BAYLOR EVNEN
WOLFE & TANNEHILL, LLP

Handling Nebraska Workers' Compensation Claims

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FOREWORD

When you assign the defense of a workers' compensation matter to Baylor Evnen Wolfe & Tannehill, LLP attorneys, we will provide you with an aggressive, pragmatic, creative and cost-effective strategy to resolve your claim as quickly as possible. We will strive to find and develop evidence that others don't, but only if the potential benefit of the evidence is justified by the time and expense to do so. We take pride in our creativity; we do not engage in "template litigation." We strive to be your partners, not just your attorneys. Our job is to ensure you have the information, analysis and advice to make well-informed decisions. We believe our job includes identifying problems before our clients may realize they have them.

Baylor Evnen Wolfe & Tannehill, LLP has been handling workers' compensation claims since shortly after the Workers' Compensation Act was adopted in 1913. Collectively, our lawyers have nearly 150 years of experience handling workers' compensation claims. When you retain Baylor Evnen Wolfe & Tannehill, LLP you will benefit from not only the knowledge, experience and talent of the individual lawyer handling your claim, you will also benefit from the collective knowledge and experience of our group.

While Baylor Evnen Wolfe & Tannehill, LLP stands alone in the amount of experience it has in litigating workers' compensation matters in Nebraska, it has been at the forefront in changing and improving the workers' compensation system. Most legislation proposed on behalf of employer or insurer groups is drafted or revised by Baylor Evnen Wolfe & Tannehill, LLP attorneys. We nearly always lead the opposition to legislation which increases the cost of workers' compensation in Nebraska. We also play a leading role in rule changes made by the Court.

Our involvement in the system is not limited to representing our clients and protecting their interests in the legislative and rule-making processes, but also in forming and leading the key workers' compensation organizations in the State, such as the Workers' Compensation Association of Nebraska (formerly the Nebraska Self-Insured Association), Nebraskans for Workers' Compensation Equity and Fairness, and the Nebraska Symposium Committee.

Baylor Evnen Wolfe & Tannehill, LLP attorneys recognize that workers' compensation claims may pose problems for employers and the impact of those claims goes beyond just an employer's workers' compensation liability, but also involves complex questions of employment law. Baylor Evnen Wolfe & Tannehill, LLP attorneys specialize in dealing not only with the workers' compensation issues, but also with all issues faced by the employer once an employee is injured.

We understand the essential nature of being accessible and responsive to claims handlers and the employer representatives, and continuously seek ways in which to become even better.

Our goal is to provide not only the highest quality service, but to do so at a very competitive overall cost. To increase the efficiency and lower the costs of our service, we assign highly- trained legal assistants who provide outstanding support to our lawyers and service to our clients.

We feel privileged to handle every matter assigned to us, and take none for granted. In exchange for the trust you place in us, we strive to provide you with unequalled information and training to ensure you have the tools necessary to best handle any workers' compensation issue. As such, we are proud to provide to you with this publication, our client seminars, attorneys who are available to answer your questions, along with the Workers' Compensation Practice Group website available at https://baylorevnen.com/trusted-services/workers-compensation/ and the workers' compensation blog available at https://baylorevnen.com/blog.

Finally, we recognize our livelihood is derived from the workers' compensation system, and we have an obligation to give something back to it. Thus, we take great pride in the fact that in 2013, Baylor Evnen Wolfe & Tannehill, LLP attorneys led the effort to form Kids' Chance of Nebraska, a nonprofit organization, the mission of which is to raise money and award scholarships to children of employees who are significantly disabled or killed on the job.

We know you have choices in whom you retain and we feel honored and indebted to you for choosing us.

INTRODUCTION

Baylor Evnen Wolfe & Tannehill, LLP proudly provides this guide to Nebraska workers' compensation law as an aid to our clients who handle workers' compensation claims in Nebraska. **Of course, the proper application of Nebraska workers' compensation law to any set of facts requires a careful analysis, and no guide can, and this guide should not, serve as a substitute for legal advice from highly-qualified attorneys such as those at Baylor Evnen Wolfe & Tannehill, LLP who have compiled this guide**. We will gladly assist you with any questions or problems you encounter, and hope this guide, in conjunction with consultation with one of our attorneys, will help you quickly and efficiently handle any workers' compensation issues you may encounter.

NEBRASKA WORKERS' COMPENSATION COURT

The Court is comprised of seven judges, four in Lincoln and three in Omaha. All are appointed by the governor. A judge is assigned to the case when a petition or motion is filed, and the judge will not be changed unless there is a basis for the judge to recuse himself or herself.

Trials are held in the courthouse of the county seat of the county where the accident occurred, unless the parties agree to change venue. NEB. REV. STAT. §48-177. Any objection to a change of venue must be made to the Trial Court to preserve venue as an issue for appeal. *Hofferber v. Hastings Utilities,* 282 Neb. 215, 803 N.W.2d 1 (2011).

During the beginning of the pandemic, most hearings were being held by videoconference. As the pandemic has continued, most hearings have returned to in-person but with precautions. In 2011, NEB. REV. STAT. §48-177(3) was added which allows hearings by videoconference. The venue provision of NEB. REV. STAT. §48-177(1) still applies. While no specific appellate decision has addressed videoconferencing under the Act, under similar statutes the Nebraska Supreme Court has held that the location of the judge determines in which county the hearing is held for purposes of videoconferencing. *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002). Therefore, the location of the judge determines the venue. A party wishing to object to a change in venue (if the proposed videoconference hearing with the judge is in Lincoln, for example) would have to make timely objection to the proposed hearing by videoconference. *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011). If the judge is located in the correct venue county, the parties may appear for an evidentiary hearing by telephone or videoconference upon permission of the Court and stipulation of the parties. Given the pandemic of 2020-2021, the Court has shown a greater deference for video hearings and we anticipate that will be the case going forward.

When the injury occurs outside of the State but there is jurisdiction in Nebraska, Lincoln is the proper venue and the hearing is held at the offices of the Court. NEB. REV. STAT. §48-186.

Contact information for the Court:

Website for the Nebraska Workers' Compensation Court www.wcc.ne.gov.

The website is a resource for trial decisions, summaries of appellate decisions, benefit calculation worksheets, EDI information and FAQs.

Toll free phone number 1-800-599-5155; fax 402-471-8231.

The Nebraska Workers' Compensation Court is located at 1010 Lincoln Mall, Suite 100, P.O. Box 98908, Lincoln, NE 68509-8908.

I. JURISDICTION

Most attention in handling workers' compensation claims centers around determining whether an accident has occurred, the status of the employee's medical condition, wage information, the necessity and reasonableness of medical care and expenses, and efforts to return the claimant to work. Before any of this information becomes relevant, however, a determination should be made as to whether Nebraska's laws apply to a claim. This requires inquiry into whether there is a sufficient relationship to Nebraska to render the employee's claim as one covered by the Nebraska Workers' Compensation Act.

A. Legitimate Nebraska Claims

Per NEB. REV. STAT. §48-115(2), any of the following creates a legitimate "Nebraska" claim:

1. Contract of Hire

The contract of hire was entered into in the State of Nebraska.

2. Nebraska Accident

The accident occurred in Nebraska.

3. Nebraska Business

The employer does business in Nebraska. The employer does not need to be a resident employer. The full extent of the relationship between the injured individual's accident and/or employment and the State of Nebraska is probably still a bit uncertain.

4. Principal Place of Business

The employer's principal place of business is in Nebraska.

B. Venue

The Nebraska Workers' Compensation Court will hear cases in the county where the accident occurred. NEB. REV. STAT. §48-177. In cases where the injury occurred outside of the State, the hearing will be held in Lincoln, Nebraska. NEB. REV. STAT. §48-186.

C. Ancillary Jurisdiction

NEB. REV. STAT. §48-161 provides: "All disputed claims for workers' compensation shall be submitted to the Nebraska Workers' Compensation Court for a finding, award, order, or judgment. Such compensation court shall have jurisdiction to decide *any issue ancillary to the resolution of an employee's right to workers' compensation benefits* . . ." with exceptions for child support matters and administrative attachments. Pursuant to this section, the Workers' Compensation Court has jurisdiction to settle subrogation disputes *between insurers* even where the employee's claim has settled and is no longer in dispute. *Midwest PMS & Federated Mut. Ins. Co. v. Olsen,* 279 Neb. 492, 778 N.W.2d 727 (2010). Please note, though, that the Court does not have the ability to determine subrogation entitlement between a claimant, the insurer/employer, and third-party tortfeasors.

D. Collection Actions

The Nebraska Workers' Compensation Court does NOT have the authority to enforce the collection of its awards. Collection actions are proper in district court. *Burnham v. Pacesetter Corp.*, 280 Neb. 707, 789 N.W.2d 913 (2010).

II. EMPLOYMENT RELATIONSHIP

The first major inquiry should focus on facts relative to the employment relationship. Before an accident can be compensable, there must be an employment relationship. To establish this, there must be: (1) an employer, (2) an employee, and (3) a contract of hire, either express or implied. There are several manners in which the Act defines and handles various types of employers and employees.

A. Employer

1. Traditional Employers

The definition of "employer" for workers' compensation purposes includes: (1) the state and every governmental agency created by it, or (2) every person, firm or corporation who is engaged in any trade, occupation, business or profession, and who has any person in service under any contract of hire. NEB. REV. STAT. §48-114.

NEB. REV. STAT. §48-106 excludes railroad companies, employers of household domestic servants, and some employers of farm or ranch laborers from coverage under the Act. An exempt employer may elect to be covered by the Act by procuring a policy of workers' compensation insurance covering its employees.

2. Agricultural Employers

If an agricultural employer elects to not obtain workers' compensation insurance, it must provide the employee, at the time of hire, written notice alerting the employee to the fact that he or she will not be covered under the Act, and this notice must be signed by the employee and retained by the employer. NEB. REV. STAT. §48-106 provides specific language to be included in that written notice. If exempt employers fail to provide this notice, they will be subject to liability under the Act.

3. Statutory Employers

The question as to whether an employer is a "statutory employer" frequently arises in the context of construction projects and common carrier/trucking situations.

An owner who employs an independent contractor to do work which is in the usual course of the business of the owner, and who fails to require the independent contractor to procure workers' compensation insurance, is liable as a "statutory employer" should one of the employees of the independent contractor become injured on the job. NEB. REV. STAT. §48-116; *Franklin v. Pawley*, 215 Neb. 624, 340 N.W.2d 156 (1983). The actual employer remains primarily liable and the statutory employer is secondarily liable. The statutory employer has a right to indemnity against the actual employer if it is forced to pay benefits.

In some circumstances, where the alleged "statutory employee" is also the uninsured subcontractor, it has been determined that the statutory employment statutes are inapplicable and the insured alleged statutory employer will not be liable for workers' compensation benefits. *Wright v. H & S Contracting, Inc.*, 29 Neb. App. 581, 588, 956 N.W.2d 329, 335 (2021)

B. Employees

No clear formula exists for determining whether an injured person is an employee. Generally, the stronger the relationship between the worker's duties and the normal business of the employer, the closer it is to being a sufficient employment relationship to invoke coverage by the Act.

1. Traditional Employees

Traditional employees include every person in the service of those not mentioned as excluded employers (railroad companies, employers of household domestic servants and agricultural operations), and whose employment is in the usual course of the regular trade, business, profession or occupation of his or her employer. NEB. REV. STAT. §48-115. This definition does not include casual employees, independent contractors, or persons not engaged in the normal business of the employer.

2. Executive Officers

Executive officers of a corporation who own less than 25 percent of the common stock of the corporation, and executive officers of a Nebraska nonprofit corporation who receive more than $1,000.00 per year in compensation, are considered employees covered under the Act. NEB. REV. STAT. §48-115(9).

Officers who own 25 percent or more of the stock, or officers of a nonprofit corporation who receive less than $1,000.00 per year in compensation, are not considered employees under the Act unless they make a formal election to do so. NEB. REV. STAT. §48-115(9).

3. Self-Employed Persons

Self-employed persons can be considered "employees" as well as "employers" if they elect to be covered under the Act. NEB. REV. STAT. §48-115(10).

4. Independent Contractors

Generally, independent contractors are not entitled to coverage under the Act but, like self-employed persons, they can make a formal election to come under the provisions of the Act. NEB. REV. STAT. §48-115.

The Nebraska Supreme Court has identified 10 factors to be considered in determining whether a person is an employee or an independent contractor. *Larson v. Hometown Comm.*, 248 Neb. 942, 540 N.W.2d 339 (1995). The determination of whether a person is an independent contractor is to be made on a case-by-case basis. *Id.* While all factors should be considered, the extent of employer control over the methods and means a person uses to complete work is the "chief factor" in distinguishing an employee from an independent contractor. *Cajiao v. Arga Transp. Inc.*, 30 Neb. App. 700, 972 N.W.2d 433 (2022). The factors to be considered are as follows:

a. Amount of control

The greater the amount of control an employer has over the methods and means the person uses to complete the work, the greater the likelihood the worker will be considered an employee. The employer can, however, maintain enough control over the person's work to ensure that performance of the contract is done in accordance with the terms of the contract without changing the person's status as an independent contractor.

b. Whether a worker is engaged in a distinct occupation or business

Evidence that the worker is providing a distinct or specialized service is indicative that the person is an independent contractor. Pertinent inquiries include whether the employee performs the same or similar services for others, whether he or she has other sources of income, and whether the worker holds himself or herself out as an independent business owner (such as by distributing business cards). If the relationship between the employer and the worker is exclusive, it is likely the worker will be considered an employee of the business.

c. Type of occupation involved

This factor focuses on whether, in the locality, the work being performed by the worker in question is usually done under the direction of an employer or by a specialist without supervision. The closer the employer monitors the worker, the more likely the worker will be considered an employee. The less supervision by the employer, the greater the chance the person will be considered an independent contractor.

d. Skill required in the particular occupation

The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor.

e. Which party supplies the instrumentalities, tools or place of work

Where an employer supplies the instrumentalities for the worker to carry out the necessary job duties, the required tools, or the place at which the work is performed, tends to support the conclusion that the person performing the job is an employee.

f. Length of employment period

A continuous relationship suggests that a worker is an employee, whereas a project of limited length indicates an independent contractor relationship.

g. Method of payment

Payment by the hour and deduction of income and social security taxes from remuneration tend to show an employer-employee relationship. The Nebraska Supreme Court has found that payment on a piece or quantity basis is not inconsistent with an employer-employee relationship. Payment by the job denotes an independent contractor relationship. In addition, an independent contractor is likely to receive a 1099 tax form while an employee is likely to receive a W-2. However, recently the Nebraska Court of Appeals did suggest that payment by the job, as opposed to by the hour, suggests an independent contractor relationship. *Wright v. H & S Contracting, Inc.*, 29 Neb. App. 581, 588, 956 N.W.2d 329, 335 (2021).

h. Whether the work is part of the regular business of the employer

If the tasks performed by the worker represent an integral part of the business of the employer, it is likely the worker will be found to be an employee. For example, the Nebraska Supreme Court found that delivery of newspapers by teenage carriers was a significant part of the paper's publishing business, indicating that the injured worker was an employee rather than an independent contractor. *Larson v. Hometown Comm.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

i. Whether the parties believe they are creating an employer-employee relationship

The intentions of the parties will be weighed in deciding whether a worker is an employee or an independent contractor. A worker who holds himself or herself out as an independent businessperson is more likely to be found to be an independent contractor. Further, a worker who is asked to be an employee and refuses to do so is less likely to be found to be an employee. *Wright v. H & S Contracting, Inc.*, 29 Neb. App. 581, 588, 956 N.W.2d 329, 335 (2021)

But the mere fact that the employer and worker agree to an independent contractor arrangement is not controlling. Where a written contract defines and describes the relationship as that of an independent contractor and there is nothing in the performance by the parties which is inconsistent with the relationship described, then an independent contractor relationship exists. Thus, under rare circumstances, the existence of an express contract can be

dispositive. However, where the above-mentioned factors do not also indicate such a relationship, the person may still be an employee rather than an independent contractor.

j. Whether the employer is or is not in business

If the employer regularly operates a business and the worker is carrying out an integral function of that business, the worker is likely to be declared an employee of the business enterprise.

Normally this is a factual determination by the Trial Court, but under certain circumstances the appellate courts have held as a matter of law that an individual is either an employee or an independent contractor. Specific examples of application of the test:

Stephens v. Celeryvale Transport, Inc., 205 Neb. 12, 286 N.W.2d 420 (1979). A trucker was an independent contractor because the contract designated him as such and his level of control of the operations was not inconsistent with that designation.

Eden v. Spaulding, 218 Neb. 799, 359 N.W. 2d 758 (1984). A newspaper delivery person was an independent contractor of a newspaper because the control exercised by the newspaper was minimal (it could only suggest operations), it could not dictate the route, and the delivery person had other contracts with other entities and did not rely solely on the newspaper for income.

Anthony v. Pre-Fab Transit Co., 239 Neb. 404, 476 N.W.2d 559 (1991). A trucker was an independent contractor of a company which received trucking orders and assigned the orders to various truckers, because the contract between the parties designated the trucker as an independent contractor and no facts contradicted that designation.

Larson v. Hometown Communications, Inc., 248 Neb. 942, 540 N.W.2d 339 (1995). Newspaper carrier was an employee because the factual finding of the Trial Court was sufficient to establish a sufficient degree of control by the newspaper in that case (directed routes, considered delivery part of overall operations, gave handbooks to carriers) to find an employment relationship. The fact there was not a written agreement did not defeat the claim of employment, as implied agreements are sufficient to establish the nature of the relationship.

Hemmerling v. Happy Cab Co., 247 Neb. 919, 530 N.W.2d 916 (1995). A taxicab driver was an employee where the company held the certificate of public convenience to provide taxicab services under state-regulated rates and

exercised the exclusive control, supervision, and possession of the vehicle; required that the vehicle be inspected and serviced by it; designated where the driver could solicit passengers; and provided complex training concerning its operations and service philosophy.

Pettit v. State, 249 Neb. 666, 544 N.W.2d 855 (1996). There was insufficient evidence of control of a home health aide (chore provider) under the Medicaid Waiver Program to hold she was an employee of the Nebraska Department of Social Services as a matter of law, and the Trial Court's finding she was an independent contractor was upheld. The Nebraska Supreme Court noted that the only factor clearly favoring a finding that she was an employee was that she was paid by the hour. On the most important factor, control, the Nebraska Supreme Court noted that while DSS had control over the essential criteria that claimant must meet, the claimant and the person she assisted had control over the daily routine of how to meet DSS's criteria. The employer of an independent contractor may exercise some control necessary to assume performance of the contract without changing the status, and it was simply insufficient to find an employment relationship as a matter of law.

Omaha World-Herald v. Dernier, 253 Neb. 215, 570 N.W.2d 508 (1997). Distributer of newspapers for the Omaha World-Herald was an independent contractor. The claimant purchased newspapers from the OWH and distributed and sold them in an area designated by the OWH. While the OWH had some control of the operation, the claimant had more control. The agreement itself provided claimant was an independent contractor and the other facts did not contradict that.

Reeder v. State, 11 Neb. App. 215, 649 N.W.2d 504 (2002). Under similar circumstances to *Pettit*, *supra*, a home health aide in a negligence action was found to be an independent contractor of the Nebraska Department of Health and Human Services and not an employee.

5. Loaned Employee and Temporary Employee

The "loaned employee" situation arises where the general employer (loaning employer) lends an employee to a special employer (borrowing employer) and: (1) the employee has a contract of hire, express or implied, with the special employer, (2) the work being done is essentially that of the special employer, and (3) the special employer has the right to control the details of the work. *Nussbaum v. Wright*, 217 Neb. 712, 350 N.W.2d 559 (1984). If the control of the person's duties remains with the loaning employer, that employer is primarily responsible in the event of an accident, but both employers remain liable for workers' compensation benefits. *B&C Excavating Co. v. Hiner*, 207 Neb. 248, 298 N.W.2d 155 (1980).

The "loaned employee" situation often occurs in the realm of temporary employment services where the primary employer (temporary agency) simply assigns its employees to work for the ultimate employer. Generally, the temporary agency will provide payment of the employee's wages, but the "borrowing employer" retains control over the employee's work. Under these circumstances, the Nebraska Supreme Court has held that the employee is a "loaned employee" and that both employers are liable for workers' compensation benefits (and are also able to invoke the exclusive remedy provisions of the Act). *Kaiser v. Millard Lumber Inc.*, 255 Neb. 943, 587 N.W.2d 875 (1999); *Daniels v. Pamida, Inc.*, 251 Neb. 921, 561 N.W.2d 568 (1997). In cases involving temporary employment services, the injured employee cannot sue the ultimate employer as a third-party tortfeasor. *Schwartz v. Riekes & Sons*, 195 Neb. 737, 240 N.W.2d 581 (1976).

6. Casual Employee

An employee who is not performing work in the regular trade, business, profession or vocation of the employer is a casual employee. A casual employee is not entitled to workers' compensation benefits from the casual employer. *Sentor v. City of Lincoln*, 124 Neb. 403, 246 N.W. 924 (1933).

7. Volunteers

Volunteers are generally not afforded coverage under the Nebraska Workers' Compensation Act. *Levander v. Benevolent & Protective Order of Elks*, 257 Neb. 283, 596 N.W.2d 705 (1999). A statutory exception exists, however, for volunteer firefighters who are members of any fire department, which is organized under the laws of the State of Nebraska. NEB. REV. STAT. §48-115(3). A statutory exception also exists for ambulance drivers, attendants, and out-of-hospital emergency care providers who are members of an emergency medical service for any county, city, village, rural or suburban fire protection district, nonprofit corporation, or any combination of such entities under the authority of NEB. REV. STAT. §13-303; NEB. REV. STAT. §48-115(6).

C. Contract of Hire

The relationship of employer-employee arises from the contract between the parties. *Gebhard v. Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001). The Nebraska Workers' Compensation Act requires that a person be under a contract of hire, express or implied, oral or written, in order to be considered an employee. NEB. REV. STAT. §48-115.

For an express contract of hire to exist, the evidence must show that there was an intention to contract and that there was a meeting of the minds between the parties as to the terms and conditions under which the employment was to be performed. *Wrede v. David City*, 137 Neb. 194, 288 N.W. 542 (1939). An implied contract arises where the intention of the

parties is not express but where the circumstances are such as to show a mutual intent to contract. Such intent is to be gathered from the conduct of the parties, i.e., language, acts, or other pertinent circumstances surrounding the transaction. *Kaiser v. Millard Lumber Inc.*, 255 Neb. 943, 587 N.W.2d 875 (1999). Whether a contract of hire exists is decided on the facts of each case.

III. COMPENSABLE EVENTS

The Nebraska Workers' Compensation Act compensates a worker for injuries resulting from an accident or occupational disease. When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury. NEB. REV. STAT. §48-101.

A. Accident

An accident for purposes of the Nebraska Workers' Compensation Act is an unexpected or unforeseen injury which occurs suddenly and violently, producing at the time objective symptoms of an injury. NEB. REV. STAT. §48-151(2). "Unexpected or unforeseen" is satisfied if either the cause was of an accidental nature or the effect was unexpected or unforeseen. "Suddenly and violently" does not mean instantaneously and with force; rather this specification is satisfied if an injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.

1. Traditional Accidents

Traditional accidents include the standard slips, trips and falls, which result in obvious injuries. Pain alone is not compensable and the law does not assume that pain experienced at work is coincidental with an injury. *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981). In cases involving a subjective injury, the employee must prove the injury, medical causation and impairment through expert medical testimony. *Frauendorfer v. Lindsay Mfg. Co. Inc.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

2. Repetitive or Cumulative Trauma

Compensability of a repetitive trauma injury is tested under the statutory definition of "accident." For a cumulative or repetitive injury to be compensable, an injured worker must satisfy three elements to prove an injury is the result of an accident: (1) the injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce, at the time, objective symptoms of injury. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009); *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); disapproved on

other grounds by *Kimminau v. Uribe Refuse Service*, 270 Neb. 682, 707 N.W.2d 229 (2005).

In repetitive trauma cases, the key issue is whether the "suddenly and violently" element has been met. Under NEB. REV. STAT. §48-151(2) "suddenly and violently" does not mean instantaneously and with force, but rather, the element is satisfied if the injury occurs at an (1) identifiable point in time, (2) requiring the employee to discontinue employment, and (3) seek medical treatment. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009). Additionally, as discussed below, there is an argument that the Nebraska courts have established an additional element - that the employee's discontinuation of employment occurs within a "reasonably limited period of time."

a. Identifiable point in time

The time of an accident is sufficiently definite "if either the cause is reasonably limited in time or the result materializes at an identifiable point." *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

In *Swoboda v. Volkman Plumbing and EMCASCO Ins. Co.*, 269 Neb. 20, 690 N.W.2d 166 (2004), the Supreme Court explained that the requisite suddenness can be found if either the cause of an accident is sudden, i.e., occurring within a reasonably-limited time, or if the effect or result of the accident is sudden, i.e., occurring at an identifiable point in time. Additionally, it is important to understand that the identifiable point in time at which the injurious result of a repetitive trauma materializes does not need to occur within the employee's working hours in order to be compensable. *Id.* In *Swoboda*, although the Court determined that plaintiff's injury had materialized at a point in time when he was engaged in the recreational activity of fishing, the Court held that did not in and of itself defeat the plaintiff's claim for compensation.

The practical effect of this rule is that most repetitive trauma claims will likely be compensable if the remaining elements of the employee's burden of proof are met, i.e., causation, notice, etc. However, if the facts reveal that an employee's condition slowly developed over a long period of time, it may still be a viable defense to claim that the employee has not shown that the cause is reasonably limited in time or the result materializes at an identifiable point. In these cases, it is necessary to look at facts regarding the timing of the injury.

In repetitive trauma claims the investigation should focus on: (1) whether the employee performed previous jobs involving repetitive activities, (2) whether

the employee was previously treated for the condition in question, (3) whether there was a change in the employee's job activities which produced symptoms within a relatively short period of time thereafter, which eventually necessitated medical treatment, (4) whether there was a point in time when the employee first experienced objective symptoms, and (5) when the employee first missed work and sought medical attention.

As discussed above, the dispositive issues surrounding the establishment of an "identifiable point in time" are whether the employee stops work and seeks medical treatment as a result of such injury. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009); *citing Voderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001).

b. Discontinue employment

To recover benefits for a repetitive trauma, an employee's injury must be such that the employee discontinues employment and seeks medical treatment. *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). However, what constitutes "discontinuation of employment" is not conclusive. On separate occasions, the Nebraska Supreme Court has defined two separate definitions of "discontinue employment."

(1) Employee misses work

Where an employee actually misses work because of an injury and is paid less because of it, the employee has satisfied the "discontinue employment" requirement. The law does not establish a minimum time that an employee must discontinue work for medical treatment to be eligible for benefits. The length of time is not the controlling factor. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

In *Potter v. McCulla*, the Nebraska Supreme Court further clarified that "no disability is manifested until there is a diminution of employability—and that can only occur when an employee's injury interferes with his or her ability to perform the requirements of the job. The point at which an employee has to miss or discontinue work **because of the injury** is thus a reasonable standard of disability manifestation." *Potter v. McCulla*, 288 Neb. 741, 751, 851 N.W.2d 94 (2014) (emphasis added). As seen below, an exception to this rule exists in circumstances where, although an employee is unable to perform his or her job duties, no work is missed.

(2) Employee is unable to perform work required

Permitting employees to satisfy the "discontinue employment" requirement by establishing that they were unable to perform the work required was implemented for employees who worked night shifts and received all of their medical treatment during the day. As a result, the employees never missed scheduled work or received less wages. In *Owen v. American Hydraulics*, the Nebraska Supreme Court held that a job transfer to another position requiring less strenuous activity can constitute a discontinuance of work and establish the date of injury. *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000).

In *Risor*, the Nebraska Supreme Court reiterated that a job transfer can constitute a discontinuance of work that establishes the date of injury; however, the Court clarified that minor accommodations are not a job change and will not constitute discontinuance of work. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

(3) Within a reasonably-limited period of time

The Court of Appeals case of *Martinez v International Paper Co.*, 27 Neb. App. 933 (2020), confirmed that there is no "time limit" for an employee to discontinue employment after the onset of the symptoms. Although the employee agreed his shoulder pain had been present since 2008 and continued until 2017, the Court held the elements of a repetitive trauma injury were satisfied, with a date of accident of November 9, 2017. The Court focused on the fact that the injury materialized at an identifiable point on November 8, 2017, when the employee felt a sharp pain and his shoulder locked up, and he had to miss work and seek medical treatment for his symptoms on November 9, 2017.

(4) Seeks medical treatment

Unfortunately, the Nebraska Supreme Court has not provided a definitive definition of "seek medical care." However, based on the doctrine of beneficent purposes, the expectation is that it would be interpreted very broadly. For instance, visiting a nurse within the employer's location has routinely been considered seeking medical treatment. Additionally, even in determining whether the requirements were satisfied when an employee went to a nurse's station on site for pain, bandages or ice, one workers' compensation judge analyzed whether this constituted "discontinuing employment,"

but never once questioned whether it amounted to "seeking medical treatment."

B. Occupational Disease

Occupational diseases are "injuries" due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process or employment, and exclude all ordinary diseases of life to which the general public is exposed. NEB. REV. STAT. §48-151(3).

1. Characteristic of and Peculiar to

The requirement of NEB. REV. STAT. §48-151(3) that an occupational disease shall be "characteristic of and peculiar to" the particular employment involves a comparison of the hazards of the claimant's employment and the hazards of employment generally. Arguably, even if an employee develops a disease due to occupational factors, if the occupational hazards in the employee's line of work are no different than hazards of employment generally, the disease will not be compensable.

In discussing the Nebraska Supreme Court's decision in *Ritter v. Hawkeye-Security Ins. Co.*, 178 Neb. 792, 135 N.W.2d 470 (1965), the Nebraska Court of Appeals held that "[i]t is not necessary that the disease originate exclusively from the employment, but only that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally." *Ross v. Baldwin Filters*, 5 Neb. App. 194, 199-200, 557 N.W.2d 368, 371 (1996).

In *Risor v. Nebraska Boiler*, the Nebraska Supreme Court determined that the claimant's noise-induced hearing loss was not an occupational disease as the noise exposure was not peculiar to the claimant's employment; rather, the Court found that it was a repetitive trauma injury. *Risor v. Nebraska Boiler,* 277 Neb. 679, 765 N.W.2d 170 (2009). Repetitive trauma injuries are not considered to be "diseases." Although the Nebraska Supreme Court has stated that repetitive trauma injuries have some characteristics of both an accidental injury and an occupational disease, repetitive trauma injuries are considered accidental injuries. *Id.* In *Risor,* the Nebraska Supreme Court determined that noise-induced hearing loss was a repetitive trauma injury because the extremely loud noises produced an external traumatic force on the ears, which was traceable to the resulting hearing loss. The Supreme Court went on to hold that noise exposure was not a condition of employment peculiar to Risor's employment as the range of workers exposed to loud noises was too broad, and many work environments expose workers to sounds capable of producing hearing loss. The Court found that the exposure to loud noises did not create a hazard that distinguished it in character from a myriad of other occupations.

2. Ordinary Diseases of Life

"Ordinary diseases of life to which the general public is exposed" are specifically exempted from being considered occupational diseases. NEB. REV. STAT. §48-151(3). There is no case law which interprets this provision. Generally, conditions such as the flu and colds are the type of conditions which would be considered "ordinary diseases of life." Additionally, conditions such as asthma and other lung diseases have been found to be occupational diseases where the condition was contributed to by a deleterious substance that the claimant was exposed to in the course of his or her work. The Covid-19 pandemic has raised questions whether contracting that disease is or is not an "ordinary disease of life." As of the time of authoring this update, no precedential decisions have been rendered by the Court, although coverage of Covid-19 related injuries has been the subject of numerous legislative efforts in 2020-2021.

3. Date of Injury

The date of injury for an occupational disease is the date when the effects of the occupational disease manifest in a disability. *Ross v. Baldwin Filters*, 5 Neb. App. 194, 557 N.W.2d 368 (1996); *Morris v. Nebraska Healthcare System*, 266 Neb. 285, 644 N.W.2d 436 (2003). A worker becomes disabled, and thus injured, from an occupational disease at the time when a permanent medical impairment or medically-assessed work restrictions result in labor market access loss. *Ludwick v. TriWest Healthcare Alliance and Physicians Clinic, Inc.*, 267 Neb. 887, 678 N.W.2d 517 (2004). An employee's disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity. *Id.*

Other cases have phrased disability as the point when the injured worker is no longer able to render further service. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). *See also Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981); *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956).
Others have stated that the date of injury equates to the date when the employee's condition causes him or her to cease employment, i.e., no longer perform the work required. *Watson v. Omaha Pub. Power Dist.*, 9 Neb. App. 909, 622 N.W.2d 163 (2001); *Ross v. Baldwin Filters*, 5 Neb. App. 194, 557 N.W.2d 368 (1996). A compensable occupational disease must involve some physical stimulus constituting violence to the physical structure of the body; a mental stimulus is not sufficient under current law. *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

If an employee's date of disability for an occupational disease does not occur until after employment is terminated for an unrelated reason, such as retirement, the

employee still has an occupational disease as of the date of disability, but is not necessarily entitled to indemnity benefits. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). In *Olivotto,* at the time the employee's occupational disease manifested in a disability, he was already retired; as a result, he had not suffered any loss of access to the labor market and had no diminution of employability or impairment of earning capacity.

4. Average **Weekly Wage**

The average weekly wage is calculated based on the "date of injury," rather than the "last injurious exposure" or some other rule. Average weekly wage is based on an employee's date of disability as all calculations under NEB. REV. STAT. §48-121 are based on wages received "at the time of injury." *Osteen v. A. C. & S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). While this does expose an employer to a higher wage in situations where an employee's wages have increased since the last injurious exposure, it also creates situations where an employee retired prior to the "date of disability," supporting the argument that the employee is not entitled to indemnity benefits.

5. Statute of Limitations

"In the case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident . . . one of the parties shall have filed a petition . . . ." NEB. REV. STAT. §48-137.

The issue of when the statute of limitations begins to run in occupational disease cases was first decided in *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956). In *Hauff,* the Nebraska Supreme Court held that the employee's cause of action did not accrue until the injury to the employee culminated in his disability and he became entitled to compensation. *See also Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981).

This appears to present an issue where an employee has knowledge of an employment-related disease prior to the date of disability, as there is a well-established rule in Nebraska applicable to latent injuries that the statute of limitations begins to run once the employee has knowledge of a compensable injury. However, the Nebraska Supreme Court has held that even in light of the latent injuries rule, a different rule is applied to occupational disease. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *see also Ross v. Baldwin Filters*, 5 Neb. App. 194, 557 N.W.2d 368, (1996).

The Courts in *Hull* and *Ross* both held that the statute of limitations did not begin to run on the date the employees had knowledge of their employment-related disease, but rather was the date of injury/disability. In both *Hull* and *Ross*, the Courts

determined that the statute of limitations began to run on the dates physicians recommended the claimants no longer work due to their occupational diseases, i.e., their dates of disability, as they had medically-assessed work restrictions resulting in diminution of employability.

6. Last Injurious Exposure

When an employee is exposed to a deleterious substance over a course of years during which the employee worked for different employers, sometimes each with a different insurer, determining which employer or insurer is liable is a function of the application of the so-called "last injurious exposure" rule.

Under the last injurious exposure rule, liability is assigned to the carrier which was covering the risk when the last "injurious" exposure occurred. To be "injurious," an exposure need not be the actual cause of the employee's condition, or even a "material contributing cause" of the condition. Rather, to be "injurious" an exposure simply needs to be "of the type which could cause the disease given prolonged exposure." *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981).

Under the "last injurious exposure" rule, it is not always the case that the last employer of the claimant will be the one which produced the "last injurious exposure." If the employee experienced no "injurious exposure" while employed by the last employer, the last employer is not liable for any benefits. The employer who last exposed the employee to an "injurious exposure" is. *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981); *see also Morris v. Nebraska Health Sys.*, 266 Neb. 285, 664 N.W.2d 436 (2003); *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

Likewise, the employer for whom the employee is working at the time when the disease manifests itself in disability is not liable for benefits if that employment did not expose the employee to an "injurious exposure." Rather, the liability would attach to the employer and carrier at the time when the employee was last exposed to the deleterious substance in a manner "which could cause the disease given prolonged exposure." *Osteen v. A. C. & S., Inc.*, 209 Neb. 282, 307 N.W.2d 514, 520 (1981).

In response to the argument that the application of the rule is harsh because it allocates liability to entities for which no proof exists that their exposures ***in fact*** caused or contributed to the employee's condition, the Supreme Court explained: "The law of averages, however, will spread the costs proportionately among insurers over time. Thus the rule equitably spreads the risk of liability for an occupational disease among the employers who expose workers to the danger of the disease and their respective carriers." *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 719, 529 N.W.2d

783, 788 (1995); *Morris v. Nebraska Health Sys.*, 266 Neb. 285, 664 N.W.2d 436 (2003).

C. Cardiovascular Injuries

Nebraska has a special set of rules for cases in which an employee suffers a cardiovascular injury, such as a heart attack or stroke. Employees must prove that both the legal and medical cause of their condition was their employment. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984); *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

1. Legal Test

An employee must prove that he or she suffered some work-related stress or exertion which is greater than that in the ordinary nonemployment life of the employee or any other person.

2. Medical Test

An employee has the burden of proof to show by a preponderance of the evidence, through expert medical testimony, that the employee's employment contributed in some material and substantial degree to cause the employee's injury.

D. Mental/Psychological Injuries

1. Physical-Mental

A claim involving psychological or mental injury due to a work accident may be compensable if the mental injury is accompanied by "violence to the physical structure of the body." NEB. REV. STAT. §48-151(4); *Bekeleski v. O. F. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). As with a purely physical injury, in order for a claim of a mental injury to be compensable, in addition to establishing violence to the physical structure of the body, the claimant would need to prove that the mental condition was proximately caused by the work accident. *Bekeleski v. O. F. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). The mental condition must be caused by the physical injury in order to be compensable. *Hynes v. Good Samaritan Hospital*, 291 Neb. 757, 869 N.W.2d 78 (2015); *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007). The physical injury need only be slight in order to prove the presence of "violence to the physical structure of the body." *Johnston v. State of Nebraska*, 219 Neb. 457, 364 N.W.2d 1 (1985).

If proven, a mental injury would be classified as an injury to the body as a whole. *See, for example, Hynes v. Good Samaritan Hospital*, 291 Neb. 757, 869 N.W.2d 78 (2015); *Bishop v. Specialty Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009). If the physical injury is to a scheduled member, a compensable mental injury may

convert that scheduled member claim to an injury to the body as a whole for which loss of earning power benefits may be owed. *See Bishop v. Specialty Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009); *Kraft v. Paul Reed Construction & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991).

2. Mental-Mental

An injury caused by a mental stimulus does not meet the statutory requirement that a compensable injury must be accompanied by violence to the physical structure of the body. Mental stress at work, which produces a mental or physical injury, is not compensable. *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007); *Dyer v. Hasting Industries*, 252 Neb. 361, 562 N.W.2d 248 (1997). Likewise, a psychological injury resulting solely from the process of workers' compensation or litigation is not proximately caused by the underlying accident. *Sweeney v. Kerstens & Lee Inc.*, 268 Neb. 752, 688 N.W. 2d 350 (2004).

3. First Responder Exceptions

The Legislature has enacted special rules and exceptions for first responders relative to mental-only injuries. The first **exception** to the rule requiring violence to the physical structure of the body for a mental injury to be compensable is in the case of "first responders." A claim brought by a first responder may be compensable if the first responder proves that the circumstances causing the mental injury or illness were "extraordinary and unusual" in comparison to the normal conditions of the first responder's particular employment, *and* those circumstances proximately caused a mental injury or illness. This is a limited exception, as the term "first responder" is defined by the Workers' Compensation Act as a sheriff, deputy sheriff, police officer, Nebraska State Patrol trooper, volunteer or paid firefighter, emergency medical technician or paramedic. NEB. REV. STAT. §48-101.01.

In 2021 the Nebraska Legislature added county correctional officers to the list of those who may have mental injury and mental illness unaccompanied by physical injury. In order to qualify, the county correctional officers must be employed by a high-population county and their duties involve regular and direct interaction with high-risk individuals. The conditions which cause their mental condition must also be extraordinary and unusual in comparison to the normal conditions of the particular employment.

Effective July 1, 2021, another class of mental injuries with respect to first responders was enacted in 2020. An employee will now only need to meet three criteria to create a *presumption of compensability* for his or her mental injury even if no injury occurred to his or her physical structure and the mental injury was not caused by "extraordinary or unusual" circumstances. First, the employee must show that before the onset of the alleged mental injury, the employee underwent a mental

health evaluation that presumably demonstrated no problems. Second, the employee must present testimony or an affidavit from a mental health professional stating that the employee is suffering from a mental injury. Finally, the employee must show that he or she underwent resilience training and updated that training at least once per year leading up to the injurious event, prior to the event that caused the injury. If all those conditions are met, and the employee has a mental injury, there is a rebuttable presumption (i.e., compensability) that the same arose out of that employee's employment. NEB. REV. STAT. §48-101.01.

IV. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

If an employment relationship exists and there is a compensable event, the employee must prove that his or her accident/occupational disease and injuries: (1) arose out of, and (2) were in the course of the employment.

A. "Arising Out Of" and "In the Course Of"

"Arising out of" refers to the origin or cause of the accident. *Coffey v. Waldinger Corp.*, 11 Neb. App. 293, 649 N.W.2d 197 (2002). The question is whether the causative danger occurred as a result of an employment-related risk. If a person's risk of injury is increased by the employment, it may be compensable.

"In the course of" refers to the time, place, and circumstances of the accident. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). Generally an injury is "in the course of" employment if it: (1) takes place during the normal working hours of employment, (2) occurs at a place where the employee may reasonably be required to be, and (3) takes place while the employee is fulfilling work duties or is engaged in doing something incidental thereto. *Skinner v. Ogallala Pub. Sch. Dist.*, 262 Neb. 387, 631 N.W.2d 510 (2001).

B. Positional Risk Doctrine

An employee's injuries sustained in a fall caused via personal risk or condition are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as at a certain height, near machinery or sharp corners, or in a moving vehicle. *Lucas v. Anderson Ford*, 13 Neb. App. 133, 689 N.W.2d 354 (2004); *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000); *Carter v. Becton-Dickinson*, 8 Neb. App. 900, 603 N.W.2d 469 (1999).

In *Logsdon*, the employee was walking the periphery of the employer's premises during a work break when he had an unexplained fall with no known reason or cause. The Court of Appeals noted that all risks causing injury to an employee fall within three categories: "(1) ***employment related*** – risks distinctly associated with the employment; (2) ***personal*** – risks personal to the claimant, e.g., idiopathic causes; and (3) ***neutral*** – a risk that is neither distinctly associated with the employment nor personal to the claimant." The Court detailed

that injury from an employment risk is universally compensable, injury from personal or idiopathic causes is universally noncompensable, and that harm arising from a neutral risk is generally compensable. The Court of Appeals concluded that the purely unexplained fall was attributable to a neutral risk and, thus, compensable.

In *Lucas*, the employee fainted at work after standing up from his desk and fractured his hip as a result of his fall to the floor. The medical evidence established that the employee fainted due to a personal health condition. The Court held that the employee's accident was not compensable based upon the reasoning that his fall was the result of a personal condition, and the placement of the employee's desk and chair in the workplace did not create an increased risk of injury. *Note:* If the employee had been working on a ladder or driving at the time he fainted, the accident would likely be deemed compensable based upon the reasoning that the employment placed him in a position that increased the risk of injury.

In *Carter*, the employee was walking between equipment when she developed left hip pain, and was diagnosed with a displaced fracture. It was determined that the displacement of the employee's hip was the result of the natural progression of a pre-existing fracture. The Court found the pre-existing condition represented a personal risk with no evidence of an employment risk. The Court commented that the activity of "nonstrenuous walking, bearing one's body weight . . . is the epitome of a non-employment risk."

C. Deviation from Time and Place of Employment

An injury during a deviation from employment is not an injury in the course of employment. Deviation can occur from a geographical context or by the nature of the activity. The general test to determine whether an act or conduct of an employee which is not a direct performance of the employee's work "arises out of" his or her employment is, essentially, whether the act is reasonably incident thereto or constitutes such a substantial deviation as to evidence a break in the employment which creates an independent hazard. *Cannia v. Douglas County*, 240 Neb. 382, 481 N.W.2d 917 (1992).

D. Accidents on Employer's Premises

An injury occurring *on the employer's premises* while the employee moves to, from, and throughout the workplace usually will be found compensable under the theory that this activity is necessary to the employment. *Acton v. Wymore School District #114*, 172 Neb. 609, 111 N.W.2d 368 (1961). The employee does not necessarily have to be on the clock when the accident occurs for it to be compensable. For example, injuries sustained on the employer's premises during the lunch hour, in a lunchroom maintained by and under control of the employer for the exclusive use of its employees, are compensable. *Thomsen v. Sears Roebuck & Co*., 192 Neb. 236, 219 N.W.2d 746 (1974).

E. Coming and Going Rule

The traditional rule is that injuries sustained by an employee while going to and from work do not "arise out of" and "in the course of" employment and are not compensable, unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury. *Torres v. Aulick Leasing, Inc*., 261 Neb. 1016, 628 N.W.2d 212 (2001); *Acton v. Wymore School District*, 172 Neb. 609, 111 N.W.2d 368 (1961). This "rule" has been greatly eroded by many exceptions and the determination of compensability turns on the particular facts of the case.

The following exceptions may apply to make a particular claim compensable:

1. Commercial Traveler

Where an employee, in the performance of his or her duties, is required to travel and an accident occurs while he or she is so engaged, the accident "arises out of" and "in the course of" his or her employment. Commercial travelers are regarded as acting in the course of their employment during the entire period of travel on the employer's business. The mission of the employer must be the major factor in the journey or movement and not merely incidental. *Torres v. Aulick Leasing, Inc*., *supra.*

2. Dual Purpose

If an employee is injured in an accident while on a trip which serves a dual purpose of both business and personal, the injuries are compensable as arising out of and in the course and scope of the employment, provided the trip involves some service to be performed on the employer's behalf which would have occasioned the trip, even if it had not coincided with the personal journey. *Jacobs v. Consolidated Telephone Co*., 237 Neb. 772, 467 N.W.2d 864 (1991).

3. Personal Comfort and Convenience

Under certain circumstances, some acts will be considered to have "arisen out of" the course of employment even when the employee is tending to a matter of personal comfort. These incidents can include leaving the employer's premises to obtain food or drink. So long as the employee is not acting in conflict with specific instructions from the employer and he or she is engaging in an activity which would normally be expected under the conditions of work, it is possible that the employee will remain within the scope of employment.

For example, in *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003), the employee was injured while walking to a convenience store to purchase soft drinks for herself as well as her co-workers and supervisors. The Nebraska Supreme Court found that even though the incident did not occur on the employer's premises, the

employee was entitled to workers' compensation benefits. Since soft drinks were not available on site, the Court found that the employee was indulging in a matter of personal convenience and comfort in which she would be expected to indulge, and since she obtained permission from her supervisor, the accident and injury arose out of and in the course of her employment.

4. Special Errand Exception

When an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, are themselves sufficiently substantial to be viewed as an integral part of the service itself. The special errand exception applies when there is instruction, direction, requirement or suggestion by the employer that the employee make the journey. *Torres v. Aulick Leasing, Inc., supra.*

5. Employer-Supplied Transportation

Where the employer furnishes transportation to the employee and the trip going to and coming from work is made in a vehicle under the control of the employer, an injury during that trip is incurred in the course of employment. *Butt v. City Wide Rock Exc. Co.*, 204 Neb. 126, 281 N.W.2d 406 (1979). Where an employer pays an employee's mileage expenses for travel to and from the employee's home as a result of the employee's use of a personal vehicle, an injury sustained while the employee is going to or coming from work in that vehicle is one which likely arises out of and is in the course of the employee's employment.

6. Returning Home for a Necessary Item

The Court of Appeals has held that when an employee forgets a security key card at home, leaves work without permission to return home to pick up the key card, and is injured in a car accident in doing so, the injury arises out of and in the course of the worker's employment and is compensable. *Parks v. Marsden Bldg. Maintenance, L.L.C.*, 19 Neb. App. 762, 811 N.W.2d 306 (2012). Because it was determined as a matter of fact that having the security key card was necessary to fulfilling his job duties and the accident occurred after the employee reported for work, clocked in, and attempted to begin his duties, the Court found the accident arose out of and was in the course of his employment. Had the accident merely occurred on the employee's way to work, it is likely that the injuries would not be compensable.

7. Parking Lots Owned by Employer

Injuries sustained on employers' parking lots are generally compensable, even if they occur before or after the employee has clocked in or out. *Buck v. Iowa Beef Processors Inc.*, 198 Neb. 125, 251 N.W.2d 875 (1977).

8. Parking Lots Not Owned by Employer

Under certain circumstances, injuries occurring in parking lots not owned by the employer have been found compensable. In *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), an employee fell in a parking lot that was not owned by the employer but the employer provided transportation to and from the lot. The Court found that there was a distinct causal connection between the employer's encouragement of its employees' use of the lot and the occurrence of the injury. By providing transportation, the employer created a condition under which its employees would encounter hazards.

9. Public Street

The Supreme Court has found that an injury sustained by an employee crossing a public street to report to work was compensable. In *Coffey v. Waldinger Corp.*, 11 Neb. App. 293, 649 N.W.2d 197 (2002), the employer encouraged its employees to park in a fenced lot across the street from a construction job site. The lot was not owned by the employer. An employee was hit and killed by a motorist as the employee attempted to cross the street from the assigned parking lot to the work site. The Court concluded that the employer created a condition under which its employees would necessarily encounter hazards while traveling to the job site where they worked. Accordingly, the Court held that there was a distinct, causal connection between the employer's encouragement of its employees' use of the parking lot and the occurrence of the accident.

10. Commercial Shopping Center Parking Lot

A shopping center parking lot provided for the convenience of, and used by, employees of the business located in the center (i.e., strip mall) is considered part of the premises of an employer located in the center. *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005).

F. Act of God

The rule of law as adopted in Nebraska requires an employer to assume compensability for an injury caused by an "Act of God," where the employment exposes the worker to an increased risk of injury. *Ingram v. Bradley*, 183 Neb. 692, 163 N.W.2d. 875 (1969).

G. Miscellaneous

1. Assaults

Assaults or fights between co-employees are compensable if they arise out of, or result from, risk connected with employment. *P.A.M. v. Quad L. Assoc.*, 221 Neb. 642, 380 N.W.2d 243 (1986); *Monahan v. United States Check Book Co.*, 4 Neb. App. 227, 540 N.W.2d 380 (1995). The Nebraska Court of Appeals has rejected the argument that shared employment is sufficient to demonstrate that the assault arises out of the work accident. *McDaniel v. Western Sugar Coop.*, 23 Neb. App. 35, 867 N.W.2d 302 (2015). In *McDaniel*, the employee was assaulted by a co-worker based upon the co-worker's discovery that the employee was a registered sex offender. The employee and co-worker did not know each other outside work and the employee argued that the workplace facilitated the assault. The Court of Appeals agreed with the Trial Court's findings that the assault was for reasons personal to the co-worker and that nothing in the workplace precipitated the assault. The decision in *McDaniel* clarifies that the origin of the dispute must relate to the workplace.

2. Horseplay

Horseplay is defined as "a deviation from the typical employer's requirement that workers work." Injuries occurring during horseplay may be compensable if: (1) the deviation is "insubstantial," and (2) the deviation does not "measurably detract from the work." *Varela v. Fisher Roofing*, 253 Neb. 667, 572 N.W.2d 780 (1998).

3. Recreational/Social Events

Injuries occurring during employer-sponsored recreational or social activities are analyzed based upon the following factors, set forth in *Shade v. Avars*, 247 Neb. 94, 525 N.W.2d 32 (1994):

a. Whether the employer derives substantial benefit from the activity beyond the intangible value of employee health and morale;

b. Whether attendance is mandatory or encouraged by the employer; and,

c. Location of the event.

In the case of recreational or social activities incident to employment, the Supreme Court has applied the following test to determine whether an injury arose out of and in the course of employment: "Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or

impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within orbit of the employment; or (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." *Jacobitz v. Aurora Coop.*, 291 Neb. 349, 865 N.W.2d 353 (2015).

In *Jacobitz,* an employee fell off a truck following a customer appreciation dinner held by his employer. The Trial Court had found the accident compensable based upon its determination that the employer received a "substantial benefit" from the employee's participation in the dinner. The Supreme Court held that the Trial Court was required to consider whether the benefit to the employer was both substantial *and* direct and had, thus, applied the wrong legal standard. The case was remanded back to the Trial Court for consideration as to whether the substantial benefit was also direct. In its analysis, the Supreme Court looked to the definitions of "direct" as set forth in Merriam-Webster's dictionary and Black's Law Dictionary, which state, in relevant part, that "direct" is defined as "stemming immediately from a source" and as being "[f]ree from extraneous influence; immediate."

4. Work Breaks

If the employer maintains authority or control over the employee during a rest break or coffee break, it is possible that injuries occurring during these breaks will be found compensable even if they take place off the employer's premises. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). Whether the employer retains sufficient control during a break will depend on the specific facts of each case.

5. Pre-Employment Physical

A job applicant is not entitled to workers' compensation benefits for injuries sustained during a pre-employment physical examination where the applicant's offer of employment is contingent on the applicant's passing of the pre-employment examination(s). Injuries during a pre-employment physical examination are not compensable under the Nebraska Workers' Compensation Act in the absence of an employer-employee relationship between the parties. *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001).

6. Accident While En Route to Medical Treatment for Work Injury

An employee's injury which occurs en route to a required medical appointment that is related to a compensable injury is also compensable, as long as the chosen route is reasonable and practical. *Straub v. City of Scottsbluff*, 280 Neb. 163, 784 N.W.2d 886 (2010).

V. CAUSATION

A. Burden of Proof

1. Plaintiff's Burden

"The claimant has the burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment." NEB. REV. STAT. §48-151(2). One should not assume that the accident caused the injury or that the injury caused the disability. *Mendoza v. Pepsi Cola Bottling Co.*, 8 Neb. App. 778, 603 N.W.2d 156 (1999).

2. Exception: Unexplained Falls

In unexplained fall cases, where there is no evidence of any idiopathic explanation for the fall, the employee does not have to establish a causal relationship between the alleged injury caused by the fall and his or her employment. Because the Court has adopted the positional risk doctrine, there is a presumption that unexplained falls arise out of one's employment. The employer then has the burden to rebut this presumption with evidence of an idiopathic cause or other risk personal to the employee. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000).

B. Necessity of Expert Opinion

Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent (i.e., an amputation injury), an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury, as well as any claimed disability consequent to such an injury. *Caradori v. Frontier Airlines, Inc.*, 213 Neb. 513, 329 N.W.2d 865 (1983).

C. What Constitutes an Expert Opinion

The **medical history** contained in the medical records does not establish causation. *Lounnaphanh v. Monfort, Inc.*, 7 Neb. App. 452, 585 N.W.2d 783 (1998).

D. Sufficiency of Expert Opinion

For medical testimony to be the basis for an award, it must be **sufficiently definite and certain** that a conclusion can be drawn that there was a causal connection between the accident and the disability. *Edmonds v. IBP, Inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992).

An award of the Workers' Compensation Court cannot be based on **mere speculation or possibility**. *Edmonds v. IBP, Inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992); *Caradori v. Frontier Airlines, Inc.*, 213 Neb. 513, 329 N.W.2d 865 (1983). An award cannot be based on **possibility or speculation** and if an inference favorable to the claimant can only be reached on the basis thereof, then there can be no recovery. *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965).

When a physician's testimony gives rise to conflicting **inferences of equal degree of probability** so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965).

Expert testimony that a claimant's injury "**appeared**" to be work related is insufficient as a matter of law to prove to a reasonable degree of medical certainty a causal connection between the injury and the work-related activity. *Fowler v. Lester Electric*, 3 Neb. App. 191, 501 N.W.2d 728 (1993).

Expert medical testimony based on "**could,**" "**may,**" or "**possibly**" lacks the definiteness required to support an award. *Edmonds v. IBP, Inc*., 239 Neb. 899, 479 N.W.2d 754 (1992).

An expert's use of the word "**suggest**," by itself, is inadequate. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991*); Lounnaphanh v. Monfort, Inc.*, 7 Neb. App. 452, 583 N.W.2d 783 (1998).

Testimony that a work-related accident "**very likely**" exacerbated claimant's pre-existing condition is held sufficient. *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985).

Testimony that it was "**very probable**" that the injury related to the accident is held legally sufficient. *Halbert v. Champion International*, 215 Neb. 200, 337 N.W.2d 764 (1983).

"**Magic words**" to the effect that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary. The sufficiency of an expert's opinion is judged in the context of the expert's entire statement. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991); *Michel v. Nuway Drug Serv*., 14 Neb. App. 902, 717 N.W.2d 528 (2006).

Where an expert's opinion does not use "magic words" to express the opinion that the employee's injury was caused by the work accident, the Court may consider the **"larger context"** of an expert's opinion as to whether the expert's opinion is sufficient to support an award. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

E. Admissibility of Expert Opinion

As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common law or statutory rules of evidence. NEB. REV. STAT. §48-168(1). Because the application of *Daubert* standards in Nebraska is limited to cases in which the Nebraska rules of evidence apply, and those rules do not apply in Workers' Compensation Court, the *Daubert* standards do not apply in workers' compensation cases. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably-accurate conclusion, as distinguished from a mere guess or conjecture. *Haynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

A qualified expert may not testify without an adequate basis for his or her opinions concerning the facts of the case on which the expert is testifying. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably-accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. The opinion must have a sufficient factual basis so that it is not mere conjecture or guess. Thus, a Trial Court may exclude an expert opinion because the expert is not qualified, because there is no proper foundation or factual basis for the opinion, because the testimony would not assist the trier of fact to understand the factual issue, or because the testimony is not relevant. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

It is within the Trial Court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

F. Successive Events Acting on Pre-Existing Condition

1. Natural Progression of Pre-Existing Condition

An injury, disability, or death that is the result of the normal progression of any pre-existing condition or that is due to natural causes, although occurring while the employee is at work, is not compensable under the Workers' Compensation Act. *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988); *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980); *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978); NEB. REV. STAT. §48-151(4).

2. New Injury Combining with Pre-Existing Condition

Where a work-related injury combines with a pre-existing injury to produce additional disability, the entire disability is compensable. *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992).

A workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a pre-existing condition to produce disability, notwithstanding that in the absence of the pre-existing condition no disability would have resulted. *Heiliger v. Walters & Heiliger Electric, Inc*., 236 Neb. 459, 461 N.W.2d 565 (1990); *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); *Miller v. Goodyear Tire & Rubber Co.* 239 Neb. 1014, 480 N.W.2d 162 (1992).

3. Aggravation of Pre-Existing Condition

To sustain an award in a workers' compensation case involving a pre-existing disease or condition, it is sufficient to show that the employment injury aggravated, accelerated, or inflamed the pre-existing condition. *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981); *Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980).

4. Aggravations v. Recurrences

"There is . . . a fine line separating aggravations from recurrences . . . . In order to find that there has been an aggravation, it must be shown that the second episode contributed independently to the final disability. Also, there must have been a second 'injury' as that term is used in the jurisdiction . . . . If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second . . . . This group . . . includes the kind of case in which a worker has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion." *Mendoza v. Omaha Meat Processors Through Tower Ins. Co.*, 225 Neb. 771, 408 N.W.2d 280 (1987).

When assessing whether an aggravation or recurrence has occurred, the following are factors which will be important:

> **a.** How long it has been prior to the work accident since the employee last suffered symptoms associated with her or his condition;

b. How long it has been prior to the work accident since the employee sought medical care for the pre-existing condition; and

c. The similarity of the symptoms associated with the pre-existing condition and those which followed the work-related event.

5. Independent Intervening Cause

Where there have been two injuries to an employee, the question of whether the disability sustained by the employee should be attributable to the first or to the second depends on whether or not the disability sustained was caused by the original injury or by an independent intervening cause. *Breed v. Interstate Glass Co.*, 188 Neb. 284, 196 N.W.2d 169 (1972).

The employer bears the burden of proving that an independent intervening cause is the cause of the employee's disability. The mere possibility of an independent intervening cause does not relieve an employer from liability for an employee's otherwise compensable claim for workers' compensation and benefits. *Mendoza v. Omaha Meat Processors Through Tower Ins. Co.*, 225 Neb. 771, 408 N.W.2d 280 (1987). If but for the work-related original injury, the employee would not have suffered any injury from a subsequent activity, no independent intervening cause occurred. *Bunz v. A.C. Lighting Prot. Co., Inc.*, 2021 WL 28205 (Neb. Ct. App. Jan.5, 2021).

6. Successive Accidents, Different Employers/Carriers

Where an employee has had two accidents, the question of whether the disability sustained by him or her should be attributed to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury. *Towner v. Western Contracting Corp.*, 164 Neb. 235, 82 N.W.2d 253 (1957); *Snowardt v. City of Kimball*, 174 Neb. 295, 117 N.W.2d 543 (1962); *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 350 N.W.2d 7 (1984).

7. Necessity of Compensable Injury for Each Subsequent Work Aggravation

A separate compensable injury for each and every subsequent work aggravation is not required if the initial cause of the injuries is a direct and natural result of the compensable injury. *Haynes v. Good Samaritan Hosp.*, 291 Neb 757, 869 N.W.2d 78 (2015). *See also Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

> When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results." *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

VI. NOTICE OF INJURY

An employee is required to notify the employer of an injury "as soon as practicable" after the happening thereof. NEB. REV. STAT. §48-133. The Nebraska Supreme Court has defined the phrase "as soon as practicable" as meaning "capable of being done, effected, or put into practice with available means, i.e., feasible." *Snowden v. Helget Gas Products, Inc.*, 15 Neb. App. 33, 721 N.W.2d 362 (2006); *Williamson v. Werner Enterprises, Inc.* 12 Neb. App. 642, 682 N.W.2d 723 (2004). The Court has also noted that the phrase "as soon as practicable" depends upon the particular facts and circumstances of each case and is not about how many days, weeks, or months elapse from the time of the injury until the reporting date. *Bauer v. Genesis Healthcare Group*, 27 Neb. App. 904 (2019). The Court further clarified that notice of an injury, not merely notice of an accident, must be provided as soon as practicable. *Williamson v. Werner Enterprises, Inc.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004).

In applying these principles, the Court in *Bauer* affirmed dismissal of the employee's claim, finding that the physical therapy assistant made a conscious decision to delay reporting his September 15, 2017, injury until October 23, 2017, because he did not want to "rock the boat" by notifying his employer, despite the fact that he knew he was injured, he understood the pain he experienced was connected to the event, and he engaged in self-treatment activities and self-work modifications. Similarly, the Court in *Williamson* held that an employee who claimed to have suffered a back injury on December 23, 2000, and who did not report his injury to his employer until May 2001, despite having gone for treatment on December 26, 2000, for pain in his back, failed to provide notice as soon as practicable. Also, a six-month delay in reporting, without at least demonstrating a reason for the delay in reporting, was found to be not "practicable." *Ali v. JBS Distribution, L.L.C.*, No. A-15-1046 (2016).

An employee is not required to tell the employer that his or her injury is work related. Notice to an employer is sufficient if a reasonable person would conclude that the injury is potentially compensable and that the employer should investigate the matter further. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009). If the employer's failure to investigate the matter further is the reason the employer was unaware that the injury is work related, notice will not be a viable defense. *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995).

VII. AFFIRMATIVE DEFENSES

Generally, the burden of proof is on the employer in establishing an affirmative defense to a workers' compensation claim. *Hilt Truck Lines, Inc. v. Jones*, 204 Neb. 115, 281 N.W.2d 399 (1979); *Nalley v. Consolidated Freightways, Inc.*, 204 Neb. 370, 282 N.W.2d 47 (1979).

A. Statute of Limitations

A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense. *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). A workers' compensation claimant has two years to file a claim against his or her employer. NEB. REV. STAT. §48-137. The two-year statute of limitations period begins to run when the claimant knew or reasonably should have known he or she had a claim to make for payment of medical or indemnity benefits. Pursuant to the statute, a claimant must file his or her petition within two years of either: (1) the date of the accident, or (2) the date of the last payment of benefits, either indemnity or medical payments, whichever is later. Note that under NEB. REV. STAT. §48-137, the "time of making of the last payment" which triggers the statute of limitations is the date the employee or employee's provider *receives* payment. *Obermiller v. Peak Interest, L.L.C.*, 277 Neb. 656, 764 N.W.2d 410 (2009).

Once the statute of limitations has run, the additional payment of benefits, including payment of a third-party settlement, does not extend the statute of limitations. *Thomas v. Lincoln Public Schools*, 9 Neb. App. 965, 622 N.W.2d 705 (2001).

1. Tolling of the Statute of Limitations

The statute is tolled under the following circumstances:

a. The employee gives notice of an accident and no First Report of Occupational Disease or Injury is filed. NEB. REV. STAT. §48-144.04.

b. The employee is a minor at the time of the accident, which in Nebraska is under the age of 19. When the employee reaches the age of majority and turns 19 years of age, the statute begins to run.

2. Exceptions to the Statute of Limitations

a. Latent and progressive injury

When a claimant suffers a "latent and progressive" injury, the statute of limitations will be tolled until it becomes, or should have become, reasonably apparent to the claimant that he or she is suffering from a compensable disability. *Gloria v. Nebraska Public Power District*, 231 Neb. 786, 438 N.W.2d 142 (1989).

b. Modification claim

When a material change in the claimant's physical condition occurs, necessitating a modification of the original award, the claimant has two years from the date he or she has knowledge of an increase in his or her incapacity

to file a petition for modification of the prior award. *White v. Sears Roebuck & Co.*, 230 Neb. 369, 431 N.W.2d 641 (1988); *Snipes v. Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

c. Previous award of future medical expenses

The statute of limitations does not apply to a claim for medical expenses if the claimant received a prior award from the Workers' Compensation Court which specifically provided for payment of future medical expenses. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001); *Thorton v. Grand Island Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001). Under these circumstances, the employer will be liable for medical expenses incurred as a result of the work-related injury even if they are incurred more than two years after the final payment of benefits. [Comment: By virtue of these decisions, where the employee receives an award providing for payment of future medical expenses, he or she has essentially been awarded lifetime future medical expenses so long as those medical expenses are related to plaintiff's compensable injury. This factor can be an important one in trying to conclude a claim with a lump sum settlement, thereby closing out any claim for future medical expenses that an injured employee may have.]

B. Willful Negligence

NEB. REV. STAT. §48-101 provides that an employee will not be entitled to workers' compensation benefits if the employee was willfully negligent at the time of the injury. Willful negligence consists of: (1) deliberate acts, (2) such conduct as evidences reckless indifference to safety, or (3) intoxication at the time of injury, such intoxication being without the consent, knowledge, or acquiescence of the employer or the employer's agent. NEB. REV. STAT. §48-151(7). It is the employer's burden to prove willful negligence on the part of the employee sufficient to preclude recovery of benefits. *Collins v. General Casualty Co*., 258 Neb. 852, 606 N.W.2d 93 (2000).

An employee's mere negligence is not sufficient to constitute willful negligence. *Guico v. Excel Corp.,* 260 Neb. 712, 619 N.W.2d 470 (2000). An employee's conduct must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result. *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004). Willful negligence implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree; a willingness to take a chance. *Guico v. Excel Corp.,* 260 Neb. 712, 619 N.W.2d 470 (2000).

Some examples of cases involving the affirmative defense of willful negligence include:

1. *Richards v. Abts*, 136 Neb. 741, 287 N.W. 199 (1939). An employee was not willfully negligent when using a torch on a pressurized tank, even though

welders universally know this is dangerous, because the employer did not show that the employee's choice to use the torch was deliberate.

2. *Moise v. Fruit Dispatch Co.*, 135 Neb. 684, 283 N.W. 495 (1939). An employee who lit his pipe in a room filled with gas (a fact the employee knew) was not willfully negligent because he responded to the impulse to smoke and did not act deliberately.

3. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). An employee who failed to put on safety gloves was not willfully negligent because the trier of fact could conclude from his testimony that he never thought about whether he was willing to assume the risk of injury from disregarding the rule as evidence that the above factors were not present in the deliberate rule violation. (There was also evidence that the employer did not regularly enforce the rules.)

4. *Spaulding v. Alliant Foodservice*, 13 Neb. App. 99, 689 N.W.2d 593 (2004). An employee's violation of the rule to keep his harness fastened was not deliberate as the employee testified he thought the harness was fastened. Thus, the four-factor analysis set forth above was not even required because the act was not deliberate.

5. Suicide can constitute willful negligence as a deliberate act. In *Breckenridge v. Midlands Roofing Co.*, 222 Neb. 452, 384 N.W.2d 298 (1986), the Nebraska Supreme Court ruled that "[a]bsent extraordinary circumstances, suicide constitutes willful negligence under NEB. REV. STAT. §48-151." Involuntary suicide from mental distress as a result of physical injury can represent extraordinary circumstances. *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983).

6. Intoxication as willful negligence requires the employer to prove that the employee was intoxicated and that the intoxication was the proximate cause of the injury. *Johnson v. Hahn Bros. Constr. Inc.*, 188 Neb. 252, 196 N.W.2d 109 (1972); *Hilt Truck Lines, Inc. v. Jones*, 204 Neb. 115, 281 N.W.2d 399 (1979).

C. Intoxication

Mere intoxication at the time of the accident is not enough. The employer must prove that the intoxication caused the accident or injury. *Nalley v. Consolidated Freightways, Inc.*, 204 Neb. 370, 282 N.W.2d 47 (1979). This rule also applies to illegal drug use. Note that in Nebraska, blood tests which are taken for statistical purposes are not admissible as proof of intoxication. NEB. REV. STAT. §60-6,102 et. seq. Therefore, one needs to make a timely order for a separate test, or autopsy before burial, if intoxication at the time of the accident is suspected.

D. Violation of a Safety Rule

An employee's deliberate or intentional defiance of a reasonable rule will disqualify that employee from receiving benefits if: (1) the employer has a reasonable rule designed to protect the health and safety of the employee, (2) the employee has actual notice of the rule, (3) the employee has an understanding of the danger involved in the violation of the rule, (4) the rule is kept alive by bona fide enforcement by the employer, and (5) the employee does not have a bona fide excuse for the rule violation.

These factors do not apply where an employee has ***accidentally*** violated a safety rule. *Spaulding v. Alliant Foodservice, Inc.*, 13 Neb. App. 99, 689 N.W.2d 593 (2004). An accidental violation of a safety rule is subject to the willful negligence standard which requires that the employer prove that the employee's conduct, which led to his or her injury, was "a deliberate act knowingly done or at least such conduct as evidences a reckless indifference to the employee's own safety. . . . Mere negligence is not sufficient. The conduct of the employee must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result . . . . Reckless indifference to safety means more than want of ordinary care. It implies a rash and a careless spirit, not necessarily amounting to wantonness, but approximating it in degree; a willingness to take a chance." *Id*.

E. False Representation

No compensation shall be allowed if, at the time of or in the course of entering into employment or at the time of receiving notice of the removal of conditions from a conditional offer of employment: (1) the employee knowingly and willfully made a false representation as to his or her physical or medical condition by acknowledging *in writing* that he or she is able to perform the essential functions of the job with or without reasonable accommodation based upon the employer's written job description, (2) the employer relied upon the false representation and the reliance was a substantial factor in the hiring, and (3) a causal connection existed between the false representation and the injury. NEB. REV. STAT. §48-148.01.

VIII. AVERAGE WEEKLY WAGE

Any indemnity benefits to which an employee may be entitled are based upon the employee's average weekly wage. The computation of an employee's average weekly wage is a function of the contract of hire, the nature of the employment, and the number of hours worked. NEB. REV. STAT. §48-126. Issues to consider in calculating the average weekly wage are set forth below.

A. Continuous Employment

Continuous employment is when the relationship between the employer and employee is a continuing one and is not dependent on the number of hours an employee works in a day or

the number of days an employee works in a week. In continuous employment situations, an employee's average weekly wage is based on the wages earned during the 26-week period prior to the accident, or the total weeks worked prior to the date of accident, if employed for less than the full 26 weeks. NEB. REV. STAT. §48-126.

1. Overtime

Overtime *hours* are included in the average weekly wage computation, but at the regular rate of pay. This rule applies *unless* the insurer collected a premium on the overtime rate of pay. If so, the average weekly wage will be calculated based upon the overtime rate of pay. In cases involving self-insured employers, the issue of whether overtime hours should be calculated at the regular rate or overtime rate has not been explicitly addressed by Nebraska's appellate courts. Thus, overtime should be calculated at the employee's regular rate in self-insured situations, the same as it would in insured situations where no premium was collected on the overtime rate.

2. Ordinary Work Week

Only those weeks where the number of hours worked reflects the employee's ordinary work week should be included in the average weekly wage calculation. For example, if a claimant normally works an average of 40 hours per week, a week in which the employee works only eight hours should be *excluded* from the average weekly wage calculation. *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). However, weeks in which the employee works *more* hours than he or she normally works must be *included* in calculating the employee's average weekly wage. *Arbtin v. Puritan Manufacturing, Co.*, 13 Neb. App. 540, 696 N.W.2d 905 (2005).

Special consideration must be given to employment relationships where an employee is paid a monthly salary over a 12-month period, but actually works fewer than 12 months per year. School employees are common examples of this issue. Generally, the average weekly wage is calculated by dividing the total annual salary by 52 weeks. The computation should attempt to accurately reflect what a worker typically makes in one week and the average weekly wage must not be distorted. *Mueller v. Lincoln Public Schools*, 282 Neb. 25, 803 N.W.2d 408 (2011).

3. Hybrid Employment Arrangements

Where part or all of an employee's compensation is based on normally non-wage items, such as lodging or mileage reimbursements, these items are also included in the average weekly wage calculation. *McGinnis v. Metro Package Courier, Inc.*, 5 Neb. App. 538, 561 N.W.2d 587 (1997) (involving a courier/delivery driver who earned 60 percent of his compensation from his "mileage reimbursement" for tax purposes).

4. Bonuses, Board and Lodging

An employee's average weekly wage calculations "shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring." If such items were part of the contract of hire, then they should be included in the wage calculations. *See Harmon v. Irby Const. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999). Evidence regarding the estimated values of meals and lodging was sufficient proof of "the money value of such" when there was no agreement on the value for the meals and lodging provided by the employer. *Foster-Rettig v. Indoor Football Operating, LLC*, 25 Neb. App. 551 (2018). Also, if the workers' compensation insurer collects a premium based upon the value of said items, then the value of those items becomes a part of the basis of determining the average weekly wage. NEB. REV. STAT. §48-126.

5. Injuries Occurring the First Day or Few Days at Work

Where a worker has only been employed for a few days prior to the accident, the average weekly wage may be estimated by considering other wages earned by similar employees working similar jobs for the same or similar employers for the six-month period prior to the accident. *Powell v. Estate Gardeners, Inc. and Auto Owners Insurance*, 275 Neb. 287, 745 N.W. 2d 917 (2008).

B. How to Calculate Average Weekly Wage

1. Calculation for Temporary Disability Purposes

For purposes of calculating temporary total disability, multiply the gross hours worked during the 26 weeks prior to the accident by the hourly rate of pay to arrive at the employee's gross wages. Divide that figure by 26 weeks (or the number of weeks worked by the employee prior to injury) to determine the average weekly wage. This calculation applies regardless of whether the employee works more or less than 40 hours per week. Abnormally low weeks should be excluded and overtime hours should be included at the *regular* hourly rate, rather than at the overtime rate.

2. Calculation for Permanent Disability Purposes

a. Where the employee averages 40 hours per week or more

When the employee averages 40 hours per week or more during the 26 weeks preceding the accident, multiply the gross hours worked by the hourly rate of pay earned at the time the hours were worked, to arrive at the employee's

gross wages. Divide that figure by 26 weeks, or the number of weeks worked by the employee prior to injury if less than 26 weeks were worked, to determine the average weekly wage.

b. Where the employee averages less than 40 hours per week

NEB. REV. STAT. §48-121(4) requires that permanent disability must be based on a minimum 40-hour work week, regardless of whether or not the employee actually averages a full 40 hours. To determine the average weekly wage for permanent partial disability purposes when the employee's hourly rate remains constant during the 26-week period, multiply the hourly rate of pay by 40 hours to determine the average weekly wage.

If the employee's hourly rate of pay does not remain constant during the 26-week period, you may use an average hourly rate. Divide the total wages earned in the 26 weeks by the total number of hours worked during the same period to arrive at an average hourly rate. Then multiply the average hourly rate by 40 hours to arrive at an average weekly wage. *See Ramsey v. State of Nebraska*, 259 Neb. 176, 609 N.W.2d 18 (2000).

C. Continuous Intermittent Employment

In continuous intermittent employment situations, use the average hours of a worker in the same or similar employment, multiplied by the hourly rate in effect at the time of the accident, in order to calculate the worker's average weekly wage. Otherwise, use the hourly rate times the hours to be worked at the job if there is no earnings history. *Clifford v. Harchelroad Chevrolet*, 229 Neb. 78, 425 N.W.2d 331 (1988).

D. Seasonal **Employment**

In seasonal employment or employment "dependent on the weather," the employee's average weekly wage is one-fiftieth of the total wages which he or she earned from all occupations during the previous year. NEB. REV. STAT. §48-126.

IX. INDEMNITY BENEFITS

A. Waiting Period (For Both Temporary and Permanent Disability)

The first seven days of lost time after an accident are considered to be the "waiting week." The temporary or permanent disability must extend for at least six weeks before the employee will be entitled to benefits for the first seven days of disability. For purposes of calculating the waiting week, any portion of a day of disability is deemed one entire day of disability. NEB. REV. STAT. §48-119. Once an employee is entitled to temporary or

permanent disability, or a combination of the two, for a period greater than six weeks, the employee is entitled to be paid for the waiting week.

B. Temporary Disability

1. Temporary Total Disability

Temporary total disability benefits are paid while an employee is treating or convalescing and has not reached maximum medical improvement. Once the employee returns to work, light duty included, or has reached maximum medical improvement, he or she is no longer entitled to payment of temporary total disability benefits. At that time, the employee may recover permanent disability benefits, if any are owed.

The extent of an employee's temporary total disability may be based on the employee's testimony. Thus, the Court may award temporary total disability benefits to the employee if the employee testifies he or she is unable to work, even if there is no medical evidence that the employee could not work. *Haro v. Beef America*, 9 Neb. App. 957, 622 N.W.2d 170 (2001). There is no statutory limitation on the length of time an employee may receive temporary total disability benefits. *Heppler v. Omaha Cable, Inc.*, 16 Neb. App. 267, 743 N.W.2d 383 (2007).

An employee's average weekly wage for temporary disability benefits is based on the employee's actual average weekly hours. See "Average Weekly Wage" section for more details.

Here are some examples of temporary total disability scenarios:

a. A physician has restricted the employee completely from work.

b. An employee misses work to attend medical appointments or because he or she is hospitalized, which does not require expert testimony to establish. *See Godsey v. Casey's General Stores*, Inc., 15 Neb. App. 854, 738 N.W.2d 863 (2007).

c. An employee is restricted from work and the employer cannot accommodate the restrictions, and the employee remains unemployed.

d. An employee who leaves employment with the employer and is subsequently restricted, when the new employer cannot accommodate the restrictions and no offer of re-employment was made to the employee for a light-duty position at the original employer. *See Zwiener v. Becton Dickenson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

e. It is an open question whether an employee who is terminated for cause *unrelated* to the work injury is entitled to temporary total disability benefits while restricted as a result of the injury, if the employer could have provided a light-duty position but for the termination for unrelated cause. However, *Zwiener*, *supra*, contains dicta indicating that temporary benefits may still be due.

f. It is a factual determination by the Trial Court whether an employee is temporarily totally disabled. Some judges following *Zwiener* have addressed the issue by noting that the employer was accommodating the claimant at the time of the termination for unrelated cause, and have awarded temporary partial disability (not total) based on those facts.

g. When an employee is terminated for a cause *related* to the accident or injury, there is no argument that the claimant could have been accommodated but for the termination, and generally temporary total disability will be due for as long as the employee remains restricted and unemployed until maximum medical improvement. This includes termination for safety violations which caused the accident. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000) (employee was terminated for violating a safety rule and it was that violation that gave rise to the accident which caused the plaintiff's injury); *Manchester v. Drivers Mgmt. LLC*, 278 Neb. 776, 775 N.W.2d 179 (2009) (employee was terminated because of her alleged negligence leading to the accident which, in turn, caused the injuries for which workers' compensation benefits were sought). It also likely includes situations in which an employee is terminated for missing work as a result of the accident.

h. An employee cannot be totally disabled in the temporary disability context when he or she is earning wages performing similar or the same work. *Kam v. IBP*, 269 Neb. 622, 694 N.W.2d 658 (2005). In *Kam*, the Trial Court found the employee was earning wages in a light-duty position but was temporarily disabled at the rate of 100 percent. The Court of Appeals found that temporary disability cannot be total (or 100 percent) if the employee is earning wages. Essentially, the Court rejected the odd-lot doctrine in the temporary context. The Court further noted that the determination of temporary benefits in the event the employee is earning wages is essentially a comparison of the average weekly wage and what the employee earned after, and not the traditional "disability" determination (see below).

i. Temporary total disability is subject to both the maximum and minimum benefit rates set out in statute.

2. **Temporary** Partial **Disability**

If an employee returns to work after a period of temporary total disability, but returns with restrictions that prevent the employee from earning the same wage being earned at the time of the accident, the employee is entitled to temporary partial disability benefits to account for the difference. The amount to which the employee is entitled is determined by taking 2/3 of the difference between the employee's average weekly wage and the actual earnings after the accident. NEB. REV. STAT. §48-121(2).

3. Potential Defense to Payment of Temporary Indemnity

If the employee has temporary restrictions that the employer could have accommodated, but the employee is not working for reasons *unrelated* to the work injury, the employer may be able to successfully argue the employee is not entitled to temporary disability benefits during the period of time he or she is released to work with temporary restrictions. *However, the Courts have foreclosed many of the opportunities to make this argument successfully*.

In *Damme v. Pike Enterprises, Inc*., 289 Neb. 620, 856 N.W.2d 422 (2014), the Nebraska Supreme Court determined that temporary disability benefits are awarded for diminished employability or impaired earning capacity and do not depend on a finding that the employee cannot be placed with the same employer or a different one. The Court further determined that an award of temporary benefits does not depend on the employee's ability to prove that he or she has lost wages because of a work injury. Rather, if the employee can prove that he or she has diminished earning capacity, he or she is entitled to benefits. This is so even if the employee is incarcerated during the time period at issue and could not have worked for that reason, as was the case in *Damme*.

Furthermore, if the reason the employee's employment was terminated is due to the same conduct that caused the injury, the employee is still entitled to temporary disability benefits after termination. *See Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *Manchester v. Drivers Management, LLC*, 278 Neb. 776, 775 N.W.2d 179 (2009). The employee is still entitled to temporary benefits if the employee *voluntarily leaves* the employer of injury to work for another employer which cannot accommodate the temporary restrictions, even if the employer of injury could have accommodated temporary restrictions had the employee still been employed by the original employer. *See Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013). The employee is still entitled to temporary benefits while incarcerated if the employee can show that he or she sustained diminished earning capacity due to the work injury. *Damme v. Pike Enterprises, Inc*., 289 Neb. 620, 856 N.W.2d 422 (2014).

Thus, the employee is often going to be found entitled to some amount of temporary benefits as long as he or she can show diminished employability, regardless of whether the employer could have accommodated the employee such that no actual wage loss was sustained.

C. Permanent Disability

When an employee reaches maximum medical improvement, he or she is no longer entitled to temporary disability benefits, but is entitled to permanent disability benefits. In the past, Nebraska case law was interpreted to require that permanent disability benefits accrue from the "date of injury," which meant that employers were required to pay the employee permanent partial disability back to the date of accident for any weeks the employee was not receiving any temporary benefits. *See Hobza v. Seedorff Masonry*, 259 Neb. 671, 611 N.W.2d 828 (2000).

However, a statutory change amended the relevant statute (NEB REV. STAT. §48-119), and replaced the reference "date of injury" with "date of disability." Thus, permanent disability benefits should be computed from the date of disability, which in most cases will mean from the date of maximum medical improvement forward, instead of going back to the date of accident. *See Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

Permanent disability benefits and death benefits are based upon a minimum 40-hour work week. NEB. REV. STAT. §48-121(4). See "Average Weekly Wage" section for more details.

1. Body As a Whole Injuries

A body as a whole injury is when the injury is to a part of the body that is not listed on the "schedule" set forth in NEB. REV. STAT. §48-121(3). Generally, body as a whole injuries are injuries to the head, neck, back, or internal injuries such as hernias. Hip injuries are also generally considered body as a whole injuries under Nebraska law. Permanent partial disability for body as a whole injuries is paid for a maximum of 300 weeks. When calculating the number of weeks due for permanent partial disability benefits for a body as a whole injury, subtract the number of weeks during which temporary disability benefits were being paid from the 300 total weeks.

Where the employee is permanently and totally disabled, the employee is entitled to those benefits as long as he or she is totally disabled, even beyond 300 weeks. Nebraska has no age limit on permanent total disability benefits.

a. Entitlement to loss of earning capacity

Injuries to the body as a whole are compensated based upon a loss of earning capacity, not upon an impairment rating to the injured body part.

Injuries to scheduled members (arms, legs, etc.) may be considered in determining the loss of earning capacity if the employee sustains a scheduled member injury and a whole body injury in the *same accident* and the scheduled member injury adversely affects the employee, such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury on the worker's employability. *See Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003). If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the Court is permitted to consider both the scheduled member and the body as a whole injury to determine the employee's loss of earning power. However, the employee may not recover *both* the loss of earning capacity and the scheduled member rating. If payment has been made on the scheduled member impairment, such payment is credited toward the loss of earning capacity, once assessed. *Zavala v. ConAgra Beef Co.,* 265 Neb. 188, 655 N.W.2d 692 (2003); *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005); *Bishop v. Specialty Fabricating Co.,* 277 Neb. 171, 760 N.W.2d 352 (2009).

If the employee sustains injuries to more than one scheduled member in the same accident, the employee is entitled to a loss of earning power, but only if the loss of earning power is greater than 30 percent. This rule applies to accidents occurring on or after January 1, 2008. *See* NEB. REV. STAT. §48-121(3). See "Scheduled Member Disability" section for more details.

In *Paulina Espinoza v. Job Sources, USA*, 313 Neb. 559 (2023) the Nebraska Supreme Court held that an employee with multiple injuries along the same extremity has suffered a "loss or loss of use of more than one member" for purposes of Neb. Rev. Stat. § 48-121(3). This likely means that as long as an employee's injuries (a) to an upper extremity involve more than the partial loss of use of one finger, or (b) to a lower extremity involve more than the partial loss of use of one toe, the employee will be deemed to have suffered a "loss or loss of use of more than one member" for purposes of Neb. Rev. Stat. § 48-121(3). However recall that an employees are only entitled to their loss of earning power if it is greater than 30%.

b. Determination of loss of earning capacity

There is no numerical formula to determine an employee's loss of earning power. Earning power is determined by considering four factors: (1) the worker's general eligibility to procure and (2) hold employment, (3) the worker's capacity to perform the tasks required by the work, and (4) the worker's ability to earn wages in employment for which he or she is engaged or fitted. *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980);

Berggren v. Grand Island Accessories, 249 Neb. 789, 545 N.W.2d 727 (1996).

Opinions as to loss of earning capacity are most often given by vocational counselors, who are either agreed upon by the parties or appointed by the Court at the request of a party. However, the Workers' Compensation Court has the power to determine loss of earning power on its own, unassisted by any expert opinions.

(1) Identifying the relevant labor market for assessing loss of earning capacity

Where an employee relocates to a new community after the injury, the new community will serve as the "hub" community from which to assess the employee's loss of earning power, provided that the change of community is made in good faith and not for improper motives. The employee bears the burden of showing that the relocation was made for legitimate reasons.

If the employee relocates to a new community, which has no reliable data from which to determine an accurate loss of earning capacity, the employee is allowed to prove loss of earning capacity using data from the location where the injury occurred. *See Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013), where an undocumented worker was injured in Nebraska and then moved back to Mexico. The employee was allowed to use the Nebraska labor market to prove loss of earning capacity because there was no reliable data on the labor market in Mexico.

After a trial judge determines an employee's hub community, the trial judge may also consider whether surrounding communities are part of the relevant labor market. Whether an employee should reasonably seek work in an area outside the hub community is a determination based on the totality of circumstances. In determining whether a surrounding community should be included in the relevant labor market, a trial judge should consider the following factors: (1) availability of transportation, (2) duration of the commute, (3) length of workday the employee is capable of working, (4) ability of the person to make the commute based on his or her physical condition, (5) economic feasibility of a person in the employee's position working in that location, and (6) whether others who live in the employee's hub community regularly seek employment in the prospective area. *Giboo v. Certified Transmission Rebuilders*, 275

Neb. 369, 746 N.W.2d 362 (2008); *Money v. Tyrell Flowers and Continental Western Grp.*, 275 Neb. 602, 748 N.W.2d 49 (2008).

(2) Additional considerations regarding loss of earning capacity

A permanent impairment rating is not required for an award of a loss of earning capacity. Permanent physical restrictions alone are sufficient to entitle an employee to loss of earning power. *Swanson v. Park Place Automotive,* 267 Neb. 133, 672 N.W.2d 405 (2003). Accordingly, when an employee sustains *no* permanent restrictions, an argument can be made that the employee is not entitled to loss of earning power because the earning power has not been changed by any restrictions due to the injury.

An opinion from a vocational counselor is not required to determine loss of earning capacity. The Workers' Compensation Court can determine the extent of loss of earning capacity without the assistance of expert testimony from a vocational counselor. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

Although NEB. REV. STAT. §48-162.01 states that a loss of earning capacity assessment by an agreed-upon or Court-appointed vocational counselor carries with it a rebuttable presumption of correctness, you may still obtain an opinion from a different vocational rehabilitation counselor to rebut an unfavorable assessment of loss of earning capacity.

An employee's refusal to locate from a depressed labor market to one with greater employment opportunities is not a factor that affects loss of earning capacity. *Harmon v. Irby Construction,* 258 Neb. 420, 604 N.W.2d 813 (1999). The employee cannot be forced to relocate to improve his or her employment opportunities.

The ability to communicate in English is to be considered in determining the magnitude of a worker's disability. *Mata v. Western Valley Packing,* 236 Neb. 584, 462 N.W.2d 869 (1990).

The odd-lot doctrine provides that total disability may be found in a case where an employee is not completely incapacitated, but is so handicapped that he or she will not be employed regularly in any well-known branch of the labor market. *Schlup v. Auburn Needleworks,* 239 Neb. 854, 479 N.W.2d 440 (1992).

(3) Timing of loss of earning capacity determination

Once it is determined that the employee has reached maximum medical improvement for all injuries resulting from the accident, the trial judge is obligated to make an assessment of loss of earning power. The Nebraska Supreme Court has determined that an employee does not reach maximum medical improvement for the purpose of determining loss of earning capacity until all injuries resulting from an accident have reached maximum medical improvement. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005).

The fact that vocational rehabilitation may reduce an employee's loss of earning power is not a valid reason for postponing a determination of loss of earning power. *Gibson v. Kurt Manufacturing*, 255 Neb. 255, 583 N.W.2d 767 (1998). Thus, if the employee has not completed vocational rehabilitation at the time of trial, the Court is not allowed to speculate as to what reduction in the loss of earning power might take place if the employee were to complete vocational rehabilitation.

In cases where vocational rehabilitation has been completed before trial, the Court may take into consideration any reduction in loss of earning power flowing from the completion of vocational rehabilitation. *Grandt v. Douglas County*, 14 Neb. App. 219, 705 N.W.2d 600 (2005).

2. Scheduled Member Disability

An employee with a permanent impairment to a scheduled member is entitled to permanent partial disability benefits for a statutorily determined number of weeks. The number of weeks depends upon which "member," or body part, is injured. NEB. REV. STAT. §48-121(3) sets out a "schedule" which shows the number of weeks allowed for each type of member injury. For example, an employee with a 100 percent permanent partial impairment to his or her lower extremity below the knee is entitled to 150 weeks of permanent benefits.

When an employee has a leg amputated at or above the knee, compensation is not granted for the individual loss of leg, foot and each individual toe on the amputated leg. Instead, compensation is limited to 215 weeks as NEB. REV. STAT. §48-121(3) specifically provides for this kind of amputation. *Melton v. City of Holdrege*, 309 Neb. 385 (2021).

Payment for a permanent disability to a scheduled member injury is paid in addition to temporary total disability benefits. Therefore, when calculating an employee's

entitlement to permanent partial disability benefits for a scheduled member, the weeks of temporary benefits paid are not subtracted from the total number of weeks owed.

a. Calculating permanent partial disability for a scheduled member injury

To determine the amount of permanent partial disability (PPD) benefits for a scheduled member injury, follow this formula:

Number of weeks for complete member loss x percentage of disability = the number of weeks of PPD to which employee is entitled.

Number of weeks entitled x 2/3 of the employee's Average Weekly Wage = amount of PPD owed. See also "Average Weekly Wage" section.

b. Disability to two or more scheduled members arising out of the same accident

Before 2008, injuries to scheduled members were compensated based upon the scheduled member rating to that body part, unless the injuries resulted in permanent total disability. However, due to a statutory change, for injuries occurring on or after January 1, 2008, the "30 percent rule" applies. This means that an employee may be entitled to a loss of earning power when he or she sustains injuries to two or more scheduled members arising out of the same accident if certain criteria are met.

In order for this rule to apply: (1) the injuries must arise out of the same accident, and (2) the loss of earning capacity sustained due to the injuries must be 30 percent or greater.

When defending claims for loss of earning capacity based on the 30 percent rule, consider whether evidence exists which shows that the injuries did not arise out of the same accident. If the injuries arose out of two or more separate accidents, then the 30 percent rule does not apply. For repetitive trauma injuries, consider the fact that in Nebraska, the "date of accident" is the date the employee stops work and seeks medical treatment. If these are not the same date, then two accidents exist. For example, suppose the employee claims loss of earning power based on bilateral carpal tunnel syndrome (CTS). If the employee stopped work and sought medical treatment for the right hand on Day 1 and stopped work and sought medical treatment for the left hand on Day 15, then the injuries did not arise out of the same accident and the 30 percent rule does not apply. Be prepared to prove that the injuries arose out of different accidents by using employment records

showing when the employee missed work and medical records showing when treatment was first sought for each condition.

Another defense to such claims is that the injuries were not severe enough to rise to the level of a 30 percent loss of earnings. This may be accomplished by showing that the employee sustained few to no restrictions, such that his or her earning power was not impaired to the level of 30 percent or more.

When the 30 percent rule is not applicable, an employee who sustains two scheduled member injuries in a single accident will receive benefits for both injuries consecutively, so long as the maximum weekly benefit amount is not exceeded.

Total loss or total loss of use of both hands, both arms, both feet, both legs, both eyes, hearing in both ears, or of any two thereof constitutes permanent total disability as a matter of law. NEB. REV. STAT. §48-121(3). The Court may also find that a combination of the loss of two or more scheduled member injuries arising out of the same accident, even if not a complete loss, results in permanent total disability based on the facts. NEB. REV. STAT. §48-121(3).

3. Vision Loss

Loss of an eye is compensated as a scheduled member pursuant to NEB. REV. STAT. §48-121. The total loss of use of both eyes constitutes permanent and total disability as a matter of law. The loss of an eye is compensated based upon a rating assigned by a physician.

a. There is no formula. 20/40 vision does not necessarily translate to a certain percent impairment rating and 20/400 vision does not necessarily translate to a 100 percent loss of the eye.

b. The impairment rating is assigned based on *uncorrected vision.* Accordingly, if the injured worker requires glasses or corneal transplants/intraocular lenses due to the injury, impairment is based upon uncorrected vision loss, even if the worker's vision is partially or even wholly restored through artificial means. *Otoe Food Products Company v. Cruickshank*, 141 Neb. 298, 3 N.W.2d 452 (1942). *See also Gruber v. Stickelman*, 149 Neb. 627, 31 N.W.2d 753 (1948); *Bolen v. Buller*, 143 Neb. 237, 9 N.W.2d 204 (1943); *Kalhorn v. City of Bellevue*, 227 Neb. 880, 420 N.W.2d 713 (1988).

4. Hearing Loss

Like loss of an eye, hearing loss is compensated as a scheduled member pursuant to NEB. REV. STAT. §48-121. There is a separate schedule for permanent impairment to an ear. The total loss or permanent total loss of hearing in both ears constitutes permanent and total disability, as a matter of law. Gradual hearing loss claims are evaluated under the statutory definition of "accident" and not "occupational disease." *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009). The date of accident in gradual hearing loss claims, like other repetitive trauma claims, is when the employee has both a discontinuance of work and medical treatment. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009). This means that an employer can be held liable for paying permanent disability benefits dating back to the first day of missed work for medical treatment even where the employee may continue to work full time for years or even decades after the date of accident. There is no credit for wages paid. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

D. Death Benefits

When an employee dies as a result of the work-related injury, his or her family members may be entitled to benefits as set forth below. If the death of the employee is for unrelated reasons, the obligation to pay indemnity and medical benefits set forth above ceases on the date of death. The employee's estate has a claim for any indemnity or medical benefits accrued prior to the date of death. Death benefits are based upon a minimum 40-hour work week. NEB. REV. STAT. §48-121(4). See "Average Weekly Wage" section for more details. The maximum weekly benefit rate for all beneficiaries combined is 75 percent of the average weekly wage. This does not apply to the lump sum due to a widow(er) upon remarriage.

Death benefits also used to include $10,000.00 for burial expenses. However, in 2020 LB 963 increased the burial benefits to $11,000.00 and built in an automatic increase to the burial benefit every year based on the consumer price index. The maximum percentage increase based on the consumer price index was limited to only 2.75 percent per year and the minimum was set to increase by at least 1 percent per year.

1. Presumed Dependent

The following are presumed dependents of the employee. NEB. REV. STAT. §48-124.

a. A spouse is presumed dependent upon the deceased employee when the employee and spouse lived together at the time of injury or death. Otherwise, a spouse can show actual dependence.

b. A child under 19, or 25 if a student (see below), or a child who is physically or mentally incapable of self-support or is actually dependent. The term "child" includes posthumous child, a child legally adopted or for whom adoption proceedings are pending at the time of death, an actually-dependent child in relation to whom the deceased employee stood in the place of a parent for at least one year prior to the time of death, an actually-dependent stepchild, or a child born out of wedlock.

c. Other relatives may qualify for benefits if they are actually dependent, which is defined as individuals who "received more than half of his or her support from the employee and whose dependency is not the result of failure to make reasonable efforts to secure suitable employment."

2. Actually Dependent

For other relatives of the employee to qualify for death benefits, they must establish they were actually dependent on the employee.

a. Parents of the employee are each entitled to 25 percent of the average weekly wage, if the parents were actually dependent.

b. Brothers, sisters, grandparents, and grandchildren are entitled to 25 percent of the average weekly wage to share.

c. Benefits cease when the beneficiary dies, marries, ceases to be actually dependent, ceases to be physically or mentally incapable of self-support, or reaches 19.

d. The widow(er) and children have priority. The parents have priority over other classes of actual dependents.

3. Calculating Death Benefits

To determine the appropriate benefit due each dependent, the remaining family members have to be established within the following scenarios.

a. Widow(er) Only. The widow(er) is entitled to 66 2/3 percent of the employee's average weekly wage (subject to the maximum) for as long as the widow(er) remains unmarried. Upon remarriage, the widow(er) receives a lump sum of two years of benefits. NEB. REV. STAT. §48-122.

b. Widow(er) with Children Living With Widow(er). The widow(er) is entitled to 60 percent of the average weekly wage of the deceased. The child(ren) are each entitled to 15 percent of the average weekly wage. The children share the child benefit equally. NEB. REV. STAT. §48-122. If there

is more than one child and all children live with the widow(er), the benefits up to the 75 percent average maximum are apportioned with 60 percent to the widow(er) and 15 percent divided among the children. NEB. REV. STAT. §48-122.03.

c. Child(ren) Only. When there is one child, the benefit is 66 2/3 percent of the average weekly wage. Each additional child is entitled to 15 percent of the average weekly wage. The children share the child benefit equally.

d. Benefits payable for children end when the child dies, marries, or turns 19 (unless enrolled as a full-time student in any accredited educational institution, which extends the age to 25). If the child is over 19 and still physically or mentally incapable of self-support, benefits continue until such status ends. If the child qualifies as an actual dependent, benefits continue so long as he or she remains actually dependent.

E. Apportionment

Previously, under certain limited circumstances, apportionment of an employee's disability between a prior injury and the current injury had been allowed. The loss of earning capacity attributable to a previous injury may have been apportionable if there was evidence that the injury: (1) was an injury to the body as a whole, (2) was independently producing some disability prior to the current accident, (3) continued to operate as a source of disability after the accident, and (4) the employee was "compensated" for the previous injury. *Martinez-Najarro v. IBP, Inc.*, 12 Neb. App. 504, 678 N.W.2d 114 (2004). Under *Martinez-Najarro*, apportionment occurred after the loss of earning power evaluation for the current injury had been determined, and the amount of loss of earning power for which the employee had already been compensated was then deducted from the subsequent loss of earning power.

However, the Nebraska Supreme Court has recently confirmed that Nebraska does not have an apportionment statute and, in the absence of such a statute, the full responsibility rule applies. *Picard v. P&C Group 1*, 306 Neb. 292 (2020). Under the full responsibility rule, the employer is generally held liable for the entire disability. The "Full Responsibility Rule" means that an employer takes the employee "as he finds him" and is liable for the total disability, notwithstanding the fact that the disability may not have been as bad without the pre-existing condition.

As a result, the Nebraska Supreme Court found that without an apportionment statute, apportionment did not apply. However, the Court went on to hold that the employee's subsequent loss of earning power *could not be accurately assessed* without considering her disability from the first injury. *Picard*.

Because NEB. REV. STAT. §48-121(2) measures benefits not by the loss of bodily function, but by the reduction in or loss of earning power or employability, it is irrelevant

that the two injuries were to "different body parts." As a result, because the employee's loss of earning capacity for the first injury was 75 percent and the second injury was a loss of earning capacity of 55 percent, the employee's earning power was not impaired by the 2015 accident and the injury was not compensable under NEB. REV. STAT. §48-121(2). *Picard*.

So what does this mean going forward? The compensation owed to an employee through successive injuries is based on the percent reduction of the earning capacity by each successive injury. There continues to be an argument that an employee cannot be compensated for more than a 100 percent loss of earning capacity if the injuries do not result in permanent total disability.

F. Maximum and Minimum Benefit Rates

The maximum and minimum benefit rates below apply to the payment of temporary and permanent disability benefits. NEB. REV. STAT. §48-121.01.

Date of Accident	Max/Min	Date of Accident	Max/Min
01/01/23 to 12/31/23	$1,029.00/$49.00	01/01/08 to 12/31/08	$644.00/$49.00
01/01/22 to 12/31/22	$983.00/$49.00	01/01/07 to 12/31/07	$617.00/$49.00
01/01/21 to 12/31/21	$914.00/$49.00	01/01/06 to 12/31/06	$600.00/$49.00
01/01/20 to 12/31/20	$882.00/$49.00	01/01/05 to 12/31/05	$579.00/$49.00
01/01/19 to 12/31/19	$855.00/$49.00	01/01/04 to 12/31/04	$562.00/$49.00
01/01/18 to 12/31/18	$831.00/$49.00	01/01/03 to 12/31/03	$542.00/$49.00
01/01/17 to 12/31/17	$817.00/$49.00	01/01/02 to 12/31/02	$528.00/$49.00
01/01/16 to 12/31/16	$785.00/ $49.00	01/01/01 to 12/31/01	$508.00/$49.00
01/01/15 to 12/31/15	$761.00/$49.00	01/01/00 to 12/31/00	$487.00/$49.00
01/01/14 to 12/31/14	$747.00/$49.00	01/01/99 to 12/31/99	$468.00/$49.00
01/01/13 to 12/31/13	$728.00/$49.00	01/01/98 to 12/31/98	$444.00/$49.00
01/01/12 to 12/31/12	$710.00/$49.00	01/01/97 to 12/31/97	$427.00/$49.00
01/01/11 to 12/31/11	$698.00/$49.00	01/01/96 to 12/31/96	$409.00/$49.00
01/01/10 to 12/31/10	$691.00/$49.00	01/01/95 to 12/31/95	$350.00/$49.00
01/01/09 to 12/31/09	$671.00/$49.00	06/01/94 to 12/31/94	$310.00/$49.00

Note that if the average weekly wage is below the minimum $49.00 benefit rate, use the actual earnings as the figure at which to pay indemnity benefits. For instance, if an employee's average weekly wage is $48.00, then indemnity benefits are paid at that rate (i.e., one does not take 2/3 of $48.00). However, if the employee's average weekly wage is $50.00, then benefits should be paid at a $49.00 rate (since 2/3 of $50.00 is less than the minimum rate).

X. MEDICAL CARE

A. Choice of Physician

1. Employee's Right to Choose

An injured employee has the right to choose his or her physician, but only if that physician is one who has previously treated the employee or an immediate family member and has records of such treatment. NEB. REV. STAT. §48-120(2)(a). "Family member" includes the employee's spouse, children, parents, stepchildren, and stepparents. If the employer does not provide the employee with a Form 50 (choice of physician form) or compensability is denied, the employee is free to treat with any, and as many, physicians as desired, without limitation to a family doctor. Denial of any portion of a claim (liability, indemnity, or medical expense) is likely sufficient to nullify the Choice of Physician Rules, leaving the employee free to choose his or her physician. *Clark v. Alegent Health Nebraska*, 285 Neb. 60, 825 N.W.2d 195 (2013).

2. Employer's Right to Choose

The employer has the right to select the physician if an employee executes a Form 50 and does not select a physician, or no physician meets the "previous treatment of employee or immediate family member" requirement.

3. Change in Physician

Once a Form 50 physician has been selected in accordance with Rule 50, a change in physician can only occur if the employee and employer agree to the change, or the change is ordered by the Compensation Court. *Rogers v. Jack's Supper Club,* 304 Neb. 605, 935 N.W.2d 754 (2019).

4. Referral

The employer is responsible for payment of medical bills due to a referral from one physician to another physician and any subsequent referrals within the referral chain from the original Form 50 physician. NEB. REV. STAT. §48-120 (Reissue 1998).

B. Unlimited Medical Expenses

The employer is liable for all reasonable medical, surgical, and hospital services which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment. NEB. REV. STAT. §48-120; *Simmons v. Precast Haulers, Inc.*, 288 Neb. 480, 849 N.W.2d 117 (2014).

1. Reasonable and Necessary

There is no limit on the amount of medical treatment to which an employee is entitled as long as the treatment is necessary and the charges do not exceed either the

Nebraska Medical Fee Schedule or the "regular charges" for services provided. Reaching maximum medical improvement does not terminate entitlement to reasonable and necessary medical treatment incurred as a result of a compensable injury. The Nebraska Supreme Court has confirmed that it is appropriate for the Court to order reimbursement to third parties in accordance with the fee schedule even though the third party may have paid more than the fee schedule allowance. *Pearson v. Archer-Daniels-Midland Milling Company*, 282 Neb. 400, 803 N.W.2d 489 (2011).

Services performed under a managed care plan certified by the Court may be excluded from the application of medical fee schedules, and disputes regarding medical, surgical, or hospital services provided may be submitted for informal dispute resolution.

2. Relieves Pain

An employee's entitlement to medical care does not depend on the employee being cured or his or her disability being reduced, as long as the medical care relieves pain.

C. Medicines

When treatment of an employee's injury requires the use of medicines and/or medical supplies, any person or entity that dispenses medicines and medical supplies is required to dispense the generic drug equivalent unless a generic drug equivalent is unavailable, or the prescribing physician specifically provides in writing that a non-generic drug must be dispensed. NEB. REV. STAT. §48-120.03.

D. Chiropractic Treatment

Medical treatment can include the services of a chiropractor so long as there is medical justification for the services provided. Compensability of chiropractor bills is generally cut off when treatments are for maintenance purposes rather than improvement of the injured condition. A chiropractor can express opinions about causation and permanency that are within the scope of the field of chiropractic. *Rodgers v. Sparks*, 228 Neb. 191, 421 N.W.2d 785 (1988).

E. Medical Services Included

Medical treatment includes plastic or reconstructive surgery and the furnishing of appliances, supplies, prosthetic devices and medicines as needed. In cases of severe injury and disability, such appliances and services can include specialized wheelchairs, handicap-accessible vehicles, and 24-hour in-home nursing care. *Simmons v. Precast Haulers, Inc.*, 288 Neb. 480, 849 N.W.2d 117 (2014). However, an employer is not obligated to provide surgery, appliances, and devices for purely cosmetic reasons. An employer is obligated to

pay for devices broken or damaged in the accident, such as eyeglasses or a hearing aid, only if the accident results in physical injury to the worker.

F. Home Healthcare

Under Nebraska law, a workers' compensation claimant may be able to recover the costs of home healthcare. The employee must show:

1. The employer is aware of the compensable disability and the employee's need for the home care;

2. The care provided by the spouse or healthcare worker is beyond normal household duties; and

3. There is a reasonable means of determining the value of the services.

Duties considered beyond normal household duties include serving meals in bed, bathing, laying out clothes and assisting in dressing, administering medication, and assisting with toilet regimens. The testimony from a home healthcare professional regarding his or her wages may be sufficient evidence to satisfy the element requiring a reasonable means to determine the value of the home healthcare services. *Koterzina v. Copple Chevrolet*, 1 Neb. App. 1000, 510 N.W.2d 467 (1993); *Simmons v. Precast Haulers, Inc.*, 288 Neb. 480, 849 N.W.2d 117 (2014).

G. Moving Expenses

A claimant may be able to recover expenses incurred as the result of a relocation or move if it is found that the move is necessary due to the work-related injury. For example, the Nebraska Court of Appeals awarded a plaintiff moving expenses incurred after he sustained a frostbite injury while at work, which increased his sensitivity to cold temperatures and required him to move to a warmer climate. *Hoffart v. Fleming Companies*, 10 Neb. App. 524, 634 N.W.2d 37 (2001).

Mileage Reimbursement Rates	
Effective Dates:	**Rate:**
Effective 01/01/2023:	**65.5 cents per mile**
07/01/22 to 12/31/22	62.5 cents per mile
01/01/22 to 06/30/22	58.5 cents per mile
01/01/21 to 12/31/21	56.0 cents per mile
01/01/20 to 12/31/20	57.5 cents per mile
01/01/19 to 12/31/19	58.0 cents per mile
01/01/18 to 12/31/18	54.5 cents per mile
01/01/17 to 12/31/17	53.5 cents per mile
01/01/16 to 12/31/16	54.0 cents per mile
01/01/15 to 12/31/15	57.5 cents per mile
01/01/14 to 12/31/14	56.0 cents per mile
01/01/13 to 12/31/13	56.5 cents per mile
01/01/12 to 12/31/12	55.5 cents per mile
01/01/11 to 12/31/11	51.0 cents per mile
01/01/10 to 12/31/10	50.0 cents per mile
01/01/09 to 12/31/09	55.0 cents per mile
07/01/08 to 12/31/08	58.5 cents per mile
01/01/08 to 06/30/08	50.5 cents per mile

H. Mileage Expense

The employer is liable for the injured employee's reasonable travel expenses incurred in receiving medical treatment, including attending local medical appointments. Travel expenses may be unreasonable if there is a lengthy distance traveled when like medical services are available in the employee's home community or a closer community. As of January 1, 2023, the current mileage rate is 65.5¢ per mile. NEB. REV. STAT. §48-120.

I. Future Medical Expenses Awarded

In cases that have been litigated and a final award entered, an employer/insurer is only obligated to pay for the plaintiff's future medical expenses if the award expressly states that the plaintiff is entitled to the same. If the award does not make a provision for the payment of future medical expenses, the employer/insurer is not obligated to pay these expenses. *Thorton v. Grand Island Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001).

An award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury. *Adams v. Cargill Meat Solutions*, 17 Neb. App. 708, 774 N.W.2d 761 (2009).

In cases where future medical expenses are awarded but a specific procedure or surgery is not discussed, the Compensation Court will allow the claimant to subsequently offer evidence that the surgery or medical treatment sought is related to the original injury for which future medical expenses were part of the award. *Pearson v. Archer-Daniels- Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011).

J. Independent Medical Examiner (IME)

When there is a dispute regarding a plaintiff's medical condition or related issues, either party may request an IME. The parties may either agree on an independent medical examiner or may request that the Court appoint an examiner. If the provider chosen to perform the IME is not on the Court-approved list of providers, the doctor chosen must agree to the Court's rules. The cost of the IME is paid by the employer regardless of which party requests the IME. See Rules 62-67 of Procedure, Workers' Compensation Court, at https://www.wcc.ne.gov/resources/court-forms-and-publications/form-62. See also the forms in Appendix B.

Both sides to the disagreement may ask questions of the doctor. If the Court is asked to assign the doctor, the person making the request includes questions on the request form. The other side may also ask questions but must send the questions to the Court, which will send them on to the independent medical examiner.

Where additional diagnostic tests, evaluations, or examinations are required, payment to the independent medical examiner shall be made in accordance with the Court's Schedule of Fees for Medical Services or Schedule of Fees for Hospitals and Ambulatory Surgical Centers, as applicable. See Rule 65(A)(3) of Procedure, Workers' Compensation Court.

The Workers' Compensation Court's refusal to grant a request for appointment of an independent medical examiner alone is not a final order and therefore is not subject to appeal. *Miller v. Regional West Medical Center and Continental Ins.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

K. Defense Medical Examiner (DME)

The employer/insurer has the right from time to time during the continuance of an employee's alleged work-related disability to have the employee examined by a physician of its choosing. The employee has the right to have a physician provided and paid for by the employee present at the examination. Unreasonable refusal to submit to an examination may deprive the employee of the right to compensation under the Workers' Compensation Act during the continuance of such refusal. The period of refusal is deducted from the period during which compensation would otherwise be payable. *See* NEB. REV. STAT. §48-134.

L. Schedule of Fees

Nebraska's fee schedule structure is divided into three general categories: (1) Medical Services (physicians, therapists, etc.), (2) Hospital and Ambulatory Surgical Centers and (3) Implantable Medical Devices. The Workers' Compensation Court revises this at least every two years. The Workers' Compensation Court website posts the current version of each fee schedule, which may be viewed on line or downloaded. See https://www.wcc.ne.gov/service-providers/medical-providers/fee-schedules.

Generally speaking, most fee invoices are simply paid per the applicable fee schedule. However, there is an anomaly in Nebraska's statutory scheme which enables an employer/insurer to challenge even the amount due per the fee schedule. While the Act gives the Workers' Compensation Court the authority to adopt fee schedules, it also includes a limitation that an employer's/insurer's liability for the cost of medical expenses shall not "exceed the regular charge made for such services in similar cases." If a case can be made that the provider usually charges a lesser amount for the same service in other cases, or that other providers in the same general geographic area charge less for the same or similar service, the employer/insurer may pay the lesser amount. Two related points are relevant here. First, the statute also precludes a provider of medical services from becoming a party to a suit. In other words, the provider may not initiate or join an action in the Workers' Compensation Court. Second, although the statute precludes "balance billing" an employee for the difference between the fee schedule amount and the billed charge, it does not preclude "balance billing" the employee the difference between the amount paid representing the "regular charge" and the fee scheduled amount. Thus, if medical payments are less than the amounts per the fee schedule, many providers will bring a collection action against the employee, who then typically initiates a suit in the Workers' Compensation Court against the employer/insurer. Then, the issue for resolution by the Court will be whether the evidence supports the payments made by the employer/insurer for an amount less than the fee schedule provides.

The schedules applicable to medical services (physicians, therapists, etc.) and implantable medical devices are reasonably straightforward. However, the schedule applicable to hospitals and ambulatory surgical centers can be complicated. All charges by hospitals and ambulatory surgical centers that pre-date January 1, 2008, are subject to an old fee schedule,

which provides that the employer/insurer shall be liable for the billed charge less a percentage, depending on the size and location of the hospital. The current schedule applies to inpatient hospital services by hospitals located in, or within 15 miles of, a Nebraska city of the metropolitan class or primary class and by other hospitals with 51 or more licensed beds. It also applies to inpatient hospital services provided prior to January 1, 2008, when the patient is discharged on or after January 1, 2008. It is based upon Medicare's Diagnostic Related Group system (DRG). The new schedule reimburses the provider at approximately 150 percent of the amount Medicare would reimburse a provider. The argument that a charge exceeds the "regular charge made for such service in similar cases" is not available for any service covered by a DRG. However, only about 90 percent of all services are covered by the DRGs adopted by the Court. Services not covered by a DRG are subject to the old "billed charge" less a discount system. Those charges are subject to the argument that they exceed the "regular charge made for such service in similar cases."

Finally, Nebraska has "prompt pay" provisions, which, if not followed, subject the employer/insurer to liability for the "billed charges," rather than the amount per the fee schedule or "regular charge made in similar cases." The employer/insurer has 15 days after receipt of a claim for reimbursement to notify the provider that the employer/insurer needs more information to process the claim (medical records, fee schedule information, billing information, etc.). If the employer does not notify the provider in 15 days that it needs more information, this gives rise to the assumption that the carrier has all the information it needs to process the bill. The employer then has 30 days after receipt of the additional information in which to pay for the services. If it fails to do so, the employer/carrier is liable to pay the "billed" charges instead of the fee schedule amount, the contracted amount if a private contract exists, or the "regular charge made for such service in similar cases." NEB. REV. STAT. §48-125.02.

Therefore, it is critical that employers promptly forward bills to the insurer, that insurers request additional information as soon as possible, and that the proper payments are made within 30 days thereafter.

M. Failure to Comply with Recommended Treatment

NEB. REV. STAT. §§48-120(2)(c) and 48-162.01(7) allow a judge to suspend, reduce or limit compensation or benefits an employee is otherwise eligible to receive if an injured employee unreasonably refuses to avail himself or herself of medical treatment furnished by the employer, or unreasonably refuses to cooperate with physical, medical, or vocational rehabilitation furnished by the employer.

While the language of these two provisions of the Act allows a judge to suspend, reduce, or limit benefits, the Supreme Court has held that these provisions do not allow a compensation court to terminate benefits altogether or dismiss a petition. *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011). According to the *Hofferber* decision, NEB. REV. STAT. §48-120(2)(c) applies only if an employer is able to prove that the employee's

unreasonable refusal of medical care worsened the condition and NEB. REV. STAT. §48-160.01(7) only applies if the employer can prove that refusal of medical care or rehabilitation benefits prevented the employee's condition from improving. If the employer can prove that the refusal to cooperate made the employee's condition worse, or prevented the employee from improving, benefits can be suspended, reduced, or limited to what the employee likely would have received had he or she complied with treatment.

XI. VOCATIONAL REHABILITATION

A. Entitlement to Vocational Rehabilitation

Vocational rehabilitation benefits are appropriate when an injured employee is unable to return to the work for which he or she has previous training or experience. *Hagelstein v. Swift-Eckrich Division of ConAgra*, 261 Neb. 305, 622 N.W.2d 663 (2001). The statutory entitlement to vocational rehabilitation is set forth in NEB. REV. STAT. §48-162.01(3). According to the statute, the injured worker must prove that "as a result of the injury the employee is unable to perform suitable work for which he or she has previous training or experience." NEB. REV. STAT. §48-162.01(3). In order to meet this burden, an injured worker must prove that he or she has a permanent injury and must present some evidence of permanent restrictions or disability. Case law has clarified that an employee will not be considered unable to return to work for the purposes of vocational rehabilitation if he or she is not permanently impaired or does not have permanent restrictions. *Green v. Drivers Management, Inc*., 263 Neb. 197, 639 N.W.2d 94 (2002).

1. Suitable Work/Employment

Suitable employment is not specifically defined within the Nebraska Workers' Compensation Act. However, case law has defined "suitable employment" to mean employment similar in remuneration to that earned prior to the injury and compatible with the employee's pre-injury occupation, age, education, and aptitude. *Haney v. Aaron Ferer & Sons, Co*., 3 Neb. App. 14, 521 N.W.2d 77 (1994).

The Nebraska Supreme Court has held that accepting a job paying minimum wage does not automatically restore a claimant to "suitable" or "gainful" employment pursuant to this section, where the claimant's previous employment was at a significantly higher wage. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

More recently the Court specifically defined "gainful employment" to be "employment similar in remuneration to that earned prior to the injury" and noted that "[i]mplicit in this is that the gainful employment sought to be restored must be 'suitable.'" *Anderson v. EMCOR Group*, 298 Neb. 174 (2017). The Court defined "suitable" employment as "employment which is compatible with the employee's pre-injury occupation, age, education, and aptitude." *Id*.

The Nebraska Supreme Court was asked to address the issues of vocational rehabilitation and suitable employment in the context of an employee who was injured while working a part-time job. The question was whether the vocational rehabilitation plan should be based upon "suitable employment" in the context of "part-time wages" or "full-time wages." The Nebraska Supreme Court ultimately determined that the question of suitable employment should be determined on the basis of full-time wages even though the employee was only working part time at the time of injury. *Becerra v. United Parcel Service*, 284 Neb. 414 (2012).

As a practical matter, the two most important factors that the Workers' Compensation Court considers are: (1) the percentage of pre-injury wages that the employee is likely to earn in jobs for which the employee still has training, experience, and the physical ability to perform, and (2) the difficulty and expense associated with "rehabilitating" the employee so that he or she can earn wages closer to that which he or she was earning at the time of the accident.

2. Evidence Required to Show Inability to Perform Suitable Employment

If an employee has evidence that his or her injuries are caused by a work accident or occupational disease, the employee's testimony as to incapacity is all that is necessary to prove an entitlement to vocational rehabilitation. Expert opinion is necessary only to prove that the employee's injuries were caused by the work accident and that the injuries are permanent. The Workers' Compensation Court may rely solely on an employee's testimony of incapacity and award vocational rehabilitation benefits. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

3. Undocumented Alien Workers and Vocational Rehabilitation

Undocumented alien workers who may not be lawfully employed in the United States are not entitled to vocational rehabilitation services. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005); *Moyera v. Quality Pork International*, 284 Neb. 963, 825 N.W.2d 409 (2013). This rule generally applies whether or not the injured worker intends to stay in the United States or return to his or her country of origin.

The Nebraska Supreme Court recently addressed the country of origin issue in the context of loss of earning power, stating that it is appropriate to use the country of origin as the labor market hub if an injured worker relocates there after his or her injury and reliable data is available for the area. However, the Court did not address whether the same analysis would apply to vocational rehabilitation if an injured worker relocates after his or her injury and reliable data exists in the area of relocation. For now, the law seems to suggest that an undocumented alien worker is

not entitled to vocational rehabilitation regardless of whether the injured worker remains in the United States or relocates to another country. *Visoso v. Cargill Meat Solutions,* 287 Neb. 439, 843 N.W.2d 597 (2014).

B. Appointment/Selection/Payment of Vocational Counselors

Only one counselor certified by the Workers' Compensation Court may provide vocational rehabilitation services at a time.

1. Agreement and/or Appointment of a Vocational Rehabilitation Counselor

When an employee claims entitlement to vocational rehabilitation services, NEB. REV. STAT. §48-162.01 provides that the employer and employee are to attempt to agree upon a vocational counselor to act as the counselor of record. If no agreement can be reached, the Compensation Court is to be notified of the disagreement in writing, along with a request for the appointment of a counselor from a directory maintained by the Court. See the forms in Appendix C.

The current approach applied by the Court is to appoint a counselor if the employee presents prima facie evidence that: (1) he or she suffered a work-related injury, that (2) has resulted or is likely to result in permanent impairment, and (3) caused or is likely to cause permanent functional restrictions.

Either party may request a change in the vocational rehabilitation counselor. A request for a change must be approved by the Compensation Court. NEB. REV. STAT. §48-162.01.

2. Fee for Vocational Rehabilitation Evaluation and Vocational Plan

The fee for the vocational rehabilitation evaluation and plan is to be paid by the employer or its workers' compensation insurance carrier. Although NEB. REV. STAT. §48-162.01(3) provides that the "compensation court may establish a fee schedule for services rendered by a vocational rehabilitation counselor," no such schedule has yet been adopted by the Court.

The vocational rehabilitation counselor's fee for the evaluation and the development and implementation of the vocational rehabilitation plan shall be paid for by the employer/insurer within 30 days of receipt of a statement of charges. Rule 44(E) of Procedure, Workers' Compensation Court.

3. Fee for Vocational Rehabilitation Counselor for Loss of Earning Power Evaluation

The fee of the vocational rehabilitation counselor for the loss of earning power evaluation shall be paid for by the employer/insurer within 30 days of receipt of a statement of charges. Rule 45 (c) of Procedure, Workers' Compensation Court.

C. Development of a Vocational Rehabilitation Plan

The services needed to return the injured employee to suitable work are evaluated through the use of five priorities. A higher priority may only be chosen if the counselor has ruled out a lower priority. The priorities, from lowest to highest, include:

1. Return to the previous job with the same employer;

2. Modification of the previous job with the same employer;

3. A new job with the same employer;

4. A job with a new employer; or

5. A period of formal retraining which is designed to lead to employment in another career field.

In most cases, the first three priorities can be addressed early on through direct communication with the employer. A vocational counselor must eliminate the first three priorities before recommending job placement (priority 4) or a formal period of retraining (priority 5). With regard to formal retraining, the statute does not provide a specific limitation or restriction on the type of retraining that is allowed. As a result, two- and four-year programs are becoming increasingly common for relatively high wage earners who are not able to return to their previous employer and are not likely to find suitable employment through direct job placement.

D. English Language Learning (ELL)

Nebraska has a significant population of non-English speaking employees. When those employees are injured at work, their inability to speak or write English can give rise to some unique problems in vocational rehabilitation. Many such employees possess little more than their physical skills in order to perform work in the general labor market. When such employees suffer physical injuries, they have few remaining skills which can be used to find suitable employment. The Vocational Rehabilitation Division of the Court will no longer approve a "stand alone" English as a Second Language (ESL) plan. Plans that incorporate classes to learn English are now referred to as English Language Learning (ELL) and are

allowed as a "supportive service" when combined with another plan which identifies a job goal, such as job placement.

E. Rebuttable Presumption of Correctness

A loss of earning power determination or vocational rehabilitation plan created by the agreed-upon or Court-appointed vocational counselor carries with it a rebuttable presumption of correctness. *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999). Either party may retain its own specialist to provide rebuttal evidence. Furthermore, the Trial Court may rely on non-expert evidence to find that a vocational rehabilitation report has been rebutted. *Romeo v. IBP, Inc.*, 9 Neb. App. 927, 623 N.W.2d 332 (2001). If a rebuttal opinion is obtained and accepted by the Trial Court, the Trial Court is required to set forth the reasons why any such presumption is rebutted.

The rebuttable presumption of correctness does not apply where the vocational counselor of record determines that the claimant is not entitled to vocational rehabilitation and therefore declines to draft a vocational rehabilitation plan. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

F. Payment of Benefits During Vocational Rehabilitation

The insurer/employer generally has an obligation to pay temporary total disability benefits or, in certain limited situations, temporary partial disability benefits during the vocational rehabilitation program. The insurer/employer is generally not required to pay temporary disability benefits during the development of a vocational rehabilitation plan. However, when applicable, the Nebraska State Trust Fund pays tuition, book expenses, mileage, and lodging expenses incurred as a result of vocational rehabilitation. NEB. REV. STAT. §48-162.01.

G. Reduction in Benefits for Plaintiff's Failure to Participate in Vocational Rehabilitation

The Trial Court may reduce payment of plaintiff's indemnity benefits under NEB. REV. STAT. §48-162.01(7) due to plaintiff's failure to participate in previously-ordered vocational rehabilitation. Defendant has the burden to prove the employee refused to participate in the vocational program AND that the refusal was unreasonable. *Lowe v. Drivers Management, Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

In situations where a claimant's participation is at issue, the best practice is to communicate in writing with the vocational counselor, ask for specific information from the counselor regarding the lack of participation, and, if appropriate, have that information transmitted to the vocational rehabilitation section of the Court so that the Court may make a determination whether the plan should be cancelled or otherwise discontinued. All communication with the

vocational counselor should be conducted in writing with copies to the claimant or the claimant's attorney, if represented.

XII. MANAGED CARE PLAN

Employers and insurance companies may contract for medical, surgical, hospital, and rehabilitation services to be provided through a managed care plan. The managed care plan must be certified by the Compensation Court. NEB. REV. STAT. §48-120(9); Rule 53 of Procedure, Workers' Compensation Court. Compensability must be accepted in order to limit an employee to treatment within the managed care plan.

A. Employee's Right to Choose Physician Despite Managed Care Plan

Even when an employer participates in a managed care plan, an employee maintains the right to treat with his or her family physician and not enter the managed care plan, if the family physician agrees to make referrals into the plan.

An employee is allowed to choose which physician will act as the employee's primary treating physician within the managed care plan. If the employee is dissatisfied with the treating physician, one change is allowed.

B. Geographical Considerations

If the employee lives or is employed within a city of at least 5,000 people, both the evaluation and primary treating physicians must be located within 30 miles of the employee's home or job site. If the employee does not live or work within a city of at least 5,000 people, the employee may be required to travel up to 60 miles.

XIII. PENALTIES/ATTORNEY'S FEES/INTEREST/COSTS

As discussed below, in some situations and circumstances, the Workers' Compensation Court will assess substantial penalties, attorney's fees, interest, and costs against an employer/insurance carrier for late payment of medical expenses and indemnity benefits. Other situations may also give rise to the assessment of attorney's fees, interest, and costs.

A. Penalties

1. Indemnity Benefits

An employee is entitled to 50 percent waiting time penalties on all indemnity benefits not paid after 30 days' notice if no reasonable factual or legal controversy exists. NEB. REV. STAT. §48-125(1). A reasonable controversy may exist: (1) if there is a question of law previously undecided by the appellate courts, which makes the obligation to pay unclear, or (2) if there is a question of fact supported by evidence which would allow denial of all or a portion of the employee's claim.

Manchester v. Drivers Mgmt., 278 Neb. 776, 775 N.W.2d 179 (2009). Whether a reasonable controversy exists is generally a question of fact for the Trial Court. *McBee v. Goodyear Tire & Rubber Co., Inc.*, 255 Neb. 903, 587 N.W.2d 687 (1999). However, when the employer has an opinion at the time of trial that indicates the employment did not cause the injuries, a reasonable controversy exists as a matter of law. *Dawes v. Wittrock Sandblasting, Inc.*, 266 Neb 526, 667 N.W.2d 167 (2003).

An employee is also entitled to a 50 percent waiting time penalty in situations in which he or she does not receive payment of indemnity benefits within 30 days of the date on which the final award was entered, assuming the award is not appealed. The mere fact that the settlement negotiations between the employer and the employee are ongoing, or that the employee will not respond to the employer's questions concerning the method of payment, does not create a reasonable controversy. *Grammar v. Endicott Clay*, 252 Neb. 315, 562 N.W.2d 332 (1997). The 30-day period runs from the date of notice of the disability or entry of the award.

In *Brown v. Harbor Financial Mortg. Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004), a plaintiff sought waiting time penalties after he was awarded benefits by the Workers' Compensation Court on August 28, 2002, and did not receive his indemnity benefits check from the insurer until September 30, 2002. In finding that the plaintiff was not entitled to waiting time penalties, the Court noted that the envelope containing the check was properly addressed and was post-marked September 26, 2002, a date within 30 days after the award's entry.

2. Medical Bills

Delinquent payment of medical expenses does not generate waiting time penalties. *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). However, the injured worker may recover an attorney's fee if there was no reasonable controversy as to the payment of the bill. NEB. REV. STAT. §48-125. In calculating attorney's fees, particular attention should be paid to the amount of legal work performed in relation to the amount of the unpaid medical bill, and the amount of the unpaid medical bill in relation to the workers' compensation award received. *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999).

B. Attorney's Fees

NEB. REV. STAT. §48-125(1) allows for attorney's fees and expenses in four situations.

1. Nonpayment of Benefits

Nonpayment of benefits for 30 days after injury or nonpayment of medical bills for 30 days after notice of disability, followed by an award ordering payment of benefits or medical bills, may result in the assessment of an attorney's fee. This 30-day

period runs from the date the award is entered, if no appeal is filed. *Roth v. Sarpy Co. Highway Dept*., 253 Neb. 703, 572 N.W.2d 786 (1998); *Gaston v. Appleton Electric*, 253 Neb. 897, 573 N.W.2d 131 (1998).

Nonpayment of permanent disability benefits within 30 days after receiving a rating, if there is no reasonable factual or legal controversy concerning the employee's entitlement to benefits, may also result in the award of an attorney's fee. The fact that the employee and the employer or its insurer are engaged in settlement negotiations does not affect this obligation. *Grammar v. Endicott Clay*, 252 Neb. 315, 562 N.W.2d 332 (1997).

2. Employer Appeal, No Reduction

If an employer appeals to the Court of Appeals or the Supreme Court and does not obtain a reduction in the award, the employee may be entitled to attorney's fees.

The Nebraska Supreme Court recently held that in order to recover statutory "reasonable" attorney's fees under NEB. REV. STAT. §48-125(4)(b), the details of the attorney-client agreement are not a necessary component of the affidavit submitted for justification of attorney's fees. *Sellers v. Reefer Systems, Inc.*, 205 Neb. 868, 943 N.W.2d 275 (2020).

3. Employee Appeal, Obtains Award

If an employee appeals to the Court of Appeals or the Supreme Court and obtains an award after the trial judge denied an award, he or she may be awarded attorney's fees.

4. Employee Appeal, Obtains Increase

If an employee appeals to the Court of Appeals or the Supreme Court and obtains an increase in the award, he or she may be entitled to attorney's fees.

C. Lump Sum Settlement

The statutory waiting time penalties and attorney's fees apply to payment of a lump sum settlement not paid within 30 days of approval of the lump sum settlement by the Court. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

D. Settlement by Release

The statutory waiting time penalties and attorney's fees apply to payment of a settlement pursuant to a release, if not paid within 30 days of filing the release with the Compensation Court. NEB. REV. STAT §48-139(4).

E. Interest

When the employee is awarded an attorney's fee under NEB. REV. STAT. §48-125, the employee is entitled to interest on the final award. NEB. REV. STAT. §48-125(3). Interest should be calculated based on benefit amounts as they became due, not on the entire amount awarded. *Russell v. Kerry, Inc*., 278 Neb. 981, 775 N.W.2d 420 (2009).

F. Court Costs

When the employee is allowed an attorney's fee under NEB. REV. STAT. §48-125, the employee shall further be entitled to costs of depositions, if admitted into evidence, and the fees and mileage for necessary witnesses attending the hearing at the request of the employee. NEB. REV. STAT. §48-172.

XIV. MODIFICATION OF A PRIOR AWARD

A. In General

After a final award has been entered by the Nebraska Workers' Compensation Court, the employee and employer may agree to modify the award based upon an increase or decrease in the employee's incapacity so long as the Court approves that agreement. NEB. REV. STAT. §48-141. If the employee and employer are unable to agree, either party may seek a modification of the award if and when the employee suffers an increase or decrease in his or her incapacity. NEB. REV. STAT. §48-141.

In order to succeed in obtaining a modification of the award, the applicant must demonstrate a change in the employee's physical disability and that the increase or decrease in incapacity is due solely to the injury resulting from the original accident. *McKay v. Hershey Food Corp*., 16 Neb. App. 79, 740 N.W.2d 378 (2007); *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006); *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). To establish a change in incapacity under NEB. REV. STAT. §48-141, an applicant must show a change in impairment (a medical assessment) *and* a change in disability (which relates to employability). *Yost v. Davita, Inc.,* 23 Neb. App. 482 (2015).

In addition, the applicant must prove there exists a "material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made." *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006). A petition for modification may only be filed beginning six months from the date of the award. NEB. REV. STAT. §48-141.

If either party is successful in obtaining a modification of the previous award, the modification is to be applied retroactively to the date of the filing of the pleading requesting the modification. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001).

The Nebraska Supreme Court has also ruled that NEB. REV. STAT. §48-162.01(7) allows the Compensation Court to modify a prior award of medical or physical rehabilitation services to the extent that the Court finds such modification necessary to return an injured employee to gainful and suitable employment, or as otherwise required in the interests of justice. Modification under § 48-162.01(7) is distinct from modification under NEB. REV. STAT. §48-141 because the former only applies to medical or physical rehabilitation services previously granted in an initial award. See *Spratt v. Crete Carrier Corp.*, 311 Neb. 262, 971 N.W.2d 335 (2022).

B. When a Running Award for Temporary Total Disability Benefits Must be Modified

As a general rule, an employer may not unilaterally terminate a workers' compensation award of indefinite temporary total disability benefits absent a modification of the award of benefits. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998); *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). If an employer unilaterally ceases temporary indemnity benefits when the employee returns to work, the employer may be liable for payment of temporary indemnity benefits until the date a petition for modification is filed, will not receive credit for wages paid, and will likely be assessed a 50 percent waiting time penalty on those benefits. *Daugherty v. County of Douglas*, 18 Neb. App. 228, 778 N.W.2d 515 (2010).

In *Holmes v. Chief Industries, Inc*., the Court of Appeals found that the defendant had erroneously terminated plaintiff's temporary total disability benefits when it failed to first seek modification of the award. *Holmes v. Chief Industries, Inc*., 16 Neb. App. 589, 747 N.W.2d 24 (2008). A hearing subsequent to the award, for the purpose of establishing an attorney's lien in which the claimant's prior attorney confirmed the claimant was receiving permanent disability benefits, did not involve a stipulation to modify the previous award or otherwise constitute a proper modification of that award.

In *Davis v. Crete Carrier Corp*., the Supreme Court of Nebraska determined that no application to modify the award was needed to terminate plaintiff's temporary total disability benefits where the *specific language of the award* contemplated that the parties would only need to file an application to modify the award should they disagree about the extent of permanent disability that would be due to plaintiff upon completion of a vocational rehabilitation plan. *Davis v. Crete Carrier Corp*., 274 Neb. 362, 740 N.W.2d 598 (2007). Additionally, in *Davis*, the Supreme Court concluded the parties had *stipulated* to modify the award and the Workers' Compensation Court had approved that stipulation.

Similarly, in *Weber v. Gas 'N Shop, Inc.*, 280 Neb. 296, 786 N.W.2d 671 (2010), the Supreme Court of Nebraska concluded that a modification proceeding was not necessary because the specific language of the award provided that when the claimant's temporary disability ceased, he was entitled to permanent partial disability benefits. The specific language of the Trial Court provided: "[Weber] have and recover of [Gas 'N Shop] and

[EMC] the sum of $255.00 per week for temporary total disability from September 1, 1992, through September 1, 1993, and thereafter and in addition thereto a like sum per week for so long in the future as [Weber] remains temporarily totally disabled as a result of said accident and injury. When [Weber] reaches maximum medical improvement, she shall be entitled to the statutory amounts for any residual disability." The Supreme Court concluded that such language in the award did not need to be modified because ceasing temporary benefits and paying permanency benefits were consistent with the specific language of the award.

XV. SUBROGATION

A. Statutory Right

The employer (or its insurer) has a statutory right to be subrogated to any recovery by the employee against a third-party tortfeasor for his or her work-related injuries. For accidents occurring after July 16, 1994, the employer is entitled only to a "fair and equitable distribution" of any judgment or settlement from the tortfeasor. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006); *Jackson v. Branick Industries*, 254 Neb. 950, 581 N.W.2d 53 (1998).

There is no set rule as to what constitutes a "fair and equitable distribution." However, the Nebraska Supreme Court has specifically rejected a claim that a claimant must be "made whole" before consideration may be given to the workers' compensation subrogation interest. In so doing, the Court stated as follows: "[§48-118] includes language providing for a fair and equitable distribution. It does not, however, adopt the made whole doctrine. Nor does it adopt any other specific rule for determining how to fairly and equitably distribute the settlement. Instead the language is plain: The court shall order a fair and equitable distribution. Because we apply statutory subrogation, we decline to further read into §48-118 a requirement that the employee be made whole." The Court went on to distinguish the case from *Dailey v. Blue Cross Blue Shield*, 268 Neb. 733, 687 N.W.2d 689 (2004), on the basis that *Dailey* involved a contractual right of subrogation, while *Turco* involved a statutory right of subrogation. The Court also refused to set forth a rigid or defined method for determining the subrogation interest under NEB. REV. STAT. §48-118, noting that the statute simply requires the Court to determine a fair and equitable distribution under the facts of each case.

In *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007), the Trial Court overseeing the third-party settlement determined the employer had no subrogation interest under the doctrines of unclean hands and equitable estoppel because the employer had denied the workers' compensation claim before ultimately settling. The Nebraska Supreme Court held that NEB. REV. STAT. §48-118 does allow the employer to defend against a workers' compensation claim and to still claim a subrogation interest in third-party claims. Employers' subrogation rights under the Act are statutory and not governed by equitable principles.

B. Effects of Subrogation

1. The employer/insurer must be made a party to any lawsuit by the plaintiff against a third-party tortfeasor.

2. The employer/insurer must agree to any settlement between the employee and the third-party tortfeasor.

3. The employee must provide the employer/insurer with notice at least 30 days before filing suit. If the employee fails to provide the required notice, he or she cannot recover expenses or attorney's fees from the subrogated amount.

C. Attorney's Fees

The employee's attorney may be able to recover attorney's fees against the employer/insurer based upon the amount recovered to offset the employer's/insurer's subrogation interest.

Although there is no sure-fire way to prevent claimant's attorney's fee on subrogated recovery, the employer may minimize this amount by hiring its own counsel.

Active participation of the employer's counsel in the lawsuit may be required in order to eliminate or minimize the attorney's fee payable to the employee's attorney.

It is appropriate to deduct attorney's fees before a "fair and equitable" determination is made. *Sterner v. American Family Ins. Co.*, 19 Neb. App. 339, 805 N.W.2d 696 (2011).

XVI. SECOND INJURY FUND

There is no Second Injury Fund liability for accidents occurring after December 1, 1997. For accidents that occurred prior to December 1, 1997, the Second Injury Fund may be an issue if the injured worker had a prior work injury.

The Nebraska Second Injury Fund was in place to encourage employers to hire injured or disabled workers. If the insurer or employer can successfully prosecute a claim against the Fund, the Fund is responsible for payment of the indemnity benefits which exceed those to which the employee would be entitled if the employee had not suffered from the pre-existing disability or injury. *See Thorell v. Ashland-Greenwood Public Schools*, 15 Neb. App. 114, 723 N.W.2d 506 (2006).

XVII. GENERAL FILE HANDLING RECOMMENDATIONS

There is no substitute for specific legal advice throughout the twists and turns of individual workers' compensation claims. Still, to assist our clients in establishing best practices for claims handling, we have identified some of the practical issues we as attorneys frequently discuss with our clients. The following general file handling recommendations may assist you as you attempt to

assess compensability of claims, provide reasonable medical care to claimants who sustain work-related injuries, effectively administer claims, and control costs.

A. Best Practices for Claims Handling Begin *Immediately* After the Accident

Employers who establish a culture of safety and vigorously work to **prevent** accidents serve themselves well. While the goal of every employer is accident prevention, if a workplace accident occurs, the employer must recognize that an effective early response to that accident can establish the framework for a well-managed and well-controlled claim.

Most important is the need to provide appropriate and prompt medical evaluation or treatment to the injured worker. Employers who have carefully established and enforced protocols for responding to workplace incidents may reduce the severity of consequences of injuries, instill confidence in the employee that the claim is being appropriately handled, and limit the long-term exposure on the claim.

From the employer's perspective, capturing and documenting information as soon as possible after the occurrence of the accident is imperative. Information about the manner in which the claim occurred may be needed for medical providers, to reinforce safe practices in the workplace, or to assess whether the employer needs to assert defenses to the claim (such as willful negligence by the employee).

Employers should make informed decisions about compensability of claims. Promptly gathering information and documenting the circumstances of the alleged accident assist the employer in making decisions about the claim and preserving information about the occurrence of the accident for reference as the claim progresses.

One current aspect of claims handling that mandates early and well-informed decisions about compensability of claims is the potential need to coordinate benefits with Medicare. At the outset of a claim, it may be difficult for the employer to predict whether the claimant will become eligible for Medicare, or have a reasonable expectation of Medicare eligibility, over the course of the claim. Given the strong position of the Centers for Medicare & Medicaid Services that **payment** upon a claim demonstrates **responsibility** for it, employers must make decisions very early on in a claim as to whether payment will be issued and, if so, to what extent. The act of payment, and the potential adverse impact of issuing payment for disputed medical conditions, has taken on a whole new meaning with the strengthened enforcement of the Medicare Secondary Payer Act in recent years.

B. Employer Should Take the Employee's Statement After the Accident

Taking the claimant's statement soon after an alleged accident and injury is a critical component of the workers' compensation claim. A statement from the claimant preserves contemporaneous information. It can be used by the employer to understand how the injury occurred, obtain initial information to help determine if the employee's claim is

compensable, identify whether workplace procedures need to be revised to increase safety, provide appropriate medical treatment to the injured worker, or develop defenses to be used if the claim becomes litigated.

Effectively gathering information from the employee immediately following the alleged accident can dramatically affect the outcome of a claim. Monitoring a claim carefully from the outset can benefit claims handling over the course of the claim and help the employer/insurer maintain control over the claim.

The specific types of information to be gathered from the claimant will vary depending on the type of injury claimed. Generally, when taking a claimant's statement the focus of questions should be on the following:

1. When the accident occurred, where it occurred, and what happened;

2. The names of witnesses to the accident;

3. To whom and when the accident was reported;

4. Whether the claimant sustained previous injuries or suffered from pre-existing medical conditions;

5. The claimant's previous employment;

6. Whether unemployment compensation was applied for or received after the accident;

7. Whether medical bills were submitted to a group health insurer;

8. Names of treating medical providers, including:

a. Family physicians;

b. Physicians treating alleged injuries;

c. Hospitals/emergency rooms;

9. Whether the employee has returned to work and, if so, whether he or she is working with any accommodations;

10. Whether the claimant was taking any medication at the time of the accident;

11. Whether the claimant is eligible for Medicare or Social Security Disability benefits.

When taking an employee's statement, try to avoid leading and/or closed-ended questions. Let the employee tell his or her story about the alleged accident, medical history, and current treatment.

C. Employers Should Keep Contemporaneous Records

Since written documentation paired with witness recollection is generally more believable than witness recollection alone, employers should maintain contemporaneous records, including:

1. Statements made by the employee;

2. Names of witnesses and contact information and/or signed written statements;

3. Photographs of the accident scene and/or written accident reports;

4. Documentation as to when the accident was reported and to whom;

5. Wage information prior to the accident and notations as to lost time after the accident;

6. Workers' compensation benefits paid information;

7. A job description for the job performed at the time of the alleged accident;

8. Background information if there are questions as to the accuracy of the claimant's description of the alleged accident or questions as to the claimant's credibility;

9. Information as to other possible causes of the claimant's condition.

Records of minors should be kept until two years after the minor reaches the age of majority (age 19 in Nebraska).

At the time the accident is reported, the employer should have the employee fill out a Choice of Physician form (Form 50). The Form 50 will confirm whom the primary treating physician will be with respect to the accident.

D. Employers Should Take Steps to Avoid a Claim of Retaliatory Discharge or Demotion by the Injured Worker

Nebraska law recognizes an employee's separate cause of action against his or her employer for discharge in retaliation for asserting rights under the Workers' Compensation Act.

Jackson v. Morris Communications Corp., 265 Neb. 423, 657 N.W.2d 634 (2003). The Supreme Court has extended this finding to include a cause of action for demotion in retaliation for asserting rights under the Workers' Compensation Act. *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007).

Perhaps the most significant factor used to prove retaliation is the timing of the adverse employment action in relation to when the employer received notice of the employee's claim for workers' compensation benefits. Any adverse employment action taken against an employee who is pursuing a workers' compensation claim should be well documented and based upon job performance irrespective of the alleged workplace accident.

E. Consider Direct Communication with Claimant's Medical Providers

When developing and evaluating medical evidence, one should keep in mind the option of attempting to speak with the claimant's medical providers regarding the claimant's physical condition. When an injured worker is seeking compensation for a work-related injury and the employer seeks relevant information from the injured worker's treating physician, the physician-patient privilege does not apply. NEB. REV. STAT. §48-120(4). Thus, an employer is not precluded from seeking such information through ex parte communications with the claimant's treating physician.

In the case of *Scott v. Drivers Management, Inc.*, 14 Neb. App. 630, 714 N.W.2d 23 (2006), the Supreme Court clarified that it is not improper for an employer to communicate ex parte with a claimant's medical providers. In *Scott*, the Supreme Court was asked to find that portions of a doctor's testimony that were obtained ex parte should be excluded from evidence. Contrary to the assertion of the claimant, the Court held that in workers' compensation cases the physician-patient privilege does not preclude ex parte communications between the employer or its representative and the claimant's treating physician as to information relevant to the workers' compensation claim.
Thus, in appropriate cases, recognize that it may assist you to communicate with the treating physician as to the manner in which the accident allegedly occurred, the claimant's job duties (either before or after the alleged accident), alternative work duties available, maximum medical improvement, or the reasonableness and necessity of medical treatment. Such communications may help the physician understand the mechanism of injury or the work duties of the claimant, and will help you understand the medical aspects of the claim.

F. Effectively Handle the Claim Today While Planning for the Future

Best claims practices include finding an appropriate balance between handling the claim well today and planning for the future of the claim (whether that means paying benefits over the long term in a catastrophic case or promptly resolving the claim on a full and final basis in one less severe). Establish timeframes early on for the milestones anticipated in the claim: release to return to work, maximum medical improvement, loss of earning power assessment or impairment rating, and claim closure. Gather information ahead of those milestones to

posture the claim for the next steps ahead. Make intentional and well-informed decisions throughout the course of the claim. Keep in mind the suggestions for disposing of a claim that follow next in this guide.

G. Best Practices for Avoiding Penalties and Attorney's Fees

A 50 percent penalty is assessed for all delinquent indemnity payments after 30 days' notice has been given of disability. NEB. REV. STAT. §48-125. Without a genuine dispute from a medical or legal standpoint that *any* liability exists, benefits should be paid. *Hale v. Vickers, Inc.*, 10 Neb. App. 627 (Neb. App. 2001).

The date of payment is the date the payment is **sent** to the employee or his or her attorney. Payment is considered "made" when it is sent by the employer/insurer. *Brown v. Harbor*, 267 Neb. 218 (2004). It must be sent to the claimant or his or her attorney to be considered "sent." *Harris v. Iowa Tanklines, Inc.*, 20 Neb. App. 513, 825 N.W.2d 457 (2013). If the 30-day deadline falls on a Saturday, Sunday, or a day when the Nebraska Workers' Compensation Court is usually closed, NEB. REV. STAT. §48-191 allows for additional days to be added. *Herrington v. P.R. Ventures*, 279 Neb. 754 (2010). Send payments directly to the claimant or to his or her attorney, if represented, to avoid unnecessary delays.

To claim a penalty, the employee must prove what the employer knew and when it knew. *McBee v. Goodyear*, 255 Neb. 903 (1999)

Medical benefits can result in an award of attorney's fees for late payment, and often the fee is proportionate to the work done to secure payment of the bills, but not necessarily. Please note that employers/insurers are entitled to have the records of treatment before paying a medical bill. An employer/insurer has 15 days to request additional information that will allow it to determine if a bill is compensable. The 30-day window to pay the medical bill begins after the employer/insurer receives the information. If the provider does not give the employer/insurer the necessary information, the provider may forfeit the right to receive payment under NEB. REV. STAT. §48-120 (4).

Following a trial decision, an employer/insurer has 30 days from the date of the award to send the awarded benefits to the claimant or the claimant's counsel to avoid penalties, attorney's fees and interest unless the award is appealed. After an appeal, the 30-day timeframe for payment begins when the appellate court's mandate is filed with the Compensation Court. Please remember that if an employer appeals and fails to obtain a reduction in the award, the claimant is entitled to attorney's fees for the cost of appeal.

The 50 percent penalty applies only to the amount of indemnity that is more than 30 days past due. As the amount due increases, absent a basis to deny, the penalty will also increase for each late week. In this situation it is important to establish a reasonable basis or to pay the accrued weeks to avoid an ongoing penalty.

Make sure to catch up the waiting period week, if applicable. The waiting period must be caught up upon receipt of a scheduled member impairment rating or loss of earning capacity report, if the temporary disability and permanent disability combine for more than six weeks of disability.

When in doubt about whether nonpayment will create exposure for penalties, attorney's fees and interest, contact your attorney to discuss the best way to proceed.

XVIII. STRATEGIES FOR MINIMIZING EXPOSURE

A. Temporary Disability Strategies

Always attempt to obtain a release to work with or without restrictions and offer the employee a light duty position when possible.

Where delayed Maximum Medical Improvement (MMI) is likely, consider having a vocational counselor assess the claimant's temporary loss of earning capacity based on his or her temporary restrictions to reduce the ongoing exposure from total to partial.

If the claimant applied for unemployment, obtain the unemployment file. Employees are required to hold themselves out as able to work in order to receive benefits and apply for a certain number of jobs per week. While a formal offset indemnity is not allowed, it does give rise to the argument that the claimant is not totally disabled.
Consider surveillance and show to the treating doctor if footage contradicts the claimant's restrictions in an effort to get the restricting physician to lessen or remove the restrictions.

Obtain an MMI finding from a doctor. Once MMI is reached, a claimant is no longer entitled to temporary disability. If there are multiple injuries, be sure the claimant is at MMI for all conditions or it may not be proper to terminate temporary disability.

B. Permanent Disability Strategies

If a scheduled member impairment rating seems much higher than expected and the difference between what was anticipated and what the physician assigned is high enough to justify the cost, consider a second opinion on the rating or ask the physician to justify the high rating.

In cases in which multiple members are injured in the same accident, try to avoid assignment of an impairment rating or permanent restrictions to more than one member, and consider a second opinion if the other circumstances in the case indicate that a high loss of earning capacity may result. For example, ask a doctor if an injury to one of the members is only a temporary aggravation and has returned to its baseline.

If the treating doctor arbitrarily assigns restrictions which seem cumbersome, consider asking the doctor whether a Functional Capacity Evaluation (FCE) would be appropriate, assuming the FCE is likely to yield better results.

Pay careful attention to the work history and education provided by claimant to the vocational counselor assessing the loss of earning capacity, and obtain information about subsequent employment the employee performed with new employers, if available.

Consider whether apportionment is applicable. See p. 60 for requirements.

When there is a body as a whole injury and a scheduled member injury with impairment, it is permissible to credit the scheduled member impairment paid against the amount due for loss of earning capacity if the loss of earning capacity cannot be accurately assessed without also considering the member injury. *See Madlock v. Square D Company*, 269 Neb. 675 (2005).

Be sure to credit weeks paid for TTD, TPD and vocational rehabilitation against the 300 weeks allowed for the loss of earning capacity. Please note that this credit is for the number of weeks paid for these benefits and not the amounts paid.

C. Medical Strategies

Ensure the treating physician has accurate information before seeking an opinion from another doctor. A doctor's opinion is only as strong as the foundation upon which it is based. Doctors are often willing to change their opinions if provided with additional medical records which they did not have at the time a diagnosis was made or treatment recommendations were made. For example, if a claimant denies any prior treatment for his low back, but the employer/insurer has records showing treatment a week before the accident, this information should be provided to the treating doctor.

When treatment is continuing and appears excessive for the nature of the injury, consider a second opinion. Even if a second opinion is not terribly persuasive, it could provide a basis to stop paying for excessive treatment, which may encourage a claimant to move forward in the claim. Timing for a second medical opinion and the content of the issues presented to the doctor are critical, so be sure to speak to your attorney for specific direction on both.

If there is a reasonable chance that a specific recommended treatment will increase an employee's functional abilities, reduce or eliminate permanent restrictions, or could avoid the need for ongoing prescription medications or other treatment, consider paying for the treatment in the hope of reducing overall exposure for the claim.

There are benefits and risks to using the Court-appointed IME process pursuant to NEB. REV. STAT. §48-134.01:

1. May be used **only if** there are **two** differing medical opinions on issues in a case;

2. The IME may carry more weight with the Court as the physician was not selected by either party to the case. The parties may either agree to the IME doctor or the Court will appoint one at the request of one party;

3. The physicians who agree to take appointments tend to be conservative and are subject to a fee schedule for the records review, exam, and report drafting, which can reduce the cost;

4. The risk in proceeding with a Court-appointed IME is that the opinion of the IME doctor may be adverse to an employer's position and may make litigating the issue more difficult. Also, since all communications with the IME doctor are in writing and filtered through the Court, no ex parte communications with the IME doctor are permitted.

XIX. CLAIMS RESOLUTION

A. Continue to Pay Benefits

In some cases, the best option for the employer is to continue to pay benefits as they come due. As the claim progresses, the employer can monitor the appropriateness of payment of benefits and assess the extent to which payment will be made. Claims in this category may include claims in which the nature of the injury or the treatment being provided warrant ongoing payment of benefits, or claims in which a full and final settlement isn't desired because the claimant continues to work for the employer.

B. Lump Sum Settlement (Complete Settlement - Including Medical Settlement)

1. Available with Court Approval

When an application for lump sum settlement is submitted to the Nebraska Workers' Compensation Court, the Court will review the settlement terms in advance of payment and enter a finding regarding whether: (1) the settlement terms are in conformity with the Workers' Compensation Act, and (2) the terms of the settlement are in the best interest of the employee.

With a Court order approving the terms of the settlement, the settlement may only be set aside later if procured by fraud.

In Nebraska, to enter into a binding contract, a person must be 18 years of age and not a ward of the State. NEB. REV. STAT. §43-2101. To be binding, therefore,

settlement with an employee under the age of 18 requires the appointment of a conservator who has been given the authority to settle the minor's claim.

2. Court Generally Will Approve Settlement if These Factors are Established

If the settlement application is in conformity with the Nebraska Workers' Compensation Act and the Court determines the settlement is in the claimant's best interest, it generally will approve the settlement so long as:

a. The claimant has reached maximum medical improvement;

b. The claimant is currently working or receiving Social Security benefits;

c. The claimant's permanent loss of earning power for injuries to the body as a whole or permanent impairment for scheduled member(s) has been assessed.

3. Exception

The Court may approve the settlement application even if one of the above is missing, if a reasonable argument can be made calling into question the underlying compensability of the claim or the circumstances of the alleged work accident. The Court will require documentation, such as medical or employment records, supporting those arguments challenging compensability of the claim.

C. Settlement by Release of Liability

An alternative to settling a claim by application for lump sum settlement is settling a case by a release of liability pursuant to NEB. REV. STAT. §48-139. Settlement by a release does **not** require Court approval of the terms of the settlement, but it may only be used in limited circumstances. To settle a claim by a release, you must meet the following conditions:

1. The employee is represented by counsel;

2. The employee, at the time the settlement is executed, is not a Medicare beneficiary, is not eligible for Medicare, and has no reasonable expectation of becoming Medicare eligible within 30 months after the date the settlement is executed.

In 2021 the Nebraska Legislature did pass an additional avenue for settlement by release of liability. A release can be used for settlement with an employee who is a Medicare beneficiary, is eligible for Medicare or has a reasonable expectation of

becoming Medicare eligible within 30 months in order to resolve all issues other than future medical. Essentially, a release can be used with a Medicare beneficiary when future medical is left open. Future medical can then be left open or resolved via a Medicare Set Aside and a lump sum settlement;

3. No medical, surgical, or hospital expenses incurred for treatment of the injury have been paid by Medicaid for which it will not be reimbursed as part of the settlement;

4. All medical, surgical, or hospital expenses incurred for treatment of the injury have been or will be fully paid as part of the settlement; and

5. The settlement does not seek to commute amounts of compensation due to dependents of the employee.

If the foregoing conditions are met, you may settle a workers' compensation claim by a release of liability. A release is final and conclusive as to all claims identified in the release unless procured by fraud.

Releases must be submitted to the Court and payment pursuant to the terms of the release is due within 30 days of filing the release. NEB. REV. STAT. §48-139(4). Following confirmation from the employer and employee that the payment has been issued and received, upon request the Court will enter an order dismissing the claim/petition.

D. Medicare and Medicaid

In order to effectively posture a claim for settlement, and to gather the information needed to confirm whether settlement can be accomplished via release, it is important to monitor claims as to whether **Medicare** or **Medicaid** may have an interest in the settlement and whether payments made by a health insurer (as to a denied workers' compensation claim) may be subject to **ERISA** (the Employment Retirement Income Security Act of 1974). Failure to adequately address these interests at the time of settlement may trigger exposure for additional payment by the employer or may undercut the finality of what the employee and employer anticipated would be a full and final settlement.

1. The Importance of Considering Medicare's Interests

In every claim for workers' compensation benefits, the employer/insurer must remain acutely aware of whether the injured worker is or may soon become a Medicare beneficiary. There are three components to considering Medicare's interest in workers' compensation cases: (1) **reporting** to Medicare acceptance of "ongoing responsibility for medical" or other payments issued to a Medicare beneficiary, (2) determining whether in the **past** Medicare has issued "conditional payments" that should have been paid by the employer or insurer as a part of the workers'

compensation claim, and (3) evaluating whether in the **future** the employee will necessitate Medicare-covered medical expenses for which a Medicare Set Aside arrangement needs to be established.

In order to make sure that Medicare's interests are adequately considered, you may need to verify whether Medicare asserts it is entitled to reimbursement for past payments issued on behalf of the injured worker, and you may need to establish a Medicare Set Aside (MSA) allocation from which the claimant's future accident-related Medicare-covered medical expenses will be paid. **Consistency** in handling these various components of protecting Medicare's interests is **imperative**: the information provided to Medicare when payments to the Medicare beneficiary are **reported** (such as compensable diagnosis codes) needs to be consistent with that used for purposes of the Medicare **conditional payment recovery** asserted, and in establishing a **Medicare Set Aside** allocation.

If the parties properly consider Medicare's interests when settling a workers' compensation case, Medicare will begin paying medical bills at an appropriate time. If Medicare's interests are not adequately considered, the claimant may jeopardize Medicare coverage and the employer or workers' compensation insurer may face additional exposure for payment of medical bills or other amounts.

a. Reporting claims

(1) The Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) was signed by President Bush on December 29, 2007. This Act went into effect in 2009 and requires health, liability, workers' compensation insurers, and self-insureds to determine whether a claimant is entitled to benefits under the Medicare program on any basis. *See* 42 U.S.C. 1395y(b)(7) and (8). If so, the Act requires submission of information to the Secretary of the U.S. Department of Health and Human Services. Mandatory Insurer Reporting is required "after the claim is resolved through a settlement, judgment, award, or other payment (regardless of whether or not there is a determination or admission of liability)."

(2) The MMSEA places upon employers and insurers an enhanced obligation to inquire in **all** claims as to whether the claimant is or soon will become a Medicare beneficiary, to recognize the claimant's Medicare status may change throughout the course of the claim, and to document efforts to verify beneficiary status. Failure to properly report claims to Medicare may result in a penalty of up to $1,000.00 per day, per claim.

b. Past conditional payments

If the claimant is currently a Medicare beneficiary, information should be obtained from the Medicare Benefits Coordination & Recovery Center (BCRC)/Medicare Secondary Payer Recovery Contractor (MSPRC) as to whether Medicare asserts a right of recovery for any past conditional payments if claims were accident related. Information about that process is available at www.cms.gov. Timely objections need to be made by the beneficiary or employer if there are services included in the Medicare claim for recovery that were not related to the accident.

c. Medicare set aside accounts for future medical expenses

In appropriate cases, an amount equal to the reasonably-anticipated, Medicare-covered, accident-related medical expenses must be "set aside" from the settlement funds in order to protect Medicare's potential interest in the settlement. In many cases, the Centers for Medicare & Medicaid Services (CMS) will approve the amount of money to be set aside from the settlement proceeds to pay for future Medicare-covered medical expenses incurred as a result of the work-related injury.

The Centers for Medicare & Medicaid Services have instituted "workload review thresholds" as to Medicare Set Aside proposals, so in some cases the parties have an obligation to consider Medicare's interests, but Medicare will not provide written confirmation as to whether the parties have met their obligation to do so. Whether a case meets Medicare's "workload review thresholds" for review of Medicare Set Aside proposals, the claimant and employer or insurer need to remain mindful of whether Medicare has a potential interest in settlement that needs to be protected. A "set aside" may be provided for in the settlement documents to be established on a voluntary basis if the settlement doesn't meet the workload review thresholds established by CMS.

Coordination of benefits with Medicare in workers' compensation cases remains an evolving area of law, and one in which claimants, employers, and insurers can face serious adverse consequences if they are not diligent. Continued developments in this area should be closely monitored by those interested in resolving workers' compensation claims of Medicare beneficiaries on a full and final basis.

2. The Importance of Considering Medicaid's Interests

Medicaid is a medical assistance program which provides low income individuals with healthcare services. It is a payor of last resort, which means, subject to a few

exceptions, medical providers must bill all third-party resources (TPR's) prior to billing Medicaid. A TPR includes any entity which may be legally liable for medical services.

If a TPR refuses payment, and it submits a "valid casualty denial," the provider must submit this to Medicaid at which point Medicaid will consider payment for the medical service. A "valid casualty denial" may include a statement that the services are not related to the work accident or that coverage is not in effect. A statement that payment cannot be made due to pending litigation is not a "valid casualty denial" sufficient to permit providers to bill Medicaid.

An application for Medicaid benefits operates as an automatic assignment by the applicant of his or her rights to the Nebraska Department of Health & Human Services (the Department). In the event Medicaid pays for services for which a TPR may be liable, it will issue a Subrogation and Assignment Request.

There are two forms of Medicaid payments of which TPR's must be aware. There are Medicaid payments administered by the Department and there are Medicaid payments administered by one of three managed care providers who contract with the Department. A subrogation notice from one does not include the subrogation interest of the other. To fully protect yourself, if you are aware Medicaid has paid for services which may be related to a work accident, you must investigate the potential existence of both.
Typically, the subrogation notice from the Department will advise you of its subrogation interest and further advise you whether there is a managed care provider involved. To ensure you have all of the information you need, you may contact the Department and inquire by calling 402-471-3153.

All applications for lump sum settlement must include an itemized list of all medical, hospital, and miscellaneous expenses incurred; clearly state whether these expenses have been paid; and identify the payor of said expenses. The Court will carefully scrutinize applications which identify Medicaid as a payor but further indicate Medicaid will not be reimbursed as part of the terms of the settlement. Absent an agreement by Medicaid to accept less or waive its interest, parties must submit a clear statement of the issues and identify the evidence which would be used to defeat compensability of the claim if the matter were to proceed to trial. The Court will likely deny the application for lump sum settlement until Medicaid is reimbursed as part of the terms of the settlement, unless the documentation supporting denial of the claim (or parts of it) strongly establishes the employee would be unlikely to recover upon the workers' compensation claim.

3. The Importance of Considering a Self-Funded Health Plan's Interests

Similar to Medicare and Medicaid, both the injured worker and the employer/workers' compensation insurer must remain cognizant of the interests of self-funded welfare benefit plans ("**ERISA plans**") when engaging in settlement negotiations. ERISA is a federal Act, which regulates benefits provided by private employers to their employees. It is important to recognize when an ERISA plan may have a stake in the outcome of a workers' compensation claim, because self-funded ERISA plans typically reserve a right of reimbursement/subrogation to proceeds related to medical expenses, which the ERISA plan previously paid.

Healthcare plans are generally "payors of first resort," which means when a workers' compensation insurer denies medical benefits, the health plan will normally step in and pay medical costs. As such, the health plan has a subrogation/reimbursement interest for any amounts paid which are determined to be the liability of a different party, i.e., a workers' compensation insurer. In the case of an ERISA plan, the extent to which it can assert its interest is not governed by state statute, federal statute, or by the terms of a settlement. Rather, federal common law dictates that the plan's rights are **governed by the terms stated within its own plan documents**. As such, many ERISA plans reserve the right to participate in settlement negotiations and recover up to the full amount of medical benefits paid regardless of the hazards of litigation and/or the allocations of settlement proceeds cited within a settlement agreement. Thus, the finality, allocation of funds, and circumstances attendant to the settlement agreement may be called into question by the ERISA plan or the plan participant/claimant (if the ERISA plan executes its right of reimbursement and the claimant is left with nothing).

Accordingly, it is first important to identify when ERISA plans have an interest in the workers' compensation matter. Sometimes this is plainly apparent through the ERISA plan's notice and demand, but other times it requires close scrutiny of the medical bills to ascertain who rendered payment in a denied claim. After a healthcare plan's interest has been recognized, the next step is to identify whether or not the plan is a self-funded ERISA plan. If it is, the **relevant plan documents should be acquired** to assess the ERISA plan's equitable subrogation and reimbursement powers. If such powers appear to allow the ERISA plan to participate in settlement negotiations and assert a subrogation claim against all forms of recovery (including settlement), then it is best practice to contact the plaintiff, the employer and the ERISA plan's authorized representative to discuss an amicable solution. Only then can the workers' compensation insurer be certain that any settlement reached will truly be final.

APPENDIX A–
ADJUSTERS' GUIDE TO FILINGS

Rule 2. Filings

Rule 2 of the Workers' Compensation Court Rules of Procedure provides for protection of personal information in Court records. The intent is to prevent Social Security numbers, birth dates, and financial account numbers from being included in Court records generally available to the public. The provisions apply to all pleadings, documents, exhibits, Court orders, judgments, and awards filed in the Workers' Compensation Court.

Please note that a completed Addendum 3 must be submitted for any petitions or initial pleadings, including settlement applications and motions. Addendum 3 must contain the Social Security number of the claimant. If applicable, the form may include other personal and financial information such as birth dates and financial account information. The Court will keep Addendum 3 separate from the case file, but accessible to judges and Court staff.

Additionally, please note that any petitions, motions, settlements, exhibits, and other documents submitted by a party or counsel should not contain Social Security numbers, birth dates, or financial account numbers. The responsibility for redacting personal and financial account information rests solely with counsel and the parties.

Rule 29. First Report of Alleged Occupational Injury or Illness

It is the responsibility of the employer, or its insurer or risk management pool, to file a first report of injury in every case of a reportable injury "arising out of" and "in the course of" employment, whether from an accident or diagnosed occupational disease. The first report of injury should be filed within 10 days after the employer, insurer or risk management pool has been given notice or has knowledge of the injury. All first reports of injury should be filed electronically with the Compensation Court. With approval of the Court administrator, the first report may be filed by means of the paper form entitled "First Report of Alleged Occupational Injury or Illness."

Rule 30. Subsequent Report

It is the responsibility of the employer, or its insurer or risk management pool, to file the subsequent report. On all subsequent report forms, cumulative weekly, medical, hospital, vocational rehabilitation and other benefit payments shall be included. All subsequent report forms shall be filed electronically.

Rule 32. Reporting of Compensation Insurance

The insurer will file a report (Form 12 "Record of Compensation Insurance") with the Court within 10 days after a workers' compensation insurance policy is written, renewed, extended, or reinstated as required by NEB. REV. STAT. §48-144.02. The insured will give notice to the Court of cancellation or nonrenewal of a workers' compensation insurance policy as required by NEB. REV. STAT. §48-144.03.

Form 12P “Nebraska Record of Compensation Insurance—Intergovernmental Risk Management Pool” shall be filed by the risk management pool with the Court within 10 days after the pool is organized. Within 10 days after any new member is accepted or whenever any member of a pool voluntarily terminates membership or is involuntarily terminated, Form 12P shall be filed with the Court.

IN THE NEBRASKA WORKERS' COMPENSATION COURT

THIS DOCUMENT IS CONFIDENTIAL AND SHALL NOT BE MADE PART OF THE COURT FILE OR PROVIDED TO THE PUBLIC PURSUANT TO WORKERS' COMP. CT. R. OF PROC. 2.

_____,
[your first name, middle initial, and last name]
Plaintiff,

vs.

_____

_____,
[name of employer or name of employer and insurance company]
Defendant(s).

Docket: _____ Page: _____

PERSONAL AND FINANCIAL ACCOUNT INFORMATION

Employee Social Security Number: _____

Employee Date of Birth (if applicable to this case): _____

Minor Children (if applicable to this case)

Name:	**Social Security Number:**	**Date of Birth:**
_____	_____	_____
_____	_____	_____
_____	_____	_____

Protected financial account information (if applicable to this case)

Entity/Person:	**Type of Account:**	**Account Number:**
_____	_____	_____

(add additional pages as necessary)

Addendum 3

EMPLOYEE'S CHOICE OR CHANGE OF DOCTOR FORM

NOTICE TO EMPLOYER:

GIVE THIS FORM TO THE INJURED WORKER AS SOON AS POSSIBLE AFTER EACH INJURY

PART A: NOTICE REGARDING CHOICE OR CHANGE OF DOCTOR

Under the Nebraska workers' compensation laws, you may have the right to choose a doctor to treat you for your work-related injury. You may choose a doctor who has treated you or an immediate family member before this injury happened. Immediate family members are your spouse, children, parents, stepchildren and stepparents. The doctor you choose must have records to show that past treatment was provided. Your employer may ask the person who was treated to give permission so the doctor can verify past treatment.

If you want to choose your doctor, you must tell your employer the name of the doctor you choose. Do this as soon as possible after your employer gives you this notice and before getting any treatment unless it is emergency medical treatment. Once you tell your employer the name of the doctor, you may not change your choice unless your employer agrees or the Nebraska Workers' Compensation Court orders a change.

If you do not choose your doctor, your employer has the right to choose the doctor to treat you. The employer may also choose the doctor to treat you if you or your family member does not give permission so your employer can verify past treatment by the doctor you chose.

You may choose a doctor if your claim is denied. You may also choose the doctor to do major surgery or for an amputation.

You may use Part B (below) to tell your employer the name of the doctor you choose.

☐ My employer has informed me of the above information regarding choice or change of doctor.

[PRINT NAME OF EMPLOYEE]

[SIGNATURE OF EMPLOYEE] [DATE]

PART B: CHOICE OF DOCTOR

☐ I choose the following doctor to treat me for this work-related injury. I certify that this doctor has treated me or an immediate family member before the work-related injury.

☐ I do not have or I do not wish to choose a doctor who has treated me or an immediate family member.

[DOCTOR'S NAME] [SIGNATURE OF EMPLOYEE]

[DOCTOR'S ADDRESS] [DATE]

PART C: USE TO CHANGE THE CHOICE MADE IN PART B, ABOVE

I wish to change my choice of doctor or I wish to choose a doctor to treat me for my work-related injury. I certify the doctor named below has treated me or an immediate family member before this work-related injury. I understand that I cannot make this change unless my employer agrees or unless the Nebraska Workers' Compensation Court orders a change.

[DOCTOR'S NAME] [SIGNATURE OF EMPLOYEE & DATE OF SIGNATURE]

[DOCTOR'S ADDRESS] [SIGNATURE OF EMPLOYER & DATE OF SIGNATURE]

NWCC Form 50 — Revised 03/2013

Nebraska Workers' Compensation Court

First Report of Alleged Occupational Injury or Illness

NWCC Form 1
Revised 12/2011

Employer

Employer FEIN _____ SIC Code _____ Report Purpose _____ OSHA Log Case # _____

Employer Name(s) _____

Address _____

City _____

State _____ Zip Code _____ Phone _____

Insured Name *(If different from employer name)*

Insured Address *(If different)* | Location _____

Insurance Carrier

Carrier FEIN _____ | Administrator FEIN _____

Name _____

Address _____

City _____

State _____ Zip Code _____ Phone _____

Policy Number _____

Policy Period: From _____ To _____

Insurance Carrier/Self-Insured Code # _____

Claim Administrator *(Name, address & phone number)*

Self Insured ☐ *Check if Appropriate*

Claim Administrator Claim # _____

Jurisdiction Claim # _____

Insured Report # _____ | Jurisdiction _____

Employee

Name *(Last, First, Middle)* _____

Address _____

City _____

State _____ Zip Code _____ Phone _____

Date of Birth | Social Security Number | Date Hired

Full Pay for DOI Yes ☐ No ☐
Salary Continued Yes ☐ No ☐

Number of Days Worked Per Week _____

Sex Male ☐ Female ☐

Number of Dependents _____

Occupational Job Title

Marital Status
Married ☐
Separated ☐
Unmarried ☐
Unknown ☐

Wage $ _____
Hourly ☐
Daily ☐
Weekly ☐
Bi-Weekly ☐
Monthly ☐

Occupational Code _____

NCCI Class Code _____

Date Employee Began Work-Related Duties _____

Employment Status FT ☐ PT ☐ Other ☐

Occurrence/Treatment

Date of Injury/Illness | Time Employee Began Work AM ☐ PM ☐ | Time of Occurrence AM ☐ PM ☐ (Cannot be determined ☐) | Last Work Date

Where Did Injury/Illness Occur?
County _____ State _____ Zip _____

Did Injury/Illness Occur On Employer's Premises? Yes ☐ No ☐

Date Employer Notified | Date Disability Began | Date Returned to Work | If Fatal, Give Date of Death

Type of Injury/Illness *(Briefly describe the nature of the injury or illness; e.g. lacerations to forearm)* | Nature of Injury Code

Part of Body Affected *(Indicate the part of the body affected by the injury/illness; e.g. right forearm, lowerback; and how it was affected)* | Part of Body Code

How Injury/Illness Occurred *(Describe activity and tools, materials, equipment the employee was using; how injury occurred)* | Cause of Injury Code

Initial Treatment:
No medical treatment ☐ | *First aid by employer* ☐ | *Minor clinic/hospital* ☐
Emergency Room ☐ | *Hospitalized overnight* ☐ | *Hospitalized > 24 hours* ☐
Future major medical/lost time ☐

Name of physician or other health care provider:

Date Administrator Notified | Form Preparer's Name, Title and Phone | Date Prepared

General Instructions

Underlined items are mandatory fields. A first report of injury or illness submitted without this information will be returned unfiled.

Employer:

- Employer FEIN — the employer/insured's Federal Employer's Identification Number.
- SIC Code — Standard Identification Classification code which represents the nature of the employer's business.
- Report Purpose — defines the specific purpose of the transaction (examples: original = 00; cancel = 01; change = 02; denial = 04; correction = CO).
- OSHA Log Case # — the Log Case number required for reporting to OSHA.
- Employer Name — include all business names/doing business as *(dba)*.
- Address (including city,state, and zip code) — the address of the employer's actual location where the employee was employed at the time of the injury.
- Phone — phone number at the employer's facility.
- Insured Name *(if different from employer)* — the named insured on the policy or the financially responsible self–insured employer.
- Insured Address *(if different from employer)* — mailing address of the insured.
- Location — a code defined by the insured/employer which is used to identify the employer's location.

Insurance Carrier:

- Carrier FEIN — carrier's Federal Employer's Identification Number.
- Administrator FEIN — administrator's Federal Employer's Identification Number.
- Name — the workers' compensation insurer, approved self insured, or intergovernmental risk management pool.
- Address — address, city, state and zip code of insurer.
- Phone — phone number of insurer.
- Claim Administrator (name, address, & phone) — enter the name, address and phone number of the carrier, third party administrator, risk management pool, or self-insurer responsible for administering the claims, if different from carrier information.
- Policy # — the number assigned to the contract/policy for that employer.
- Policy Period — the effective and expiration dates of the contract/policy.
- Insurance Carrier/Self Insured Code # — for insurance carriers, the number assigned by the Nat'l Assn. of Insurance Commissioners. For self-insured employers, the code number assigned by the court.
- Self Insured — check if appropriate.
- Claim Administrator Claim # — identifies a specific claim within a claim administrator's claims processing system.
- Jurisdiction Claim # — number assigned by the court when the initial First Report is accepted.
- Insured Report # — a number used by the insured to identify a specific claim.
- Jurisdiction — the governing body or territory whose statutes apply (NE).

Employee:

- Name — give full name as shown on payroll (avoid initials if possible).
- Address — address, city, state and zip code of employee.
- Social Security Number. The social security number must be provided. This is mandatory pursuant to Neb.Rev.Stat. §48-144, Rule 29 of the Workers' Compensation Court Rules of Procedure, and Section 7(a)(2)(B) of the Privacy Act of 1974. The social security number is used by the Nebraska Workers' Compensation Court for purposes of verifying the identity of the employee and administering the Nebraska Workers' Compensation Act. It is a unique identifier and is needed because of the number of persons who have similar names and birth dates, and whose identities can only be distinguished by social security number. The social security number may also be shared with claims handling entities for purposes of processing a claim for workers' compensation benefits and verifying the identity of the claimant.
- Date of Birth — the date the injured worker was born.
- Date Hired — the date the injured worker began his/her employment with the employer.
- Full Pay for DOI (date of injury) — check one.
- Salary Continued — check one.
- Number of Days Worked Per Week — the number of the employee's regularly scheduled work days per week.
- Sex — check one.
- Number of Dependents — the number of dependents as defined by the Nebraska Workers' Compensation Act.
- Marital Status — check one.
- Wage — check one and state wage.
- Occupational Job Title — the primary occupation of the claimant at the time of the accident.
- Occupational Code — Standard Occupational Classification code used to identify the primary occupation of the employee at the time of the accident.
- NCCI Code — The identifying number for an occupational classification.
- Date Employee Began Work-Related Duties — date pertaining to employee's present occupation.
- Employment Status — check one.

Occurrence/Treatment:

- Date of Injury/Illness — date on which the accident occurred *(only one date of injury per form)*.
- Time Employee Began Work — time employee began work for that date.
- Time of Occurrence — time of day the injury occurred.
- Last Work Date — the last paid work day prior to the initial date of disability.
- Where Did Injury/Illness Occur — complete county, state, and zip code.
- Did Injury/Illness Occur On Employer's Premises — check one.
- Date Employer Notified — the date that the injury was reported to a representative of the employer.
- Date Disability Began — if not disabled answer none and skip questions.
- Date Returned to Work — if injured has returned to work, complete this question.
- If Fatal, Give Date of Death, (date employee died as a result of the work-related injury.)
- Type of Injury/Illness — describe the nature of injury.
- Nature of Injury Code — the code which corresponds to the nature of the injury sustained by the employee.
- Part of Body Affected — the part of the body to which the employee sustained injury.
- Part of Body Code — the code which corresponds to the Part of the body to which the employee sustained injury.
- How Injury/Illness Occurred — a free-form description of how the accident occurred and the resulting injuries.
- Cause of Injury Code — the code that corresponds to the cause of injury.
- Initial Treatment — check one.
- Name of physician or other health care provider — provide name of physician or other health care provider that treated employee for injury.
- Date Administrator Notified — the date the claim administrator who is processing the claim received notice of the loss or occurrence.
- Form Preparer's Name, Title and Phone.

Nebraska Workers' Compensation Court—SUBSEQUENT REPORT

NWCC FORM 4
REVISED 06/2008

EMPLOYEE NAME (Last, First, Middle)	SOCIAL SECURITY NUMBER	DATE OF INJURY	REPORT EFFECTIVE DATE	JURISDICTION

DATE DISABILITY BEGAN	PRE-EXISTING DISABILITY? ☐ YES ☐ NO	DATE OF REPRESENTATION	DATE OF DEATH	REPORT PURPOSE

RELEASED/ RETURNED TO WORK (RTW) DATE	RELEASED/ RTW QUALIFIER	RTW WITHOUT RESTRICTIONS ☐	RELEASED RTW WITHOUT RESTRICTIONS ☐	AGENCY CLAIM NUMBER
		RTW WITH RESTRICTIONS ☐	RELEASED RTW WITH RESTRICTIONS ☐	

NUMBER OF DEPENDENTS	DEATH DEPENDENT/ PAYEE RELATIONSHIP	WIDOW ☐	WIDOWER ☐	CHILDREN ☐	SIBLINGS ☐	PARENTS ☐	OTHER ☐	DATE OF MAXIMUM MEDICAL IMPROVEMENT

PERMANENT IMPAIRMENT	BODY PART	PERCENT	BODY PART	PERCENT	BODY PART	PERCENT

EMPLOYER NAME	FEIN	INSURED REPORT NUMBER

WAGE

WAGE PERIOD	AVERAGE WEEKLY WAGE	NUMBER OF DAYS WORKED PER WEEK	SALARY CONTINUED IN LIEU OF COMP?
☐ WEEKLY ☐ BI-WEEKLY ☐ MONTHLY ☐ SEMI-MONTHLY			☐ YES ☐ NO

PAYMENTS

PAYMENT TYPE	PAID FROM (MM/DD/YYYY)	PAID THROUGH (MM/DD/YYYY)	# WEEKS PAID	# DAYS PAID	WEEKLY PAYMENT AMOUNT	AMOUNT PAID TO DATE

BENEFIT ADJUSTMENTS

BENEFIT ADJUSTMENT TYPE	WEEKLY AMOUNT (+ OR -)	START DATE

BENEFIT ADJUSTMENTS

BENEFIT ADJUSTMENT TYPE	WEEKLY AMOUNT (+ OR -)	START DATE

PAID-TO-DATE

PAID TO DATE TYPE	PAID TO DATE AMOUNT

PAID-TO-DATE

PAID TO DATE TYPE	PAID TO DATE AMOUNT

CLAIM ADMINISTRATION

INSURER NAME	FEIN	CLAIM STATUS	OPEN ☐	REOPENED ☐	
			CLOSED ☐	REOPENED/CLOSED ☐	
THIRD PARTY ADMINISTRATOR NAME	FEIN	CLAIM TYPE	MEDICAL ONLY ☐	NOTIFICATION ONLY ☐	BECAME LOST TIME ☐
			INDEMNITY ☐	BECAME MED ONLY ☐	TRANSFER ☐
CLAIM ADMINISTRATOR CLAIM NUMBER		AGREEMENT TO COMPENSATE		WITHOUT LIABILITY ☐	
				WITH LIABILITY ☐	
CLAIM ADMINISTRATOR ADDRESS PHONE # _____ _____ CITY _____ STATE _____ ZIP CODE _____		LATE REASON DATE PREPARED			
FORM PREPARER'S NAME		PREPARER'S PHONE			

NEBRASKA
RECORD OF COMPENSATION INSURANCE

To be Used to Report Compensation Insurance Issuance, Cancellation, Renewal, Nonrenewal, or Reinstatement.

MAIL TO: NEBRASKA WORKERS' COMPENSATION COURT, P.O. BOX 98908, LINCOLN, NE 68509-8908 (402) 471-6468

1. Name and Address of Insurance Carrier Assigned Risk? ☐ Yes ☐ No		10. Insured's Name & Address
2. Policy Number	3. NE Dept. of Ins. Company Number (5 digit)	11. Any Prior Business Names
4. Deductible Amount	5. If No Deductible ☐ Not Chosen ☐ Not Offered	
6. Effective Date	7. Expiration Date	12. List **All Nebraska** location addresses with the current business name (If additional space is needed, use back of form or attach separate sheet.)
8. Transaction (Complete One) ☐ New Policy ☐ Cancellation Cancellation Date _____ For Effective Date See NE Rev. Stat. 48-144.03 or Rule 32. Must be sent by certified mail. ☐ Renewal or Extension ☐ Nonrenewal (Effective 30 days after certified mailing) ☐ Reinstatement Reinstatement Date _____		
9. Reason for Cancellation or Nonrenewal		13. Insured's Federal Identification Number (FIN)
Prepared By (Please Type)		Preparer's Telephone # / Date

NWCC FORM 12 (REV. 6/95)

Nebraska Record of Compensation Insurance — Form 12P

Intergovernmental Risk Management Pool

To be used to provide information on each pool member involved in the event of organization, joinder, or termination, within 10 days of the event. Only one member of a pool may be reported on a Form 12P.

1. Name and Address of Member of Risk Management Pool:

   _____

   _____

   _____

   Phone:_____ Dept. of Insurance Code:_____

2. Name of Member:_____

3. Event Reported (check one and give the effective date):

   ☐ Initial Organization of Pool Effective Date: _____

   ☐ New Member Effective Date: _____

   ☐ Termination of Member Effective Date: _____

4. For workers' compensation purposes, list any separately named entities under the jurisdiction of this member from which employees work and the location. (If additional space is needed, attach a separate sheet.)

   Name Address FEIN

   _____

   _____

   _____

   _____

5. Name of Pool Administrator:_____

   Address:_____

   _____

6. Prepared by (please type):_____

   Phone:_____

7. Mail to: **Nebraska Workers' Compensation Court**
   PO Box 98908
   Lincoln NE 68509-8908
   402-471-6468 or 800-599-5155

NWCC Form 12P (Rev. 11/06)

APPENDIX B–
INDEPENDENT MEDICAL EXAMINER FORMS

NWCC Form 63-1 (Rev. 4/08)

REQUEST FOR INDEPENDENT MEDICAL EXAMINER

Requester Name, Address, and Telephone:

Representing:

Employer Name, Address, and Telephone:

Insurer Name, Address, and Telephone:

Nebraska Workers' Compensation Court
State Capitol Building
P.O. Box 98908 800-599-5155
Lincoln, NE 68509-8908 402-471-6468

Attach a separate sheet of paper to add additional information.

Employee Name, Social Security #, Address, and Telephone:

Date of Injury:

Description of Injury:

Identify All Attorneys Currently Representing Any Party by Name, Address, Telephone, and Client Name:

Name, Address, and ***Specialty*** of all physicians who have treated or examined the employee for this injury:

Define the disputed medical issues which require the opinion of an Independent Medical Examiner.

List the specific questions related to the disputed medical issues that you wish to be submitted to the examiner.

Preferred specialty, if any, of independent medical examiner. The court is not bound by such preference.

Submit with certificate of service as proof that all other parties have been served a copy of the request.

NOTICE OF AGREEMENT
TO USE A NAMED INDEPENDENT MEDICAL EXAMINER

NWCC Form 67-2 (4/08)

Nebraska Workers' Compensation Court
State Capitol Building
P.O. Box 98908 800-599-5155
Lincoln, NE 68509-8908 402-471-6468

Attach a separate sheet of paper to add additional information.

Initiator: Name, Address, and Telephone

Representing:

Employer: Name, Address, Telephone, and Attorney's Name (if represented in this case)

Insurer: Name, Address, Telephone, and Attorney's Name (if represented in this case)

The parties have agreed to use the physician named below to perform an independent medical examination.

_____
Employer/Insurer/Representative Signature

_____
Employee/Representative Signature

Employee: Name, Social Security #, Address, Telephone, and Attorney's Name (if represented in this case)

Date of Injury: Description of Injury:

Name, Address, and *Specialty* of all physicians who have treated or examined the employee for this injury:

Name of Agreed Upon Independent Medical Examiner: _____

Signature required if the physician is not on the list of court-appointed independent medical examiners

I acknowledge that I am not on the list of court-appointed independent medical examiners. However, I agree to perform an independent medical examination for the above employee in accordance with the Nebraska Workers' Compensation Act and the Court's Rules of Procedure (63–65).

Physician Signature: _____ Date: _____

Questions submitted to the independent medical examiner:

Submit with certificate of service as proof that all other parties have been served a copy of the request.

Independent Medical Examiner
Application For Appointment

Nebraska Workers' Compensation Court
State Capitol Building
P. O. Box 98908
Lincoln, NE 68509-8908

402-471-6468 or 800-599-5155
402-471-2700 (FAX)
http://www.wcc.ne.gov/

Applicant's Name:		Social Security Number:	Date of Birth:
Address:		City or Town:	
State:	Zip Code:	Business Telephone:	

EDUCATION AND TRAINING

Name & Location	Dates From/To	Major	Degree	Month/Year of Degree
College/University:				
Medical School:				
Osteopathic School:				
Chiropractic School:				
Other:				

PROFESSION

Specialty: Board certification with: Certification expires: _____	Subspecialty: Board certification with: Certification expires: _____
Have you ever performed an independent medical exam? Yes ☐ No ☐ What percentage of current practice is IMEs?	If yes, how many years have you been performing IMEs? _____
List any IME training you have attended:	
Please list any experience or education concerning workers' compensation principles or the Nebraska workers' compensation system:	
Please identify any employer, insurer, attorney, employee group, managed care plan or representatives of any of these to whom you are under contract or who regularly use your services:	
If appointed, what type of cases would you prefer be referred to you?	

Independent Medical Examiner — Application For Appointment

Nebraska State License # _____ Tax I.D. # _____ Drug Enforcement Agency # _____

Are you currently licensed in any other state? Yes ☐ No ☐ If yes, please list state and license #: _____

List any other registrations, certifications or licenses you possess: _____

Have you ever been subject to disciplinary action? Yes ☐ No ☐ If yes, please explain: _____

Have you ever voluntarily surrendered your license? Yes ☐ No ☐ If yes, please explain: _____

PRACTICE HISTORY

Present practice name and location:

Name: _____ Type of Practice: _____ From: _____

Address: _____

List other site addresses if applicable: _____

Prior practice name(s) and location(s):

1. Name: _____

   Address: _____ Telephone: _____

   City, State & Postal Code: _____ From: _____ To: _____

2. Name: _____

   Address: _____ Telephone: _____

   City, State & Postal Code: _____ From: _____ To: _____

3. Name: _____

   Address: _____ Telephone: _____

   City, State & Postal Code: _____ From: _____ To: _____

I request appointment to the list of independent medical examiners maintained by the Nebraska Workers' Compensation Court. I will provide independent, impartial and objective medical findings in all cases that come before me. I will decline a request to serve as an independent medical examiner only for good cause shown. If I determine an examination is necessary, I will contact the employee within 10 business days after receipt of records from all parties to schedule an appointment. I will submit a written report within 10 business days following receipt of all necessary records and information, the completion of an examination, or the completion of any required tests, whichever is applicable. I will accept the fees established pursuant to Rule 65 as payment in full for services rendered as an independent medical examiner. I will submit to a review pursuant to Rule 62, E.

I have read and understand Rule 62 though Rule 66 of the Nebraska Workers' Compensation Court, which describe the independent medical examiner system. I agree to comply with all of the provisions of these rules.

I hereby attest that the information contained in this application is correct to the best of my knowledge and belief. I understand that false or misleading information may result in the rejection of my application or in my removal from the list if I am appointed.

_____ _____

SIGNATURE DATE

NWCC Form 62 (03/2009) Page 2 of 2

APPENDIX C–
VOCATIONAL REHABILITATION COUNSELOR REQUEST FORMS

Nebraska Workers' Compensation Court
Vocational Rehabilitation Section
P.O. Box 98908
Lincoln, Nebraska 68509-8908
(402) 471-3606
(800) 599-5155
MAIL COMPLETED FORM TO ABOVE ADDRESS
OR FAX TO NE WCC VR SECTION AT (402) 742-8311
Or email to wcc.vocrehab@nebraska.gov

VR-42b

VOCATIONAL REHABILITATION COUNSELOR APPOINTMENT REQUEST

EMPLOYEE NAME		DOCKET & PAGE NO. (IF APPLICABLE)
STREET ADDRESS		TELEPHONE NUMBER
CITY, STATE, ZIP CODE		EMPLOYEE EMAIL ADDRESS
EMPLOYER (NAME & ADDRESS)		DATE OF INJURY
INSURER (NAME & ADDRESS)		CLAIM ADJUSTER EMAIL ADDRESS
CLAIM NUMBER (IF KNOWN)	CLAIM ADJUSTER	CLAIM ADJUSTER TELEPHONE NUMBER
TYPE OF INJURY		HAS EMPLOYEE RETURNED TO WORK? YES ☐ NO ☐
EMPLOYEE'S ATTORNEY (NAME & ADDRESS)		TELEPHONE NUMBER
EMPLOYER'S / INSURER'S ATTORNEY (NAME & ADDRESS)		TELEPHONE NUMBER
IS THE EMPLOYEE CLAIMING ENTITLEMENT TO VOCATIONAL REHABILITATION PURSUANT TO §48-162.01? YES ☐ NO ☐	IS THE EMPLOYEE REQUESTING THAT VOCATIONAL REHABILITATION SERVICES BE PROVIDED? YES ☐ NO ☐	IS THE REQUESTOR ASKING THAT A LOSS-OF-EARNING-POWER EVALUATION BE PERFORMED UNDER STATUTE 48-121(2)? YES ☐ NO ☐
IS THE REQUESTOR ASKING THAT A LOSS-OF-EARNING-POWER EVALUATION BE PERFORMED FOR MULTIPLE SCHEDULED MEMBERS UNDER STATUTE 48-121 (3)? YES ☐ NO ☐	IS AN INTERPRETER REQUIRED? YES ☐ NO ☐	PRIOR TO THIS REQUEST, HAS ANY PARTY RETAINED THE SERVICES OF A VOC. REHAB. COUNSELOR FOR THIS CASE? YES ☐ NO ☐

A. The requestor attests that the employee has reached maximum medical improvement. YES ☐ NO ☐

B. The requestor attests that the employee has permanent restrictions that are authored or endorsed by a physician. YES ☐ NO ☐

C. The requestor attests that the employee has temporary restrictions that are authored or endorsed by a physician. YES ☐ NO ☐

D. Describe in detail: (1) on what basis is the request for vocational rehabilitation counselor appointment being made; and (2) what steps the parties have taken in an attempt to agree on the selection of a vocational rehabilitation counselor. (Be sure to identify the names of the vocational rehabilitation counselors suggested by each party).

NOTE: The requestor must provide the original or a copy of the VR-42b to the VR Section of the Workers' Compensation Court. Requestor must also provide a copy of this request to all parties. [Rule 42 (A)(3)]

PRINTED NAME OF REQUESTOR	SIGNATURE OF REQUESTOR	DATE SIGNED

(8/17)

VR-42C

AGREEMENT FOR THE SELECTION OF A VOCATIONAL REHABILITATION COUNSELOR

Workers' Compensation Court
State of Nebraska
P. O. Box 98908
Lincoln, NE 68509-8908

(402) 471-6468
(Lincoln Area)
(800) 599-5155 (Toll Free)
Fax- (402) 742-8311

I, _____, have agreed on the selection of _____ as the vocational rehabilitation counselor to provide vocational rehabilitation services and/or perform a loss of earning power evaluation.

arising out of a work-related injury occurring on _____.

I understand that:

I have the right to agree to the proposed vocational rehabilitation counselor to provide vocational rehabilitation services and/or perform a loss of earning power evaluation.

I have the right <u>not</u> to agree to the proposed vocational rehabilitation counselor.

I have the right to propose a vocational rehabilitation counselor of my own choosing.

If I cannot agree with the other party on a vocational rehabilitation counselor, I have the right to request that the Workers' Compensation Court appoint a vocational rehabilitation counselor at no cost to me.

I have read this agreement on this_____ Day of _____, 20_____, and I understand my rights as set forth above.

_____
Signature of Employee

I verify that I have given _____ a copy of this Agreement on this_____ day of _____, 20____.

_____
Signature of Counselor Date

(1/13)

United States Citizenship Attestation Form

For the purpose of complying with Neb. Rev. Stat. §§ 4-108 through 4-114, I attest as follows:

☐ I am a citizen of the United States.

— OR —

☐ I am a qualified alien under the federal Immigration and Nationality Act, my immigration status and alien number are as follows:

_____, and attached is a copy of both sides of my United States Citizenship and Immigration Services documentation.

I hereby attest that my response and the information provided on this form and any related application for public benefits are true, complete, and accurate and I understand that this information may be used to verify my lawful presence in the United States and work eligibility status.

NAME: _____
(Print first, middle, and last name)

SIGNATURE: _____

DATE: _____

This form must accompany all submissions of **Form VR-44: VR Plan.**