

WORKERS' COMPENSATION: WHAT TO DO IN CASE OF AN ON-THE-JOB INJURY

In general the purpose of the North Carolina Workers' Compensation Act, N.C. G.S. 97-1 et. seq., is to put in place a system of money payments by way of partial financial relief for loss of capacity to earn wages. This system is a substitute for statutory or common law rights of action. Each state has a Workers' Compensation Act or system of one form or another.

More than 90% of all workers' compensation claims in this state are processed each year without controversy. The remaining 10% usually involve legal or medical issues, or both, and are litigated administratively before the Industrial Commission, first through mediation and, if not settled, through hearing, with possible appeals to the Full Industrial Commission and into the Appellate Court System of this state.

The purpose of this pamphlet is to provide reminders regarding the responsibilities that employees and employers have in the event of an on-the-job injury or a disease believed to be related to or caused by employment.

WHO IS SUBJECT TO THE NORTH CAROLINA WORKERS' COMPENSATION ACT?

Not everyone who works in North Carolina is covered. An employee is covered if he or she works for an employer who regularly employs three or more people full or part time, or is an employee of a construction subcontractor, or where the employer has workers' compensation insurance (an employer may choose to buy workers' compensation insurance even though employing less than three people). An individual who works for the State, a County, or City is covered. An individual who works with or around radiation is covered regardless of the number of employees.

Agricultural workers are not covered unless working for an employer who regularly employs ten or more full-time non-seasonal agricultural workers.

Residential domestic workers are not covered nor are independent contractors. Workers employed only on a casual basis to do work unconnected with an employer's business are not covered, nor are railroad workers (who are covered by other State laws).

Employees of the Federal Government are covered by the Federal Employees' Compensation Act (FECA), which is entirely separate from the North Carolina workers' compensation system, and a Federal worker has rights only under FECA even though he or she lives and works in North Carolina.

Maritime workers (shipbuilders, harbor workers, longshoremen) likewise are covered exclusively by the Longshoremens' and Harbor Workers' Act and/or The Jones Act, entirely separate from the North Carolina workers' compensation system.

WHAT TO DO IN THE EVENT OF AN ON-THE-JOB INJURY OR DIAGNOSIS OF A JOB-RELATED DISEASE OR CONDITION

The employee should immediately, if physically able, report to his or her supervisor any on-the-job injury including the time and date of the injury, the manner in which it occurred, and the nature of the injury. If an employee is informed by a doctor, or believes that he or she has a disease or condition which is related to or caused by the job, that should be immediately reported as well. The immediate oral report should be followed up as soon as possible and in any event within thirty days by a written report of the injury or disease.

The employee should request North Carolina Industrial Commission Form 18 from the employer, or from the Industrial Commission if necessary, fill this form out and give it to the employer, providing the Industrial Commission with a copy. If this form is not provided, the employee should simply type and sign, or write out, a full report and give it to the employer, keeping a copy.

Employers must keep a record of all injuries received by employees at work on forms supplied by the Industrial Commission. If the employee misses more than one day of work due to an injury or the charges for the medical services exceed a certain amount

as set by the Industrial Commission, the employer must file a written report of that injury on a Form 19 within five days. The employer may be required to file supplemental reports on other Industrial Commission forms depending upon the nature and extent of the disability.

INSURANCE

In North Carolina, every employer subject to the North Carolina Workers' Compensation Act must maintain the ability to pay workers' compensation benefits, either by purchasing workers' compensation insurance to cover those benefits or by qualifying to be self-insured. There are strict requirements on employers who choose to be self-insured insofar as furnishing proof of financial ability to pay either alone or through membership in a group of two or more employers.

Most workers' compensation claims are administered either by the workers' compensation insurance carrier or, in the case of a self-insured employer, a claims administrator.

TIME REQUIREMENTS

The employee must give written notice of a claim to the employer as soon as possible after the occurrence of the injury and in any event within thirty days. The employer must file North Carolina Industrial Commission Form 19, Report of Injuries, within five days of the injury, as earlier discussed.

A claim which is accepted by the carrier/employer as falling under the North Carolina Workers' Compensation Act is also known as a "compensable" claim. If the carrier/employer agrees that the claim is compensable and that benefits will be paid then the carrier/employer may file either Industrial Commission Form 21, "Agreement for Compensation for Disability", after the form has been signed by all parties including the employee, or Industrial Commission Form 60, "Employer's Admission of Employee's Right to Compensation Pursuant to N.C. General Statute 97-18(b)", which is not signed by the employee.

Payment of medical expenses alone by an employer, without the execution and filing of a Form 21, or the filing of a Form 60, does not bind a carrier/employer to pay other benefits and is not an admission of compensability or acceptance of the claim. In fact an employee may even receive one or more checks while he is out of work but that also in and of itself is not an admission of compensability or acceptance of the claim. The carrier/employer may file Industrial Commission Form 63, "Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim pursuant to N.C. General Statute 97-18(d)". Pursuant to this form, the carrier/employer may pay benefits to the employee temporarily but may continue to investigate the claim and that they reserve the right to later deny the claim. The carrier/employer then has ninety days (with one thirty day extension possible) from the date the employer has written or actual notice of the injury (whichever occurs first) within which to deny the claim and contest its compensability. If the carrier/employer does not within that time period file a written denial of the claim then it may not contest compensability unless significant evidence is later discovered that could not have been reasonably discovered earlier.

If a carrier/employer denies that a claim is compensable, it must file North Carolina Industrial Commission Form 61 stating that the claim is denied and the basis for the denial.

If an employee believes that he or she has a compensable claim it is important that either a Form 21 or 60 be filed, or that a Form 63 be filed and not converted to a denial within the required time, and if none of these things are done, or if the claim is denied, then the employee must be sure that Form 18 is filed within thirty days. It can be filed within two years of the date of the claimed injury or within two years of the time the employee is told by a physician or other competent medical authority that he has or may have a job related condition or disease, as long as the employer is not prejudiced by the delay in filing.

WHAT BENEFITS ARE AVAILABLE UNDER THE NORTH CAROLINA WORKERS' COMPENSATION ACT?

Medical expenses during the healing period are covered. These include such things as medical, surgical, hospital and nursing services; medical and surgical supplies; rehabilitation services; artificial limbs and other prosthesis; some chiropractic services; prescription medication; and travel of more than ten miles one way for medical appointments. Any other treatment that is "reasonably necessary" or "medically necessary" may be covered.

Future medical expenses fall into one of two categories. If the injury occurred before July 5, 1994, then an employee with a compensable claim can get medical compensation for as long as that is necessary and related to the claim, potentially for life. If the injury occurred on or after July 5, 1994, in general the right to payment for future medical expenses ends two years after the date of last payment of any compensation including medical compensation. This time can be extended by the employee filing Form 18M before the end of the two year time period.

In some cases, an employee may be injured seriously enough that he or she is unable to work, which entitles the employee to **temporary total disability benefits (TTD)** for their time missed from work. An individual cannot receive anything for the first

seven days out of work but begins receiving out-of-work benefits on day eight. Once the inability to work exceeds twenty-one days, the first seven days are also compensated.

The compensation rate is the amount of TTD that an injured worker receives while out of work, usually though not necessarily paid on a weekly basis. That rate is two-thirds of the average weekly wage earned by that worker for the fifty-two weeks prior to the injury, with the same employer. That includes overtime and may under some circumstances include other things such as a housing allowance. The total during that period of time is simply divided by fifty-two to arrive at the average weekly wage and from that the compensation rate can be calculated. There are statutorily several different methods that can be used in calculating an average weekly wage to arrive at a figure that is fair to both the employee and the employer. There is also a maximum compensation rate in effect for each year, so that the TTD, the weekly benefits, is two-thirds of the average weekly wage or the maximum rate, whichever is less, and the average weekly wage refers to gross, or pre-tax wages, not net wages after taxes and other deductions.

An injured worker may return to work at reduced hours or income, while he is still healing or being treated, and that may cause him or her to receive **temporary partial disability benefits (TPD)**. That essentially is paid at the weekly rate of two-thirds of the difference between what the worker was making before injury and what he or she is making after the injury. These benefits cannot continue more than three hundred weeks from the date of the injury.

Another benefit potentially available is **permanent disability or permanent partial disability benefits (PPD)**. Once a worker's doctor determines that his or her medical condition is not expected to improve or worsen significantly in the future then he or she has reached a point of "maximum medical improvement," which is the end of the healing period. The doctor may assign a percentage rating to the body part that was injured. There is a statutory schedule of benefits which can be used to calculate the dollar amount of that rating in terms of PPD. For example, a 10% PPD rating to the back translates to thirty weeks of payment of PPD at the compensation rate of the injured worker. That is because the schedule of injuries provides that an individual with 100% disability to the back may receive three hundred weeks of compensation, and three hundred weeks times 10% is thirty weeks.

If the worker has not returned to work at the same or greater wages than he or she was earning at the time of injury then the worker may elect to be paid, in lieu of the impairment rating, the benefits for partial wage loss up to the three hundred week cap.

In some tragic cases, a worker may be permanently disabled from returning to work. The worker must establish that he or she is totally and permanently disabled from returning to any occupation, not just the one in which the injury occurred. In this event the worker would receive medical benefits for life and also be paid at his weekly compensation rate for life. This rate will not increase in the future.

There are no benefits for pain and suffering, in and of themselves.

DEATH BENEFITS

If death has resulted from the injury, compensation payments will be made for a period of four hundred weeks from the date of death and the rate of payment will be the same as the TTD benefits would have been. The death must have occurred from a compensable injury or occupational disease and within six years of the date of injury, or occur within two years of the final determination of disability, whichever comes later. If the payment is made to a widow or widower who is disabled then those payments will continue during his or her lifetime or until remarriage. Compensation payments to a dependant child continue until that child reaches an age of eighteen. Persons entitled to receive benefits in a death situation are those who are wholly or partially dependant upon the deceased. There is a statutory presumption that a widow, widower, or a child is wholly dependant.

If the deceased employee leaves no one either wholly or partially dependant then the compensation is payable to "next of kin" and that includes only the father, mother, child, brother or sister of the deceased including any adult children, or adult brothers or sisters. Two thousand dollars is also allowed toward funeral expenses.

OTHER BENEFITS

Under some circumstances an injury may result in disfigurement for which compensation would be due. The law distinguishes between disfigurement of the face or head, and disfigurement of another part of the body. The maximum for head or facial disfigurement is \$20,000. The maximum compensation for other bodily disfigurement is \$10,000. An award for head or facial disfigurement is mandatory. To receive benefits for bodily disfigurement there must be some proof that the disfigurement impairs the employee's wage earning capacity.

Permanent loss of an important bodily organ as the result of an occupational injury or disease may entitle the employee to compensation up to \$20,000. An example is permanent damage to a lung, unless the lung damage has caused the employee to be totally and permanently disabled from returning to work.

If caused by an occupational disease or accident, the loss of hearing or a portion of hearing in one or both ears or loss of vision

or a portion of vision in one or both eyes is compensable.

EXCLUSIVE REMEDY

Generally an injured worker's rights are limited to his or her workers' compensation rights and there is no right for the injured worker to sue his or her employer. However an injured worker may have the right to sue an employer who acted intentionally and knew that the action was substantially certain to cause serious injury or death, but this is an exceedingly rare situation and has been limited by our Appellate Courts.

DENIED CLAIMS

An employee should note that if a claim is denied North Carolina Industrial Commission Claim Form 18 **must** be filed within two years from the date of injury or, in the case of an occupational disease, within two years from the date the employee is advised by "competent medical authority" of the work related nature of his or her disease or condition and the onset of disability. This is an absolute rule and the failure to file a Form 18 within the period required means that the claim is forever barred, no matter how meritorious.

After the filing of the Form 18 the worker may file a Request for Hearing, Industrial Commission Form 33. The parties will then be Ordered by the Industrial Commission to mediate the claim. Mediation is a procedure for working out voluntary settlements and utilizes an independent third party as a mediator to encourage the parties to settle the claim. It does not involve an open court hearing or any kind of testimony. The Industrial Commission has a list of approved workers' compensation mediators. The parties either agree upon a mediator or the Industrial Commission appoints one. The parties and the mediator then schedule the mediation and meet in an attempt to work out a settlement of the claim. A mediator can use his or her skills and tools to encourage the parties to settle but cannot order either side to do anything. The settlement itself is voluntary but the mediation is mandatory unless the parties are excused from mediation pursuant to a special request made to the Industrial Commission by either party. The Industrial Commission's mediation procedure results in about a 75% settlement rate of those claims actually going to mediation.

If the claim is not settled through mediation then it is referred to a Deputy Commissioner, a judge with the Industrial Commission, for a hearing. Evidence is actually presented in open court through live testimony of witnesses. Medical records are usually stipulated into evidence and any medical testimony that needs to be taken from any physician or physicians is usually done by way of a post-hearing deposition in the physician's office. After that the Deputy Commissioner makes a decision by issuing a written Opinion & Award. There is a right of appeal from the Opinion and Award to the Full Industrial Commission. The appeal is heard and decided by a panel of three Commissioners. There may be appeals from that to the North Carolina Court of Appeals and, possibly, to the North Carolina Supreme Court.

SOME THINGS NOT COVERED BY THE WORKERS' COMPENSATION ACT

What is commonly known as "pain and suffering" is not compensable. Ongoing pain may contribute to a disability which may be compensable, but the pain itself is not.

Second opinions from other doctors are not automatically covered by the carrier/employer, unless the same is ordered by the Industrial Commission or pre-approved by the carrier or employer, except that the employee is allowed a second opinion from another physician as to the question of an impairment rating only on the question of permanent partial disability.

In a contested claim neither side's attorney's fees are usually required to be paid by the other. There are exceptions but they are extremely rare. In addition an employee's attorney's fee must be approved by the Industrial Commission before any fee is paid.

If a worker's injury is caused by the negligence of someone or a company for whom the worker was not working at the time of injury then there may arise what is known as a "third party claim" for negligence. That action is not brought before the Industrial Commission but is a civil action brought in either State Court or Federal Court depending upon the circumstances. The best example involves a motor vehicle collision in which a worker of Company A is struck by a driver employed by Company B. The worker has his workers' compensation claim, (provided that he is within the course and scope of his own employment at the time) and also a separate negligence claim against Company B and its employee.

The North Carolina Industrial Commission's telephone number is 1-919-807-2500. The Industrial Commission also has an office that is designed in particular to attempt to answer telephone questions and resolve some problems, 1-800-688-8349, and 1-919-807-2501. Any call to the Commission should also include a request to be sent a copy of the Commission's latest Bulletin.

The North Carolina Industrial Commission's Web site is www.comp.state.nc.us, and the forms cited in this pamphlet can be

found at that site.

This pamphlet was prepared as a public service by the Workers' Compensation Section and is not intended to be a comprehensive statement of the law. North Carolina laws change frequently and could affect the information in this pamphlet. If you have specific questions with regard to any matters contained in this pamphlet, you are encourage to consult an attorney. If you need an attorney and do not know one, please contact the North Carolina Lawyer Referral Service, a nonprofit public service project of the North Carolina Bar Association, toll-free: 1-800-662-7660. (Wake County residents call: 677-8574.)