

COMMENTS

Workers' Compensation and the Overlooked Hidden Disfigurement

Current California law provides an inadequate remedy to victims of work-related hidden disfigurement. This comment explores and criticizes the present treatment of hidden disfigurement under the workers' compensation system and proposes that the legislature amend the system to provide workers' compensation permanent indemnity benefits to these victims.

INTRODUCTION

Jane is a California chemical worker who was burned in a plant fire. Following medical treatment, Jane remained severely and permanently scarred on her torso and legs. She later returned to the same job at the same wage, but she could no longer wear a swimming suit, low-cut blouses or other revealing clothing without feeling self-conscious.

What remedies are available for Jane's injury? Since the accident occurred on the job, the California Workers' Compensation Act¹ requires Jane's employer to pay for all of her medical expenses² and to reimburse her partially for her temporary wage loss.³ An indemnity award is also available to workers who suffer permanent disability.⁴ However, Jane is not entitled to this in-

¹ See CAL. LAB. CODE §§ 3200-4649 (West 1971 & Cum. Supp. 1981).

² *Id.* § 4600.

³ *Id.* § 4650. The Act provides for payment of two-thirds of the employee's average weekly wage for temporary total disability, *id.* § 4653, and two-thirds of the employee's wage loss for temporary partial disability, *id.* § 4654.

⁴ *Id.* § 4650 provides: "If the injury causes permanent disability, a disability payment shall be made. . . ."

demnity award because her injury is a hidden disfigurement—a permanent, superficial alteration of the body which is not apparent when she is clothed normally for work⁵—and is not considered to be “disabling” under California law.⁶

This comment explores the inadequacy of the present treatment of hidden disfigurement under California law. Section I describes the state workers’ compensation system—its goals, the exclusive-remedy rule, the determination of compensation, and the diminished earning capacity requirement. Section II criticizes the earning capacity doctrine. Finally, Section III proposes a program for compensating victims of hidden disfigurement.

I. THE CALIFORNIA WORKERS’ COMPENSATION SYSTEM

A. *The Goals of Workers’ Compensation*

The California Legislature created the workers’ compensation system in 1911⁷ in response to the gravely inadequate treatment

⁵ This definition excludes disfigurement which currently qualifies for workers’ compensation permanent indemnity benefits. Thus, “hidden disfigurement” does not include disfigurement which appears on the head or face, or which is otherwise noticeable, because the Workers’ Compensation Appeals Board (WCAB) indemnifies such “conspicuous disfigurement.” See note 39 *infra*. Although inconspicuous injuries such as the loss of one testicle or the loss of teeth or hair that is concealed by prosthesis arguably are also hidden disfigurements, see note 63 *infra*, the compensation of such injuries is beyond the scope of this comment. Disfigurement is also generally distinguished from injuries which impair physical function, such as the loss or diminished use of a limb.

⁶ See text accompanying notes 27-28 *infra*.

⁷ The Roseberry Act, ch. 399, 1911 Cal. Stats. 796 (repealed in part 1937), was the original California workers’ compensation statute. Two years later the Boynton Act, ch. 279, 1913 Cal. Stats. 279 (repealed in part 1937), made the system compulsory.

CAL. CONST. art. 14, § 4 (formerly CAL. CONST. art. 20, § 21) authorizes the enactment of a comprehensive no-fault employer liability system

to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers’ compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full

of industrial injury at common law.⁸ The common law afforded a remedy only to those employees who could establish that employer negligence or recklessness alone caused their injuries.⁹

The primary objective of the workers' compensation system is to assure workers a remedy for on-the-job injury by substituting strict liability for the common law fault principle.¹⁰ At the same time, the system relieves public disability programs of the burden of supporting totally disabled workers and their families,¹¹ placing the economic cost of all injuries on industry and consumers.¹² While employers compensated employees only for

provision for securing safety in the places of employment . . . to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State. . . .

⁸ 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKERS' COMPENSATION § 1.05[1] (2d ed. 1980); 1 S. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW HANDBOOK § 1.1, at 12-13 (2d ed. 1978).

See *Fitzpatrick v. Fidelity Cas. Co.*, 7 Cal. 2d 230, 233-34, 60 P.2d 276, 278 (1936); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 200 Cal. 579, 583, 253 P. 926, 928 (1927); *Western Indem. Co. v. Pillsbury*, 170 Cal. 686, 692, 151 P. 398, 401 (1915); *Flores v. WCAB*, 36 Cal. App. 3d 388, 394, 111 Cal. Rptr. 424, 428 (5th Dist. 1973); *Hazelwerdt v. Industrial Indem. Exchange*, 157 Cal. App. 2d 759, 762, 321 P.2d 831, 833 (2d Dist. 1958).

⁹ W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530-31 (4th ed. 1971). The common law scheme also required lengthy litigation for recovery by those injured workers for whom an action did lie. Further, that scheme inadequately promoted workplace safety. *Id.* See also text accompanying notes 11-13 *infra*.

¹⁰ See *Western Indem. Co. v. Pillsbury*, 170 Cal. 686, 693-94, 151 P. 398, 401 (1915); 2 W. HANNA, *supra* note 8, § 1.05[3]; 1 S. HERLICK, *supra* note 8, § 1.1, at 13-14; D.W. O'BRIEN, CALIFORNIA EMPLOYER-EMPLOYEE HANDBOOK 3-4 (3d ed. 1974).

¹¹ [T]he primary purpose of industrial compensation is to ensure the injured employee and those dependent upon him adequate means of subsistence while he is unable to work and also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor. By this means society as a whole is relieved of the burden of caring for the injured workman and his family, and the burden is placed upon the industry.

Union Iron Works v. Industrial Accident Comm'n, 190 Cal. 33, 39, 210 P. 410, 413 (1922).

¹² See *Arizona Copper v. Hammer*, 250 U.S. 400 (1918); *Edson v. Industrial Accident Comm'n*, 206 Cal. 134, 137, 273 P. 572, 573 (1928); *Employer's Liab. Assurance Corp. v. Industrial Accident Comm'n*, 179 Cal. 432, 436, 177 P. 273, 274 (1919); *West v. Industrial Accident Comm'n*, 79 Cal. App. 2d 711, 721, 180 P.2d 972, 978-79 (2d Dist. 1947); *State Compensation Ins. Fund v. Industrial*

those injuries caused by the employer's negligence or recklessness at common law, workers' compensation holds employers responsible for all employee injuries. This stricter standard of employer liability gives industry a greater incentive to make the work place safe.¹³

A second goal of the workers' compensation system is to provide benefits to injured employees quickly and with minimal litigation.¹⁴ Administration of all claims through one bureaucracy promotes this end.¹⁵ Such organization tends, for example, to compensate workers with similar disabilities similarly.¹⁶ Additionally, it facilitates early payment, easing the economic hardship incidental to occupational injury.

B. *The Exclusive Remedy Rule*

An important feature of the workers' compensation system, and one considered essential to the effectuation of its goals, is that workers' compensation benefits are the exclusive remedy for work-related injury.¹⁷ The exclusive remedy rule is an element of

Accident Comm'n, 46 Cal. App. 2d 526, 530, 116 P.2d 173, 175 (4th Dist. 1941).

¹³ Imposing the cost of all employee injury on industry forces employers to either rectify unsafe conditions or to raise prices to cover this cost. When higher market prices cause decreased demand, the employer must then either lower its accident rate or take a loss on high-risk products. 2 W. HANNA, *supra* note 8, § 1.05[2], at 27.

¹⁴ See note 10 *supra*.

¹⁵ Administration of the California workers' compensation system is handled by the WCAB, CAL. LAB. CODE § 111 (West 1971), a subpart of the Division of Industrial Accidents, within the Department of Industrial Relations. *Id.* § 56 (West Cum. Supp. 1981). Seven board members, appointed by the Governor with the advice and consent of the Senate, head the WCAB. *Id.* § 112 (West 1971). See also 1 W. HANNA, *supra* note 8, §§ 1.01, 1.02[1].

¹⁶ This is due to the fact that compensation awards are determined under uniform regulations throughout the state and with one schedule for rating permanent disability. This method of determination attempts to minimize the adjudicating WCAB judge's discretion. See text accompanying notes 22-35 *infra*.

¹⁷ Thus, although the system affords the victim of injuries such as hidden disfigurement medical care and payment for temporary wage loss, California statutes preclude a common law tort action. CAL. LAB. CODE §§ 3600, 3601, 3603 (West. Cum. Supp. 1981) form the exclusive remedy rule.

Section 3600 provides: "[L]iability for compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of employment. . . ."

Section 3601(a) provides: "[W]here the conditions of compensation exist, the

the system's compromise between employer and employee. In effect, the employee gives up his or her action at law in return for the employer's no-fault liability.¹⁸ As a result, while the employee need not establish negligence,¹⁹ he or she cannot recover full compensatory damages. This worker concession is significant, since workers' compensation does not allow recovery for pain and suffering or punitive damages, and its compensation for temporary wage loss and permanent disability is only partial.²⁰

C. *The Determination of Compensation*

The Workers' Compensation Appeals Board (WCAB) adjudi-

right to recover such compensation, . . . is . . . the exclusive remedy for injury or death of an employee against the employer"

Section 3603 provides: "[P]ayment of compensation in accordance with the order and direction of the appeals board shall discharge the employer from all claims therefor."

The worker who suffers hidden disfigurement therefore receives no compensation for the physical impairment itself. *See, e.g., Williams v. State Compensation Ins. Fund*, 50 Cal. App. 3d 116, 122-23, 123 Cal. Rptr. 812, 815 (3d Dist. 1975) (denying a legal action for work-related injury to genitalia).

There are, however, two exceptions to the exclusive remedy rule. CAL. LAB. CODE § 3706 (West. Cum. Supp. 1981) allows a worker a common law action when the employer fails to secure payment. In addition, the "dual-capacity doctrine" allows the employee a legal remedy when the employer acts tortiously in a capacity other than that of the employer. *See, e.g., D'Angona v. County of Los Angeles*, 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980) (allowing legal action for chiropractor's negligent aggravation of his employee's work-related injury); *Johns-Manville Prod. Corp. v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (allowing legal action for aggravation of injury caused by employer's fraudulent concealment of unsafe work conditions); *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (4th Dist. 1978) (allowing legal action for intentional infliction of emotional distress not an incident of physical injury); *Ramey v. General Petroleum Corp.*, 173 Cal. App. 2d 386, 343 P.2d 787 (2d Dist. 1959) (allowing legal action to redress employer's fraudulent conspiracy to deny the employee compensation for medical expenses).

¹⁸ "The award is not redress for a tort. It is an allotment to an insured workman of his proportion of a fund maintained for his insurance." *Sweeting v. American Knife Co.*, 226 N.Y. 199, 200, 123 N.E. 82, 83 (1919). *See also* cases cited in note 8 *supra*.

¹⁹ The employer also may not assert the common law defenses of contributory negligence, the fellow servant rule or assumption of risk. *See W. PROSSER, supra* note 9, at 526-30.

²⁰ *See* note 3 *supra*.

cates compensation claims for work related injuries.²¹ When an injured employee files an application for relief, the WCAB assigns a WCAB judge²² to determine the appropriate award.²³

²¹ CAL. LAB. CODE § 5309 (West 1971). "Work-related injury" is defined as injury which "arise[s] out of and in the course of employment" when the following conditions concur:

(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

(c) Where the injury is proximately caused by the employment, either with or without negligence.

(d) Where the injury is not caused by the intoxication of the injured employee.

(e) Where the injury is not intentionally self-inflicted.

(f) Where the employee has not willfully and deliberately caused his own death.

(g) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

(h) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where such activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. . . .

Id. § 3600.

²² The WCAB judge is an attorney and a civil service employee of the Division of Industrial Accidents. CAL. ADMIN. CODE, tit. 8, § 10345. Statutory authority for the Division of Industrial Accidents to hire judges is derived from CAL. LAB. CODE § 123 (West 1971). 1 S. HERLICK, *supra* note 8, § 1.9.

²³ CAL. LAB. CODE § 5309 (West 1971). This section authorizes the WCAB, upon application by either party or upon its own motion, to direct a WCAB judge to try issues of fact and/or law, to hold necessary hearings, and to make a finding and award based thereon. The judge has full power to adjudicate the case, and the judge's rulings are incorporated as those of the WCAB. CAL. ADMIN. CODE, tit. 8, § 10345.

No pleadings other than the claimant's application and the defendant's answer are required. These pleadings simply must set out all relevant matters and furnish the WCAB with any information necessary to determine the case. CAL. LAB. CODE § 5500 (West 1971); CAL. ADMIN. CODE, tit. 8, § 10400. The defendant may present any defense in the answer, alleging that the claimant's application is inaccurate in any respect, and/or providing any further information in support of his or her allegations. CAL. LAB. CODE § 5505 (West 1971). The parties may stipulate to any facts in writing and submit this stipulation to the WCAB. *Id.* § 5702.

Any person aggrieved by the final order of a WCAB judge may petition the WCAB for reconsideration. *Id.* § 5900. The WCAB may, with or without fur-

Three types of compensation are available: defrayal of medical expenses;²⁴ partial reimbursement of temporary wage loss;²⁵ and an indemnity award to compensate permanent disability.²⁶

Permanent disability is defined as the loss of earning capacity occasioned by the injury, rather than the physical impairment itself.²⁷ Thus, only those workers whose injuries permanently diminish their earning capacity qualify for indemnity payment.²⁸ This is not due until the injury stabilizes and its permanency

ther proceedings, affirm, rescind, alter or amend the WCAB judge's order on the basis of previously submitted or new evidence. *Id.* § 5906.

Any person affected by an order of the WCAB may apply to the supreme court or to a court of appeal for a writ of review following reconsideration by the WCAB. *Id.* § 5950 (West Cum. Supp. 1981). The findings of the WCAB on questions of fact are not subject to review. Upon hearing, the court must enter judgment affirming or annulling the WCAB's order or remanding for further proceedings. *Id.* § 5953 (West 1971).

²⁴ CAL. LAB. CODE § 4600 (West Cum. Supp. 1981).

²⁵ See note 3 *supra*.

²⁶ See note 4 *supra*.

²⁷ In *Marsh v. Industrial Accident Comm'n*, 217 Cal. 338, 344, 18 P.2d 933, 936 (1933), the California Supreme Court stated that "the law does not award compensation for mere pain or physical impairment, unless it is of such character as to raise a presumption of incapacity to earn." See also *Mercier v. WCAB*, 16 Cal. 3d 711, 717, 548 P.2d 361, 364, 129 Cal. Rptr. 161, 164 (1976); *Union Iron Works v. Industrial Accident Comm'n*, 190 Cal. 33, 39, 210 P. 410, 413 (1922); *Williams v. State Compensation Ins. Fund*, 50 Cal. App. 3d 116, 122-23, 123 Cal. Rptr. 812, 815 (3d Dist. 1975); *West v. Industrial Accident Comm'n*, 79 Cal. App. 2d 711, 721, 180 P.2d 972, 977-78 (2d Dist. 1947).

Noted workers' compensation scholar Arthur Larson states that neither the philosophy nor the purpose of workers' compensation provides a basis for "making nonfault awards which bear no relation to earning capacity merely because the claimant has suffered some other type of loss which arouses one's sympathy." 2A A. LARSON, *WORKMEN'S COMPENSATION LAW* § 65.30, at 18 (1976). Warren Hanna argues that disfigurement and other injuries should be compensable only to the extent that they produce diminished capacity to compete. 2 W. HANNA, *supra* note 8, § 14.01[2](a).

²⁸ For cases denying compensation for physical impairment which does not diminish earning capacity, see, e.g., *Gaiera v. WCAB*, 271 Cal. App. 2d 246, 76 Cal. Rptr. 656 (1st Dist. 1969) (loss of blood supply to the brain); *Hunt v. WCAB*, 39 Cal. Comp. Cases 441 (1974) (impotence); *Simas v. Roof Structures, Inc.*, 36 Cal. Comp. Cases 541 (1971) (loss of spleen); *Jones v. WCAB*, 34 Cal. Comp. Cases 294 (1969) (hidden disfigurement); *Dale v. Industrial Accident Comm'n*, 23 Cal. Comp. Cases 22 (1958) (hidden disfigurement); *Giuliani v. IAC*, 5 Cal. Comp. Cases 126 (1940) (small scar on the eye). See also text accompanying notes 41-63 *infra*.

becomes evident.²⁹

In determining the amount of the indemnity award, the WCAB uses the Schedule for Rating Permanent Disability. The Schedule utilizes four statutorily established factors in creating a disability rating: (1) the nature of the injury or disfigurement;³⁰ (2) the victim's occupation;³¹ (3) the victim's age;³² and (4) the victim's diminished capacity to compete in the open labor market.³³ The Schedule anticipates and presumes the effect of these combined factors on the victim's earning capacity.³⁴ The resulting disability rating then defines the number of weeks over which the worker receives two-thirds of his or her average annual earnings.³⁵

²⁹ A disability is regarded as permanent when the injured employee is restored to health as fully as possible or when the condition has been stable for a reasonable period of time. CAL. ADMIN. CODE tit. 8, § 10900. See *State Compensation Ins. Fund v. WCAB*, 35 Cal. Comp. Cases 555 (1970); *Industrial Indem. Exch. v. Industrial Accident Comm'n*, 14 Cal. Comp. Cases 25 (1949).

³⁰ For instance, the Schedule provides a basic disability rating of 70% for a major arm lost above the elbow, while the loss of a major thumb receives only a 16% rating. Schedule for Rating Permanent Disability (compiled and published by Division of Industrial Accidents of the Department of Industrial Relations of the State of California) (copy on file at U.C. Davis Law Review office). For a description of the WCAB's system of determining percentage disability ratings, see 1 W. HANNA, *supra* note 8, § 11.03.

³¹ This factor increases the basic rating for workers in occupations that are physically more demanding. For example, the basic rating for a carpenter (before adjustment for age) who loses a major arm increases from 70%, see note 30 *supra*, to 75%. Schedule for Rating Permanent Disability, *supra* note 30.

³² This factor increases the basic rating for younger workers because their injuries will diminish earning capacity for a longer period of time. For example, the rating for a 35-year-old carpenter who loses a major arm is 74%, after adjustment for occupation and age. Schedule for Rating Permanent Disability, *supra* note 30; see notes 30-31 *supra*.

³³ CAL. LAB. CODE § 4660(a) (West 1971).

³⁴ *Id.* § 4660(b) provides: "[S]uch schedule . . . without formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." The parties may introduce evidence to rebut the Schedule's presumptions, but this is rarely attempted or successful. 1 S. HERLICK, *supra* note 8, § 7.2, at 207.

³⁵ CAL. LAB. CODE § 4658 (West Cum. Supp. 1981) requires each weekly payment to be two-thirds of the worker's "average annual earnings." "Average annual earnings" is defined as the actual past weekly earnings over a one-year period. *Id.* § 4451 (West 1971). Section 4453 subjects the average annual earnings to a maximum of \$105 per week and a minimum of \$45 per week. *Id.* § 4453 (West Cum. Supp. 1981). Thus, the 35-year-old carpenter who loses a

D. *The Diminished Earning Capacity Doctrine*

As noted above, a worker's on-the-job injury must impair his or her earning capacity to qualify the worker for a permanent indemnity award.³⁶ This requirement is met if the injury diminishes the worker's physical capacity to work or if it creates a competitive handicap in the labor market by inducing employer discrimination.³⁷ Rather than actual loss of employment or wages, "[i]t is the prospective loss of future earning power under the existing handicap of physical impairment that is to be considered."³⁸

Both the California workers' compensation statute and the WCAB Schedule for Rating Permanent Disability grant indemnity payment to victims of *conspicuous* disfigurement.³⁹ In con-

major arm and has a weekly past wage of \$105 receives \$70 per week for 413.5 weeks, or a total of \$28,927.50. Schedule for Rating Permanent Disability, *supra* note 30, at 1. See generally 1 W. HANNA, *supra* note 8, § 11.04.

³⁶ See note 27 *supra*.

³⁷ State Compensation Ins. Fund v. Industrial Accident Comm'n, 59 Cal. 2d 45, 52, 377 P.2d 902, 907, 27 Cal. Rptr. 702, 709 (1963); Moyer v. WCAB, 24 Cal. App. 3d 650, 657, 100 Cal. Rptr. 540, 544 (4th Dist. 1972); De Celle v. City of Alameda, 186 Cal. App. 2d 574, 581, 9 Cal. Rptr. 549, 554 (1st Dist. 1960). See also 2 W. HANNA, *supra* note 8, § 14.01[2](a).

³⁸ Department of Motor Vehicles v. Industrial Accident Comm'n, 14 Cal. 2d 189, 192, 93 P. 131, 132 (1939). There, an injured employee who returned to the same job at the same wage nevertheless received a substantial indemnity payment. Justice Pullen wrote:

[T]he disability referred to in the statute [CAL. LAB. CODE § 4660] was not such disability as impaired present earning power only, but embraced any loss of physical function which detracted from the former efficiency in the ordinary pursuits of life. It is the prospective loss of future earning power under the existing handicap of physical impairment that is to be considered. . . .

Id. at 192, 93 P. at 132-33. See also Smith v. Industrial Accident Comm'n, 20 Cal. Comp. Cases 82 (1955); Postal Tel. Cable Co. v. Industrial Accident Comm'n, 213 Cal. 544, 3 P.2d 6 (1931).

³⁹ CAL. LAB. CODE § 4660(a) (West 1971) specifies that disfigurement is a compensable injury in California. The Schedule for Rating Permanent Disability includes "cosmetic disfigurement." While disfigurement which is "very slight" and "not noticeable except on close inspection" receives a zero rating and hence is not compensable, "slight" to "pronounced" disfigurement receives from a 5% to an 80% rating. Schedule for Rating Permanent Disability, *supra* note 30, Disability No. 4.

Georgia, Kansas, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Vermont, Washington and West Virginia make no specific statutory reference to disfigurement. All other states, however, expressly com-

trast, permanent indemnity awards are apparently unavailable to workers who sustain hidden disfigurement and other injuries which do not interfere with their earning power. Although California courts have not addressed the application of the earning-capacity requirement in disfigurement cases, the WCAB denies indemnity for hidden disfigurement because the injury neither reduces the worker's physical ability to work nor induces discrimination in the labor market.⁴⁰

II. CRITICISM OF THE DIMINISHED EARNING CAPACITY DOCTRINE

The requirement of diminished earning capacity as a prerequisite to a workers' compensation indemnity award is susceptible to three major objections. First, coupled with the exclusive remedy rule, the requirement arguably violates workers' constitutionally protected due process rights. Second, the requirement frustrates the workers' compensation system's basic goals. Third, the principle from which the requirement derives—that workers' compensation indemnity awards compensate only the victim's

compensate disfigurement. See ALA. CODE § 25-5-57(a)(3)(34) (1977); ALASKA STAT. § 23.30.190(19)(A) (1980); ARIZ. REV. STAT. ANN. § 23-1044(22) (Cum. Supp. 1980); ARK. STAT. ANN. § 81-1313(g) (1976); COLO. REV. STAT. § 8-51-105 (Cum. Supp. 1979); CONN. GEN. STAT. ANN. § 31-308(d) (West Cum. Supp. 1980); DEL. CODE ANN. tit. 19, § 2326(f) (1979); FLA. STAT. ANN. § 440.15(3)(a) (West Cum. Supp. 1980); HAW. REV. STAT. § 386-32(a) (1968); IDAHO CODE § 72-430(1) (1973); ILL. ANN. STAT. ch. 48, § 138.8(c) (Smith-Hurd Cum. Supp. 1981); IND. CODE § 22-3-3-10(b)(7) (Cum. Supp. 1980); IOWA CODE ANN. § 85.34(2)(t) (West Cum. Supp. 1981); KY. REV. STAT. § 342-620(11) (Cum. Supp. 1980); LA. REV. STAT. ANN. § 23:1221(4) (West Cum. Supp. 1981); MD. CODE ANN. art. 101, § 36(3)(f) (1979); ME. REV. STAT. ANN. tit. 39, § 56 (1980); MASS. GEN. LAWS ANN. ch. 152, § 36(k) (West Cum. Supp. 1981); MINN. STAT. ANN. § 176.101(3)(41) (West Cum. Supp. 1981); MISS. CODE ANN. § 71-3-17(c)(24) (1972); MO. ANN. STAT. § 287.190(4) (Vernon Cum. Supp. 1981); MONT. REV. CODES ANN. § 39-71-708 (1979); N.M. STAT. ANN. § 52-1-44 (1978); N.Y. WORK. COMP. LAW § 15(3)(t) (McKinney 1965); N.C. GEN. STAT. § 97-31(21) (1979); OHIO REV. CODE ANN. § 41-4123.57(C) (Page 1980); OKLA. STAT. ANN. tit. 85, § 22(3) (West Cum. Supp. 1981); PA. STAT. ANN. tit. 77, § 513(22) (Purdon 1981); R.I. GEN. LAWS 38-33-19(n)(2) (1979); S.C. CODE § 42-9-30(21) (1977); S.D. COMPILED LAWS ANN. § 62-4-6(24) (1978); TENN. CODE ANN. § 50-1007(c) (Cum. Supp. 1980); TEX. CIV. CODE ANN. tit. 8306, § 12 (Vernon Cum. Supp. 1981); UTAH CODE ANN. § 35-1-66 (Cum. Supp. 1979); VA. CODE § 65.1-56(19) (1980); WIS. STAT. ANN. § 102.56 (West Cum. Supp. 1981); WYO. STAT. § 27-12-403(j) (1977).

⁴⁰ See, e.g., *Jones v. WCAB*, 34 Cal. Comp. Cases 294 (1969); *Dale v. Industrial Accident Comm'n*, 23 Cal. Comp. Cases 22 (1958); *Nimmer v. Permanente Metals Corp.*, 11 Cal. Comp. Cases 137 (1946).

loss of earning capacity—is not consistently followed by the WCAB.

A. Due Process Rights of the Hidden Disfigurement Victim

As applied to the victim of a hidden disfigurement, the combination of the diminished earning capacity and exclusive remedy rules may violate due process. Together, these rules appear to deprive the worker of a civil action without affording him or her a sufficient remedy under the workers' compensation system.⁴¹ The U.S. Supreme Court addressed a due process challenge to workers' compensation in *New York Central Railroad v. White*.⁴² In that case, the employer asserted that the denial of the common law defenses and removal of the need to show employer negligence under the New York workers' compensation system deprived the employer of liberty and property without due process.⁴³ The Court upheld the statute, reasoning that the statutory scheme effected a fair exchange of concessions between employers and employees.⁴⁴

Nevertheless, the Court there examined only the workers' compensation system's fairness to the employer and employee as *classes*. When viewed from the perspective of an individual worker whose hidden disfigurement is severely undercompensated,

⁴¹ See text accompanying notes 17-20 *supra*.

⁴² 243 U.S. 188 (1917). The widow of the employer railroad's night watchman claimed and received workers' compensation death benefits for her husband's work-related accidental death.

⁴³ *Id.* at 196-97. This case challenged the New York workers' compensation statute, which is similar to California's.

⁴⁴ The Court said:

[I]t is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may fall—that is, upon the injured employee or his dependents.

Id. at 203-04. See also *Madera Sugar Pine Co. v. Industrial Accident Comm'n*, 262 U.S. 499 (1923); *Western Indem. Co. v. Pillsbury*, 170 Cal. 686, 151 P. 398 (1915).

sated,⁴⁵ the balance of equities shifts strikingly. In such a case, the workers' compensation system arguably deprives the worker of substantially more than it offers in return.⁴⁶

B. Frustration of Workers' Compensation's Goals

In a number of ways, the earning capacity requirement also undermines the basic objectives of workers' compensation. For example, to the extent that some victims receive no indemnity award, the goal of remedying those industrial injuries that went uncompensated at common law is undercut.⁴⁷ Nor does the requirement encourage industrial safety. The failure of the workers' compensation system to penalize employers for injuries which are not economically disabling reduces the employer's incentive to minimize such injuries.⁴⁸ Finally, the requirement impedes the immediate payment of benefits, since it creates litigation over the effect that some injuries have on earning power.⁴⁹

C. The WCAB's Inconsistent Application of the Earning Capacity Principle

The diminishment of earning-capacity requirement is also susceptible to criticism because the WCAB does not consistently adhere to the principle from which the requirement derives—that compensable permanent disability is defined as the victim's loss of earning capacity.⁵⁰ While this principle generally

⁴⁵ See note 40 and accompanying text *supra*.

⁴⁶ The dissent in *Moushan v. National Garages, Inc.*, 2 Ill. 2d 407, 413, 137 N.E. 2d 842, 848 (1956), expressed this view. In that case, the court denied a civil cause of action to the victim of work-related impotence, which was apparently uncompensable under Illinois' workers' compensation statute.

⁴⁷ See notes 10-12 and accompanying text *supra*.

⁴⁸ For example, in industries with a high risk of burn injuries, many employee injuries may be undercompensated under the workers' compensation system because the scars are wholly or partially hidden. If the system provided indemnity payment for hidden disfigurement, employers would be forced to reduce the incidence of such accidents to cut their injury costs. See note 13 *supra*.

⁴⁹ This occurs when the type of injury involved is not presumed to impair earning capacity in all cases. Disfigurement, for instance, is not presumptively economically disabling when it does not appear on the face or head. See note 40 and accompanying text *supra*. Thus, litigation is necessary to determine when disfigurement of other parts of the body is compensable.

⁵⁰ See note 27 *supra*.

precludes indemnification of hidden disfigurement,⁵¹ several other WCAB practices are inconsistent with the premise that indemnity awards compensate only the loss of earning power.

The WCAB's payment of permanent indemnity awards to some injured workers who never actually suffer economic loss exemplifies the inconsistent application of the principle that indemnity awards compensate only the worker's loss of earning capacity. A claimant may draw present indemnity compensation even when he or she immediately returns to the same job at the same wage.⁵² This results from the practice of basing present compensation on the injury's presumed future economic impact.⁵³ The inherently speculative nature of prospective economic impact may mandate such a presumption.⁵⁴ Nevertheless, the result is inconsistent with the earning capacity definition of "disability" when an injury never actually impairs earning power.

A further example of the WCAB's inconsistent application of the earning capacity principle is its allowance of possible aggregate disability ratings of greater than 100% for successive, independent injuries. When a worker is injured more than once and the injuries are independent, he or she receives payment for the subsequent injury regardless of awards previously obtained. In such a case, the cumulative disability rating may exceed 100% despite the fact that a worker can have no more than 100% earning power to lose. In one case, for instance, a gardener for the City of Los Angeles ultimately enjoyed an aggregated 158% disability rating after two separate injuries.⁵⁵

Thus, the WCAB has allowed awards that compensate more than just diminished earning power. At the same time, however, the system may fail to compensate all elements of diminished earning capacity. For instance, compensation awards do not include the impairment of earning power associated with possible

⁵¹ See cases cited in note 40 *supra*.

⁵² See cases cited in note 38 *supra*.

⁵³ See text accompanying notes 30-35 *supra*.

⁵⁴ Actual economic impact stretches over the victim's entire career and depends on immeasurable future labor market conditions.

⁵⁵ *City of Los Angeles v. WCAB*, 37 Cal. Comp. Cases 206 (2d Dist. 1972). The claimant suffered a back injury in 1964, at which time the WCAB awarded a 58% disability rating. Then, in 1966, he received an additional 100% disability rating for a gunshot wound.

future occupation changes.⁵⁶ A disfigurement may, for example, be hidden when its victim is clothed for work as a pipefitter and therefore not qualify for indemnity payment. But the workers' compensation system fails to account for the possibility that the injured worker may change to an occupation where the disfigurement may be conspicuous.

Moreover, the WCAB does not consistently apply the earning capacity principle to deny indemnification of injuries which do not impair earning power. The inconsistent treatment of hidden disfigurement bears witness to this phenomenon. While the diminished earning capacity requirement generally precludes indemnity payment for hidden disfigurement,⁵⁷ the WCAB has awarded recovery for such injury in a few cases. In two decisions, workers obtained indemnity payment for hidden disfigurement which would be revealed during a pre-employment physical examination.⁵⁸ In another instance, the WCAB compensated a

⁵⁶ This is the converse of the result discussed in text accompanying notes 52-54 *supra*. Because present awards are based on the injury's future economic impact in the worker's present occupation, the possibility that the claimant may change occupations is not taken into account. For a discussion of the determination of compensation, see text accompanying notes 23-38 *supra*.

An injured worker who can prove at the time of the injury that his or her future earning capacity is likely to be greater than his or her past earnings because of expected change of occupation can, however, thereby receive greater compensation. In *Jeffares v. WCAB*, 6 Cal. App. 3d 548, 86 Cal. Rptr. 288 (2d Dist. 1970), for instance, the court held that a part-time worker's status as a student preparing for a teaching career must be considered. The claimant did later become a teacher. 1 S. HERLICK, *supra* note 8, § 5.9, at 134.

CAL. LAB. CODE § 4455 (West Cum. Supp. 1981) also provides that an injured minor's earnings are deemed to be the probable earnings at the age of majority in his or her present occupation or in an occupation to which he or she would be promoted absent the injury. 1 S. HERLICK, *supra* note 8, § 5.14.

⁵⁷ See cases cited in note 40 *supra*.

⁵⁸ In *Shell Chemical Corp. v. Industrial Accident Comm'n*, 20 Cal. Comp. Cases 209 (1955), a chemical products mixer sustained burns and scarring on his arms, legs, back and head when a container exploded. He received permanent indemnity of 40% for the scarring, some of which was normally covered by his clothing. The WCAB justified the award by the possibility that the scarring would be conspicuous in a pre-employment physical examination and thus might impair the worker's ability to obtain new employment. *Id.* at 209.

Similarly, in *Fibreboard Paper Prods. v. Industrial Accident Comm'n*, 22 Cal. Comp. Cases 229 (1957), hot liquified paper had burned 40% of the claimant's body. The disfigurement was largely hidden when the claimant was clothed, but the WCAB allowed indemnity because the scars would be conspicuous in a pre-employment physical examination. *Id.* at 229.

waitress for hidden disfigurement that would be conspicuous in future waitress uniforms.⁵⁹

The WCAB's indemnification of certain injuries which are unlikely to affect earning power further illustrates the inconsistent application of the diminished earning capacity requirement. The losses of taste and smell, for instance, are scheduled injuries and hence qualify for an indemnity award.⁶⁰ The loss of one testicle is also compensable,⁶¹ despite medical evidence that this injury does not diminish the physical capacity to work.⁶² And since the impairment is hidden, it does not interfere with the ability to obtain work.⁶³ These awards bring home the inequity of the present system's severe undercompensation of work-related hidden disfigurement and seem to evidence the WCAB's recognition that such injuries deserve recompense.

⁵⁹ In *Zenith Nat'l Ins. Co. v. WCAB*, 43 Cal. Comp. Cases 254 (1978), a waitress was scarred on her torso, arms and thighs. The claimant worked for her husband and could choose her own uniform, so that the disfigurement did not then hamper her earning capacity. The WCAB nevertheless awarded an indemnity payment because the disfigurement would be conspicuous if she were to change uniforms or seek other employment as a waitress.

But see Jones v. WCAB, 34 Cal. Comp. Cases 294 (1969), where dust from a 64-year-old domestic worker's vacuum cleaner caught fire as she emptied it into an incinerator. The fire burned and scarred her upper torso and fingers. Despite this woman's subsequent inability to wear a brassiere or girdle, the WCAB denied her an indemnity payment because the disfigurement was hidden and hence did not diminish her earning capacity. The disfigurement of the claimant's fingers also did not qualify for indemnity since the scarring was not severe enough to be noticeable. *See note 39 supra*.

⁶⁰ Schedule for Rating Permanent Disability, *supra* note 30, Disability No. 5.3.

⁶¹ *Curry v. Permanente Metals Corp.*, 10 Cal. Comp. Cases 255 (1945) (2-½% permanent disability rating for atrophy of one testicle); *Llewallen v. Industrial Accident Comm'n*, 5 Cal. Comp. Cases 186 (1940) (5% disability rating for loss of sexual function despite the absence of effect on claimant's earning capacity). *But see Hunt v. WCAB*, 39 Cal. Comp. Cases 441, 442 (1974) (claimant was denied compensation for impotence because it did not limit his earning power). *See also Comment, The Treatment of Sexual Impairment Injuries under Workers' Compensation Laws*, 30 HASTINGS L.J. 1207 (1979).

⁶² E. McBRIDE, *DISABILITY EVALUATION AND PRINCIPLES OF TREATMENT OF COMPENSABLE INJURIES* 498 (6th ed. 1963). *See also Curry v. Permanente Metals Corp.*, 10 Cal. Comp. Cases 255, 255 (1945).

⁶³ The loss of one testicle might be considered a hidden disfigurement since it is not an apparent impairment. *See note 5 supra*; *see, e.g., Williams v. State Compensation Ins. Fund*, 50 Cal. App. 3d 116, 123 n.3, 123 Cal. Rptr. 812, 815 n.3 (3d Dist. 1975).

III. PROPOSAL

California must provide compensation to Jane and other victims of hidden disfigurement resulting from on-the-job injuries. The fact that Jane's injury does not diminish her earning capacity does not justify the workers' compensation system's failure to redress an injury which permanently impairs the quality of her life.

Several other states' workers' compensation statutes already compensate victims of hidden disfigurement.⁶⁴ These states merely presume that all disfigurement affects the worker's earning capacity. But such a presumption is sometimes inaccurate and often does not reach victims of other injuries which do not impair economic capacity.⁶⁵

A preferable program for compensation of victims of hidden disfigurement would dispose of diminished earning capacity as a prerequisite to recovery of a permanent indemnity award.⁶⁶ Such a program would compensate workers for both decreased earning power and diminished quality of life outside work.

This program could take either of two forms. First, a new subsystem of compensation could remedy those injuries which presently do not receive indemnity. Most other states, for example,

⁶⁴ See, e.g., *Dombrowski v. Fafnir Bearing Co.*, 148 Conn. 87, 167 A.2d 458 (1961) (interpreting CONN. GEN. STAT. ANN. § 31-162 (current version at § 31-308 (West Cum. Supp. 1980))); *Bethlehem Steel Co. v. Wilson*, 210 Md. 568, 124 A.2d 249 (1956) (interpreting MD. ANN. CODE art. 101, § 35(3)(f) (1951)).

⁶⁵ Examples include loss of reproductive capacity, and loss of teeth and hair which is concealed by prosthesis.

⁶⁶ Professor Larson proposes the abandonment of the exclusive remedy rule for injuries which do not qualify for indemnity under workers' compensation. 2A A. LARSON, *supra* note 26, § 65.30, at 18. But this solution is flawed in that it denies the advantages of workers' compensation to workers who suffer such injuries. Because most industrial injury was not remedied under the common law scheme, see note 9 *supra*, this solution leaves these workers without even workers' compensation's provision of medical care and temporary wage loss. Consequently, those workers for whom a legal action would be available may be unable to pay for medical care while they are involved in lengthy litigation.

Professor Larson also argues, however, that the unfairness to these workers is too insignificant to justify elimination of the earning capacity requirement because most workers would not recover at law in any event. Larson, *Basic Concepts and Objectives of Workmen's Compensation*, in I SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 34 (M. Berkowitz ed. 1973).

currently handle disfigurement separately.⁶⁷ This special subsystem could give the WCAB judge discretion to determine the size of the award for injuries which affect only the quality of private life, considering personal as well as economic impact.

A second option would add a new "personal disability" factor to the existing Schedule for Rating Permanent Disability, and thus indemnify the physical impairment of every industrial accident victim. Determination of disability ratings would follow the current model, but payments would compensate both impaired earning power and declined quality of non-economic life. The workers' compensation system would then look at the worker as a whole—his or her mental as well as economic existence. A victim of hidden disfigurement could then receive compensation similar to that of a worker whose injury comparably affects both earning power and personal life.

These two options are different in several respects. The first would give the WCAB judge substantial leeway to consider any additional factors he or she deems relevant, such as the victim's psychological reaction to the disfigurement and the impact the disfigurement may have on the victim's possible future occupations. This plan might produce dissimilar awards for similar disfigurement. The second option would prescribe that payment reflect only the extent of the injury and the victim's age,

⁶⁷ See ALA. CODE § 25-5-57(a)(3)(34) (1977); ALASKA STAT. § 23.30.190(19)(A) (1980); ARIZ. REV. STAT. ANN. § 23-1044(22) (Cum. Supp. 1980); ARK. STAT. ANN. § 81-1313(g) (1976); COLO. REV. STAT. § 8-51-105 (Cum. Supp. 1979); CONN. GEN. STAT. ANN. § 31-308(d) (West Cum. Supp. 1980); DEL. CODE ANN. tit. 19, § 2326(f) (1979); HAW. REV. STAT. § 386-32(a) (1968); ILL. ANN. STAT. ch. 48, § 138.8(c) (Smith-Hurd Cum. Supp. 1981); IND. CODE § 22-3-3-10(b)(7) (Cum. Supp. 1980); IOWA CODE ANN. § 85.34(2)(t) (West Cum. Supp. 1981); LA. REV. STAT. ANN. § 23:1221(4) (West Cum. Supp. 1981); MD. CODE ANN. art. 101, § 36(3)(f) (1979); ME. REV. STAT. ANN. tit. 39, § 56 (1980); MASS. GEN. LAWS ANN. ch. 152, § 36(k) (West Cum. Supp. 1981); MINN. STAT. ANN. § 176.101(3)(41) (West Cum. Supp. 1981); MISS. CODE ANN. § 71-3-17(c)(24) (1972); MO. ANN. STAT. § 287.190(4) (Vernon Cum. Supp. 1981); MONT. REV. CODES ANN. § 39-71-708 (1979); N.M. STAT. ANN. § 52-1-44 (1978); N.Y. WORK. COMP. LAW § 15(3)(t) (McKinney 1965); N.C. GEN. STAT. § 97-31(21) (1979); OHIO REV. CODE ANN. § 41-4123.57(C) (Page 1980); OKLA. STAT. ANN. tit. 85, § 22(3) (West Cum. Supp. 1981); PA. STAT. ANN. tit. 77, § 513(22) (Purdon 1981); R.I. GEN. LAWS § 28-33-19(n)(2) (1979); S.C. CODE § 42-9-30(21) (1977); S.D. COMP. LAWS ANN. § 62-4-6(24) (1978); TENN. CODE ANN. § 50-1007(c) (Cum. Supp. 1980); UTAH CODE ANN. § 35-1-66 (Cum. Supp. 1979); VA. CODE § 65.1-56(19) (1980); WIS. STAT. ANN. § 102.56 (West Cum. Supp. 1981); WYO. STAT. § 27-12-403(j) (1977).

occupation, diminished capacity to compete and decreased quality of personal life. By minimizing the judge's leeway, this method would encourage more uniform awards.

The second option would also avoid the need to determine which injuries diminish earning capacity and which do not. Thus, this option is more consistent with the administrative efficiency goals of the workers' compensation system. Either method, however, would create a more equitable system of compensation than the one presently in operation.

CONCLUSION

The California workers' compensation system currently offers Jane and other victims of hidden disfigurement only medical care and partial defrayal of temporary wage loss because their injuries do not diminish earning capacity. This approach is unduly harsh in light of the system's simultaneous denial of a civil action to remedy otherwise uncompensable injuries.

This comment therefore admonishes the California Legislature to amend the Workers' Compensation Act to eliminate diminution of earning capacity as a prerequisite to a permanent indemnity award. The legislature should either create a new subsystem for the compensation of injuries which do not diminish earning power or add a new "personal disability" factor to the existing Schedule for Rating Permanent Disability. Either approach would afford victims of hidden disfigurement and other non-economically disabling injuries the compensation which they deserve.

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