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Sidney Shemel

WORKMEN'S COMPENSATION AWARDS FOR INJURIES TO SPECIFIC MEMBERS OF THE BODY

SIDNEY SHEMEL

Attorneys engaged in practice before workmen's compensation tribunals are frequently confronted with the problem of whether claimants with injuries to specific members of the body should receive schedule awards, or awards for reduced earning capacity. Schedule awards are ostensibly supposed to be granted for such injuries; yet non-schedule compensation is often allowed.

Why is it important to distinguish between schedule and non-schedule injuries? What criteria are applied to determine whether an injury deserves an award for reduced earning capacity rather than a schedule award? What injuries to specific members generally call for awards for reduced earning capacity as contrasted with schedule awards? In the discussion which follows, these problems are considered, primarily in terms of New York decisions, but with a necessary background of the adjudications of other tribunals.

Under the New York Workmen's Compensation Law[1] special provision is made to compensate claimants with permanent or temporary total disability.[2] Whether there is a permanent total disability is to be determined "in accordance with the facts."[3] It is immaterial that the disability is due to an injury such as the loss of a leg, which is scheduled by the Workmen's Compensation Law. If the resultant disability be total, an award is granted for total disability.[4] In this respect, New York differs from many other

[1]"Whether an injury shall be classified as a specific injury or as a permanent partial or total disability depends much upon the particular wording of the Workmen's Compensation statute." Note (1936) 22 IOWA L. REV. 161.

[2]N. Y. WORK. COMP. L. § 15 (1) (2).

[3]N. Y. WORK. COMP. L. § 15 (1) states: "Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts."

It has been said that the "most liberal type of statute provides for a determination of a case in accordance with the facts. Under such a clause a finding of the Industrial Commissioner of total disability will not be disturbed, even though the injury be one for which the specific schedule might have provided compensation." Note (1936) 22 IOWA L. REV. 161.

[4]Carr v. Lewiston Union School, 241 App. Div. 640, 13 IND. BULL. 26 (3d Dep't 1934) (an ununited fracture of the femur was the basis of an award for permanent total disability); Matter of Cartenuto v. McConnell & Company, Inc., 254 App. Div. 612, 2 N. Y. S. (2d) 841 (3d Dep't 1938), *leave to appeal denied* 278 N. Y. 737 (1938), 204 SPEC. BULL. 277 (open ulcers on heel of foot, chronic osteomyelitis and a circulatory disturbance of foot; permanent total disability found).

states wherein a schedule injury merits only scheduled compensation regardless of its effect upon a claimant's ability to work.[5]

Schedule awards and awards for reduced earning capacity are provided for under Subdivision 3 of Section 15 of the Workmen's Compensation Law which is entitled "Permanent partial disability." Schedules for the loss or loss of use of members of the body are set forth in Paragraphs a through l. Provision for non-scheduled compensation in "all other cases" is made in Paragraph v.

I. Enumerated and Unenumerated Schedule Awards

Cases of permanent partial disability are thus divided into two classes: (1) enumerated injuries to members of the body for which statutory fixed awards are provided; (2) unenumerated "other cases."[6]

The schedule lists specific awards for the loss or loss of use of arms, legs, hands, feet, eyes, fingers and phalanges. Compensation for loss of hearing is also scheduled. The enumerated cases seem limited to the limbs, the eyes, the hearing and to facial or head disfigurement. The unenumerated cases, by elimination, would seem to include injuries: (1) confined to the trunk and head, excluding injuries to the eyes, the hearing and disfigurement of the face or head; (2) affecting the trunk or head concurrently with injuries affecting the limbs, eyes, hearing mechanism or causing disfigurement of the face or head.[7]

How are the awards to be fixed for the enumerated schedule cases? It is provided in Section 15, Subdivision 3 of the Workmen's Compensation Law that:

> . . . the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in this subdivision. . . .

The period of payment is set forth in a schedule listing the number of

[5]Note (1936) 22 Iowa L. Rev. 161; Ketchikan Lumber & Shingle Co. v. Walker, 15 F. (2d) 772 (C. C. A. 9th, 1926); Cresson Co. v. Industrial Commission, 90 Colo. 353, 9 P. (2d) 295 (1932); Bateman v. Smith, 85 N. J. L. 409, 89 Atl. 979 (1914); Texas Employer's Ins. Ass'n v. Thrash, 136 S .W. (2d) 905 (Tex. Civ. App. 1940); Soukup v. Shores Co., 222 Iowa 272, 268 N. W. 598 (1936); Stapf v. Savin, 125 Conn. 563, 7A. (2d) 226 (1939); O'Donnell v. South Lafayette T. P. School District, 109 Pa. Super. 163, 167 Atl. 438 (1932); Morris v. Garden City Co., 144 Kan. 790, 62 P. (2d) 920 (1936); Kingsport Silk Mills v. Cox, 161 Tenn, 470, 33 S. W. (2d) 90 (1930).

[6]For a discussion of the schedule and "other cases" provisions see Matter of Flicker v. Mac Sign Co., 252 N. Y. 492, 170 N. E. 118 (1930); Matter of Sokolowski v. Bank of America, 261 N. Y. 57, 184 N. E. 492 (1933); and text *infra*, pp. 222.

[7]161 Spec. Bull. 107, 108 (N. Y. 1929).

weeks of compensation to be paid for particular members of the body which have been lost. For example, the loss of an arm entitles a claimant to 312 weeks of compensation, and the loss of a leg to 288 weeks of compensation.[8]

Often, however, there is only a partial loss of the function of a member. Must compensation be paid for the same period as that provided for the entire loss of a member? According to the statute, the compensation period is to be proportioned to the loss or loss of use of the member.[9] Thus, if there is a 10% loss of function of a leg (the schedule lists 288 weeks for the entire loss of a leg), the claimant recovers 10% of 288 weeks, 28.8 weeks, which is multiplied by his compensation rate to determine the sum to be awarded.

How is the award fixed for non-enumerated "other cases"? The statute provides that the compensation

> . . . shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment, or otherwise, payable during the continuance of such partial disability. . . .[10]

Thus, if a man earned $35 a week before an accident and $50 a week thereafter, under the above provision he would be entitled to two-thirds of the difference, that is, two-thirds of $15, or $10, payable during the continuance of his disability. The manner in which earning capacity is fixed has been discussed by the writer in another article.[11]

Schedule awards are made irrespective of a claimant's return to work, the claimant receiving both his wages and the schedule payments.[12]

In New York the schedule establishes arbitrary periods of payment designed to compensate claimants for the time they are "actually or presumptively . . . disabled and non-productive."[13] Compensation is granted for in-

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[8]N. Y. WORK. COMP. L. § 15 (3) (a) (b).
[9]N. Y. WORK. COMP. L. § 15 (3) (s).
[10]N. Y. WORK. COMP. L. § 15 (3) (v).
[11]Shemel, *The Determination of Earning Capacity in Workmen's Compensation Cases*, 103 N. Y. L. J., p. 1856, col. 1, p. 1847, col. 1 (April 24, 25, 1940).
[12]Bednar v. Ingersoll Rand Co., 279 N. Y. 80, 17 N. E. (2d) 777, 17 IND. BULL. 580 (1938); Rowe v. McGovern, 254 App. Div. 432, 5 N. Y. S. (2d) 626, 17 IND. BULL. 347 (1938); 114 SPEC. BULL. 29 (1922); Texas Employer's Ins. Ass'n v. Pierson, 135 S. W. (2d) 550 (Tex. Civ. App. 1940); Morrow v. James S. Murray & Sons, 136 Pa. 277, 7 A. (2d) 109 (1939); Blue Bell Mfg. Co. v. Baird, 64 Ga. App. 347, 13 S. E. (2d) 105 (1941).
[13]Marhoffer v. Marhoffer, 220 N. Y. 543, 546, 116 N. E. 379 (1917); Matter of Carolan v. Hoe & Co., 225 App. Div. 393, 233 N. Y. Supp. 333 (3d Dep't 1939); Matter of Bernstein v. Hoffman, 219 App. Div. 152, 154, 219 N. Y. Supp. 219 (3d Dep't 1927). For a similar theory see Moses v. National Union Coal Mining Co., 194 Iowa 819, 184, N. W. 746 (1921).

ability to work and not as an indemnity for physical impairment or the loss of a member.[14]

The advantages of simplicity and definiteness afforded by a schedule are considered by the New York courts as outweighing the disadvantage arising from the fact that actual periods of disability may be longer or shorter than the schedule periods.[15]

Before making awards for reduced earning capacity there must necessarily be a determination of that reduced capacity.[16] If a claimant, after his injury, earns the same or more wages than he earned at the time of his accident, there is no loss of earning capacity; consequently, no award for reduced earning capacity can be made against the insurance carrier. If he earns less than before the accident, awards for reduced earning capacity will be allowed.

Ordinarily, insurance carriers favor schedule awards, since by such awards their liability is limited to a specific number of weeks, and the possibility that they will be required to pay compensation to a claimant for the remainder of his life is eliminated.[17] Claimants who are unemployed or who work for reduced wages usually prefer awards for reduced earning capacity. By such awards they are compensated during the period that their injuries incapacitate them from earning their normal wages.[18] Claimants receiving their normal wages will generally prefer schedule awards since such awards permit them to collect wages and compensation at the same time.

II. Non-Schedule Awards

In some cases, although claimants have injured specific members for which injuries schedule awards are apparently provided, awards for reduced earning capacity have been made. These awards seem, on their face, to be in violation of the statute. Yet, they have been sanctioned by the courts. What is the basis for such sanction?

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[14]See cases cited note 13 *supra.*

[15]Marhoffer v. Marhoffer, 220 N. Y. 543, 548, 116 N. E. 379, 380 (1917).

[16]N. Y. Work. Comp. L. § 15 (5) (a); Shemel, *loc. cit. supra* note 11; Elk City Cotton Oil Co. v. State Industrial Commission, 184 Okla. 503, 88 P. (2d) 615 (1939); Panico v. Sperry Engineering Co., 113 Conn. 707, 156 Atl. 802 (1931).

[17]Margolies and Bloom, A Guide to Workmen's Compensation (1939) 70 states: "Non-schedule cases are much more severe and are more costly than the scheduled permanent impairments. For non-schedule cases, the average compensation per case received by claimants for 1938 was $10,184. The average payment for scheduled injuries was as follows: For eye (partial loss of vision) $1,727; for arm $1,478; for hand and finger $474; for leg, foot and toe $748; and for loss of hearing $689."

[18]N. Y. Work. Comp. L. §§ 15 (3) (v) and (5) (a). It is provided by Subd. 5 (a) that "the wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earnings. . . ."

Frequently, schedule and non-schedule injuries occur simultaneously. A claimant may hurt his leg and back at the same time. In such a situation, the courts have ruled consistently that there should be an award for reduced earning capacity under the "other cases" clause.[19] The reason for the refusal to permit both schedule awards and reduced earning capacity awards is that compensation for reduced earning capacity under the "other cases" provision is considered to be complete and adequate in itself.[20] Schedule and "other cases" clauses are deemed to be mutually exclusive.[21] In *Matter of Sokolowski* v. *Bank of America*,[22] the court said:

> Obviously, the phrase "in all other cases" signifies that the provisions of the paragraph shall apply only in cases where the injuries received are not confined to a specific member or specific members. By clear implication if the schedules are sufficient completely to cover the disabilities, paragraph v [the "other cases" paragraph] may not be employed to extend the period of weeks provided for thereby.

Thus it would appear that where there are schedule injuries, schedule awards must be granted for any resultant permanent partial disability. However, the courts, despite the clear wording of the *Sokolowski* case, have repeatedly sanctioned awards for reduced carning capacity in certain cases where there seem to be schedule injuries to specific limbs.

The rule has been established that if an injury to a member results in a permanent condition of "pain which affects claimant's general earning capacity" an award for reduced earning capacity under the "other cases" paragraph is proper.[23] Why should such cases be classified as non-schedule

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[19]Schaefer v. Buffalo Steel Car Co., 225 App. Div. 839; 232 N. Y. Supp. 870 (3d Dep't 1929), *aff'd* 250 N. Y. 507, 166 N. E. 183 (1929); Matter of Carolan v. Hoe & Co., 225 App. Div. 393, 233 N. Y. Supp. 333 (3d Dep't 1939); Dewitt v. Hoornbeek's Sons, 248 App. Div. 647, 287 N. Y. Supp. 942, 204 SPEC. BULL. 289, 15 IND. BULL. 182 (3d Dep't 1936); Doherty v. N. Y. Rapid Transit Corp., 244 App. Div. 853, 279 N. Y. Supp. 877, 14 IND. BULL. 172 (3d Dep't 1935); Neu v. General Electric Co., 243 App. Div. 658, 14 IND. BULL. 29, 185 SPEC. BULL. 55 (3d Dep't 1935).

[20]Pinski v. Superior Fireproof Door & Sash Co., 209 App. Div. 305, 204 N. Y. Supp. 415 (3d Dep't 1924).

[21]*Ibid.*; Matter of Sokolowski v. Bank of America, 261 N. Y. 57, 62, 184 N. E. 492, 494 (1933); Freeland v. Endicott Forging & Mfg. Co., 233 App. Div. 440, 253 N. Y. Supp. 597 (3d Dep't 1931).

[22]261 N. Y. 27, 62, 184 N. E. 492, 494 (1933); Freeland v. Endicott Forging & Mfg. Co., 233 App. Div. 440, 253 N. Y. Supp. 597 (3d Dep't 1931); 71 C. J. 834.

[23]Matter of Robinson v. Pitkin Moving Van Co., Inc., 258 App. Div. 829, 15 N. Y. S. (2d) 764, 204 SPEC. BULL. 285 (3d Dep't 1938); Mestler v. American Book Sales Co., 248 App. Div. 646, 287 N. Y. Supp. 512 (3d Dep't 1936), *aff'd* 272 N. Y. 544, 4 N. E. (2d) 728, 204 SPEC. BULL. 284, 285 (1936); Matter of Cartenuto v. McDonnell & Co., Inc., 254 App. Div. 612, 2 N. Y. S. (2d) 841 (3d Dep't 1939); DiBenedetto v. McKinney Corp., 252 App. Div. 712, 298 N. Y. Supp. 810, 16 IND. BULL. 423, 204 SPEC. BULL.

permanent partial disabilities? The statute clearly makes no provision for pain, nor does it imply that pain takes a case out of the schedule group.[24]

Furthermore, practice before the State Industrial Board reveals that "pain which affects claimant's general earning capacity" is not always present in cases of injuries to specific members of the body wherein non-schedule awards are made. Such awards are found in cases of unhealed non-painful lesions such as leg ulcers.[25] Why are these cases classified as non-schedule disabilities? As in the pain cases, no statute appears to except them from the schedule group.

In the pain cases, only one decision has been found which has alluded to a reason why such cases are excluded from the schedule provisions. In that case, an injury to the claimant's left knee aggravated a latent arthritis which became severely painful and progressive. After a schedule award had been made for 15% loss of use of the leg, and the insurance carrier had paid the award, the case was reopened. The schedule award was rescinded and an award was granted for total temporary disability from the date of the accident up to the time when claimant first had an earning capacity and for reduced earning capacity after that time, the carrier being credited for schedule payments made. The court, affirming the award, said:

> The findings are to the effect that claimant's disability is not confined to the left leg, but that it is coupled with *additional disability* due to pain from arthritis.[26]

Manifestly, all cases in which schedule awards are granted are characterized by impairment of a bodily function, such impairment causing a permanent partial disability. To speak of an "additional disability" would be to refer to a disability greater than one ordinarily resulting from schedule injuries.

If the criterion of exceptions to the schedule is "additional disability," clearly such exceptions need not be confined to cases of pain affecting earning capacity, but may also encompass the non-painful unhealed lesion and other cases.

The New York Court of Appeals has established the real, over-all criterion for such non-schedule cases; although not one case involving the

287 (3d Dep't 1937), *leave to appeal denied* 276 N. Y. 688 (1938); Schultz v. Buffalo Dry Dock Co., 250 App. Div. 807, 294 N. Y. Supp. 386, 16 IND. BULL. 166, 204 SPEC. BULL. 289 (3d Dep't 1937); Kallio v. Sachs, 251 App. Div. 759, 295 N. Y. Supp. 442, 16 IND. BULL. 207, 204 SPEC. BULL. 287 (3d Dep't 1937).

[24]N. Y. WORK. COMP. L. § 15 (3).

[25]See text and cases *infra* concerning unhealed lesions.

[26]Brennan v. Mack International Motor Truck, 238 App. Div. 877, 263 N. Y. Supp. 1001 (3d Dep't 1933), *aff'd* 262 N. Y. 660, 188 N. E. 109 (1933). Italics added.

painful or non-painful exceptions to the schedule provisions has referred to that criterion or cited the case establishing it.

In *Matter of Dowling* v. *Gates*,[27] it was pointed out by the Court of Appeals that the Legislature, when it established the schedule, had in mind the usual and expected consequences resulting from the loss, or the loss of use, of a member of the body. A person is restricted to the schedule compensation only "in case the effect of the injury is the *usual* and *expected* effect." If he suffers from a "*serious, unusual* and *unexpected* condition as a result of a schedule injury, he is entitled to an award greater than that provided for such schedule injury." If an "*unusual* and *extraordinary* condition develops as a result of the injury" an award is to be made "for the actual, although unusual and unexpected condition," despite the fact that the original injury was covered by the schedule.

The Court of Appeals drew a distinction between the usual results of injuries and those consequences which are "natural and unavoidable" in particular cases. For example, death or blood poisoning is not the usual result of an injury to the foot, although in the case of certain individuals with pre-existing infirmities, either may be the natural and unavoidable consequence. Increased awards[28] are to be made if the *sequelae* are unusual even though such *sequelae* be natural and unavoidable.[29]

No limitation is placed upon the type of effects which excludes a case from the schedule group. "The determination depends upon the facts in each case."[30] Pain which affects earning capacity has been held to be a consequence which removes a case from the schedule provisions.[31] In other cases, other consequences will have the same result.

Words such as "usual," "expected," "unusual" and "extraordinary" are simple on their face. The practitioner before the State Industrial Board may well wonder whether the claimant he represents suffers from "usual" or "unusual" results of a schedule injury. As the Court of Appeals has said: "The determination depends upon the facts in each case."[32]

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[27]253 N. Y. 108, 110, 111, 170 N. E. 511, 512 (1930). Italics added.

[28]In speaking of increased awards, the court was not referring to a schedule award plus an additional award. See cases cited notes 20, 21 *supra*, and the text pertaining thereto. The court probably had in mind awards for death benefits or for reduced earning capacity, which may extend beyond the schedule periods. Matter of Sokolowski v. Bank of America, 261 N. Y. 57, 62, 184 N. E. 492, 494 (1933); Matter of Carolan v. Hoe & Co., 225 App. Div. 393, 396, 233 N. Y. Supp. 333, 336 (3d Dep't 1939).

[29]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 170 N. E. 511 (1930).

[30]*Id.* at 111, 170 N. E. at 511, 512.

[31]See cases cited note 23 *supra*.

[32]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 170 N. E. 511 (1930).

III. Other Criteria

New York is not the only state which uses the usual results test. In fact, it may be stated as the general rule that if effects are usual, claimants will be limited to schedule compensation.[33] It is a prerequisite to the making of non-schedule awards that the results of injuries to specific limbs be extraordinary and unusual.

True, states use varying phraseology to describe their criteria for non-schedule compensation. But embedded in the language of most state courts is the requirement of unexpected effects.[34] It is said to be the intent of the legislature that the schedule compensate for the "common and recognized result," for what "commonly and usually follows,"[35] and for the "normal and immediate incidents"[36] of injuries to specific members.

Some states adhere to the same rule as New York.[37] Others require the satisfaction of not only the usual results test but also of additional criteria as a prerequisite to non-schedule awards. In some states, the additional test is whether the injuries affect another portion of the claimant's body.[38] Several states, for a supplemental criterion, require that the injuries involve, in the alternative, other portions of the body or the general health of the claimant.[39]

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[33]Ottens v. Western Contracting Co., 296 N. W. 431 (Neb. 1941) (this case cites Matter of Dowling v. Gates, 253 N. Y. 108, 170 N. E. 511 (1930), the leading New York case which establishes the "usual results" test); Kajundzich v. State Industrial Accident Commission, 164 Ore. 510, 102 P. (2d) 924 (1940) (this case also cites Matter of Dowling v. Gates, 253 N. Y. 108, 170 N. E. 511 (1930); Spring Canyon Coal Co. v. Industrial Commission, 60 Utah 553, 210 Pac. 611 (1922); Morgan v. Adams, 127 Conn. 294, 16 A. (2d) 576 (1940); Amos v. J. E. Trigg Drilling Co., 153 Kan. 617, 113 P. (2d) 107 (1941); Bommarito v. Fisher Body Corporation, 273 Mich. 1, 262 N. W. 329 (1935); Texas Employer's Ins. Ass'n v. Lemons, 33 S. W. (2d) 251 (Tex. Civ. App. 1930); Lente v. Lucci, 275 Pa. 217, 119 Atl. 132 (1922); Sigley v. Marathon Razor Blade, 111 N. J. L. 25, 166 Atl. 518 (1933); Ketchikan Lumber & Shingle Co. v. Walker, 15 F. (2d) 772 (C. C. A. 9th, 1926) (involving Alaska Workmen's Compensation Act).

[34]See cases cited note 33 *supra*.

[35]Texas Employer's Ins. Ass'n v. Lemons, 33 S. W. (2d) 251, 253 (Tex. Civ. App. 1930); Jasper v. Liberty Mut. Ins. Co., 119 S. W. (2d) 386, 387 (Tex. Civ. App. 1938).

[36]Saddlemire v. American Bridge Co., 94 Conn. 618, 628, 110 Atl. 63, 68 (1920); Bommarito v. Fisher Body Corporation, 273 Mich. 1, 262 N. W. 329 (1935). *See also* Matter of Dowling v. Gates, 253 N. Y. 108, 170 N. E. 511 (1930).

[37]Saddlemire v. American Bridge Co., 94 Conn. 618, 628, 110 Atl. 63, 68 (1920); Spring Canyon Coal Co. v. Industrial Commission, 60 Utah 553, 210 Pac. 611 (1922); Amos v. J. E. Trigg Drilling Co., 153 Kan. 617, 113 P. (2d) 107 (1941).

[38]Lente v. Lucci, 275 Pa. 217, 119 Atl. 132 (1922); Traveler's Ins. Co. v. Reid, 178 Ga. 399, 173 S. E. 376 (1934); Maryland Casualty Co. v. Smith, 44 Ga. App. 840, 163 S. E. 247 (1932); Elk City Cotton Oil Co. v. State Industrial Commission, 184 Okla. 503, 88 P. (2d) 615 (1939).

[39]Kajundzich v. State Industrial Accident Commission, 164 Ore. 510, 102 P. (2d) 924

A few states prescribe a criterion supplemental to the "usual results," the "general health" or "other portions of the body" tests. They say that the disability must extend beyond the schedule period.[40] This idea has been expressed in an appellate division decision in New York.[41] Others require a prolonged disability, without defining the length of disability in terms of its exceeding the schedule periods.[42] However, it is probable that these courts also mean incapacity in excess of the schedule number of weeks.

Implied in all the criteria is the requisite of an unusual disability continuing for an unusually long time. Some states, as stated above, voice the view that there must be prolonged disability. The others apparently assume this requirement without expressing it other than to prescribe that the disability be permanent.

The length of disability is very important. It may be the period of disability rather than the particular *sequela* of the injury which makes the disability unusual. Thus it may be normal for a claimant to suffer pain after an injury, although it is abnormal for the pain to be permanent.[43]

Decisions of states which supplement the usual results test by other standards are significant. These states grant only schedule compensation for normal effects since it is agreed that the schedule covers usual results.[44] The additional standards of such states are utilized to point out cases which legislatures did not intend to include in the schedules. It may be stated, consequently, that the additional criteria indicate the characteristics of unusual results. Thus, if injuries affect other portions of the body or the general health of a claimant so as to cause prolonged disability, such results are extraordinary, and such cases merit non-schedule compensation.[45]

All things being equal, human bodies react similarly to injuries. Therefore, an extraordinary consequence of an injury in one part of the United

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(1940); Ottens v. Western Contracting Co., 296 N. W. 431 (Neb. 1941); Greseck v. Farmers Union Elevator Co., 123 Neb. 755, 243 N. W. 898 (1932); Petroleum Casualty Co. v. Seale, 13 S. W. (2d) 264 (Tex. Comm. App. 1929); Federal Underwriters Exchange v. Simpson, 137 S. W. (2d) 132 (Tex. Civ. App. 1941).

[40]Lente v. Lucci, 275 Pa. 217, 119 Atl. 132 (1922); Bommarito v. Fisher Body Corporation, 273 Mich. 1, 262 N. W. 329 (1935); Matter of Carolan v. Hoe & Co., 225 App. Div. 393, 233 N. Y. Supp. 333 (3d Dep't 1939).

[41]Matter of Carolan v. Hoe & Co., 225 App. 393, 233 N. Y. Supp. 333 (3d Dep't 1939).

[42]Spring Canyon Coal Co. v. Industrial Commission, 60 Utah 553, 210 Pac. 611 (1922); Firemen's Fund Indemnity Co. v. Hopkins, 119 S. W. (2d) 394 (Tex. Civ. App. 1938).

[43]Texas Employer's Ins. Ass'n v. Hevolow, 136 S. W. (2d) 931, 933 (Tex. Civ. App. 1940).

[44]See cases cited notes 33, 35, and 36 *supra*.

[45]See cases cited notes 38 and 39 *supra*.

States will ordinarily be regarded in the same light in another portion of the country. Hence, it may be concluded that the criteria employed by states other than New York for the determination of abnormal results should also have valid application in New York. Such criteria indicate the types of *sequelae* which New York courts will probably deem unusual.

It is noteworthy for the New York courts that Oregon and Nebraska which have espoused the usual results test, citing with approval *Matter of Dowling* v. *Gates*,[46] the leading New York case on that subject, have supplemented this test with the requirement, for non-schedule awards, that the extraordinary conditions involve other portions of the claimant's body or his general health.[47] This shows a trend towards defining what are unusual results in addition to establishing the rule that they are necessary for non-schedule compensation.

The supplemental criteria already discussed are not the sole ones which may and have been utilized to judge the normality of effects.

In Indiana[48] a principle has been evolved which the writer for convenience calls the "unhealed lesion" test. In one case,[49] an abrasion of the left leg had resulted in inflammation of the veins, varicose veins and ulcers. The leg was so painful that the claimant was wholly unable to perform his usual work. The court, refusing to modify an award for total disability, said:

> . . . at no time since the injury have his injuries healed or attained a permanent or quiescent state so that his injury has been confined to any degree of permanent impairment.

Claimants with such conditions are entitled to be paid continuously as long as the conditions persist.[50]

In the unhealed lesion cases, schedule awards may be deemed impractical because a tribunal is unable to estimate the extent of loss of function. Temporary healing may reduce the percentage of loss on certain days, whereas on other days the percentage of loss is higher. On particular days, moreover, the pain may be less disabling than on other days.

Unhealed lesions necessitate a limitation of activities to an extent which

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[46]253 N. Y. 108, 170 N. E. 511 (1930).

[47]Ottens v. Western Contracting Co., 296 N. W. 431 (Neb. 1941); Greseck v. Farmers Union Elevator Co., 123 Neb. 755, 243 N. W. 898 (1932); Kajundzich v. State Industrial Accident Commission, 164 Ore. 510, 102 P. (2d) 924 (1940).

[48]Swift & Co. v. Bobich, 88 Ind. App. 64, 163 N. E. 232 (1928); Inman v. Carl Furst Co., 92 Ind. App. 17, 174 N. E. 96 (1930).

[49]Swift & Co. v. Bobich, 88 Ind. App. 64, 163 N. E. 232 (1928).

[50]Inman v. Carl Furst Co., 92 Ind. App. 17, 174 N. E. 96 (1930).

is greater than the degree of limitation ordinarily following mere loss of function. There is constant need for medical attention.[51]

It may be concluded that unhealed lesions cause unusual disabilities for prolonged periods, and that they should rightly be classified as unusual results of injuries, justifying non-schedule compensation.

Another criterion, previously mentioned, is pain affecting earning capacity. This standard seems to be a more specific restatement of the requirement that the conditions involve other portions of the body or the general health of a claimant. Pain in one part of the body may cause the whole body to suffer.[52] It may affect the mind, leaving the individual depressed and unable to concentrate. It may result in a restriction of the movements of the body in an effort to avoid pain. Valuable time is spent in palliative measures. Moreover, it is impracticable to estimate the extent of loss of function where the condition is painful.[53] Although pain and loss of function may be permanent, it is infeasible to measure the loss. As in unhealed lesion cases, the pain on certain days will be less disabling than on others.

It is clear that all pain will in some way influence an individual's capacity to work. Therefore, "pain" and "pain affecting earning capacity" are practically synonymous.

The New York courts have ruled that pain affecting earning capacity removes a case from the schedule class.[54] They have, in effect, decided that pain is an unusual consequence of an injury. This finding seems justified in view of the effects of pain on an individual as a working unit. There is unusual "additional"[55] disability for a prolonged period of time.

The following criteria, then, seem pertinent to an inquiry as to whether the results of an injury are usual: (a) their effect on other portions of the body; (b) their effect on general health; (c) whether there are unhealed lesions; and (d) whether there is pain effecting earning capacity. These factors are, of course, important only if the disability is unusually prolonged.

These criteria cannot be clearly differentiated. Unhealed lesions and pain

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[51]*Cf.* Lumbermen's Reciprocal Ass'n v. Anders, 292 S. W. 265, 267 (Tex. Civ. App. 1927).

[52]Maryland Casualty Co. v. Donnelly, 50 S. W. (2d) 388, 391 (Tex. Civ. App. 1932); Oilmen's Reciprocal Ass'n v. Youngblood, 297 S. W. 255 (Tex. Civ. App. 1927); Security Union Casualty Co. v. Frederick, 295 S. W. 301 (Tex. Civ. App. 1927); Plum v. Hotel Washington, 125 Pa. Super. 280, 189 Atl. 792 (1937).

[53]This argument was made by the Attorney General of New York State in Franich v. N. Y. Trap Rock Corp., 242 App. Div. 744, 13 IND. BULL. 250 (3d Dep't 1934).

[54]See cases cited note 23 *supra.*

[55]Brennan v. Mack International Motor Truck, 238 App. Div. 877, 263 N. Y. Supp. 1001 (3d Dep't 1933), *aff'd* 262 N. Y. 600, 188 N. E. 109 (1933); see text *supra* p. 223.

may affect other portions of the body and the general health. One might justifiably consider unhealed lesions and pain as subdivisions of the more general criteria: "effects on other parts of the body and on the general health."[56]

The latter standards need further definition. Not any effect on other portions of the body or on the general health is sufficient to warrant non-schedule awards. Many schedule injuries normally affect other parts of the body. For example, a shortened leg may cause a muscle strain on the uninjured side. Yet, such a result is usual and will not merit non-schedule compensation.[57]

It appears that only unusual effects on other portions of the body, or on the general health, will be regarded as the basis for awards for reduced earning capacity. Such conditions as unhealed lesions and pain affecting earning capacity will probably be considered as unusual effects. Other consequences may be unusual, but their characteristics are not precisely delineated.

Courts, in deciding whether results are uncommon, will look for unusual disabilities resulting from an injury to a limb.[58] If an extraordinary permanent disability is evident, non-schedule compensation is likely to be granted. "The law intends that an employee who is entitled to compensation shall receive compensation for all the disability he suffers from the accidental injury."[59] Schedules provide compensation only for usual disability. For permanent disability in excess of usual disability, the courts, to compensate claimants fully, tend to resort to non-schedule awards.

IV. Usual and Unusual Results of Injury

In concentrating upon the unusual effects of injuries, one may lose sight of the innumerable cases in which the results are normal. The following statement of the Supreme Court of Kansas is noteworthy:

> Fundamentally almost any scheduled injury under our Workmen's Compensation Law produces some—perhaps slight although it may be substantial—unnatural results upon normal bodily functions. If it were held that all such results constituted general partial disability under the statute, there would be little or no purpose in having scheduled injuries.[60]

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[56]For cases relating to pain which causes the whole body to suffer, see note 52 *supra*.

[57]*See* Cornell v. Cities Service Gas Co., 138 Kan. 607, 27 P. (2d) 228 (1933).

[58]Brennan v. Mack International Motor Truck, 238 App. Div. 877, 263 N. Y. Supp. 1001 (3d Dep't 1933), *aff'd* 262 N. Y. 660, 188 N. E. 109 (1933).

[59]Matter of Carolan v. Hoe & Co., 225 App. Div. 393, 233 N. Y. Supp. 333 (3d Dep't 1939).

[60]Cornell v. Cities Service Gas Co., 138 Kan. 607, 609, 27 P. (2d) 228 (1933). The

The following is an analysis of cases of injuries to specific members of the body with respect to the consequences and the accompanying compensation awards:[61]

A. Usual Results

When fractured bones heal, residual deformities and limitations of motion are frequent. For such common results, scheduled compensation will be considered complete and adequate.[62] Even the need for crutches or a cane is a "normal result" for which schedule awards fully compensate.[63]

Atrophy of the uninjured portion of a limb due to disuse after amputation of or injury to another part of the limb is regarded as a usual effect.[64] Thus where a foot was amputated, the atrophy in the remainder of the leg because of disuse was held to be covered by the schedule award.[65]

For injuries to a specific limb causing anaesthesia of the limb, only a schedule award was granted.[66] A similar view was taken as to injuries to a limb causing a paralysis of that limb.[67]

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quotation is repeated in Barry v. Peterson Motor Co., 55 Idaho 702, 706, 46 P. (2d) 77 (1935).

[61]For general references relating to the medical conditions considered in the study, see: BRAHDY AND KAHN, TRAUMA AND DISEASE (1937); CAMPBELL, A TEXT-BOOK ON ORTHOPEDIC SURGERY (1930); CECIL, TEXTBOOK OF MEDICINE (5th ed. 1940); GRAY, ATTORNEYS TEXTBOOK OF MEDICINE (2d ed. 1940); KESSLER, ACCIDENTAL INJURIES (1931); MEAKINS, THE PRACTICE OF MEDICINE (3d ed. 1940).

[62]Cornell v. Cities Service Gas Co., 138 Kan. 607, 27 P. (2d) 228 (1933); Sharcheck v. Beaver Run Coal Co., 275 Pa. 225, 119 Atl. 135 (1922); Inman v. Carl Furst Co., 92 Ind. App. 17, 174 N. E. 96 (1930).

[63]Sharcheck v. Beaver Run Coal Co., 275 Pa. 225, 228, 119 Atl. 135, 136 (1922). *See also* Inman v. Carl Furst Co., 92 Ind. App. 17, 174 N. E. 96 (1930).

[64]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 111, 170 N. E. 511, 512, (1930); Stein v. Topol, 217 App. Div. 797, 216 N. Y. Supp. 720 (3d Dep't 1926); Matter of Roular v. Henry Forge and Tool Company, 232 App. Div. 857, 249 N. Y. Supp. 17 (3d Dep't 1931); Ocean Accident & Guarantee Corp. v. Harden, 44 Ga. App. 223, 160 S. E. 699 (1931).

[65]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 111, 170 N. E. 511, 512 (1930); Stein v. Topol, 217 App. Div. 797, 216 N. Y. Supp. 720 (3d Dep't 1926); Ocean Accident & Guarantee Corp. v. Harden, 44 Ga. App. 223, 160 S. E. 699 (1931) (injury to heel bone).

[66]Gruttaduria v. Imperial Metal Mfg. Co., 250 App. Div. 242, 294 N. Y. Supp. 451, 16 IND. BULL. 125, 204 SPEC. BULL. 288 (3d Dep't 1937); Matter of Nycz v. Buffalo Body Corporation, 221 App. Div. 620, 224 N. Y. Supp. 734, 7 IND. BULL. 65 (3d Dep't 1927); Kajundzich v. State Industrial Accident Commission, 164 Ore. 510, 102 P. (2d) 924 (1940).

[67]Magnolia Petroleum Co. v. Brown, 174 Okla. 191, 50 P. (2d) 165 (1935). *See* Maryland Casualty Co. v. Smith, 44 Ga. App. 840, 163 S. E. 247 (1932). In Matter of Dowling v. Gates, 253 N. Y. 108, 110, 111, 170 N. E. 511, 512 (1930), paralysis is stated to be an unusual result. The New York Court of Appeals said: "The amputation of a foot may result in blood poisoning, paralysis or death. They are not the usual results of the injury and operation. . . ." In view of the other conditions, *i.e.* blood poisoning or death, it appears that the word paralysis, as used by the court, connotes paralysis

B. Unusual Results

(1) Pain Affecting Earning Capacity

This criterion has been clearly established as a basis for reduced earnings awards.[68] It is relevant and applicable to the following, among other, painful effects of injuries:

(a) Arthritis.—Arthritis has been defined as the "inflammation of a joint."[69] The cases have held uniformly that a painful traumatic arthritis of the knee or leg merits an award for reduced earning capacity.[70]

(b) Neuritis and Nerve Injuries.—Neuritis is an "Inflammation of a nerve. The condition is attended by pain and tenderness over the nerves, anesthesia, disturbances of sensation, paralysis, wasting, and disappearance of the reflexes."[71] Non-schedule awards for painful residual disabilities caused by neuritis and nerve injuries are common.[72]

(c) Phlebitis.—Phlebitis is an "Inflammation of a vein. The condition is marked by infiltration of the coats of the vein and the formation of a thrombus of coagulated blood. The disease is attended by edema, stiffness, and pain in the affected portion."[73] Phlebitis is a ground for an award for reduced earning capacity.[74]

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of a goodly portion of the body and not just paralysis of a limb. The writer believes that paralysis confined to a limb would be considered covered by a schedule award.

[68]See cases cited note 23 *supra.*

[69]DORLAND, THE AMERICAN ILLUSTRATED MEDICAL DICTIONARY (17th ed. 1935) 151.

[70]Kallio v. Sachs, 251 App. Div. 759, 295 N. Y. Supp. 442, 161 IND. BULL. 207, 204 SPEC. BULL. 287 (3d Dep't 1937); Brennan v. Mack International Motor Truck, 238 App. Div. 877, 263 N. Y. Supp. 1001 (3d Dep't 1933) *aff'd* 262 N. Y. 660, 188 N. E. 109 (1933) (painful progressive arthritis commencing in the left knee); Plum v. Hotel Washington, 125 Pa. Super. 280, 189 Atl. 792 (1937) (knee); *cf.* Crowninshield v. Buck Productions, Inc., 243 App. Div. 662, 14 IND. BULL. 26 (3d Dep't 1935).

[71]DORLAND, *op. cit. supra* note 69, at 908.

[72]Security Union Casualty Co. v. Frederick, 295 S. W. 301 (Tex. Civ. App. 1927) (total disability due to traumatic neuritis resulting from an injury to a leg); Simpson v. New Jersey Stone and Tile Co., 93 N. J. L. 250, 107 Atl. 36 (1919) (total disability—neuritis plus abscesses in arm); Traders & General Ins. Co. v. Nunley, 82 S. W. (2d) 715 (Tex. Civ. App. 1935) (total disability—injury to foot resulted in exposed nerve ends and other effects); Aetna Life Ins. Co. v. Bulgier, 19 S. W. (2d) 821 (Tex. Civ. App. 1929) (total disability—fractures of the arm caused impinged nerves affecting the shoulders, back and spine); Nebraska National Guard v. Morgan, 112 Neb. 432, 199 N. W. 557 (1924) (total disability—fractures of neck of femur causing misplacement of hip bone with resulting irritation of nerves, and affecting the entire physical and nervous system).

[73]DORLAND, *op. cit. supra* note 69 at 1404, 1405.

[74]Schultz v. Buffalo Dry Dock Co., 250 App. Div. 807, 294 N. Y. Supp. 386, 16 IND. BULL. 166, 204 SPEC. BULL. 289 (3d Dep't 1937) (phlebitis and infected ulcers in leg); Saddlemire v. American Bridge Co., 250 App. Div. 807, 294 N. Y. Supp. 386, 16 IND. BULL. 166, 204 SPEC. BULL. 289 (3d Dep't 1937) (phlebitis in leg); Morgan v. Adams, 94 Conn. 618, 628, 110 Atl. 63, 68 (1920); Amos v. J. E. Trigg Drilling Co., 153 Kan.

(d) Synovitis.—Synovitis is an "inflammation of a synovial membrane"[75] which is the lining of a joint cavity such as the knee.[76] The function of the synovial membrane is to secrete the synovia which is a "viscid lubricating fluid."[77] Synovitis "is usually painful, particularly on motion. . . ."[78] Impaired earnings awards have been granted for a painful chronic synovitis of the knee.[79]

(e) Ununited Fractures.—Frequently, ununited fractures of the legs cause total disability.[80] Ununited fractures are usually painful and are a valid basis for non-schedule awards.[81]

(2) Unhealed Lesions

Unhealed lesions are unusual consequences of injuries, causing unexpected disabilities. The "unhealed lesion" criterion is relevant and applicable to the following, among other, conditions:

(a) Osteomyelitis.—Osteomyelitis is defined as an "inflammation of the bone marrow, or of the bone and marrow; inflammation of the medullary cavity of a bone.[82] It is an infection requiring drainage.[83] Pus is discharged through sinuses (channels) in the skin.[84] In chronic osteomyelitis, "one or more sinuses at various points continue to drain; on palpation there is swelling . . . of the soft tissues, hypertrophy (morbid enlargement or overgrowth) of the bone, and the affected area is tender to pressure. Unless deformity has been prevented, the adjacent joints may be con-

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617, 113 P. (2d) 107 (1941); Swift & Co. v. Bobich, 88 Ind. App. 64, 16 N. E. 232 (1928); Sigley v. Marathon Razor Blade, 111 N. J. L. 25, 160 Atl. 518 (1933); Bommarito v. Fisher Body Corporation, 273 Mich. 1, 262 N. W. 329 (1935).

[75]DORLAND, *op. cit. supra* note 69, at 1337.

[76]CAMPBELL, *op. cit. supra* note 61, at 143.

[77]WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1935) 2560.

[78]DORLAND, *op. cit. supra* note 69, at 1337.

[79]Kallio v. Sachs, 251 App. Div. 759, 295 N. Y. Supp. 442, 161 IND. BULL. 207, 204 SPEC. BULL. 287 (3d Dep't 1937); Mestler v. American Book Sales Co., 248 App. Div. 647, 287 N. Y. Supp. 512 (3d Dep't 1936); *cf.* Crowninshield v. Buck Productions, Inc., 243 App. Div. 662, 14 IND. BULL. 26 (3d Dep't 1935).

[80]Carr v. Lewiston Union School, 241 App. Div. 642, 13 IND. BULL. 26 (3d Dep't 1934); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S. W. (2d) 90 (1930); Lumbermen's Reciprocal Ass'n v. Anders, 292 S. W. 265 (Tex. Civ. App. 1927).

[81]Coates v. Warren Hotel, 18 N. J. Misc. 122, 11 A. (2d) 436 (1940); Gorman v. Miner-Edgar Chemical Corp., 9 N. J. Misc. 180, 153 Atl. 271 (1931), *modified* 123 N. J. L. 235, 8 A. (2d) 574 (1939); *cf.* McCarty v. U. S. Trucking Corp., 255 App. Div. 741, 6 N. Y. S. (2d) 939 (3d Dep't 1938), *aff'd* 281 N. Y. 704, 23 N. E. (2d) 538 (1939).

[82]DORLAND, *op. cit. supra* note 69, at 965.

[83]GRAY, *op. cit. supra* note 61, at 554, 559; BRAHDY AND KAHN, *op. cit. supra* note 61, at 367.

[84]CAMPBELL, *op. cit. supra* note 61, at 449, 450.

tracted in malposition."[85] The temperature may remain slightly elevated.[86] The claimant may have chills and headaches.[87]

Osteomyelitis may be classified as an unhealed lesion. It requires continual medical care.[88] Disability ensues by reason of draining sinuses and bone overgrowth, although frequently, in the chronic stage, pain is unimportant. Osteomyelitis affects the general health, producing fever, toxemia, anemia, loss of weight and other conditions.[89] During flair-ups pain may be acute.[90]

In *Huber* v. *Cutler Hammer Mfg. Co.*,[91] the claimant had a chronic osteomyelitis of the tibia in a leg and an open ulcer on the leg. The Appellate Division of the Supreme Court of New York, Third Department, reversed an award for reduced earning capacity on the ground that the injury was confined to the claimant's leg and that therefore a schedule award should have been made.

This case seems to have been overruled in effect by the later cases of *Anderson* v. *International Motor Co.*[92] and *Matter of Cartenuto* v. *McConnell & Co. Inc.*[93] wherein osteomyelitic conditions in the leg and foot, respectively, were deemed to be the basis for non-schedule awards. In *Matter of Mestler* v. *American Book Sales Co.*,[94] an award was made for reduced earning capacity due to a synovitis of the knee. The New York Court of Appeals, in affirming that case, did not heed the dissent in the appellate division. The dissent had cited the *Huber* case in support of the position that a schedule award should have been made. It may be said that the *Huber* case is no longer good law.

Some decisions have stated specifically that osteomyelitis is an abnormal,

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[85] *Id.* at 452.

[86] *Ibid.*

[87] Anderson v. International Motor Co., 244 App. Div. 853, 279 N. Y. Supp. 534, 14 IND. BULL. 171 (3d Dep't 1935).

[88] *Ibid.* (osteomyelitis of the tibia of the leg with an open sinus, requiring almost daily treatment); Matter of Cartenuto v. McConnell & Co., Inc., 254 App. Div. 612, 2 N. Y. S. (2d) 841 (3d Dep't 1938) (wherein claimant was confined to his bed).

[89] Anderson v. International Motor Co., 244 App. Div. 853, 279 N. Y. Supp. 534, 14 IND. BULL. 171 (3d Dep't 1935); Johnson v. Purnell, 131 Pa. Super. 230, 200 Atl. 151 (1938); Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S. W. (2d) 1027 (1938); Spring Canyon Coal Co. v. Industrial Commission, 60 Utah 553, 210 Pac. 611 (1922); CAMPBELL, *op. cit. supra* note 61, at 452.

[90] Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S. W. (2d) 1027 (1938); Lumbermen's Reciprocal Ass'n v. Anders, 292 S. W. 265 (Tex. Civ. App. 1927).

[91] 243 App. Div. 646, 276 N. Y. Supp. 496, 14 IND. BULL. 28 (3d Dep't 1935).

[92] 244 App. Div. 853, 279 N. Y. Supp. 534 (3d Dep't 1935).

[93] 254 App. Div. 612, 2 N. Y. S. (2d) 841 (3d Dep't 1938); see cases cited notes 4 and 88 *supra*.

[94] 248 App. Div. 646, 287 N. Y. Supp. 512 (3d Dep't 1936), *aff'd* 272 N. Y. 544, 4 N. E. (2d) 728 (1936).

unexpected condition.[95] Other cases have held that it affects "other portions of the body."[96]

It may be concluded that claimants with chronic osteomyelitis will generally receive non-schedule awards.

(b) Ulcers.—An ulcer is "an open sore other than a wound; a loss of substance on a cutaneous or mucous surface, causing gradual disintegration and necrosis (death of a circumscribed portion) of the tissues."[97] The failure of chronic ulcers to heal is commonly due to underlying circulatory pathologies in the veins and arteries, such as varicose veins and arteriosclerosis.[98] Medical supervision is necessary to prevent infection and to promote healing.

It has been indicated above that the case of *Huber* v. *Cutler Hammer Mfg. Co.*,[99] wherein a claimant with an open ulcer and chronic osteomyelitis was restricted to a schedule award, has been impliedly overruled. This trend is made even clearer by *Schultz* v. *Buffalo Dry Dock Co.*,[100] a later case, which relates to a claimant suffering from infected ulcers and a phlebitis of the leg with marked swelling below the knee. Therein, an award for reduced earning capacity was affirmed.

Ulcers are unhealed lesions[101] which affect the remainder of the body and cause unexpected disability. Non-schedule awards will ordinarily be granted where injuries result in chronic ulcers.[102]

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[95]Spring Canyon Coal Co. v. Industrial Commission, 60 Utah 553, 210 Pac. 611 (1922); Johnson v. Purnell, 131 Pa. Super. 230, 200 Atl. 151 (1938). *But see* Sharcheck v. Beaver Run Coal Co., 275 Pa. 225, 119 Atl. 135 (1922). In that case, the claimant who had restricted motion of the ankle and a healed osteomyelitis of the tibia was limited to a schedule award.

It is significant that the Pennsylvania courts under their interpretation of the Pennsylvania workmen's compensation statutes do not permit any recovery over and above the schedule for "pain, annoyance, inconveniences, disability to work or anything that may come under the term 'all disability,' or normally resulting from permanent injury." Lente v. Lucci, 275 Pa. 217, 222, 119 Atl. 132, 134 (1922).

[96]Johnson v. Purnell, 131 Pa. Super. 230, 200 Atl. 151 (1938); Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S. W. (2d) 1027 (1938).

[97]DORLAND, *op. cit. supra* note 69, at 1460, 891 (see definitions of ulcer and necrosis therein).

[98]KESSLER, *op. cit. supra* note 61, at 65; BRAHDY AND KAHN, *op. cit. supra* note 61, at 100, 101; GRAY, *op. cit. supra* note 61, at 896, 887.

[99]243 App. Div. 646, 276 N. Y. Supp. 496 (3d Dep't 1935).

[100]250 App. Div. 807, 294 N. Y. Supp. 386 (3d Dep't 1937).

[101]Swift v. Bobich, 88 Ind. App. 64, 163 N. E. 232 (1928).

[102]Von Lehn v. Von Lehn Sons, 31 N. Y. St. Dep't Rep. 538 (1924) (decision of the Industrial Board making an award for reduced earning capacity due to incurable gangrenous ulcers on the claimant's leg); Swift v. Bobich, 88 Ind. App. 64, 163 N. E. 232 (1928) (total disability found).

(3) *Injuries Affecting Other Portions of the Body or General Health*

It has been pointed out that pain and unhealed lesions affect other portions of the body and the general health. However, in some instances, even in the absence of pain or unhealed lesions, the injuries affect other parts of the body or the general health. Thus an injury may cause blood poisoning,[103] paralysis in another part,[104] nervous disorders,[105] insanity[106] or even death.[107] These are not the usual results of injuries.[108] In such cases, there is agreement that non-schedule awards are proper.[109]

V. Conclusion

Under the usual results test, the New York Industrial Board is vested with a great degree of discretion. Each case is determined on its own facts.

Actually, in practice, the Industrial Board and the courts seem to adhere to the test, although they fail to express their adherence. Mention is made only of such factors as pain affecting earning capacity and "additional" disability. These factors are but guides to what are unusual results and should be recognized as such.

It is in the best interests of the public and the bar that the usual results criterion be more specifically defined in terms such as pain, failure to heal, effect on the general health, etc. The ability to predict schedule or non-schedule awards in cases of permanent, partial disability will then be general, instead of confined almost wholly to veteran workmen's compensation practitioners, who know through experience what is unexpressed in decisions.

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[103]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 111, 170 N. E. 511, 512 (1930); Morgan v. Adams, 127 Conn. 294, 296, 16 A. (2d) 576 (1940); Georgia Casualty Co. v. Jones, 156 Ga. 664, 667, 119 S. E. 721 (1923); Sigley v. Marathon Razor Blade, 111 N. J. L. 25, 30, 166 Atl. 518, 520 (1930); Greseck v. Farmer's Union Elevator Co., 123 Neb. 755, 759, 243 N. W. 898, 900 (1932); Amos v. J. E. Trigg Drilling Co., 153 Kan. 617, 620, 113 P. (2d) 107, 109 (1941).

[104]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 111, 170 N. E. 511, 512 (1930); Georgia Casualty Co. v. Jones, 156 Ga. 664, 667, 119 S. E. 721 (1923); Greseck v. Farmer's Union Elevator Co., 123 Neb. 755, 759, 243 N. W. 898, 900 (1932); Bommarito v. Fisher Body Corporation, 273 Mich. 1, 3, 4, 262 N. W. 329, 330 (1935).

[105]Morgan v. Adams, 127 Conn. 294, 296, 16 A. (2d) 576, 577 (1940); Sigley v. Marathon Razor Blade, 111 N. J. L. 25, 166 Atl. 518 (1933); Amos v. J. E. Trigg Drilling Co., 153 Kan. 617, 620, 113 P. (2d) 107, 109 (1941).

[106]Matter of Rothwell v. Shipley Construction & Supply Co., 244 N. Y. 558, 155 N. E. 896 (1927); Matter of Dowling v. Gates, 253 N. Y. 108, 110, 170 N. E. 511 (1930); Gardner v. Pressed Steel Car Co., 122 Pa. Super. 592, 186 Atl. 410 (1935).

[107]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 111, 170 N. E. 511, 512 (1930).

[108]Matter of Dowling v. Gates, 253 N. Y. 108, 110, 111, 170 N. E. 511, 512 (1930); cases cited notes 103 through 107 *supra*.

[109]See cases cited notes 103 through 108 *supra*.