Fundamentals of Workers’ Compensation in Minnesota
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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. The tort system was fraught with inequities and tremendous adversity for employees. Employees had to overcome the affirmative defenses of comparative fault, assumption of risk, and the fellow servant doctrine. 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.

This was a fault-based system and the employee bore the burden of proving the employer’s negligence.

The legislature, recognizing the devastating effect of this system, sought to create a statutory system which insured the prompt payment to or on behalf of the employee of workers’ compensation benefits from the employer/insurer regardless of fault. The Minnesota Workers’ Compensation Act, which was passed in 1913, is a no-fault system. The rationale for the statute was that injured employees are essentially a cost of doing business that can more easily be borne by individual employers than the individual employee. Further, the legislature sought to ensure the prompt payment of benefits to injured employees. See, Briemhorst v. Beckman, 35 N.W.2d 719 (Minn. 1949).

There of course was a trade off in this system. In return for this faultless system which provides benefits to an employee simply because he or she suffered a work injury, and in consideration for the waiver by the employer of its affirmative tort defenses, limitations were placed on the employer’s liability through the implementation of caps on wage replacement benefits, caps on permanent partial disability compensation, limitations of the payment of medical and vocational rehabilitation benefits, and the elimination of compensation for pain and suffering, loss of consortium and punitive damages.

The employer’s liability for an employee who suffers a work-related injury is “exclusive and in the place of any other liability.” Minn. Stat. § 176.031 (2000). The employee is not permitted to pursue a tort cause of action against an employer except under very limited circumstances.¹

¹ 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 employee;
   3. Is subject to liability under federal law, e.g.: liability under the Americans with Disabilities Act;
   4. Is liable under Minn. Stat. § 176.82 in district court;
   5. Is liable under the Minnesota Human Rights Act.
Unless involved with the employer in a common 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. (See Minn. Stat. § 176.061.)

Law in Effect on Date of Injury Controls, i.e. Workers’ Compensation is an archeological dig.

A fundamental precept is that the law in effect on the date of the last injury which is a substantial contributing factor to the employee’s disability controls. Joyce v. Lewis Bolt and Nut Co., 412 N.W.2d 304, 307 (Minn. 1987). Therefore, in order to determine the applicable law, potential defenses, likely exposure, and the existence, non-existence, or duration of any caps or limitations on benefits, one must know two things: first of all, the last date of injury that is a controlling event and, second, the substantive law that governs the claim for that particular date of injury.

For example, if you have 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) and injuries subsequent to 1995 (where there were caps not only on temporary total disability and temporary partial disability benefits), if the last date of injury is a substantial contributing factor to ongoing disability, the law in effect on that date of injury controls. This would mean that all dates of injury would be subject to caps on benefits, not just the last injury.

1. Who is a Covered Worker?

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

Employee - Minn. Stat. § 176.011 subd. 9 - An employee is an individual who “performs services for another for hire.” This means that the employee must receive or have an expectation that he or she will receive payment for services rendered. See, Huebner v. Farmers Co-op Assn., 167 N.W.2d 369 (Minn. 1969). The “contract for hire” can be an express contract or a contract implied by the conduct of the parties. If the services are provided gratuitously or charitably, without any expectation of consideration or remuneration, then there is no employer/employee relationship.

The medium of payment or consideration can be anything of value and it need not be money, as long as it is not a gratuity or a gift which is not understood by the parties to constitute the equivalent of wages or consideration for services rendered. Schneider v. Salvation Army, 14 N.W.2d 467 (Minn. 1944).

A. Exclusions from Definition of Employee

1. Independent Contractor. Not covered by the Workers’ Compensation Act. An independent contractor is a person who is defined by Minn. Rules 5224.0010 through 5224.0340. See Minn. Stat. § 176.041 subd. 1(1). These rules cover 34 specific
occupations, and also provide general criteria for non-specified occupations. A primary factor to consider in making this determination is whether the putative employer exercised control, or had the right to exercise control over the means and manner of doing the job.\(^2\)

2. If an individual’s work for an employer is casual, and not in the usual course of the employer’s business.


Under the statute, there are numerous other employment occupations where employees are not covered by the Workers’ Compensation Act. These 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
- Employees of non-profit associations not meeting certain wage requirements.

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\(^2\) Independent contractors performing commercial or residential building construction or improvements have been treated separately under Minn. Stat. § 176.042, which required that an independent contractor meet all nine separate independent contractor conditions, or the contractor would be deemed an employee of the entity for which he or she was providing services. Effective 1/1/09, Minn. Stat. § 176.042, subd. 2, was repealed. A new provision, Minn. Stat. § 181.723, became effective. In addition to meeting all nine independent contractor factors, an individual must have approved by the Division an Independent Contractor Exemption Certificate.
4. Illegal Aliens

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. Minnesota is no different.

Under Minn. Stat. § 176.011, subd. 9(1), a “covered employee” includes any person who performs services for another for hire, including aliens.

This issue was addressed in Minnesota in the case of Gonzalez v. Midwest Staffing Group, Inc., 59 W.C.D. 207 (W.C.C.A. 1999).

In Gonzalez, the employee was an illegal or undocumented alien. He had provided a false Social Security card and resident alien card to the employer as an inducement for the employer to hire him as an employee.

The employee sustained an admitted work injury.

The employer denied temporary total disability benefits based upon the fact that the employee was an illegal alien and based upon his fraudulent representations concerning his status as an eligible employee.

The WCCA reversed the compensation judge’s denial of wage loss benefits to the employee. They noted that Minn. Stat. §176.011, subd. 9, covers as an employee any person who performs services for another for hire. They 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 Minn. Stat. §176.011 and Minn. Stat. §176.021.

In a subsequent Supreme Court Case, the Supreme Court affirmed an award of temporary total disability benefits to the employee, rejecting the employer’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. Correa v. Waymouth Farms, 664 N.W.2d 324 (Minn. 2003).

The employee 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, by law, he was not entitled to temporary total disability benefits.\(^3\)

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.

There is no dispute that in this case the employee had engaged in a diligent job search. The court found that since the employee had engaged in a diligent job search he was entitled to temporary total disability benefits. The court rejected the argument that under federal immigration law employers cannot employ unauthorized or illegal aliens, the employee could not legally engage in a diligent job search to establish an entitlement to temporary total disability benefits.

However, in the case of *Rivas v. Car Wash Partners*, slip op (W.C.C.A. 6/4/04), the employer made a post-injury light-duty job offer to the illegal alien employee which was contingent upon his producing satisfactory evidence of his legal ability to work. The alien employee failed to respond because of his illegal status. The employer then discontinued benefits based upon a refusal of an offer of suitable gainful employment under Minn. Stat. §176.101. The court allowed the discontinuance of benefits based upon the refusal of an offer of gainful employment, and this decision was affirmed by the WCCA.

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. However, if the employee were to return to his or her native country and then request vocational rehabilitation and retraining, the employer and insurer in all likelihood would be obligated to provide these services under Minn. Stat. §176.102.

2. **Definitions of Injury and Disability**

An insured employee has sustained a compensable injury if he or she sustains an injury while working for an employer, which injury arose out of and in the course of his or her employment with his or her employer. There must be a sufficient nexus between the injury and the employment in terms of causation, and in terms of the time, place and circumstances of the injury.

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3 In this case, the employer and insurer had taken the employee back to work in a light-duty job at a wage loss. They then suspended the employee and gave him 48 hours to provide valid documentation of his eligibility to work in the United States. The employee notified the employer that he could not provide the requested documentation and was thereupon terminated from his job.
A. Personal Injury. Minn. Stat. § 176.011, subd. 16

Personal injury means an injury “arising out of and in the course of employment” and is inclusive of “personal injury caused by occupational disease.” Minn. Stat. § 176.011, subd. 16.

Personal injury has always included a specific traumatic injury or event, i.e. an injury “caused by accident.” However, since 1953 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. Forseen v. Tire Retreading Co., 271 Minn. 399, 136 N.W.2d 75 (1965).

The definition of “personal injury” encompasses the classic “Gillette injury,” where repetitive work activities over a period of time result in minute micro trauma which eventually results in or culminates in a disability and/or need for medical treatment. Gillette v. Harold, Inc., 101 N.W.2d 200 (1960).

1. Mental Injury. Personal injury includes mental, not just physical, injury. A physical injury or death caused by work-related mental stress beyond the ordinary day-to-day stress to which all employees are exposed is compensable. See, Middleton v. Northwest Airlines, 600 N.W.2d 707 (Minn. 1999), on remand, Middleton v. Northwest Airlines, 60 W.C.D. 445, 531 (2000), aff’d 617 N.W.2d 561 (Minn. 2000).

A personal injury includes consequential mental or psychological injuries. The Employee must prove both medical cause and legal cause.

**MEDICAL CAUSE.** The medical evidence establishes a causal connection between the work activities or work injury and the mental injury.

**LEGAL CAUSE.** The stress of the job which resulted in the mental injury was beyond the ordinary “day-to-day stress to which all employees are exposed.” See, Lockwood v. Independent School District #877, 312 N.W.2d 924 (Minn. 1981); Middleton v. Northwest Airlines, 600 N.W.2d 707 (Minn. 1999), on remand, affirmed 617 N.W.2d 561 (Minn. 2000).


Example: An employee sustains a compensable work-related physical injury and develops a consequential depression.
b. Mental/Physical Injury. If the on-the-job stress is of such magnitude that it causes a separately treatable physical injury, the mental injury is compensable.


In a mental stress physical injury situation, for the physical injury to be compensable, a consequential physical injury must be an independent physical event which is treated separately from the work-induced emotional condition rather than in conjunction with it. *Johnson v. Paul's Auto and Truck Sales*, 409 N.W.2d 506 (Minn. 1987). 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. However, if an employee under mental stress suffers physical manifestations of the mental stress injury, such as ticks, tremors, or cramps, which are not treated separately from the emotional condition, then the injury is not compensable.

c. Mental Only Injury. Minnesota is among a minority of jurisdictions which does not recognize as compensable a purely mental injury. If an employee sustains a work-related disability due solely to mental stress, without an accompanying physical injury, the mental injury is not compensable. *Lockwood v. Independent School District* 877, 312 N.W.2d 924 (Minn. 1981). A classic example in this case is where an employee, burdened by extreme work stress, goes on to suffer a consequential mental injury such as depression or schizophrenia. This mental injury alone is not compensable if unaccompanied by a separately treated physical injury or condition.

2. Occupational Disease. An employee who sustains disability because of an occupational disease has a compensable injury. See Minn. Stat. § 176.011, subs. 15 and 16. The most common examples of an occupational disease are work-related asbestosis,
mesothelioma, or other respiratory diseases caused by exposure to workplace chemicals or substances.

B. **Arising Out of and in the Course of Employment.**
   Minn. Stat. § 176.011, subd. 16

1. **Arising out of Employment.** The Minnesota Workers’ Compensation System is a no-fault system. However, there must be a requisite causal connection between the employment and the injury. An injury meets this requirement if it was caused by either:

   a. **Increased Risk.** The employment must expose the employee to a greater hazard than that confronted by:
      - the public generally or
      - the employee apart from work.


   or

   b. **Street Risk.** If an employee engaged in his job duties suffers an injury that comes from a hazard which originates upon, is connected with or referable to the use of the public street. This latter risk is generally the only positional risk theory of recovery that is consistently applied by Minnesota Workers’ Compensation Courts. *Auman v. Breckenridge Tel. Co.*, 246 N.W.2d 889 (Minn. 1933).

   However, in idiopathic fall cases (fall caused by pre-existing condition or unknown condition), the courts have on occasion found liability where there really is no evidence presented of any increased risk of such an injury from the employment.

   The Minnesota courts have consistently allowed recovery in cases where an employee falls at work, although generally this has been done on theory of an increased risk. The courts have reasoned that where the employee’s fall itself

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4 Please note that occupational diseases are subject to different time limits in terms of statute of limitations and notice requirements. See Section 4, A and B, below.
was caused by an idiopathic condition which had no relation to the employee’s employment, the injury will be compensable if the employee who falls because of the condition was placed by his employment in a position which aggravates the effects of the fall, resulting in an injury or death. See, Barlau v. Minneapolis Moline and Power and Implement Co., 9 N.W.2d 6 (Minn. 1943); O'Rouke v. Northstar Chemical, Inc., 281 N.W.2d 192 (Minn. 1979). For example, if an employee were to slip at work and fall into a vat of chemicals which result 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.

Also, in Minnesota, the courts have held that idiopathic falls on a flat surface are not compensable. See, Koenig v. North Star Landing, 54 W.C.D. 86 (W.C.C.A. 1996).

However, there have been cases where the Supreme Court appears to have applied nothing more than a positional risk test or appears to have disregarded the requirement that the injury must arise out of the employment. This occurred in a 1990 case of Starrett v. Pier Foundry, 488 N.W.2d 273 (Minn. 1992). In that case, the employee who had just arrived at work tripped on a wire coming from the dashboard of the vehicle he was riding in and fell in the employer’s parking lot, breaking his hip. The Supreme Court in upholding the award noted that travel between the employer’s parking lot and the main premises is considered to arise out of and in the course employment and coverage extends to a reasonable period of ingress and egress beyond the actual working hours. Noting the fact that the employee was on the employer’s premises and was coming to work when the injury occurred, the injury was found to be compensable even though there was no evidence that the work environment increased the risk of such an injury.5

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5 The Supreme Court did affirm a ruling that seemed to limit the defense of an idiopathic fall in Duchene v. Aqua City Irrigation, 58 W.C.D. 223 (W.C.C.A. 1998). In the Duchene case, the employee felt his knee pop as he was arising from the grass following a paid lunch break. Under the personal comfort doctrine, the “in the course of” requirement was satisfied. The employee had no prior condition with respect to the knee and, therefore, the condition was due to an unknown etiology. The Duchene court held that the employee’s knee condition resulted from a “neutral” risk and awarded benefits under an expanded positional risk test rather than the increased risk test. The employee was thus relieved from having to prove that he was exposed to a higher risk of injury during the lunch break or that his employment caused him to bend, slip or twist while standing up. However, the Bohlin v. St. Louis County case, 61 W.C.D. 69 (W.C.C.A. 2000), significantly narrowed the Duchene case. In Bohlin the employee felt a “pinch” in her back while exiting her vehicle in the company parking lot. Her foot had not actually touched the ground in Footnote continued on next page
2. In the Course of Employment, i.e. Time, Place and Circumstances.

Personal injury is compensable only if the employee was injured “while engaged in, on, or about the premises where the employee’s services required the employee’s presence as a part of such service at the time of the injury and during the hours of such service.” Minn. Stat. § 176.011(16).

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 the employment which benefit the employer. For example, the hours of service to the employee have been expanded to be inclusive of “a reasonable time of ingress to or egress from the work premises.” Blattner v. Loyal Order of Moose, 117 N.W.2d 570 (Minn. 1962).

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.

a. Travel to and from work. Travel to and from work is generally excluded from coverage. However, where the employer “regularly furnished transportation” to and from the place of employment, employees are covered while “being so transported.” Minn. Stat. § 176.011, subd. 16 (2000). This situation requires that the employer must have furnished the vehicle providing transportation, and the employer must be in direction and control of the vehicle (i.e. providing the driver). See, Bonfig v. Megarry Bros., 199 N.W.2d 796 (Minn. 1972).

b. Traveling employees covered portal to portal. 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. 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. Lundgaard v. State, 237 N.W.2d 617 (Minn. 1975).
2) Where the employee is traveling between work assignments or work places. *Faust vs. State*, 252 N.W.2d 855 (Minn. 1977).

3) Where the employee is involved in a dual purpose trip wherein a business purpose is a concurrent cause of the trip. *Rau v. Crest Fiberglass Industries*, 148 N.W.2d 149 (Minn. 1967). The employee will be covered “portal to portal,” including time periods involved in reasonable relaxation activities.

4) Where employee is involved on a special errand for the employer, he or she will be covered portal to portal. *Bengston v. Greening*, 230 Minn. 139, 41 N.W.2d 185 (1950); *Nehring v. Minnesota Mining and Manufacturing Co.*, 8 W.C.D. 321, 258 N.W. 307 (1935). A special errand exists if:

- There is an express or implied request that service be performed after normal work hours by an employee who has fixed hours of employment;
- The trip involved is an integral part of the service performed; and
- The work performed was not the type of work which was regular or reoccurring during normal hours of employment.

C. Covered Non-Work-Related Activities

The Worker’s Compensation Act, as interpreted by the judiciary, assumes that employees are not automatons or robots who will devote 100% of their time, energy and efforts to job activities. It is recognized that employees are human and they need to take breaks, to let off steam, and even need to engage in certain acceptable levels of misconduct or insubordination on the job. In many instances, injuries sustained while engaged in these ancillary or even insubordinate activities will be deemed compensable.

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6 It should be noted that if an employee significantly deviates from the work-related trip for purely personal reasons, he will not be covered during this significant deviation. *Falkum vs. Daniel Star and Staff*, 135 N.W.2d 693 (Minn. 1965). However, once the employee resumes the business purpose of the trip, coverage will resume. *Nehring v. Minnesota Mining and Manufacturing*, 258 N.W. 307 (Minn. 1935).

It should also be noted that reasonable relaxation activities during a business trip are covered and injuries sustained in reasonable relaxation activities which are not related to the service being provided to the employer and insurer shall be compensable. *Voight v. Rettinger Transportation Co.*, 306 N.W.2d 133 (Minn. 1981).
1. Injuries sustained during personal comfort activities. Employees who take a break and obtain a drink of water, go to the restroom or have a cigarette, etc., are covered while involved in such reasonable relaxation activities. Injuries sustained during these activities will be compensable unless the conduct shows a departure that is so great as to show an 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. *Eiffelt v. Red Owl Stores*, 296 Minn. 41, 046 N.W.2d 370 (1973).

2. Horseplay and fighting can be covered. 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. *See, Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W2d 876 (1960). 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. *Pedro v. Martin Baking Co.*, 58 N.W.2d 731 (Minn. 1953).

3. Violation of instructions. In many instances even a violation of an instruction or directive from the employer will not preclude coverage. The current rule in Minnesota is that an injury sustained by an employee while engaged in work activity that benefits the employer will be compensable unless:

   a. The employee committed a violation of an express prohibition.

   b. The express prohibition was of a specific act designated by the employer.

   c. The violation of the prohibition was not reasonably foreseeable by the employer.

   d. The violation of instruction resulted in injury.

   *Bartley v. C H Riding Stable Inc.*, 206 N.W.2d 660 (Minn. 1973); *Brown v. Arrowhead Tree Services*, 332 N.W.2d 28 (Minn. 1983).

   The foreseeability factor can also be known as the “wink-wink rule.” A violation of an instruction may be reasonably foreseeable by the employee 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
instructions. However, in *Otto v. Midwest of Cannon Falls*, 59 W.C.D. 25 (W.C.C.A. 1999), it was held that the fact that an employer had in process a disciplinary process 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. This disciplinary process was relevant to the fact of whether or not the violation of the prohibition was reasonably foreseeable.

4. **Death presumption.** In certain situations, the “in the course of” 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.

If the employee dies during the hours of service and at the place of employment, this death will be rebuttably presumed to have arisen out of and in the course of employment, even if the cause of the death remains unknown. *Lange v. Minneapolis/ St. Paul Metropolitan Airports Comm.*, 99 N.W.2d 915 (Minn. 1959). 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 or by a compensable street risk). Once the presumption is rebutted, then it drops out of the case and the burden of proof returns to the employee to prove that the death arose out of and/or in the course of the employment. *Williams v. Hoyt Construction Co.*, 306, 347 N.W.2d 339 (Minn. 1975).

5. In some cases, an injury is compensable if it arose out of **or** it occurred in the course of employment.

Generally, the employee must establish that a work-related injury both arose out of and in the course of employment. However, as the above-referenced death presumption demonstrates, there may be situations where only one of the requirements need be established and the other one will be presumed or found.

The courts have at times refused to apply the arising out of and in the course of requirements independently of one another and have analyzed them together so that the strengths in one of the entitlement factors may compensate for the deficiency in the other. *See, Bohlin v. St. Louis County*, 61 W.C.D. 69 (W.C.C.A. 2000), **aff’d mem.** 621 N.W.2d 459 (Minn. 2001). In *Bohlin*, the court discussed the *Duchene v. Aqua City Irrigation* case, 48 W.C.D. 223 **aff’d mem.** 577 N.W.2d 729 (Minn. 1998), and noted that “although the arising out of element was weak (unexplained knee injury), the in the course of connection was strong. Lunch breaks on the work
premises fall within the personal comfort doctrine and have long been recognized as an activity reasonably incident to and part of the work day, therefore, a work activity.” As such, Bohlin noted that the court in Duchene found a compensable injury despite the lack of or a weak “arising out of” situation.

6. Exclusions from Coverage

a. Personal assault. Minn. Stat. § 176.011, subd. 16. When an employee suffers an injury due to a personal assault by another person, the injury will not be compensable, even if it occurred during the time, place and circumstances of employment, if:

1) The assailant intended to injury the victim;
2) For reasons personal to the victim;
3) The assault was not directed against the victim as an employee of the employer; and
4) The assault was not directed against the victim because of the victim’s employment.

If the reason for the assault was due to the employee’s employment status, or due to the employee’s conduct as an employee, the injury will be compensable.

If the assault was 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.

Where the motivation of the assailant is unknown, then the injury sustained in the assault will be compensable. See, Foley v. Honeywell, Inc., 488 N.W.2d 268 (Minn. 1992).

b. Intentional self-infliction. If the employee intentionally injures himself or herself on the job, the injury generally is not compensable. Minn. Stat. § 176.021, subd. 1.

The burden of proof in establishing this exclusion is on the employer.

Exception: Death by suicide 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. See, Middleton vs.
Northwest Airlines, 600 N.W.2d 707 (Minn. 1999); Anderson v. Armour and Co., 101 N.W. 2d 435 (Minn. 1960).

c. Intoxication as proximate cause of injury. If the employee suffers a work injury while intoxicated, and the intoxication the **proximate cause** of the injury, then the employer will not be liable for compensation. Minn. Stat. § 176.021, subd. 1.

The burden of proof is on the employer to establish this defense.

The intoxication cannot be only a substantial contributing factor to the injury; it essentially must be the only cause.

3. **Workers’ Compensation Benefits Available**

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

One of the fundamental purposes of the workers’ compensation system is 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. Wage replacement benefits include temporary total disability, temporary partial disability, permanent total disability, and retraining benefits.

1. **Date of injury average weekly wage.** The linchpin of wage loss benefit calculations is the date of injury average weekly wage. The date of injury wage is utilized to calculate the various wage loss benefits. The purpose of the workers’ compensation benefits is to compensate the employee for the loss of earnings capacity. 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 which has been impaired or destroyed by the injury. This is usually done by analyzing what the employee’s wages or earnings were at the time of the injury. Sawczuk v. Special School District 1, 34 W.C.D. 282, 312 N.W.2d 435 (1981). The wages earned in the 26 weeks preceding injury are used to determine the date of injury average weekly wage.

There may be situations where 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. See, Knotz v. Viking Carpet, 37 W.C.D. 452, 361 N.W.2d 872 (1985); and Bradley v. Vic’s Welding, 39 W.C.D. 921, 405 N.W.2d 243 (1987).
REGULAR EMPLOYMENT. 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. Minn. Stat. § 176.011, subds. 3 and 18.

Another factor to consider is the existence of an employment contract. 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. See, Knotz v. Viking Carpet, 361 N.W.2d 872 (Minn. 1985).

IRREGULAR EMPLOYMENT. If the amount of the daily wage is irregular or difficult to determine, or if the employment is part time or the hours irregular, then the employee’s date of injury average weekly wage will be calculated as follows:

- Gross wages, vacation pay, and holiday pay actually earned in the 26 weeks preceding the injury divided by the total number of days in which such wages, vacation pay and holiday pay were earned equals daily wage.

- Total number of days that the employee actually performed work in the 26 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.

Daily wage multiplied by the number of days normally worked per week equals date of injury average weekly wage.

Minn. Stat. § 176.011, subds. 3 and 18.

EXAMPLE:  

A. Gross wages earned in 26 weeks preinjury $24,000.00  
B. Vacation and holiday pay earned in 26 weeks preinjury: $6,000.00  
Days actually worked in 26 weeks preinjury: 90  
Vacation days and holidays earned/taken in 26 weeks preinjury: 14  
Number of weeks actually worked by the employee 26 weeks preinjury: 24  

Daily wage: \[ \frac{30,000}{104 \text{ days}} = 288.46 \]  
Number of days normally worked per week: \[ \frac{90}{24} = 3.75 \text{ days per week} \]  
Date of injury average weekly wage: \[ 288.46 \times 3.75 \text{ days} = 1,081.72 \text{ per week} \]  

NOTE: Where the employment is in the construction industry, mining industry or any other injury where the hours of work are affected by seasonal conditions, then 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. Minn. Stat. § 176.011, subd. 3.

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For dates of injury prior to 10/1/00, in calculating the daily wage, include wages, salary, vacation pay, holiday pay and sick pay. However, do not include vacation days, holidays or sick days in calculating the number of days normally worked per week. See, Fougnier v. Boise Cascade Corp., 460 N.W.2d 1 (Minn. 1990). This had the effect of artificially increasing the date of injury wage. The statute was amended to eliminate this result on 10/1/00. Minn. Stat. § 176.011, subd. 3.
2. Definition of Wages. Salary and commission income are considered in calculating the date of injury wage. Additionally, the following forms of compensation are considered in calculating the date of injury average weekly wage:

a. Tips and Gratuities. These are included only if the employee accounts for them to the employer.\(^8\) Minn. Stat. § 176.011, subd. 3.

b. 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. Minn. Stat. § 176.011, subd. 3.

c. Allowances/Per Diems. Where employees receive per diem payments to compensate them for their travel expenses or 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, then the payments will be included in the wage calculation. See, Truesdale v. Dettman Trucking, Inc., 40 W.C.D. 12 (W.C.C.A. 1987); Cosgriff v. Duluth Firemen’s Relief Association, 233 Minn. 233, 46 N.W.2d 250 (1951).

d. Barter, Goods, Accommodations. The employee is not required 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. E.g., Aleckson v. Kennedy Motor Sales Co., 238 Minn. 110, 55 N.W.2d 696 (Minn. 1952). For example, the employee may be 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. The employee is receiving something of value from the employer, that being the use of the car for personal use, which results in saving wear and tear on his own car, maintenance expenses on his own car, and saving insurance costs on his own car. These savings or this value would be included in the employee’s date of injury wage at the value to the employee.

e. 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:

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\(^8\) In a situation where the employee is claiming tips and gratuities as income, you should check the employer records to see if the employee accounted for the tips and gratuities. You should obtain copies of the employee’s income tax returns to see if these tips and gratuities were included.
1) The payments do not go directly to the employee, but rather go to a fund on behalf of the employee;

2) The payments are not taxable as wages; and


f. 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 to the employee’s efforts. *Stewart v. Ford Motor Co.*, 474 N.W.2d 162 (Minn. 1991).


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

j. Vacation and holiday pay are included in the employee’s date of injury wage calculations. Additionally, days of vacation, sick time or leave pay which are taken in the 26 weeks preceding the injury will be included in calculating the date of injury wage.

k. Retroactive pay increases will be included in the calculation of the employee’s date of injury average weekly wage.

l. Overtime. If the overtime is occasional, it will not be considered in the weekly wage calculation. However, if the overtime is regular or frequent throughout the one year (rather than 26 weeks) prior to injury, it will be considered. Minn. Stat. § 176.011, subd. 18.
m. Multiple Employment Situations. If the employee is regularly employed by two or more employers 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. Minn. Stat. § 176.011, subd. 18. One will calculate the gross earnings from both jobs in the 26 weeks preceding injury, and divide them by the total number of weeks worked. *Hatner v. Glenwood Liberty*, 42 W.C.D. 16 (1989).

n. 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 that wage cannot be considered reflective of their potential earnings capacity. 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. See, *Bituminous Cas. Corp. v. Swanson*, 341 N.W.2d 285 (Minn. 1983).

A minor’s date of injury wage will be imputed at a level sufficient to produce the maximum compensation rate. For dates of injury prior to 10/1/92, the minor must have sustained a permanent partial disability in order to have the wage imputed. For dates of injury on or after 10/1/92, the minor must be permanently totally disabled because of the injury in order to have the benefit of this imputed wage. Minn. Stat. § 176.101, subd. 6.

With respect to apprentices, the date of injury average weekly wage will be imputed as a wage sufficient to produce the maximum compensation rate if the injury results in permanent total disability or compensable permanent partial disability. Minn. Stat. § 176.101, subd. 6.

EXAMPLE: An apprentice suffers a work-related injury which results in permanent partial disability. The apprentice’s actual earnings in the 26 weeks preceding his injury came out to $200 per week. However, because he is an apprentice, he will have an imputed wage for purposes of calculating benefits sufficient to give rise to the maximum compensation rate.

Maximum compensation rate: = $750

Imputed date of injury wage: $750 x 3/2 = $1,125
The above formulas 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 earnings power which has been impaired or destroyed because of the injury.” Bradley v. Vic’s Welding, 405 N.W.2d 243 (Minn. 1987). 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 26 weeks preceding injury and dividing them by the number of weeks actually worked. Brunkow v. Red Wing Shoe Co., 43 W.C.D. 232 (W.C.C.A. 1990).

Compensation judges have divided the total gross wages earned in the 26 weeks preceding injury by the total number of hours worked to obtain an average hourly wage and then multiplying that average hourly wage by a 40-hour work week. Decker v. Red Wing Shoe Co., 41 W.C.D. 763 (W.C.C.A. 1988).

B. Indemnity Benefits

1. Temporary Total Disability. Temporary total disability benefits are payable if the employee is totally disabled. 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 insubstantial income. Schulte v. C. H. Peterson Construction Co., 153 N.W.2d 130 (1967); Minn. Stat. § 176.101, subd. 1.

   a. Benefit Caps. At various times, temporary total disability benefits have been subjected to various caps or limitations.

      1) Dates of injury, 1951 to 1957: There was a benefit cap of 310 weeks of temporary total disability.

      2) Dates of injury, 1957 through 7/31/75: An employee could draw up to 350 weeks in temporary total disability benefits for an injury.

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9 Cost of living adjustments per Minn. Stat. § 176.645. Wage loss benefits are subject to cost of living adjustments under Minn. Stat. § 176.645. The initial onset date of a COLA and the COLA rate will be determined by the date of injury.
3) Dates of injury, 8/1/75 through 12/31/83: 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.

4) Dates of injury, 1/1/84 through 9/30/95: There was no specific cap on the employee’s benefits during this period of time. However, temporary total disability benefits would end 90 days after the employee had reached maximum medical improvement, notice of which was served and filed pursuant to statute, or 90 days after the expiration of an approved retraining plan.

However, this expiration 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 90 days after the employee had again reached maximum medical improvement, notice of which was served and filed per statute.

5) Dates of injury, 10/1/95 to 10/1/08. In 1995, the legislature imposed the most significant cap on temporary total disability benefits ever. Now, employees are limited to an absolute maximum of 104 weeks of temporary total disability benefits for an injury. Minn. Stat. § 176.101, subd. 1. It should be noted that if the employee is involved in a retraining plan approved under Minn. Stat. § 176.102, subd. 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.

6) Date of injury, 10/1/08 to present and continuing. The temporary total disability cap was increased to 130 weeks for dates of injury on or after 10/1/08. Minn. Stat. § 176.101, subd. 1k.

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.
1) Maximum Compensation Rate. The maximum compensation rate has varied from year to year. For dates of injury from 10/1/95 through 9/30/00, the maximum compensation rate was $615.00 per week. For dates of injury from 10/1/00 through 9/30/08, the maximum compensation rate was $750.00 per week. For dates of injury on or after 10/1/08, the maximum compensation rate was increased to $850 per week. Minn. Stat. § 176.101, subd. 1b.

2) Minimum Compensation Rate. For dates of injury from 10/1/95 through 9/30/00, the minimum weekly compensation rate was the lesser of $104.00 per week or the injured worker's actual weekly wage. For dates of injury on or after 10/1/00, the minimum compensation rate is $130.00 per week. Minn. Stat. § 176.101, subd. 1c.\textsuperscript{10}

c. Circumstances resulting in the termination of temporary total disability benefits. Minn. Stat. § 176.101, subd. 1(e) through (l):

1) Attainment of 130-week cap.\textsuperscript{11} Minn. Stat. § 176.101, subd. 1k.

2) End of disability.

3) Withdrawal from labor market.

4) Nondiligent job search.

5) 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. Temporary total disability benefits which are terminated for this reason may never be recommenced.

\textsuperscript{10} The maximum compensation rate applies to temporary total disability, temporary partial disability, permanent total disability, and retraining benefits. The minimum compensation rate applies to temporary total disability and retraining benefits. 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.

\textsuperscript{11} For dates of injury occurring from 10/1/95 through 9/30/08, the TTD cap was 104 weeks.
6) 90 days post maximum medical improvement. The 90-day maximum medical improvement period commences on the earlier of:

- The date that the employee receives written medical report indicating he has attained maximum medical improvement; or
- The date that the employer and insurer serves the report on the employee and the employee’s attorney.

MAXIMUM MEDICAL IMPROVEMENT:
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 Minn. Stat. § 176.101, subd. 1(e)(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. A determination that an employee has reached maximum medical improvement shall not be rendered ineffective by the worsening of an employee’s medical condition and recovery therefrom. Minn. Stat. § 176.011, subd. 25. Under Minn. Rule 5221.0410, subp. 3A, the following factors shall be considered by the health care provider as an indication that maximum medical improvement has been reached:

- No significant lasting improvement in employee’s condition and significant recovery or lasting improvement is unlikely even with ongoing treatment;
- All diagnostic evaluations and treatment options that may be expected to improve or stabilize the employee’s condition have been exhausted or declined;
- Any further treatment is primarily for purposes of maintaining the employee’s current condition or is palliative in nature; and
- Any further treatment is primarily for the purposes of temporary or intermittent symptom relief.

The following factors are deemed an indicator that maximum medical improvement has not occurred:

- The employee’s condition is significantly improving or is likely to significantly improve with or without additional treatment.
- There are diagnostic evaluations which could be performed that have reasonable probability of changing or adding to the treatment plan leading to significant improvement.
- There are treatment options that have not been applied that may reasonably be expected to improve the employee’s condition.

7) If the employee has received temporary total disability benefits and has returned to work, and then is later **terminated for misconduct**, then temporary total

8) Non-cooperation with medical treatment.

9) Non-cooperation with vocational rehabilitation.


Per Minn. Stat. § 176.101, subd. 1(l), the above-referenced grounds to terminate temporary total disability benefits are not exhaustive.

If the employee’s temporary total disability benefits are discontinued or terminated, in a number of circumstances, they can be recommenced. If the employee is laid off or terminated for reasons other than misconduct, and the lay-off or termination occurs prior to 90 days post maximum medical improvement, benefits may be recommenced. Minn. Stat. § 176.101, subd. 1(e)(1).

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. However, the employee must actually be employed at the time he or she is totally disabled from work for benefits to recommence. 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. Minn. Stat. § 176.101, subd. 1(e)(2).

An employee whose benefits have been terminated for withdrawal from the labor market or a nondiligent 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 90 days post maximum medical improvement and prior to the payment of 104 weeks. Minn. Stat. § 176.101, subs. 1(f) and (g).


a. Temporary partial disability benefits are payable to an employee who, because of the effects of a work-related injury, has suffered a diminished earnings capacity. This
benefit is designed partially to make up that differential. To be entitled to temporary partial disability, the following factors must exist:

1) The employee has sustained a work-related injury resulting in disability;

2) The employee is able to work subject to the disability;

3) The employee has sustained an actual loss of earnings capacity due to the work injury.


b. Benefit Caps

1) Dates of injury prior to 1957: Benefits are not payable beyond 310 weeks after the date of injury.

2) Dates of Injury: 1957 through 7/31/74: No benefits are payable beyond 350 weeks from the date of injury.

3) Dates of Injury: 8/1/74 through 9/30/77: There was a cap of 350 weeks on temporary partial disability benefits. Thus, the employee could receive temporary partial disability benefits even beyond 350 weeks post injury until the 350-week cap had been reached.

4) Dates of Injury: 10/1/77 through 9/30/92: There were no caps on temporary partial disability benefits. 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.

5) Dates of Injury: 10/1/92 to present and continuing: Temporary partial disability benefits now are limited to 225 weeks per injury. Additionally, no temporary partial disability benefits are payable more than 450 weeks after the date of injury. Therefore, even if the employee has not yet been paid 225 weeks, no further temporary partial disability benefits will be due
once the 450 week post injury date has been attained.\footnote{12}

c. Calculation of Temporary Partial Disability

Temporary partial disability benefits are two-thirds of the difference between the date of injury average weekly wage and the employee’s earnings capacity.\footnote{13}

\begin{tabular}{|l|}
\hline
\textbf{EXAMPLE:} \\
Date of injury average weekly wage $1200 per week \\
Employee’s earnings capacity $500 per week \\
\hline
$1200 \\
- 500 \\
\hline
700 \\
\hline
x 2/3 \\
\hline
TPD Rate: \$466.66 \\
\hline
\end{tabular}

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 52 weeks. This method would be acceptable in situations where the employee may be working at a wage loss in some weeks and may be earning far in excess of his date of injury wage in other weeks. To calculate temporary partial disability exposure on a week-by-week basis would be unfair and would not be truly reflective of the employee’s earnings capacity. \textit{Nutter v. United Parcel Service}, 58 W.C.D. 183 (1997) aff’d mem. 577 N.W.2d 226 (1998).

d. Maximum and Minimum Compensation Rate.

1) Maximum Compensation Rate. The maximum compensation rate has varied from year to year. For dates of injury from 10/1/95 through 9/30/00, the maximum compensation rate was $615.00 per week.\footnote{12}

$1200 - 500 \\
\hline
700 \\
\hline
x 2/3 \\
\hline
TPD Rate: \$466.66 \\
\hline

\footnote{12} 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. Minn. Stat. § 176.102, subd. 11.

\footnote{13} The employee’s actual earnings post injury are presumed to be the employee’s earnings capacity. However, this is a rebuttal presumption. \textit{Jellum v. McGough Construction Co.}, 46 W.C.D. 182, 474 N.W.2d 718 (1992); \textit{Wesley v. City of Detroit Lakes}, 36 W.C.D. 518, 344 N.W.2d 614 (Minn. 1984).
For dates of injury from 10/1/00 through 9/30/08, the maximum compensation rate was $750.00 per week. For dates of injury on or after 10/1/08, the maximum compensation rate was increased to $850 per week. Minn. Stat. § 176.101, subd. 1b.

2) Minimum Rate. No minimum.

e. Athlete/Entertainer’s Presumption. Temporary partial disability benefits will be reduced by the amount that the employee’s post injury wage plus the temporary partial disability benefit rate exceeds 500% of the statewide average weekly wage. Minn. Stat. § 176.101, subd. 2(c).

3. Permanent Total Disability

Permanent total disability 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. Benefits continue under this section until the employee is proven to be retired, dies, or reaches a statutorily designated presumed retirement age which the employee is unable to rebut.

a. Date of Injury: Pre 10/1/92. For dates of injury occurring on or before 10/1/92, there were two factors of entitlement:

1) Irrebuttable presumption of permanent total disability.

- Total and permanent loss of sight of both eyes
- Total loss of both arms at shoulder
- Loss of both legs so close to hips that no effective artificial member is possible
- Complete and permanent paralysis
- Total and permanent loss of mental faculties.

Minn. Stat. § 176.101, subd. 4.

2) Any other injury that totally incapacitates the employee from working in an occupation that brings the employee an income. Minn. Stat. § 176.101, subd. 4.

An employee is considered totally disabled if his or her physical condition, in combination with his or her age, training, and experience, and the type of work available in his or her community, cause the employee to be unable to secure anything greater than sporadic employment resulting in an

b. Date of Injury: 10/1/92 to 9/30/95.
Factors of entitlement:

1) Irrebuttable presumption of permanent total disability.

2) 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, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Minn. Stat. § 176.101, subd. 5(a)(1).

c. Dates of Injury on or after 10/1/95: Crossing the Threshold.

The factors of entitlement for permanent total disability were changed substantially for dates of injury occurring on or after 10/1/95 by the enactment of Minn. Stat. § 176.101, subd. 5. The analysis now has become a three-tiered analysis:

1) Irrebuttable presumption of permanent total disability. 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.

2) The employee must meet one of the following PTD thresholds\(^{14}\):

- 17% whole body permanent partial disability; or
- 15% whole body permanent partial disability, and employee was at least 50 years of old on date of injury; or
- 13% whole body permanent partial disability; and employee at least age 55 as of date of injury; and employee has not completed 12th grade or obtained a GED.

Minn. Stat. § 176.101, subd. 5(2).

\(^{14}\) 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 (1997), *sum. affd.*, 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.
If the employee meets one of the thresholds under subpart (2) above, then one moves on to step 3.

3) *Schulte* factors: The employee’s physical disability, in combination with his or her disability, age, education, experience and training causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Minn. Stat. § 176.101, subd. 5.

d. Sometimes One Can Have Their Cake and Eat it Too: Working While Drawing Permanent Total Disability.

1) If the employee is irrebuttably presumed to be permanently and totally disabled pursuant to Minn. Stat. § 176.101, subd. 4, the employee will be eligible for permanent total disability 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. *Ford v. Kruckeberg Roofing & Sheetmetal*, 241 N.W.2d 653 (Minn. 1976); *Anderson v. Kulzer Construction*, 51 W.C.D. 512, 526 N.W.2d 627 (Minn. 1994).

2) The employee may still be eligible for permanent total disability status while working if the job is so sporadic in hours and results in such insubstantial income that it cannot be deemed substantial gainful employment. *Hengemuhle v. Long Prairie Jaycees*, 37 W.C.D. 233, 358 N.W.2d 54 (Minn. 1984); *Hempel v. Speed-O-Lag Chemical*, 40 W.C.D. 682 (W.C.C.A. 1982); *Stebbins v. Dodge County Service Co.*, 244 N.W.2d 55 (Minn. 1976).

Whether the employee is substantially and gainfully employed is a fact question. Factors commonly relied upon in determining whether or not the employee’s employment will preclude a finding of permanent total disability 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
  • Date of injury

e. Retirement Presumption – Permanent Total Disability Is Not Always Permanent.

1) Dates of injury prior to 1/1/84.

For dates of injury occurring prior to 1/1/84, there is no retirement presumption. 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. McGlish v. Pan-O-Gold Baking Co., 336 N.W.2d 538 (Minn. 1983). The mere receipt of Social Security retirement benefits without more was held insufficient to establish a retirement. Henry v. Sears, Roebuck and Co., 286 N.W.2d 720 (Minn. 1979).

2) Dates of injury: 1/1/84 to 9/30/92.

Any employee who received Social Security old age and survivor’s insurance or retirement benefits was presumed to be retired, which would thus terminate an entitlement to permanent total disability benefits. Minn. Stat. § 176.101, subd. 8. This presumption was in fact easily rebuttable by the employee. The presumption did not apply if the employee was receiving Social Security disability benefits. The employee essentially was required only to establish that he or she would not have retired but for the injury.

Retirement factors included:

• Employee’s intent with respect to retirement.
• Type of work being performed
• Presence or absence of pension or retirement plan
• Financial adequacy of the employee’s retirement arrangements
• Sufficiency of the employee’s financial resources and retirement
• Employee’s age and work history
• Willingness to forego Social Security retirement benefits based on income offset
• Family work history
• Common retirement age in industry
• Whether application was made for Social Security retirement benefits before or after onset of permanent total disability status
• Job search
• Corroborating lay testimony.


3) Dates of injury: 10/1/92 to 9/30/95.

Due to ambiguous legislative draftsmanship, there was no retirement defense for dates of injury occurring between 10/1/92 and 9/30/95. Minn. Stat. § 176.101, subd. 8, provided that temporary total disability shall cease at retirement. However, there was no reference to permanent total disability benefits ending upon retirement. The Supreme Court interpreted the statute to mean that there is no retirement presumption in PTD cases. Behrens v. City of Fairmont, 53 W.C.D. 20, 533 N.W.2d 854 (Minn. 1995).

4) Date of injury on or after 10/1/95.

The statute was amended yet again to provide that permanent total disability benefits shall cease at age 67 due to a presumed retirement from the labor market. This presumption is rebuttable, and the mere statement that the employee is not retired is insufficient in and of itself to rebut the presumption of retirement, although it may be considered with other evidence. Minn. Stat. § 176.101, subd. 4. Liniewicz v. Muller Family Theaters, 06-253 slip op. 3/21/07 (W.C.C.A.).

f. Calculation of Permanent Total Disability Benefits In Coordination with Government Disability/Old Age and Survivor’s Benefits.

1) Permanent Total Disability Rate.

PTD benefits are payable at the rate of 66-2/3 of the date of injury average weekly wage, subject to statutory maximums and minimums.
Maximum PTD rate is equal to the maximum weekly compensation rate for temporary total disability benefits ($850.00 per week for dates of injury on or after 10/1/08).

The minimum PTD rate for dates of injury occurring on or before 10/1/92 is the same as the minimum compensation rate for temporary total disability. The minimum PTD rate for dates of injury occurring on or after 10/1/95 is 65% of the statewide average weekly wage.\(^\text{15}\) Minn. Stat. § 176.101, subd. 4.

2) Offset for Government Disability/Survivor Benefits.

After the payment of $25,000.00 to permanent total disability benefits, PTD benefits shall be reduced by the amount of any:

a) Government disability benefits (this includes Social Security disability benefits paid to the disabled worker’s children). \textit{Sundby v. City of St. Peter}, 693 N.W.2d 206 (Minn. 2005).\(^\text{16}\)

b) Government old age or retirement benefits
c) Government survivor’s insurance benefits
d) PERA benefits
e) Police/Fireman’s Relief Association benefits
f) State retirement benefits

The offset provisions result in significant savings to employers and insurers in long-term permanent total disability cases. Due to these offset provisions, employers and insurers in some cases may have an economic incentive to stipulate to permanent total

\(^\text{15}\) Minimum permanent total disability rate:

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<thead>
<tr>
<th>Date</th>
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<td>10/1/95</td>
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</table>

\(^\text{16}\) The government disability benefits \textbf{must} be occasioned by the same injury or injuries which give rise to the workers’ compensation payments. 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. \textit{Sundby v. City of St. Peter}, 693 N.W.2d 206 (Minn. 2005).
disability 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 and temporary partial disability, and possibly weekly permanent partial disability benefits as permanent total disability benefits by stipulation or judicial determination to secure the earliest onset date of the offset.

3) Supplementary Benefits - Dates of Injury Prior to 8/1/95.

The economic impact of the aforementioned offset provisions on the employee was ameliorated significantly by supplementary benefits payable pursuant to Minn. Stat. § 176.132. This provision was repealed for dates of injury occurring on or after 8/1/95. Supplementary benefits were designed to guarantee that the employee received a minimum indemnity benefit of at least 65% of the statewide average weekly wage in long-term total disability situations.

a. Date of injury: Pre-10/1/83.

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.

All periods were required to be caused by the same injury. Minn. Stat. § 176.132, subd. 1(a).

b. Date of injury: 10/1/83 to 9/30/92.

Supplementary benefits were payable:

- After payment of 104 weeks of temporary total disability or permanent total disability benefits, or
- If the employee received temporary total disability benefits more than 208 weeks
after the first date of total disability.

All periods of disability were required to be caused by the same injury. Minn. Stat. § 176.132, subd. 1(b).

The 208-week eligibility clause was applicable only if the employee was receiving temporary total disability benefits more than 208 weeks after the injury. Therefore, if the employee was receiving permanent total disability 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. Werkman v. Emmanuel Nursing Home, 49 W.C.D. 275 (W.C.C.A. 1993).

c. Date of injury: 10/1/92 to 10/1/95.

Supplementary benefits were payable:

- After payment of 208 weeks of temporary total disability or permanent total disability benefits, or

- If the employee received permanent total disability benefits more than 208 weeks after the date of first disability. Minn. Stat. § 176.132, subd. 1(c).


EXAMPLE:

- Dates of Injury: Pre-10/1/95.

Once $25,000.00 in permanent total disability 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 65% of the statewide average weekly wage. The employer and insurer will pay both the net permanent total disability 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.
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.

EXAMPLE:

- Dates of Injury: On or after 10/1/95.

Supplementary benefits were repealed by the legislature for dates of injury occurring on or after 10/1/95. Additionally, at that time, the minimum permanent total disability rate was increased to a minimum rate of no less than 65% of the statewide average weekly wage. The employee is entitled the minimum PTD rate only until $25,000.00 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. *Vezina v. Best Western Inn Maplewood, 627 N.W.2d 324* (Minn. 2001).

EXAMPLE

- The following illustrates the significant economic differences between the PTD statute for dates of injury pre 10/1/95 and for dates of injury from and after 10/1/95:

<table>
<thead>
<tr>
<th></th>
<th>PRE 10-1-95</th>
<th>POST 10-1-95</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOI AWW</td>
<td>$500.00/week</td>
<td>$500.00/week</td>
</tr>
<tr>
<td>PTD Rate</td>
<td>$333.33</td>
<td>$333.33</td>
</tr>
<tr>
<td>Supp. Benefit Rate</td>
<td>$442.00</td>
<td>N/A</td>
</tr>
<tr>
<td>SSDI</td>
<td>$200.00</td>
<td>$200.00</td>
</tr>
<tr>
<td>PTD Comp Rate</td>
<td>$333.33</td>
<td>$442.00</td>
</tr>
<tr>
<td>Less: SSDI</td>
<td>$200.00</td>
<td>$200.00</td>
</tr>
<tr>
<td>Net PTD Comp Rate</td>
<td>$133.33</td>
<td>$242.00</td>
</tr>
<tr>
<td>Supp Benefit Rate</td>
<td>$442.00/week</td>
<td>N/A</td>
</tr>
<tr>
<td>Less Offset PTD Comp Rate</td>
<td>$133.33</td>
<td>N/A</td>
</tr>
<tr>
<td>Comp Rate</td>
<td>$308.67</td>
<td>N/A</td>
</tr>
<tr>
<td>Net Supp. Benefit Rate</td>
<td>$308.67</td>
<td>N/A</td>
</tr>
<tr>
<td>5% Reduction per MSA §176.32 subd. 2(3)</td>
<td>$293.23 (round up to nearest dollar)</td>
<td></td>
</tr>
<tr>
<td>TOTAL PAYABLE</td>
<td></td>
<td>TOTAL PAYABLE</td>
</tr>
<tr>
<td>a. Net PTD</td>
<td>$133.33</td>
<td>a. Net PTD</td>
</tr>
<tr>
<td>b. Supp. Benefit</td>
<td>$294.00</td>
<td></td>
</tr>
<tr>
<td>Total Weekly Payment</td>
<td>$427.33</td>
<td></td>
</tr>
</tbody>
</table>
Rather, it compensates the employee for the loss of function of a body part. This has been the case for dates of injury occurring on or after 8/1/74. Minn. Stat. § 176.101, subd. 2a.

Since 1/1/84, 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. See Minn. Rules 5223.0010 through .0250 for permanent partial disability ratings for dates of injury between 1/1/84 through 6/30/93. See Minn. Rules 5223.0300 through .0650 for permanent partial disability ratings for dates of injury from 7/1/93 to the present and continuing.

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 percentage rating for the functional impairment. Minn. Stat. § 176.105, subd. 4; Minn. Stat. § 176.021(3), and Arouni v. Kelleher Construction, Inc., 41 W.C.D. 42, 426 N.W.2d 860 (1988). The disability ratings must be based upon objective medical evidence such as consistent and reproducible clinical findings, objectively verifiable spasm or diminished range of motion, or specific surgical procedures. Arouni v. Kelleher Construction, Inc., 41 W.C.D. 42, 426 N.W.2d 860 (1988).

The 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, this impairment is still compensable. The Supreme 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. See, Weber v. City of Inver Grove Heights, 43 W.C.D. 471, 461 N.W.2d 918 (1990).

The Weber decision was codified by Minn. Stat. § 176.105(1)(c) which states:

If any 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.

a. Dates of Injury: 1/1/84 through 9/30/95 - Two-tiered system of compensation.

For dates of injury from 1/1/84 through 9/30/95, permanent partial disability could be paid in one of two different ways. The determining factor was whether or not the employee received an economically and suitable “3(e) job” pursuant to
Minn. Stat. § 176.101, subd. 3(e), prior to the expiration of 90 days post maximum medical improvement.

If the employee did not obtain or was not provided with such a job within this 90-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/insurer within the 90 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.

<table>
<thead>
<tr>
<th>PPD Schedules: Effective for dates of injury 1/1/84 to 9/30/00</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Impairment Compensation</strong></td>
</tr>
<tr>
<td>% Disability</td>
</tr>
<tr>
<td>0-5</td>
</tr>
<tr>
<td>26-30</td>
</tr>
<tr>
<td>31-35</td>
</tr>
<tr>
<td>36-40</td>
</tr>
<tr>
<td>41-45</td>
</tr>
<tr>
<td>46-50</td>
</tr>
<tr>
<td>51-55</td>
</tr>
<tr>
<td>56-60</td>
</tr>
<tr>
<td>61-65</td>
</tr>
<tr>
<td>66-70</td>
</tr>
<tr>
<td>71-75</td>
</tr>
<tr>
<td>76-80</td>
</tr>
<tr>
<td>81-85</td>
</tr>
<tr>
<td>86-90</td>
</tr>
<tr>
<td>91-95</td>
</tr>
<tr>
<td>96-100</td>
</tr>
</tbody>
</table>

**EXAMPLE:**
Assume: 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:

\[ 20\% \times 75,000 = 15,000 \]

If the employee, however, would be entitled to **economic recovery compensation**, permanency would be substantially greater:

\[ 20\% \times 600 \text{ weeks} \times 400 = 48,000 \]
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 90 days post MMI.

b. This two-tiered system was repealed by the legislature effective 10/1/95. Thereafter, permanency would be paid utilizing only the impairment compensation schedule.

c. PPD schedule for date of injury on or after 10/1/00.

The impairment compensation schedule was modified to account for inflation effective for dates of injury on or after 10/1/00. Following is the impairment compensation schedule for purposes of calculating permanency for dates of injury on or after 10/1/00:

<table>
<thead>
<tr>
<th>% Disability</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 5.5</td>
<td>$75,000</td>
</tr>
<tr>
<td>5.5 to less than 10.5</td>
<td>80,000</td>
</tr>
<tr>
<td>10.5 to less than 15.5</td>
<td>85,000</td>
</tr>
<tr>
<td>15.5 to less than 20.5</td>
<td>90,000</td>
</tr>
<tr>
<td>20.5 to less than 25.5</td>
<td>95,000</td>
</tr>
<tr>
<td>25.5 to less than 30.5</td>
<td>100,000</td>
</tr>
<tr>
<td>30.5 to less than 35.5</td>
<td>110,000</td>
</tr>
<tr>
<td>35.5 to less than 40.5</td>
<td>120,000</td>
</tr>
<tr>
<td>40.5 to less than 45.5</td>
<td>130,000</td>
</tr>
<tr>
<td>45.5 to less than 50.0</td>
<td>140,000</td>
</tr>
<tr>
<td>50.5 to less than 55.5</td>
<td>165,000</td>
</tr>
<tr>
<td>55.5 to less than 60.5</td>
<td>190,000</td>
</tr>
<tr>
<td>60.5 to less than 65.5</td>
<td>215,000</td>
</tr>
<tr>
<td>65.5 to less than 70.5</td>
<td>240,000</td>
</tr>
<tr>
<td>70.5 to less than 75.5</td>
<td>265,000</td>
</tr>
<tr>
<td>75.5 to less than 80.5</td>
<td>315,000</td>
</tr>
<tr>
<td>80.5 to less than 85.5</td>
<td>365,000</td>
</tr>
<tr>
<td>85.5 to less than 90.5</td>
<td>415,000</td>
</tr>
<tr>
<td>90.5 to less than 95.5</td>
<td>465,000</td>
</tr>
<tr>
<td>95.5 up to and including 100</td>
<td>515,000</td>
</tr>
</tbody>
</table>

Permanent partial disability is not payable concurrently with temporary total disability benefits. PPD payments are to commence only after temporary total disability has expired.
PPD payments are payable concurrently with other wage loss benefits. Minn. Stat. § 176.021, subd. 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. Minn. Stat. § 176.111.

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 date). Borchardt v. Biddick, 33 W.C.D. 664, 306 N.W.2d 817 (1981).

a. What is a dependent?

There are two categories of dependents, inclusively presumed dependents and actual dependents.

1) Conclusively presumed dependents

- Spouse, unless the spouse and decedent were voluntarily living apart at the time of the injury or death

- Children under the age of 18, or a child under the age of 25 who is regularly attending as a full-time student a high school, college or university, or vocational or technical training school

- Children in excess of the age of 18 if physically or mentally incapacitated from earning.

Minn. Stat. § 176.111 (1) and (2).

2) Actual Dependents

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 are considered actual dependents.

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. See Minn. Stat. § 176.111, subd. 3 and subd. 4.

Those partially supported shall receive their benefits at a rate which 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. See, *Miller v. Bohn Refrigerator Co.*, 8 W.C.D. 190, 255 N.W. 835 (1934).

b. Burial expense

For dates of death on or after 4/28/00, the maximum amount that will be payable as burial expense is $15,000. Minn. Stat. § 176.111 (18).17

c. Payments if no surviving dependents

If an employee dies without any surviving dependents, the employer shall pay to the estate of the deceased employee the sum of $60,000. Minn. Stat. § 176.111, subd. 22. This provision applies for dates of death on or after 4/28/00.

For dates of death prior to 4/28/00 where there are no surviving dependents, the employer, 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.

d. Calculation of dependency benefit for statutorily presumed dependents

1) Dependent spouse with no dependent child: Weekly dependency benefits equivalent to 50% of the employee’s date of injury daily wage for a period of ten years. Minn. Stat. § 176.111(6).

2) Dependent spouse with one dependent child: 60% of the daily wage at the time of the injury until the child

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17 For dates of death from 10/1/83 to 10/1/92, the burial expense could not exceed $2,500. For dates of death occurring between 10/1/92 and 4/27/00, the maximum burial expense was $7,500.
ceases to be a dependent. At the time the child loses dependency status, the surviving spouse shall be paid benefits at a rate of 50% of the date of injury daily wage at the time of death. This benefit will last for a period of ten years. Minn. Stat. § 176.111(7).

3) Dependent spouse with two or more dependent children: The dependency benefit payable to the spouse and the children is 66 2/3% of the date of injury daily wage. Once the last child loses dependency status, the dependent surviving spouse shall be paid 50% of the date of injury daily wage for a period of ten years. Minn. Stat. § 176.111(8).

6. Medical Expenses

An injured employee is entitled to receive reimbursement for any medical treatment which was reasonable and necessary for the cure or relief of the effects of the employee's work injury. See Minn. Stat. § 176.135.

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, surgical supplies, crutches and apparatus, artificial members, and even in certain circumstances Christian Science treatment in lieu of medical treatment, chiropractic, medical supplies, etc. It also includes medical appliances and supplies and durable medical equipment. Minn. Stat. § 176.135, subd. 1.

The Minnesota treatment parameters (Minn. Rules 5221.6010 through 8900) 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, neck and thoracic, as well as upper extremities. 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. See, Asti v. Northwest Airlines, 59 W.C.D. 53, 588 N.W.2d 737 (1999); Stulen v. Halvorson Co., slip op. (W.C.C.A. 4/6/99). (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, i.e., but for the ongoing treatment the employee would not be able to work.

The current treatment parameters apply to any date of injury, but only apply to dates of treatment provided on or after 1/5/95.
Additionally, the parameters are not applicable to medical treatment for an injury or condition for which primary liability has been denied. Minn. Rule 5221.6020, subp. 2. The treatment parameters will not apply to even an admitted work injury if benefits are later denied on the basis that the injury was merely a temporary aggravation. *Oldenburg v. Philips & Temro Corp.*, 60 W.C.D. 8 (1999), summarily aff’d 606 N.W.2d 445.

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.

The purpose of vocational rehabilitation is intended to:

- Restore the injured employee so that the employee may return to a job related to the employee’s former employer; or
- Return to a job in another work area which produces an economic status as close as possible to that which the employee would have enjoyed without disability.

Minn. Stat. § 176.102, subd. 1(b).

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 re-employment. Economic status shall be measured not only by an opportunity for immediate income, but also by an opportunity for future income. Minn. Stat. § 176.102, subd. 1(b).

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 seeking skills training, work adjustment, labor market surveys, on-the-job training and retraining. See Minn. Stat. § 176.102.

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:
1) 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;

2) Cannot reasonably be expected to return to suitable gainful employment with the date of injury employer; and

3) 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.

Minn. Rule 5220.0100 (22).\(^{18}\)

b. Retraining

This is a separate benefit that is rarely provided for employees due to the fact that the vast majority of employees is 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.

However, in certain situations, an employee may not be employable without the provision of retraining. Minn. Stat. § 176.102.

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

1) The reasonableness of retraining compared to the employee’s return to work with the employer or through job placement;

2) The likelihood of the employee succeeding in a formal course of study given the employee’s abilities and interests;

\(^{18}\) 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 (11).
3) The likelihood that retraining will result in a reasonably attainable employment; and

4) The likelihood that retraining will produce an economic status as close as possible to that which the employee would have enjoyed without the disability.


c. Retraining benefits include:

1) Retraining benefits of 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;

2) Reasonable cost of tuition, books, travel, custodial daycare, board and lodging when rehabilitation requires residence away from the employee’s customary residence;

3) Reasonable cost of travel and custodial daycare during the job interview process;

4) Reasonable costs of moving expenses if a job is found in a different area.

Minn. Stat. § 176.102, subd. 9, and subd. 11.

d. Notice Requirements in re Retraining

1) Dates of injury from 10/1/95 to 9/30/00.

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.
The employer and insurer are obligated to give the employee notice of the right to request retraining before 80 weeks of temporary total or temporary partial disability benefits has been paid, otherwise the filing requirements for the employee will be extended.

2) Dates of injury from 10/1/00 to 9/30/08.

- Any request for retraining must be filed by the employee with the Commissioner before 156 weeks of any combination of temporary total disability or temporary partial disability benefits has been paid.

- The employer and insurer must give the injured employee notice of the 156-week limitation for filing a request for retraining before 80 weeks of temporary total disability or temporary partial disability compensation has been paid, otherwise the filing requirements for the employee will be extended.

Minn. Stat. § 176.102, subd. 11(d).

3) Dates of injury 10/1/08 to present and continuing.

- The employee must file a Request for Retraining with the Commissioner before 156 weeks of any combination of temporary total disability or temporary partial disability benefits have been paid.

- The employer and insurer remain obligated to give the insured notice of the 208-week limitation for filing a Request for Retraining before payment of 80 weeks of temporary total disability or temporary partial disability. Otherwise, the filing requirements for the employee will be extended.

Minn. Stat. § 176.102, subd. 11d.

4. Distinction Between Occupational Disease and Injury Claims

Prior to 1921, only injuries caused by “accident” were compensable. The Minnesota Workers’ Compensation Act was amended in 1991 to include as a compensable injury occupational diseases.
In 1973, the Workers’ Compensation Act eliminated the requirement of an “accident” resulting in occupational disease.

The term “occupational disease” is given a lengthy and convoluted definition under Minn. Stat. § 176.011, subd. 15.

There are basically two types of occupational diseases. One type is a “personal injury caused by occupational disease.” Minn. Stat. § 176.011, subd. 16.

Another is “the disablement of an employee resulting from an occupational disease.” Minn. Stat. § 176.66.

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.

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. See, Forseen v. Tire Retreading Company, 271 Minn. 399, 136 N.W.2d 750 (1965).

However, if one makes claim for a personal injury caused by occupational disease, then one need only prove that the workplace exposure was only a substantial contributing cause of the occupational disease. Tyler v. Fegler Power Service, 45 W.C.D. 457 (1991); Bertrand v. API, Inc., 37 W.C.D. 544, 365 N.W.2d 222 (Minn. 1985); Olson v. Executive Travel MSP, Inc., 437 N.W.2d 645 (Minn. 1989).

A. Notice. Minn. Stat. § 176.141

For personal injury, the employee must give notice of the work injury no later than 180 days after the injury date. However, in an occupational disease situation, the employee has up to three years after knowledge of the cause of the injury and the injury resulting in disability to give notice.

B. Statute of Limitations. Minn. Stat. § 176.151

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 or if no First Report of Injury is filed, the employee must file a claim for a work injury within six years after the date of the injury.

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.

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. 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.

C. Disablement

An occupational disease does not become compensable until an employee becomes disabled under Minn. Stat. § 176.66, subd. 1.

The concept of disablement has been expanded by legislative amendment and court decision over the years. Disablement can mean the date that the employee becomes disabled from work; the date the employee becomes disabled from earning full wages at work (*Notch v. Victory Granite Company*, 28 W.C.D. 252, 238 N.W.2d 426 (Minn. 1976)); the date that the employee takes a different job at reduced wages or requests a modification of job duties due to the occupational disease (*Green v. Boise Cascade*, 38 W.C.D. 301, 377 N.W.2d 294 (Minn. 1985); *Lundmark v. Nokomis Sheet Metal*, 45 W.C.D. 213 (1991)).

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). *Moes v. City of St. Paul*, 39 W.C.D. 675, 402 N.W.2d 520 (Minn. 1987).

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. In that case, an employee who has contracted the occupational disease is eligible to receive medical treatment under Minn. Stat. § 176.135(5) even if the employee has not suffered any inability to earn full wages. Minn. Stat. § 176.135, subd. 5.

D. Effective Law

With respect to personal injuries, the law in effect on the date of injury controls. *Joyce v. Lewis Bolt & Nut Co.*, 412 N.W.2d 304 (Minn. 1987).

However, for occupational diseases, the law in effect on the date of disablement controls entitlement to benefits. *Stillson v. Peterson & Hede Company*, 42 W.C.D. 1000, 454 N.W.2d 430 (Minn. 1990).

E. Apportionment

For personal injuries, wage loss, vocational rehabilitation, medical and dependency benefits are apportionable pursuant to *Goetz v. Bulk Commodity Carriers*, 27 W.C.D. 297, 227 N.W.2d 888 (Minn. 1975). 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 Minn. Stat. § 176.105, subd. 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. 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. Minn. Stat. § 176.66, subd. 10 (10/1/83).

5. **Specific Occupational Diseases**

“Disease” has traditionally been broadly defined by the courts. 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.” *The American Heritage Dictionary of the English Language* (1980).

Disease is “literally 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.” *Taber’s Cyclopedic Medical Dictionary* (1981).

Occupational diseases are conditions that can be caused by specific exposure to chemicals in the workplace. Occupational diseases can also include disease that arises 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 employment. Minn. Stat. § 176.66.

“Peculiar to the employment” means that exposure to the condition which results in disablement results in an increased risk of the occupational disease. It does not go so far as to say that the exposure must be “unique to the occupation.” This 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. *See, Sandy v. Walter Butler Ship Builders, Inc.*, 221 Minn. 215, 21 N.W.2d 612 (1946).

Ordinary diseases of life to which the general public is equally exposed away from employment may be compensable where the disease is an incident of the occupational disease or where contracting the disease or exposure to the disease is peculiar to the occupation in which the employee was engaged. Minn. Stat. § 176.011, subd. 15.
FOLLOWING ARE RECOGNIZED COMPENSABLE AND WORK-RELATED OCCUPATIONAL DISEASES IN MINNESOTA

a. Asbestosis
b. Mesothelioma as a result of asbestos exposure
d. Coronary artery disease (Courtney v. City of Orono, 424 N.W.2d 295 (Minn. 1988); Moes v. City of St. Paul, 39 W.C.D. 675, 412 N.W.2d 520 (Minn. 1987))
e. Influenza - type B (Olson v. Executive Travel MSP, 41 W.C.D. 7983, 437 N.W.2d 645 (Minn. 1989))
f. Cancer (if the disease follows as an incident of the occupation) (Rademacher v. FMC Corporation, 38 W.C.D. 195, 375 N.W.2d 809 (Minn. 1985)). Employee was exposed to ultraviolet lights used to treat a work-related dermatitis and developed cancer due to this exposure.
g. Occupational asthma
h. Chemically induced bronchitis (Buck v. 3M Company, 45 W.C.D. 108 (1991), summarily affirmed by Minnesota Supreme Court, 8/16/91)
i. Coronary sclerosis due to work stress (Schwartz v. City of Duluth, 264 Minn. 514, 119 N.W.2d 822 (1963))
k. Carpal tunnel syndrome (Jenson v. Kronick’s Floor Covering, 309, 541, 245 N.W.2d 230 (1976))
l. Pulmonary emphysema
m. Pulmonary fibrosis
n. Goodpasture’s Syndrome (a rare disease that attacks membranes of the kidneys and alveolar lining cells of the lungs caused by working with heated glue) (Boldt v. Josten’s, Inc., 261 N.W.2d 82 (Minn. 1977)).