WORKER'S COMPENSATION TRAINING WORKSHOP:

SIGNIFICANT INDIANA WORKER'S COMPENSATION CASES

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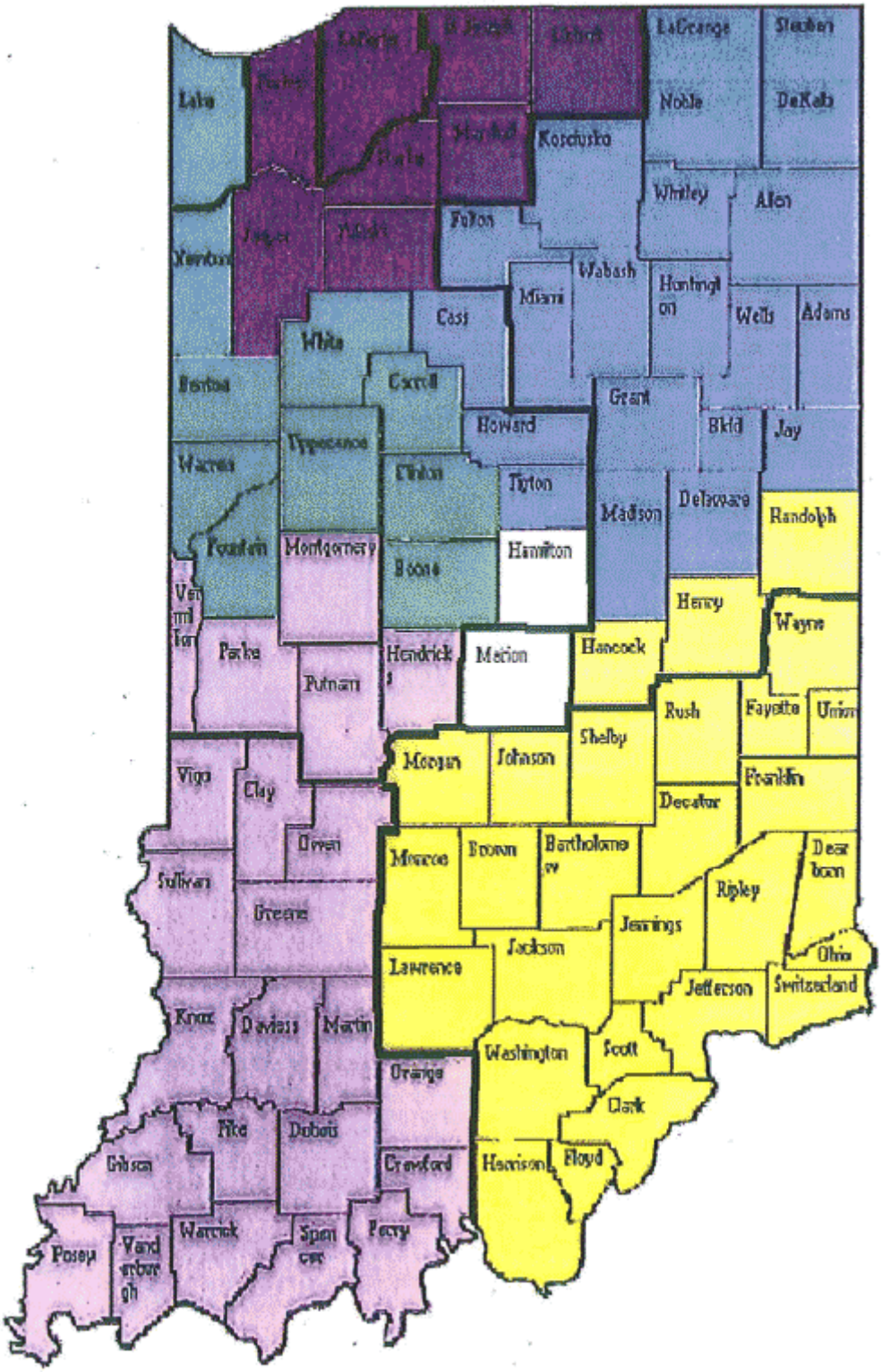
By:

Michael S. Huntine
DUE DOYLE FANNING, LLP
55 Monument Circle
900 Circle Tower Building
Indianapolis, Indiana 46204
(317) 635-7700
mhuntine@duedoyle.com

INDIANA WORKER'S COMPENSATION BOARD DISTRICTS



INDEX

REQUIREMENTS FOR A WORKER'S COMPENSATION CLAIM

A. Accident - Considered "by accident" when it is the unexpected result of the routine performance of the job.

B. Arising out of Employment - When there is a causal connection between the duties or conditions of employment and the injury.

C. In the Course of Employment - When it occurs at a time and place where the employee may be expected to be in the performance of the employment.

1. **Injury by Accident:** *Evans v. Yankeetown Dock Corp.*, 491 N.E. 2d 969 (Ind. 1986).

Plaintiff Evans was at work prior to shift starting in the morning, drinking coffee with fellow employees. Due to an alcoholic paranoid delusional state, another employee sneaked up on him and short him five times - killing him within minutes. The Plaintiff's Estate filed a wrongful death claim against the employer (not a worker's compensation claim). The employer obtained dismissal of the case due to the Exclusive Remedy Provision of the Workers' Compensation Act. Upon review by the Supreme Court, the dismissal was upheld.

At Issue:

"Personal Injury or Death by Accident." Previously it required a showing of untoward or unexpected event. (i.e., reinterpreted the act to require an injury by "an" accident).

Now:

Requires accidental cause or accidental result. (i.e., the unexpected result of the routine performance of the claimants' duties. "Unexpected injury or death"). The Court found that the Plaintiff did not intend or expect to be injured or killed as he was drinking his coffee at work that morning.

2. **Mental-Mental Stress Claim:** *Hansen v. Van Duprin, Inc.*, 507 N.E. 2d 573 (Ind. 1987)

The Plaintiff had pre-existing emotional and physical problems, including a gunshot wound inflected by her former husband. Employer's supervisor knew this and would sneak up on her from behind and jab her in the ribs as if holding a gun. He also dropped books and fired a cap gun. The Plaintiff ultimately suffered a mental breakdown and stopped working.

At Issue:

Whether or not injury arose out of and in the course of employment. Since the *Evans* case, all that is required is an unexpected injury. The Court of Appeals found this was satisfied, but that it had to be "other than the day-to-day mental stresses which all employees experience." It concluded this was not the type of horseplay that would result in severe anxiety of an employee.

Supreme Court:

Reversed and found compensable. Held that it was not whether the events were "ordinary," or unusual, rather did the injury arise out of and in the course of employment. In other words, whether it was "causally connected to the employment." The Plaintiff submitted medical testimony that the condition would not have developed without the events.

Signif.:

You take your employee as your find them!

3. **Intentional Tort Exclusion to the Exclusive Remedy Provision:**
Baker v. Westinghouse, 637 N.E. 2d 1271 (Ind. 1994)

In Indiana, employees who are injured at work have certain rights and remedies under the Indiana Workers' Compensation Act. The Workers' Compensation Act is the exclusive remedy for employment-related personal injury or death which occurs by accident. As a general rule, an employee injured at work is not entitled to maintain a lawsuit against her or her employer. However, if an employer is found to have intentionally caused injury to an employee, such conduct would fall outside the parameters of the Workers' Compensation Act and a lawsuit in a court of law would be appropriate. Such was the case in *Baker v. Westinghouse Electric Corp.*. In *Baker*, the Plaintiff attempted to circumvent the Exclusive Remedy Provision, by suing a court of law instead of at the Worker's Compensation Board, contending that his occupational disease was intentionally caused by Westinghouse. The Supreme Court concluded that intentional injuries are not covered by the Workers' Compensation Act since intentionally-caused injures are not "by accident." In determining whether an injury is "intentional," the Court looked to the state of mind or level of intent necessary to qualify as an exclusion to workers' compensation. Mere negligence was not enough to strip the Board of its jurisdiction. Nothing short of deliberate intent to inflict injury or actual knowledge that an injury is certain to occur would defeat the exclusive remedy of worker's compensation. In addition, it must be the employer who intended to harm the employee. Acts of foremen or supervisors were not automatically imputed to the employer for purposes of determining who intentionally caused the injury. Further, employees could not rely on the theory of respondeat superior to invoke liability on the employer for an intentional tort. The corporation must be an "alter ego" of the employee who allegedly caused the intentional harm to the employee.

This issue was again decided in the case of *Lawson v. Raney Manufacturing, Inc.*, 678 N.E. 2d 122 (Ind.App. 1997).

In that case Lawson sustained amputations to both hands, the first day of work for the employer. She filed a civil action against the employer alleging that the employer had actual knowledge that injury was certain to occur. This allegation is the standard established by the Indiana Supreme Court in *Baker v. Westinghouse* for intentional acts. The employer moved to dismiss her claim. The trial court granted the employer's motion to dismiss.

The Court of Appeals affirmed the trial court's dismissal of the action finding that the Indiana Workers' Compensation Act was the exclusive remedy. The Court found that there was insufficient evidence to establish that the employer had actual knowledge that an injury was certain to occur. The Court noted that, at best, the allegations raised by the employee would show recklessness but no intent to injure or actual knowledge that an injury was certain to occur.

A showing of wantonness or recklessness in the use of a dangerous workplace procedure is not sufficient to show an intent to cause injury, as required by *Baker*. The case was dismissed.

4. **Cumulative Trauma - Statute of Limitations:** *Union City Body v. Lamdin*, 569 N.E. 2d 373 (Ind.App. 1991)

The Plaintiff was a 19-year employee of the company. He first complained of an acute back strain. After the *Evans* decision, he amended this claim to include permanent and total disability due to the cumulative effect of bending, twisting, stooping and lifting while at work. Remember, prior to *Evans*, he was required to show "an" accident. Since the *Evans* decision, he simply needed to show an unexpected injury as a result of his usual job. In this case, the Court ultimately acknowledged that the occurrence is a continuing one that happens day after day on the job, and a combination of all the days produced the injurious result. Where such a situation occurs, there is a continuing wrong which exists, and the statute of limitations commences to run when its permanence is discernable.

Duvall v. ICI Americas, Inc., 621 N.E. 2d 1122 (Ind.App. 1993)

In this case, the Plaintiff complained of carpal tunnel syndrome, as well as other problems. She initially argued that it was an occupational disease claim. This makes a difference because the statute of limitations in an occupational disease claim is two years from disablement versus the rule announced in *Union City Body*, which was when the permanence is discernable. The Plaintiff argued she filed her claim timely within two years of her last day of work. The Board and Court ultimately held that it was not an occupational disease claim but a worker's compensation matter. Again, the Court referred to the *Evans* case in that this was an unexpected result of the routine performance of the job. In this case, the evidence showed that the Plaintiff was first diagnosed with carpal tunnel syndrome and that her physician placed her on a treatment regime, along with work restrictions, years prior to her filing. Therefore, the Court found that the injuries were discernable at the time they were diagnosed and/or received medical treatment. Because this took place at least three years prior to the Plaintiff's first filing, the claim was barred by the statute of limitations.

5. **Burden of Proof – Positional Risk Doctrine:** The rise and fall of *Milledge v. The Oaks*, 784 N.E. 2d 926 (Ind. 2003)

The employee, Milledge, sprained her ankle in the parking lot of the employer. There was no defect in the parking lot which might have increased the risk of injury and there was no evidence that Milledge had a pre-existing problem with her ankle. She developed a blister on the ankle which was lanced by her husband. An infection developed which did not heal because the employee's diabetic condition and the leg had to be amputated below the knee.

The Workers' Compensation Board determined that the case was not compensable because the parking lot was "clean, dry, level and clear of debris" and therefore, did not present an increased risk of accidental injury. The Court of Appeals agreed, but the Supreme Court of Indiana reversed, holding that since there was no employment risk and no personal risk, the case

must be classified as one of neutral risk and compensability imposed based on the positional risk doctrine. Such doctrine finds an accidental injury to be compensable where it is in the course of the employment and would not have occurred but for the fact that the employment placed the employee in the position where the injury occurred.

In essence, this case was one of an unexplained fall where the employer did not meet its burden of proving that the accident was actually caused by a risk personal to the employee. If it is a personal risk (i.e., pre-existing condition) then it would not be covered by worker's compensation. If an employment risk, then it would be covered. Since it was determined to be a neutral risk, the positional risk doctrine applied. That doctrine shifts the burden of proof and creates a "rebuttable presumption" that the injury arose out of employment. The employer bears the burden of proof that the injury was caused by something personal to the Plaintiff.

2006 Amendment in Response to Milledge

Three years after *Milledge*, in 2006, the Indiana General Assembly amended I.C. 22-3-2-2 to add the following:

> "The burden of proof is on the employee. The proof of the employee of an element of a claim does not create a presumption in favor of the employee with regard to another element of the claim."

Subsequent cases have upheld the statutory change, in light of a weak constitutional challenge to it. *Pavese v. Cleaning Solutions*, 894 N.E. 2d 570 (Ind.App. 2008).

This case involved a custodian that was dusting and cleaning floors with cleaning solution and water. After dusting, but prior to using any water, she was found unconscious on the floor – not remembering a thing. The doctor suspected a fainting episode, possibly related to her heart, and conducted tests. The tests were normal and, therefore, the cause of her accident was unknown. The other possibility was that she fell on a slick floor, struck her head and sustained a concussion with retrograde amnesia and was simply unable to remember the reason for the fall. The doctor advanced both potential causes for the accident. The Plaintiff simply testified that this was a non-painted concrete floor and that it was slick when there was water, and sometimes oil on it.

The court concluded that Plaintiff failed to meet her burden of proof that her injury arose out of employment, when she advanced two possible causes for the fall. The court specifically noted the amendment in 2006, requiring the burden of proof remain squarely on the employee. The court acknowledged that the amendment overruled *Milledge's* position that the Positional Risk Doctrine should be applied in cases involving neutral risks. In noting that the Plaintiff failed to meet her burden of proof, it commented that the fainting episode would be considered a personal risk and not compensable. However, it also noted that slipping on the floor would

generally be considered a neutral risk and covered by worker's compensation. In this case, the Plaintiff presented the court with both possibilities and, therefore, failed to meet her burden of proof when it was on her to establish the injury arose out of employment.

6. **Bad Faith and Independent Tort:** *Sims v. USF&G*, 782 N.E. 2d 345 (Ind. 2003)

Sims was injured at work and filed a claim for worker's compensation. The employer sent the First Report of Injury to the worker's compensation carrier, who requested a claim statement form from the employee. Sims completed and returned the form and never heard back from the carrier regarding treatment or benefits. The employee followed up with the insurance carrier multiple times with no response regarding TTD, medical care, or therapy. Sims subsequently filed a claim in civil court alleging gross negligence, intentionally inflicted emotional distress, and intentionally depriving him of certain statutory rights by refusing to provide worker's compensation benefits and denying him access to timely medical care and physical therapy. The trial court granted the employer's motion to dismiss because of the exclusive jurisdiction over worker's compensation claims. (In 1997, the legislature added I.C. 22-3-4-12.1, which gave the Workers' Compensation Board exclusive jurisdiction over claims of lack of diligence, bad faith or of an independent tort in adjusting or settling a claim for compensation). A divided Court of Appeals reversed stating that this section of the Indiana Code violated the State constitution's "open courts" policy. The employer appealed.

The Indiana Supreme Court concluded that that the statute did not violate the Indiana constitution and affirmed the trial court's dismissal. The Court ruled that the statutory provision did not violate the open court's provision since the jurisdiction of the appellate courts was available after the Board made a final determination. The Court also held that the jury guarantee was not violated since worker's compensation determinations are part of a special statutory proceeding, not a civil case.

7. **Future Medical Expenses:** *Bloomington Hospital v. Stofco*, 705 N.E. 2d 515 (Ind.App. 1999); Rehearing 709 N.E. 2d 1078 (Ind.App. May 7, 1999)

In this case, an employee contracted Hepatitis C in the usual course of employment. In this occupational disease claim, the parties agreed on the PPI award, and the only contested issue was for future medical treatment. The Workers' Compensation Board adopted the Single Hearing Member's award of future medical treatment in perpetuity for the employee. The employer appealed.

The issue in this case was whether the Board's adoption of the award for future medical treatment in perpetuity for the employee, exceeded the Board's jurisdiction.

The employer argued that the employee was limited to an Order to provide medical services to a maximum of one year from the last day for which compensation benefits were paid for PPI. (i.e., the time frame in which to re-open a claim for additional medical benefits after the PPI award). The Court, however, concluded that Hepatitis C is a continuing problem which results in deteriorating health and increasing medical expenses over the lifetime of the sufferer. An employee who contracts such a disease in the course of his employment may not be adequately compensated by a lump sum payment at the outset of the disease, and the Board therefore has the discretion to award continuing medical expenses payments. The Court upheld the conclusion that the medical treatment was necessary to limit or reduce the stipulated impairment. This relied on two earlier cases that ruled that continuing medical expenses could be awarded if it serves to limit or reduce impairment. In *Tallas v. Correct Piping Company*, post quiescent medical care was compensable in a permanent and total disability claim. In *Grand Lodge v. Jones*, the Court held that palliative medical care was compensable so long as it as needed. The *Bloomington Hospital* case has gone a step further by calling for payment of "lifetime" medical although it is not specifically referred to in the Worker's Compensation Act.

8. **PPI Determination:** *Memorial Hospital v. Szuba*, 705 N.E. 2d 519 (Ind.App. 1999)

In this case, a 16 year old boy slipped and fell and sustained injuries. One issue the Court addressed was the statute of limitations. The Court ruled that he had two years from reaching the age of 18 years old in which to file his claim. The more significant reason this case is important, however, is the fact that it requires the employer to provide a permanent partial impairment rating for an injured employee who has permanent injuries.

The Defendant argued that the Plaintiff has the burden or establishing each fact necessary to support a legal award. They claimed that the Plaintiff should be responsible for providing his own PPI rating. The statute simply says that prior to a PPI adjudication, the employer must provide an injured employee with a doctor and assume all necessary medical expenses. The Court read the statute liberally and found that the initial PPI determination is part of an employee's necessary medical treatment. Therefore, the burden of providing an initial PPI rating rests with the employer. Should the employee dispute that rating, then the burden of proving a different rating would rest with the Plaintiff. The Court noted in a footnote that the expense of a subsequent PPI determination that is obtained by an employee, to refute the initial PPI determination, shall be reimbursed to the employee if it is ultimately accepted by the Board.

9. **Apportionment:** *U.S. Steel Corp v. Spencer*, 655 N.E. 2d 1243 (Ind.App. 1995)

In this case, the employee was injured at work when he fell on a piece of coal while attempting to clean the windshield of his truck. There were no witnesses. He filed a claim for permanent and total disability because he was unable to go back to work after the accident.

The Plaintiff had a prior low back injury while playing baseball, approximately 10 years earlier. He developed spondylolisthesis. As a result of that prior injury, he had a lumbar spinal fusion that was unsuccessful. He developed problems and took a one-year leave of absence from work. When he did return to work, he had restrictions of no heavy lifting, bending, or standing work. For the eight years prior this accident, he receiving continual treatment for the condition and had intermittent time off due to his complaints of back pain.

There existed two difference medical opinions. One doctor noted a 35% impairment related to the pre-existing condition, and rendered a 20% PPI rating to this injury. A second doctor stated that the Plaintiff was permanently and totally disabled and that it was not in any way related to the pre-existing condition.

At issue was the Application of the apportionment statue. Essentially, that statute provides that if a Plaintiff has a pre-existing condition and injures himself on the job, the employer is only responsible for that portion that was caused by the work-related accident. The Court, in two separate opinions in this case, gave us several clarifications of the apportionment statute. The statute does not apply to the aggravation of a pre-existing but non-impairing and non-disabling condition. Therefore, to apply the apportionment statute, there must be a previously assigned PPI rating for the Plaintiff's pre-existing condition. If the employee has no specific prior PPI rating, but is simply more susceptible to injury than others, then apportionment will not apply. This goes back to the old phrase that an employer takes an employee as he finds them, if he takes him at all.

The Court ultimately ruled that the Plaintiff would lie about his back pain to cover up his alcohol problem. He would use this as an excuse when he did not want to go to work. He had a doctor who would support his claim of back pain, when in fact he had none. They ultimately concluded that the Board's finding of permanent and total disability was proper and that the Plaintiff did not suffer from any pre-existing permanent disability or impairment mandating the application of the apportionment statute. The Court stated that:

> "Fairness dictates that the employer should only be responsible for compensating those injuries which result solely from events within its employ. The apportionment statute furthers this policy by providing that if an employee comes to an employer with a pre-existing impairment or disability which combines with a subsequent accident to result in further impairment or disability, the employer will not be liable for that portion of the injury not directly related to its employment. On the other hand, if an employee has merely common ailments, (i.e., back pain as the Plaintiff was found by the Board to Suffer from here), but thereafter falls victim to a workplace accident, it would not be just to deny such employee

compensation for his injury because he did not come to his employer as a mentally and physically perfect employee even if such perfect employee would not have sustained the same injury."

There have been subsequent cases that have suggested the apportionment statute may be used not only to reduce PPI awards, but to apportion permanent and total disability benefits. In such a case, a prior PPI is not what is needed, rather, evidence of vocational factors, such as testimony by a vocational rehabilitation specialist is necessary.

DUE DOYLE FANNING, LLP

900 Circle Tower Building
55 Monument Circle
Indianapolis, IN 46204-5900
Phone: (317) 635-7700 Fax: (317) 636-2408
www.duedoyle.com

Indiana Worker's Compensation Rates

TEMPORARY TOTAL DISABILITY

DATE OF INJURY	MAXIMUM AWW	MAXIMUM TDD
July 1, 1998	$702.00	$468.00
July 1, 1999	$732.00	$488.00
July 1, 2000	$762.00	$508.00
July 1, 2001	$822.00	$548.00
July 1, 2002	$882.00	$588.00
July 1, 2006	$900.00	$600.00
July 1, 2007	$930.00	$620.00
July 1, 2008	$954.00	$636.00
July 1, 2009	$975.00	$650.00

MAXIMUM FOR ALL COMPENSATION

July 1, 1998	$234,000	July 1, 2006	$300,000
July 1, 1999	$244,000	July 1, 2007	$310,000
July 1, 2000	$254,000	July 1, 2008	$318,000
July 1, 2001	$274,000	July 1, 2009	$325,000
July 1, 2002	$294,000		

Worker's Compensation Practice Group Members:

Robert J. Doyle	*rdoyle@duedoyle.com*
Robert A. Fanning	*rfanning@duedoyle.com*
Michael S. Huntine	*mhuntine@duedoyle.com*
Kristen K. Rollison	*krollison@duedoyle.com*
Mary A. Schopper	*mschopper@duedoyle.com*

DUE DOYLE FANNING, LLP

PERMANENT PARTIAL IMPAIRMENT

DATE OF INJURY	DEGREES	DOLLARS PER DEGREE
July 1, 1998	1-10°	$ 750
	11-35°	1,000
	36-50°	1,400
	51-100°	1,700
July 1, 1999	1-10°	$ 900
	11-35°	1,100
	36-50°	1,600
	51-100°	2,000
July 1, 2000	1-10°	$ 1,100
	11-35°	1,300
	36-50°	2,000
	51-100°	2,500
July 1, 2001	1-10°	$ 1,300
	11-35°	1,500
	36-50°	2,400
	51-100°	3,000
July 1, 2007	1-10°	$ 1,340
	11-35°	1,545
	36-50°	2,475
	51-100°	3,150
July 1, 2008	1-10°	$ 1,365
	11-35°	1,570
	36-50°	2,525
	51-100°	3,200
July 1, 2009	1-10°	$1,380
	11-35°	1,585
	36-50°	2,600
	51-100°	3,330
July 1, 2010	1-10°	$1,400
	11-35°	1,600
	36-50°	2,700
	51-100°	3,500

BODY PART	MAXIMUM DEGREES
Thumb	12°
Index Finger	8°
Second Finger	7°
Third Finger	6°
Fourth Finger	4°
Hand Below Elbow	40°
Arm Above Elbow	50°
Great Toe	12°
Second Toe	6°
Third Toe	4°
Fourth Toe	3°
Fifth Toe	2°
Foot Below Knee	35°
Leg Above Knee	45°
Whole Body	100°
Eye	35°
Ear	15°

For amputations the dollar value is doubled.

For losses to more than one thumb/ finger the multiple digit loss table applies.