

COLORADO

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

The Colorado Workers' Compensation Act is proscribed by Colorado Revised Statutes § 8-40-101, *et seq.*, (hereinafter, "the Act").

SCOPE OF COMPENSABILITY

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

Every person in the service of any person, association of persons, firm, or private corporation, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed constitute employees under the Colorado Workers' Compensation Act. C.R.S. § 8-40-202(1)(b). Additionally, any person who performs services for pay for another is a covered employee, unless such individual is free from control and direction in the performance of service and such individual is customarily engaged in an independent trade or occupation related to the service performed. C.R.S. § 8-40-202(2)(a).

Volunteer firefighters, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams are deemed employees during the actual performance of their duties, and during drills, practice, and training necessary and proper for the performance of their duties. C.R.S. § 8-40-202(1)(a)(I)(A). In addition, volunteer police officers may constitute employees under the Act. *City of Florence v. Pepper*, 145 P.3d 654, 660 (Colo. 2006).

Persons confined to city or county jail or any department of corrections facility with certain exceptions, persons who volunteer time and services for a ski area operator or for a ski area sponsored program or activity, and persons working as drivers under a lease agreement with a common carrier or contract carrier are not considered "employees." C.R.S. § 8-40-301(3)-(5). Under certain circumstances, persons who provide host home services, as part of residential services and support, will not be considered employees. C.R.S. 8-40-301(7).

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

Every person, association of persons, firm, and private corporation that has one or more persons engaged in the same business or employment in service under contract of hire, express or implied, is a statutory employer. C.R.S. § 8-40-203(b). The state, and every county, city, drainage and school district and all other taxing districts, all public institutions, and administrative boards, therein without regard to the number of persons engaged in the same business or employment, also constitute statutory employers under the Act. C.R.S. § 8-40-203(a).

Employers engaged in any business by contracting out part or all of their work are deemed to be employers of subcontractors and the subcontractors' employees, and such employers are liable

for workers' compensation benefits. C.R.S. § 8-41-401(1)(a). However, the buyer of goods is not liable as a statutory employer when a lessee, sub-lessee, contractor, or sub-contractor, or their employee who is delivering goods to the buyer, is injured while not on the buyer's premises. *Id.* However, where the employer hires the subcontractor to perform work on real property that it owns, the employer is entitled to recover the cost of workers' compensation insurance from the subcontractor and may withhold and deduct the insurance costs from the contract price. C.R.S. § 8-41-402(1). Additionally, an owner of real property who contracts out work for the improvement to real property is deemed to be the employer of all subcontractors and their employees, unless the work is completed on qualified residential property, in which event the owner is excepted from the definition of employer. *Id.*

Additionally, if a contractor, subcontractor, or person undertaking work on real property, is also an employer in the doing of such work, and possesses workers' compensation insurance, the contractor, subcontractor, or person or employees thereof do not have rights of contribution or action against the owner of the real property. C.R.S. § 8-41-402(2).

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

A. Traumatic or "single occurrence" claims.

The claimant has the burden of establishing his entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). The ALJ has broad discretion in assessing the weight and sufficiency of the evidence to determine whether this burden has been satisfied. *Sena v. World of Sleep*, 478 P.2d 671 (1970); *Eisnach v. Indus. Comm'n*, 633 P.2d 502 (Colo. App. 1981).

All physical injuries may be deemed compensable under the Act. Mental impairment injuries are also compensable, but certain restrictions apply. C.R.S. § 8-41-301(2)(a). A claim for mental impairment must be supported by the testimony of a licensed physician or psychologist and must be precipitated by a psychologically traumatic event that is generally outside an employee's usual experience and would evoke significant symptoms of distress in an employee in similar circumstances. *Id.* Disabilities from heart attacks are covered, but the employee must demonstrate by competent evidence that the heart attack was caused by an "unusual exertion" arising out of and within the course of employment. C.R.S. § 8-41-302(2).

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

Under the Act, an occupational disease means "a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment." C.R.S. § 8-40-201(14).

Traumatic or "single occurrence" claims and occupational diseases fall within the same definition of "injury" and are equally compensable, assuming the employee meets the burden of proving that the trauma or occupational disease arose out of occurred through the course of the

COLORADO

employment. Generally, “where employment conditions act upon a claimant's individual allergy, hypersensitivity, or pre-existing weakness so as to disable him, he has a compensable occupational disease[.]” *Denver v. Hansen*, 650 P.2d 1319, 1321 (Colo. App. 1982).

In the event there is more than one employer of an employee who has contracted an occupational disease, the employer in whose employ the employee was last injuriously exposed to the hazards of the disease, and suffered a substantial permanent aggravation thereof, is alone liable without right to contribution from any prior employer. C.R.S. § 8-41-304(1). However, apportionment of benefits may be available where there is proof of nonoccupational exposure or causation. *Anderson v. Brinkhoff*, 859 P.2d 819, 825 (Colo. 1993).

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

Excluded claims include all mental disability claims based, in whole or in part, on facts and circumstances common to all fields of employment, heart attacks caused by anything other than unusual exertion within the course of the employment, and occupational diseases caused by hazards to which the employee was equally exposed outside of the employment.

6. What psychiatric claims or treatments are compensable?

Mental impairment claims are limited to recognized permanent psychological disabilities resulting from accidental injuries without physical injury. A claim for mental impairment is compensable if: (1) the claim arises primarily from the occupation and place of employment and in the course of employment; (2) the mental impairment is, in and of itself, either sufficient to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or require medical treatment; (3) the claim is supported by the testimony of a licensed physician or psychologist; (4) the mental impairment involves no physical injury and arises from a psychologically traumatic event that is generally outside an employee's usual experience and would evoke significant symptoms of distress in an employee in similar circumstances; and (5) the claim does not arise from a disciplinary action, work evaluation, job transfer, lay-off, demotion, or similar action taken in good faith by the employer. C.R.S. § 8-41-301(2)(a). Compensation that is solely to reimburse treatments for mental impairment, is limited in duration to 36 weeks. C.R.S. § 8-41-301(2)(b).

7. What are the applicable statutes of limitations?

The employee must file a claim for compensation with the Division of Workers' Compensation within two years after the injury or death. C.R.S. § 8-43-103(2). However, this limitation does not apply to any employee to whom compensation has been paid, or who establishes to the satisfaction of the Division within three years of the injury that a reasonable excuse existed and the employer was not prejudiced by the delay. *Id.* The provision of medical benefits does not constitute payment of benefits or compensation for the purposes of the statute of limitations. *Id.*

This limitation does not apply to disabilities resulting from certain toxic exposures. Where the disability results from exposure to radioactive materials, substances, or machines or fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium, or from

COLORADO

asbestos, silicosis, or anthracosis, the right to compensation is barred five (5) years after commencement of the disability unless a worker's claim for compensation is filed with the Division. C.R.S. § 8-43-103(3).

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

The employee must give written notice to the employer within ten working days of the occurrence of the accident or injury. C.R.S. § 8-43-102(1)(a). In the event of an occupational disease, the employee must provide the employer with written notice within 30 days after the first distinct manifestation of the disease. C.R.S. § 8-43-102(3).

The employee is protected from any loss of compensation due to a failure to timely report the injury in the event the employer had actual notice of the injury or good cause is shown for the employee's failure to timely report the injury. If the Employer fails to provide a copy of the notice of the injury to the employee or the employer fails to post the required notice, the time period allotted to the employee to notify the employer of an injury is tolled for the duration of the failure. C.R.S. § 8-43-102(1)(a)(I).

The employer must have a notice posted clearly in the workplace that states the name of the insurer or states that the employer is self-insured This notice shall be on the division form WC 50. Workers' Compensation Rules of Procedure ("WCRP") 3-6.

9. Describe available defenses based on employee conduct:**A. Self-inflicted injury.**

Intentionally self-inflicted injuries are not compensable. C.R.S. § 8-41-301(1)(c).

B. Willful misconduct, "horseplay," etc.

Generally, an injury sustained while engaging in horseplay that is unrelated to an employee's duties is not compensable. However, where horseplay has become a regular incident of employment and is sufficiently related to the circumstances under which the employee normally performs his or her duties, injuries resulting from such horseplay may be compensable. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 718 (Colo. 1995).

If an employee incurs an injury as a result of horseplay, and is not himself or herself a participant in such horseplay, the injury is deemed compensable. *Indus. Comm'n of Colo. v. Emp'rs Cas. Co.*, 318 P.2d 216, 218 (Colo. 1957).

C. Injuries involving drugs and/or alcohol.

Disability payments for non-medical benefits, otherwise payable to an injured worker, are reduced by 50% for injuries that result from the presence of non-medically prescribed controlled substances in an employee's system. The employer is responsible for preserving a duplicate sample from any test conducted which determines the presence of drugs or alcohol, and the sample must be made available to the worker for purposes of a second test to be conducted at the workers' expense. C.R.S. § 8-42-112.5; *see also Stohl v. Blue Mountain Ranch Boys Camp*, W.C. No. 4-516-764 (February 25, 2005); *affirmed* 2005 Colo. App. LEXIS 2155 (Colo. App. Dec. 29, 2005).

COLORADO

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

The Act provides for two remedies in cases involving fraud. First, an employer/insurer may take a credit or an offset of previously paid benefits or payments against any further benefits due when the employee obtains benefits through fraud. The fraud must either be admitted, or a civil judgment or criminal conviction entered against the employee. C.R.S. § 8-43-304(2).

Additionally, anyone who willfully makes a false statement or representation material to a claim to obtain any order, benefit, award, compensation or other payment under the Act commits a class 5 felony and will be punished as provided by the criminal statutes, and forfeits all right to compensation if convicted of the offense. C.R.S. § 8-43-402.

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

Compensation benefits are reduced by 50% if an injured employee willfully misleads the employer regarding the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the misleading physical ability. C.R.S. § 8-42-112(1)(d).

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

Injuries sustained by an employee while engaging in a recreational activity when the employee is relieved of and is not performing any duties of employment are not compensable. C.R.S. § 8-40-301(1)(a). Injuries incurred during off-duty exercise or other non-work activities are compensable only if the activity is an incident of employment. The five factors to be considered are whether: (1) the injury occurred during working hours; (2) the injury occurred on the employer's premises; (3) the employer initiated the employee's activity; (4) the employer exerted any control over the activity; and (5) the employer stood to benefit from the employee's activity. The court gives the most weight to factors one and two. *Price v. Indus. Claim Appeals Office*, 919 P.2d 207, 210-11 (Colo. 1996).

13. Are injuries by co-employees compensable?

Yes, injuries by co-employees are compensable if the injuries arise out of and in the course of employment. If the injury arises out of a tort claim based on a co-employee assault, the Court has developed a test to determine if the injuries arise out of employment for purposes of the Workers' Compensation Act. Under the test, willful assaults by co-employees are divided into three categories: (1) those assaults that have an inherent connection with the employment; (2) those assaults that are inherently private; and (3) those assaults that are neutral. *Popovich v. Irlanda*, 811 P.2d 379, 383 (Colo. 1991). Both the first and third categories of assaults arise out of the employment for the purposes of the Act. Only the second category of assaults, inherently private assaults, do not arise out of employment and thus are not covered by the Act. See *Horodyskyj v. Karanian*, 32 P.3d 470, 477 (Colo. 2001). "Ordinary" sexual assaults have been determined to fall into the second category, those assaults that are inherently private," and thus, are not compensable under the Colorado Workers' Compensation Act. *Id.*

14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g.

COLORADO

"irate paramour" claims)?

The fact that an injury occurs on the premises of the employer does not, in and of itself, make the injury compensable. The "irate paramour" claim is generally not compensable. Likewise, injuries arising out of purely personal disputes are not compensable. *Tolbert v. Martin Marietta Corp.*, 759 P.2d 17, 20 (Colo. 1988); *Horodyskyj v. Karaian*, 32 P.3d 470, 478 (Colo. 2001).

BENEFITS

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

Average weekly wage is determined by the monthly, weekly, daily, or hourly wage earned by the employee at the time of the injury. If the employee is paid by the month, the average weekly wage is determined by multiplying the monthly salary by twelve and dividing by fifty-two. If paid by the week, that wage is deemed to be the average weekly wage. If paid per diem, the daily wage is to be multiplied by the number of days and fractions of days in a week that the employee was working at the time of the injury. When paid by the hour, the average weekly wage is calculated by multiplying the hourly rate by the number of hours in a day during which the employee was working or would have worked if the injury had not occurred; the daily wage is then multiplied by the number of days in a week the employee was working. C.R.S. § 8-42-102(2).

The value of certain fringe benefits specifically enumerated in the statute, *e.g., inter alia*, health insurance plan, board and lodging, are also to be included in calculating average weekly wage. C.R.S. § 8-40-201(19). However, the administrative law judge may disregard the product yielded by these equations if the wages computed are not a fair representation of the earnings at the time of the injury. C.R.S. § 8-42-102(3). For example, an employee hasn't worked for the employer for a sufficient period of time or the employee has been ill.

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

C.R.S. §§ 8-42-105, 8-42-106 govern the payment of temporary disability benefits. Under the Colorado Workers' Compensation Act, two types of temporary disability benefits are available to injured workers: temporary total disability benefits and temporary partial disability benefits.

Temporary total disability benefits are payable to the injured worker where he or she incurs total wage loss as a result of the injury and are paid at the rate of two-thirds of the employee's average weekly wage. C.R.S. § 8-42-105(1).

If the injured worker continues to work after his or her injury but is earning less than before his or her industrial injury, and his or her average weekly wage is consequently decreased, temporary partial disability benefits are payable at the rate of two-thirds of the wages lost due to the injury. C.R.S. § 8-42-106(1).

There is no minimum amount of benefits. The maximum weekly temporary benefits for injuries occurring after July 1, 2019 is \$1,022.56, which is determined by calculating 91% of the state average weekly wage. The state average weekly wage and the maximum TTD rate are re-determined every July 1st by the Director of the Division of Workers' Compensation. C.R.S. § 8-47-106.

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

The first installment of compensation shall be paid on the same date that liability for the claim is

COLORADO

admitted by the insurance carrier or self-insured employer unless the claim is denied. C.R.S. § 8-42-105(2)(a).

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

If the period of disability does not last longer than 3 days from the day the employee leaves work as a result of the injury, then the employee is not entitled to temporary total disability benefits. If the employee is off work as a result of the injury for more than two weeks, temporary disability benefits are recoverable from the first day the injured employee left work as a result of the accident or injury. C.R.S. § 8-42-103(1)(a)-(b).

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

For injuries arising on or after July 1, 1991, temporary benefits may be suspended or terminated unilaterally by the employer under one of the following five circumstances: (1) the employee has reached maximum medical improvement (MMI) and the employer's final admission of liability takes a position on the issue of permanency; (2) the primary treating physician reports that the employee is able to return to regular employment; (3) the employee has returned to work, verified by the employer, and the employer reports the employee's earnings; (4) the employer sends the employee a certified letter offering employment within work restrictions and a statement from an authorized treating physician that the employment offered is within those restrictions; or (5) the employee fails to appear at a rescheduled medical appointment after being warned by the employer, through a certified letter, that temporary benefits will be suspended for a failure to appear, and the treating physician confirms the failure to appear. In the event the employee's temporary total disability payments end based on the primary physician's report that the employee can return to work, the employee can request an expedited hearing on the issue. C.R.S. § 8-42-105(5)(a). Only the first offer of modified employment by a temporary help contracting firm need be in writing. WCRP 6-1(A)(1-5).

If the employer/insurer seeks to suspend for any other reason, it must submit a written petition to suspend, stating the factual background and the legal principle that warrants the suspension or termination. A hearing is scheduled if the employee submits a timely objection. WCRP 6-4.

However, in the event that the employee is responsible for his or her termination of employment, his or her resulting wage loss is not attributable to the industrial injury, and no temporary total disability benefits are owed. C.R.S. § 8-42-105(4).

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

An insurance carrier is entitled to credit against permanent disability benefits for any temporary disability benefits paid beyond the date of maximum medical improvement, except where vocational rehabilitation is offered. WCRP 5-6(D); C.R.S. § 8-42-105(1).

Additionally, for injuries occurring after July 1, 2019, an employee may not receive more than \$94,330.19 from combined temporary disability and permanent partial disability payments if the employee has a medical impairment rating of 25% whole person impairment or less. C.R.S. § 8-

COLORADO

42-107.5. If the impairment rating is greater than 25%, the ceiling for combined temporary disability and permanent disability benefits is \$188,658.00 for injuries occurring after July 1, 2019. C.R.S. § 8-42-107.5.

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

An employee who is seriously, permanently disfigured "about the head, face, or parts of the body normally exposed to public view," may receive benefits up to \$4,000.00, at the discretion of the Director of the Division of Workers' Compensation. C.R.S. § 8-42-108(1).

An employee who sustains: 1) extensive facial scars or burn scars, 2) extensive body scars or burn scars, or 3) stumps due to loss or partial loss of limbs may receive up to \$8,000.00, at the discretion of the Director of the Division of Workers' Compensation. C.R.S. § 8-42-108(2).

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

Permanent partial disability benefits, referred to under the Act as "medical impairment benefits," are calculated differently depending on whether the injury is to a part of the body which is classified by the statute as a "scheduled injury," or a part of the body not so classified. In the event that the injury is incurred to a part of the body that is not statutorily scheduled, permanent partial disability benefits will be paid based upon a whole person calculation. C.R.S. § 8-42-107(8)(d). If an employee suffers an injury that could be compensated as a scheduled or a nonscheduled injury, the employee is entitled to scheduled injury compensation if it is greater than the nonscheduled compensation. C.R.S. § 8-42-107(7)(b)(IV).

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

From July 1, 2019 to June 30, 2020, scheduled injuries, in which a member of the body has been permanently impaired, are paid out at the scheduled rate of \$320.90 per week. The scheduled rate is determined by the Director of the Division of Workers' Compensation, and changes every July 1st. C.R.S. § 8-42-107(6)(b). The statute sets forth the number of weeks of compensation to be awarded for each scheduled injury. C.R.S. § 8-42-107(2).

For example, the statute awards 208 weeks of compensation for the loss of an arm at the shoulder. The total award for such a loss would be calculated by multiplying the number of weeks (208) by the scheduled rate, which differs depending upon the year in which the injury was incurred. If an injured worker incurred an injury subsequent to July 1, 2019, the applicable scheduled rate is \$320.90. Thus, 208 weeks is multiplied the amount to be paid by the week (\$320.90), which yields a product of \$66,747.20

Assuming, hypothetically, the employee has only a 10% permanent impairment of the arm, the award would be determined by multiplying \$66,747.20 by 10%, rendering an award of \$6,674.72. ($\$320.90 \times 208 \times .10 = \$6,674.72$).

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

Benefits for all permanent injuries not classified as "scheduled injuries" are determined by a

COLORADO

formula, which factors in the employee's age, whole body impairment rating, and temporary total disability rate. For example, assume a 40-year-old employee suffers a lower back injury and has a whole person medical impairment rating of 10%. Assume, furthermore, that the same employee has an average weekly wage of \$300. The statute requires that the award be determined by multiplying the impairment rating (10%) by the age factor (1.40, according to the statute) by the temporary disability rate (2/3 of the \$300 average weekly wage, or \$200), by 400 weeks. In this example, $.10 \times 1.40 \times \$200 \times 400$ produces an award of \$11,200.00 for the 40-year-old employee with the 10% whole person impairment rating. The applicable age factors are set forth in the statute. C.R.S. § 8-42-107(e).

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

Vocational rehabilitation is offered at the discretion of the employer/insurer. An employee who refuses an offer of vocational rehabilitation is not eligible for an award of permanent total disability benefits, if the employee is capable of rehabilitation. C.R.S. § 8-42-111(3).

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

Permanent total disability benefits are paid to the employee at the rate of two-thirds of his or her average weekly wage, not to exceed the maximum temporary total disability rate, for the employee's life. C.R.S. § 8-42-111. The maximum temporary disability rate is determined on a yearly basis by the Director of the Division of Workers' Compensation.

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

A. Funeral expenses.

The employer/insurer must pay in one lump sum, within 30 days of the death, up to \$12,500.00 for reasonable funeral and burial expenses. C.R.S. § 8-42-123. If the employee leaves no dependents, compensation is limited to \$12,500.00 (adjusted yearly by the Director) and the compensation that was accrued or paid to the employee for disability, medical, surgical, and hospital expenses. *Id.* If the employee does leave dependents, the sum of \$12,500.00, must be paid in addition to all other sums of compensation provided in Article 42. *Id.*

B. Dependency claims.

Death benefits are paid to the dependent spouse for life, or until remarriage, in an amount equal to two thirds of the deceased employee's average weekly wage. C.R.S. § 8-42-114; C.R.S. § 8-42-120. At the time of remarriage, a two-year lump sum is paid to the spouse, if there are no dependent children. If there are dependent children, the benefits to the spouse terminate upon remarriage and survive to the other dependents. Benefits to dependent children are payable until they reach the age of eighteen. C.R.S. § 8-42-120. Benefits may be apportioned among the dependents in a manner determined to be just and equitable by the Division of Workers' Compensation. C.R.S. § 8-42-121. The maximum rate for death benefits to dependents is 91% of the state average weekly wage, which is the same as the current maximum for temporary total disability, \$1,022.56. C.R.S. §§ 8-42-114, 8-42-120. The minimum rate is 25% of the

COLORADO

applicable maximum per week.

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

Colorado previously established a Subsequent Injury Fund. C.R.S. § 8-46-101. However, the Subsequent Injury Fund has been abolished for injuries occurring after July 1, 1993 or for occupational diseases occurring after April 1, 1994. C.R.S. § 8-46-104. For injuries sustained prior to July 1, 1993, a recovery may be had against the Subsequent Injury Fund where an employee has sustained a previous industrial disability, and, in a subsequent work-related injury, sustains additional permanent disability, which, in combination with the first injury, renders the employee permanently and totally disabled. In such a case, the employer of the last injury causing permanent disability is responsible only for the portion of disability attributable to that injury. C.R.S. § 8-46-101. The Subsequent Injury Fund is liable for the remainder. *Id.*

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

A claim may be re-opened at any time within six years of the injury on the grounds of fraud, overpayment, error, mistake, or change in condition, unless the employee has entered into a settlement in which he or she has waived the right to re-open; however, a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. C.R.S. § 8-43-303(1). At any time within two years after the payment of the last temporary or permanent disability benefit, the Division may re-open the claim for fraud, overpayment, error, mistake, or change of condition, unless the employee has entered into a settlement in which he or she has waived the right to re-open. C.R.S. § 8-43-303(2)(a).

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

An employer may be obligated to pay an employee's attorney fees where the employer files a frivolous appeal or attempts to set for hearing an issue not ripe for adjudication. C.R.S. § 8-43-211(3).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Where an employer constitutes a statutory employer under the Act, the employer is immune from civil liability for damages resulting from the employee's industrial injury. C.R.S. §§ 8-41-401, 8-41-402. In cases in which a tortfeasor would be considered an employee's "statutory employer" under the Colorado Workers' Compensation Act, the employer is immune from civil liability, even if the employee has already received workers' compensation benefits from his actual employer. *See Finlay v. Storage Tech. Corp.*, 764 P.2d 62, 63 (Colo. 1988).

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

There are no statutory exceptions to the exclusivity of the workers' compensation remedy. Even in situations where an injury is the result of an intentional assault by a co-worker, a finding that

COLORADO

the injury arose out of the employment is not precluded. Rather, assaults upon employees are generally divided into three categories: (1) those that have some inherent connection with the employment, as where the assault results from the "enforced contacts" required by the conditions of the employment; (2) those that are inherently private disputes imported into the employment; and (3) those that are neither and may therefore be termed "neutral." Unless the assault arises from a private or personal dispute, injuries resulting from an assault are compensable. *Triad Painting Co. v. Blair*, 812 P.2d 638, 642 (Colo. 1991). Accordingly, intentional acts against an employee that are personal to the employee, such as sexual harassment, have been held to be outside the scope of employment. *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991).

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

No.

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

No penalties against employers are specifically provided for under the Act for injuries sustained by minor employees. Under the Act, a minor is a person under the age of twenty-one years. *Torres v. Canam Indus.*, 942 P.2d 1384, 1385-86 (Colo. App. 1997). Benefits are payable to minors for temporary as well as permanent disability. For temporary disability, the minor's benefits are payable the same as an adult, two thirds of the minor's average weekly wage. In the instance of a whole person permanent disability, benefits are paid at the maximum permanent partial disability rate at the time the employee is placed at maximum medical improvement. C.R.S. § 8-42-102(4).

Minors, unlike adults, may pursue remedies at law and equity, including in tort and under the Workers' Compensation Act, for a compensable injury if the minor was engaged in work or worked hours that violate the Colorado Youth Employment Opportunity Act of 1971 when the compensable injury occurred. C.R.S. § 8-12-117(2). Any economic damages awarded to a minor through a remedy outside the parameters of the Workers' Compensation Act, will be reduced by the amount of compensation received through the employer's workers' compensation insurance. C.R.S. § 8-12-117(3).

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

An employer or insurer who violates any provision of the Workers' Compensation Act, or who refuses to comply with any lawful order, "shall be punished" by a fine of not more than \$1,000 per day. Each day of noncompliance constitutes a separate offense. C.R.S. § 8-43-304(1).

An employer or insurer who willfully refuses to cooperate with claims management efforts of the Division is subject to the penalty provisions of C.R.S. § 8-43-304 and to the denial or vacation of a hearing date. C.R.S. § 8-43-218(3); *Vaughan v. McMinn*, 945 P.2d 404, 410 (Colo. 1997).

Bad faith occurs when an employer or insurer knowingly or recklessly denies benefits without a reasonable basis. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985). Injuries arising from the mishandling of a workers' compensation insurance claim do not fall within the exclusive province of the Act. *McKelvy v. Liberty Mut. Ins. Co.*, 983 P.2d 42, 44 (Colo. App. 1998). If an

COLORADO

insurance carrier intentionally, knowingly or willfully violates any provisions of the Act, the Commissioner of Insurance at the recommendation of the Division will suspend or revoke the license or authority of such carrier to do a compensation business in the state. C.R.S. § 8-44-106.

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

An employee discharged for filing a workers' compensation claim may pursue a cause of action in District Court for retaliatory or wrongful discharge. *Lathrop v. Entenmann's, Inc.*, 770 P.2d 1367, 1373 (Colo. App. 1989).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. See C.R.S. § 8-41-203. An employee who is entitled to compensation under the Colorado Workers' Compensation Act and is injured or killed by the negligence or wrong of another not in the same employ, may pursue a remedy against that person "to recover any damages in excess of the compensation available" under the Act. C.R.S. § 8-41-203(1)(a).

However, the insurance carrier's payment of benefits to the injured worker "operate[s] as an assignment of the cause of action against such other person to...the insurance carrier liable for the payment of such compensation." C.R.S. § 8-41-203(1)(b). In the event the insurance carrier recovers an amount in excess of the amount paid in compensation to the injured employee, the carrier is subrogated to the rights of the injured employee against the third-party causing injury. *Id.*

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

Generally, no. However, an employee can sue a co-employee for intentional acts that are personal to the employee. *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991).

36. Is subrogation available?

Yes. See C.R.S. § 8-41-203(1)(c).

MEDICALS

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

Yes. The time limit for an insurance carrier's payment of medical bills is 30 days subsequent to the receipt of the bill by the insurer. WCRP 16-11(A)(2). A violation may subject an employer to penalties of up to \$1,000 per day. C.R.S. § 8-43-304.

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

There are several Rules of Procedure mandating the exchange of medical records. When the Final Admission is predicated upon medical reports, such reports must accompany the Admission. WCRP 5-5(A). Medical, hospital, physician and vocational reports, and records of the employer must be provided to the opposing party at least 20 days prior to a formal hearing. C.R.S. § 8-43-210. Insurers are prohibited from disclosing mental health records to anyone that

COLORADO

is not necessary for medical evaluation or adjustment of the claim. C.R.S. § 8-47-203.2(3)(a). With regard to authorizations, the employee or any other person must execute and return any request for release of medical information within 15 days from the date of mailing. WCRP 5-4(C).

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.

Effective April 1, 2015, Colorado law changed regarding choice of physician. C.R.S. § 8-43-404(5)(a) provides how an authorized treating physician is chosen. A list of at least four physicians or four corporate medical providers or two physician and two corporate medical provider, where available, must be provided to the injured worker and then the injured worker selects the physician that will attend to him. C.R.S. § 8-43-404(5)(a)(I)(A). At least one of the designated providers shall be at a distinct locations without common ownership. *Id.* If there are not two providers without common ownership within 30 miles of each other, the employer may designate two providers at the same location or with shared ownership interests. *Id.* If a physician is not selected at the time of the injury, the employee has the right to select a physician or a chiropractor. *Id.*

An employee may obtain a one-time change in the designated authorized treating physician when:

- 1) Notice is provided within ninety days after the date of the injury but before the injured workers reaches maximum medical improvement;
- 2) The notice is in writing and submitted on a form designated by the Director of Workers' Compensation;
- 3) The notice is directed to the insurance carrier and to the initial authorized treating physician;
- 4) The new physician is on the employer's designated list;
- 5) The transfer of medical care does not pose a threat to the injured employee.

See C.R.S. § 8-43-404(5)(a)(III)(A)-(E).

In addition to the one-time change of physician and upon written request to the insurance carrier, an injured worker may get written permission to have a personal physician treat him. C.R.S. § 8-43-404(5)(a)(VI). The request is deemed granted unless the insurance carrier or employer objections to the request within 20 days. *Id.* If the employer timely objects, the employee may nonetheless petition the Division of Workers' Compensation for an order authorizing a change in physicians. *Id.*

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

COLORADO

The employer has a right to request the employee to submit to a reasonable number of Independent Medical Examinations upon written request. C.R.S. § 8-43-502(5). The employee has the right to have a physician of his or her own choosing present at the independent medical examination. *Id.*

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

The employer and insurer are responsible for providing all reasonable and necessary medical care to cure and relieve the effects of the injury. C.R.S. § 8-42-101(1)(a).

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

All prosthetic devices are covered, if the expense is reasonable and necessary and the device is needed to relieve the employee of the effect of the injuries. The employer must furnish a prosthetic device, and any necessary replacements, if reasonably required to improve the function of the part of the body affected by the injury. C.R.S. § 8-42-101(1)(b).

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

Yes, so long as the modifications are reasonable and necessary to cure and relieve the effects of the injury. Modifications designed strictly to enhance the quality of the employee's living environment are not covered. *See, e.g., Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (March 18, 2005).

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

Yes. The Division of Workers' Compensation establishes a fee schedule fixing the fees for which all medical and rehabilitation expenses shall be compensated. The schedules are revised on or before July 1st of each year by the Division. C.R.S. § 8-42-101(3)(a)(I); WCRP 18.

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

"Managed care" is the provision of medical care through an organization that is defined by the statute as a health maintenance organization, or through a network of medical providers accredited to practice workers' compensation medicine. The employer and insurer are required to offer managed care or medical case management in the areas of major cities and towns, and to offer medical case management throughout the state. C.R.S. § 8-42-101(3.6)(p).

PRACTICE/PROCEDURE

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

The employer and insurer are responsible for filing a First Report of Injury with the Division of Workers' Compensation within 10 days after they knew, or should have known, of an injury to an employee, assuming the employee is disabled for more than three shifts or three calendar days, irrespective of whether liability is admitted or contested. C.R.S. § 8-43-101(1). The employer and insurer are also responsible for filing a First Report of Injury with the Division if the employee has been receiving medical treatment from an authorized treating physician with the intent of curing or relieving the injury for more than 180 days after the injury, regardless of how many days or shifts the employee missed due to the injury. WCRP 5-2 (B). Thereafter, the employer must submit a position statement with the Division of Workers' Compensation, either admitting to the claim or denying the claim, within 20 days of filing the First Report of Injury. WCRP 5-2 (C).

If the employee submits a claim, the employer and insurer must admit or contest liability within 20 days of receiving notice of the claim. C.R.S. §8-43-203(1)(a). If the claim is contested, the employee may request an expedited hearing on the issue of compensability and medical benefits only if it is requested within 45 days of the date of mailing of the notice to contest. *Id.* Other issues may be contested and determined at a hearing, even where compensability is not a contested issue.

An employee may request a hearing on compensability only but litigate other issues, e.g., average weekly wage, change of physician, etc. at any time as those issues become ripe for adjudication.

46. What is the method of claim adjudication?

A. Administrative level.

Disputes are resolved in an administrative forum. C.R.S. § 8-43-207. The rules of evidence are theoretically the same as in state district court. C.R.S. § 8-43-210. The administrative law judge has broad discretion in admitting evidence and making findings of fact. *Kilpatrick v. Indus. Claim Appeals Office*, 356 P.3d 1008, 1018-19 (Colo. App. 2015).

B. Trial court.

The Industrial Claims Appeals Office, commonly referred to as ICAO, presides over appeals of orders entered by the administrative law judge. C.R.S. § 8-43-301.

C. Appellate.

The parties may further appeal the case to the Colorado Court of Appeals and the Colorado Supreme Court. C.R.S. §§ 8-43-307, 8-43-313.

47. What are the requirements for stipulations or settlements?

The parties are free to enter into stipulations and settlements regarding claims for compensation, benefits, penalties, and interest. C.R.S. § 8-43-204. The settlement must be in writing and signed by representatives of the insurer and employer and signed and sworn to by the injured employee. C.R.S. § 8-43-204(2)-(3). However, settlements must be approved by the Division of Workers' Compensation, and *pro se* settlements are strictly scrutinized. C.R.S. § 8-43-204(3); WCRP 9-9.

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

Yes. C.R.S. § 8-43-204(1).

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

Yes. C.R.S. § 8-43-204(3).

RISK FINANCE FOR WORKERS' COMPENSATION

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

Employers may become self-insured, participate in an insurance pool, subscribe to the state fund (Pinnacol Assurance), or elect to seek coverage from a private insurer or stock or mutual corporation. If an employer secures coverage with a stock or mutual corporation, it must file a notice with the Division of Workers' Compensation providing the name of insurer and insured, as well as other pertinent information. C.R.S. § 8-44-101.

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

A. For individual entities.

If the employer elects to be self-insured, it must apply for a permit from the Division of Workers'

COLORADO

Compensation and provide, on a form prescribed by the Division, all information that is required. C.R.S. §§ 8-44-101(1)(c), 8-44-205.

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

If the employer elects to participate in a self-insurance pool, a proposal of the plan providing information on claims handling, reinsurance, administration, etc. must first be submitted to and approved by the Division. C.R.S. §§ 8-44-101, 8-44-205.

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"?

Yes. "Illegal aliens" are included in the definition of employee under the Colorado Workers' Compensation Act. C.R.S. § 8-40-202(1)(b). Colorado case law has consistently held that "illegal aliens" are entitled to workers' compensation benefits in the event they are injured. *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997).

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

There is no provision under the Colorado Workers' Compensation Act that would explicitly preclude terrorist acts from coverage.

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

There is no provision in the Colorado Workers' Compensation Act that provides any state specific requirements, which must be satisfied under Medicare.

However, under Medicare regulations (42 C.F.R. § 411.20), 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 employee is already a Medicare beneficiary and the total settlement amount is greater than \$25,000; or
- there is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement *and* the settlement amount is greater than \$250,000.

If the employee meets the criteria for consideration by Medicare, Medicare must be notified in the event of a settlement. Upon review of the file, Medicare may conclude that the settlement does not meet its criteria, or it may require a Medicare set aside trust for large settlements, or it may require merely a custodial self-administered trust account. (Reference 42 C.F.R. 411.46; 42 USC §1395y).

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. 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).

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. §§ 160-164 and 65 Fed. Reg. 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"?

C.R.S. § 8-40-202(2)(b)(II) provides nine criteria for determining whether a worker is an independent contractor or an employee. In order to prove independence, it must be shown that the individual for whom services are performed does not:

- A. Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period to time specified in the document;
- B. Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
- C. Pay a salary or at an hourly rate instead of at a fixed or contract rate;

COLORADO

- D. Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specification of the contract;
- E. Provide more than minimal training for the individual;
- F. Provide tools or benefits to the individual; except that materials and equipment may be supplied;
- G. Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
- H. Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and
- I. Combine the business operations of the person for whom service is provided in anyway with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

However, it is not necessary to satisfy all nine criteria because evidence of one factor is not conclusive evidence that an individual is an employee instead of an independent contractor. *Nelson v. Indus. Claim Appeals Office*, 981 P.2d 210, 212 (Colo. App. 1998).

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

No. C.R.S. § 8-41-401.

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

Yes. C.R.S. § 8-40-301(5)-(6) states that a person who is working as a driver under a lease agreement with a common carrier or contract carrier is not considered an employee. However, any person working as a driver with a common carrier shall be eligible for workers’ compensation through Pinnacle Assurance or similar insurance carrier that provides coverage under workers’ compensation or a private insurance policy with similar coverage.

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

Every business must deal with the expense of workers’ compensation in its risk management and in dealing with the inevitable claim. Financial exposure to workers’ compensation is an expensive and complex challenge for all businesses. The best means for reducing and eliminating that exposure is a strong and individualized “Best Practices” plan.

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

Colorado law permits the use of medical marijuana. Colorado employers retain the right,

COLORADO

however, to terminate an employee for use of medical marijuana. In *Coats vs. Dish Network*, 350 P.3d 849 (Colo. 2015), the plaintiff was terminated for use of medical marijuana to treat his chronic condition. The Colorado Supreme Court ruled a claimant can be terminated for use of medical marijuana despite its legalization under Colorado law as it remains illegal under federal law. However, the Colorado legislature introduced a bill in early January 2020, which would prohibit employers for firing workers for participating in activities off the clock that are otherwise illegal under federal law. House Bill 1089.

Respondent insurance carriers are not liable for reimbursement of medical marijuana. “No governmental, private, or any other health insurance provider shall be required to be liable for any claim for reimbursement for the medical use of marijuana.” Colo. Const. art. XVIII, § 14(10)(a).

62. 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?

Colorado permits the recreational use of marijuana. Colorado employers retain the right, however, to terminate an employee for use of marijuana, even if it is after-hours and off premises. The only requirement is that a standing enforced policy forbidding marijuana use be in place. *Coats vs. Dish Network*, 350 P.3d 849 (Colo. 2015). However, the Colorado legislature introduced a bill in early January 2020, which would prohibit employers for firing workers for participating in activities off the clock that are otherwise illegal under federal law. House Bill 1089. If this bill is enacted as a law, it would prevent employers from firing workers for engaging in marijuana use outside of work. This bill would still allow employers to terminate employees for marijuana use at work.

If a claimant’s use of recreational marijuana results in a work injury, a respondent can assert an intoxication defense or a safety rule violation defense. If successful, these defenses entitle a respondent to a 50% reduction in all indemnity benefits owed. Additionally, if a claimant returns to work following injury performing some kind of light duty, they can be terminated if they are subsequently found to have consumed marijuana in violation of a standing employment policy. This is called a “termination for cause defense.” If a claimant is found to be terminated for cause, temporary indemnity benefits can be modified or terminated.