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Workmen's Compensation—Disfigurement Awards under the Nebraska Statutes—*Wengler v. Grosshans Lumber Co.* (Neb. 1962)

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WORKMEN'S COMPENSATION—DISFIGUREMENT AWARDS UNDER THE NEBRASKA STATUTES

I

In a recent Nebraska case[1] claimant suffered a compensable accident resulting in a scar on his chin, loss of teeth, and an alleged speech defect. After receiving medical benefits,[2] claimant applied for disability benefits under Nebraska's Workmen's Compensation Statute.[3] The Nebraska Supreme Court *held* that in the absence of proof that claimant's earning capacity had been impaired, he was not entitled to disability benefits under the statute.

Nebraska has no statute specifically covering the problem of disfigurement awards. Forty other jurisdictions have statutes[4] mentioning and providing for disfigurement, either generally[5] or

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[1] Wengler v. Grosshans Lumber Co., 173 Neb. 839, 115 N.W.2d 415 (1962).

[2] NEB. REV. STAT. § 48-120 (Reissue 1960) provides for "reasonable medical and hospital services and medicines as and when needed, subject to the approval of the compensation court."

[3] NEB. REV. STAT. § 48-101 to § 48-191 (Reissue 1960).

[4] ALA. CODE tit. 26, § 279 (1958); ALASKA COMP. LAWS ANN. § 43-3-1 (Supp. 1958); ARIZ. REV. STAT. ANN. § 23-1044 (1956); ARK. STAT. ANN. § 81-1313(g) (1947); CAL. LAB. CODE § 4660; COLO. REV. STAT. ANN. § 81-12-6 (Supp. 1960); CONN GEN. STAT. ANN. § 31-308 (Supp. 1961); DEL. CODE ANN. tit. 19, § 2326 (Supp. 1960); D.C. CODE ANN. § 36-501 (1951) (adopting 44 Stat. 1428 (1927), 33 U.S.C. § 908(20) (1959)); FLA. STAT. ANN. § 440.15 (1952); HAWAII REV. LAWS § 97-26 (Supp. 1960); IDAHO CODE ANN. § 72-1017 (1949); ILL. ANN. STAT. ch. 48, § 138.8 (Smith-Hurd 1961); IND. ANN. STAT. § 40-1303 (Supp. 1962); KY. REV. STAT. § 342.110 (Supp. 1962); Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1428 (1927), 33 U.S.C. § 908(20) (1959); LA. REV. STAT. ANN. § 23.1221 (1950); MD. ANN. CODE art. 101, § 36 (1957); MINN. STAT. § 176.101 (1961); MISS. CODE ANN. § 6998-09(24) (Supp. 1960); MO. REV. STAT. § 287.190 (1959); MONT. REV. CODES ANN. § 92-709 (Supp. 1961); NEV. REV. STAT. § 616.590 (Supp. 1959); N.M. STAT. ANN. § 59-10-18.5 (Supp. 1959); N.Y. WORKMEN'S COMP. § 15(3); N.C. GEN. STAT. § 97-31 (1958); N.D. CENT. CODE § 65-01-02(11) (1960); OHIO REV. CODE ANN. § 4123.57 (Page Supp. 1961); OKLA. STAT. ANN. tit. 85, § 22 (Supp. 1962); PA. STAT. ANN. tit. 77, § 513 (Supp. 1961); Philippines; P.R. LAWS ANN. tit. 11, § 3 (Supp. 1957); S.C. CODE § 72-153 (1952); S.D. CODE § 64.0403(2) (1939); TENN. CODE ANN. § 50-1007 (Supp. 1962); TEX. REV. CIV. STAT. art. 8306 § 12 (Supp. 1962); UTAH CODE ANN. § 35-1-66 (Supp. 1961); VA. CODE ANN. § 65-53 (1950); WIS. STAT. ANN. § 102.56 (Supp. 1962); WYO. STAT. ANN. § 27-83 (1957).

[5] See, *e.g.*, MINN. STAT. § 176.101 (1961) (for disfigurement not resulting from the loss of a member or other injury); S.C. CODE § 72-153 (1952) (facial, head or bodily disfigurement or injury to any member or organ of body); UTAH CODE ANN. § 35-1-66 (Supp. 1961) (for the loss of bodily function not provided for or any other disfigurement).

specifically,[6] in many instances fixing maximums on awards that may be given.[7] Some of these statutes are premised on the theory that disfigurement impairs the earning capacity of the injured workman and should, to that extent, be compensable,[8] while others make the term "disfigurement" a "catch-all" for all injuries not specifically covered by the schedules.[9]

II

The Nebraska statutes provide compensation under section 48-121(1) for "total disability"[10] and under section 48-121(2) for "disability partial in character, except the particular cases mentioned in subdivision (3) of this section."[11] In interpreting sub-

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[6] See, *e.g.*, N.M. STAT. ANN. § 59-10-18.5 (Supp. 1959) (permanently disfigured about the head or face); OKLA. STAT. ANN. tit. 85, § 22 (Supp. 1962) (serious and permanent disfigurement of head, face, or hand); WIS. STAT. ANN. § 102.56 (Supp. 1962) (disfigurement about head, neck, hand or arm).

[7] See, *e.g.*, COLO. REV. STAT. ANN. § 81-12-6 (Supp. 1960) (maximum $1,000); HAWAII REV. LAWS § 97-26 (Supp. 1960) (maximum $7,000); N.C. GEN. STAT. § 97-31 (1958) (maximum $3,500).

[8] See, *e.g.*, Jolly v. Hampton & Sons Lumber Co., 353 S.W.2d 338 (Ark. 1962) (disfigurement of ear and face not compensable unless shown to affect earning capacity). For collected cases see 11 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 2337 at 626 n. 2 (3d ed. 1957).

[9] See *e.g.*, Bethlehem Steel Co. v. Wilson, 210 Md. 568, 124 A.2d 249 (1956) (compensation awarded for disfigurement to parts of body usually covered by clothing); Shannon v. General Motors Corp., 52 Del. 524, 161 A.2d 433 (1960) (although recovery denied for small scar, impairment of earning capacity not prerequisite to recovery); Arkin v. Industrial Comm'n., 145 Colo. 463, 358 P.2d 879 (1961) (compensation for loss of four teeth even though there were means of concealment); Macaluso v. Schell-Wolfson, 56 So. 2d 429 (La. App. 1952) (loss of teeth compensable as "loss of function" even if dentures provided).

[10] NEB. REV. STAT. § 48-121(1) (Reissue 1960): "The following schedule of compensation is hereby established for injuries resulting in disability: (1) For the first three hundred weeks of *total disability,* the compensation shall be sixty-six and two-thirds per cent of the wages received at the time of injury . . . ." (Emphasis added.)

[11] NEB. REV. STAT. § 48-121(2) (Reissue 1960): "For *disability partial in character,* except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . ." (Emphasis added.) Section 48-121(3) lists certain scheduled injuries and states in part: "Should the employer and the employee be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensation shall be settled according to the provisions of sections 48-173 to 48-185."

divisions (1) and (2), the Nebraska Supreme Court has found "disability" to mean the impairment of earning capacity,[12] and such impairment must be shown before compensation will result. "Disability" in terms of earning capacity, however, apparently is not at issue in the scheduled injuries set out in section 48-121(3) as it is under section 48-121(1) and (2). Under the scheduled injuries listed in section 48-121(3) it has been held that it is immaterial whether an industrial disability is present or not.[13] It may be questioned whether this ability to receive compensation under section 48-121(3) without proving any diminution of earning capacity is, in fact, consistent wth the court's requirement that impairment of earning capacity be established before compensation will be granted under section 48-121(1) or (2). Under this interpretation of section 48-121 and these standards of proof, a watchmaker who loses a leg is entitled to immediate compensation because the loss of a leg is specifically covered by the schedule under subdivision (3)[14] even though his present earning capacity may not have been impaired. However, since he receives compensation under section 48-121(3), he is not required to show any diminution of earning capacity—present or future. A workman, however, who receives an injury which is not specifically covered by the schedule under subdivision (3) must receive compensation, if he is to receive it at all, under section 48-121(1) or (2) and therefore, has the added burden of proving impairment of earning capacity. This distinction may, perhaps be explained by saying that one of the prime objectives of workmen's compensation is to get the compensation to the worker immediately. It is therefore in the interest of this objective that the scheduled injuries be promptly compensated without additional proof of diminution of earning capacity and, consequently, without additional delay. Furthermore, the injuries specifically covered by the schedule are of a commonly recurrent nature, being, in and of themselves, serious enough to be presumptive proof of diminution of earning capacity, either present or future.

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[12] Thinnes v. Kearney Packing Co., 173 Neb. 123, 112 N.W.2d 732 (1962); Pavel v. Hughes Bros., 167 Neb. 727, 94 N.W.2d 492 (1959); Miller v. Peterson, 165 Neb. 344, 85 N.W.2d 575 (1957).

[13] Paulson v. Martin-Nebraska Co., 147 Neb. 1012, 26 N.W.2d 11 (1947); Bronson v. City of Fremont, 143 Neb. 281, 9 N.W.2d 218 (1943).

[14] NEB. REV. STAT. § 48-121(3) (Reissue 1960) ("for the loss of a leg, sixty-six and two-thirds per cent of daily wages during two hundred fifteen weeks").

III

Although the Nebraska statutes do not specifically mention disfigurement, Nebraska apparently follows the majority of states in granting compensation for disfigurement if the disfigurement impairs the earning capacity of the injured claimant. In the leading Nebraska case and the only one prior to *Wengler* specifically dealing with the disfigurement problem, *Wilson v. Brown-McDonald,*[15] claimant, a salesman, received severe facial disfigurement while working within the scope of his employment. He was awarded compensation even though the statute made no specific provision therefor. Claimant in *Wilson* based his claim on section 48-121(3) which states in part: "should the employer and employe be unable to agree upon the amount of compensation to be paid *in cases not covered by the schedule,* the amount of compensation shall be settled according to the provisions of sections 48-173 to 48-185."[16] The court concluded that this section and the procedure set out in sections 48-173 to 48-185 "leaves the matter of award and the degree of disability for this court to determine."[17] In order for the court to determine the "degree of disability", *i.e.* to determine whether the disability is total or partial, the court needs, under section 48-121(1) or (2), proof of diminution of earning capacity. Consequently, even though the injury is covered by the language in subdivision (3), the court, without specifically so stating, is removing the injury from subdivision (3) and placing it under either subdivision (1) or (2) and requiring proof of earning capacity impairment.[18] Claimant in *Wilson,* a salesman, furnished that proof[19]

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[15] 134 Neb. 211, 278 N.W. 254 (1938).

[16] NEB. REV. STAT. § 48-121(3) (Emphasis added.) Sections 48-173 to 48-185 set out the procedure to be followed by a claimant in applying for compensation and also the procedure to be followed on any appeal.

[17] Wilson v. Brown-McDonald Co., 134 Neb. 211, 224, 278 N.W. 254, 261 (1938).

[18] "The term wages is not a complete synonym for earning power. The ability to earn wages in one's employment is, obviously, a primary base in the admeasurement of earning power, but several other component factors are also involved. These include eligibility to procure employment generally, ability to hold a job obtained and capacity to perform the tasks of the work in which engaged. If any one or more of these four elements of earning power are affected and only partially impaired, as a result of an accident arising out of and in the course of employment, and the disability is not one covered by subdivision 3 of section 48-121, Comp. St. 1929, the right to compensation is governed by subdivision 2 of such section." Micek v. Omaha Steel Works, 136 Neb. 843, 848, 287 N.W. 645, 648 (1939).

[19] "To say the least, his facial appearance and disfigurement are of such

and the court concluded that since his earning capacity had been so greatly impaired,[20] he was totally disabled[21] within the meaning of the act and entitled to compensation.

In the instant case, claimant alleged that since he had received a compensable injury,[22] the court should grant compensation under section 48-121(3) irrespective of impairment of earning capacity. He apparently relied on the theory that previous cases[23] had made it clear that *for scheduled injuries* under section 48-121(3) he was not required to advance any evidence that his earning capacity had been impaired. In fact, he conceded that his "earning capacity had not been impaired."[24] He assumed that he was free from proving diminution of earning power if he could bring his injury under the language of section 48-121(3). The court apparently held, however, that the mere fact that his injury is covered by the words in subdivision (3)—"cases not covered by

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a character that he will be greatly handicapped in procuring employment on the open labor market. *The evidence adduced in the record is clear in this respect.*" Wilson v. Brown-McDonald Co., 134 Neb. 211, 225, 278 N.W. 254, 261 (1938). (Emphasis added.)

[20] "His injuries are the sole and only reason for his inability to obtain or perform work in the line for which he was trained or is fitted. If he obtained employment, he could not perform the work. The very nature of his work would require him to meet the public, where appearance most assuredly would seriously handicap him in using his ability as a salesman and place him at a great disadvantage in competition with other salesmen, and in fact, would rule him out altogether." Wilson v. Brown-McDonald Co., *supra* note 19, at 225, 278 N.W. at 262.

[21] "[S]uffice it to say, that the very nature of the third-degree burns, resulting in the severe facial disfigurement of the claimant, totally and permanently disable him, and for reasons stated in this opinion we believe that he was totally and permanently disabled from the date of the accident . . . ." Wilson v. Brown-McDonald Co., 134 Neb. 211, 225, 278 N.W. 254, 262 (1938); *accord,* Knaggs v. City of Lexington, 171 Neb. 135, 105 N.W.2d 727 (1960); Rapp v. Hale, 170 Neb. 620, 103 N.W.2d 851 (1960); Miller v. Peterson 165 Neb. 344, 85 N.W.2d 575 (1957); Haler v. Gering Bean Co., 162 Neb. 748, 82 N.W.2d 152 (1957); Franzen v. Blakely, 155 Neb. 621, 52 N.W.2d 833 (1952); Ludwickson v. Central States Elec. Co., 135 Neb. 371, 281 N.W. 603 (1938).

[22] Appellant argued that since he had met the four prerequisites to a compensable claim: (1) an injury; (2) an accident; (3) accident arose out of and in the course of his employment; and (4) no willful negligence on his part, the court should be governed by section 48-109—"which compensation shall be paid *in every case*" and should grant him compensation for his disfigurement." (Emphasis added.)

[23] Cases cited note 13 *supra.*

[24] Brief for Appellant, p. 34, Wengler v. Grosshans Lumber Co., 173 Neb. 839, 115 N.W.2d 415 (1962).

the schedule"—does not necessarily free a claimant from the burden of showing diminution of earning capacity. It is submitted that these words merely give the court the right to determine the amount of the compensation and the *degree of disability*.[25] To reach a determination of whether the injury is "total" (covered by section 48-121(1)) or "partial" (covered by section 48-121(2)) the court, in effect, is saying that the injury, since it is not specifically covered by the schedule, no longer is included under subdivision (3) but under either subdivision (1) or (2), both of which require proof of diminution of earning capacity to establish disability. Consequently, since claimant in *Wengler* failed to advance any evidence that the scar on his chin, his loss of teeth or alleged speech defect would in any way impair his earning power, the court held that he was not entitled to compensation under section 48-121.

The apparent holding in the *Wengler* case is that while disfigurement is a compensable injury under the Nebraska Workmen's Compensation Statute, the language in section 48-121(3), with respect to "cases not covered by the schedule" does not, in and of itself, cover disfigurement where no evidence of "disability" is presented to the court. Viewed in this light the *Wengler* decision is reconcilable with the earlier *Wilson* decision. While both cases were tried under the same wording of the statute—section 48-121(3)—both injuries were, in reality covered by section 48-121(1) or (2), requiring proof of impairment of earning capacity. Claimant in *Wilson* proved "disability" in terms of earning capacity while claimant in *Wengler* conceded that his earning power was not, to any degree, diminished.[26]

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[25] The Nebraska Supreme Court stated in *Wilson* that "the instant case is not covered by schedule, but recovery is permitted by the use of the language, 'in cases not covered by the schedule,' contained in section 48-121, Comp. St. 1929, which leaves the matter of award and the degree of disability for this court to determine." Wilson v. Brown-McDonald Co., 134 Neb. 211, 224, 278 N.W. 254, 261 (1938).

[26] Whether it is socially desirable to base compensation in this area upon the earning capacity concept or whether some broader standard should be adopted is an issue beyond the scope of this article. For an analysis of the difference between workmen's compensation and social insurance see 1 LARSON, WORKMEN'S COMPENSATION LAW § 3 at 13 (1952). It has even been suggested that in this area of disfigurement, the legislatures should perhaps restore the common law remedies. 2 LARSON, WORKMEN'S COMPENSATION LAW § 65.40 at 140 (1952).

For disfigurement in general see 11 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 2337 at 625 (3d ed. 1957); Annot., 80 A.L.R. 970; 116 A.L.R. 702.

IV

The confusing feature of the *Wengler* decision is the fact that the opinion uses language which has two unfortunate and probably unintended implications. The *first* of these is the inference that disfigurement injuries are only compensable when "total" disability and not mere "partial" disability results.[27] The opinion can be read literally as saying that a claimant can recover for disfigurement only if he is "totally" disabled under section 48-121(1) and if he shows that his earning power has been "greatly handicapped"[28] by the injury. The only factual difference, other than impairment of earning capacity, it is submitted, between *Wilson* and *Wengler* is the degree of disfigurement. The disfigurement in the *Wilson* case resulted in "total" disability to the injured salesman, while the disfigurement in the *Wengler* case resulted, perhaps, in only "partial" disability. It is submitted that, if claimant in *Wengler* could have shown partial impairment of earning power because of the disfigurement, he could have received compensation under section 48-121(2) and nothing in either the *Wilson* decision or the *Wengler* holding is contrary to such compensation.

The *second* inference is that "there is no 'disability' if the employee is receiving the same wages in the same or any other employment."[29] This language is misleading because, while it makes sense on the facts of this case, it is much narrower than the court's previous definition of "disability." Previously, "disability" was defined in terms of "earning capacity", and "earning capacity" in terms of employability. "Earning capacity" means *not only* the ability to perform the same work or like work at the same rate of

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[27] "The evidence in the instant case shows no such facial disfigurement as appeared in the case of Wilson v. Brown-McDonald Co., *supra,* nor does it show *total permanent* disability as appeared by the evidence in that case. The cited case [*Wilson*] is no authority supporting the plaintiff's claim for compensation." Wengler v. Grosshans Lumber Co., 173 Neb. 839, 849, 115 N.W.2d 415, 421 (1962). (Emphasis added.)

[28] There is language in the *Wilson* decision which indicates that perhaps the injury must be severe to the extent that not only would claimant be handicapped in getting future employment but that he would be "greatly handicapped," *e.g.,* "severely" burned; "shockingly" disfigured; "greatly" handicapped; "seriously" handicapped; "third-degree burns"; "severe" facial disfigurement. However, if a claimant could show only partial disability, it is submitted that the Nebraska Supreme Court would have a difficult time denying recovery in light of the reasoning used in the *Wilson* case.

[29] Wengler v. Grosshans Lumber Co., 173 Neb. 839, 850, 115 N.W.2d 415, 421 (1962).

pay, *but also* the ability to secure employment on the open labor market.[30] If claimant in *Wengler* could have shown that his future quests for employment on the open labor market would, to some degree, be hampered because of the disfigurement, he should be allowed compensation for "partial disability."

V

However, in spite of the misleading dictum, one thing appears certain after the *Wengler* decision. A claimant who receives a disfigurement injury and brings his claim under the language of section 48-121(3), must nevertheless prove impairment of earning capacity—either total or partial—to receive compensation under the Nebraska Workmen's Compensation Statute.

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[30] See note 18 *supra.*