

ARKANSAS

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

Arkansas Code Annotated § 11-9-101 et seq.

In 1993, the Arkansas Legislature enacted significant amendments to the Arkansas Workers’ Compensation Act. Act 796 of 1993 became effective July 1, 1993 and applies to all injuries occurring after July 1, 1993. Ark. Code Ann. § 11-9-103(c).

SCOPE OF COMPENSABILITY

2. Who are covered “employees” for purposes of workers’ compensation?

“Employee” means any person, including a minor, whether lawfully or unlawfully employed under any contract of hire, written or oral, express or implied, but excluding agricultural farm laborers, State employees, one whose employment is casual and not in the course of a trade, business, profession, or occupation of the employer. The Act excludes persons who perform work while incarcerated. The Act also provides that sole proprietors and partners are employees unless they file written notice with the Commission opting out. Any reference to a deceased employee also includes the legal representative, descendants, and other persons to whom compensation may be payable. Ark. Code Ann. § 11-9-102.

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

When a subcontractor fails to secure workers’ compensation insurance, the prime contractor is liable for compensation to the subcontractor’s employees. Any contractor or its insurer who becomes liable for the payment of compensation for an employee of a subcontractor may recover from the subcontractor for liability so incurred. A claim for recovery constitutes a lien against all money due to or to become due the subcontractor by the prime contractor.

There is no coverage for sole proprietors or partners when there is an election for noncoverage. Neither the prime contractor nor its insurer is liable for injuries to the sole proprietor or partner. The prime contractor is still, however, liable for injuries to employees of the sole proprietor or partner. Ark. Code Ann. § 11-9-402.

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 course of the employment is covered. Ark. Code Ann. § 11-9-102(5). The standard of proof is preponderance of the evidence. Ark. Code Ann. § 11-9-704(c), § 11-9-102(5)(E).

An injury is accidental only if it is caused by a specific incident and is identifiable by time and place of occurrence. There are exceptions for: (1) injuries caused by rapid repetitive motion; (2) carpal tunnel syndrome; (3) gradually occurring back injuries; and (4) gradual hearing loss. With regard to such exceptions, however, the injury must be proved by a preponderance of the evidence and the work must be shown to be the major cause of the disability or need for treatment.

In addition to these exceptions, there are three separate statutes which define the requirements for certain types of compensable injuries: mental injury or illness (§ 11-9-113); cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular injury illness or death (§ 11-9-114); hernia (§ 11-9-523).

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

Occupational disease is any disease that results in disability or death and arises out of and in the course of the employment, or naturally follows or unavoidably results from a compensable injury. The disease must be due to the nature of an employment in which the hazards of the disease actually exist, are characteristic thereof, peculiar to the employment and actually incurred in the employment. Ark. Code Ann. § 11-9-601(g). No compensation is payable for any ordinary disease of life to which the general public is exposed. A causal connection between the employment and the occupational disease must be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-601(e). The employer in whose employment the employee was last injuriously exposed is liable for all benefits. Ark. Code Ann. § 11-9-601(f). There is a separate statute covering silicosis and asbestosis. See Ark. Code Ann. § 11-9-602.

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

Claims covered by any federal compensation program are excluded. Ark. Code Ann. § 11-9-102(11)(A)(v). For all injuries occurring after July 1, 1993, stress-induced mental injuries with no accompanying physical injury are not compensable unless the stress was occasioned by a crime of violence. Ark. Code Ann. § 11-9-113.

The Arkansas Act defines certain types of excluded injuries: unprovoked assaults, horseplay (except “innocent victims”), certain recreational and social injuries, injuries which occur at a time when “actual employment services are not being performed,” and injuries substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders. Ark. Code Ann. § 11-9-102(4)(B).

6. What psychiatric claims or treatments are compensable?

Prior to July 1, 1993, all psychiatric claims were compensable so long as there was a causal connection between the injury and the employment. The employee also had to prove that the stress was greater than the day-to-day stress experienced by all employees. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). All treatments were compensable if reasonable and necessary. Ark. Code Ann. § 11-9-508. See answer 5 regarding stress claims.

For conditions arising after July 1, 1993, mental injuries or illness are not compensable unless the condition is caused by physical injury to the employee's body. However, the physical injury limitations do not apply to a victim of crime or violence. Ark. Code Ann. § 11-9-113 (a)(1). Moreover, no mental injury or illness is compensable unless diagnosed by a licensed psychiatrist or psychologist, using a diagnosis consistent with the current issue of the Diagnostic and Statistical Manual of Mental Disorders. Ark. Code Ann. § 11-9-113(a)(2). There is also a twenty-six week limitation on disability benefits associated with psychological injuries. Finally, there is a one-year limitation on death benefits resulting from a mental injury. Ark. Code Ann. § 11-9-113.

7. What are the applicable statutes of limitations?

Compensation for disability for an injury, other than an occupational disease or infection, is barred unless a claim is filed with the Commission within two years from the injury. If, during the two-year period following the filing of the claim, the employee receives no weekly benefits or medical treatment from the injury, the claim is barred. Ark. Code Ann. § 11-9-702(a)(1).

A claim for an injury which is either an occupational disease or occupational infection is barred unless filed within two years from the date of the last injurious exposure. Ark. Code Ann. § 11-9-702(a)(2). A claim for silicosis or asbestosis must be filed within one year after disablement, and the disablement must occur within three years from the last injurious exposure. Ark. Code Ann. § 11-9-702(a)(2)(B). A claim for a disease or condition caused by an exposure to x-rays, radioactive substances, or ionizing radiation, must be filed within two years from the date the condition is made known to an employee following an examination and diagnosis by a doctor. Ark. Code Ann. § 11-9-702(a)(2)(C). Act 796, effective July 1, 1993, defines "date of injury" as the date an injury is caused by an accident.

A claim for compensation on account of death is barred unless filed within two years of the death. Ark. Code Ann. § 11-9-702(a)(3). If within six months after the filing of a claim, and no hearing has been requested, the claim will [upon motion] be dismissed without prejudice until the refiling of the claim within limitations. Ark. Code Ann. § 11-9-702(a)(4). A claim for additional compensation is barred unless filed within one year from the last payment of compensation or two years from the date of the injury, whichever is later. Ark. Code Ann. § 11-9-702(b).

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

An employer is not responsible for a claim until the employee reports the injury to a person or at a place specified by the employer, on a form prescribed by the Commission, unless the employee is rendered unable to do so by the injury. Ark. Code Ann. § 11-9-701(a)(1). The foregoing does not apply when an employee requires emergency medical treatment outside of the employer's normal business hours. In that event, however, the employee must report the injury on the employer's next regular business day. Ark. Code Ann. § 11-9-701(a)(3).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

A claim is barred if the injury or death was substantially occasioned by willful intention of the employee to bring about the injury or death. Ark. Code Ann. § 11-9-401(a)(2).

B. Willful misconduct, “horseplay,” etc.

An injury resulting from horseplay or willful misconduct is not compensable if the employer had no prior knowledge of the conduct, unless the injury is sustained by an innocent party. *Southern Cotton Oil Division v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (1964). See also Ark. Code Ann. § 11-9-102(4)(B)(i).

C. Injuries involving drugs and/or alcohol.

A claim is barred if the injury or death was substantially occasioned by the employee’s intoxication. Ark. Code Ann. § 11-9-102(4)(B)(iv).

Also, the use of prescription drugs in contravention of a physician’s orders may bar a claim. The law also now shifts the burden of proof. If testing reveals the presence of a drug, there is a rebuttable presumption that it caused the injury. Finally, the employee is deemed to have impliedly consented to reasonable and responsible testing for drugs and alcohol. One caveat: The relatively new state law permitting medical marijuana will complicate the intoxication defense. Stay tuned.

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

Any person or entity who willfully and knowingly makes any false statement or representation for the purpose of obtaining benefits or payment, or for the purpose of defeating or wrongfully increasing or decreasing any claim or payment or obtaining or avoiding workers’ compensation coverage, is guilty of a Class D felony. The Act also provides for the establishment within the Arkansas Insurance Department of a workers’ compensation fraud investigation unit. That unit has been given broad powers to investigate and, where appropriate, to refer for prosecution. Ark. Code Ann. § 11-9-106.

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

No compensation will be paid if the employee, at the time of entering into the employment, falsely represented in writing not having previously been disabled, laid off or compensated for an injury. Ark. Code Ann. § 11-9-601(b). False representation of a physical condition in procuring employment will preclude benefits if it is shown that: (1) the employee knowingly and willfully made a false representation as to the condition; (2) the employer relied upon the representation; (3) the reliance was a substantial factor in the hiring decision; and (4) there was a causal connection between the concealed condition and the new injury. *Shippers Transport of Georgia and Travelers Ins. Co. v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). See answer 10.

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

Injuries suffered by an employee while watching, participating in, or going to or coming from recreational activities sponsored in whole or in part by employer are generally not compensable, but there are exceptions where employees are required to participate, there is regular participation or participation incidental to the employment, or recreational facilities are maintained by an employer for its own interest and not merely because of altruistic motives. Ark. Code Ann. § 81-13-1 et seq.; *Woodmansee v. Frank Lyon Co.*, 223 Ark. 222, 265 S.W.2d 521 (1954). Recreational or social activities do not provide the basis for a claimed compensable injury when the activities are determined to be primarily for the “employee’s personal pleasure”. Ark. Code Ann. § 11-9-102(4)(B)(ii).

- 13. **Are injuries by co-employees compensable?**
Yes, if they arise out of and in the course of the employment.
- 14. **Are acts by third parties unrelated to work but committed on the premises, compensable (e.g. “irate paramour” claims)?**

No. *Bagwell v. Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983). See also Ark. Code Ann. § 11-9-102(B)(i).

BENEFITS

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

State average weekly wage is determined by the director of the Department of Labor. Compensation is computed on the average weekly wage earned at the time of the accident and in no case on less than a full-time workweek. Ark. Code Ann. § 11-9-518.

Per diem payments for truckers must be included in calculating their average weekly wage. See *Eckhardt v. Willis Shaw*, 62 Ark. App. 224, 970 S.W.2d 316 (1998).

Where the employee was working on a piece basis, the wage is determined by dividing the earnings by the number of hours required to earn the wages, up to 52 weeks preceding the accident, and by multiplying this wage by the number of hours in a full-time work week. Ark. Code Ann. § 11-9-518(a)(2). Overtime earnings are added by dividing the overtime earnings by the number of weeks worked in the same employment, up to 52 weeks before the accident. Ark. Code § 11-9-518(b).

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

Compensation for temporary/lost time must not exceed two-thirds of the employee’s average weekly wage, up to a statutory maximum. Ark. Code Ann. § 11-9-501(b). The minimum is \$20.00 per week. *Id.* Also, the benefit rates are rounded to the nearest whole dollar, effective January 1, 1994. *Id.* The maximum rate for temporary/lost time benefits changes each year, along with the state average weekly wage. Ark. Code Ann. § 11-9-501. For maximum and minimum rates in recent years, see below:

Total Disability (TTD and PTD)

As of 1/1/23	\$835 (max) and \$20 (min)
As of 1/1/22	\$790 (max) and \$20 (min)
As of 1/1/21	\$736 (max) and \$20 (min)
As of 1/1/20	\$711 (max) and \$20 (min)
As of 1/1/19	\$695 (max) and \$20 (min)
As of 1/1/18	\$673 (max) and \$20 (min)
As of 1/1/17	\$661 (max) and \$20 (min)
As of 1/1/16	\$646 (max) and \$20 (min)
As of 1/1/15	\$629 (max) and \$20 (min)
As of 1/1/14	\$617 (max) and \$20 (min)
As of 1/1/13	\$602 (max) and \$20 (min)

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

The first installment becomes due on the fifteenth day after notice to the employer, and all compensation then accrued must be paid. Subsequent compensation must be paid every two (2) weeks unless the Commission directs otherwise. § 11-9-802(a). For failure to pay benefits, including willful and intentional failure to pay benefits, see Ark. Code Ann. § 11-9-802(b),(c),(e).

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

Compensation is not allowed for the first seven days, excluding the day of injury. If a disability extends beyond that period, compensation commences with the ninth day of disability. If a disability extends for a period of two weeks, compensation is allowed beginning the first day of disability, excluding the day of injury. Ark. Code Ann. § 11-9-501(a).

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

Benefits continue until the healing period ends, when the employee is as far restored as the permanent character of the injury will permit. *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982). Within 30 days after the final payment of compensation, the employer/insurer must send to the Commission a notice, on the prescribed form. This Form (AR-4) must state that the final payment has been made, the total amount of compensation paid, the employee’s name and any other person to whom compensation has been paid, and the date of injury or death. Ark. Code Ann. § 11-9-810(b)(l). If payments are suspended, the employer/insurer must notify the Commission on a prescribed form (AR-4). Ark. Code Ann. § 11-9-810.

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?

Compensation for serious and permanent facial or head disfigurement may be awarded up to \$3,500.00. No award for disfigurement can be entered until 12 months after the injury. Ark. Code Ann. § 11-9-524.

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

The permanent partial disability rate (PPD) shall, in most instances, not exceed seventy-five (75%) of the employee’s total disability rate. Ark. Code Ann. § 11-9-501(d). There are different calculations – narrowing the gap between PPD and TTD – when the total disability rate is less than \$205.35 per week. For maximum and minimum rates in recent years, see below:

Partial Disability (PPD)

As of 1/1/23	\$626 (max) and \$20 (min)
As of 1/1/22	\$593 (max) and \$20 (min)
As of 1/1/21	\$552 (max) and \$20 (min)

As of 1/1/20	\$533 (max) and \$20 (min)
As of 1/1/19	\$521 (max) and \$20 (min)
As of 1/1/18	\$505 (max) and \$20 (min)
As of 1/1/17	\$496 (max) and \$20 (min)
As of 1/1/16	\$485 (max) and \$20 (min)
As of 1/1/15	\$472 (max) and \$20 (min)
As of 1/1/14	\$463 (max) and \$20 (min)
As of 1/1/13	\$452 (max) and \$20 (min)

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

Arm amputated at the elbow, or between the elbow and shoulder.....	244 weeks
Arm amputated between the elbow and wrist	183 weeks
Leg amputated at the knee or between knee and the hip.....	184 weeks
Leg amputated between the knee and the ankle.....	131 weeks
Hand amputated	183 weeks
Thumb amputated.....	73 weeks
First finger amputated.....	43 weeks
Second finger amputated.....	37 weeks
Third finger amputated	24 weeks
Fourth finger amputated.....	19 weeks
Foot amputated.....	131 weeks
Great toe amputated.....	32 weeks
Toe other than great toe amputated.....	11 weeks
Eye enucleated, in which there was useful vision	105 weeks
Loss of hearing of one ear	42 weeks
Loss of hearing of both ears.....	158 weeks
Loss of one testicle	53 weeks
Loss of both testicles	158 weeks

Ark. Code. Ann. § 11-9-521.

Compensation for amputation of a first phalange is one-half (1/2) of the compensation for the amputation of the entire digit. Compensation for amputation of more than one phalange of a digit is the same as for the loss of entire digit. Ark. Code Ann. § 11-9-521(b).

Compensation for amputation or loss of use of two or more digits or one or more phalanges or two or more digits of a hand or foot may be proportioned to the total loss of use of the hand or the foot occasioned thereby but must not exceed the compensation for the total loss of a hand or foot. Ark. Code Ann. § 11-9-521(d). Compensation for the total loss of use of a member is the same as for amputation of the member. Compensation for permanent partial loss or loss of use of a member is the same as for the proportionate loss or loss of use of a member. Ark. Code Ann. § 11-9-521(e)-(f).

Compensation for the permanent loss of 80 percent or more of the vision of the eye is the same as for the loss of an eye. In all cases of permanent loss of vision, the use of corrective lenses may be taken into consideration in evaluating the extent of the loss of vision. Ark. Code Ann. § 11-9-521(c). There is no

impairment when vision can be corrected by eyeglasses. See *Barnard v. B&M Construction*, 52 Ark. App. 61, 915 S.W.2d 296 (1996).

Amputations or permanent total loss of use of a member are to be paid at the total disability rate. Ark. Code Ann. § 11-9-501(d)(2)(B).

The Act provides an impairment rating guide which is included in Commission Rule 34. It outlines criteria for acceptable impairment ratings. Impairment rating must be made using the *AMA Guide to the Evaluation of Permanent Impairment*, 4th Edition.

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

Permanent partial disability not scheduled in Ark. Code Ann. § 11-9-521 is apportioned to the body as a whole, and compensation is paid for the proportional loss of use of the 450 weeks for the body as a whole. Ark. Code Ann. § 11-9-522(a).

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

An employee who is entitled to receive compensation for permanent disability may receive vocational rehabilitation if the Commission finds that a proposed program is reasonable. Ark. Code Ann. § 11-9-505(b)(1). The employer’s responsibility for rehabilitation payments will not exceed 72 weeks of training, regardless of the length of the program. Ark. Code Ann. § 11-9-505(b)(2). An employee must file a request for a rehabilitation program prior to a determination of permanent disability. Ark. Code Ann. § 11-9-505(b)(4).

The Act incorporates a strong return to work incentive. Under Section 505(a)(1), an employer who refuses without reasonable cause to return an injured employee to suitable employment, where such is available, will be ordered to pay the difference between benefits received and the employee’s average weekly wage for up to one year.

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

An employee receives, during permanent total disability, two-thirds of the average weekly wage, subject to the maximum rates for total disability (see answer 16). In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or any two thereof constitutes permanent total disability. In all other cases, permanent total disability is determined in accordance with the facts. Ark. Code Ann. § 11-9-519.

An employer/insurer may annually request certification of continuing total disability. Ark. Code Ann. § 11-9-519(d)(1).

The Act provides for the reduction of payments in certain situations where the employee is paid benefits from public or privately funded retirement pension plans, but there is no reduction for payments made pursuant to the employee’s contributions to such a plan. There is no benefit offset for Social Security retirement benefits. *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998).

Ark. Code Ann. § 11-9-502 provides for a Death and Permanent Disability Trust Fund that covers losses associated with death and permanent disability after the employer and insurer have paid beyond a certain

threshold. For injuries occurring on or after January 1, 2008, the employer or its carrier shall pay weekly benefits for death or permanent total disability “not to exceed three hundred twenty-five (325) times the maximum total disability rate” in effect at the time of the injury. Thus, the maximum exposure for permanent disability changes from year to year.

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

A. Funeral expenses.

The employer pays the actual funeral expenses, up to \$6,000. Ark. Code Ann. § 11-9-527(a).

B. Dependency claims.

Death benefits must not exceed two-thirds of the employee’s average weekly wage. The weekly minimum is \$20.00. Ark. Code Ann. § 11-9-501(a). The maximum rate changes each year.

Compensation for death is paid to those who were wholly and actually dependent upon the deceased employee in the following percentage of the employee’s average weekly wage and in the following order of preference: (1) to the spouse if there is no child, 35 percent and the compensation is paid until death or remarriage; but, the surviving spouse must establish some dependence upon the deceased employee before becoming entitled to benefits; (2) to the spouse if there is a child, the compensation payable under subdivision one of this section and 15 percent on account of each child; (3) to one child if there is no spouse, 50 percent; (4) to more than one child if there is no spouse, 15 percent to each child, and in addition thereto, 35 percent to the children as a class to be divided equally; (5) to the parents, 25 percent each; and (6) to brothers, sisters, grandchildren and grandparents, 15 percent each. Ark. Code Ann. § 11-9-527.

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

Act 1415 of 2007 amended Ark. Code Ann. § 11-9-525 by prohibiting claims for second injuries being made under the provisions of § 11-9-525 after January 1, 2008. In effect, this act has eliminated the Second Injury Fund with regard to claims made after January 1, 2008.

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

The Commission may review any compensation order, award or decision on the ground of a change of physical condition or proof of an assignment of an erroneous wage rate. Ark. Code Ann. § 11-9-713 (a) and *United States Fid. & Guar. Co. v. Brewer*, 52 Ark. App. 214, 916 S.W.2d 773 (1996). Aging and its effects are not considered in determining whether there has been such a change.

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

When the Commission finds that a claim has been controverted, in whole or in part, it will direct that fees for legal services be paid directly to the employee’s attorney as follows: ½ by the employer/insurer in addition to compensation awarded and ½ by the employee or dependent. Attorney fees are allowed only on the amount of compensation (indemnity) controverted and awarded and may not exceed 25% of the indemnity benefits awarded. Ark. Code Ann. § 11-9-715. There is no attorney’s fee on medical benefits whether or not controverted.

If an employee prevails on appeal, his or her attorney is entitled to additional fees at the full Commission and appellate court levels; the additional fee to be paid equally by the employer/insurer and by the employee or dependents. *Id.*

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The workers' compensation remedies are exclusive. Ark. Code Ann. § 11-9-105(a).

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

Where the employer is uninsured, the employee may elect to claim workers' compensation benefits or to sue in tort. Ark. Code Ann. § 11-9-105(b)(1). Also, where the acts of the employer which result in injury to the employee are deemed willful and intentional, the employer loses exclusive remedy protection. Ark. Code Ann. § 11-9-105; *Sontag v. Orbit Value Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984).

In *Stapleton v. MD. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998), the Arkansas Supreme Court ruled that the prime contractor is not the "statutory employer" of the injured worker where the subcontractor paid workers' compensation benefits to the injured employee. In such situations there is no real or quasi-employment relationship between the prime contractor and the injured employee. Hence, the injured worker may recover tort damages against the prime contractor.

Finally, where it is determined that an employee's injuries are not covered by the workers' compensation act, the circuit court has jurisdiction to hear a tort claim against the employer. In *Automated Conveyor Systems v. Hill*, 362 Ark. 215, 208 S.W.3d 136 (2005), the Arkansas Supreme Court ruled that circuit court had jurisdiction to consider a negligence action against the employer where it has previously been determined that the injured worker's injuries were not of a type covered by the Workers' Compensation Act. Jurisdiction to determine jurisdiction, however, rests solely with the Workers' Compensation Commission. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006).

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

Prior law made additional compensation available to employees who established by clear and convincing evidence that an injury or death was caused in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to employee health or safety. That changed in 1993. Enhancement of benefits is no longer available to employees in such circumstances, however penalties may be assessed. Safety violations may trigger various provisions under Ark. Code Ann. § 11-9-409, which pertain to the Health and Safety Division. The Act provides for the establishment of a Workers' Health and Safety Division, to, among other things, make designations of "extra-hazardous employers". Such designations require formulation of remedial plans, inspections, etc. The Act also provides for formal accident prevention services. Ark. Code Ann. § 11-9-409.

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

Where an injury or death is sustained by a minor employed in violation of federal or state statutes pertaining to the minimum age for their employment, compensation or death benefits are doubled. However, the penalty does not apply when the minor misrepresents his or her age, in writing, to the employer. Ark. Code Ann. § 11-9-504.

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

Willful discrimination with regard to hiring or tenure, or any term or condition of work on account of pursuing a compensation claim may result in a Class D felony with a fine up to \$10,000. The same penalties are imposed on employers who obstruct or impede the filing of a claim for benefits. Ark. Code Ann. § 11-9-107.

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

See answer 32. It should be noted that under § 107 the penalty is not paid to the claimant, but rather to the Special Funds Division. Hence, there is little incentive for the claimant to pursue § 107 benefits.

An Arkansas Court of Appeals decision changed this. The Court of Appeals, in *Nestle, USA, Inc. v. Drone*, 2009 Ark. App. 311, 307 S.W.3d 54 (2009) determined that an employee, injured in the course of employment, may under certain circumstances receive enhanced disability benefits for up to one year under Ark. Code Ann. § 11-9-505(a). To receive such enhanced benefits, the claimant must prove that: (1) he or she sustained a compensable injury, (2) suitable employment which is within his physical and mental limitations was available, (3) the employer refused to return the employee to work, and (4) the employer’s refusal was without reasonable cause.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. Ark. Code Ann. § 11-9-410(a)(1)(A).

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

Yes. *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969).

36. Is subrogation available?

Yes and no. An action at law can be commenced by an employee or the employer/insurer to recover damages against a responsible third party. If the action is initiated by the employee, the employer can intervene and assert a statutory lien. See Ark. Code Ann. § 11-9-410. However, in recent years, efforts by the employer/carrier to recover § 410 liens have been an exercise in futility. This is because of the impact of the “made whole” doctrine. In *Franklin v. HealthSource of Arkansas*, 343 Ark. 163 (1997), the Arkansas Supreme Court ruled that a health insurance carrier could not recover in a civil action until the injured plaintiff has been made whole. This decision rendered nugatory a contract between the injured party and his health carrier. This “made whole” requirement was extended to workers’ compensation liens by *General Accident Insurance Company v. Jaynes*, 343 Ark. 143 (2000). Hence, until the injured party is made whole, respondents will not be able to recover under the § 410 lien. Therefore, as a practical matter unless

respondents can persuade claimant to waive the made whole defense, respondents will not be able to participate in a third-party recovery.

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 30 days of receipt. Willful failure to comply may result in a penalty of up to 36%. Ark. Code Ann. § 11-9-802(d)(e). Bills may, however, be audited and, when appropriate, reduced in line with the Commission Medical Cost Containment Program. (Commission Rule 099.30)

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

Medical records are obtained pursuant to a signed release. If the provider does not release records pursuant to a valid release, either party may ask the Commission to issue a subpoena. Commission Rule 099.30 also contains provisions pertaining to the release of medical records.

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

The employer has the right to choose the initial treating physician. Ark. Code Ann. § 11-9-508(a), (c). Change of physician rules are highly technical and depend on the date of injury. Ark. Code Ann. § 11-9-514, § 11-9-508(c)(5).

The claimant has an absolute right once during the claim to petition for a change in treating physician. Ark. Code Ann. § 11-9-514. Though the Commission tends to honor the claimant's request for a specific treating physician, the ultimate decision is made by the Commission (Cost Containment Division). The Commission has found that the "one-time" change of treating physicians has not occurred until the Commission enters an order changing the physician. Where the claimant simply requests a new physician and the employer agrees, the Commission does not recognize that as the one-time change. A word to the wise: be certain that a change order is entered by the Commission.

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

Medical treatment must be reasonable, necessary and authorized. Ark. Code Ann. § 11-9-508; § 11-9-514.

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

All prosthetic devices deemed reasonable and necessary are covered. Ark. Code Ann. § 11-9-508.

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

Vehicle and/or home modifications are covered as medical expenses if they are reasonable and necessary.

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

Yes. The medical fee guide is Commission Rule 30.

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

Pursuant to Ark. Code Ann. § 11-9-508, the Workers’ Compensation Commission adopted Commission Rule 33. It provides for the establishment of a managed care program. Initially, the managed care program was to become mandatory in 1997, but it did not. Due to a number of challenges, managed care in Arkansas remains voluntary. Ark. Code Ann. § 11-9-530. Details concerning the purpose, rules, administration, certification, etc., are provided in Commission Rule 33.

PRACTICE/PROCEDURE

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

Each employer desiring to controvert the right to compensation must file, on or before the fifteenth day following notice of the alleged injury or death, a statement on a form prescribed by the Commission [Form AR-2] asserting that the right to compensation is controverted, the grounds therefor, the names of the employee, employer, and insurer, if any, and the date and place of the alleged injury or death. Failure to file a statement of controversion does not preclude any defense to a claim subsequently filed, nor will the filing of the statement of controversion preclude additional defenses to those contained in it. Ark. Code Ann. § 11-9-803.

46. What is the method of claim adjudication?

A. Administrative level.

An administrative law judge presides over a hearing.

B. Trial court.

A party can appeal the administrative law judge’s decision to the Arkansas Workers’ Compensation Commission. This is a *de novo* review on the record. The standard of review is preponderance of the evidence.

C. Appellate.

An appeal from the Commission’s opinion is heard by the Arkansas Court of Appeals. This is an appeal of right. An appeal from the Arkansas Court of Appeals may be taken to the Arkansas Supreme Court upon a grant of a writ of certiorari. The much higher substantial evidence standard applies.

47. What are the requirements for stipulations or settlements?

Upon petition filed by the employer or carrier and the injured employee requesting a final settlement, the Workers’ Compensation Commission shall hear the petition, take testimony, make any investigation, and determine whether the proposal is in the best interest of the parties. This is termed a “joint petition” procedure. If approved, the settlement is final as to all workers’ compensation rights, including future medical. Ark. Code Ann. § 11-9-805; Commission Rule 099.19.

Act 1058 of 2017 changed the longstanding rule prohibiting partial settlements. The statute now reads: “If

a claimant is determined to be eligible for Medicare, the parties may petition the Commission for a partial settlement of all issues other than future medical treatment.” Ark. Code Ann. §11-9-805(b)(2)(A&B).

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

Yes. The Commission may also entertain petitions for partial settlements, leaving future medical open.

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

Yes. A workers’ compensation claim cannot be settled in Arkansas without approval by the Commission. Informal settlements are not binding.

RISK FINANCE FOR WORKERS’ COMPENSATION

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

Every employer must secure compensation for disability or death from injury arising out of and in the course of employment. Ark. Code Ann. § 11-9-401(a)(1). Private insurers and an assigned risk pool are available.

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

A. For individual entities.

Each employer desiring to become an individual self-insurer, as contemplated by Ark. Code Ann. § 11-9-404, must make application to the Commission for such privilege on a prescribed form, at least sixty days prior to the desired effective date. The application must contain answers to all questions propounded and must be under oath. (Commission Rule 099.05)

Before considering the application, the Commission will require a current financial statement showing a net worth of not less than \$250,000.00, a current ratio of more than one-to-one, and a working capital of an amount establishing financial strength and liquidity of the business to promptly pay normal claims. The requirement for a more than one-to-one ratio may be waived for a public utility or in those instances where generally recognized accounting principles peculiar to a particular industry make the requirement unreasonable. In any event, the net worth must be no less than three times the annual loss fund, or in the event that aggregate excess insurance is not maintained, at least three times the self-insurer’s annual standard premium. Financial statements dated six months or more prior to the date of application may be required to be accompanied by an affidavit stating that there has been no material lessening of net worth or significant deterioration of current ratio since the statement.

The Commission, as a condition to granting self-insured status, may require the employer to deposit either an indemnity bond or securities. The conditions of the surety include authorization to the Commission, in case of default, to sell any securities sufficient to pay awards or to bring suit on the bonds to procure prompt payment of compensation.

B. For groups or “pools” or private entities.

The Commission, under such rules and regulations as it may prescribe, may permit two or more

employers engaged in a common type of business activity or pursuit to enter into agreements to pool their liabilities under the Act for the purposes of qualifying as self-insurers, and each member of such group is classified as a self-insurer.

In order to qualify as a group self-insurer, the group must furnish to or satisfy the Commission as to the following: (1) an application accompanied by an indemnity agreement jointly and severally binding each member to comply with the Act and an individual application by each member; (2) a current, audited financial statement of each member showing a combined net worth of all members of not less than \$1,000,000.00, a combined ratio of current assets to current liabilities of not less than one-to-one, and working capital of an amount establishing financial ability and liquidity sufficient to promptly pay normal claims; (3) that the group deposits and maintains with the Commission acceptable securities or has posted a surety bond issued by a corporate surety authorized to do business in Arkansas, in an amount determined by the Commission, but not less than \$200,000.00; (4) that there are ample facilities and competent personnel of good character within the group, or through an approved service organization, for the group to service its own program with respect to underwriting matters, claims and adjusting, industrial safety engineering, accounting, and financial management; (5) that the group maintains acceptable excess insurance; and (6) that such financial statements, payroll records, accident experience, and compensation reports and such other reports and statements are filed at such time and in such manner as the Commission may require. Ark. Code Ann. § 11-9-404.

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”?**

Given the other compensability requirements, illegal aliens are covered in Arkansas.

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

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

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

No. The CMS Guidelines control in Arkansas.

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

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

As for health insurers, liens would typically be covered by the contract of insurance. However, in dealing with workers’ compensation the Arkansas Supreme Court has determined that the “made whole” doctrine applies. *Franklin v. Healthsource of Arkansas*, 328 Ark. 163, 942 S.W. 2d 837 (1997). Thus, the insurer

receives nothing on its lien until and unless it is determined that the claimant has been made whole.

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 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(1)]

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

By definition, an Independent Contractor is not an employee, and therefore not covered under the Arkansas Workers' Compensation Law. The Courts in Arkansas have considered this issue on many occasions. In reaching a determination as to whether a particular claimant is, or is not, an independent contractor, the Courts have designated a number of factors that can be considered. In *Franklin v. Arkansas Craft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982), the following factors were listed as those that may be considered: 1. The right to control the means and method by which the work is done; 2. The right to terminate the employment without liability; 3. The method of payment, whether by time, job, piece, or other unit of measurement; 4. The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials; 5. Whether the person employed is engaged in a distinct occupation or business; 6. The skill required to do a particular occupation; 7. Whether the employer is in business; 8. Whether the work is an integral part of the regular business of the employer; and 9. The length of time for which the person is employed. In considering those factors the Courts and the Commission give greatest weight to the amount of control an employer has exercised (or has the right to exercise) over the claimant. This is sometimes referred to as the "relative nature of the work" test. See *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

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

Arkansas Code Ann. § 23-92-401, et. seq. provides for the licensing and operation of professional employer organizations. A licensed professional employer organization shall be deemed an employer of the covered employee and shall perform the following employer responsibilities in conformity with all applicable federal and state laws and regulations to: "Be entitled and to entitle the client, together as joint employers to the exclusive remedy under § 11-9-105, under both the workers' compensation and employer's liability provisions of a workers' compensation policy or plan. Ark Code Ann. § 23-92-409(j)(4)

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?

There are no special provisions for owner/operators or delivery drivers. The ordinary factors listed at number 57 are applied. However, the Arkansas Workers' Compensation Commission has examined this question in the case of *Arlie Stark v. Lee Transportation Co.* AWCC Claim Nos. E507889 & E505795, June 26, 1997. In that case, owner/operators were held not to be employees and therefore not entitled to workers' compensation benefits. Such cases are highly fact specific.

The Arkansas Code was amended to include Ark. Code Ann. § 11-9-412 which pertains to owner-operators (and their drivers). When specific requirements of the statute are followed, the owner-operators are deemed to be independent contractors (not employees) for workers' compensation purposes. However,

to take advantage of this 2013 change in Arkansas law, motor carriers must provide owner-operators the option to purchase workers' compensation coverage through the motor carrier. Note that this option must be provided to the owner-operator in the parties' written contract.

60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

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

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

No.

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

Yes, Arkansas permits medical marijuana due to the passage of a medical marijuana amendment to the Arkansas Constitution approved by the voters in November 2016. Act 593, among other acts, modified the amendment to allow employers to have and enforce substance abuse and drug free workplace programs that are compliant with state or federal law. Additionally, employers are free to prohibit employees a) from being under the influence of medical marijuana while at work or during work hours (although a positive drug test alone is not sufficient to show impairment), b) from possessing medical marijuana while at work or during work hours, and c) from holding safety-sensitive jobs if they are current users of medical marijuana.

The Arkansas Workers' Compensation Commission is examining its Drug Free Workplace regulations with regard to the implementation of the medical marijuana amendment; no determination has been made yet whether there will be any rule or regulation modifications issued.

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?

No.