

WORKERS' COMPENSATION

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Louisiana Workers Compensation: The Parties

---La. R.S. 23:1037---

Any person who is paid wages (either monthly, hourly, weekly or for a specific lump sum) to perform a task that is part of the employer's trade, business or occupation will be regarded as an "employee," and if that person is injured at work, he may seek compensation benefits.

Specific Employment Situations

- **Volunteers**

- Volunteers, who by definition are not paid wages for their services, are generally not considered employees.
- However, wages alone are not dispositive of an employment relationship. The amount of control and supervision that the employer has over the volunteer should be considered, as well as whether the employer benefited from the work being done.

- **Multiple Employment**

- An individual may be employed by more than one person or corporation.
- If he is injured while performing services for the multiple employers, he may seek compensation from any employer.

- **Joint Employers**

- Joint employment is a type of multiple employments.
- An example of joint employment is an individual paid by several employers to do similar work for each, with each employer paying a percentage of the employee's wages.
- Each employer is regarded as the employer of the joint employee, and is liable to the employee for the full amount of benefits. However, between themselves, each joint employer is only liable for its pro rata share.

- **Borrowed Employee**

- An employee is borrowed when his general employer relinquishes control to the borrowed employer, and the borrowing employer exercises control over the borrowing employee at the time of the injury.
- The employee has the right to seek compensation benefits from both the borrowing and the lending employers or he may choose to recover against only one of the-employers.

- **Independent Contractor**

- Independent contractors are not entitled to worker's compensation benefits.
- However, if an independent contractor is doing something that is part of the employer's business trade or occupation, and a substantial part of the work time is spent in manual labor, he will be treated as an employee of that employer and thus entitled to worker's compensation benefits.

- Manual labor is defined liberally; it only requires some physical participation in the work instead of strictly supervision. Driving a truck and the traditional requirements associated with same are not deemed “manual labor.”
- **Owner/Operator Truck Drivers as Independent Contractors**
 - Legislation specifically excludes an employment relationship between any owner-operator truck drivers (and their employees) and any common carrier, contract carrier, or exempt hauler. Such "owner-operator" truck drivers and their employees are not entitled to worker's compensation.
- **Successive Employment**
 - Not Joint
 - No “common enterprise”
 - Only the employer where the injury occurred is liable.
 - Aggravated Injury- If injury occurred during work for employer A, then re-aggravated with employer B, B can seek contribution of injuries from A.
Note- there is also potential for a second injury fund claim.

Louisiana Workers Compensation: The Exclusive Remedy

---La. R.S. 23:1032---

- Worker's compensation is the exclusive remedy of an employee against his employer.
- Worker's compensation does not cover intentional acts. An employee can sue his employer in tort for injuries resulting from intentional acts of his employer (or co-employee).
- An intentional act is one in which the person who commits the act either desired the consequences of his acts or omissions or who believed the consequences were substantially certain to result from them.

- **Intentional Acts Denied by Courts**

- Despite the more liberal definition of "intentional act," courts rarely define employer behavior as intentional.
 - An injury that is probable, but not certain or inevitable, will not be intentional.
 - Dangerous or stupid acts by employers are not automatically intentional torts.

Louisiana Workers Compensation: The Injury

---La. R.S. 23:1032---

Employers shall pay compensation to employees who receive personal injuries from accidents arising out of and in the course of employment.

Time and Place of Accident

Accidents in the Course of Employment and Arising Out of Employment

- The term “arising out of employment” is used to define the risk in question.
- The term "during the course of employment" is used to define the relationship between the risk and the employment in terms of time and space.
- Both “arising out of” and “during the course of” must be present. However, a strong showing with reference to one requirement may compensate for a relatively weak showing of the other.

Accidents during "Horseplay"

- The statute specifically excludes the claims of employees who are injured while engaged in horseplay.
- This does not preclude the claim of an employee who was the innocent victim of horseplay while engaged in his proper work duties.

Accidents Caused by Acts of Nature or by Risks Common to Everyone

- Whenever the call of duty brings the worker to the place of danger, wherever that place may be, the resulting mishap is recognized as an accident that arises out of employment.

Assaults by Third Parties Involving Purely Personal Matters

- Recovery of worker's compensation benefits is excluded when the injury arises out of a dispute with another person or employee over matters unrelated to the injured employee's employment.

Accidents during Social Activities

- An employer may be responsible in worker's compensation for an employee who is injured while attending an after work hours social event.
- Recreational or social activities are within the course of employment when:
 - They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
 - The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the ambit of the employment; or
 - The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

- **Accidents While Standing By**
 - "Standing by" is when an employee is waiting for a new task to be given. An employee who is injured while standing by is entitled to worker's compensation benefits.

- **Accidents While on Call**
 - The fact that an employee is "on call" for a period of time does not mean that injuries suffered during that time will necessarily entitle him to worker's compensation benefits. The employee must be in the course and scope of the actual duties during the on call period.

- **Accidents during Lunch Hour or Rest Periods**
 - An employee who sustains injuries away from his place of his employment during lunch or a period of rest is generally not entitled to worker's compensation benefits.
 - However, if an employee is injured at his place of employment during lunch or rest, he generally will be entitled to worker's compensation benefits.

- **Accidents To and From Work**
 - As a general rule, accidents that occur while the employee is going to or returning from work are not covered under worker's compensation law.
 - An exception to this rule occurs when transportation is furnished incidental to employment.
 - Accidents involving a car furnished by the employer when the employee is traveling to or from work will be compensable.
 - If the employer reimburses the employee for travel expenses, then an accident that occurs while traveling to or from work is compensable.
 - An exception to the general rule, known as the "threshold doctrine", is that travel is in the course of employment when the employer's premises are immediately adjacent to an unusually hazardous area of travel. For example, adjacent railroad tracks were found to be a distinct travel risk for an employee traveling to and from work.

- **Deviation**
 - An employee may be in the course of his employment in the performance of a job related errand, but not if the employee deviates and engages in a personal errand.

- **Special Mission for Employer**
 - If an employee is found to be on a special mission for his employer, he is considered to be within the course of his employment, including the travel from his home to the place of the mission or vice-versa.

Nature of the Injury

- **Effect of Independent Causes**
 - When an employee has a pre-existing condition that is aggravated by physical or extraordinary mental stress at work, the employer must take the employee as he is and cannot deny benefits because the work accident or stress would not have resulted in injury in a healthy individual.
- **Accidents Which Occur After the Work Accident**
 - When an accident occurs after a work related injury, the employer will be responsible for the additional injury if the new injury is an aggravation of the original injury.
- **Degenerative Conditions and Repeated Traumas**
 - The occurrence of an accident is required for a compensable physical or mental injury. The accident must be an actual event that directly produces symptoms at the time of the injury, as opposed to a gradual deterioration.

Occupational Disease

- **Occupational Disease**
 - “Disease or illness which is due to causes or conditions peculiar to that particulate trade.”
 - Expressly includes carpal tunnel
 - Expressly excludes:
 - Degenerative disc disease
 - Spinal stenosis
 - Arthritis
 - Mental Illness
 - Heart Disease
 - Perivascular disease.
 - Presumption that the disease is non-occupational if the employee works for employer less than one year.
- **Successive Employers**
 - All employers liable in solido.
 - The last employer will ultimately be liable and the prior employers can seek contribution.
- **Issues with timing**
 - Prescription- 1 year from the date:
 - The disease manifests itself;

- The employee is disabled; and
 - The employer knows the disease is “occupationally related.”
- Only receive the one year prescriptive period if notice is posted at the workplace. If not, add six months to the date.

Louisiana Workers Compensation: Affirmative Defenses

---La. R.S. 23:1081--

There are three general circumstances in which recovery is denied because of the employee's conduct. These affirmative defenses must be specifically pleaded by the employer.

- **Aggressor Doctrine**
 - No compensation is allowed for an injury caused by the injured employee's willful intention to injure himself or another.

- **Initial Physical Aggressor**
 - No compensation is allowed for an injury caused to the initial physical aggressor in an unprovoked physical altercation, unless excessive force was used in retaliation against the initial aggressor.

- **Intoxication**
 - No compensation shall be allowed for an injury caused by the injured employee's intoxication at the time of the injury, unless the employee's intoxication resulted from activities which were in pursuit of the employer's interests or when the employer procured the intoxicating beverage and encouraged its use during the employee's work hours
 - Intoxication includes alcohol and drugs
 - Employers are permitted to administer drug and alcohol testing after the accident. The testing should be administered as closed to the accident as possible.
 - The employer must have a written drug policy in order to administer a drug test.
 - Presumption of Intoxication
 - There is a presumption of intoxication if an employee is found to have .1 % or more of alcohol in his blood at the time of the accident or if there is evidence of on or off the job use of non-prescription controlled substances.
 - Once intoxication is established, there is a presumption that the accident was caused by the intoxication.
 - The presumption is rebuttable.
 - The presumption can be rebutted if the employee can prove that the accident is not of the type caused by intoxication.
 - The presumption can be rebutted with testimony from others that the employee was not intoxicated.

Louisiana Workers Compensation: Wages as Basis for Compensation

---La. R.S. 23:1021--

Average Weekly Wage

The average weekly wage is the basis upon which his indemnity benefits are calculated. Calculation of the average weekly wage differs depending upon the basis of the employee's pre-accident wages.

- **Hourly Wages**
 - For an employee who was hired to work 40 hours a week or more, the average hours worked in the 4 full weeks preceding the date of the accident is multiplied by the hourly wage rate. The week of the accident is not included in the calculation.
 - If the employee did not work an average of 40 hours through no fault of his own, his hourly wage rate is multiplied by 40 hours.
 - For an employee who is offered 40 hours or more a week, but who "regularly, and at his own discretion, works less than 40 hours per week", simply average the wages earned in the 4 full weeks preceding the date of the accident. This employee is not given the benefit of the presumption of 40 hours.
 - For employees who regularly work less than 40 hours, but whose personnel records reflect a classification as "full time", such employees have been given the 40 hour presumption.

- **Monthly Wages**
 - For employees paid on a monthly basis, multiply the monthly salary by 12 and divide by 52.

- **Annual Wages**
 - For employees paid an annual salary, divide the salary by 52.
 - Additionally, the courts have also considered bonuses, tips and the like.

- **Unit, Commission or Other Basis**
 - If the employee is paid on some measure other than hourly, monthly or annually (such as unit, piecework or commission basis), the calculation requires consideration of the 26 weeks of earnings prior to the accident.
 - For the employee paid on a "unit, commission or other basis", total the gross earnings for the 26 week period immediately preceding the accident and divide by the total number of days worked for the employer during that period which produces a day rate). Multiply that figure by the average number of days worked per week during that timeframe.

- **Seasonal Employment**
 - Seasonal employment is defined as employment which customarily operates only during regularly recurring periods of less than 44 weeks per year.
 - For seasonal employees, divide the annual earnings by 52.

- **Maximum and Minimum Compensation**
 - Maximum and minimal compensation rates are established each year by the state of Louisiana as a percentage of the statewide average weekly wage.

Louisiana Workers Compensation: Disability Benefits

---La. R.S. 23:1221--

Disability benefits compensate for wages which are unable to be earned due to a work related injury. Such benefits are paid pursuant to temporary total disability (TTD), permanent total disability, supplemental earnings benefits (SEB) or permanent partial disability.)

- **Temporary Total Disability**

- TTD is generally regarded as the healing period during which the employee is totally disabled and unable to work.
- The injured worker must not have worked for a minimum of 7 days. Once the employee misses work for 14 consecutive dates, the employee will receive benefits for the first week of TTD.
- TTD is paid at the rate of 66 -2/3 percent of the average weekly wage.

- **Permanent Total Disability**

- Lifetime disability benefits are provided for permanent and total disability. The maximum compensation rate is adjusted automatically each year based on 66-2/3 percent of the state wide average weekly wage.
- There is no limit to the number of weeks such benefits are to be paid and such benefits are paid at the rate of 66-2/3 percent of the average weekly wage.

- **Supplemental Earnings Benefits**

- SEB is due if the post-accident wages (or the employee's ability to earn wages) are less than 90 percent of the pre-accident wages.
- SEB is calculated on a monthly basis. Average monthly wages are computed by multiplying the average weekly wage by 52 and then dividing by 12.
- The employee is entitled to 66-2/3 percent of the difference between the pre-accident monthly wages and the post-accident monthly wages earned or capable of being earned.
- The employer can take advantage of wages the employee is capable of earning, even though the employee has not actually earned those wages, by identifying jobs in the employee's reasonable geographic area which are available at the time the jobs are approved by the treating physicians.
- The easiest way to produce actual post-accident earnings or evidence of wages capable of being earned is for the employer to offer a position which is approved by the treating physician. Regardless of whether the employee accepts the job, SEB can be calculated based on the wages that were earned or could have been earned. If those wages are greater than 90 percent of the pre-accident wage, regardless of whether the employee is performing light duty, modified work or the same work he was performing pre-accident, no SEB is due.

- **Permanent Partial Disability**
 - Permanent partial disability compensates the employee for serious disfigurement or loss of use of a part of his body.
 - Specific body parts are enumerated in the statute and provide different numbers of weeks for which 66-2/3 percent of wages are due.
 - The neck and back are not listed in the statute and thus do not qualify for permanent partial disability, although such injuries may qualify for TTD or SEB.
 - Less than a full loss of use of a specified body part will result in a payment of weekly benefits based on a percentage of that loss of use.

Louisiana Workers Compensation: Indemnity Benefit Credits and Offsets

- **Unemployment Compensation**
 - No workers' compensation benefits are payable for temporary total disability, permanent total disability or supplemental earnings benefits in any week in which the employee has received unemployment benefits.

- **Credit for Other Indemnity/Lost Wage Payments**
 - An employee is entitled to a credit against permanent partial disability benefits by virtue of payments made for temporary total disability, permanent total disability or supplemental earnings benefits. The credit is provided on a week to week basis.
 - By way of example, if the statute provides that an injured employee is to receive 50 weeks of benefits for a permanent partial disability, but the employee has already received 50 or more weeks of temporary total disability benefits and/or supplemental earnings benefits, the employee is not entitled to any permanent partial disability benefits.

- **Social Security Offset- “Reverse Offset”**
 - Only available if the employee is totally disabled.
 - Must be awarded by OWC judge- must seek modification
 - Must wait for social security to remove their offset

- **Private Disability**
 - Only receive offset if the employer pays for the disability and only to the extent of the percentage of the employer's payment

- **Credit for Overpayment**
 - Only allowed as an offset for future obligations.
 - If a large amount, must spread out the offset over multiple payments.

Louisiana Workers Compensation: Penalties

---La. R.S. 23:1125--

Penalties to the Employer

Workers compensation is designed to provide quick medical attention and economic assistance following an injury. Penalties have been incorporated into the law to help achieve these ends.

- **Failure to Provide Medical Reports upon Request**
 - If the medical report prepared after the accident is not furnished to the employee within 30 days of receipt, the employer is liable to the employee for a civil penalty of \$250 plus a reasonable attorney's fee.
 - An employer will also be subject to these penalties and fees for any other medical reports that the employer may have received that the employee requests. The employer must send the reports within 30 days of written request from the employee.

- **Failure to Pay Benefits Timely**
 - Compensation benefits are to be paid in the same manner and period of time as the payment of wages during employment.
 - **Temporary Total Disability Benefits** are due on the **14th day** after the employer has knowledge of the injury.
 - **Permanent Total Disability Benefits** are due on the **14th day** after the employer has knowledge of the injury.
 - **Death Benefits** are due on the **14th day** after the employer has knowledge of the death.
 - **Supplemental Earnings Benefits (SEB)** are due on the **14th day** after the employer has knowledge of the compensable earnings loss entitling the employee to supplemental earnings benefits.
 - **Permanent Partial Disability Benefits** are due on the **30th day** after the employer or insurer receives a medical report giving notice of the permanent partial disability. This 30-day period gives the employer time for an independent medical examination of the employee. If the independent examination contradicts the employee's medical report, the employer will have a basis upon which he can reasonably controvert the employee's claim.
 - Failure to “reasonably controvert” the claim or to pay benefits within the time period specified will result in a penalty being assessed against the employer, or the insurer, for the full medical payment plus a penalty of \$50 per day (up to a maximum of \$2,000) or 12% of any unpaid benefit (up to a maximum of \$8,000), whichever is greater.

- **“Arbitrary and Capricious” Termination of Benefits**
 - An employer who terminates benefits whose conduct is “arbitrary, capricious, or without probable cause” shall be subject to a penalty not to exceed \$8,000 and a reasonable attorney fee.

- **Failure to Pay Correct Mileage**
 - Employers must pay the statutory amount for mileage reimbursement when reimbursing employees for mileage driven to and from medical appointment.

Penalties to the Employee / Forfeiture of Benefits

- **Penalty for Misrepresentations Concerning Benefit Payments**
 - Employees and employers who are proven to have made willfully false statements regarding compensation violate La. RS. §23:1208 and face serious criminal penalties. The penalties are set in accordance with the value of the benefits involved, ranging from 6 months in prison and a fine of \$500 to 10 years in prison and a fine of \$10,000.
 - Additionally, employees who make material misrepresentations forfeit all compensation benefits.

- **Misrepresentations Violating La. R.S. §23:1208**
 - Employees violate La. RS. §23:1208 when they make misrepresentations denying prior injuries.
 - Employees violate La. RS. §23:1208 when they make misrepresentations about the extent of disability, and their ability to engage in various activities.
 - Employees violate La. RS. §23:1208 when they make misrepresentations concerning post injury employment and earnings to their employer who is paying compensation benefits.
 - Employees violate La. RS. §23:1208 when they make misrepresentations concerning post-accident injuries.
 - Employees violate La. RS. §23:1208 when they make misrepresentations about mileage for the purposes of mileage reimbursement.

- **Summary Judgment in Fraud Cases**
 - A determination of whether a party has violated La. R.S. §23:1208 turns on an evaluation of the party's motive or intent in making the contested representation and summary judgment is seldom appropriate for determination based on subjective facts, such motive, intent, good faith, knowledge and malice.

- **Forfeiture for Failure to Answer Truthfully Regarding Prior Medical Conditions**
 - Employers often ask their employees to complete a medical questionnaire at the time of hire so that the employer is aware of any pre-existing disabilities.
 - If an employee fails to answer the medical questionnaire truthfully, he will forfeit his Worker's Compensation benefits per La. R.S. §23:1208.1 provided that his failure to answer truthfully is directly related to the medical condition for which a claim for benefits is made or affects the employer's ability to receive reimbursement from the Second Injury Fund.

- **Forfeiture of Benefits While Incarcerated**
 - Employees who are incarcerated for a criminal offense forfeit their right to compensation benefits, unless a judge finds that an employee has dependents who rely on a compensation award for their support, in which case the compensation award shall be made payable and transmitted to the legal guardian of the minor dependent or person designated by the judge.

- **Forfeiture Due to Unauthorized Third Party Settlement**
 - An employee who settles his third party suit without written approval of his employer or his insurer forfeits his right to future worker's compensation benefits.

Louisiana Workers Compensation: Medical Benefits

---La. R.S. 23:1125---

WHAT:

If an employee sustains an injury or illness arising out of and during the course of his employment, he is entitled to all necessary medical, surgical, hospital services and medicines or any nonmedical treatment recognized by the state's laws as legal. Treatment includes the furnishing of prosthetics to repair or replace any part damaged or destroyed as a result of the accident. The employer is also responsible for any expenses incurred for mileage traveled to obtain the medical services, as long as the expenses are reasonable.

WHEN:

- **Deadline for employer to pay benefits**
 - Medical benefits must be paid within 60 days of the employer or the insurer receiving notice of the bill.

- **Prescription for claim**
 - The employee must bring a medical benefits claim one year from the date of the accident, or three years from the date of the last payment of medical benefits.
 - The employee and the medical provider are solidary obligees, so suit brought by one interrupts prescription (statute of limitations) as to the other.

HOW:

- **Approval of Health Care Provider Treatment, Testing, and Fees**
 - A health care provider providing care to an employee must get approval for all non-emergency care over \$750 from the employer or workers compensation insurer.
 - Exceptions:
 - If the procedure is an emergency, no approval is required
 - If the employer denies the injury is work related or that the injury is compensable, no approval is required
 - Unreasonable refusal of medical care or unreasonable delay of approval of medical care can result in penalties.

- **Choice of Doctor**
 - An employee may use the doctor that the employer suggests or he can choose his own doctor.
 - To avoid the problem of "doctor shopping," an employee is allowed to choose one physician in any field or specialty. After that, the employee must receive approval from his employer or workers compensation carrier to switch doctors *within the same field of medicine*.
 - An employer must be reasonable in refusal to allow switching doctors. The main inquiry in deciding reasonableness is whether the switch is an attempt to

"Doctor Shop."

- Multiple treating doctors in different fields or specialties are allowed.

- **De Facto Choice**

- When an employee accepts the employer's choice of doctor and receives treatment from that doctor, this is known as the employee's "de facto choice".
- When an employee has accepted treatment from the employer's doctor, and then wants to change his doctor, the employee has the right to do this without approval so long as he has not signed a selection of physician form selecting that physician.

- **Medical Examinations**

- An employee is obligated to submit himself to an examination by a qualified physician paid for by the employer as soon after the accident as demanded and as often as reasonably necessary.
- The employer is obligated to furnish the report from the examination within 6 days of receipt of the report.
- Upon receipt 'of such a report by either party, the receiving party has 6 days to notify the other party that he disputes something in the report, otherwise the report shall be prima facie evidence of the facts stated therein.
- If the employee refuses to submit himself to an examination at the request of the employer, and the Worker's Compensation Judge orders the examination, the employee's right to compensation will be suspended until the examination takes place.

- **Employee Refusal to Submit to an Operation**

- Some injuries require surgery to return the employee to the pre-accident condition. Courts generally do not require employees to undergo surgery.
- However, compensation may be discontinued or reduced if the employer can prove that the surgery will cause minimal risk to the employee's life and the doctors agree that the surgery will result in a reduction of the employee's impairments.

- **Communications with Physicians and HIPAA**

- An employee's attorney will often advise the treating physician not to have any conversations with an adjuster, citing the physician/client privilege.
- However, the legislature amended the medical records and information statute, La. R.S. 23:1127, specifically recognize the right of adjusters to speak with health care providers notwithstanding the patient/physician privilege.
- HIPAA restricts who a physician can speak to regarding a patient's care. Federal statute § 164.512(1) recognizes the special needs of employers and their insurers to have access to medical information in the area of worker's compensation and authorizes it to the extent necessary.

- **Reimbursement Schedule**
 - The reimbursement schedule is a medical fee schedule created by the Office of Worker's Compensation for drugs, supplies, hospital care and services, medical and surgical treatment, and non-medical treatment. The charges on the schedule are the mean of the customary charges.
 - A health care provider may not charge the employee, the employer or the insurer an amount greater than the charges on the schedule.

- **No Demands for Payment from Claimant**
 - A health care provider may not seek payment from the employee or claimant.
 - The purpose is to protect the employee or claimant from credit loss due to payment disputes.
 - A demand for payment from a claimant faces a penalty of \$250.

Louisiana Workers Compensation: Death Benefits

---La. R.S. 23:1231--

If an injury at work causes death to an employee within two years after the last medical treatment for that injury, benefits are to be paid to the dependents of the employee or if there are no dependents, to the parents.

- **Persons Entitled to Receive Benefits**

- A person cannot receive benefits under the act unless that person was actually dependent (fully or partially) on the employee at the time of death. The following persons are presumed to be dependent.
 - A spouse living with the deceased employee at the time of the accident or death.
 - A surviving spouse not living with the deceased employee at the time of the accident or death must prove dependency.
 - A child living with the deceased employee at the time of the accident or death.
 - Until the child is 18,
 - Or until 23 if enrolled and attending an accredited educational institution,
 - Or over the age of 18 if the child is physically or mentally incapacitated from earning wages.
 - If there are no dependents, the parents are entitled to receive benefits.

- **Computation of Benefits**

- The maximum compensation is 65% of the deceased employee's average weekly wage. This amount is dispersed first amongst wholly dependent persons, then partially dependent persons.
- Wholly Dependent Persons:
 - A widow or widower alone -32.5% wages
 - Widow or widower, plus one child -46.25% wages
 - Widow or widower, plus two or more children -65% wages
 - One child alone-32.5% wages
 - Two children -46.25% wages
 - Three or more children 65% wages
 - If none of the above, wages go to dependent parents
 - One parent -32.5% wages
 - Both parents -65% wages
 - If none of the above, wages go to dependent siblings
 - One sibling -32.5% wages
 - 11 % additional for each sibling in excess of one

- **Partially Dependent Persons**
 - One who received only part of his support from the earnings of the deceased employee at the time of the accident or death is entitled only to a portion of the compensation he would receive if he were wholly dependent.

- **Non-Dependent Parents**
 - Non-dependent parents qualify for benefits if the deceased employee has no legal dependents.
 - Lump sum of \$75,000 to be paid to each of the surviving parents as their sole and exclusive compensation

Termination of Benefits

- **Spouse**
 - Weekly payments to a surviving spouse end upon the death or remarriage of the spouse.
 - If the spouse remarries, a payment of two years compensation in a lump sum is due.

- **Children**
 - Benefits to children continue until death, marriage, the age of 18, or the age of 23 if the child is enrolled and attending an accredited educational institution as a full time student.
 - Benefits to children who are mentally or physically incapacitated of earning wages continue as long as the incapacity exists.

- **Other Dependents**
 - Benefits to all other dependents continue as long as their dependency exists and terminates upon death.

Burial Expenses

- The employer must pay reasonable burial expenses of the deceased employee. Expenses must not exceed \$7,500.
 - If the burial expenses are less than \$7,500, the remainder is to be paid to the heirs.

Louisiana Workers Compensation: Rehabilitation

---La. R.S. 23:1226--

An employee who is unable to earn wages equal to the wages he was earning before the accident is entitled to prompt rehabilitation services provided by the employer or insurer. The purpose of vocational rehabilitation is job placement, with job training as a secondary purpose.

- **Reasonable Geographic Area**
 - When the employee has proven that he is unable to earn 90% of his pre accident wages because of the job accident, supplemental earnings benefits are due and the burden shifts to the employer to show that there are jobs available to the employee in the employee's reasonable geographic region.

- **Travel Reimbursement**
 - Medical benefits include reimbursement for travel related to vocational rehabilitation, provided that the employer required the travel.

- **Communications with the Physicians**
 - Case managers and vocational counselors have a specific right to speak with health care providers notwithstanding the patient/physician privilege or any other law to the contrary in order to have reasonable access to medical information for all parties to coordinate and manage the care for the injured employee and to facilitate his return to work.
 - Any case manager or vocational counselor who speaks with a health care provider must mail the employee and the physician a written summary of the communications and any requirements for the employees reasonable return to work within five working days of the communication.

Louisiana Workers Compensation: The Second Injury Fund

---La. R.S. 23:1378--

- A "second injury" occurs when an employee has a permanent partial physical impairment due to a previous accident or disease and is reinjured on the job, causing the first and second injuries to merge and create a greater degree of impairment than would have resulted had there been no pre-existing condition.
- In such a situation, the employer can be reimbursed from the Second Injury Fund, as long as it is properly insured or qualified as a self-insured employer. The purpose behind the Second Injury Fund is to encourage employment of the physically impaired and to protect employers from excess liability.

- **"Permanent Partial Disability"**
 - A permanent partial disability is one of such seriousness that it constitutes a hindrance or obstacle to obtaining employment.

- **Employer Must Know of Prior Injury**
 - The employer is not entitled to reimbursement from the Second Injury Fund unless it had knowledge of the preexisting condition and then retained the employee in employment. Knowledge of the preexisting condition acquired after the job accident is not sufficient to qualify for reimbursement from the fund.
 - If the employer has knowledge of the permanent partial disability before hiring the employee, there is a presumption that the disability was considered by the employer as a hindrance or obstacle to employment if the condition is one of these specifically listed in R.S. 23: 1378(F).

- **Employer Must Make Written Request for Reimbursement from Fund**
 - The employer or insurer must file a claim for reimbursement with the Second Injury Fund within 52 weeks after the first payment of any benefits to the employee.

- **Time Limit for Submitting Reimbursements**
 - The employer or insurer must submit their request for reimbursement within 180 days of the approval of the Second Injury Fund claim or within one year of the payment of the benefits, whichever occurs latter.

- **Subrogation**
 - Employers and insurance carriers must notify the Second Injury Fund Board when they have asserted a subrogation claim against a third party.
 - There is a penalty of 20% of the employer's claim if the employer fails to notify the Second Injury Fund Board before receiving any funds from a third party.

Louisiana Workers Compensation: Claims against Third Parties

---La. R.S. 23:1101-1104--

An employee has the right to file a negligence claim against a third party who has legal liability for a work related injury. Similarly, an employer who has paid compensation benefits or who may become liable for compensation benefits can sue a third party for reimbursement for the benefits the employer has paid or may be required to pay in the future.

- **Filing Suit**
 - If either the employee or the employer files suit against a third party, they must notify the other party so that party can intervene to assert its rights against the third party. Additionally, the employee may not settle with a third party without approval of the employer and will be penalized if he does so.

- **Apportionment of Damages**
 - When judgment is rendered against a third party and damages are awarded, the damages are apportioned so that the employer first recovers the payments he has made on behalf of his employee. Any remaining amount is given to the injured employee. This payment releases the employer from liability until benefits due to the employee exceed the amount paid to the employee from the award.

- **Comparative Negligence and Employer Fault**
 - An employer's recovery against a third party will be reduced by the same percentage of fault assigned to the employee. This reduces the employer's claim for reimbursement to the same percentage as the employee's claim against the third party defendant.
 - The fault of the employer shall be assessed as a percentage of aggregate fault of all persons contributing to the injury, and the recovery of the employer's lien will also be reduced by the employer's fault.

Louisiana Workers Compensation: Prescription (Statute of Limitations)

---La. R.S. 23: 1209--

- **Prescriptive Period**
 - An employee must assert his claim for benefits with the Office of Workers' Compensation within 1 year from the accident, or if the injury is a developmental injury, within 1 year from the development of the injury, but no more than 2 years from the accident.
 - If disability benefits other than SEB were paid, the employee will have 3 years from the last payment to assert a claim for SEB. However, the employee's right to SEB payments terminates at the end of 2 years if the employee has not received 13 consecutive weeks of SEB payments.
 - Other than SEB payments or developmental injuries, the employee has 1 year from receipt of the last payment of compensation benefits to file a claim for additional benefits.

- **Interruption of Prescription**
 - Filing of a suit for medical benefits interrupts prescription for an indemnity claim, but payment of medical benefits does not.

- **Prescription and Developmental Injuries**
 - Prescription for a developmental injury will not begin to run until the employee is aware, or should have been aware, that the injury and its resultant disability are work related.
 - The doctrine of *contra non valentum* (i.e. prescription suspended while the employee is unaware of the injury) does not apply in developmental injury cases because the legislature expressly stated it would not and deems the action prescribed 2 years from the time of the accident.

- **TTD, SEB, and Prescription**
 - An employee who is temporarily totally disabled and not able to work is entitled only to TTD. If an employee's TTD claim has prescribed, he is not entitled to SEB.

- **Prescription for Medical Benefits**
 - Disability benefits and medical benefits have separate and independent prescriptive periods.
 - The prescriptive period for medical benefits are 1 year after the accident or death, and if any medical payments' are made, 3 years from the last payment.

- **Prescription for Modification of Judgment**
 - If after obtaining judgment, the incapacity of the employee has changed for better or for worse, either party may seek to modify the judgment. Prescription for a claim to modify a judgment is the same as provided for any claim for benefits under La. R.S. 23:1209.

- **Prescription for Rehabilitation Benefits**
 - If an employee needs vocational rehabilitation after returning to work from a temporary total disability, the employee must request the rehabilitation within 2 years from the date of the termination of the temporary total disability. Otherwise, his claim for rehabilitation will have prescribed.

- **Prescription for Third Party Claims**
 - A timely filed workers compensation suit against an employer interrupts prescription against a third party tortfeasor. Payment of benefits by an employer does not alone interrupt prescription against a third party. The plaintiff who is seeking to take advantage of the interruption of prescription against the third party has the burden to prove solidary liability of the employer and the third party when, on the face of the pleadings, the suit has prescribed.

- **Prescription for Penalties and Attorney Fees**
 - A claim for penalties and attorney fees prescribes 1 year from the denial of benefits.

Louisiana Computation of Average Weekly Wage (AWW)

---R.S. 23:1021 (10)---

1) Hourly Wages

A) Employees hired for 40hrs/week or more

- Average the hrs worked in the 4 full weeks preceding the accident and multiply by the hourly wage rate.
- Note: 40 hrs/week presumed and 40 hrs/week is to be used if employee averages less than 40 through no fault of his own.

B) Employees offered employment for 40 hrs or more, but “regularly at his own discretion, works less than 40 hrs/week”

- Average the wages earned in the four full weeks preceding the date of the accident
- Note: Employee is not given the benefit of the presumption of 40 hours.

C) “Part-time” Employees—An employee who as a condition of his hiring knowingly accepts employment that:

(i) customarily provides for less than 40 hrs/week, and (ii) that is classified by the employer as a part-time position

- Average the actual hrs worked in the 4 full weeks preceding the date of injury and multiply by the wage rate.
- Note: An employer must note either in the employee’s personnel file or his wage records that the employee is employed in a part-time position or the employee will be granted the 40 hour presumption.

D) “Moonlighting” Part-time Employees—Part-time employees who work another job either on a part-time of full-time basis

- Multiply the hourly rate the employee was receiving in the employment at the time of the injury by the total hrs worked for all employers not exceeding the actual average hours worked or 40 hours, whichever is less.

2) Monthly Wages

- Multiply monthly salary by 12 and divide by 52.

3) Annual Wages

- Annual salary is divided by 52.
- Note: Courts may also consider bonuses.

4) Seasonal Wages—Employment which customarily operates only during regularly recurring periods of less than 44 weeks annually.

- Annual earnings divided by 52.
- Note: Annual earnings not limited to the earnings from seasonal employment only.

5) Unit, Commission, or Other Basis

- Gross earnings for the 26-week period immediately preceding the accident divided by the total number of days worked for that employer during that period (which gives you a day rate) multiplied by the average number of days worked per week.

6) Fringe Benefits

- No income is included in the calculation of wages unless it is taxable to an employee for federal income tax purposes.
- However, any amount that is withheld by the employer to fund any non-taxable benefit will be included in the calculation of AWW if this fringe was elected by the employee in lieu of taxable earnings.

---Maximum and Minimum Compensation Chart---

(ACTUAL WAGES ARE TO BE PAID IF THE WAGES ARE LESS THAN THE MINIMUM)

| <u>Date of Injury</u> | <u>AWW</u> | <u>Max</u> | <u>Min</u> | | | |
|-----------------------------|------------|------------|------------|------------------------------|----------|---------------|
| Sept 1, 2002 - Aug 31, 2003 | 554.31 | 416.00 | 111.00 | Sept 1, 2013 - Aug. 31, 2014 | 825.54 | 619.00 165.00 |
| Sept 1, 2003 - Aug 31, 2004 | 572.53 | 429.00 | 114.00 | Sept 1, 2014 - Aug. 31, 2015 | 839.76 | 630.00 168.00 |
| Sept 1, 2004 - Aug 31, 2005 | 584.40 | 438.00 | 117.00 | Sept 1, 2015 - Aug. 31, 2016 | 865.31 | 649.00 173.00 |
| Sept 1, 2006 - Aug 31, 2007 | 637.19 | 478.00 | 127.00 | Sept 1, 2016 - Aug. 31, 2017 | 876.00 | 657.00 175.00 |
| Sept 1, 2007 - Aug 31, 2008 | 696.00 | 522.00 | 139.00 | Sept 1, 2017 - Aug. 31, 2018 | 870.00 | 653.00 174.00 |
| Sept 1, 2008 - Aug 31, 2009 | 728.10 | 546.00 | 146.00 | Sept 1, 2018 - Aug. 31, 2019 | 886.38 | 665.00 177.00 |
| Sept 1, 2009 - Aug 31, 2010 | 768.83 | 577.00 | 154.00 | Sept 1, 2019 - Aug. 31, 2020 | 916.85 | 688.00 183.00 |
| Sept 1, 2010 - Aug 31, 2011 | 772.18 | 579.00 | 154.00 | Sept 1, 2020 - Aug. 31, 2021 | 940.00 | 705.00 188.00 |
| Sept 1, 2011 - Aug 31, 2012 | 789.00 | 592.00 | 158.00 | Sept 1, 2021 - Aug. 31, 2022 | 990.85 | 743.00 198.00 |
| Sept 1, 2012 - Aug 31, 2012 | 807.07 | 605.00 | 161.00 | Sept 1, 2022 - Aug. 31, 2023 | 1,027.95 | 771.00 206.00 |
| | | | | Sept 1, 2023 - Aug. 31, 2024 | 1,088.07 | 816.00 218.00 |

Date of Injury AWW Max Min

- Note: The maximum and minimum rates in effect on the date of the injury apply for the duration of the period benefits are due.
- Note: Supplemental Earnings Benefits are not subject to minimum compensation.

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Louisiana Worker's Compensation Disability Benefits

---R.S. 23:1221---

A. Temporary Total Disability (TTD)

- **Generally:** the healing period during which the claimant is totally disabled and unable to work.
- **To be eligible:** injured Worker must not have worked for a minimum of 7 days and he/she must prove by clear and convincing evidence, unaided by any presumption of disability, that he/she is physically unable to engage in any employment regardless of the nature or character of the employment
- **Not Awarded if:** the employee is engaged in any employment or self-employment regardless of the nature or character of the employment or self-employment including but not limited to any and all odd-lot employment, sheltered employment, or employment while working in any pain. If employee is working or capable of working per a medical release, Supplemental Earnings Benefits may be due.
- **Benefits Due:** 66 2/3 % of AWW during the period of such disability
- **Termination:** when the extent of disability of the employee can be reasonably and reliably determined and the employee's physical condition has improved to the point that continued, regular treatment by a physician is not required.
- **Modification:** when there is a change in the medical condition of the employee.

B. Permanent Total Disability (PTD)

- **To be eligible:** injured worker must prove by clear and convincing evidence, unaided by any presumption of disability, that he/she is physically unable to engage in any employment regardless of the nature or character of the employment, notwithstanding the location or availability of any such employment or self-employment.
- **Not Awarded if:** the employee is engaged in or medically capable of any employment or self-employment regardless of the nature or character of the employment or self-employment including but not limited to any and all odd-lot employment, sheltered employment, or employment while working in any pain.
- **Benefits Due:** 66 2/3 % of AWW during the period of such disability
- **Termination:** no limit to the number of weeks these payments can be made.
- **Presumption of PTD:** an employee who has lost the use of both hands, both arms, both feet, both legs, both eyes or one hand and one foot or any two thereof or paraplegia or quadriplegia shall, in the absence of conclusive proof of a substantial earning capacity, constitute PTD.

C. Supplemental Earnings Benefits (SEB)

- **Generally:** compensation for the wage earning capacity the injured employee has lost as a result of the accident. Paid monthly.
- **To be eligible:** injured worker's post-accident wages or ability to earn wages must be less than 90% of his pre-accident wages.
- **Benefits Due:** 66 2/3 % of the difference between the average monthly wage at the time of injury and the average monthly wage earned or able to be earned after the injury. Convert the AWW into an Average Monthly Wage (AMW) by multiplying the AWW by 52 and dividing by 12.
- **Terminated:** (1) At the end of 520 weeks of benefits (need not be consecutive weeks), or (2) After the passage of 2 yrs from termination of TTD unless the employee received at least 13 consecutive weeks of SEB payments during that 2 yr period, or (3) The employee retires via a removal from the workforce with no intention to return to any form of employment (but in such event he is entitled to at least 104 weeks of SEB), or (4) the employee is able to earn 90% of his pre-accident wages, or (5) the employee returns to work and fails drug test required by employer.
- **Prescriptive Period/Statute of Limitations:** a claim for SEB payments must be made within **Three Years** of any benefit paid. If there have been **no payments** paid to the worker, then the employee's claim for benefits will prescribe **One Year** from the date of the accident, or if it is an injury that does not develop into a disability until after one year, the claim can be made within **Two Years** of the accident but no later than two years.
- **Reduction After Subsequent Accident:** if an employee is receiving SEB payments and suffers another accident entitling him to TTD, PTD, or SEB, the combined benefits from the two accidents cannot exceed the Maximum Compensation Rate in effect for TTD at the time of the subsequent injury.
- **Post-Accident Earnings for Employee Not Working:**
 - Employee must complete LDOL Form 1020 monthly which identifies earnings
 - If employee is medically cleared to work in some capacity but does not work or works in a job earning less than he is capable of earning, the employer can present evidence of wages the employee is "able" to earn.
 - This is done by presenting the wages he can earn in a job that he is medically able to perform and is (a) offered by the employer or another employer, or (b) proven to be available in the employee's community, the employer's community, or a reasonable geographic area at the time the employment is made known to the employee and approved by the physician.
 - Employee claiming he cannot perform work b/c of "substantial pain" is entitled to SEB payments only by "clear and convincing proof unaided by any presumption of disability."
- **Effect of Retirement:** if TTD or PTD continues, then the employer cannot terminate benefits based on retirement. However, if the employee is no longer TTD or PTD, then the employer should pay SEB and, after paying 104 weeks of those benefits SEB can be terminated.

D. Partial Permanent Disability

- Compensation for anatomical loss of use or amputation as follows:
 - a. Thumb----- 66 2/3% of AWW for 50 weeks
 - b. Index Finger----- 66 2/3% of AWW for 30 weeks
 - c. A Finger or Big Toe--66 2/3% of AWW for 20 weeks
 - d. Any Other Toe----- 66 2/3% of AWW for 10 weeks
 - e. Hand----- 66 2/3% of AWW for 150 weeks
 - f. Arm----- 66 2/3% of AWW for 200 weeks
 - g. Foot----- 66 2/3% of AWW for 125 weeks
 - h. Leg-----66 2/3% of AWW for 175 weeks
 - i. Eye-----66 2/3% of AWW for 100 weeks
- First Phalanx of the Thumb or Big Toe, or Two Phalanges of any finger or toe = loss of such member; Compensation shall be ½ of amount above.
- More than one Phalanx of a Thumb, or more than two Phalanges of any Finger or Toe = ½ loss of entire member.
- Amputation between the Elbow and Wrist = Loss of a Hand ; Amputation between the Knee and Ankle = Loss of a Foot
- Permanent Total Anatomical Loss of the use of a member = Amputation of the member
- Any loss less than a total loss of that body part results in a reduction in the number of weeks the benefits are paid.
 - Ex: 60% impairment to the arm would result in 120 weeks of benefits (60% x 200)
- **Disfigurement and Loss of Function:**
 - Grants up to 100 weeks of benefits to an employee who is seriously and permanently disfigured
 - Covers loss of function of the respiratory system, gastrointestinal system or gastro-urinary system
 - Neck/back are not specifically covered; Employee with such injuries can only receive TTD, PTD, or SEB.
 - Applies to workers who suffer a permanent hearing loss due to a single accident.
- **“Catastrophic Injuries”**
 - Employees suffering an injury from an accident that arises out of and in the scope of employment is entitled to a one-time payment of \$50,000 payable within one year of the date of the injury only if the injuries suffered are paraplegia or quadriplegia or the total loss of both hands or both arms, or both feet, or both legs, or both eyes, or one hand and one foot, or any of the two thereof and third degree burns of 40% or more of the total body surface.

E. Miscellaneous

- **Voluntary Payments:** An employer who continues to pay wages to an employee while the employee is unable to work is given credit on a week to week basis for “voluntary payments”

Louisiana Worker’s Compensation Affirmative Defenses

---No compensation shall be allowed for an injury if---

| | | |
|--|---|--|
| <p>(a) The injured employee willfully intended to injure himself or injure another</p> <ul style="list-style-type: none">• Called the “Aggressor Doctrine”• Compensation is denied to an aggressor in a physical altercation | <p>(b) The injured employee was intoxicated at the time of the injury, unless the employee's intoxication resulted from activities which were in pursuit of the employer's interests or the employer procured the intoxicating beverage or substance and encouraged its use during the employee's work hours</p> <ul style="list-style-type: none">• If employer establishes blood alcohol level of .08 percent or more, intoxication is presumed• The employer can administer testing after the accident. If the employee refuses, intoxication is presumed. | <p>(c) The injured employee was the initial physical aggressor in an unprovoked physical altercation, unless excessive force was used in retaliation against the initial aggressor.</p> <ul style="list-style-type: none">• Under certain circumstances an employer may utilize paragraph (a) and/or paragraph (c) to deny compensation |
|--|---|--|

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MEDICAL GUIDELINES

Claims of Medical Necessity under 23:1203.1 and the 1009 Process

Beginning on July 13, 2011, new legislation went into effect allowing the OWC to establish a medical treatment schedule which establishes guidelines outlining whether medical treatment is reasonable. The medical guidelines have been established for various injuries or conditions, including spinal injuries, upper and lower extremities, neurological/neuromuscular conditions, and chronic pain. Additional injuries and conditions are constantly being addressed. **Treatment that varies from the schedule is generally not considered reasonable and will not be owed by the employer/insurer.**

The courts are split regarding whether the guidelines should be applied retroactively to injuries predating July 13, 2011.

Other state's guidelines can be used for injuries that are not address by Louisiana's current schedule if the other state's guidelines were prepared in accordance with the rules for developing Louisiana's medical schedule pursuant to La. R.S. 23:1203.1(D).

Below are the steps in the process of evaluating whether treatment is authorized by the medical schedule.

- Step 1: Initial Request for Treatment-** Medical Provider submits a request for authorization (Form 1010).
- Step 2: Utilization Review-** Utilization review company compares the request for authorization with the Medical Guidelines to determine whether treatment request is appropriate. **Must be a Louisiana licensed physician.**

- Within 5 **business** days of the receipt of the request for authorization, the payor shall notify the medical provider of the decision to authorize the treatment.

Step 3: Disputed Claim for Medical Treatment- Within 15 **calendar** days of the medical provider or claimant may file a Disputed Claim for Medical Treatment (Form 1009) with the Medical Director to review the decision of the utilization review company.

- Medical Treatment that varies from the guidelines may also be due by the employer/payor if the claimant can show by a preponderance of the scientific medical evidence, that a variance from the medical treatment schedule is reasonably required to cure or relieve the injured worker.
- If any party believes a conflict of interest exists with the Medical Director, it shall be communicated in writing to the Medical Director who must issue a ruling on the conflict within 2 business days.

Step 4: Decision by the Medical Director- The Medical Director's office shall render a decision on the dispute as soon as practicable but in no event more than 30 days from the date of filing the Form 1009.

Step 5: Appeal of the Medical Director's Decision- If either party disagrees with the Medical Director's decision, it may appeal by filing a Disputed Claim for Compensation (Form 1008). The Medical Director's decision may be overturned when it is shown by clear and convincing evidence that the decision was not in accordance with the medical schedule.

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23:1201.1- Quick Guide to Safe Harbor Provisions

In August of 2013, Louisiana Revised Statute 23:1201.1 went into effect. It provides new procedures that an employer/payor may follow to dispute a claim without subjecting themselves to penalties and attorney fees. It applies to any modification, suspension or termination of benefits, including issues of medical causation, compensability of the claim, fraud, CR disputes, failure to attend treatment, SMO, vocational rehab, employee's failure to return a choice of physician form or 1020 report of earnings, etc.

*******This does not apply to claims of Medical Necessity under 23:1203.1 (the Treatment Guidelines). Employers must still use UR/1009 Process*******

Below are the steps an employer/payor must follow to receive protection against penalties and attorney fees:

Step 1: Initial Payment- On the same day of making an initial payment, employer/payor must prepare a (newly released) Form 1002 "Notice of Payment, Modification, Suspension, Termination or Controversion of Compensation or Medical Benefits."

- Must mark "Initial Payment."
- Must send the notice to the injured employee the same day the payment is made.
- Must send a copy of the form **via fax** to the employee's attorney if represented.
- Must send a copy of the notice to the OWC **within 10 days.**

Step 2: Change, Suspension or Termination- If there is a change in benefits (including monthly SEB changes) then another Form 1002 must be prepared.

- Must mark the reason for the change.
- Must send to the employee **via certified mail** to the address where benefits are being sent **on or before the date of change**.
- Must send a copy of the form **via fax** to the employee's attorney if represented.
- Must send a copy of the notice to the OWC **the same day as sent to the employee and attorney**.

Step 3: Notice of Disagreement- If the employee disagrees with the change, suspension or termination, the employee must send notice of the disagreement to the employer/payor.

- May be done either on the "Notice of Disagreement" Form attached to the Form 1002 **or** "by letter of amicable demand."
- Employee must provide any amounts of compensation he believes are due.

Step 4: Determine whether to pay- Within 7 days of receipt of the notice of disagreement, employer/payor may pay the claim without being subject to penalties and attorney fees.

Step 5: Filing of 1008 Disputed Claim for Compensation- If the employer/payor fails to pay the disputed amount, then the employee is allowed to file a 1008.

- Employee must have sent the notice of disagreement or the 1008 is premature.
- Employee must wait the 7 days unless the delay would result in the claim prescribing (employer still given 7 days to respond to disagreement).

Step 6(a): Request for Preliminary Determination- After a 1008 is filed, the employer/payor may request a hearing for a preliminary determination.

- Request must be made in the answer if a new suit.
- If suit was pending, request must be made in an amended answer within 15 days of the expiration of the 7 day payment period (i.e. 21 days after the Notice of Disagreement received).
- Preliminary Determination hearing is **only** available if all of the above steps are followed by the employer/payor.
- **Within 10 days of the request, the employer/payor must produce to the employee all documentation relied on in “calculating modifying, suspending, terminating, or controverting the employee’s benefits.**
- Failure to request a preliminary determination subjects the employer/payor to penalties and attorney fees at trial.

Step 6(b): Expedited Hearing- In addition to the preliminary determination hearing, either party may file a motion for an expedited summary proceeding **only** if the issue concerns one of the following:

- Failure to allow choice of physician;
 - Failure to provide voc rehab by employer;
 - Failure of employee to comply with voc rehab- have suspension lifted;
 - Hearing to compel employee to provide Choice of Physician form- have suspension lifted;
 - Failure to attend COP/SMO/IME- have suspension lifted; or
 - Failure to return 1020/1025 Forms
- If filed, court must provide notice of hearing within 3 days and the hearing must be set within 10-30 days of the request.
 - Decision is a final decision of the court.

Step 7: Employee Objects to Preliminary Determination- The employee may dispute that a preliminary determination hearing based on the employer/payor's failure to follow the above steps.

- Employee must file a Rule to Show Cause.
- Rule to Show Cause hearing must be held "prior to the preliminary hearing or any hearing held pursuant to this Section."

Step 8: Telephone Conference with Judge- After a request for preliminary determination is filed, judge will hold a telephone conference to "schedule discovery deadlines and to facilitate the exchange of documents."

- Discovery is limited to the issues raised in the disputed change, suspension or termination of benefits.

Step 9: Preliminary Determination Hearing: The court will hold a contradictory hearing on the issue during which the parties are allowed to submit evidence.

- Must be held within 90 days from the scheduling conference. Parties may request one extension for 30 days for good cause if approved by the judge.
- Medical testimony- May be submitted via certified records, deposition, or non-certified records upon agreement of the parties.
- Witness testimony- may be live or via deposition upon agreement of parties.

Step 10: Judge's Ruling- Judge must issue a determination within 30 days of the hearing.

- Generally not consider an Order of the Court (more akin to an advisory decision) UNLESS the issue concerns:
 - Choice of Physician
 - Failure to Comply with Voc Rehab/Have Suspension Lifted

- Hearing to Compel Choice of Physician Form/Have lifted
 - Failure to attend COP/SMO/IME/have lifted; or
 - Failure to return 1020/1025 Forms
- Judge's ruling not res judicata
 - Judge's ruling not a final order that necessitates a modification request upon change of circumstances as needed after a regular judgment.

Step 11: Determine whether to comply- Within 10 days of the mailing of the decision, the employer/payor must determine whether to accept the decision.

- If accepted, the employer/payor must (1) comply with the decision, and (2) mail a revised Form 1002 to the injured employee or his attorney along with any payment due and any arrearage due. If so, employer/payor is not liable for penalties and attorney's fees.
- If not accepted, employer/payor must notify the employee or his representative in writing of the decision.

Step 12: Request for trial- either party may request a trial on the merits within 10 days of receipt of the preliminary determination.

- Employer/Payor request- The employer may request a trial **only** on the issues that were subject to the preliminary determination. This can be done whether the employer/payor accepted and complied with the preliminary determination or whether the employer rejected the decision and did not comply. In the former case, the employer/payor will not be subject to penalties and attorney fees.
- Employee request- The employee may request a trial **only** on the issues that were subject to the preliminary determination. If so, the employer may litigate all issues in the claim, even if not subject to the preliminary determination hearing.