

Arising Out of and in the Course of Employment: *Dykhoff v. Xcel Energy* What it Means and What it Does Not Mean

RANDALL S. LANE RLANE@HEACOXLAW.COM
 JOSHUA M. STEINBRECHER JSTEINBRECHER@HEACOXLAW.COM
 HEACOX, HARTMAN, KOSHMRL, COSGRIFF & JOHNSON, P.A.
 550 HAMM BUILDING
 408 ST. PETER STREET
 ST. PAUL, MINNESOTA 55102
 (651) 222-2922

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History

- ▶ In order for an injury to be compensable, it must arise out of and be in the course of employment:
 - ▶ Minn. Stat. § 176.011 subd. 16 – definition of “personal injury:” mental impairment or physical injury arising out of and in the course of employment.
 - ▶ Minn. Stat. § 176.021 subd. 1 – liability for compensation: employers are liable to pay compensation in every case of personal injury or death of an employee arising out of and in the course of employment . . .
 - ▶ Both requirements must be satisfied in order for a claim to be compensable (the extent to which each requirement must be satisfied has been the subject of litigation)

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“Arising Out of”

- ▶ Must be something more than simply an injury occurring at work
- ▶ Must be a causal connection between the injury and the employment
- ▶ Tests for assessing causal connection between the injury and the employment (difficult to determine consistent application – courts might use the tests alternatively and/or in combination):
 - ▶ Increased risk test
 - ▶ Positional risk test/street risks
 - ▶ Special hazard test

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“In the Course of”

- ▶ Refers to time, place, and circumstances of the incident-causing injury
- ▶ Minn. Stat. § 176.011 subd. 16 definition of “personal injury” does not cover an employee except while engaged in, on or about the premises where the employer’s services require the employee’s presence as a part of such service at the time of the injury and during the hours of such service.
- ▶ Injury in the course of employment when:
 - ▶ It takes place within period of employment
 - ▶ At a place where the employee reasonably may be
 - ▶ While fulfilling duties of the employment or engaged in something incidental to the employment

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“In the Course of”

- ▶ Coming/Going rule – But . . .
 - ▶ Traveling employees
 - ▶ Special errands
 - ▶ Deviations
- ▶ Personal Comfort Doctrine
- ▶ Horseplay
- ▶ Violation of Employer Rules

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Balancing “Arising out of” and “In the Course of” – the “Work-Connection Test”

Bohlin v. St. Louis County

- ▶ Compare relative strengths of the “arising out of” and “in the course of” elements, and if one is weak, but the other is strong, the two-prong test may be sufficiently satisfied
- ▶ But . . . *Dykhoff*

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Dykhoff Decision

▶ Facts of the Case:

- ▶ 6/20/2011: Employee working as a preventative maintenance coordinator for Xcel Energy
 - ▶ On date of injury, attending computer training sessions in downtown Minneapolis
 - ▶ Told to wear “dress clothes” which, to the employee, included shoes with 2” high wooden heels
 - ▶ Walking with laptop bag over her left shoulder, purse over right shoulder, coat over right arm
- ▶ Employee fell on floor while walking, landed on buttocks, due to her right foot “slipping” out from under her
 - ▶ Employee testified that she fell because the floor was “highly polished” and “very clean”
 - ▶ Marble floor; no defects; no water; no other hazard
- ▶ Dislocated left knee → Primary liability denied
 - ▶ Did not “arise out of” employment

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Litigation at OAH

- ▶ Employee filed Claim Petition claiming left knee injury arising out of and in the course of her employment on 6/20/11
- ▶ Alleged 1 week Temporary Total Disability; reserved Permanent Partial Disability, medical, and attorney fees
- ▶ Hearing before compensation judge Peggy Brenden on 4/16/12
 - ▶ Employee presented photos of a scuff mark on the floor to prove she slipped or slid
 - ▶ Operations manager testified that the floor had been stripped 1 month prior, but was not “slippery” on the date of injury, and that it was free of debris

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Litigation at OAH

- ▶ Judge Brenden determined that the employee failed to prove the injury arose out of her employment, based on inadequate evidence that she was at any increased risk for falling due to the condition of the floor
 - ▶ Denied claim
 - ▶ Relied on 4 key facts:
 - ▶ 1) Testimony of operations manager re: post-fall inspection of floor
 - ▶ 2) Employee walked across the floor moments before the fall without any incident
 - ▶ 3) Equally plausible that fall was due to 2" heels, rather than the floor
 - ▶ 4) Floor was clean, flat, and dry

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WCCA Review

- ▶ The Court discussed the "increased risk" test applied by Judge Brenden:
 - ▶ The test requires that an employee be exposed to a risk of harm greater than that of the general public, because of the nature, obligations, or incidents of the employment
 - ▶ The Court noted that Judge Brenden relied solely on the increased risk test in determining the employee's injury as non-compensable
- ▶ In effect, the Court felt application of the increased risk test was unfair to the employee
 - ▶ "We are left with an employee who sustained an injury as a result of a fall at work, and she has been denied compensation because she could not prove the floor was slippery."
 - ▶ The Court was concerned that if the increased risk test was applied in every case, "unexplained injuries" would never be compensable
 - ▶ Differentiated between "unexplained" and "idiopathic," the latter of which are generally non-compensable

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WCCA Review

- ▶ To avoid the feared result, the Court determined that the "proper test" to apply in all cases is the "work-connection" analysis laid out in the *Bahlin* decision
 - ▶ The "arising out of" requirement should be balanced with the "in the course of" requirement
 - ▶ If one requirement is strong, but the other weak, the injury may still be compensable
- ▶ As applied to *Dykhoff*, the Court conceded that the facts failed to satisfy the increased risk test
 - ▶ However, the Court held that the "in the course of" requirement was strong enough to outweigh the deficiencies in the "arising out of" requirement
 - ▶ In such cases, the injury is compensable
 - ▶ The Court reversed the decision of the Compensation Judge

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Supreme Court Review

- ▶ The issues:
 - ▶ 1) Whether WCCA committed an error of law by applying the work-connection balancing test (de novo review);
 - ▶ 2) Whether WCCA erred by substituting its findings of fact for those of the compensation judge (clear and manifest error review).
- ▶ Minn. Stat. § 176.021 demands the distinct requirements be met for an injury to be compensable
 - ▶ "Arising out of:" causal connection
 - ▶ "In the course of:" time, place, and circumstances
 - ▶ No argument that the employee's injury satisfied the "in the course of" requirement

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Supreme Court Review

- ▶ The Supreme Court's staircase analogy as an unintentional litigation generator
 - ▶ Prior to its actual opinion on the *Dykhoff* issues, Supreme Court Justice Gildea wrote "Many workplaces have stairways and there is nothing inherently dangerous or risky about requiring employers to use them."
 - ▶ That comment prefaced a discussion of a case where a staircase injury was actually compensable as a work injury
 - ▶ Even so, some now believe that comment can serve as a basis to deny most, if not all, staircase-related injuries

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Supreme Court Review

- ▶ The Supreme Court worked back through the evidence presented indicating that the floor was not slippery on the date of injury
 - ▶ Cited numerous decisions for the proposition that the "increased risk" test is proper to analyze the "arising out of" requirement
 - ▶ Confirmed the compensation judge's finding that the floor was not slippery
 - ▶ Held that without evidence that something about the floor increased her risk of injury, *Dykhoff* failed to meet her burden of proof

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Supreme Court Review

- ▶ The Supreme Court held that the application of the "work connection" test by the WCCA was contrary to law, as the test fails to give effect to both requirements of Minn. Stat. § 176.021
 - ▶ The test treats requirements as alternatives
 - ▶ The work connection test is rejected by the court and the WCCA is reversed
- ▶ Justice Page dissents: if an employee is engaged in "an employment-related responsibility" and sustains an injury, the "arising out of" requirement is met
- ▶ Justice Lillehaug dissents: the undisputed facts constituted an increased risk

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The Progeny of *Dykhoff*: *Kainz v. Arrowhead Senior Living Community*

- ▶ The "staircase" denial
- ▶ Employee twisted her ankle while descending a staircase to get supplies
- ▶ At the hearing, the employee testified that the staircase was "kind of steep"
- ▶ A photo was submitted by the employee as evidence but photo was cut off before the bottom of the staircase
- ▶ Compensation Judge used the photo to determine that the handrail ended where the employee fell
- ▶ Compensation Judge determined the staircase presented an "increased risk" of injury and awarded the claim

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The Progeny of *Dykhoff*: *Kainz v. Arrowhead Senior Living Community*

- ▶ WCCA upheld the findings of the compensation judge and affirmed, but did so using the work connection test
 - ▶ The Court rejected the employer's argument that the employee was placed at a risk greater than the general public
 - ▶ The Supreme Court stayed the employer's appeal, while considering *Dykhoff*, then remanded to the WCCA to be reconsidered in light of *Dykhoff*
 - ▶ WCCA affirmed again using the increased risk test applied initially by the compensation judge

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The Progeny of *Dykhoff*: *Kainz v. Arrowhead Senior Living Community*

- ▶ Employer again appealed the decision, and the Supreme Court granted certiorari
 - ▶ Supreme Court found that the photo conclusively established that the handrails extended all the way down the staircase
 - ▶ WCCA finding was manifestly contrary to the evidence
 - ▶ No finding by the compensation judge as to the "steepness" of the stairs, relied upon by WCCA solely via employee's testimony
 - ▶ WCCA decision reversed, and case remanded to the compensation judge to reconsider his decision in light of *Dykhoff*

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The Progeny of *Dykhoff*: *Dennis v. Salvation Army*

- ▶ Cook for Salvation Army in Minneapolis where two areas were provided for employee smoking
 - ▶ One area was across the street from the building where employee usually worked
- ▶ It had snowed overnight, the street had not been plowed, and the sidewalk had not been shoveled
- ▶ Employee utilized a path through the snow created by other employees to cross the street
- ▶ Employee slipped and fell as he stepped onto the path and injured his left knee
- ▶ Compensation judge determined the injury arose out of and in the course of employment and awarded the claim:
 - ▶ Utilized the "street risk" doctrine, which states that if the work subjects the employee to the risks of the street, it is compensable
 - ▶ Street risk doctrine essentially views street as a "special hazard" inherent to the employment

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The Progeny of *Dykhoff*: *Dennis v. Salvation Army*

- ▶ On appeal to WCCA, the employer argued that *Dykhoff* abolished the "street risk" doctrine, and argued the employee must prove an "increased risk" outside of that faced by the general public
 - ▶ WCCA disagreed, and affirmed compensation judge's reliance on the street risk doctrine
 - ▶ The street presents a "special hazard" for employees, regardless of requirements of *Dykhoff*
- ▶ In other words, it doesn't matter that the general public have just as much risk while crossing the street, so long as the employment called the employee into the street

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The Progeny of *Dykhoff*:
Hohlt v. University of Minnesota
 “Special risk” vs. “increased risk”

- ▶ Painter at University of Minnesota slipped and fell on an icy sidewalk while walking three blocks from campus parking ramp to campus building
- ▶ Employer denied liability based on *Dykhoff*
- ▶ Compensation judge accepted employer’s argument that employee’s injury did not arise out of her employment
- ▶ Employee appealed, and WCCA reversed compensation judge’s decision
 - ▶ Rejected the argument of employer that *Dykhoff* requires a “special, unique” risk

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The Progeny of *Dykhoff*:
Hohlt v. University of Minnesota

- ▶ WCCA determined that a “special risk” is only required where the employee is not on the work premises when injured
 - ▶ If on the premises, employee only needs to show an increased risk of injury and that the injury followed from the risk
 - ▶ Court noted that it is irrelevant if the public is similarly at risk
- ▶ E.g., injury to a maid, driver, cook, etc.

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The Progeny of *Dykhoff*:
Kubis v. Community Memorial Hospital
 “Everybody’s in a Hurry”

- ▶ Registered nurse fell when she “rushed up the stairs” to return to her nursing station
- ▶ Testified that she rushed up the stairs due to hospital’s overtime policy
- ▶ Considerable evidence submitted in contradiction to the employee’s testimony at the hearing
- ▶ Compensation Judge denied the claim on a lack of increased risk pursuant to *Dykhoff*, and credibility issues with employee’s testimony

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The Progeny of *Dykhoff*:
Kubis v. Community Memorial Hospital

- ▶ WCCA reversed the compensation judge on the issues of “arising out of” and increased risk
 - ▶ Cited the fact that the employee was “hurrying” to update other nurses on patient care before shift ended
 - ▶ She was hurrying for a work-related purpose, and the hurrying increased her risk of injury
- ▶ The fact that there was no debris, water, defect, nor any type of safety hazard in the staircase was of no consequence to the WCCA

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The Progeny of *Dykhoff*: *Erven v. Magnetation, LLC*

Is there anything left of *Dykhoff*?

- ▶ Employee was "walking fast" to respond to a slurry tank at the job premises
 - ▶ Twisted/rolled his right ankle
 - ▶ Method of injury was unexplained/unknown
 - ▶ No fall, floor was flat and dry, employee did not trip or stumble
 - ▶ Testified that he was not looking at the floor due to the slurry tank leak
- ▶ Compensation judge determined the increased risk test was met, because:
 - ▶ 1) Employee was required to increase his rate of movement;
 - ▶ 2) more likely to avert his vision from the floor due to watching slurry leak
- ▶ Evidence and testimony regarding the rate of speed was that of a "fast walk"
- ▶ WCCA affirmed

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The *Dykhoff* Effect into the Future?

- ▶ A Road Map for Petitioners
 - ▶ Is *Dykhoff* a "game changer" that allows denial of a large swath of previously compensable cases?
 - ▶ Recent WCCA decisions interpreting *Dykhoff* have likely been highly instructive to the Petitioner's bar
 - ▶ The decisions lead well to "sand-papering" claimants
 - ▶ E.g., "Are you sure you weren't in a hurry?"
 - ▶ The WCCA will go to considerable lengths to read facts favorable to employees in *Dykhoff* cases

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The *Dykhoff* Effect into the Future

- ▶ Greater Insulation from "Unknown Injury" Claims if Properly Handled
 - ▶ Important to gather as many facts and as much evidence as possible immediately following the injury
 - ▶ Take recorded statements; obtain photographs; speak to witnesses; preserve the scene; etc.
- ▶ A Case-by-Case Analysis is Crucial
 - ▶ *Dykhoff* is not a "one-size-fits-all" defense to claims, and is extremely fact-specific
 - ▶ That does not mean that *Dykhoff* cannot be used to deny claims where no increased risk is present
 - ▶ Expectations need to be kept realistic on the chances to prevail solely on a *Dykhoff* defense
 - ▶ More work done at the outset of the claim → the better the chances of success

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