MH MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 41 | Issue 4 Article 1

2015

# Fundamentals of Workers' Compensation in Minnesota

Thomas F. Coleman

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

 Part of the Labor and Employment Law Commons

Recommended Citation

Coleman, Thomas F. (2015) "Fundamentals of Workers' Compensation in Minnesota," *William Mitchell Law Review*: Vol. 41: Iss. 4, Article 1.
Available at: http://open.mitchellhamline.edu/wmlr/vol41/iss4/1

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

MH MITCHELL | HAMLINE School of Law OPEN ACCESS
mitchellhamline.edu

# FUNDAMENTALS OF WORKERS' COMPENSATION IN MINNESOTA

Thomas F. Coleman†



---

† Thomas F. Coleman graduated from William Mitchell College of Law in 1984 and is a partner at Cousineau McGuire Chartered. The author wishes to thank Elizabeth R. Cox for her editing contributions.



Published by Mitchell Hamline Open Access, 2015

## I. INTRODUCTION

This Article will provide a historical perspective and a substantive overview of the Minnesota Workers' Compensation Act.

Discussed will be the socioeconomic factors which gave rise to the birth of this very important social legislation, the distinction of the substantive law in workers' compensation from the common law tort structure, and a discussion of the workers' compensation benefits available to employees and how they are calculated.

Prior to the adoption of the Minnesota Workers' Compensation Act in 1913, employees did not have a remedy for work-related injuries outside of the tort system.[1] The tort system was fraught with inequities and tremendous adversity for employees.[2] Employees had to overcome the affirmative defenses of comparative fault, assumption of risk, and the fellow servant

1. KENNETH F. KIRWIN & THOMAS COLEMAN, CASES AND MATERIALS ON MINNESOTA WORKERS' COMPENSATION 1 (2014 ed.).

2. *Id.*

doctrine.[3] Further, tort cases took a considerable amount of time to work their way to a conclusion, much to the detriment of injured employees, who languished for years without any compensation for their injuries.[4] This was a fault-based system, and the employee bore the burden of proving their employer's negligence.[5]

The legislature, recognizing the devastating effect of this system, sought to create a statutory system that insured prompt payment of workers' compensation benefits to, or on behalf of, the employee from the employer/insurer *regardless* of fault.[6] The Minnesota Workers' Compensation Act, which was passed in 1913, is a no-fault system.[7] Further, the legislature sought to ensure the prompt payment of benefits to injured employees.[8]

There, of course, was a trade-off in this system. The no-fault system provides benefits to an employee simply because he or she suffered a work injury. In exchange for the employer's waiver of affirmative tort defenses, the law limits employer's liability.[9] The law's limiting mechanisms include caps on wage replacement benefits; caps on permanent partial disability compensation; limitations on the payment of medical and vocational rehabilitation benefits; and elimination of compensation for pain and suffering, loss of consortium, and punitive damages.[10]

The employer's liability for an employee who suffers a work-related injury is "exclusive and in the place of any other liability . . . ."[11] The employee is *not* permitted to pursue a tort cause of action against an employer except under very limited circumstances.[12] Unless involved with the employer in a common

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* MINN. STAT. § 176.001 (2014).

7. *Id.* § 176.021, subdiv. 1; *see also* Cunning v. City of Hopkins, 258 Minn. 306, 319, 103 N.W.2d 876, 885 (1960) ("The gross negligence of an employee is not a defense to an employer.").

8. MINN. STAT. § 176.001.

9. *See id.* ("Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited . . . .").

10. *See id.* §§ 176.001, .134, .102, .031.

11. *Id.* § 176.031.

12. 1 LEX K. LARSON & ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.01 (2013). The employee may sue the employer in tort if the employer: (1) is uninsured for workers' compensation liability or fails to be self-insured as required by MINN. STAT. § 176.031, (2) intentionally injures or assaults the

enterprise at the time the employee sustains a work-related injury, other employers are not entitled to claim exclusive immunity and can be sued in tort by the injured employee.[13]

## II. LAW IN EFFECT ON DATE OF INJURY CONTROLS (I.E., WORKERS' COMPENSATION IS AN ARCHEOLOGICAL DIG)

A fundamental precept of workers' compensation is that the law in effect on the date of the last injury that is a substantial contributing factor to the employee's disability controls.[14] Therefore, in order to determine the applicable law, potential defenses, likely exposure, and the existence, nonexistence, or duration of any caps or limitations on benefits, one must know two things: (1) the last date of injury that is a controlling event and (2) the substantive law that governs the claim for that particular date of injury.[15] For example, in a situation where an employee sustained work-related injuries prior to 1992 (in an era where there were no caps or limitations on wage-loss benefits),[16] and injuries subsequent to 1995 (where there were caps on temporary total disability and temporary partial disability benefits),[17] if the last date of injury is a substantial contributing factor to ongoing disability, then the law in effect on that date of injury controls.[18] Therefore, *all dates of injury* would be subject to caps on benefits, not just the last injury.[19]

## III. WHO IS A COVERED WORKER?

For there to be workers' compensation coverage for an injury, there must exist an employer/employee relationship. An employee

---

employee, (3) is subject to liability under federal law (e.g., liability under the American with Disabilities Act), (4) is liable under MINN. STAT. § 176.82 in district court, or (5) is liable under the Minnesota Human Rights Act. *See generally* MINN. STAT. §§ 176.031, 176.82, 363A.08.

13. MINN. STAT. § 176.061.

14. *See* Joyce v. Lewis Bolt & Nut Co., 412 N.W.2d 304, 307 (Minn. 1987).

15. *See generally* MINN. R. 5223.0010–.0650 (2014). MINN. R. 5223.0010–.0250 applies to injuries predating July 1, 1993, whereas MINN. R. 5223.0300–.0650 applies to injuries thereafter.

16. MINN. STAT. § 176.101, subdiv. 1 (1992).

17. MINN. STAT. § 176.101, subdiv. 1(e) (1994); *see id.* § 176.101, subdiv. 2(e).

18. *Joyce*, 412 N.W.2d at 307; *see* Busch v. Advanced Maint., 659 N.W.2d 772, 776 (Minn. 2003).

19. *See* MINN. R. 5223.0010–.0650; *see also Busch*, 659 N.W.2d at 776.

is an individual who "performs services for another for hire . . . ."[20] This means that the employee must receive, or have an expectation that he or she will receive, payment for services rendered.[21] The "contract for hire" can be an express contract or a contract implied by the conduct of the parties.[22] If the services are provided gratuitously or charitably, without any expectation of consideration or remuneration, then there is no employer/employee relationship.[23] The medium of payment or consideration can be anything of value—it need not be money—as long as it is not *a gratuity or a gift*, meaning it is not understood by the parties to constitute the equivalent of wages or consideration for services rendered.[24]

Naturally, a worker must be a considered an employee before workers' compensation coverage can begin. There are a handful of workers, however, that do not qualify as employees. These exceptions include independent contractors, employees performing "casual" labor, exclusions under Minnesota Statutes section 176.041, and illegal aliens.

First, independent contractors are not covered by the Workers' Compensation Act. An independent contractor is a person who is defined by Minnesota Administrative Rules 5224.0010 through 5224.0340.[25] These rules cover thirty-four specific occupations and also provide general criteria for non-specified occupations.[26] A primary factor to consider in determining if an individual is an independent contractor is whether the putative employer exercised control, or had the right to exercise control, over the means and manner of doing the job.[27] Similarly, if an individual's work for an

20. MINN. STAT. § 176.011, subdiv. 9 (2014).

21. *See generally* Huebner v. Farmers Coop. Ass'n, 283 Minn. 258, 167 N.W.2d 369 (1969).

22. Schneider v. Salvation Army, 217 Minn. 448, 448, 14 N.W.2d 467, 468 (1944).

23. Meyer v. Duluth Bldg. Trades Welfare Fund, 299 F.3d 686, 691 (8th Cir. 2002) (citing Hunter v. Crawford Door Sales, 501 N.W.2d 623, 624 (Minn. 1993)).

24. *See Schneider*, 217 Minn. at 452–53, 14 N.W.2d at 469–70.

25. *See* MINN. STAT. § 176.041, subdiv. 1(12); MINN. R. 5224.0010–.0340 (2014).

26. MINN. R. 5224.0010–.0340.

27. *Id.* R. 5224.0330. Independent contractors performing commercial or residential building construction or improvements have been treated separately under Minnesota Statutes section 176.042, which required that an independent contractor meet all nine separate independent contractor conditions, or the

employer is casual and not in the usual course of the employer's business, then no employee/employer relationship is formed for the purpose of that casual labor.[28] Further, Minnesota Statutes section 176.041 also provides exclusions for particular types of workers. Under the statute, there are numerous other occupations where employees are not covered by the Workers' Compensation Act.[29]

Lastly, the issue of undocumented aliens or illegal aliens has become a much more significant issue in workers' compensation law throughout the country. Traditionally, in other jurisdictions, illegal aliens have been accorded employee status, thus making them eligible for workers' compensation coverage.[30] Minnesota is no different. Under Minnesota Statutes section 176.011, a covered employee includes *any* person who performs services for another for hire, *including* aliens.[31]

This issue was addressed in *Gonzalez v. Midwest Staffing Group, Inc.*[32] In *Gonzalez*, the employee was an illegal or undocumented alien.[33] The employee provided a false social security card and resident alien card to the employer as an inducement for the

---

contractor would be deemed an employee of the entity for which he or she was providing services. MINN. STAT. § 176.042 (2006) (repealed 2007). A new provision, MINN. STAT. § 181.723, became effective in 2008. In addition to meeting all nine independent contractor factors, an individual must have been approved by the division for an Independent Contractor Exemption Certificate. MINN. STAT. § 326B.701 (2014). Likewise, a similar statute has been passed with respect to trucking and messenger/courier industries. *Id.* § 176.043. Persons employed in the operation of a car, van, truck, tractor, or truck-tractor that is licensed and registered by a government motor vehicle agency is deemed an employee, unless all seven independent contractor factors are met. *Id.*

28. *See* Kolbeck v. Myhra, 255 Minn. 341, 342, 96 N.W.2d 633, 634 (1959); Amundsen v. Poppe, 227 Minn. 124, 128, 34 N.W.2d 337, 340 (1948).

29. *See generally* MINN. STAT. § 176.041. Workers not covered include: railroad employees who are covered by the Federal Employee's Liability Act; certain agricultural workers; executive officers of family farm corporations and closely held corporations and certain family members; partners and spouses; parents; sole proprietors; spouses, parents, or children of the business owner; veterans organizations; convention delegates; household workers who do not meet certain earnings requirements; and employees of non-profit associations not meeting certain wage requirements. *Id.*

30. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 324 (Minn. 2003).

31. MINN. STAT. § 176.011, subdiv. 9(1) ("including . . . an alien").

32. 1999 WL 297157, at *1–3 (Minn. WCCA Apr. 6, 1999), *aff'd*, 598 N.W.2d 657 (Minn. 1999).

33. *Id.* at *1.

employer to hire him as an employee.[34] Thereafter, the employee sustained an admitted work injury.[35] The employer and insurer denied temporary total disability benefits based on the fact that the employee was an illegal alien and because of the employees fraudulent representations concerning his status as an eligible employee.[36]

The Minnesota Workers' Compensation Court of Appeals reversed the compensation judge and granted wage benefits to the employee.[37] It noted that Minnesota Statutes section 176.011, subdivision 9 covers as an employee any person who performs services for another for hire.[38] It also noted that there was no specific exclusion for illegal aliens in the statute, even though other employment categories are specifically excluded from coverage under Minnesota Statutes sections 176.011 and 176.021.[39]

In a subsequent Minnesota Supreme Court case, the court affirmed an award of temporary total disability benefits to the employee, rejecting the employer and insurer's argument that the employee was not entitled to temporary total disability benefits because he could not, by law, engage in a diligent job search, which is a prerequisite to benefit entitlement.[40] The employer and insurer argued that once the employee was given restrictions under which he could work, he could not, by law, engage in a diligent job search and, therefore, he was not entitled to temporary total disability benefits.[41] The supreme court agreed that once an employee has restrictions under which he or she can work, the employee is obligated to engage in a diligent job search to establish an entitlement to temporary total disability benefits.[42] In this case,

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at *2.
38. *Id.*
39. *Id.* at *3.
40. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 324 (Minn. 2003).
41. *Id.* at 328. In this case, the employer and insurer had taken the employee back to work in a light-duty job at a wage loss. *Id.* at 326. The employer then suspended the employee and gave him forty-eight hours to provide valid documentation of his eligibility to work in the United States. *Id.* The employee notified the employer that he could not provide the requested documentation and was terminated from his job. *Id.*
42. *Id.* at 328 (quoting Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 733 (Minn. 1988)).

there was no dispute that the employee engaged in a diligent job search.[43] The court found that since the employee had engaged in a diligent job search, the employee was entitled to temporary total disability benefits.[44] The court rejected the argument that, under federal immigration law, employers cannot employ unauthorized or illegal aliens and so, therefore, the employee could not legally engage in a diligent job search to establish an entitlement to temporary total disability benefits.[45]

In the case of *Rivas v. Car Wash Partners*, however, the employer made a post-injury, light-duty job offer to the illegal-alien employee that was contingent upon his producing satisfactory evidence of his legal ability to work.[46] The alien employee failed to respond because of his illegal status.[47] The employer then discontinued benefits based on a refusal of an offer of suitable gainful employment under Minnesota Statutes section 176.101.[48] In this situation, the Minnesota Workers' Compensation Court allowed the discontinuance of benefits based on the refusal of an offer of gainful employment.[49]

There is no case that holds that an employer and insurer are obligated to provide vocational rehabilitation services or retraining to an illegal alien employee, at least if the employee continues to reside in the United States. Though there is no Minnesota case directly on point, if the employee were to return to his or her native country and then request vocational rehabilitation and retraining, however, the employer and insurer, in all likelihood, would be obligated to provide these services under Minnesota Statutes section 176.102.

## IV. DEFINITIONS OF INJURY AND DISABILITY

An injury is compensable if the employee sustains the injury while working for an employer and if that injury arose out of and in the course of his or her employment.[50] Further, there must be a

43. *Id.* at 326.
44. *Id.* at 331.
45. *Id.* at 330–31.
46. 2004 WL 1444564, at *1 (Minn. WCCA June 4, 2004).
47. *Id.*
48. *Id.* at *1–2.
49. *Id.* at *3.
50. MINN. STAT. § 176.021, subdiv. 1 (2014).

sufficient nexus between the injury and the employment in terms of causation, time, place, and circumstances of the injury.

### A. *Personal Injury*

Personal injury means an injury "arising out of and in the course of employment" and is inclusive of "personal injury caused by occupational disease."[51] Personal injury has always included a specific traumatic injury or event, (i.e., an injury "caused . . . by accident").[52] Since 1953, however, when the Workers' Compensation Act was amended, injuries include situations where the *work activities substantially aggravate or accelerate a pre-existing injury or disease process*, whether or not that pre-existing condition is work-related.[53] The definition of "personal injury" encompasses the classic "*Gillette* injury," where repetitive work activities over a period of time result in minute microtrauma that eventually culminate in a disability or need for medical treatment.[54]

The following is a discussion of the various types of work injuries or illnesses, other than the standard traumatically induced physical injury or "*Gillette* injury," that are or may be compensable in Minnesota.

#### *1. Mental Injury*

Personal injury can include specific mental, not just physical, injuries. A physical injury or death caused by work-related mental stress "beyond the ordinary day-to-day stress to which all employees are exposed" are compensable.[55] A personal injury includes consequential mental or psychological injuries.[56] The employee must prove both medical cause and legal cause.[57] A medical cause is one in which the medical evidence establishes a causal connection between the work activities or work injury and the mental injury.[58]

51. *Id.* § 176.011, subdiv. 16.

52. MINN. GEN. STAT. § 8195 (1913).

53. *See* Forseen v. Tire Retread Co., 271 Minn. 399, 402–04, 136 N.W.2d 75, 77–78 (1965).

54. *See* Gillette v. Harold, Inc., 257 Minn. 313, 320–21, 101 N.W.2d 200, 206 (1960).

55. *See* Middleton *ex rel.* Middleton v. Nw. Airlines, 600 N.W.2d 707, 709–11 (Minn. 1999).

56. *See id.* at 709.

57. *Id.* at 711.

58. *See id.* at 708.

On the other hand, a legal cause is one in which the stress of the job that resulted in the mental injury was "beyond the ordinary day-to-day stress to which all employees are exposed."[59]

Mental injuries are divided into the following three categories: physical/mental injury, mental/physical injury, and mental/mental injury.

*a. Physical/Mental Injury*

First, a compensable physical/mental injury is a compensable physical injury that results in a mental injury.[60] For example, an employee sustains a compensable work-related physical injury and consequently develops depression.[61]

*b. Mental/Physical Injury*

Second, if the on-the-job stress is of such magnitude that it causes a separately treatable physical injury, the mental injury is compensable as a mental/physical injury.[62] For example, an employee, due to significant on-the-job stress, commits suicide or develops a separately treatable physical condition such as an ulcer.[63] In a mental-stress-physical-injury situation, for the physical injury to be compensable, the consequential physical injury must be an independent physical event that is treated separately from the work-induced emotional condition rather than in conjunction with it.[64] For example, if an employee, because of mental stress, suffers a subsequent physical injury, such as stress-induced fibromyalgia or ulcers, which must be treated separately from the emotional condition, then the injury is compensable.[65] However, if an

59. *See id.*; Lockwood v. Indep. Sch. Dist. No. 877, 312 N.W.2d 924, 926 (Minn. 1981).

60. Hartman v. Cold Spring Granite Co., 243 Minn. 264, 271, 67 N.W.2d 656, 660 (1954).

61. *See* MINN. STAT. § 176.011, subdiv. 16 (2014) ("Physical stimulus resulting in mental injury and mental stimulus resulting in physical injury shall remain compensable.").

62. *Lockwood*, 312 N.W.2d at 926.

63. *See Nw. Airlines*, 600 N.W.2d at 709–11; Egeland v. City of Minneapolis, 344 N.W.2d 597, 604–05 (Minn. 1984); Eidem v. United Parcel Serv., 44 W.C.D. 426, 430–31 (Minn. WCCA 1991).

64. Johnson v. Paul's Auto & Truck Sales, Inc., 409 N.W.2d 506, 508–09 (Minn. 1987).

65. *See, e.g.*, *Egeland*, 344 N.W.2d at 605.

employee under mental stress suffers physical manifestations of the mental-stress injury, such as tics, tremors, or cramps, which are not treated separately from the emotional condition, then the injury is not compensable.[66]

*c. Mental/Mental Injury*

Third, prior to October 1, 2013, Minnesota was among a minority of jurisdictions that did not recognize the compensability of a mental-only injury, or a mental/mental injury.[67] Minnesota's statute, however, was amended for work injuries on or after October 1, 2013, to expand the definition of an injury or occupational disease to include mental impairment.[68] A compensable mental impairment is defined as a "diagnosis of post-traumatic stress disorder" by a licensed psychiatrist or psychologist.[69] "Mental impairment is not considered a personal injury if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer."[70]

*2. Occupational Disease*

An employee who sustains disability because of an occupational disease has a compensable injury.[71] The most common examples of occupational diseases are work-related asbestosis, mesothelioma, or other respiratory diseases caused by exposure to workplace chemicals or substances.[72]

66. *Johnson*, 409 N.W.2d at 508–09.

67. *Id.* at 509 (citations omitted) ("We are well aware that the *Lockwood* decision is representative of a minority position . . . .").

68. Act of May 20, 2013, ch. 70, art. 2, §§ 1, 2, 14, 2013 Minn. Laws 362, 367–69, 377 (codified at MINN. STAT. § 176.011, subdivs. 15(a), 16 (2014)).

69. MINN. STAT. § 176.011, subdiv. 15(d). "'[P]ost-traumatic stress disorder' means the condition as described in the most recently published edition of Diagnostic and Statistical Manual of Mental Disorders by the American Psychiatric Association." *Id.*

70. *Id.* § 176.011, subdiv. 16.

71. *See id.* § 176.011, subdivs. 15–16.

72. *See, e.g.*, Armstrong v. Potlatch Corp. & Fireman's Fund Ins., 40 W.C.D. 806 (Minn. WCCA 2007). Please note that occupational diseases are subject to different time limits in terms of statute of limitations and notice requirements than personal injuries.

### B. *Arising out of and in the Course of Employment*[73]

#### 1. *Arising out of Employment*

The Minnesota workers' compensation system is a no-fault system. The statute, however, requires a causal connection between the employment and the injury.[74] An injury meets this requirement if it was caused by either an "increased risk" or a "street risk."[75] An increased risk is one in which the employment exposes the employee to a greater hazard than that confronted by the public generally or the employee apart from work.[76] On the other hand, a street risk is one in which an employee engaged in his job duties suffers an injury that comes from a hazard that originates on, is connected with, or is referable to the use of the public street. In some cases, the employee may be able to recover.[77] Street risk is generally the only positional risk theory of recovery that is consistently applied by Minnesota workers' compensation courts.[78]

Minnesota courts have consistently allowed recovery in cases where an employee falls at work, although generally this has been done on the theory of an increased risk. The courts have reasoned that where the employee's fall itself was caused by an idiopathic medical condition unrelated to the his or her employment, the injury will be compensable if the afflicted employee was placed by virtue of the employment in a position which aggravates the effects

73. MINN. STAT. § 176.011, subdiv. 16.

74. Bohlin v. St. Louis Cnty., 61 W.C.D. 69, 72 (Minn. WCCA 2000) (citations omitted) (noting that the increased risk test requires both a causal connection between employment and injury and "a showing of some hazard that increases the employee's exposure to injury beyond that of the general public"), *aff'd*, 621 N.W.2d 459 (Minn. 2001).

75. *Id.* at 74–75.

76. *Id.* at 72 (citations omitted); *see* Foley v. Honeywell, Inc., 488 N.W.2d 268, 271–72 (Minn. 1992) (discussing causal connection and increased risk as employee versus the general public); Lange v. Minneapolis-St. Paul Metro. Airports Comm'n, 257 Minn. 54, 56, 99 N.W.2d 915, 917 (1959) (noting the need for the causal connection between employment and injury); *see also* Olson v. Trinity Lodge 282, 226 Minn. 141, 147, 32 N.W.2d 255, 259 (1948) (alluding to a causal connection).

77. Bookman v. Lyle Culvert & Road Equip. Co., 153 Minn. 479, 481, 190 N.W. 984, 984 (1922).

78. *See, e.g.*, Auman v. Breckenridge Tel. Co., 188 Minn. 256, 259, 246 N.W. 889, 890 (1933).

of the fall, resulting in an injury or death.[79] For example, if an employee were to slip at work and fall into a vat of chemicals resulting in significant burns to the employee's skin, the work hazard itself substantially aggravated or exacerbated the consequential effects of the fall and resulted in an injury which would not otherwise have occurred.[80]

Prior to the *Dykhoff v. Xcel Energy* case,[81] discussed below, there were a string of cases where the Minnesota Supreme Court appeared to have applied nothing more than a positional risk test or appeared to have disregarded the requirement that the injury must arise out of the employment.[82] In those cases, the court noted that some injuries are pure accidents—or injuries resulting from "neutral risk"—where the employee's injury occurred in the course of employment and the injury was of unknown etiology.[83] Such cases were considered compensable as a matter of law.[84] The Minnesota Supreme Court had also applied a balancing test, holding that a very strong finding that the accident occurred "in the course of" the worker's employment can make up for deficiencies in the complementary "arising out of" factor to establish compensability.[85]

In *Dykhoff*, the Minnesota Supreme Court reversed this liberalization of causation and liability.[86] The Minnesota Supreme Court rejected the expansion of the positional risk test beyond the street risk doctrine and the death presumption.[87] Further, the supreme court explicitly rejected the balancing test or blending test and held that the employee, pursuant to the statute, has the burden of proving *both* that the injury: (1) arose out of and

79. O'Rourke v. Northstar Chem., Inc., 281 N.W.2d 192, 194 (Minn. 1979); Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 579, 9 N.W.2d 6, 13 (1943).

80. Additionally, in Minnesota, the Workers' Compensation Court of Appeals has held that idiopathic falls on a flat surface are not compensable. Koenig v. N. Star Landing, 54 W.C.D. 86, 94 (Minn. WCCA 1996).

81. 840 N.W.2d 821 (Minn. 2013).

82. Duchene v. Aqua City Irrigation, 58 W.C.D. 223, 236–37 (Minn. WCCA 1998).

83. *Id.*

84. *Id.*

85. Bohlin v. St. Louis Cnty., 61 W.C.D. 69, 79 (Minn. WCCA 2000), *aff'd*, 621 N.W.2d 459 (Minn. 2001).

86. 840 N.W.2d at 831.

87. *See id.* at 828–29.

(2) occurred in the course of employment.[88] Both of these factors must be proven by a preponderance of the evidence for the employee to recover.[89]

### 2. *In the Course of Employment (i.e., Time, Place, and Circumstances)*

As previously stated, personal injury is compensable only if the employee was injured "while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of that service at the time of the injury and during the hours of that service."[90] It is noteworthy that the "in the course of" requirement can be met even where the employee is injured when he or she is not actually on the job site, on the clock, or engaged in the specific duties of employment that benefit the employer. For example, the hours of service to the employee have been expanded to include a reasonable time of travel to and from work.[91]

Likewise, in terms of location, the employee need not necessarily be at the place of employment. If the employee's services require that the employee's presence be elsewhere at the time of the injury, the injury will be compensable.[92] In fact, the employee can either be traveling to and from work under special circumstances or traveling "portal to portal."[93] Each instance is discussed in turn.

First, travel to and from work is generally excluded from coverage.[94] Where the employer "regularly furnished transportation" to and from the place of employment, however, employees are covered while "being so transported."[95] This situation requires that the employer furnish the vehicle providing

88. *Id.* at 830.

89. *See id.* at 828 (referring to the standard of proof as "preponderance of [the] evidence").

90. MINN. STAT. § 176.011, subdiv. 16 (2014).

91. Blattner v. Loyal Order of Moose, 264 Minn. 79, 80, 117 N.W.2d 570, 572 (1962).

92. MINN. STAT. § 176.011, subdiv. 16 (requiring that the premises be "where the employee's services require the employee's presence as part of such service").

93. Voight v. Rettinger Transp. Co., 306 N.W.2d 133, 137 (Minn. 1981).

94. *E.g.*, Lundgaard v. State, 306 Minn. 421, 422, 237 N.W.2d 617, 619 (1975) (citation omitted).

95. MINN. STAT. § 176.011, subdiv. 16.

transportation, and the employer be in direction and control of the vehicle (i.e., providing the driver).[96]

Second, where the travel itself is integral or a substantial part of the services being rendered for the benefit of the employer, injuries sustained while traveling are compensable.[97] Travel itself will be deemed a substantial or integral part of the services being provided in the following situations: (1) where the employer pays or reimburses the employee for the travel time or expense;[98] (2) where the employee is traveling between work assignments or work places;[99] (3) where the employee is involved in a dual-purpose trip where a business purpose is a concurrent cause of the trip;[100] and (4) "[w]here an employee is on a special mission for his employer, he is covered . . . from the beginning . . . to the end of the return journey."[101] Where the trip is considered dual-purpose, the employee will be covered "portal to portal"; furthermore, reasonable relaxation activities during a business trip will be covered, and injuries sustained in reasonable relaxation activities that are not related to the service being provided to the employer and insurer shall be compensable.[102] In regard to the fourth situation, a special errand exists if an employee with fixed hours of employment is responding to an express or implied after-hours request, the travel is necessary for the work performed, and the

96. Bonfig v. Megarry Bros., 294 Minn. 180, 182, 199 N.W.2d 796, 798 (1972).

97. *See* 2 LARSON & LARSON, *supra* note 12, §§ 14.01–.07.

98. *See Lundgaard*, 306 Minn. at 424, 237 N.W.2d at 619 ("The evidence in this case indicates that Lundgaard's journey was entirely an errand of the employer.").

99. Faust v. State, 312 Minn. 438, 441, 252 N.W.2d 855, 857 (1977) (noting that even parks on the employer's complex fall under the premise rule outlined in Goff v. Farmers Union Accounting Servs., Inc., 308 Minn. 440, 241 N.W.2d 315 (1976)).

100. Rau v. Crest Fiberglass Indus., 275 Minn. 483, 486, 148 N.W.2d 149, 152 (1967). It should be noted that if an employee significantly deviates from the work-related trip for purely personal reasons, he or she will not be covered during this significant deviation. Falkum v. Daniel Star & Staff, 271 Minn. 277, 282–83, 135 N.W.2d 693, 696 (1965). Once the employee resumes the business purpose of the trip, however, coverage will resume. Nehring v. Minn. Mining & Mfg. Co., 193 Minn. 169, 171, 258 N.W. 307, 308 (1935).

101. Bengston v. Greening, 230 Minn. 139, 139, 41 N.W.2d 185, 185 (1950); *see also Nehring*, 193 Minn. at 171, 258 N.W. at 308.

102. Voight v. Rettinger Transp. Co., 306 N.W.2d 133, 137 (Minn. 1981).

work performed is not the same regular or reoccurring work that arises during normal employment hours.[103]

### C. *Covered Non-Work-Related Activities*

The Workers' Compensation Act, as interpreted by the judiciary, assumes that employees are not automatons or robots who devote one-hundred percent of their time, energy, and efforts to job activities. It recognizes that employees are human and they need to take breaks, to let off steam, and even to engage in certain acceptable levels of misconduct or insubordination on the job.[104] In many instances, including personal comfort, horseplay, and even violations of instructions, injuries sustained while engaged in these ancillary or even insubordinate activities will be deemed compensable.

#### 1. *Personal Comfort*

Employees who, for example, take a break and obtain a drink of water for personal comfort, go to the restroom, or smoke a cigarette are covered while involved in such reasonable relaxation activities.[105] Injuries sustained during these activities will be compensable unless the conduct shows a departure that is so great as to show intent to abandon the job temporarily or unless the conduct is so unusual or unreasonable that the conduct cannot be considered an incident of the employment.[106]

---

103. Youngberg v. Donlin Co., 264 Minn. 421, 425, 119 N.W.2d 746, 749 (1963).

104. Cunning v. City of Hopkins, 258 Minn. 306, 320, 103 N.W.2d 876, 885 (1960) ("The burden in the instant case is upon respondents to sustain their claim that relator's alleged misconduct was of such serious, grave, and willful nature as to come within some express exception granted by the act.").

105. Corcoran v. Fitzgerald Bros., 239 Minn. 38, 40, 58 N.W.2d 744, 746 (1953) (quoting Novak v. Montgomery Ward & Co., 158 Minn. 495, 499, 198 N.W. 290, 292 (1924)) (stating that an employee performing employment duties on the premises of her employer is considered to be "engaged in the ordinary pursuit of her employment, and is entitled to the protection").

106. *See generally* Elfelt v. Red Owl Stores, 296 Minn. 41, 206 N.W.2d 370 (1973) (holding that where an employee created a hazard by jumping up to touch a rafter above a doorway, that action took him outside the course of employment).

*2. Horseplay*

If the employee is involved in horseplay, scuffling, or even fighting on the job, injuries sustained in these activities will be covered if the work played a part in bringing about the horseplay or fighting.[107] Even if the injured employee initiates the misconduct or the assault, if it pertained to the job and was not for purely personal reasons, an injury sustained will be compensable.[108]

*3. Violations of Instruction*

In many instances, even a violation of an instruction or directive from the employer will not preclude coverage.[109] The rule in Minnesota is that an injury sustained by an employee while engaged in work activity that benefits the employer will be compensable unless the employee committed a violation of an express prohibition, the express prohibition was of a specific act designated by the employer, the violation of the prohibition was "not reasonably foreseeable by the employer," and the violation of instruction resulted in injury.[110] A violation of an instruction may be reasonably foreseeable by the employer if it is *not* communicated in strong terms to the employees, if discipline for violations of the instruction is not enforced, if the prohibited conduct is not very hazardous, or if it is known by the employer that employees consistently violate said instruction.[111] In *Otto v. Midwest of Cannon Falls*, the court held that the fact "[t]he employer had a [disciplinary] process in place to deal with violations of safety rules" was a factor in finding an employee's injury compensable when the employee violated a safety instruction by walking on a pallet, as forbidden by work safety rules.[112] This disciplinary process was relevant to the issue of whether the violation of the prohibition was reasonably foreseeable.[113]

---

107. *Cunning*, 258 Minn. at 318, 103 N.W.2d at 885.

108. Petro v. Martin Baking Co., 239 Minn. 307, 307, 58 N.W.2d 731, 732 (1953).

109. Prentice v. Twin City Wholesale Grocery, 202 Minn. 455, 457, 278 N.W. 895, 895 (1938).

110. *See* Brown v. Arrowhead Tree Servs., 332 N.W.2d 28, 30 (Minn. 1983); Bartley v. C-H Riding Stable Inc., 296 Minn. 115, 120, 206 N.W.2d 660, 663 (1973).

111. Otto v. Midwest of Cannon Falls, 59 W.C.D. 25, 36 (Minn. WCCA 1999).

112. *Id.*

113. *Id.*

*4. Death Presumption*

In certain situations, where the "in the course of"[114] requirement is clearly satisfied and one cannot ascertain whether the injury or death arose out of the employment, the court will presume that the work-related injury/death arose out of and in the course of employment.[115] If the employee dies during the hours of service and at the place of employment, then there is a rebuttable presumption that this death arose out of and in the course of employment, even if the cause of the death remains unknown.[116] An employer may rebut this presumption by presenting evidence that the injury did *not* arise out of the employment (was not caused by an increased risk associated with the employment). Once the presumption is rebutted, the burden of proof returns to the employee to prove that the death arose out of and in the course of the employment.[117]

*D. Exclusions from Coverage*

Naturally, there are several categories of non-work injuries excluded from coverage, such as personal assault, intentional self-infliction, and intoxication (as a proximate cause of injury).

*1. Personal Assault*

When an employee suffers an injury due to a personal assault by another person, the injury will *not* be compensable. That is so even if the assault occurred during the time, place, and circumstances of employment or if the assailant intended to injure the victim "because of personal reasons, and not directed against the [victim] as an employee, or because of the employment."[118] For example, if the reason for the assault was the employee's employment status, or the employee's conduct as an employee, the injury will be compensable.[119] On the other hand, if the assault was

114. MINN. STAT. § 176.021, subdiv. 1 (2014).

115. Lange v. Minneapolis-St. Paul Metro. Airports Comm'n, 257 Minn. 54, 56–57, 99 N.W.2d 915, 918 (1959).

116. *Id.*

117. Williams v. Hoyt Constr. Co., 306 Minn. 59, 66–67, 237 N.W.2d 339, 345 (1975).

118. MINN. STAT. § 176.011, subdiv. 16.

119. *Id.*

for purely personal reasons and was not motivated in any way by the employee's status as an employee, then the injury will not be compensable.[120] Nonetheless, where the motivation of the assailant is unknown, the injury sustained in the assault will be compensable.[121]

*2. Intentional Self-Infliction*

If the employee intentionally injures himself or herself on the job, the injury is generally not compensable.[122] The burden of proof in establishing this exclusion is on the employer.[123] Death by suicide, however, may be found compensable if the claimant can establish by substantial evidence that a work-related injury resulting in consequential psychological problems or significant emotional distress on the job beyond the ordinary day-to-day stresses to which all employees are exposed resulted in an "unbroken chain of causation," which directly caused a mental derangement of such severity that it overrode normal and rational judgment.[124]

*3. Intoxication as Proximate Cause of Injury*

If the employee suffers a work injury while intoxicated, and "the intoxication of the employee is the *proximate cause* of the injury, then the employer [will not be] liable for compensation."[125] The burden of proof is on the employer to establish this defense.[126] The intoxication cannot be only a substantial contributing factor to the injury; intoxication, essentially, must be the only cause.[127]

120. *Id.*

121. *See* Foley v. Honeywell, Inc., 488 N.W.2d 268, 273 (Minn. 1992).

122. MINN. STAT. § 176.021, subdiv. 1.

123. *Id.*

124. *See* Middleton *ex rel.* Middleton v. Nw. Airlines, 600 N.W.2d 707, 710–11 (Minn. 1999); Anderson v. Armour & Co., 257 Minn. 281, 281, 101 N.W.2d 435, 435–36 (1960).

125. MINN. STAT. § 176.021, subdiv. 1.

126. *Id.*

127. Bitterman v. Safe Way Bus Co., No. WC13-5581, 2013 WL 6151363, at *8 (Minn. WCCA Oct. 31, 2013).

## V. WORKERS' COMPENSATION BENEFITS AVAILABLE

### A. *Date-of-Injury Average Weekly Wage*

Two of the fundamental purposes of the workers' compensation system are to compensate employees for lost earnings when they become totally disabled from working, or to replace diminished earnings capacity when they are able to work but at a diminished earnings capacity due to the results of the work injury.[128] Wage replacement benefits include temporary total disability, temporary partial disability, permanent total disability, and retraining benefits.[129]

In situations where the employment is regular in terms of number of days normally worked and number of hours per week worked, then one calculates the date-of-injury average weekly wage by multiplying the daily wage by the number of days and fractional days normally worked in the business of the employer.[130]

If the amount of the daily wage is "irregular," or "difficult to determine," or if the employment is part time or the hours are irregular, then the employee's date-of-injury average daily wage will be calculated as follows: gross wages, vacation pay, and holiday pay actually earned in the twenty-six weeks preceding the injury divided by the total number of days in which such wages, vacation pay, and holiday pay were earned.[131] Here, the total number of days that the employee actually performed work in the twenty-six weeks preceding the injury divided by the number of weeks in which the employee actually performed said duties equals the number of days normally worked per week.[132] In the final calculation, daily wage multiplied by the number of days normally worked per week equals

128. *See* MINN. STAT. § 176.001 (noting that the "the intent of the legislature" is "to assure the quick and efficient delivery of indemnity and medical benefits to injured workers").

129. *See id.*

130. *Id.* § 176.011, subdiv. 8a.

131. *Id.*

132. *Id.* For dates of injury prior to October 1, 2000, in calculating the daily wage, include wages, salary, vacation pay, holiday pay, and sick pay. Do not, however, include vacation days, holidays, or sick days in calculating the number of days normally worked per week. *See* Fougner v. Boise Cascade Corp., 460 N.W.2d 1, 1 (Minn. 1990). This had the effect of artificially increasing the date-of-injury wage. The statute was amended to eliminate this result on October 1, 2000. MINN. STAT. § 176.011, subdiv. 8a.

date-of-injury average weekly wage.[133] There may be situations in which the employee's actual wages are not reflective of his earnings capacity and, therefore, the actual wages will be disregarded in calculating the date-of-injury average weekly wage upon which to base future benefits.[134]

The linchpin of wage loss benefit calculations is the date-of-injury average weekly wage.[135] The date-of-injury wage is utilized to calculate the various wage loss benefits. The purpose of workers' compensation benefits is to compensate the employee for the loss of earnings capacity.[136] As such, in order to determine the earnings capacity that has been damaged, one must know what the employee's actual earnings were at the time of the injury. The objective of the wage determination is to arrive at a fair approximation of the employee's probable future earning power that has been impaired or destroyed by the injury. Analyzing what the employee's wages or earnings were at the time of the injury usually makes this approximation.[137] The wages earned in the twenty-six weeks preceding injury are used to determine the date-of-injury average weekly wage.[138]

Another factor to consider is the existence of an employment contract.[139] If an employment contract provides for the employee to be paid a certain amount of money per week, the employee's actual wage received will be disregarded and the employment contract will generally control.[140]

133. MINN. STAT § 176.011, subdiv. 8a.

134. Bradley v. Vic's Welding, 405 N.W.2d 243, 245 (Minn. 1987); Knotz v. Viking Carpet, 361 N.W.2d 872, 873–74 (Minn. 1985).

135. *See* MINN. STAT § 176.101, subdiv. 1.

136. *See id.* § 176.001.

137. Sawczuk v. Special Sch. Dist. No. 1, 312 N.W.2d 435, 437–38 (Minn. 1981).

138. *Id.* at 438.

139. *See Knotz*, 361 N.W.2d at 874.

140. *Id.*

| **EXAMPLE** | |
|---|---|
| Gross wages earned in 26 weeks preinjury: | $24,000 |
| Vacation/holiday pay earned in 26 weeks preinjury: | $6000 |
| Days actually worked in 26 weeks preinjury: | 90 |
| Vacation days/holidays earned/taken in 26 weeks preinjury: | 14 |
| Weeks actually worked in 26 weeks preinjury: | 24 |
| Daily wage: *$30,000 / 104 days = $288.46* | |
| Number of days normally worked per week: *90 days / 24 weeks = 3.75 days per week* | |
| Date-of-injury average weekly wage: *$288.46 x 3.75 days = $1081.72 per week* | |
| **NOTE**: Pursuant to Minnesota Statutes section 176.011, subdivision 8a, where the employment is in the construction industry, mining industry, or any other industry where the hours of work are affected by seasonal conditions, the weekly wage shall not be less than five times the daily wage. This is called the five-day work week presumption for these types of injuries. | |

### *B. Definition of Wages*

Salary and commission income are considered in calculating the date-of-injury wage.[141] Additionally, the following forms of compensation are considered in calculating the date-of-injury average weekly wage. The factors below are not absolute and can be disregarded by the court to fulfill the objective of calculating the employee's weekly wages to arrive at a "fair approximation of [the employee's] probable future earning power which has been impaired or destroyed because of the injury."[142] Therefore, the judiciary has considerable discretion in calculating the date-of-injury average weekly wage. For example, the courts have determined a date-of-injury average weekly wage by taking the total gross earnings in the twenty-six weeks preceding injury and

141. MINN. STAT. § 176.011, subdiv. 8a.

142. Bradley v. Vic's Welding, 405 N.W.2d 243, 245–46 (Minn. 1987) (alteration in original) (quoting Knotz v. Viking Carpet, 361 N.W.2d 872, 874 (Minn. 1985)).

dividing them by the number of weeks actually worked.[143] Additionally, compensation judges have divided the total gross wages earned in the twenty-six weeks preceding injury by the total number of hours worked to obtain an average hourly wage and then multiplied that average hourly wage by a forty-hour workweek.[144]

*1. Tips and Gratuities*

Tips and gratuities are included only if the employee accounts for them to the employer.[145]

*2. Room and Board*

Where boarder allowances are paid to an employee over and above wages as part of the wage contract, they are included as earnings.[146]

*3. Allowances/Per Diems*

Where employees receive per diem payments to compensate for their travel expenses, lodging expenses, or food expenses as part of the job and the employees are not required to document the actual expenses in order to receive these payments, the payments will be included in the wage calculation.[147]

*4. Barters, Goods, and Accommodations*

Employees are not entitled to be paid in cash. Any services, goods, or accommodations of substantial value given to the employee in consideration for services rendered are included in the wage calculation.[148] For example, the employee may be

143. Brunkow v. Red Wing Shoe Co., 43 W.C.D. 232, 236 (Minn. WCCA), *aff'd*, 460 N.W.2d 341 (Minn. 1990).

144. Decker v. Red Wing Shoe Co., 41 W.C.D. 763, 765 (Minn. WCCA 1988).

145. *Id.* In a situation where the employee is claiming tips and gratuities as income, one should check the employer records to see if the employee accounted for the tips and gratuities. *See id.* Also, one should obtain copies of the employee's income tax returns to see if these tips and gratuities were included.

146. *Id.*

147. *See* Cosgriff v. Duluth Firemen's Relief Ass'n, 233 Minn. 233, 240, 46 N.W.2d 250, 254 (1951); Truesdale v. Dettman Trucking, Inc., 40 W.C.D. 12, 12 (Minn. WCCA 1987).

148. *See* Aleckson v. Kennedy Motor Sales Co., 238 Minn. 110, 116, 55 N.W.2d

provided with a car to use on the job, and as part of the contract, the employee is also allowed to use the car for personal reasons.[149] The employee is receiving something of value from the employer, that being the personal use of the car, which results in saving on the expenses of wear and tear, maintenance, and insurance.[150] These savings are included in the employee's date-of-injury wage at the value to the employee.[151]

*5. Pension, Profit Sharing, and Fringe Benefits*

Generally, fringe benefit payments made on behalf of the employee are *not* included in the employee's income if the payments do not go directly to the employee. Funds do not go directly to the employee if they go to a fund on behalf of the employee, if the payments are not taxable as wages, and the employee does not have the right to utilize or spend these funds at his or her own discretion.[152]

*6. Profit Sharing Payments*

Profit sharing payments made to an employee will *not* be included in the date-of-injury wage if the profits accrued independently of the employee's own efforts, rather than directly from the employee's efforts.[153]

*7. Attendance Bonuses*

Attendance bonuses are included in the date-of-injury wage calculation.[154]

*8. Incentive Bonuses*

Incentive bonuses are included in the employee's date-of-injury wage.[155]

---

696, 700 (1952).

149. *Id.*

150. *Id.*

151. *Id.*

152. Boelter v. City of Ham Lake, 46 W.C.D. 214, 219 (Minn. WCCA 1991), *aff'd*, 481 N.W.2d 50 (Minn. 1992); Boschee v. Barry Blower, 1989 WL 226698, at *2 (Minn. WCCA Aug. 25, 1989).

153. Stewart v. Ford Motor Co., 474 N.W.2d 162, 164 (Minn. 1991).

154. *Boschee*, 1989 WL 226698, at *2.

*9. Performance Bonuses*

Performance bonuses—which are based upon the employee's actual performance, hours worked, or days worked—are includable in the employee's date-of-injury wage.[156]

*10. Vacation and Holiday Pay*

Vacation and holiday pay are included in the employee's date-of-injury wage.[157] Additionally, days of vacation, sick time, or leave pay, which are taken in the twenty-six weeks preceding the injury, will be included in calculating the date-of-injury wage.[158]

*11. Retroactive Pay Increases*

Retroactive pay increases will be included in the calculation of the employee's date-of-injury average weekly wage.[159]

*12. Overtime*

If the overtime is regular or frequent throughout one year (rather than twenty-six weeks) prior to injury, it will be considered.[160]

*13. Multiple Employment Situations*

If two employers regularly employ the same employee at the time of the injury, then the income from both employments shall be included in the computation of the date-of-injury average weekly wage.[161] The court will calculate the gross earnings from both jobs

155. *See* Senser v. Minn. Vikings Football Club, 42 W.C.D. 688, 691 (Minn. WCCA 1989), *aff'd*, 451 N.W.2d 330 (Minn. 1990).

156. Anderson v. Ford Motor Co., 46 W.C.D. 24, 26 (Minn. WCCA 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992).

157. *See id.* (stating that vacation and holiday pay, when mistakenly paid to an employee who had not actually earned the vacation and holiday pay, should not be included when calculating weekly wage).

158. *Id.* at 27.

159. Johnson v. Nw. Airlines, Inc., 30 W.C.D. 311, 313–14 (Minn. WCCA 1978).

160. MINN. STAT. § 176.011, subdiv. 18 (2014).

161. *Id.*

in the twenty-six weeks preceding injury and divide them by the total number of weeks worked.[162]

*14. Special Occupations*

Minors and apprentices are treated differently for purposes of calculating the date-of-injury wage due to the fact that their date-of-injury income is considered to be so low in relation to what their future earnings capacity will be that their wages cannot be considered reflective of their potential-earnings capacity.[163] It is also designed to prevent employers from hiring inexperienced minors as employees to perform dangerous work in an effort to minimize workers' compensation exposure.[164]

A minor's date-of-injury wage will be computed at a level sufficient to produce the maximum compensation rate.[165] For dates of injury prior to October 1, 1992, the minor must have sustained either a "permanent total or a compensable permanent partial disability" in order to have the wage computed.[166] For dates of injury on or after October 1, 1992, the minor must be permanently totally disabled because of the injury in order to have the benefit of this computed wage.[167]

With respect to apprentices, the date-of-injury average weekly wage will be computed as a wage sufficient to produce the

162. Hafner v. Glenwood Liberty Serv. Ctr., 42 W.C.D. 16, 20 (Minn. WCCA 1989).
163. Bituminous Cas. Corp. v. Swanson, 341 N.W.2d 285, 288 (Minn. 1983).
164. *Id.*
165. *See* MINN. STAT. § 176.101, subdiv. 6(b).
166. MINN. STAT. § 176.101, subdiv. 6(a) (1992).
167. MINN. STAT. § 176.101, subdiv. 6(b) (2014).

maximum compensation rate if the injury results in permanent total disability or compensable permanent partial disability.[168]

| EXAMPLE | |
|---|---|
| An apprentice suffers a work-related injury, which results in permanent partial disability. The apprentice's actual earnings in the twenty-six weeks preceding his injury came out to $200 per week. Because he is an apprentice, however, he will have an imputed wage for purposes of calculating benefits sufficient to give rise to the maximum compensation rate | |
| Maximum compensation rate: | $980.22 |
| Imputed date-of-injury average weekly wage: | *$980.22 x (3 / 2) = $1470.33* |

## C. *Indemnity Benefits*[169]

### 1. *Temporary Total Disability*

Temporary total disability benefits are payable if the employee is totally disabled.[170] Total disability is defined as a situation where one's "physical condition, in combination with his age, training, and experience, and the type of work available in this community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income."[171]

#### a. *Benefit Caps*

At various times, temporary total disability benefits have been subjected to various caps or limitations. The history of benefit caps is listed below according to effective years for the date of injury.

- *Date of injury from 1953 to 1957*: There was a benefit cap of 310 weeks of temporary total disability.[172]

168. *Id.* § 176.101, subdiv. 6(a).

169. Wage-loss benefits are subject to cost-of-living adjustments (COLA) under section 176.645 of Minnesota Statutes. The initial onset date of a COLA as well as the COLA rate will be determined by the date of injury. *See id.* § 176.645, subdiv. 2.

170. *Id.* § 176.101, subdiv. 1(d).

171. Schulte v. C. H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 133–34 (1967); *see also* MINN. STAT. § 176.101, subdiv. 5.

172. *Compare* MINN. STAT. § 176.101, subdiv. 1 (1957), *with* MINN. STAT. § 176.101, subdiv. 1 (1953).

- *1957 through July 31, 1975*: An employee could draw up to 350 weeks in temporary total disability benefits for an injury.[173]
- *August 1, 1975, through December 31, 1983*: During this period of time, there was no cap or limitation on the number of weeks of temporary total disability benefits an employee could receive for an injury.[174]
- *January 1, 1984, through September 30, 1995*: There was no specific cap on the employee's benefits during this period of time. Temporary total disability benefits, however, would end ninety days after the "employee ha[d] reached maximum medical improvement," notice of which was served and filed pursuant to statute, or ninety days "after the end of an approved retraining plan."[175] This expiration, however, was rather toothless because if an employee subsequently became medically unable to continue working because of the effects of the injury, temporary total disability benefits would have to be recommenced, and could not be terminated later on, until either the employee ceased to be disabled or until ninety days after the employee had again reached maximum medical improvement, notice of which was served and filed per statute.[176]
- *October 1, 1995, to October 1, 2008*: In 1995, the legislature imposed the most significant cap on temporary total disability benefits ever. During this time, employees were limited to an absolute maximum of 104 weeks of temporary total disability benefits for an injury.[177] It should be noted that if the employee is involved in a retraining plan approved under section 176.102, subdivision 11, the retraining benefits that the employee receives (at the temporary total disability rate) shall not be counted towards the attainment of the 104-week cap.[178]
- *October 1, 2008, to present*: The temporary total disability cap was increased to 130 weeks for dates of injury on or after October

173. *Compare* MINN. STAT. § 176.101, subdiv. 1 (1974 & Supp. 1975), *with* MINN. STAT. § 176.101, subdiv. 1 (1957).

174. *Compare* MINN. STAT. § 176.101, subdiv. 3(e) (1984), *with* MINN. STAT. § 176.101, subdiv. 1 (1974 & Supp. 1975).

175. *Compare* MINN. STAT. § 176.101, subdiv. 1(e) (1994 & Supp. 1995), *with* MINN. STAT. § 176.101, subdiv. 3(e) (1984).

176. MINN. STAT. § 176.101, subdiv. 1 (1976 & Supp. 1977).

177. MINN. STAT. § 176.101, subdiv. 1(e) (1994 & Supp. 1995).

178. *Id.* § 176.101, subdiv. 1(k).

1, 2008.[179] As above, however, if the employee is involved in a retraining plan approved under section 176.102, subdivision 11, the retraining benefits that the employee receives (at the temporary total disability rate) shall not be counted towards the attainment of the 130-week cap.[180]

*b. Calculation of Temporary Total Disability*

Temporary total disability benefits are calculated by multiplying the employee's date-of-injury average weekly wage by two-thirds.[181]

| | | |
|---|---|---|
| **EXAMPLE** | Date-of-injury wage: | $1000 |
| | TTD Rate: | *$1000 x (2 / 3) = $666.66* |

*c. Maximum Compensation Rate*

The maximum compensation rate has varied from year to year. For dates of injury from October 1, 1995, through September 30, 2000, "the maximum compensation rate . . . was $615 per week."[182] For dates of injury from October 1, 2000, through September 30, 2008, the maximum compensation rate was $750 per week.[183] For dates of injury on or after October 1, 2008, the maximum compensation rate was increased to $850 per week.[184] For dates of injury on or after October 1, 2013, the maximum compensation rate is "102 percent of the statewide average weekly wage for the period ending December 31 of the preceding year."[185]

179. MINN. STAT. § 176.101, subdiv. 1(k) (2008); *see* MINN. STAT. § 176.101, subdiv. 1(k) (2014).

180. MINN. STAT. § 176.101, subdiv. 1(k) (2014).

181. *Id.* § 176.101, subdiv. 1(a).

182. MINN. STAT. § 176.101, subdiv. 1(b)(1) (1994 & Supp. 1995); *see* MINN. STAT. § 176.101, subdiv. 1(b)(1) (2000).

183. MINN. STAT. § 176.101, subdiv. 1(b)(1) (2000); *see* MINN. STAT. § 176.101, subdiv. 1(b)(1) (2008).

184. MINN. STAT. § 176.101, subdiv. 1(b)(1) (2008); *see* MINN. STAT. § 176.101, subdiv. 1(b)(1) (2014).

185. MINN. STAT. § 176.101, subdiv. 1(b)(1) (2014).

*d. Minimum Compensation Rate*

For dates of injury from October 1, 1995 through September 30, 2000,[186] the minimum weekly compensation rate was the lesser of "$104.00 per week or the injured [worker's] actual weekly wage."[187] For dates of injury on or after October 1, 2000, the minimum compensation rate is $130 per week.[188]

*e. Circumstances Resulting in the Termination of Temporary Total Disability Benefits*

Generally, temporary total disability benefits are terminated when the worker has attained the 130-week cap,[189] the disability has ended,[190] the worker has withdrawn from the market,[191] or the worker is not diligently seeking work after the total disability ends.[192] Similarly, refusal of "an offer of gainful employment that" is within the employee's physical restrictions or refusal of an offer of gainful employment "that is consistent with a plan of rehabilitation filed with the" Department of Labor and Industry also results in the termination of benefits, never to be recommenced.[193] Per Minnesota Statutes section 176.101, subdivision 1(l), the above-referenced grounds to terminate temporary total disability benefits are not exhaustive.

Additionally, the running of the ninety-day maximum medical improvement period will mean the termination of benefits. This period "commences on the earlier of: (1) the date that the

186. *Compare id., and* MINN. STAT. § 176.101, subdiv. (1)(b)(1) (1998), *with* MINN. STAT. § 176.101, subdiv. (1)(b)(1) (2000).

187. MINN. STAT. § 176.101, subdiv. 1(c) (1996).

188. *Compare* MINN. STAT. § 176.101, subdiv. 1(c) (2000), *with* MINN. STAT. § 176.101, subdiv. 1(c) (1998). The maximum compensation rate applies to temporary total disability, temporary partial disability, permanent total disability, and retraining benefits. *See* MINN. STAT. § 176.101, subdivs. 1(b)(1), 2a, 4 (2000); *see also id.* § 176.102, subdiv. 11(b). The minimum compensation rate applies to temporary total disability and retraining benefits. *See id.* §§ 176.101, subdiv. 1(a)–(d), 176.102, subdiv. 11(b). It does *not* apply to permanent total disability benefits, which have a different minimum compensation rate payable, or to temporary partial disability benefits, for which there is no minimum mandatory compensation rate. *See id.* § 176.101, subdivs. 2, 4.

189. MINN. STAT. § 176.101, subdiv. 1(e) (2014).

190. *Id.* § 176.101, subdiv. 1(h).

191. *Id.* § 176.101, subdiv. 1(f).

192. *Id.* § 176.101, subdiv. 1(g).

193. *Id.*

employee receives a written medical report indicating [he or she] has [attained] maximum medical improvement; or (2) the date that the employer or insurer serves the report on the employee and the employee's attorney."[194] Further, if the employee has received temporary total disability benefits and has returned to work, and then is later *terminated for misconduct,* then temporary total disability benefits may be terminated and the employee will not be able to

194. *Id.* § 176.101, subdiv. 1(j).

> "Maximum medical improvement" means the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability, irrespective and regardless of subjective complaints of pain. Except where an employee is medically unable to continue working under [Minnesota Statutes] section 176.101, subdivision 1, paragraph (e), clause (2), once the date of maximum medical improvement has been determined, no further determinations of other dates of maximum medical improvement for that personal injury are permitted. The determination that an employee has reached maximum medical improvement shall not be rendered ineffective by the worsening of the employee's medical condition and recovery therefrom.

*Id.* § 176.011, subdiv. 13a. Under the Minnesota Administrative Rules,

> the following factors shall be considered by the health care provider as an indication that maximum medical improvement has been reached: (a) there has been no significant lasting improvement in the employee's condition, and significant recovery or lasting improvement is unlikely, even if there is ongoing treatment; (b) all diagnostic evaluations and treatment options that may reasonably be expected to improve or stabilize the employee's condition have been exhausted, or declined by the employee; (c) any further treatment is primarily for the purpose of maintaining the employee's current condition or is considered palliative in nature; and (d) any further treatment is primarily for the purpose of temporarily or intermittently relieving symptoms.

MINN. R. 5221.0410, subpart 3(A)(1) (2014) (original paragraph structure omitted). The following factors are deemed an indicator that maximum medical improvement has *not* occurred:

> (a) the employee's condition is significantly improving or likely to significantly improve, with or without additional treatment; (b) there are diagnostic evaluations that could be performed that have a reasonable probability of changing or adding to the treatment plan leading to significant improvement; or (c) there are treatment options that have not been applied that may reasonably be expected to significantly improve the employee's condition.

*Id.* (original paragraph structure omitted).

recommence benefits.[195] Similarly, non-cooperation with medical treatment,[196] non-cooperation with vocational rehabilitation,[197] and retirement[198] will result in termination of benefits.

*f. Recommencement of Temporary Total Disability*

If the employee's temporary total disability benefits are discontinued or terminated, in a number of circumstances, they can be recommenced. For example, "[i]f the employee is laid off or terminated for reasons *other than* misconduct [and] the layoff or termination occurs prior to 90 days [post] maximum medical improvement," benefits may be recommenced.[199] Similarly, if the employee becomes "medically unable to continue working" because of the effects of the injury after the benefits have been terminated, benefits may be recommenced.[200] However, the employee must actually be employed at the time he or she is totally disabled from work for benefits to recommence.[201] In other words, if the employee was not working at a time when a doctor renders him or her totally disabled, the employee will not be able to recommence benefits.[202] Additionally, an employee whose benefits have been terminated for withdrawal from the labor market or a non-diligent job search may have benefits recommenced by re-entering the labor market and performing a diligent job search, so long as this occurs prior to the attainment of the ninety days post maximum medical improvement "and prior to the payment of 130 weeks."[203]

*2. Temporary Partial Disability*[204]

Temporary partial disability benefits are payable to an employee who, because of the effects of a work-related injury, has

195. *See* MINN. STAT. § 176.101, subdiv. 1(e)(1); Langworthy v. Signature Flight Support, 1998 WL 34334641, at *5 (Minn. WCCA July 8, 1998).
196. Fenton v. Murphy Motor Freight Lines, 297 N.W.2d 294, 296 (Minn. 1980).
197. MINN. STAT. § 176.102, subdiv. 13.
198. *Id.* § 176.101, subdiv. 8.
199. *Id.* § 176.101, subdiv. 1(e)(1) (emphasis added).
200. *Id.* § 176.101, subdiv. 1(e)(2).
201. *Id.*
202. *Id.*
203. *Id.* § 176.101, subdivs. 1(f)–(g).
204. *Id.* § 176.101, subdiv. 2.

suffered a diminished earnings capacity.[205] This benefit is designed partially to make up that differential.[206] To be entitled to temporary partial disability, the following factors must exist: the employee has sustained a work-related injury resulting in disability,[207] the employee is able to work subject to the disability,[208] and the employee has sustained an actual loss of earnings capacity due to the work injury.[209]

*a. Benefit Caps*

Much like temporary total disability, temporary partial disability also has a lengthy history of benefit caps depending on the date of injury. These periods are discussed in turn.

- *Dates of injury prior to 1957*: Benefits are not payable beyond 310 weeks after the date of injury.[210]
- *1957 through 1976*: No benefits are payable beyond 350 weeks from the date of injury.[211]
- *August 1, 1974, through September 30, 1977*: There was a cap of 350 weeks on temporary partial disability benefits.[212] Thus, the employee could receive temporary partial disability benefits even beyond 350 weeks post injury until the 350-week cap had been reached.[213]
- *October 1, 1977, through September 30, 1992*: There were no caps on temporary partial disability benefits.[214] This was considered to be the "golden era" of benefits from the petitioner's perspective. This dramatically drove up the exposure on a broad range of cases.[215]
- *October 1, 1992, to present*: Temporary partial disability benefits are limited to 225 weeks per injury.[216] Additionally, no

205. *Id.* § 176.101, subdivs. 2(a)–(b).
206. *Id.*
207. *See id.* § 176.101, subdiv. 2(b).
208. *See id.*
209. *See id.*
210. *Compare* MINN. STAT. § 176.101, subdiv. 2 (1957), *with* MINN. STAT. § 176.101, subdiv. 2 (1953).
211. *Compare* MINN. STAT. § 176.101, subdiv. 2 (1978), *with* MINN. STAT. § 176.101, subdiv. 2 (1976), *and* MINN. STAT. § 176.101, subdiv. 2 (1957).
212. MINN. STAT. § 176.101, subdiv. 2 (1974).
213. *Id.*
214. MINN. STAT. § 176.101, subdiv. 2 (1978).
215. *Id.*
216. MINN. STAT. § 176.101, subdiv. 2(b) (2014).

temporary partial disability benefits are payable more than 450 weeks after the date of injury.[217] Therefore, even if the employee has not yet been paid for 225 weeks, no further temporary partial disability benefits will be due once the 450-week post-injury date has been attained.[218]

*b. Calculation of Temporary Partial Disability*

Temporary partial disability benefits are calculated as two-thirds of the difference between the date-of-injury average weekly wage and the employee's earnings capacity.[219]

| | | |
|---|---|---|
| **EXAMPLE** | Date-of-injury average weekly wage: | $1200 |
| | Employee's weekly earnings capacity: | $500 |
| | TPD Rate: | *$1200 - $500 = $700* |
| | | *$700 x (2 / 3) = **$466.66*** |

If the employee's earnings are sporadic, inconsistent, or widely variable, the compensation judge may utilize a method other than the week-by-week method in calculating temporary partial disability benefits. For example, the compensation judge could do an income averaging method and consider a larger time period such as fifty-two weeks. This method would be acceptable in situations where the employee may be working at a wage loss during some weeks and may be earning far in excess of his date-of-injury wage during other weeks. To calculate temporary partial disability

217. *Id.*

218. *Id.* If the employee is working at a wage loss during a period of retraining and is receiving retraining benefits at the temporary partial disability rate, these payments shall not be counted towards the attainment of the 225/450-week cap. *Id.* § 176.102, subdiv. 11(b).

219. *Id.* § 176.101, subdiv. 2(a). The employee's actual earnings post-injury are presumed to be the employee's earnings capacity. However, this is a rebuttable presumption. *See* Jellum v. McGough Constr. Co., 479 N.W.2d 718, 719 (Minn. 1992) (holding that the calculation of temporary partial compensation is based on the employee's earnings capacity for what she was actually earning rather than what she theoretically could be earning); Wesley v. City of Detroit Lakes, 344 N.W.2d 614, 616 (Minn. 1984) (holding that post-injury earnings were not representative of the employee's earnings capacity because he only had the job during a three-day period and it was the only employment he was able to obtain after several years of searching).

exposure on a week-by-week basis would be unfair and would not be truly reflective of the employee's earnings capacity.[220]

*c. Maximum and Minimum Compensation Rate*

Unlike temporary total disability, there is no minimum rate on temporary partial disability. But, like temporary total disability, the maximum compensation rate has varied through the years. For dates of injury from October 1, 1995, through September 30, 2000, the maximum compensation rate was $615 per week.[221] For dates of injury from October 1, 2000, through September 30, 2008, the maximum compensation rate was $750 per week.[222] For dates of injury on or after October 1, 2008, the maximum compensation rate was increased to $850 per week.[223] For dates of injury on or after October 1, 2013, the maximum compensation rate is "102 percent of the statewide average weekly wage for the period ending December 31 of the preceding year."[224]

*d. Athlete/Entertainer's Presumption*

Temporary partial disability benefits will be reduced by the amount that the employee's post-injury wage plus the TPD benefit rate exceeds 500% of the statewide average weekly wage.[225]

*3. Permanent Total Disability*

Permanent total disability (PTD) benefits are payable to an employee who, because of the effects of a work-related injury, is totally disabled with no prospect for returning to substantial gainful employment, or, in the alternative, who has suffered a statutorily classified injury of such a degree that the employee is irrebuttably presumed to be permanently and totally disabled.[226] Benefits continue under this section until the employee is proven to be

220. *See* Nutter v. United Parcel Serv., 58 W.C.D. 183, 186–89 (Minn. WCCA 1997), *aff'd*, 577 N.W.2d 226 (Minn. 1998).
221. MINN. STAT. § 176.101, subdiv. 1(b)(1) (1994 & Supp. 1995).
222. MINN. STAT. § 176.101, subdiv. 1(b)(1) (2000).
223. MINN. STAT. § 176.101, subdiv. 1(b)(1) (2008).
224. MINN. STAT. § 176.101, subdiv. 1(b)(1) (2014).
225. *Id.* § 176.101, subdiv. 2(c).
226. *Id.* § 176.101, subdiv. 5.

retired, dies, or reaches a statutorily designated presumed retirement age, which the employee is unable to rebut.[227]

For dates of injury occurring on or before October 1, 1992, there were two factors of entitlement: irrebuttable presumption of PTD (i.e., "[t]otal and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial members can be used, complete and permanent paralysis, total and permanent loss of mental faculties")[228] and "[a]ny other injury that totally incapacitates the employee from working in an occupation that brings [the employee] an income."[229] That is, an employee "is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income."[230] For dates of injury from October 1, 1992, through September 30, 1995, the irrebuttable presumption of PTD remained. In addition, the *Schulte* factors were codified. Therefore, the employee is considered permanently and totally incapacitated if his or her disability, "in combination with [his or her] age, education, training, and experience, causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income."[231]

The factors of entitlement for PTD were changed substantially for dates of injury occurring on or after October 1, 1995, by the enactment of Minnesota Statutes section 176.101, subdivision 5(2). The analysis now has become a three-tiered evaluation outlined as follows:

(1) Irrebuttable presumption of PTD. If the employee did not fall within one of the disability categories for an irrebuttable presumption of permanent and total disability, then the analysis moves on to step (2).

227. *Id.* § 176.101, subdiv. 4.

228. MINN. STAT. § 176.101, subdiv. 5 (1953).

229. *Id.* (alteration in original).

230. Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 133–34 (1967).

231. MINN. STAT. § 176.101, subdiv. 5(a)(2)(b) (1992).

(2) The employee must meet one of the following PTD thresholds (if the employee meets one, then the analysis moves on to step (3)):[232]
- seventeen percent whole body permanent partial disability;
- fifteen percent whole body permanent partial disability and employee is at least fifty-years old on date of injury; or
- thirteen percent whole body permanent partial disability, employee was at least fifty-five-years old as of date of injury, and employee has not completed grade 12 or obtained a GED certificate.[233]

(3) *Schulte* factors: The employee's physical disability, in combination with his or her age, education, experience, and training, causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.[234]

#### *a. Sometimes You Can Have Your Cake and Eat It Too: Working While Drawing PTD*

If the employee is irrebuttably presumed to be permanently and totally disabled pursuant to Minnesota Statutes section 176.101, subdivision 4, the employee will be eligible for PTD status regardless of whether or not the employee is substantially gainfully employed and even if the employee is working at a wage that exceeds his or her date-of-injury wage.[235]

Additionally, the employee may still be eligible for PTD status while working, if the job is so sporadic in hours and results in such insubstantial income that it cannot be deemed substantial gainful

232. The Minnesota Supreme Court has affirmed that in attempting to meet the permanency thresholds to establish permanent total disability, permanent partial disability due to any injuries or conditions—be they work-related or non-work-related—may be aggregated with permanent partial disability due to the work injury. *See* Frankhauser v. Fabcon, Inc., 57 W.C.D. 239, 251–52 (Minn. WCCA), *aff'd*, 569 N.W.2d 533 (Minn. 1997). It is also important to note that the employee must meet the age threshold as of the date of injury, *not* as of the date of application for permanent total disability status. *See, e.g.*, MINN. STAT. § 176.101, subdivs. 5(2)(ii)–(iii) (2014).

233. MINN. STAT. § 176.101, subdiv. 5(2) (1996).

234. MINN. STAT. § 176.101, subdiv. 5 (2014).

235. *See* Ford v. Kruckeberg Roofing & Sheet Metal, 308 Minn. 271, 273, 241 N.W.2d 653, 654 (1976); Anderson v. Kulzer Constr., 51 W.C.D. 512, 516–17 (Minn. WCCA), *aff'd*, 526 N.W.2d 627 (Minn. 1994).

employment.[236] Factors commonly relied upon in determining whether or not the employee's employment will preclude a finding of PTD include: number of hours, earnings, nature of job duties, job procurement, pre-injury wage, presence or lack of fringe benefits and post-injury employment opportunities compared to date-of-injury employment, and date of injury.[237]

*b. Retirement Presumption—PTD Is Not Always Permanent*

For dates of injury occurring prior to January 1, 1984, there was no retirement presumption.[238] The burden of proof was on the employer and insurer to prove that the employee retired or had intended to retire as of a specific date regardless of the disability situation.[239] The mere receipt of Social Security retirement benefits without more was held insufficient to establish retirement.[240]

For dates of injury from January 1, 1984, through September 30, 1992, any employee "who receive[d] Social Security old age and survivors insurance retirement benefits [was] presumed retired," which terminated an entitlement to PTD benefits.[241] This presumption was, in fact, easily rebuttable by the employee. The presumption did not apply if the employee was receiving Social Security disability benefits.[242] The employee essentially was required only to establish that he or she would not have retired but for the injury.[243] Retirement factors included, but were not limited to, the following: the employee's expressed intent to retire, the type of work being performed, the presence or absence of a pension or retirement plan, financial adequacy of the employee's retirement arrangements, sufficiency of the employee's financial resources and

236. *See, e.g.*, Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 62 (Minn. 1984); Stebbins v. Dodge Cnty. Serv. Co., 309 Minn. 563, 564, 244 N.W.2d 55, 55 (1976); Hempel v. Speed-O-Laq Chem., 40 W.C.D. 682, 684–85 (Minn. WCCA 1988).

237. Davidson v. Thermo King, 64 W.C.D. 380, 389 (Minn. WCCA 2004); *see, e.g., Hengemuhle*, 358 N.W.2d at 62; *Stebbins*, 309 Minn. at 564, 244 N.W.2d at 55; Panitzke v. Homette Corp., 2001 WL 900664, at *6–8 (Minn. WCCA July 9, 2001).

238. *Compare* MINN. STAT. § 176.101, subdiv. 8 (1984), *with* MINN. STAT. § 176.101, subdiv. 8 (1982).

239. *See* McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 541 (Minn. 1983).

240. *See* Henry v. Sears, Roebuck & Co., 286 N.W.2d 720, 723 (Minn. 1979).

241. *See* MINN. STAT. § 176.101, subdiv. 8 (1984).

242. MINN. STAT. § 176.101, subdiv. 8 (1982 & Supp. 1983).

243. Grunst v. Immanuel St. Joseph's Hosp., 424 N.W.2d 66, 69 (Minn. 1988).

retirement, the employee's age and work history, the employee's willingness to forego Social Security retirement benefits based on income offset, family work history, common retirement age in the industry, whether application was made for Social Security retirement benefits before or after onset of PTD status, the employee's job search, and corroborating lay testimony.[244]

Due to ambiguous legislative draftsmanship, there was no retirement defense for dates of injury occurring between October 1, 1992, and September 30, 1995.[245] During this period, there was no reference to PTD benefits ending upon retirement. Accordingly, the Minnesota Supreme Court interpreted the statute to mean that there is no retirement presumption in PTD cases.[246]

The statute was amended yet again on October 1, 1995, to provide that PTD benefits "shall cease at age 67" due to a "presumed retire[ment] from the labor market."[247] "This presumption is rebuttable" and "[t]he subjective statement the employee is not retired is not sufficient in itself to rebut the presumptive evidence of retirement but may be considered along with other evidence."[248]

### c. *Calculation of PTD Benefits in Coordination with Government Disability/Old Age and Survivor's Benefits*

PTD benefits are payable at the rate of 66.6% of the date-of-injury average weekly wage, subject to statutory maximums and minimums.[249] Maximum PTD rate is "equal to the maximum weekly compensation rate for [TTD benefits]."[250] The minimum PTD rate for dates of injury occurring on or before October 1, 1992, is the same as the minimum compensation rate for TTD.[251] The minimum

244. Davidson v. Thermo King, 64 W.C.D. 380, 389–90 (Minn. WCCA 2004); *see Grunst*, 424 N.W.2d at 69; Faber v. Grand Labs, 56 W.C.D. 81, 86–90 (Minn. WCCA 1997).

245. MINN. STAT. § 176.101, subdiv. 8 (1992).

246. *See* Behrens v. City of Fairmont, 533 N.W.2d 854, 856–57 (Minn. 1995).

247. MINN. STAT. § 176.101, subdiv. 4 (1994 & Supp. 1995).

248. *Id.*; Liniewicz v. Muller Family Theaters, 67 W.C.D. 325, 328–39 (Minn. WCCA 2007).

249. MINN. STAT. § 176.101, subdiv. 4 (2014).

250. *Id.*

251. MINN. STAT. § 176.101, subdiv. 4 (1992).

PTD rate for dates of injury occurring on or after October 1, 1995, is "[sixty-five] percent of the statewide average weekly wage."[252]

After the payment of $25,000 to PTD benefits, PTD benefits are reduced by the amount of any government disability benefits.[253] This includes Social Security disability benefits paid to the disabled worker's children,[254] government old age or retirement benefits, and government survivor's insurance benefits.[255]

State and county retirement benefits are no longer to be offset effective August 13, 2014. Prior to August 13, 2014, the Minnesota Workers' Compensation Court of Appeals routinely offset state and county retirement benefits such as PERA benefits (Public Employee Retirement Act), and TRA benefits (Teachers Retirement Association) against PTD benefits.[256] However, the companion opinions of *Hartwig v. Traverse Care Center*[257] and *Ekdahl v. Independent School District Number 213*,[258] both issued by the Minnesota Supreme Court on August 13, 2014, eliminated these offsets. The cases held that PERA and TRA benefits could not offset, as the statutory offset "refers only to *federal* social security [retirement] benefits."[259]

252. MINN. STAT. § 176.101, subdiv. 4 (1994 & Supp. 1995).

| MINIMUM PERMANENT TOTAL DISABILITY RATE | | | |
|---|---|---|---|
| 10/1/95: $328.25 | 10/1/96: $340.60 | 10/1/97: $360.00 | 10/1/98: $377.00 |
| 10/1/99: $400.00 | 10/1/00: $417.30 | 10/1/01: $442.00 | 10/1/02: $457.00 |
| 10/1/03: $467.00 | 10/1/04: $481.00 | 10/1/05: $504.00 | 10/1/06: $509.00 |
| 10/1/07: $526.00 | 10/1/08: $553.00 | 10/1/09: $570.70 | 10/1/10: $564.20 |
| 10/1/11: $582.40 | 10/1/12: $595.40 | 10/1/13: $614.25 | 10/1/14: $624.65 |

*Id.*

253. The government disability benefits must be "occasioned by the same injury or injuries which give rise to" the workers' compensation payments. MINN. STAT. § 176.101, subdiv. 4 (2014).

254. Sundby v. City of St. Peter, 693 N.W.2d 206, 214–15 (Minn. 2005). Additionally, Social Security benefits paid to the employee's children are likewise includable in the Social Security disability offset to reduce permanent total disability exposure after payment of $25,000 in permanent total disability benefits.

255. MINN. STAT. § 176.101, subdiv. 4.

256. Fletcher v. Todd Cnty., 2004 WL 886837, at *5 (Minn. WCCA Mar. 23, 2004).

257. 852 N.W.2d 251 (Minn. 2014).

258. 851 N.W.2d 874 (Minn. 2014).

259. *Hartwig*, 852 N.W.2d at 253 (emphasis added); *see Ekdahl* 851 N.W.2d at 877–78.

The offset provisions result in significant savings to employers and insurers in long-term PTD cases. Due to these offset provisions, employers and insurers, in some cases, may have an economic incentive to stipulate to PTD status at the earliest possible date to allow for the earliest taking of the government disability offset. One can retroactively reclassify previously paid temporary total disability, temporary partial disability, and possibly weekly permanent partial disability benefits as PTD benefits by stipulation or judicial determination to secure the earliest onset date of the offset.[260]

*d. Supplementary Benefits—Dates of Injury Prior to August 1, 1995*

The economic impact of the aforementioned offset provisions on the employee was ameliorated significantly by supplementary benefits payable pursuant to chapter 176 of the Minnesota Statutes. This provision was repealed for dates of injury occurring on or after August 1, 1995.[261] Supplementary benefits were designed to guarantee that the employee received a minimum indemnity benefit of sixty-five percent of the statewide average weekly wage in long-term total disability situations.[262]

For dates of injury prior to October 1, 1983, supplementary benefits were payable after payment of more than 104 weeks of total disability benefits, or if the employee received total disability benefits greater than four years after the first date of total disability.[263] All periods were required to be caused by the same injury.[264]

For dates of injury between October 1, 1983 and September 30, 1992, supplementary benefits were payable after payment of 104 weeks of TTD or PTD benefits, or if the employee received TTD benefits more than 208 weeks after the first date of total disability.[265] All periods of disability were required to be caused by the same injury.[266] The 208-week eligibility clause was applicable only if the employee was receiving TTD benefits more than 208

260. Sundby v. City of St. Peter, 693 N.W.2d 206 (Minn. 2005); McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 544 (Minn. 1983).

261. MINN. STAT. § 176.132 (2014).

262. *Id.* § 176.132, subdiv. 1.

263. MINN. STAT. § 176.132, subdiv. 1 (1982).

264. *Id.*

265. MINN. STAT. § 176.132, subdivs. 1(a)–(b) (1982 & Supp. 1983).

266. *Id.*

weeks after the injury.[267] Therefore, if the employee was receiving PTD benefits more than 208 weeks post-injury, then supplementary benefits were not payable until the employee had actually received 104 weeks in TTD or PTD benefits.[268]

For dates of injury between October 1, 1992, and October 1, 1995, supplementary benefits were payable after payment of 208 weeks of TTD or PTD benefits or if the employee received PTD benefits more than 208 weeks after the date of first disability.[269]

Below are examples for dates of injury before, on, and after October 1, 1995:

- *Example for dates of injury before October 1, 1995*: Once $25,000 in PTD benefits have been paid, then the employer and insurer are entitled to take a dollar-for-dollar offset against any government disability, survivor's, or retirement benefits. Once the employee becomes entitled to supplementary benefits, the dollar-for-dollar offset will be reduced to such an extent that the employee received benefits that are at least sixty-five percent of the statewide average weekly wage. The employer and insurer will pay both the net PTD benefits and supplementary benefits, subject to reimbursement from the State of Minnesota, Special Compensation Fund, upon the submission of an annual claim for reimbursement at *year's end.*
- *Example for dates of injury on or after October 1, 1995*: Supplementary benefits were repealed by the legislature for dates of injury occurring on or after October 1, 1995. Additionally, at that time, the minimum permanent total disability rate was increased to a minimum rate of no less than sixty-five percent of the statewide average weekly wage. The employee is entitled to the minimum PTD rate only *until* $25,000 in PTD benefits have been paid. At that point, employers and insurers are allowed to take a dollar-for-dollar offset against any government disability, survivor, or retirement benefits that the employee is receiving.[270]

267. *Id.*

268. *See* Werkman v. Emmanuel Nursing Home, 49 W.C.D. 275, 279 (Minn. WCCA 1993).

269. MINN. STAT. § 176.132, subdiv. 1(c) (1992).

270. Vezina v. Best Western Inn Maplewood, 627 N.W.2d 324 (Minn. 2001).

For an example of calculations of the offset for dates of injury before October 1, 1995 and on or after October 1, 1995, see the table below.

**EXAMPLE**

The following table illustrates the significant economic differences between the PTD statute for dates of injury before October 1, 1985, and for dates of injury on or after October 1, 1985.

| **Before October 1, 1995** | | **On or After October 1, 1995** | |
|---|---|---|---|
| DOI AWW | $500.00/week | DOI AWW | $500.00/week |
| PTD Rate | $333.33 | PTD Rate | $333.33 |
| Supp. Benefit Rate | $442.00 | Supp. Benefit Rate | N/A |
| SSDI | $200.00 | SSDI | $200.00 |
| PTD Comp. Rate | $333.33 | PTD Comp. Rate (Min 65% of AWW) | $442.00 |
| Less: SSDI | $200.00 | Less: SSDI | $200.00 |
| Net PTD Comp. Rate | $133.33 | Net PTD Comp. Rate | $242.00 |
| Supp. Benefit Rate | $442.00/week | | |
| Less Offset PTD Comp. Rate | $133.33 | | |
| Net Supp. Benefit Rate | $308.67 | | |
| 5% Reduction per MINN. STAT. § 176.32, subdiv. 2(3) | x .95<br>$293.23 (round up to nearest dollar) | | |
| **TOTAL PAYABLE** | | **TOTAL PAYABLE** | |
| a. Net PTD | $133.33 | a. Net PTD | $242.00 |
| *b. Supp. Benefit | $294.00 | | |
| Total Weekly Payment | $427.33 | | |

*NOTE: The Employer and insurer are reimbursed by the Special Compensation Fund for supplementary benefits paid.

*4. Permanent Partial Disability*

Permanent partial disability is a different benefit than the previously discussed wage indemnity benefits. It does *not* compensate the employee for a diminution of earnings capacity or loss of ability to work. Rather, it compensates the employee for the loss of function of a body part.[271] This type of compensation has been available for dates of injury occurring on or after August 1, 1974.[272]

Since January 1, 1984, physicians and chiropractors have been guided by the Minnesota workers' compensation permanent partial disability schedules in assigning permanency ratings for a permanent injury and loss of function.[273] The permanency rules are designed to effectuate the legislative intent of promoting "objectivity and consistency in the evaluation of permanent functional impairment due to personal injury and in the assignment of a numerical rating to the functional impairment."[274] The disability ratings must be based on objective medical evidence such as consistent and reproducible clinical findings, objectively verifiable spasm or diminished range of motion, or specific surgical procedures.[275]

The Minnesota Supreme Court has held that where a work injury results in a permanent loss of functional impairment, which is not scheduled or specifically addressed in the permanency ratings, the impairment is still compensable.[276] The court has indicated that the compensation judge should be allowed discretion to assign a non-scheduled injury and functional impairment to a permanency rating equivalent to its closest compensable category within the permanency schedule.[277] The Minnesota Supreme Court's decision in *Weber v. City of Inver Grove Heights* was codified by Minnesota Statutes section 176.105,

271. MINN. STAT. § 176.101, subdiv. 2a (2014).

272. MINN. STAT. § 176.101, subdiv. 2a (1974).

273. MINN. STAT. § 176.101, subdiv. 2a (2014). Refer to MINN. R. 5223.0010 –.0250 (2014) for permanent partial disability ratings for dates of injury between January 1, 1984, and June 30, 1993. Refer to MINN. R. 5223.0300–.0650 for permanent partial disability ratings for dates of injury from July 1, 1993, to the present.

274. MINN. STAT. §§ 176.021, subdiv. 3, 176.105, subdiv. 4(c).

275. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 865 (Minn. 1988).

276. Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 922 (Minn. 1990).

277. *Id.*

subdivision 1(c), which states: "If an injury for which there is objective medical evidence is not rated by the permanent partial disability schedule, the unrated injury must be assigned and compensated for at the rating for the most similar condition that is rated."[278]

*a. Dates of Injury: January 1, 1984, Through September 30, 1995—Two-Tiered System of Compensation*

| **EXAMPLE** | |
|---|---|
| Permanent partial disability: | 20% whole body |
| Date-of-injury average weekly wage: | $600 per week |
| Temporary total disability rate: | $400 per week |
| If the employee is entitled to impairment compensation, permanency would be calculated as follows: *20% x $75,000 = $15,000* | |
| If the employee, however, would be entitled to economic recovery compensation, permanency would be substantially greater: *20% x 600 weeks x $400 = $48,000* | |

For dates of injury from January 1, 1984, through September 30, 1995, permanent partial disability could be paid in one of two different ways. The determining factor was whether or not the employee received an economically suitable "3(e) job" pursuant to Minnesota Statutes section 176.101, subdivision 3(e) (1984), prior to the expiration of ninety days post maximum medical improvement. If the employee did not obtain or was not provided with such a job within this ninety-day period, then the employer was penalized by having to pay permanency under the economic recovery compensation schedule, which provided for a much more lucrative permanency benefit to the employee. If, however, the employee obtained such employment or was provided such employment by the employer and insurer within the ninety days, then the employer and insurer were rewarded by being permitted to pay permanency pursuant to the impairment compensation schedule, which was a less lucrative form of permanency.

278. *Id.*

This two-tier provision resulted in considerable litigation over whether or not the employee had been provided with a suitable 3(e) job prior to the expiration of the ninety days post maximum medical improvement. Somewhat unsurprisingly, this system was repealed by the legislature effective October 1, 1995.[279] Thereafter, permanency would be paid utilizing only the impairment compensation schedule. The impairment compensation schedule was modified to account for inflation effective for dates of injury on or after October 1, 2000. The following is the impairment compensation schedule for purposes of calculating permanency for dates of injury on or after October 1, 2000.[280]

**PPD SCHEDULES**
Effective for dates of injury January 1, 1984, to September 30, 2000

| Impairment Compensation | | Economic Recovery Compensation* | |
|---|---|---|---|
| % Disability | Amount | % Disability | Weeks |
| 0–5 | $ 75,000 | 0–25 | 600 |
| 26–30 | 80,000 | 26–30 | 640 |
| 31–35 | 85,000 | 31–35 | 680 |
| 36–40 | 90,000 | 36–40 | 720 |
| 41–45 | 95,000 | 41–45 | 760 |
| 46–50 | 100,000 | 46–50 | 800 |
| 51–55 | 120,000 | 51–55 | 880 |
| 56–60 | 140,000 | 56–60 | 960 |
| 61–65 | 160,000 | 61–65 | 1040 |
| 66–70 | 180,000 | 66–70 | 1120 |
| 71–75 | 200,000 | 71–100 | 1200 |
| 76–80 | 240,000 | *Economic recovery compensation schedule effective for dates of injury January 1, 1984, to September 30, 1995 | |
| 81–85 | 280,000 | | |
| 86–90 | 320,000 | | |
| 91–95 | 360,000 | | |
| 96–100 | 400,000 | | |

279. MINN. STAT. § 176.101, subdiv. 3(e) (1994) (repealed 1995).
280. MINN. STAT. § 176.101, subdiv. 2a (2014).

*b. Permanent Partial Disability (PPD) Schedule for Dates of Injury on or After October 1, 2000*

Permanent partial disability is not payable concurrently with temporary total disability benefits.[281] PPD payments are to commence only after temporary total disability has expired.[282] PPD payments are payable concurrently with other wage loss benefits.[283]

| **SCHEDULE FOR PERMANENT PARTIAL COMPENSATION** Effective for dates of injury on or after October 1, 2000 | |
|---|---|
| *% Disability* | *Amount* |
| Less than 5.5 | $75,000 |
| 5.5 to less than 10.5 | $80,000 |
| 10.5 to less than 15.5 | $85,000 |
| 15.5 to less than 20.5 | $90,000 |
| 20.5 to less than 25.5 | $95,000 |
| 25.5 to less than 30.5 | $100,000 |
| 30.5 to less than 35.5 | $110,000 |
| 35.5 to less than 40.5 | $120,000 |
| 40.5 to less than 45.5 | $130,000 |
| 45.5 to less than 50.0 | $140,000 |
| 50.5 to less than 55.5 | $165,000 |
| 55.5 to less than 60.5 | $190,000 |
| 60.5 to less than 65.5 | $215,000 |
| 65.5 to less than 70.5 | $240,000 |
| 70.5 to less than 75.5 | $265,000 |
| 75.5 to less than 80.5 | $315,000 |
| 80.5 to less than 85.5 | $365,000 |
| 85.5 to less than 90.5 | $415,000 |
| 90.5 to less than 95.5 | $465,000 |
| 95.5 up to and including 100 | $515,000 |

281. *Id.* § 176.101, subdiv. 2a(b).
282. *See id.*
283. *Id.* § 176.021, subdiv. 3.

*5. Dependency Benefits*

If an employee dies as a result of the effects of the work injury, then the employee's dependents, which are statutorily defined, shall be entitled to receive dependency benefits.[284] The dependents' right to benefits vests on the date of the employee's death and is governed by the law in effect on the date of death, rather than the law in effect on the date of injury (although both dates are oftentimes the same).[285]

There are two categories of dependents, conclusively presumed dependents and actual dependents.[286] Conclusively presumed dependents include the spouse (unless the spouse and decedent were voluntarily living apart at the time of the injury or death); children under the age of eighteen, or a child under the age of twenty-five who is a regularly attending, full-time student of a high school, college or university, or vocational or technical training school; and children in excess of the age of eighteen if physically or mentally incapacitated from earning.[287]

On the other hand, actual dependents include a wife, child, husband, mother, father, grandmother, grandchild, grandfather, sister, brother, mother-in-law, father-in-law who is wholly supported by the deceased employee at the time of the death and for a reasonable period of time prior thereto.[288] If one of these categories of persons were partially supported by the deceased employee at the time of death and for a reasonable time prior thereto, they will receive dependency benefits in the order so named.[289] Those partially supported shall receive their benefits at a rate that reflects the percentage of financial support they received from the deceased employee relative to their total income. Within the various actual dependent categories, there is a system of priorities. A dependent who has priority over another dependent shall take to the exclusion of the lower priority dependent.[290]

284. *Id.* § 176.111.
285. Borchardt v. Biddick, 306 N.W.2d 817, 818–19 (Minn. 1981).
286. MINN. STAT. § 176.111, subdiv. 1.
287. *Id.* § 176.111, subdivs. 1–2.
288. *Id.* § 176.111, subdivs. 3–4.
289. *Id.*
290. Miller v. Bohn Refrigerator Co., 192 Minn. 242, 246, 255 N.W. 835, 837 (Minn. 1934).

*a. Burial Expense*

For dates of death on or after April 28, 2000, the maximum amount that will be payable as burial expense is $15,000.[291]

*b. Payments if No Surviving Dependents*

If an employee dies without any surviving dependents, the employer and insurer shall pay to the estate of the deceased employee the sum of $60,000.[292] This provision applies for dates of death on or after April 28, 2000. For dates of death prior to April 28, 2000, where there are no surviving dependents, the employer and insurer, rather than paying anything to the employee's estate, was designated by statute to pay the sum of $25,000 to the Commissioner of the Department of Labor and Industry.[293]

*c. Calculation of Dependency Benefit for Statutorily Presumed Dependents*

A dependent spouse with no dependent children receives weekly dependency benefits equivalent to fifty percent of the employee's date-of-injury daily wage for a period of ten years.[294] Meanwhile, a dependent spouse with one dependent child receives sixty percent of the daily wage at the time of the injury until the child ceases to be a dependent. At the time the child loses dependency status, the surviving spouse shall be paid benefits at a rate of fifty percent of the date-of-injury daily wage at the time of death. This benefit will last for a period of ten years.[295] Lastly, a dependent spouse with two or more dependent children is entitled to 66.6% of the date-of-injury daily wage. Once the last child loses dependency status, the dependent surviving spouse shall be paid fifty percent of the date-of-injury daily wage for a period of ten years.[296]

291. MINN. STAT. § 176.111, subdiv. 18. For dates of death from October 1, 1983, to October 1, 1992, the burial expense could not exceed $2500. *See* MINN. STAT. § 176.111, subdiv. 18 (1984). For dates of death occurring between October 1, 1992, to April 27, 2000, the maximum burial expense was $7500. *See* MINN. STAT. § 176.111, subdiv. 18 (1992).

292. MINN. STAT. § 176.111, subdiv. 22 (2014).

293. MINN. STAT. § 176.129, subdiv. 2 (1984).

294. MINN. STAT. § 176.111, subdiv. 6 (2014).

295. *Id.* § 176.111, subdiv. 7.

296. *Id.* § 176.111, subdiv. 8.

### 6. *Medical Expenses*

An injured employee is entitled to receive reimbursement for any medical treatment that was reasonable and necessary for the cure or relief of the effects of the employee's work injury.[297] There is a broad array of treatment modalities which fall under the ambit of medical treatment, including "medical, psychological, chiropractic, podiatric, surgical and hospital treatment . . . nursing, medicines, medical, chiropractic, podiatric, and surgical supplies, crutches and apparatus . . . [and] artificial members."[298] In certain circumstances, an injured employee is entitled to "Christian Science treatment in lieu of medical treatment, chiropractic medicines and medical supplies."[299] It also includes medical appliances and supplies and durable medical equipment.[300]

The Minnesota treatment parameters govern and establish durational and frequency limitations on various treatment modalities for specific body parts. The body parts addressed by the treatment parameters include low back,[301] neck,[302] and thoracic,[303] as well as upper extremities.[304] Further, there are limitations set forth on various diagnostic testing modalities and surgical modalities. The treatment parameters have gone a long way to reducing medical costs in Minnesota workers' compensation cases. They are presumptively applicable and departures from the treatment parameters will be granted only in rare cases.[305]

The *current* treatment parameters apply to any date of injury, but only apply to dates of treatment provided on or after January 5,

297. *Id.* § 176.135, subdiv. 1.
298. *Id.*
299. *Id.*
300. *Id.*
301. MINN. R. 5221.6200 (2014).
302. *Id.* R. 5221.6205.
303. *Id.* R. 5221.6210.
304. *Id.* R. 5221.6300.
305. For examples of such rare cases, see *Asti v. Northwest Airlines*, 588 N.W.2d 737, 740 (Minn. 1999) (holding that rare circumstances warranted departure from treatment parameters in the form of a paid health club membership); and *Stulen v. Halvorson Co.*, 1999 WL 297098, at *5 (Minn. WCCA Apr. 6, 1999) (affirming an award of medical expenses for chiropractic and therapeutic massage). Rare case departures from the treatment parameters have generally been granted by the courts in situations where the ongoing treatment assists the employee in continuing to work, without such ongoing treatment the employee would not be able to work. *See* MINN. R. 5221.6050, subpart 8.

1995.[306] Additionally, the parameters are not applicable to medical treatment for an injury or condition for which primary liability has been denied.[307] The treatment parameters will not even apply to an admitted work injury if benefits are later denied on the basis that the injury was merely a temporary aggravation.[308]

*7. Vocational Rehabilitation/Retraining*

There are cases where, because of the effects of a work injury, an employee will not be able to return to work to his or her date-of-injury job or even with his or her date-of-injury employer. Under such circumstances, the employee may be a qualified employee for the receipt of vocational rehabilitation services, including retraining.[309]

Vocational "[r]ehabilitation is intended to restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability."[310] To this effect, Minnesota Statutes section 176.102, subdivision 1(b) states:

> Rehabilitation to a job with a higher economic status than would have occurred without disability is permitted if it can be demonstrated that this rehabilitation is necessary to increase the likelihood of reemployment. Economic status is to be measured not only by opportunity for immediate income but also by opportunity for future income.[311]

The employee is entitled to various vocational rehabilitation services including medical management, counseling and professional guidance, on-site job analysis, modification of date-of-injury job to accommodate restrictions, job development and job placement, vocational testing, transferrable skills analysis, job

306. *See* Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 36 (Minn. 1998).

307. MINN. R. 5221.6020, subpart 2.

308. *See* Oldenburg v. Phillips & Temro Corp., 60 W.C.D. 8, 13–15 (Minn. WCCA 1999), *aff'd*, 606 N.W.2d 445 (Minn. 2000).

309. MINN. STAT. § 176.102, subdivs. 10–11 (2014).

310. *Id.* § 176.102, subdiv. 1(b).

311. *Id.*

seeking skills training, work adjustment, labor market surveys, on-the-job training, and retraining.[312]

*a. Qualified Employee*

An employee is entitled to receive vocational rehabilitation services or retraining if, "because of the effects of the work-related injury," the employee:

> (A) is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job that the employee held at the time of injury;
>
> (B) cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and
>
> (C) can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician's opinion of the employee's work ability.[313]

*b. Retraining*

Retraining is a separate benefit that is rarely provided for employees due to the fact that the vast majority of employees are able to return to work with the date-of-injury employer or are able to be successfully placed in other suitable employment through the provision of vocational rehabilitation services and job placement. In certain situations, however, an employee may not be employable without the provision of retraining.[314]

Factors to consider in determining whether or not an employee is eligible for a specific retraining program include:

---

312. *See id.* §§ 176.101, subdiv. 5, 176.102, subdiv. 11; MINN. R. 5220.0100, subparts 2(c), 13, 16–19, 37–38; *id.* R. 5220.0850.

313. MINN. R. 5220.0100, subpart 22. In certain situations, the spouse of an employee whose death arises out of and in the course of employment may be eligible for vocational rehabilitation services if these services are deemed necessary for the spouse "to become self-supporting" financially. MINN. STAT. § 176.102, subdiv. 1(a).

314. *See* MINN. STAT. § 176.102, subdiv. 11; Varda v. Nw. Airlines Corp., 692 N.W.2d 440, 444 (Minn. 2005) ("The purpose of retraining benefits is to return the employee 'to his or her established preinjury employment status and to discontinue workers' compensation benefits.'" (quoting Wirtjes v. Interstate Power Co., 479 N.W.2d 713, 715 (Minn. 1992))).

> (1) the reasonableness of retraining as compared to returning to work with employer or other job placement activities; (2) the likelihood that employee has the ability and interest to succeed in a formal course of study in a school; (3) whether retraining is likely to result in a reasonably attainable employment[] . . . ; [and] (4) whether retraining is likely to produce an economic status as close as possible to that which the employee would have enjoyed without disability.[315]

When the employer and insurer propose an alternative-retraining plan, a comparative analysis must be done of the two retraining plans utilizing the factors set forth in *Poole v. Farmstead Foods*.[316] Such retraining benefits are available up to 156 weeks. If the employee is not working during the retraining, these benefits will be paid at the temporary total disability rate. If the employee is working during retraining, the benefits will be paid at the temporary partial disability benefit rate.[317] These benefits include "reasonable cost of tuition, books, travel, and custodial day care; . . . reasonable costs of board and lodging when rehabilitation requires residence away from the employee's customary residence";[318] "reasonable costs of travel and custodial day care during the job interview process";[319] and "reasonable cost of moving expenses" if a job is found in a different area.[320]

---

315. Poole v. Farmstead Foods, 42 W.C.D. 970, 987 (Minn. WCCA 1989); *see* Kunferman v. Ford Motor Co., 55 W.C.D. 464, 467 (Minn. WCCA 1996) ("Implicit in these factors is consideration of whether the retraining and the job which is the goal of the retraining are within the physical capabilities of the employee, given the disability associated with the work injury.").

316. *See Kunferman*, 55 W.C.D. at 466–68.

> Inherent in this comparison would be a review of how long the various programs would take, how soon the employee would be returned to an economic status as close as possible to that which they would have enjoyed without the disability, and a comparison of the total costs associated with providing the training.

*Id.* at 468.

317. MINN. STAT. § 176.102, subdiv. 11(a), (b).

318. *Id.* § 176.102, subdiv. 9.

319. *Id.*

320. *Id.*

*c. Notice Requirements for Retraining*

For dates of injury between October 1, 1995, and September 30, 2000, the employee must file a request for retraining with the Commissioner prior to the payment of 104 weeks of any combination of temporary total or temporary partial disability benefits.[321] The employer and insurer are obligated to give the employee notice of the right to request retraining before eighty weeks of temporary total or temporary partial disability benefits has been paid, otherwise the filing requirements for the employee will be extended.[322]

For dates of injury between October 1, 2000, and September 30, 2008, "[a]ny request for retraining shall be filed with the Commissioner before 156 weeks of any combination of temporary total or temporary partial compensation have been paid."[323] The employer and insurer must give the injured employee notice of the 156-week limitation for filing a request for retraining before eighty weeks of temporary total disability or temporary partial disability compensation has been paid, otherwise the filing requirements for the employee will be extended.[324]

For dates of injury from October 1, 2008, to present, "[t]he employee must file a request for retraining with the commissioner before 208 weeks of any combination of temporary total disability or temporary partial disability benefits have been paid."[325] The employer or insurer remains obligated to give the insured notice "of the 208-week limitation for filing a request for retraining" before payment of "[eighty] weeks of temporary total disability or temporary partial disability compensation . . . ."[326] Otherwise, the filing requirements for the employee will extend to "225 weeks after any combination of temporary total disability or temporary partial disability compensation have been paid."[327]

A 2013 legislative change limited job placement services to "[twenty-six] hours per month or [twenty-six] consecutive or

321. MINN. STAT. § 176.102, subdiv. 11(c) (1994 & Supp. 1995).
322. *Id.* § 176.102, subdiv. 11(d).
323. MINN. STAT. § 176.102, subdiv. 11(c) (2000).
324. *Id.* § 176.102, subdiv. 11(d).
325. MINN. STAT. § 176.102, subdiv. 11(c) (2014).
326. *Id.* § 176.102, subdiv. 11(d).
327. *Id.*

intermittent weeks" for dates of injury on or after October 1, 2013.[328]

## VI. DISTINCTION BETWEEN OCCUPATIONAL DISEASE AND INJURY CLAIMS

Prior to 1953, only injuries caused by "accident" were compensable.[329] In 1953, the Workers' Compensation Act eliminated the requirement that an "accident" cause the resulting occupational disease to be covered.[330] The term "occupational disease" is given a lengthy and convoluted definition under Minnesota Statutes section 176.011, subdivision 15.[331]

There are two types of occupational diseases. One type is a "personal injury caused by occupational disease."[332] Another is "the disablement of an employee resulting from an occupational disease."[333] In truth, these two types of compensable occupational diseases are virtually indistinguishable from one another. However, one may choose one definition over another in order to avoid a statute of limitations or notice issue, or in order to have a more relaxed causation standard.[334] If an employee makes a claim for an occupational disease resulting in disablement, then the employee must prove that the work activities or exposure at the workplace was the proximate cause (or sole cause) of the occupational disease.[335] If one makes a claim for a personal injury caused by occupational disease, however, then one need only prove that the workplace exposure was a substantial contributing cause of the occupational disease.[336]

---

328. *Id.* § 176.102, subdiv. 5.

329. MINN. STAT. § 176.021, subdiv. 1 (1953); Gillette v. Harold, Inc., 257 Minn. 313, 318, 101 N.W.2d 200, 205 (1960).

330. MINN. STAT. § 176.021, subdiv. 1.

331. *See* MINN. STAT. § 176.011, subdiv. 15 (2014).

332. *Id.* § 176.011, subdiv. 16.

333. *Id.* § 176.66, subdiv. 1.

334. *See generally* Thomas L. Johnson & Catherine J. Wasson, *The Minnesota Workers' Compensation Act: Amendments by the 1995 Minnesota Legislature*, 22 WM. MITCHELL L. REV. 1493 (1996) (discussing Minnesota's workers' compensation statute).

335. *See* Forseen v. Tire Retreading Co., 271 Minn. 399, 403, 136 N.W.2d 75, 77 (1965) (citing Gillette v. Harold, Inc., 257 Minn. 313, 322, 101 N.W.2d 200, 206 (1960)).

336. *See* Bertrand v. API, Inc., 365 N.W.2d 222, 224 (Minn. 1985) (citing Polaschek v. Asbestos Prods., Inc., 361 N.W.2d 37, 42 (Minn. 1985)); *see also* Olson

### A. *Notice*

For personal injury, the employee must give notice of the work injury no later than 180 days after the injury date.[337] In an occupational disease situation, however, the employee has up to three years after obtaining knowledge of the cause of the injury that resulted in disability to give notice.[338]

### B. *Statute of Limitations*

If the case involves a personal injury, the employee must file a claim for benefits within three years after the filing of a First Report of Injury with the Department of Labor and Industry, but the employee must file a claim for a work injury within six years after the date of the injury.[339]

For occupational diseases, the statute of limitations is the same as the notice requirement (i.e., commence an action within three years after the employee has knowledge of the cause of the injury and the injury results in disability).[340]

The rationale for the distinction between the notice and the statute of limitations is that in an occupational disease situation, there may be a lengthy time period between the exposure in the workplace and the "disablement" from the injury.[341] In this situation, there may be a significant lag time, which could result in situations where the employee does not attain "disablement" until many years after the employee has ceased working for the responsible employer.[342]

---

v. Exec. Travel MSP, Inc., 437 N.W.2d 645, 646 (Minn. 1989).

337. MINN. STAT. § 176.141.

338. *Id.* § 176.151.

339. *Id.*

340. *Id.*

341. *Cf.* Jordan H. Leibman & Terry Morehead Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS L.J. 287, 333–34 (1985) (discussing case law that addressed the latency between exposure and disability).

342. *See, e.g.*, Graber v. Peter Lametti Const. Co., 293 Minn. 24, 29, 197 N.W.2d 443, 447 (1972) (discussing the "considerable time" that may elapse between exposure and disability).

### C. *Disablement*

An occupational disease does not become compensable until an employee becomes disabled under Minnesota Statutes section 176.66, subdivision 1.[343]

The concept of disablement has been expanded by legislative amendment and court decisions over the years.[344] Disablement can mean the date that the employee becomes disabled from work, the date the employee becomes disabled from earning full wages at work,[345] or the date that the employee takes a different job at reduced wages or requests a modification of job duties due to the occupational disease.[346] Disablement also has been expanded to mean the date on which the employee obtains a ratable permanent partial disability (regardless of whether or not there is any wage loss or inability to earn).[347]

There may be situations where the employee develops an occupational disease condition with no disablement or permanency; however, the employee may require medical treatment for the condition nonetheless. In that case, an employee who has contracted the occupational disease is eligible to receive medical treatment under Minnesota Statutes section 176.135, subdivision 5, even if the employee has not suffered any inability to earn full wages.[348]

### D. *Effective Law*

With respect to personal injuries, the law in effect on the date of injury controls.[349] For occupational diseases, however, the law in effect on the date of disablement controls entitlement to benefits.[350]

---

343. MINN. STAT. § 176.66, subdiv. 1.

344. *See* Leibman & Dworkin, *supra* note 341, at 333–34.

345. *See* Notch v. Victory Granite Co., 306 Minn. 495, 502, 238 N.W.2d 426, 431 (1976) (citing Fink v. Cold Spring Granite Co., 262 Minn. 393, 401, 115 N.W.2d 22, 28 (1962)).

346. *See* Green v. Boise Cascade Corp., 377 N.W.2d 924, 926 (Minn. 1985); Lundmark v. Nokomis Sheet Metal, 45 W.C.D. 213, 217 (Minn. WCCA 1991).

347. Moes v. City of St. Paul, 402 N.W.2d 520, 526 (Minn. 1987).

348. MINN. STAT. § 176.135, subdiv. 5.

349. Joyce v. Lewis Bolt & Nut Co., 412 N.W.2d 304, 307–08 (Minn. 1987).

350. Stillson v. Peterson & Hede Co., 454 N.W.2d 430, 433 (Minn. 1990).

### *E. Apportionment*

For personal injuries, wage loss, and vocational rehabilitation, medical and dependency benefits are apportionable pursuant to *Goetz v. Bulk Commodity Carriers.*[351] In other words, there may be more than one injury that is a substantial contributing factor to the employee's disability. In that case, benefits may be apportionable on a percentage basis among the various injuries.

With respect to permanent partial disability, benefits are apportioned pursuant to Minnesota Statutes section 176.101, subdivision 4a. However, with respect to occupational disease situations, there is *no apportionment.* Only the employer for whom the employee was working when "last exposed in a significant way to the hazard of the occupational disease" shall be liable.[352] If a particular employer has multiple insurers over a period of time, only "the insurer who was on the risk during the employee's last significant exposure to the hazard of the occupational disease" will be liable.[353]

### *F. Specific Occupational Diseases*

Traditionally, the courts have broadly defined "disease." The standard dictionary definitions are also quite broad. Disease is "an abnormal condition of an organism or a part, especially as a consequence of infection, inherent weakness, or environmental stress, that impairs normal physiological functioning."[354] Disease is "[l]iterally the lack of ease; a pathological condition of the body that presents a group of symptoms peculiar to it and that sets the condition apart as an abnormal entity differing from other normal or pathological body states."[355]

Occupational diseases are conditions that can be caused by specific exposure to chemicals in the workplace. Occupational diseases can also include diseases that arise out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of the

351. 303 Minn. 197, 226 N.W.2d 888 (1975).
352. MINN. STAT. § 176.66, subdiv. 10.
353. *Id.*
354. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 517 (4th ed. 2000).
355. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 474 (15th ed. 1981).

employment.[356] "Peculiar to the occupation" means that exposure to the condition that results in disablement results in an increased risk of the occupational disease.[357] It does not go so far as to say that the exposure must be "unique to the occupation." This clarification addresses situations where the employee may be working in an area where there is a great deal of exposure to chemicals from work being done by others.[358] That said, under Minnesota Statutes section 176.011, subdivision 15, "[o]rdinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard."[359]

The following occupational diseases are recognized as compensable, work-related diseases in Minnesota: asbestosis; mesothelioma as a result of asbestos exposure; herpes keratitis;[360] coronary artery disease;[361] influenza-type B;[362] cancer (if the disease follows as an incident of the occupation);[363] occupational asthma; chemically-induced bronchitis;[364] coronary sclerosis due to work stress;[365] hearing loss as a result of noise;[366] carpal tunnel syndrome;[367] pulmonary emphysema; pulmonary fibrosis; and Goodpasture's Syndrome ("a rare disease that attacks membranes

356. MINN. STAT. § 176.011, subdiv. 15.

357. Sandy v. Walter Butler ShipBuilders, Inc., 221 Minn. 215, 222, 21 N.W.2d 612, 616 (1964).

358. *See id.*

359. MINN. STAT. § 176.011, subdiv. 15.

360. *See generally* Tofte v. Hubert Tofte, P.A., 39 W.C.D. 10 (Minn. WCCA 1986).

361. *See* Courtney by Higdem v. City of Orono, 424 N.W.2d 295, 297 (Minn. 1988); Moes v. City of St. Paul, 402 N.W.2d 520, 525 (Minn. 1987); *see also* MINN. STAT. § 176.011, subdiv. 15.

362. Olson v. Exec. Travel MSP, Inc., 437 N.W.2d 645, 645 (Minn. 1989).

363. Radermecher v. FMC Corp., 375 N.W.2d 809, 812 (Minn. 1985). In this case, the employee was exposed to ultraviolet lights used to treat work-related dermatitis and developed cancer due to this exposure. *Id.* at 810.

364. Buck v. 3M Co., 45 W.C.D. 108, 109–10 (Minn. WCCA), *aff'd*, 472 N.W.2d 871 (Minn. 1991).

365. Schwartz v. City of Duluth, 264 Minn. 514, 517–19, 119 N.W.2d 822, 824–25 (1963).

366. Fehling v. Dayton Rogers Mfg. Co., 28 W.C.D. 35, 38 (Minn. WCCA 1975).

367. Jenson v. Kronick's Floor Covering Serv., 309 Minn. 541, 542, 245 N.W.2d 230, 231 (1976).

of the kidneys and alveolar lining cells of the lungs" caused by working with heated glue).[368]

## VII. CONCLUSION

It is the hope of the author that this Article gives the reader a good understanding of the historical underpinnings and genesis of the Minnesota Workers' Compensation Act. It is also hoped that the reader has been educated on the factors of entitlement necessary to establish a workers' compensation claim, as well as the potential benefits available and the procedure for calculating these benefits.

The Minnesota Workers' Compensation Act has been much maligned, sometimes rightfully so. Yet it remains one of the greatest pieces of social legislation of the last one hundred years, benefiting countless workers and their families in times of financial need and crisis.

368. Boldt v. Jostens, Inc., 261 N.W.2d 92, 92–93 (Minn. 1977).