

ALABAMA

1. Citation for the state's workers' compensation statute

Alabama Code §25-5-1 *et seq.* (1975) (As amended 1992)

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

All employees, other than domestic servants, farm laborers, casual employees, and those employed by employers of less than five employees, are covered. Also, licensed real estate agents operating under licensed brokers and product demonstrators are not considered employees. Ala. Code §25-5-50 (1975).

3. Identify and describe any "statutory employer" provision.

There is no such provision. An "employer" is defined as "[e]very person who employs another to perform a service for hire and pays wages directly to the person." Ala. Code §25-5-1 (4).

4. What types of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" claims.

Compensation is paid to an employee for injuries caused by an accident arising out of and in the course of the employment, without regard to any question of negligence. Ala. Code §25-5-51. The employee must prove his or her claim by a preponderance of evidence. Ala. Code §25-5-81(c). Even carpal tunnel, if the result of a one-time accident, can be shown by a preponderance of the evidence, rather than clear and convincing evidence. *Ex parte USX Corp.*, 881 So.2d 437 (Ala. 2003).¹

¹ *But see, Millry Mill Co. v. Manuel*, 999 So.2d 508 (Ala.Civ.App. Mar 07, 2008) (indicating that the appropriate standard for gradual deterioration or cumulative stress carpal tunnel syndrome cases is clear and convincing evidence)

B. Occupational disease (including respiratory and repetitive use).

Diseases arising out of and in the course of employment and due to hazards in excess of those ordinarily incident to employment in general are compensable. The disease must be caused by a hazard peculiar to the occupation and result directly from exposure, over a period of time, to the normal working conditions of the occupation. Ala. Code §25-5-110. The employee must prove his or her claim by a preponderance of evidence, except claims involving gradual deterioration or cumulative physical stress disorders which must be proven by clear and convincing evidence. Ala. Code §25-5-81(c); *Williams v. Union Yarn Mills, Inc.*, 709 So.2d 71 (Ala. Civ. App. 1998).

5. What, if any, injuries or claims are excluded?

Claims involving sexual harassment, *Busby v. Truswal*, 551 So.2d 322 (Ala. 1989), claims where the employee has misrepresented prior injuries after being accepted for employment, Ala. Code §25-5-51 (1992 Supp.), solely idiopathic factors, *Brown v. Patton*, 2009 WL 1026832 (Ala.Civ.App. Apr 17, 2009) (NO. 2070810), and preexisting physical weakness or disease, *Brown v. Patton*, 2009 WL 1026832 (Ala.Civ.App., Apr 17, 2009), are all excluded.²

6. What psychiatric claims or treatments are compensable?

The term "injury" does not include a mental disorder or injury that has neither been produced nor proximately caused by some physical injury to the body. Ala. Code §25-5-1(9) (1992 Supp.). Attempts to recover compensation benefits for "occupational stress disorder" as an occupational disease have been denied by the Alabama Court of Appeals when there is no physical injury. *Herchenhahn v. Amoco Chemical Co.*, 688 So.2d 847 (Ala. Civ. App. 1997).

However, if an employee's mental disorder originates from both physical and emotional factors, it is compensable. See, *Ex Parte Vongsouvah*, 795 So.2d 625 (Ala. 2000).

7. What are the applicable statutes of limitations?

The statute of limitations for accident and occupational disease cases is two years from the date of the accident or two years from the date of last payment of compensation (not medical) benefits.

² Likewise, injuries caused by the willful misconduct of the employee, including refusal or failure to use safety devices provided by the employer, or by accident due to intoxication or illegal drug use are also excluded. Ala. Code §25-5-51 (1992 Supp.).

Ala. Code §§25-5-80, 25-5-117 (1992 Supp.). (Note the latter is the occupational disease statute and time runs from the date of last exposure.)

For “cumulative trauma injuries,” the two year statute of limitations runs two years from the date of the last exposure (i.e. carpal tunnel syndrome). *Dun & Bradstreet Corp. v. Jones*, 678 So.2d 181 (Ala.Civ.App.1996).

For death claims, the statute is two years from the date of death, but in no event may a claim be filed if the death occurs more than three years from the date of the accident. Ala. Code §25-5-80 (1992 Supp.).

8. What are the reporting and notice requirements for those alleging an injury?

Although the statute requires written notice, case authority allows actual notice to suffice. Notice must be within five days or the employee loses the right to benefits until actual notice is received. If notice is not provided within 90 days, there is an absolute bar to compensation. Ala. Code §25-5-78 (1992 Supp.).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Such injuries are not compensable. Ala. Code §25-5-51 (1992 Supp.).

B. Willful misconduct, "horseplay," etc.

Injuries caused by an employee's willful misconduct are not compensable. Ala. Code §25-5-51. "Willful misconduct" includes all conscious or intentional violations of law or prescribed rules of conduct. *See, Sun Papers, Inc. v. Jerrell*, 411 So.2d 790 (Ala. Civ. App. 1981); *Ex Parte Bowater, Inc.*, 772 So.2d 1181 (Ala. 2000) (finding no compensation because ignoring lock out tag out procedure and placing hand into moving machinery constitutes misconduct). Injuries incurred during "horseplay" may not be compensable if the "horseplay" constitutes a substantial deviation from the employment. *See, Walden v. Glaze & Son, et al.*, 616 So.2d 357 (Ala. Civ. App. 1992) (finding no compensable injury when employee involved in horseplay with co-employees after work sustained injury because employee substantially deviated from employment); *but see, Beverly v. Ruth's Chris Steakhouse*, 682 So. 2d 1360 (Ala. Civ. App. 1996) (finding compensable injury when employee is injured in altercation with co-employee while protecting property of employer).

The employer bears the burden of proof for establishing misconduct. Ala Code §25-5-36.

C. Injuries involving drugs and/or alcohol.

Under the Act an employer is not required to pay compensation for an injury or death caused by willful misconduct. Ala. Code §25-5-51. (The provision specifically addresses intoxication from alcohol and illegal drugs). The employer, however, must prove that the impairment (from drugs or alcohol) was the cause of the injury. *Ross v. Ellard Construction Co., Inc.*, 686 So.2d 1190 (Ala. 1996).

10. What, if any, penalties or remedies are available in claims involving fraud?

Case law has established that an employee may have a claim against his or her employer for fraudulent misrepresentations that relate to a workers' compensation claim. The Alabama Supreme Court has held that if such a claim is supported by "clear and convincing proof," a claim for fraud will not be barred by the exclusivity provision of the Act. *Lowman v. Piedmont Executive Shirt Mfg. Co.*, 547 So.2d 90 (Ala. 1989). Legislation effective August 1, 1992 makes it a felony for an employee to make a false or fraudulent material statement or misrepresentation for the purpose of obtaining workers' compensation benefits.

11. Is there any defense for falsification of employment records regarding medical history?

Ala. Code §25-5-51 allows such a defense. For an employer to successfully defend a claim on that basis it must prove (1) that the employee knowingly and willingly made a false representation about his condition; (2) that the employer relied upon the false representation and his reliance is a substantial factor in the hiring of the employee; and (3) that there is a causal connection between the false representation and the injury. *B.E. & K v. Weaver*, 801 So. 2d 12 (Ala. Civ. App. 2000). Additionally, to deny compensation based upon misrepresentations regarding physical or medical history at the time an employer makes an unconditional offer of employment the employer must provide a written warning in bold type print stating, "Misrepresentations as to preexisting physical or mental conditions may void your workers' compensation benefits". Ala. Code § 25-5-51 (1992).

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

Although there are no direct cases on point, the ground work is laid for arguments that employer sponsored social activities can give rise to compensable events. The Alabama Supreme Court set forth the following standards in considering whether an employee can recover for an injury sustained while attending a party given by his employer: (1) whether the activity is customary; (2) whether the employer subsidized or encouraged the activity; (3) the extent to which the employer directs the activity; (4) the presence of pressure or compulsion upon the employee to attend and participate; or (5) whether the employer expects to receive a benefit from the employee's participation in the activity. *Anderson v. Custom Caterers, Inc.*, 185 So.2d 383 (Ala. 1966); *Board of Managers of the City of Birmingham Retirement and Relief System v. Elliott*, 532 So. 2d 1019 (Ala. Civ. App. 1988); compare *St. Paul Insurance Co. v. Harris*, 758 F. 2d 1450 (11th Cir. 1985).

Ironically, no good deed goes unpunished. When an employer gave his employee a Christmas ham, the injury she suffered when picking up the ham was compensable. *Moesch v. Baldwin County Electric Membership Corporation*, 479 So.2d 1271 (Ala. 1985).

13. Are injuries by co-employees compensable?

An employer will usually have liability for an injury to an employee if it is the result of an action by a co-employee (for limited exceptions involving personal ill will see section 14). However, the injured employee may also pursue a claim against a co-employee who "intentionally" causes the injury. Ala. Code § 25-5-11 (1992 Supp.). One scenario, which has produced considerable litigation, occurs where the co-employee removes a safety guard. Ala. Code §25-5-11 (1992 Supp.); *see also, Moore v. Reeves*, 589 So.2d 173 (Ala. 1991).

14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g. "irate paramour" claims)?

"Injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him or her and not directed against him or her as an employee or because of his or her employment." Ala. Code §25-5-1(9) (1992 Supp.). However, if circumstances of the assault arise out of the employment, the assault is compensable. *Beverly v. Ruths Chris Steak House*, 682 So.2d 1360 (Ala. Civ. App. 1996).

BENEFITS

15. What criterion is used for calculating the average weekly wage?

A 52 week wage history is used to calculate the average weekly wage. If that information is unavailable, the employer may substitute a 52 week wage statement of a "similarly situated" employee. Ala. Code §25-5-57 (1992 Supp.). Average weekly wage should include the employer-paid portion of health, life, and disability insurance premiums unless the same continue to be made available to the employee during compensable lost time. Ala. Code §25-5-1(6).

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

The rate is two-thirds of the average weekly wage, subject to certain maximum and minimum amounts. The Alabama legislature publishes new maximums and minimums every July 1st. For injuries occurring between July 1, 2013 and July 1, 2014, the maximum is \$788.00 per week and the minimum is \$217.00 per week. If at the time of injury the employee received average weekly earnings of less than the minimum, then he or she shall receive the full amount of the average weekly earnings per week. Ala. Code §25-5-57(a)(1) .

17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?

Unless good cause can be demonstrated, any installment of compensation must be paid within 30 days after it becomes due or a 15% penalty shall be paid in addition to the installment. Ala. Code §25-5-59(b).

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out 21 days before recovering benefits for the first 3 days)?

Compensation is not payable for the first three days of disability. However, if the employee is out longer than 21 days, compensation is payable for the first three days. Ala. Code §25-5-59.

19. What is the standard/procedure for terminating temporary benefits?

Generally, temporary total benefits are payable until the employee reaches maximum medical improvement. *Accustar, Inc. v. Staples*, 598 So.2d 943 (Ala. Civ. App. 1992); *Goodyear Tire & Rubber Co. v. Rich*, 598 So.2d 923 (Ala. Civ. App. 1992). No cases require court approval before suspension of temporary total disability benefits. Neither case nor statutory law requires that the employee return to work before suspension of such benefits.

20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?

The number of temporary total disability weeks is credited towards the calculation of a "body as a whole" permanent partial disability award. However, no credit is received for temporary total disability weeks paid in the calculation of the number of weeks due for a scheduled member injury. Injuries to the back, shoulder, head, etc. are not deemed scheduled injuries, and calculation of benefits due depends upon loss of ability to earn. Ala. Code §25-5-57(a)(3) (1992 Supp.).

21. What disfigurement benefits are available and how are they calculated?

Case authority requires that the disfigurement result in a loss of "employability" before permanent compensation may be awarded. *Flowers Speciality Foods of Montgomery, Inc. v. Glenn*, 718 So.2d 1137 (Ala. Civ. App. 1998). The applicable code section is §25-5-57(a)(3)(a)(34.). The loss can not exceed 100 weeks.

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

A. How many weeks are available for scheduled members/parts, and the standard for recovery?

The maximum number of weeks for each scheduled member are as follows:

<u>Bodily Parts</u>	<u>Maximum Weeks</u>
thumb	62
first (index) finger	43
second finger	31
third finger	22
fourth finger	16
first phalange of thumb or finger	½ thumb or finger
two or more phalanges	entire thumb or finger (but if more than one finger involved maximum is the amount for a hand)
great toe	32
toes other than great toe	11
first phalange of any toe	½ toe
two or more phalanges	entire toe
Hand (includes amputation between elbow and wrist)	170
arm	222
foot (includes amputation between knee and ankle)	139
leg	200
eye	124
complete and permanent hearing loss:	
both ears	163
one ear	53
eye and a leg	350
eye and an arm	350
eye and a hand	325
eye and a foot	300

two arms (other than at shoulder)	400
two hands	400
two legs	400
two feet	400
One arm and the other hand	400
one hand and one foot	400
one leg and the other foot	400
one hand and one leg	400
one arm and one foot	400
one arm and one leg	400

These numbers are not off-set by the number of weeks of temporary total disability benefits due. Weekly rates are calculated based upon two-thirds of the average weekly wage. The max compensation payable for permanent partial disability shall be no more than the lesser of \$220.00 per week or 100% of the average weekly wage. Ala. Code §§25-5-57(3) and 25-5-68(b) (1992 Supp.).

B. Number of weeks for "whole person" and standard for recovery.

Up to 300 weeks are available for permanent partial disability (less than 100% disability). The compensation shall be 66 2/3 percent of the difference between the average weekly earnings of the worker at the time of the injury and the average weekly earnings he or she is able to earn in his or her partially disabled condition, subject to the maximum weekly compensation. If a permanent partial disability follows a period of temporary total disability resulting from the same injury, the number of weeks of the temporary total disability shall be deducted from the number of weeks payable for the permanent partial disability. Ala. Code §25-5-57(a)(3)g (1992 Supp.).

Under amendments made to the Act in 1992, if an employee returns to work making a wage equal to or greater than his pre-injury wage, the employee shall not be entitled to compensation based on vocational disability. Instead, the Court will award the employee compensation based on a physical impairment rating. Ala. Code §25-5-57(a)(3)(i). Under the provision, if the employee should lose his job within 300 weeks of the injury (except for specified reasons) he can petition the Court within 2 years thereof to reconsider his permanent partial disability rating.

23. **Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?**

The employee is required to accept vocational retraining if requested by the employer. The employer is required to provide vocational retraining if suggested in writing by the treating physician and a vocational specialist. Ala. Code §25-5-77(c) (1992 Supp.).

24. **How are permanent total disability benefits calculated, including the minimum and maximum rates?**

Calculation of benefits is based upon two-thirds of the average weekly earnings, subject to maximum and minimum amounts. For injuries occurring between July 1, 2015 and July 1, 2016, the maximum rate is \$832.00. The minimum rate during the same time period is \$229.00, unless the average weekly wage is less than the minimum, which would require use of the average weekly wage.

25. **How are death benefits calculated, including the minimum and maximum rates?**

A. Funeral expenses.

The burial allowance is \$3,000.00. Ala. Code §25-5-67 (1992 Supp.).

B. Dependency claims.

If there are no dependents, the estate is entitled to a one time \$7,500.00 lump sum payment. Ala. Code §25-5-60(1)g (1992 Supp.). If there is one dependent, benefits are payable to that dependent based upon 50% of the employee's average weekly wage. If there are two or more dependents, benefits are payable at two-thirds of the average weekly earnings (subject to maximum and minimum tables) for the period of dependency up to 500 weeks. Ala. Code §25-5-60(1) (1992 Supp.).

26. **What are the criteria for establishing a "second injury" fund recovery?**

Alabama no longer has a Second Injury Trust Fund.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

A claim may not be re-opened because of a worsened condition if settlement has been approved by a judge. A Trial Judge can not reserve the issue of extent of disability in his decree. *Ex parte Kimberly-Clark Corporation*, 779 So.2d 178 (Ala. 2000). Settlements may be set aside for fraud, undue influence, or coercion, provided application is made therefor within six months of the settlement. Ala. Code §25-5-56 (1992 Supp.). An employer may petition a judge to set aside an award of permanent total disability if, as the result of physical or vocational rehabilitation, or otherwise, the employee is able to obtain gainful employment. Ala. Code §25-5-57(a)(4)h (1992 Supp.).

Under the return to work provision, Ala. Code § 25-5-57(a)(3)(i), if the employee has settled his claim based on a physical impairment, and then loses his job (except for certain specified reasons) he or she can then petition the court within two years thereof for reconsideration of his or her permanent partial disability rating (within 300 weeks from the injury).

28. What situation would place responsibility on the employer to pay an employee's attorney's fees?

The statute precludes a plaintiff's attorney's fee without approval of the judge. Ala. Code § 25-5-90. Attorney's fees, by statute, come out of the amount awarded to the employee. The attorney's fee is limited to 15% of the compensation award. The attorney's fees can be awarded in a lump sum but the amount is deducted from the employee's benefits and calculated in accordance with Ala. Code § 25-5-83. *Ex parte St. Regis Corp*, 535 So.2d 160 (Ala. 1988).

A Trial Court can assess an attorney's fees against the employer in a civil contempt proceeding if the actions of the employer evince bad faith. *Argo Const. Co. v. Rich*, 603 So.2d 1078 (Ala. Civ. App. 1992).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The exclusive remedy provision is statutory. Ala. Code §25-5-53 (1992 Supp.). One interesting recent case from the Court of Civil Appeals held that when an employee was involved in an altercation with a co-worker at the time she was fired, the employee's exclusive remedy is under the Workers' Compensation Act. *Cook v. AFC Enterprises, Inc.*, 826 So.2d 174 (Ala. Civ. App. 2002). However, there are exceptions.

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

The exclusive remedy provision may not protect the employer/insurer from the following claims: (1) intentional fraud, *Lowman v. Piedmont Executive Shirt Manufacturing Co.*, 547 So.2d 90 (Ala. 1989); (2) outrageous conduct, *Continental Casualty Insurance Co. v. McDonald*, 567 So.2d 1208 (Ala. 1990); *Travelers Indemnity Co. of Illinois v. Griner*, 809 So.2d 808 (Ala. 2001); (3) retaliatory discharge for filing a workers' compensation claim, Ala. Code §25-5-11.1 (1975); *Coastal Lumber Co. v. Johnson*, 669 So.2d 803 (Ala. 1995); and (4) sexual harassment, *Busby v. Truswal System Corp.*, 551 So.2d 322 (Ala. 1989). In addition, co-employees may be subject to claims for willful conduct and for removal of a safety guard. Ala. Code §25-5-11. See also *Moore v. Reeves*, 589 So.2d 173 (Ala. 1991).

30. Are there any penalties against the employer for unsafe working conditions?

Statutory duty to provide a safe workplace is imposed upon the one who has control or custody of the employment or place of employment. Ala. Code § 25-1-1(a) (1975); *Procter & Gamble Co. v. Staples*, 551 So. 2d 949 (Ala. 1989). Claims against employers for failing to provide a safe workplace should be barred by the exclusivity provision of the Workers' Compensation Act. Under rare circumstances, co-employees may be subject to direct action for willful and intentional violation of a specific written safety rule. Ala. Code §25-5-11(c)(4) (1992 Supp.). The state is required to assist an employer in developing a safety program. Ala. Code §25-5-15.1(c)(4) (1992 Supp.).

31. What is the penalty, if any, for an injured minor?

If the minor was employed in violation of law, the penalty is compensation of twice the ordinary amount. Ala. Code §25-5-34 (1992 Supp.).

32. What is the potential exposure for "bad faith" claims handling?

There is no cause of action for "bad faith" handling of claims. *Farley v. CNA Insurance Co.*, 576 So.2d 158 (Ala. 1991). Where the employer/insurer has some ulterior motive for denying benefits, however, a cause of action for "outrageous conduct" might exist. In the past the Alabama Supreme Court has affirmed a jury verdict for outrageous conduct arising out of the workers' compensation environment. *Continental Casualty Ins. Co. v. McDonald*, 567 So.2d 1208 (Ala. 1990) (insurer held liable for intentional infliction of emotional distress for purposefully withholding benefits in an attempt to coerce acceptance of a small lump sum settlement). See also *Travelers Indemnity Co. of Illinois v. Griner*, 809 So.2d 808 (Ala. 2001);

33. What is the exposure for terminating an employee who has been injured?

Termination because of the claim may entitle the employee to a jury trial with compensatory and punitive damages. Ala. Code §25-5-11.1. Case law from the Alabama Supreme Court has clarified the *prima facie* case in retaliatory discharge cases and held that there are five prongs to a *prima facie* case including:

- (1) Proof of an employment relationship;
- (2) An on-the-job injury;
- (3) Notice to the employer of the on-the-job injury;
- (4) Subsequent termination of the employment; **and**
- (5) **Proof of a causal relationship between** the workers' compensation claim and the subsequent **discharge**.

Alabama Power Company v. Aldridge, 854 So. 2d 554 (Ala. 2002).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. Cases must be brought through the procedures under Ala. Code §25-5-11 (1992 Supp.).

35. Can co-employees be sued for work-related injuries?

Co-employees may be subject to claims for willful conduct (requires intent to injure) and removal of a safety guard. Ala. Code § 25-5-11. *See also Moore v. Reeves*, 589 So.2d 173 (Ala. 1991).

36. Is subrogation available?

The employer/insurer may subrogate for both compensation and medical benefits paid. Ala. Code §25-5-11(a) (1992 Supp.). Future medical bills/benefits are also subject to subrogation. *Ex Parte BE&K Construction Company*, 728 So.2d 621 (Ala. 1998); *Ex Parte Miller & Miller Construction Co., Inc.*, 736 So.2d 1104 (Ala. 1999). The subrogation amount is subject to reduction for payment of attorney's fees in obtaining the third party recovery. Ala. Code § 25-5-11(e).

MEDICALS

37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

An employee can make claims for medical benefits even if a claim was not filed within the typical two-year statute of limitations period. *Ex Parte Tuscaloosa County*, 522 So.2d 782 (Ala. 1988). Under the 1992 amendments, all undisputed medical bills must be paid within 25 working days of receipt of claims or a 10% penalty can be imposed. Ala. Code §25-5-77(h) (Supp. 1992).

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

Alabama adjudicates workers' compensation claims in the state judicial system applicable to all civil and criminal actions. Medical information and records may therefore be obtained by ordinary

discovery methods. Alternatively, a statutory provision allows either party to obtain the employee's medical records without notice to opposing party. Ala. Code §25-5-77(b). Medical records can be introduced at trial without a deposition using a statutory procedure for authenticating the records. Ala. Code §25-5-81(f)(4).

39. What is the rule on (a) Claimant's choice of a physician; and (b) Employer's right to second opinion and/or Independent Medical Examination?

A. Claimant's choice of a physician.

The employer has the right to select the initial treating physician. If the employee is dissatisfied with the initial treating physician selected by the employer and if further treatment is required, the employee can select a physician from a panel or list of four physicians selected by the employer. Ala. Code §25-5-77(a).

B. Employer's right to second opinion and/or Independent Medical Examination.

The employee must submit to examination by the employer's physician at all reasonable times. The employee has the right to have his or her own doctor present at the examination. Ala. Code §25-5-77(b).

The Court may also appoint a neutral physician to examine the employee who will report his findings to the Court. Ala. Code §25-5-77(b).

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

There are no direct provisions on point other than the section pertaining to physicians. Ala. Code §25-5-77(a) (1992 Supp.). Dicta in case law suggests that the employer/insurer may limit referrals if it makes its position known on this issue at an early date. *Transco Energy v. Tyson*, 497 So.2d 184 (Ala. Civ. App. 1986); *Hudson Industries v. Harrell*, 484 So.2d 1099 (Ala. Civ. App. 1986).

41. Which prosthetic devices are covered, and for how long?

"Crutches, artificial members, and other apparatus" are covered. Ala. Code §25-5-77 (1992 Supp.).

42. Are vehicle and/or home modifications covered as medical expenses?

There are few cases on point, but the general thought is that such expenses will be covered if they are deemed reasonable and necessary. See *Continental Casualty Ins. Co. v. McDonald*, 567 So. 2d 1208 (Ala. 1990). The statute does not require employers to purchase vehicles such as a specially retrofitted van. *Ex Parte City of Guntersville*, 728 So.2d 611 (Ala. 1998). (declining to address the issue of whether an employer would be required to modify a vehicle for an injured employee).

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Yes. A medical fee schedule governing physicians' charges is available from the Department of Industrial Relations. Ala. Code §25-5-313. Additionally, a committee establishes rates charged by hospitals and out-patient medical facilities. The Act created a workers compensation Medical Services Board to determine criteria for utilization review and bill screening. Ala. Code §25-5-311 (1992 Supp.).

44. What, if any, provisions or requirements are there for "managed care"?

None.

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

A petition for determination of a disputed claim may be filed by either party in the circuit which would have had jurisdiction over the parties in a tort claim. Typically, this is the county where the accident occurred or the county where the employee lives if the employer does business in that county. Ala. Code § 25-5-81.

46. What is the method of claim adjudication?**A. Administrative level.**

An Ombudsman may be used by either party, but both parties must agree to utilization of the ombudsman unless the Court orders the parties to mediate. Ombudsmen do not create a record and serve only to mediate claims. Ala. Code §25-5-290 *et seq.* (1992 Supp.). This mediation option offers significant opportunity for reduction of legal expenses.

B. Trial court.

Alabama provides for initial adjudication of workers' compensation disputes by circuit court judges. These are the same judges that preside over typical civil and criminal matters. Standard rules of evidence and procedure apply in workers' compensation cases, except for levels of proof required (either preponderance of evidence or clear and convincing proof, the latter for repetitive motion claims) and a provision allowing medical records to be introduced without the testimony of the treating physician. Ala. Code §25-5-81 (f)(4) (1992 Supp.).

C. Appellate.

Appeal is to the Alabama Court of Civil Appeals. Writ of Certiorari to the Alabama Supreme Court may be sought after an appellant loses at the Court of Civil Appeals. There is no presumption of correctness at the Court of Civil Appeals but decisions may not be reversed if the trial court's decision is supported by substantial evidence. Ala. Code §25-5-81(e) (1992 Supp.).

47. What are the requirements for stipulations or settlements?

Settlements must be court approved in order to have binding authority. Ala. Code §25-5-56 (1992 Supp.). Alternatively, settlements can be approved at a Benefits Review Conference with a state Ombudsman, *Ala. Code § 25-5-292(b); Stubbs v. Brookwood Medical Center*, 767 So.2d 359 (Ala. Civ. App. 2000).

48. Are full and final settlements with closed medicals available?

Full and final settlements are available. The 1992 amendments specifically entitle parties to settle matters involving medical payments and rehabilitation. A trial court must still determine that the settlement is in the best interest of the employee. Ala. Code §25-5-56 (1992 Supp.).

49. Must stipulations and/or settlements be approved by the state administrative body?

Settlements can be approved by the Circuit Court or by an Ombudsman in a Benefits Review Conference.

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

There is no current state fund. There is an assigned risk pool administered by the National Council of Compensation Insurance (NCCI). There are a number of active group funds.

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

An applicant must have a net worth of \$5.0 million and a current ratio of 1.0 or better. The employer must provide audited or certified financial reports for the prior three years of operation. There must be a positive net income history as shown on the audit and financial statements. The employer must provide a copy of the company's annual report, or statement of assets and liabilities to the Department at the close of each fiscal year, as evidence of continued financial ability to self-insure its liability under said Law. There is a \$500 application fee.

B. For groups or "pools" of private entities.

Such groups are allowed. Contact the Department of Industrial Relations for a copy of the group fund rules and regulations.

52. Are "illegal aliens" entitled to benefits of workers' compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of "employee"?

There are no cases on point. Under the statute, the term employee specifically includes aliens, although there is no reference to whether these workers are employed legally or not. In all likelihood, these workers would be covered under the Act since it recognizes aliens and the Act allows double recovery for minors who are not legally employed. Ala. Code §25-5-1. However, please recall that the Act does not cover domestic servants, farm laborers, casual employees, and those employed by employers of less than five employees. Ala. Code §25-5-50 (1975).

53. Are terrorist acts or injuries covered or excluded under workers' compensation law?

A terrorist act would be subject to the same principles applicable to injuries by other third parties. See answer 14.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

No specific state requirements that must be satisfied are known. Generally, under Medicare regulations (42 CFR 411.46), Medicare is secondary payer to the payment of workers' compensation by a workers' compensation carrier or self-insured employer. The obligation to pay medical bills for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a workers' compensation matter if at the time of the settlement the employee agrees to close out medical benefits and meets the following criteria:

- the employee is already a Medicare enrollee, in which case there is not a threshold settlement amount; or

- there is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement *and* the settlement amount is greater than \$250,000.

If the employee meets the criteria for consideration by Medicare, Medicare must be notified in the event of a settlement. Upon review of the file, Medicare may conclude that the settlement does not meet its criteria, or it may require a Medicare set aside trust for large settlements, or it may require merely a custodial self-administered trust account. (Reference 42 CFR 404, 411; 42 USC ' 1395)

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights to payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. ' 1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. ' 1396k(b).

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462 provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. 45 C.F.R. 164.512(l). Therefore, your current practice of obtaining medical records could proceed under state law.

In Alabama to obtain medical records through subpoena one must file a notice of intent fifteen days before the subpoena can be issued. This notice may be sufficient to provide notice to the patient that Protected Health Information is being sought. Ala. Civ. Proc. R. 45.

57. What are the provisions for "Independent Contractors"?

Alabama courts have established that the general test to ascertain whether a worker is an employee or an independent contractor for workers compensation purposes is: whether the person to whom the worker provides services has reserved the right to control the manner in which those services are performed. *Gordon v. West Weaver Baptist Church*, 777 So.2d 734 (Ala. Civ. App. 2000). Alabama courts have stated that an employment relationship may be inferred from four basic factors: (1) direct evidence which demonstrates a right or exercise of control, (2) the method by which the individual receives payment for his or her services, (3) whether

equipment is furnished or not, and (4) whether the individual has the right to terminate. *Hooker Const., Inc. v. Walker*, 825 So.2d 838 (Ala. Civ.App. 2001).

The language that used to be in 25-5-50(h) was deleted as of August 1, 2008. This language provided employers engaged in the business of residential construction the option of option out of workers' compensation provisions. 25-5-50(a) now states that:

(a) This article and Article 2 of this chapter shall not be construed or held to apply to...an employer who regularly employs less than five employees in any one business, other than the business of constructing or assisting on-site in the construction of new single-family, detached residential dwellings

Essentially, an employer who regularly employs less than five employees in the business of constructing or assisting on-site in the construction of single-family, detached residential dwellings no longer has an option to opt for exemption from coverage as of August 1, 2008.

58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?

There are no specific provisions. However, under case law such workers may be either classified as loaned workers or joint employees depending upon the facts of the case.

When a general employer loans an employee to a special employer, the special employer becomes an employer only if: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. Alabama courts recognize that if the above three conditions are met, the special employer may become liable for compensation in the event of a work-related injury. *Rast Const., Inc. v. Peters*, 689 So.2d 781 (Ala. 1996); *Ex parte Stewart*, 518 So.2d 118 (Ala. 1987).

Whereas, joint employment occurs most commonly when an employee's services are leased or sold to another employer by the employee's original employer and the original employer retains some control over the work performed. Some examples of joint employment are: (1) a truck driver leased to a common carrier by a trucking company, and (2) an employee of a labor broker who is assigned to work for a special employer. *Craig v. Decatur Petroleum Haulers, Inc*, 340 So.2d 1127 (Ala. Civ. App. 1976); *Rhodes v. Alabama Power Co.*, 599 So. 2d 27 (Ala. 1992). In a joint employment relationship, both employers become liable for compensation. The allocation of

liability for joint employers has been specifically addressed in Ala. Code § 25-5-76 which appears to provide for apportionment of compensation awards between joint employers based on each employer's contribution to the employee's wages, unless the employers have contractually agreed otherwise. However, the statute has never been construed. Case law has only shown courts finding joint employers jointly and severally liable for compensation. *Domino's Pizza, Inc. v. Casey*, 611 So. 2d 377 (Ala. Civ. App. 1992); *Street v. North Alabama Conf. For United Methodist Church*, 753 So. 2d 1169 (Ala. Civ. App. 1999).

59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Ala. Code § 25-5-1(4) states, "In no event shall a common carrier by motor vehicle operating pursuant to a certificate of public convenience and necessity be deemed the "employer" of a leased-operator or owner-operator of a motor vehicle or vehicles under contract to the common carrier." Thus, where common carriers enter into contracts with owners of motor vehicles for the use of those vehicles, the common carrier is not the employer of the leased-operator or owner-operator. *Alaplex Transp., Inc. v. Rossen*, 836 So.2d 901 (Ala. Civ. App. 2002) (driver injured while operating a truck leased by a common carrier from an owner-operator could not recover benefits under the Act from the common carrier because the legislature "chose ... to maintain the immunity afforded under the Act to common carriers in one particular situation, i.e., where common carriers have entered into contracts with owners of motor vehicles for the use of those vehicles" (emphasis added)). Compare *Liberty Mutual Insurance Co. v. D & G Trucking, Inc.*, 966 So.2d 266 (Ala. Civ. App. 2006).

60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized Best Practices plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

62. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

No.

63. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

No.