

WASHINGTON

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

The Industrial Insurance Act of Washington (the “Act”) is in Title 51 of the Revised Code of Washington, from RCW 51.04.010 to 51.98.070. The Board of Industrial Insurance Appeals is governed by Washington Administrative Code 263-12.

SCOPE OF COMPENSABILITY

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

The Act covers “workers” who are defined as 1) employees, and 2) independent contractors, the essence of whose contract is his or her personal labor. RCW 51.08.180; 51.08.185. Under RCW 51.08.185, “employee” has the same meaning as “worker” when the context would so indicate, and shall include all officers of the state, state agencies, counties, municipal corporations, or other public corporations, or political subdivisions. Case law has expansively interpreted that portion of RCW 51.08.180 extending coverage to independent contractors, the essence of whose contract is for personal labor. *See*, answers 57 through 59.

The Act specifically excludes particular workers and occupations. RCW 51.08.180; 51.12.020. Excluded workers include certain workers for businesses registered under chapter 18.27 RCW (Registration of Contractors) or licensed under chapter 19.28 RCW (Electricians and Electrical Installations). RCW 51.08.180; *See*, answers 57 through 59. Other excluded workers include domestic servants, home gardening and maintenance workers, employees not in the course of the trade, business, or profession of the employer, services performed in return for aid or sustenance, sole proprietors or partners, work of minor children employed by parents for agricultural activities on the family farm, jockeys, certain officers of a corporation, entertainers for specific performances, home newspaper delivery, services performed by an insurance producer, services performed by a booth renter, certain activities and situations for members of a limited liability company, a driver providing commercial transportation services, and for hire vehicle operators (*e.g.*, chauffeurs). RCW 51.12.020(1)-(15).

In addition, an individual is not a “worker” if:

“(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and

- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the Department of Revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.” RCW 51.08.195.

A son who was injured while being paid by the Department of Social and Health Services (“DSHS”) to provide in-home care for his disabled mother, was denied benefits under the Act because (1) he was not an employee of DSHS, and (2) he was nonetheless excluded from the Act because he was a domestic servant. Bennerstrom v. Dep’t of Labor & Industries, 120 Wn. App. 853, 86 P.3d 826 (2004).

A volunteer firefighter was not an “employee” or “worker” subject to the exclusive remedies provisions of the Act, where the town neither paid for nor compelled the volunteer’s services and those services were freely given. Doty v. Town of South Prairie, 155 Wn.2d 527, 120 P.3d 941 (2005).

3. Identify and describe any “statutory employer” provision.

For purposes of the Act, “employer” is defined as “any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers.” RCW 51.08.070.

“[A]s an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in section 5 of this act for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.” Id.

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

A. Traumatic or “single occurrence” claims.

An industrial injury is defined as “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.” RCW 51.08.100. The injury is compensable if it occurs in the course of employment. RCW 51.32.010. By judicial interpretation, compensation is payable for the aggravation or “lighting up” of pre-existing conditions and musculoskeletal injuries resulting from ordinary bodily movement. See, Ruse v. Department of Labor & Industries, 138 Wn.2d 1, 977 P.2d 570 (1999).

The burden is on the employee to show that an injury occurred within the course of employment, and the statute is liberally construed in favor of the employee. See, Clausen v. Department of Labor & Industries, 15 Wn.2d 62, 129 P.2d 777 (1942).

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

“Occupational disease” is defined as “such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.” RCW 51.08.140. Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an “occupational disease” under this Act. RCW 51.08.142.

The employee must prove by a preponderance of the evidence that the disease or disease-based disability came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment, rather conditions coincidentally occurring in his or her workplace. Dennis v. Department of Labor & Industries, 109 Wn.2d 467, 745 P.2d 1295 (1987). A “disease-based disability” is the aggravation or “lighting up” of a pre-existing occupational or non-occupational disease and includes repetitive use.

In a claim for hearing loss, the Washington Supreme Court held that an employer could not use a median-based allocation method to reduce a worker’s hearing loss permanent partial disability award to compensate for age-related hearing loss. That would be contrary to the nature of workers’ compensation, which focuses on specific and individual employment-related injuries and diseases of claimants. Boeing Co. v. Heidy, 147 Wn.2d 78, 51 P.3d 793 (2002). For purposes of determining the appropriate rate of compensation, the court has held that occupational hearing loss is “partially disabling” as of the date a worker is last exposed to hazardous occupational noise. Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009).

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

Pursuant to statutory mandate, the Department of Labor and Industries (“Department”) has adopted a regulation which establishes that claims based on mental conditions or disabilities caused by stress do not fall within the definition of an occupational disease. RCW 51.08.142. Under WAC 296-14-300, examples of stressful conditions include conflicts with a supervisor, actual or perceived threat of termination, demotion, or disciplinary action, workload pressures, relationships with supervisors, co-employees or the public, fear of exposure to chemicals, radiation or other perceived hazards, personnel decisions, actual, perceived or anticipated financial reversals or difficulties occurring to the business of the self-employed individuals or corporate officers. See, RCW 51.08.142. Stress claims resulting from a single traumatic event are adjudicated with reference to RCW 51.08.100. WAC 296-14-300.

The Act excludes parking areas and disassociates them from the legislative definition of a jobsite for purposes of workers’ compensation. Puget Sound Energy, Inc. v. Adamo, 113 Wn. App. 166, 52 P.3d 560 (2002). However, this exclusion is not an absolute bar to compensation under the Act; the appropriate test is whether the worker’s injury occurred while acting in the course of employment. Id. If it did, then it does not matter whether the accident occurred in the parking lot or elsewhere. Id. Because the employer in Adamo required the worker to drive the company vehicle home, the worker’s accident was covered even though he was no longer working and was headed home for the day. Id. The parking lot exclusion is narrowly construed. In University of Washington, Harborview Medical Center v. Marengo, 122 Wn. App. 798, 95 P.3d 787 (2004),

the exclusion did not preclude coverage for an employee who was injured when he slipped and fell in the stairwell of his employer's parking garage on his way to work. The court held that the stairwell did not fall within the exclusion, because it was a means of getting to and leaving the parking area rather than a place where vehicles parked. The Court stated that such a narrow construction of this exception was consistent with the legislative intention to broadly construe the Act in favor of coverage.

The "dual purpose" exception to the "going and coming" rule under the Act may apply when an employee is injured in transit to or from a location off the employer's premises, when the employee's presence at that location served both a business and personal purpose and particularly where the making of the journey or the special urgency in which it is made is in itself a substantial part of the service for which the worker is employed. Cochran Elec. Co. v. Mahoney, 129 Wn. App. 687, 121 P.3d 747 (2005). In Cochran, the exception applied to allow benefits to the survivor of an employee who was fatally injured on his bicycle while returning home after dropping off his employer-provided van for service, even though the injury occurred on the employee's day off.

6. What psychiatric claims or treatments are compensable?

Mental conditions or disabilities caused by stress are excluded from the definition of "occupational disease." See, answers to 4B and 5. Thus, "mental-mental" claims are not compensable. However, psychiatric conditions proximately caused by an otherwise compensable disease or injury are compensable ("physical-mental" cases). Mental health conditions that are the result of exposure to toxic chemicals and radiation can lead to an allowable claim if they are caused by exposure at work; in determining the existence of such conditions diagnosis by a psychologist can be considered. In re Dianna R. Gegg, BIIA Dckt. No. 08 16647 (April 16, 2010).

7. What are the applicable statutes of limitations?

Claims for injuries must be filed within one year after the date upon which the injury occurred or the rights of the dependents or beneficiaries accrued. RCW 51.28.050. Thus, injury claims must be filed within one year after the date of the occurrence, not the date of discovery of disability. Rector v. Department of Labor & Industries, 61 Wn. App. 385, 810 P.2d 1363 rev. denied, 117 Wn.2d 1004, 815 P.2d 266 (1991). Claims for occupational disease or infection must be filed within two years following the date the employee had written notice from a physician of the existence of the disease and that a claim for benefits may be filed. RCW 51.28.055.

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

The Act requires the employee or someone on the employee's behalf to immediately report an industrial accident to the employer, superintendent or foreman in charge of the work. RCW 51.28.010. The employer must immediately report such an accident and the resulting injury to the Department if the employee received treatment, has been disabled or hospitalized, or has died as the apparent result of the accident or injury. Id. The Department has specific forms for reporting injuries or diseases, which satisfy the statutory requirements for content. See RCW 51.28.025.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

If injury or death results from the deliberate intention of the employee to produce such injury or death, or while the employee is engaged in an attempt to commit or during the commission of a felony, neither the employee nor any dependent shall receive any payment under the Act. RCW 51.32.020.

B. Willful misconduct, "horseplay," etc.

Workers' compensation applies even where the injury or death occurs because of the employee's horseplay. Tilly v. Department of Labor & Industries, 52 Wn.2d 148, 324 P.2d 432 (1958). In Tilly, the Washington Supreme Court held that a deceased employee was injured within the course of employment even though he died of a cerebral aneurysm shortly after horseplay with a co-employee near a drinking fountain adjacent to the men's lavatory. However, the above general rule is limited. In evaluating whether or not an employee's "horseplay" while at work takes the employee out of the "course of employment," the Board of Industrial Insurance Appeals has applied the following test:

Whether the employee, by engaging in the horseplay or occasional foolery, unreasonably deviated from acting in furtherance of the employer's business to such an extent that the deviation could be said to constitute an abandonment (however temporary) of the employee's employment.

BIIA Dckt. No. 880362 (1989).

C. Injuries involving drugs and/or alcohol.

Coverage for these injuries depends on the circumstances. In Flavorland Industries, Inc. v. Schumacker, 32 Wn. App. 428, 647 P.2d 1062 (1982), the court held that the widow of an employee killed in an automobile accident was entitled to death benefits under the Act even though the decedent's fatal accident occurred after working hours, off the employer's premises, and after the employee had been drinking at a bar. The evidence indicated that the employee was driving a company car at the time, was reimbursed by his employer for entertainment expenses, and was required to socialize with clients and prospective clients as a part of his employment. The employee was socializing with clients and prospective clients at the bar before leaving for home. Thus, the employee was furthering the interests of his employer at the time he was drinking at the bar. *But see*, Superior Asphalt & Concrete Co. v. Department, 19 Wn. App. 800, 578 P.2d 59 (1978), where the same court held that an intoxicated worker who was on his way home from a construction site was not in the course of his employment and, hence, benefits were properly denied because consumption of alcohol was not part of his job. In In re Wesley H. Nicholas, BIIA Dckt. No. 1015503 (October 11, 2011), the Board allowed benefits finding that a worker with trace amounts of marijuana and unprescribed methadone in his system was not so intoxicated that he could not perform his duties, and had not abandoned his employment.

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

At the administrative level, the Department can demand a refund of all benefits paid, plus a penalty of 50% of the total benefits paid whenever any payment of benefits under the Act has been induced by willful misrepresentation. RCW 51.32.240(5).

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

It is a criminal felony or gross misdemeanor for theft under Washington's criminal code (Title 9A RCW) for a claimant to knowingly provide false information required in a claim or application for workers' compensation. RCW 51.48.020; *See also*, State v. Bodey, 44 Wn. App. 698, 723 P.2d 1148 (1986).

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

The Washington Workers' Compensation Act provides benefits to "each worker receiving an injury...during the course of his or her employment...." RCW 51.32.015. "Acting in the course of

employment” means the worker acting at his or her employer’s direction or in the furtherance of his or her employer’s business. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based. RCW 51.08.013(1). By statute, an employee is not acting in the course of his or her employment while participating in social activities, recreational or athletic activities, events or competitions, or parties or picnics, whether or not the employer pays some or all of the costs thereof, unless: (1) the participation is during the employee’s working hours, not including paid leave; (2) the employee was paid monetary compensation by the employer to participate; or (3) the employee was ordered or directed by the employer to participate or reasonably believed that he or she was ordered or directed to participate. RCW 51.08.013(2)(b).

Under the "traveling employee rule," when employees are required by their employers to travel to distant job sites, they are within the course of their employment throughout the trip for purposes of collecting benefits under the Act, unless they are pursuing a distinctly personal activity. RCW 51.08.013; Ball-Foster Glass Container Co. v. Giovanelli, 128 Wn. App. 846, 117 P.3d 365 (2005). "The rationale for this extended coverage is that when travel is an essential part of employment, the risks associated with the necessity of eating, sleeping, ... are an incident of the employment even though the employee is not actually working at the time of the injury." Ball-Foster, 163 Wn.2d at 142, citing Buczynski v. Industrial Comm'n, 934 P.2d 1169, 1174-74 (Utah Ct. App. 1997). It follows then that the court's focus when evaluating the compensability of injuries occurring off duty during travel should be on whether the injury is fairly attributable to the increased risks of travel. Washington court's adopted this test stating "the injury must have its origin in a travel-related risk." Ball-Foster at 144. In Ball-Foster, an employee on paid business travel was eligible for benefits under the Act when he was injured while walking from his hotel to a musical performance because it was found that the employee was traveling at the direction of his employer and his travel was for a purpose benefitting the employer. An employee that is required to travel away from his permanent residence is considered a traveling employee even if he is required to stay at a fixed location for an extended period of time.

13. Are injuries by co-employees compensable?

Yes, this is true regardless of the co-employee’s negligence. RCW 51.24.030. Co-employees are immune from lawsuits unless the injury was intentional, such as an assault. See, e.g., Newby v. Gerry, 38 Wn. App. 812, 690 P.2d 603 (1984).

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

Yes. Compensable injuries need not arise out of the employment; they need only occur in the course of employment. RCW 51.24.030. The Act permits the injured worker or beneficiary to

elect to sue third parties (not co-workers) whose negligence caused the injury. See, Tallerday v. Delong, 68 Wn. App. 351, 842 P.2d 1023 (1993).

BENEFITS

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

Calculations are based on the wages the employee was receiving from all employment at the time of the injury. RCW 51.08.178. Consideration is given to the seasonal, part-time or intermittent nature of employment, as well as the employee's pattern of employment.

Also, if an employer was supplying health care coverage (through health insurance or otherwise) before the worker's injury, but no longer supplies it after the worker's injury, the worker must replace it out of time-loss compensation, and it should be included in the basis from which time-loss compensation is computed. Therefore, if the employer discontinues payment of health insurance premiums for the injured worker during the time period the employee is off work due to an industrial injury, the reasonable value of health insurance must be included within "wages" when computing time-loss compensation. Cockle v. Department of Labor & Industries, 142 Wn.2d 801, 16 P.3d 583 (2001).

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

The employee's gross monthly wage multiplied by the entitlement percentage equals the monthly time loss. RCW 51.32.090; 51.32.060. The payment is, based upon marital and dependency status and the payments range from 60% to 75% of the worker's monthly wage. The maximum is 120% of the average state wage for injuries on and after June 30, 1996. Id. Benefits continue indefinitely, as long as the employee's condition is not fixed and stable. Id.

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

Time loss compensation must commence within fourteen (14) days of the Department's receipt of the claim. RCW 51.32.210.

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

The employee must be unable to work for fourteen (14) days before recovering benefits for the first three (3) days. RCW 51.32.090(7). Time loss benefits are never provided for the date of injury. Id.

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

Benefits may be terminated when: (1) an employee returns to work; (2) the attending physician releases the employee to return to work; or (3) the employee’s medical condition is fixed and stable. RCW 51.32.090.

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?

There is no provision for disfigurement benefits. Such injuries would be considered in calculating permanent partial disability.

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

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

Unlike many states, permanent partial disability awards are not payable in terms of weeks of disability payments. Schedule awards for actual amputations are set by statute in fixed dollar amounts and adjusted each July by reference to the consumer price index. RCW 51.32.080. Unspecified permanent partial disability awards are based on the extent of total bodily impairment. Id. Most unspecified awards are the subject of “categories” of impairment

administratively adopted by rule. Id. The categories carry varying percentages of the maximum allowable for unspecified disabilities. Id. The maximum allowed for unspecified disabilities is adjusted each July 1 by reference to the consumer price index. Id. The standard for recovery is decided by medical opinion based on objective medical findings after a worker's condition becomes fixed and stable. RCW 51.32.055.

B. Number of weeks for “whole person” and standard for recovery.

See, answer to 22A.

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

Vocational services are discretionary with the supervisor or supervisor's designee of the Department of Labor and Industries. RCW 51.32.095. When the Department has approved a vocational plan before December 31, 2007, benefits may include the cost of books, tuition, fees, supplies, equipment, transportation, child or dependent care, and other necessary expenses. Id. The amount of benefits may not exceed \$4,000 (\$3,000 in all other cases) in any fifty-two (52) week period and, in the discretion of the supervisor, may be extended for an additional fifty-two (52) week period. Id.

For vocational plans approved for a worker between January 1, 2008 through July 31, 2015, total vocational costs allowed by the supervisor or supervisor's designee are limited to those provided under the pilot program established in RCW 51.32.099.

Furthermore, In 2011 Washington created a Stay-At-Work Program codified at RCW 51.32.090. With limitations detailed in the statute, employers who provide employees receiving temporary total disability with light duty or transitional work allowed by the worker's physician are eligible to receive wage subsidies and other incentives from the Department. For sixty six (66) days the employer can receive a wage subsidy of fifty percent (50%) of the employee's basic, gross wage paid for light duty or transitional work. Additional incentives include up to one thousand dollars (\$1,000.00) in reimbursement for training, up to four hundred dollars (\$400.00) for necessary clothing and up to two thousand five hundred dollars (\$2,500.00) for tools or equipment.

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

Benefits are calculated in the same manner as time loss benefits. *See*, answer to 16.

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

A. Funeral expenses.

Burial expenses are paid where death results from the injury. The maximum payment is 200% of the average monthly wage in the state. RCW 51.32.050.

B. Dependency claims.

The amount payable for dependents is based upon whether there is a surviving spouse, children or other dependents. *See*, RCW 51.32.050. The amounts vary from 60 to 70% of the worker's wages. *Id.* The maximum benefit is 120% of the average wage in Washington as determined each July 1. *Id.* If there are surviving children but no eligible spouse, a monthly benefit of 35% of the employee's wages are paid to the guardian of the minor dependent. *Id.* An additional 15% of the wage is paid for each additional child, up to a maximum benefit of 65% of the wage. *Id.* If there is more than one child, benefits are divided equally among them. *Id.* Other qualified dependents are eligible for benefits. *Id.* The benefit limit is 65% of the employee's wage, or 120% of the average wage in the state, whichever is less. *Id.*

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

The Second Injury Fund applies to permanent total disability which results from the combined effects of pre-existing disabling conditions and the industrial injury/occupational disease. RCW 51.44.040. The employer bears the burden of establishing that the employee had a "previous bodily disability" which objectively impaired the ability to perform his or her work duties at the time of hiring or materially diminished the employee's ability to perform the activities of daily living. Crown, Cork & Seal v. Smith, 171 Wn.2d 866, 259 P.3d 151 (2011).

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

An employee can apply for reopening of the claim for additional compensation within seven

years (ten years for eye injuries) from the date the first closing order based on medical advice, recommendation or examination becomes final. RCW 51.32.160. In every case the employee must show, by a comparison of objective medical findings, that his or her causally-related condition worsened between the time of last closure and date the application is acted upon. Loushin v. ITT Rayonier, 84 Wn. App. 113, 924 P.2d 953 (1996). The Director, on his or her own motion and in his or her discretion, may reopen a claim for all benefits at any time. RCW 51.32.160.

In Energy Northwest v. Hartje, 148 Wn. App. 454, 199 P.3d 1043 (2009), the Board of Industrial Insurance Appeals ("the Board") reopened a workers' compensation claim and awarded the worker additional time loss compensation due to aggravation of her industrial injury. The employer appealed the decision, and the Washington Court of Appeal reversed. The court of appeals held that the worker voluntarily retired prior to reopening her claim and that since her injury did not cause her failure to return to the work force, she was not entitled to additional compensation.

In In re Stephen R. Everhart, BIIA Dckt. No. 09 14820 (March 3, 2010), the Department reopened a claim for aggravation at the request of the claimant but then decreased the finding of the claimant's wage at the time of injury from \$2,200.00 to \$440.00. The claimant appealed to the Board requesting that the first wage order be used, but the Board held that the most recent wage order was final and determinative.

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

Employees aggrieved by orders issued by the Department or self-insured employers may appeal to the Board. There is no provision for payment of attorney's fees incurred by the employee in proceedings before the Board.

Appeals may be taken from the Board to Washington Superior Court for a trial de novo, with or without a jury. A reasonable attorney fee is payable by the Department or self-insurer for the services of the employee's attorney in both the superior court and the appellate courts, if the order of the Board is reversed or modified and either the accident fund or medical aid fund is affected. RCW 51.52.120. Courts have interpreted the attorney fee's statute liberally to "ensure adequate representation for injured workers who were denied justice by the Department." Guillen v. Contreras, 169 Wn.2d 769, 238 P.3d 1168 (2010) (quoting Brand v. Dept. of Labor, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999)). Attorney fees are also payable by the Department or self-insurer if an appeal is pursued by "a party other than the worker or beneficiary" and the right to entitlement is affirmed by the board.

In an appeal by an employee to superior court involving a state fund employer with 25 employees or less, if the Department does not appear and the Board's order in favor of the

employer is sustained, the Department must pay a reasonable fee and costs. RCW 51.52.130.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Each employee injured in the course of employment, or his or her family or dependents in the case of death, shall receive benefits. Except as otherwise provided in the Act, those benefits are in lieu of any and all rights of action whatsoever against any person. RCW 51.32.010.

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

If injury results from the “deliberate intention” of the employer to produce such injury, the employee receives compensation benefits and may sue the employer. RCW 51.24.020. The phrase “deliberate intention” means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. Birklid v. Boeing, Co., 127 Wn.2d 853, 904 P.2d 278 (1995). This exception has consistently been interpreted narrowly, and requires more than gross negligence or failure to observe safety laws or procedures. See, e.g., Vallandigham v. Clover Park School Dist. No. 400, 154 Wn.2d 16, 109 P.3d 805 (2005). An employer was immune from liability under the Act for the wrongful death of an employee who died from dehydration on a long-haul driving trip, because causation was not established, the employer did not have actual knowledge that the employee would die or willfully disregard that knowledge, and the employer did not engage in any practices that denied the employee proper hydration. Byrd v. System Transport, Inc., 124 Wn. App. 196, 99 P.3d 394 (2004).

An employee may also sue the employer if the condition complained of is a “non-occupational disease,” i.e., a disease which is not covered under “the basic provisions of the Act.” McCarthy v. DSHS, 110 Wn.2d 812, 759 P.2d 351 (1988). Suit will also lie under the Washington Law Against Discrimination for a discriminatory response to a compensable injury or disease. Reese v. Sears Roebuck, 107 Wn.2d 563, 731 P.2d 497 (1987), overruled on other grounds, Phillips v. City of Seattle, 111 Wn.2d 903, 766 P.2d 1099; Goodman v. Boeing, 127 Wn.2d 401, 899 P.2d 1265 (1995).

Neither an employee nor an employer can exempt itself from, or waive the benefits of, the Act.

Any attempt to do so, by contract or otherwise, is void. RCW 51.04.060.

The Washington Supreme Court has rejected the “dual capacity” doctrine. Corr v. Willamette Industries, 105 Wn.2d 217, 713 P.2d 92 (1986); Spencer v. City of Seattle, 104 Wn.2d 30, 700 P.2d 742 (1985). Likewise, a “bad faith” suit arising out of allegedly unfair or deceptive claims has been rejected by the Washington Court of Appeals, although a suit based on the “tort of outrage” has been held outside the immunity provisions of the Act. Deeter v. Safeway, 50 Wn. App. 67, 747 P.2d 1103 (1987).

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

Yes. The state has adopted the Washington Industrial Safety & Health Act (WISHA), a counterpart to the Occupational Safety and Health Act (OSHA), which imposes safety and health standards on industry and sets penalties for violations of those standards. See, Chapter 49.17 RCW. The authority to assess penalties under WISHA lies exclusively with the Department of Labor and Industries, and the Board's authority regarding a WISHA citation is appellate only. In re Bergen Brunswig Drug Co. dba Amerisource Bergen Corp., BIIA Dckt. No. 08 W1080 (February 11, 2010). The Board lacks the authority to increase the penalty on its own motion. Id.

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

A minor shall be deemed “sui juris” under this Act and a claim by an injured minor worker will be treated the same as other workers’ claims, except to the extent that payments may be made to the minor’s parent or guardian until age of majority. RCW 51.04.070.

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

The Washington Supreme Court has specifically rejected a cause of action for wrongful delay or termination of benefits, i.e., “bad faith.” Wolf v. Scott Wetzel Services, 113 Wn.2d 665, 782 P.2d 203 (1989). However, the exclusive remedy provisions of the Act do not protect an employer from a civil action when the employer or an agent hired by the employer to administer a claim wrongfully delays or terminates benefits through conduct which constitutes the tort of outrage. Mere allegation of “bad faith” conduct is insufficient. Outrageous conduct must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. 113 Wn.2d at 667.

A self-insurer’s delays in payment or refusals to pay benefits as they come due trigger penalties

under the Act in the amount of \$500, or 25% of the amount then due, whichever is greater. The penalties are paid to the employee. RCW 51.48.017. This is the sole remedy unless the conduct is outrageous.

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

An employee who is terminated in retaliation for a compensation claim has statutory and common law remedies. Discharge or discrimination against any employee because he or she has filed or expressed an intention to file a claim for compensation is prohibited. RCW 51.48.025(1). An employer was held to be in violation of this anti-retaliation provision where its worker, after injuring her back and filing a workers' compensation claim, was harassed and verbally and non-verbally abused by co-workers who called her names and accused her of lying about her injury. Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002).

However, an employer may still take action against an employee for other reasons, including failure to observe health or safety standards adopted by the employer, or the frequency or nature of job-related accidents. RCW 51.48.025(1).

Any employee discharged or subjected to discrimination in violation of the statute may file a complaint with the Department, which must investigate the complaint. RCW 51.48.025(2). If a violation is found, the Director is obligated to bring an action in the superior court of the county in which the violation is alleged to have occurred. Id. The employee has the right to institute the action on his or her own if the Director determines that the section has not been violated. Id. The superior court has authority, for cause shown, to restrain violations of this action and to order all appropriate relief including reinstatement with back pay. Id. In Wilmot v. Kaiser Aluminum and Chemical Corporation, 118 Wn.2d 46, 921 P.2d 18 (1991), the Washington Supreme Court held that this statute is not a condition precedent to a common law action against an employer for retaliatory discharge for filing a claim; nor does the statute prohibit a suit for the tort of outrage.

Terminating an injured employee may also invoke claims under the Family Medical Leave Act of 1993, the Americans with Disabilities Act of 1990, and the Washington Law Against Discrimination codified under Chapter 49.60 RCW.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. RCW 51.24.030. *See also*, answer to 14.

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

Usually a co-employee who causes an injury cannot be sued. The statute authorizing third-party actions (RCW 51.24.035) has been construed as an extension of the exclusive remedy rule to co-employees so long as the injury is not intentional. *See also*, answer to 13.

36. Is subrogation available?

Yes. The Act authorizes a lien in favor of the Department or a self-insurer, as well as formulas to determine an amount which must be repaid from a third-party action. RCW 51.24.060. Any recovery by an employee from a third party relating to an injury in which the employee received workers' compensation benefits "shall be distributed" according to the statute's distribution formula. *Id.* The formula requires payment in the following order: (1) attorney fees and costs, (2) 25% to the injured worker free of any claim by the Department, (3) to the Department "the balance of the recovery made, but only to the extent necessary to reimburse for benefits paid," and (4) to the injured worker. *Id.* The amount of a third party settlement or judgment that relates to loss of consortium or pain and suffering cannot be distributed to the Department as a reimbursement because the Department does not provide funds for noneconomic damages when distributing workers' compensation benefits. Flanigan v. Dept. of Labor & Industries, 123 Wn.2d 418, 869 P.2d 14 (1994)(loss of consortium); Tobin v. Dept. of Labor & Industries, 81946-7 (Wash. 8-12-2010)(pain and suffering). In Tobin a worker who was totally and permanently disabled by a crane boom settled with a third party for \$1.4 million, \$793, 086.16 of which was attributable to pain and suffering; the Department was overruled by the Washington Supreme Court when it attempted to include the entire \$1.4 million in its reimbursement calculation.

MEDICALS

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

Medical bills must be paid within 60 days of receipt of proper billing in the form prescribed by the Department. RCW 51.36.080.

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

The physician-patient privilege is abolished in workers' compensation proceedings. RCW 51.04.050. The statute specifically provides that all medical information in the possession or control of any person and relevant to the injury in question in the opinion of the Department, shall be made available, upon request, to the employer, the employee's representative, and the Department. No person shall incur any legal liability for releasing that information. RCW 51.36.060.

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 physician.

The claimant may choose his or her physician as long as the physician is part of the approved health care provider network established by the Department. RCW 51.36.010; WAC 296-20-01010.

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

Any worker entitled to receive, or who claims, benefits under the Act shall, if requested by the Department or self-insurer, submit himself or herself for medical examination, at a time and from time to time, at a place reasonably convenient for the worker. RCW 51.32.110; 51.36.070.

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

Only treatment which is "proper and necessary" is authorized by statute. RCW 51.36.010. Proper and necessary chiropractic care and evaluation is allowed. RCW 51.36.015. By rule, the Department has established guidelines for approval and the duration of many treatment procedures.

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

The Act provides proper prosthetic devices for workers whose injury results in the loss of an eye or a limb. RCW 51.36.020(2). These devices are provided and replaced for the worker without regard to the date of injury or treatment. RCW 51.36.020(5). The Department has authority to rent or purchase prosthetic devices, depending on the length of time the employee will require them. The Department or self-insurer will repair or replace originally-provided prosthetics that are damaged, broken or worn out, upon documentation from the attending doctor. WAC 296-20-1102. Replacement of prosthetics or special equipment can be provided on closed claims after prior authorization. WAC 296-20-124(4).

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

Yes. RCW 51.36.020(7) to (9).

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

Yes. The director publishes a maximum fee schedule. RCW 51.04.030.

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 60 days of an order, decision, or award by the Department, a request for reconsideration may be filed with the Department, or an appeal may be filed with the Board. RCW 51.52.050. The 60 day time period begins when the order, decision, or award is "communicated" to the worker. Id. The Board determined that an order was not "communicated" to a worker until the worker returned from vacation where the order was mailed to the worker prior to her leaving for vacation, but did not arrive at her residence until after she left. In re Dorena R. Hirschman, BIIA Dckt. No. 09 17130 (May 7, 2010). However, the Board does consider an electronic "secure

message" which denies a worker's request as a written final determination on the issue which could be appealed. In re Colleen M. Aldridge, BIIA Dckt. No. 1015903 (February 16, 2011).

46. What is the method of claim adjudication?

A. Administrative level.

State fund claims are adjudicated by the Department, and interlocutory and final decisions are made in orders which may be protested or appealed. Self-insured claims are self-adjudicated or managed by third-party administrators, but in either case the Department retains oversight authority. *See*, Chapter 51.32 RCW. Self-insured employers may issue orders closing claims in limited circumstances, but the Department must review and issue a final order in most cases. *Id.* Adjudications at the Department level, including both state fund and self-insured claims, may be appealed to the Board which is a quasi-judicial agency designated by statute as the exclusive forum for hearing appeals in workers' compensation cases. *See*, Chapter 51.52 RCW.

B. Trial court.

Decisions of the Board may be appealed to Superior Court within 30 days of the date of communication of the order. RCW 51.52.110. Review in the Superior Court is de novo, but no new evidence is admissible. RCW 51.52.115. Trial may be by jury, upon demand as in any other civil case. *Id.* Decisions of the Board are prima facie correct and the appealing party has burden of proof to overcome that presumption. *Id.* If an employer is appealing the Board's decision regarding an assessment of unpaid industrial insurance premiums stemming from a Department audit, the employer must first pay the full amount of the assessment (including the unpaid tax, penalties and interest) before it can bring an action in Superior Court, unless the employer obtains a court order showing undue hardship. RCW 51.52.112; Arredondo v. Dept. of Labor & Industries, 155 Wn. App. 1031 (2010); Probst v. Dept. of Labor, 155 Wn. App. 908 (2010).

C. Appellate.

After workers' compensation claims enter the trial court system, the cases follow standard judicial procedure and decisions of the Superior Court may be appealed to the Washington Court of Appeals, and then the Washington Supreme Court.

Furthermore, a Limited English Proficiency (LEP) individual's statutory right to government paid

interpreter services is triggered when a government agency initiates a legal proceeding involving the individual. RCW 2.43.010 et al. "[N]either the Department nor the Board initiate[s] a legal proceeding" when it analyzes and reviews a claim for workers compensation. Kustura v. Dept. of Labor & Industries, 169 Wn.2d 81, 233 P.3d 853 (2010). If the Board in its discretion appoints an interpreter to assist an LEP party, current regulations require the Board to pay for the interpreter's services, and once appointed the Board is required to permit the interpreter to translate whenever necessary at the hearing. Id. at 85.

47. What are the requirements for stipulations or settlements?

All claim resolution structured settlement agreements must be approved by the board of industrial insurance appeals. RCW 51.04.063. An application for approval of claim resolution structured settlement must be filed electronically. WAC 263-12-01501. Structured settlement agreements must conform to the multiple statutory requirements detailed in RCW 51.04.063 to receive approval, including age limitations. Attorney fees for claim resolution structured settlement agreements are limited to fifteen percent (15%) of the total amount to be paid to the worker. RCW 51.52.120.

The above laws regarding structured settlements were recently enacted and will likely evolve as they are interpreted. It is recommended that anyone consult local employment counsel regarding new and recent developments in this area.

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

No.

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

Yes. RCW 51.04.063(2)(a).

RISK FINANCE FOR WORKERS' COMPENSATION

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

The Act does not contemplate the participation of private insurers. Premiums are paid to the state treasury for the accident fund, the medical aid fund, the supplemental pension fund, or any other fund created by the Act. RCW 51.08.015. Certain state fund employers qualify for participation in the retrospective rating program which rewards low claims experience with a premium refund. RCW 51.18.010.

Self-insured employers do not contribute to the state fund and may reinsure up to 80% of their liability. But the reinsurer has no voice in claim adjudication. RCW 51.14.020.

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

A. For individual entities.

An employer qualifies as a self-insurer by establishing to the satisfaction of the Director of the Department that it has sufficient financial ability to ensure the prompt payment of all compensation due. RCW 51.14.020. The Director may require self-insurers to (1) supplement existing financial ability by depositing into an escrow account, in a depository designated by the Director, money and/or corporate or governmental securities; or (2) procure a surety bond written by any company admitted to transact surety business in the state. Id. A letter of credit is acceptable in lieu of money and/or corporate or governmental securities, but only if the self-insurer has a net worth of not less than \$500,000,000 as evidenced in an annual financial statement prepared by a qualified, independent auditor using generally accepted accounting principles. Id.

The money, securities or bond must be in an amount reasonably sufficient in the Director's discretion to ensure payment of reasonably foreseeable compensation and assessments, but not less than the employer's normal expected annual claim liabilities and in no event less than \$100,000. Id. A self-insurer may reinsure a portion of its liability with any reinsurer authorized in the state, but the reinsurer may not participate in the administration of the responsibilities of the self-insurer. Id. The reinsurance may not exceed 80% of the liabilities under the Act. Id.

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

School districts, educational service districts, private hospitals, and member managed LLC's are authorized to form a self-insured group, which is deemed to be a single employer for purposes of the Act. RCW 51.14.150; In re J D I, LLC, BIIA Dckt. No. 09 18829 (June 15, 2010).

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”?

Yes. A “worker” is defined as any person in the state who is engaged in covered employment or who is engaged in the employment of or who is working under an independent contract, the essence of which is for personal labor. RCW 51.08.180.

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

Neither the Act nor Washington case law addresses this question.

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

The Act does not include any state specific provisions regarding reimbursing Medicare.

A structured settlement can resolve all benefits and “[b]ind the parties with regard to all aspects of a claim except medical benefits.” RCW 51.04.063(2)(c)(i)(emphasis added). Therefore, most structured settlements will not need to consider Medicare’s interests since medical is not compromised. In unique situations the potential for defining the nature and extent of the injuries and disability may require the consideration of Medicare’s interest in the structured settlement. *See*, WAC 263-12-052(6); *See also*, answers to 37 and 49.

The above laws regarding structured settlements, and Medicare’s involvement, were recently enacted and will likely evolve as they are interpreted. It is recommended that anyone consult local employment counsel regarding new and recent developments in this area.

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

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 Act does not address the question. The Department retains the right of subrogation, i.e., off-set, against social benefits received by the injured worker from the Department of Social and Health Services. RCW 43.20B.720.

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)?

The Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. parts 160-164 and 65 F.R. 82462-01, went into effect on April 14, 2003. It provides an exception for workers' compensation claims to allow the collection of medical records by employers and insurers. 45 C.F.R. 164.512. Employers must nonetheless treat these medical records confidentially, as they would under any other circumstance.

The Act does not specifically address the confidentiality and privacy of medical records in light of state and federal regulations. However, under the Act, the Department has the authority to conduct audits and investigations of health care providers who provide care to industrially injured workers pursuant to the Act, including medical records that may be deemed privileged or confidential *under other statutes*. RCW 51.36.110. The auditor/investigator cannot remove original patient records, or disclose any records or information, unless directly related to the official duties of the Department. Additionally, the auditor/investigator must destroy all copies of medical records in their possession upon completion of the audit, investigation or proceeding. Id. The health care provider shall not be liable for breach of any confidential relationships based on the disclosure of such medical records. Id.

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

The Act covers "workers." See, RCW 51.32.010. Independent contractors are considered "workers" if the essence of their contract is for their personal labor. RCW 51.08.180. Case law has expansively interpreted workers' compensation laws to extend coverage to independent contractors. However, independent contractors are not considered "workers" if the essence of their contract is not for their personal labor, or as a separate alternative, if the independent contractor meets the test set forth in RCW 51.08.195:

“As an exception to the definition of ‘employer’ under RCW 51.08.070 and the definition of ‘worker’ under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and [*See, In re GT Drywall, Inc.*, BIIA Dckt. No. 10 11537 (January 3, 2011) discussing this factor in depth]

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the Department of Revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.”

In addition, workers for either independent contractors registered under Chapter 18.27 RCW or

electricians licensed under Chapter 19.28 RCW are not considered “workers” covered under the Act. RCW 51.08.180. There are additional categories of workers who are excluded. See, Chapter 51.12 RCW and answer to 2.

Under RCW 51.12.070:

“The provisions of this title apply to all work done by contract; the person, firm, or corporation who lets a contract for such work is responsible primarily and directly for all premiums upon the work. The contractor and any subcontractor are subject to the provisions of this title and the person, firm, or corporation letting the contract is entitled to collect from the contractor the full amount payable in premiums and the contractor in turn is entitled to collect from the subcontractor his or her proportionate amount of the payment.”

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

Yes. RCW 51.16.060 requires temporary staffing service providers to pay the required premiums for temporary employees assigned to a client customer. The rule applies to any temporary staffing business providing temporary employees to a client customer. WAC 296-17-31027. If the temporary staffing service provider fails to pay the required premium to the Department, the client customer is responsible for the unpaid premium. Id.

- 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?**

Yes. Under RCW 51.08.180, a person is not a “worker” under the Act with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

- 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?**

No, there are not any state specific requirements as it relates to protecting Medicare's interests when settling a claim. However, the Washington Department of Labor and Industries has a duty to notify Medicare when a claim is settled. Medicare will then pursue any funds it previously paid, which it believes should have been satisfied by L&I.

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

In 1998, Washington State's Initiative I-692 went into effect, Washington's Medical Use of Marijuana Act (MUMA)(codified at RCW 69.51A et. seq., permitting patients with certain debilitating conditions to use medical marijuana. However, I-692 did not legalize marijuana use in the workplace and is silent on how the workplace may be impacted. In that regard, employers retain authority to enact drug policies prohibiting marijuana use both in and outside the workplace. Private sector employers may require that their employees consent to drug testing as a condition of employment. Public employers may also require drug testing subject to the same Constitutional requirements that impacted them prior to the enactment of I-692.

Qualified patients who are entered into the medical marijuana database may legally purchase sales-tax free any combination of the following:

- Three (3) ounces of usable marijuana
- Forty-eight (48) ounces of marijuana-infused product in solid form
- Two hundred sixteen ounces (216) of marijuana-infused product in liquid form or
- Twenty-one (21) grams of marijuana concentrate

Current medical aid rules, [WAC 296-20-03010](#), provides that L&I considers payment for drugs when approved by the FDA for the condition prescribed or is prescribed for off label use for a drug supported by published scientific evidence of safety and effectiveness. Since the FDA has not approved medical marijuana for any disease or condition, coverage decisions will be

dependent upon L&I's and the courts' interpretation of [WAC 296-20-02704](#) which is the directors criteria used to make a medical coverage decisions. There is room here for good law to be made by administrative regulation, or through the court system.

Worker's compensation claims are subject to denial, but not automatically denied when an injured worker tests positive for THC; and it is unlikely to make any difference in the analysis when medical vs recreational use is considered. However, there is one theory that will support claim rejection however, and that is excess intoxication, where the level of intoxication is so great the workers have effectively removed themselves from the course and scope of their employment.

Note that while MUMA permits the use of medical marijuana, the Act holds no job protections. See, e.g., *Roe v. TeleTech Customer Care Mgmt*, 171 Wn.2d 736 (2011) (plaintiff authorized to use marijuana medicinally under MUMA had her job offer rescinded after testing positive for marijuana; court held MUMA did not protect employees from discharge for medicinal use.)

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?

In 2012, Washington State's Initiative I-502 went into effect, decriminalizing certain cultivation, sale, possession and use of marijuana. RCW 69.50 et. seq. However, I-502 did not legalize marijuana use in the workplace and is silent on how the workplace may be impacted. In that regard, employers retain authority to enact drug policies prohibiting marijuana use both in and outside the workplace. Private sector employers may require that their employees consent to drug testing as a condition of employment. Public employers may also require drug testing subject to the same Constitutional requirements that impacted them prior to the enactment of I-502.

Any adult aged 21 or older may purchase any combination of the following from a licensed retail marijuana store:

- One (1) ounce of usable marijuana
- Sixteen (16) ounces of marijuana-infused product in solid form
- Seventy-two (72) ounces of marijuana-infused product in liquid form, or
- Seven (7) grams of marijuana concentrate

For any further questions, concerns or advice, please contact your local ALFA counsel contact:

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