

Workers' Compensation

Chapter 9

Workers' Compensation: Basics of Coverage

Q: Who are covered “employers” for purposes of workers’ compensation?

A: The workers’ compensation statutes define *employer* broadly to include every person, firm or corporation which employs one or more employees under a contract of hire, whether that contract is oral or written. All such employers are required to obtain workers’ compensation coverage. An application for coverage may be obtained from any local Bureau of Workers’ Compensation (BWC) service office.

Q: Who are covered “employees” for purposes of workers’ compensation?

A: “Employees” are equally broadly defined to include any person in the service of any person, firm or corporation. An *employee* for workers’ compensation purposes also includes household workers who earn \$160 or more in any calendar quarter.

Q: Are independent contractors “employees” for workers’ compensation purposes?

A: No. Independent contractors are responsible for obtaining their own workers’ compensation coverage. An employer must be careful, however, to ensure that persons performing work for them are truly independent contractors before relying upon this exception. Generally, the question of whether someone is an independent contractor involves a case-by-case determination focusing on which party had the right to direct and control the work (*i.e.*, manner/details of work, hours of employment, method payment).

Q: What insurance is required? What is available (e.g., private carriers, state fund, assigned risk pools, etc.)?

A: Ohio is a *monopoly* state, meaning that private insurance is not permitted for workers’ compensation. All employers must either participate in the state insurance fund or be self-insured. The privilege of self-insurance is restricted to employers having more than 500 employees, who have done business in Ohio for more than two years, and who can demonstrate to the administrator of the BWC that they have sufficient financial wherewithal to satisfy and pay workers’ compensation costs directly.

Q: Is group rating available?

A: State Fund employers do have the option of participating in workers’ compensation group rating programs which, in many cases, will substantially decrease their workers’ compensation costs. Such groups consist of at least 100 members engaged in similarly conducted businesses, which participate in group rating in order to increase their aggregate payroll and take advantage of rate reductions (workers’ compensation premiums are based upon a percentage of the employer’s payroll).

Q: What are some of the risks of non-coverage?

A: In general, employers who comply with the law by paying workers’ compensation premiums are not liable for damages for any injuries sustained by an employee on the job. If the employer has not obtained coverage, however, this broad immunity does not apply, and the employer may be sued in a civil action for negligence. Moreover, certain potential common law defenses are denied to non-complying employers. Last but not least, non-complying employers are subject to charges by the BWC for the full costs of any claims which are filed, together with back premiums and penalties.

—by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers’ compensation and related matters.

Workers' Compensation: Basics of Litigation and Benefits

Q: What is the litigation process for a contested workers' compensation claim?

A: Once a claim is filed, the initial determination is made by a Bureau of Workers' Compensation (BWC) claims representative or, in the case of a self-insured employer, by the employer. The BWC claims representative will review all the information submitted and issue a tentative order either allowing or disallowing the claim. If either the injured worker (claimant) or the employer disagrees with the BWC decision, each may file an appeal, which will result in a hearing before a hearing officer of the Industrial Commission of Ohio.

Once at the Industrial Commission, a series of up to three hearings may be held, depending upon whether either party files a further appeal. Industrial Commission hearings are informal, and the rules of evidence (rules followed in a formal court of law) do not apply. After the Industrial Commission has issued its final decision, both the claimant and the employer have the right to file an appeal to the court of common pleas. Once before the court of common pleas, the rules of evidence apply, and a decision is made to allow or disallow the claim by either a judge or a jury (if either party demands a jury), without reference to the prior administrative decision.

Q: Assuming that the claim is allowed, how long must an employee be off work before he or she will receive temporary total disability compensation.

A: No compensation is paid for the first week after an injury, unless the employee is totally disabled for a period of at least two weeks, at which time compensation will be paid retroactive to the first day of disability.

Q: What is the basis for calculating an award of temporary total compensation?

A: An employee receives compensation based upon a percentage (generally $66\frac{2}{3}$ percent) of his or her prior weekly earnings. For 2008 injuries, the maximum rate for temporary total compensation was \$751 per week.

Q: How long can temporary total compensation be received?

A: As long as the claimant's condition remains temporary, temporary total compensation can continue indefinitely. Temporary total compensation can be terminated, however, based upon any of the following circumstances: 1) where the employee returns to work; 2) where the employee's treating physician releases the employee to return to work; 3) when work within the physical capabilities of the employee is made available by the employer or another employer (e.g., a light-duty offer); and 4) where the claimant's treating physician and/or an Industrial Commission hearing officer finds that the claimant has reached maximum medical improvement (MMI).

Q: Other than temporary total compensation, what other sorts of compensation benefits are available?

A: Twenty-six weeks after he or she receives the last payment of temporary total compensation, an employee may be eligible for a *permanent partial award*, calculated based upon a percentage of bodily impairment assessed by a physician under the American Medical Association (AMA) guidelines. If, due to his or her industrial injury, an employee either cannot find work within his or her restrictions, or is required to accept work at a lesser rate of pay, the claimant may be entitled to wage loss compensation payable at $66\frac{2}{3}$ percent of the difference, subject to a statutory maximum. If an injury

has resulted in the loss of—or in the loss of use of—a body part, the claimant is entitled to a scheduled award, payable at the maximum rate for a specified number of weeks, depending upon the body part affected. If the claimant is rendered permanently and totally disabled from continued employment as a result of the industrial injury, he or she will be entitled to permanent total disability benefits, payable for the remainder of his or her life. Finally, where an employee dies as the result of a work-related injury or occupational disease, his or her dependents may be eligible to recover death benefits, as well as statutory funeral expense.

Q: Can a workers' compensation claim be settled?

A: Yes. Claims involving self-insured employers may be settled by agreement of the parties, subject to approval by the Industrial Commission. Where a State Fund employer is involved, the injured worker may apply for a settlement of the claim through the BWC, generally subject to the approval of the employer. Once a full and final settlement has been entered into, the entire claim is closed, including future medical benefits.

—by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers' compensation and related matters.

Workers' Compensation: When Is an Injury or Disease Compensable?

Q: What is an "injury" for workers' compensation purposes?

A: In general, *injury* includes any injury received in the course of, and arising out of, the injured employees' employment. However, the workers' compensation statute specifically provides that *injury* does not include:

- 1) psychiatric conditions, *except* where the condition has arisen from an injury or occupational disease;
- 2) injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body; or
- 3) an injury or disability incurred when an employee is participating *voluntarily* in an employer-sponsored recreation or fitness activity, *provided* that the employee has signed a waiver of compensation for injuries sustained in such activities.

Q: What are some other potential defenses to workers' compensation claims?

A: Several circumstances may preclude compensation for an injury, even where the injury may have occurred on the employers' premises. These potential defenses include the following:

- 1) *Purposely self-inflicted injuries*;
- 2) *Intoxication*;
- 3) *Horseplay and fighting*: Injuries sustained as a result of horseplay or fighting are not compensable where the injured employee instigated or participated in the horseplay or instigated the fight.

Q: Are injuries sustained during work-related travel compensable?

A: The compensability of a travel-related injury depends on the nature of the travel involved. Under the so-called *going and coming* rule, where an employee has a fixed place of employment, an injury sustained while traveling to or from that place of employment is not compensable. However, where travel is an integral part of the employment, and creates a risk greater than the typical commute, an injury sustained during the travel will be compensable (e.g., a traveling salesperson with no fixed place of employment).

Q: What about injuries in other common employment situations?

A: Based upon the case law which has developed over the years, the following rules exist concerning the compensability of injuries occurring in other common situations:

- 1) *Parking lot injuries*: The going and coming rule ends once the employee reaches the employer's premises. Thus, where an injury occurs in a parking lot owned or controlled by the employer, it will generally be compensable. Where the lot is not owned or controlled by the employer, however, this rule will not apply.
- 2) *Lunch hour and break time injuries*: In general, injuries occurring on the employer's premises are compensable. This rule of compensability extends to injuries sustained while an employee is on a lunch break or other break authorized by the employer. An injury sustained off-premises on a lunch hour, however, is generally not compensable, whether the break is paid or unpaid.

Q: Are stress-related conditions compensable?

A: Recall that purely psychological conditions are not compensable unless they arise from a work-related injury. Thus, a mental condition caused by work-related stress is not compensable. *Physical* conditions caused by work-related stress are treated differently. Where work-related stress causes a physical injury (*e.g.*, a stress-related heart attack), the injury will be compensable where it is shown that the employee was subject to pressures greater than those occasionally experienced in most types of employment.

Q: Is the aggravation of a pre-existing injury compensable?

A: In general, the “substantial” aggravation of a pre-existing condition is a compensable injury for workers’ compensation purposes. Such an aggravation must generally be proven by objective diagnostic studies or clinical findings.

Q: What is an “occupational disease”?

A: An occupational disease is defined under the Workers’ Compensation Act as a disease contracted in the course of employment, wherein the nature of the employment puts an employee at risk of contracting the disease to a greater degree and in a different manner than would be true of a member of general public. A common occupational disease is carpal tunnel syndrome, caused by overuse of the hands in a job which requires extensive manipulative use of the hands.

Q: Is the aggravation of a pre-existing disease compensable?

A: No. Unlike the aggravation of a pre-existing injury, the aggravation of a pre-existing disease condition is not compensable, since the statute requires that the disease be contracted in the course of the employment in order to be compensable.

—by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers’ compensation and related matters.

Workers' Compensation: Related Issues

Q: Are there any penalties against the employer for unsafe working conditions?

A: Yes. Where an employee is injured as a result of the employer's failure to comply with a specific safety requirement, the employee is eligible for an additional award amounting to 15 percent to 50 percent (depending upon the circumstances) of the maximum compensation payable for the life of the claim. Such awards are commonly referred to as "VSSR" (*violation of specific safety requirement*) awards, and are charged directly to the employer.

Q: What is a specific safety requirement?

A: A VSSR award may be paid based upon the violation of a safety statute or administrative regulation. The specific safety requirements of the Industrial Commission are printed in the *Ohio Administrative Code*. There are specific safety requirements for each of the following categories: workshops and factories; elevators; metal casting; steel mills; laundering and dry cleaning; rubber and plastic industries; window cleaning; and construction.

Q: Are there any other exceptions to the broad immunity provided to employers who possess workers' compensation coverage?

A: Unlike actions based on a theory of negligence, the immunity from liability provided to employers having workers' compensation coverage does not extend to so-called *employment-intentional torts*.

Q: What is an "employment-intentional tort"?

A: Unlike negligence, an employer is not immune from liability where that employer has intentionally injured an employee. However, in order to recover under such a theory, the plaintiff must prove that the employer acted with deliberate intent to injure the employee, or with knowledge that an injury was substantially certain to occur.

Q: Is there a workers' compensation discrimination statute?

A: Yes. No employer may discharge, demote, reassign, or take any punitive action against an employee because the employee filed a workers' compensation claim or testified in a workers' compensation proceeding. If successful in a civil suit, the employee is entitled to be reinstated in his or her position with back pay and/or lost wages, plus attorneys' fees.

Q: What happens when a third party's negligence causes the injury?

A: Where an employee recovers workers' compensation benefits as a result of injuries sustained due to the negligence or fault of a third party, a right of *subrogation* exists. This right entitles the self-insured employer (or the BWC administrator on behalf of the State Fund employer) to recover a share of the amounts of workers' compensation benefits paid from monies received by the claimant from the third party at fault (minus costs and attorneys' fees). Subrogation rights exist under the current statute even where the injured employee does not file a lawsuit against the third party, but instead, for example, enters into a settlement. The statute places upon the injured worker the burden of notifying the employer/administrator of potential third parties from whom the injured worker might seek compensation. Moreover, no settlement or award can be final unless the employee

has provided the employer or BWC administrator with appropriate notice and an opportunity to assert its subrogation rights.

—by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers' compensation and related matters.

Employers Should Understand Limits on Non-Lawyers in Workers' Compensation Claims and Other Areas of Law

The Supreme Court of Ohio initially addressed the role of non-lawyers' participation in workers' compensation claim proceedings (*Cleveland Bar Assn. v. CompManagement Inc.* [2004] 104 Ohio St. 3d 168, 2004-Ohio 6506, commonly referred to as "CompManagement I"). The court held, at that time, that, as long as non-lawyers (usually actuarial firms or third-party administrators) maintained conformity to rules set forth by the Industrial Commission of Ohio (ICO Resolution R-04-1-01) they may assist employees at hearings held before the Industrial Commission of Ohio.

The court then remanded the case back to the Board of Commissioners on the Unauthorized Practice of Law to review the allegations against CompManagement in accordance with the ICO Resolution.

On remand, the Board of Commissioners found four areas in which CompManagement representatives had committed the unauthorized practice of law and the case was sent back to the Supreme Court of Ohio again (*Cleveland Bar Assn. v. CompManagement, Inc.* (2006) 111 Ohio St. 3d 444, 2006-Ohio-6108, commonly "CompManagement II"). The court held as follows:

- 1) Allegations of acts of unauthorized practice of law must be supported by either admission or other evidence of specific act(s) or conduct.
- 2) A third-party administrator may:
 - a) make actuarial determinations regarding settlement;
 - b) act as a messenger for the employer with regard to settlement issues;
 - c) file settlement documents; and
 - d) communicate to the hearing officer the employers' areas of concern relating to a particular claim.
- 3) A third-party administrator may not:
 - a) conduct an examination of a witness or comment on credibility of a witness;
 - b) make or give any legal interpretation or comment about evidence;
 - c) give legal opinions or advice; and
 - d) provide representation for a fee at a workers' compensation hearing without providing other services.

The court basically held that a third-party administrator may only offer general claim assistance that does not involve any legal analysis, skill, citation or interpretation. The court held that, as long as a third-party administrator made no legal determinations and acted merely as a messenger for the employer, those activities were permitted.

An employer should be aware that there are additional limitations on the activities of lay persons or non-lawyers within both courts and administrative agencies. Beyond representation of employers at workers' compensation hearings, lay persons:

- are permitted to represent of limited liability companies before small claims courts with “limits;”¹
- are permitted limited representation before the Unemployment Compensation Board of Review Commission and the Ohio Department of Job and Family Services (ODJFS);
- may not represent a corporation or take any legal action on behalf of a corporation before a court or administrative agency, and any filing by a non-attorney on a corporation’s behalf may be stricken;
- may not give legal advice and assist individuals in preparing legal pleadings or other documents, including documents for filing with the Ohio Secretary of State;
- are not permitted to prepare instruments for others to grant easements;
- are not permitted to represent others in union election matters or in the negotiation of a collective bargaining agreement;
- are not permitted to draft or write contracts or other legal documents on behalf of another between employee and a union, even if the contract is copied from a book or was previously prepare by a lawyer;
- are permitted to prepare and file a complaint with the county board of revision on behalf of a corporation within certain limits; and
- are not permitted to assist others in reinstatement of drivers’ licenses.

Conclusion:

Non-lawyers, in a workers’ compensation proceeding, may not: examine witnesses; make or give any legal interpretation about evidence; comment or give an opinion regarding evidence or credibility of a witness; note legal significance of a claim; provide legal advice to anyone; give legal opinions; or provide representation at a hearing for a fee without also providing other services. For workers’ compensation claims that involve significant issues, witnesses or legal argument, an employer should retain the services of an attorney to protect and defend their interests, due to the limitations placed on non-lawyers and their ability to effectively represent an employer’s interests.

There are also limitations on lay person’s participation in other areas including appearances in court and other administrative agencies.

–by Cathryn R. Ensign, a shareholder in the law firm of Bonezzi, Switzer, Murphy, Polito & Hupp Co., LPA.

¹ Lay persons may not engage in cross examination, argument or other acts of advocacy.

Workers' Compensation Drug and Alcohol Testing Law

Effective October 12, 2004, Ohio law establishes a *rebuttable presumption* against an employee who makes a workers' compensation claim if he/she either tests positive for alcohol or drugs or refuses to be tested. A rebuttable presumption is a legal conclusion that is thought to be valid until evidence to the contrary is provided. In lay terms, this means that, if an employee tests positive or refuses to be tested for alcohol or drugs following a work-related accident, the employer may be able to prove that drug or alcohol use contributed to or caused the employee's injury. The employer could thereby avoid the costs of such a claim.

In order for employers to take advantage of this law, a notice of the rebuttable presumption *must be posted* in their place of business. The notice must be the same size or larger than the Bureau of Workers' Compensation (BWC) compliance certificate that must be posted, and it must be in the same location as the current BWC postings. A copy of the required notice may be downloaded and printed from the BWC's Web site at www.ohiobwc.com.

While the law does not require businesses to implement drug testing, it is a very effective method of reducing an employer's exposure from a costly claim for injuries or death where the employee was under the influence of drugs or alcohol at the time of a workplace accident.

Be advised, however, that the posting of the BWC notice of this law is only the starting point. The rebuttable presumption is effective after a workplace injury only if specific steps are taken within a certain amount of time after the injury occurs. If alcohol is suspected as a cause of the accident, a "qualifying" test must be given within eight hours of the injury. If non-prescribed drugs are suspected, the qualifying test must be given within 32 hours of the injury. If the injured employee refuses to take a test, and assuming the required notice has been posted, the employee's refusal triggers the rebuttable presumption. Note, however, that in order to trigger the presumption, the test must be offered within the timeframes mentioned above.

Employers must address many other issues and requirements if they wish to take full advantage of the law. For example, unless a police officer or a doctor requests the drug or alcohol test, an employer must have "reasonable cause" to believe the injured employee was under the influence of alcohol or drugs at the time of the accident. Otherwise, the test may not qualify under the law. Therefore, the employer will need to collect evidence to show that the test was justified. Direct evidence of possession, consumption, or distribution may be available, but employers also will need to train supervisors to collect evidence in the form of their own observations and records, witness statements, and other evidence that can confirm symptoms, behavior, patterns of conduct, attendance, work and safety rules violations, and the like.

For further information regarding these issues, the BWC has a very informative and useful Web site at www.ohiobwc.com.

—by James D. (Chip) Viets and James M. Vonau, partners in the Columbus firm of Decker, Vonau, Seguin, Lackey & Viets Co., LPA.