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A Comparison of Wisconsin and Minnesota Workers' Compensation Claims

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A COMPARISON OF WISCONSIN AND MINNESOTA WORKERS’ COMPENSATION CLAIMS

Thomas M. Domer† and Michael R. Johnson†††

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** The authors would like to sincerely thank Thomas P. Kieselbach for his assistance in authoring this Article. Mr. Kieselbach is a shareholder at the firm of Cousineau McGuire Chartered and an adjunct professor at William Mitchell College of Law.
Ole, a fifty-eight-year-old truck driver, is hired in Minnesota (by a corporation registered in Minnesota and Wisconsin) and works fifty percent in Minnesota and fifty percent in Wisconsin. En route to Milwaukee for a delivery, on June 1, 2014, he trips in a pothole at a sex toy shop in Delevan, Wisconsin after stopping for lunch and drinking six beers. Ole falls and injuries his neck, leaving a wicked scar on his forehead. He has neck fusion surgery and is assigned a healing plateau December 31, 2014, with these permanent restrictions: no lifting over twenty pounds and no driving more than fifty minutes. These restrictions preclude his return to work with his employer. Ole finished the eleventh grade and has no GED. Prior to his injury, Ole earned $1500 per week. He calls your office for help.

The increasing geographic complexity of interstate and international employment relationships makes current
jurisdictional issues more problematic than in the early days of workers' compensation. The scenario above poses a plethora of problems for the practitioner: jurisdiction, "course of employment" standards, alcohol as a causative agent, and a panoply of benefits issues. The authors will discuss a baker's dozen of these below, indicating the relevant considerations in Wisconsin and Minnesota. Exploring the relative benefits of Wisconsin, vis-à-vis Minnesota, may prove productive. In some instances, Wisconsin's benefits exceed adjoining states' or provide a benefit not available in another state (for example, minimum permanency percentages for certain surgical procedures or better vocational rehabilitation benefits). Minnesota, however, may have better temporary and permanency benefits.

I. JURISDICTION

A. Wisconsin

In Wisconsin, liability for compensation "exists whenever an employee sustains an injury, at a time [when] both the employer and employee are subject to the provisions of [Wisconsin's Workers' Compensation Act]."¹ "[W]here a Wisconsin employer and an employee have established an employment status in Wisconsin, [jurisdiction exists] even though the contract of employment was made elsewhere, the injury occurred elsewhere, and the injured" worker lives in another state.² "Once [the] employment status [has] been established," it is immaterial whether the claimant was in Wisconsin at the time of injury.³

If an employee working outside Wisconsin suffers a compensable injury, Wisconsin's Workers' Compensation Act applies, under certain conditions.⁴ In some circumstances, the employee may meet the criteria for workers' compensation benefits in more than one state. In such instances, Wisconsin follows the McCartin rule. Where payment has been made in another jurisdiction and Wisconsin jurisdiction is also claimed, the Wisconsin insurer receives a credit for all previously paid

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2. Id. at 308.
3. Id.
compensation. On the other hand, other jurisdictions, while providing successive awards, may honor a claim for reimbursement of the Wisconsin workers' compensation payments.

B. Minnesota

In Minnesota, unless an exception applies, the Minnesota Workers' Compensation Statute does not cover injuries that occur outside of the state and no jurisdiction may be exercised under said statute. There are two exceptions to this rule:

1. When the employee regularly performs the primary duties of his employment in Minnesota.

2. When an employee is hired in Minnesota and injured "while temporarily employed outside of [Minnesota]."

Exception #1: Regular Performance of Primary Duties in Minnesota

The Minnesota Workers' Compensation Statute will apply to "an employee who regularly performs the primary duties of employment within [Minnesota]" and is injured while outside of Minnesota. The phrase "regularly performs" is not rigid; it must be viewed in terms of the nature of the work performed by the employee on the whole. The term "primary duties" refers to something fundamental or basic about the employment being performed in Minnesota. It does not require that the employee spend more time performing job duties in Minnesota than elsewhere. Such an approach has been specifically rejected.

Case law on this subject strongly favors granting jurisdiction. As long as there is any regular task that is in some manner fundamental or basic to the performance of the employee's job duties, jurisdiction will be granted. For example, in the case of a traveling operations director who spent three out of every four

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5. Indus. Comm'n of Wis. v. McCartin, 330 U.S. 622, 629 (1947). Where dual jurisdiction existed in both Illinois and Wisconsin and an initial award was obtained in Illinois, the employee was allowed to obtain additional benefits in Wisconsin with credit given for any sum received in Illinois. Id.


7. Id. § 176.041, subdiv. 2.

8. Id. § 176.041, subdiv. 3.

9. Id. § 176.041, subdiv. 2.


11. Id.
weeks outside of the State of Minnesota, jurisdiction was granted, because the one week spent in Minnesota per month was a "fundamental or basic part" of the employee's job duties.\(^\text{12}\)

\textit{Exception \#2: Employee Hired in Minnesota but Injured While Temporarily Employed Out-of-State}

The Minnesota Workers' Compensation Statute will also apply to "an employee [who is] hired in [Minnesota] by a Minnesota employer" and is injured "while temporarily employed outside of [Minnesota]."\(^\text{13}\) All three of these requirements must be met for jurisdiction to attach.\(^\text{14}\)

Minnesota courts have taken an expansive view of what constitutes being "hired in Minnesota." As long as the offer of employment is made from Minnesota and constitutes the final word on employment, it will constitute a hiring in Minnesota for jurisdictional purposes.\(^\text{15}\) Additionally, jurisdiction was found in the case where an employment offer was extended from Minnesota and the employee had to travel to Iowa for mandatory drug testing and training, so it would appear that absolute finality in the hiring is not always required for the order to constitute being "hired in Minnesota."\(^\text{16}\)

Whether or not an employer is considered a "Minnesota employer" turns on the nature and extent of the employer's activities in Minnesota.\(^\text{17}\) The state of incorporation is not

\begin{footnotesize}
\begin{itemize}
\item \text{12.} Burgard v. Innworks, Inc., 1996 WL 265825, at *5–6 (Minn. WCCA May 6, 1996).
\item \text{13.} MINN. STAT. § 176.041, subdiv. 3.
\item \text{14.} See Wood v. Fred Madsen Constr. Co., 49 W.C.D. 569, 572–74 (Minn. WCCA), aff'd, 512 N.W.2d 106 (Minn. 1993).
\item \text{15.} See McCoy v. Ingersoll/Rand, 40 W.C.D. 1027, 1031–32 (Minn. WCCA 1987), aff'd, 423 N.W.2d 685 (Minn. 1988) (finding that acceptance of an oral contract to hire in Minnesota constituted hiring in Minnesota, even when the phone call originated out of state). \textit{But see} Pauley v. Donco Carriers, Inc., 46 W.C.D. 14, 16–17 (Minn. WCCA 1991), aff'd, 478 N.W.2d 763 (Minn. 1992) (finding that hiring contingent upon passing a safety clearance was not complete until the clearance was approved; since approval occurred out of state, the hiring also occurred out of state).
\item \text{17.} Rundberg v. Hirschbach Motor Lines, 51 W.C.D. 193, 201 (Minn. WCCA), aff'd, 520 N.W.2d 747 (Minn. 1994).
\end{itemize}
\end{footnotesize}
necessary,\textsuperscript{18} although incorporating in Minnesota would assure status as a Minnesota employer. Other relevant factors include whether the employer has any offices or facilities in Minnesota.\textsuperscript{19}

Finally, the employee must be “temporarily employed” outside of Minnesota for jurisdiction to apply under this exception. The key factor here is the permanency (or lack thereof) of the employee’s performance in another state.\textsuperscript{20} Generally, so long as the work the employee is performing outside of Minnesota is not intended to be permanent and/or a relocation, he will be deemed to be “temporarily employed” and jurisdiction will be found. A transient employee who travels from site to site to perform work will be deemed to be “temporarily employed” out-of-state if there is some major contact with Minnesota, such as the facility which directs his movements, pay, or other administrative matters being located in Minnesota.\textsuperscript{21}

Ole’s employment would very likely result in Minnesota jurisdiction under the first of the above-referenced exceptions. Certainly he performed “primary duties” in Minnesota because he did fifty percent of his driving there. Under the second exception, the facts explain he was hired in Minnesota and he was temporarily outside of Minnesota on a run to Milwaukee.

Ultimately, Ole would have a choice of jurisdiction (i.e., whether to file his claim in Wisconsin or Minnesota).

II. LIABILITY/CAUSATION

A. “In the Course of Employment” Issues

1. Wisconsin

In Wisconsin, where an injury occurs in the course and scope of employment and all the following elements are met, the worker’s exclusive remedy against the employer is workers’ compensation:

\begin{enumerate}
\item \textit{Id.} at 201–02.
\item See Fischer v. Malleable Iron Co., 303 Minn. 1, 4–5, 225 N.W.2d 542, 545 (1975).
\end{enumerate}
An injury has occurred.

(2) An employee-employer relationship exists.

(3) The injury has occurred in the course and scope of employment.

(4) The injury is not self-inflicted.

(5) The injury arises out of employment.\(^22\)

As a long haul truck driver, Ole is a "traveling employee," which provides more latitude regarding whether he is "deviating," and thus not in the course of employment.

Traveling employees receive broad workers' compensation coverage in Wisconsin under a three-step analysis:

(1) Traveling employees are deemed to be in the course of employment at all times while on a trip ("portal to portal"),

(2) "[e]xcept when engaged in a deviation for a private or personal purpose," and

(3) acts reasonably necessary for or incidental to living are not deviations.\(^23\)

The traveling employee provision was created to remedy situations in which employees, whose work required them to live away from home for periods of time, were not compensated for injuries sustained during normal activities of daily living on a business trip.\(^24\)

\(^{22}\) Wis. Stat. Ann. § 102.03(a)–(c) (West, Westlaw through 2015 Act 3).

\(^{23}\) Id. § 102.03(1)(f) (Westlaw). The statute permits compensation to injured traveling employees under these circumstances:

Every employee whose employment requires the employee to travel shall be deemed to be performing service growing out of and incidental to the employee's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee's employment.

Id. (Westlaw).

\(^{24}\) The traveling employees statute was created by the Act of Aug. 20, 1945, ch. 537, 1945 Wis. Sess. Laws 963. Creamery Package Manufacturing Co. v. Industrial Commission, 248 N.W. 140, 143 (Wis. 1933), is an example of an outcome that section 102.03(1)(f) of Wisconsin Statutes was meant to remedy. In that case the court held that an employee's contraction of typhoid fever was not compensable because it was only conjecture that the employee contracted the disease during the exact time he was traveling for his employer. See Creamery Package Mfg. Co., 248
Wisconsin’s Supreme Court has issued a ‘‘presumption that a traveling employee performs services incidental to his employment at all times on a business trip,’’ with the burden of proving a deviation falling to the employer.25 The presumption is rebutted by a fact scenario indicating intent to abandon employment.26 However, if the facts only lead to ‘‘mere speculation’’ that the employee abandoned employment, the presumption in favor of continuing employment benefits remains.27 Additionally, the presumption favoring traveling employees does not modify the ‘‘arising out of’’ requirement that a hazard of employment must cause the injury,28 nor does the presumption trump solely personal injury causation.29

N.W. at 141-43; see also Gibbs Steel Co. v. Indus. Comm’n, 10 N.W.2d 130, 130-31 (Wis. 1943) (finding that a traveling employee’s fall in a bathtub was not compensable because bathing does not arise out of employment).


27. See Hansen v. Indus. Comm’n, 46 N.W.2d 754, 756 (Wis. 1951) (holding in favor of dead plaintiff found some distance away from where he had eaten dinner). The Hansen court found that a traveling employee need not ‘‘seek immediate seclusion in a hotel and remain away from human beings at the risk of being charged with deviating from his employment. Nor is he required to eat his evening meal at the restaurant nearest to the spot where he takes leave of his customer.’’ Id.

28. See Goranson v. Dep’t of Indus., Labor & Human Relations, 289 N.W.2d 270, 280 (Wis. 1980) (affirming denial of benefits). Applicant, a bus driver, was staying in a hotel room as part of his job requirements when he drunkenly jumped (or was pushed) out of the window. Id. at 272-73. The continuing employment presumption was tested, and the court rejected the argument that in order to rebut the presumed fact of continuing employment, an employer must do so by a preponderance of the evidence. Id. at 277-78. The employer need not disprove the presumed fact of continuing employment by a preponderance of the evidence; the presumption of continuing employment is met only when there is nothing appearing to the contrary. Id. at 277.

29. See, e.g., Keene v. L & S Trucking, No. 2008-037854, 2011 WL 6363680, at *3, *6-7 (Wis. Labor & Indus. Review Comm’n Nov. 30, 2011) (denying trucker’s claim, concluding that the ‘‘stroke did not arise out of employment but was due to circumstances solely personal to him’’).
The Commission must deal with fact issues determining whether an employee obtains “traveling employee” status, rather than that of a commuting employee with a fixed place of business. “Traveling” status was granted to an employee traveling off premises for a smoke, working on an out-of-town contract assignment, and bicycling to a required seminar to retain a physician’s license. Where several business-related reasons for a trip were raised but found unsubstantiated, an applicant was deemed commuting—not traveling—and compensation was denied.

Courts have addressed acts reasonably necessary for or incidental to living. While eating appears to be reasonably necessary, a trip thirty miles across the state border for lunch was held unreasonable. Sleeping is also reasonably necessary for living, but an injury sustained driving in a direction away from the motel and jumping (or being pushed) out a hotel window stemming from a likely immoral or a personally caused purpose is not covered.

Injuries incurred by traveling employees engaged in reasonable recreation are covered. Such widely varied activities as

33. Neese v. State Med. Soc’y of Wis., 153 N.W.2d 552 (Wis. 1967). The trip from Houlton, Wisconsin, to the high-end Charlie’s restaurant in Minneapolis, Minnesota, was too far because “there were several good and adequate eating establishments within the course of travel.” Id. at 559.
34. Dibble v. Indus. Comm’n (Dep’t. of I. L. H. R.), 161 N.W.2d 913, 914-15 (Wis. 1968).
36. In 1945, the Industrial Commission interpreted the new traveling employee statute as follows:

This provides that employees who travel shall be entitled to benefits for injury while on a trip, including injuries sustained in trains, cabs, eating places, hotels and other places of sojourn, provided the employee has not deviated for a private or personal purpose. Acts reasonably necessary for living, such as eating, bathing, sleeping, etc. are not to be regarded as a deviation. Injuries occurring because of hotel fires, collapse of buildings, accidents on trains and other
skiing, shopping, drinking, and swimming have been found compensable under the traveling employee statute. Recent court cases confirm that traveling employees may participate in reasonable recreational activities without deviating from their employment. An employee is not required to seek immediate seclusion in a hotel and to remain away from human beings to avoid the risk of being charged with deviation from employment. For example, injury during an extended trip following a business conference was found compensable, where the extended time benefited the employer by flight-cost savings, and the trip was a reasonable distance from the conference site.

An employee who returns to the course of employment after deviating for a personal purpose can receive compensation. The geographic site of the injury is significant: the employee may reclaim "course of employment" status when re-entering the normal route of business travel after the deviation. A "meaningful manifestation to engage in activities purely personal to the employee" will substantiate a deviation.

conveyances will clearly be covered.

38. See CBS, Inc., 579 N.W.2d at 676, where the court found that a skiing incident was compensable for an employee who was injured on his day off. The CBS supervisor had suggested the trip and provided transport and lift tickets; the test of reasonableness remained, however, despite local custom. CBS, Inc. v. Labor & Indus. Review Comm’n, 570 N.W.2d 446, 449 (Wis. Ct. App. 1997), aff’d, 579 N.W.2d 668. The underlying court of appeals decision, affirmed by the Wisconsin Supreme Court, found that "[t]he mere fact that a certain town is populated with avid cliff divers does not by itself make cliff diving an activity reasonably necessary to living." Id.
40. See Lager v. Dep’t of Indus., Labor & Human Relations, 185 N.W.2d 300, 304 (Wis. 1971) (holding that a salesman on a trip who deviates to spend several hours in a tavern—"a frolic of his own"—before being killed on his regular route home may regain the course of employment coverage). But see Tyrrell v. Indus. Comm’n, 133 N.W.2d 810, 815 (Wis. 1965) (holding that the employee “was not acting within the scope of his employment because the predominant purpose of his journey . . . was not business orientated”).
41. Tyrrell, 133 N.W.2d at 814; see also Adamski v. Stevens Point Area Pub. Sch., No. 2008-006551, 2009 WL 4822333, at *10 (Wis. Labor & Indus. Review Comm’n Nov. 30, 2009) (holding that a teacher did not engage in a deviation...
Thus, in Wisconsin, a truck driver’s stop at a sex-toy shop may be considered “incidental to living,” and not a deviation. The distance from his direct route, the time spent there, and the employer’s former condonation of such trips may also play a role.

2. Minnesota

In Minnesota, an injury must occur “in the course of employment” in order to be compensable. This is a term of art that refers to the location and circumstances of the accident that caused the employee’s injury. Generally, this requirement is not met unless the injury occurs on the employer’s premises or on some premises where the employee is required to be in order to render services on behalf of the employer. However, there are numerous exceptions to this general rule, including the “traveling employee.”

Ole is a “traveling employee” because his work requires him to drive to various locations in order to make deliveries on behalf of the employer. As in Wisconsin, traveling employees receive broad workers’ compensation coverage in Minnesota. Traveling employees are deemed to be in the course of employment at all times while on a trip that was in service to the employer. Injuries sustained on any such trip will be compensable. The course of employment burden is generally met by demonstrating that the trip from the business trip by making a brief stop en route to lunch, which is incidental to an act reasonably necessary for living).

42. MINN. STAT. § 176.021, subdiv. 1 (2014).
43. See Swenson v. Zacher, 264 Minn. 203, 207, 118 N.W.2d 786, 789 (1962) (“[A]rising out of . . . refers to the causal connection between the employment and the injury, whereas the term ‘in the course of’ refers to the time, place, and circumstances of the accident causing the injury.”).
44. MINN. STAT. § 176.011, subdiv. 16.
45. Id. (“Where the employer regularly furnished transportation to employees to and from the place of employment, those employees are subject to this chapter while being so transported.”).
46. See, e.g., Lundgaard v. State, Dept of Pub. Safety, Bureau of Criminal Apprehension, 306 Minn. 421, 237 N.W.2d 617 (1975); Schwalbe v. Am. Red Cross, 72 W.C.D. 121 (Minn. WCCA 2011), aff’d, 811 N.W.2d 635 (Minn. 2012). But see, e.g., Funk v. A.F. Scheppmann & Son Constr. Co., 294 Minn. 483, 199 N.W.2d 791 (1972) (per curiam) (holding that an employee using his employer’s vehicle for personal convenience is not in the service of the employer and thus injury was not compensable).
was in the interests of the employer and that the employee was paid wages for his travel and/or reimbursed for his travel expenses.\footnote{See Tyrrell v. Indus. Comm'n, 133 N.W.2d 810, 814 (Wis. 1965); Adamski v. Stevens Point Area Pub. Sch., No. 2008-006551, 2009 WL 4822333, at *3 (Wis. Labor & Indus. Review Comm'n Nov. 30, 2009); see also Gene P. Bradt, An Examination of the "Arising out of" and "in the Course of" Requirements Under the Minnesota Workers' Compensation Law, 6 WM. MITCHELL L. REV. 533, 559 (1980).}

However, deviation from the employee’s business trip for personal reasons takes the employee out of the course of employment until the personal “deviation” ends and the employee resumes travel towards the "business goal."\footnote{Williams v. Hoyt Constr. Co., 306 Minn. 59, 69, 237 N.W.2d 339, 346 (1975).} Several factors go into determining whether the employee has deviated. These include the length or duration of the deviation, whether the path taken to and from the alleged deviation was on the same direct route the employee would have taken on the business trip regardless of the alleged deviation, and whether any of the employee’s activities during the alleged deviation served any of the employer’s business interests (even if insignificantly).\footnote{See, e.g., Mills v. Standard Parts Serv. Co., 269 Minn. 501, 504, 131 N.W.2d 546, 548 (1964) (denying compensation for an employee who was on business trip between two stores and stopped for lunch, then resumed towards the second store and subsequently injured himself, because the injury occurred on a route that would not have been taken if the employee had not stopped for lunch); Rhea v. Overholt, 222 Minn. 467, 471, 25 N.W.2d 656, 658 (1946); Nehring v. Minn. Mining & Mfg. Co., 193 Minn. 169, 171, 258 N.W. 307, 308 (1935) (finding that extremely minimal deviations do not remove the employee from the course of employment); Geldert v. Hennepin Cnty. Adult Corr., 1999 WL 1034701, at *4 (Minn. WCCA Oct. 20, 1999) (holding that an employee who was required to travel between different worksites throughout the day, but was injured after a trip home to retrieve a forgotten driver’s license and parking card, was not performing a specific work duty).}

Not all personal acts are deviations. For example, normal acts committed for the employee’s personal comfort, such as using a restroom, eating a meal, and resting or sleeping at a hotel or motel are not deviations and injuries sustained during such activities are compensable if the employer could reasonably foresee the hazard that created the injury.\footnote{Epp v. Midwestern Mach. Co., 296 Minn. 231, 235, 208 N.W.2d 87, 89 (1973).} Everyday hazards incidental to life are foreseeable to the employer. Injuries sustained by employees on business trips as the result of hotel fires, food poisoning, and from

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choking while eating have all been compensable, \textsuperscript{51} because it is reasonably foreseeable to the employer that a traveling employee will stop to eat and sleep.

Compensability extends beyond personal comfort. Ultimately any reasonable activity "which may normally be expected of a traveling employee" is compensable. \textsuperscript{52} This includes recreational activities during a business trip, such as visiting a bar while not on duty. \textsuperscript{53} In order for an activity to \textit{not} be reasonably foreseeable under \textit{Epp} and \textit{Voight}, it must be "clearly unanticipated, unforeseeable and extraordinary." \textsuperscript{54} In reality, very few cases fall into this category. For example, in \textit{Shirkey v. J & R Schugel Trucking, Inc.}, the employee, while on a layover, left a very valuable cargo load completely unsecured, a clear violation of company policy, and proceeded to walk several miles to a bar and restaurant. \textsuperscript{55} While at the bar, he drank several beers in violation of company policy. \textsuperscript{56} He then walked through farm fields in the wintertime, without a coat or flashlight, on his way back to his truck. \textsuperscript{57} He was injured when he fell off of a culvert. \textsuperscript{58} The court affirmed on appeal that the injury was compensable on the basis that, despite its prohibitions against the activity engaged in by the employee, his conduct was reasonably foreseeable to the employer and not extraordinary. \textsuperscript{59}

Under Minnesota law, in Ole's case, his initial stop for lunch may not have constituted a deviation. It was reasonably foreseeable to the employer that he would need to stop to eat for his personal comfort. However, Ole clearly deviated from his business trip in order to consume alcohol and purchase goods at the sex shop. There was no business purpose to these activities. Further, consuming alcohol while operating a commercial trucking vehicle would likely be considered extraordinary, as would stopping at a

\textsuperscript{51} See id. at 232, 208 N.W.2d at 88 (injury walking to hotel); Snyder v. Gen. Paper Corp., 277 Minn. 376, 377, 152 N.W.2d 743, 744 (1967) (choking); Stansberry v. Monitor Stove Co., 150 Minn. 1, 3, 183 N.W. 977, 977 (1921) (motel fire).

\textsuperscript{52} Voight v. Rettinger Transp., Inc., 306 N.W.2d 133, 138 (Minn. 1981).

\textsuperscript{53} Id.

\textsuperscript{54} Id.; see \textit{Epp}, 296 Minn. 231, 208 N.W.2d 87.

\textsuperscript{55} 72 W.C.D. 239, 241–43 (Minn. WCCA 2012).

\textsuperscript{56} Id. at 241.

\textsuperscript{57} Id. at 242.

\textsuperscript{58} Id.

\textsuperscript{59} Id. at 241.
sex shop. Therefore, it is most likely that Ole will be deemed outside the course of employment at the time of the injury and thus it will not be compensable.

B. Involvement of Alcohol

1. Wisconsin

In Wisconsin, if an injury results from the intoxication (by alcohol or drugs), benefits may be reduced by fifteen percent as an employee safety violation, but intoxication is not evidence of a deviation if the employee is otherwise in the course of employment.

The much-heralded “frozen fingers” case, Heritage Mutual Insurance Co. v. Larsen, confirmed that rule. Intoxication will not, by itself, take an employee out of the course of employment, even when the intoxication is several times the legal limit. Thus, in Wisconsin, Ole’s consumption of six beers would likely not be a bar to compensation, but may result in reduced benefits if alcohol caused the injury.

2. Minnesota

In Minnesota, intoxication can bar compensation if, and only if, it is the proximate cause of the injury. This is an affirmative defense and the burden of proof is on the employer. The employer can offer both direct and circumstantial evidence

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60. WIS. STAT. ANN. § 102.58 (West, Westlaw through 2015 Act 3).
62. 2001 WI 30, 242 Wis. 2d 47, 624 N.W.2d 129. The applicant was intoxicated returning to his home, which doubled as a sales office. Id. ¶ 2. After passing out outside on the porch while trying and failing to enter the home, the applicant spent the night exposed to sub-zero temperatures, ultimately resulting in partial amputation of his frostbitten fingers and thumb. Id. The employee was compensated as a traveling employee because his frostbite occurred as a result of the zone of special danger (cold weather) created by his employment, though the award was reduced by fifteen percent for the intoxication. Id. ¶¶ 51, 70.
63. City of Phillips v. Dep’t of Indus., Labor & Human Relations, 202 N.W.2d 249, 254–55 (Wis. 1972). While at a convention a sheriff with a blood alcohol count of 0.24 walked into roadway and was struck and killed by a motorist. Id. His estate was awarded benefits. Id.
64. MINN. STAT. § 176.021, subdiv. 1 (2014).
65. Id.
regarding the employee's intoxication, including evidence of blood alcohol level, eyewitness testimony regarding the employee's behavior and mannerisms, the employee's conduct before the injury, and the employee's personal tolerance for alcohol.\textsuperscript{66} In practice, proving that the employee's intoxication was the proximate cause of the injury may mean eliminating all other possible causes.\textsuperscript{67} For example, in \textit{Shirkey}, the employee's intoxication was not found to be the proximate cause of the employee's injuries because an alternative cause—the employee being startled by headlights of an oncoming vehicle—led him to fall down an embankment.\textsuperscript{68} His claim was therefore held to be compensable.\textsuperscript{69} Under Minnesota law, in Ole's case, it is unlikely on the facts presented that the employer will be able to prove that his intoxication was the proximate cause of his injury. There are many other potential causes for falling into a pothole (inattention, his view of the pothole was obstructed, etc.).

\section*{C. "Arising out of Employment"}

\subsection*{1. Wisconsin}

The words "arising out of" employment are not the same as "caused by" the employment.\textsuperscript{70} Outside of Wisconsin law, historical cases suggest four basic interpretations of the phrase "arising out of employment": (1) the peculiar or increased risk doctrine, wherein the accident arises out of employment only when it arises out of a

\begin{itemize}
\item \textsuperscript{66} Lowrey v. Interlock Decorating, 54 W.C.D. 36, 37, 40–42 (Minn. WCCA 1995), \textit{aff'd}, 544 N.W.2d 31 (Minn. 1996) (discussing testimony regarding an employee's conduct and behavior); \textit{see also} Thake v. Backhauls, Inc., 345 N.W.2d 745, 747–48 (Minn. 1984) (stating that employers may prove their affirmative intoxication defense by direct or circumstantial evidence and discussing alcohol tolerance); Manthey v. Charles E. Bernick, Inc., 306 N.W.2d 544, 547 (Minn. 1981) (discussing blood alcohol concentration and tolerance in relation to proving proximate cause).

\item \textsuperscript{67} \textit{See} Ball by Mancino v. Pear One, Inc., 67 W.C.D. 31, 44 (Minn. WCCA), \textit{aff'd}, 726 N.W.2d 454 (Minn. 2006).

\item \textsuperscript{68} \textit{Shirkey} v. J & R Schugel Trucking, Inc., 72 W.C.D. 239, 250, 254 (Minn. WCCA 2012). Note that in \textit{Shirkey}, there were no blood alcohol tests conducted. \textit{See id.} Proof of intoxication and the extent thereof via such tests may have been helpful to the intoxication defense.

\item \textsuperscript{69} \textit{Id.} at 254.

\item \textsuperscript{70} Cutler-Hammer, Inc. v. Indus. Comm'n, 92 N.W.2d 824, 827 (Wis. 1958).
\end{itemize}
hazard peculiar to or increased by the employment and the hazard is not common to most people generally; (2) the actual risk doctrine, wherein an accident arises out of the employment if the employment subjects the employee to the actual risk which injured him although such risk is also common to the public; (3) the proximate cause interpretation, which implies negligence or fault; and (4) the positional risk interpretation, wherein the “arising out of” criteria is met when, by reason or obligation of employment, the employee is present at a time and place and injured by a non-personal force (i.e., hazard of employment).\(^71\)

In Wisconsin, the “arising out of employment” test follows the “positional risk” doctrine.\(^72\) Where the obligation or circumstances of the employment place the employee in the particular time and place when injured by a force not solely personal to the employee, the “positional risk” doctrine dictates that workers’ compensation liability will be found.\(^73\)

Generally, a “zone of special danger” accompanies a finding of positional risk liability.\(^74\) Positional risk applies to danger inherent in a building layout (such as sidewalk configuration)\(^75\) and building

\(^{71}\) Id.; see 1 Lex K. Larson & Arthur Larson, Larson’s Workers’ Compensation Law §§ 3.03D–06D (2013) (discussing the five current interpretations).


\(^{73}\) Id. The court found that a concrete stairway created a special zone of hazard and that an accidental fall down steps arose out of employment. Id. at 828; see also Allied Mfg., Inc. v. Dep’t of Indus., Labor & Human Relations, 173 N.W.2d 690, 692–93 (Wis. 1970) (holding a death compensable, and the positional risk doctrine applicable, when an employee was alone after hours in the building and was stabbed by an unknown assailant).

\(^{74}\) See Freeman v. Dane Cnty. Sheriff Dep’t, No. 2005-002204, 2006 WL 2330522 (Wis. Labor & Indus. Review Comm’n July 11, 2006). The Commission notes: “Applying the ‘positional risk’ doctrine it has been said accidents arise out of employment if the conditions or obligations of the employment create a zone of special danger out of which the accident causing the injury arose.” Id. at 4 (quoting Cutter-Hammer, Inc., 92 N.W.2d at 828). The applicant experienced back pain while walking and wearing body armor on a level and unobstructed floor; accordingly, the Wisconsin Labor and Industry Review Commission (LIRC) determined that there was no zone of special danger, and the claim was dismissed. Id. at *2, *4.

\(^{75}\) See Schampers v. First Choice Auto, Inc., No. 2003-011262, 2006 WL 1367949 (Wis. Labor & Indus. Review Comm’n Apr. 14, 2006). The applicant was a morbidly obese man who injured his knee when he lost his balance turning a corner on a sidewalk. Id. at *2. The administrative law judge (ALJ) and LIRC determined that the sidewalk configuration (being a corner with a slope that leads
fixtures (such as door jambs and slippery floor material). In one Wisconsin case, the applicant slipped on tile flooring and fell into a door jamb. The administrative law judge (ALJ) and Wisconsin Labor and Industry Review Commission (LIRC) found that the fall was not idiopathic and, under the positional risk doctrine, the applicant would not have fallen if the floor had been made of a less slippery material and would not have been injured if the doorjamb had not been there. Therefore, the applicant was awarded benefits.

Arguably, positional risk would also apply to most motor vehicle accidents, even when the initial injury may be due to a personal cause to the driver (stroke, seizure, blackout, etc.).

Purely personal assaults (bearing no relation to an individual's employment status or location) generally will not trigger "arising out of" coverage based on positional risk. However, if a condition of employment facilitates the injury, positional risk applies. The courts have indicated that positional risk applies to certain occupations where the zone of danger accompanies the job, such as bank teller, gas station attendant, and convenience store worker.

Thus, in Wisconsin, an argument could be made that the circumstances of Ole's employment (over-the-road trucking) and to a crosswalk) was enough of a factor to satisfy the positional risk doctrine. Id. at *5-6. The applicant was awarded benefits. Id. at *6.

77. Id. at *1.
78. Id. at *2.
79. Id.
80. See Smith v. Kitson Mktg., Inc., No. 1997-058052, 1999 WL 296809 (Wis. Labor & Indus. Review Comm'n Apr. 27, 1999). Smith had a seizure in his car and slumped over, resulting in arm problems. Id. at *3. Applying the positional risk doctrine, LIRC found that it was not the seizure, but the fact that he "slumped over which resulted in him laying across the console and bucket seat in his automobile for six hours, which led to his brachial plexopathy and resulting arm problems." Id. at *1.
82. Weiss v. City of Milwaukee, 559 N.W.2d 588, 594 (Wis. 1997). The city's release of personal information to an abusive ex-spouse led to an emotional injury caused by harassing phone calls at home. Id. at 590, 595.
83. See, e.g., Allied Mfg., Inc., 173 N.W.2d at 692.
exposure to such hazards as potholes, would trigger liability under "positional risk." This is the most unlikely theory of recovery.

2. **Minnesota**

Minnesota does not have a positional risk doctrine. Rather, Minnesota employs an "increased risk" test. The employee must demonstrate that her employment "exposed her to a risk of injury that was increased over what she would face in her everyday life." Injuries sustained in an unexplained fall or as the result of an idiopathic condition (i.e., seizure disorder, syncopal episode, etc.) are not compensable unless there is some causal connection to the employment that increased the risk of such an event or injuries resulting from the same. Increased risk can come in many forms. A workplace with dangerous conditions may increase the employee's risk of injury from an unexplained fall if, for instance, a fall caused the employee to be exposed to dangerous chemicals or machinery. Other conditions leading to an increased risk include wet or icy surfaces and stairways without railings.

Under Minnesota law, one must assume that Ole was acting in the course of his employment while in the sex shop parking lot in order to get to the question of whether his injury arose from his employment under the increased risk doctrine; both elements must be satisfied for compensability. Assuming that is the case, the pothole is an unsafe condition which may very well have increased Ole's risk of injury. However, potholes are a condition of everyday

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84. Dykhoff v. Xcel Energy, 840 N.W.2d 821, 828–29 (Minn. 2013). Note that there is one exception to this rule. Minnesota employs positional risk for injuries that occur on a public street or roadway. This is known as "street risk." See Auman v. Breckenridge Tel. Co., 188 Minn. 256, 259, 246 N.W. 889, 890 (1933).
85. *Dykhoff*, 840 N.W.2d at 828.
86. *Id.* at 827.
87. *Id.* at 826–27.
88. See, e.g., O’Rourke v. N. Star Chems., Inc., 281 N.W.2d 192, 193 (Minn. 1979) (holding that the death of an employee who fell into bauxite as the result of an idiopathic condition arose out of his employment); Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 565, 9 N.W.2d 6, 7 (1943) (holding that the death of an employee with seizure disorder who fell into dangerous machinery during a seizure arose out of his employment).
90. *Dykhoff*, 840 N.W.2d at 830.
life, especially in states such as Minnesota and Wisconsin, and therefore a strong argument could be made that Ole's employment did not increase his risk of slipping into a pothole any more than he was at risk for such an accident in his daily life. This is an open question very suitable for litigation in light of the Dykhoff decision cited above.

III. BENEFITS

A. Temporary Total Disability

1. Wisconsin

In Wisconsin, when a worker has a complete wage loss during a "healing period," the worker is eligible for temporary total disability (TTD) benefits.91 This equals two-thirds of the worker's average weekly wage, but it cannot exceed two-thirds of the maximum wage rate in effect on the date of injury.92 For example, in 2014 the maximum weekly wage rate was $1338, with a corresponding TTD rate of $892 per week.93 The TTD payable is a tax-free benefit under the workers' compensation law.

Complete wage loss—and resulting TTD payment—occurs when a treating practitioner indicates the worker needs to be off work completely as a result of the work injury or when a practitioner provides temporary physical limits that the time-of-injury employer cannot accommodate.94

If an employee receives temporary physical limitations and returns to work making the same or more than his average weekly wages on the date of injury, no TTD is due during these periods. Thus, in Wisconsin, Ole maintains entitlement to TTD through the healing period at $879 per week from June 1 to December 31.

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93. Id. §§ 102.11(1), .43(1) (Westlaw).
2. Minnesota

In Minnesota, an employee is entitled to TTD benefits if: his physical condition, in combination with his age, training and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income . . . [and the] total disability is temporary when it is likely [to] exist for a limited period of time only. 96

Of course, the employee must also demonstrate that he is in the position described above because of the alleged work injury. 97 The employee will remain entitled to TTD benefits until he either returns to work or is “released to return to work without any physical restrictions caused by the work injury.” 98 TTD can also be discontinued ninety days after service of a maximum medical improvement (MMI) opinion. 99 That period begins to run “on the earlier of: (1) the date that the employee receives a written medical report indicating that the employee has reached MMI; or (2) the date that the employer or insurer serves the report on the employee and the employee’s attorney, if any.” 100 Additionally, TTD can be discontinued if the employee fails to engage in a diligent job search, 101 withdraws from the labor market, 102 or refuses a suitable job offer. 103

The employee’s entitlement to TTD runs for a maximum of 130 weeks, after which it must cease. 104 However, if the employee is engaged in an approved retraining plan, the TTD paid during the retraining period does not count towards the 130 week cap, though

98. MINN. STAT. § 176.101, subdiv. 1(e), (h) (2014).
99. Id. § 176.101, subdiv. 1(j). Maximum medical improvement is defined by MINN. STAT. § 176.011, subdiv. 13(a) as “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.”
100. Id. § 176.101, subdiv. 1(j).
101. Id. § 176.101, subdiv. 1(g).
102. Id. § 176.101, subdiv. 1(f).
103. Id. § 176.101, subdiv. 1(i).
104. Id. § 176.101, subdiv. 1(k).
the weeks paid before and after the retraining period do indeed count. 105

TTD is calculated as two-thirds of the employee’s pre-injury average weekly wage, 106 subject to a maximum which, at the time of Ole’s injury, was $963.90 per week. 107

Under Minnesota law, assuming he is otherwise qualified for TTD, Ole’s entitlement would cease ninety days after service of MMI. Because two-thirds of his pre-injury average weekly wage is $1000 \( \left( \frac{2}{3} \times 1500 \right) = 1000 \), his TTD benefit would be $963.90, the TTD maximum.

B. Permanency Benefits

1. Wisconsin

After the magic moment arrives when an injured worker reaches a healing “plateau,” a doctor may assign a percentage of permanent disability based on the worker’s functional loss. 109 The employee may also return to work with no permanency, or even be considered permanently totally disabled. 110

In addition, whenever an injured employee has more than three weeks of temporary disability, the employer or insurer must obtain and file a final medical report from a treating practitioner that indicates whether there is any resulting permanent partial disability (PPD) and, if so, the extent of that resulting permanent disability, by assigning a percentage. 111

In Wisconsin, an injured worker can receive compensation for both permanent functional disability and permanent vocational

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105. Id. § 176.101, subdiv. 1(k); id. § 176.102, subdiv. 11(b).
106. Id. § 176.101, subdiv. 1(a).
109. The Commission found that it did not have to delay a PPD award for a compensable consequence injury (back/hip from an altered gait) when the physician assessed permanency on those body parts, even though the applicant was still in a healing period from the original injury (ankle). Parris v. Walker Stainless Equip., 2009 WL 2139936 (Wis. Labor & Industry Review Comm’n June 30, 2009).
110. WIS. STAT. ANN. § 102.44(2) (West, Westlaw through 2015 Act 3).
111. WIS. ADMIN. CODE ch. DWD §§ 80.02(2)(e)(4), .02(2)(j) (West, Westlaw through Feb. 9, 2015).
disability (for certain types of injuries). Functional disability is generally determined by a treating practitioner, while vocational disability is assessed by vocational experts who understand the labor market. Other than permanent and total disability, PPD, whether functional or vocational, is payable at a weekly rate equal to two-thirds of the employee’s average gross weekly earnings at the time of the injury, subject to a maximum rate. Ole’s weekly permanency rate is the 2014 maximum, $322 per week. Except for very low wage earners, most workers qualify for the maximum weekly PPD rate. The maximum PPD rate usually changes each year, but the rate payable is generally fixed based upon the date of injury. The maximum PPD rate, except for very low wage earners, is substantially less than the TTD rate.

When assessing permanent disability, Wisconsin varies from many other states around the country. Twenty-two states require the American Medical Association (AMA) Guides to the Evaluation of Permanent Disability as a basis for their determination of PPD, and six states “suggest” the use of the Guides. Wisconsin, however, does not use the AMA Guides as a determination of the level of PPD. Rather, the functional disability assessment is left to the discretion of a treating practitioner, with certain guidelines.

112. Wis. Stat. Ann. § 102.44(2) codifies certain scheduled impairments (loss of both arms, legs, or eyes) as permanent, total disability.
113. Balczewski v. Dep’t of Indus., Labor & Human Relations, 251 N.W.2d 794, 797 (Wis. 1977).
114. Permanent total disability (PTD) benefits are payable for life at the same rate as TTD benefits. See Wis. Stat. Ann. § 102.11(1) (Westlaw).
115. See id. (Westlaw).
116. See id. (Westlaw).
117. See id. § 102.03(4) (Westlaw).
118. Id. § 102.11(1) (Westlaw).
120. The Commission has indicated a physician’s rating of permanent disability in Wisconsin is not made credible, however, solely by his reference to the AMA standards. See Lang v. Consol. Papers, Inc., Claim No. 89048039, 1997 WL 614850, at *7 (Wis. Labor & Indus. Review Comm’n Sept. 8, 1997).
121. The Department of Workforce Development’s workers’ compensation pamphlet for treating practitioners indicates that “final rating will be based on the
Wisconsin Administrative Code chapter DWD, section 80.32 provides minimum percentages based on range of motion, sensory loss, and certain surgical procedures.122

Thus, for a C4-5 fusion, Wisconsin pays a minimum ten percent functional permanency (ten percent of 1000 weeks, since this is an “unscheduled” injury) with additional components for weakness, pain, and range of motion loss. The minimum ten percent would pay $322 per week for one-hundred weeks ($32,200), whether or not Ole returns to work.

2. Minnesota

In Minnesota, an employee is entitled to PPD benefits for loss of function or impairment of use to a part of his body.123 PPD is rated as a percentage and in relation to the effect on the body as a whole.124 PPD cannot exceed one-hundred percent to the body as a whole.125

The permanency percentage is assigned per Minnesota Administrative Rule 5223, which exhaustively covers virtually every contemplated injury and assigns percentages accordingly.126 These assignments require medical confirmation and may vary based upon medical testing (e.g., for range of motion, etc.). The assigned 

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124. See id. § 176.101, subdiv. 2a(a).
125. Id.
126. See generally Minn. R. 5223 (2014).
percentage is then used as a multiplier against a sum certain, provided by statute (see below) and varying by percentage range. The result of this equation is the payable PPD.  

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</table>

PPD is payable in a lump sum upon the employee’s request, but may otherwise be paid on a weekly basis. Also, PPD is not payable while the employee is receiving TTD benefits.

127. See MINN. STAT. § 176.101, subdiv. 2a(a).
128. Id.
129. Id. § 176.101, subdiv. 2a(b).
If not already apparent, in Minnesota PPD has no relation to wage loss whatsoever. PPD is not intended to replace lost wages, but rather to compensate for damage to the body.

Under Minnesota law, Ole would most likely be entitled to a 7% rating for his cervical pain, assuming there were confirmatory diagnostic tests, plus an additional 2.5% added directly thereto because he underwent a single-level fusion procedure. It should be noted that this could increase if Ole had any radicular symptoms. With a 9.5% rating, Ole would be entitled to $7600 in PPD benefits ($7600).

C. Vocational Rehabilitation

1. Wisconsin

A main focus of the workers' compensation system in Wisconsin is to restore the earning capacity that a worker held before suffering a work injury. As a public policy, the hope is that an injured worker—after reaching their healing plateau—can return to their time-of-injury employer, making similar wages. A return to work, however, is not always possible, based on the worker's level of disability, the former employer's decisions, or a variety of other factors. In these situations, vocational retraining becomes an option.

Specifically, an injured worker who has permanent doctor's restrictions, which preclude a return to work for the former employer, may be eligible for vocational retraining benefits under the Wisconsin workers' compensation law. Allowing an injured worker the option to be retrained in a new field or profession fulfills one of the goals of the workers' compensation system: restoring the injured worker's pre-injury earning capacity. Indeed, the Wisconsin Administrative Code states that "[t]he primary purpose of vocational rehabilitation benefits is to provide a method to restore an injured worker as nearly as possible to the worker's preinjury earning capacity and potential."
To fulfill this purpose, the Wisconsin workers’ compensation law works in conjunction with the Federal Rehabilitation Act of 1973 and the state agency that administers that Act, the Wisconsin Division of Vocational Rehabilitation (DVR). Title I of the Rehabilitation Act was designed to provide vocational rehabilitation services for individuals with disabilities, regardless of whether the disability was work related or not.

In Wisconsin, the DVR administers the Act and provides vocational rehabilitation services for eligible individuals with disabilities (known to the DVR as “consumers”). The DVR’s purpose is to “work in partnership with consumers to individually pursue, obtain and maintain employment suited to their abilities and interests and leading to independence, increased self-sufficiency and full inclusion in society.”

An employee who received workers’ compensation and is unable to return to work for his time-of-injury employer can pursue vocational retraining benefits. If the DVR finds the injured worker eligible for retraining benefits and establishes an academic retraining plan (e.g., a return to school), the insurance carrier is responsible for weekly maintenance benefits (at two-thirds of the employee’s average weekly earnings), as well as travel and meal expenses during school, and tuition and book expenses. The workers’ compensation system also allows an injured worker to pursue an academic retraining program through a private

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138. See 29 U.S.C. §§ 701-797b (2012). The purpose of Title I of the Rehabilitation Act of 1973, as amended, is to provide:

comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation, each of which is . . . designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, informed choice, and economic self-sufficiency, so that such individuals may prepare for and engage in gainful employment.

Id. § 720(a) (2).

139. VOCATIONAL REHABILITATION PROGRAM, supra note 137, at iii.

140. Id. at 5.

141. WIS. STAT. ANN. §102.61 (1) (Westlaw).

142. Id. §§ 102.61(1), (1)(g)(b), (1)(m)(d), (1)(r)(c) (Westlaw).
vocational counselor if the DVR does not have immediate funding to provide services to the worker.143

Retraining programs established through the DVR are entitled to a great amount of deference by the Worker's Compensation Department.144 ALJs and the Commission can overturn a DVR counselor's proposed academic retraining plan only on limited grounds, thus providing few defenses to insurance carriers.145 The presumption in favor of the DVR program only applies to the first eighty weeks of benefits, although programs longer than eighty weeks can be awarded if warranted by the Department.146

The option of vocational retraining takes on added significance depending on whether an injured worker suffered a scheduled or unscheduled injury. If an injured worker with permanent restrictions from a scheduled injury (e.g., injuries to extremities, limbs, vision, or hearing) cannot return to work for the time-of-injury employer (making eighty-five percent of pre-injury wages), the worker’s only vocational benefits under the law are retraining benefits.147 However, if an injured worker with permanent restrictions from an unscheduled injury (e.g., back, neck, head, or mental injuries) cannot return to the time-of-injury employer (earning eighty-five percent of pre-injury wages), the worker can pursue vocational retraining benefits and loss of earning capacity benefits.148

Loss of earning capacity benefits are available only for workers who suffered unscheduled injuries. Therefore, if retraining does not occur or it is not possible for an injured worker with an unscheduled injury (such as Ole’s injury to his neck), that employee has another option: pursuing loss of earning capacity benefits, which generally are more significant (i.e., greater monetary compensation) than retraining benefits.149

146. Retraining beyond eighty weeks may not be authorized “if the primary purpose of further training is to improve upon preinjury earning capacity rather than restoring it.” Wis. Admin. Code ch. DWD, § 80.49(3) (Westlaw).
148. Id. § 102.44(3) (Westlaw).
149. Id. § 102.44(3) (Westlaw).
On the contrary, if an employee with a scheduled injury cannot return to his former profession, the employee's only vocational recourse under the workers' compensation law is a retraining program. If retraining for that individual is not viable, there are no further vocational benefits (including loss of earning capacity benefits). The significance of this is seen in the example of a high-wage earning trucker who suffers a hand injury that precludes a return to his former profession (i.e., inability to use a stick shift). If the trucker cannot be retrained (because of past education, age, or other factors), he has no further vocational benefits available—a legal concept that comes as quite a shock to the injured worker who can no longer perform his former job.

Thus, in Wisconsin, Ole may benefit from vocational retraining if the DVR counselor deems him eligible for benefits and establishes an Individual Plan for Employment that includes GED training as a prerequisite to other degrees that may restore his earning capacity. For every week he is in school, the insurer is liable for weekly maintenance TTD of $879 per week, plus meals, mileage, and tuition book expenses. His age and lack of education may preclude him, however, from such a program. Because his injury is unscheduled, loss of earning capacity benefits are available as well.

2. Minnesota

In Minnesota, vocational rehabilitation benefits are intended to assist the employee to "return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability."

Restoration of pre-injury economic status is the hallmark and guiding principle of Minnesota workers' compensation law. Rehabilitation that places the employee in a position to achieve an economic status greater than that which he held prior to the injury is permissible if "necessary to increase the likelihood of reemployment."

In order to be entitled to rehabilitation benefits, the employee must be qualified. A qualified employee is one who, because of the work injury and its effects:

150. MINN. STAT. § 176.102, subdiv. 1 (b) (2014).
151. See id.
152. Id.
{(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 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. 153

This determination is usually made by a qualified rehabilitation consultant (QRC), a “professionally trained” and registered individual, 154 during a rehabilitation consultation between the QRC and the employee.155

The employer and insurer can, and often do, dispute the employee’s “qualified” status, which is ultimately a matter subject to litigation. Assuming the employee is eventually adjudicated to be “qualified,” the QRC will develop a rehabilitation plan, which will detail the necessary rehabilitation services, dates for initiating said services, and expected duration of said services. 156 Again, there are opportunities for litigation regarding the proposed plan. Assuming the rehabilitation plan is agreed to and/or approved one way or another, the employee then proceeds with rehabilitation according to the plan, subject to modification along the way. 158 Services rendered during this time may include, but are not limited to, medical management, counseling, professional guidance, job analysis, modification of prior job to accommodate work restrictions, job placement services, development of transferrable job skills, job training, and vocational testing. 159 Along the way, the QRC must provide periodic reports on the employee’s progress. 160 Benefits end and the plan is closed when the employee completes the rehabilitation plan, is working at suitable employment for thirty days or more, settles his case on terms which foreclose ongoing

154. Id. R. 5220.0100, subpart 23.
155. Id. R. 5220.0100, subpart 26.
156. Id. R. 5220.0410, subpart 1.
158. See id. R. 5220.0510.
159. See id. R. 5220.0100.
160. Id. R. 5220.0450, subpart 3.
rehabilitation benefits, dies, or the employer and insurer successfully move for closure, among other reasons.\textsuperscript{161} During the period of vocational rehabilitation, the employee is entitled to continue receiving TTD or temporary partial disability (TPD) benefits.\textsuperscript{162}

Retraining is a separate benefit from vocational rehabilitation and constitutes “a formal course of study in a school setting which is designed to train an employee to return to suitable gainful employment.”\textsuperscript{163} It is available only when it will materially assist the employee in returning to his prior economic status by restoring his lost earning capacity.\textsuperscript{164} Generally, an employee’s entitlement to retraining is assessed according to the following factors:

(1) the reasonableness of retraining as compared to returning to work with employer or other job placement activities, (2) the likelihood that employee has the ability and interest to succeed in a formal course of study in a school, (3) whether retraining is likely to result in reasonably attainable employment, and (4) whether retraining is likely to produce an economic status as close as possible to that which the employee would have enjoyed without disability.\textsuperscript{165}

Employers and insurers virtually always defend retraining claims. The benefits available in a retraining plan include: (1) up to 156 weeks of retraining indemnity benefits (paid at the same rate as TTD or TPD);\textsuperscript{166} (2) the “reasonable cost of tuition, books, travel, custodial day care; and . . . board and lodging when [retraining] requires residence away from the employee’s customary residence”;\textsuperscript{167} (3) the “reasonable costs of travel and custodial day care during the job interview process”;\textsuperscript{168} and (4) the “reasonable

\textsuperscript{161} Id. R. 5220.0510, subparts 5–7a.
\textsuperscript{162} TTD benefits are payable when the employee is unable to work at all; temporary partial disability (TPD) benefits are payable when the employee has returned to work, but at a gross weekly wage that is lower than his gross weekly wage prior to the injury (i.e., when the employee is working at a wage loss).
\textsuperscript{163} MINN. STAT. § 176.011, subdiv. 17a (2014).
\textsuperscript{164} Norby v. Arctic Enters., Inc., 305 Minn. 519, 521, 232 N.W.2d 773, 775 (1975).
\textsuperscript{165} Poole v. Farmstead Foods, Inc., 42 W.C.D. 970, 978 (Minn. WCCA 1989).
\textsuperscript{166} See MINN. STAT. § 176.102, subdiv. 11(a).
\textsuperscript{167} Id. § 176.102, subdiv. 9(a)(3).
\textsuperscript{168} Id. § 176.102, subdiv. 9(a)(4).
cost for moving expenses of the employee and family if a job is found in a geographic area beyond reasonable commuting distance” (after a diligent search demonstrates no such job or similar job within the present community is available). 169

Under Minnesota law, Ole would almost assuredly be deemed a “qualified” employee due to his permanent work restrictions and because he cannot return to his work as a truck driver. He would therefore be entitled to rehabilitation benefits according to a rehabilitation plan, with the goal of returning him to his prior economic position.

D. Loss of Earning Capacity Benefits

1. Wisconsin

Since the Ole matter is an unscheduled injury, if the worker cannot complete school or is unable to go to school, a private vocational counselor determines a loss of earning capacity as a percentage of PPD (subsuming the ten percent for the functional PPD). 170 The doctor must establish permanent restrictions that preclude a return to work as a prerequisite to PPD (as in Ole’s case). 171

For workers with non-scheduled injuries in Wisconsin, a loss of earning capacity claim is available if they cannot return to work for their employer at eighty-five percent of former wages. 172 The loss of earning capacity is routinely established by testimony from a vocational expert. 173

The expert compares the effect of the impairment on the employee’s wage earning capacity with the employee’s permanent and total disability for occupational purposes, taking into account age, education, work history, vocational training and other factors listed in chapter DWD, section 80.34. 174 This loss of earning

169. Id. § 176.102, subdiv. 9(a)(5).
171. Id.
172. WIS. STAT. ANN. § 102.44(6) (a) (West, Westlaw through 2015 Act 3).
174. See WIS. ADMIN. CODE ch. DWD, § 80.34 (West, Westlaw through Feb. 9, 2015).
capacity is calculated as a percentage and applied to 1000 weeks, then paid at the PPD rate. 175

The percentage of PPD assigned for loss of earning capacity is not added to the functional physical PPD; rather, the worker is entitled to the greater of the two. 176 The lower assessment essentially is subsumed as part of the larger assessment. For example, an employee with a ten percent functional PPD to the back would be entitled to one-hundred weeks of PPD for the functional loss. Permanent restrictions from the doctor, however, may preclude his return to work for the employer and result in a claim for a loss of earning capacity at forty percent (four-hundred weeks of PPD). In this scenario, the injured worker does not receive the one-hundred weeks for the functional loss, plus the four-hundred weeks for the vocational loss. The total PPD entitlement is the greater of the two assessments, or in this case, four-hundred weeks.

Given Ole’s lack of education and absence of transferrable skills, his loss of earning capacity in Wisconsin would be significant.

2. Minnesota

Minnesota has no claim for loss of earning capacity. Further, Minnesota has a 130-week cap on TTD benefits and a separate cap on TPD benefits, which are intended to compensate the employee who returns to work, but at a wage loss. The TPD cap is either 225 weeks or 450 weeks of payments after the date of injury, whichever occurs sooner. However, time spent in a retraining program does not count towards either the TTD or TPD caps (i.e., the time in

175. WIS. STAT. ANN. § 102.44(3) (Westlaw); see also id. § 102.11(1) (Westlaw).
176. The 1000-week “body as a whole” permanency listed in section 102.44(3) of Wisconsin Statutes is the basis for both the doctor’s functional loss percentage and the vocational expert’s loss of earning capacity.
177. See Lani Fay v. Emerson Elec. Co., No. 2000-028695, 2004 WL 2031442, at *4 (Wis. Labor & Indus. Review Comm’n Aug. 31, 2004). The Commission refers to the “standard practice” of combining the “functional” rating into the rating for loss of earning capacity to reach a single permanent partial disability award.” Id. The Commission further notes that the Wisconsin Supreme Court has emphasized that in such cases of unscheduled disability, “there is one award for permanent partial disability based on a consideration of both the functional loss and the loss of earning capacity.” Id. (footnote omitted). These considerations are “generally accomplished by determining the effect of the permanent work restrictions from the injury on the applicant’s future earning capacity, rather than basing the award purely on the functional loss.” Id.
retraining suspends the running of the caps until retraining is complete).

E. Disfigurement Benefits

1. Wisconsin

In Wisconsin, Ole's disfigurement would be payable for the discriminatory effects on future employment up to a maximum of $66,900.\(^{178}\) The term “disfigurement” is not defined in the statute. The Wisconsin Supreme Court indicated “that the plain meaning of disfigurement encompasses an impairment that significantly affects the appearance of a person.”\(^{179}\)

Under Wisconsin law, consideration for disfigurement allowance is confined to those areas of the body that are exposed in the “normal course of employment.”\(^{180}\) Examples include the face, neck, hands, arms, and legs.\(^{181}\) Gender issues do apply in assessing what parts of the body are visible at work.\(^{182}\) A scar’s ability to be hidden is only one factor; it does not preclude an award.\(^{183}\)

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179. Cnty. of Dane v. Labor & Indus. Review Comm’n, 2009 WI 9, ¶ 25, 315 Wis. 2d 293, 759 N.W.2d 571.
181. The reported cases routinely involve “normally exposed” areas of the body, but not exclusively. See, e.g., Evans Bros. Co. v. Labor & Indus. Review Comm’n, 335 N.W.2d 888 (Wis. Ct. App. 1983) (allowing for compensation where a chest scar was exposed on a construction worker).
182. For instance, a woman’s leg scar may be exposed in normal employment while a male’s leg scar is more likely to be covered by pants.
183. See Thompson v. Thompson Roofing, No. 85003642, 1997 WL 100933, at *2, *6 (Wis. Labor & Indus. Review Comm’n Feb. 28, 1997) (crediting applicant’s testimony that wearing shorts frequently as a roofing estimator was routine where employer argued that the worker could wear long pants to hide the scar); see also Blaise v. Berlinger & Marx, No. 90024198, 1993 WL 441417, at *1 (Wis. Labor & Indus. Review Comm’n Oct. 6, 1993) (“The commission realizes that applicant’s scar may be hidden if he wears a long sleeve shirt. However, the commission does not believe that occupations for which the applicant is suited are ones that, in the most part and for the majority of time, utilize long sleeves unless applicant chose to wear such long sleeves simply to cover his scar. The commission has considered the fact that long sleeves will cover the applicant’s scar but, again, it is only one factor in the commission’s review of this case.”).
Scars are not the only compensable claims. For instance, facial tics, missing teeth, torticollis (head leaning to one side), a claw hand, and a hand tremor may also be compensated. 184

Obviously, the extent of the disfigurement affects the size of the award. The maximum recovery is equal to the employee's average annual earnings, subject to the State's maximum wage rate. 185 Under Wisconsin Statutes section 102.11(2), the average annual earnings are fifty times the average weekly wage, unless the actual earnings in the fifty-two weeks before the injury are higher. 186

Under Wisconsin Statutes section 102.56, the disfigurement award can either be the statutory maximum or a lesser amount determined by a host of enumerated statutory factors including the employee's age, work history, and occupation, as well as the scar's appearance, location, and visibility. 187 A significant amount of subjectivity exists in weighing these factors and making a disfigurement award. According to the Wisconsin Court of Appeals, section 102.56 "affords the department substantial leeway in calculating a sum to compensate workers who most likely will never know the full extent to which their disfigurements reduced their wages." 188

2. Minnesota

Minnesota has no specific benefit for disfigurement. Rather, cosmetic disfigurement to only the face, head, neck, or dorsum of the hands is compensable as a form of PPD. 189 As with other forms of PPD, the percentage is assigned by rule. 190 Also, PPD is not assigned until twenty-four months after the injury and also after any plastic surgery is performed. 191

185. WIS. STAT. ANN. § 102.11 (Westlaw).
187. WIS. STAT. ANN. § 102.56 (Westlaw).
189. MINN. R. 5223.0650, subpart 1 (2014); id. R. 5223.0010.
190. Id. R. 5223.0650, subparts 2–6.
191. Id. R. 5223.0650, subpart 1.
Ole has a scar on his forehead. Assuming that this remains more than twenty-four months after his injury, he would be entitled to a PPD percentage of anywhere from zero to four percent, depending on the length of the scar. This would amount to anywhere between $0 to $3000 in PPD (0% x $75,000 = $0; 0.04% x $75,000 = $3000). This could increase if the scar is hypertrophic.

F. Permanent Total Disability

1. Wisconsin

In general, a Wisconsin injured worker may be deemed permanently and totally disabled through two routes: (1) complete physical incapacity—defined medically or statutorily; or (2) vocational permanent and total disability. If an employee is found to be permanently and totally disabled, Wisconsin law provides weekly indemnity benefits (at two-thirds of the average weekly wage), along with reasonable and necessary medical expenses, for the employee’s lifetime. The length and amount of payments often result in a considerable value to the applicant and corresponding exposure for an insurance carrier—generating substantial litigation of PTD claims in Wisconsin. Additionally, for employees found permanently totally disabled, a death benefit is available to dependents upon the employee’s death, even if the death is not proximately related to the injury.

PTD claims generally are applicable for only “unscheduled” work injuries. Based on the type of proof submitted, an employee can be deemed permanently totally disabled from either a medical perspective or a vocational perspective. Regarding physical incapacity, the severity of an employee’s unscheduled work injuries may render the employee physically incapable of engaging in any

192. Id. R. 5223.0650, subpart 2(F)(4)(a)–(c).
193. Id. R. 5223.0650, subpart 2(F)(4)(d).
194. Balczewski v. Dep’t of Indus., Labor & Human Relations, 251 N.W. 2d 794, 797 (Wis. 1977).
195. WIS. STAT. ANN. § 102.44(2)–(3) (West, Westlaw through 2015 Act 3). Note, for certain dates of injuries, supplemental benefit amounts are available for permanently totally disabled workers. Id. § 101.44(1) (Westlaw).
196. See id. §§ 102.44(3), .46 (Westlaw).
197. Spine, torso, or head injuries are not specified in WIS. STAT. ANN. § 102.52 (Westlaw).
further employment. This occurs when the employee’s treating physician indicates that the employee is unable to work.\footnote{198}{An example is when a physician indicates that the injured worker is “unable to perform any work,” or “permanently and totally precluded from gainful employment” on the Department’s prescribed WKC 16 b report (otherwise known as a Practitioner’s Report in Lieu of Testimony) pursuant to Wis. STAT. ANN. § 102.17(1)(d) (Westlaw).}

While doctors are not necessarily experts in the labor market, they can opine about an employee’s physical incapacity and make recommendations to not return to any employment. Respondent attorneys often argue that such “vocational” opinions should be left to vocational experts and that “medical permanent total disability” opinions by physicians stray from their area of expertise.\footnote{199}{
\textit{Kurschner v. Industrial Commission}, 161 N.W.2d 213 (Wis. 1968), ushered in the concept of vocational testimony supplanting medical testimony on loss of earning capacity.
}

Accordingly, claimants facing these situations are well-advised to obtain vocational reports, even in the face of a physician providing a medical PTD assessment.

Alternatively, an employee can be permanently and totally disabled \textit{vocationally}.\footnote{200}{See, e.g., \textit{Harris v. Am. Motors Corp.}, No. 88-27583, 1990 WL 483292, at *3 (Wis. Labor & Indus. Review Comm’n Nov. 29, 1990).}

For unscheduled injuries, vocational disability is determined by assessing an employee’s loss of earning capacity.

When an employee suffers a near-complete loss of earning capacity, the “odd lot” doctrine may play a role.\footnote{201}{See \textit{Wis. STAT. ANN. §§ 102.44(3), 11(1) (Westlaw); Wis. ADMIN. CODE ch. DWD, § 80.34 (West, Westlaw through Feb. 9, 2015).}

The best introduction to the “odd lot” doctrine is through the example of an applicant named Lonnie Smith.\footnote{202}{\textit{Cargill Feed Div. v. Labor & Indus. Review Comm’n}, 2010 WI App 115, ¶ 1, 329 Wis. 2d 206, 789 N.W.2d 326 (“Under the odd-lot doctrine, injured workers may be classified permanently and totally disabled even if they retain a small, residual capacity to earn income; if they are ‘fit only for the odd lot job that appears occasionally and for a short time.’” (quoting \textit{Beecher v. Labor & Indus. Review Comm’n}, 2004 WI 88, ¶ 2, 273 Wis. 2d 136, 682 N.W.2d 29)).}

Mr. Smith “worked virtually all his adult life” as a heavy laborer, primarily sorting, handling, and transporting scrap metal.\footnote{203}{Lonnie Smith v. Milwaukee Scrap Metal Co., No. 1996012444, 1998 WL 1006264 (Wis. Labor & Indus. Review Comm’n Feb. 25, 1999).}

He had no secondary education, and

\footnote{204}{\textit{Id.} at *2.}
he was functionally illiterate.\textsuperscript{205} At the age of sixty-two, he suffered a work-related back injury that drastically altered his work abilities.\textsuperscript{206} He could not lift more than twenty pounds, had to avoid repetitive motions, and frequently had to change positions.\textsuperscript{207} Essentially, he could no longer engage in the only type of work he knew—heavy physical labor.

Based on his injury, Smith filed a claim for workers' compensation benefits, where he was found to be permanently and totally disabled.\textsuperscript{208} Such a determination raises questions. Smith's back injury, while significant, did not render him completely incapacitated or physically helpless,\textsuperscript{209} so how was he deemed permanently and totally disabled?

The answer lies in the nuances and ambiguities of the "odd lot" doctrine in Wisconsin. The "odd lot" doctrine is one of the crowning achievements of the Wisconsin workers' compensation law. This inexact doctrine applies when "[a]n employee . . . is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist."\textsuperscript{210}

The "odd lot" doctrine serves primarily as a rule of evidence. The applicant initially must show that the combination of certain basic facts—the applicant's injury, age, education, capacity, and training—demonstrate an inability to secure any continuing and gainful employment.\textsuperscript{211}

After a prima facie case is made, the respondent bears the burden of proving (through nonmedical vocational expert testimony, opinion, or labor market survey) "that the injured employee is actually employable and that there are actual jobs available to him."\textsuperscript{212} If such proof is not provided in rebuttal, the

\begin{itemize}
\item 205. Id.
\item 206. Id.
\item 207. Id.
\item 208. Id.
\item 209. Id.
\item 210. Id. (noting limited employment possibilities).
\item 211. Balczewski v. Dep't of Indus., Labor & Human Relations, 251 N.W.2d 794, 797 (Wis. 1977).
\item 212. Beecher v. Labor & Ind. Review Comm'n, 2004 WI 88, 273 Wis. 2d 136, 682 N.W.2d 29; Balczewski, 251 N.W.2d at 797.
\item 213. Beecher, 2004 WI 88, ¶ 44, 273 Wis. 2d 136, 682 N.W.2d 29 (emphasis added). Generally, a labor market survey is needed to identify specific and currently available jobs within the applicant's permanent physical restrictions.
\end{itemize}
applicant technically prevails.\textsuperscript{214} Alternatively, if the respondent satisfies its burden, the decision maker then faces the actual "odd-lot" determination: whether the injured worker—based on pertinent characteristics—can only perform those jobs which are so limited in quality, dependability, and quantity "that a reasonably stable market for them does not exist.\textsuperscript{215}

The substantial social and economic support provided to injured workers by these rules is undisputed. The doctrine assists those injured workers who—while not physically helpless or incapable of work—cannot secure any continuing, consistent, or gainful employment based on their relevant characteristics and work limitations. As such, the "odd lot" doctrine is "an exception to the general rule that a permanently, totally disabled employee has no future earning capacity."\textsuperscript{216} The doctrine "fills the gaps" and attempts to adequately compensate these individuals—so that such a worker is not left to the sometimes harsh realities (and potential discriminations) of the labor market. Moreover, when compared to the benefit levels for even a high-end loss of earning capacity assessment, a finding of "odd lot" PTD results in a substantial economic benefit for the injured worker.\textsuperscript{217}

In Wisconsin, should a vocational expert find Ole permanently totally disabled under the "odd lot" doctrine, he would be paid $892 per week during his lifetime, with no cut-off at a presumed retirement age.\textsuperscript{218} With a life expectancy of thirty years or so, his indemnity claim is worth well over a million dollars.

2. Minnesota

Minnesota has two forms of PTD. The first type of PTD relates to those employees who have sustained catastrophic injuries,
namely the "total and permanent loss of the sight of both eyes, the
loss of both arms at the shoulder, the loss of both legs so close to
the hips that no effective artificial members can be used, complete
and permanent paralysis, [or] total and permanent loss of mental
faculties."219 The second type of PTD takes account of both medical
and vocational characteristics of the employee. This is a two-step
process. First, the employee must demonstrate that he meets any of
the following three criteria:

(i) [he] has at least a 17 percent permanent partial
disability rating of the whole body; (ii) [he] has a
permanent partial disability rating of the whole body of at
least 15 percent and [he was] at least 50 years old at the
time of injury; or (iii) [he] has a permanent partial
disability rating of the whole body of at least 13 percent
and [he] is at least 55 years old at the time of the injury,
and has not completed grade 12 or obtained a GED
certificate.220

Second, the employee must demonstrate that this condition,
when considered alongside his "age, education, training and
experience," renders him "unable to secure anything more than
sporadic employment resulting in an insubstantial income"—the
consideration of age, education, training, and experience cannot
be addressed until the employee satisfies the first set of thresholds
(i–iii above).221

Generally, this second type of PTD is more complicated and
more often the subject of litigation. Defenses to PTD claims run
the gamut from allegations that the employee has not performed a
diligent (failed) job search or otherwise demonstrated that he
cannot attain suitable regular employment222 to the employee’s
withdrawal from the labor market.223 Another defense arises when
the employee is actually working despite the PTD claim. In order to
counter such a defense, the employee needs to show that his
earnings from said employment are insubstantial and/or that the
employment is sporadic.224

220. Id. § 176.101, subdivs. 5(2)(i)–(iii).
221. Id. § 176.101, subdiv. 5.
222. See, e.g., Hanmer v. Wes Barrette Masonry, 403 N.W.2d 839, 840 (Minn.
1987).
223. See Paine v. Beek’s Pizza, 323 N.W.2d 812, 814 (Minn. 1982).
Retirement is perhaps the best defense to a PTD claim under Minnesota law. By law, PTD benefits must stop when the employee reaches the age of sixty-seven because the employee is presumed under the law to have retired as of that date. The employee may rebut this presumption, but a simple subjective offering that the employee "is not retired" will be insufficient to successfully rebut; more is required. Successfully rebutting the retirement presumption often falls upon witness testimony (such as from the employee’s spouse or co-workers) that the employee said (before his injury) that he intended to work beyond the age of sixty-seven. The testimony of the employee regarding his own intentions is helpful as well and may in some cases be enough to rebut the retirement presumption. The following are additional factors which may aid the court in determining whether the employee has removed himself from the labor market via retirement: (1) the employee’s expressed intent to retire or continue working; (2) an application for social security, retirement, or disability; (3) evidence of a financial need for employment income, including the adequacy of a pension or other retirement; (4) whether the employee or the employer initiated the discussion of retirement; (5) whether the employee sought rehabilitation assistance; and (6) whether the employee actively sought alternative employment or was in fact working.

In Ole’s case, the catastrophic-injury type of PTD is inapplicable; he did not lose the described body parts and there is also no indication that he has lost his mental faculties. Under the medical/vocational form of PTD, he has not sustained 17% PPD or 15% PPD, so the first two qualifying criteria are foreclosed. On the other hand, he was at least fifty-five years old at the time of the injury, has not completed grade twelve, and does not have a GED. Therefore, if he can demonstrate at least 13% PPD, he can move on to considerations of his age, education, training, and so forth.

WCCA July 9, 2001).

225. MINN. STAT. § 176.101, subdiv. 4.
226. Id.
This will be difficult. As was previously noted, Ole would be entitled to 9.5% PPD for the back and 0%-4% for the scar, but total PPD is not calculated by simply adding all ratings together (i.e., by adding 9.5% to 0%-4% to get 9.5%-13.5%). Rather, a different formula is employed, which in this case nets a total PPD to the body as a whole of 9.5% to 13.12%. Therefore, Ole must show that he is entitled to the maximum PPD possible. Assuming he can, and exceeds the 13%, Ole's age, education, training, etc. would be considered to determine PTD.

If entitled to PTD benefits, Ole would receive $963.90 per week (the PTD maximum) and be entitled to receive the same until reaching age sixty-seven, at which point he would need to rebut the statutory retirement presumption. Also, Ole's benefits would be subject to cost-of-living adjustments beginning on the third anniversary of his date of injury (June 1, 2017). Ole's PTD claim has a present value of over $380,000.

G. Social Security/Workers' Compensation Offset

1. Wisconsin

An injured worker's receipt of Social Security Disability (SSD) Benefits can produce an offset from workers' compensation payments for TTD, PPD, and PTD. There is no social security offset against vocational retraining benefits.

A workers' compensation recipient who is also collecting SSD cannot net, in combined benefits, more than eighty percent of his average current earnings (ACE). Wisconsin is one of sixteen "Reverse Offset" states, whereby any offset is taken on workers'

For each dollar that the total monthly [workers’ compensation] benefits . . . , excluding attorney’s fees and costs, plus the monthly benefits payable under the social security act for disability exceed 80% of the employee’s average current earnings as determined by the social security administration, the [workers’ compensation] benefits . . . shall be reduced by the same amount so that the total benefits payable shall not exceed 80% of the [worker’s ACE].

The offset ends at SSD regular retirement age, now sixty-five, sixty-six, or sixty-seven.

2. Minnesota

In Minnesota, once the employer and insurer have paid $25,000 in PTD benefits, they are entitled to a dollar-for-dollar offset for: (1) any government disability benefits paid to the employee if said benefits are the result of the work injury; (2) government old age benefits (i.e., Social Security retirement benefits); and (3) government survivor insurance benefits (i.e., Social Security survivor benefits). There is no cap or restriction on this offset—it can theoretically completely eliminate the PTD

236. Most other states provide that under federal law the Social Security Administration is entitled to a credit against any workers’ compensation benefits that a Social Security Disability claimant receives. See 42 U.S.C. § 424a(a); 20 C.F.R. § 404.401(a) (2014); see also SSR 87-21C, 1987 WL 109206 (Jan. 1, 1987); SSR 81-32, 1981 WL 27310 (Jan. 1, 1981); SSR 81-20, 1981 WL 27309 (Jan. 1, 1981). Under Social Security law, Social Security is required to reduce or offset the level of a recipient’s Social Security Disability payments when a total of the recipient’s disability payments and workers’ compensation benefits exceed eighty percent of his average current earnings, a figure that is arrived at by taking one-twelfth of the claimant’s highest year of wages and self-employment income in the calendar year of the disability onset date or any of five preceding years. 42 U.S.C. § 424a(a). The reduction is taken against the recipient’s monthly Social Security benefits. Id. In Wisconsin, however, the reverse is true. The eighty percent ACE formula is used, but the workers’ compensation insurance carrier liability is reduced, not that of Social Security.


liability for the employer and insurer if the offset exceeds the PTD payable. 239 It is thus very beneficial to employers and insurers.

H. Attorney’s Fees

1. Wisconsin

In Wisconsin, attorney’s fees on PTD claims are capped at twenty percent, with one further limitation: attorney’s fees are not allowed on PTD claims beyond five-hundred weeks. 240 The five-hundred week “clock” starts at the end of healing date (i.e., when the claim for PTD benefits generally begins).

Attorney’s fees are not applicable to medical expenses, nor to any part of a settlement allocated for future medical expenses. 241 If Ole’s case settled in Wisconsin, fees on PTD benefits would be limited to $89,200 (0.20 x 500 weeks at $892 per week).

2. Minnesota

In Minnesota, attorney’s fees are awarded at twenty percent of the employee’s recovery, subject to a maximum of $26,000. 242 This is presumed by statute to be an adequate amount of attorney’s fees. 243 However, a variety of cases decided in Minnesota have allowed an employee’s attorney to move for fees in excess of the twenty percent called for by statute. 244 These include Roraff fees and Heaton fees (named after the cases which spawned them). 245 These cases require the petitioning attorney to show that the statutory fee (i.e., twenty percent of the compensation awarded to the employee) would inadequately compensate him, considering the factors involved in the employee’s case, including “the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the

239. See id.
243. Id. § 176.081, subdiv. 1(1).
244. See, e.g., Roraff v. State, Dep’t of Transp., 288 N.W.2d 15, 16 (Minn. 1980); Heaton v. J.E. Fryer & Co., 36 W.C.D. 316, 319 (Minn. WCCA 1983).
245. See Roraff, 288 N.W.2d at 16; Heaton, 36 W.C.D. at 319.
difficulties of the issues, the nature of the proof involved, and the results obtained.\textsuperscript{246} These claims are vigorously litigated in Minnesota. Under Minnesota law, the attorney retained by Ole would be entitled to twenty percent of his awarded compensation and, if Ole was adjudicated permanently totally disabled, he would likely move for excess fees, arguing that $26,000 inadequately compensated him.

IV. CONCLUSION

Overall, assuming jurisdiction in both states, Ole’s chances for recovery based on “course of employment” and considering his “traveling employee” status is much better in Wisconsin.\textsuperscript{247} He is unlikely to recover in Minnesota due to his deviation.\textsuperscript{248} However, if he could recover in either state, the length and extent of his disability would determine which state offered better benefits. If he is only temporarily or partially disabled, his benefits in Minnesota would likely be greater. If, on the other hand, he is permanently totally disabled, Wisconsin would provide greater benefits.\textsuperscript{249}

\textsuperscript{246} Irwin v. Surdyk’s Liquor, 599 N.W.2d 132, 142 (Minn. 1999).
\textsuperscript{247} See supra Part II.A.
\textsuperscript{248} See supra Part II.A.2.
\textsuperscript{249} See supra Part III.F.