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

The North Carolina Workers' Compensation Act is codified at Chapter 97 of the North Carolina General Statutes (cited as N.C. Gen. Stat.).

SCOPE OF COMPENSABILITY

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

"Employment" is generally defined as employment by the state and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment. N.C. Gen. Stat. §97-2(1) (2003). An "employee," in turn, is generally defined as any person engaged in employment under any employment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his or her employer. N.C. Gen. Stat. §97-2(2).

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

A contractor is deemed an employer of the employees of its subcontractors, unless: (1) the principal contractor obtains a certificate of insurance prior to subletting work to the subcontractor; (2) the subcontractor has valid workers' compensation insurance coverage on the date of the injured employee's injury; or (3) the principal contractor has a valid certificate of insurance but is unaware the coverage has expired. See N.C. Gen. Stat. §97-19. *Suazo v. Gutierrez-Bojorquez, et. Al.*, 2021-NCCOA-131 (N.C. App. 2021). Additionally, motor carriers who contract with independent contractor drivers are liable to the independent contractor and his employees unless insurance has been secured by the independent contractor. See N.C. Gen. Stat. §97-19.1.

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

A. Traumatic or "single occurrence" claims.

Any accident arising out of and in the course of the employment is covered. N.C. Gen. Stat. §§97-2(6), 97-9. The phrase "by accident" means that the act causing the injury, and not the injury itself,

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must be accidental. *E.g., Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619 (1994). The term "accident," in turn, is generally defined as any interruption of the employee's normal work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. *See, e.g., Calderwood v. Charlotte-Mecklenberg Hosp. Auth.*, 135 N.C. App. 112, 519 S.E.2d 61 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000). Importantly, "when one is injured while performing his customary duties in the usual way, it is not an accident under G.S. 97-2(6)." *Turner v. Burke Hosiery Mills*, 251 N.C. 325, 111 S.E.2d 185 (1959)

However, with respect to back injuries and hernias, where the injury arises out of and in the course of the employment and is the direct result of a "specific traumatic incident of the work assigned," the injury is compensable. N.C. Gen. Stat. §§ 97-2(6), 97-9. The onset of pain does not establish that a specific traumatic incident occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. *Chambers v. Transit Management*, 360 N.C. 609, 636 S.E.2d 553 (2006).

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

Diseases are not compensable unless they result naturally and unavoidably from an accident or come within the statutory definition of an occupational disease. N.C. Gen. Stat. §§ 97-2(6), 97-52. Several enumerated diseases are deemed to be occupational, as well as any disease "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13). A disease is "characteristic of" a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979). Mere evidence that the job will increase the employee's risk of experiencing symptoms or an aggravation of an underlying condition not contracted as a result of the employment is insufficient to prove a disease is "characteristic of" the profession. *Futrell v. Resinall Corporation*, 151 N.C. App. 456, 566 S.E.2d 181 (2002), *aff'd*, 357 N.C. 158, 578 S.E.2d 269 (2003). A disease is "peculiar to" a profession if the employment results in a hazard which distinguishes it in character from the general run of occupations and is in excess of that attending employment in general. *Booker*, at 473, 256 S.E.2d at 199.

The employment need not be the exclusive cause of the occupational disease but need only be a significant contributing factor to the development of the disease in order for it to be compensable. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983).

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

No injuries or claims are expressly excluded.

6. What psychiatric claims or treatments are compensable?

Claims for psychiatric disability and treatment may be compensable if the psychiatric condition is a natural consequence of a compensable injury by accident or occupational disease, N.C. Gen. Stat. §§ 97-2(6); 97-52. *See also Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E.2d 539 (1981) *disc. review denied*, 304 N.C. 75, 288 S.E.2d 380 (1982).

Psychiatric conditions may also be compensable if they independently satisfy the definition of an occupational disease. *See Smith-Price v. Charter Pines Behavioral Ctr.*, 160 N.C. App. 161, 584 S.E.2d 881 (2003). To prove a psychiatric condition is an occupational disease, the employee must prove that the mental illness or injury was due to stresses different than those borne by the general public. *Pitillo v. N.C. Dept. of Env't. Health & Natural Res.*, 151 N.C. App. 641, 566 S.E.2d 807 (2002). To do so, the claimant must show that her psychological condition, or the aggravation thereof, was (1) "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or category of employment and that it is not (2) an "ordinary disease of life to which the general public is equally exposed." N.C. Gen. Stat. §97-57(13); *Woody v. Thomasville Uphostery Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002) (adopting dissent in 146 N.C. App. 187, 202, 552 S.E.2d 202, 211); *Clark v. City of Asheville*, 161 N.C. App. 717, 589 S.E.2d 384 (2003).

Additionally, a psychiatric condition may be found compensable as an injury by accident. *See Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 476 S.E.2d 410 (1996), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997). However, a mental injury is not a compensable "injury by accident" if the relevant events were "neither unexpected nor extraordinary," and it was only the "[claimants'] emotional response to the [events that] was the precipitating factor." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991). Personnel actions which are found to be ordinary incidents of employment do not give rise to a psychiatric injury by accident because they do not represent an "interruption of the work routine." *Pitillo*, 151 N.C. App. at 646, 566 S.E.2d at 812; *compare, Bursell v. General Elec. Co.*, 172 N.C. App. 73, 616 S.E.2d 342 (2005) (remanded for findings on whether the personnel action leading to injury were the normal work routine or part of an established sequence of operations).

7. What are the applicable statutes of limitations?

Although technically a condition precedent to jurisdiction rather than statute of limitations, N.C. Gen. Stat. §97-24 provides that the right to compensation is forever barred unless a claim or memorandum of agreement is filed with the Industrial Commission within two years after an accident, or within two years after the last payment of medical compensation when no other compensation has been paid. *See, e.g., Reinhardt v. Womens Pavilion, Inc.*, 102 N.C. App. 83, 401

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S.E.2d 138 (1991). With respect to occupational diseases, the employee must file a claim within two years after disability begins, although the two years does not begin to run until the employee is first informed by competent medical authority of the nature and work-related cause of the disease. N.C. Gen. Stat. §97-58(c); *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980). However, where egregious conduct on the part of the employer induces the employee to refrain from filing a claim, the employer may be estopped from raising the jurisdictional bar. See *Reinhardt*, 102 N.C. App. 83, 401 S.E.2d 138 (1991).

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

An employee must give written notice of an accident to the employer as soon as practicable, and is not entitled to medical or disability compensation prior to the giving of such notice, unless the employer had knowledge of the accident or the employee could not give notice by reason of physical or mental incapacity, fraud, or deceit on the part of some third person. N.C. Gen. Stat. §97-22. In addition, unless notice is provided within thirty days after the occurrence of an accident, no compensation is payable unless the employee (1) makes a reasonable excuse to the satisfaction of the Industrial Commission for failing to give such notice and (2) the employer is not prejudiced thereby. *Id.* With respect to claims for occupational disease, the same time limitations for reporting apply and commence on the date the employee receives advice from competent medical authority that he or she has an occupational disease. N.C. Gen. Stat. §97-58(b).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

No compensation is payable for an injury proximately caused by the employee's willful intention to injure or kill himself or herself, or another. N.C. Gen. Stat. §97-12(3).

B. Willful misconduct, "horseplay," etc.

Injuries resulting from horseplay initiated and participated in by an employee have not been excluded from the Act. *Bare v. Wayne Poultry Co.*, 70 N.C. App. 88, 318 S.E.2d 534 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). However, some activities are so far removed from the accomplishment of the employer's objectives that the activities do not arise out of and are not in the course of the employment. *Arp v. Parkdale Mills, Inc.*, 356 N.C. 657, 576 S.E.2d 326 (2003) (adopting dissent in 150 N.C. App. 266, 273, 563 S.E.2d 62, 68 (2002)); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

C. Injuries involving drugs and/or alcohol.

No compensation is payable where an employee's injury is proximately caused by intoxication or the influence of any controlled substance under the North Carolina Controlled Substances Act sufficient to cause appreciable impairment to the employee's mental and/or physical faculties, unless such substance was prescribed for the employee or was supplied by the employer. N.C. Gen. Stat. §97-12. "Intoxication" or being "under the influence" may be proven by a blood or other medical test conducted in a manner generally acceptable to the scientific community, and a positive result creates a rebuttable presumption of impairment. *Id.*

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

Attorney's fees and costs may be assessed against a party if the case has been prosecuted or defended without reasonable grounds. N.C. Gen. Stat. §97-88.1. Moreover, a person willfully making a false statement for the purpose of obtaining or denying any benefit or payment is subject to civil penalty and guilty of a misdemeanor. N.C. Gen. Stat. §97-88.2. The Commission may enter "such orders as necessary" to ensure the party does not benefit from the unlawful conduct. *Id.* An agreement between the parties may be set aside upon a showing that there is error in the agreement due to fraud. N.C. Gen. Stat. §97-17. A penalty may also be assessed against any health care provider who fraudulently administers or attempts to collect for inappropriate or unnecessary treatment or services. N.C. Gen. Stat. §97-88.3.

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

Yes. Pursuant to N.C. Gen. Stat. §97-12.1, compensation shall be barred if the employer proves that: (i) at the time of hire or in the course of entering into employment, (ii) at the time of receiving notice of the removal of conditions from a conditional offer of employment, or (iii) during the course of a post-offer medical examination: (1) the employee knowingly and willfully made a false representation as to the employee's physical condition; (2) the employer relied upon one or more false representations by the employee, and the reliance was a substantial factor in the employer's decision to hire the employee; *and* (3) there was a causal connection between false representation by the employee and the injury or occupational disease.

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

Injuries sustained during recreation or other non-work activities paid for or supported by the employer are not compensable where an Employee is not required to participate in the activity by

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his Employer. *Frost v. Salter Path Fire & Rescue*, 361, N.C. 181, 186, 639 S.E.2d 429, 433 (2007) Likewise, injuries sustained by an Employee during activities that are not a function or duty of his employment, not calculated to directly or indirectly further his Employer's business to an appreciable degree, and were only authorized for the optional pleasure and recreation of the employee while off-duty are not compensable. *Id.*

13. Are injuries by co-employees compensable?

Yes.

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

No. When the moving cause of an assault upon an employee by a third person is personal, or the circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack, the injury is not compensable. *Robbins v. Nicholson*, 281 N.C. 234, 237, 188 S.E.2d 350 (1972).

BENEFITS

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

The preferred method of calculating the average weekly wage is to divide the earnings of the employee in the employment in which he or she was working at the time of injury during the 52-week period immediately preceding the injury by 52. N.C. Gen. Stat. §97-2(5) If the employee lost more than seven consecutive calendar days at one or more times during that 52-week period, then the earnings for the remainder of the 52 weeks are divided by the number of weeks remaining after the time so lost has been deducted. *Id.* Certain groups of employees, such as minors and volunteer firemen, merit special consideration. *Id.* Other methods may be employed when the above calculation does not produce a result fair to the parties.

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

Compensation is paid at the rate of two-thirds of the difference between the average weekly wage and the post-injury earning capacity. N.C. Gen. Stat. §§97-29, 97-30. An employee who is totally

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disabled is entitled to at least \$30.00 per week by statute, but there is no minimum compensation rate for an employee who is partially disabled. N.C. Gen. Stat. §§97-29, 97-30. The maximum compensation rate for either total or partial disability is revised annually. N.C. Gen. Stat. §97-29. For injuries occurring in 2023, the maximum compensation rate is \$1,254.00 per week.

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

Where the employee's right to compensation is admitted, the first installment of compensation is due on the fourteenth (14th) day after the employer has written or actual notice of the injury, on which date all compensation then due is to be paid. N.C. Gen. Stat. §97-18(b). The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the Court upon appeal from such an award, becomes due 10 days from the day following the expiration of time for an appeal of the award or the judgment, or after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. N.C. Gen. Stat. §97-18(e). If any payment is not made within 14 days after it "becomes due," 10% must be added to the payment. N.C. Gen. Stat. §97-18(g).

In cases where liability has not been determined, the employer has 30 days to investigate and to make a compensability determination. N.C. Gen. Stat. § 97-18(j).

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

The employee must be out 22 days before recovering benefits for the first 7 days. N.C. Gen. Stat. §97-28.

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

Compensation under an award of the Commission shall continue until the terms of the award are completed. N.C. Gen. Stat. §97-18.1(a). Compensation under an award or agreement for ongoing compensation may be terminated upon: (1) the employee's return to employment for the same or a different employer (and the filing of the appropriate form with the Industrial Commission); (2) approval by the Commission of a compromise settlement agreement or a subsequent agreement for payment of compensation; or (3) approval by the Commission of an application to terminate compensation. N.C. Gen. Stat. §97-18.1(b)(c).

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Payment of temporary total disability compensation is capped at 500 weeks from the date of first disability. N.C. Gen. Stat. 97-29(b). An employee may qualify for extended compensation if, after 425 weeks from the date of first disability, he is able to prove by a preponderance of the evidence that he has sustained a total loss of wage-earning capacity. N.C. Gen. Stat. 97-29(c). An employee's burden for showing a "total loss of wage-earning capacity" under 97-29(c) is the same as the burden showing a "total disability" under 97-29(b). *Sturdivant v. N. Carolina Dep't of Pub. Safety*, 887 S.E.2d 85, 88 (N.C. Ct. App. 2023). However, an employee seeking extended benefits is not entitled to a presumption of total loss of wage-earning capacity based on a prior determination of total disability. *Id.* at 89.

Applications for termination of compensation (Form 24) must be accompanied by documentation supporting a determination that compensable disability has ended, such as the employee has returned to gainful employment for another employer, the employee has been released to return to work full duty without restrictions, or the employee's unjustified refusal to accept suitable employment offered by an employer.

Where compensation benefits are terminated because the employee has returned to light duty work, the employee is entitled to a nine-month "trial return to work" period. N.C. Gen. Stat. §97-32.1. During the trial return to work period the employee has the right to have benefits resumed should the employee's treating physician indicate that the employee's injury prevents the continuation of the trial return to work. N.C. Gen. Stat. §97-32.1. *See also* 04 NCAC 10A.0404 of the Workers' Compensation Rules.

In addition, reinstatement of compensation may be applied for where liability has been established or in admitted claims, and the employee has subsequently been removed from work. N.C. Gen. Stat. § 97-18(k). This does not apply to a request on the grounds of a change of condition.

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

An employee is compensated for total disability during the "healing period." After reaching maximum medical improvement the employee may elect to receive benefits for a permanency rating or for continuing total disability. *Arnold v. Wal-Mart*, 154 N.C. App. 482, 571 S.E.2d 888 (2002). This election does not allow for an employee to recover from both methods simultaneously, but is rather entitled to select the statutory compensation which provides the more favorable remedy. N.C. Gen. Stat. § 97-29. Thus, temporary total disability benefits paid after the end of the healing period (date of maximum medical improvement) may be credited against permanency rating benefits if elected by the employee following a return to work or other termination of temporary total disability benefits.

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

In cases of serious facial or head disfigurement, the Industrial Commission may award compensation not to exceed \$20,000.00. N.C. Gen. Stat. §97-31(21). In cases of serious bodily disfigurement for which no compensation is payable under the schedule of benefits, the Commission may award compensation up to \$10,000.00. N.C. Gen. Stat. §97-31(22). The determination of whether disfigurement is "serious" turns on whether it will affect the employee's future earning capacity. *See Anderson v. Shoney's*, 76 N.C. App. 158, 332 S.E.2d 93 (1985).

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

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

With respect to permanency ratings, an employee is entitled to compensation for total disability as outlined in answer 16 for the number of weeks derived by multiplying the percentage of disability by the applicable number of weeks under the following schedule:

Thumb	75 weeks
First Finger	45 weeks
Second Finger	40 weeks
Third Finger	25 weeks
Fourth Finger	20 weeks
Great Toe	35 weeks
Other Toes	10 weeks
Hand	200 weeks
Arm	240 weeks
Foot	144 weeks
Leg	200 weeks
Eye	120 weeks
Hearing in One Ear	70 weeks
Hearing in Both Ears	150 weeks

In addition, in case of permanent injury, or total loss of, any important organ or part of the body not listed above the Commission may award compensation up to \$20,000.00 N.C. Gen. Stat. §97-31.

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

North Carolina does not recognize ratings for disability of the "whole person."

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

The employer is required to provide medical compensation, including rehabilitative services, reasonably required to effect a cure, give relief, or lessen the period of disability. N.C. Gen. Stat. §§97-25, 97-2(19). Typically, the employer initiates vocational rehabilitation in an effort to decrease potential exposure in cases of continuing wage-loss. Specific guidelines have been instituted regarding an employer's use of vocational rehabilitation specialists. See 04 NCAC 10C.0101 et. Seq. North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims.

Vocational rehabilitation, to include a one-time assessment, will be allowed regardless of whether the employee has reached maximum medical improvement. If the employee is out of work or earning partial wage loss benefits and his post-injury wages are less than 75 percent of his pre-injury wages, the employee may request vocational rehabilitation to include course in the North Carolina community college and university systems. N.C. Gen. Stat. §97-32.2(a). Vocational rehabilitation services may only be terminated by agreement of the parties or by order of the Commission. N.C. Gen. Stat. §97-32.2(e). An employee's refusal to cooperate with vocational rehabilitation services when ordered by the Industrial Commission will result in a bar of further compensation until such refusal ceases. N.C. Gen. Stat. §97-32.2(g).

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

Compensation rates for total disability are computed as outlined in answer 16.

The employee may qualify for permanent total disability benefits if the employee can prove that

one or more of the following limitations must have resulted from the injury: (1) loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof; (2) spinal injury involving severe paralysis of both arms, legs or the trunk; (3) severe brain or closed head injury as evidence by severe and permanent: (a) sensory or motor disturbances, (b) communication disturbances, (c) complex integrated disturbances of cerebral function, or (d) neurological disorders; (4) second degree or third-degree burns to thirty-three percent or more of the total body surface. N.C. Gen. Stat. § 97-29(d).

Permanent total disability entitles the employee to compensation, including medical compensation, during the employee's lifetime, unless the employee shows by a preponderance of the evidence that the employee is capable of returning to suitable employment. Regardless of the employee's work status, however, he is entitled to lifetime medical compensation. *Id.*

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

A. Funeral expenses.

Burial expenses up to \$10,000.00 are payable for compensable death claims. N.C. Gen. Stat. §§97-38, 97-40.

B. Dependency claims.

Generally, death benefits are paid to whole dependents at a rate of compensation for total disability, as calculated in answer 16, for 500 weeks. N.C. Gen. Stat. §97-38. In addition, a spouse who is unable to support himself or herself because of physical or mental disability as of the date of the employee's death is entitled to continuing payments of compensation until death or re-marriage. *Id.* A dependent child is entitled to continuing compensation until the child reaches the age of 18. *Id.* Dependents share the weekly compensation, share and share alike. N.C. Gen. Stat. §§97-38, 97-39.

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

In general, there are two factual patterns that will support such a recovery. First, where an employee has a pre-existing disability of at least 20% of a member of the body and incurs an additional 20% or more disability to the same member as a result of the second injury, the employee is entitled to compensation for the pre-existing disability from the Second Injury Fund. N.C. Gen. Stat. §§97-33, 97-40.1(b)(1). Second, where an employee has a pre-existing loss of a

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hand, arm, foot, leg or eye and a second injury results in permanent total disability, the Second Injury Fund will compensate the employee for permanent total disability, less the employer's contribution for the second injury. N.C. Gen. Stat. §§97-35, 97-40.1(b)(2). Recovery, of course, depends on the availability of funds.

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

Any award or agreement for payment of compensation may be reviewed within two years of the last payment of compensation pursuant to a final award upon the showing of a "change of condition." Replacement checks may constitute payment of compensation and reset the two-year period. *Dominguez v. Francisco Dominguez Masonry, Inc.*, 284 N.C. App. 260, 878 S.E.2d 600 (2022). In cases where only medical or other treatment bills have been paid, however, no review shall be made after 12 months from the date of the last payment of bills for medical or other treatment. N.C. Gen. Stat. §97-47. "Change of condition" refers to a substantial change of the employee's physical capacity to earn wages. *E.g. Swaney v. George Newton Constr. Co.*, 5 N.C. App. 520, 169 S.E.2d 90 (1969).

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

If the employer defends a claim without reasonable ground, the Commission has the discretion to assess reasonable attorney's fees against the employer. N.C. Gen. Stat. §97-88.1. In addition, where an unsuccessful appeal has been brought by an employer, the Commission has the discretion to award the costs of the appeal, including reasonable attorney's fees, to be paid by the employer. N.C. Gen. Stat. §97-88.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The compensation remedy is exclusive. N.C. Gen. Stat. §§97-9, 97-10.1.

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

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The courts have created an exception for intentional acts by the employer, including intentionally engaging in misconduct known to be substantially certain to cause serious injury. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). Co-employees are also protected by the exclusivity provision for negligent acts but may be liable in tort for willful, wanton or reckless acts or omissions. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985).

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

When injury results from the willful failure of the employer to comply with any statutory requirement or any lawful order of the Industrial Commission, compensation is increased by 10%. N.C. Gen. Stat. §97-12.

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

There is no such penalty per se, but a minor who sustains permanent disability or dies leaving dependents is entitled to have the average weekly wage computed based on the weekly wage of an adult employee in a similar or like class of work which the employee would probably have been promoted to if not for the injury. N.C. Gen. Stat. §97-2(5). If that method of computation is not feasible, compensation is to be computed based on the maximum weekly benefit as described in answer 16. *Id.* In addition, compensation for total disability in excess of 52 weeks may be increased to reflect expected earnings. *Id.*

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

Defending a hearing without reasonable grounds may subject the employer or carrier to an assessment of attorney's fees under N.C. Gen. Stat. §97-88.1, as discussed in answer 28. Willful misrepresentations are also punishable as misdemeanors, and restitution may be ordered. N.C. Gen. Stat. §97-88.2. The courts have held that the Workers' Compensation Act is the sole remedy for allegations of fraud, bad faith refusal to pay or settle a valid claim, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy. *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998).

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

No employer may discharge any employee because the employee has instituted a workers' compensation proceeding in good faith, and any employer in violation of this provision may be liable in a civil action for "reasonable damages." N.C. Gen. Stat. §95-240 *et. seq.*

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. N.C. Gen. Stat. §97-10.2.

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

Yes. But see answer 29B.

36. Is subrogation available?

Yes, in accordance with N.C. Gen. Stat. §97-10.2, so long as the employer's negligence did not contribute to the injury. N.C. Gen. Stat. §97-10.2(e).

MEDICALS

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

Within 30 days of the receipt of any statement for medical services, the employer/insurer must pay the statement, submit the statement to the Commission for approval, or send the provider written objections to the statement. 04 NCAC 10J.0101 of the Workers' Compensation Rules. Any bill for medical compensation services not paid within 60 days after it has been approved by the Commission and returned to the responsible party is subject to a 10% penalty, unless late payment is excused by the Commission. N.C. Gen. Stat. §97-18(i). If an insurer disputes any portion of a health provider's bill, it must pay the undisputed portion of the bill while the dispute concerning the balance is being resolved. N.C. Gen. Stat. §97-26(e).

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

An employer has the right to obtain medical information related to the employee's particular injury or disease, reasonably related to the injury or disease, or related to an assessment of the

employee's ability to return to work as a result of the injury or disease. N.C. Gen. Stat. §97-25.6. In a compensable case, authorization from the employee is not necessary to request medical records. In denied claims, the employer must give contemporaneous notice of the request for medical records to the employee.

In addition to requesting medical records, the employer may communicate with a health care provider in writing, with contemporaneous notice to the employee, and ask for information about diagnosis, treatment recommendations, work restrictions, causation issues, permanent impairment, and the kind of work for which the employee might be eligible. The employer may communicate with a health care provider orally if the employer cannot secure information from the medical records or from written communication. The employee must be provided with notice of the intended oral communication and an opportunity to participate in the communication at a mutually agreeable time. N.C. Gen. Stat. §97-25.6. A summary of the oral communication must be provided to the employee within 10 business days.

Employers are also allowed to provide information not contained in the medical records to the providers for comment. The employer must provide a copy of the proposed communication to the employee at least 10-business days in advance of the transmittal to the doctor, and the employee will have the right to object and file a motion to prohibit the communication. Sanctions may be imposed if either party acts unreasonably by initiating or objecting to the communication. N.C. Gen. Stat. §97-25.6.

Claims representatives may still request medical records, bills or other non-substantive information by phone without notifying the employee. N.C. Gen. Stat. §97-25.6.

39. What is the rule on (a) claimant's choice of physician; and (b) employer's right to a second opinion?

An employer has the right to direct treatment. See N.C. Gen. Stat. §§97-25, 97-27. An employee may make a written request to the employer for a second opinion examination. N.C. Gen. Stat. §97-25. The employer can choose whether to authorize the request, suggest an alternate provider or deny the request. Id. If a request for a second opinion is denied, or the parties are unable to reach an agreement regarding the provider, within fourteen days of receipt of the request by the employer, the employee may request that the Industrial Commission order a second opinion examination. Id.

The employer's right to direct medical care is also subject to the employee's right to request a change of treating physician, upon approval by the Industrial Commission. N.C. Gen. Stat. §97-25. The Commission must find by a preponderance of the evidence that the change is reasonably necessary to affect a cure, provide relief or lessen the period of disability. In addition, the

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employee is encouraged to make a request in writing to the employer before he seeks treatment. If the employee fails to seek permission in writing and is evaluated by a doctor without the employer's authorization, the Commission "may" disregard that doctor's opinions.

The employee is also entitled to request a second opinion evaluation, solely on the percentage of permanent disability per N.C. Gen. Stat. §97-31. The employee may select his own doctor to perform the evaluation, but the Commission must disregard or give less weight to the opinions of that physician on issues other than the permanent partial disability rating. N.C. Gen. Stat. §97-27(b).

An employer is also entitled to have plaintiff undergo an independent medical examination (IME) with a provider of his choosing. N.C. Gen. Stat. §97-27. A functional capacity evaluation may also be required. *Richardson v. Goodyear Tire & Rubber Co.*, 2021-NCCOA-234 (N.C. App. 2021).

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

The employer is required to provide "medical compensation," which includes medical, surgical, hospital, nursing and rehabilitative services, and medicines, sick travel and other treatment including medical and surgical supplies, as may reasonably be required to effect a cure, give relief or lessen the period of disability. N.C. Gen. Stat. §§97-25, 97-2(19). The treatment must be "directly related" to the original compensable injury. *See Klutz-Ellison v. Noah's Playloft Preschool*, 283 N.C. App 198, 873 S.E.2d 414 (2022), *review allowed, writ allowed*, 878 S.E.2d 803 (N.C. 2022) (Defendants ordered to pay for bariatric surgery for weight loss to allow knee surgery). Aside from chiropractic care, which is limited to 30 visits without prior written authorization, there are no limitations on the length or frequency of treatment covered by the statutory definition of medical compensation. The right to medical compensation terminates two years after the employer's last payment of medical or disability compensation unless the Commission approves or orders additional medical compensation before the two year period expires. N.C. Gen. Stat. §97-25.1.

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

The employer is to provide any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances. N.C. Gen. Stat. §§97-2(19), 97-25.

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

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Typically, an employer does not have a duty to purchase (or pay to construct) specially modified housing or vehicles for an employee, but is required to modify existing housing or vehicles with those accessories necessary to accommodate the employee's disabilities. See *Timmons v. North Carolina Dept. of Transportation*, 123 N.C. App. 456, 473 S.E.2d 356 (1996). However, an employer must furnish specially modified housing where the employee's existing quarters are not satisfactory and for some exceptional reason structural modification is no practical. See *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986)

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

The Industrial Commission publishes a medical fee schedule. See N.C. Gen. Stat. §97-26(a); Rule 11 NCAC 23J. 0102 - Fees for Professional Services for dates of service after July 1, 2015. For impairment rating guides, See North Carolina Industrial Commission Evaluation of Permanent Physical Impairment and Rating Guide (2016). An employer's obligation to provide medical treatment may be satisfied by entering into an appropriate contract with a managed care organization. N.C. Gen. Stat. §97-25.2. Insurers are required to adopt, file with the North Carolina Industrial Commission, and implement a Utilization Review Plan which provides for mandatory preauthorization for, among others, in-patient admissions to a hospital or treatment center and for in-patient or out-patient surgery. N.C. Gen. Stat. §97-25.3; North Carolina Industrial Commission Utilization Review Rules (1996).

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

The employer/insurer may satisfy its requirement to provide medical compensation through contract with a managed care organization. N.C. Gen. Stat. §97-25.2. The managed care organization may be a preferred provider organization or a health maintenance organization regulated under Chapter 58 of the North Carolina General Statutes. Payment for services rendered by a health care provider to a workers' compensation patient are controlled by contract between the provider and managed care organization, or, if none, by the North Carolina Industrial Commission Medical Fee Schedule. See 04 NCAC 10D.0101 et. Seq. Workers Compensation Rules for Managed Care Organizations. Further, any contract between a managed care organization and an employer/insurer shall contain certain specific provisions and is subject to approval by the North Carolina Industrial Commission. *Id.*

PRACTICE/PROCEDURE

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

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The employer/insurer is required to promptly investigate reported injuries and admit or deny compensation “at the earliest practicable time.” Within 30 days of lost time or the filing of a claim by the employee (i.e. Form 18), the employer/insurer must accept, deny, or initiate payments without prejudice or liability. N.C. Gen. Stat. §97-18(j). The basis for a defense in a subsequent proceeding may be limited to the grounds set forth in that form. N.C. Gen. Stat. §97-18(f). The Commission may order reasonable sanctions against an employer/insurer which does not accept, deny or initiate payments within 30 days, but such sanctions cannot include waiver of any defenses to compensability or liability.

46. What is the method of claim adjudication?

A. Administrative level.

The Commission may set the case for hearing in the county where the injury occurred, or a neighboring county. Cases are tried initially before deputy commissioners of the Industrial Commission, who receive evidence, make findings of fact and conclusions of law, and render awards of compensation as appropriate. N.C. Gen. Stat. §97-84. Either party may then appeal to the full Commission (a body of three commissioners) which may make, delete or amend findings of fact, conclusions of law and awards by de novo review. N.C. Gen. Stat. §97-85.

B. Trial court.

Not applicable.

C. Appellate.

From the full Commission, either party may appeal to the North Carolina Court of Appeals for a review of issues of law. N.C. Gen. Stat. §97-86. From the Court of Appeals, either party may petition for discretionary review by the Supreme Court, and in certain cases the losing party may appeal as a matter of right on questions of law. See N.C. Gen. Stat. §7A-30, 7A-31; N.C. R. App. P. 14, 15.

47. What are the requirements for stipulations or settlements?

Agreements for payment of permanent partial disability compensation, must be submitted to the Commission on approved forms, which contain supporting factual stipulations. N.C. Gen. Stat.

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§97-82. Compromise settlement agreements or “clinchers” for a full and final release of a claim must contain certain required language, including agreement by the parties as to payment of medical expenses. N.C. Gen. Stat. §97-17; 04 NCAC 10A.0502 of the Workers’ Compensation Rules. The parties also must provide a list of all known medical expenses where the employer/insurer has not agreed to pay all medical expenses. N.C. Gen. Stat. §97-17(2)-(3). In addition, the Commission requires that all relevant medical, vocational and rehabilitation reports be submitted. *Id.*

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

Yes, subject to the approval of the Industrial Commission. N.C. Gen. Stat. §97-17.

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

Yes. N.C. Gen. Stat. §§97-17, 97-82.

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 Act must: (1) be insured under the Act in any authorized corporation, association, organization or in any mutual insurance association formed by a group of employers so authorized; or (2) self-insure in accordance with the provisions of the Act. N.C. Gen. Stat. §97-93. Insurance is available through private insurers on either a voluntary or assigned risk basis.

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

A. For individual entities.

In order to self-insure, an employer must furnish to the Commissioner of Insurance satisfactory proof of the employer's financial ability to directly pay compensation allowed by the Act. N.C. Gen. Stat. §97-170. The Commissioner of Insurance may require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation obligations as they are incurred. N.C. Gen. Stat. §97-170(e)

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

Groups of two or more employers may self-insure as a pool. The requirements are essentially the same as those for individual self-insureds.

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

Yes. The North Carolina Workers' Compensation Act includes aliens in the definition of "employee". N. C. Gen. Stat. § 97-2(2).

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

There is no specific exclusion for injuries as a result of terrorist acts, however, a compensable injury must arise out of the employment. An injury does not arise out of the employment if the employment did not subject the employee to a special hazard or greater risk of the particular injury than that to which he or she would otherwise be exposed simply as a member of the public at large. *See Pope v. Goodson*, 249 N.C. 690, 107 S.E.2d 524 (1959)(lighting strike); *Minter v. Osborne Co.*, 127 N.C. App. 134, 487 S.E.2d 835 (1997), *cert. denied*, 347 N.C. 401, 494 S.E.2d 415 (1997)(insect sting).

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?

No, there are no state specific requirements. Consult your ALFA lawyer if there are questions about ensuring a settlement agreement complies with the Medicare Secondary Payer Act.

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

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party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b).

If the employee receives assistance in the form of Medicaid benefits, the North Carolina Department of Human Resources is entitled to recover the amounts paid. N.C. Gen. Stat. §108A-57. If the lien is not protected, the Department can make a direct claim against the employee or the employer. *Malloy v. Durham Cty. Dep't of Social Services*, 58 N.C. App. 61, 293 S.E.2d 285 (1982).

A health insurer that covers an employee under a State regulated plan may only recover reimbursement for medical payments made on the employee's behalf upon the admission or adjudication that a claim is compensable. N.C. Gen. Stat. §97-90.1 (2002). However, self-funded plans established, maintained and operated under the Employee Retirement Income Security Act (ERISA) of 1974 may include a provision for reimbursement of benefits of injured workers that would preempt North Carolina law.

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

HIPAA, 45 C.F.R. parts 160-164 and 65 C.F.R. 82462, provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. [45 C.F.R. 164.512(l)] Therefore, your current practice of obtaining medical records could proceed under state law.

Subject to any Federal provision, in North Carolina medical reports are not privileged in any workers' compensation case with respect to a claim pending for hearing before the Industrial Commission. See N.C. Gen. Stat. §97-27 (a).

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

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As defined by the North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-2(2), an injured person can recover workers' compensation benefits only if he is an "employee" of the one from whom he seeks compensation at the time of his injury. An "independent contractor" is "one who exercises an independent employment and contracts to do certain work without being subject to his employer except as to the result of his work." *Hicks v. Guilford Co.*, 267 N.C. 364, 148 S.E.2d 240 (1966). The North Carolina Supreme Court has established eight factors to consider in determining whether a worker is an employee or an independent contractor, and an independent contractor (1) is engaged in an independent business, calling, or occupation; (2) is to have the independent use of his or her skill, knowledge, or training in the execution of the work; (3) is doing a specific piece of work at a fixed price, or for a lump sum or upon a quantitative basis; (4) is not subject to discharge because he or she adopts one method of doing the work rather than another; (5) is not in the regular employ of the other contracting party; (6) is free to use such assistants as he or she thinks proper; (7) has full control over such assistants; and (8) selects his or her own time. *Hayes v. Board of Trustees*, 224 N.C. 11, 29 S.E.2d 137 (1944). The presence of no one of these indicia is controlling, nor is the presence of all required, but the dominant factor is whether the employer has authority to control how the person hired accomplishes the task to be done. *Id.*; *Youngblood v. North State Food Truck Sales*, 87 N.C. App. 35, 359 S.E.2d 256 (1987)

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

No.

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

Yes. Motor carriers who contract with independent contractors are liable to the independent contractor and his employees unless insurance has been secured by the independent contractor. See N.C. Gen. Stat. § 97-19.1.

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

No. There are no specific provisions in the North Carolina Workers' Compensation laws for medical marijuana. See Answer to Question 9(c).

61. 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. There are no specific provisions in the North Carolina Workers' Compensation laws for recreational marijuana use. See Answer to Question 9(c).

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