

LOSS OF EARNING POWER EVALUATIONS IN NEBRASKA

LAWS, RULES, AND GUIDELINES

STATUTORY LAW

STATUTORY LAWS – Laws that exist by legislative enactments. There are very few statutory laws specifically addressing loss of earning power evaluations under the Nebraska Workers' Compensation Act. The statutes that do address them are §§48-121(2) and (3) and §48-162.01(3).

§ **48-121(2)** provides that compensation for partial disability resulting from injuries that are not on the statutory list of scheduled member injuries “shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . “

§ **48-121(3)** states “If, in the compensation court’s discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee’s loss of earning capacity . . .”

§ **48-162.01(3)** states “Any loss-of-earning power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor from the directory established pursuant to subsection (2) of this section and chosen or selected according to the procedures described in this subsection.” This section also states, “It is a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.”

CASE LAW

CASE LAW – Laws that exist by judicial precedent. Judicial decisions in workers' compensation cases involving earning power disputes have interpreted statutory provisions. Several have become generally recognized as authority for the disposition of disputes.

- A. Entitlement to Loss of Earning Evaluation.** With the exceptions noted below, case law dictates that all five of the criteria listed below must

be met in order to establish entitlement to a loss of earning power evaluation. One or more of these are frequently issues of dispute in court pleadings. In such cases it is generally not appropriate to conduct an evaluation until these issues are resolved by agreement of the parties or a court order.

1. Body as a Whole. Generally the claimant must have sustained an injury or occupational disease that impacts the whole body. This is usually taken to mean an injury to the head, neck, back, torso, etc., as opposed to single-member injuries to arms, legs, fingers, toes, etc. The Nebraska Supreme Court has stated, “The statutory scheme found in Neb. Rev. Stat. § 48-121 compensates impairments of the body as a whole in terms of employability and loss of earning capacity but compensates impairments of scheduled members on the basis of loss of physical function” See Nordby v. Gould Inc., 213 Neb. 372 (1983) The test for determining whether a disability is to a scheduled member or the body as a whole is not the situs of the injury but, rather, the location of the residual impairment. See Nordby v. Gould Inc.

In a case where one work accident produces two injuries, one of which is scheduled and the other is unscheduled, it is permissible to consider the impact of the scheduled member injury when assessing loss of earning capacity if the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without such consideration. See Zavala v. ConAgra Beef Company, 265 Neb. 188 (2003).

The Supreme Court has also held that an injury to a scheduled member can cause a whole-body impairment, thus entitling the employee to indemnity for loss of earning power. For example, in Bishop v. Specialty Fabricating Co. 277 Neb. 171 (2009), the employee developed PTSD as a result of a left arm injury and was found to be entitled to a loss of earning capacity evaluation.

Further, when a whole-body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of whole-body impairment. See Madlock v. Square D Co., 269 Neb. 675 (2005). Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity; to allow both awards creates an impermissible double recovery. See Madlock v. Square D Co.

More recently, the Supreme Court clarified that whether an employee's scheduled member loss has caused a whole-body impairment is properly resolved under a proximate cause inquiry at the point of the employee's maximum medical improvement, when the employee's permanent impairment is assessed. See Moyera v. Quality Pork International, 284 Neb. 963 (2013). If, by the point of maximum medical improvement, an employee has developed a whole-body impairment in addition to a scheduled member injury, the question is whether the work-related injury proximately caused the whole-body impairment. If both injuries arose from the same work-related injury, because the scheduled member injury resulted in the whole-body impairment in a natural and continuous sequence of events and the whole-body impairment would not have occurred but for the work-related injury, then the claimant is entitled to disability benefits for the whole-body impairment. See Moyera v. Quality Pork Int'l. In Moyera, the employee sustained a right foot injury which resulted in gait derangement along with hip and back pain. The Supreme Court held that he was entitled to a loss of earning capacity assessment.

Finally, under a provision added to the Workers' Compensation Act in 2008, multiple-member injuries may also qualify for a loss of earning capacity evaluation. Section 48-121(3) now provides, in relevant part: "If, in the compensation court's discretion, . . . benefits payable for a loss . . . of more than one member or parts of more than one member . . . , resulting from the same accident . . . , do not adequately compensate the employee for such loss . . . and such loss . . . results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee's loss of earning capacity"

- 2. Work-Related Injury or Disease.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. See Frank v. A&L Insulation, 256 Neb. 898 (1999).
- 3. Permanent Impairment.** Evidence of permanent impairment *or* permanent physical restrictions is sufficient to establish a permanent medical impairment for purposes of determining loss of earning capacity. See Swanson v. Park Place

Automotive, 267 Neb. 133 (2003). A numeric functional impairment rating is not a necessary prerequisite to an award of vocational rehabilitation services in loss of earning power cases. See Swanson v. Park Place Automotive.

4. Permanent Restrictions. A physician-ordered permanent physical restriction, based on a medically established permanent impairment of a body function, establishes a permanent medical impairment for purposes of determining loss of earning capacity. See Swanson v. Park Place Automotive.

However, with respect to multiple-member injuries under § 48-121(3), the Supreme Court has stated there is nothing that requires proof of permanent physical restrictions as to each injured member in order to perform a loss of earning capacity assessment thereunder. See Rodgers v. Nebraska State Fair, 288 Neb. 92 (2014).

5. Maximum Medical Improvement (MMI). Upon a determination that the claimant has reached a point of maximum medical improvement, absent a valid reason for not making such a determination, loss of earning power is to be determined as soon as possible. See Gibson v. Kurt Mfg., 255 Neb. 255 (1998). The fact that vocational rehabilitation may reduce an employee's loss of earning power is not a valid reason for postponing a determination of such loss. See Gibson v. Kurt Mfg. However, if vocational rehabilitation has been completed at the time a compensation court judge is requested to determine loss of earning capacity, the court should consider the beneficial effects of vocational rehabilitation on the claimant's loss of earning capacity. See Grandt v. Douglas County, 14 Neb. App. 219 (2005).

Occupational Disease. When an employee sustains an occupational disease in the course of his or her employment, which disease permanently restricts the return to his or her prior type of employment, the employee may recover for proven loss of earning power or capacity *without establishing a permanent physical impairment to the body as a whole*. See Jorn v. Pigs Unlimited, Inc., 255 Neb. 876 (1998). In Jorn's particular case, the Supreme Court stated "Unlike the rule discussed in Gibson v. Kurt Mfg. . . . a determination of earning capacity should be made following rehabilitation. Whether there has been a reduction of loss of earning power will not depend upon whether there has been a decrease of Jorn's whole-body impairment, since none was assessed."

B. Factors for Determining Earning Power Loss. Nebraska Supreme Court cases have set forth the following general principles relating to loss of earning determinations: An employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function. See Kleiva v. Paradise Landscapes, 227 Neb. 80 (1987). Total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. See Heiliger v. Walters and Heiliger Electric, Inc., 236 Neb. 459 (1990). The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. See Heiliger v. Walters and Heiliger Electric, Inc. Earning power, as used in 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. See Sidel v. Travelers Insurance Company, 205 Neb. 541 (1980). These four factors are commonly referred to as the Sidel factors and all four must be taken into account in determining an employee's loss of earning capacity. See Jorn v. Pigs Unlimited, Inc.

1. Eligibility to procure employment generally. This factor is a claimant's likelihood of obtaining employment in his or her geographic labor market area given the type and number of jobs that would be available to a claimant with his or her physical abilities, aptitudes, skills, training and experience.

Labor Market Definition. Generally the labor market available to the plaintiff is considered to be the area in and around the community where the claimant resides at the time of injury. However, the Supreme Court has stated that either the community where the injury occurred or the community where the employee has moved can serve as the hub community from which to assess the claimant's loss of earning power. See Money v. Tyrrell Flowers, 275 Neb. 602 (2008). Communities surrounding the claimant's hub community should be considered part of the claimant's labor market, but only to the extent that it would be reasonable for the claimant to seek work in that location. This

reasonableness determination should be based on the totality of the circumstances, with regard for such factors as (1) availability of transportation, (2) duration of the commute, (3) length of the workday the claimant is capable of working, (4) ability of the person to make the commute based on his or her physical condition, and (5) economic feasibility of a person in the claimant's position working in that location. See Giboo v. Certified Transmission Rebuilders, 275 Neb. 369 (2008). The Giboo decision went on to state “Regard might also be given to the more generalized inquiry of whether others who live in the claimant's hub community regularly seek employment in the prospective area. When an employee injured in one community relocates to a new community, the new community will serve as the hub community from which to assess the claimant's earning capacity, provided that the change of community was done in good faith, and not for improper motives.”

In a 2013 case involving an undocumented worker, the Supreme Court held that if the worker has returned to his or her country of origin and no reliable data is available for the location where the worker moved, the place where the injury occurred can be considered the hub community for the purpose of determining loss of earning capacity. See Visoso v. Cargill Meat Solutions, 285 Neb. 272 (2013)

- 2. Ability to hold a job obtained.** Some counselors include physical stamina (e.g. ability to work four hours a day) under this factor, but it could also include non-physical traits, both pre- and post-injury, that can impact a claimant's ability to hold a job even though he or she may be physically capable of performing the job (e.g., temperament, motivations, emotional issues, medications, self-imposed limitations, etc.). Definitions for many of these worker trait factors can be found in the DOT and in the Classification of Jobs-2000(COJ).
- 3. Capacity to perform the tasks of the work.** This pertains to a claimant's pre- and post-injury physical abilities to perform the essential functions of a job or jobs (lifting, reaching, climbing, sitting, standing, physical stamina, etc.). Definitions and levels of these abilities can be found in the U.S. Department of Labor's Dictionary of Occupational Titles (DOT).
- 4. Ability of the worker to earn wages in the employment in which he/she is engaged or for which he/she is fitted.** This factor pertains to a claimant's pre-injury wage (at the time of the injury) and the post-

injury wages associated with the jobs that would presumably be available to him or her subsequent to the injury.

Pre-Injury Wage.

Section §48-121(2) sets “wage received at the time of the injury” as the primary reference point from which to measure earning power loss. Determining wage at the time of injury, however, is generally not simply a matter of stating the employee’s hourly earnings. Pre-injury wage by statute and case law is a multivariate factor that is frequently an issue of dispute that can only be resolved in a court of law. A nonexclusive listing of some of the variables that are to be considered is presented below.

Contract of Hiring. Wage at the time of injury has been statutorily defined under §48-126 as “the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident.” Gratuities, board, lodging, or “similar advantages received from the employer” are not to be included “unless the money value of such advantages shall have been fixed by the parties at the time of hiring, except that if the workers’ compensation insurer shall have collected a premium based upon the value of such board, lodging, and similar advantages, then the value thereof shall become a part of the basis of determining compensation benefits.” See §48-126.

Average Weekly Wage. Under §48-126, if the employee was paid by the hour or day, or on the basis of his or her output, the pre-injury wage for continuous employment is the claimant’s “average weekly income for the period of time ordinarily constituting his or her week’s work and using as a basis of calculation his or her earnings during as much of the preceding six months (26 weeks) as he or she worked for the same employer.” Abnormally low work weeks due to circumstances such as sickness, vacation, holidays, or work shortages should be excluded from the 26-week period used for the calculation. See Arbtin v. Puritan Mfg. Co., 13 Neb. App. 540 (2005), and Canas v. Maryland Cas. Co., 236 Neb. 164 (1990).

Commissions, Bonuses, and Similar Advantages.

Section 48-126 provides that while gratuities are not included within wages, “similar advantages” fixed by the parties at the time of hiring are included. See Schlotfeld v. Mel’s Heating & Air Conditioning, 233 Neb. 488 (1989),

Logan v. Rocky Mountain Rental, 3 Neb. App. 173 (1994). For example, if a bonus is a specifically bargained-for wage benefit, fixed at the time of hire, and represents a real and reasonably definite economic gain to the employee, it may be properly included in the calculation of plaintiff's average weekly wage. See Solheim v. Hastings Housing Co., 151 Neb. 264 (1949).

Overtime Wages. Section 48-126 states that average weekly wage calculation "shall also be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime, except that if the insurance company's policy of insurance provides for the collection of a premium based upon such overtime, then such overtime shall become a part of the basis of determining compensation benefits." A Workers' Compensation Court review panel opinion held as follows: "The Court has for decades construed this statute to allow the inclusion in the calculation of the employee's average weekly wage those hours that the employee may have worked in excess of 40 hours, provided that those hours are considered as having been compensated at the regular rate and not at the overtime rate unless a premium based upon such overtime rate was collected by the employer's workers' compensation insurer. To argue that an employee regularly scheduled to work 48 hours per week, for example, is deemed to be working only 40 hours for purposes of calculating his entitlement to workers' compensation benefits, is silly." See Boyd v. City of Lincoln, Doc. 198 No. 2467 (2000). In that case, the review panel concluded that the trial judge did not err in including the plaintiff's overtime hours because the judge did so at the regular hourly rate.

Part-time Wages. By convention, full-time employment is generally considered to be 40 hours per week and part-time to be any thing less than 40 hours. However, with respect to wages, the Nebraska Workers' Compensation Act draws no distinction between part-time and full-time for workers with permanent disabilities. Section 48-121(4) provides "For disability resulting from permanent disability, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee, the weekly wages shall be taken to be computed upon the basis of a workweek of a minimum of five days, if the wages are paid by the day, or upon the basis of a workweek

of a minimum of forty hours, if the wages are paid by the hour, or upon the basis of a workweek of a minimum of five days or forty hours, whichever results in the higher weekly wage, if the wages are based on the output of the employee.” In Ramsey v. State of Nebraska, 259 Neb. 176 (2000), the Nebraska Supreme Court made the following observation: “As to hourly employees, §48-121(4) alters the computation of the average weekly wage under §48-126 only to the extent that it requires that a minimum of 40 hours per week be utilized in making the computation, which would result in part-time hourly employees with permanent disabilities being treated as though they had worked a 40-hour workweek.”

Post-Injury Wage.

The practice of comparing pre-injury wage to post-injury wage to estimate wage loss is axiomatic under the Nebraska Workers’ Compensation Act. However, unlike pre-injury wage, a claimant’s post-injury wage and how it is to be calculated is not defined by statute and depends on the specific facts and circumstances of the case.

C. The Process. While case law requires that the Sidel factors be addressed in a loss of earning power evaluation, it does not specify how they are to be factored into an overall loss estimate. The Nebraska Supreme Court has stated “[W]e construe the phrase ‘loss-of-earning-power evaluation’ in §48-162.01(3) to refer to a process as opposed to a document.” See Variano v. Dial Corp., 256 Neb. 318 (1999). Case law does not specify what that process is. However, some cases have addressed what it is *not*:

1. Loss of earning power is not synonymous with loss of physical function. In Gardner v. Beatrice Foods, 231 Neb. 464 (1989), the Nebraska Supreme Court stated, “Earning power is synonymous neither with wages . . . nor with loss of physical function. . . . Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical formula for determining one's earning power following an injury to the body as a whole . . . the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.”

2. Loss of earning power is not synonymous with loss of access to the labor market. A 2006 Workers’ Compensation Court review

panel opinion, which was affirmed in an unpublished Nebraska Court of Appeals decision, held that loss of access to the labor market may not be used as the only determinant of loss of earning power. See Krumwiede v. Metropolitan Utilities District, 204 No. 0075 (2006), aff'd April 17, 2007.

3. Loss of earning power is not synonymous with a loss in wages.

“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.” See Sidel v. Traveler’s Insurance Company. Further, the Supreme Court has stated that the mere fact that after an injury the employee receives, or is offered, his or her former wages or a larger sum does not necessarily preclude recovery of compensation under the workers' compensation statutes. See Schmid v. Nebraska Intergov. Risk Mgt. Assn., 239 Neb. 412 (1991). The fact that an employee is still employed and still paid the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity. See Underwood v. Eilers Machine & Welding, 6 Neb. App. 631 (1998).

4. No numerical formula. The Nebraska Supreme Court has stated “There is no numerical formula for determining earning power or the loss of earning power due to an injury.” See Aldrich v. ASARCO, Inc., 221 Neb. 126 (1985).

Multiple Scenarios. Frequently a vocational rehabilitation counselor will encounter situations involving two or more differing sets of facts pertaining to the same case. These situations arise when there are varying opinions regarding physical restrictions, average weekly wage, the actual labor market, etc. In such situations, the Nebraska Supreme Court has held that a vocational rehabilitation counselor may issue more than one report in the determination of loss of earning power. See Variano v. Dial Corp. The Nebraska Court of Appeals has further stated that “when a vocational rehabilitation counselor submits multiple reports that are determined to be written not because a process of recovery was incomplete from the time a prior report was written, but, rather, because a counselor gives differing opinions each based on a different factual scenario, it is up to the trial court to make factual findings to determine which report should be given the rebuttable presumption. See Noordam v. Vickers, Inc., 11 Neb. App. 739 (2003).

Expert Testimony. As noted earlier, if the nature and effect of a claimant’s injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. See Frank v. A&L Insulation. Once the cause

of a disability has been established, the compensation court may consider the testimony of the claimant in determining the extent of the claimant's disability. See Luehring v. Tibbs Constr. Co., 235 Neb. 883 (1990). In addition, the Supreme Court has stated that "While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant." See Cords v. City of Lincoln, 249 Neb. 748 (1996).

RULES

RULES – Prescribed guides for action adopted by the court. A rule of the court, albeit subordinate to statutory and case law, is in effect a law itself. The only court rule pertaining solely to loss of earning power evaluations is Rule 45 of the Nebraska Workers' Compensation Court Rules of Procedure. Rule 45 states as follows:

- A.** Loss of earning power evaluations shall be performed by private vocational rehabilitation counselors whose names appear on the approved directory established by the court.
- B.** If the parties cannot agree on the choice of a vocational rehabilitation counselor from the directory to perform the loss of earning power evaluation, the parties shall request the court to assign a vocational rehabilitation counselor from the directory of vocational rehabilitation counselors pursuant to the procedures outlined in Rule 42.
- C.** The fee of the vocational rehabilitation counselor for the loss of earning power evaluation shall be paid by the employer or his or her insurer. Such fee shall include expenses for an interpreter when necessary to assist the vocational rehabilitation counselor in the performance of his or her duties. Any such interpreter shall be selected by the vocational rehabilitation counselor.