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IDAHO

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

Idaho Code § 72-101, et. seq.

SCOPE OF COMPENSABILITY

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

"'Employee' is synonymous with 'workman' and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer." Idaho Code § 72-102(12). Unless an election for coverage is made pursuant to I.C. § 72-213, the following listed employments are exempt from coverage under the Idaho Workers' Compensation statutes: household domestic service; casual employment; employment of outworkers; family members living within the same dwelling; family members not living in same dwelling if the employer is the owner of a sole proprietorship; employment as the owner of a sole proprietorship, working member of a partnership or limited liability company, employment of an officer of a corporation who at all times during the period involved owns not less than ten percent (10%) of all of the issued and outstanding voting stock of the corporation and, if the corporation has directors, is also a director thereof; employment covered by federal laws; pilots of agricultural spraying or dusting planes; associate real estate brokers and real estate salesmen; volunteer ski patrollers; and officials of athletic contests involving secondary schools. I.C. § 72-212(1)-(11).

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

"'Employer' means any person who has expressly or impliedly hired or contracted the services of another, and includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of a business there carried on, but who, by reason of their being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is secured, it means his surety so far as applicable." Idaho Code § 72-102(13)(a). The statutes also extend coverage to employees of contractors and/or subcontractors. I.C. § 72-216; Dewey v. Merrill, 124 Idaho 201, 858 P.2d 740 (1993).

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

A. Traumatic or "single occurrence" claims.

"Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by the workers' compensation law. I.C. § 72-102(18)(a). "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located at the time when and place where it occurred, causing an injury. I.C. § 72-102(18)(b). "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The term shall in no case be construed to include an occupational disease and only such non-occupational diseases as result directly from an injury. I.C. § 72-102(18)(c).

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

"Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders, or conditions unless the conditions set forth in § 72-451, Idaho Code, are met. I.C. § 72-102(22)(a). Covered diseases include those specified in Idaho Code § 72-438 and those due to the nature of the employment in which the hazards of the disease actually exist and are peculiar to the trade or employment. "Last exposure rule" fixes liability on the current employer if exposure is at least 60 days. I.C. § 72-439(2).

C. Subsequent injury rule.

If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment, suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the Industrial Special Indemnity Account. I.C. § 72-332(1).

The claimant has the burden of establishing a *prima facie* case of total disability within the odd lot category; once the claimant meets his or her initial burden of establishing a *prima facie* case of total disability within the odd lot category, the burden then shifts to the employer and/or the Industrial Specialty Indemnity Fund to show that some kind of suitable work is readily and

continuously available to the claimant. Mapusaga v. Red Lion Riverside Inn, 113 Idaho 842, 748 P.2d 1372 (1987), *overruled on other grounds*, Archer v. Bonners Ferry Datsun, 117 Idaho 166, 786 P.2d 557 (1990). Burden of proof is on the party seeking to invoke the liability of the Industrial Special Indemnity Fund (ISIF) under the statute, to show that the disability would not have been total "but for" the pre-existing condition. Garcia v. J. R. Simplot Co., 115 Idaho 966, 772 P.2d 173 (1989), *overruled on other grounds*, Archer v. Bonners Ferry Datsun, 117 Idaho 166, 786 P.2d 557 (1990).

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

Any claims arising out of employments which are exempt, unless an employer of an exempt occupation elects coverage. I.C. §§ 72-212 & 213. In addition, no compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or to injure another. If intoxication is a reasonable and substantial cause of an injury, then no income benefits will be paid except where the intoxicants causing the employee's intoxication were furnished by the employer or where the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated. I.C. § 72-208(1) & (2).

6. What psychiatric claims or treatments are compensable?

Psychological injuries, disorders or conditions are generally not compensated under the Idaho workers' compensation statutes unless the various conditions enumerated under I.C. § 72-451 are met. No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel related action, including, but not limited to, disciplinary action, changes in duty, job evaluation and employment termination. I.C. § 72-451(2).

7. What are the applicable statutes of limitations?

Applications for a hearing must be made within one (1) year if no compensation has been paid, and when compensation has been discontinued, employee has five (5) years from the date of the accident causing the injury or date of first manifestation of the occupational disease within which to file the application with the commission. I.C. § 72-706(1)(2). If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease, the claimant shall have one (1) year from the date of the last payment of income benefits within which to make and file with the commission an application requesting a hearing for additional income benefits. I.C. § 72-706(3). No limitation of time provided in this law shall run against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian, or next friend. I.C. § 72-705.

This statute does not affect the right to medical benefits under I.C. §72-432(1).

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

Notice of an injury must be given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof. I.C. § 72-701. Want of notice or delay in giving notice shall not be a bar to proceedings under the workers' compensation statutes if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice. I.C. § 72-704. Such notice and such claim shall be in writing; the notice shall contain the name and address of the employee, and shall state in ordinary language the time, place, nature and cause of the injury or disease and shall be signed by him or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person on their behalf. The notice may include the claim. I.C. § 72-702. A notice shall not be held invalid or insufficient by reason of any inaccuracy in stating that time, place and nature or cause of injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. I.C. § 72-704.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

No compensation shall be allowed to an employee for injury proximately caused by the employee's wilful intention to injure himself or to injure another. I.C. § 72-208(1).

B. Willful misconduct, "horseplay", etc.

No compensation shall be allowed to an employee for injury proximately caused by the employee's wilful intention to injure himself or to injure another. I.C. § 72-208(1). In determining whether an accident arises out of and in the course of employment, each case must be decided upon its own attendant circumstances under a liberal construction of the Workers' Compensation Act to effectuate its intent and purpose. Colson v. Steele, 73 Idaho 348 (1953). In Colson, the court refused to follow those jurisdictions which had created an automatic exclusion for accidents resulting from on-the-job horseplay. Clark v. Daniel Morine Constr. Co., 98 Idaho 114 (1977).

C. Injuries involving drugs and/or alcohol.

If intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid, except where the intoxicants causing the employee's intoxication were furnished by the employer or the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated. I.C. § 72-208(2).

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

If, for the purpose of obtaining any benefit or payment under the provisions of this law, either for himself or for any other person, anyone wilfully makes a false statement or representation, he shall be guilty of a misdemeanor and upon conviction or such offense, he shall forfeit all right to compensation under this law. I.C. § 72-801. An award may be modified within five (5) years of the date of the accident causing the injury, or the date of the first manifestation of an occupational disease, for fraud. I.C. § 72-719(1)(b).

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

No compensation shall be payable for an *occupational disease* if the employee, at the time of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled, laid off, or compensated in damages or otherwise because of such disease. I.C. § 72-441. There does not appear to be a similar statute for pre-existing *accidents* or *injuries*.

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

Acts done by an employee partly for personal reasons and partly to serve the employer is still within the scope of employment for purposes of workers' compensation. Mortimer v. Riviera Apartments, 122 Idaho 839, 845, 840 P.2d 383 (1992). In Grant v. Brownfield's Orthopedic and Prosthetic, 105 Idaho 542, 671 P.2d 455 (1983), the Idaho Supreme Court was asked to decide whether an employee's accidental death while choking on a piece of meat at the employer's annual Christmas party was compensable under the Idaho workers' compensation statutes. Relying on a secondary reference, the court stated:

> When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer, and *it becomes necessary to consult a series of tests*

> *bearing on work-connection*. The most prolific *illustrations of this problem are company picnics and office parties*. Among the questions to be asked: Did the employer in fact sponsor the event? To what extent was attendance really voluntary? Was there some degree of encouragement to attend in such factors as taking a record of attendance, paying for the time spent, requiring the employee to work if he did not attend, or maintaining a known custom of attending? Did the employer finance the occasion to a substantial extent? Did the employees regard it as an employment benefit to which they were entitled as of right? Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

Grant, 105 Idaho at 543-544 *quoting* Larson, 1A Workmans' Compensation Law §22.23, pp. 5-85 to 86 (emphasis in the original). After an extensive examination of these factors, the court found that the employee's death was compensable under the Idaho workers' compensation statutes. Grant, 105 Idaho at 551.

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13. Are injuries by co-employees compensable?

An injury caused by a co-employee will generally be compensable under the Idaho workers' compensation statutes if it arises out of and in the course of employment. I.C. §72-102(18)(a); Colson v. Steele, 73 Idaho 348, 252 P.2d 49 (1953). However, an injury by a co-employee will not be considered to arise out of employment when the injury stems from a personal dispute, even if the employee was performing duties required by employment at the time of injury. Kessler on Behalf of Kessler v. Peyette County, 129 Idaho 855, 860, 934 P.2d 28 (1997); Duerock v. Acarregui, 87 Idaho 24, 390 P.2d 55 (1964).

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

No. Where an employee is assaulted and injuries inflicted upon him through animosity and ill will arising from some cause wholly disconnected with the employer's business or the employment, the employee cannot recover compensation simply because he was assaulted when he was in the

discharge of his duties, since the injury does not, under such circumstances arise out of the course of employment, and employment is not the cause of the injury. Hudson v. Roberts, 75 Idaho 224, 270 P.2d 837 (1954).

BENEFITS

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

The employee's average weekly wage, from which benefits during the first fifty-two (52) weeks are calculated (at two-thirds (2/3) of the average weekly wage), is based on: (1) if paid by the week, weekly pay; (2) if paid monthly, monthly wage multiplied by 12 divided by 52; (3) if fixed by year, divided by 52; or (4) if fixed by day, hour or output, the average weekly wage most favorable to the employee is computed by dividing by 13, the employee's wages earned on first, second, third or fourth of 13 successive calendar weeks prior to the injury or disease manifestation. I.C. § 72-419 (1) - (4). *See* Idaho Code § 72-419 for additional considerations.

I.C. § 72-419 is used to calculate the rate at which income benefits are paid, which is better suited to mathematical calculation, but when evaluating a claimant's permanent physical disability, the Industrial Commission is required to consider the factors articulated in I.C. § 72-425 and cannot rely solely upon mathematical calculation. Vassar v. J.R. Simplot Co., 134 Idaho 495, 5 P.3d 475 (2000).

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

Benefits are paid at two-thirds (2/3) of the employee's average weekly wage, subject to a maximum of 90% of the state average weekly wage, and a minimum of 45% of the state's average weekly wage; but during the first 52 weeks of total disability income benefits, no more than 90% of the employee's average weekly wage, provided that if during the first 52 weeks 90% of the employee's average weekly wage is less than 15% of the state average weekly wage, then the employee shall receive no less than 15% of the average weekly wage. I.C. §§ 72-408 & 409.

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

An injured employee shall not be allowed income benefits for the first five (5) days of disability for work; provided, if the injury results in disability for work exceeding two (2) weeks, income benefits

shall be allowed from the date of disability and be paid no later than four (4) weeks from the date of disability. Provided, further, that the waiting period shall not apply if the injured employee is hospitalized as an in-patient. I.C. § 72-402(1).

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

An injured employee shall not be allowed income benefits for the first five (5) days of disability for work; provided, if the injury results in disability for work exceeding two (2) weeks, income benefits shall be allowed from the date of disability and be paid no later than four (4) weeks from the date of disability. Provided, further, that the waiting period shall not apply if the injured employee is hospitalized as an in-patient. I.C. § 72-402(1). The day on which the injury occurred shall be included in computing the waiting period unless the employee has been paid wages for that day. I.C. § 72-402(2).

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

A workman shall receive written notification within fifteen (15) days of any change of status or condition which directly or indirectly affects the level of compensation benefits to which he might presently or ultimately be entitled. I.C. §72-806.

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

No. An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to 55% of the average weekly state wage stated against the impairments listed in I.C. § 72-428.

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

There are no special or scheduled disfigurement benefits. *See* I.C. § 72-430(1). Disfigurement may be treated as "impairment" under the AMA Guidelines Book. Disfigurement is compensable if the commission finds that the physical injury resulted in "disability."

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?

Scheduled benefits are specified in Idaho Code § 72-428, up to a maximum of 350 weeks. The evaluation of permanent disability includes consideration of all physical impairments that were caused by the claimant's work-related injury and pre-existing impairments or physical condition. Eckhart v. State, Indus. Special Indem. Fund, 133 Idaho 260, 985 P.2d 685 (1999).

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

The "whole man" for purposes of computing disability evaluation of scheduled or unscheduled permanent injuries (bodily loss or losses or loss of use) for conversion to scheduled income benefits, shall be a deemed period of disability of 500 weeks. I.C. § 72-426. The evaluation or rating of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors as provided in I.C. § 72-430. I.C. § 72-425.

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

Following a hearing upon a motion of the employer, the employee, or the commission, if the commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, the commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case may be. The period of retraining shall be fixed by the commission but shall not exceed fifty-two (52) weeks unless the commission, following the application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty-two (52) weeks. The employer and the employee may mutually agree to a retraining program without the necessity of a hearing before the commission. I.C. § 72-450.

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

Detailed calculations and limits are specified in I.C. § 72-408. Generally, for the first fifty-two (52) weeks, two-thirds (2/3) of the employee's average weekly wage; thereafter, two-thirds (2/3) of the average state wage, increasing from year to year.

Such benefits are subject to a minimum of no less than 45% of the average state wage and a maximum of 90% of the average state wage. I.C. § 72-409(1).

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

A. Funeral expenses.

If death results from the injury within four (4) years, the employer shall pay to the person entitled to compensation, or if there is none then to the personal representative of the deceased employee, a sum, not to exceed $6,000 for funeral and burial or cremation, together with the actual expenses of transportation of the employee's body to his place of residence within the United States or Canada. I.C. §§ 72-102(4) and 72-436.

B. Dependency claims.

Dependency shall initially be determined as of the time of the accident causing the injury or of manifestation of an occupational disease for purposes of income benefits therefor, and as of the time of death for purposes of income benefits for death. I.C. § 72-401.

Income benefits for death of an employee are payable for specific periods of time measured either by events or by an income benefit compensation period of five hundred (500) weeks, whichever is lesser in any given circumstance. I.C. § 72-412.

A widow or a widower is paid income benefits until either death or remarriage, but in no case can compensation exceed five hundred (500) weeks. I.C. § 72-412(1). A child will receive income benefits until the child reaches eighteen (18) years of age, and if incapable of self-support after age eighteen (18), for an additional period not to exceed five hundred (500) weeks, deducting the period benefits which were paid prior to eighteen (18) years of age. Provided, income benefits payable to or for any child shall cease when such child marries. I.C. § 72-412(2). A child over the age of eighteen (18) will be paid income benefits if the child is enrolled as a full-time student in any accredited educational institution, or accredited vocational training program, until such child ceases to be enrolled or reaches the age of twenty-three (23) years. I.C. § 72-412(3). A parent or grandparent shall be paid death benefits during the continuation of a condition of actual

dependency, but in no case to exceed five hundred (500) weeks. I.C. § 72-412(4). A grandchild, brother or sister may receive income benefits during a period of dependency, but in no case may the benefits exceed five hundred (500) weeks. I.C. § 72-412(5). In the event the death of the employee occurs after a period of disability, the period of disability will be deducted from the total of compensation. I.C. § 72-412(6).

If death results from the accident or occupational disease within four (4) years from the date of the accident, or manifestation of the occupational disease, the employer shall pay to or for the benefit of the following particular classes of dependents weekly income benefits equal to the following percentages of the average weekly state wage as defined in I.C. § 72-409. I.C. § 72-413. The statute then sets out an exhaustive list of percentages paid to certain dependents of the deceased employee, *e.g.*, dependent widow or widower, if there are no dependent children, is entitled to 45% of the average weekly state wage.

In the event of remarriage of the widow or widower prior to the expiration of five hundred (500) weeks, a lump sum shall be paid to the widow or widower in an amount equal to the lesser of one hundred (100) weeks or the total of income benefits for the remainder of the five hundred (500) week period computed on the basis of a weekly rate of 45% of the average weekly state wage in effect at the time of remarriage. I.C. § 72-413A.

In case there are two (2) or more classes of persons entitled to compensation under § 72-413, and the apportionment of such compensation as above provided, would result in injustice, the commission may, in its discretion, modify the apportionment to meet the requirements of the class. I.C. § 72-414.

Upon the cessation of the income benefits for death to or on account of any person, income benefits of the remaining persons entitled to income benefits for the unexpired part of the period during which their income benefits are payable shall be that which such person would have received if they had been the only persons entitled to income benefits at the time of the decedent's death. I.C. § 72-415.

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

The Idaho Supreme Court has held that to require any contribution from the second injury fund, the party seeking the funds participation in the payment of benefits must prove: (1) the employee had a permanent physical impairment which pre-existed the injury; (2) the permanent physical impairment was "manifest" prior to the current injury; (3) the pre-existing impairment constituted a subjective hindrance or obstacle to obtaining employment or re-employment; (4) the employee has experienced a subsequent work-related injury or occupational disease which is disabling; and

(5) the employee is now permanently and totally disabled either as a result of the combined effect of the pre-existing impairment and the subsequent injury or by reason of the aggravation and acceleration of the pre-existing impairment. Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990); Garcia v. J.R. Simplot Co., 115 Idaho 966, 722 P.2d 173 (1989); I.C. §72-332.

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

Application for hearing must be made within one year if no compensation has been paid, and when compensation has been discontinued, the employee has five (5) years from the date of the accident causing the injury or the date of first manifestation of the occupational disease within which to file the application with the commission. I.C. § 72-706(1)(2). In addition, if income benefits have been paid and discontinued more than four (4) years from the date of the accident or the first manifestation of the occupational disease, the employee has one (1) year from the date of the last payment of income benefits within which to file an application for hearing. I.C. § 72-706(3). Standard claims may be re-opened and modified within five (5) years of the injury, or first manifestation of exposure if there is a change in condition or disablement, but not more often than once in six (6) months. I.C. § 72-719.

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

If the commission or any court for whom any proceedings are brought under the Idaho workers' compensation laws determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable grounds, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney's fees in addition to the compensation provided by this law. In all such cases, the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. I.C. § 72-804.

IDAPA 17.02.08.033 regulates the amount of fees an attorney can recover from a claimant in a worker's compensation proceeding and has been upheld by the Idaho Supreme Court. Seiniger Law Offices, P.A. v. State Ex. Rel. Indus. Comm'n, ___ Idaho ___, 299 P.3d 773 (4-12-2013).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

I.C. §§ 72-201, 72-209, and 72-211 provide that the Idaho workers' compensation laws are the exclusive remedy for injuries caused by accidents arising out of and in the course of employment.

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

The exemption from tort liability given to an employer shall not apply in any case where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer, its officers, agents, servants, or employees, the loss of such exemption applies only to aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto. I.C. §72-209(3). Contractual waiver is not recognized in the state of Idaho. When the employee is employed by two employers and one employer is attempting to use the workers' compensation law as a shield to avoid third-party liability, it is that employer's duty to prove that the employee was working for the employer when the accident occurred and the fact that the employee was subject to the direction and control of either employer at moment's notice was not determinative; what the employer had to prove as claimant was that the employee's injury arose out of and in the course of his employment with the employer. Basin Land Irrigation Co. v. Hat Butte Canal Co., 114 Idaho 121, 754 P.2d 434 (1988).

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

An employer can be guilty of a misdemeanor if they fail or refuse to comply with an order of the commission regarding safety. The employer may also be penalized $1 for each employee for every day during which such failure to comply continues. I.C. § 72-723.

If any employer shall fail for a period of ten (10) days to comply with such order of the Commission, he may be enjoined by such district court from carrying on such trade or occupation while such failure continues. I.C. § 72-723.

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

None.

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

An employer or surety may be liable for reasonable costs of the claimant's attorney's fees for bad faith in handling the claim. I.C. § 72-804. The legislature did not intend that a worker should be able to bring a bad faith tort action against his employer's surety in courts of general jurisdiction, but rather that a worker could receive attorney's fees and sometimes punitive costs if the employer or surety acted unreasonably. Idaho State Ins. Fund v. Van Tine, 132 Idaho 902, 980 P.2d 566 (1999).

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

There is no such exposure under the Workers' Compensation Act. However, such an action may violate the doctrine of the implied covenant of good faith and fair dealing which is recognized by the Idaho civil courts.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. I.C. § 72-223(2).

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

Generally a co-employee will not be liable for tort liability based on mere negligence. However, the co-employee may expose himself or their employer to tort liability for intentional acts unrelated to the job. I.C. § 72-209(3).

36. Is subrogation available?

Yes. I.C. § 72-223(3).

MEDICALS

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

Unless the payor denies liability for the claim or sends a Preliminary Objection, a Request for Clarification, or both, as to any charge, the Payor shall pay the charge within thirty (30) calendar days of receipt of the bill. IDAPA 17.02.09.035.04. "Payor" means the legal entity responsible for paying medical benefits under Idaho's Workers' Compensation Law.

IDAPA subsections .035.04-.035.10 provide a procedure for resolving disputes over medical fees between Care Providers and Payors. Upon completion of the specified procedure, if the Provider prevails in a dispute over CPT or MS-DRG coded items, Payor shall pay the amount owed, plus an additional thirty percent (30%). However, if the Provider prevails in a dispute over items without CPT or MS-DRG codes, the additional thirty percent (30%) shall be due only if the Payor does not pay the amount due within thirty (30) days of the administrative order.

If the commission or any court for whom any proceedings are brought under the Idaho workers' compensation laws determines that the employer or his surety … neglected or refused within a reasonable time after receipt of a written claim for compensation to pay the injured employee or his dependents the compensation provided by law, … the employer shall pay reasonable attorney's fees in addition to the compensation provided by this law. In all such cases, the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. I.C. § 72-804.

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

In filing a workers' compensation complaint, the claimant is required to sign a release of medical information which allows the employer to have access to any medical documents relating to the claim.

All medical information relevant to or bearing upon a particular injury or occupational disease shall be provided to the employer, surety, manager of the Industrial Special Indemnity Fund or their attorneys or authorized representatives, the claimant, the claimant's attorneys or authorized representative, or the Commission without liability on the part of the physician, hospital, or other provider of medical services and information developed in connection with treatment or examination for an injury or disease for which compensation is sought and shall not be privileged communication. I.C. § 72-432(11).

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

I.C. §72-432(4)(a) states "The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee must give written notice to the employer or surety of the employee's request for a change of physicians to afford the employer the opportunity to fulfill its obligation under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained... If any dispute arises over the issue of a request for change of physician, the industrial commission shall conduct an expedited hearing to determine whether or not the request for change of physician should be granted."

I.C. §72-433(1) states that after an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon.

I.C. §72-433(2) allows the employee to have a physician or surgeon designated and paid by himself present at an examination by an employer's physician or surgeon.

If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee's right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues. I.C. §72-434.

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

An employee shall not be responsible for charges of physicians, hospitals, or other providers of medical services to whom he has been referred for treatment of his injury or occupational disease by an employer designated physician or by the commission, except for charges for personal items or extended services which the employee has requested for his convenience and which are not required for treatment of his injury or occupational disease. I.C. § 72-432(7).

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

Prosthetic devices are authorized under the Idaho workers' compensation laws. I.C. § 72-432(2). No specific limitation or description is dictated by statute, rule, or case law.

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

No. Other than necessary travel in obtaining medical care, any employee who seeks medical care in a manner not provided for in I.C. § 72-432 or as ordered by the Industrial Commission pursuant to this section, shall not be entitled to reimbursement of costs of such care. I.C. § 72-432(5) and (13).

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

No.

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

None.

PRACTICE/PROCEDURES

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

If the insurance company or self-insured employer denies a claim, the claimant can file a complaint with the Industrial Commission. I.C. § 72-706. The complaint initiates the formal legal process to bring the issue to the Commission for a hearing and decision. Mediation is also available.

46. What is the method of claim adjudication?

A. Administrative level.

Hearings are generally held before a referee who submits recommended findings and conclusions to the Industrial Commission, a three-member panel appointed by the governor. I.C. § 72-501(1). The statute requires that not more than one commissioner be a lawyer. I.C. § 72-501(4). A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the Commission upon filing the decision in the Office of the Commission; provided, within twenty (20) days from the date of filing the decision, any party may move for reconsideration or rehearing of the decision, or the Commission may rehear or reconsider its decision on its own initiatives, and in any such event, the decision shall be final upon denial of a

motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed directly to the Supreme Court as provided by I.C. § 72-724. I.C. § 72-718.

B. Trial court.

No court of this state shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend, or annul any order or award of the Commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its duties. I.C. § 72-733.

Courts do have concurrent jurisdiction over issues that may arise in a civil action, such as independent contractor vs. employee status, or the employer being covered under the Workers' Compensation Act, or being subject to an exemption.

C. Appellate.

All decisions of the Industrial Commission may be appealed, as a matter of right, directly to the state's highest court, the Idaho Supreme Court. I.C. §§ 72-718 and 72-724 .

47. What are the requirements for stipulations or settlement?

If the employer and the afflicted employee reach an agreement in regard to compensation under this law, a memorandum of the agreement shall be filed with the commission, and, if approved by it, thereupon the memorandum shall for all purposes be an award by the commission and be enforceable under the provisions of section 72-735, unless modified as provided in section 72-719. An agreement shall be approved by the commission only when the terms conform to the provisions of this law. I.C. § 72-711.

The Industrial Commission's Rule of Judicial Procedure (J.R.P.) 18 contains requirements for enforceable Lump Sum Settlement Agreements. *But see* Morris v. Hap Taylor & Sons, Inc., ___ Idaho ___, 301 P.3d 639 (5-23-2013) (stipulated award not set aside for failure to state claimant's current medical and employment status as required by J.R.P. 18).

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

Yes.

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

Yes. A memorandum of the agreement shall be filed with the Commission, and, if approved by it, thereupon the memorandum shall for all purposes be an award by the Commission and be enforceable under the provisions of I.C. § 72-735 unless modified as provided in I.C. § 72-719. An agreement shall be approved by the Commission only when the terms conform to the provisions of this law. I.C. § 72-711.

RISK FINANCE FOR WORKERS COMPENSATION

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

Workers' compensation insurance is required for all injuries incurred by employees arising out of their employment, except for exemptions. I.C. § 72-301. Employers can obtain worker's compensation insurance through one of four options: (1) private insurance; (2) State Insurance Fund; (3) assigned risk pool; and (4) self insurance. Each employer/insurer contributes part of the basic premium to the Idaho Special Indemnity Fund, Idaho's "second injury fund," which is responsible for apportioned benefits attributable to pre-existing conditions or injuries. I.C. § 72-332(1). Idaho Code § 72-306 requires that policies insure all liability under the Workers' Compensation Act.

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

A. For individual entities.

Individual employers may self-insure upon posting security satisfactory to the Industrial Commission. I.C. § 72-301. In order to be considered for approval by the Industrial Commission to self-insure under I.C. § 72-301, an employer shall maintain an average Idaho payroll over the proceeding three (3) years of at least Four Million Dollars ($4,000,000.00). IDAPA 17.02.11.013.01. A self-insured employer shall also deposit an initial security deposit with the Idaho State Treasurer in the form of cash, U.S. obligations, Idaho municipal bonds, or a self-insurer's bond in substantially the form set forth in the amount of One Hundred Fifty Thousand Dollars ($150,000.00), plus 5% of the first Ten Million Dollars ($10,000,000.00) of the employer's average annual payroll in the State of Idaho for the three (3) preceding years. IDAPA 17.02.11.013.11.

Additional application requirements for prospective self-insured employers are set forth in IDAPA 17.02.11.013.02 through 17.02.11.013.12. Continuing requirements for self-insured employers are set forth in IDAPA 17.02.11.014.01 through 17.02.11.014.06.

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

Groups or pools of private employers may not self-insure as such. In three instances, however, groups of employers have effectively "self-insured" by creating separate entities which qualify as sureties under the Idaho statute. Idaho presently has three reciprocal employer-owned sureties: Truckers Exchange, Associated Loggers, and Workers' Compensation Exchange.

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"?

"Alien" means a person who is not a citizen, a national, or resident of the United States or Canada. Any person not a citizen or a national of the United States who relinquishes or is about to relinquish his residence in the United States shall be regarded as an alien. I.C. § 72-102(1). There is no specific statute exempting "illegal aliens" from coverage under Idaho's workers' compensation laws.

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

Idaho's workers' compensation statute does not address the question.

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 Payor Act ?

Idaho's workers' compensation statute does not address the question. However, Medicare will seek reimbursement from a liable party for monies Medicare paid. An attorney should find out the amount of the trust/lien, or "interest" as Medicare calls it, and include that amount in the settlement.

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

First, there would be no need for Medicaid or a health insurer to pay medical benefits, and thus be subrogated, if the injury arises out of the course and scope of employment. If a health insurer paid medical expenses as a disputed claim and it was ultimately determined to be compensable, the compensation insurer would be responsible for the expenses and would have to pay off the health insurer or Medicaid.

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)?

All medical information relevant to or bearing upon a particular injury or occupational disease shall be provided to the employer, surety, manager of the Industrial Special Indemnity Fund or their attorneys or authorized representatives, the claimant, the claimant's attorneys or authorized representative, or the Commission without liability on the part of the physician, hospital, or other provider of medical services and information developed in connection with treatment or examination for an injury or disease for which compensation is sought and *shall not be privileged communication*. I.C. § 72-432(11). (Emphasis added)

Idaho's workers' compensation statute does not specifically address the confidentiality and privacy of medical records. The Idaho Administrative Code has a procedure for submitting medical reports. IDAPA 17.02.04.322.02. Whenever possible, billing information shall be coded using the Current Procedural Terminology (CPT). In the case of hospitals, reports shall include a Uniform Billing (UB) Form 92. In the case of physicians and other providers supplying outpatient services, this reporting requirement shall include a Health Care Financing Administration (HCFA) Form 1500.

Depending on the type, there are different statutes for each profession relating to confidential and privileged information. "A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." I.C. §9-203(4).

45 CFR 160 supercedes state law unless the state law is more restrictive. Since federal HIPAA is more restrictive than Idaho state laws, HIPAA supercedes the Idaho act. HIPAA sets the standard for the disclosure of released medical records and subpoenaed records.

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

Independent contractor is defined as, "any person who renders service for a specified

recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished. I.C. § 72-102(17).

Independent contractors are ineligible to recover worker's compensation from the State Insurance Fund. The determination of whether an injured party is an independent contractor or an employee is a factual determination to be made on a case-by-case basis from full consideration of the facts and circumstances established by the evidence. Olvera v. Del's Auto Body, 118 Idaho 163, 795 P.2d 862 (1990).

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

The only reference to "professional employment organizations" is located in I.C. § 72-103, which states that the parties to a professional employer arrangement have the option to determine for themselves, in writing, whether the temporary employer or the work site employer will be the party to secure liability as required by section 72-301. To the extent the parties to do not exercise the option provided, the obligation to secure such liability shall be with the temporary or professional employer. I.C. § 72-103(3).

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?

No.

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.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan by contacting the ALFA attorneys at (312) 642-ALFA (2532).