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

Delaware Code Annotated Title 19, §§ 2301-2397.

SCOPE OF COMPENSABILITY

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

"Employee" includes every person in service of any corporation, association, firm or person under any contract of hire or performing services for a valuable consideration. 19 Del. C. § 2301(10).

The following are specifically excluded from the definition of "employee": (1) the spouse and minor children of a farm employer if they are not named in an endorsement to the farm employer's contract of insurance; (2) any person whose employment is casual and not in the regular course of the trade, business, profession or occupation of the employer and; (3) any person to whom articles or materials are furnished or repaired, or adopted for sale in the employee's own home, or on the premises not under the control or management of the employer. 19 Del. C. § 2301(10).

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

A contractor or subcontractor shall be deemed to be an employer. 19 Del. C. § 2311(a)(1). Additionally, lessees transporting passengers for hire in motor vehicles leased pursuant to written leases shall be deemed to be employers. 19 Del. C. § 2311(b)(2).

A common law inquiry may also be made to determine whether the employee of the putative subcontractor was indeed that subcontractor's employee or whether his or her day to day activities were directed by the general contractor.

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

A. Traumatic or "single occurrence" claims.

Personal injuries rising out of and in the course of employment are compensable. 19 Del. C. § 2301(16). "Injury" and "personal injury" are defined as "violence to the physical structure of the body, such disease or infection as naturally results directly therefrom when reasonably treated." 19 Del. C. § 2301(16).

The Delaware Supreme Court outlined four scenarios where a Claimant is entitled to an award. They are as follows:

- 1) He proves that "the injury happened at a fixed time and place and was attributable to a clearly traceable incident of . . . [his] employment", Gray's Hatchery & Poultry Farms v. Stevens, Del.Super., 45 Del. 191, 81 A.2d 322, 324 (1950); Faline v. Guido and Francis DeAscanis & Sons, Del.Supr., 56 Del. 202, 192 A.2d 921, 924 (1963);

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- 2) He proves that "unusual exertion" in the course of his employment aggravated a pre-existing physical weakness, Milowicki v. Post and Paddock, Inc., Del.Supr., 260 A.2d 430, 432 (1969); Faline v. Guido and Francis DeAscanis & Sons, supra 192 A.2d at 924;
- 3) He proves that he sustained a "compensable occupational disease" as defined in § 2301(4), cf. Air Mod Corporation v. Newton, Del.Supr., 59 Del. 148, 215 A.2d 434, 441 (1965);
- 4) He proves that his work has had a cumulative detrimental effect on his physical condition, General Motors Corporation v. McNemar, Del.Supr., 57 Del. 511, 202 A.2d 803, 806 (1964).

Duvall v. Charles Connell Roofing, 564 A.2d 1132, 1135 (Del. 1989). Additionally, the employee must present a medical opinion to a reasonable degree of medical probability regarding the cause and nature of the injury alleged.

However, in the aforementioned case the Supreme Court of Delaware modified the "unusual exertion" provision. The Court stated that the appropriate principal to follow is the "usual exertion" rule, which provides that irrespective of previous condition, an injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury. Duvall v. Charles Connell Roofing, 564 A.2d 1132, 1136 (Del. 1989).

See also Day & Zimmerman Sec. v. Simmons, 965 A.2d 652, 657 (Del. 2008) (pre-existing disease does not disqualify a claim for workers' compensation if the employment aggravated or in combination with the infirmity produced the disability for the employer takes the employee as he finds him).

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

Compensable occupational diseases include all occupational diseases arising out of and in the course of the employment only when the exposure has occurred during the employment. 19 Del. C. § 2301(4). The employee must show the working conditions produced the disease as a natural incident of the occupation in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general. Anderson v. General Motors Corp., 442 A.2d 1359 (Del. 1982). See also, Rhodes v. Diamond State Port Corp., 2 A.3d 75 (Del. 2010); Walker v. State, 2009 Del. Super. LEXIS 180 (Del. Super. Ct. May 18, 2009); Diamond Fuel Oil v. John S. O'Neal, 734 A.2d 1060 (Del. 1999).

Ionizing radiation injuries are compensable if they result from the employment. A compensable ionizing injury radiation injury is any harmful change in the human organism including damage to or loss of a prosthetic appliance arising out of and in the course of employment and caused by exposure to ionizing radiation which renders the party disabled. 19 Del. C. § 2301(3).

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

- i. An employee who refuses reasonable surgical, medical and hospital services, medicines or supplies tendered by the employer shall forfeit their right to compensation for any injury or increase in incapacity is shown to have resulted from such refusal. 19 Del. C. § 2353(a).
- ii. Injuries as a result of the employee's own intoxication. 19 Del. C. § 2353(b).
- iii. Injuries as a result of the employee's own deliberate or reckless indifference to danger. 19 Del. C. § 2353(b).

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- iv. Injuries due to the employee's own willful intention to bring about the injury or death of the employee or of another. 19 Del. C. § 2353(b).
- v. Injuries as a result of the employee's willful failure or refusal to use a reasonable safety appliance provided for the employee or to perform a duty required by statute. 19 Del. C. § 2353(b).
- vi. If an employee refuses suitable employment, the employee forfeits any right to compensation for the period of such refusal, unless the Board finds the refusal was justified. 19 Del. C. § 2353(c).
- vii. If an employee is receiving benefits or claims to be eligible for benefits, whether partial or total disability, those benefits may be suspended by agreement or order of the Board, where an employee is incarcerated. 19 Del. C. § 2353(d).

Personal injury is excluded from the coverage of the Workmen's Compensation Act where the injury was caused by the act of another employee whose act was "willful," and whose act was directed against the injured employee "by reasons personal to such employee and not directed against him as an employee or because of his employment." Ward v. General Motors Corp., 431 A.2d 1277, 1279 (Del. Super. 1981).

Rose v. Cadillac Fairview Shopping Center Properties (Delaware) Inc., Del. Super., 668 A.2d 782 (1995) (finding that the exclusivity provision of workers' compensation law barred a personal injury suit brought against the employer by an employee who was raped, because the injury arose out of and in the course of employee's work), aff'd sub nom. Rose v. Sears, Roebuck & Co., 676 A.2d 906, Del. Supr., Veasey, C.J. (1996). Because the Act does not contain any provision excluding sexual harassment claims, an employee cannot maintain a common law action against her employer for personal injury caused by the on-job sexual harassment by co-employees. Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 939 (Del. 1996). See also Postell v. Eggers, 2008 Del. Super. LEXIS 17, 2008 WL 134830 (Del. Super.) (In order to be exempted, the wrongful acts must be completely unrelated to the conditions existing in, or created by the workplace).

6. What psychiatric claims or treatments are compensable?

All claims resulting from the original work-related injury, as defined in 19 Del. C. § 2301(15), are covered. An injured worker can recover for the full effect of an injury, including psychological or neurotic disorders. Rice's Bakery v. Adkins, 269 A.2d 215 (Del. 1970). In addition, a psychological or mental injury which is substantially caused by the gradual and cumulative stress and strain of employment is also compensable. Duvall v. Charles Connell Roofing, 564 A.2d 1132 (Del. 1989). Note: The term "substantial cause" has no application to causation relating to specific and identifiable accidents. See Reese v. Home Budget Center, 619 A.2d 907 (Del. 1992) (it is unnecessary to quantify causation where there is no dispute that a specific accident contributed to the condition, which would not have occurred without the accident).

A mental injury can be compensable even if (1) there was no prior physical trauma, (2) the injury was the result of gradual stimuli rather than a sudden shock, and (3) the job-related stress causing the injury was not unusual. An employee must establish by objective proof his/her working conditions were actually stressful, and were a substantial cause of the disabling injury. See State v. Cephas, 637 A.2d 20 (Del. 1994) (the objective causal nexus test does not require proof that a reasonable or average person would have been affected by the job-related stress).

7. What are the applicable statutes of limitations?

Unless the employer has actual knowledge of the occurrence of the injury or unless the

employee, or someone on the employee's behalf, or some of the dependents, or someone on their behalf, gives notice thereof to the employer within 90 days after the accident, no compensation shall be due until such notice is given or knowledge obtained. 19 Del. C. § 2341. In cases of personal injury or death, all claims for compensation are barred unless, within two years after the accident, the parties have agreed upon the compensation due, or, one or more of the interested parties have filed a claim within two years after the accident with the Industrial Accident Board. 19 Del. C. § 2361(a).

Concerning occupation diseases, unless the employer during the continuance of the employment has actual knowledge that the employee has contracted a compensable occupational disease or unless the employee, or someone in the employee's behalf, or some of the employee's dependents, or someone on their behalf, gives the employer written notice or claim that the employee has contracted one of the compensable occupational diseases, which notice to be effective shall be given within a period of 6 months after the date on which the employee first acquired such knowledge that the disability was, could have been caused or had resulted from the employee's employment, no compensation shall be payable on account of the death or disability by occupational disease of such employee. 19 Del. C. § 2342. Claims for compensation for compensable occupational disease or for an ionizing radiation injury are barred unless a petition is filed in duplicate with the Department within one year after the date on which the employee first acquired such knowledge the disability was or could have been caused by the employment. 19 Del. C. § 2361(d).

Where payments of compensation have been made pursuant to an agreement or an award of the Board, the statute of limitations does not expire until five years from the time of the making of the last payment for which a proper receipt has been filed with the Department. 19 Del. C. § 2361(b). Note: Payment of a medical bill may extend the statute of limitations. See New Castle County v. Goodman, 461 A.2d 1012 (Del. 1983) (where the employer or its carrier made a payment under a feeling of compulsion, there was an agreement within the meaning of § 2361(b)); Tenaglia-Evans v. St. Francis Hosp., 2006 Del. LEXIS 648 (2006) (Simple payment of expenses is not enough; there must be a finding of "compulsion" on the part of the employer or its insurance carrier to pay the expenses). The Court in Rash v. State (DHHCI), 2007 Del. Super. LEXIS 286 (Del. Super. Ct. Sept. 28, 2007) explained that where the issue of compensability was not previously litigated, and it appears that the State voluntarily agreed to pay for claimant's surgery based on inaccurate information it had at the time the surgery was approved, the State is not liable for the disfigurement that is associated with the surgery.

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

Unless the employer has actual knowledge of the injury or unless the employee, or someone on his or her behalf, or dependents, or someone on their behalf, gives notice thereof to the employer within 90 days after the accident, no compensation is due until such notice is given or knowledge is obtained. 19 Del. C. § 2341.

Unless the employer during the continuance of the employment has actual knowledge that the employee contracted a compensable occupational disease, the employee, someone on the

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employee's behalf, the employee's dependents or someone on their behalf must give the employer written notice or claim that the employee has contracted one of the compensable occupational diseases within a period of 6 months of when the employee first knew that the disability was, could have been caused or had resulted from the employee's employment. If notice is not provided, no compensation shall be payable on account of the death or disability by the occupational disease. 19 Del. C. § 2342.

9. Describe available defenses based on employee conduct:

- i. Refusal of services - Injuries or any increase in the employee's incapacity which results from the employee's refusal of reasonable surgical, medical, and hospital services, medicines and supplies are not compensable. 19 Del. C. § 2353(a).
- ii. Refusal of employment - If an employee refuses employment procured for the employee and suitable to the employee's capacity, the employee shall not be entitled to compensation during the period of such refusal. 19 Del. C. § 2353(c).
- iii. Self-inflicted injury - Intentionally self-inflicted injuries are not compensable. 19 Del. C. § 2353(b).
- iv. Willful misconduct, "horseplay," etc. - Injuries caused by the employee's deliberate or reckless indifference to danger, or willful refusal to use a reasonable safety appliance or to perform a duty required by statute, are not compensable. 19 Del. C. § 2353(b).
- v. Injuries involving drugs and/or alcohol - Injuries which result from the employee's intoxication are not compensable. 19 Del. C. § 2353(b). However, the employer must prove by a preponderance of the evidence both the accident and the injuries were caused by the intoxication.

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

Neither the workers' compensation statute nor the rules for the Industrial Accident Board provide any penalties or remedies for claims involving fraud. The Industrial Accident Board, however, will deny claims based on fraud. In Air Mod Corporation v. Newton, 59 Del. 148, 215 A.2d 434 (Del. 1965) the Delaware Supreme Court held:

An employee forfeits his right to benefits . . . if, in applying for employment, the employee (1) knowingly and willfully made a false representation as to his physical condition; and (2) the employer relied upon the false representation and such reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury.

Additionally, the Fraud Prevention Bureau of the Delaware Insurance Department will be notified by the Department or Board if either has reason to believe that any person is committing or has committed an act of insurance fraud.

Under 11 Del. C. § 913(a)(1), "[a] person is guilty of insurance fraud when, with the intent to injure, defraud or deceive any insurer the person...presents or causes to be presented to any insurer, any written or oral statement...as part of, or in support of, a claim for payment or other benefits pursuant to an insurance policy, knowing that such statement contains false, incomplete or misleading information concerning any fact of thing material to such claim." Further, the legislature enacted the Delaware Insurance Fraud Prevention Act. 18 Del. C. § 2401 *et. seq.* The Fraud Protection Act establishes the Insurance Fraud Prevention Bureau which has the authority

to conduct independent investigations where fraud has been committed. The commissioner may impose an administrative penalty of not more than \$10,000 for each act of insurance fraud which violates the Fraud Prevention Act.

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

Yes. The employer must show through medical testimony that there was a causal nexus between an allegedly misrepresented or undisclosed prior physical condition and the subsequent injury. Mountaire of Delmarva, Inc. v. Glacken, 487 A.2d 1137, 1141 (Del. 1984). See also Air Mod Corporation v. Newton, 59 Del. 148, 215 A.2d 434 (Del. 1965) (there was a causal connection between the misrepresented physical condition and the plaintiff's present physical condition); General Motors Corp. v. Cresto, 265 A.2d 42 (Del. Super. Ct. 1970) (there was no causal connection between the misrepresented disability of the back and the present injury to the elbow).

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

Each case is determined on a case by case basis and according to the specific facts. As a general rule, for an injury to be compensable, it must be "caused in a time and place where it would be reasonable for the employee to be under the circumstances" and "there must be a reasonable causal connection between the injuries and the employment." Rose v. Cadillac Fairview Shopping Center, 668 A.2d 782 (Del. Super. 1995), *aff'd*, Rose v. Sears, 676 A.2d 906 (Del. 1996).

There are three factors to be examined in determining whether an injury that occurred during a non-sponsored recreational activity was within the scope of the individual's employment: (1) it occurs on the premises during lunch or a recreation period as a regular incident of employment; (2) the employer brings the activity within the orbit of the employment by expressly or impliedly requiring participation, or by making the activity part of the services of an employee and; (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. State v. Dalton, 878 A.2d 451 (Del. 2005) *citing* 2 Larson, Workers' Compensation Law, ch. 22 (LEXIS Publishing 2001) § 22.01. See Bedwell v. Brandywine Carpet Cleaners, 684 A.2d 302 (Del. Super. 1996) (where a carpet cleaner was compensated for injuries sustained after a slip and fall in the parking lot of a fast food restaurant where claimant had stopped to eat lunch while traveling from one work site to another).

13. Are injuries by co-employees compensable?

Yes, to the extent the injury (or death) of the employee was caused in whole or part by "the want of ordinary or reasonable care of or by the negligence of a fellow employee."

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

No. An injury must arise out of and in the course of the employment contract to be compensable.

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

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Under § 2302 (a), "average weekly wage" means the weekly wage earned by the employee at the time of the employee's injury at the job in which the employee was injured, including overtime pay, gratuities and regularly paid bonuses (other than an employer's gratuity or holiday bonuses) but excluding all fringe or other in-kind employment benefits. The term "average weekly wage" shall include the reasonable value of board, rent, housing or lodging received from the employer, which shall be fixed and determined from the facts in each particular case.

Under §2302 (b), AWW is determined by computing the total wages paid to the employee during the 26 weeks immediately preceding the date of injury and dividing by 26, provided that:

- 1) If the employee worked less than 26 weeks, but at least 13 weeks, in the employment in which the employee was injured, the average weekly wage shall be based upon the total wage earned by the employee in the employment in which the employee was injured, divided by the total number of weeks actually worked in that employment;
- 2) If an employee sustains a compensable injury before completing that employee's first 13 weeks, the average weekly wage shall be calculated as follows:
 - i. If the contract was based on hours worked, by determining the number of hours for each week contracted for by the employee multiplied by the employee's hourly rate;
 - ii. If the contract was based on a weekly wage, by determining the weekly salary contracted for by the employee; or
 - iii. If the contract was based on a monthly salary, by multiplying the monthly salary by 12 and dividing that figure by 52; and
 - iv. If the hourly rate of earnings of the employee cannot be ascertained, or if the pay has not been designated for the work required, the average weekly wage, for the purpose of calculating compensation, shall be taken to be the average weekly wage for similar services performed by other employees in like employment for the past 26 weeks.

19 Del. C. §2302 (b). The weekly compensation allowed shall not exceed the maximum or be less than the minimum provided by law. 19 Del. C. §2302 (b)(3). Note : Gratuities received from the employer or others are not included in the definition of wages.

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

For all injuries resulting in total disability after July 1, 1975, the benefits to be paid during the period of total disability are 66⅔% of the employee's wages, not to exceed 66⅔% of the state average wage as announced by the Secretary of the Department of Labor for the last calendar year for which a determination of the state wage has been made, nor be less than 22 2/9% of the state wage. If, at the time of the injury, the employee receives wages of less than 22 2/9% of the state wage, then the employee receives the full amount of such wages per week. 19 Del. C. § 2324.

The Department of Labor announced that the new workers' compensation rates effective July 1, 2022, establish an average weekly wage of \$1,234.04. Accordingly, the maximum weekly compensation rate is \$822.70 and the minimum weekly compensation rate is \$274.24.

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

The employer has fifteen days after receipt of knowledge of a work-related injury to accept or deny a claim. 19 Del. C. § 2362(a). If the parties reach a written agreement as to the compensation due the claimant, payment must start within 14 days of the agreement. 19 Del. C. § 2362(c). An employer/insurance carrier has no more than 14 days after an award by the Board becomes final and binding to make payment. 19 Del. C. § 2362(d). Note: For all payments of total or partial disability, it shall be printed above the endorsement on the reverse side of the check "Your acceptance of this check for total or partial disability is a representation by you that you are legally entitled to such payment and a false representation is punishable under federal and state laws." 19 Del. C. § 2344(b)(2).

Following a demand, the employer has 30 days from the date of settlement fixing compensation or the date of a Board order requiring the employer to pay. Huffman v. C.C. Oliphant & Sons, Inc., 432 A.2d 1207 (Del. 1981) (the remedy for recovery of unpaid wages under 19 Del. C. § 2357 is also available for the recovery of wrongfully withheld workers' compensation benefits). Under 19 Del. C. § 2357 and the Huffman case, an employer can be liable for liquidated damages if it is in default for thirty days after demand for payment of an amount due under the Worker's Compensation law. Specifically, 19 Del. C. § 2357 provides: "If default is made by the employer for 30 days after demand in the payment of any amount due under this chapter, the amount may be recovered in the same manner as claims for wages are collectible." See Kelley v. ILC Dover, Inc., 787 A.2d 751, 2001 Del. Super. LEXIS 125 (Del. Super. Ct. 2001) ("wages" in Section 1113(a) must be construed to include claims based on unpaid workers' compensation benefits due after proper demand therefor has been made.).

A demand letter cannot in and of itself create a default in payment where one has not yet occurred. See Ramirez v. Murdick, 2007 Del. Super. LEXIS 344, 2007 WL 4171117 (Del. Super.) *aff'd* 948 A.2d 395, 2008 Del. LEXIS 202 (Del. 2008); Delmarva Warehouses, Inc. v. Yoder, 2001 Del. LEXIS 453, 2001 WL 1329691 (Del. Supr.) (holding that it would amount to an unreasonable elevation of form over substance to require the employee to reassert his demand in order to trigger the employer's obligation to pay the award); Ramirez v. Murdick, 948 A.2d 395, 399 (Del. 2008) (because the default was for less than thirty days from the date the amount was due, the remedies under 19 Del. C. § 2357 do not apply).

Importantly, absent the predicate of a proper demand, the employee has no Huffman claim. The Court in Shortridge v. Del. Hospice, 984 A.2d 124 (Del. 2009) noted that there is no magic language that has been blessed by the courts as to what constitutes a proper Huffman demand. However, between counsel whose expertise is in the field of industrial accident compensation, correspondence which sets forth the amount owed, proof of the amount owed, and a request to be paid would be construed as a demand.

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 there is lost time which extends beyond three days due to the injury, temporary benefits become payable starting with the fourth day lost. The employee must be out seven days or

more, including the day of the injury, to recover benefits for the first three days. However, if the permanent injury relates to vision or hearing loss, surgical, medical and hospital services, medicines and supplies, or funeral benefits, payment shall be made from the first day of injury. 19 Del. C. § 2321.

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

An employer wishing to terminate benefits must file a Petition For Review of Compensation ("Petition to Terminate") with the Industrial Accident Board. The petition to terminate will not be accepted by the Department unless it is accompanied by proof that a copy has been served by registered mail upon the other party to the agreement or award. On the application of any party in interest, the Board may at any time, but not oftener than once in 6 months, review any agreement or award. 19 Del. C. § 2347. Absent agreement of the parties, benefits cannot be terminated except upon order of the Board following a hearing. 19 Del. C. § 2347. See Huffman v. C.C. Oliphant & Sons, Inc., 432 A.2d 1207 (Del. 1981). Note: Although the right by Claimant to receive total disability benefits continues after the petition to terminate is filed, the benefits are paid by the Secondary Fund rather than the employer. Clements v. Diamond State Port Corp., 831 A.2d 870 (Del. 2003).

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

No. The two rights of recovery are independent of each other. 19 Del. C. § 2324 (temporary total disability) and § 2325 (partial disability).

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

The Board may award compensation for "serious and permanent disfigurement to any part of the human body up to 150 weeks, provided that such disfigurement is visible and offensive when the body is clothed normally . . ." Such compensation is paid at the rate of 66⅔% of the employee's average weekly wage, and where the injury causes both disfigurement and loss of use to the same part of the body, compensation shall be the higher of the amount of compensation due for disfigurement or the amount of compensation due for loss of use plus 20% for disfigurement. 19 Del. C. § 2326(f).

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

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

For all permanent injuries to scheduled members, compensation is paid at the rate of 66⅔% of wages pursuant to the schedule and regardless of the earning power of the employee after the injury. 19 Del. C. § 2326(a)-(e).

Schedule:

Bodily Loss

Maximum Weeks

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Hand	220
Arm	250
Foot	160
Leg	250
Thumb	75
Index finger	50
Middle finger	40
Ring finger	30
Little finger	20
Great toe	40
Other toes	15
Loss of hearing:	
One ear	75
Both ears	175
Loss of vision:	
One eye	200

There are also unscheduled losses payable up to three hundred weeks. 19 Del. C. § 2326(g). As a general rule, permanency is calculated as the product of three factors: (1) the percentage of loss of the body part affected; (2) 66⅔% of wages; and (3) the number of weeks reflected in the schedule for the particular body part. $P = (\% \text{ of loss of body part})(66\frac{2}{3}\%)(\text{no. of weeks})$. 19 Del. C. § 2326.

Compensation benefits are paid at 66⅔% of the employee's average weekly wage, not to exceed two-thirds of the state average weekly wage nor be less than 22-2/9% of the state average weekly wage. If, at the time of injury, the employee's average weekly wage is less than 22-2/9% of the state average weekly wage, then compensation paid the full amount of his/her weekly wage. 19 Del. C. § 2326(h).

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

Not applicable.

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

The Board may require an employee to participate in vocational rehabilitation services by any public or private agency, upon motion by the employer, after making a finding that such services constitute the tender of reasonable medical services. Refusal to accept rehabilitation services pursuant to order of the Board shall result in a loss of compensation for each week of the period of refusal.. Reasonable expenses, including board, lodging and travel when necessary because of

the situs of the rehabilitation agency, must be paid by the employer. 19 Del. C. § 2353(a).

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

Total disability is a disability that prevents an employee from obtaining employment commensurate with his or her qualifications and training. See Keith v. Dover City Cab Co., 427 A.2d 896 (Del. Super. 1981) (total disability is not equated with utter helplessness, but rather is where an employee is unable to perform any services other than those which are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist).

Permanent total disability benefits are paid at two-thirds of the employee's average weekly wage, not to exceed 66⅔% of the state average weekly wage as announced by the Secretary of the Department of Labor, nor be less than 22 2/9% of the state average weekly wage. If the employee receives wages less than 22 2/9%, the employee receives his or her full wages. Benefits continue for the duration of the total disability. 19 Del. C. § 2324.

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

A. Funeral expenses.

The employer must pay reasonable burial expenses up to \$3,500.00. 19 Del. C. § 2331.

B. Dependency claims.

Death benefits are calculated as a percentage of the decedent's wages (not to exceed the state average weekly wage for the most recent calendar year for which such information has been published) and are adjusted according to the status and dependency condition of the beneficiary. See 19 Del. C. § 2330. Section 2330 sets out the beneficiary matrix with corresponding benefits. However, where a child is entitled to death benefits, that child may receive such benefits "until . . . the age of 18 years, or if enrolled as a full-time student . . . , until such child ceases to be so enrolled or reaches the age of 25 years, and in the case of a widow or widower entitled to compensation . . . the compensation shall continue . . . until the widow or widower dies or remarries." 19 Del. C. § 2330(b). See also 19 Del. C. § 2330(c)(relating to extended benefits for minor siblings of the deceased during the period of their education or as a consequence of a mental or physical handicap).

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

When a subsequent permanent injury in connection with a previous permanent injury results in total disability, as defined in 19 Del. C. § 2326, the employee is paid compensation from a special fund known as the "Workers' Compensation Fund." 19 Del. C. § 2327(a). Where an employee who has previously sustained a permanent injury suffers a subsequent permanent injury, the Board apportions liability. The employer for whom the employee was working at the time of the subsequent injury need only pay the amount of compensation as would be due for the subsequent injury alone. 19 Del. C. § 2327. No petition of an employer or its insurance carrier for reimbursement from the Workers' Compensation Fund will be accepted by the Department unless the employer or its insurance carrier first notifies the Deputy Attorney General assigned

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to the Board, by certified mail, of its intention to seek reimbursement from the Fund, and thereafter supplies the Department with proof of compliance when its petition is filed. Board Rule 24.

19 Del. C. § 2327 applies only to employers insured by insurance carriers. The Workers' Compensation Improvement Act of 1997 revoked the right for reimbursement by self-insureds.

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

A petition to determine additional compensation must be filed with the Department within five years from the time of the making of the last payment for which a proper receipt has been filed with the Department. 19 Del. C. § 2361(b).

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

A reasonable attorney's fee is not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware at the time of the award, whichever is smaller. 19 Del. C. § 2320(10)(a). The reasonable attorney's fee shall be allowed by the Board to any employee awarded compensation and taxed as costs against a party. Any fee awarded to any employee under 19 Del. C. § 2320(10)(a) shall be applied to offset the fees that would otherwise be charged to the employee by the employee's attorney under the fee agreement.

However, if an offer to settle an issue pending before the Board is communicated to the claimant in writing at least 30 days prior to the trial date established by the Board and the offer is equal to or greater than the amount ultimately awarded by the Board on that issue, the attorney's fee will not be taxed as costs against the employer. 19 Del. C. § 2320(10)(b). See Clements v. Diamond State Port Corp., 831 A.2d 870 (Del. 2003).

Board Rule 23 sets forth the requirements for the filing of an Affidavit Regarding Attorney's Fees.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Workers' compensation is the exclusive remedy for an employee who sustains an industrial injury. 19 Del. C. § 2304. The exclusivity provision only applies between the employer and the employee, and third party suits are permitted. See Konstantopolous v. Westvaco Corp., 690 A.2d 936 (Del. 1996), *cert. denied*, 522 U.S. 1128, 119 S. Ct. 1079, 140 L. Ed. 2 137 (1998) (an employee's recovery against an employer for personal injuries sustained arising out of and during the course of employment is limited to those remedies under the Delaware Workers' Compensation Act, even if those personal injuries are the result of sexual harassment).

Injured employees cannot generally bring third party claims against co-employees because co-employees are generally considered to be "in the same employ" under § 2363(a), and, thus, fall within the definition of "employer" under § 2304. See Grabowski v. Mangler, 938 A.2d 637, 2007 Del. LEXIS 301 (Del. 2007) *aff'd* 956 A.2d 1217, 2008 Del. LEXIS 408 (Del. 2008). As explained by the Court in Groves v. Marvel:

"person in the same employ" means a person employed by the same employer and acting in the course of his employment at the time of the injury to the co-employee ... It is clear, therefore, that to have been acting in the course of his employment, . . . the defendant need not have been engaged in a regular duty or function of his own employment at the time of injury to the plaintiff. [The co-employee is immune from liability] if the act complained of was one which the defendant might reasonably do, or be expected to do, within a time during which he was employed and at a place where he could reasonably be during that time--even through outside his regular duties

213 A.2d 853, 855 (Del. 1965). The Court in Lovett v. Cheney, 2007 Del. Super. LEXIS 110, 7-8 (Del. Super. Ct. Apr. 19, 2007) noted that an exception to § 2304 does exist when a claimant is injured by a co-worker's conduct, but in that case, the claimant must establish the co-worker's specific, intentional conduct, and a deliberate intent to cause the injury.

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

A tort action may be maintained against the employer if there is a true intent by the employer to injure the employee. See Rafferty v. Hartman Walsh Painting Co., 760 A.2d 157 (Del. 2000) (there must be facts alleged which, if true, show a deliberate intent to bring about an injury); EEOC v. Avecia, Inc., 151 Fed. Appx. 162, 166 (3d Cir. Del. 2005); Nieves v. Acme Mkts., Inc., 541 F. Supp. 2d 600, 2008 U.S. Dist. LEXIS 17820, 91 Empl. Prac. Dec. (CCH) P43201, 103 Fair Empl. Prac. Cas. (BNA) 338 (D. Del. 2008).

Under Delaware law, derivative claims are barred under the workers' compensation statute because the exclusivity provision extinguishes the predicate claim. See Deuley v. DynCorp International, Inc., 8 A.3d 1156, 2010 Del. LEXIS 623, 31 I.E.R. Cas. (BNA) 1849 (Del. 2010) (a wrongful death action is derivative and wholly dependent on whether the decedent had a right to bring a claim during his lifetime and are subject to the same infirmities as would have existed in a suit by the deceased if still alive).

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

No, not under the workers' compensation statute.

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

None under the Act. The minor employee, however, even if employed illegally, is not thereby barred from receiving workers' compensation benefits. 19 Del. C. § 2315.

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

Employees may sue workers' compensation insurers for breach of the implied covenant of good faith and fair dealing as third-party beneficiaries of contracts of insurance between employers and insurers. Pierce v. International Ins. Co. of Illinois, 671 A.2d 1361 (Del. 1996).

An insurer who neglects or refuses to pay, such delay being avoidable or due to negligence, is fined not less than \$500 nor more than \$2,500, which is payable to the Workers' Compensation Fund. 19 Del. C. § 2362.

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

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None under the Act. However, there may be other remedies under federal law if the employee is disabled.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. See 19 Del. C. § 2363.

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

Co-employees cannot be sued for injuries arising from their negligence. They can, however, be sued for willful acts directed against a co-employee for personal reasons. 19 Del. C. § 2301(19).

36. Is subrogation available?

Yes. See 19 Del. C. §§ 2363(c)-(e). The employer/insurer is responsible for its pro-rata share of litigation costs expended. Keeler v. Harford Mut. Ins. Co., 672 A.2d 1012 (Del. 1996), *overruling*, Cannon v. Container Corp. of America, 282 A.2d 614 (Del. 1971). The Court noted in Roadway Express v. Folk, 817 A.2d 772, 776 (Del. 2003), that the trial court may use its discretion to deviate from a pro rata apportionment to account for the employer's or its insurance company's attorneys' fees if the court believes a reduction is necessary to achieve an equitable result. See Arthur Lawson, *The Law of Workmen's Compensation*, § 117.02 (2001) ("[U]nder a statute ...that has been construed to permit apportionment of the claimant's attorneys' fees, the services provided by the carrier's attorney may be taken into account in adjusting the amount of fees to be borne by the carrier and the employee.").

MEDICALS

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

An employee's request for reimbursement for nonpreauthorized care medical expenses must be paid within 30 days after presentation to the insurer, as long as the claim contains substantially all the required data elements necessary to adjudicate the invoice, unless the invoice is contested in good faith. 19 Del. C. § 2322F(h). Fines, of not less than \$1,000.00, nor more than \$5,000.00, may be assessed for failure to pay medical expenses properly due. 19 Del. C. § 2322F(g). Unpaid invoices incur interest at a rate of 1% per month payable to the provider. 19 Del. C. § 2322F(h). See also 19 Del. C. § 2346 (hearing to settle disputes between medical provider and person charged with duty to pay such provider).

19 Del. C. § 2322F(d) provides that treatments, evaluations and therapy provided by a certified health care provider shall be paid within 30 days of receipt of the health care provider's bill or invoice together with records or notes as provided in this section, unless compliance with the health care payment system or practice guidelines adopted pursuant to § 2322B or § 2322C is contested, in good faith, to the utilization review system set forth in subsection (j) of this section. If employer is denying payment for health care services provided pursuant to this chapter, whether in whole or in part, the denial shall be accompanied with written explanation of reason for denial. 19 Del. C. § 2322F(e).

However, it must be noted that under §2322(h):

An employer or insurance carrier may pay any health care invoice or indemnity benefit without prejudice to the employer's or insurance carrier's right to contest the compensability of the underlying claim or the appropriateness of future payments of health care or indemnity benefits. In order for any provision or payment of health care services to constitute a payment without prejudice, the employer or insurance carrier shall provide to the health care provider and the employee a clear and concise explanation of the payment, including the specific expenses that are being paid, the date on which such charges are paid, and the following statement, which shall be conspicuously displayed on the explanation in at least 14 point type:

This claim is IN DISPUTE and payment is being made without prejudice to the Employer's right to dispute the compensability of the workers' compensation claim generally or the Employer's obligation to pay this bill in particular.

Further, partial payment of the uncontested portion of a partially contested health care invoice shall be considered a payment without prejudice to the right to contest the unpaid portion of a health care invoice, provided the above notice requirements are met. 19 Del. C. §2322(h)(1).

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

Prior to an employee filing a Petition with the Department, an employer has the right to request that the employee provide an executed authorization. The employee has no duty to provide medical reports. However, if the employee fails to provide an executed authorization, the employer can deny the claim on the basis it is prevented from properly investigating the claim.

After an employee files a petition with the Department, an employer has the right to serve a Request for Production upon the employee or employee's counsel. The employee must provide a written response within fifteen days. The response must contain the requested items including medical records or it must advise where the records can be obtained. Additionally, the employee must provide a medical authorization. If the employee fails to provide a response or an authorization, the employer may file a motion with the Department compelling the production of the requested information. Moreover, any party may request the Industrial Accident Board to issue subpoenas for medical or other records. See, Board Rule 11.

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

A. Claimant's choice of physician.

An employee who alleges an industrial injury has the right to select a physician, surgeon, dentist, optometrist or chiropractor. Notice of intention to employ such medical aid must be given to the employer/insurer, or to the Board. Notice that medical aid was employed must be given within 30 days thereafter to the employer/insurer in writing. If the alleged injury is subsequently held to be compensable, the employer is liable for the reasonable cost of the services of any provider utilized by the employee if proper notice of the treatment was given to the employer/insurer. 19 Del. C. § 2323.

Certification is required for a health care provider to provide treatment to an employee, without the requirement that the health care provider first pre-authorize each health care procedure, office visit or health care service to be provided to the employee with the employer if self-insured, or the employer's insurance carrier. 19 Del. C. §2322D (a)(1). A health care provider shall be certified only upon meeting the following minimum certification requirements:

- i. Have a current license to practice, as applicable;
- ii. Meet other general certification requirements for the specific provider type;
- iii. Possess a current and valid Drug Enforcement Agency ("DEA") registration, unless not required by the provider's discipline and scope of practice;
- iv. Have no previous involuntary termination from participation in Medicare, Medicaid or the Delaware workers' compensation system. Any such involuntary termination shall be considered to be inconsistent with certification;
- v. Have no felony convictions in any jurisdiction, under a federal-controlled substance act or for an act involving dishonesty, fraud or misrepresentation. A felony conviction in any jurisdiction under a federal-controlled substance act or for an act involving dishonesty, fraud or misrepresentation shall be considered to be inconsistent with certification;
- vi. Provide proof of adequate, current professional malpractice and liability insurance.

In addition to the above, the health care provider to be certified must agree to the terms and conditions set forth on the Health Care Provider Application for Certification, as follows:

- i. Comply with Delaware workers' compensation laws and rules;
- ii. Maintain acceptable malpractice coverage;
- iii. Complete state-approved continuing education courses in workers' compensation every two (2) years from the date of the health care provider's initial certification. A listing of continuing education courses in workers' compensation care approved by the State of Delaware, Department of Labor, Office of Workers' Compensation, will be posted on the Office of Workers' Compensation website. To maintain certification, every two (2) years from the initial date of certification the health care provider must provide written notification to the Office of Workers' Compensation of compliance with the continuing education course requirement noted above, setting forth the name of the course(s) completed and the date of completion;

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- iv. Practice in a best-practices environment, complying with practice guidelines and Utilization Review Accreditation Council ("URAC") utilization review determinations;
- v. Agree to bill only for services and items performed or provided, and medically necessary, cost-effective and related to the claim or allowed condition;
- vi. Agree to inform an employee of his or her liability for payment of non-covered services prior to delivery;
- vii. Accept reimbursement for and not unbundle charges into separate procedure codes when a single procedure code is more appropriate;
- viii. Agree not to balance bill any employee or employer. Employees shall not be required to contribute a co-payment or meet any deductibles;
- ix. Agree to have knowledge of all statements authorized under the certified health care provider's signature and to be responsible for the content of all bills submitted pursuant to the provisions of 19 Del. C. §2322B, C, E, F;
- x. Agree to provide written notification to the Department of Labor, Office of Workers' Compensation, State of Delaware, of any relevant changes to the requirements set forth in the Certification Form within thirty (30) days of the health care provider's knowledge or receipt of notice of any and all such change(s).

19 Del. C. §2322D (a)(2). Any health care provider may provide services during one office visit, or other single instance of treatment, without first having obtained prior authorization from the employer if self-insured, or the employer's insurance carrier, and receive reimbursement for reasonable and necessary services directly related to the employee's injury or condition at the health care provider's usual and customary fee, or the maximum allowable fee pursuant to the workers' compensation health care payment system adopted pursuant to 19 Del. C. §2322D (B), whichever is less. The provisions of §2322D are limited to the occasion of the employee's first contact with any health care provider for treatment of the injury, and further limited to instances when the health care provider believes in good faith, after inquiry, that the injury or occupational disease was suffered in the course of the employee's employment.

B. An employer's right to a second opinion and/or independent medical examination.

Following an injury and during the period of disability, the employee shall submit for an examination at a reasonable and place by a physician legally authorized to practice upon reasonable request by an employer or order by the Board. If the employee requests, he/she shall be entitled to have a physician of the employee's own selection, to be paid for by the employee, present to participate in the examination. 19 Del. C. § 2343(a). Note: This evaluation is not to be referred to as an "Independent Medical Examination."

The refusal of the employee to submit to the examination or the employee's obstruction of such examination shall deprive the employee of the right to compensation during the continuance of such refusal or obstruction and the period of such refusal or obstruction shall be deducted from the period during which compensation would otherwise be payable. 19 Del. C. § 2343(b).

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

The standard is whether the charges are reasonable, necessary, and causally related. If medical charges are disputed, "any interested party" may request a hearing before the Board in regard to

the dispute. 19 Del. C. § 2346.

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

During the period of disability, the employer must furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services, medicine and supplies, including repairing damage to or replacing false dentures, false eyes or eyeglasses and providing hearing aids, as and when needed, unless the employee refuses to allow them to be furnished by the employer. 19 Del. C. § 2322(a). In addition, an employee is entitled to mileage reimbursement in an amount equal to the state specified mileage allowance rate for travel to obtain said devices. 19 Del. C. § 2322(g).

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

Industrial Accident Board decisions generally permit vehicle and/or home modifications in catastrophic cases.

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

Yes. The intent of the health care payment system developed pursuant to Delaware's Workers' Compensation Act ("Act") is to establish a system that eliminates outlier charges and streamlines payments by creating a presumption of acceptability of charges implemented through a transparent process, involving relevant interested parties, that prospectively responds to the cost of maintaining a health care practice, eliminating cost shifting among health care service categories, and avoiding institutionalization of upward rate creep. 19 Del. C. §2322B(1).

Carriers pay the lesser of the rate established by the State payment schedule, or the actual charge. The maximum allowable payment for health care treatment and procedures covered under the Workers' Compensation Act shall be 200% of the Federal Medicare schedule price for that procedure, with the exception of 250% for radiology services and 300% for surgical services. 19 Del. C. §2322B(3)(b)(6).

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

"Any employee who alleges an industrial injury shall have the right to employ a physician, surgeon, dentist, optometrist or chiropractor of the employee's own choosing." 19 Del. C. § 2323.

Employees must give notice of their intent to obtain medical aid. If the employee gives notice, the employer "is liable for the reasonable cost of the services of any physician, surgeon, [etc.] whose employment was utilized by the employee." *Id.*

PRACTICE/PROCEDURE

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

No formal pleading or formal answer shall be required of any party to any action before the Board. Board Rule 6(A). However, each person making a written request for a hearing must file with the Department on forms approved by the Department a statement giving substantially the information requested on the forms. Board Rule 6(A).

If the employer and employee (or in the case of any employee's death the employee's dependents) fail to reach agreement in regard to compensation, either party may notify the Department of the facts and the Department shall schedule a hearing. 19 Del. C. § 2345.

46. What is the method of claim adjudication?

A. Administrative level.

The adjudication of a claim begins with a hearing before the Industrial Accident Board. The Board consists of ten members appointed by the governor and confirmed by the state senate for a term of six years. 19 Del. C. § 2301A(a). Two members of the Board constitute a quorum for hearings conducted under Title 19. 19 Del. C. § 2301A(c).

The parties may also agree to the adjudication of a claim by a hearing officer. Hearing officers are appointed by the Secretary of Labor for a term of five years. 19 Del. C. §2301B(b).

B. Trial Court.

An employer may petition the Department for a rehearing. Board Rule 21 provides: applications for (1) further hearing in a proceeding after the closing of testimony and before final submission on oral argument or brief, or for (2) reopening a proceeding after final submission and before decision, or for (3) rehearing, or reargument after decision, must be made by petition within 10 days after the date of such closing of testimony, final submission, or decision, as the case may be.

An employer, may, in the alternative, file an appeal on the record with the Superior Court within 30 days of the Board's decision. The court reviews the decision of the Board to determine whether there was substantial evidence to support the Board's decision or whether there was an error of law. 19 Del. C. §§ 2349, 2350.

C. Appellate.

An appeal may then be taken to the State Supreme Court.

47. What are the requirements for stipulations or settlements?

They must be approved by the Industrial Accident Board.

Pursuant to § 2358(a), following application of either party and notice to the other party, the compensation may be commuted by the Board at its present value when discounted at 5% interest, with annual rests, disregarding, except in commuting payments due under § 2324 of this title, the probability of the beneficiary's death. The commutation may be allowed if it appears that it will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or hardship to either party, or that such employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the whole or the greater part of the injured employee's or the dependents of a deceased employee's business or assets. Importantly, it shall not be allowed for the purpose of enabling the injured employee or the dependents of a deceased employee to satisfy a debt created before the accident, other than a mortgage upon the injured employee's or the dependents of a deceased employee's or their home or household furniture.

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

Rarely. Medicals must ordinarily stay open as a condition of approval of any commutation of benefits.

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

Yes.

RISK FINANCE FOR WORKERS' COMPENSATION**50. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?**

Coverage is available through private insurers or assigned risk pools. In addition, self-insurance is permitted.

51. What are the provisions/requirements for self-insurance?**A. For individual entities.**

Every employer to whom this chapter applies shall insure and keep insured the employer's liability for compensation in some corporation, association or organization approved by the Department and authorized to transact the business of workers' compensation insurance in this State or shall furnish to the Department satisfactory proof of the employer's financial ability to pay directly the compensation, in the amount and manner and when due, as provided in this chapter. 19 Del. C. § 2372 (a).

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

Under 19 Del. C. § 2376 there is a provision for the creation of mutual insurance companies (pooling of risks by two or more companies) to satisfy the requirements of §2372. The groups are subject to such reasonable conditions and restrictions as may be fixed by the Department.

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

Immigration status is not an outright bar to receipt of benefits. While there are no Delaware Statutes that are directly on point, the Delaware Superior Court has addressed this issue and stated the following:

This Court must and can reasonably assume the General Assembly is aware of the myriad issues swirling around illegal immigrants. From that, too, the Court can deduce, the Legislature's silence, especially in 2006 when the amendment to § 2353 was passed, could readily mean it chose not to add an exclusion due to deportation/exclusion to the list of disqualifications or reasons for suspension of benefits. Del. Valley Field Servs. v. Ramirez, 2012 Del. Super. LEXIS 622 (Del. Super. Ct. 2012).

The Supreme Court has also dealt with immigration status as a factor in determining job availability and whether an injured worker is considered "displaced" under the meaning of the

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Act. See, Campos v. Daisy Construction Co., 107 A.3d 570 (Del. 2014); Roos Foods v. Guardado, 152 A.3d 114 (Del. 2016).

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

There are no known statutory provisions or Superior Court cases addressing this issue.

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

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

- the employee is already a Medicare enrollee, in which case there is not a threshold settlement amount; 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 CFR 404, 411; 42 USC§1395).

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 a general rule, in cases where an employee is injured within the course of his employment by a third party, the employee is permitted to recover worker's compensation benefits from his employer, and also pursue a personal injury action against the tortfeasor. *See* 19 Del. C. § 2363. However, any recovery by an employee in such action "shall first reimburse the employer or its workers' compensation insurance carrier for any amount paid or payable under the Workers' Compensation Act...", and any balance shall be paid to the employee. 19 Del. C. § 2363(e). The statute prevents a double recovery by the employee, and permits the employer or its insurer to recoup its compensation payments.

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Insurers providing benefits under an employee's own motor vehicle policy are subrogated to the rights of the employee for whom benefits are paid under the worker's compensation law. See 21 Del. C. §2118(f).

An employer's worker's compensation carrier cannot assert a priority lien for payments made to the employee by the employer's own underinsured motorist insurer. See 18 Del. C. § 3902, and 19 Del. C. § 2363.

The state public assistance subrogation statute is codified at 31 Del. C. § 522. "In any claim for benefits by a recipient who receives medical care under [Title 31], where the recipient has a cause of action against any other person, the Department of Health and Social Services [is] subrogated against (substituted for) the recipient to the extent of any payment made by the Department of Health and Social Services on behalf of the recipient receiving medical care, resulting from the occurrence which constituted the basis for the action against the other person." *Id.*

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)?

At the present time, HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462 provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers.

As a general rule, an employee's medical records, which may contain facts of a personal nature, are within the ambit of privacy protection. *Petition of Greenwood Trust Co.*, C.A. No. 98M-03-007-WTQ, 1999 WL 167792, Quillen, J. (Del. Super. March 3, 1999). In addition, Delaware courts have adopted a testimonial privilege recognizing the confidentiality of the physician-patient relationship, and medical records are included in this privilege. Del. Rule of Evidence 503. The General Assembly also recognizes physicians have a professional duty to maintain patient confidences. "[W]illful violation of the confidential relations and communications of a patient" constitutes unprofessional conduct by a medical doctor or surgeon under Delaware law. 24 Del. C. § 1731(b)(12).

However, under the Worker's Compensation Act, no fact communicated to, or otherwise learned, by a physician or surgeon who has attended or examined the employee, or who has been present at any examination is privileged in any hearings under the Act, or in any other action at law. 19 Del. C. § 2343(c).

The employer can request, or the Board can order, the employee to submit to a medical examination by a physician at a reasonable time and place, and as often as reasonably necessary. 19 Del. C. § 2343(a). The Board can also order the examining physician to testify before the Board. 19 Del. C. § 2320(7). The Board has broad statutory authority to examine physicians as witnesses, take medical evidence, and require the production of medical documentation. 19 Del. C. § 2320(4); Board Rule 11.

On appeal, the Superior Court can also appoint 1 or more impartial physicians to examine the injuries of the employee. 19 Del. C. § 2351(a).

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

Delaware courts have defined an "independent contractor" as "one who is engaged to do work in an independent manner, accountable only as to the results obtained, and not subject to the control or supervision of the employer." Rocha v. Keka Constr., Inc., 2005 Del. Super. LEXIS 101, Del. Super., C.A. No. 04A-07-002, Bradley, J. (2005) (citing Gooden v. Mitchell, 41 Del. 301, 2 Terry 301, 21 A.2d 197, 200 (Del. Super. Ct. 1941)). Control is not determined by actual control, but the "right to control the details of the work beyond what is necessary to ensure the bargained for end result." Bryson v. H. O. Kline Transportation, Inc., 1987 Del. Super. LEXIS 1139 at 1, Del. Super. C. A. No. 85A-OC-9, Balick, J. (May 6, 1987); Miller v. Preston Trucking, 1998 Del. Super. LEXIS 414 (Del. Super. Ct. June 11, 1998); Falconi v. Coombs & Coombs, Inc., 902 A.2d 1094, 2006 Del. LEXIS 383 (Del. 2006).

The Restatement (Second) of Agency states that the following non-exclusive "matters of fact" are to be considered in deciding whether the actual tortfeasor is a servant or an independent contractor:

- i. the extent of control, which, by the agreement, the master may exercise over the details of the work;
- ii. whether or not the one employed is engaged in a distinct occupation or business;
- iii. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- iv. the skill required in the particular occupation;
- v. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- vi. the length of time for which the person is employed;
- vii. the method of payment, whether by the time or by the job;
- viii. whether or not the work is a part of the regular business of the employer;
- ix. whether or not the parties believe they are creating the relation of master and servant; and
- x. whether the principal is or is not in business.

Restat. 2nd of Agency 220 (2).

There is a strong inference that an individual is the servant of the owner if the work is done upon the premises of the employer with his machinery and it is agreed that the general rules for the regulation of the conduct of employees will be obeyed by the individual. This inference is not necessarily rebutted by the fact that the individual is paid by the amount of work performed or by the fact that he supplies in part his own tools or even his assistants. If, however, the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are servants of the person making the rules. See Falconi v. Coombs & Coombs, Inc., 902 A.2d 1094 (Del. 2006)

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

The general rule is that an employee, with his consent, may be loaned by his general employer to another to perform specific services, and that, in the course of and for the purpose of

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performing such services, he may become the employee of the specific employer rather than the employee of the general employer. As such, a loaned employee may become the specific employer's employee, while at the same time remaining the employee of employer who loaned his/her services. Restatement of Agency 2d § 227.

The borrowed servant doctrine is recognized in Delaware and was outlined in Richardson v. John T. Hardy & Sons, Inc.:

Whether or not a loaned employee becomes the employee of the one whose immediate purpose he serves is always a question of fact, and depends upon whether or not his relationship to the specific employer has the usual elements of the employer-employee status.

Fundamentally, it is not important whether or not he remains the employee of the general employer as to matters generally. What is important to determine is, with respect to the alleged negligent act in question, whether or not he was acting in the business of and under the direction of the general or the specific employer. This is almost always determined by which employer has the right to control and direct his activities in the performance of the act allegedly causing the injury, and whose work is being performed.

54 Del. 567, 182 A.2d 901, 4 Storey 567 (Del. 1962).

As held by the Court in Volair Contrs., Inc. v. AmQuip Corp., 829 A.2d 130, 134 (Del. 2003):

The common law borrowed servant doctrine focuses on the relationship between an employer and an employee. The general rule is that an employee, with his consent, may be loaned by his general employer to another to perform specific services, and that, in the course of and for the purpose of performing such services, he may become the employee of the specific employer rather than the employee of the general employer. ...Accordingly, a loaned employee may become the specific employer's employee while at the same time remaining, generally speaking, the employee of him who loans his services.

Whether or not a loaned employee becomes the employee of the one to whom he/she is loaned depends upon whether or not his relationship to the specific employer has the usual elements of the employer-employee status. Specifically, it must be determined whether or not he was acting in the business of and under the direction of the general or the specific employer. Restatement of Agency 2d, § 227, comment a; 35 Am. Jur., Master and Servant, § 541. The existence of an employer-employee relationship is an issue of law. Porter v. Pathfinder Servs., 683 A.2d 40, 42 (Del. 1996). The test is who hired the worker, had the power to discharge him, paid his wages, and was in control of the worker's activities while he was working. Barnard V. State, Del. Super., 642 A.2d 808 (1992), *aff'd*, Del. Supr., 637 A.2d 829 (1994); Lester C. Newton Trucking Co. v. Neal, Del. Supr., 58 Del. 55, 204 A.2d 393 (1964). See Richardson v. John T. Hardy & Sons, Inc., 54 Del. 567, 571, 182 A.2d 901, 903 (Del. 1962) ("This is almost always determined by which employer has the right to control and direct his activities in the performance of the act allegedly causing the injury, and whose work is being performed."). The greatest weight is given to the issue of control. Barnard, 642 A.2d at 815; White v. Gulf Oil, Del. Supr., 406 A.2d 48 (1979).

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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?

Under Lester C. Newton Trucking Co. v. Neal, 204 A.2d 393, 395 (Del. Supr. 1964), the four-prong test in determining employer-employee status is: (1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee's wages; (4) who has the power to control the conduct of the employee when he is performing the particular job in question. In distinguishing between an employee and an independent contractor, there are four factors to be considered in showing the right of control: (1) direct evidence of right or exercise of control, (2) method of payment; (3) furnishing equipment; (4) right to fire. 1C A. Larson, Workmen's Compensation Law §44.00 (1982). See Patterson v. Blue Hen Lines, Inc., 1986 Del. Super. LEXIS 1060 (1986) (ICC regulations standing alone are insufficient to turn owner-operators into employees).

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, listed below:

61. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?

No, other than the generally-applicable requirements of the Medicare Secondary Payer Act described in Question 54, above. However, closed medical commutations are rarely available and must be approved by the Industrial Accident Board.

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

Delaware has an operational medical marijuana program. Patient's participation in the program requires a diagnosis of one or more listed conditions and certification by a physician with whom the patient has a bona fide relationship. 16 Del. C. § 4903A. Patients are issued registration cards upon approval and may purchase and possess up to 6 ounces of marijuana products per month. Notably, this includes smokeable marijuana. 16 Del. C. § 4902A(9) and 16 Del. C. § 4701(27). All marijuana must be purchased from a state-approved dispensary. See, 16 Del. C. § 4901A, *et seq.*

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The laws specifically exempts insurers from having to pay for medical marijuana treatment. 16 Del. C. § 4907A(a). Employers are allowed to prohibit and discipline employees for on the job medical marijuana use. 16 Del. C. § 4907A(b).

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?

Recreational use of marijuana remains illegal in Delaware. There is a current effort at legalization in the legislature but, the process is still ongoing.