

## **WORKER'S COMPENSATION OR NOT-THAT'S THE QUESTION.**

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Attorney Reed Noble has successfully handled Workers' Compensation cases for clients since 1982.

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Read the article below to fully understand your rights as an injured worker. Also, there are links to additional useful information from the Workers' Compensation Commission at the end of the article.

### **THE NORTH CAROLINA WORKERS COMPENSATION ACT**

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## **INJURIES COVERED UNDER THE ACT**

What injuries are covered by the North Carolina Workers Compensation Act?

If you are injured by an "accident" while carrying out activities for the benefit of your employer, you are entitled to benefits.

If you are injured by a "specific traumatic incident", while carrying out activities for your employer, and these result in a hernia or a back injury, you are entitled to benefits.

If you contract an "occupational disease" while carrying out activities for the benefit of your employer, you are entitled to benefits.

## **THE LAWYERS FUNCTION IN WORKER'S COMPENSATION CASES**

If accidents and occupational diseases are covered under the North Carolina Worker's Compensation Act, why do I need a lawyer?

An injured worker needs a lawyer to prevent a dispute from arising as to his right to compensation and as to the amount of compensation to which he is entitled. An injured worker needs a lawyer to settle any dispute which has arisen as to his right to compensation and as to the amount of compensation to which he is entitled.

To put this in English, "disputes" frequently arise as to an employee's right to compensation for an industrial accident or occupational disease, because of the financial impact worker's compensation claims have on both the employer and the insurance company representing that employer.

When the employer has industrial accident or occupational disease claims made, the insurance premiums it must pay to cover future accident or occupational disease claims are increased by its insurer since the statistical risk of financial loss (claims) has increased. Therefore, the employer has incentive to reduce or eliminate as many claims as possible and for as little money as possible. This obviously leads to "disputes" over an employee's right to worker's compensation benefits.

On the other side of the coin, the insurance company representing the employer is not in business to pay out money, but to make money for its shareholder. They do this by taking in insurance premiums and minimizing the payment of claims - like worker's compensation. Oh yes, they have attorneys working for them too, to help accomplish this goal. As you can well imagine, this also leads to "disputes" over an employee's right to worker's compensation benefits.

I'm sure you get the picture by this point. A lawyer can settle the "disputes" which arise by taking the companies and their insurance carriers to task, using knowledge of the law and the worker's compensation system for the benefit of injured worker.

How do employer's insurance companies and their lawyers minimize the payment of claims in worker's compensation cases?

The bottom line answer is that they evaluate each claim to see if the liability (claim on which they will have to pay some amount) is "clear cut" or not. Then they evaluate the financial exposure (size of the maximum possible payout) of the "clear cut" or potential claim (claim on which they may have to pay some amount) and compare it to the projected costs to "defend" the claim. Then an economic decision is made whether to pay, compromise or defend the claim.

The rationale seems to be unless the case is "clear cut", they deny the claim and file the appropriate Form with the Industrial Commission. They know that the unrepresented worker generally does not contest the decision. This is so many times because he believes either: (1) his employer would retaliate against him (fire him or make him quit) if he pursued his claim (this is unlawful by the way), or (2) he does not understand the ramifications of the denial of the claim, or (3) he doesn't know how to deal with fighting it effectively, or (4) all three of the above.

If the case is "clear cut", they pay as little as possible to make you go away. However, their job is not to inform you of your rights and remedies under the North Carolina worker's Compensation Act, just to pay as little as possible to make the claim go away.

However, in "clear cut" cases when a worker is represented by counsel, the insurance company generally has to pay out more money in worker's compensation benefits to injured workers since all potential bases for compensation have been explored and advanced. For this same reason, disputed cases are frequently settled by negotiation or through mediation when an injured worker retains an attorney.

Finally, as you read through the following outline of the process that an employer and his insurance company go through to "dispute" a claim, keep in mind that a lawyer's knowledge of this very complicated area of law can help you navigate safely through the defenses, traps and elements of a claim.

## **TOOLS TO MAKE A CLAIM "DISPUTED" -- DEFENSES AND TRAPS**

If I am not represented by an attorney, what kind of defenses do insurance companies and their lawyers generally raise when a case is not "clear cut?" Well this is a trick question. Whether you are represented or not, the following defenses, traps and elements of a claim are routinely used to completely defend or to compromise the value of a claim.

### **JURISDICTIONAL DEFENSES**

Was there an employer-employee relationship when the injury by accident occurred?

Independent contractors have no right to compensation under the North Carolina worker's Compensation Act. Quite often, unrepresented workers are denied benefits due to a zealous insurance company asserting that you are in fact an "independent contractor" rather than an employee. You receive a Form 61 denial of your right to worker's compensation in the mail. Then you must file a Form 33 request for a hearing to prove you are entitled to benefits under the Act. A Deputy Commissioner (worker's compensation trial judge) will review all evidence presented by you and by your employer (through his attorney who also represents the insurance company as well).

As I said above, this is a mixed question of law and fact and can be very complicated and unclear. The trap is unleashed at the recorded statement (more on this later) when specific questions are asked to the unrepresented worker about various aspects of his job which bear on this issue.

Whether a worker is an employee or an independent contractor is a mixed question of law and fact. However, where a worker is paid by wages or salary, and is subject to the control of the alleged employer as to the manner and means of his work, the courts generally construe him to be an employee.

Did the employer regularly employ at least three employees in the business where the injury took place?

A business does not have to provide worker's compensation insurance for the benefit of its employees unless it employs at least three (3) regular employees on a constant basis.

The trap is that this jurisdictional defense will not be challenged by many workers since they don't know about the employment status of other co-workers or how to challenge it. While the Industrial Commission will make inquiry into the sufficiency of the

jurisdictional defense, unless a worker challenges the company's assertions, the finding will probably be for the company.

## **PROCEDURAL AND STATUTORY DEFENSES**

Failure to provide notice of the accident and the claim of the employee to the employer within thirty (30) days may result in the denial of your claim if the employer's defense of the claim is prejudiced by your failure to give the appropriate notice.

I have never had a client come in to my office and say, "Yes, Mr. Noble I filed a Form 18 in this matter and here is a copy of it for you", and have actually done it. However, many people think they have filled out this document. As a practical matter, our office always files this document with the North Carolina Industrial Commission on behalf of prospective clients even if we do not accept the case.

Therefore, as soon as an accident at work occurs, the employee should report the accident to his employer (usually a supervisor) and any co-workers in his department and fill out a Form 18.

The trap is that the company must show it was prejudiced by the failure to receive this notice before this defense will work and that you must challenge the basis for this defense by a hearing before the Industrial Commission.

## **CONDUCT DEFENSES**

No compensation shall be paid to an employee if his injury (or death) was proximately caused by intoxication.

No compensation shall be paid to an employee if his injury (or death) was proximately caused by the employee being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. 90-86, et seq., where such controlled substance was not by prescription by a doctor.

No compensation shall be paid to an employee if his injury (or death) was proximately caused by the employee's willful intention to injure (or kill) himself or another.

No compensation shall be paid to an employee who refuses employment procured for him suitable to his capacity to work.

No compensation shall be paid to an employee who is injured by an intervening event which is attributable to his own intentional conduct.

A reduction of compensation by ten (10%) will be made if an employee willfully fails to use safety appliances, perform a statutory duty or breaches any rule or regulation of the employer approved by the Industrial Commission and it proximately causes the injury or death of the employee.

The traps here are that an employee is still entitled to compensation under these defenses unless the employer proves that the accident and resulting injury was proximately caused (more probably than not caused) by the intoxication, influence of a controlled substance, or the willful intent to injure his person, or another.

Another trap is that an employee who does not accept employment which is suitable to his capacity can still receive compensation if the Industrial Commission believes his refusal was justified.

The trap with the reduction of compensation scenario is the notion many workers have: "I did something wrong" or I am "partially at-fault", therefore, I am not entitled to compensation. This belief that contributory negligence is an absolute bar to recovery is correct in civil litigation matters, like car accidents, but absolutely wrong in worker's compensation cases.

## **STATUTE OF LIMITATIONS DEFENSE**

An employee's right to compensation shall be forever barred unless he files a claim or memorandum of agreement with the North Carolina Industrial Commission, unless he is paid compensation as provided for under the Act within two years after the accident.

An employee's right to compensation shall be forever barred unless he files a claim or memorandum of agreement with the North Carolina Industrial Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under the Act.

An employee must file an occupational disease case within two years of being advised by competent medical authority of the name of the disease and the nature and work-related cause of the disease, and the employee has suffered an injury by the occupational disease which has created a loss of wage earning capacity.

The trap here is that employees do not know the time limitations for filing their claims with the Industrial Commission or they just don't know how to file the claim. Sometimes they think, "Well I told them about that a long time ago, I should be okay." Wrong!

Now let's look at the "trap of all traps" - the one which should make you get a lawyer!

## **THE RECORDED STATEMENT**

Insurance companies routinely take a "recorded statement" from an injured worker within a few days following notification of an "accident." This statement is designed to elicit testimony which will limit the scope of and financial exposure for "alleged injuries" as well as support potential defenses to the claim as noted above.

In my experience, ninety-nine (99) times out of one hundred (100), the injured worker has not retained an attorney by the time he is asked to give "his statement", and is therefore, at the mercy of the insurance adjuster who will ask leading questions (and will frequently try to put words in your mouth) designed to cut off the worker's right to worker's compensation benefits. This statement is always recorded.

The insurance adjuster will say: "My name is Ms. Doubtyourstory from Your Good Neighbor Insurance Company." Trying to be nice she says, "How are you today?" And you say fine. Then she says, "I am here to take your statement about the injury you had on January 25, 2014." "Is that okay with you?" And you say, "Yes ma'am." Then she says, "And you know that I am taking this statement to determine your right to worker's compensation benefits." And you say, "Yes ma'am." Then she says, "And do I have your permission to record this statement?", and you say, "Yes ma'am."

Then Ms. Doubtyourstory will be off to the races, firing questions at you about whether or not you reported this "alleged accident" to your employer, or if so when you did it, who you told about your accident or injuries, your medical background, previous claims, previous accidents, witnesses to the "alleged accident", what your usual activities entail, when you first felt any pain, injury or symptoms, when they "came on", gradually or not, what you did about it or them, whether you told your doctor that you were hurt at work - all to be used at a hearing if necessary to support the denial of your benefits!

At the end of your statement Ms. Doubtyourstory says, "I don't have any more questions. Do you have anything to add?" You say, "No Ma'am." Then she says, "Have all your answers been true to the best of your knowledge and belief?" And you say, "Yes Ma'am."

Then she says, "And do I have your permission to turn off the recorder?" And you say, "Yes Ma' am." After the recorder is off you say, "By the way, when can you start my worker's comp benefits?" You know I haven't had a check in a couple of weeks and I need to get to a doctor." And Ms. Doubtyourstory says, "Well Mr. Jones, I'll have to get back with you on that after I review your statement."

Get your lawyer immediately so he can advise you before you give this "recorded statement"(walk to the gallows)! Anything you say to the insurance adjuster at this recorded statement can and will be used against you in a court of law (i.e., an Industrial Commission Hearing) after she (he) denies your claim, I promise! And you didn't even get "read your rights" because a worker's compensation hearing is a civil matter.

## **ELEMENTS OF A CASE FOR WORKER'S COMPENSATION BENEFITS**

The way the Industrial Commission's Deputy Commissioner determines whether or not an employer (i.e., his insurance company) is legally responsible to pay worker's compensation benefits to an injured worker, is to see if the facts of the worker's case square with the elements of law necessary for a compensation award.

## **ACCIDENTS**

To be entitled to worker's compensation, the job related injury must be an "accident" under the North Carolina worker's Compensation Act. An accident is an event which can be identified by a time and a specific place. An accident is an event where the worker's job routine is interrupted by unusual conditions which produce unexpected consequences.

Therefore, injuries occurring under normal work conditions, where the employee is doing his regular job, as he always does it, are not covered by worker's compensation.

However, back injuries (and hernias) are covered by the Act (as accidents) in any event, if they result from a "specific traumatic incident." If the employee suffers immediate pain then the back injury will be compensable and will include any disabling physical injury arising out of the specific traumatic incident. Pain, however, is not the key to this definition! If the back injury is linked to a specific event and specific time, the claim is compensable even if there is no pain. Should an employee describe the start of his back injury as, "gradual", or that "the pain came on gradually over the next few hours", he will probably not receive compensation from his employer, because there was no "specific traumatic incident."



## **ARISING OUT OF EMPLOYMENT**

To be entitled to worker's compensation the origin of the accident resulting in injury must arise out of the employment relationship. This means the injury must be a natural and probable consequence or result of the employment (the injury must come from the employment). Indeed the worker's job must put him in the position or place where he was hurt to be compensable. It doesn't necessarily matter even if he is engaged in horseplay, fights or is assaulted if the activity was related to the employment and wasn't personal.

## **IN THE COURSE OF EMPLOYMENT**

In a worker's compensation case, the accident giving rise to injury must occur within the course of employment. This means that at the time of the injury, the worker must be doing what he was hired to do or that his authorized actions were intended to benefit the employer's business. A worker is not excluded from benefits even if his injury occurs before or after his work day, during a break or off the premises under certain conditions. The Industrial Commission views both the "arising out of employment" and "in the course of employment" facts together when making the determination of whether the accident and resulting injury are compensable.

Obviously, a lawyer's knowledge of the law as it pertains to the issues above is helpful when deciding how to obtain a compensation award based upon the facts in a particular case.

## **DISABILITY**

Under the North Carolina worker's Compensation Act, disability means incapacity to earn the wages he was receiving before the injury. It is not a concept referring to physical infirmity, but one relating to the ability to earn wages. An injured worker receives compensation based upon his loss of earning capacity not what money he earns. If he is not hireable, he is disabled under this definition.

An employee is under temporary total disability when he simply cannot work at the present time. However, he is expected to return to work after he has recovered. During the period of his disability, he is entitled to receive  $66 \frac{2}{3}$  % of his average weekly wage as compensation.

An employee is under temporary partial disability when he can work some sort of "light duty" at a reduced wage rate. In this case he is entitled to receive 66 2/3 % of the difference in wage earning capacity before and after the injury for as long as the disability continues.

An employee is under permanent total disability when he is no longer capable of earning wages. In this situation he is entitled to receive 66 2/3 % of his average weekly wage for life.

An employee is under permanent partial disability when he has a permanent injury which reduces his earning capacity. In this case he is entitled to receive 66 2/3 % of the difference between the wage he was earning before the injury and what he is capable of earning after the injury. However, if the permanent partial injury is to one of the scheduled body members for which a value of a specific number of weeks of compensation has been specified by statute, the employee can collect an additional 66 2/3 % of his average weekly wage, multiplied by his percentage of permanent partial disability, multiplied by the number of weeks assigned to that body member as compensation after the healing period.

Compensation will not be allowed for the first seven (7) days of disability unless the injury results in disability of more than twenty-one (21) days. The twenty-one (21) days of disability do not have to be consecutive.

### **AVERAGE WEEKLY WAGE**

The average weekly wage is a necessary component to the computation of compensation under the Act as indicated above.

The average weekly wage an employee makes is determined by taking his gross earnings (this includes all benefits) for the previous year, and dividing them by fifty-two (52) weeks. For fairness, if seven (7) consecutive days are missed during this period of time, you then subtract the number of days missed from three hundred sixty-five (365) and divide the wages earned over fifty-two (52) weeks by the remaining number of days to get the average daily wage. Then you multiply this number by seven (7) to get the average weekly wage.

When the employment term is less than fifty-two (52) weeks, you use the same method as above as long as the results are fair for both parties.

## **SCHEDULED INJURIES**

Permanent injury to several specific body members are conclusively presumed to be disabling. These body members are listed in the North Carolina worker's Compensation Act. This means an injured worker may claim these benefits without the necessity of proving "disability" as a result of an injury. These body members include the following and are accompanied by their scheduled value in terms of the number of weeks of compensation assigned:

### **MEMBER WEEKS**

- a. thumb 75
- b. index finger 45
- c. second finger 40
- d. third finger 25
- e. little finger 20
- f. great toe 35
- g. any other toe 10
- h. hand 200
- i. arm 240
- j. foot 144
- k. leg 200
- l. eye 120
- m. hearing (one ear) 70
- n. hearing (both ears) 150
- o. back 300

The schedule injury section of the Act also allows for serious (appearance which affects future employability) facial or head disfigurement up to twenty thousand (\$20,000.00), and serious bodily disfigurement where there is no scheduled compensation (as set forth above) available.

Finally, the schedule injury section of the Act allows for compensation for permanent injury or loss of an internal or external organ up to twenty thousand (\$20,000.00) if no other compensation is payable in other parts of the Act.

## **OCCUPATIONAL DISEASES**

In order for a worker to receive worker's compensation benefits as a result of an occupational disease, he must show that:

1. He was exposed to a hazardous substance in employment;
2. He developed a disease;
3. The occupation exposed him to a greater risk of developing the disease than members of the public generally;
4. The exposure to the hazardous substance significantly contributed to or was a significant causal factor in, the development of the disease; and
5. The occupational disease caused disability or death.

The claim for an occupational disease must be filed within two (2) years of diagnosis of the condition by a medical doctor. Once disability or death occurs, the case is treated in the same way as an injury by accident as discussed above.

If a worker has a disease which is aggravated or accelerated by causes and conditions characteristic of and peculiar to a worker's employment, the disability or death which results from it is compensable, if he can show that without the exposure the disease would not have developed to such an extent to cause the disability or death.

## **SETTLEMENT OF ALL CLAIMS**

Under the North Carolina worker's Compensation Act, a worker may conclude his claim by a "clincher agreement." This is a final agreement between the employer and the worker and should not be entered into lightly.

Any agreement reached between the employer and the employee must be approved by the Industrial Commission, whose job it is to see that it is fair to everyone concerned. Under a clincher agreement, even the worker's retainer agreement with his attorney must be approved before the attorney will be paid from the settlement.

Another type of an agreement is known as a "Form 26" agreement. This agreement does not completely finalize the financial responsibility of the employer and his insurance company to the injured employee. Under this agreement, a worker may receive permanent partial disability benefits associated with the body member listed in the schedule. In this situation the worker has the right to receive future medical compensation unless 2 years has expired since the insurance carrier/administrator last pays any medical compensation or other compensation, whichever occurs last.

Finally, an agreement for compensation known as a "Form 21" agreement is available in uncontested cases. Under this agreement, a worker receives compensation while his is recovering from his injury. Compensation ceases when the worker has reached maximum medical improvement and has returned to work.

### **ATTORNEY FEES MUST BE APPROVED BY THE INDUSTRIAL COMMISSION**

When an attorney undertakes a worker compensation case, it is difficult to determine with any degree of certainty the amount of work required to properly represent the worker. Knowing this the Industrial Commission reviews any retainer agreement reached between the worker and his attorney to see that it is fair and reasonable based upon the complexity and time associated with the case.

Most cases are taken on a "contingent fee" basis, plus costs associated with the litigation. This means that the attorney will be paid only if the worker receives an award from his employer (insurance company). When the case is eventually finalized, the Industrial Commission approves an attorney's fee in the range of 20% - 25% in the "average" case. However, your case may not be an "average" case!

Employers and their insurance companies will spend a lot of money if they think they can save even more money through the litigation. Many cases go to the N.C. Court of Appeals, or the N.C. Supreme Court, and possibly back down through the court system again before they are resolved. Therefore, attorneys frequently set forth attorney fees as high as 33 1/3 %- 40 %, plus costs associated with the litigation in their retainer agreements to cover this situation should it develop. The worker should not be "afraid" or "worried" about these numbers because the Industrial Commission has the duty and obligation to review the fairness of the attorney's fee based upon the amount of work necessary to obtain the award for the worker.

## **NORTH CAROLINA INDUSTRIAL COMMISSION**

Should you need any additional information about a worker's compensation matter in North Carolina visit the North Carolina Industrial Commission Website at: <http://www.ic.nc.gov/index.html> or contact The Reed Noble Law Firm, PLLC by phone at 910 551-1926, or by email us at: <mailto:rnoble@noblelegalservices.com>.