

Limitation Of Attorney Fees (Minn. Stat. § 176.081, subd. 1)

Prepared by John T. Thul, Esq.

Currently

Attorney is entitled to 25% of the first \$4,000.00 of compensation awarded to the employee, and 20% of the next \$60,000.00 of compensation awarded to the employee, for a maximum of \$13,000.00 in attorney fees.

New Law (for employee injuries from and after October 1, 2013)

Attorney is entitled to 20% of the first \$130,000.00 of compensation awarded to the employee, for a maximum of \$26,000.00 in attorney fees.

Reminder

The Minnesota Supreme Court decision in *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132 (Minn. 1999), will still provide a basis for a potential claim for attorney fees in excess of \$26,000.00, based upon the following "seven *Irwin* factors:"

1. The amount involved;
2. The time and expense necessary to prepare for trial;
3. The responsibility assumed by counsel;
4. The expertise of counsel;
5. The difficulty of the issues;
6. The nature of the proof involved;
7. The results obtained.

Partial Reimbursement Of Attorney Fees To Employee

(Minn. Stat. § 176.081, subd. 7)

Prepared by John T. Thul, Esq.

Currently

Pursuant to the language of Minn. Stat. § 176.081, Subd. 7, an employee is entitled to an award of 30% of attorney fees paid in excess of the first \$250.00 of attorney fees. However, since the statute did not specifically limit this payment to **contingency** attorney fees, the Minnesota Supreme Court found in *Irwin v. Surdyk's Liquor*, 599 N.W2d 132 (Minn. 1999), that this payment to the employee was also owed on the payment of other hourly "add-on" attorney fees, such as medical dispute *Roraff* attorney fees and vocational rehabilitation dispute *Heaton* attorney fees that are paid by the Employer and Insurer.

New Law (for Employee injuries from and after October 1, 2013)

The partial reimbursement of attorney fee payment to an employee is now calculated **only** on the **contingency** attorney fees payable from an employee's compensation benefits; this is effected by the following sentence now being added to the end of Minn. Stat. § 176.081, Subd. 7:

This subdivision shall apply only to contingent fees payable from the employee's compensation benefits, and not to other fees paid by the employer and insurer, including but not limited to those fees payable for resolution of a medical dispute or rehabilitation dispute, or pursuant to section 176.191.

Maximum Compensation Rate (Minn. Stat. § 176.101, subd. 1(b)(1))

Prepared by John T. Thul, Esq.

Currently

Since 1995, the maximum weekly compensation rate has been set by statute. For example, \$615.00 (effective 10/1/95), \$750.00 (effective 10/1/00), and \$850.00 (effective 10/1/08).

New Law (for employee injuries from and after October 1, 2013)

Commencing on October 1, 2013, and on each October 1 thereafter, the maximum weekly compensation rate will be 102% of the statewide average weekly wage (SAWW) for the period ending December 31 of the preceding year. For example, the SAWW as of December 31, 2011 was \$916.00; assuming theoretically that the SAWW as of December 31, 2012 rises to \$1,000.00, then the maximum weekly compensation rate will be \$1,020.00 (i.e., 102% of \$1,000.00). There is no change in the minimum weekly compensation rate; this remains set by statute (§176.101, subd. 1(c)) at \$130.00 per week or the employee's actual weekly wage, whichever is less.

Please see <http://www.doli.state.mn.us/WC/RatesSaww.asp> for up-to-date information on statewide average weekly wage, compensation rates, and cost of living adjustment amounts.

Cost of Living Adjustments (Minn. Stat. § 176.645)

Prepared by John T. Thul, Esq.

Currently

Since 1995 the first adjustment of benefits was deferred until the fourth anniversary of the date of injury, and no adjustment could exceed 2% a year.

New Law (for employee injuries from and after October 1, 2013)

The first adjustment of benefits will now be earlier and will now occur on the third anniversary of the date of injury. Also, the maximum adjustment will now increase from 2% to 3%. No adjustment shall be less than 0%; adding this 0% "floor" eliminates what happened in 2010 when the adjustment was -1.14%, and benefit payments were actually reduced.

Job Placement Services

(Minn. Stat. § 176.102, subd. 5)

Prepared by John T. Thul, Esq.

Currently

Vocational rehabilitation job placement services (a/k/a job development services) are not limited to a specific maximum number of hours per month, or a maximum weekly duration.

New Law (for employee injuries from and after October 1, 2013)

Minn. Stat. § 176.102, subd. 5(b) was added to the statute, and it reads as follows:

For purposes of this subdivision, job development means systematic contact with prospective employers resulting in opportunities for interviews and employment that might not otherwise have existed, and includes identification of job leads and arranging for job interviews. Job development facilitates a prospective employer's consideration of a qualified employee for employment. Job development services provided by a qualified rehabilitation consultant firm or a registered rehabilitation vendor must not exceed 20 hours per month or 26 consecutive or intermittent weeks. When 13 consecutive or intermittent weeks of job development services have been provided, the qualified rehabilitation consultant must consult with the parties and either file a plan amendment reflecting an agreement by the parties to extend job development services for up to an additional 13 consecutive or intermittent weeks, or file a request for a rehabilitation conference under section 176.106. The commissioner or compensation judge may issue an order modifying the rehabilitation plan or make other determinations about the employee's rehabilitation, but must not order more than 26 total consecutive or intermittent weeks of job development services.

Basically, job placement services (a/k/a job development services) by a vendor are now limited to no more than 20 hours per month, and the duration of job placement services is now limited to a maximum total of 26 consecutive or intermittent weeks. Also, once 13 consecutive or intermittent weeks of job placement services have been provided, the QRC must either get an agreement from all parties to extend job placement services for up to an additional 13 weeks, or file a Rehabilitation Request. However, even at a Rehabilitation Conference, the specialist or compensation judge may not order more than 26 total consecutive or intermittent weeks of job placement services.

QRC/Disability Case Management (Minn. Stat. § 176.102, subd. 10)

Prepared by John T. Thul, Esq.

Minn. Stat. § 176.102, subd. 10 has been amended to add subd. 10(b) which reads as follows:

An individual qualified rehabilitation consultant registered by the commissioner must not provide any medical, rehabilitation, or disability case management services related to an injury that is compensable under this chapter when these services are part of the same claim, unless the case management services are part of an approved rehabilitation plan.

This statute would appear to basically codify language from a longstanding decision of the Minnesota Workers' Compensation Court of Appeals, In re the QRC Registration of David Scorse, 56 W.C.D. 18 (W.C.C.A 1996), wherein it was noted that a QRC may not function as a disability case manager and a statutory rehabilitation provider on the same employee claim. This statutory amendment is effective October 1, 2013, for all dates of injury.

Medication Pain Contracts (Minn. Stat. § 176.83, subd. 5)

Prepared by John T. Thul, Esq.

Minn. Stat. § 176.83, subd. 5(b) has been amended to indicate that the commissioner shall now adopt rules to establish:

Criteria for the long-term use of opioids or other scheduled medications to alleviate intractable pain and improve function, including the use of written contracts between the injured worker and the health care provider who prescribes the medication.

These criteria hopefully will assist in controlling the long-term use of narcotic medications. The statute is to be effective October 1, 2013, and applies to employees, for all dates of injury, who receive treatment after the rules are adopted.

OCCUPATIONAL DISEASE (Minn. Stat. 176.011, subd. 15 and 16)

Prepared by Whitney L. Teel, Esq.

- For dates of injury on or after October 1, 2013, occupational disease includes a mental impairment
 - Mental impairment's narrow definition: "a diagnosis of post-traumatic stress disorder by a **licensed psychiatrist or psychologist.**"
 - "post-traumatic stress disorder" (PTSD) means the condition as described in the most recently published edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") by the American Psychiatric Association.
 - Exception: mental impairment 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 employer.
 - Physical stimulus resulting in mental injury remains compensable
 - Mental stimulus resulting in physical injury remains compensable
- What is the current definition of PTSD in the DSM?
 - Fifth edition published May 27, 2013
 - Section 309.81 overviews diagnostic criteria for PTSD:
 - Exposure to actual or threatened death, serious injury, or sexual violence
 - by either directly experiencing or witnessing said event, or learning of said event to close friend or family member, OR
 - experiencing **repetitive** or extreme exposure (example, police officers repetitively exposed to facts of child abuse)
 - Experience of intrusion symptoms due to traumatic event after event occurs (examples: involuntary memories, dreams, feels as if event reoccurring)
 - Avoidance of stimuli associated with event
 - Negative alterations in cognitions and mood with event (examples: memory loss, negative beliefs, distorted memories-blaming self, etc., interest in participating in normal activities, detachment, etc.)

- Marked alterations in arousal and reactivity associated with traumatic events
- Duration of disturbance more than one month
- Disturbance causes clinically significant distress or impairment in life
- Disturbance not attributable to physiological effects of substance
- If questioning diagnosis, need a licensed psychiatrist or psychologist to review

Arising Out Of And In The Course Of Employment: Determination of compensability in light of *Dykhoff v. Xcel Energy*

Prepared by Richard W. Schmidt, Esq. and Jennifer R. Augustin, Esq.

One of the more litigated areas of Minnesota workers' compensation is that involving so-called "idiopathic" injuries. *Dorland's Illustrated Medical Dictionary* 874 (29th Ed. 2000) defines "idiopathic" as "of unknown cause or spontaneous origin."

Historically, in dealing with an idiopathic injury Minnesota courts have generally utilized the increased risk test.

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.

Koenig v. North Shore Landing, 54 W.C.D. 86 (1996). Koenig fell for unknown reasons onto a flat surface of slate tiles while at work. He could not recall why or how he fell. Several doctors opined the most likely cause of his fall was a seizure related to alcohol withdrawal. This was the first time the W.C.C.A. was asked to address whether injuries resulting from striking a flat hard surface after a so-called "idiopathic" fall are compensable. It was also the first time the court adopted a clear test to determine compensability of idiopathic injuries. The court held that the effects of an idiopathic fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall (such as height, near machinery or sharp corners, or in a moving vehicle). Regarding idiopathic falls onto flat surfaces, the court chose to adopt the majority position outlined by Larson's treatise on workers' compensation, which provided that such injuries are not injuries which arise out of employment, and denied compensability indicating a flat floor, regardless of its softness or hardness, is the ordinary standard for workplaces and does not pose a unique or unusual hazard.

However, Minnesota courts have also applied the positional risk test.

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).

Duchene v. Aqua City Irrigation, 58 W.C.D. 223 (1998). Duchene was a laborer. At the beginning of each work day, he reported to the employer's shop and was driven to the work site in a company truck, then taken back to the shop at the end of the work day. He was paid from the time he reported to the shop until his return. On the date of injury, he was at the work site sitting on the grass during his lunch break. As he finished and was preparing to go back to work, he stood up and heard a loud pop in his left knee. He could recall no particular

incident that caused his injury and there was no evidence that he had a pre-existing condition or weakness. In its decision, the court cited Larson, stating that “arising out of” cases fall into three categories:

1. Those involving risks that are distinctly associated with the employment;
2. Those involving risks personal to the employee; and
3. Neutral risk cases where the hazard is neither obviously related to the employment nor strictly personal to the employee.

Specifically included in the third category are unexplained accidents. These cases give rise to peculiar problems of proof since the risk or hazard giving rise to the injury is simply unknown. Therefore, it is impractical to apply the increased risk test. The court, therefore, adopted the positional risk test for the third category of cases. Because Duchene’s injury occurred when he was engaged in activities incidental to his employment, at the time of his employment, and at the employer’s work site, the court found his injury arose out of his employment.

The courts continued to struggle with the appropriate test of compensability. In 2000, the W.C.C.A. was presented with *Bohlin v. St. Louis County*. For the first time, the court adopted a test other than the increased or positional risk test.

Work-Connection Test: In any given case, 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.

Bohlin v. St. Louis County, 61 W.C.D. 69 (2000). Bohlin drove to work and parked her truck in the employee parking lot. She opened the driver’s side door with her left hand. As she turned to exit the vehicle, she felt something “pinch” in her back. The court struggled with what test to apply to determine whether the injury arose out of the employment. They first addressed the increased risk test and determined the only connection between the employment and the injury was the fact that the employee’s vehicle was parked on the employer’s parking lot. There was no evidence that parking lot was the source of the injury-producing risk. Thus, she failed the increased risk test. They then looked to alternative tests.

The court noted that the positional risk test had been applied in cases involving a neutral risk occurring off the employment premises (i.e., hit by car crossing public street), in cases where the injury-producing risk is truly neutral (i.e., struck by lightning, hit by a stray bullet, random assault), and in cases where the specific circumstances of the injury are unknown. It was determined that Bohlin’s injury did not fit any of these types of cases. She was on the employer’s premises at the time of the injury. And because she neither identified any particular risk or hazard nor presented evidence as to the cause of her injury, she failed to show an employment-related neutral risk or that the cause of her injury was unknown.

A failure to prove the cause of injury does not make the injury unknown; Bohlin simply failed to provide any evidence of the cause of her injury.

The court cautioned that *Duchene* does not support the unqualified application of a positional risk test. Rather, to establish the necessary work-connection, the employee must prove the injury both arose out of and in the course of the employment. While these two requirements express two different concepts, they are not independent, but are elements of a single test of work-connection. If one element is weak but the other strong, the necessary minimum quantum of work-connection will be met. If both elements are weak, the minimum connection to the employment will not be met. The court seemed to retroactively explain that *Duchene* involved a compensable injury because the "in the course of" element was strong. *Duchene* was engaged in activity recognized by case law as incidental to the employment, i.e., an on-the-premises lunch break.

For *Bohlin*, the arising out of element was weak because the mechanism of injury was simply unknown. The in the course of element was also weak because her activities at the time of injury were akin to coming and going from work and, as a general rule, injuries sustained while coming to or going from work are not compensable. Thus, Bohlin's injury failed the work-connection test and was not compensable.

Over the years, the courts have been inconsistent in citing *Bohlin*, sometimes citing *Bohlin* while stating that the primary test for analyzing the "arising out of" element is the increased risk test and other times citing *Bohlin* in applying the work-connection test.

Dykhoff v. Xcel Energy, slip op. (W.C.C.A. Nov. 29, 2012). Dykhoff had just arrived at the headquarters of her employer wearing two-inch wooden heels, and was walking back toward a conference room when she fell, dislocating her knee. The area where she fell was flat, dry and free of debris. It was not slippery. Because Dykhoff failed to show that her injury was caused by an increased risk related to her employment, the compensation judge denied her claim. The W.C.C.A. reversed. The court explained that while the increased risk test is the primary test applied in Minnesota to analyze the arising out of element, it is not the only test. While the court indicated that no one comprehensive definition can be fashioned to fit all cases addressing whether an injury arises out of an in the course of employment, it nonetheless held that the proper test is the work-connection analysis. Because there was no dispute that Dykhoff fell at the employer's headquarters when she was specifically require to be there for training purposes, the "in the course of" element was strong. So, even though the "arising out of" element was weak, any deficiency was outweighed by the strength of the "in the course of" element, and the minimum work-connection had been established.

Dykhoff is currently on appeal at the Minnesota Supreme Court. Oral arguments were heard on June 3, 2013. Counsel for the employer argued that the increased risk test is the law of the land and that the W.C.C.A. had improperly taken upon itself to extend the

work connection test because it felt it would be unjust to deny benefits simply because the employee could not explain why she had fallen. It was argued that under the facts of the case, the employee had failed to prove any causal connection or increased risk. Counsel for the employee argued that each case is different, distinct, and must stand on its own facts. In *Dykhoff*, counsel for the employee argued that to apply the increased risk test would be unfair because when there is an unexplained injury, the employee would never be able to meet the burden of proving an increased risk. The Minnesota Supreme Court typically issues a decision three to five months after oral arguments.

Since *Dykhoff* was decided by the W.C.C.A., the compensability of two other claims involving idiopathic injuries/injuries due to unknown causes was reviewed on appeal by the W.C.C.A.

Gilbert v. ISD #625, slip op. (W.C.C.A. Jan. 23, 2013). Gilbert, a school custodian, was found dead of unknown causes in a classroom during summer recess. He had been given the task of shampooing the carpet in a particular classroom. Typically, his shift ended at 4:30 p.m. However, it was not uncommon for a contractor to ask a custodian to stay late so that work could be finished for the day. Surveillance cameras showed Gilbert walking in the hall or sitting and standing immobile for periods of time until just before 8:00 p.m. The classroom in which he was found was not the one that he was directed to shampoo. Dependency benefits were denied by the compensation judge. The W.C.C.A. affirmed after applying the work-connection test. Gilbert died of unknown causes, thus, the "arising out of" element was weak. Further, the evidence did not support a determination that he was in the course of his employment because there was no plausible reason for him to be in the school three and one-half hours after his shift ended and the security cameras did not show him to be engaged in any work activity after 4:30 p.m.

Kainz v. Arrowhead Senior Living Cmty., slip op. (W.C.C.A. April 1, 2013). Kainz was descending a flight of stairs when she twisted her ankle, causing a fracture. The compensation judge, using the work-connection test, found that the injury arose out of the employment. On appeal, the W.C.C.A. affirmed, relying on *Dykhoff*. They pointed out that the "in the course of" element was very strong. There was no dispute that Kainz was on the employer's premises retrieving supplies during her work shift. Given the strength of the "in the course of" element, the court refused to overturn the compensation judge's determination.

A third "arising out of" case was reviewed by the W.C.C.A. since *Dykhoff*. The cause of the injury was known and the increased risk test was applied.

Kanable v. Service Master of Rochester, slip op. (W.C.C.A. Jan. 31, 2013). A semi-truck crashed into the employer's office, where Kanable was working on a project at a co-worker's desk, causing significant injuries. The compensation judge found the claim compensable under the increased risk test. Due to the proximity of the building to the highway, the direction of traffic and the absence of any barriers between the highway and the office, the compensation judge found

Kanable was at an increased risk of injury not shared equally by all in the neighborhood of the employer's premises. The W.C.C.A., in affirming, placed some importance on the fact that the employer and insurer stipulated in their appeal that the increased risk test was the appropriate test to apply. Thus, even though the court noted several alternative legal theories for compensability existed, they declined to address those alternative theories.

Conclusion: Stay tuned for the Minnesota Supreme Court's decision in *Dykhoff*.