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Employee's Ability to Recover Benefits Based On a Loss of Earning Power for Multiple Scheduled Member Injuries in One Accident, Made Easier By the Nebraska Supreme Court

The Nebraska Legislature amended the Nebraska Workers' Compensation Act in 2007 with L.B. 588, adding a provision at Neb. Rev. Stat. § 48-121(3) that employees suffering injuries to more than one scheduled member in the same accident may be entitled to benefits based upon a loss of earning power if: (1) In the Compensation Court's discretion, benefits payable per the schedule do not adequately compensate the employee; and (2) the employee's loss or loss of use results in at least a 30% loss of earning capacity. Many practitioners and at least one judge of the Nebraska Workers' Compensation Court interpreted this new provision to apply only where the employee can show permanent restrictions to more than one scheduled member due to a single accident. In *Rodgers v. Nebraska State Fair*, the Nebraska Supreme Court made it clear that such a showing is not a prerequisite to recovery under this provision.

In *Rodgers*, the employee suffered injuries to both knees due to a single accident. The employee underwent surgery to his left knee and sustained a 2% permanent impairment and no permanent restrictions due to the left knee. The employee underwent two surgeries to the right knee and sustained a 40% permanent impairment to his right lower extremity, and he was permanently restricted from climbing, squatting, kneeling, and prolonged walking due to the right knee. A vocational counselor determined the employee's loss of earning capacity was approximately 65% and the employee requested compensation based upon the loss of earning power.

The Workers' Compensation Court addressed whether Neb. Rev. Stat. § 48-121(3) entitled the employee to loss of earning capacity benefits. The employee argued proof of permanent impairment to multiple members triggered the additional remedy. Conversely, the employer argued the statute requires expert testimony showing permanent restrictions to **both** knees. The trial court agreed with the employer and held in order for the employee to recover benefits based upon a loss of earning capacity, there must be a functional loss of use in the form of permanent physical restrictions from an expert to each scheduled member.

The Nebraska Supreme Court disagreed and reversed the trial court's decision, finding proof of functional loss in the form of permanent physical restrictions to more than one scheduled member from an expert is **not** necessary for an employee to recover benefits based upon a loss of earning capacity. Instead, proof of permanent impairment to more than one scheduled member is sufficient.

In so finding, the Supreme Court said, "...the Legislature clearly intended to extend the opportunity to receive benefits for loss of earning capacity to workers with multiple member injuries resulting from the same accident or illness and for whom there is evidence of a 30-percent loss of earning capacity." It specifically found that expert proof of physical restrictions to each injured member is not a prerequisite for an employee to recover benefits under this provision.

It is reasonable to conclude from the *Rodgers* opinion that permanent loss or loss of use in the form of a permanent impairment to each extremity from an expert is still required. To recover based upon Neb. Rev. Stat. § 48-121(3), the employee still has to show that benefits payable per the schedule do not adequately compensate the employee and that the accident resulted in a loss of earning power of 30% or more.