

WORKMEN'S COMPENSATION

SUPREME COURT REVIEW

During the survey period, no particularly startling decisions were handed down in the area of workmen's compensation. The following two cases are of interest, however, one dealing with a constitutional argument, the other concerning the burden of proof required to establish a benefit claim.

CONSTITUTIONALITY OF PENALTY PROVISION

University of Nebraska at Omaha v. Paustian,¹ involved Section 48-125² of the Workmen's Compensation Act.³ That section provides for 50 percent additional compensation in the event that the employer's payments are delinquent.⁴ The only issue involved on appeal⁵ was whether Section 48-125 was unconstitutional because it authorizes the recovery of a penalty by a private individual contrary to article VII, section 5, of the Constitution of Nebraska.⁶

In *Abel v. Conover*,⁷ the court had declared unconstitutional certain statutory provisions which provided for treble damages in an action for deceit or collusion.⁸ Relying on *Sunderland Brothers Co. v. Chicago, B. & Q. R.R. Co.*,⁹ that court had held:

1. 190 Neb. 840, 212 N.W.2d 704 (1973) [hereinafter cited as *Paustian*].

2. NEB. REV. STAT. § 48-125 (Supp. 1973).

3. NEB. REV. STAT. §§ 48-101 *et seq.* (Reissue 1968).

4. NEB. REV. STAT. § 48-125 (Supp. 1973) states in part:

Except as hereinafter provided, all amounts of compensation payable under the provisions of this act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability.

5. The original award of a single judge of the compensation court had been affirmed, in turn, by the Workmen's Compensation Court *en banc*, and the District Court for Douglas County, prior to this appeal. *Paustian* at 841, 212 N.W.2d at 705.

6. NEB. CONST. art. 7, § 5:

All fines, penalties, and license money, arising under the general laws of the state, . . . shall belong and be paid over to the counties respectively, where the same may be levied or imposed, . . . [all such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, . . .

7. 170 Neb. 926, 104 N.W.2d 684 (1960).

8. *Id.* at 933, 104 N.W.2d at 690.

9. 104 Neb. 319, 177 N.W. 156, *on rehearing*, 104 Neb. 322, 179 N.W. 546 (1920).

A statute which imposes a liability for actual damages and in addition thereto a penalty to be paid to the injured party is repugnant to . . . the Constitution, which requires all fines and penalties arising under the general laws to go exclusively to the school fund. A statute which imposes liability for actual damages and additional liability for the same act provides a penalty.¹⁰

The court in *Paustian*, however, held *Abel v. Conover* inapplicable. In *Abel*, "actual damages" was intended to refer only to liabilities determined under the rules of common law, i.e., compensation for the injury sustained.¹¹ Since the Workmen's Compensation Act created rights which did not exist at common law, "[c]ompensation under the act need bear no relationship to actual damages resulting from the injury."¹² Indeed, Section 48-121¹³ of the Workmen's Compensation Act makes two-thirds of weekly wages the standard of compensation for a total disability. This obviously has no relation to the "actual damages" sustained.

The supreme court held that it was within the province of the legislature to increase the compensation by 50 percent for delay in payment.¹⁴ Since the legislature had created rights which did not exist at common law, it could place such restrictions thereon as it saw fit.¹⁵ The 50 percent additional compensation provided for by the statute was not a "penalty" within the constitutional prescription.¹⁶

BURDEN OF PROOF

In *Barbaglia v. General Motors Acceptance Corp.*,¹⁷ the supreme court rejected the plaintiff's contention that the rule of liberal construction of the Workmen's Compensation Act should be applied to aid him in carrying the burden of proving his case by a prepon-

10. 170 Neb. 926, 930, 104 N.W.2d 684, 688. The *Abel* court also said that liquidated damages in favor of a private person, although in form a penalty, were permissible if they were reasonably related to the actual damage sustained, which was not measurable by ordinary pecuniary standards. *Id.* at 931, 104 N.W.2d at 689.

11. *Paustian* at 843, 212 N.W.2d at 706.

12. *Id.* at 844, 212 N.W.2d at 706. See *Micek v. Omaha Steel Works*, 136 Neb. 843, 287 N.W. 645 (1939).

13. NEB. REV. STAT. § 48-121 (Supp. 1973).

14. *Paustian* at 844, 212 N.W.2d at 706.

15. *Id.* at 843, 212 N.W.2d at 706, citing *Ray v. Sanitary Garbage Co.*, 134 Neb. 178, 278 N.W. 139 (1938).

16. *Paustian* at 845, 212 N.W.2d at 707.

17. 190 Neb. 529, 209 N.W.2d 353 (1973) [hereinafter cited as *Barbaglia*].

derance of the evidence.¹⁸ In a workmen's compensation case, the burden is on the claimant to establish that his disability was caused by an accident arising out of and in the course of his employment.¹⁹ The court held that the rule of liberal construction of the Workmen's Compensation Act applies to the law, itself, but not to the evidence offered in support of a claim under the act.²⁰

LEGISLATION

VOCATIONAL REHABILITATION

Workmen's Compensation claimants will be permitted to obtain payments for vocational rehabilitation as a result of new legislation creating the Vocational Rehabilitation Fund.¹ Vocational rehabilitation basically involves providing services to disabled persons enabling them to overcome handicaps and to engage in useful occupations.² The Fund was established in order to provide a specific financial source for such services.

The money for the Fund will be obtained from all insurance companies writing workmen's compensation insurance in Nebraska,³ and from all employers doing business in Nebraska who are self-insurers.⁴ Insurance companies are required to contribute an amount equal to one percent of the gross amount of premiums received by them for workmen's compensation insurance;⁵ employers who are self-insurers must contribute an amount equal to one percent of the prevailing premium rate which would be paid for a policy of workmen's compensation insurance insuring against vocational rehabilitation risks.⁶

Pursuant to the creation of the Vocational Rehabilitation Fund, the statutory provision relating to restoration of injured employees

18. *Barbaglia* at 532, 209 N.W.2d at 355-56.

19. *Hartwig v. Educational Service Unit No. 13*, 189 Neb. 339, 202 N.W.2d 618 (1972).

20. *Barbaglia* at 532, 209 N.W.2d at 355-56. See *Hartwig v. Educational Service Unit No. 13*, 189 Neb. 339, 202 N.W.2d 618 (1972).

1. L.B. 808, § 3, [1974] Laws of Neb. 675.

2. See NEB. REV. STAT. § 79-1452 (Reissue 1971).

3. L.B. 808, § 3, [1974] Laws of Neb. 675.

4. *Id.* at 676.

5. *Id.* at 675.

6. *Id.* at 676.

was amended to state that the costs of any evaluation to determine the practicability of vocational rehabilitation, plus the costs of any vocational rehabilitation itself, will be paid from the Fund.⁷ Also, in the event that the vocational rehabilitation requires the employee to live somewhere other than his customary residence, the reasonable costs of his board, lodging and travel will be paid from the Fund.⁸

SCHEDULE OF COMPENSATION

The schedule of compensation provided by statute to determine workmen's compensation benefits for injury to specific parts of the body was amended in L.B. 807.⁹ A new clause was added to provide that where there has been a loss, or loss of use, of more than one member or parts of more than one member of the body, but not amounting to total and permanent disability, compensation shall be paid for such loss, with the periods of benefits to run consecutively.¹⁰ The statute as it previously existed made no provision for the loss of more than one member of the body not amounting to total and permanent disability.¹¹ Another amendment to the same section provides that the total loss of both hands, arms, feet, legs, eyes, or any two thereof, *in one accident*, shall constitute "total and permanent disability" entitling the injured employee to be compensated accordingly.¹² In all other cases, whether or not such losses constitute "total and permanent disability" must be determined according to the particular fact situation involved.¹³ The original provision stated that any total loss of both hands, arms, feet, legs, eyes, or any two thereof would constitute "total and permanent disability"—without regard to whether the loss occurred in one accident.¹⁴

7. *Id.*, § 2(3), at 674.

8. *Id.*, § 2(4).

9. L.B. 807, § 1, [1974] Laws of Neb. 666, *amending* NEB. REV. STAT. § 48-121 (Cum. Supp. 1973).

10. *Id.* at 667-68.

11. See NEB. REV. STAT. § 48-121 (Reissue 1974), *as amended*, L.B. 807, [1974] Laws of Neb. 666.

12. L.B. 807, § 1, [1974] Laws of Neb. 668.

13. *Id.*

14. See note 11 *supra*.

