor-trailer driver, suffers a compensable low-back injury which a trial court determines to have rendered him totally disabled.46 At the time A sustained his work related injury, he had an average weekly wage of $950.00. Two-thirds A's average weekly wage results in a weekly benefit of $600.00.47 In 2002, the maximum benefit an employee is eligible to receive is $528.00. Because the weekly benefit to which A is entitled exceeds the statutory maximum, A is entitled only to the statutory maximum of $528.00 per week for the remainder of his life. IRS life expectancy tables estimate that the life expectancy of a 35 year old individual is 47.3 years.48 $528.00 multiplied by 2459.60 weeks (52 weeks multiplied by 47.3 years) results in a total benefit of $1,298,668.80 over the employee's lifetime.49

Now, if A's employer knew prior to the A's injury that it was not exempt from the Act and had acted appropriately by obtaining workers' compensation insurance, the employer's overall liability would be minimal. The only out of pocket expenses the employer would be faced with would include any applicable deductibles and possible increases to its workers' compensation premiums, which are based on the number of claims an individual employer submits. However, if the employer failed to obtain workers' compensation insurance because of the mistaken belief that it was exempt from the Act, the employer would find itself personally liable for all A's medical bills and weekly benefits.50 As the calculation above demonstrates, without workers' com-

46. Disability in workers' compensation is a legal term determined by a judge or vocational rehabilitation counselor, rather than a medical term determined by a medical doctor.

47. To determine the benefits to which an employee is entitled, the sum of his or her gross pay for the 26 weeks prior to the accident is divided by number of weeks in which the employee received a paycheck. If an employee received a paycheck for only 20 weeks prior to the accident, the sum of those paychecks would be divided by 20 weeks. Once the average weekly wage is determined, it is multiplied by two-thirds. In this example, the calculation is as follows: average weekly wage = $900.00 x 2/3 = $600.00 (rounded to the nearest cent).


49. In addition to the weekly benefit, A's employer or its insurer is also responsible for all medical expenses related to A's injury. In some instances, medical expenses can far exceed an employee's wage replacement. For example, in 1995, a migrant farm worker who lost three limbs in a farming accident in Idaho incurred $750,000 in medical expenses. Norma Wagner, Farm Workers: A Net for Migrants Who Slip Through Insurance Cracks, SALT LAKE TRIB., Jan. 24, 1997, at A1.

50. In the Nebraska Legislature floor debate over LB 417, Senator Matt Connealy argued that if employers are not required to carry workers' compensation insurance for their employees, such employees should be covered under health and/or accident insurance. In support of Senator Connealy's proposal, Senator Bromm
pensation insurance, A's employer's personal liability, absent general liability insurance, exceeds one million dollars.

Prior to Larsen, an agricultural employer could determine whether he was an exempted employer under the Act by reviewing the nature of his agricultural operation. If the operation was traditional in nature, the employer was excepted. If the operation was commercial in nature, the employer was not excepted. This easy analysis no longer existed after Larsen. Rather, in order to determine whether it was excepted under the farm laborer exception, an employer had to look into the future to determine what specific activities an employee would be performing when he sustained an injury. Because we lack the ability to foresee future events, an agricultural employer that is engaged in both commercial and traditional farm operations is unable to determine whether or not it is excepted from the Act. To protect itself from tremendous personal liability after Larsen, it was necessary for commercial agriculture employers to obtain workers' compensation insurance, despite the fact that part of their operations are excepted under the Act. Consequently, to all extents and purposes, Larsen abrogated the farm exception for agricultural employees engaged in both farm and commercial operations.

As Justice Stephan stated in his dissenting opinion to Larsen, not only does the analysis employed by the majority fail to benefit employers, it also fails to benefit employees.51 Because of the uncertainty of whether or not they were excepted from the Act, some agricultural employers may have chosen to tempt fate by not obtaining workers' compensation insurance. If the dice were rolled and the employer lost, the employee also lost. This is so because without the protection of workers' compensation coverage, an injured employee may be forced to sue his employer to collect the benefits and medical expenses to which he is entitled.

While it is true that some employers may have general liability insurance policies upon which they can rely, such policies often provide inadequate coverage.52 In fact, the limits of general liability poli-


cies are often inadequate to cover medical expenses incurred by the injured farm employee. For example, in *Benson v. North Dakota Workmen's Compensation Bureau*, the injured employee's employer did not carry voluntary workers' compensation insurance because it would be "too costly." Instead, the employer believed he had enough private insurance that would take care of any employee accident. However, the farm liability insurance policy carried by the employer only provided $2,000 in no-fault medical benefits.

Even greater losers, however, are those employees whose employers failed to obtain any type of liability insurance coverage. The only remuneration these employees will receive is what their employers can personally afford. If the employee's workers' compensation entitlement exceeds one million dollars, as in the earlier hypothetical, the likelihood of an employer, especially a small traditional and commercial agricultural employer, being able to cover its entire liability is highly unlikely. Consequently, the employee is not afforded full recovery for either his injuries or his loss of earnings.

IV. LEGISLATIVE RESPONSE TO SECTION 48-106 AMBIGUITY

To prevent the potential detrimental effect of future farm exception analyses after *Larsen*, a clear definition of who constituted and excepted farm employer, which did not turn on "[d]istinctions that are too subtle to be understood or anticipated," needed to be established. As Justice Gerrard noted in his dissent, the proper forum to provide this definition was the Nebraska Legislature. Approximately one year after the court issued its opinion in *Larsen*, the Nebraska Legislature did react to the inherent ambiguity of section 48-106 as it existed at the time of *Larsen* by the passage of LB 210. The result was a complete rewriting of the statute. As it stands now, section 48-106(d) excepts from coverage of the Act services performed by a worker "when performed for an employer who is engaged in an agricultural operation and employs unrelated employees" unless the employer employs ten or more, full-time, unrelated employees for thirteen weeks.

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53. *Id.*
54. *Benson v. N.D. Workmens' Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979) (holding that excluding agricultural employees from the benefits of workers' compensation is unreasonable and contrary to the expressed purpose of North Dakota's workers' compensation act"), overruled by *Haney v. N.D. Workers Comp. Bureau*, 18 N.W.2d 195 (1994) (finding the agricultural exception to be constitutional).
55. *Benson*, 233 N.W.2d at 105.
56. *Larsen*, 264 Neb. at 485, 648 N.W.2d at 315.
Eliminated entirely from the statute was the now ambiguous language "employers of farm or ranch laborers." In its place, the Legislature has substituted the broad wording of "agricultural operation" which seems to encompass both the traditional farming operations that were excluded under the previous version of section 48-106, as well as those commercial agricultural operations which had in recent years been deemed not excluded under section 48-106. By incorporating the broader new language and by placing limitations on the number of unrelated employees an employer may employ and still exempt from the requirement of carrying workers' compensation insurance, the Legislature has clarified the inherent ambiguity of the previous version of the statute and dealt with the problem of commercial agricultural operations, which the Nebraska courts were disinclined to exempt from coverage.

Unfortunately, in its clarification of the statute, the Legislature missed an opportune time to remedy injustices encountered by the thousands of agricultural employees who are injured in work-related agricultural accidents yearly. Agriculture has long been recognized as one of the most hazardous industries in the United States. In 2002, 789 people died while involved with agricultural work in the United States. The rate for non-fatal injuries in the agricultural sector is similarly substantial. While there is no single, continuous source of national non-fatal agricultural injury data, it was estimated that there were 200,000 work-related agriculture related injuries in 1993. In Nebraska, agriculture wasn't merely one of the top ranking hazardous employment sectors, it was the most hazardous, accounting for 83 deaths in 2002.

Despite the well documented hazards of agricultural employment, a number of states, Nebraska included, continue to exempt employment in that sector from their workers' compensation statutes. In part, this is due to the belief that "farming, unlike other professions, cannot effectively pass on the increased costs of agricultural accidents.
and injuries to consumers.” Furthermore, the belief predominates that the farmers’ related insurance premiums are cost prohibitive in a farm economy already financially strapped. Whether these fears are justifiable will not be argued in this Note. Rather, it will merely be pointed out that the financial savings of the farmer stemming from the exemption from workers’ compensation comes at the expense of the farmer’s employees. While individual health insurance may cover medical bills stemming from an injury not covered by workers’ compensation, such insurance does not provide reimbursement for lost wages, both past and future, as a result of a work related injury. Similarly, as previously noted, general liability policies carried by farmers are often inadequate to fully compensate an injured farm laborer. Such policies do not always provide coverage for work-related injuries and are often inadequate to cover basic medical expenses incurred while treating work-related injuries. In addition, when seeking remuneration through common law personal injury claims, farm laborers must prove that the negligence of their employer was the legal and proximate cause of the employees injuries and rebut the plethora of defenses which can bar their recovery, including assumption of risk, contributory negligence, and the negligence of fellow employees.

It was clear from Larsen that steps needed to be taken by the Legislature to clear up the ambiguity of section 48-106. The Legislature has done so and for clarification purposes, has done a fine job. However, in rewriting the statute in a more inclusive manner than the preceding statute had been interpreted in recent years, the Legislature protected the finances of the farmers at the expense of their often low-paid, minimally educated employees. Author Heather Palmer had it partially correct when she characterized the agriculture exemption in workers’ compensation as an American tragedy for farmers and injured farmhands. In Nebraska, it is simply an American tragedy for injured farmhands.

63. See Palmer, supra note 40.
64. Id. at 492.
65. Id. at 493.
66. Id. at 497.