

WYOMING

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

Wyoming Statutes § 27-14-101, et seq., proscribes the Wyoming Workers' Compensation Act (hereinafter, "the Act.").

SCOPE OF COMPENSABILITY

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

Under the Act, covered employees are "any person engaged in any extrahazardous employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written, and includes student learners engaged in any extrahazardous employment, legally employed minors, aliens authorized to work by the United States department of justice, office of citizenship and immigration services, and aliens whom the employer reasonably believes, at the date of hire and the date of injury based upon documentation in the employer's possession, to be authorized to work by the United States department of justice, office of citizenship and immigration services." Wyo. Stat. § 27-14-102(a)(vii). Notably, this statute was amended in 2021 to specifically include the "student learners" provision.

The Act specifically excludes from the definition of employee: 1) any individual whose employment is determined to be causal labor; 2) sole proprietors or partners of business partnerships (unless coverage is elected); 3) an officer of a corporation (unless coverage is elected); 4) independent contractors; 5) a spouse or dependent of an employer living in the employer's household; 6) a professional athlete¹; 7) an employee of a private household; 8) a private duty nurse engaged by a private party; 9) an employee of the federal government; 10) any volunteer²; 11) any adult or juvenile prisoner or probationer; 12) any elected or appointed public official of any governmental board or commission, except for a duly elected or appointed county officer; 13) any owner and operator of a motor vehicle which is leased or contracted with driver to a for-hire common or contract carrier; 14) any member of a limited liability company (unless coverage is elected); 15) any foster parent providing foster care services for the department of family services or for a certified child placement agency; 16) any individual providing child day care or babysitting services, whose wages are subsidized or paid in whole or in part by the Wyoming department of family services; and 17) any responsible broker, associate

¹ Team owners are required to obtain coverage for professional athletes under a different section of the act. Wyo. Stat. §§ 27-14-102(a)(xxix) and 27-14-108(q).

² Unless covered pursuant to Wyo. Stat. § 27-14-108(e), which covers an enumerated number of volunteers, including but not limited to firefighters, search and rescue personnel, search pilots, law enforcement personnel, etc.

broker or salesperson licensed under the Real Estate License Act, who receives compensation for their services. Wyo. Stat. § 27-14-102(a)(vii)(A)-(S).

Those working in extrahazardous industries must be covered by workers' compensation insurance. Wyo. Stat. § 27-14-108(a). The "extra hazardous" industrial occupations enumerated by the Act include: agriculture, mining, utilities, construction, manufacturing, wholesale trade, retail trade, transportation and warehousing, information, real estate (including rental and leasing), administrative and support and waste management and remediation services, educational services, health care and social services, arts entertainment and recreation, accommodation and food services, other services (including repair and maintenance, personal and laundry services, dry-cleaning, and pet care), and public administration, including human resource and environmental quality programs. Wyo. Stat. § 27-14-108(a)(ii)(A)-(S).

The Act also specifically enumerates the instances in which governmental employees are covered by the Act. Wyo. Stat. § 27-14-108(d).

Further, any employer can elect to cover all of its employees, regardless of industrial classification, and any corporation or limited liability company may elect to obtain coverage for its corporate officers or limited liability company members. Wyo. Stat. § 27-14-108(j)-(k).

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

A statutory employer is any person or entity that employs an employee engaged in any extrahazardous occupation enumerated in the Act, or electing to cover an employee under Wyo. Stat. § 27-14-108(j) or (k), and at least one of whose employees is described in Wyo. Stat. § 27-14-301. See Wyo. Stat. § 27-14-102(a)(viii).

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

A. Traumatic or "single occurrence" claims.

Any injury arising out of and in the scope of employment is compensable. "Injury" "means any harmful change in the human organism other than normal aging and includes damage to or loss of any artificial replacement and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence and which

subjects the employee to extrahazardous duties incident to the business.” Wyo. Stat. § 27-14-102(a)(xi).

The employee has the burden of establishing all essential elements of the claim by a preponderance of the evidence. Coronary conditions and hernias have specific burden of proof requirements. Wyo. Stat. §§ 27-14-603(b), 27-14-603(c). Mental injury claims are also subject to special evidentiary requirements, including proof that the mental injury was caused by, and occurred simultaneously with or subsequent to, a compensable physical injury. See Wyo. Stat. § 27-14-102(a)(xi)(J).

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

The employee has a greater burden of proof in proving compensability of "injuries which occur over a substantial period of time." Wyo. Stat. § 27-14-603(a). The employee must prove by competent medical authority that the claim arose out of and in the course of the employment. Additionally, the employee must prove by a preponderance of the evidence that there is a causal connection between the employment and the injury, that the injury followed as a natural incidence of the work as a result of the employment, that the injury can be fairly traced to the employment as a proximate cause, that the injury does not come from a hazard to which the employee was equally exposed outside of the employment, and that the injury is incidental to the character of the business and not independent of the relation of employer and employee. Wyo. Stat. § 27-14-603(a)(i)-(v).

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

Excluded claims include claims involving: (1) any illness or communicable diseases unless the risk of contracting the illness or disease is increased by the nature of the employment³; (2) injuries due to intoxication; (3) the employee's willful intention to injure or kill himself or herself or another; (4) injuries due solely to the "culpable negligence" of the employee; (5) injuries sustained in travel to or from the employment unless the employee is reimbursed for travel expenses or is transported by the employer's vehicle; (6) injuries sustained by a prisoner during or any harm resulting from any illegal activity engaged in by prisoners held under custody; (7) any pre-existing injury or condition; (8) any injury related to the natural aging process or from the normal activities of day-to-day living; (9) injuries sustained while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did

³ The legislature included a specific amendment to this provision amidst the COVID-19 pandemic, holding that for the time period of 12/1/2020-3/31/22 (unless extended by the legislature), for any covered employee who contracts COVID-19, it is presumed that the risk of contracting the illness or disease was increased by the nature of the employment.

not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer; and (10) any mental injury, unless it is caused by a compensable physical injury, it occurs subsequent to or simultaneously with the physical injury, and it is proved by clear and convincing evidence. Wyo. Stat. § 27-14-102(a)(xi)(A)-(J).

6. What psychiatric claims or treatments are compensable?

The definition of “injury” under the Wyoming Workers’ Compensation Act excludes mental injuries, unless the mental injury is caused by a compensable physical injury, it occurs subsequent to or simultaneously with the physical injury, it is diagnosed by a licensed psychiatrist or licensed clinical psychologist meeting criteria established in the most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association, and meets certain other specified requirements. Wyo. Stat. § 27-14-102(a)(xi)(J). In no event may benefits for compensable mental injuries be paid for more than thirty-six (36) months after the injured employee’s physical injury has healed to the point that it is not reasonably expected to substantially improve. *Id.*

7. What are the applicable statutes of limitations?

For an injury that is the result of a single occurrence, an application for benefits must be made within one year after the accident occurs. Wyo. Stat. § 27-14-503(a). For injuries not readily apparent, the claim must be filed within one year after the employee discovers the injury. *Id.* For an injury which occurs over a substantial period of time, the claim must be filed within one year after the diagnosis of injury is first indicated to the employee, or within three years from the last date of injurious exposure, whichever occurs last. Wyo. Stat. § 27-14-503(b). However, the three-year statute of limitations does not apply to injuries that result from exposure to ionizing radiation. *Id.*

The statutes of limitation may be tolled if the injured employee is mentally incompetent or a minor, or where death results from the injury and any of his dependents are mentally incompetent or minors. Wyo. Stat. Ann. § 27-14-505.

A claim for increase or modification of benefits must be made within four years from the date of the last payment of benefits. Wyo. Stat. § 27-14-605.

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

An employee must notify the employer of the occurrence and general nature of the accident as soon as is practicable, but no later than 72 hours after the injury becomes apparent. Wyo. Stat. § 27-14-502(a). In addition, the injured employee is obligated to, within ten days after the injury becomes apparent, file an injury report with his or her employer as well as the Division of Workers' Safety and Compensation. *Id.*

Failure to file such reports creates a rebuttable presumption that the claim shall be denied. Wyo. Stat. § 27-14-502(c). However, “[t]he presumption may be rebutted if the employee establishes by clear and convincing evidence a lack of prejudice to the employer or division in investigating the injury and in monitoring medical treatment.” *Id.*

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Recovery under workers’ compensation is barred if the injury arose from the "employee's willful intention to injure or kill himself." Wyo. Stat. § 27-14-102(a)(xi)(B)(II).

B. Willful misconduct, "horseplay," etc.

Recovery is barred if the injury resulted from the "employee's willful intention to injure or kill himself or another," or was "due solely to the culpable negligence of the injured employee." *Id.*; *See, e.g., Shepherd of Valley Care Center, v. Fulmer*, 269 P.3d 432 (Wyo. 2012). “Culpable negligence” means “willful and serious misconduct.” *Id.* at 438. To be culpable negligence, “an act must be intentional, unreasonable and taken in disregard of a known or obvious risk so great as to make it probable injury will follow.” *Id.* It requires “an extreme departure from ordinary care in a situation where a high degree of danger is apparent.” *Id.*

Additionally, if an employee knowingly engages or persists in an unsanitary or injurious practice which tends to imperil or retard his recovery, or if the employee refuses to submit to medical or surgical treatment reasonably essential to promote recovery, then the employee forfeits all right to compensation. Wyo. Stat. § 27-14-407.

Any injury sustained by a prisoner during or any harm resulting from any illegal activity engaged in by the prisoner held under custody is not compensable. Wyo. Stat. Ann. § 27-14-102(a)(xi)(E).

C. Injuries involving drugs and/or alcohol.

Recovery is barred if the injury was caused by the employee being "intoxicated or under the influence of a controlled substance, or both, except any prescribed drug taken as direct by an authorized health care provider." Wyo. Stat. § 27-14-102(a)(xi)(B)(I).

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

A misrepresentation or false statement made for the purpose of receiving a workers' compensation payment is a criminal offense. Wyo. Stat. § 27-14-510(a)(i)-(ii). Specifically, this applies to "any person who knowingly makes, authorizes or permits any misrepresentation or false statement to be made for the purpose of him or another person receiving payment of any kind under this act." *Id.* Additionally, employers are subject to criminal penalties for "mak[ing] a false statement in a payroll report or reports resulting in the avoidance of or reduction in the employer's premium obligation," or "mak[ing] a false statement in an injury report with the intention of denying a worker benefits due." Wyo. Stat. § 27-14-510(b)-(c). An employer, employee, or other person making a false statement as set forth in the statute is guilty of "(i) A misdemeanor punishable by a fine of not more than seven hundred fifty dollars (\$750.00), imprisonment for not more than six (6) months, or both, if the value of the payment is less than five hundred dollars (\$500.00) (ii) A felony punishable by a fine of not more than ten thousand dollars (\$10,000.00), imprisonment for not more than ten (10) years, or both, if the value of the payment is five hundred dollars (\$500.00) or more. *Id.* Additionally, the Wyoming Attorney General can bring a civil action to recover benefits paid due to mistake, misrepresentation, or fraud. Wyo. Stat. § 27-14-511.

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

No section of the Act specifically addresses falsification of employment records regarding medical history. However, a misrepresentation or false statement made for the purpose of receiving a workers' compensation payment is a criminal offense. See Answer to No. 10, *supra*.

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

An employee cannot recover for injuries sustained while engaged in recreational or social events

under circumstances where the employee was under no duty to attend the recreational or social event, and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed. Wyo. Stat. § 27-14-102(a)(xi)(H). The Wyoming Supreme Court has used the theory of the "second compensable injury" to make adverse findings to this particular exception. *See, e.g., Alvarez v. State ex rel. Wyoming Workers' Safety & Comp. Div.*, 164 P.3d 548 (Wyo. 2007).

13. Are injuries by co-employees compensable?

Injuries incurred as a result of actions by co-employees are compensable if they arise out of and in the course of employment. However, the exclusive remedy provision of the Wyoming Workers' Compensation Act does not include immunity for co-employees who "intentionally act to cause physical harm or injury to the injured employee." *See* Wyo. Stat. § 27-14-104(a) and Wyo. Stat. § 27-14-105(a). The Wyoming Supreme Court has interpreted "intentionally act" to mean willful and wanton misconduct. *Vandre v. Kuznia*, 310 P.3d 919, 922 (Wyo. 2013). "Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another." *Id.* It essentially means that co-employee "acted with a state of mind approaching intent to do harm or committed an act of unreasonable character in disregard of known or obvious risks so great as to make it highly probable that harm would follow." *Id.*

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

Unclear. Recovery is allowed for any injury "arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence...." Wyo. Stat. § 27-14-102(a)(xi). An employee covered by the act and injured while engaged in his work is not deprived of coverage if the injury was sustained under circumstances creating a legal liability in some person other than the employer. Wyo. Stat. § 27-14-105(a). If the employee recovers from a liable third party, then the state is to be reimbursed for all payments made, or to be made, on behalf of the employee but not to exceed one-third of the total proceeds of recovery alleged in the third-party action. *Id.* The state's recovery is also reduced pro rata for attorney fees and costs. *Id.*

BENEFITS

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

The Act does not contemplate an average weekly wage. Rather, the Act provides that benefits are paid pursuant to the injured worker's actual monthly earnings at the time of injury. See Wyo. Stat. § 27-14-403. The Act's implementing Rules and Regulations define actual monthly earnings as the "[i]ncome the employee was receiving from all employment and which is lost due to the injury." Average monthly earnings includes 1) actual value of board, lodging, rent or housing and per diem expenses; 2) commissions and bonuses; 3) average amount of overtime received in the six months prior to the injury; 4) gratuities received in the course of employment; 5) wages earned from employment at more than one occupation; and 6) unemployment insurance benefits. *Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*, Chapter 1 (4)(d)(i)(A)-(F).

Average monthly wage does not include severance pay, the cash value of health, medical, life or other insurance benefits, social security benefits, passive investment income, any adjustments to the employee's income made after the date of injury, or the amounts reimbursed to the employee for any special expenses incurred by the employee in the nature of the employment. *Id.*

The state determines the statewide monthly wage, based on unemployment insurance commission information and other available statistics. Wyo. Stat. § 27-14-802(b).

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

Temporary total disability benefits are paid monthly and are calculated at either "thirty percent (30%) of the statewide average monthly wage or two-thirds (2/3) of the injured employee's actual monthly earnings at the time of injury, whichever is greater," but not to exceed "the lesser of one hundred percent (100%) of the injured employee's actual monthly earnings at the time of the injury or the statewide average monthly wage for the twelve (12) month period immediately preceding the quarterly period in which the injury occurred." Wyo. Stat. § 27-14-403(c); See also, Chapter 7, Section 1(a)(i), *Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*.

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

Wyoming's workers compensation system is a state-run system and benefits are paid as they are processed. Thus, there is no statutory guideline for payment within a certain period of time, because the state fund is the payor. However, the Division has 15 days to review an employee's entitlement to benefits once an injury report or claim for compensation is filed. Following this initial review, the Division must issue a final determination approving or denying the claim. Wyo. Stat. § 27-14-601(k)(i). If the claim is approved, the Division must determine the amount of the compensation award and then notify the employee. Wyo. Stat. § 27-14-601(d). If the Division's determination of compensability cannot be approved without additional information, the Division has 45 days to issue its final determination from the date it issues its request for additional information. Wyo. Stat. § 27-14-601(k)(ii).

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 out eight days before recovering benefits for the first three days. Wyo. Stat. §27-14-404(d).

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

Temporary total disability benefits cease when the employee's recovery is complete, to the extent that his or her earning capacity is substantially restored, or the employee has an ascertainable loss and qualifies for permanent disability. Wyo. Stat. § 27-14-404(c). Additionally, temporary total disability benefits will not be paid if, inter alia, an employee or his personal representative fails to file a claim for benefits within thirty 30 days after the first day immediately succeeding the first 30 days of any "certified" period of temporary total disability. Wyo. Stat. § 27-14-404(d)(i). Only a health care provider may "certify" temporary total disability, and the employer, employee and division may request recertification of the period of total temporary disability at interval of not less than sixty (60) days, except in extraordinary circumstances in which case the division may reconsider recertification at any time. Wyo. Stat. § 27-14-404(g). Temporary total disability benefits can also be suspended if the employee fails to appear and cooperate at an appointment with the employee's health care provider, or one scheduled by the Division. Chapter 7, Section 2(a), Wyoming Workers' Safety and Compensation Rules, Regulations and Fee Schedules.

The period for receiving a total temporary disability award for injuries resulting from anyone (1) incident or accident shall not exceed a cumulative period of twenty-four (24) months. Wyo. Stat.

§ 27-14-404(a). The Division may award additional benefits beyond this limitation pursuant to its rules and regulations and its discretion “in the event of extraordinary circumstances.” *Id.* An additional award of total temporary disability benefits in extraordinary circumstances may be awarded if the claimant establishes by clear and convincing evidence that they 1) remain totally disabled; 2) have not recovered to the extent so as to return to gainful employment; 3) reasonably expect to return to gainful employment within 12 months following the date of the first TTD claim after the expiration of the 24-month period; 4) do not have an ascertainable loss which would qualify for benefits under Wyo. Stat. § 27-14-405 or 406 and; 6) have taken reasonable measures to facilitate recovery. Chapter 7, Section 2(b)(i)(A-E), Wyoming Workers' Safety and Compensation Rules, Regulations and Fee Schedules.

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

There are no provisions in the Statute or Rules of Procedure providing for crediting the amount of temporary total disability paid toward the amount of entitled permanent partial disability benefits.

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

An employee incurring permanent disfigurement to the face or head that affects earning capacity or the ability to secure gainful employment receives an additional award, to not exceed six (6) months of compensation payable as provided in Wyo. Stat. § 27-14-403(c). *See* Wyo. Stat. § 27-14-405(k).

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?

Permanent partial disability benefits are calculated on the basis of two-thirds of a state-wide average monthly wage for the 12-month period immediately preceding the quarterly period in which the injury occurred. Partial disability benefits are calculated as a portion of the injured worker's permanent total disability rating would be. *See* Answer to 22B. *See also* Chapter 7, Section 1 of the *Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*.

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

The Act recognizes two types of permanent partial awards, and specifies formulas for these awards. The amendments passed in 1994 replaced what was formerly a permanent partial disability award that had both a physical component as well as a vocational or loss of earnings component. Different benefit schedules are applicable for injuries occurring, or benefits awarded, prior to July 1, 1994.

Permanent Partial Impairment

The permanent partial impairment award is calculated by a licensed physician. Wyo. Stat. § 27-14-405(g). The physician uses the most recent edition of the AMA Guide to the Evaluation of Permanent Impairment to rate the injury. *Id.* The award is to be paid monthly at two-thirds (2/3) of the state average monthly wage for the twelve-month period immediately preceding the quarterly period in which the injury occurred. Wyo. Stat. § 27-14-403(c). The award is paid for the number of months determined by multiplying the percentage of impairment by sixty (60) months. Wyo. Stat. § 27-14-405(g). There is no longer a lengthy list of body parts with a corresponding schedule.

Permanent Partial Disability

An employee awarded permanent partial impairment benefits may also apply for either permanent partial disability benefits or vocational rehabilitation. Permanent partial disability benefits appear to be the legislature's response to the previous award for loss of earnings. *See Mahaffey v. State ex rel. Wyoming Workers' Safety and Compensation Division*, 249 P.3d 234, 237-38 (Wyo. 2011). The formula for the award is based in part upon factors that the Wyoming Supreme Court had stated should be considered in the former loss of earnings component of a permanent partial disability award. *Id.* To qualify for permanent partial disability benefits, an employee must be, because of the injury, unable to return to employment at a wage that is at least ninety-five percent (95) of the monthly gross earnings the employee was earning at the time of injury, and must have actively sought suitable work, considering the employee's health, education, training and experience. Wyo. Stat. § 27-14-405(h)(i)-(iii). Permanent partial disability benefits depend upon what percentage of the state average monthly wage the employee's actual monthly earnings are. The award is then based on either a percentage of the employee's actual monthly earnings or the state average monthly wage. *See* Wyo. Stat. § 27-14-403(c). The number of months available for permanent partial disability benefits depends on factors such as age, education, and the number of occupations previously worked. Wyo. Stat. §

27-14-403(c); Wyo. Stat. § 27-14-405(j)(i)-(v).

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

An employee may apply to the division to participate in a vocational rehabilitation program if a permanent partial impairment award has been made, or is at least reasonably expected to be made, and the compensable injury will prevent the employee from returning to any occupation for which he or she had previous training or experience and in which the employee was gainfully employed at any time during the three-year period before the injury. *See* Wyo. Stat. § 27-14-408. An individual rehabilitation plan must not exceed five years or a total cost of \$30,000, absent extenuating circumstances. *See generally* Wyo. Stat. § 27-14-408(e)(ii).

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

Permanent total disability benefits are calculated as provided in Wyo. Stat. § 27-14-403(c). Employees are classified by what percentage of the statewide average monthly wage their actual monthly earnings are. The award is paid for 80 months and is a percentage of either the employee's actual monthly earnings or the statewide average monthly wage. Wyo. Stat. § 27-14-406(a). The maximum rate is the statewide average monthly wage. The minimum depends on the employee's actual earnings. The permanent total disability award constitutes the exclusive benefit for both the physical impairment and the economic loss resulting from an injury, including loss of earnings, extra expenses associated with the injury and vocational rehabilitation. *Id.*

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

A. Funeral expenses.

The expenses must be paid up to \$5,000, with an additional \$5,000 to cover related expenses. Wyo. Stat. § 27-14-403(e)(ii).

B. Dependency claims.

Dependent children are entitled to \$250.00 per month “until the child dies or reaches the age of twenty-one (21), whichever occurs first, or if the child is physically or mentally incapacitated until the child dies unless qualified for and receiving benefits under the Medicaid home and community-based waiver program.” Wyo. Stat. § 27-14-403(b). If “the child is enrolled or preregistered in a post-secondary educational institution including a four-year college, community college or private trade school,” the child shall receive the amount until age 25. *Id.* This amount is to be adjusted annually for inflation by the Division. *Id.*

A surviving spouse is entitled to receive monthly payments for 100 months on the same basis that the employee would have had for permanent disability. *See* Wyo. Stat. § 27-14-403(e)(iii). If the surviving spouse dies before the award is entirely paid or if there is no surviving spouse, then the unpaid balance is paid to surviving dependent children of the employee. *Id.*

Surviving parents (or a parent) are entitled to receive payments for 60 months on the same basis that the employee would have for permanent disability if the employee died with no surviving spouse or dependent children and the parent or parents received one-half of their financial support from the employee at the time of the injury. Wyo. Stat. § 27-14-403(e)(v).

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

The Division may apportion the benefit charge to the employer's general industrial classification when an employee has suffered successive compensable injuries, but no single employer can be determined to be singularly chargeable. Wyo. Stat. § 27-14-603(e). *See also* Wyo. Stat. § 27-14-201(d).

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

An application can be made within four years from the date of the last payment for additional medical and disability benefits on the ground of increase or decrease of incapacity due solely to the injury, or for mistake or fraud. *See* Wyo. Stat. § 27-14-605.

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

Hearing examiners may appoint attorneys to injured employees in contested cases, whose attorney fees are paid by the state. Depending upon the merits of the claim, the hearing

examiner will designate whether attorneys' fees should be charged against the employer's experience rating in the State Fund, or whether payment of the attorney's fees will come out of a general fund. Wyo. Stat. § 27-14-602(d).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Employers and joint employers who contribute to the state fund and who remain current in their premium payments possess immunity from civil actions. See Wyo. Stat. § 27-14-104. Currently, co-employees also enjoy immunity unless their conduct causing injury is intentional (see answer 13). For a discussion of the standards for co-employee suits, see *Vandre v. Kuznia*, 310 P.3d 919 (Wyo. 2013). Additionally, the Director and the Attorney General must be served by certified mail return receipt requested with a copy of the complaint in any suit against a third party. Wyo. Stat. § 27-14-105(b).

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

Co-employees do not enjoy immunity and can be sued if they intentionally act to cause physical harm or injury. Wyo. Stat. § 27-14-104(a). See Section 13, *supra*.

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

There is no statutory provision proscribing penalties against an employer for unsafe working conditions. However, in *McKenna v. Wyoming Sawmills, Inc.*, 816 P.2d 1303 (Wyo. 1991), the Court held that OSHA violations do not remove the protection afforded employers under the Act.

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

There are no special or additional penalties for injuries to a legally employed minor. Wyo. Stat. § 27-14-102(a)(vii). A minor is deemed to be free of any legal disability for purposes of the Act.

Wyo. Stat. § 27-14-106.

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

There is no such exposure because the state is the only insurer.

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

In *Griess v. Consolidated Freightways Corp.*, 776 P.2d 752, 754 (Wyo. 1989), the Wyoming Supreme Court held that firing an employee for filing a workers' compensation claim violated public policy and was actionable. However, the Wyoming Supreme Court has affirmed a dismissal of a plaintiff's claim for wrongful termination, where the only evidence the plaintiff presented in support of her claim that she was wrongfully discharged as a result of filing a workers' compensation claim was the temporal proximity of her claim and her termination. *Cardwell v. Am. Linen Supp.*, 843 P.2d 596 (Wyo. 1992).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

An employee may bring an action against a third person for causing an injury, however, the Workers' Compensation Fund "is entitled to be reimbursed for all payments made, or to be made, to or on behalf of the employee under th[e] act but not to exceed one-third (1/3) of the total proceeds of the recovery[.]" Wyo. Stat. § 27-14-105(a).

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

Co-employees can be sued if they intentionally act to cause physical harm or injury. Wyo. Stat. § 27-14-104(a). See Section 13, *supra*.

36. Is subrogation available?

Subrogation rights and further rights to reimbursement have been limited. If an employee

recovers from a third party, the State is entitled to be reimbursed for all payments it has made, but its reimbursement must not exceed one-third of the employee's total recovery. Wyo. Stat. § 27-14-105.

MEDICALS

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

There are no time limit provisions in the Statute or Rules of Procedure for payment of medical bills. Additionally, because Wyoming utilizes a state fund for payment of workers' compensation benefits, there are no penalties for late payment of medical bills. However, reimbursements for medical services must be deemed reasonable, necessary and directly related to the work-related injury. *See, Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division, Chapter 7, Section 3.*

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

An employee's health care provider may be required to testify before a hearing examiner or court and provide written reports and attend depositions in his or her professional capacity. Failure to comply will forfeit his or her remuneration for services rendered. The law of privileged communication between health care provider and patient does not apply. Wyo. Stat. § 27-14-610.

An employee's filing of a report of accident is considered a release of information pertaining to the injury. Upon notice to the employee, a medical care provider is authorized to release medical records pertaining to the injury to the clerk of court, the division, or the employer. Wyo. Stat. § 27-14-502(d).

If the Administrator has reason to believe that an employee, employer, health care provider or any representative thereof has engaged in any activity in violation of the Act, the Administrator can conduct an investigation to determine if the Act has been violated and can conduct discovery pursuant to the Wyoming Rules of Civil Procedure. The administrator may examine the books, accounts, payrolls or business operations of any employer to secure any information necessary for the investigation and administration of the Act at any reasonable time on twenty-four (24) hours notice but excluding Sundays and holidays unless waived by the employer, either in person or through any authorized inspector, agent or deputy. *See Wyo. Stat.*

§ 27-14-803.

If the employer, employee, health care provider or any representative thereof refuses to cooperate and assist discovery by the Administrator, the Attorney General may, at the request of the Administrator and upon reasonable notice to all parties, apply to the district court for a subpoena or for an order compelling compliance. *Id.*

Finally, The Wyoming Rules of Civil Procedure shall apply and be followed in hearings before the Division, to the extent not inconsistent with these rules. *Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*, Chapter 1, Section 4(j). This allows parties typical discovery tools to gain access to medical records.

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

A. Claimant's choice of physician.

An employer or the Division may designate health care providers to provide non-emergency medical attention. Wyo. Stat. § 27-14-401(f). However, an employee may select any other health care provider. *Id.* An employee wishing to change a treating health care provider while under treatment must file a written request with the Division stating all reasons for the change and the intended new health care provider. *See, Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*, Chapter 7, Section 3(a)(ii).

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

If the employee selects a health care provider other than the one selected by the employer or the Division, the employer or the Division may require a second opinion by the health care provider of their choice. Wyo. Stat. § 27-14-401(f). "The second opinion may include an independent medical evaluation, a functional capacity exam or a review of the diagnosis, prognosis, treatment and fees of the employee's health care provider. The independent medical evaluation, a functional capacity exam or the review by the employer's health care provider shall be paid for by the employer and the evaluation, a functional capacity exam or review by the division's health care provider shall be paid from the worker's compensation account." *Id.*

In addition, in any contested case proceeding, the hearing examiner may a duly qualified

impartial health care provider to examine the employee and give testimony. Wyo. Stat. 27-14-604(a). The employer or employee may, at his own expense, also designate a qualified health care provider who may be present at the examination of the employee and give testimony at later hearings. *Id.*

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

The standard generally is that reasonable and necessary health care, which is required as a result of compensable injuries, must be provided. *See* Wyo. Stat. § 27-14-401(a); Wyo. Stat. § 27-14-102(a)(xii); *Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*, Chapter 7, Section 3(a)(i). In addition, reimbursements for travel in obtaining medical and hospital care will not be paid for travel to a location within 10 miles except by ambulance, or for travel other than that necessary to obtain the closest available medical or hospital care needed by the employee. Wyo. Stat. § 27-14-401(d).

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

Artificial replacement is defined by statute and is generally covered for essential items. *See* Wyo. Stat. § 27-14-102(a)(i), Wyo. Stat. § 27-14-402.

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

Only one automobile at a time may be remodeled and certain modifications may be made to the employee's primary residence. Wyo. Stat. § 27-14-102(a)(i)(A)-(B).

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

Guidelines and fee schedules are published within the Workers' Compensation Division, Rules, Regulations and Fee Schedules. *See, Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*, Chapter 9. These fees are promulgated under authority granted by the Act. Wyo. Stat. § 27-14-802(a).

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

The Division of Workers' Safety and Compensation assigns "case analysts" to oversee cases. The case analyst may, in essence, coordinate managed care.

PRACTICE/PROCEDURE

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

An initial review of entitlement to benefits will be made by the Division within fifteen (15) days after the accident report or claim is filed. The Division issues a final determination or a request for additional information at that time. Wyo. Stat. § 27-14-601(k)(i). Any interested party may request a hearing before a hearing examiner on the Division's final determination by filing a written request for hearing with the Division within fifteen (15) days after the final determination notice is mailed. Wyo. Stat. § 27-14-601(k)(iv).

Upon receipt of a request for hearing, the Division will refer the matter to the appropriate hearing authority. A hearing examiner designated by the Office of Administrative Hearings conducts contested cases. *See generally* Wyo. Stat. §§ 27-14-601, 27-14-602. Medically contested cases may be referred to a medical hearing panel, or, by agreement of the parties, the hearing examiner may transfer a medically contested case to a medical hearing panel or seek the advice of the medical commission. Wyo. Stat. § 27-14-616(e).

For a list of claims procedures see the *Rules, Regulations, and Fee Schedules of the Wyoming Workers' Safety and Compensation Division*, Chapter 5, Section 4.

46. What is the method of claim adjudication?

A. Administrative level.

Administrative determinations are made by the Division of Workers' Compensation, as outlined in answer 45.

B. Trial court.

The initial objection or "appeal" of the Division's Final Determination is made to The Office of

Administrative Hearings or the Medical Commission, depending on the case. Either way, a formal hearing will be conducted for contested cases. Wyo. Stat. § 27-14-602(a). The hearings are in accordance with the law in effect at the time of the injury, as a small claims hearing or as a contested case hearing, subject to certain statutory criteria. Wyo. Stat. § 27-14-602(b).

C. Appellate.

Decisions of the administrative law judges can be appealed first to the district court, and then directly to the Wyoming Supreme Court, as provided by the Wyoming Administrative Procedure Act. Wyo. Stat. § 27-14-602(b)(iii).

47. What are the requirements for stipulations or settlements?

The Act specifically states that there is no prohibition against the employer or Division from reaching a settlement of up to \$2,500 in any one case without an admission of compensability or that the injury was work-related. Wyo. Stat. § 27-14-601(e).

The Act also sets forth procedures for settlements in third party actions, requiring that before offering settlement to an employee, a third party or its insurer must notify the State of the proposed settlement and give the State the opportunity to object within fifteen (15) days of receipt of the notice. Wyo. Stat. § 27-14-105(b). "If notice of proposed settlement is not provided, the state is entitled to initiate an independent action against the third party or its insurer for all payments made to and any amount reserved for or on behalf of the employee under th[e] act." *Id.* Failure of the attorney for the third party to give notice could result in being reported to the Grievance Committee of the Wyoming State Bar. Wyo. Stat. § 27-14-105(d).

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

Yes. It is considered the better practice to have such closed medical settlements approved by an administrative law judge. However, this subject is not specifically contemplated or proscribed by statute, rule or regulation. It is also noteworthy that the Division is often wary of entering into such settlement, as they may cause future issues (such as potential Medicare complications).

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

As stated in answer 48, this is the best practice. Cases do arise where the state approves a claim which an employer contests. In those cases, it would not seem necessary to have the approval of the state. This area is also not specifically contemplated or proscribed by statute, rule, or regulation.

RISK FINANCE FOR WORKERS' COMPENSATION

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

Wyoming has a state fund as the sole system available to all employers. Employers should be aware that taking part in the state system may be the only method of gaining immunity from suit. Some employers have mistakenly relied upon a private insurance policy that guarantees to employees the same benefits as required under state law. Such a private policy may not grant immunity to the employer.

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

A. For individual entities.

See answer 50.

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

See answer 50.

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

An "employee" covered by the act includes legally employed "aliens authorized to work by the United States department of justice, office of citizenship and immigration services, and aliens whom the employer reasonably believes, at the date of hire and the date of injury based upon documentation in the employer's possession, to be authorized to work by the United States department of justice, office of citizenship and immigration services." Wyo. Stat. § 27-14-

102(a)(vii); *See, e.g., Felix v. State ex rel. Wyoming Workers' Safety & Comp. Div.*, 986 P.2d 161 (Wyo. 1999).

“Illegal aliens” may be entitled to benefits of the Act, if the employer has documentation and a reasonable belief that the employee is authorized to work in the United States, but in fact is not. *See, e.g., Gonzalez v. Reiman Corp.*, 357 P.3d 1157 (Wyo. 2015). However, employers who knowingly hire “illegal aliens” potentially expose themselves to personal liability for work-related injuries and may not be able to claim immunity under the Act.

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

This is unknown; however, it is possible that terrorist acts are covered under the Act as there are no provisions under the Act specifically precluding terrorist acts from coverage.

54. How are workers’ compensation settlements affected by Medicare trusts and liens?

Under Medicare regulations (42 C.F.R. 411.46), Medicare is secondary payer to the payment of workers compensation by a workers compensation carrier or self-insured employer. The obligation to pay medical for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a workers compensation matter if at the time of the settlement the employee meets the following criteria:

- The claimant is currently a Medicare beneficiary and the amount is greater than \$25,000; or
- The claimant has reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement *and* the anticipated settlement amount is greater than \$250,000.

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

Medicare has several options and sanctions, but the enforcement varies for geographical regions

of the country. Consult your ALFA lawyer for the current practice in your state for this evolving area of the law.

Medicare is requiring Medicare set-aside trusts to be established for settlements in which the employee is likely to be qualified for or is receiving Medicare and faces significant medical costs related to the employee's industrial injury in the future. If the trust is not established, Medicare reserves the right to file a claim in the future against all parties involved in the settlement, including the lawyers representing both parties, and the insurance company.

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. See 42 U.S.C. §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).

Medicaid and health insurers have a right to file a claim in civil court against any parties involved in a workers' compensation matter for medical bills which should have been covered under a workers' compensation case.

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

HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462, went into effect on April 14, 2003. The law provides an exception for 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.

HIPAA will apply to workers' compensation cases. Therefore, all parties need to be careful in dealing with medical records in worker's compensation matters.

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

Independent Contractors are expressly excluded from the definition of “employee.” Wyo. Stat. § 27-14-102(a)(vii)(D). “Independent contractor” is defined as an individual who performs services for another individual or entity and (1) is free from control or direction over the details of the performance of services by contract and by fact; (2) represents his services to the public as a self-employed individual or an independent contractor; and (3) may substitute another person to perform his services. Wyo. Stat. § 27-14-102(a)(xxiii).

In *Diamond B Services, Inc.* 120 P.3d 1031 (Wyo. 2005), the Wyoming Supreme Court, citing *Combined Insurance Company of America v. Sinclair*, 584 P.2d 1034, 1043 (Wyo. 1978) and quoting *Lichty v. Model Homes*, 211 P.2d 958, 967 (Wyo. 1949), has held that an independent contractor “is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.”

The overriding consideration in distinguishing between master-servant relationships and employer-independent contractor relationships is the employer’s right to control the means and manner of the work. See e.g., *Singer v. New Tech Engineering L.P.*, 227 P.3d 305, 309 (Wyo. 2010); *Stratman v. Admiral Beverage Corp.* 760 P.2d 974, 980 (Wyo. 1988); *Cline v. State, Dep’t. of Family Services*, 927 P.2d 261, 263 (Wyo. 1996); *Noonan v. Texaco, Inc.*, 713 P.2d 160, 164 (Wyo. 1986).

When an express contract exists between the parties, it is important evidence in defining the relationship, although it is not conclusive of the issue. Other factors which are important to the determination include: the method of payment, the right to terminate the relationship without incurring liability, the furnishing of tools and equipment, the scope of the work, and the control of the premises where the work is to be done. *Singer*, 227 P.3d at 309; *Stratman*, 760 P.2d at 980. Another factor to be considered is whether the worker devotes all of his efforts to the position or if he also performs work for others. *Id.*

With regard to the “method of payment” criterion, an independent contractor usually determines the price of his services and bills for his services on a regular basis. *Singer*, 227 P.3d at 309; *Noonan*, 713 P.2d at 166. On the other hand, when the employer determines the worker’s rate of pay and takes deductions out of his paychecks for federal income taxes, Social Security, and Medicare then a master-servant relationship is indicated. *Id.* Payment of workers’ compensation and unemployment insurance premiums by an employer suggests that the worker is an employee rather than an independent contractor. See *In re: Claims of Naylor*, 723 P.2d 1237, 1240-41 (Wyo. 1986); *In re Reed*, 444 P.2d 329, 330 (Wyo. 1968). Similarly, when a worker is eligible to participate in benefit programs such as retirement or insurance plans, as a result of his association with the employer, it suggests a master-servant relationship exists. *Combined*

Insurance, 584 P.2d at 1043.

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

Wyo. Stat. §27-14-102(a)(xxiv) defines "casual labor" as service of less than two (2) consecutive weeks and not within the normal course of business. Further, § 27-14-102(a)(xxv) defines "temporary service contractor" to be any person, firm, association or corporation conducting a business that employs individuals directly for the purpose of furnishing services of the employed individuals on a temporary basis to others. Wyo. Stat. §27-14-102(a)(xxvi) defines a "temporary worker" to be a worker whose services are furnished to another employer on a temporary basis to substitute for a permanent employee on leave or to meet an emergency or short-term workload.

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

No. However, Wyo. Stat. § 27-14-102 (a)(xi)(D) provides that injury does not include any injury sustained during travel to or from employment unless the employee is reimbursed for travel expenses or is transported by a vehicle of the employer.

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?**

There are no state specific statutory requirements which must be satisfied in order to protect

Medicare's interest when settling the right to medical treatment benefits under a claim. *See also*, Response 54 *supra*.

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

Wyoming does appear to permit medical marijuana as contemplated by Wyo. Stat. § 35-7-1901 et seq. (Supervised Medical Use of Hemp Extracts). However, the Wyoming Workers' Compensation Division issued a Provider Bulletin on December 18, 2013 noting the denial of Marinol for non-malignant pain.

Additionally, there is at least one district court case which has found the use of medical marijuana is not permitted under Wyoming Workers' Compensation. *See, e.g., Tarraferro v. State of Wyoming, ex. rel.*, Doc. No. 176-631, filed in the First Judicial District, County of Laramie, *Opinion and Order on Petition for Review*, filed March 25, 2011. In *Tarraferro*, the court concluded "[t]he Wyoming Supreme Court has recently addressed the issue of medical marijuana and its status in the state of Wyoming. They have said that marijuana is illegal even for medical purposes and that it would be illegal for a physician to prescribe it, even in Colorado." *Id* (citing *Burns v. State*, 246 P.3d 283, 286 (Wyo. 2011)).

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?

Wyoming does not permit the recreational use of marijuana. *See* Wyo. Stat. § 35-7-1014(d)(xiii), List of Controlled Substances. As discussed in response to Questions 62, the state of Wyoming still considers marijuana illegal.

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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