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NEBRASKA

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

Nebraska Revised Statutes § 48-101 et. seq.

SCOPE OF COMPENSABILITY

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

The Nebraska Workers' Compensation Act covers employees of the state, every governmental agency created by it, and every employer in Nebraska, including non-resident employers performing work in the state employing one or more employees in the regular trade, business, profession, or vocation of such employer.

A. Employees excluded from coverage.

Household domestic servants; workers employed by an employer who is engaged in an agricultural operation and employs only related employees; workers employed by an employer who is engaged in an agricultural operation and employs unrelated employees unless such service is performed for an employer who during any calendar year employs ten or more unrelated, full-time employees; and employees of railroad companies engaged in interstate or foreign commerce are excluded from coverage by the Act. Neb. Rev. Stat. § 48-106.

Independent contractors, and self-employed individuals may secure coverage under the Act by notifying the insurer in writing of the intent to be covered. Neb. Rev. Stat. §48-115(10). Executive officers of a corporation who own 25 percent or more of the corporation's common stock may elect to be covered under the Act by written notification to the insurer and the corporation secretary of the election to be covered. Neb. Rev. Stat. § 48-115(9).

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

Section §48-116 of the Act represents the Nebraska "statutory employer" provision. In essence it provides that any person, entity, or employer which requires another business to perform work and fails to require the other business to procure workers' compensation insurance is liable as a statutory employer. *Rogers v. Hansen*, 211 Neb. 132, 317 N.W.2d 905 (1982). 'Perform work' means to conduct tasks that are part of the 'regular trade' of the employer; not occasional tasks that are merely incidental to the business. *Hassan v. Trident Seafood*, 302 Neb. 44, 50, 921 N.W.2d. 146, 151 (2019). 'Procure a policy' means more than just obtaining a Certificate of Insurance, it means verifying the status of the policy before beginning the work. *Martinez v. CMR*

Construction & Roofing of Texas, 302 Neb. 618, 628, 924 N.W.2d 326, 336 (2019).

The protections provided under § 48-116 also are meant to ensure that companies cannot use subcontractors to absolve them of the responsibility to ensure that employees are properly insured under the Nebraska Workers' Compensation Act. *Aboytes-Mosqueda v. LFA Inc.,* 306 Neb. 277, 283, 944 N.W.2d 765, 770 (2020).

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

A personal injury or death caused to an employee by an accident or occupational disease arising out of and in the course of the employment is compensable. The employee must establish the right to compensation by a preponderance of the evidence. Neb. Rev. Stat. § 48-101.

A. Traumatic or "single occurrence" claims.

Such injuries are compensable. *See* Neb. Rev. Stat. § 48-151(2).

B. Occupational disease (including respiratory).

Occupational disease claims are compensable so long as they are due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment. Neb. Rev. Stat. § 48-151(3). Ordinary diseases of life to which the general public is exposed are excluded. There is, however, no statutory or administrative listing of covered diseases. That determination is made on a case-by-case basis. The Nebraska Supreme Court has found that noise-induced hearing loss was *not* an occupational disease under the Act and should be viewed as a cumulative trauma injury. *Risor v. Nebraska Boiler,* 277 Neb. 679, 765 N.W.2d 170 (2009).

C. Repetitive use or cumulative trauma injuries.

The compensability of conditions resulting from cumulative effects of repeated work-related trauma is tested under the definition of accident. In order to prove that an accident has occurred in the context of a repetitive use or cumulative trauma claim, the plaintiff must prove that either the cause was reasonably limited in time or the result materialized at an identifiable point. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). There is no "time limit" for an employee to discontinue employment after the onset of the symptoms. *Martinez v. International Paper Co.,* 27 Neb. App. 933, 937 N.W.2d 875 (2020).

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

Except in the case of mental-mental injuries suffered by first responders (see response to question #6), so-called "mental-mental" claims are excluded, meaning 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. Hastings Industries, Inc.*, 252 Neb. 361, 562 N.W. 2d 348 (1997); *Sorensen v. City of Omaha,* 230 Neb. 286, 430 N.W.2d 696 (1988); *Bekelski v. O.F. Neal Co.,* 141

Neb. 657, 4 N.W.2d 741 (1942).

6. What psychiatric claims or treatments are compensable?

Psychiatric conditions caused by or resulting from a physical injury are compensable. *VanWinkle v. Electric Hose and Rubber Co.*, 214 Neb. 8, 332 N.W.2d 209 (1983). Mental injuries or illness suffered by first responders, "frontline state employees" and "county correctional offices" in "high-population" counties even though unaccompanied by physical injury, are compensable if such injuries or illness are the result of extraordinary and unusual conditions in comparison to the normal conditions of the particular employment and the injuries or illness are not incidental to normal employer and employee relations. *See* Neb. Rev. Stat. § 48-101.01. A "high population" county is defined as one with more than 300 thousand inhabitants. Only Douglas County and Lancaster County currently fit that definition.

With respect to first responders, an employee will now only need to meet three criteria to create a presumption of compensability for his or her mental injury. 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. *See* Neb. Rev. Stat. § 48-101.01.

7. What are the applicable statutes of limitations?

All claims for compensation are forever barred unless within two years after the accident, or if payments of compensation have been made, within two years of the time of the making of the last payment, a petition for compensation is filed with the Nebraska Workers' Compensation Court. *See* Neb. Rev. Stat. § 48-137.

The statute of limitations may be tolled:

1) When the employee has sustained a latent and progressive injury;
2) When any employer, risk management pool, or insurer fails, neglects, or refuses to file a First Report of Accident (NWCC Form 1). Such failure tolls the statute of limitations until such report is filed. *See* Neb. Rev. Stat. § 48-144.04;
3) When there is a material change in the employee's condition which necessitates additional medical care. *See Snipes v. Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

The statute of limitations will not be a defense to claims for payment of medical bills even though more than two years passed without the payment of benefits, if the claimant received a prior award from the Workers' Compensation Court that specifically made a provision for payment of future medical benefits. *Foote v. O'Neil Packing,* 262 Neb. 467, 632 N.W.2d 313 (2001).

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

The employee must give notice of injury to the employer 'as soon as practicable' after the happening thereof. Neb. Rev. Stat. § 48-133. An employee need not give notice to any one person, notifying a "foreman, supervisor, or superintendent. . ." is enough to impute constructive notice on the employer. *Kaiser v. Metropolitan Utilities District*, 26 Neb. App. 38, 49, 916 N.W.2d 448, 457 (2018). 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 determination as to whether notice was given "as soon as practicable" is made on a case-by-case basis. Approximately five months has been determined to be not "as soon as practicable" (*Williamson v. Werner Enterprises, Inc.,* 12 Neb. App. 642 (2004)), and most recently 5 weeks was determined to be too late. *Bauer v. Genesis Healthcare Group*, 27 Neb.App. 904, 937 N.W.2d 492 (2019).

An employee is not required to tell the employer that his 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 Boller*, 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).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Under Neb. Rev. Stat. § 48-101, a claimant cannot recover workers' compensation benefits if the employee was willfully negligent. See *Hannon v. J. L. Brandeis & Sons, Inc*., 186 Neb. 122, 181 N.W.2d 253 (1970), overruled on other grounds, *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983). Willful negligence consists of a deliberate act, conduct evidencing a reckless indifference to safety, or intoxication at the time of injury without consent, knowledge, or acquiescence of the employer. See Neb. Rev. Stat. § 48-151(7). Committing suicide generally constitutes willful negligence within the meaning of this language and thereby bars recovery under the workers' compensation law. See *Hannon v. J. L. Brandeis & Sons*, Inc., *supra*. However, Nebraska law has recognized an exception to the rule that suicide constitutes willful negligence when the evidence shows that suicide was involuntary. See *Friedeman v. State, supra*. In *Friedeman*, the decedent suffered a work injury that left her with chronic pain, making it very difficult for her to engage in any of her pre-accident activities, such as working, helping on the family farm, and looking after her family. She had difficulty moving around and getting to sleep and became " a mere shadow of her former self." *Id*. at 415, 339 N.W.2d at 70. Several years after the accident, decedent committed suicide, leaving behind a note explaining that she " 'just [could not] stand the pain any longer.'" *Id*. Her doctor later expressed the opinion that the pain from her work injury, rather than depression, drove her to commit suicide and that her decision to do so was involuntary and beyond her control. *Friedeman v. State, supra*. The Nebraska Supreme Court agreed, acknowledging that there are factors which can override a person's free will and that

scientific testimony to such can be admitted as evidence the suicide was not willful, thereby allowing for recovery. *Id*. In so ruling, the Supreme Court carved out an exception from the general rule of *Hannon*, finding that an involuntary suicide does not constitute willful negligence. See *Friedeman v. State, supra*.

B. Willful misconduct, "horseplay," etc.

Willful negligence can be a bar to recovery. However, willful negligence is defined to include a deliberate act or such conduct as evidences reckless indifference to safety. Neb. Rev. Stat. § 48-151. In fact, the employee must manifest a reckless disregard for the consequences, coupled with a consciousness that injury will naturally result and mere negligence or violation of safety rules is insufficient. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). Accidents and injuries which occur as a result of "horseplay" are compensable if (1) the deviation is insubstantial and (2) the deviation does not measurably detract from the work. *Varela v. Fisher Roofing Co., Inc.*, 253 Neb. 667, 572 N.W.2d 780 (1998), *Webber v. Webber*, 28 Neb.App. 287, 942 N.W.2d. 438 (2020).

C. Injuries involving drugs and/or alcohol.

Neither the employee nor the beneficiaries are entitled to recover for injuries caused by being in a state of intoxication. Intoxication includes use of an illegal controlled substance by the employee. The burden of proving that the accident was caused by reason of the employee's intoxication rests with the employer. Neb. Rev. Stat. § 48-127.

D. Violation of a Safety Rule.

An employee's deliberate or intentional defiance of a reasonable safety 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 are not applicable when an employee has accidentally violated a safety rule. *Spaulding v. Alliant Foodservice*, 13 Neb.App. 99, 689 N.W.2d 593 (2004).

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

A person who presents a false or fraudulent insurance claim, or proof in support of a false or fraudulent claim, knowing the claim to be false or fraudulent, is guilty of a Class IV misdemeanor. Neb. Rev. Stat. § 28-106. Or a person who presents a false or fraudulent insurance claim may be subject to an imposition of a civil fine initiated by the Director of Insurance pursuant to the Insurance Fraud Act, Neb. Rev. Stat. §§ 44-6601 to 44-6608 (Reissue 1999).

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

Yes. 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 our 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.

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

"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 the 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." *Shade v. Ayars & Ayars, Inc*., 247 Neb. 94, 525 N.W.2d 32 (1994).

13. Are injuries by co-employees compensable?

Yes. See Neb. Rev. Stat § 48-102.

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

Probably not. There is little case law on point. Assault on an employee after work in employer provided parking lot was an "accident" within the meaning of the workers' compensation law. *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005). In *Zoucha* the employee worked at a bar and was assaulted by a patron who had approached her during her shift. In a case where the reason for the assault is truly unrelated to employment, the argument for noncompensability of the claim could be made.

BENEFITS

15. What criteria are used for calculating the average weekly wage?

Wages under the Nebraska Workers' Compensation Act are construed to mean the money rate at which the service rendered was recompensed under the contract of hire in force at the time of the accident. Wages do not include gratuities received from the employer or others, nor do they 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, except that if the insurer shall have collected a premium based upon the value of such board, lodging, or similar advantages then the value shall become a part of the basis of determining compensation benefits.

Neb. Rev. Stat. § 48-126. *Foster-Rettig v. Indoor Football Operating, L.L.C.*, 25 Neb.App. 551, 908 N.W.2d 426 (2018). Net profits of a subchapter S corporation are not included as wages in determining the average weekly wage of an employee-shareholder. *Bortolotti v. Universal Terrazzo and Tile Co*., 304 Neb. 219, 234, 933 N.W.2d 851, 862 (2019)(*citing* Neb. Rev. Stat. § 48-126).

In order to compute the average weekly wage in continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his or her weekly wages shall be based upon the hours worked and the wages earned by the claimant during the twenty-six week period prior to the accident, or so much thereof preceding the date of accident during which the claimant was employed. Neb. Rev. Stat. § 48-126. Only the weeks with hours worked which ordinarily constitute the plaintiff's work week will be used. *Canas v. Maryland Cas.,* 236 Neb. 164, 459 N.W.2d 533 (1990). The hourly rate used to compute the average weekly wage should be "prorated" to reflect the wage actually in effect during each of the weeks utilized in computing the average weekly wage. *Ramsey v. State,* 259 Neb. 176, 609 N.W.2d 18 (2000). Overtime pay is not included within the average weekly wage calculation unless the compensation insurer collects a premium based upon the overtime pay. Neb. Rev. Stat. § 48-126.

Where a worker has insufficient work history to be able to calculate his average weekly income based on as much of the preceding six months as he worked for the same employer, then what would "ordinarily" constitute the employee's work week and average weekly wage should be estimated by considering other employees working similar jobs for 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).

For seasonable employees such as teachers, who only work nine months out of the year, but elect to receive pay spread out over a twelve-month period, the average weekly wage should be calculated based on the actual pay received over the twenty-six week period preceding the injury that is derived from the elected lower amount received per week. *Simpson v. Lincoln Pub. Schs.*, 30 Neb. App. 537, 971 N.W.2d 347 (2022).

In accordance with Neb. Rev. Stat. §§ 48-121 and 48-122 for permanent partial disability and death benefit purposes, the weekly wages shall be taken to be computed on the basis of a work week of a minimum of five days if the wages are paid by the day, or upon the basis of a work week of a minimum of 40 hours if the wages are paid by the hour or the greater of the two if wages were based on the output of the employee.

The Employee has the burden to prove his/her average weekly wage. *Bortolotti v. Universal Terrazzo and Tile Co*., 304 Neb. 219, 236, 933 N.W.2d 219, 863 (2019). Without supporting documentation, an employee's testimony, or allegation in the petition, are an insufficient based upon which to establish the average weekly wage. *Id*. at 228, 859. When the evidence is clear that the employee received a wage, but there is insufficient evidence to determine what that wage was, the lowest statutorily permissible wage will apply. *Id*. at 236, 863.

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

Indemnity benefits are two-thirds of the employee's average weekly wage, subject to the applicable maximum weekly benefit. If that calculation yields a weekly benefit of less than the minimum ($49.00 per week), the employee is entitled to $49.00 per week. If the employee's average weekly wage at the time of the accident is less than the statutory minimum, the employee is entitled to the actual wage received. The minimum and maximum benefits are as follows:

Table of Maximum & Minimum Compensation Rates [Neb. Rev. Stat. § 48-121.01]:

Applicable Dates	Maximum Rate	Minimum Rate
July 12, 1974 – August 23, 1975	89.00	49.00
July 12, 1974 – August 23, 1975 Burial: $1,000.00 Death: Same as previously	89.00	49.00
Aug 24, 1975 – Sept. 1, 1997	100.00	49.00
Aug 24, 1975 – Sept. 1, 1997	100.00	49.00
Sept. 2, 1997 – Apr 20, 1978	140.00	49.00
Apr 21, 1978 – Aug 23, 1979	155.00	49.00
Aug 24, 1979 – Aug 25, 1983 Burial: Aug 20, 1981 - $2,000.00	180.00	49.00
Aug 26, 1983 – Sept 5, 1985	200.00	49.00
Sept 6, 1985 – May 29, 1987	225.00	49.00
May 30, 1987 – June 30, 1988	235.00	49.00
July 1, 1988 – July 9, 1990	245.00	49.00
July 10, 1990 – June 20, 1991	255.00	49.00
July 1, 1991 – May 30, 1994	265.00	49.00
June 1, 1994 – Dec 31, 1994	310.00	49.00
Jan 1, 1995 – Dec 31, 1995	350.00	49.00
Jan 1, 1996 – Dec 31, 1996	409.00	49.00
Jan 1, 1997 – Dec 31, 1997 Burial: 1997 - $6,000	427.00	49.00
Jan 1, 1998 – Dec 31, 1998	444.00	49.00
Jan 1, 1999 – Dec 31, 1999	468.00	49.00
Jan 1, 2000 – Dec 31, 2000	487.00	49.00
Jan 1, 2001 – Dec 31, 2001	508.00	49.00
Jan 1, 2002 – Dec 31, 2002	528.00	49.00
Jan 1, 2003 – Dec 31, 2003	542.00	49.00
Jan 1, 2004 – Dec 31, 2004	562.00	49.00
Jan 1, 2005 – Dec 31, 2005	579.00	49.00
Jan 1, 2006 – Dec 31, 2006	600.00	49.00
Jan 1, 2007 – Dec. 31, 2007	617.00	49.00

Jan 1, 2008 – Dec. 31, 2008	644.00	49.00
Jan 1, 2009 – Dec. 31, 2009	671.00	49.00
Jan 1, 2010 – Dec. 31, 2010	691.00	49.00
Jan 1, 2011 – Dec. 31,2011	698.00	49.00
Jan 1, 2012 – Dec. 31, 2012	710.00	49.00
Burial: July 19, 2012 – $10,000		
Jan 1, 2013 – Dec. 31, 2013	728.00	49.00
Jan 1, 2014 – Dec. 31, 2014	747.00	49.00
Jan 1, 2015 – Dec. 31, 2015	761.00	49.00
Jan 1, 2016 – Dec. 31, 2016	785.00	49.00
Jan 1, 2017 – Dec. 31, 2017	817.00	49.00
Jan 1, 2018 – Dec. 31, 2018	831.00	49.00
Jan 1, 2019 – Dec. 31, 2019	855.00	49.00
Jan 1, 2020 – Dec. 31, 2020	882.00	49.00
Jan 1, 2021 – Dec. 31, 2021	914.00	49.00
Burial: Jul 2, 2021 – $11,000		
Jan 1, 2022 – Dec. 31, 2022	983.00	49.00
Jan 1, 2023 – Dec. 31, 2023	1,029.00	49.00
Burial: Jul 1, 2023 – $11,300		

Commencing January 1, 1996, and each January 1 thereafter, the maximum weekly rate shall be 100 percent of the state average weekly wage.

In 2012 Burial expenses were increased to $10,000. However, in 2020 burial benefits were increased to $11,000 and an automatic increase to the burial benefit every year based on the consumer price index was added. The maximum percentage increase based on the consumer price index was limited to only 2.75% per year and the minimum was set to increase by 1% per year.

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

Unless there is a reasonable controversy, the employer/insurer must begin payment of benefits within 30 days after notice has been given of disability or within 30 days after notice has been given of outstanding medical expenses. Neb. Rev. Stat. § 48-125. Failure to pay such benefits in the absence of a "reasonable controversy" concerning the employer/insurer's obligation to pay the indemnity or medical benefits exposes the employer/insurer to a 50 percent waiting time allowance on the past due indemnity benefits, as well as to an attorney's fee on any unpaid medical expenses. Waiting for an employee's response about possible settlement, or on-going settlement discussion, is not justification for withholding payment of benefits. The “after thirty days’ notice” language only applies to an employer’s failure to timely pay benefits pending trial and the Workers’ Compensation Court is not authorized to impose waiting-time penalties absent a final adjudication when a party appeals. *Lageman v. Nebraska Methodist Hospital*, 277 Neb. 335, 762 N.W.2d 51 (2009).

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

The employee must be out more than six weeks before recovering benefits for the first seven days. Neb. Rev. Stat. § 48-119.

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

If an Award has not been entered by the court, an employer or insurer may unilaterally terminate or reduce temporary disability benefits when evidence is sufficient to support such a termination or reduction. An employee is entitled to temporary disability until s/he has reached maximum medical improvement, unless evidence exists which justifies terminating such benefits. The level of a worker's disability depends on the extent of diminished employability or impairment of earning capacity, and does not directly correlate to current wages. *Damme v. Pike Enterprises, Inc.*, 289 Neb. 620, 856 N.W.2d 620 (2014).

If an Award has been entered which provides for temporary benefits on an ongoing basis, temporary disability benefits may not, generally speaking, be discontinued without a modification from the court or agreement of the parties. *Hagelstein v. Swift-Eckrich,* 261 Neb. 305, 622 N.W.2d 663 (2001); *Holmes v. Chief Industries, Inc.*, 16 Neb. App. 589, 747 N.W.2d 24 (2008). However, if Award directed the cessation of temporary benefits and conversion to permanent benefits upon the happening of an identified event, a modification action may not be necessary to terminate temporary benefits. *Weber v. Gas 'N Shop, Inc.,* 280 Neb. 296, 786 N.W.2d 671 (2010).

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

Yes, credit may be taken for the number of weeks of temporary disability benefits paid, but only in the case of whole body injuries. Temporary disability payments are not credited toward the amount the employee is entitled to receive for permanent disability benefits for scheduled member injuries.

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

There is no specific provision in the Act providing for specific benefits as a result of disfigurement. Disfigurement can conceivably decrease earning capacity and thus result in a greater level of permanent benefits.

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

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

Thumb	60 weeks	Arm	225 weeks

1st Finger	35 weeks	Foot	150 weeks
2nd Finger	30 weeks		
Leg	215 weeks		
3rd Finger	20 weeks	Eye	125 weeks
4th Finger	15 weeks	Ear	25 weeks
Great Toe	30 weeks	Hearing (One ear)	50 weeks
Other Toe	10 weeks	Hearing (Both ears)	100 weeks
Hand	175 weeks	Nose	50 weeks

See Neb. Rev. Stat. § 48-121(3).

Additionally, for accidents occurring on or after January 1, 2008, if the employee sustains injuries to two or more scheduled members in the same accident, and it is determined that the benefits pursuant to the schedule will not "adequately compensate" the employee, the court, in its discretion, may award the employee a loss of earning power, if the loss of earning power is 30% or more. *See* Neb. Rev. Stat. § 481-21(3).

Under certain circumstances injuries to scheduled members may also be considered in determining the loss of earning power. The Nebraska Supreme Court has held that when a worker sustains a scheduled member injury **and** a whole body injury in the same accident, the Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003). If the loss of earning capacity for a whole body injury cannot be fairly and accurately assessed without also considering a scheduled member injury sustained in the same accident, then the court is permitted to consider both the scheduled member and the body as a whole injuries to determine the plaintiff's loss of earning power. The claimant *may not* recover both a loss of earning that takes into account a scheduled member injury and indemnity for the permanent impairment of the scheduled member injury. *Bishop v. Speciality Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009); *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), *Melton v. City of Holdrege,* 309 Neb. 385, 960 N.W.2d 298 (2021).

The Nebraska Supreme Court has also held that an employee with multiple injuries along the same extremity may suffer a loss of use of more than one member qualifying for an assessment of loss of earning capacity rather than a scheduled member impairment. *Espinoza v. Job Source USA, Inc.*, 313 Neb. 559, 572 (2023). For example, if an employee injures an upper extremity and the partial loss of use of one finger, this constitutes the loss of use of more than one member for purposes of Neb. Rev. Stat. § 48-121(3).

Although there exists no current statute for apportioning loss of earning capacity to a prior compensable injury, the Nebraska Supreme Court has held that if a successive injury claim with the same employer does not cause a further loss of earning power than was already assessed in the preceding claim, there is no further loss of earning capacity. *Picard v. P & C Grp. 1, Inc.*, 306 Neb. 292, 945 N.W.2d 183 (2020).

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

For "whole person" disabilities resulting in less than total disability, the employee is entitled to temporary total disability and permanent partial disability/loss of earning capacity benefits for an aggregate of 300 weeks. In calculating the amount of permanent partial indemnity benefits payable, the average weekly wage is multiplied by two-thirds and then by the percentage amount of permanent loss of earning capacity or disability. For example, an employee with an average weekly wage of $450.00 and a permanent loss of earning capacity of 15 percent would be entitled to a weekly permanent partial disability benefit of $45.00 per week based upon the following calculation: $450 x 2/3 x 15% = $45.00. This amount would be payable for 300 weeks reduced by the number of weeks already paid for temporary total disability benefits. *See,* Neb. Rev. Stat. § 48-121(2).

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

The employee is entitled to vocational rehabilitation if, because of the work related injuries, the employee is no longer able to perform "suitable" employment. The employer is obligated to pay temporary disability benefits to the employee during the period of vocational retraining. Neb. Rev. Stat. § 48-162.01. The cost of vocational retraining, including tuition, books, lodging, and mileage expense is paid from a separate vocational rehabilitation fund administered by the Nebraska Workers' Compensation Court. For example, the mileage reimbursement rate is $0.655 per mile for travel to seek related medical treatment or while participating in a vocational rehabilitation plan. The period of vocational retraining is theoretically unlimited. Vocational retraining has been interpreted to include everything from formal schooling to direct job placement programs. Vocational rehabilitation counselors must abide by the following priorities in evaluating an employee's need for vocational rehabilitation and what appropriate vocational retraining should be: (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) formal retraining designed to lead to employment in another occupation. Neb. Rev. Stat. § 48-162.01.

Illegal aliens who may not be lawfully employed in the United States and who intend on remaining in the United States, are not entitled to vocational rehabilitation services. *Ortiz v. Cement Products,* 270 Neb. 787, 708 N.W.2d 610 (2005).

In certain instances, 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).

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

Permanent total disability benefits are two-thirds of the employee's average weekly wage subject to the applicable maximum weekly benefit. Permanent total disability benefits are payable for so long as the employee remains permanently and totally disabled. There is no "working life" cap on payment of permanent total disability benefits. Maximum and minimum rates are identical to those set forth in #16 above.

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

Payable to spouse in above maximums and minimums. If children, then 60% of AWW to spouse and 15% of AWW to children but when combined benefit reaches maximum then spouse received 80% of maximum benefit and children receive 20% of maximum benefit. § 48-122.01(1) & (2). The surviving spouse receives two years balloon payment on remarriage and children then receive full benefits divided equally so long as they meet the dependency criteria of § 48-122.01(5).

A. Funeral expenses.

In 2023 the burial benefit was raised to $11,300.00. However, an automatic increase to the burial benefit every year based on the consumer price index is also built in. The maximum percentage increase based on the consumer price index was limited to only 2.75% per year and the minimum was set to increase by at least 1% per year. Neb. Rev. Stat. § 48-122(3).

B. Dependency claims.

Natural, minor children of the decedent and a spouse with whom the decedent was living at the time of the accident are conclusively presumed to be dependent. Posthumous children and adopted children are considered dependents. Others seeking dependency must establish actual dependency which requires the dependent to show that more than one-half of his or her support was derived from the employee at the time of death. *See* Neb. Rev. Stat. § 48-124. The actual dependency requirement as imposed between natural, legitimate children of the deceased and illegitimate or stepchildren was found to be unconstitutional, *Findaya v. A-Team Co.,* 249 Neb. 838, 546 N.W.2d 61 (1966). The method of apportioning death benefits among various dependents is set forth in Neb. Rev. Stat. § 48-122.01.

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

Nebraska does not have a Second Injury Fund.

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

Application for modification may be made by either the employee or the employer at any time

after six months from the date of any agreement or award, on the ground of increase or decrease in incapacity due solely to the injury. The applicant must show an increase or decrease in the employee's physical condition which would allow a modification of the award. Such an application must be filed within two years of the applicant's knowledge of the change in condition. Neb. Rev. Stat. § 48-141; *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).

Under Neb. Rev. Stat. § 48-162.01(7), where a prior award of a compensation court provided medical or physical rehabilitation services, the compensation court may modify the award of such services to the extent the court finds modification necessary to accomplish the goal of restoring the injured employee to gainful and suitable employment, or otherwise required in the interest of justice. *Spratt v. Crete Carrier Corp.*, 311 Neb. 262, 971 N.W.2d 335 (2022).

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

If the court determines there is no reasonable controversy justifying a delay of payment of an indemnity benefit or medical bill for more than 30 days, the court will order the employer or carrier to pay an attorneys' fee to the employee. In addition, if the employer appeals an award of the Compensation Court and fails to secure a reduction in the court's award, the employee is entitled to an attorney's fee award. Neb. Rev. Stat. § 48-125.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The workers' compensation remedy is exclusive except for injury or death proximately caused by the willful and unprovoked physical aggression of a co-employee, officer, or director. Neb. Rev. Stat. §§ 48-109, 48-111.

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

The employer's immunity cannot be implicitly waived, but can be waived by express contract. *Vangreen v. Interstate Machinery & Supply Co.,* 197 Neb. 29, 246 N.W.2d 652 (1976). Dual capacity is not recognized. *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985).

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

No.

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

None.

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

None.

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

There is no specific penalty pursuant to the workers' compensation act for terminating the employment of an employee who has been injured at work. Of course, any time an employee is terminated while recovering from a workers' compensation injury, there is additional risk of liability for temporary benefits as well as the risk of liability for wrongful termination premised upon retaliation, disability discrimination, the Family Medical Leave Act and various other state and federal antidiscrimination provisions. For example, a public policy exception to the at-will employment doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for filing a workers' compensation claim. *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). Similarly, a cause of action for retaliatory demotion exists when the employer demotes an employee for filing a workers' compensation claim. *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d. 704 (2007).

In 2022, the Nebraska Supreme Court held that when an employee is terminated because their injury from a workplace accident makes them unable to fulfill the regular duties of their position, the cause of the termination arises out of the employee's workplace injury and that there is no separate civil claim under the Nebraska Fair Employment and Practice Act, such termination being subject to the Nebraska Worker's Compensation Act's exclusive remedy provision. *Dutcher v. Neb. Dep't of Corr. Servs.*, 312 Neb. 405, 979 N.W.2d 245 (2022).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes.

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

Only where the injury or death is proximately caused by the willful and unprovoked physical aggression of such co-employee, officer, or director of the employer. Neb. Rev. Stat. § 48-111.

36. Is subrogation available?

Yes. The distribution of the third party proceeds shall be on a "fair and equitable" basis. Neb. Rev. Stat. § 48-118. In making a fair and equitable distribution of third party proceeds, the district court

must order a "reasonable" division of the proceeds between the parties. *Burns v. Nielsen*, 273 Neb. 724, 735, 732 N.W.2d 640, 650 (2007). There is no exact formula to be used in making a reasonable distribution. The "made whole" doctrine of equitable subrogation is not applicable in an action under § 48-118 and may not be used to bar recovery of a subrogation interest. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006). Additionally, equitable doctrines, such as unclean hands and estoppel, may not be used to bar recovery of a § 48-118 subrogation interest. *Burns v. Nielsen*, 273 Neb. 724, 735, 732 N.W.2d 640, 650 (2007).

MEDICALS

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

Medical expenses must be paid within 30 days of being presented to the employer/insurer so long as there is no reasonable controversy concerning the compensability of the bill. If timely payment is not made, the employer/insurer is subject to an attorney's fee to be determined by the Compensation Court. Neb. Rev. Stat. § 48-125.

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

All medical and hospital information relevant to an injury for which workers' compensation benefits are sought are to be made available to the employer/insurer on demand. Neb. Rev. Stat. § 48-120. Relevant information developed in connection with treatment or examination of such an injury is not considered a privileged communication for purposes of the claim. Thus the statute directs medical providers to provide that information to the employer/insurer on demand. The employer/insurer is required to pay the cost of any information requested. Medical care providers' obligation to release this information is not dependent upon the filing of a lawsuit, but requires only that the employee request or demand benefits, either indemnity or medical.

After a lawsuit commences, an employer/insurer can secure medical records through normal discovery means. An employer/insurer can also subpoena those records and in most cases secure a court order which obligates the employee to execute an authorization directed to the medical care provider authorizing the release of the records to the employer/insurer.

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

The only situation in which an employer may designate the primary treating physician is if the employer provides the employee with a Form 50 as soon as possible after being notified of the injury, and on the Form the employee either defers to the employer's choice, or the employee does not have a physician who has maintained the medical records and has a documented history of treatment with the employee or an immediate family member prior to the date of injury, and the employer has accepted the compensability of the injury. In all other cases the employee may

choose the primary treating physician. Rule 50. Once a 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).

Employers can also enter into managed care plans where choice of physician is controlled by the plan, except that so long as the employee designates a physician prior to or at the time of injury the employee can always seek treatment from the designated physician with any referrals thereafter to be made into the managed care plan. Neb. Rev. Stat. § 48-120.02.

When there is a dispute regarding a plaintiff's medical condition or related issues, either party may request an Independent Medical Examination (IME). The parties may either agree on an independent medical examiner or may request that the court appoint an IME provider. 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/insurer regardless of which party requests the IME. Neb. Rev. Stat. § 48-134.01. 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 party may also ask questions but must send the questions to the court which will send them on to the independent medical examiner.

Additionally, the employer/insurer has the right from time to time during the period of an employee's alleged work-related disability to have the employee examined by a physician of its choosing in a Defense Medical Examination (DME). 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 a DME may deprive the employee of right to compensation under the Workers' Compensation Act during the period 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.

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

The employer/insurer is obligated to pay for all reasonable medical, surgical, and hospital services, including plastic or reconstructive surgery (but not cosmetic surgery), appliances, supplies, prosthetic devices, and medicines required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment. Chiropractors are defined as physicians. Neb. Rev. Stat. § 48-120.

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

Prosthetic devices 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 are compensable and are subject to replacement for the life of the employee, so long as the applicable two year statute of limitations does not run. Dental appliances, hearing aids, or eyeglasses are replaceable only if damage or destruction to the item resulted from an accident which also caused personal injury

entitling the employee to compensation therefore for disability or treatment.

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

Home modifications are covered where the modifications are required by the nature of the injury and will relieve pain or promote and hasten the employee's restoration to health and employment. *Miller v. E.M.C. Insurance Co.,* 259 Neb. 433, 610 N.W.2d 398 (2000). While neither the Nebraska Supreme Court nor the Nebraska Court of Appeals has specifically passed upon vehicle modifications, the trial judges routinely award such modifications and as such, they are voluntarily paid in most instances. In *Lewis v. MBC Constr. Co., Inc.*, 309 Neb. 726, 962 N.W.2d 359 (2021), without offering an express opinion, the Nebraska Supreme Court suggested that under certain circumstances an employer may be required to construct a handicap accessible home if no other reasonable options exist that accommodate a claimant's disability.

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

Yes. It is administered by the Nebraska Workers' Compensation Court per Neb. Rev. Stat. § 48-120. The Nebraska Workers' Compensation Court Schedule of Medical and Hospital Fees can be found on the court's website at http://www.wcc.ne.gov.

Effective January 1, 2008, Nebraska utilizes a Diagnostic Related Group In-Patient Hospital Fee Schedule (DRG Fee Schedule) for inpatient hospital services. Nebraska law requires that insurers, employer, and self-insureds (payors) must notify the provider within 15 business days of receiving a claim for payment if additional information is needed to process the bill. If no such notification is provided, it is assumed that the payor has all information needed to pay the claim. Payors must provide payment within 30 business days after receipt of all information needed to pay the claim. If the payor fails to comply with these provisions, the payor cannot obtain the benefits of the DRG Fee Schedule.

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

Neb. Rev. Stat. § 48-120.02 specifically allows the implementation of a managed care plan by employer/insurers. Such a plan must be certified by the Workers' Compensation Court before it can be implemented. Neb. Rev. Stat. § 48-102.02, together with court rules 51-61, identify the requirements for certification and operation of a managed care plan.

PRACTICE/PROCEDURE

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

The employee, employer or insurer can file a petition with the Clerk of the Nebraska Workers' Compensation Court to commence an action or adjudication of a claim.

46. What is the method of claim adjudication?

A. Administrative level.

The Nebraska workers' compensation system is a judicial system without administrative hearings.

B. Trial court.

Following the filing of a petition, cases are heard before a single judge of the Compensation Court.

C. Appellate.

If either party is dissatisfied with the decision, it must appeal directly to the Nebraska Supreme Court.

The Court will either accept the case or assign the case to the Nebraska Court of Appeals. The review is "on the record" and applies a "clearly erroneous" standard in evaluating the trial court's factual findings.

47. What are the requirements for stipulations or settlements?

Settlements may be finalized either by submission to and approval by the Nebraska Workers' Compensation Court, or, when appropriate, via Release, which does not require approval of the Court. See Number 49 below.

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

Yes. *See* Neb. Rev. Stat. §§ 48-139, 48-140, 48-141.

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

Matters may be settled on a full and final basis using either a Release, which does not require Court approval, or Settlement Agreement, which does require Court approval. Court approval of a settlement agreement is required, and a Release may not be used, if:

1) The employee is not represented by counsel;
2) The employee at the time the settlement is executed, is eligible for Medicare, is a Medicare beneficiary, or has a reasonable expectation of becoming eligible for Medicare within thirty months after the date the settlement is executed;
    a) However, a Release may be used to finalize an agreement to resolve all issues other than future medical where the employee is eligible for Medicare, is a Medicare beneficiary, or has a reasonable expectation of becoming a Medicare beneficiary within thirty months of the settlement. As a condition precedent to using a Release in these circumstances, all medical bills must be paid and any conditional payments made by Medicare must be reimbursed.

3) Medical, surgical, or hospital expenses incurred for treatment of the injury have been paid by Medicaid and Medicaid will not be reimbursed as part of the settlement;
4) Medical, surgical, or hospital expenses incurred for treatment of the injury will not be fully paid as part of the settlement; or
5) The settlement seeks to commute amounts of compensation due to dependents of the employee.

If none of these conditions exist, a Release may be used. Note, that while a Release does not require Court approval, a Release can only discharges liability once payment is made and the Court enters an order of dismissal. *Dragon v. Cheesecake Factory*, 300 Neb. 548, 556, 915 N.W.2d 418, 424 (2018). Whether a case is settled by Release filed with the Court, or a Court Approved Settlement Agreement, either approach will result in a full and complete discharge from further liability on account of the accident and injury so long as it was not procured by fraud. Neb. Rev. Stat. § 48-139.

RISK FINANCE FOR WORKERS' COMPENSATION

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

Every employer subject to the Nebraska Workers' Compensation Act must either carry workers' compensation insurance, qualify as a self-insured, or be a member of a qualified risk management pool. Neb. Rev. Stat. § 48-145. There is an assigned risk pool regulated by the director of insurance. Neb. Rev. Stat. § 48-146.01. There is no state fund. Neb. Rev. Stat. § 44-3,158.

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

A. For individual entities.

To qualify as a self-insurer, the employer must furnish the State Treasurer proof of ability to pay plus security in an amount equal to two and one-half percent of the prospective loss costs for like employment. The Workers' Compensation court must approve the self-insurance plan, and is the sole judge of the appropriate "prevailing rate." Neb. Rev. Stat. § 48-145. The court will usually require the applicant for self-insurance to post a surety bond, the amount of which the Court determines based upon the number of employees.

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

The procedure for self-insured individual entities applies to self-insurance pools. To qualify as a pool, the group of employers must be engaged in like businesses. Neb. Rev. Stat. § 48-145.

52. Are 'illegal aliens' entitled to benefits of workers' compensation as The Immigration Control Act indicates that they cannot be employees although most state acts include them within the definition of 'employee'?"

The Nebraska Supreme Court has ruled that illegal aliens are "employees" covered by the Nebraska Workers' Compensation Act and that illegal aliens are entitled to workers' compensation benefits, including medical benefits, temporary disability benefits, and permanent disability benefits. *Moyera v. Quality Pork Intern.*, 284 Neb. 963, 825 N.W.2d 409 (2013); *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013). However, the Court has further determined that illegal aliens are generally not entitled to vocational rehabilitation because their illegal work status prevents them from satisfying the statutory priorities required for vocational rehabilitation to be granted. Specifically, because the employee's illegal employment status prevents the employee from returning to a job with the same or a new employer, the court is precluded from ordering vocational retraining because the work lower priorities set forth in the vocational rehabilitation statute have not been met. *See Moyera v. Quality Pork Intern.*, 284 Neb. 963, 825 N.W.2d 409 (2013); *see also Ortiz v. Cement Products,* 270 Neb. 787, 708 N.W.2d 610 (2005). In death cases, a 'nonresident alien dependent' can designate any suitable person residing in Nebraska to as as attorney in fact during workers' compensation proceedings if the court determines that the interests of the nonresident alien dependent will be better served by such a person rather than by the consular officer. *See* Neb. Rev. Stat. §48-122(5)(a)(i).

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

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

The Nebraska Workers' Compensation Act does not specifically address whether such injuries are covered by the Act. There are no current cases on point.

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

The Nebraska Workers' Compensation Court (Court) has set forth Guidelines for Medicare Set Aside Arrangements to be followed in submitting lump sum settlements to the Court. The Guidelines generally provide that for situations that meet the current "workload review thresholds" established by the Centers for Medicare & Medicaid Services, any settlement application submitted to the Court for approval must "address Medicare's interest". The Guidelines established by the Court also provide that the set aside amount cannot be included as indemnity due. The settlement amount alone must be sufficient to cover the amount of indemnity due. The proposed order of approval submitted to the Court with the settlement application must list the settlement amount and the set aside amount separately. In situations where the settlement application does not need to address Medicare's interests (where a set aside is voluntary), the entire amount of the settlement can be used to calculate indemnity coverage. A comprehensive chart addressing these requirements may be obtained from the Nebraska

Workers' Compensation Court website at:

https://www.wcc.ne.gov/legal-practice-statutes-and-rules/settlements/medicare-set-aside-guidelines

Additionally, the Nebraska Workers' Compensation Act allows for parties to settle claims by using a release, without Court approval, under certain circumstances. The provision for settlements via release specifically states Court approval of a settlement is required if the claimant currently is a Medicare beneficiary, is eligible for Medicare, or has a reasonable expectation of becoming one within thirty months after the date when the settlement is executed. *See* Neb. Rev. Stat. 48-139.

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

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

The Nebraska Workers' Compensation Court will not allow any third-party supplier or payor of medical services to become a party to an action. However, if the Court determines that the plaintiff has incurred medical expenses as a result of the work related accident and some or all of the medical expenses were paid for by some other source (i.e Medicaid or Group Health Carrier) the court will order the employer to make payment directly to the supplier of the service or reimbursement to anyone who has paid the medical bills. Neb. Rev. Stat. § 48-120(8).

If Medicaid has paid for treatment due to a work accident, parties may settle a claim by a Release of Liability only if Medicaid has been or will be fully reimbursed as part of the settlement. Neb. Rev. Stat. § 48-139(3). If Medicaid will not be fully reimbursed as part of the settlement, parties must proceed with an Application for Lump Sum Settlement providing the Court a basis to approve the settlement absent full reimbursement.

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

The Nebraska Workers' Compensation Act has no confidentiality or privacy requirements. The rights of an employer and workers' compensation carrier to obtain records pursuant to State law is outlined in response to Question No. 38.

Additionally, an employer, insurance carrier, or its agent may communicate *ex parte* with medical providers as the normal patient-physician privilege is inapplicable regarding injuries alleged to

arise out of the work-related accident. *Scott v. Drivers Management*, 14 Neb. App. 630, 646, 714 N.W.2d 23, 35 (2006).

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

In determining whether or not a worker is an employee, as distinguished from an Independent Contractor, there is no single test by which the determination may be made. Such a determination must be made from all the facts in the case. In making this determination 10 factors are considered and weighed, no one of which may be conclusive. The factors to be considered are: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business. *Larson v. Hometown Communications*, Inc., 248 Neb. 942, 540 N.W.2d 339 (1995), *Wright v. H & S Contracting, Inc.,* 29 Neb. App. 581, 956 N.W.2d 329 (2021).

Again, determining if a worker is an independent contractor is an extremely case-specific determination. Litigants should be careful to not only consider the typical factors but should also be on the lookout for other facts that support their position, such as the level of supervision, who brought the tools necessary to complete the task, or how an employee is paid.

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

Persons in the service of a temporary agency are generally not considered independent contractors. When a general employer, such as a temporary agency loans an employee to another for the performance of some special service, that employee may become the employee of the party to whom his or her services have been loaned (special employer). When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if (1) the employee has made 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. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workers' compensation. *Kaiser v. Millard Lumber, Inc.*, 255 Neb. 943, 587 N.W.2d 875 (1999).

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

No. The Nebraska Workers' Compensation Act does not contain special provisions regarding owner/operators of trucks or other vehicles for driving or delivery of people or property. The 10 factor assessment (see Item 57 above) would apply to determine if an owner/operator of a truck or other vehicle is an employee or an independent contractor.

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

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

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response.

No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorneys for your state, listed at the beginning of this section.

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

Yes. See Answer to Question 54.

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

No.

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

No.

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