

MASSACHUSETTS

FOR MORE INFORMATION

MORRISON MAHONEY, LLP
Boston, Massachusetts
www.morrisonmahoney.com

Meredith P. Rainey, Esq.
mrainey@morrisonmahoney.com

Justin P. Starr, Esq.
jstarr@morrisonmahoney.com

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

Massachusetts General Laws, Chapter 152.

SCOPE OF COMPENSABILITY

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

An employee is defined as any person in the service of another under any contract of hire, express or implied, oral or written, who does not fall within one of the specific exclusions contained in Mass. Gen. L. c. 152, § 1. A corporate officer or stockholder can also be considered an employee if employed by the corporation. *Emery's Case*, 271 Mass. 46 (1930). This chapter shall be elective for an officer or director of a corporation who owns at least 25 percent of the issued and outstanding stock of the corporation. For the purpose of this chapter, a sole proprietor at his option or a partnership at its option shall be an employee. A sole proprietor or partnership may elect coverage by securing insurance with a carrier.

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

The most common statutory employer relationship is where an insured employer contracts to have part of its work performed by an uninsured independent contractor and an employee of the contractor suffers an industrial injury. Mass. Gen L. c. 152, § 18.

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

A. **Traumatic or "single occurrence" claims.**

For an injury to be compensable, it must arise out of and in the course of the employment. Mass. Gen. L. c. 152, § 26. Any injury is compensable if it arises out of the "nature, conditions, obligations, or incidents of employment... looked at in any of its aspects." *Matthews v. Liberty Mutual Insurance Co.*, 354 Mass. 470, 473 (1968).

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

The definition for personal injury is the same whether the injury is classified as traumatic or an occupational disease. "Personal injury" includes infectious or contagious diseases if the employment exposes the employee to the risk of contracting such disease. Mass. Gen. L. c. 152, § 1(7A).

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

None which arise out of and in the course of the employment. However, if a compensable injury combines with a non compensable, pre existing condition to cause or prolong disability, the resultant condition is compensable only to the extent that the industrial injury remains a major

cause of the disability or need for treatment. Mass. Gen. L. c. 152 § 1(7A).

6. What psychiatric claims or treatments are compensable?

A psychiatric or emotional injury may be compensable if it resulted from a specific or series of specific incidents in the workplace. However, no mental or emotional disability arising principally out of a bona fide personnel action, including a transfer, promotion, demotion or termination, is compensable, unless the action amounts to intentional infliction of emotional harm. Mass. Gen. L. c. 152, §1(7A). For injuries occurring on or after December 24, 1991, a claim for mental or emotional disability is only compensable when the predominant contributing cause of such disability is an event or series of events occurring within the employment. An employee may also be entitled to workers' compensation benefits if he can show that the emotional disability was sequelae to a compensable physical injury.

7. What are the applicable statutes of limitations?

A claim must be filed within four years of the date the employee first became aware of the causal relationship between the disability and the employment. Mass. Gen. L. c. 152, § 41. In the event of death, a claim must be made within four years after the death. Payment of compensation, or the filing of a claim, tolls the statute of limitations for any benefits due as a result of that injury. See Mass. Gen. L. c. 152, §§ 41, 49.

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

Under Mass. Gen. L. c. 152, essentially, as long as an employee files a claim within four years (§ 41), the employee is required to provide notice of claim to the employer or insurer "as soon as practicable after the happening thereof." The statute further provides, however, that want of notice shall not bar the proceedings unless the insurer was prejudiced. Mass. Gen. L. c. 152, § 44. The employee has the burden of showing such lack of prejudice.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

There is no provision barring benefits as a result of a self inflicted injury. However, when an employee commits suicide, his or her dependents cannot recover benefits unless it is shown, by the weight of the evidence, that due to a work related injury, the employee was of such unsoundness of mind that he or she could not be held responsible for the act of suicide. Mass. Gen. L. c. 152, § 26A.

B. Willful misconduct, "horseplay," etc.

A claim for injury caused by serious and willful misconduct is barred. Mass. Gen. L. c. 152, § 27. Serious and willful misconduct is defined as conduct quasi criminal in nature, the intentional doing of something either with knowledge that it is likely to result in serious injury or with wanton and reckless disregard of its probable consequences. Durgin's Case, 251 Mass. 427 (1925). Mere negligent conduct on the part of an employee does not preclude benefits. Lawrence's Case, 330 Mass. 244 (1953).

C. Injuries involving drugs and/or alcohol.

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Intoxication in and of itself is not a bar to compensation. Mass. Gen. L. c. 152, § 27. Eldridge's Case, 310 Mass. 830 (1941). Compare Dupuis v. Phillip Beaulieu Home Improvement, 19 Mass. Workers' Comp. Rep. 33, 34-35 (2005) (A fall off a roof caused by an employee's intoxication, constituted serious and willful misconduct under Mass. Gen. L. c. 152, § 27, thereby resulting in the denial and dismissal of the employee's claim). The voluntary ingestion of a narcotic substance has been found to be a bar to benefits under a related disability statute. DiGloria v. The Chief of Police of Methuen, 8 Mass. App. Ct. 506 (1979) (disability benefits for police and fire fighters).

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

Any party, including an attorney or expert medical witness, who is found to have engaged in fraudulent conduct in connection with any proceeding must be reported to the general counsel of the Insurance Fraud Bureau. Fraudulent conduct includes concealing or knowingly failing to disclose that which is required by law to be revealed, knowingly using perjured testimony or false evidence, knowingly making a false statement of fact or law or otherwise engaging in conduct that such party knows to be illegal. Mass. Gen. L. c. 152, § 14(2).

Regardless of any action taken by the Bureau, any party violating the statute will be assessed the entire cost of the proceedings, including attorney's fees, and must also pay a penalty to the aggrieved party in the amount of not less than the average weekly wage in the Commonwealth multiplied by six. Attorneys and physicians who are found to engage in fraudulent activity will be reported to their respective professional disciplinary boards.

The provision also contains criminal penalties of "imprisonment in the state prison for not more than five years or by imprisonment in jail for not less than six months nor more than two and one half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment." Mass. Gen. L. c. 152 § 14(3).

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

Benefits are barred when an employee knowingly and willfully made a false representation as to his or her physical condition at the time of hire and the employer relied upon the false representation in hiring the employee. Mass. Gen. L. c. 152, § 27A. In order for the misrepresentation to act as a bar, the employer must show that the employee knew or should have known that it was unlikely he or she could fulfill the duties of the job without incurring a serious injury. An employee may rectify any misrepresentation made to the employer regarding physical condition, subsequent to hire, as long as it is done prior to injury.

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

Recreational and non work activities paid for or supported by the employer are generally not compensable. Mass. Gen. L. c. 152, § 1(7A). However, if participation in the activity was compelled in part by the employer, benefits may be recovered. See Tigno v. Acme Boot Company, 8 Mass. Workers' Comp. Rep. 145 (1994).

13. Are injuries by co-employees compensable?

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Yes, if the injury is deemed to have arisen out of and in the course of employment. *Matthews v. Liberty Mutual Insurance Company*, 354 Mass. 470, 473 (1968).

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

If the act or assault by a third party is unrelated to work, it would not meet the statutory requirement that the injury arose out of employment.

BENEFITS

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

The average weekly wage is calculated by taking the earnings of the employee during the 12-month period immediately preceding the injury and dividing that amount by 52. In situations where, because of the short duration of employment, it is impracticable to compute the wage according to that formula, the wages of a person employed in the same grade and in the same class of employment may be utilized. Mass. Gen. L. c. 152, § 1(1). The average weekly wage of a seasonal employee with a "determinate duration" such as a landscaper is calculated on the basis of fifty two weeks rather than the actual weeks worked. *Bunnell v. Wequasset Inn*, 12 Mass. Workers' Comp. Rep. 152 (1998)

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

For injuries occurring before December 24, 1991, an employee is entitled to two thirds of the pre injury average weekly wage, not to exceed the state average weekly wage. For injuries occurring on or after December 24, 1991, an employee is entitled to 60% of the pre injury average weekly wage, when deemed temporarily totally disabled, not to exceed the state average weekly wage. An employee deemed partially disabled is entitled to 75% of the temporary total disability rate, but if the employee is earning reduced wages, the employee is entitled to 60% of the difference between the pre-injury average weekly wage and the wage the employee is able to earn post-injury. The state average weekly wage is set by the Commissioner of the Division of Employment Security on October 1st of each year. The minimum weekly compensation rate is 20% of the average weekly wage.

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

An insurer has 14 days from the receipt of a first report of injury or claim in which to pay a claim for benefits. Mass. Gen. L. c. 152, § 7.

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

For injuries occurring after December 24, 1991, an employee must be out of work for more than 5 days before recovering benefits (and is only entitled to benefits from the 6th day of incapacitation forward). However, an employee out of work for 21 days or more is entitled to recover benefits for the first 5 days of incapacity.

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

An insurer may commence the payment of weekly benefits on a without prejudice basis within 14 days of receipt of either a first report of injury or the employee's claim. Mass. Gen. L. c. 152 § 7. For injuries occurring before December 24, 1991, benefits may be paid without prejudice for a period of 60 days and can be extended to a maximum of 120 days. For injuries occurring after December 24, 1991, benefits can be paid without prejudice for 180 days and extended up to a maximum of 360 days. As long as an insurer is within the payment without prejudice period, it may terminate benefits for essentially any reason. Mass. Gen. L. c. 152, § 8. Once compensability has been established, benefits may only be terminated by judicial order, return to work, or release by a treating or impartial physician accompanied by a suitable job offer from the employer.

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

Massachusetts does not recognize permanent partial disability, but it does recognize partial incapacity benefits based upon a diminution in the employee's earning capacity. There are different maximums with respect to the amount an employee is entitled to receive in temporary total and partial disability benefits. Mass. Gen. L. c. 152 §§ 34, 35.

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

Disfigurement benefits are calculated by using guidelines promulgated by the Department of Industrial Accidents. Mass. Gen. L. c. 152, § 36(K).

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

Massachusetts does not recognize permanent partial disability. It does however, recognize partial incapacity based upon a diminution in an employee's earning capacity. If any employee returns to work after sustaining an injury and earns less than the pre injury earning, or is determined to have a reduced earning capacity, for dates of injury occurring before December 24, 1991, he or she is entitled to receive two thirds of the difference between the average weekly wage before and after the injury. For injuries occurring on or after December 24, 1991, an employee is entitled to receive 60% of the difference between the average weekly wage before the injury and the wage he or she is capable of earning after the injury. Mass. Gen. L. c. 152, § 35. The employee, however, may not receive benefits in excess of the maximum compensation rate in effect on the date of the injury nor can such benefits exceed 75% of the temporary total disability benefits the employee would be entitled to receive. For injuries prior to December 24, 1991, up to 600 weeks of partial benefits are available to the employee. Injuries on or after that date are afforded up to 260 weeks of partial benefits. In certain very limited situations, an employee may be awarded up to 520 weeks for a partial disability.

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

Massachusetts does not schedule permanent partial disability benefits. Rather, Mass. Gen. L. c.

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152, § 36 and the guidelines promulgated by the Department of Industrial Accidents provide formulas for determining loss of function benefits.

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

The statute is based upon a diminution in an employee's earning capacity.

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

For any injury occurring after November 1, 1986, the employee is entitled to receive vocational rehabilitation. Mass. Gen. L. c. 152, § 30G. However, before an employee is entitled to vocational rehabilitation, he or she first must be deemed suitable for those services by the Department of Industrial Accidents.

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

An employee determined to be permanently and totally disabled is eligible to receive two thirds of the pre injury wage, but not more than the maximum rate, nor less than the minimum compensation rate, in effect on the date of injury. The employee may also be entitled to receive cost of living adjustments. Mass. Gen. L. c. 152, § 34B.

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

While death benefits are divided into several sections regarding the payment of weekly death benefits, a spouse who satisfies certain criteria, as long as he or she remains unmarried, receives two thirds the average weekly wage of the deceased employee, but not more than the average weekly wage in Massachusetts on the date of death. In no instance shall said spouse receive less than \$110.00 per week. Also, said benefits are payable for 250 times the state average weekly wage on the date of death. Said benefits can continue beyond said time frame, if the spouse is found to be not fully self-supporting. Also, under certain circumstances, there may be other individuals, such as children, and dependents of the employee, who may be eligible to receive weekly benefits under Section 31. If an employee is entitled to receive loss of function, or disfigurement benefits under Section 36, but that is before fully collecting these benefits, the benefits are payable in a lump sum to the employee's legal representative.

A. Funeral expenses.

For injuries occurring before December 23, 1991, the insurer is required to pay reasonable burial expenses up to \$2,000.00. For injuries occurring on or after December 23, 1991, the maximum is \$4,000.00. Mass. Gen. L. c. 152, § 33.

B. Dependency claims.

§§ 31, 32 and 35A of the Act set forth the guidelines for the payment of claims to survivors, and dependents. Essentially, a surviving spouse, child, or parent of a deceased employee may be entitled to benefits if they can establish that they were wholly or partially dependent upon the deceased employee at the time of the injury or death.

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

An insurer must establish that the employee had a known physical impairment due to a previous accident, disease or congenital condition which was likely to be a hindrance or obstacle to employment, and who sustained a compensable injury. In order to be entitled to such a recovery, the insurer must show that the resulting disability is substantially greater by reason of the combined effects of the known physical impairment and the subsequent personal injury, than the disability which would have resulted from the subsequent personal injury alone. Mass. Gen. L. c. 152, § 37. For injuries occurring on or after December 24, 1991, said recovery will only pertain to claims that involve permanent and total disability under § 34A, death claims under § 31, § 32, § 33, and § 36A, and where benefits are due under any of the aforementioned sections, medicals under § 30. Furthermore, the insurer must also prove that the employer had personal knowledge of the existence of such pre existing physical impairment within thirty days of the date of employment or retention of employment. Id.

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

A case can be settled by the payment of a lump sum. Normally, if such a settlement is reached prior to liability being established, then an employee is foreclosed for seeking further benefits for that injury. However, a claim for further medical benefits can be filed where the employee has "suffered a substantial deterioration of his medical condition which (i) could not reasonably have been foreseen at the time said agreement was entered into, and (ii) is the result of an injury for which the insurer would have been liable". Such a claim must be filed within one year of when the employee first became aware of the causal relationship between the deterioration and his employment. Mass. Gen. L. c. 152, § 48.

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

Pursuant to Mass. Gen. L. c. 152, § 13A, insurers are liable for payment of an attorney's fee to the employee's counsel if the employee prevails or, in certain circumstances, if the parties enter into an agreement.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

If an employee files a claim, accepts payment of compensation or submits to a proceeding before the Department of Industrial Accidents, such action constitutes a release to the employer/insurer of all claims and demands at common law arising from the injury. Furthermore, unless an employee notifies the employer at the time of hire of intent to retain a common law right of action, or, if the contract of hire was made before the employer became an insured person or self-insurer, if the employee shall not have given the said notice within thirty days of the time said employer became an insured person or self-insurer, the employee and dependents are precluded from filing a civil action against the employer for a compensable injury. Mass. Gen. L. c. 152, § 24.

A. Scope of immunity.

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In order to be immune from an action at common law, an employer must establish: (1) it is an insured entity liable for the payment of compensation; and (2) it is the direct employer of the employee. *Lang v. Edward J. Lamothe Company*, 20 Mass. App. Ct. 231, 232 (1985).

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

The dual capacity doctrine is recognized, and the exclusivity bar does not necessarily pass to a successor corporation. *Gurry v. Cumberland Farms, Inc.*, 406 Mass. 615 (1990). In addition, an employee who files a workers' compensation claim is not barred from bringing an action for discrimination under Mass. Gen. L. c. 151B.

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

An employee is entitled to double compensation if the employer is guilty of serious and willful misconduct and that misconduct resulted in the injury. Mass. Gen. L. c. 152, § 28. If the provision applies, the insurer pays indemnity and medical benefits to the employee, and the employer is required to duplicate the payments.

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

There is no penalty, per se. However, if the minor is employed in violation of any of the following sections of the Child Labor Laws, §§60 64, or Mass. Gen. L. c. 149, § 104, he or she is entitled to double compensation if it is determined he or she is entitled to benefits under c. 152. Mass. Gen. L. c. 152, § 28.

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

The Department of Industrial Accidents has promulgated regulations regarding such practices by insurers. Mass. Regs. Code tit. 452, § 7.00. The Department may receive complaints on prescribed forms and investigates allegations of questionable claims handling on the part of insurers, self insurers, self insured groups, third party administrators, employers, or other entities handling workers' compensation claims. Mass. Regs. Code tit. 452, § 7.04.

When a claim is received, the party against whom the allegation has been made has an opportunity to respond in writing within thirty days. The Division of Administration will investigate and report its findings to the Commissioner of Insurance, as well as the parties involved. However, when the alleged conduct involves a self insured employer, a Department certified vocational rehabilitation provider, or a Department approved utilization review agent, the findings of the Division will be reported to the Commissioner of the Department of Industrial Accidents rather than the Commissioner of Insurance.

Where the Division of Administration finds evidence sufficient to support a finding of questionable claims handling or patterns of unreasonably controverting claims, such findings are reported to either the Commissioner of Insurance or Commissioner of the Department of Industrial Accidents, depending on the party involved. The Commissioner of Insurance may undertake such enforcement as license revocation, and/or other actions as may be applicable. In addition, the Commissioner of the Department of Industrial Accidents may also impose a fine against the entity that has engaged in such activity. Mass. Regs. Code tit. 452, § 7.04.

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

An employee has a cause of action if he or she discharged for exercising any right afforded under the Act. Mass. Gen. L. c. 152, § 75B(2).

Under circumstances where the payment of benefits has been reduced or terminated upon the insurer's possession of both a medical report from either the employee's treating physician or an impartial medical examiner releasing the employee to a suitable and a specific written job offer from the employer, any termination of the employee within one year of returning to the job offered will be presumed to have been due to the employee being physically or mentally unable to perform said job duties. Mass. Gen. L. c. 152, § 8(2).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. Mass. Gen. L. c. 152, § 15. However, the employer/insurer has a lien on any third-party settlement, or judgment in the amount of any benefits paid including the employee's medical bills. However, said lien does not apply to the portion of proceeds of a third-party settlement allocated for the loss of consortium or for the employee's conscious pain and suffering. *Curry v. Great American Insurance Company*, 80 Mass. App. Ct. 592 (2011).

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

A co employee who negligently causes an injury to another employee cannot be sued civilly. *Mulford v. Mangano*, 35 Mass. App. Ct. 800 (1993). However, an employee may have a cause of action for the intentional tort of a co employee. Mass. Gen. L. c. 152, §§ 23, 24.

36. Is subrogation available?

Yes. The employee has the exclusive right to bring such an action for seven months from the injury. If the employee fails to bring an action within that period and the insurer has paid compensation, the insurer may file a civil action against the negligent third party in the employee's name. Mass. Gen. L. c. 152, § 15.

MEDICALS

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

An employee is entitled to reasonable and necessary medical care for an industrial injury. There is no time limitation, per se, with respect to the payment of medical bills. If an insurer denies the payment of medical bills, the employee may bring a claim against the insurer.

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

Once a claim or complaint is filed, any party may serve a request for production of medical records on any other party. 452 CMR, § 1.12(2). Requests must be accompanied by a statement providing the relevance of the information sought. The party on whom a request is made must respond within twenty days after service of the request. If a party does not respond or refuses

to produce records, a motion to compel may be filed with the administrative judge, who can order that the records in question be produced. *Id.* Additionally, in practice, parties routinely subpoena medical records directly from health care providers and, with an administrative judge's permission, the parties may depose a physician. An administrative judge also has the authority to issue a subpoena for medical records or witnesses and a party may move for issuance of such a judicial subpoena. Mass. Gen. L. c. 152, § 11B.

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.

Prior to July 1, 1992, an employee could essentially choose and there was no limitation as to the number of physicians with whom an employee could consult. For injuries occurring after July 1, 1992, an employee may choose a treating physician, but may only switch to another physician once. In addition, effective July 1, 1992, the statute allows employers to enter into preferred provider arrangements. If the employer has such an arrangement, it can require the employee to treat with a physician in that agreement. Mass. Gen. L. c. 152, § 30. However, under such an arrangement, an employee is only required to treat with a physician under the plan for the first scheduled visit for medical treatment. Pursuant to a collective bargaining agreement, an employee can be limited to a set list of providers for medical treatment. Mass. Gen. L. c. 152, § 10C.

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

Under Mass. Gen. L. c. 152, § 45, an employee must submit to an examination by a physician furnished and paid for by either the insurer or the employer. The employee is then entitled to reimbursements for reasonable travel expenses and lost wages resulting from such examination. The employee also has the right to have his own physician present during the examination, although this is rarely done. If the report of such an examination "is to be used as the basis of any order", it must be filed with the Division of Dispute Resolution. An employee who refuses to submit to a medical examination at the request of an insurer or employer or in any way obstructs it has his right to compensation suspended and his compensation during the period of suspension may be forfeited.

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

As long as the treatment is reasonable and necessary and related to the employee's industrial injury, it is allowed. If, however, an insurer declines to make payment on a specific form of treatment, that issue can then be litigated before the Department of Industrial Accidents. Mass. Gen. L. c. 152, §§ 13, 30.

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

The prosthetic devices covered are set by the Rate Setting Commission and are accompanied by a fee schedule. There is no time limit on the use of a prosthetic device as long as it is reasonable and necessary and related to the employee's industrial injury.

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

As long as the modification is determined to be reasonable and necessary, an insurer may be required to pay for it. Mass. Gen. L. c. 152, §§ 13, 30.

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

The Massachusetts Rate Setting Commission sets the rates of payment for specific modalities of treatment. Furthermore, the Reviewing Board of the Department of Industrial Accidents has held that the rates established by the Commission are binding on out of state providers. *Tedeschi v. S.F. Concrete/Alderson v. Foster Forbes*, 6 Mass. Workers' Comp. Rep. 120 (1992).

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

Section 30 of c. 152, as amended by St. 1991 c. 398, provides for the promulgation of regulations regarding the provision of adequate and reasonable health care services. Section 13 of c. 152, as amended by St. 1991 c. 398, provides for the creation of a health care services board. Among the board's duties is the development of written guidelines for appropriate and necessary treatment based on diagnosis of injuries and illness. Such guidelines were promulgated pursuant to 452 C.M.R. §§ 6.00 6.07 and were made applicable to health care services rendered on or after October 1, 1993, regardless of the date of injury. Insurers must either contract with agents who provide utilization review services or develop their own utilization review programs. Proposed medical treatment for work related injuries or illness is subject to utilization review for a determination as to whether the treatment is question is reasonable and necessary under the treatment guidelines promulgated by the health care services board. Guidelines can be obtained from the Health Care Services Board at the Department of Industrial Accidents.

PRACTICE/PROCEDURE

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

An insurer has 14 days upon receipt of a first report of injury, or claim, in which to deny or commence payment. The insurer is limited to the defenses it asserts in its denial of a claim if that claim is later litigated. Mass. Gen. L. c. 152, § 7. Where the insurer commences payment of weekly benefits within said 14-day period the insurer may pay without prejudice for up to 180 days with termination upon seven days notice to the employee. The notice shall specify the insurer's grounds for terminating benefits with said grounds to remain the insurer's sole basis for noncompensability. Mass. Gen. L. c. 152, § 8(1).

46. What is the method of claim adjudication?

A. Administrative level.

When a claim is filed with the Department of Industrial Accidents it is scheduled for a conciliation, a type of mediation in which the parties attempt to resolve their differences in a non binding format. If the parties are unable to reconcile their differences, the case is then scheduled for a conference before an administrative judge. Mass. Gen. L. c. 152, § 10A. The conferences are informal and the rules of evidence do not apply, but the judge is authorized to issue a binding order with respect to the payment or denial of benefits.

The parties may agree to binding arbitration at any time prior to five days before a conference. Mass. Gen. L. c. 152, § 10B. Parties wishing to go to arbitration must sign a written agreement. Once this written agreement is submitted to the Department of Industrial Accidents, no further claims or complaints can be filed until there is an award or written withdrawal from the original arbitration.

B. Trial court.

After a conference is conducted and an order issued, each party has the option of appealing the order to a de novo hearing before the administrative judge who presided at the conference. At the hearing level, rules of evidence apply and the parties are allowed to elicit testimony from lay witnesses and submit medical testimony by means of deposition. Mass. Gen. L. c. 152, § 11. After a conference, but before a hearing, the Department of Industrial Accidents will schedule an examination of the employee with an impartial physician picked by the department. That doctor's report and testimony is the only medical evidence to be considered by the administrative judge, unless there is a showing of inadequacy of the report or complexity of the medical issues. Mass. Gen. L. c. 152 § 11A.

C. Appellate.

After a hearing decision is rendered, either party has the option of appealing to the Reviewing Board of the Department of Industrial Accidents. Normally the Board will assign the case to a single administrative law judge for a preliminary hearing, after which the judge will determine whether to refer the case to a panel of three administrative law judges. A decision is then rendered and a party may appeal the Reviewing Board's decision to the Commonwealth of Massachusetts's Court of Appeals. Mass. Gen. L. c. 152, §§ 11C, 12.

47. What are the requirements for stipulations or settlements?

Parties may enter into Stipulations of Fact during the course of a hearing. Settlements may be approved either by a conciliator, administrative judge, or an administrative law judge. Mass. Gen. L. c. 152, § 48.

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

For any injuries occurring on or after November 1, 1986, the employee's right to medical treatment can remain open after the indemnity portion of a claim is settled. If liability has been established (or accepted), then medicals remain open even after a claim is settled. If liability has not been established (or accepted), the parties may enter into a settlement which closes out the employee's right to future medical treatment. Mass. Gen. L. c. 152 § 48.

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

In order to be enforceable, a settlement must be approved by a conciliator, administrative judge, or administrative law judge of the Department of Industrial Accidents. Mass. Gen. L. c. 152, § 48. Where a workers' compensation and a third-party action are settled simultaneously, a settlement petition may be presented to either an administrative law judge or a justice of the

Superior Court of The Commonwealth of Massachusetts. Mass. Gen. L. c. 152, § 15.

RISK FINANCE FOR WORKERS' COMPENSATION

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

Workers' compensation insurance is mandatory. Mass. Gen. L. c. 152, § 25A. Failure to obtain insurance subjects an employer to an action at law for full tort damages without the benefit of many common law defenses, Mass. Gen. L. c. 152, § 66, and can subject an employer to civil fines, stop work orders, and may even subject a corporate officer to personal and criminal liability should an employee sustain an industrial injury. An employer may obtain coverage by being self insured, from a private insurer, or if ineligible for voluntary coverage, from the assigned risk pool. In addition, there is a state fund for employees who sustain injuries while working for uninsured employers. Mass. Gen. L. c. 152, § 65.

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

A. For individual entities.

The rules with respect to self insurance for individual employers are contained in Mass. Gen. L. c. 152, § 25A, and the regulations promulgated by the Department of Industrial Accidents. 452 Codes Mass. Reg. § 5.00 et. seq.

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

Any five or more employers who are engaged in the same or similar type of business, industry, trade or profession may petition the Commonwealth of Massachusetts Division of Insurance to be licensed as a self insured group. Mass. Gen. L. c. 152, §§ 25A through 25U. The Division of Insurance has also promulgated regulations governing self insurance groups. 211 Code Mass. Reg. § 67.00 et. seq.. In addition to workers' compensation self insurance groups, public employers may form self insurance groups covering property and casualty risk including, but not limited to workers' compensation. Mass. Gen. L. v. 40M.

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"?**

Illegal aliens are entitled to receive workers' compensation benefits pursuant to a decision of the Reviewing Board. *Brambila v. Chase Walton Elastometers, Inc.* 11 Mass. Workers' Comp. Rep. 410 (1997).

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

Injuries resulting from terrorist acts are not per se excluded under M.G.L. c. 152. Where it can be shown that the nature of the employment exposed an employee to a particular risk resulting in injury a claim for benefits would be compensable. Any injury is compensable if it arises out of and in the course of the "nature, conditions, obligations, or incidents of employment . . . looked

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at in any of its aspects.” *Matthews v. Liberty Mutual Insurance Co.*, 354 Mass. 470, 473 (1968).

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 are no state specific requirements in Massachusetts relative to satisfying Medicare’s interests.

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).

Under Mass. Gen. L. c. 152, § 46A, where medical, dental, hospital or list time weekly benefits have been paid or furnished the provider at any time before an award or workman’s compensation benefits or approval of a lump sum settlement is paid, may file with the D.I.A. a claim for reimbursement out of the proceeds of such award or lump sum settlement.

In instances where such a claim is filed, an accident and health insurer or hospital, medical or dental service corporation, the Department of Public Welfare, the Division of Medical Assistance or employer shall have a lien against any award of benefits or lump sum settlement amount. In cases where lien holder and employee are unable to agree on an amount to discharge a lien against a lump sum settlement the D.I.A. Reviewing Board shall have the right to determine the fair and reasonable amount to be paid out of the lump sum settlement to discharge the lien.

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

The Health Insurance Portability and Accountability Act (HIPAA) specifically excludes workers’ compensation. Under Massachusetts Workers’ Compensation law there is no requirement that a claimant provide an insurer or employer with consent to obtain medical records. However, 452 CMR 1.12(2) provides that: “On or after the filing of any claim or complaint, any party may serve on any other party a request to produce, and permit making the request to inspect and copy, any medical report, or record of wages earned subsequent to the alleged injury.” On written motion of a party the administrative judge to whom the case has been assigned may issue an order to comply and failure to comply with said order without good cause may trigger the assessment of penalties pursuant to M.G.L. c. 152, § 14.

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

Under the Massachusetts independent contractor statute, M.G.L. c. 149, § 148B, any individual performing any service shall be considered to be an employee rather than an independent contractor unless such individual meets all requirements of a three-pronged test.

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- (1) Such individual has been and will continue to be free from control and direction in connection with the performance of such service under his contract: and
- (2) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all places of business of the enterprise: and
- (3) Such individual is customarily engaged in an independently established occupation, profession or business of the same nature as that involved in the service performed.

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

There are no such specific provisions beyond those set out in M.G.L. c. 149, § 148B. However, with respect to employee leasing companies M.G.L. c. 152, § 14A(c) defines an employee leasing company as a sole proprietorship, partnership, corporation or other form of business entity whose business consists largely of leasing employees to one or more client companies under contractual arrangements that retain for such employee leasing companies a substantial portion of personnel management functions, such as payroll, direction and control of workers, and the right to hire and fire workers provided by the employee leasing company; provided, however, that the leasing arrangement is long term and not an arrangement to provide the client company temporary help services during seasonal or unusual conditions. M.G.L. c. 152, § 14 provides for the assessment of costs, fines and criminal penalties for knowingly misclassifying employees or engaging in deceptive leasing practices for the purpose of avoiding full payment of insurance premiums.

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

There are no such specific provisions beyond those set out in M.G.L. c. 149, § 148B.

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.