

# Minnesota Workers' Compensation New Law Update

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## Attorney Fees

(Minn. Stat. § 176.081, subd. 1)

- Contingency Fees
  - Old Law (dates of injury before 10/1/2013): 25% of first \$4,000.00, and 20% of next \$60,000.00, maximum of \$13,000.00
  - New Law (dates of injury on or after 10/1/2013): 20% of first \$130,000.00, maximum of \$26,000.00

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## **Partial Reimbursement of Attorney Fees**

(Minn. Stat. § 176.081, subd. 7)

- Partial Reimbursement of Fees
  - Old Law: 30% of excess of first \$250.00, including fees on indemnity benefits, Roraff fees (medical dispute fees), Heaton fees (rehabilitation dispute fees) and 176.191 fees (dispute between insurers)
  - New Law: 30% of excess of first \$250.00 only on the contingency fees from indemnity benefits

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## **Maximum Compensation Rate**

(Minn. Stat. § 176.101, subd. 1(b)(1))

- Old Law: maximum rate set by statute (most recently \$850.00)
- New Law: Maximum 102% of statewide average weekly wage for period ending December 31 of preceding year.

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## **Cost of Living Adjustments**

(Minn. Stat. § 176.645)

- Since 1995, not to exceed 2%
- New Law: not to exceed 3%, and not less than 0% (2010 adjustment was -1.14 and benefit payments actually reduced)

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## **Job Placement Services**

(Minn. Stat. 176.102, subd. 5)

- Old Law: no limit to weeks of job placement services
- New Law: no more than 20 hours per month, and no more than 26 weeks

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## **QRC/Disability Case Management**

(Minn. Stat. § 176.102, subd. 10)

Codifies longstanding decision of WCCA that a QRC may not function as a disability case manager and statutory rehabilitation provider on the same claim.

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## **Medication Pain Contracts**

(Minn. Stat. § 176.83, subd. 5)

Requires DOLI Commissioner to adopt rules to establish criteria for long-term use of opioids or other scheduled medications including pain contracts between injured worker and prescribing health care provider.

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**OCCUPATIONAL DISEASE  
(Mental Claims)**

(Minn. Stat. § 176.011, subd. 15 and 16)

For dates of injury on or after October, 1, 2013, occupational disease includes a mental impairment, narrowly defined to include a diagnosis of post-traumatic stress disorder by licensed psychiatrist or psychologist.

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**Mental Impairment:  
Post-traumatic Stress  
Disorder under Minn. Stat.  
Sec. 176.011, subd. 15  
(2013)**

Prepared by Mark A. Kleinschmidt, Esq.

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## ***Lockwood v. ISD #877, 312 NW2d 924***

(Minn. 1981)

- High School principal of fast growing Buffalo School District
- Cluster of genuine work stressors with workday ending at 11pm
- Symptoms: sleep, weight loss, temper, physical outbursts with students, embezzlement.
- Expert Testimony:
  - Manic Depressive Disorder - stress triggered chemical reaction
  - Schizophrenia - triggered by criminal proceedings

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- Holding: Mental stress (without physical trauma) causing mental injury is not compensable under MS 176.011, subd. 16.

"If [the legislature] wishes to extend WC coverage for mental-mental cases, it is free to articulate that intent clearly. In the absence of a clearly expressed legislative intent on the issue, we will not hold such disability to be compensable."

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- Effective 10/1/2013, Minn. Stat. § 176.011, subd. 15 (a):
  - Mental impairment as defined in paragraph (d)
- Mental impairment is **not** considered a disease if it results from a:
  - disciplinary action
  - work evaluation
  - job transfer
  - layoff
  - demotion
  - promotion
  - termination
  - retirement
  - or similar action taken in good faith by the ER

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- **Minn. Stat. § 176.011, subd. 15 (d):**
  - For purposes of this chapter, “mental impairment” means a diagnosis of post-traumatic stress disorder (PTSD) by a licensed psychiatrist or psychologist.
  - For purposes of this chapter, PTSD means the condition described in the most recently published edition of the DSM by the APA. (i.e. DSM 5)
  - Does **not** mean
    1. Depression Disorders - 296; 300.4; 293.83; 311
    2. Anxiety Disorders – 309.21; 300.29; 300.23; 300.01; 300.02; 300.9; 300.00
    3. OCD – 300.3; 294.8; 300.3
    4. Other Traumatic Disorders:
      - a) Reactive Attachment Disorder (child) – 313.89
      - b) Disinhibited Social Engagement Disorder (child) – 313.89
      - c) Acute Stress Disorder – 308.3 (immediate symptoms up to a month)
    5. Adjustment Disorders

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## DSM-5

- A. Traumatic Event (TE)
- B. Exposure to actual or threatened:
  - 1. Death
  - 2. Serious injury
  - 3. Sexual violence
- C. Exposure:
  - 1. Direct experience
  - 2. Witnessed
  - 3. Learned of to close family/friends (violent or accident)
  - 4. Repeated or extreme
- D. See *Gillette v. Harold, Inc.*

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- A. Intrusive symptoms associated with the TE.
- B. Avoidance of stimuli associated with the TE.
- C. Negative alterations in cognition and mood.
- D. Marked alterations in arousal and reactions.
- E. Duration of B, C, D, and E is **more than one month**.
- F. Disturbance causes clinically significant distress or impairment in social, occupational, or other important area of functioning.
- G. Disturbance is not attributable to meds or ETOH or another medical condition.

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## Investigation to Determine Compensability

### A. 14 days to pay or deny

- Condition excluded by subd. a
- Condition not properly diagnosed by statutory provider (i.e. psychiatrist or psychologist)
- **Not** a TE (threat of death, serious injury or sexual violence)
  - Not experienced
  - Not witnessed
  - Not a close friend or family member
  - Not traumatic (e.g. startled coming around a corner)
  - Not repeated exposure or extreme exposure

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## Investigation to Determine Compensability

### B. 30 day follow-up (grief counselors, managers)

- No present intrusive symptoms
- Not prolonged
- Not marked reaction

### C. 60 day follow-up (managers)

- Any evidence of persistent avoidance (external) – avoids people, places, activity, objects, situations to remind

### D. 90 day follow-up

- Any negative alterations
- Any alterations in arousal (e.g. concentration, sleep disturbance)

### E. Any evidence of disqualifying causes: ETOH; meds; another medical condition. Any evidence of malingering.

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## Workers' Compensation Hypothetical Scenarios

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- Greg and Sally work side-by-side at a cabinet making facility. Sally is hostile to Greg, always cutting him down for any minor mistakes he makes, calling him an imbecile and similar terms on a daily basis. Their boss offers to transfer Greg to another station in a different department. Greg takes the transfer.
- The day after he accepts the transfer, he begins treating with a psychiatrist who diagnoses PTSD. Greg develops facial tics every time he encounters Sally and begins taking prescribed anti-depressants.
- **Are Greg's medical bills for said treatment compensable?**

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- While there is no perfect answer, any litigation over this claim would involve whether PTSD was properly diagnosed (DSM-5 requires exposure to a traumatic event involving actual or threatened death or serious injury), and whether the transfer to another work station precludes compensability.
- Attacking the diagnosis is the stronger defense, as Greg would likely testify his condition was a result of Sally's behavior and not as a result of the job transfer.

- Tony has worked for Anderson & Sons for 40 years. In the past several months, his supervisors have begun badgering him to retire/voluntarily resign his employment.
- Tony submits his resignation and then begins treatment for depression, as diagnosed by a nurse practitioner. He alleges the depression is a result of the months badgering leading up to his resignation and files a workers' compensation claim for lost wages and payment of medical bills.
- Tony does not have PTSD, but the IME confirms the depression and causation. **Is this compensable?**

- Tony has been diagnosed with depression, not PTSD. The statute allows a “mental-mental” claim only if it is for PTSD diagnosed by a licensed psychiatrist or psychologist.
- Depression remains non-compensable in Minnesota unless it is causally related to a physical injury.

- Bob and Tom work for Roof-Roof Roofers as laborers. Bob has worked there for 15 years; Tom was hired just one year ago. The two have become good friends.
- Tom is subsequently promoted to foreman, a job that Bob has had his eye on for some time. Out of jealousy, Bob begins treating Tom with hostility, calling him derogatory names, and falsely criticizing Tom's work.
- Tom starts seeing a counselor and is diagnosed with PTSD. He files a workers' compensation claim for payment of medical bills. **Is this compensable?**

- Tom's problems begin with the fact that his diagnosis comes from a counselor, not a licensed psychiatrist or psychologist as the statute requires.
- And, as in the first hypothetical, there is a question regarding whether PTSD was properly diagnosed without any exposure to a traumatic event involving actual or threatened death or serious injury.
- Further, there is an argument that Tom's PTSD is a result of his employer's good faith promotion, which would bar his claim.

- Betsy is sexually harassed by her boss, Jacob. He has never made a physical overture, but makes repeated sexual comments to her in front of others.
- Jacob demotes Betsy and she develops PTSD. **Given the exclusive remedy provision set forth in Minn. Stat. § 176.031, would her only option be to pursue a workers' compensation claim?**

- Even if Betsy had a *prima facie* “mental-mental” injury, the answer to this question remains to be seen, as the issue has not yet been litigated or decided by the courts.
- Further investigation is necessary to determine who diagnosed the PTSD, whether the demotion was made in good faith, and whether the PTSD is a result of the demotion or the sexual harassment.

- If Betsy is transferred and develops PTSD, would she be prohibited from bringing a workers’ compensation claim?

- Similar to the above question, additional investigation would be needed to determine whether the employer acted in good faith when transferring Betsy, whether her PTSD was diagnosed by a licensed psychiatrist or psychologist, and whether it was the result of the transfer or the sexual harassment.

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## **Arising Out Of and In the Course Of Employment**

**Presented by Richard W. Schmidt, Esq.**

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**Increased Risk Test:** the employee must show that the injury was caused by an increased risk to which the employee, distinct from the general public, was subjected to by his or her employment. 1 A. Larson & L. Larson, § 6.30.

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**Positional Risk Test:** the employee must show that the obligations or incidents of the employment placed him in the particular place at the particular time that he was injured by some neutral risk or hazard. *United Fire & Casualty Co. v. Maw*, 510 N.W.2d 241 (Minn. Ct. App. 1994).

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**Work-Connection Test:** a certain minimum level of work-connection must be established; if the “in the course” test is weak but the “arising out of” test is strong, the necessary minimum quantum of work-connection will be met, as it is also if the “arising” test is weak and the “course” factor is strong; but if both elements are weak, the minimum connection to the employment will not be met.

### *Midas v. Coborn's Inc.*

(Jan. 16, 2008)

- **FACTS:** EE worked in the floral dept. at a grocery store. Injured left knee when she landed on hard floor. Injury occurred 70 ft. from floral dept. EE was performing a normal floral dept. duty. EE testified that it felt like her feet stuck to the floor on a floral preservative.
- **BASIS FOR DENIAL:** ER and IR denied liability based on the injury being idiopathic.

## ***Midas v. Coborn's Inc.***

(Jan. 16, 2008)

- **WC JUDGE HOLDING:** Injury did arise out of and in the course of employment as a result of her foot sticking to the floor. Even if the EE had simply tripped over her own foot as alleged, the injury would still be compensable in that the tripping would be mere negligence which is not a basis for a denial.

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## ***Midas v. Coborn's Inc.***

(Jan. 16, 2008)

- **WCCA HOLDING:** Affirmed. Although the arising out of factor may be weaker, the in the course of factor is very strong. Court did not address the rationale offered by the WC judge re: negligence.

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## ***Lester v. Allina Health System***

(Oct. 14, 2008)

- **FACTS:** EE was a registered nurse. She parked in the hospital's parking ramp and just after passing through a door between the concrete ramp and carpeted skyway, she fell and severely twisted her right ankle. The incident report stated the EE did not trip on anything, but her shoe scuffed the carpet causing her to lose her balance. She said she was walking very quickly which may have contributed to the incident.

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## ***Lester v. Allina Health System***

(Oct. 14, 2008)

- **BASIS FOR DENIAL:** ER admitted that the injury occurred in the course of the EE's employment in the sense that it was an ingress to the ER's facility. They denied the claim based on the injury not arising out of the employment.
- **WC JUDGE HOLDING:** the injury did not arise out of the EE's employment.

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## ***Lester v. Allina Health System***

(Oct. 14, 2008)

- **WCCA HOLDING:** Affirmed. The EE gave various statements, testimony and explanations regarding the cause and/or mechanism of her fall. The fall was unexplainable. Possibilities include toe stubbing, tripping over something, tripping over her own feet, a misstep, and others. The EE did not establish that the injury was caused by an increased risk to which the EE, as distinct from the general public, was subjected to by her employment.

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## ***Lester v. Allina Health System***

(Oct. 14, 2008)

- **DISSENT:** In the instance of an unexplained injury on the job, I would adopt the positional risk doctrine.

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## ***Dykhoff v. Xcel Energy***

(Nov. 29, 2012)

- **FACTS:** EE arrived at premises of ER wearing two-inch wooden heels, was walking toward a conference room when she fell, dislocating her knee. The area was flat, dry and free of debris. It was not slippery.
- **BASIS OF DENIAL:** ER denied liability arguing EE sustained an idiopathic injury, relying on *Koenig*.

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## ***Dykhoff v. Xcel Energy***

(Nov. 29, 2012)

- **WC JUDGE HOLDING:** Injury did not arise out of an in the course of employment. Applied increased risk test.

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## ***Dykhoff v. Xcel Energy***

(Nov. 29, 2012)

- **WCCA HOLDING:** Reversed. While increased risk test is the primary test applied to analyze arising out of element, citing *Bohlin* said it is not the only test. Noted positional risk test, citing *Duchene*. Then said proper analysis requires balancing arising out of and in the course to determine if sufficient "work connection." Held that even though arising out of element was weak, in the course element was strong. So minimum work-connection was established.