

West Virginia

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

W. Va. Code § 23-1-1 et seq.

SCOPE OF COMPENSABILITY

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

"Employees" for the purposes of workers' compensation are defined as "all persons in the service of employers and employed by them for the purpose of carrying on the industry, business, service or work in which they are engaged . . .," except those that meet the definition of independent contractor established in W. Va. Code 23-5I-4. W. Va. Code § 23-2-1a(a). As the quoted language indicates, "employee" is very broadly defined. Notably, the right to receive workers' compensation is not affected by the fact that a minor was or is employed in violation of state laws regarding the employment of minors, even where the minor obtained employment by misrepresenting his or her age. W. Va. Code § 23-2-1a(b).

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

Employers within the meaning of West Virginia's workers' compensation statute include "all persons, firms, associations and corporations regularly employing another person or persons" for the purpose of conducting any form of industry, service or business in the state. W. Va. Code § 23-2-1(a). As with the term "employee," "employer" is broadly defined. The state of West Virginia, state governmental agencies, volunteer fire departments or companies, and certain emergency service organizations are specifically deemed to be employers. *Id.*

Certain employers are not required to maintain workers' compensation insurance for their employees but may elect to do so. W. Va. Code § 23-2-1(b). These exempt employers include:

- A. Employers of employees engaged in domestic services.
- B. Employers of five or fewer full-time employees engaged in agricultural service.
- C. Employers of employees while the employees are employed out of state unless such out of state employment is temporary.
- D. Churches.

- E. Casual employers, meaning an employer who employs no more than three persons on a temporary, sporadic and intermittent basis for no longer than ten calendar days in any calendar quarter.
- F. Employers engaged in organized professional sports activities, including employers of trainers and jockeys engaged in thoroughbred horse racing; however, any employees who do not participate in sports activities must be covered by workers' compensation insurance. For example, a driver who transports equipment, but who does not participate in any sports activities, would have to be covered.
- G. Volunteer rescue squads or volunteer police auxiliary units organized under the auspices of the government, or volunteer organizations created or sponsored by government entities or an area or regional emergency medical service board of directors in furtherance of the purposes of the Emergency Medical Services Act (W. Va. Code § 16-4C-1 *et seq.*). However, any paid employees of these volunteer organizations must be covered by workers' compensation insurance.
- H. Any employer whose employees are eligible to receive benefits under the federal Longshore and Harbor Workers' Compensation Act, but only with respect to such employees.
- I. Taxicab drivers of taxicab companies operating under W. Va. Code § 24A-2-1 *et seq.*, who provide taxicab services pursuant to a written or electronic agreement that identifies the driver as an independent contractor consistent with the requirements of the U.S. Internal Revenue Code.

W. Va. Code § 23-2-1(b)(1)-(9); W. Va. Code St. R. §§ 85-8-4.3.a-g.

The definitions of "domestic services," "temporary," or "temporary, intermittent and sporadic" are set forth in Title 85, Series 8 of the West Virginia Code of State Rules. "Domestic services" are services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. W. Va. Code St. R. § 85-8-3.3. Such services generally include the services performed by cooks, butlers, maids, housekeepers, baby-sitters, care givers, medical providers, handymen, gardeners, and the like. *Id.* at § 85-8-3.3.1 "Temporary" employment, as used in the context of temporary employment outside the state, means a period not exceeding thirty calendar days within any 365-day period. *Id.* at § 85-8-3.17. Finally, "temporary, intermittent and sporadic" employment means a period not exceeding ten working days in any ninety-day period. *Id.* at § 85-8-3.19.

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

A. Traumatic or "single occurrence" claims.

Injuries sustained "in the course of" and "resulting from" covered employment are compensable. W. Va. Code § 23-4-1(a). All three elements must be present or the claim is not compensable. *Barnett v. State Workmen's Compensation Commissioner*, 172 S.E.2d 63 (W. Va. 1996). For example, if an employee sustains an injury in the course of employment, but not as a result of that employment, the claim would not be compensable.

Generally, an employee must establish by positive evidence, or by evidence from which the inference can fairly and reasonably be drawn, that he or she sustained an injury in the course of and resulting from his or her covered employment. *Emmel v. State Workers' Compensation Director*, 145 S.E.2d 29 (W. Va. 1965); *Deverick v. State Workmen's Compensation Director*, 144 S.E.2d 498 (W. Va. 1964); *Hayes v. State Workmen's Compensation Director*, 140 S.E.2d 443 (W. Va. 1963).

Pursuant to W. Va. Code § 23-4-1g(a), the resolution of any issue, including compensability of a claim, must be based on a weighing of the evidence and a finding that a preponderance of the evidence supports the particular resolution of that issue. The process of weighing the evidence includes, without limitation, assessing the reliability, relevance, materiality, and credibility of the evidence in the context of the issue presented. *Id.* Where the evidence on opposing sides of an issue is found to be equal in weight, the resolution most consistent with the employee's position is adopted. *Id.* Except in this limited circumstance, all claims for compensation must be decided according to their merit and not according to any principle of law requiring the liberal construction or application of workers' compensation legislation. W. Va. Code § 23-4-1g(b).

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

As with traumatic or single occurrence claims, occupational diseases that are sustained "in the course of" and "resulting from" covered employment are compensable. W. Va. Code §§ 23-4-1(a) and (b). Occupational disease claims may be filed for occupational hearing loss, repetitive motion conditions, and "each new occupational disease as medical science verifies it and establishes it as such. . ." *Powell v. State Workmen's Compensation Commissioner*, 273 S.E.2d 832 (W. Va. 1980).

No employee, however, may receive compensation for an "ordinary disease of life to which the general public is exposed outside of employment . . . except when it follows as an incident of an occupational disease . . ." W. Va. Code § 23-4-1(f).

Pursuant to W. Va. Code § 23-4-1(f), an occupational disease, excluding occupational pneumoconiosis, occurs in the course of and as a result of covered employment, where it appears to the "rational mind," based upon consideration of all the circumstances, that:

- (1) There is a direct causal connection between work conditions and the occupational disease;
- (2) The disease can be seen to have followed as a natural incident of work as a result of the exposure occasioned by the nature of the employment;
- (3) The employment is the proximate cause of the disease;
- (4) The disease did not result from a hazard to which the employee is equally exposed outside of employment;
- (5) The disease is incidental to the character of the employment, and not independent of the employer-employee relationship; and
- (6) The disease appears to have originated from a risk connected with employment and to have flowed as a natural consequence from that risk.

A claim for occupational pneumoconiosis must satisfy the nonmedical criteria in order to be accepted. The nonmedical criteria consist of the following:

- (1) The claimant must have been exposed to minute particles of dust in abnormal quantities for a continuous period of at least sixty days while in the employ of the employer against whom the claim is asserted;
- (2) The claim must be filed within three years from the last day of a continuous period of sixty days' exposure to the hazards of occupational pneumoconiosis or within three years from the date the claimant was advised by a physician of a diagnosed impairment due to occupational pneumoconiosis, whichever is later;
- (3) The claimant must have been exposed to the hazards of occupational pneumoconiosis in West Virginia for a continuous period of at least two years during the ten years immediately preceding the date of last exposure, or for any five of the fifteen years immediately preceding the date of last exposure; and
- (4) Whether the claimant has been exposed to the hazards of occupational pneumoconiosis for a period of at least ten years during the fifteen years preceding the date of last exposure and whether the claimant has sustained a chronic respiratory disability, in which event the claimant will be entitled to a rebuttable presumption that he or she is suffering from occupational pneumoconiosis.

W. Va. Code §§ 23-4-1(b); 23-4-8c(b); 23-4-15(b); and 23-4-15b.

Occupational pneumoconiosis is defined as a lung disease “caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of employment.” W. Va. Code § 23-4-1(d). It includes, but is not limited to, silicosis, anthracosilicosis, coal workers' pneumoconiosis, silico-tuberculosis, asbestosis, siderosis, anthrax, and any and all other dust diseases of the lungs. *Id.*

Once an occupational pneumoconiosis claim is accepted on a nonmedical basis, the claimant is referred to the Occupational Pneumoconiosis Board (a panel of physicians specializing in occupational lung disease) for a medical diagnosis of occupational pneumoconiosis and a determination of the extent, if any, of the claimant's impairment. W. Va. Code §§ 23-4-8b and 23-4-8c.

The evidentiary standard and burden of proof in occupational disease and occupational pneumoconiosis claims are the same as the standard and proof required in occupational injury claims. W. Va. Code § 23-4-1g; see also answer to No. 4A.

Professional firefighters may be entitled to a rebuttable presumption of certain diseases presumed to be occupational diseases. See W. Va Code § 23-4-1(h).

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

Claims involving injuries or diseases not sustained “in the course of,” or “resulting from” employment, or both, are not compensable. See answer to No. 4. A pre-existing condition is not considered a compensable component of a workers' compensation claim merely because the pre-existing condition may have been aggravated by a compensable injury. Syl. Pt. 3, *Gill v. City*

of *Charleston*, 783 S.E.2d 857 (W. Va. 2016). Instead, the aggravation of a noncompensable pre-existing condition is compensable if it results in a discrete new injury. *Id.* In certain circumstances, there is a rebuttable presumption that a preexisting disease or condition is compensable. Syl. Pt. 5, *Moore v. ICG Tygart Valley, LLC*, 879 S.E.2d 779 (W. Va. 2022). Additionally, claims involving psychiatric conditions, without associated physical injuries, are excluded. W. Va. Code § 23-4-1f; *Bias v. Eastern Associated Coal Corporation*, 640 S.E.2d 540 (W. Va. 2006); see also *State ex rel. Darling v. McGraw*, 647 S.E.2d 758 (W. Va. 2007); see also answer to No. 6. Finally, self-inflicted injuries, or injuries caused by the employee's willful misconduct (provided such misconduct resulted in a self-inflicted or intentional injury), horseplay or intoxication are not compensable. W. Va. Code § 23-4-2(a); see also answer to No. 9.

6. What psychiatric claims or treatments are compensable and is PTSD a compensable diagnosis?

Generally, only psychiatric claims that are accompanied or caused by a compensable physical injury are compensable. W. Va. Code § 23-4-1f. Consequently, so-called “mental-mental” claims are not compensable. *Bias v. Eastern Associated Coal Corporation*, 640 S.E.2d 540 (W. Va. 2006); see also *State ex rel. Darling v. McGraw*, 647 S.E.2d 758 (W. Va. 2007). In other words, any alleged psychiatric condition caused solely by nonphysical means and which does not result in physical injury or disease is not compensable. *Id.*

In recognition of its unique status, PTSD suffered by “first responders” may be a compensable occupational disease even without an accompanying physical injury if: (1) the employer elected to carry specific coverage for PTSD; (2) the diagnosis of PTSD is made by a licensed psychiatrist, certified mental health nurse practitioner or certified psychiatric assistant; (3) the diagnosis is that the claimant suffered from PTSD due to exposure to an event or events that occurred in the course of and resulting from the first responder's paid or volunteered covered employment; and (4) the diagnosis was made after July 1, 2021. The claimant has three years from the date of being diagnosed with PTSD to file a claim for this disease.

If the psychiatric condition is otherwise compensable, most forms of psychiatric treatment will be authorized, provided the treatment is reasonably required. W. Va. Code § 23-4-3(a)(1). In certain cases, treatment for psychiatric conditions not causally related to a compensable injury or disease may be authorized for a limited period of time to maximize recovery from the compensable injury or disease. W. Va. Code St. R. § 85-20-12.6. The treatment, compensability, and evaluation of psychiatric conditions is governed further by the provisions of W. Va. Code St. R. § 85-20-12. However, the requirement of § 85-20-12.2.a that a psychiatric diagnosis be made within six months of a work-related injury, or a significant complication thereof, in order to be ruled compensable is invalid. *Bowers v. W. Va. Office of the Ins. Comm'r*, 686 S.E.2d 49 (W. Va. 2009). The requirement of § 85-20-12.5.a that a claimant must obtain prior authorization of an initial psychiatric consultation is also invalid. Syl. Pt. 1, *Hale v. W. Va. Office of the Ins. Comm'r*, 724 S.E.2d 752 (W. Va. 2012). In addition, a claimant must follow a specific three-step process when attempting to add a psychiatric condition as a compensable component of his or her workers' compensation claim. *Id.* at Syl. Pt. 2. This three-step process consists of the following: (1) the claimant's treating physician refers the claimant to a psychiatrist for an initial consultation; (2) following the initial psychiatric consultation, the psychiatrist is to make a detailed report consistent with the procedure described in West Virginia Code of State Rules § 85-20-12.4; and (3) the claims administrator, aided by the psychiatrist's report,

is to determine whether the psychiatric condition should be added as a compensable injury in the claim. *Hale, supra* at Syl. Pt. 2; W. Va. Code St. R. § 85-20-12.4.

In recognition of its unique status, PTSD suffered by “first responders” may be a compensable occupational disease even without an accompanying physical injury if: (1) the employer elected to carry specific coverage for PTSD; (2) the diagnosis of PTSD is made by a licensed psychiatrist, certified mental health nurse practitioner or certified psychiatric physician assistant; (3) the diagnosis is that the claimant suffered from PTSD due to exposure to an event or events that occurred in the course of and resulting from the first responder’s paid or volunteered covered employment; and (4) the diagnosis was made after July 1, 2021. The claimant has three years from the date of being diagnosed with PTSD to file a claim for this disease.

7. What are the applicable statutes of limitations?

The statute of limitations varies depending on whether the claim is for an occupational injury, an occupational disease, or occupational pneumoconiosis.

For occupational injury claims, including claims for dependent’s benefits, the statute of limitations is six months from the date of injury or death, whichever is applicable. W. Va. Code § 23-4-15(a). Despite this statute of limitations being jurisdictional (meaning the failure to file timely “forever bar[s]” the claimant’s right to compensation), the West Virginia Supreme Court of Appeals carved out an exception to the statute of limitations that applies in a limited context. This exception, as declared by the Court, applies where the claimant in a dependent’s death benefits claim based on a traumatic injury “delays filing a claim because the claimant was unaware, and could not have learned through reasonable diligence, that the decedent’s cause of death was work related, and the delay was due to the medical examiner completing and making available an autopsy report . . .” Syl. Pt. 5, *Sheena H. v. Amfire, LLC*, 772 S.E.2d 317 (W. Va. 2015). Under these circumstances, the six-month deadline for filing a dependent’s benefits claim is “tolled until the claimant, through reasonable diligence, could have learned of the autopsy report finding that the decedent’s death was, in any material degree, contributed to by an injury or disease that arose in the course of and resulting from the decedent’s employment.” *Id.* According to the Court, its decision to create an exception to the statute of limitations of W. Va. Code § 23-4-15(a) is a “narrow ruling” that applies only to death benefit claims. *Id.* at 323 n.4. The ruling also only applies where the delay in filing was attributable to a delay in the medical examiner providing the autopsy report. *Id.* at 323.

For occupational disease claims, other than occupational pneumoconiosis, an application for benefits must be filed within the later of: (a) three years from the last day the employee was exposed to the occupational hazard; or (b) the date the employee’s occupational disease was made known to him or her by a physician, or the date the employee reasonably should have known of the existence of the occupational disease, whichever occurs earlier. W. Va. Code § 23-4-15(c); *Holdren v. Workers’ Compensation Commissioner*, 382 S.E.2d 531 (W. Va. 1989). In the case of death due to occupational disease, the application for benefits must be filed within one year from the employee’s death. W. Va. Code § 23-4-15(c). As a practical matter, occupational disease claims generally are not burdened by the statute of limitations because of testimony by the claimant that he or she did not know of the condition and was not told of the condition by a physician until a time that is within the three-year limitations period.

For occupational pneumoconiosis claims, an application for benefits must be filed within three years from the last day of a continuous period of at least 60 days during which the employee was exposed to the hazards of occupational pneumoconiosis, or within three years from when a diagnosed impairment due to occupational pneumoconiosis was made known to the employee by a physician. W. Va. Code § 23-4-15(b); Syl. Pt. 1, *Pennington v. W. Va. Ins. Comm’r*, 820 S.E.2d 626 (W. Va. 2018). In the case of death due to occupational pneumoconiosis, the application for benefits must be filed within two years from the employee’s death. W. Va. Code § 23-4-15(b).

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

An employee who sustains an occupational injury must immediately, or as soon as practical, give or cause to be given written notice to the employer. A copy of the notice must also be given to the employer’s third-party administrator and/or insurance carrier, or if the claim involves the state Old Fund, the Insurance Commissioner. See W. Va. Code § 23-4-1a. Notice given within two working days of an injury is deemed to be immediate notice. W. Va. Code St. R. § 85-1-3.1. The failure to give immediate notice of an injury weighs against a finding of compensability, and dilutes the credibility and reliability of the claim, although such failure may not be the only reason for denying a claim. *Id.* This rule has been interpreted by the Insurance Commissioner as being limited to traumatic injury claims, and as such, is not applicable to occupational disease or occupational pneumoconiosis claims.

The written notice must include: the name and address of the employer; the name and address of the employee; the time, place, nature and cause of the injury; and whether temporary total disability has resulted from the injury. W. Va. Code § 23-4-1a. Examples of forms for reporting injuries or diseases which incorporate these requirements, and which have been approved for general use by the Insurance Commissioner, are available on the Insurance Commissioner’s website, www.wvinsurance.gov. The forms may be modified by a claims administrator with regard to trade dress and other related information, such as name and mailing address. However, a claims administrator may not modify, add or remove information fields from the forms without prior approval of the Insurance Commissioner. The written notice to the employer must be given personally by the employee or sent by certified mail. *Id.* This requirement is rarely observed in practice. The written notice to the employer’s administrator or insurance carrier may be sent by regular mail. *Id.*

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Claims involving self-inflicted injuries are not compensable. W. Va. Code § 23-4-2(a). Nonetheless, an employee’s suicide is compensable and dependent’s benefits are payable for such suicide if: (1) the employee sustained an injury or disease arising out of the course of and result of covered employment; (2) without that injury or disease the employee would not have developed a mental disorder that impairs his or her rational judgment; and (3) without that mental disorder the employee would not have committed suicide. Syl. Pt. 1, *Hall v. State Workmen’s Compensation Commissioner*, 303 S.E.2d 726 (W. Va. 1983).

B. Willful misconduct, “horseplay,” etc.

Willful misconduct or disobedience of a statute or rule legally promulgated for an employee’s protection will bar recovery for that employee if his injury is strictly a result of his misconduct or disobedience. See *Chiericozzi v. Compensation Commissioner*, 19 S.E.2d 590 (W. Va. 1942). Before an employee’s violation can work to bar compensation, however, it must be shown that the employee’s misconduct or disobedience resulted in a self-inflicted or intentional injury. See *Roberts v. Consolidated Coal Co.*, 539 S.E.2d (W. Va. 2000). Compensation is not barred if the employer acquiesces in the conduct. *Chiericozzi*, 19 S.E.2d 590. Moreover, bad judgment and negligence is not willful misconduct. *Thompson*, 54 S.E.2d 13.

An employee who is injured as a result of “horseplay” or a quarrel which is a purely personal matter and unrelated to covered employment does not sustain an injury as a result of employment and is not entitled to workers’ compensation benefits. *Claytor v. State Compensation Commissioner*, 106 S.E.2d 920 (W. Va. 1959), overruled on other grounds by, *Geeslin v. Workmen’s Compensation Commissioner*, 294 S.E.2d 150 (W. Va. 1982). However, an employee who is the innocent victim of the horseplay of other workers and is thus injured during the course of employment is entitled to workers’ compensation benefits for the injury. *Sizemore v. State Workmen’s Compensation Commissioner*, 435 S.E.2d 473 (W. Va. 1977).

If an altercation “arises out of the employment, the fact that claimant was the aggressor does not, standing alone, bar compensation under the West Virginia Workers’ Compensation Act . . . for injuries sustained in the altercation.” Syl. Pt. 1, *Geeslin v. Workmen’s Comp. Commissioner*, 170 W. Va. 347, 294 S.E.2d 150 (1982).

C. Injuries involving drugs and/or alcohol.

If an employee's injury was caused by his or her intoxication, the employee is not entitled to receive any benefits. W. Va. Code § 23-4-2(a). "Intoxication" is not specifically defined by statute or regulation, although in certain circumstances an employee may be presumed to be intoxicated. Intoxication also is not expressly limited to drugs or alcohol. Thus, one could argue that an employee is not entitled to compensation where the employee's injury resulted from ingestion of any substance that results in "intoxication."

Pursuant to W. Va. Code § 23-4-2(a), two circumstances will give rise to a presumption that an employee was intoxicated and that the employee's injury was caused by intoxication: (1) where a blood test is administered within two hours of the injury and the test shows more than five hundredths of one percent, by weight, of blood alcohol content; or (2) where, at the time of blood test, there is evidence of on or off the job use of non-prescribed controlled substances. *Id.*

Under the Workers' Compensation Act, an employer may require an employee to undergo a blood test after an injury for the purposes of determining whether the employee is intoxicated, as long as the employer has a reasonable and objective good faith suspicion of the employee's intoxication. *Id.*

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

Pursuant to W. Va. Code § 61-3-24f(1), any person who fraudulently obtains, or attempts to obtain, workers' compensation benefits to which he or she is not entitled, or greater than he or she is entitled, or for a period longer than he or she is entitled, is guilty of felony larceny if the amount in question is \$1,000 or more, and guilty of misdemeanor larceny if the amount is less than \$1,000. *Id.* A person convicted of a felony shall be confined in a state penitentiary for one to ten years, or confined in a county or regional jail for not longer than one year and fined up to \$2,500. *Id.* A person convicted of a misdemeanor, shall be confined in a county or regional jail for not longer than one year or fined up to \$2,500, or both. *Id.*

W. Va. Code §§ 61-3-24f(2) and 61-3-24e(5) make it a felony for any person to knowingly and willfully make false reports or statements under oath, affidavit, certification, or by any other means regarding information required to be provided under the workers' compensation statutes in a workers' compensation matter. The penalty for this offense is one to three years imprisonment and/or fines of \$1,000 to \$10,000. *Id.*

Any person convicted under the provisions of W. Va. Code §§ 61-3-24f or 61-3-24e(5) shall also be required to make full restitution of all monies paid, regardless of whether the person was convicted of a felony or misdemeanor. W. Va. Code §§ 61-3-24f(3) and 61-3-24e(5). Moreover, where the person convicted is an employee receiving workers' compensation, the employee shall, from and after conviction, cease to receive such compensation for "any alleged injury or disease." W. Va. Code § 61-3-24f(4). Where the person convicted is a responsible person of an employer, the person or entity also shall forfeit any property that constitutes, or is directly or indirectly derived from, proceeds of the offense. W. Va. Code § 61-3-24e(6)(A).

In addition to the above, there are numerous other criminal penalties defined by statute. These penalties apply to employers, responsible persons of employers, health care providers,

employees, and other persons. It is beyond the scope of this document to describe them all. For further information, see W. Va. Code §§ 61-2-24e, 61-3-24g, and 61-3-24h.

On the administrative side, the workers' compensation insurance provider, whether it be the Insurance Commissioner, a self-insured employer, or an insurance company, may set aside, amend, or correct any decision it made which is discovered to be the result of fraud. W. Va. Code § 23-5-1a(e). This corrective action can be taken at any time, regardless of whether the order may otherwise be considered final. *Id.*

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

Yes. See answer to No. 10.

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

There are no specific statutory provisions with respect to this area of law. As stated above, an injury is compensable if it is sustained "in the course of" and "resulting from" employment. Generally, recreational and social activities are deemed to be in the course of employment when the employer derives a substantial and direct benefit from the activity. However, the employer's benefit must be something more than the intangible value of improving the health and morale of one's employees. See *Emmel v. State Workmen's Compensation Director*, 145 S.E.2d 29 (W. Va. 1965).

13. Are injuries by co-employees compensable?

Yes, if they are sustained "in the course of" and "resulting from" covered employment.

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

Yes, provided that the employee establishes that he or she sustained the injury "in the course of" and "resulting from" covered employment.

BENEFITS

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

The average weekly wage is the daily rate of pay at the time of the injury or the weekly average of the employee's best quarter of wages out of the preceding four quarters of wages, whichever is greater. W. Va. Code § 23-4-14(b)(2). However, for purposes of determining temporary total disability benefits payable to part-time employees, the average weekly wage is generally based upon the best average weekly gross pay received during the best quarter of wages in the preceding four quarters of wages. W. Va. Code § 23-4-6d(b). Part-time employees are those employees who are customarily and regularly employed twenty-five hours or less per week, and are classified as part-time by the employer. W. Va. Code § 23-4-6d(a).

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

The maximum weekly rate for temporary total disability benefits is 66⅔% of the average weekly wage earnings at the date of the injury, not to exceed the state average weekly wage. W. Va.

Code § 23-4-6(b). The minimum weekly benefit may not be less than 33⅓% of the state average weekly wage, except in the case of part time employees or temporary partial rehabilitation benefits. *Id.* Under no circumstances may the minimum weekly benefit rate exceed the level of benefits determined by using the applicable federal minimum wage. *Id.*

The Insurance Commissioner publishes a chart of the maximum and minimum benefit rates on its website, www.wvinsurance.gov.

Aggregate awards of temporary total disability benefits resulting from a single injury may not exceed 104 weeks. W. Va. Code § 23-4-6(c).

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

Upon finding the claim compensable, a self-insured employer must immediately pay the amounts due the employee for temporary total disability benefits. W. Va. Code § 23-4-1c(g). In any event, payment of temporary total disability benefits by any claims administrator must begin no later than fifteen working days from receipt of the employee's or employer's report of injury, whichever is received sooner, and a proper physician's report or any other information necessary for determining whether an injury will result in disability exceeding three days. See W. Va. Code § 23-4-1c(b). Notwithstanding the above temporary total disability benefits may be immediately paid where it appears from the employer's report of injury or proper medical evidence that the injury will result in disability greater than three days. *Id.*

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 unable to work due to the compensable injury for more than seven consecutive calendar days before recovering benefits for the first three days. W. Va. Code § 23-4-5; W. Va. Code St. R. § 85-1-5.1. In order to qualify for temporary total disability benefits, the employee must be unable to work due to the compensability injury for three consecutive calendar days. *Id.*

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

Temporary total disability benefits are suspended when: (1) the physician selected by the workers' compensation provider finds that the employee has reached maximum degree of improvement; (2) the authorized treating physician finds that the employee has reached maximum degree of improvement, or that the employee is ready for a permanent disability evaluation and the treating physician has not made a recommendation regarding permanent disability; (3) the evidence otherwise justifies a finding that the employee has reached maximum degree of improvement; or (4) the evidence justifies a finding that the employee has engaged, or is engaging, in abuse including, but not limited to, physical activities inconsistent with the compensable injury. W. Va. Code § 23-4-7a(e). When benefits are suspended for any of these reasons, the employee is permitted a reasonable period of time (usually 30 days) to submit evidence justifying the continued payment of temporary total disability benefits. *Id.* If no evidence is submitted or the evidence that is submitted is insufficient, a protestable order is entered closing the claim for temporary total disability benefits.

Temporary total disability benefits terminate when: (1) the claimant returns to work; or (2) the authorized treating physician concludes that the claimant has reached his or her maximum degree of improvement and recommends a permanent partial disability award of fifteen percent or less. W. Va. Code §§ 23-4-7a(c) and 23-4-7a(e). Under these circumstances, the suspension procedure described above is not applicable. Benefits cease immediately upon the occurrence of either of these events.

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

No.

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

If disfigurement causes permanent disability less than total disability, permanent partial disability benefits are available. The method for calculating these benefits is explained below in the answer to No. 22. Disfigurement is not taken into consideration in awarding permanent total disability benefits, except to the extent that it affects the claimant's ability to engage in substantial gainful activity requiring skills that can be acquired or skills which are comparable to those of any gainful activity in which the claimant has engaged with some regularity over a substantial period of time. See W. Va. Code § 23-4-6(n)(2).

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

Permanent partial disability benefits are calculated by first determining the percentage of disability to total disability. W. Va. Code § 23-4-6(e)(1). Each percent of disability is generally equal to four weeks of benefits. *Id.* However, if the claimant is released by the authorized treating physician to return to the pre-injury job without restrictions, but the employer does not offer the pre-injury job or a comparable job when a position is available, each percent of disability equals six weeks of benefits. *Id.* at § 23-4-6(e)(2). The maximum benefit rate for permanent partial disability awards is 66⅔% of the average weekly wage earnings at the date of the injury, not to exceed 70% of the state average weekly wage. *Id.* at § 23-4-6(e)(1). The minimum weekly benefit is the same as the minimum rate for temporary total disability. *Id.*

The Insurance Commissioner publishes a chart of the maximum and minimum benefit rates on its website, www.wvinsurance.gov.

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

W. Va. Code § 23-4-6(f) sets forth a table which provides the percentage of disability for injuries resulting in the total loss by severance of any of the members named therein. For example, the loss of a thumb is considered to be 20% disability. In addition, the loss of both eyes or the sight thereof, the loss of both hands or the use thereof, the loss of both feet or the use thereof, and the loss of one hand and one foot or the use thereof are conclusively presumed to be permanent total disabilities. W. Va. Code § 23-4-6(m).

B. Number of weeks for “whole person” and standard for recovery.

The Workers’ Compensation regulations require the use of the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition in determining whole-person impairment for most injuries. W. Va. Code St. R. § 85-20-65.1. The *AMA Guides* do not apply to disability resulting from occupational pneumoconiosis, occupational hearing loss, psychiatric conditions, or claims involving the provisions of W. Va. Code § 23-4-6(f) (relating to loss of certain body parts) or W. Va. Code § 23-4-6(m) (relating to certain injuries conclusively presumed to be permanent total disabilities). W. Va. Code St. R. § 85-20-67. The Workers’ Compensation Act equates the terms whole-person impairment and permanent disability. W. Va. Code § 23-4-6(i). Generally, each percent of disability equals four weeks of benefits. *Id.* at § 23-4-6(e)(1). If, however, the claimant is released by the treating physician to return to the pre-injury job without any restrictions, but the employer does not offer the pre-injury job or a comparable job when a position is available, each percent of disability equals six weeks of benefits. *Id.* at § 23-4-6(e)(2); *Janet L. Richardson v. Speedway, LLC*, No. 14-0106 (W. Va. Mar. 27, 2015) (unpublished Memorandum Decision).

The evaluation and rating of permanent partial disability resulting from lumbar, thoracic, and cervical spine injuries is further subject to the ranges of permanent partial disability set forth in Tables 85-20-C, 85-20-D, and 85-20-E of Title 85, Series 20 of the Workers’ Compensation Rules. W. Va. Code St. R. § 85-20-64.1-64.4; *Simpson v. W. Va. Office of the Ins. Comm’r*, 678 S.E.2d 1 (W. Va. 2009). Additionally, awards for permanent partial disability due to carpal tunnel syndrome are capped at six percent for each injured hand. W. Va. Code St. R. § 85-20-64.5. However, the Supreme Court of Appeals of West Virginia has held that the impairment cap for carpal tunnel syndrome in W. Va. Code § 85-20-64.5 is invalid and cannot be applied to carpal tunnel impairment ratings assessed under Table 16 of the *AMA Guides*. *Syl. Pt. 3, Davies v. W. Va. Office of the Ins. Comm’r*, 708 S.E.2d 524 (W. Va. 2011). The Court’s decision in *Davies* did not address application of the carpal tunnel impairment cap to impairment ratings determined under Table 15 of the *AMA Guides*. *Id.* at 527 n.2.

The Supreme Court of Appeals of West Virginia has held that the employer has the burden of proving apportionment of definitely ascertainable impairment resulting from pre-existing conditions. *Duff v. Kanawha County Commission*, 250 W.Va. 510, 905 S.E.2d 528 (2024); *see* W.Va. Code § 23-4-9b.

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

Employees who have sustained a permanent disability or injuries likely to result in temporary total disability may qualify for vocational rehabilitation benefits. W. Va. Code § 23-4-9(b). The workers’ compensation claims administrator must, at the earliest possible time, determine whether the employee is a suitable candidate for vocational rehabilitation. *Id.* With limited exception, vocational rehabilitation benefits must be authorized by the workers’ compensation claims administrator prior to rendering the rehabilitation services. *Id.* The expenditure for any one employee’s vocational rehabilitation shall not exceed \$20,000.00. *Id.*

Where vocational rehabilitation is authorized, the employee is entitled to receive temporary total disability benefits during vocational rehabilitation or rehabilitative treatment, if such vocational rehabilitation or rehabilitative treatment renders the employee temporarily totally disabled. W. Va. Code § 23-4-9(c). If an employee returns to gainful employment as a part of a rehabilitation plan, but the employee's average weekly wage earnings are less than those earned at the time of the injury, the employee is entitled to receive temporary partial rehabilitation benefits. W. Va. Code § 23-4-9(d). However, temporary partial rehabilitation benefits are not paid where the difference between the pre-injury average weekly wage and the post injury average weekly wage is five percent or less. W. Va. Code St. R. § 85-15-7.6.

The rate of temporary partial rehabilitation benefits is 70% of the difference between the average weekly wage at the time of the injury and the average weekly wage at the new employment, but in any event, cannot exceed the employee's temporary total disability rate. W. Va. Code § 23-4-9(d). There is no minimum benefit rate for temporary partial rehabilitation benefits. *Id.*

The aggregate award of any temporary total rehabilitation benefits or temporary partial rehabilitation benefits for a single injury may not be for a period exceeding 52 weeks, unless the payment of temporary total rehabilitation benefits is made in connection with an approved vocational rehabilitation plan for retraining. *Id.* In such a case, temporary total rehabilitation benefits may be provided for 104 weeks. *Id.*

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

For all permanent total disability awards granted on or after July 1, 2003, irrespective of date of injury or last exposure, benefits are payable until the employee reaches age 70, at a rate of 66⅔% of the employee's earnings, not to exceed the state average weekly wage. W. Va. Code §§ 23-4-6(d) and 23-4-6(n)(2). For permanent total disability awards granted before July 1, 2003 in claims with a date of injury or last exposure prior to May 12, 1995, benefits are payable until the employee reaches the age necessary to receive federal old age retirement benefits under the version of the Social Security Act in effect on May 12, 1995 (typically age 65), at a rate of 66⅔% of the employee's earnings, not to exceed the state average weekly wage. W. Va. Code § 23-4-6(d). For permanent total disability awards granted before July 1, 2003 in claims with a date of injury or last exposure before May 12, 1995, benefits are payable for life at a rate of 70% of the employee's average weekly wage on the date of injury, not to exceed the state average weekly wage. W. Va. Code § 23-4-6(d) (1994). Generally speaking the minimum rate for any PTD award is 33⅓% of the state average weekly wage. W. Va. Code §§ 23-4-6(d) and 23-4-6(b).

The Insurance Commissioner publishes a chart of the maximum and minimum benefit rates on its website, www.wvinsurance.gov.

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

A. Funeral expenses.

Reasonable funeral expenses may be paid as deemed proper, and in an amount fixed by the Insurance Commissioner. W. Va. Code § 23-4-4(a). At time of publication, the maximum benefit amount for funeral expenses is \$7,000.00. W. Va. Insurance Commissioner Informational Letter No. 170.

B. Dependency claims.

When a compensable traumatic injury causes death, and disability is continuous from the date of the injury until death, or if death results from occupational disease or occupational pneumoconiosis, dependents are entitled to receive benefits for as long as their dependency shall continue, in the same amount as was paid or would have been paid to the employee for total disability. W. Va. Code 23-4-10; *see also Crist v. Cline*, 632 S.E.2d 358 (W. Va. 2006). The persons that are considered dependents and the length of dependency for each type of person is set forth in W. Va. Code §§ 23-4-10(b) and (d). The standard for compensability in dependents' benefits claims is whether the compensable injury or disease was a material contributing factor to the employee's death. *Bradford v. Workers' Compensation Commissioner*, 408 S.E.2d 13 (W. Va. 1991).

If an employee receiving permanent total disability benefits dies from a cause other than a compensable injury or disease, the employee's statutorily defined dependents are entitled to an award equal to 104 times the weekly benefit amount the employee was receiving at the time of death. W. Va. Code § 23-4-10(e). This amount may be paid in either a lump sum or in periodic payments, at the option of the dependents. *Id.*

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

The Second Injury Reserve fund has been eliminated with respect to all awards made by a claims administrator on or after July 1, 2003. W. Va. Code § 23-3-1(d)(1).

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

A claimant may seek further benefits in a claim that has been closed, but which is not time barred, by submitting a written request to reopen. To obtain a reopening, the claimant must demonstrate that there has been an aggravation or progression of his or her condition, or the existence of a previously unconsidered material fact. W. Va. Code §§ 23-5-2 and 23-5-3a. Moreover, the West Virginia Supreme Court of Appeals held that for purposes of obtaining a reopening, the claimant must show a *prima facie* cause, which is nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the compensable injury. *Harper v. State Workmen’s Comp. Comm’r*, 234 S.E.2d 779 (W. Va. 1977).

In a claim closed without entry of a permanent partial disability award or in which no award was made, a request for reopening must be made within five years of the date of closure. W. Va. Code § 23-4-16(a)(1).

In a claim in which an award of permanent partial disability was made, the reopening request must be made within five years of the date of the initial permanent partial disability award. W. Va. Code § 23-4-16(a)(2). Under limited circumstances, this five-year deadline may be excused or extended. All of the following circumstances must be present to excuse or extend the reopening deadline: (1) the claimant must have received an initial permanent partial disability award; (2) the claimant must file a timely request to add a condition to his or her claim; (3) the additional condition is found to be compensable; and (4) the claims administrator failed to refer the claimant for the permanent partial disability evaluation mandated by W. Va. Code § 23-4-7a(f). *Syl. Pt. 5, Hammons v. W. Va. Office of the Ins. Comm’r*, 775 S.E.2d 458 (W. Va. 2015). The mandatory examination cited by the Court in *Hammons* refers to the claims administrator’s obligation in most claims to refer the claimant for an independent medical examination whenever temporary total disability exceeds 120 days from the date of injury, or from the date of the last examination. W. Va. Code § 23-4-7a(f).

In a fatal claim, any further award must be made within two years after the employee’s death. W. Va. Code § 23-4-16(a)(3).

Except with regard to occupational pneumoconiosis claims, further medical treatment or rehabilitation services may not be authorized in any claim in which “significant treatment” has not been rendered for five years. W. Va. Code § 23-4-16(a)(4). (Exactly what constitutes “significant treatment” is not defined by statute, regulation or court decision). Occupational pneumoconiosis claims, however, are never closed for medical benefits. W. Va. Code § 23-4-8d. Additionally, the limitation on medical or rehabilitation services does not apply to the replacement of artificial limbs, crutches, hearing aids, eyeglasses, or other mechanical appliances that wear out, need to be refitted due to a progression of the compensable injury, or are broken in the course of and as a result of employment. W. Va. Code §§ 23-4-16(a)(4) and 23-4-3(d).

A claimant may only make two requests to reopen a claim for permanent benefits in the applicable five-year period; except that for occupational disease and occupational pneumoconiosis claims, a new five-year period begins after each subsequent award. W. Va. Code §§ 23-4-16(a)(1) and (2). There is also a limited exception to the reopening deadline of W. Va. Code § 23-4-16(a)(2), as discussed above. The number of times the claimant may attempt to reopen a claim for temporary total disability benefits is unlimited. See W. Va. Code §§ 23-4-16(a)(1) and (2); W. Va. Insurance Commissioner Informational Letter No. 164.

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

If it is determined by the Workers' Compensation Board of Review that a denial of compensability, temporary total disability benefits, or an authorization of medical benefits was unreasonable, the employee is entitled to receive reasonable attorneys' fees and costs incurred in obtaining a reversal of the unreasonable denial. W. Va. Code § 23-2C-21(c). This provision applies only to self-insured employers and insurance companies; it is not applicable to claim decisions made by the Insurance Commissioner or its third-party administrator. *Id.* A denial is unreasonable if, after the employee submits evidence of the compensability of the claim, the entitlement to temporary total disability benefits or medical benefits, the insurance company or self-insured employer cannot demonstrate that it had, at the time of denial, evidence or a legal basis which supported the denial. *Id.* Payment of the attorney fees and associated costs is not made until conclusion of the litigation, including all appeals. *Id.*

To initiate the unreasonable denial and attorney fees process, the claimant must submit a written allegation to the Workers' Compensation Board of Review. W. Va. Code St. R. §§ 102-1-18.2.1 and 18.2.2. The Board of Review's rules require that the written allegation be copied to the employer and filed with the Board of Review within ninety days of the final decision or final appeal outcome. W. Va. Code St. R. § 102-1-18.2.2.

A claimant who prevails in any proceeding relating to the denial of medical benefits by a private carrier or a self-insured employer may be awarded reasonable costs and reasonable attorney fees incurred in reversing the denial. W. Va. Code § 23-5-16a(c)(1); Syl. Pt. 4, *Cassella v. Mylan Pharmaceuticals, Inc.*, 766 S.E.2d 432 (W. Va. 2014). The maximum hourly attorney rate is \$125. W. Va. Code § 23-5-16a(c)(2). The maximum attorney fee award is \$500 per litigated medical benefits denial, up to \$2,500 per claim. *Id.* A claimant may not receive an award of attorney fees and costs under W. Va. Code § 23-5-16a(c)(1) and the unreasonable denial process of W. Va. Code § 23-2C-21(c) for the same litigated issue. W. Va. Code § 23-5-16a(c). To proceed under § 23-5-16a(c)(1), the claimant's attorney must file a fee petition with the adjudicatory body, or arbitrator or mediator that entered a final decision on the issue within thirty days after the decision becomes final. *Id.* The attorney's experience, the complexity of the issue, the hours expended, and the contingent nature of the fee must be considered when determining whether a requested attorney fee award is reasonable. W. Va. Code § 23-5-16a(c)(3).

Additionally, in certain cases permanent total disability awards may be reopened and re-evaluated by a self-insured employer, the Insurance Commissioner, or an insurance carrier, whichever is responsible for the claim, in order to assess whether the employee continues to be

totally disabled. W. Va. Code § 23-4-16(d)(1); *See Justice v. W. Va. Office of the Ins. Comm'n*, 736 S.E.2d 80 (W. Va. 2012). The employee is entitled to reasonable attorneys' fees and costs incurred in defending the award, if the award is retained. W. Va. Code § 23-4-16(d)(2). Pursuant to W. Va. Code St. R. § 85-5-5.7, the employee's attorney may charge up to a maximum of \$5,000 (\$3,500 through final decision by Board of Review and \$1,500 for appeals), although this maximum fee may be waived in extraordinary cases.

EXCLUSIVITY/TORT IMMUNITY

29. Are there any specific compensability requirements or applicable statutes for hybrid employees?

No, West Virginia has no specific compensability requirements or applicable statutes for hybrid employees.

30. Is the compensation remedy exclusive?

A. Scope of immunity.

Yes, unless the employer has engaged in "deliberate intention" pursuant to W. Va. Code § 23-4-2(d)(2), has defaulted on premium payments or other obligations of the Workers' Compensation Act, or in other circumstances where the Legislature specifically provides a private remedy outside the workers' compensation system. W. Va. Code § 23-2-6; *Bias v. Eastern Associated Coal Corporation*, 640 S.E.2d 540 (W. Va. 2006). Absent these circumstances, the immunity is absolute and precludes any tort action against an employer. *Id.*

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

The statutory immunity may be lost if the employer acted with "deliberate intention." This exception may be established in one of two statutory ways. Regardless of the type of deliberate intent claim pursued by the plaintiff, the employee, the employee's representative, or the employee's dependent must file a workers' compensation claim as a prerequisite to filing a civil action for "deliberate intention", unless he or she can establish good cause for not filing the workers' compensation claim. W. Va. Code § 23-4-2(c).

The first method for establishing "deliberate intention" requires proof that the employer acted with a conscious, subjective, and deliberate intent to produce the specific result of injury or death to an employee. W. Va. Code § 23-4-2(d)(2)(A). This standard requires a showing of actual, specific intent and is not satisfied by an allegation or proof of: (1) conduct which produces a result that was not specifically intended; (2) conduct which constitutes negligence, regardless of how gross or aggravated; or (3) willful, wanton or reckless misconduct. *Id.*

"Deliberate intention" may also be found if the trier of fact determines, either through specific findings of fact made by the court or jury, that five specific elements are proven: (1) the existence of a specific unsafe working condition which presents a high degree of risk and a strong probability of serious injury or death; (2) that the employer, prior to the injury, had actual knowledge of the specific unsafe working condition and the high degree of risk and strong probability of serious injury or death presented by such condition; (3) that the unsafe working condition was a violation of a law, regulation, rule, or commonly accepted and well known safety

standard within the employer's industry or business; (4) that notwithstanding the existence of the facts as set forth above, the person or persons alleged to have actual knowledge of the specific unsafe working condition nevertheless intentionally exposed the employee to such specific unsafe working condition; and (5) the employee so exposed suffered serious compensable injury or death as a direct and proximate result of such condition. W. Va. Code §§ 23-4-2(d)(2)(B)(i)-(v). See generally *Mayles v. Shoney's, Inc.*, 405 S.E.2d 15 (W. Va. 1990); *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907 (W. Va. 1978).

Actual knowledge must be specifically proven and cannot be "deemed" or presumed to exist. W. Va. Code § 23-4-2(d)(2)(B)(ii)(I). The plaintiff/employee also cannot establish actual knowledge by showing what the employee's immediate supervisor or manager should have known had he or she exercised reasonable care or been more diligent. *Id.* at § 23-4-2(d)(2)(B)(ii)(II). In addition, to prove that the employee's immediate supervisor or that management knew of prior accidents, near misses, safety complaints, or citations, the plaintiff must present "documentary or other credible evidence." *Id.* at § 23-4-2(d)(2)(B)(ii)(III).

The safety standard on which the "deliberate intent" claim is based must be a "consensus written rule or standard promulgated by the industry or business of the employer." *Id.* at § 23-4-2(d)(2)(B)(iii)(I). The state or federal statute, rule or regulation at issue in the claim must be specifically applicable to the work or working condition involved; must be intended to specifically address the alleged hazard involved; and the determination whether the statute, rule or regulation is applicable is a legal issue to be decided by the Judge. *Id.* at §§ 23-4-2(d)(2)(B)(iii)(II)(a)-(c).

To constitute a "serious compensable injury" for purposes of the five-factor test for a "deliberate intent" claim, the plaintiff must prove that the injury meets one of four specific definitions:

- (1) The injury results in at least 13% whole person impairment granted as a final award in a workers' compensation claim; causes permanent serious disfigurement, permanent loss or significant impairment of function of any bodily organ or system, or objectively verifiable bilateral or multilateral radiculopathy; and is not a physical injury that has no objective medical evidence to support the diagnosis;
- (2) The plaintiff provides written certification by physician that the injury is caused by the unsafe working condition and is likely to cause death within 18 months or less of filing the civil action;
- (3) If the injury is one for which impairment cannot be determined under applicable impairment rules, the injury causes permanent serious disfigurement, permanent loss or significant impairment of bodily organ or system function, or objectively verified bilateral or multilateral radiculopathy; and is not a physical injury that has no objective medical evidence to support the diagnosis; or
- (4) If the condition is occupational pneumoconiosis, the plaintiff provides written certification from a pulmonologist that the injured employee has complicated pneumoconiosis or pulmonary massive fibrosis that has caused at least 15% impairment as confirmed by reproducible ventilatory testing, and the cause of action is filed within one year of the date the employee meets the requirements of this definition. In addition, for occupational pneumoconiosis claims with dates of last exposure or "injury" on or

after July 1, 2023, the plaintiff must also prove “that the employer fraudulently concealed or manipulated dust samples or air quality samples.”

W. Va. Code §§ 23-4-2(d)(2)(B)(v)(I)-(IV) and 23-4-2(g) (eff. June 8, 2023).

No punitive or exemplary damages may be awarded in a deliberate intent action that is based on the five-factor test. W. Va. Code § 23-4-2(d)(2)(C)(ii). There is also a limit on compensatory damages for noneconomic loss applicable to all causes of action accruing on or after July 1, 2023. W. Va. Code § 23-4-2a(c). This limit is no more than two times the economic damages before offset for workers’ compensation benefits received or receivable in the underlying claim, or \$500,000 for each person, whichever amount is higher. W. Va. Code § 23-4-2a(a). Beginning on January 1, 2024, and every year afterward, this limit on noneconomic damages is adjusted for inflation by an amount equal to the Consumer Price Index, subject to an overall maximum of 150% of the initial damage limitation amounts. W. Va. Code § 23-4-2a(b).

The court is required to dismiss an action for deliberate intent on a motion for summary judgment if the plaintiff has failed to prove *all* five of the factors in this test. *Id.* at § 23-4-2(d)(2)(C)(iii).

Any employer who is required to obtain and maintain workers’ compensation insurance, but who fails to do so, loses immunity from civil actions by an employee and may not raise the following common law defenses: (1) the fellow-servant rule; (2) assumption of risk; (3) contributory negligence; and (4) that the negligence in question stemmed from the actions of someone whose duties are prescribed by statute. W. Va. Code § 23-2-8.

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

No, other than unsafe working conditions that would constitute acts committed with “deliberate intention” as set forth in W. Va. Code § 23-4-2(d)(2).

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

The West Virginia Workers' Compensation Act contains no provisions that grant special protections to injured minors or assess penalties for employers of minors. See *McVey v. C & P Telephone Company*, 138 S.E. 97 (W. Va. 1927).

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

Pursuant to W. Va. Code § 23-2C-21(a), an employee may not bring or maintain a cause of action for violation of the provisions of the Workers' Compensation Act or the provisions of Chapter 33 of the West Virginia Code (relating to insurance in general) against an insurance carrier or third-party administrator, or any employees or agents of the same. The exclusive civil remedy for such a violation is the administrative fines or remedies provided by statute or regulation. W. Va. Code § 23-2C-21(b). An employee, however, may maintain an action for reasonable attorney's fees and expenses where it is determined that a denial of compensability, temporary total disability benefits, or an authorization of medical benefits was unreasonable. W. Va. Code § 23-2C-21(c); see also answer to No. 28. Additionally, an employer may be sued by an employee for intentionally providing information it knows to be false for the purpose of depriving the employee of workers' compensation benefits. *Persinger v. Peabody Coal Company*, 474 S.E.2d 887 (W. Va. 1996).

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

An employer shall not discriminate in any manner against present or former employees due to actual or attempted receipt of workers' compensation benefits. W. Va. Code § 23-5A-1. Moreover, it is a discriminatory practice to terminate an employee who is receiving, or is eligible to receive, temporary total disability benefits while he or she is off work due to a compensable injury, unless the employee committed a separate dischargeable offense. W. Va. Code § 23-5A-3(a). It is also a discriminatory practice for an employer to fail to reinstate an employee who has sustained a compensable injury to his or her former position "upon demand made in writing and transmitted by the United States Postal Service, return receipt requested, to the employer's principal office", provided that the position is available and the employee is not disabled from performing the duties. W. Va. Code § 23-5A-3(b) (eff. June 9, 2023). An employee may bring a cause of action for discrimination and recover those damages typically available in a civil action, including punitive damages.

THIRD PARTY ACTIONS

35. Can third parties be sued by the employee?

Yes. An employee is not precluded from asserting claims against a third party whose act or omission causes, in whole or in part, the employee's injury, even if he or she has received workers' compensation benefits for the same injury. W. Va. Code § 23-2A-1(a). (If the third party's act or omission causes, in whole or part, the employee's death, a cause of action against that party could be maintained by the employee's dependents or personal representative. *Id.*) However, subrogation applies to amounts recovered through any third-party actions. See answer to No. 37.

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

No. The immunity from liability extends to every officer, manager, agent, representative or employee of an employer, as long as such person is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention. W. Va. Code § 23-2-6a.

37. Is subrogation available?

Yes. Subrogation is allowed with regard to all medical and indemnity benefits paid as of the date of the recovery in the employee's third-party cause of action. W. Va. Code § 23-2A-1(b)(1). In addition, the Insurance Commissioner is allowed subrogation with regard to all medical and indemnity benefits paid, and which are to be paid, from the Uninsured Employer Fund, regardless of the date on which the cause of action arose or accrued. W. Va. Code § 23-2A-1(b)(3). Reasonable attorneys' fees and costs are deducted from any amount subject to subrogation. W. Va. Code § 23-2A-1(c).

MEDICALS

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

There is no law specifying a time limit within which medical bills or invoices must be paid.

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

In claims in litigation before the Board of Review, the parties are required, upon request, to promptly exchange reports rendered in conjunction with evaluations. W. Va. Code St. R. § 102-1-7.10.3. The Board of Review may enter an order compelling production if a motion to compel is filed.

A party to a workers' compensation matter may also utilize a subpoena *duces tecum* in order to compel the production of documents. W. Va. Code St. R. § 102-1-8.4.1.b.

An employee, by filing an application for workers' compensation benefits, irrevocably agrees that any physician may release and/or orally discuss medical reports pertaining to the employee's medical history, condition, treatment, prognosis, and anticipated period of disability. W. Va. Code § 23-4-7(b). Despite this, some health care providers may still insist on receiving a specific, Health Insurance Portability and Accountability Act (HIPAA) compliant release before providing medical records. Such releases usually are not difficult to obtain. Moreover, the claimant must sign all medical releases that are necessary for the self-insured employer or insurance company to obtain information and records concerning a pre-existing medical condition that is reasonably related to the compensable injury in order to determine the nature and amount of workers' compensation benefits to which the claimant is entitled. W. Va. Code § 23-2C-17(f). Furthermore, in claims in litigation, the Board of Review will compel a claimant to sign a medical release upon a showing of an unjustified failure of the claimant to cooperate. W. Va. Code St. R. § 102-1-7.4.2.

Whenever a private carrier, a claims administrator, a self-insured employer, or the Insurance Commissioner refers a claimant for an independent medical examination in connection with the entity's claims administration functions, the claimant and employer (if applicable) must be

provided with a copy of the examination report. W. Va. Code § 23-4-8(a).

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

A. Claimant’s choice of physician.

The employee chooses his or her treating physician. W. Va. Code St. R. § 85-20-6.1. However, an employee may be required to choose a physician within a managed health care plan, such as a preferred provider organization or health maintenance organization, established by the employer or insurance carrier and approved by the Insurance Commissioner. W. Va. Code § 23-4-3(b)(2); W. Va. Code St. R. § 85-20-6.1. The Insurance Commissioner, self-insured employer, or insurance company has the right to choose the physician for an independent medical evaluation.

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

The employee and employer each are entitled to have the physician of their choosing attend the examination of the employee performed by the physician selected by the Insurance Commissioner, self-insured employer, or insurance carrier. W. Va. Code § 23-4-8(a). The physician selected by the employee and/or employer has the right to concur in the resulting report, or may prepare his or her own report of the examination. *Id.* In addition, for claims in litigation, all parties are entitled to “a reasonable number of relevant medical examinations or vocational evaluations,” meaning no more than two per specialty or discipline involved in the litigated issue. W. Va. Code St. R. § 102-1-7.10.1. This limitation may be exceeded upon a showing of necessity. *Id.*

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

Any treatment that is “reasonably required” as a result of the compensable injury is covered. W. Va. Code § 23-4-3(a)(1). Additionally, W. Va. Code St. R. § 85-20-1 *et seq.* sets forth specific and extensive treatment guidelines for a wide range of injuries and diseases. The treatment guidelines further define and clarify what treatments are reasonably required for a given injury or disease. It is noted, however, that the West Virginia Supreme Court of Appeals has invalidated or modified certain guidelines or requirements for treatment. *See, e.g., Moore v. K-Mart Corp.*, 769 S.E.2d 35 (W. Va. 2015).

42. What prosthetic devices are covered, and for how long?

Any prosthetic device that is “reasonably required” as a result of the compensable injury is covered until no longer reasonably required. W. Va. Code § 23-4-3(a)(1).

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

Yes. Such medical goods and supplies “as may be reasonably required” are covered as medical expenses. W. Va. Code § 23-4-3(a)(1). The West Virginia Supreme Court has specifically interpreted this language to include automobile modifications. *Crouch v. Commissioner*, 403 S.E.2d 747 (W. Va. 1991).

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

The Insurance Commissioner is authorized to establish and amend, from time to time, a schedule of the maximum reasonable amounts to be paid to those rendering treatment or services to employees. W. Va. Code § 23-4-3(a). The fee schedule does not apply to managed care programs. A copy of the fee schedule can be obtained from the Insurance Commissioner's website (www.wvinsurance.gov).

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

The Workers' Compensation Act specifically prohibits employers from entering into "contracts with any hospital, its physicians, officers, agents or employees to render medical, mental or hospital service to or give medical or surgical attention therein to any employee . . ." for a compensable workers' compensation injury. W. Va. Code § 23-4-3(b)(1). This provision, however, does not prevent employers from participating in a managed health care plan, including but not limited to, a preferred provider organization or program, health maintenance organization, or managed care organization. W. Va. Code § 23-4-3(b)(2). The managed health care plan must be approved by the Insurance Commissioner. Further requirements of managed health care plans are contained in W. Va. Code St. R. § 85-21-1 *et seq.*

PRACTICE/PROCEDURE

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

The claimant, or his or her dependents, may protest (contest) any final decision of the Insurance Commissioner, insurance carrier, or self-insured employer, whichever is applicable. W. Va. Code § 23-5-1a(b)(1). "An employer may protest decisions incorporating findings made by the Occupational Pneumoconiosis Board, decisions made by the Insurance Commissioner . . . or decisions entered pursuant to . . . [§ 23-4-7a(c)(1) (relating to permanent partial disability recommendations by treating physician)]." W. Va. Code § 23-5-1a(b)(1). This language has been interpreted as limiting the employer's right to protest to these three categories of decisions. *Lowe's Home Centers, Inc. v. Gregory Gwinn*, No. 13-1291 (W. Va. June 1, 2015) (unpublished Memorandum Decision). Moreover, the insurance carrier has "sole authority to act on behalf of the employer in the claim," in all aspects related to litigation, including hiring and designating lead counsel. W. Va. Code St. R. § 85-1-7.3; *see also* W. Va. Code St. R. § 85-8-8.4.

The protest must be filed with the Workers' Compensation Board of Review within sixty days of receipt of the decision, or it will become final. W. Va. Code § 23-5-1a(b)(1). The written protest must include a copy of the decision protested and must be copied to all parties to the claim. W. Va. Code § 23-5-1a(b)(1); W. Va. Code St. R. § 102-1-6.3. The sixty-day time limit for filing a protest may be extended by an additional sixty days, for a total of 120 days, upon a showing of good cause or excusable neglect. W. Va. Code §§ 23-5-6a and 23-5-1a(b)(1); W. Va. Code St. R. § 102-1-6.2.

47. What is the method of claim adjudication?

A. Administrative level.

The litigation of a claim at the administrative level is initiated by filing a protest to a final claim

decision made by the Insurance Commissioner, an insurance carrier, or a self-insured employer. The protest must be properly and timely filed with the Board of Review. W. Va. Code § 23-5-1a(b)(1).

Once a protest is timely and properly filed, the Board of Review will enter a time frame order setting forth the sequence in which evidence is presented. W. Va. Code St. R. §§ 102-1-6.3 and 6.4. During this time frame, the Board of Review receives evidence and/or argument and holds hearings. At the conclusion of the time frame, the Board of Review will issue a written decision affirming, reversing, or modifying the protested claim decision. W. Va. Code § 23-5-9a(e). The Board of Review may instead remand a claim for further development if necessary for a full and complete disposition of a protest. W. Va. Code § 23-5-9a(f). An appeal from a final decision of the Board of Review is filed with the Intermediate Court of Appeals of West Virginia. W. Va. Code §§ 23-5-10a(a) and 23-5-12a(a).

In deciding a given protest, the Board of Review is not bound by the usual common law or statutory rules of evidence. W. Va. Code § 23-5-9a(d). The Board of Review, however, does have its own rules of practice and procedure which govern the litigation of protests before it. These rules are set forth at W. Va. Code St. R. § 102-1-1 *et seq.*

B. Trial court.

Not applicable.

C. Appellate.

The appellate process changed effective July 1, 2022. The appeal of any decision made by the Board of Review must be filed with the Intermediate Court of Appeals. W. Va. Code §§ 21-1-h(b) and 23-5-8b(d). The appeal must be filed with the Intermediate Court of Appeals within 30 days of receipt of notice of the final decision of the Board of Review, or in any event and regardless of notice, no later than 60 days from the date of the final decision. W. Va. Code §§ 23-5-10a(a) and 23-5-12a(a). The Intermediate Court of Appeals will issue a written order reversing, affirming, or modifying the decision of the Board of Review. W. Va. Code § 23-5-12a(b). Alternatively, at the request of a party or on its own volition, the Intermediate Court of Appeals may remand the claim to the Board of Review for additional development. W. Va. Code § 23-5-12a(d). The Intermediate Court of Appeals' review of an appeal is based on the record submitted to it and any oral argument. W. Va. Code § 23-5-12a(b).

Any party may also petition the West Virginia Supreme Court of Appeals for an appeal from the decision of the Intermediate Court of Appeals. W. Va. Code § 51-11-10(a). The Supreme Court has the discretion to accept or decline the appeal. W. Va. Code § 51-11-10(c). The deadline to petition the Supreme Court for an appeal is 30 days from the date of the Mandate of the Intermediate Court of Appeals. W. Va. Code § 58-5-1(b); W. Va. R. App. P. 12(b).

A party to a claim may also seek a stay of payment of benefits, except for medical, rehabilitation, or permanent total disability benefits, required by a decision of the Board of Review. W. Va. Code §§ 23-5-9a(g). Even though permanent total disability benefits may not be stayed, a portion of the back permanent total disability benefits due may be withheld pending appeal. W. Va. Code § 23-4-1d(b). The petition for stay must be submitted to the Intermediate Court of

Appeals or the administrative law judge who authored the decision granting the benefits. W. Va. Code § 23-5-9a(g). For appeals pending before the Supreme Court of Appeals of West Virginia, either party may move the Court to stay the decision of the Intermediate Court of Appeals. W. Va. Code § 58-5-5; W. Va. R. App. P. 28(b).

48. What are the requirements for stipulations or settlements?

There are no statutory requirements for stipulations. However, the rules of the Workers' Compensation Board of Review govern stipulations made in litigated claims. Stipulations must be written or made orally on the record, and may relate to a question of fact, the contents of a document, or expected testimony of a witness. W. Va. Code St. R. § 102-1-7.9. Stipulations must be written or stated in clear and unambiguous terms, relevant to an issue in litigation, supported by a factual basis, and understood and agreed to by all parties. W. Va. Code St. R. § 102-1-7.9.1. A stipulation of fact accepted by the Board of Review is binding upon, and may not be contradicted by, the parties. W. Va. Code St. R. § 102-1-7.9.2. However, a stipulation pertaining to the contents of a document or expected testimony may be attacked, contradicted, or explained as if the document had actually been submitted into evidence or the witness had actually testified. *Id.* No stipulation, regardless of type, is binding on the Board of Review. *Id.*

The parties to a claim may negotiate a full and final settlement of any and all issues in a claim, including medical benefits, wherever the claim may then be in the administrative or appellate process. W. Va. Code § 23-5-7(a). Medical benefits previously could not be settled in nonorthopedic occupational disease claims. The settlement of medical benefits in these claims was made possible by legislation passed in 2015 and which became effective on June 8, 2015. The claimant must be represented by counsel in order to settle medical benefits in a nonorthopedic occupational disease claim. *Id.* An orthopedic occupational disease is an occupational disease that involves the musculoskeletal system (bone, muscles, ligaments, tendons, and nerves) as it functions for the purposes of mobility; a nonorthopedic occupational disease is an occupational disease that is not an orthopedic occupational disease. W. Va. Code St. R. §§ 85-12-3.3 and 85-12-3.4. Moreover, hearing loss or hearing impairment claims are expressly excluded from the definition of nonorthopedic occupational disease claims. W. Va. Code § 23-5-7(a).

Insured employers may participate in settlement only to the extent permitted under the terms of its insurance policy. W. Va. Code St. R. § 85-12-4. Moreover, if a non-self-insured employer is inactive in a claim, the Insurance Commissioner, an insurance carrier, or self-insured employer, whichever is responsible for the claim, may negotiate a settlement on its behalf. W. Va. Code § 23-5-7(a). If a self-insured employer defaults in payment of the settlement, the Insurance Commissioner must assume responsibility for payment and then recover the amount paid from the employer. *Id.*

Every settlement agreement must include the toll-free number of the West Virginia State Bar and provide the employee with five business days from the date of execution in which to revoke the agreement. W. Va. Code § 23-5-7(b). The settlement agreement is to be made a part of the claim record for settlements involving all employers other than self-insured employers. W. Va. Code § 23-5-7(a); W. Va. Code St. R. § 85-12-3.10. Any issue that is the subject of a properly executed settlement agreement may not be reopened by any party, except in the case of fraud.

W. Va. Code § 23-5-7(a). However, the Insurance Commissioner may void settlement agreements entered into by unrepresented claimants that are found to be unconscionable. W. Va. Code § 23-5-7(b). A settlement is unconscionable if it constitutes a “gross miscarriage of justice of if the terms shock the conscience.” W. Va. Code St. R. § 85-12-14.2. The criteria to be considered in determining whether a settlement is unconscionable includes, but is not limited to: each party’s bargaining position; whether any material terms of settlement were not conspicuous; meaningful alternatives available to the claimant at the time of settlement; whether the claimant had adequate time to read and review the settlement agreement; and whether the claimant was advised of his or her right to obtain a lawyer. *Id.* The claimant bears the burden of proving a settlement is unconscionable, and all settlements are presumed not to be unconscionable. W. Va. Code St. R. § 85-12-14.3.

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

Yes. The parties are permitted to settle medical benefits in all claims. W. Va. Code § 23-5-7(a). See answer to No. 48.

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

No. Settlements need not be approved by any administrative or regulatory agency. *See* W. Va. Code § 23-5-7. Stipulations are subject to the requirements described in the answer to No. 48.

RISK FINANCE FOR WORKERS' COMPENSATION

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

Generally, all employers must have workers’ compensation coverage for their employees. W. Va. Code §§ 23-2-1(a) and 23-2-9. Previously, such coverage was offered exclusively through the State Workers’ Compensation Commission. In 2005, the Workers’ Compensation Commission was terminated and the market was privatized. A single insurance company was given the exclusive right to provide workers’ compensation insurance until July 1, 2008. W. Va. Code § 23-2C-15(a) and (b). The market was fully opened on July 1, 2008, and other insurance companies entered the market. An employer must maintain workers’ compensation insurance through a private carrier or self-insure its risk. W. Va. Code § 23-2C-15(b).

Many State funds were created as a result of the privatization of the workers’ compensation system. These include, among others, the Workers’ Compensation Uninsured Employers’ Fund, Assigned Risk Fund, Self-Insured Employer Guaranty Risk Pool, and Self-Insured Employer Security Risk Pool. W. Va. Code § 23-2C-6(a). Although the 2005 amendments formally created the Self-Insured Employer Guaranty Risk Pool and Self-Insured Employer Security Risk Pool, these funds, having been previously established by the Commission, were in existence prior to 2005.

In addition, political subdivisions, as defined by W. Va. Code St. R. § 114-65-2.9, are permitted to join together to purchase group insurance or to establish and maintain a self-insurance risk pool to provide coverage for their workers’ compensation insurance risks (as well as civil liability risks). *Id.* at § 114-65-3.1.

Insurance companies pay a fee into the Workers' Compensation Uninsured Employers' Fund. W. Va. Code § 23-2C-8(a)(3). Self-insured employers may also be assessed a fee for this fund. *Id.* Coverage provided by the Assigned Risk Fund is pursuant to a pooling arrangement managed by the Insurance Commissioner and is intended to be self-sustaining. W. Va. Code § 23-2C-10(c). Assessments may be made on all insurance companies providing workers' compensation insurance in the event of a deficit in the Assigned Risk Fund. W. Va. Code § 23-2C-10(e). The Self-Insured Employer Security Risk Pool is funded by proceeds received from the draw-down on surety documents in the event of a self-insured employer's default, graduated premium taxes made by participating self-insured employers for periods through the quarter ending June 30, 2004, certain statutory assessments on self-insured employers, and any other funds made available through legislative grant. W. Va. Code St. R. § 85-19-7.1. The Self-Insured Employer Guaranty risk pool is funded by an annual assessment of 5% of the preceding fiscal year's premium payments or \$5,000, whichever is greater, for the first three years after an employer become self-insured, and thereafter an annual assessment of 2% of the self-insured employer's preceding fiscal year's indemnity payments, (excluding payments to fully and finally settle claims) or \$5,000, whichever is greater. W. Va. Code St. R. § 85-19-9.1. The Insurance Commissioner may change the assessment methodology or minimum level of funding if necessary to maintain the solvency of the Self-Insured Employer Guarantee Risk Pool. W. Va. Code St. R. § 85-19-9.3. All insurance companies and self-insured employers are assessed amounts for regulatory surcharges, and until January 2019, for debt reduction surcharges. W. Va. Code § 23-2C-3(f). The debt reduction surcharge was eliminated on January 1, 2019. W. Va. Code 23-2C-3(h). The regulatory surcharge is charged to policyholders and remitted to the Insurance Commissioner. W. Va. Code § 23-2C-3(f)(3)(A); W. Va. Code St. R. § 85-6-4.1. Self-insured employers are assessed a certain percentage of their payroll for the regulatory surcharge. W. Va. Code §§ 23-2C-3(f)(2) and (3)(B); W. Va. Code St. R. § 85-6-5.1. The amount of each surcharge is generally determined by the Insurance Commissioner every fiscal year. *Id.* However, the Insurance Commissioner has set the regulatory surcharge for insurance companies for July 1, 2023 to June 30, 2028, at the rate of 5%. The self-insured regulatory surcharge is .14% for July 1, 2023 through June 30, 2024.

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

A. For individual entities.

There are express requirements for being self-insured, most of them concerning financial responsibility and capability. These requirements are set forth at W. Va. Code § 23-2-9 and W. Va. Code St. R. § 85-18-1 *et seq.* Employers qualifying for and electing self-insurance must furnish a bond or other security to insure payments, in addition to other requirements. *Id.*

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

The Insurance Commissioner is authorized to create and administer a perpetual self-insurance security risk pool of funds, sureties, securities, and insurance provided by private insurers to secure payment of obligations of self-insured employers. W. Va. Code § 23-2-9(e). An example of such security risk pools are the self-insured employer guaranty risk pool and self-insured employer security risk pool, which were discussed above in the answer to No. 51.

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

"Nonresident alien beneficiaries" are entitled to the same benefits as United States citizens. W. Va. Code § 23-4-15a. The Legislature has not addressed illegal aliens specifically, and the issue has not arisen before the Supreme Court of Appeals of West Virginia or the Intermediate Court of Appeals of West Virginia.

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

There is no statutory provision specific to terrorist acts and the issue has not otherwise arisen. Presumably, any injury or disease to an employee caused by a terrorist act would be compensable if it otherwise meets the criteria for a compensable injury.

55. 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?

There are no requirements specific to West Virginia that must be observed. However, the parties must ensure that federal law is observed.

Under 42 U.S.C. § 1395y(b)(2) and Medicare regulations (42 C.F.R. § 411.46), Medicare payments may not be made for items or services to the extent that payment for the same has been, or can be, made under a workers' compensation law or plan. Moreover, Medicare will not pay for an employee's medical services related to a compensable workers' compensation injury when the individual receives a settlement, judgment, or award that includes funds for future medical expenses, until such funds are expended. In other words, Medicare is a secondary payer of medical expenses related to a workers' compensation injury. The obligation to pay medical benefits for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a workers' compensation matter which involve a commutation of medical expenses, i.e. the settlement includes an amount for future medical benefits or releases the workers' compensation carrier from responsibility for future medical benefits. Medicare approval of a settlement, particularly the amount set aside for future medical treatment, is strongly recommended if at the time of the settlement:

- A. The employee is a Medicare beneficiary and the settlement amount is greater than \$25,000; or
- B. There is a reasonable expectation that the employee will become a Medicare beneficiary within 30 months of the settlement and the settlement amount is greater than \$250,000.

In either case, Medicare should be notified in the event of a settlement. Medicare may conclude that the settlement does not meet its criteria, or it may require a Medicare set-aside trust for large settlements, or it may require merely a custodial self-administered trust account. 42 C.F.R §§ 404 and 411; 42 U.S.C. § 1395.

Medicare has several options and sanctions, but the enforcement varies for geographical regions of the country. Consult your ALFA lawyer for the current practice in your state for this evolving area of the law.

West Virginia workers' compensation law permits settlement of future medical benefits in all claims. Accordingly, when settling future medical expenses related to a compensable injury, the parties must consider the interests of Medicare if the claimant is a Medicare beneficiary, or there is a reasonable expectation that the claimant will enroll in Medicare within 30 months of the settlement, regardless of the settlement amount. If the amount of the settlement meets the applicable Centers for Medicaid & Medicare Services review threshold criteria discussed above, the parties are strongly advised to submit the settlement to Medicare for approval. If the settlement amount is less than the applicable dollar amount threshold, but the settlement otherwise meets the applicable Centers for Medicaid & Medicare Services review criteria, the parties should consider whether it is necessary to include a Medicare set-aside arrangement as part of the settlement or an allocation for future medical expenses within the settlement agreement.

When submitting a request for review and approval of the set-aside arrangement to Medicare, include a cover letter which contains:

- A. The employee's name, date of birth, address, phone number, and Health Insurance Number or Social Security Number if the employee is not yet entitled to Medicare;
- B. The name, address, and phone number of the employer;
- C. The name, address, and phone number of the workers' compensation insurer;
- D. The date(s) of injury or last exposure;
- E. A brief description of the compensable injuries, including the ICD-9 diagnosis codes, if available;
- F. Information regarding the employee's entitlement to Medicare;
- G. The total settlement amount;
- H. The proposed Medicare set-aside amount;
- I. The name of the attorneys representing the employee, employer, and workers' compensation insurer;
- J. The state where the workers' compensation matter is being litigated; and
- K. A medical release.

In addition, the request for approval must include, among other things, the actual settlement agreement, and documentation regarding: the employee's life expectancy; a life care plan if the injury is serious or extensive; current and future treatment; expected medical recovery; the

person responsible for control and documentation of expenditures from the Medicare set-aside account; and the details of the Medicare set-aside account.

56. 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 identifying or pursuing any third party who may be liable to pay for care and services available under the Medicaid plan, unless good cause for refusing to cooperate is shown. 42 U.S.C. § 1396k(a)(1). State plans for medical assistance must also provide for entering into cooperative arrangements with any appropriate state agency, court or law enforcement officials to assist the state agency administering the state plan with enforcement and collection of rights to support or payment and any other matter of common concern. 42 U.S.C. § 1396k(a)(2). A state is authorized to retain such amount as is necessary to reimburse it (and the Federal Government where appropriate) for medical assistance payments, with the remainder of any such amount retained being paid to the individual. 42 U.S.C. § 1396k(b).

The Workers' Compensation Act does not contain any statutory provisions specific to this question, and the issue has not otherwise arisen. Subrogation generally is considered in the answer to No. 37.

57. 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 regulations, 45 C.F.R. 164.512(1)(a), provide an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. Therefore, the current practice of obtaining medical records could proceed under state law. See answer to No. 39 for a discussion of the relevant state law. Issues related to HIPAA have not otherwise arisen.

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

There is specific four-part test for determining whether a worker is an independent contractor or employee. The test is set forth at W. Va. Code § 21-5I-4. The test includes: a written contract requirement; a business or self-employment requirement; a control requirement; and additional fact specific criteria.

Written Contract Requirement

The worker must have a written contract with the principal that states the following:

- a. The principal is hiring the worker as an independent contractor;
- b. The worker is an independent contractor;
- c. The worker will not be treated as an employee;
- d. The principal will not provide workers' compensation or unemployment compensation coverage to the worker;
- e. The worker is obligated to pay all applicable federal and state income taxes;

- f. The principal will not make any tax withholdings; and
- g. The worker is responsible for the majority of his or her supplies and other variable expenses (unless there is an exception allowing for reimbursement of expenses).

W. Va. Code § 21-51-4(a)(1).

Business/Self-Employment Requirement

- a. The worker must file an income tax return on the earnings as a business or as self-employment; or
- b. The worker must provide his or her services through a business entity.

W. Va. Code § 21-51-4(a)(2).

Control Requirement

Except for the control required to ensure compliance with statutory, regulatory, licensing, or other requirements, the worker must actually and directly control the manner and means by which the work is to be done. W. Va. Code § 21-51-4(a)(3).

Fact Specific Criteria

The worker must meet at least three of these additional fact specific criteria to qualify as an independent contractor:

- a. The worker generally has control over the amount of time personally spent providing services;
- b. The worker generally has control over where the services are performed;
- c. The worker is not required to work exclusively for one principal, unless required by law, permit, license, etc.;
- d. The worker generally is free to exercise independent initiative in soliciting others to purchase his or her services;
- e. The worker is free to hire employees or to contract with assistants, helpers, or substitutes to perform all or some of the work;
- f. The worker generally is not required to perform additional services without a new or modified contract;
- g. The worker has obtained a license or other permission from the principal to use any workspace of the principal;
- h. The IRS has audited the principal and not reclassified the worker as an employee;
- i. The worker is required to maintain and pay the costs of any required business licenses, insurance, certifications, or permits required to perform the services; or
- j. The worker generally meets the IRS definition of a direct seller.

W. Va. Code § 21-51-4(a)(4).

If for any reason a worker does not meet any part of the four-part independent contractor test, the entity must instead use the IRS independent contractor test to determine whether the worker is an independent contractor or an employee for workers' compensation purposes. W. Va. Code § 21-51-4(b).

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

There are no specific statutory or regulatory provisions applicable to independent contractors with regard to professional employment organizations, temporary service companies, or leasing companies. W. Va. Code § 33-46A-1 *et seq.* generally governs professional employer organizations, as does W. Va. Code St. R. § 85-31-1 *et seq.*

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

There are no specific provisions for independent contractors in this industry. Independent contractors engaged in these services would have to meet the four-part test set forth at W. Va. Code § 21-51-4, or the IRS test if they do not satisfy the four-part test. See answer to No. 58.

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?**

West Virginia does not have any specific requirements that must be satisfied with respect to the obligation of the parties to protect Medicare’s interests when settling medical benefits. See answer to No. 55.

62. **What are the “Best Practices” for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?**

Financial exposure to workers’ compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized “Best Practices” plan.

Every business must deal with the expense of workers’ compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized “Best Practices” plan.

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

Medical marijuana is permitted in West Virginia. Medical marijuana dispensaries were approved in early 2021, and patient registration began on February 3, 2021. Medical marijuana may be dispensed to patients and caregivers. A patient may receive medical marijuana only if they have a certification from a medical practitioner registered with and approved by the Bureau of Public Health, and a valid medical marijuana identification card from the Bureau of Public Health. W. Va. Code § 16A-3-2(a)(1)(A). Medical marijuana may be dispensed to caregivers only if they meet the requirements of the West Virginia Medical Cannabis Act and have a valid medical marijuana identification card from the Bureau of Public Health. W. Va. Code § 16A-3-2(a)(1)(B). Medical marijuana may only be dispensed in the following forms: pill; oil; topical; a medically appropriate form for vaporization or nebulization; dry leaf or plant form; tincture; liquid; dermal patch; and other approved forms. W. Va. Code § 16A-3-2(a)(2); W. Va. Code St. R. § 64-112-2.4.

The West Virginia Medical Cannabis Act contains a number of provisions relating to employment

issues that may arise with respect to an employee's use of medical marijuana. An employer may not discharge, threaten, refuse to hire, or otherwise discriminate or retaliate against an employee solely because of the employee's status as an individual who is certified to use medical marijuana. W. Va. Code § 16A-15-4(b)(1). However, the employer is not required by the Medical Cannabis Act to make any accommodation for the use of medical marijuana on the employer's property or premises. W. Va. Code § 16A-15-4(b)(2). The Medical Cannabis Act further permits an employer to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position. *Id.* An employer may also prohibit an employee from performing any duty or task that the employer deems life-threatening to the employee or other employees, while the employee is under the influence of medical marijuana. W. Va. Code § 16A-5-10(3). Lastly, employers are not required to commit any act that would put the employer or any person acting on its behalf in violation of federal law. W. Va. Code § 16A-15-4(b)(3).

The Medical Cannabis Act generally prohibits anyone from performing any task under the influence of medical marijuana when doing so would constitute negligence, professional malpractice, or professional misconduct. W. Va. Code § 16A-12-9(1). This general prohibition applies to employment and non-employment settings.

64. 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, recreational use of marijuana is not permitted.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below:

Michael A. Kawash, Esquire
mak@ramlaw.com
304-347-8315

Mark J. Grigoraci, Esquire
mjpg@ramlaw.com
304-347-8304