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NEW JERSEY

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

New Jersey Statutes Annotated 34:15-1 et seq.

SCOPE OF COMPENSABILITY

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

Every employee within the course of employment, with some minor limitations such as maritime accidents, to and from work, independent contractors, householders, and an employee who is willfully negligent, are covered. N.J.S.A. 34:15-36.

All workers in New Jersey are covered by the compensation Act titled N.J.S.A. 34:15-7, et seq. unless they specifically opt out of the act's coverage provisions.

The following are NOT covered:

- Coverage does not extend to independent contractors. Petrone v. Kennedy, 183 A.2d 124 (N.J. Super. Ct. App. Div. 1962).
  Note: the definition of "employee" is a broad definition and is liberally construed so as to bring as many persons as possible within the coverage of the Act.

- An inmate of a penal institution is not an employee. Drake v. Essex County, 469 A.2d 512 (N.J. Super. Ct. App. Div. 1983).

- Casual employees are excluded from receiving benefits under N.J.S.A. 34:15-36. Such employment arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring. N.J.S.A. 34:15-36.

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

There is no such provision. General contractors are not parties to the employment contract between a subcontractor and its employees. They are not required to provide workers' compensation insurance and do not enjoy the immediate employer's immunity from tort liability. Eger v. E.I. DuPont DeNemours Co.,539 A.2d 1213 (N.J. 1988). However, a general contractor, in the event that the subcontractor is uninsured, is liable for any compensation due to an employee or the dependents of a deceased employee of a subcontractor. The general contractor shall then have a right of action against the subcontractor for reimbursement. N.J.S.A. 34:15-79.

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

A. Traumatic or "single occurrence" claims.

Traumatic injury claims are governed by N.J.S.A. 34:15-7. Such claims involve one-time trauma, physical or psychiatric in nature. In Brunell, the court defined accident as an "unexpected event or mishap resulting in injury." Brunell v. Wildwood Crest Police Department, 176 N.J. 225, 236-237, 248 (2003).

Compensation is provided for injuries arising out of and in the course of employment, without regard to negligence. The burden of proof is on the employee to prove the case by a preponderance of the evidence. N.J.S.A. 34:15-7. Cardiovascular or cerebral vascular injuries are compensable if, by a preponderance of credible evidence, the injury is produced by the work effort or strain involving a substantial condition in excess of the wear and tear of the Petitioner's daily living and in a reasonable medical probability caused in a material degree the cardiovascular or cerebral injury. Material degree means an appreciable degree or a degree substantially greater than de minimus. N.J.S.A. 34:15-7.2.

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

All diseases arising out of and in the course of the employment which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment are *compensable*. N.J.S.A. 34:15-31(a).

Under N.J.S.A. 34:15-31, occupational disease claims involve injuries caused by repetitive activity or exposures over a period of days, months, or even years.
Examples of occupational illnesses/diseases include Anthrax, Asbestos or Lead poisoning, Mercury poisoning, Arsenic poisoning, Phosphorous poisoning, poisoning from benzene and its homologues, and all derivatives thereof, Wood alcohol poisoning, Chrome poisoning, Caisson disease, Mesothorium or radium poisoning, Carpal tunnel syndrome when not caused by trauma, cancer claims, stress claims when not based on physical trauma or one-time incidents.

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

In occupational disease cases, the following claims will not be compensable: Deterioration of a tissue, organ or part of the body in which the function of such tissue, organ or part of the body is diminished due to the natural aging process thereof is *not compensable*. N.J.S.A. 34:15-31(b).

Idiopathic Injuries: Injuries caused by a purely personal condition having no work connection whatsoever.

Ie: Heart attack or epileptic seizure unrelated to work. However, even if a fall is determined to be idiopathic and thus not work related, any injury resulting from the fall is compensable.

Subsequent Injuries unless its directly connected in a chain of physical causation with the compensable injury. (ex. of a compensable subsequent injury: Petitioner fell while walking on crutches on his way to receive treatment for a work-related injury).

6. What psychiatric claims or treatments are compensable?

Psychiatric claims can be compensable provided there is demonstrable objective medical evidence that such injuries are connected with the employment. Such evidence must consist of an independent professional analysis apart from the base statement of the employee. *See* Saunderlin v. E.I. DuPont Co., 508 A.2d. 1095 (N.J. 1986). The New Jersey Supreme Court further defined an "objective material degree" by stating that objectively stressful working conditions must be "peculiar" to the individual's workplace. Goyden v. State, 256 N.J. Super. 438, 607 A.2d 651*, aff'd* 128 N.J. 54 (1992).

The claim can also be compensable when employee who develops a psychiatric reaction to a perceived physical condition which he reasonably believes he had but in fact did not suffer from. Wernowski v. Continental Can Co., 618 A.2d 882 (N.J. Super. Ct. App. Div.1993), certif. denied, 627 A.2d 1142 (N.J. 1993).

However, when an employee's worrying is not based on the events, which actually took place involving the employee but only what might have happened to the employee, the case will not be compensable. Stroka v. United Airlines, 835 A.2d 1247 (N.J. Super. Ct. App. Div. 2003). Mrs. Stroka was a flight attendant, scheduled for work on September 11, 2001, but requested a day off. She filed a worker's compensation claim because she developed a post-traumatic stress syndrome as a result of 9/11 events. Appellate Division reversed the prior award and held that condition was not work related.

7. What are the applicable statutes of limitations?

A traumatic injury claim must be filed within two years after the date of the accident, within two years of the failure of the employee to receive payment in accordance with an agreement between the employer and employee or within two years after the last payment of compensation is received. N.J.S.A. 34:15-51.

Cases have differentiated between payments of indemnity benefits and medical benefits.

When the last compensation event is a medical treatment, at least one case states that it is two years from the date of treatment, not the date the carrier or employer pays the doctor or hospital bill. Oldfield v. N.J. Realty Co., 61 A.2d 767 (N.J. 1948).

Claims for **occupational diseases** must be filed within two years after the date the employee first knew the nature of the disability and its relation to the employment, regardless of when the last date of exposure occurred. N.J.S.A. 34:15-34.

In Panzino, Petitioner last work for Respondent in 1966. During his employment, Petitioner was exposed to loud noise and developed a 54% hearing loss. He did not discover that this hearing loss was due to work until 1972, when he filed the claim. The New Jersey Supreme Court held that the claim was not barred because it was filed within 2 years of the date when the hearing loss was discovered to be work related, even though it was not filed until six years after employment ended. Panzino v. Continental Can Co., 364 A.2d 1043 (N.J. 1976).

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

Unless the employer has actual knowledge of an injury, the employee must notify the employer of the injury within fourteen (14) days after the date of the accident. If the notice is given, or the knowledge obtained within thirty (30) days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer can show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If notice is given within ninety (90) days after the accident, the employer can bar compensation by showing it was prejudiced by the lack of notice. No compensation is allowed if notice is not provided nor knowledge obtained by the employer within ninety (90) days of the date of the accident. N.J.S.A. 34:15-17.

Traumatic Cases: Petitioner must provide verbal or written notice within 90 days of the accident under N.J.S.A. 34:15-17. Actual notice of the accident is sufficient to defeat the notice defense, so that even if the worker has not given formal notice but the employer becomes aware of the accident within 90 days, that is considered sufficient notice.

Occupational Cases: On January 14, 2004, the occupational notice defense was eliminated and the provisions of N.J.S.A. 34:15-33 were repealed. There is therefore no more occupational notice defense in New Jersey.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Intentional or self-inflicted injuries are not compensable. N.J.S.A. 34:15-7.
However, the Supreme Court found that "employee's death by suicide is compensable where the original work-connected injuries result in the employee's becoming dominated by a disturbance of mind directly cause by his injury and consequences, such as extreme pain and despair, of such variety as to override normal rational judgment." Kahle v. Plochman, Inc., 428 A.2d 913 (N.J. 1981). In that case, worker suffered an injury, which led to back surgery and a dependency on potent medications. She never returned to work, developed a convulsive disorder from drug

withdrawal, arachnoiditis, a neurogenic bladder, anemia, iron deficiency and cystitis and ultimately committed suicide.

B. Willful misconduct, "horseplay," etc.

Injuries incurred through an employee's willful negligent conduct are not compensable. N.J.S.A.. '34:15-7. Injuries sustained by employees participating in horseplay are also not compensable. However, employees who do not participate in, but are innocent victims of, horseplay by fellow employees have compensable claims for any injuries sustained. N.J.S.A. 34:15-7.1; Trotter v. Monmouth County, 365 A.2d 1374 (N.J. Super. Ct. App. Div. 1976).

In an unreported case of Wasik v. Nborough of Bergenfield, A-794-02T3 (App. Div. December 1, 2003), the Court considered a case in which the instigator himself was injured. Petitioner, who was also the instigator, touched his co-worker between his buttocks, prompting the co-worker to strike him with a hot scraper. The Court stated that "the horsing around by petitioner was neither extensive nor serious and was obviously commingled with the performance of the duty of garbage collection." The Court found the injury to be compensable because it was caused by a *minor deviation* from work.

C. Injuries involving drugs and/or alcohol.

Injuries which are the natural and proximate result of intoxication or the unlawful use of controlled dangerous substances are not compensable. N.J.S.A. 34:15-7.

The employer is required to prove that the intoxication was the *sole and proximate cause* of the injury to defeat a claim on that ground. Cellucci v. Bronstein, 649 A.2d 1333 (N.J. Super. Ct. App. Div. 1994), *certif. denied*, (1995). Basically, if the injured employee can point to any contributing cause other than intoxication, he can still receive workers' compensation benefits. Warner v. Vanco Mfg. Inc., 690 A.2d 1126 (N.J. Super. Ct. App. Div. 1997), *certif. denied*, 697 A.2d. 544 (N.J. 1997).

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

The New Jersey Legislature passed two significant bills in 1998 which are having an impact on workers' compensation. First, an Act concerning workers' compensation fraud under N.J.S.A. 34:15-57.4. Second, the Health Care Claims Fraud Act found at N.J.S.A. 2C:21-4.2. Employers can now appeal directly to workers' compensation judge for relief from actions and statements, which the employer believes, constitute fraud. Employer may seek an order from the judge (1) terminating all benefits and forfeiting the right to all future benefits, or (2) requiring the employee to repay all benefits paid on account of fraud plus simple interest or have the sum owed plus simple interest from future payments, or (3) proceed with a claim against the

fraudulent employee for civil damages and counsel fees.

An employee must notify the Director of the Division of Workers' Compensation immediately, in writing, of any increase or decrease in his or her income which may affect his or her eligibility for benefits payable from the "uninsured employer's fund." Ten days after the employee and the Attorney General receive notice, the Director may modify or terminate an award payable from the fund as conditions may require. N.J.S.A. 34:120.12. If the Commissioner of Labor later determines that any payment made to an employee has been procured by fraud, mistake, or an unreported change in condition, the payment is recovered from the employee and deposited in the "uninsured employer's fund." N.J.S.A. 34:120.12.

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

No.

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

Yes, if they are a regular incident of the employment and produce a benefit to the employer that would be beyond "improvement in employee health and morale." N.J.S.A. 34:15-7.

The vast majority of injuries arising out of recreational or social activities should be denied, unless it is apparent that the activity involved has elements of compulsion by the employer (rendering it a regular incident of employment) and benefits the employer in some way other than health and morale (such as fundraising or education).

13. Are injuries by co-employees compensable?

Yes.

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

Maybe. See Marky v. Dee Rose Furniture Co., 574 A.2d 546 (N.J. Super. Ct. App. Div. 1990) *cert. denied*, 585 A.2d 368 (N.J. 1990). (Court held that female employee who was shot by former boyfriend at the place of her employment was not permitted to receive workers' compensation benefits as the court held that the incident did not arise out of her employment even though the assailant believed there was a romantic relationship between the employee and a co-worker.)

However, if the third-party action is unrelated to the employee, it may be considered a 'neutral risk' and therefore compensable. Coleman v. Cycle Transformer Corp., 520 A.2d 1341 (N.J. 1986). *See also* Gargiulo v. Gargiulo, 97 A.2d 593 (N.J. 1953). In Gargiulo, an employee, while at work in

the back yard of his employer's store, was injured when struck by an arrow that a neighborhood boy had shot in the general direction of a tree on the employer's property. The employee received compensation because "but for" the employment, he would not have been in the line of fire and therefore would not have been hit.

BENEFITS

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

The weekly wage is calculated by multiplying the hourly rate by the customary number of hours constituting an ordinary day in the character of the work involved, then multiplying that daily wage by the customary number of working days constituting an ordinary week in the character of the work involved. Board and loading furnished by the employer as part of wages is valued at $25.00 per week, unless otherwise fixed at the time of hiring, and is considered in computing the weekly wage. N.J.S.A. 34:15-37.

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

Employees receive 70% of their average weekly wage at the time of injury, subject to maximum compensation of 75% of the state average weekly wage and a minimum of 20% of the state average weekly wage. Compensation must not exceed 400 weeks. N.J.S.A. 35:15-12.

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

Although the statute provides no distinct time-period, the unreasonable or negligent delay or refusal to pay temporary disability compensation subjects the employer/insurer to a penalty. In addition, there is a rebuttable presumption that a delay of 30 days or more is negligent or unreasonable conduct. N.J.S.A. 34:15-28.1.

Fact that there may have been question of medical causation in and of itself was not sufficient to overcome statutory presumption of unreasonable delay in payment of temporary disability benefits for purposes of this section authorizing imposition of penalty when payment is unreasonably delayed. Amorosa v. Jersey City Welding & Mach. Works, 518 A.2d 529 (N.J. Super. Ct. App. Div. 1986).

On the other hand, voluntarily taking oneself out of the workplace for personal reasons negates the receipt of temporary disability benefits. Electronic Associates, Inc. v. Heisinger, 266 A.2d 601 (N.J. Super. Ct. App.Div. 1970). See also Cunningham v. Atlantic States Cast Iron Pipe Co., 901 A.2d 956 (N.J. Super. Ct. App. Div. 2006). In Cunningham, the Court held that although Petitioner

was terminated, as opposed to voluntarily leaving his employment, he is entitled to receive temporary disability benefits if he can show actual wage loss, meaning that he was available and willing to work, and would have been working if not for the disability.

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out 8 days before recovering benefits for the first 7 days)?

Employees do not receive temporary total benefits until their disability extends beyond 7 days, at which time the disability benefits are paid retroactive. N.J.S.A. 34:15-14.

The "seven day waiting period" need not immediately follow the accident. Frasier v. L. Bamberger & Co., 160 A. 630 (N.J. 1932), *affirmed* 166 A. 101 (1933). The seven days also do not need to be consecutive. The injured employee may recover compensation for intermittent periods of recurrent intervals of temporary disability. Colbert v. Consolidated Laundry, 107 A.2d 521 (N.J. Super. Ct. App. Div. 1954). The day that petitioner is unable to continue to work by reason of the accident, whether it be the day of the accident or later, shall count as one whole day of the "waiting period".

If qualified, the employee is entitled to benefits at a rate of 70% of his average gross weekly wages (SAWW), not to exceed the maximum rate of 75% of SAWW or fall below the minimum rate of 20% of SAWW.

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

The temporary total disability (TTD) benefits continue until the employee goes back to work or has reached maximum medical improvement (MMI), a state in which additional treatment will no longer improve his medical condition.

In other words, benefits may be terminated based upon a report from a doctor indicating that the employee is able to return to work. **The employee must be notified in writing of the termination.** Owens v. Bennett Air Service, 133 N.J.L. 540, 45 A.2d 320 (1946), *judgment aff'd*, 135 N.J.L. 467, 51 A.2d 111 (1947).

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

No.

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

Disfigurement is compensable when it is of such a nature and extent that it may reasonably be presumed to impair or interfere with the future earning capacity or employability of the

employee. Wright v. Purepac Corp., 196 A.2d 695 (N.J. Super. Ct. Law Div. 1964). Scars may be compensable when it causes significant permanent disfigurement. N.J.S.A. 34:15-36.

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?

Bodily Loss		Maximum Weeks
Thumb		75
Index finger		50
Middle finger		40
Ring finger		30
Little finger		20
Great toe		40
Other toes		15
Hand, or thumb and first and second fingers (on one hand) or four fingers (on one hand)		245
Arm		330
Foot		230
Leg		315
Loss of vision (one eye)		200
Loss of hearing:	One ear	60
	Both ears	200
Tooth		4 weeks for each tooth lost

N.J.S.A. 34:15-12.

Compensation benefits for permanent partial disability are paid pursuant to a formula and chart contained within the statute. N.J.S.A. 34:15-12. This statutory provision is too complicated and extensive to completely summarize here. For details concerning the calculation of permanent partial disability benefits, please consult the statute or counsel.

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

In all lesser or other cases involving permanent loss, or where the usefulness of a member of any physical function is permanently impaired, compensation benefits bear such relation to the periods allowed for scheduled members as the disabilities bear to those produced by the injuries listed in the schedule. Where disability is determined as a percentage of total and permanent

disability, compensation is made to a corresponding portion of 600 weeks. N.J.S.A. 34:15-12(c)(22).

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

None. However, if one is found to be permanently and totally disabled, after the initial 450 weeks of disability, the petitioner may be required to submit to a vocational rehabilitation evaluation.

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

Compensation is paid at 70% of the average weekly wage, not to exceed 75% nor be less than 20% of the state average weekly wage. Compensation ceases after 450 weeks unless the employee submits to physical or educational rehabilitation as may have been ordered and can show that it is impossible to earn wages equal to his or her pre-injury wage, in which case compensation continues in an amount equal to the difference between the pre-injury and post-injury wages. N.J.S.A. 34:15-12(b).

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

A. Funeral expenses.

If death results from the work accident or occupational disease, whether there be dependents or not, burial and funeral expenses are allowable up to $3,500.00. N.J.S.A. 34:15-13(h).

B. Dependency claims.

Dependents generally include all relatives who are dependent upon the employee at the time of the accident or at the time of death. N.J.S.A. 34:15-13(f).

N.J. no longer uses a graduated death benefit calculation. It is now a flat 70% of the deceased workers' wages, regardless of the number of dependents.

N.J.S.A. 34:15-13.

Insofar as medical and hospital bills are concerned, they are paid as any claim would be paid, provided they relate to the condition produced by the compensable accident that occasioned death.

Partial vs. Total Dependent:

A total dependent is the one who receives from another all the ordinary necessities of life. In contrast, partial defendant receives only some or a portion of these necessities including food, clothes and shelter. Gladstone v. Trenton Lehigh Coal Co., 3 N.J. Misc. 27 (Dept. Labor 1924).

Total dependency is conclusively presumed in the case of a surviving spouse and natural children under 18 years of age, who are actually a part of decedent's household at the time of death.

In the case of partial dependents, the compensation shall be "such proportion of the schedule percentage as the amounts actually contributed to them by the deceased for their support constituted of his total wages…" N.J.S.A. 34:15-13.

The formula for calculating compensation of a partial dependent is: contribution divided by wages times the scheduled percentage. Ricciardi v. Damar Products Co., 45 N.J. 54 (1965), *overruled on other grounds.*

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

Petitioner is entitled to benefits from the Second Injury Fund ("SIF") when the worker becomes totally and permanently disabled as a result of a last compensable accident, in combination with pre-existing disabilities, regardless of whether the prior disabilities are work related. With regards to medical bills, the SIF does not assume responsibility for any medical treatment. Instead, the employer remains responsible for reasonable and necessary medical treatment only for the injuries associated with the compensable last accident, for the life of the worker. N.J.S.A. 34:15-95.

Payments by the Second Injury Fund are considered payments by the employer for purposes of statute of limitations. DiBernard v. Great Atlantic & Pacific Tea, 696 A.2d 764 (N.J. Super. Ct. App. Div. 1997), *certif. denied*, 704 A.2d 1300 (N.J. 1998). When the Second Injury Fund is involved, the Fund does not pay for medical benefits, that's respondent's responsibility.

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

Claims may be re-opened for a worsening of condition within two years of the date the employee last received payment of compensation. An award, determination and rule for judgment or order approving settlement may be reviewed by the parties at any time on the ground that the disability has diminished or subsequently increased. N.J.S.A. 34:15-27.

One question that comes up often is the effect of ongoing medical monitoring on the statute of limitations. In Milos v. Exxon Co. U.S.A., 656 A.2d 1300 (N.J. Super. Ct. App. Div. 1995), *aff'd*, 671 A.2d 120 (N.J. 1996), the court held that a reopener that was filed more than two years after the entry of the original award was not barred by N.J.S.A. 34:15-27 since there was ongoing medical

monitoring. If the insured has been ordered to provide annual chest x-rays or the like, that will likely toll or stop the statute from running. Every time the monitoring occurs, petitioner has another two years to file the reopener. It should be noted that IME exams are not considered medical treatment if the purpose of the exam is claims evaluation. Witty v. Fortuneoff, 669 A.2d 244 (N.J. Super. Ct. App. Div. 1996).

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

Generally, any medical bills or temporary disability benefits paid as a result of an Order of the Court results in a fee of up to 20% to be paid by the respondent. Any permanency award will result in a fee of up to 20%, for which the allocation is within the discretion of the Court, but is generally ordered 60% paid by respondent and 40% paid out of petitioner's award. Witness fees are generally split 50-50 between the parties. N.J.S.A. 34:15-64.

Recently signed into law, S1913/A2966 allows a Judge of Compensation the discretion to impose costs, simple interest on money due under an order, add an additional assessment of up to 25% for "unreasonable payment delay", and assess reasonable attorney's fees to enforce an order. The Court may also assess an additional fee not to exceed $5,000 to be paid into the Second Injury Fund for unreasonable delay.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Unless otherwise agreed, employers are immune from common law tort actions by their employees when compensation benefits are provided. N.J.S.A. 34:15-8.

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

Employers may contractually waive immunity. Kasadis Bros. Painting Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co., 292 A.2d 42 (N.J. Super Ct. Ch. Div. 1972). Employers may also be subject to common law tort actions where the employee was intentionally wronged. N.J.S.A. 34:15-8. *See* Millisson v. E.I. DuPont DeNemours & Co., 501 A.2d 505 (N.J. 1985); Bustamante v. Tuliano, 591 A.2d 694 (N.J. Super. Ct. App. Div. 1991).

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

No.

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

Employers are responsible for double the amount of compensation payable under the schedules when an injury to an illegally employed minor occurs. Please note that while the initial compensation is payable by the insurance carrier, t*he double amount must be paid directly by the employer*. Legally employed minors receive normal compensation benefits. N.J.S.A. 34:15-10.

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

There is no special statutory provision or case law for such potential exposure.

However, recently signed into law, S1913/A2966 allows a Judge of Compensation the discretion to impose costs, simple interest on money due under an order, add an additional assessment of up to 25% for "unreasonable payment delay", and assess reasonable attorney's fees to enforce an order. The Court may also assess an additional fee not to exceed $5,000 to be paid into the Second Injury Fund for unreasonable delay.

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

It is unlawful to discharge or discriminate against any employee for claiming compensation benefits. N.J.S.A. 34:15-39.1. Penalties include fines of not less than $100 nor more than $1,000 and/or imprisonment for not more than 60 days.

> If the termination is not in retaliation of the claim, but because of the disabling condition, there may be a claim as per the Americans with Disabilities Act.

If an employer discontinues employee's health benefit coverage while they are unable to work as a result of a job-related injury, there may be some protection under the Federal Family Medical Leave Act.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. N.J.S.A. 34:15-40.

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

No, unless the injury is a result of the co-employee's intent to harm. Intentional harm gets the worker around the section 8 immunity against co-workers, not just employers.

36. Is subrogation available?

Yes, the employer/insurer has a lien on the proceeds of a third-party settlement or judgment. N.J.S.A.. 34:15-40.

MEDICALS

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

No.

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

If an employer requests an employee to submit to a physical examination or x-ray, the employee must submit to that examination. The examination or x-ray must occur at some reasonable time and place in New Jersey as often as reasonably requested. If an employee refuses to submit to the examination, the employee loses the right to compensation during the period of time of the refusal. In the event that medical records are not provided, the Rules allow respondent to file a motion to dismiss for lack of prosecution. N.J.A.C. 12:235-3.6(i).

The Director of the Division of Workers' Compensation, each Deputy Director and each referee possess the same power as the Superior Court to issue subpoenas to compel the production of books and papers. N.J.S.A. 34:15-60. Moreover, the employer/insurer must, when directed, file with the Workers' Compensation Bureau, copies of any medical reports or certificates that they possess. N.J.S.A. 34:15-100.

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

A. Petitioner's choice of physician.

The employer controls the petitioner's choice of a physician and is responsible for payment for authorized treatment only.

All fees and charges for physician's and surgeon's treatment shall be reasonable and based on the usual fees and charges which prevail in the same community for similar medical services. N.J.S.A. 34:15-15.

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

The employer must authorize all medical treatment that is reasonable and necessary to cure and relieve the condition. When the Petitioner has reached maximum medical improvement, the respondent may schedule a permanency evaluation.

N.J.S.A. 31:15-19 provides that an employee must submit to a physical examination and X-rays within the state of New Jersey at a reasonable time and place, and as often as may be reasonably requested, by a physician authorized to practice medicine in this state.

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

Employers must furnish such medical, surgical and other treatment and hospital services as are necessary to cure and relieve the employee of the effects of the injury, provided the employee files with the Division of Workers' Compensation a petition stating the need for medical services or appliances which exceed $50.00. The employer is given an opportunity to be heard and the Division makesa determination as to the necessity and reasonableness of such treatment or equipment. N.J.S.A. 34:15-15.

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

They are covered, without time limitation. If such devices are damaged, the employer/insurer must replace them. N.J.S.A. 34:15-12.7.

As the techniques grow in medical acceptance, they may become treatments that respondents will be required to furnish.

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

Generally, home modifications are considered "other treatment" to relieve the effects of the injury. Sqeo v. Comfort Control Corp., 476 A.2d 1265 (N.J. Super. Ct. App. Div. 1984), *aff'd,* 494 A.2d 313 (N.J. 1985).

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

No. However, all medical fees must be reasonable and based upon the usual fees and charges which prevail in the same community for similar medical services. N.J.S.A. 34:15-15.

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

None.

PRACTICE/PROCEDURE

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

Within thirty days after service of the petition for benefits, the employer must file an answer to the petition admitting or denying the substantial averments of the petition and stating the employer's contentions concerning the petition. N.J.S.A. 34:15-52.

46. What is the method of claim adjudication?

A. Administrative level.

The Division of Workers' Compensation has exclusive original jurisdiction over all workers' compensation claims. N.J.S.A. 34:15-49. Within twenty days of the filing of an answer, or after expiration of the time-period to file an answer, the secretary of the Division schedules a hearing not less than four weeks or more than six weeks after the filing of the petition. N.J.S.A. 34:15-53. Such hearings are informal and the rules of evidence are loosely applied. N.J.S.A. 34:15-56.

B. Trial court.

Decisions of the Division of Workers' Compensation may be appealed to the Appellate Division of the Superior Court. N.J.S.A. 34:15-66. The Appellate Division review is restricted to determining whether the findings made below could reasonably have been reached on sufficient credible evidence present in the record, Kovach v. General Motors Corp, New Departure Hyatt Bearings Division, 384 A.2d 847 (N.J. Super. Ct. App. Div. 1978); Goyden v. State, 607 A.2d 651 (N.J. Super. Ct. App. Div. 1991), *aff'd,* 607 A.2d 622 (N.J. 1992). The Appellate Division ordinarily defers to determinations of judges of compensation when they are supported by the sufficient credible evidence in record. Akef v. BASF Corp., 702 A.2d 519 (N.J. Super. Ct. App. Div. 1997).

In an unpublished opinion, the Court reasoned that a reviewing court must defer to the findings of credibility made by a Judge of Compensation, as well as the Judge's expertise in analyzing medical testimony (Marier v. Marshall's Dep't Store, 2011 N.J. Super. Unpub. LEXIS 1210) citing Kovach v. General Motors Corp, 384 A.2d 847 (N.J. Super. Ct. App. Div. 1978).

C. Appellate.

An Appellate Decision can be appealed to the NJ Supreme Court like any other civil decision. N.J.S.A. 34:15-66.

47. What are the requirements for stipulations or settlements?

Parties may agree upon the compensation due and file such agreement with the Division of Workers' Compensation. The agreement is not binding until approved by the Division. N.J.S.A. 34:15-22. When there are disputes regarding the compensability of a claim, full and final settlements may be obtained subject to Division approval on the basis that the settlement is fair and just under all the circumstances. N.J.S.A. 34:15-20.

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

Yes. See answer number 47.

Section 20 settlements resolve cases by way of on Order Approving Settlement with Dismissal pursuant to N.J.S.A. 34:15-20. This settlement is appropriate when there is a dispute as to jurisdiction, liability, causal relationship, or dependency. In exchange for dismissal, respondent pays the petitioner lump sum. In turn, petitioner gives up the rights he would otherwise be entitled to if he went to trial. These rights also include the ability to reopen a case should the work-related injury worsen in the future. Petitioner will not be entitled to additional medical treatment, temporary disability benefits or an increase in permanent disability payments.

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

Yes. The stipulations and/or settlements are subject to the Judge finding them to be fair and just See answer number 47.

RISK FINANCE FOR WORKERS' COMPENSATION

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

The employer has three insurance options: private insurer, assigned risk pool, or self-insurance. An employer must be insured to provide complete payment of any obligation, which may be incurred, to an employee or dependents arising out of a compensable injury. N.J.S.A. 34:15-71.

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

A. For individual entities.

Employers may self-insure by filing an application with the Commissioner of Insurance, demonstrating a satisfactory financial ability to pay compensation. The commissioner, if satisfied of the applicant's financial ability and the permanence of his business, shall by

written order exempt the applicant from insuring the whole or any part of his compensation liability. N.J.S.A. 34:15-77.

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

Group self-insurance is permitted for hospitals only,
and requires that the group be composed of ten or more hospitals. N.J.S.A. 34:15-77.1.

52. Are "illegal aliens" entitled to benefits or 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"?

New Jersey **DOES** permit the recovery of benefits for an illegal alien.

In Fernandez-Lopez, the Court made clear that illegal alien status does not negate the protections of the New Jersey Workers' Compensation Act. Fernandez-Lopez v. Jose Cervino, Inc., 671 A.2d 1051 (N.J. Super. Ct. App.Div. 1996). The employer had argued that an alien had no right to access the New Jersey courts and that his contract was unenforceable. The court stated that "unless and until the Legislature expressly excludes undocumented aliens from workers' compensation benefits, the compassionate public policy which animates this social legislation favors inclusion of all injured workers not specifically excluded by the Legislature". 671 A.2d 1051, 1055.

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

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

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

New Jersey does not have any statutory requirements to satisfy in light of the MSPA laws. However, since the Judges must approve all settlements, the court will seek to ensure that the parties have taken Medicare's interests into account and have satisfied the MSPA.

In order for the parties to take Medicare's interest into account, the parties must request set aside information and inquire as to whether any conditional payments were made.
Set-asides involve future payments while conditional payments involve prior payments made by Medicare. While there is no need for a Medicare set-aside if the settlement is not greater than $25,000.00, Medicare must still advise whether any conditional payments were made, regardless of the settlement amount.

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

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

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

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

Section 164.514 of the Act provides: "A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers compensation or other similar programs established by law, that provide benefits for work-related injuries or illness without regard to fault". Further, Section 164.512 states: "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

File handling procedures that are a necessary part of the workers' compensation process are not subject to HIPAA. However, many medical practitioners believe that it covers release of medical information even to carriers or third-party administrators, which are paying for authorized treatment. Thus, HIPAA-compliant medical releases have become a standard part of the worker's compensation practice.

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

In determining whether someone is an employee or independent contractor, the Court must first review the language of N.J.S.A. 34:15-36 which provides in pertinent part that: ""Employer" is declared to be synonymous with master, and includes natural persons, partnerships and corporations; "employee' is synonymous with servant, and includes all natural persons, excluding officers of corporations, who perform service for an employer for financial consideration, exclusive of. . . casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental, or if not

in connection with any business of the employer, as employment no regular, periodic or recurring;"

It is well-settled and understood that "independent contractors" are excluded from the aforesaid definition of "employee" and therefore from coverage under the Worker's Compensation Act. It has also long been accepted that, an independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his/her own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.

To help determine if an individual is an "employee" within the meaning of N.J.S.A. 34:15-36 or an independent contractor, the courts developed two tests: (1) the "control test" and (2) the "relative nature of the work test." These two tests are basically designed to draw a distinction between those occupations which are properly characterized as separate enterprises and those which are in fact and integral part of the employer's regular business.

In addressing the "control test," four factors are reviewed: 1) the degree of control the employer has the right to exercise; 2) the method of payment; 3) who furnished equipment; and 4) the right of termination. New Jersey Property-Liability Guar. Ass'n v. State, 195 N.J. Super. 4, 14 (App.Div.), certify. denied, 99 N.J. 188 (1984).

See also, Re/Max of New Jersey, Inc. v. Wausau Ins. Co, 744 A.2d 154 (N.J. 2000).
Pollack v. Pino's Formal Wear & Tailoring, 601 A.2d 1190 (N.J. Super. Ct. App. Div.),

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

Where a worker may be supplied through a temporary or professional agency, or may be lent from one company to another, the courts have developed tests to determine if the worker may be considered a "special employee" of the company to which he is lent.

There are 5 listed criteria to be considered, although case law indicates that these are not exclusive - the court may consider other relevant information. The tests include:
1) Whether the is a contract of hire, express or implied, with the "special" employer;
2) Whether the work being done is that of the special employer;
3) Whether the special employer has the right to control the details of the work;
4) Whether the special employer pays wages, either to the employee or back to the leasing agency; and
5) Whether the special employer has the power to hire and fire the employee.

Kelly v. Geriatric and Medical Services, Inc., 671 A.2d 631 (N.J. Super. Ct. App. Div. 1996), *aff'd o.b.* 685 A.2d 943 (N.J. 1996).

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?

Similar to the tests generally given to determine independent contractor status, New Jersey applies the control test and relative nature of the work test. More specific to this industry, the courts will look to the agreement between the owner/operator and the alleged employer. The more control (or right to control) that the employer has, the more likely employment will be found. Leasing the truck to the employer or using an employer-owned truck; agreements to haul exclusively for one company, producing economic dependence; or adding loading and unloading the good of the employer, are all factors that would create a greater likelihood of employment. The control test and relative nature of the work test will be applied independent of any contractual terms that call the worker an 'independent contractor', and those tests will determine employment in the workers' compensation context.

Pickett v. Tryon Trucking Co., 518 A.2d 500 (N.J. Super. Ct. App. Div. 1986), *certif. denied*, 526 A.2d 210 (N.J. 1987).

also Tofani v. Lo Biondo Brothers Motor Express, Inc., 83 N.J. Super 480 (N.J. Super. Ct. App. Div.), *aff'd o.b.* 205 A.2d 736 (N.J. 1964).

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.

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 answer number 53.

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

New Jersey has a medical marijuana program. N.J.S.A. 24:6I-1, *et seq.* The statute allows medical marijuana to be prescribed for a list of specified conditions. The statute specifically

exempts insurers from paying for medical marijuana as well as employers from having to make accommodations for the use of medical marijuana in the workplace. N.J.S.A. 24:6I-14.

However, there have been WCJ's who have granted motions for medical benefits for medical marijuana. Geany, John, *New Jersey Judge of Compensation Orders Employer to Pay Costs of Medical Marijuana Program and Costs of Filling Prescriptions*, New Jersey Workers' Comp Blog, https://njworkerscompblog.com/ (December 29, 2016). To date, no reported decision has upheld such an order.

Employers are not required to pay for continued opioid medication if continued treatment with prescription opioids would not reduce symptoms and increase function. Samuel Martin, III v. Newark Public Schools, N.J. Super. Ct. App. Div. 2019 (appr'd for publication, Dec. 13, 2019).

However, the Appellate Division of the Superior Court of New Jersey, in a case of first impression, affirmed an order of a state workers' compensation judge that required an employer to reimburse its employee for the employee's use of medical marijuana prescribed for chronic pain following a work related accident. Hager v. M&K Construction, 2020 N.J. Super. LEXIS 4, A-0102-18T3 (appr'd for publication, Jan. 13, 2020).

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

New Jersey does not allow recreational marijuana.

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 with the ALFA Workers' Compensation attorney for your state, listed below:

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