

## INDIANA

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

Indiana Worker's Compensation Act, Ind. Code § 22-3-1-1 et seq. (2019).  
Worker's Compensation Board of Indiana, 631 Ind. Admin. Code 1-1 et seq. (2019).

## SCOPE OF COMPENSABILITY

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

All employees who suffer personal injury or an occupational-related disease "arising out of and in the course of employment" are considered covered employees. Employees mean every person, including minors, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the course of trade, business, occupation, or profession of the employer. I.C. § 22-3-6-1. An executive officer appointed or elected, other than that of a municipal corporation, governmental subdivision, charitable, religious, educational or other nonprofit corporation is also considered an employee. *Id.* An officer of the aforementioned organizations and corporations may be covered under the Indiana Workmen's Compensation Act (Act) if that officer is specifically identified in the contract of insurance. *Id.* An employee may also include the owner of a sole proprietorship if the owner is actually engaged in the proprietorship business. *Id.* An employee may also include a partner of a partnership if the partner is engaged in the partnership business. *Id.*

The Act does not apply to railroad employees engaged in the train service as: 1) engineers, 2) firemen, 3) conductors, 4) brakemen, 5) flagmen, 6) baggage men, and 7) foremen in charge of yard engines and helpers. I.C. § 22-3-2-2. The Act does not apply to the employees of a fire department, police department of any municipality who partake in a firefighter's or police officer's pension fund. *Id.* The Act does not cover for persons who enter into an independent contractor agreement with a nonprofit organization. *Id.* The Act does not apply to casual laborers, farm or agricultural employees, and household employees. I.C. § 22-3-2-9. The Act further does not apply to real estate professionals if: (1) they are licensed real estate agents; (2) substantially all their remuneration is directly related to sales volumes and not the numbers worked; and (3) there is a written agreement with the real estate brokers indicating that they are not to be treated as employees for tax purposes. I.C. § 22-3-6. An independent contractor, as defined under the United States Internal Revenue Code, is not considered an employee under the Act. *Id.* Additionally, an "owner-operator" that provides a motor vehicle and the services of a driver under a written contract that is subject to federal transportation regulations is not an employee of the

motor carrier for purposes of the Act. *Id.* Finally, the Act does not provide coverage for casual laborers, farm or agricultural employees, and household employees. *Id.*

Something to monitor regarding those that are exempt from the Act, the Indiana General Assembly has introduced a bill in the Indiana Senate that would allow for a religious exemption from worker's compensation and occupational diseases coverage for a member of certain religious sects or a division of a religious sect who meets certain requirements and obtains a certificate of exemption from the worker's compensation board. S.B. 393, 121st Gen. Assemb., 2d Reg. Sess. (In. 2020). In addition to amending I.C. § 22-3-2-9 which lists those already exempt from the Act, the bill would add two new sections, I.C. § 22-3-5-1.5 and I.C. § 22-3-7-34.2, that enumerate the requirements for the religious exemption and the application process.

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

Any principal contractor, intermediate contractor, or subcontractor, who sublets work to a subcontractor who is subject to the worker's compensation statute provisions, without requiring the subcontractor to show a certificate of insurance, is liable to the same extent as such subcontractor for the payment of compensation and medical expenses. I.C. § 22-3-2-14(c).

"Employer" includes the state and any political subdivision, any municipal corporation within the state, any individual or the legal representative of a deceased individual, firm, association, limited liability company, limited liability partnership, or corporation or the receiver or trustee of the same, using the services of another for pay. I.C. § 22-3-6-1(a). As of July 2018, the classification of "joint employers" has been expanded to include more business entities, *See Id.* Additionally, lessors and lessees of employees are considered joint employers. *Id.* A recent case addressed lessors and lessees of employees as joint employers when an employee of a temporary staffing agency was hurt while working for the agency's client. *Walls v. Markley Enterprises, Inc.*, 116 N.E.3d 479 (Ind. Ct. App., 2018). After recovering worker's compensation benefits from her staffing agency, Bridge Staffing, Inc. and its insurer, the plaintiff brought a claim for negligence against the company she was assigned to work for by the staffing agency, Markley Enterprises, Inc. *Id.* at 482. The Court held that her worker's compensation claim was the exclusive remedy for her injuries sustained while working at Markley because, despite language in the agreement that plaintiff was "assigned" to work for Markley, under a statutory interpretation of the term "leased," Bridge remained the lessor and Markley the lessee of the plaintiff. *Id.* at 487-88.

If the employer is insured, the term includes the employer's insurer so far as applicable. However, the inclusion of an employer's insurer within this definition does not allow an employer's insurer to avoid payment for services rendered to an employee with the approval of the employer. I.C. § 22-3-6-1.

Each employer subject to the Act is required to post, in a form approved by the board, a notice in the employer's place of business to inform employees that their employment is covered by worker's compensation containing the name, address, and telephone number of the employer's insurance carrier or the person responsible for administering the employer's worker's compensation claims if the employer is self insured. I.C. § 22-3-2-22(a)-(b). As the use of mobile and remote employees has increased, employees now must convey the same information to their employees in an electronic format or in the same manner as the employer conveys other related information. I.C. § 22-3-2-22(c).

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

Accidental injuries or occupational diseases arising out of an in the course of the worker's employment are covered. A worker is entitled to receive benefits if the injury/ illness results in: 1) loss of use of part of the body; 2) partial loss of use of part of the body; 3) total permanent disability; 4) permanent reduction of eye sight; 5) permanent reduction in hearing; 6) permanent partial impairment; 7) permanent disfigurement which may cause impairment; 8) occupational diseases; 9) temporary impairment resulting in the inability to earn full wages; and 10) death. I.C. § 22-3-3-10. *See also Borgman v. State Farm Insurance Co.*, 713 N.E.2d 851 (citing *Campbell v. Eckman/Freeman & Assoc.*, 670 N.E.2d 925, 929 (Ind. Ct. App. 1996)).

In a worker's compensation case, the claimant who seeks disability benefits bears the burden of persuasion. To carry their burden, an injured employee generally must establish: (1) their "disability;" and (2) the nature of the disability. *Walker v. State*, 694 N.E.2d 258 (Ind. 1998). To establish a disability, it is not necessary that the employee prove their impairment or loss of bodily function is 100% because an injured worker may experience partial impairment as defined by the Act. *Id.*

In any action brought forth under the purview of the Act, the burden of proving that an injury or death of an employee was a result of the failure to use due care and diligence at the time of injury or death shall rest with the defendant, but the same may be proved under a general denial. I.C. § 22-3-9-2. It should be noted that an employee cannot be guilty of negligence or contributory negligence under a theory of "assumption of risk" if the employer violated any ordinance or statute, and said violation was the cause of the injury or death. *Id.*

No compensation is allowed for an injury or death due to the employee's knowingly self-inflicted injury, their intoxication, their commission of an offense, their knowing failure to use a safety appliance, their knowing failure to obey a reasonable written or printed rule of the employer which

has been posted in a conspicuous position in the place of work, or their knowing failure to perform any statutory duty. Ultimately, the burden of proof is on the defendant. I.C. § 22-3-2-8.

#### A. Traumatic or "single occurrence" claims.

There are two (2) statutory jurisdictional prerequisites that must be met in order for the Act to apply: (1) personal injury or death by accident; and (2) arising out of or in the course of employment; *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969 (Ind. 1986); I.C. § 22-3-2-6. An accident "arises out of" employment for purposes of the Act when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is fulfilling the duties of employment or while engaged in doing something incidental thereto. *Thompson v. York Chrysler*, 999 N.E.2d 446 (Ind. Ct. App. 2013). Additionally, a claimant must show a causal relationship between an incident and an injury or death to qualify for worker's compensation benefits. *Id.* at 974. The degree of medical proof necessary is less than a "reasonable medical certainty," but more than a possibility. An expert's opinion that something is "possible" may be sufficient to sustain a verdict if it is substantiated by other probative evidence that establishes the material fact. See *Dial X-Automated Equipment v. Caskey*, 826 N.E.2d, 642 (Ind. 2005).

#### B. Occupational disease.

Occupational Disease means a disease arising out of an in the course of employment. I.C. § 22-3-7-10. Ordinary disease of life to which the general public is exposed outside of the employment shall be compensable, except where such disease follows as an incident of an occupational disease. *Id.*

The claimant must show that the disease arose out of and in the course of the employment. A disease arises out of employment only if it is apparent to the rational mind that:

- (1) There is a causal connection between the work conditions and disease;
- (2) The disease followed as a natural incident of the work as a result of some exposure;
- (3) The employment is the proximate cause of the disease;

- (4) The hazard is not equally accessible outside the employment;
- (5) The disease is incidental to the character of the business;
- (6) The disease had its origin in a risk connected with the employment; and
- (7) The disease flowed from that risk as a rational consequence.

Indiana Code § 22-3-7-10.

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

There are no specific injuries or claims that are excluded from the Act. If the injury or death was an unexpected result from the usual exertion or exposure of an employee's job, then it meets the definition of an accident, and if the accident occurred in the course of the employment, then it is compensable. I.C. § 22-3-2-6. *See also Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969 (Ind. 1986). The Act was passed for the benefit of the employee and will be liberally construed so as to not negate the Act's humane purpose. *Gray v. Daimler Chrysler Corp.*, 821 N.E.2d 431 (Ind. Ct. App. 2005).

The term accident in Indiana Code § 22-3-2-6 establishes that the exclusive provision of the Act is not automatic. *Wiseman v. AutoZone, Inc.*, 819 F. Supp. 2d 804, 825 (N.D. Ind. 2011) (applying Indiana law). The requirement that the plaintiff's injuries arise "by accident" obviously exempts intentional tort claims from the operation of the exclusivity provision. *Id.*

#### 6. What psychiatric claims or treatments are compensable?

"Whether the injury is mental or physical, the determinative standard should be the same." *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987). Accordingly, if the mental injury arose out of and in the course of employment, it is compensable. *Id.*; *Rayford v. Lumbermen's Mutual*, 840 F. Supp. 606 (N.D. Ind. 1993). *aff'd*, 44 F.3d 546 (7th Cir. 1995). In *Hansen*, the court found compensable a mental injury without any accompanying physical injury and rejected any requirement that the mental injury be the result of some unusual stress in the employee's employment. *Id.* at 576-77. In *Indiana State Police v. Wiessing*, the Indiana Court of Appeals upheld the Worker's Compensation Board's determination that an officer's death was the result of post-traumatic

stress disorder that resulted when Wiessing shot and killed a motorist who tried to take his gun. 836 N.E.2d 1038, 1046 (Ind. Ct. App. 2005). The court reasoned that because Trooper Wiessing's suicide resulted from this condition, it is not considered to be a self-inflicted injury, but rather an injury due to mental trauma that arose out of the officer's course of employment. *Id.*

## 7. What are the applicable statutes of limitations?

### A. Workers' compensation cases.

(1) Generally, unless an employer or their representatives have actual knowledge of the occurrence of an injury or death at the time thereof, as soon as practicable after the injury or death occurs, the employee shall give written notice to the employer of said injury or death. I.C. § 22-3-3-1. Unless such notice is given or acquired within thirty (30) days from the date of the injury or death, no compensation shall be paid until and from the date such notice is given, or knowledge is obtained. *Id.* Once the employer receives notices, if the employer accepts their employee's claim without any dispute, then the employer will generally submit the claim to their respective worker's compensation insurer. The employer then files a "First Notice of Care" with the Worker's Compensation Board. However, if there is a dispute in the claim, then the employee has two (2) years from the date of injury to file a claim with the Worker's Compensation Board. I.C. § 22-3-3-3. If no claim is made within two (2) years after the occurrence of the accident, then the claimant's right to compensation shall forever be barred.

In cases where an accident or death arises from radiation, a claim for compensation shall be filed with the Board within two (2) years from the date on which the employee had knowledge of his injury or by exercise of reasonable diligence should have known that the existence of such injury and its causal relationship to employment. *Id.* However, for progressive types of injuries, with no clear-cut accident date, the statute begins to run when the permanence of the injury is discernible. *Union City Body Co., Inc. v. Lambdin*, 569 N.E.2d 373 (Ind. Ct. App. 1991).

(2) The power and jurisdiction of the Worker's Compensation Board over each case shall be continuing and from time to time it may, upon its own motion or upon the application of either party, on account of a change in conditions, make such modifications or change in awards, either by agreement or upon a hearing, subject to the maximum and minimum allowable awards under the Act. I.C. § 22-3-3-27. However, the Worker's Compensation Board may not make such modifications upon its own motion nor shall any application be filed by either party after the expiration of two (2) years from the last day for which compensation was paid. *Id.*

(3) No limitation of time provided in the Act shall run against any person who is mentally incompetent or a minor so long as the person has no guardian or trustee.

#### **B. Occupational disease claims.**

No proceedings by an employee for compensation for Occupational Disease shall be maintained unless claim for compensation shall be filed by the employee with the Worker's Compensation Board within two (2) years after the date of the disablement. I.C. § 22-3-7-32.

Additionally, no proceedings by dependents of a deceased employee for compensation for death for Occupational Disease shall be maintained unless claim for compensation shall be filed by the dependents with the Worker's Compensation Board within two (2) years after the date of death. *Id.*

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

As indicated above, if the employer does not have actual knowledge of an injury or death, the employee or his dependents must give written notice as soon as practicable. I.C. § 22-3-3-1. Unless such notice is given or knowledge acquired within thirty (30) days from the date of injury, no compensation shall be paid until the date such notice or knowledge is obtained. *Id.* However, lack of notice is not a bar to compensation unless the employer has been prejudiced by the lack of notice. *Id.*

The notice, as required in Indiana Code § 22-3-3-1 shall state the name and address of the employee, the time, place, nature and cause of the injury or death, and shall be signed by the injured employee or by someone on their behalf in the case of death. I.C. § 22-3-3-2. The notice may be served personally upon the employer, or to other employees of the employer that the injured person was required to report to, or orders had to be followed. *Id.* See also *Pirtle v. National Tea Company*, 308 N.E.2d 720 (Ind. Ct. App. 1974); *Roebel v. Dana Corp.*, 638 N.E.2d 1356 (Ind. Ct. App. 1994).

Within seven (7) days after the occurrence or knowledge of any injury – either actual, alleged, or reported under I.C. 22-3-3-1 – that causes an employee's death or the need for medical care beyond first aid, the employer must mail – or submit electronically– a report to the employer's insurance carrier, or, if the employer is self-insured, to the board. I.C. 22-3-4-13. The insurance

carrier, companies without insurance, and third-party administrators that report accident information to the board must report the information via the Electronic Data Interchange (EDI) using the First Report of Injury form (State Form 34401). I.C. 22-3-4-13(b). This report must include: the name, nature, and location of the employer's business; the name, age, sex, wages, and occupation of the injured employee; the date and hour of the accident; the nature and cause of the injury; and such other information as the board may require. I.C. 22-3-4-13(c). The report must be delivered to the worker's compensation board the later of seven (7) days after receipt of the report or fourteen (14) days after the employer's knowledge of the injury. I.C. 22-3-4-13(a).

Electronic Data Interchange (EDI) is a process which allows one company to send information to another company electronically rather than with paper. For a list of forms, including those required to be submitted electronically via an approved EDI 3.1 process such as the First Report of Injury or Subsequent Report of Injury, see: <https://www.in.gov/wcb/2339.htm>

For information on the new EDI Claims Release 3.1 Reporting in Indiana, see: <https://www.in.gov/wcb/2586.htm>

For information on the EDI Claims Release 3.1 Requirements, see: <https://inwcbedi.info/requirements>

For the most up-to-date news and information from the Worker's Compensation Board of Indiana, see: <https://inwcbedi.info/news>

## 9. Describe available defenses based on employee's conduct:

Available affirmative defenses are set forth in I.C. § 22-3-2-8: (a) employee's intoxication; (b) employee's knowingly self-inflicted injury; (c) employee's commission of an offense; (d) employee's failure to use a safety appliance; (e) employee's failure to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous place; or (f) employee's failure to perform any statutory duty. However, a claimant's mere own negligence will not preclude an employee from receiving worker's compensation benefits.

Additionally, a worker injured while actively participating in horseplay is not entitled to compensation, unless he was an innocent victim. *Neidige v. Cracker Barrel*, 719 N.E.2d 441 (Ind. Ct. App. 1999); *Pepka Spring Co. v. Jones*, 371 N.E.2d 389 (Ind. Ct. App. 1978); *Weldy v. Kline*, 616 N.E.2d 398 (Ind. Ct. App. 1993).

Generally, worker's compensation third-party actions, as in other tort settings, the comparative fault of the injured employee-plaintiff is factored into the final judgment or settlement. *Spangler, Jennings & Dougherty P.C. v. Indiana Ins. Co.*, 729 N.E.2d 117 (Ind. 2000). And, while the employee is generally required to repay the worker's compensation carrier for benefits and expenses paid while the employee pursued the third-party action, the amount of that reimbursement is likewise reduced by the amount of the employee's comparative fault. *Id.* The Act governs claims against third persons, and specifically provides that a plaintiff can choose between worker's compensation benefits and third-party judgments so that they may maximize the recovery. *Id.* However, if the final judgment in a suit brought by an injured employee is less than the amount of the worker's compensation benefits and medical expenses, the employee can choose to accept the judgment and reimburse the worker's compensation payor. *Id.* However, if through settlement or litigation, an employee obtains an amount that is more than the worker's compensation benefits, then the employee must reimburse the worker's compensation payor and keep the remainder of the judgment or settlement, thereby effectively relinquishing all rights to worker's compensation benefits. *Id.* See also *Kornelik v. Mittal Steel USA, Inc.*, 952 N.E.2d 320, 325 (Ind. Ct. App. 2011).

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

There are no statutory penalties within the Act relating to claims involving fraud. The Worker's Compensation Board does, however, have the power in the case of fraud to vacate its approval of a compensation agreement, and to entertain an application for that purpose when made by the employee, employer or insurance carrier. *Indiana University Hospitals v. Carter*, 456 N.E.2d 1051 (Ind. Ct. App. 1983). At the same time, a party to a worker's compensation agreement can challenge the validity of the agreement in an independent tort action for fraud. *Id.*

It should be noted that Indiana Code § 22-3-4-12.1 addresses the issue of bad faith on behalf of the employer or employer's insurance provider in administering worker's compensation claims and gives the Worker's Compensation Board the power to award damages to the claimant up to \$20,000, depending upon the degree of culpability and the actual damages sustained. This section also allows for the reimbursement of attorney fees that are incurred by an employee in bringing forth a claim under this section.

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

Research has found no Indiana cases on this topic.

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

Where there is a clear nexus between work activities and after-hours recreational activities sponsored by the employer, injuries incurred in recreational activities arise out of and in the course of employment. *Ski World, Inc. v. Fife*, 489 N.E.2d 72 (Ind. Ct. App. 1986); *Weldy v. Kline*, 616 N.E.2d 398 (Ind. Ct. App. 1993). Where an employer's interests in sponsoring after-hours activities are not merely altruistic, but also intended to improve business, the activity will likely be considered incidental to employment. *Knoy v. Cary*, 813 N.E.2d 1170, 1173 (Ind. 2004). See also *Curry v. D.A.L.L. Anointed, Inc.*, 966 N.E.2d 91 (Ind. Ct. App. 2012).

**13. Are injuries by co-employees compensable?**

Yes, injuries by co-employees are compensable when the injuries arise out of the course of employment. *Nelson v. Denkins*, 598 N.E.2d 558 (Ind. Ct. App. 1992) (co-worker pushed worker after co-worker told worker to get back to work); *Skinner v. Martin*, 455 N.E.2d 1168 (Ind. Ct. App. 1983) (Workers' Compensation Act should be liberally construed to include employment-related assaults as compensable accidents).

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

Where an injury by a third party is one which might be reasonably anticipated because of the general character of the work, or the particular duties imposed upon the workman (i.e., salesman who carried money and was shot and robbed, or a night watchman killed by intruders) such injuries or death may be found to arise out of the employment. *Wayne Adams Buick, Inc. v. Ference*, 421 N.E.2d 733 (Ind. Ct. App. 1981); The court in *K-Mart Corp. v. Novak*, 521 N.E.2d 1346 (Ind. Ct. App. 1988), even went so far as to hold that a store employee's death as a result of a shooting spree by a third party arose out of her employment because her job exposed her to a higher risk of encountering dangerous people.

However, when the animosity or dispute that culminates in an assault on the employee is imported into the workplace from the claimant's domestic or private life, and is not exacerbated by the employment, the assault cannot be said to arise out of the employment under any circumstances. *Peavler v. Mitchell & Scott Machine Co.*, 638 N.E.2d 879, 881 (Ind. Ct. App. 1994), *trans. denied*.

## BENEFITS

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

The average weekly wage is the earnings of an injured employee in the employment in which the employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of injury, divided by fifty-two (52), except as follows:

- A. If the employee lost seven (7) or more calendar days during this period, then the earnings for the remainder of the fifty-two (52) weeks shall be divided by the number of weeks remaining after the time lost has been deducted;
- B. Where employment prior to injury was less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks which the employee earned wages shall be followed if the results just and fair to both parties will be obtained;
- C. Allowances made to an employee in lieu of wages as part of a wage contract are deemed part of his earnings; and
- D. For a student employee, the average weekly wage is calculated by multiplying the student employee's hourly wage rate by forty (40) hours.

I.C. § 22-3-6-1(d).

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

Temporary benefits are calculated by taking 66 2/3% of the employee's average weekly wage times the number of weeks the employee is entitled to the temporary benefits. I.C. § 22-3-3-22. However, there are maximum and minimum average weekly wage limitations. *Id.* The following chart delineates the maximum and minimum average weekly wage figures and the resulting temporary benefits for injuries that occurred on a specific date:

TEMPORARY TOTAL DISABILITY BENEFITS

Date of Injury	Min.	Min.Max.	Min.*	Max.	Compensation
		<u>AWW</u>	<u>AWW</u>	<u>Benefit</u>	<u>Benefit</u> ( <u>500 weeks</u> )

7/1/85-6/30/86	\$75	\$267	\$89,000
7/1/86-6/30/88	\$75	\$285	\$95,000
7/1/88-6/30/89	\$75	\$384	\$128,000
7/1/89-6/30/90	\$75	\$441	\$137,000
7/1/91-6/30/92	\$75	\$492	\$147,000
7/1/92-6/30/93	\$75	\$540	\$164,000
7/1/93-6/30/94	\$75	\$591	\$197,000
7/1/94-6/30/97	\$75	\$642	\$214,000
7/1/97-6/30/98	\$75	\$672	\$224,000
7/1/98-6/30/99	\$75	\$702	\$234,000
7/1/99-6/30/00	\$75	\$732	\$244,000
7/1/00-6/30/01	\$75	\$762	\$254,000
7/1/01-6/30/02	\$75	\$822	\$274,000
7/1/02-6/30/06	\$75	\$882	\$294,000
7/1/06-6/30/07	\$75	\$900	\$300,000
7/1/07-6/30/08	\$75	\$930	\$301,000
7/1/08-6/30/09	\$75	\$954	\$318,000
7/1/09-6/30/14	\$75	\$975	\$325,000
7/1/14-6/30/15	\$75	\$1,040	\$347,000
7/1/15-6/30/16	\$75	\$1,105	\$368,000
7/1/16-	\$75	\$1,170	\$390,000

\*Note: minimum benefit shall not exceed the actual wage earned by the employee, in which case, the employee would receive his entire average weekly wage.

The values listed above remain current, but a bill has been introduced to amend these values after July 1, 2016. S.B. 202, 121st Gen. Assemb., Reg. Sess. (In. 2020). The *proposed* values are as follows:

7/1/16-6/30/20	\$75	\$1,170	\$390,000
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7/1/20-6/30/21	\$75	\$1,040	\$398,000
7/1/21-6/30/22	\$75	\$1,105	\$406,000
7/1/22-	\$75	\$1,170	\$414,000

For a downloadable version of the tables regarding information on PPI & Weekly Benefits, see: <https://www.in.gov/wcb/files/PPIandTTD%20benefits2020.pdf>

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

The first weekly installment of compensation for temporary disability is due fourteen (14) days after the disability begins. I.C. § 22-3-3-7(b). The employer must file proposed Agreements to Compensation electronically via Electronic Data Interchange (State Form 1043) and serve it on the employee or the employee's dependents within 15 days of the date the first installment of compensation is due. *Id.*

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

Compensation for temporary benefits is to begin on the eighth (8th) day. I.C. § 22-3-3-7(a). If the disability continues for longer than twenty-one (21) days, then compensation for the first seven (7) days is paid. *Id.*

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

Once begun, temporary benefits may not be terminated by the employer unless:

- A. The employee has returned to any employment;
- B. The employee has died;
- C. The employee has refused to undergo a medical examination;
- D. The employee has received five hundred (500) weeks of benefits or has been paid the maximum compensation allowed; or

E. The employee is unable or unavailable to work for reasons unrelated to the compensable injury.

In all other cases, the employer must notify the employee in writing of the employer's intent to terminate that payment of temporary total disability benefits and of the availability of employment, if any, on a form approved by the Worker's Compensation Board. If the employee disagrees with the proposed termination, the employee must give written notice of disagreement to the Worker's Compensation Board and the employer with seven (7) days after the notice of intent to terminate benefits. I.C. § 22-3-3-7.

If the Worker's Compensation Board and the employer do not receive a notice of disagreement under this section, the employee's temporary total disability benefits shall be terminated. Upon receipt of the notice of disagreement, the Worker's Compensation Board shall immediately contact the parties, which may be by telephone or other means, and attempt to resolve the disagreement. If the Worker's Compensation Board is unable to resolve the disagreement within ten (10) days of receipt of the notice of disagreement, the Worker's Compensation Board shall immediately arrange for an evaluation of the employee by an independent medical examiner. The independent medical examiner shall be selected by mutual agreement of the parties or, if the parties are unable to agree, appointed by the Worker's Compensation Board. I.C. § 22-3-4-11. If the independent medical examiner determines that the employee is no longer temporarily disabled or is still temporarily disabled but can return to employment that the employer has made available to the employee, or if the employee fails or refuses to appear for examination by the independent medical examiner, temporary total disability benefits may be terminated. If either party disagrees with the opinion of the independent medical examiner, the party shall apply to the Worker's Compensation Board for a hearing under I.C. § 22-3-4-5.

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

Yes. An employer may be entitled to a dollar-for-dollar credit against PPI benefits owed for temporary benefits paid beyond the number of weeks (currently 125) set out in I.C. § 22-3-3-10.

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

In all cases of permanent disfigurement which may impair the future usefulness or opportunities of the employee, the employee shall receive compensation, at the discretion of the Worker's

Compensation Board, not exceeding forty (40) degrees of permanent impairment, to be paid weekly at a rate of sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly wages. I.C. § 22-3-3-10(i)(15).

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

For injuries that occur(ed) after July 1, 1991, the percentage of impairment to various body parts are delineated in “degrees” which reflects the loss of body function. The following charts show the value in degrees for the various body part impairments, the compensation per degree of impairment, and the maximum benefit of impairment. Ultimately, an employee will receive weekly payments of sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly wages in accordance with the charts below. However, an employee shall not receive worker’s compensation benefits for the below injuries in an amount exceeding \$125.00 weekly. I.C. § 22-3-3-10.

After calculation, a new section of the Indiana Worker’s Compensation Act, I.C. § 22-3-3-10.5, requires employers and worker’s compensation administrators to send the proposed PPI agreement, the associated physician’s statement required by I.C. 22-3-3-6(e), the employer waiver of examination, and a hand/foot chart (if necessary) to the employee no later than fifteen (15) days after the date of the physician’s statement. I.C. § 22-3-3-10.5(a). The employee signed PPI agreement – along with the supporting documentation listed *supra* – must be submitted to the worker’s compensation board within fifteen (15) days after receiving it from the employee. I.C. § 22-3-3-10.5(b). Thirty (30) days after the worker’s compensations board’s approval of the PPI, either the first weekly installment of PPI compensation, or the lump sum amount, must be paid. I.C. § 22-3-3-10.5(c).

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

<u>Body Part</u>	<u>Value in Degrees</u>
Thumb	12
Index finger	8
Second finger	7
Third finger	6

Fourth finger	4
Hand below elbow	40
Arm above elbow	50
Big toe	12
Second toe	6
Third toe	4
Fourth toe	3
Fifth toe	2
Foot below knee	35
Leg above knee	45
Body as whole	100

PERMANENT PARTIAL IMPAIRMENT COMPENSATION  
PER DEGREE OF IMPAIRMENT

<u>Date</u>	<u>Degrees</u>	<u>Dollars per Degree of Impairment</u>
7/1/91-7/1/92	1-35	\$ 500
	21-35	\$ 800
	36-50	\$ 1,300
	51-100	\$ 1,500
7/1/92-7/1/93	1-20	\$ 500
	21-35	\$ 800
	36-50	\$ 1,300
	51-100	\$ 1,700
7/1/93-7/1/97	1-10	\$ 500

	11-20	\$ 700
	21-35	\$ 1,000
	36-50	\$ 1,400
	51-100	\$ 1,700
7/1/98-7/1/99	1-10	\$ 750
	11-35	\$ 1,100
	36-50	\$ 1,400
	51-100	\$ 1,700
7/1/99-6/30/00	1-10	\$ 900
	11-35	\$1,100
	36-50	\$1,600
	51-100	\$2,000
7/1/00-6/30/01	1-10	\$1,100
	11-35	\$1,300
	36-30	\$2,000
	51-100	\$2,500
7/1/01 - 6/30/07	1-10	\$1,300
	11-35	\$1,500
	36-50	\$2,400
	51-100	\$3,000
7/1/07-6/30/08	1-10	\$1,340
	11-35	\$1,545
	36-50	\$2,475
	51-100	\$3,150
7/1/08-6/30/09	1-10	\$1,365

	11-35	\$1,570
	36-50	\$2,525
	51-100	\$3,200
7/1/09-6/30/10	1-10	\$1,380
	11-35	\$1,585
	36-50	\$2,600
	51-100	\$3,300
7/1/01-6/30/07	1-10	\$1,300
	11-35	\$1,500
	36-50	\$2,400
	51-100	\$3,000
7/1/07-6/30/08	1-10	\$1,340
	11-35	\$1,545
	36-50	\$2,475
	51-100	\$3,150
7/1/08-6/30/09	1-10	\$1,365
	11-35	\$1,570
	36-50	\$2,525
	51-100	\$3,200
7/1/09-6/30/10	1-10	\$1,380
	11-35	\$1,585
	36-50	\$2,600
	51-100	\$3,300
7/1/10-6/30/14	1-10	\$1,400

	11-35	\$1,600
	36-50	\$2,700
	51-100	\$3,500
7/1/14-6/30/15	1-10	\$1,517
	11-35	\$1,717
	36-50	\$2,862
	51-100	\$3,687
7/1/15-6/30/16	1-10	\$1,633
	11-35	\$1,835
	36-50	\$3,024
	51-100	\$3,873
7/1/16-	1-10	\$1,750
	11-35	\$1,952
	36-50	\$3,186
	51-100	\$4,060

The values listed above remain current, but a bill has been introduced to amend these values after July 1, 2016. S.B. 202, 121st Gen. Assemb., Reg. Sess. (In. 2020). The *proposed* values are as follows:

7/1/16-6/30/20	1-10	\$1,750
	11-35	\$1,952
	36-50	\$3,186
	51-100	\$4,060
7/1/20-6/30/21	1-10	\$1,785
	11-35	\$1,991
	36-50	\$3,250

		51-100	\$4,141
7/1/21-	6/30/22	1-10	\$1,821
		11-35	\$2,031
		36-50	\$3,315
		51-100	\$4,224
7/1/22-		1-10	\$1,857
		11-35	\$2,072
		36-50	\$3,381
		51-100	\$4,308

The following is an example of the calculations of PPI awards under the "degree" system:

INJURY FORMULA FOR PERCENTAGE OF  
PERMANENT PARTIAL IMPAIRMENT

The doctor has given a PPI rating of 65% for a loss of to the arm above the elbow.

The maximum benefit for the Arm above the Elbow = 50 degrees.

7/1/99

50 degrees X 65%	=	32.5 degrees.
10 degrees X \$900	=	\$9,000
<u>22.5</u> degrees X \$1,100	=	<u>\$24,750</u>
32.5 degrees		\$33,750

7/1/01

50 degrees X 65%	=	32.5 degrees
10 degrees X \$1,300	=	\$13,000
<u>22.5 degrees X \$1,500</u>	=	<u>\$33,750</u>
32.5 degrees		\$46,750

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

See answer to 20A.

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

An injured employee, who as a result of an injury or occupational disease is unable to perform work for which the employee has had previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment. I.C. § 22-3-12-1.

The office of vocational rehabilitation shall, upon receipt of the report of injury, immediately provide the injured employee with a written explanation of: (1) the rehabilitation services that are available for the injured employee; and (2) the method by which the injured employee may apply for these services. I.C. § 22-3-12-4.

The office of vocational rehabilitation shall also determine the eligibility of the injured employee for rehabilitation services, and where appropriate, develop an individualized rehabilitation plan for the employee. I.C. § 22-3-12-4 (b)

Finally, the office of vocational rehabilitation shall implement the rehabilitation plan. After completion of the rehabilitation program, the office of vocational rehabilitation shall provide job placement services to the rehabilitated employee. I.C. § 22-3-12-4 (c).

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

An injured employee is entitled to total permanent disability benefits when the work-related injuries are so debilitating and disabling so as to prevent the injured employee from engaging in reasonable types of employment for the remainder of his life. *Walker v. State*, 694 N.E.2d 258, 265 (Ind. 1998) (citing *Perez v. United States Steel*, 359 N.E.2d 925 (Ind. Ct. App. 1977)). With respect to injuries occurring on and after July 1, 1976, causing temporary total disability (“TPD”), the employee is entitled to worker’s compensation benefits equal to 66 2/3% of the employee’s average weekly wage for a period not to exceed five hundred (500) weeks or in an amount equivalent to that paid during the period of temporary total disability, whichever is greater. I.C. § 22-3-3-8.

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

For death occurring on or after July 1, 1976 and before July 1, 1976, the Act provides that when death results from an injury within five hundred (500) weeks, benefits are then payable to the dependents of the deceased. The benefits shall total an amount that is equal to 66 2/3 % of the deceased’s average weekly wage for a time period of five hundred (500) weeks, less any compensation paid to the deceased. I.C. § 22-3-3-17. The employer must also pay for funeral expenses up to \$7,500.00. I.C. § 22-3-3-21.

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

If an employee who has lost a limb or suffered a loss of use of a body part in a subsequent industrial accident, becomes permanently or totally disabled by reason of the loss, the employer shall be liable only for the compensation payable for such secondary injury. I.C. § 22-3-3-13. However, in addition to such compensation and after the completion of the payment therefor, the employee shall be paid the remainder of the compensation that would be due for such total permanent disability out of a special fund known as the second injury fund. *Id.*

An employee who has exhausted his maximum benefits may access the Second Injury Fund if it is established that the employee is totally permanently disabled, and that the employee is unable to support himself in any gainful employment, not associated with rehabilitative or vocational therapy. I.C. § 22-3-3-13(d)(e) and (f). Compensation would be equal to 66 2/3% of employee’s average weekly wage for a period not to exceed one hundred fifty (150) weeks. Such payment is contingent upon evidence that shows the employee is totally and permanently disabled from causes and conditions of which there are or have been objective conditions and symptoms proven that are not within the physical or mental control of the employee, and that the employee is unable to support themselves in any gainful employment, not associated with rehabilitative or

vocational therapy. *Id.* The employee may seek renewal of benefits from the Second Injury Fund at the end of each one hundred fifty (150) week period. *Id.*

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

The Worker's Compensation Board, on its own motion or upon the application of either party, on account of a change in conditions, may re-open a claim and make modifications to the award by ending, lessening, continuing or extending payments previously awarded, either by agreement or a hearing. Any modification in benefits is subject to the maximum benefits allowed. I.C. § 22-3-3-27(a). An application by either party, or a modification by the Worker's Compensation Board, on its own motion, must be done within two (2) years from the last day compensation was paid under the original award. I.C. § 22-3-3-27(c). The Worker's Compensation Board, at any time, may correct any clerical errors in any finding or award. *Id.*

**28. What situation would place responsibility on the employer to pay a claimant's attorney fees?**

A. Whenever the Worker's Compensation Board determines that the employer has acted in bad faith in adjusting and settling a claim or that the employer has not pursued the settlement of the claim with diligence, the Worker's Compensation Board shall, if compensation is awarded, fix the amount of the claimant's attorney fees and such attorney fees shall be paid to the attorney and shall not be charged against the award of the claimant. I.C. § 22-3-4-12. The attorney's fees payable under Indiana Code § 22-3-4-12.1 may not exceed thirty-three percent (33 1/3) of the amount of the award. *Id.*

B. The board may award to the employee or his dependents reasonable attorney fees in addition to the compensation and medical expenses in an action before the Worker's Compensation Board where the employer failed to comply with I.C. § 22-3-5-1 or I.C. § 22-3-7-34(a) or (b) (insurance requirements).

## EXCLUSIVITY/TORT IMMUNITY

**29. Is the compensation remedy exclusive?**

### A. Scope of immunity.

Pursuant to I.C. § 22-3-2-6 an employee's remedy against their employer is exclusively limited to the Act. However, where the injury to the employee is caused by some person other than the employer and not in the same employment, the employee may pursue a separate cause of action against that third person under Indiana Code § 22-3-2-13. If the action against the other person is brought by the injured employee's dependents and judgment is obtained, accepted, or a settlement has been reached, then the amount received by the employee or dependents shall be paid to the employer or the employer's compensation carrier, subject to its paying of the pro rata share of the reasonable and necessary costs and expenses of asserting the third party claim, plus the services and products and burial expenses paid by the employer or the employer's compensation insurance carrier. I.C. § 22-3-2-13.

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

- (1) Indiana does not recognize the dual capacity doctrine. *Rodgers v. Hembd*, 518 N.E.2d 1120 (Ind. Ct. App. 1988); *Needham v. Fred's Frozen Foods, Inc.*, 359 N.E.2d 544 (Ind. Ct. App. 1977).
- (2) Tort claims against an employer or co-employee for intentional torts are not barred by the exclusive remedy provision of the Act. *Perry v. Stitzer Buick, GMC, Inc.*, 637 N.E.2d 1282 (Ind. 1994).
- (3) The exclusivity provision of Act does not preclude a claim against a medical services coordinator for damages resulting from emotional distress and physical injuries allegedly caused by fraudulent misrepresentations. *Stump v. Crawford & Co.*, 726 F. Supp. 228 (N.D. Ind. 1989).

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

In *Blade v. Anaconda Aluminum Co.*, 452 N.E.2d 1036 (Ind. Ct. App. 1983), plaintiff alleged that employer committed an intentional tort by knowingly violating safety regulations and failing to maintain a safe place to work. Despite noting plaintiff's counsel's compelling argument that employers are shielded from the full consequences of intentionally maintaining unsafe plants, the court held that the exclusivity provision of the Act precluded plaintiff's claim. *Id.* The court further noted that this issue is a matter to be resolved by the General Assembly, if indeed any change is to be made. See also, *Baker v. Westinghouse Electric Corporation*, 637 N.E.2d 1271 (Ind. 1994);

*Bailor v. Salvation Army*, 854 F. Supp. 1341 (N.D. Ind. 1994); *Tribbett v. Tay Mor Industries, Inc.*, 471 N.E.2d 332 (Ind. Ct. App. 1984).

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

A minor who is employed, required, or permitted to work in violation of I.C. § 20-8.1-4-25 is entitled to double the amount of compensation and death benefits provided in the Act. I.C. § 22-3-6-1(c)(2). The insurance carrier is liable for one-half (1/2) of the benefits, and the employer is liable for the other one-half (1/2) of the benefits. *Id.* If the employee is a minor who is not less than sixteen (16) years of age and who has not reached seventeen (17) years of age and who at the time of the accident is employed, suffered, or permitted to work at any occupation which is not prohibited by law, this subdivision does not apply.

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

The Worker's Compensation Board has the exclusive jurisdiction to determine whether the employer, the employer's worker's compensation administrator, or the worker's compensation insurance carrier has acted with a lack of diligence, in bad faith. I.C. § 22-3-4-12.1. If lack of diligence, bad faith, or an independent tort is proven, the award to the claimant shall be at least five hundred dollars (\$500), but not more than twenty thousand dollars (\$20,000), depending upon the degree of culpability and the actual damages sustained. *Id.* This damage will be paid by the employer, worker's compensation administrator, or worker's compensation insurance carrier, whomever was responsible for the bad faith acts. *Id.*

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

Indiana is an employment at will state. There is no obligation under the Act to re-employ an injured worker or to continue an injured worker's employment because of his physical disability. However, there are three (3) exceptions to the employment at will doctrine including a public policy argument. The Indiana Supreme Court has held that the worker's compensation statute has created a public policy argument in favor of an employee filing a worker's compensation claim. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973). Thus, when an employee is discharged, whether expressly or constructively, solely for exercising a statutorily conferred right, an exception to the general rule of at will employment is recognized and a cause of action exists in the employee as a result of the retaliatory discharge. *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006). Therefore, Indiana case law allows an employee at will to bring an action for retaliatory discharge if the employee was discharged for exercising his or her statutorily conferred right to file a worker's compensation claim. Moreover, the Americans with Disability Act or a worker's union collective bargaining agreement may provide a terminated employee with some

additional recourse.

## THIRD PARTY ACTIONS

### 34. Can third parties be sued by the Claimant?

Yes, an injured employee may file a civil lawsuit to recover damages received from a work-related accident which was caused by a person, manufacturer, or a sub-contractor not of the same employment as the person injured. I.C. § 22-3-2-13. Additionally, the Indiana Court of Appeals, as a matter of first impression, held that an injured employee “is not required to file a WCA claim against her employer prior to pursuing litigation against a third-party tortfeasor. *Brenner v. All Steel Carports, Inc.*, 122 N.E.3d 872, 881 (Ind. Ct. App. 2019)

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

A co-employee is not immune from tort suit just by having the same employer as the injured employee; a co-employee is entitled to immunity only when acting in course of employment at time of incident. *Nelson v. Denkins*, 598 N.E.2d 558 (Ind. Ct. App. 1992). The exclusive remedy provision will apply to co-worker’s actions were within the scope of employment. I.C. 22-3-2-6. *See also Hatke v. Fiddler*, 868 N.E.2d 60 (Ind. Ct. App. 2007).

### 36. Is subrogation available?

If an injured employee agrees to receive compensation from the employer or the employer's compensation insurance carrier, the employer or employer's carrier has a lien upon any amount which the employee receives from a third party. I.C. § 22-3-2-13; I.C. § 22-3-7-36 (occupational disease). An employer or worker’s compensation carrier can choose to file suit on its own behalf for recovery of disability and medical benefits regardless of whether an employee files a third-party suit. *See Depuy, Inc. v. Farmer*, 847 N.E.2d 160 (Ind. 2006). *Also see Answer to #9.*

## MEDICALS

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

After an injury and prior to an adjudication of permanent impairment, an employer is required to furnish, free of charge, physician, surgical, nursing and hospital services as needed prior to the determination of permanent impairment. I.C. § 22-3-3-4. If an employer refuses to provide medical attention, then the injured employee may see his own doctor, and such expenses, subject to approval of the Worker's Compensation Board, shall be paid by the employer. I.C. § 22-3-3-4(d). Additionally, an employer's insurance carrier may not delay the provision of emergency medical care whenever emergency medical care is considered necessary in the professional judgment of the attending health care facility physician. I.C. § 22-3-3-4(e). The Indiana Code does not specifically address a time limit for medical bills to be paid. However, a medical service provider or its agent may not knowingly collect or attempt to collect the payment of a charge for medical services or products covered under the Act from an employee or the employee's estate or family members. I.C. § 22-3-3-5.1(a).

In 2018, several amendments were enacted regarding civil penalties for failing to comply, report, or timely pay under the Act. For the specific civil penalties, see I.C. § 22-3-4-15.

**38. What, if any, mechanisms are available to compel the production of medical information at the administrative level?**

**A. Medical reports.**

Generally, the Indiana Trial Rules do not govern or bind the Worker's Compensation Board. However, if the Board specifically adopts certain trial rules, then those rules will govern the proceedings of claims in front of the board. *Riley v. Heritage Products, Inc.*, 803 N.E.2d 1185 (Ind. Ct. App. 2004). For example, the discovery rules (Trial Rules 26 through 37) are a recognized exception. As such, the Worker's Compensation Board has authority to compel discovery. *Josam Manufacturing Co. v. Ross*, 428 N.E.2d 74 (Ind. Ct. App. 1981); Ind. R. Trial P. 28(F). Such discovery includes interrogatories, depositions and/or requests for production to obtain relevant medical records.

**B. Executed authorization.**

Pursuant to Indiana Trial Rule 28(F), the Worker's Compensation Board does have authority to compel discovery. *Josam Manufacturing Co. v. Ross*, 428 N.E.2d 74 (Ind. Ct. App. 1981). Although research produced no cases concerning the Board compelling a claimant to sign a medical record release, such authority does exist in a non-administrative venue. *Cua v. Morrison*, 600 N.E.2d 951 (Ind. Ct. App. 1992). Additionally, the employer and insurance carrier have a statutorily guaranteed right to require the claimant to be examined by physicians of their choice. I.C. § 22-3-

3-6. The Board is also vested with wide discretion to appoint its own physician for purposes of medical examinations and testimony. *Hilltop Concrete Corp. v. Roach*, 366 N.E.2d 218 (Ind. Ct. App. 1977); I.C. § 22-3-4-11.

**39. What is the rule on (a) Claimant’s choice of a physician; (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 choose the physician. I.C. § 22-3-3-4. However, the employer and employee can enter into an agreement on the selection of healthcare providers. I.C. § 22-3-3-4(h). Moreover, an employee may choose a physician in an emergency or when an employer does not provide a physician. I.C. § 22-3-3-4(d).

**B. Employer’s right to a second opinion and/or Independent Medical Examination.**

Both parties have the right to request an Independent Medical Examination. The Worker's Compensation Board must immediately arrange for independent medical examination (IME) if it is unable to resolve disagreement between employer and employee within ten days of receipt of employee's notice of disagreement with termination of temporary total disability benefits. *Woehner v. Cooper Tire & Rubber Co.*, 764 N.E.2d 688 (Ind. Ct. App. 2002).

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

As long as an employee is either temporarily totally disabled or a permanent impairment has not been adjudicated, the employee is entitled to the continuation of all medical benefits without regard to whether they are, in fact, limiting or reducing the employee's impairment or disability. I.C. § 22-3-3-4(a) and (b). Where the injury has been adjudicated on the basis of permanent partial impairment, additional medical benefits may be awarded to the employee only upon a showing that the benefits are “necessary to limit or reduce the amount and extent of the employee's impairment.” I.C. § 22-3-3-4(c); *Jones v. State*, 477 N.E.2d 353 (Ind. Ct. App. 1985); *Grand Lodge Free & Accepted Masons v. Jones*, 590 N.E.2d 653 (Ind. Ct. App. 1992).

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

Where an injury results in the amputation of an arm, hand, leg or foot, the enucleation of an eye, or the loss of natural teeth or prosthodontics, the employer is required to furnish an artificial member, proper braces, and prosthodontics. I.C. § 22-3-3-4(f). The employer shall, when medically required (“medically required,” as used in this section, does not include normal wear and tear), provide replacements for artificial members. *Id.*

If an accident occurs, in the course of employment after 1997, results in the loss or damage to an artificial member, a brace, eyeglass, an implant, or other prosthodontics, the employer shall repair the artificial limb, brace, or member or furnish an identical or reasonably equivalent replacement. I.C.I.C. § 22-3-3-4(g)

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

Given the broad language of I.C. § 22-3-3-4, vehicle and/or home modifications could be included as medical benefits to the extent the board deems them necessary to limit or reduce the amount and extent of the employee's impairment. I.C. § 22-3-3-4; *Jones & Laughlin Steel Corp. v. Kilburne*, 477 N.E.2d 345 (Ind. Ct. App. 1985). In *Kilburne*, the Court of Appeals upheld the board's award requiring the employer to provide the injured employee with wheelchairs, special soft shoes, grab bars in bathroom, ramps to garage and home, and remodeling to enlarge a bathroom to accommodate a wheelchair.

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

The pecuniary liability of the employer for medical, surgical, hospital and nurse service herein required shall be limited to such charges as prevail in the same community for a like service or product to injured persons. I.C. § 22-3-3-5. With respect to these “balance billing” disputes, the Worker’s Compensation Board has exclusive jurisdiction to determine the reasonable value of medical services provided to injured employees.

**44. What, if any, provisions/requirements are there for “managed care”?**

There are no specific provisions or requirements within the Indiana Worker’s Compensation Act concerning managed care. The employer/insurer has the right to choose the treating physician,

which may include a managed care type provider. I.C. § 22-3-3-4. Additionally, employer/insurers may utilize third-party administrators, with captive managed care providers, for claims administration purposes.

## PRACTICE/PROCEDURE

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

A denial of claim must be made in writing to the injured employee within thirty (30) days after knowledge of the injury. I.C. § 22-3-3-7(b). If an employer is unable to make a determination regarding liability within the first thirty (30) days, the Board may approve an additional thirty (30) days upon a written request of the employer or the employer's insurance carrier that sets forth the reasons that the determination could not be made within thirty (30) days and states the facts or circumstances that are necessary to determine liability within the additional thirty (30) days. More than thirty (30) days of additional time may be approved by the worker's compensation board upon filing of a petition with the board that states 1) the extraordinary circumstances that have precluded determination of liability within the initial sixty (60) days; 2) that status of the investigation on the date of the petition is filed; 3) the facts or circumstances that are necessary to make a determination; and 4) a timetable of completion remaining on the investigation. *Id.* State Form 48557 can be utilized for the purpose of requesting additional time in accordance with the foregoing.

### 46. What is the method of claim adjudication?

#### A. Administrative level.

If the employer denies the injured employee's claim, then the injured employee has the right to file (Form No. 29109) for a hearing before the Worker's Compensation Board to resolve the dispute. After the employee files a claim, the case is set for a hearing before a single member of the Board. Unless otherwise agreed, the hearing must be held in the county where the injury occurred. The defendant/employer may file a responsive pleading any time prior to the hearing date. 631 I.A.C. 1-1-8. However, no such answer is required unless the defendant relies upon the special defenses enumerated in Indiana Code § 22-3-2-8. *Id.* In such cases, the defendant must plead by an affirmative answer such special defenses no later than forty-five (45) days before the hearing date. *Id.* In all hearings proof may be made by oral testimony, or by depositions. 631 I.A.C. 1-1-12. The hearing judge is not bound by any technical rules of practice in conducting hearings.

631 I.A.C. 1-1-3. A physician's statement that meets the requirements set out in I.C. § 22-3-3-6(e) is admissible into evidence unless the statement is ruled inadmissible on other grounds. The single hearing member after due consideration determines the dispute in a summary manner and forwards a copy of the decision to each party. I.C. § 22-3-4-6.

#### **B. Trial court.**

If either party is not satisfied with the decision of the award made by less than all the members, an application for review may be filed with the board within thirty (30) days. I.C. § 22-3-4-7. If the first hearing was not held before the full board, the board shall review the evidence, or if deemed advisable hear the parties at issue and make an award and file the same with finding of the facts on which it is based and send a copy thereof of the parties in dispute. I.C. § 22-3-4-7. If there is a failure to file an application within this time period will cause the appeal to be automatically dismissed. I.C. § 22-3-4-8. The application for review is usually heard by all the members of the board. The full board hearing is a trial de novo. *Burton v. Rock Road Construction Co.*, 235 N.E.2d 210 (Ind. Ct. App. 1968). Therefore, the full board can make its own findings and determinations. 631 I.A.C. 1-1-15. The full board has the discretion of admitting new or additional evidence. *Id.* Usually oral argument, although not required, is presented to the full board on the evidence submitted to the single hearing member. Either party may file with the board no later than thirty (30) days prior to the review date, a brief or statement setting forth the errors alleged. *Id.* The opposing party has the right to file a rebuttal no later than ten (10) days prior to the review date. The full board after due consideration will render a decision and forward a copy of same to each party. I.C. § 22-3-4-7. If not appealed, the full board's decision is final. *Id.*

#### **C. Appellate.**

An award of the board by less than all of the members, if not reviewed pursuant to a written petition mentioned above, shall be final and conclusive. I.C. § 22-3-4-8. Either party may within thirty (30) days from the date of the full board's decision appeal the case to the Court of Appeals for errors of law under the same terms and conditions as govern appeals in ordinary civil actions. *Id.* Any party desiring to appeal must file with the secretary of the board within fifteen (15) days from the full board's decision, a written praecipe designating specifically the pleadings to be incorporated into the transcript for such appeal. 631 I.A.C. 1-1-22. The only assignment of error that is necessary is that the full board's decision is contrary to law. I.C. § 22-3-4-8. Further appeal must be filed with the Indiana Supreme Court.

#### **47. What are the requirements for stipulations or settlements?**

The parties to any proceeding before the board may stipulate the facts in writing from which the board will make its order or award. 631 I.A.C. 1-1-11. Where the stipulation covers a permanent partial impairment, it is necessary to file with the stipulation a report of a physician furnished by the employer and also a report of the claimant's physician. *Id.* The employee may waive examination by a physician other than the one provided by the employer. *Id.* The board highly encourages this type of stipulated disposition of a case. *Id.*

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In addition, I.C. § 22-3-2-15 allows for parties to enter into a voluntary settlement agreement of the injured employee's rights under the provisions of the Act. However, no agreement can operate to relieve any employer in whole or in part of any obligation created by the Act. I.C. § 22-3-2-15(a). However, nothing in the Act should be construed as to prevent the parties of a claim to enter into voluntary agreements in settlement. *Id.* But a settlement cannot waive claimants rights vested in the Act unless approved by the board. *Id.* No such agreement shall be valid unless made after seven (7) days from the date of the injury or death. *Id.* In any case where a provider fee application has been filed, the provider must sign off on any settlement agreement between the employee and employer before it will be approved by the Board. In cases where no provider application has been filed, medical expenses must nonetheless be addressed. If all medical treatment has been provided and paid for, this should be spelled out. In all other cases, financial responsibility for the past care provided and any future care must be stated.

A minor dependent, by parent or legal guardian, may compromise disputes and may enter into a settlement agreement, and if approved by the board, the settlement agreement will have the same effect as though the minor had been an adult. *Id.*

Any settlement payment must be made no later than thirty (30) days after the date the worker's compensation board approves the agreement. *Id.* If an employer fails to make payment within the 30 days, the employer will be subject to the civil penalties. *Id.*

**48. Are full and final settlements with closed medical available?**

Yes. See answer to #47 above.

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

Yes. A settlement agreement is not valid until approved by a member of the board, and the member of the board cannot approve an agreement which is not in accordance with the rights of the parties as given in the Act. I.C. § 22-3-2-15.

## RISK FINANCE FOR WORKERS' COMPENSATION

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

Every employer who is bound by the compensation provisions of the Act shall insure the payment of compensation to the employer's employees and their dependents or procure from the board a certificate authorizing the employer to carry such risk without insurance. I.C. § 22-3-2-5(a). Excluded from this provision are the state, counties, cities, towns, school townships, other municipal corporations, and banks. *Id.* The state is not allowed to purchase worker's compensation insurance, but rather is entitled to establish a program of self-insurance to cover its liability. *Id.* Pursuant to I.C. § 22-3-5-1(a), every employer, except those exempted by I.C. § 22-3-2-5, shall:

A. Insure and keep insured the employer's liability in some corporation, association or organization authorized to transact the business of worker's compensation insurance in Indiana; or

B. Furnish to the board satisfactory proof of the employer's ability to pay direct the compensation in the amount and manner when due.

The board may require the deposit of an acceptable security indemnity or bond to secure the payment of compensation liabilities as they are incurred. *Id.*

Subject to the approval of the board, any employer may enter into any agreement with the employees to provide a system of compensation, benefit, or insurance in lieu of the compensation and insurance provided by the Act. I.C. § 22-3-5-4(a). However, no substitute system will be approved unless it confers benefits at least equivalent to the benefits provided by the Act, nor if it requires contributions from the employees unless it confers benefits in addition to those provided

under the Act at least commensurate with such contributions. *Id.* Such a system may be terminated by the worker's compensation board on reasonable notice and hearing to the interested parties if it appears that the same is not fairly administered, its operation discloses latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of the Act. *Id.*

Additionally, groups of employers may form mutual insurance associations or reciprocal or interinsurance exchanges subject to such reasonable conditions and restrictions as may be fixed by the department of insurance. I.C. § 22-3-6-2.

There is also available a special fund known as the Residual Asbestos Injury Fund. The purpose of this fund is to provide compensation to employees who become totally and permanently disabled from exposure to asbestos while in employment within Indiana and who are eligible under I.C. § 22-3-11-1. The fund is used only for the payment of awards of compensation and expense of medical examinations made and ordered by the board and chargeable against the fund. I.C. § 22-3-11-1(b). I.C. § 22-3-11-2 sets forth the assessment criteria against insurance carriers and self-insured employers for deposit in the fund.

To the extent that a principal retains an independent contractor, the employer must verify in writing that each independent contractor (specifically, their respective employer) carries worker's compensation insurance. I.C. § 22-3-2-14. If a principal does not comply with Indiana Code § 22-3-2-14 and ensure the independent contractor carries worker's compensation insurance, then the principal shall be liable to the same extent as such independent contractor for the payment of compensation, physician fees, hospital fees, nurse's charges and burial expenses on account of injury or death of any employee of the independent contractor due to an accident arising out of the and in the course of the performance of the work covered by such subcontract. *Id.*

An employer's failure to carry worker's compensation insurance is a Class A criminal misdemeanor. I.C. § 22-3-7-34. It should be noted that there is no criminal penalty for a principal failing to verify or ensure that its independent contractor maintains proper worker's compensation insurance.

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

**A. For individual entities.**

See answer to #50 above. Moreover, the employer upon application for certificate of self-insurance, must certify that it has adequate facilities for making necessary accident reports, executing compensation agreements and other necessary documents, and that it has placed in

charge of this work a person(s) within the state familiar with the Act and the rules of the board. 631 I.A.C. 1-1-29. In addition, the Worker's Compensation Board may require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities. I.C. § 22-3-5-1(b). There is an initial application fee of \$500.00 to be paid along with the proof of financial ability, and a renewal fee of \$250.00 if the employer holds a certificate of self-insurance. I.C. § 22-3-5-1(b)(1) and (2).

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

See answer to #50 above. For the purposes of complying with I.C. § 22-3-5-1, groups of employers are authorized to form mutual insurance associations or interinsurance exchanges subject to such reasonable conditions and restriction as maybe set by the department of insurance. I.C. § 22-3-6-2. Additionally, membership in such groups so approved, together with evidence of the payment of premiums due, is evidence of compliance with I.C. § 22-3-5-1. *Id.*

52. **Are "illegal aliens" entitled to benefits of worker's 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"?**

The Indiana Code does not contemplate worker's compensation benefits for illegal aliens, nor has case law addressed this issue. However, an illegal alien, who is a dependent of an employee who is legally entitled to receive worker's compensation benefits, will be considered a dependent authorized to collect worker's compensation money. *See Miama Coal Co. v. Peskir*, 139 N.E. 684 (Ind. Ct. App. 1923).

53. **Are terrorist acts or injuries covered or excluded under worker's compensation law?**

It is likely that terrorist acts or injuries are compensable under the Act although no Indiana case has specifically addressed the issue. When determining whether an injury "arises out of" one's employment, the three possible risk categories are: 1. Risks associated with the employment and those are compensable; 2. Risks that are neutral and have no specific relationship to the employer or employee; and 3. Risks that are personal to the employee and therefore not compensable. Indiana courts have often applied the "positional risk" test if the risk appears "neutral." Examples of neutral risks include "cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations place the employee in a particular place at a particular time when they were injured by some neutral force." *Conway v. School City of East Chicago*, 734 N.E.2d 594, 599 (Ind. Ct. App. 2000) (citing *K-Mart Corp. v. Novak*, 521 N.E.2d 1346, 1349 (Ind. Ct. App. 1988)). As a result, under the positional risk test, it is likely

that injuries resulting from terrorist acts are covered under Indiana worker's compensation law as they arise out of a worker's employment and obligations to be at a certain place at a specific time.

**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?**

Under Medicare regulations (42 C.F.R. 411.46), Medicare is secondary payer to the payment of worker's compensation by a worker's compensation carrier or self-insured employer. The obligation to pay medical for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a worker's compensation matter if at the time of the settlement the employee 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 C.F.R. 404, 411; 42 USC §1395)

At this time, Indiana has not added any additional requirements for satisfying Medicare's interests, and it is anticipated that Indiana will follow the national trend in this regard.

For more information on Workers' Compensation Medicare Set Aside Arrangements, please visit the Centers for Medicare & Medicaid Services at:

<https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Overview.html>

**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).

The Medicaid lien statute is found at I.C. 12-15-8-1 and provides a statutory lien “to the extent of the amount paid by the office on any recovery under the claim, whether by judgment, compromise or settlement.” In addition, the lien reduction statute is found at I.C. § 34-51-2-19 and provides that liens are to be diminished by: “(1) comparative fault; or (2) by reason of the uncollectibility of the full value of the claim . . . resulting from limited liability insurance or from any other cause.” In that case, the lien is to be diminished in the same proportion as the claimant’s recovery is diminished. There are no exceptions for worker’s compensation, occupational diseases or Medicaid in the lien reduction statute.

**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, went into effect on April 14, 2003. The law provides an exception for worker’s 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.

The law regarding confidentiality of medical records is codified at I.C. § 16-39-6-3. This section states confidential records may be produced on court order in a cause in which the records and proceedings are relevant or material. There is no section specific to worker’s compensation law. The privacy of mental health records is codified at I.C. § 16-39-2, et seq., 16-39-3, et seq. and 16-39-4, et seq. *L.G. v. S.L.*, 76 N.E.3d 157, 170 (Ind. Ct. App. 2017). In addition, no court has yet addressed how those privacy concerns are affected by federal law.

**57. What are the provisions for “Independent Contractors”?**

Since independent contractors are not employees under Indiana law, an independent contractor who does not make an election under I.C. § 22-3-7-9 is then not subject to the compensation provisions of the Act and must file a statement with the department of state revenue and obtain

a certificate of exemption. I.C. § 22-3-7-34.5. The rules for determining who is an independent contractor for Indiana workers 22-3-7-9 compensation purposes are similar to those applied by the Internal Revenue Service. The IRS weighs twenty factors in making such a determination. Per current case law, the Board considers some of these factors and others. Note that there are special procedures concerning independent contractors working in the building and construction trades. A person is an independent contractor in the construction trades and not covered as an employee under the Act if, and only if, the person is an independent contractor under the guidelines of the Internal Revenue Service. I.C. §22-3-6-1(b)(7). These guidelines may be found in IRS Publication 937.

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

As employers, all employee leasing services and temporary agencies are required by I.C. §§ 22-3-2-5, 22-3-5-1, and 22-3-5-5 to maintain worker's compensation coverage for all employees. Proof of coverage is required to be furnished to the Worker's Compensation Board.

Worker's compensation coverage is required even though leased and temporary employees may not be directly supervised by officials of the leasing firm or temporary service. While in some cases the business where the temporary employee is filling in may arrange for worker's compensation coverage for employees leased from a temporary agency, the temporary agency may ultimately be liable under Indiana law if no insurance policy is in place and the agency is found to be the employer of the leased worker.

**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?**

An owner-operator who provides a motor vehicle and the services of a driver to a motor carrier under a written contract that is subject to I.C. § 8-2.1-24-23, 45 I.A.C. 16-1-13, or 49 C.F.R 376 is not an employee of the motor carrier and is therefore not covered under the Indiana Worker's Compensation Act. I.C. § 22-3-6-1(b)(8). The owner-operator may elect to be covered and have the owner-operator's drivers covered under a worker's compensation insurance policy or authorized self-insurance that insures the motor carrier if the owner-operator pays the premiums as requested by the motor carrier. *Id.* An election by an owner-operator under this subdivision does not terminate the independent contractor status of the owner-operator for any other purpose. *Id.*

**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.

More information, including forms and online services, can be found on Indiana's Worker's Compensation Board website: <http://www.in.gov/wcb/>

**61. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?**

See responses to questions 54 and 55 above. Keep in mind that worker's compensation settlements will likely require satisfaction of Medicare's lien interests if Medicare made conditional payments for an injured plaintiff. Both parties' counsel may be held liable to satisfy the lien if Medicare's interests are not properly protected. The MMSEA Section 1111 mandates proper reporting of workers' compensation settlements to the government. Further, as indicated above, certain workers' compensation settlements are required to contemplate Medicare set-aside agreements to ensure protection of Medicare's interests. Counsel must know how to determine if a Medicare set-aside is needed, how to determine the proper amount and then how to properly establish these arrangements.

**62. Does Indiana permit medical marijuana and what are the restrictions for use and for work activity Indiana's Worker's Compensation law?**

Indiana law has been silent on medical marijuana throughout the years; however, it is possible that it could pass legislature soon. House Bill 1106 was introduced in January 2018 and "permits the cultivation, dispensing, and use of medical marijuana by persons with serious medical conditions." Additionally, the bill "prohibits discrimination against medical marijuana users." H.B. 1106 (2018). If passed, it is very likely that legislation will form restrictions of use and work activity under Indiana Workers' Compensation laws and the State Department of Health will "implement and enforce the medical marijuana program." H.B. 1106 (2018).

However, beginning July 1, 2018, it will be legal in Indiana to use cannabis-derived CBD oil (with a THC level of 0.3 percent or lower) and to sell CBD products that comply with new state testing and packaging requirements, including certification that the product is derived from industrial hemp and not marijuana. S.B. 52 (2018). Indiana does not regulate drug testing by private employers which gives wide latitude to type and degree of drug test. It is likely that the passage of this bill will provoke legislation limiting the use of CBD Oil in the workplace due to its relationship with marijuana and drug testing.

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

Indiana does not permit recreational use of marijuana; therefore, there are no restrictions for use and for work activity under Indiana Workers' Compensation law. However, as neighboring states such as Illinois and Michigan have legalized recreational use of marijuana in 2019, employers and insurers should evaluate the consequences of out-of-state citizens working in Indiana. *See Brenon v. First Advantage Corp.*, 973 N.E.2d 1116 (Ind. Ct. App. 2012) (holding that Wisconsin resident hired to perform investigative services in Indiana could pursue a claim for benefits in Indiana after being injured in a head-on collision).