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## OUTLINE OF NEBRASKA WORKERS' COMPENSATION LAW

### I. The Nebraska Workers' Compensation Act

The primary purpose of the act is to provide compensation for an employee injured in an accident arising out of and in the course of employment. The Act is intended to simplify legal proceedings and bring about a speedy resolve of disputes between the injured worker and the employer. Further, the Act is written for the benefit of employees and will be liberally construed to fulfill its purpose, however the evidence is not to be liberally construed in the same manner.

### II. The Nebraska Workers' Compensation Court

A. The Court consists of seven judges, including:

1. Julie Martin
2. Daniel Fridrich
3. Tom Stine
4. James Coe
5. Lauren Van Norman – Presiding Judge
6. Mike Fitzgerald
7. John Hoffert

B. The Court's website, [www.wcc.ne.gov](http://www.wcc.ne.gov), contains background information on each Judge and provides forms

### III. Jurisdiction of the Nebraska Workers' Compensation Court

The Court has the authority to administer and enforce all of the provisions of the Nebraska Workers' Compensation Act. Neb. Rev. Stat. §48-152. This power extends as follows:

- A. Injuries occurring within the State of Nebraska (this includes injuries to employees of a nonresident employer);
- B. Injuries occurring outside the State of Nebraska, but where employment is principally located within the State; or
- C. Injuries occurring outside the State of Nebraska, but employment contract made within the State.
- D. The Court's jurisdiction also extends to non-resident employers conducting business in the State of Nebraska.

### IV. Venue (location)

The Nebraska Workers' Compensation Court will hear cases:

- A. In the county where the accident occurred. §48-177.
- B. In cases where the injury occurs outside the State of Nebraska, the hearing will be held in Lincoln, Nebraska. §48-186.

### V. Exclusive Remedy of Workers' Compensation

The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991).

- A. Application of the Exclusive Remedy:
  - 1. **Employer Negligence.** The Workers' Compensation Act eliminates an employee's common law cause of action for an employer's negligence. In return for this immunity the employer is held strictly liable for payment of workers' compensation benefits regardless of fault. *Ray v. School District of Lincoln*, 105 Neb. 456 (1920).
  - 2. **Employer Intentional Tort.** The Workers' Compensation Act also eliminates an employee's cause of action for an employer's intentional tort. The Act is the exclusive remedy for an employee against the employer for any injury arising out of and in the course of employment. This is the basis on which the rights of employers and employees are put in balance. The employer, by having liability imposed on him without fault, receives in return relief from tort actions. *Abbott v. Gould, Inc.*, 232 Neb. 907 (1989); *Ihm v. Crawford & Co.*, 254 Neb 818 (1998).
  - 3. **Employer Dual Capacity or Dual Persona.** The idea of the dual capacity doctrine is that the employer may become liable to an

employee in tort if the employer occupies a position which places upon it obligations independent of, and distinct, from its role as an employer. However, the Nebraska Supreme Court recently ruled that an employee's medical malpractice action against the employer (also a hospital) was barred by the exclusivity provision. *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300 (2007).

4. **Third-Party Contribution Claims.** If an injured worker files a third-party claim for damages, the exclusivity provision bars a third-party defendant's right to seek contribution against the injured worker's employer or co-workers. *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W.2d 652 (1976); *Harsh International v. Monfort Indus.*, 266 Neb. 82 (2003). See also, *Downey v. Western Comm. College Area*, 282 Neb. 970 (2012).

\* Exception. The existence of an express contract between the employer and the third-party to indemnify the third-party for the loss. *Union Pacific Railroad Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160 (1988).

5. **Loss of Consortium.** The spouse of an injured employee may not maintain an independent cause of action for loss of consortium. An employee-spouse's right of recovery must be brought under the Workers' Compensation Act or not at all, the non-employee spouse may not impose liability upon the employer. *Johnston v. State*, 219 Neb. 457 (1985).

- B. **Waiver of Exclusive Remedy.** If an employer subject to the Workers' Compensation Act fails to carry workers' compensation insurance or an acceptable alternative, then the Workers' Compensation Act is no longer the employee's exclusive remedy; instead, the employee can elect to either proceed under the act and recover the statutorily set benefits or seek to recover damages in a common-law action against the employer. Neb.Rev.Stat. § 48-145(3).

## VI. Notice of Injury

An injured employee must provide notice of an injury "as soon as practicable" after the injury. The notice is required to be in writing and must describe the time, place and cause of the injury. However, if employer has actual notice or knowledge of the injury, the employee's failure to report will not preclude an award of benefits. §48-133.

- A. **What Is A Reasonable Amount of Time?** A 5 month delay in reporting may not be sufficient. *Williamson v. Werner Enterprises, Inc.*, 12 Neb.App. 642 (2004).

\* Exception - if the employee's accidental injury is latent and progressive, and cannot with reasonable certainty be recognized as compensable until a later time.

- B. **What Is Sufficient Notice?** Knowledge of an employee's injury, gained by a foreman, supervisor, or superintendent, in a representative capacity for the employer, is knowledge imputed to the employer. Such knowledge

is sufficient to meet the notice requirement. *Thompson v. Monfort of Colo., Inc.*, 221 Neb. 83, 375 N.W.2d 601 (1985).

1. **Employer Responsibility.** If an employer has knowledge or notice that an employee's injury is potentially compensable, the employer should investigate the matter further. See *Scott v. Pepsi Cola Co.*, 257 Neb. 312, 597 N.W.2d 394 (1995) (processing claims under group health was sufficient notice to employer to investigate further).
2. **Notice in writing is not required** if employer has actual notice or knowledge of injury.

## VII. First Report of Injury

In every case of "reportable injury" occurring during employment, the employer or insurance carrier must file a report with the Nebraska Workers' Compensation Court stating the nature and extent of the injury. §48-144 and Rule 29.

- A. **Timing Requirement.** Must file within 48 hours of accident resulting in death or hospitalization of 5 or more employees from one accident; within 7 days in all other reportable injuries. §48-144.01.4
- B. **A "Reportable Injury" is:** Any occupational disease or illness resulting in fatality, lost time (includes partial workdays) or loss of consciousness; or cases resulting in job transfer, termination of employment, work restrictions (i.e. light duty work); or requiring medical treatment. §48-144.02.
- C. **A "Reportable Injury" is not:** Medical treatment requiring one time treatment for minor scratches, cuts, bumps, bruises, burns or splinters.
- D. **Consequences for Failure to File.** If the employer, or any agent of the employer, has knowledge of the injury, the statute of limitations will not begin to run until filed. Furthermore, failure to file may result in a Class II misdemeanor punishable by \$1,000 fine, 6 months in prison, or both. §48-144.04.

## VIII. Statute of Limitations

All claims for compensation must be filed within two years after the accident or last payment of compensation. §48-137. Payment of compensation includes the payment of medical expenses. *Gourley v. City of Grand Island*, 168 Neb. 538, 96 N.W.2d 309 (1959). The statutory period ends two years after the last indemnity payment is received by the injured employee or the medical provider. *Obermiller v. Peak Interest*, 277 Neb. 656 (2009).

- A. **Failure to File First Report of Injury.** If an employer or insurance carrier fails, neglects or refuses to file a First Report of Injury, the statute of limitations is tolled until the report is furnished to the Court. §48-144.04.
- B. **Latent Injuries.** In the event of latent and progressive injuries, the statute of limitations will be tolled until it becomes, or should become reasonably apparent to the Plaintiff that a compensable disability is present.

1. The burden of proving a latent and progressive injury is on the employee.
  2. Knowledge of a compensable injury (not the full extent of the injury) is the controlling factor, especially where the medical facts are readily discoverable.
- C. **Award/Stipulation of Future Medical Expenses.** Where an award or stipulation has been entered that calls for the payment of medical benefits into the future, the obligation to pay medical benefits will not be extinguished if the injured worker fails to treat for two years or more. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).
- D. **Legal Disability.** In the event of legal disability such as minor status or mental incapacity, the statute of limitations begins to run from the time the legal disability status is removed.
1. Mental incapacity of an employee's attorney does not toll the statute. *Bame v. Lipsett, Inc.*, 172 Neb. 623, 111 N.W.2d 380 (1961).

#### **IX. Trial Proceedings**

- A. One Judge is the trier of the facts and law, and has the sole discretion to determine the admissibility of evidence and the credibility of the witnesses.
- B. Medical evidence can be submitted in written form in lieu of live testimony. Rule 10.
1. Rule 10 covers written reports and medical bills from physicians, chiropractors, psychologists, physical therapists, and vocational rehabilitation experts.
  2. Rule 10 does not preclude live or deposition testimony.
- C. After the trial, the Judge reviews all of the evidence and renders a written decision.
- D. The decision can take 4-6 weeks or longer, depending on the Judge and complexity of the case.
- E. The date stamped on the decision dictates the appeal deadline.
- F. Motions for a new trial, reconsideration or rehearing are not allowed. Rule of Procedure 12.

#### **X. Appeal from Trial Order**

- A. **Nebraska Court of Appeals.** Either party can appeal a final order from the Nebraska Workers' Compensation Court. §48-185. Although appeals are generally heard by the Court of Appeals, the Nebraska Supreme

Court has the option to bypass the Court of Appeals and hear the appeal directly.

1. **Time to File.** Must file within 30 days from the date stamped on the decision from the Nebraska Workers' Compensation Court. §48-182.
  2. No new evidence.
  3. The Appellate Court reviews evidence in the light most favorable to successful party.
  4. The Appellate Court may modify or reverse the decision of the Nebraska Workers' Compensation Court only if:
    - a. The Compensation Court acted without or in excess of its powers;
    - b. The decision was procured by fraud;
    - c. There is insufficient competent evidence in the record to warrant the making of the decision; or
    - d. The findings of fact by the Compensation Court do not support the order or award.
- B. **Nebraska Supreme Court.** An appeal to the Supreme Court is not a matter of right. The Supreme Court may, in its discretion, grant further review of a decision of the Court of Appeals upon petition of either party. §48-185 and Nebraska Court Rule of Practice 2F.
1. **Timing to File.** Must file within 30 days from the date stamped on the decision from the Nebraska Court of Appeals.
  2. The grounds for modification or reversal are the same as the Nebraska Court of Appeals.

## XI. Wage Rate and Average Weekly Wage

Section 48-126 provides that wages in Nebraska are construed to mean, "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident."

- A. The following exceptions/exclusions apply:
1. **Gratuities/tips.** Gratuities and tips received from the employer or others are not included in wages. (unless they are provided for as compensation under the contract or as part of understanding between employee and employer)
  2. **Fringe Benefits.** Some union employees receive base wages, plus fixed hourly amounts that are paid directly by the employer to the union for health benefits, pension funds, training funds, etc. These "fringe benefits" are not considered gratuities or "similar

advantages" to board and lodging. Even though they are fixed at a per hour rate, they are not considered part of the "money rate". The reasoning is that the money is not paid to the employee and is not the result of the employee's individual labors, but is the fruit of collective bargaining.

3. **Contributions.** Contributions to savings/retirement plans such as a 401K should also be excluded from the weekly wage for principally the same reasoning. However, there is no case law directly on this point in Nebraska.
4. **Board, lodging and similar advantages.** Not included, unless the money value has been fixed by the parties at the time of hiring.

**\*\*Exception:** If the insurance carrier collects a premium based on the value of board and lodging, then the value is included in the wages.

**\*\*Exception:** Even if the money value of board and lodging or similar advantages is fixed at the time of hiring, it must be determined whether the allowances represent a "real and reasonably definite economic gain" to the employee, and so intended by the parties, before it can be considered as wages for the purpose of computing compensation under the act. *Solheim vs. Hastings Housing Co.* 151 Neb. 264, 37 N.W.2d 212 (1949).

**B. Calculation of Wage:**

1. **Seasonal employment.** Occupations which can be carried on only at certain or fairly definite seasons or portions of the year. *Elrod vs. Prairie Vallev. Inc.*, 214 Neb. 696, 335 N.W.2d 317 (1993). Wages are calculated to be one-fiftieth (1/50) of the total wages earned from all occupations during the year immediately preceding the accident.

If exceptional cause can be shown that such method of computation does not fairly represent the earnings of the employee, then the period for calculation shall be extended so far as to give basis for "fair ascertainment" of the employee's average weekly earnings. § 48-126.

2. **Continuous employment.** If immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, the employee's weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting a week's work and using as the basis of calculation the employee's earnings during the preceding 6 months (26 weeks) as the employee worked for the same employer.
  - a. **Calculation of average weekly wage** shall be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime.

- b. **Overtime hours should be included** at the straight time rate. However, if the insurance company's policy of insurance provides for the collection of a premium based upon such overtime, then the overtime pay shall become a part of the basis of determining compensation benefits.
  - c. **Exclude abnormally low workweeks** from the 26-week period used for the calculation. *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990).
  - d. **Shift Differentials are included** in the wage calculation.
3. **Calculation of Wage for Permanent Disability.** If immediately prior to the accident, the rate of wages was fixed by the day or hour, or by the output of the employee, the weekly wages shall be taken to be computed upon the basis of a work week of a minimum of 5 days, if the wages are paid by the day, or upon the basis of a work week of a minimum of 40 hours, if the wages are paid by the hour, or upon the basis of a work week of a minimum of 5 days or 40 hours, whichever results in the higher weekly wage, if the wages are based on the output of the employee. § 48-121 (4).

## **XII. Accident.**

When a personal injury is caused by an accident or occupational disease, arising out of and in the course of his or her employment, the injured employee shall receive compensation therefore from his or her employer unless the employee was willfully negligent at the time of receiving such injury. §48-101.

- A. **"Accident"** (defined §48-151(2)). Three elements must be demonstrated in order to prove that an injury is the result of a work-related accident:
  - 1. The injury must be "unexpected or unforeseen." This element is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen.
  - 2. The accident must happen "suddenly and violently." This does not mean instantaneously and with force, but, rather, if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).
  - 3. The accident must produce at the time, "objective symptoms of injury." This element is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

\* Failure to establish any one of the three elements precludes an award based on a claim of accident.

- B. The Court normally requires an injury-causing event. However, if a minor work-incident or the conditions of employment cause the aggravation of a pre-existing condition, the resulting injury may be compensable.
- C. In addition to proving the occurrence of an "accident," the work-injury must "arise out of" and "in the course of employment." These two elements are necessary to establish a causal connection between the alleged injury and the injured worker's employment.
1. **"Arising out of"** - refers to the origin or cause of the accident:
    - a. **Acts of God.** An employer assumes compensability for an injury caused by an act of God where the employment places the worker in the path of the storm. *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 388 N.W.2d, 820 (1986) (injury from tornado during work found compensable).
    - b. **Positional Risk.** All risks causing injury to an employee can be placed within three categories: (1) employment related--risks distinctly associated with employment; (2) personal --risks personal to the claimant, e.g., idiopathic causes; and (3) neutral – a risk that is neither distinctly associated with employment nor personal to the claimant.
      1. Harm that arises from risks distinctly associated with employment is universally compensable, harm that can be attributed to personal or idiopathic causes is universally noncompensable.
      2. Harm that arises from neutral risks (a risk having no particular employment or personal character) is generally compensable. *Monahan v. United States Check Book Co.*, 4 Neb.App. 227, 540 N.W.2d 380 (1995).
      3. Neutral risks are presumed related to the duties of employment and must, therefore, be rebutted with affirmative evidence of an idiopathic cause or risk personal to the employee to overcome the presumption.
    - c. **Assault.** An employer is responsible for injuries of an employee incurred by the physical aggression of a third-party where the assault occurs in the scope of employment. *P.A.M. v. Quad L. Associates.*, 221 Neb. 642, 380 N.W.2d 243 (1986) (sexual assault of employee by robber found compensable).
    - d. **Horseplay.** An employer is responsible for horseplay if the deviation is insubstantial and does not measurably detract from work. *Varela v. Fisher Roofing Co., Inc.*, 253 Neb. 667, 572 N.W.2d 780 (1998) (injury incurred while arm wrestling found compensable).
  2. **"In the course of employment"** - refers to the work connection as to time, place and activity.

- a. **Premises Rule.** Generally an injury occurring on the employer's premises is compensable.
- b. **Coming and Going Rule.** Generally an injury sustained by an employee while going to and coming from work does not arise in the course of employment.

\* Employer Created Condition Exception. Where a distinct causal connection exists between an employer-created condition and occurrence of the injury then an injury while going to or coming from work may be compensable. *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998) (injury occurring on off-site employer sponsored parking lot found compensable). See also, *Zoucha v. Touch of Class Lounge*, 269 Neb. 89 (2005) (employer's business located in shopping center with parking lots used by employees are responsible for injuries occurring in those parking lots).

\* Special Errand Exception. When employee is running an errand requested or authorized by the employer. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003).

\* Furnished Transportation Exception. Where transportation to place of work is furnished by employer and injury occurs while workman is being transported in vehicle under control of employer. *Butt v. City Wide Rock & Excavating Co.*, 204 Neb. 126, 281 N.W.2d 406 (1976).

- c. **Recreational and Social Events.** Injuries occurring during employer sponsored recreation or social activities are compensable if: (1) they occur on the premises during lunch or recreational period as regular incident of employment; or (2) the employer derives substantial benefit from the activity beyond the intangible value of employee health and morale; or (3) the employer expressly or implicitly requires or encourages attendance. *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994).
- d. **Required Travel.** Injuries occurring during travel, which is required by employer, are generally compensable. However, there is a deviation exception that applies when an employee departs from where employment duties are performed for personal reasons. *Reynolds v. School Dist. of Omaha*, 236 Neb. 508, 461 N.W.2d 758 (1990).

D. **Affirmative Defenses.** There are few, they are limited, and the employer has the burden of proving the required elements of each. § 48-127.

- 1. **Intoxication.** Must prove the employee was intoxicated (drunk or under the influence of drugs) at the time of the injury and that the accident is connected to the intoxication. Medical testimony is required to establish both intoxication and its connection to the accident.

2. **Willful Negligence.** To establish this defense, an employer must prove a deliberate act knowingly done, or at least such conduct as evidences a reckless indifference to safety. See *Krajeski v. Beam*, 157 Neb. 586 (1953). Therefore, ordinary negligence is not sufficient.
  - a. The failure to use a required safety device supplied by the employer can be used to support the willful negligence defense. However, it still requires a showing of a reckless indifference to safety, and ordinary negligence in failing to use a safety device is not sufficient. The factors examined by the court are:
    1. whether an employer has a reasonable rule designed to protect the health and safety of the employee;
    2. whether the employee has actual notice of the rule;
    3. whether the employee has an understanding of the danger involved in the violation of the rule;
    4. whether the rule is kept alive by bona fide enforcement by the employer; and
    5. whether the employee has a bona fide excuse for the rule violation.

See *Spaulding v. Alliant Food Service*, 13 Neb. App. 99 (2004).

### **XIII. Repetitive or Cumulative Trauma**

The Nebraska Supreme Court expanded the definition of "Accident" to include work activities that create a series of repeated traumas ultimately producing disability. *Schlup v. Auburn Needleworks, Inc.*, 239 Neb. 854, 479 N.W.2d 440 (1992) (carpal tunnel syndrome found compensable).

#### **A. Must prove elements of "Accident."**

1. **"Suddenly and Violently"** element - this element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). The timing of the repetitive injury is sufficiently definite when the result materializes at an identifiable point (i.e. when the employee discontinues employment and seeks medical treatment). *Swoboda v. Volkman Plumbing*, 269 Neb. 20 (2004).

\* The law does not establish a minimum amount of time which must be missed from work for medical treatment in order for an employee to be eligible for workers' compensation benefits. All that is required is that the employee must stop work and seek medical treatment for an injury. *Vonderschmidt v. Sur-Gro and Tri-*

*State Ins. Co. of Minnesota*, 262 Neb. 551, 635 N.W.2d 405 (2001) (Element satisfied where a injured worker missed a few hours from work for medical treatment).

#### **XIV. Occupational Diseases**

"Occupational Disease" shall mean only a disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public is exposed. §48-151(3).

##### **A. Examples of Occupational Diseases:**

1. Respiratory injuries such as Asbestosis or Reactive Airways Dysfunction;
2. Dermatitis or inflammation of the skin; and
3. Specific diseases caused by long term exposure to harmful chemicals, toxins or dust such as Peritoneal Mesothelioma or Baker's Asthma.

- B. Date of Injury for Occupational Diseases.** An occupational disease has caused an "injury," within the meaning of the act, at the point it has resulted in disability. §48-151(4). A worker becomes disabled, and thus injured, from an occupational disease at the point in time when a permanent medical impairment or medically assessed work restrictions result in labor market access loss. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887 (2004).

An employee's disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity. *Ludwick*, *Supra*.

- C. Determination of Liability.** Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employers or insurers, the employer who most recently exposed the worker to the harmful substance, or that employer's insurer, is generally liable to pay the entire award. *Osteen v. A.C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981).

1. Application of Last Injurious Exposure Rule. The last employment that bears a causal relation to a worker's disability is deemed to have caused the disease, even though the employee has not proved the last employment was the actual cause of the disability.

\* Sufficient proof exists if the exposure is of the type which could cause the disease, given prolonged exposure. You do not need to prove that the exposure was a "material contributing cause" of the disease. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003).

- D. **Statute of Limitations.** The date of injury is the date when the *disability* is first incurred and the period of limitations begins to run from that date. *Osteen v. A.C. and S., Inc., Supra.*
- E. **Entitlement to Loss of Earning Capacity.** An injured employee is entitled to a loss of earning capacity analysis if the occupational disease causes permanent physical impairment to the body as a whole or permanently restricts the employee from returning to that type of employment. *Jorn v. Pigs Unlimited, Inc., 255 Neb. 876, 587 N.W.2d 558 (1998).* In other words, either finding sufficiently entitles the injured worker to a loss of earning capacity.

**XV. Employer, Employee and Independent Contractor Status**

- A. **Employer** defined as the state and every governmental agency created by it, every person, firm or corporation including a public service corporation engaged in any trade, occupation, business or profession with a contract for hire with any person. §48-114.
- B. **Employee** defined as every person in the service in the state or governmental agency including the National Guard and Military Forces of the State of Nebraska, every person in the service of an employer engaged in any trade, occupation, business or profession under contract for hire including minors, and every executive officer of a corporation elected or appointed subject to limitations or each individual employer, partner, limited liability company member or self-employed person engaged in the activities of that business. §48-115.
- C. **Independent Contractor** is defined as one who in the course of an independent occupation or employment undertakes work subject to the will and control of the person for whom the work is done only as to the result of the work and not as the method or means used. *Larson By and Through Larson v. Hometown Communications, Inc., 3 Neb.App. 367, 526 N.W.2d 691 (1995).*

Ten factors to determine whether an individual worker is an independent contractor or employee:

1. Control - more control over individual indicative of employee status. \* This is the chief criterion for determining employee versus independent contractor status. *Plock v. Crossroads Joint Venture, 239 Neb. 211, 475 N.W.2d 105 (1991).*
2. Distinct occupation or business - if individual offers similar service for other businesses or persons, indicative of contractor status.
3. Supervision - more supervision over individual indicative of employee status.
4. Skill - more skill required to perform work indicative of contractor status.
5. Materials and tools - if individual brings own materials and tools indicative of contractor status.

6. Length of time - the longer period of time involved in job indicative of employee status.
7. Method of payment - employee compensated while working, whereas, a contractor's compensation depends on whether profit earned from work.
8. Type of work - if work performed is part of regular business of employer indicative of employee status.
9. Taxes - if taxes are withheld from pay indicative of employee status.
10. Intent - what relationship did parties intend to create.

## **XVI. Statutory Employer versus Actual Employer**

- A. Any person or business creating a scheme or device to execute work without being responsible to the workers for workers' compensation shall be jointly and severally liable with the immediate employer. However, this does not apply to an owner or contractor who requires the independent contractor, subcontractor or immediate employer to procure workers' compensation insurance. §48-116.

Joint and several liability is imposed upon the statutory employer and actual employer. The liability of the actual employer is primary and that of the statutory employer is secondary. §48-116.

A statutory employer is entitled to indemnity from the actual employer for all amounts the statutory employer has been required to pay for the workers' compensation injury. *Duffy Brothers Constr. Co. v. Pistone Builders, Inc.*, 207 Neb. 360, 299 N.W.2d 170 (1980).

1. **Business Owner.** A business owner who employs an independent contractor to perform work which is in the usual course of business of the owner, and who fails to require the independent contractor to procure workers' compensation insurance, is liable as a Statutory Employer. §48-116.
2. **Contractor/Subcontractor.** If a contractor fails to require a subcontractor to procure worker's compensation insurance, the contractor is liable as the Statutory Employer. *Gardner v. Kothe*, 172 Neb. 364, 109 N.W.2d 405 (1961).

Whether the independent contractor or subcontractor is performing work within the owner's usual course of business is a factual determination. *Rogers v. Hansen*, 211 Neb. 132, 317 N.W.2d 905 (1982).

3. **Temporary Staffing Agency.** Absent a contract requiring the business owner to carry insurance, the agency is typically the actual employer and the business owner is the statutory employer for purposes of §48-116. *See Rogers, Supra.*

## **XVII. Mental Claim**

- A. **Mental Injury Without Physical Injury.** First Responders who suffer mental injury from extraordinary or unusual circumstances, not incidental to their normal employment, may obtain workers' compensation benefits. §48-101.0115
- B. **All Other Mental Injuries Require Physical Injury.** A physical injury is required to establish a mental claim in all other situations. The injured employee must produce evidence of a physical injury, which arises out of and in the course of employment. *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).
1. Must show internal or external injury to the physical structure of body. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988).
  2. Job-related stress is not sufficient. *Tarvin v. Mutual of Omaha*, 238 Neb. 851, 472 N.W.2d 727 (1991).
  3. The mental condition must be related to or caused by the physical injury. *Dyer v. Hastings Industries, Inc.*, 252 Neb. 361, 562 N.W.2d 348 (1997).
- C. **Aggravation of Pre-existing Condition.** If the injured employee suffered a pre-existing mental condition, he or she must provide evidence showing that the work-injury combined with the pre-existing condition to produce disability, or that the injury aggravated, accelerated, or inflamed the pre-existing condition.

## **XVIII. Functional Impairment versus Loss of Earning Capacity**

- A. **Functional impairment.** A functional impairment is provided by a doctor in the form of a percentage according to the AMA Guide to Evaluation of Permanent Impairment. It is based upon evidence from the physical examination(s) and objective test results. Typically, loss of function is best identified through a functional capacity evaluation for applicable work restrictions.
- B. **Loss of Earning Power Capacity.** A loss of earning evaluation is provided by a vocational counselor(s) or Judge in the form of a percentage. It is based primarily upon four factors:
1. Eligibility to procure employment generally;
  2. Ability to hold a job obtained;
  3. Capacity to perform the tasks of the work; and
  4. Ability of the employee to earn wages in which he is engaged or for which he is fitted.

Awards for injuries to the body as a whole are not measured by the loss of bodily function, but by impairment of earning power or diminution of employability. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Thus, if you obtain a zero percent (0%) loss of earning opinion, the argument exists that the employer is not liable for the functional impairment rating.

C. **Apportionment** (the act of dividing or allocating benefits). Generally, an injured worker is entitled to full compensation for an injury, notwithstanding the fact that the present disability is the result of an aggravated preexisting condition. *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994).

1. **Scheduled Member Injuries.** Apportionment is not appropriate for scheduled member injuries. In *Jacob v. Columbia*, the Nebraska Court of Appeals held apportionment did not apply where both injuries were scheduled member injuries as opposed to whole body injuries; the overriding factor being that the prior injury did not result in any loss of earning capacity.

2. **Whole Body Injuries.** Apportionment is appropriate only when the injured worker was previously compensated for a prior whole body injury and the resulting disability was still impacting the worker's ability to earn wages at the time of the subsequent injury. In *Heiliger v. Walters & Heiliger Electric. Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the injured worker was entitled to the full permanent partial impairment despite that the treating physician attributed ½ the impairment to a preexisting condition; the key factor being that the preexisting portion was unpaid.

3. **Loss of Earning Power Capacity.** Apportionment is not properly done when determining an employee's loss of earning capacity. Rather, apportionment occurs after the loss of earning capacity for the current injury has been determined; the amount of loss of earning capacity for which the claimant has already been compensated is deducted from the subsequent loss of earning capacity.

\* Lifting restrictions cannot be the sole basis for apportionment of loss of earning capacity determination (in other words you cannot assess the difference between prior restrictions and new restrictions). There must be a previous loss of earning capacity for apportionment. *Martinez-Najarro v. IBP, Inc.*, 12 Neb. App. 504 (2004).

## **XIX. Payment of Disability Benefits**

A. The payment of disability benefits is controlled by §48-121.

B. **Temporary total disability** the compensation for the disability is 66 2/3 percent of the wages received at the time of the injury

1. Use 26-week wage statement

2. Compare with First Report of Accident or Injury
  3. Subject to the minimums or maximums as specified in §48-121.01.
  4. The date of the accident controls the maximum.
  5. Temporary total disability benefits are owed for time missed by employee to seek medical treatment. §48-121(5). If an employee missed a partial day of work for a medical appointment, that is treated as a calendar day of disability. §48-119. But if partial day worked, then TPD is paid.
- C. **Temporary partial disability.**
1. Paid to supplement any wages earned when a claimant is working light duty or working under restrictions provided by a doctor.
  2. The TPD rate is typically 2/3 the difference between the claimant's average weekly wage and current weekly wage while in light duty.
    - a. A new trend emerging that involved the request for a vocational counselor to do a temporary loss of earning capacity based on the temporary restrictions provided from the doctor. The determination is identical to a loss of earning capacity analysis performed in order to determine the permanent partial disability owed for a body as a whole injury (see Section XVIII). This applies to scheduled member injuries and injuries to the body as a whole.
- D. **Partial disability.**
1. Scheduled injuries pursuant to 48-121(3):
    - a. Two-thirds of the average weekly wage (calculated at a minimum of 40 hours per week) per the schedule.
    - b. Partial disabilities bear proportion to the total weeks given for the scheduled member.
- E. **Body as a whole** injuries are limited to 300 weeks.
1. Deduct amounts of temporary total disability and temporary partial disability paid from the 300 weeks.
  2. Paid on the basis of the loss of earning capacity percentage multiplied by two-thirds of the average weekly wage for the balance of the 300 weeks.
- F. **Permanent total** disability and temporary total disability do not expire after the expiration of a certain number of weeks.
- G. Permanent benefits are paid on the basis of 40 hours or more per week.

- H. **Stacking** - stacking can occur in two separate situations. When stacking occurs, the aggregate weekly benefit cannot exceed the applicable statutory maximum.
1. Combining scheduled member injuries with whole body injuries. If a scheduled member impairment adversely affects an injured worker to the point that the loss of earning capacity from an unscheduled injury cannot be fairly assessed without considering the impact of the scheduled member injury on the worker's employability, then stacking is permitted. *Zavala v. ConAgra Beef Co.*, 11 Neb.App. 235, 647 N.W.2d 656 (2002).
  2. Disability from injuries occurring from two separate accidents may be stacked up to the maximum allowable weekly rate. *Vega v. Iowa Beef Processors Inc.* 264 Neb.282, 646 N.W.2d 643 (2002).

## XX. Minors

Minors are entitled to benefits under the Nebraska Workers' Compensation Act. §48-115(2).

- A. **Guardian's Right to Bring Action.** If an injured employee or a dependent is mentally incompetent or is a minor at the time when any right or privilege accrues to him or her under the Nebraska Workers' Compensation Act, his or her guardian or next friend may, in his or her behalf, claim and exercise such right or privilege. §48-132.
- B. **Tolling of Statute of Limitations.** The failure of either a guardian or next friend to bring action thereunder on behalf of a minor employee will not preclude such employee from asserting his rights under workmen's compensation law within two years after becoming of age. See *Krajeski v. Beam*, 157 Neb. 586 (1953); §48-137 (§48-137 was modified after the *Krajeski* decision thereby altering the statute of limitations period from 1 year after the accident to 2 years).

## XXI. Medical Benefits

- A. Employer or its insurer are liable for all reasonable and necessary medical expenses related to the work injury. §48-120.
- B. Rule 50 provides the employee the right to choose a doctor. "Form 50" (published by Nebraska Work Comp Court) explains the employee's right to choose a doctor. The employer must provide the Form 50 to the employee as soon as possible after gaining knowledge about an injury. Rule 50(B)(2).

The employee has right to choose a family doctor (defined as a physician who has maintained the medical records of and has a documented history of treatment with the employee or an employee's immediate family member). Rule 49(E).

1. Immediate family member means the employee's spouse, children, parents, stepchildren, and stepparents. Rule 49(H).

- C. Employer has the right to verify the family physician's prior treatment and if the authorization needed to verify is refused, employer may choose the physician.
- D. The family physician chosen becomes the primary treating physician, and the costs of any and all referrals from the primary treating physician must be paid by the employer/carrier.
- E. If employer gives employee notice of right to choose and the employee fails to exercise that right, then employer may choose physician.
- F. Rules for notice of right to treat do not apply to emergency treatment needed.
- G. Employee has right to choose any physician if compensability is denied.

## XXII. Vocational Rehabilitation

One of the primary purposes of the Nebraska Workers' Compensation Act is the restoration of an injured employee to gainful employment. Vocational rehabilitation is available to any injured worker who is unable to perform "suitable work" for which he or she has previous training or experience.

- A. "Suitable Work." Suitable work is defined as work that pays at or near the average weekly wage the employee earned prior to the time of the injury.
  - \* If the evidence established shows that the employee could engage in substantial employment on the basis of a 40-hour workweek, then the employee is typically not entitled to vocational training or education. However, a minimum-wage job is not in itself sufficient to deny vocational rehabilitation
- B. If the employee claims entitlement to vocational rehabilitation, including job placement or retraining, the employee and employer (or insurance carrier) shall attempt to agree on the choice of a vocational rehabilitation counselor. If the parties are unable to agree on a vocational rehabilitation counselor, either party can notify the Compensation Court, and the Compensation Court will select a vocational rehabilitation counselor.
  1. **Who is Responsible for Cost?** The employer (or insurance carrier) is responsible for the cost of the court-appointed or agreed upon vocational counselor. §48-162.01(3).
  2. **Presumption of Correctness.** The court-appointed counselor's opinion is entitled to a rebuttable presumption of correctness. §48-162.01(3).
  3. **Rebuttal Analysis.** Either party also has the option to select their own vocational counselor to conduct a rebuttal analysis. However, the Compensation Court Judge ultimately decides which vocational opinion is correct based upon the totality of the factual evidence presented at the time of the hearing.

- C. **Vocational Priorities.** The priorities utilized by the court-appointed or agreed upon vocational counselor are as follows:
1. Return to previous job with same employer;
  2. Modification of previous job with same employer;
  3. New job with same employer;
  4. New job with new employer;
  5. Formal retraining - ranges from six months to four years, but typically involves a two-year associates degree.
- \* No formal retraining plan will be approved by the Compensation Court unless all lower priorities have been determined to be unlikely to result in suitable job placement or return to work.
- D. When the vocational counselor determines that the employee cannot return to suitable employment without vocational rehabilitation services, the vocational counselor shall develop a plan and submit it directly to the Compensation Court.
1. Entitlement to TTD. The employee is entitled to temporary total disability benefits during the pendency of a court-approved vocational rehabilitation plan.
  2. Other Costs. If the vocational rehabilitation plan requires the employee to reside away from home, the Workers' Compensation Trust Fund bears the costs of the employee's board, lodging and travel. §48-162.01(5).
  3. Refusal to Cooperate. If an employee fails or refuses to cooperate with a vocational plan, the Compensation Court may suspend, reduce or limit the employee's compensation, and may modify a previous finding, order, or award of medical or vocational rehabilitation services.
  4. Past Performance. An employee's past performance in a program of vocational rehabilitation may be considered by the Compensation Court in determining whether to award further rehabilitation benefits.
- E. **Loss of Earning Capacity.** Upon request, a vocational counselor may perform a loss of earning capacity evaluation. However, an injured employee is only entitled to such evaluation if the employee sustains a whole body injury resulting in permanent restrictions or permanent impairment (scheduled member injuries do not qualify).

### **XXIII. Second Injury Fund**

An employer may be able to shift liability to the Workers' Compensation Trust Fund if a subsequent injury occurring before December 1, 1997 produces a greater

disability than that which would have resulted from the last injury alone (pre-existing permanent partial disability). The Trust Fund will pay for the increased disability.

- A. **Nebraska Law:** "If an employee... has a preexisting permanent partial disability...the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. For the additional disability, the employee shall be compensated out of the Workers' Compensation Trust Fund..." §48-128 (in pertinent part).
- B. **Written Record Requirement.** The employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.
- C. **Triggering Liability Under §48-128.** The threshold for the Workers' Compensation Trust Fund liability depends on the nature of the permanent pre-existing condition.
  - 1. If the preexisting permanent condition was to the body as a whole, or if a preexisting scheduled member injury falls under the "unusual or extraordinary condition" exception, the Fund is liable only if that permanent preexisting condition would have resulted in a 25 percent or more loss of earning capacity.
  - 2. If the preexisting permanent condition was to a scheduled member, the Fund would be liable only if that permanent preexisting condition would result in compensation payable for a period of 90 weeks or more for disability for permanent injury as computed under Neb.Rev.Stat. §48-121(3).

#### XXIV. Stipulations and Settlements

- A. **Stipulations.** An agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them. A stipulation is an agreement, an understanding. The court must construe it like a contract, i.e., interpret it in a manner consistent with the parties' intentions.
  - 1. **Jurisdictional Exception.** It is not within the power of the parties to a lawsuit to invest a court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the court does not have jurisdiction over the cause of action or subject-matter involved in a particular case, such jurisdiction cannot be conferred upon the court by consent, agreement, or waiver.
  - 2. **Workers' Compensation Exception.** An injured employee cannot enter a stipulation or agreement with the employer to waive his or her rights to workers' compensation protection.
- B. **Settlements.** Prior to filing any Release of Liability or reviewing any Agreement, the Compensation Court requires a \$15.00 filing fee check.

There are four types of settlements that parties to a workers' compensation claim may negotiate:

1. **Rule 46 Settlement.** Allows the parties to resolve all issues with the exception of the injured employee's entitlement to vocational rehabilitation and future medical care. The parties may reach an agreement for payment of the past medical expenses, temporary benefits, and permanent benefits including loss of earning benefits, if applicable. The parties may also agree to fix the indemnity rate for payment of past and future temporary and permanent benefits, including loss of earnings.
  - a. The settlement agreement must include language which states, "Claimant understands his or her rights to vocational rehabilitation. Any attempt to "buy out" vocational rehabilitation will not be approved."
  - b. The settlement agreement must be submitted to, and approved by, the Nebraska Workers' Compensation Court.
2. **Rule 47 Settlement** (leaving future medical entitlement open). Allows the parties to resolve all issues with the exception of the claimant's right to future medical care. Future medical care must remain open as part of the agreement and the employer shall remain liable for all medical expenses reasonably related to, and necessitated by, the work-related injury or occupational disease.
  - a. Compromised settlements must include evidence showing the matter is "doubtful and disputed."
  - b. The settlement must include language which states, "In the event a dispute arises as to payment of a medical expense, the parties may submit the matter to a judge of the Compensation Court for a determination."
  - c. The settlement must also include a statement that claimant understands the right to vocational rehabilitation but waives such right, along with an explanation or reason for the waiver. Generally, the Compensation Court will not approve a settlement if claimant has not returned to suitable employment or otherwise remains unemployed at the time of settlement (with certain exceptions).
  - d. The settlement agreement must be submitted to, and approved by, the Nebraska Workers' Compensation Court.
3. **Rule 47 Settlement** (Full & Final). Allows the parties to resolve all issues. The same rules outlined in #2 apply except you are also closing future medical entitlement.
  - a. The settlement agreement must be submitted to, and approved by, the Compensation Court.

4. **Release of Liability.** Allows the parties to resolve all issues without formal Compensation Court intervention and approval. The Release is a form document located on the Court's website. Both parties must be represented by an attorney. Furthermore, all medical bills must be paid as part of the settlement (including reimbursements to Medicaid) and the claimant may not be a Medicare beneficiary or have a reasonable expectation of becoming eligible within 30 months. §48-139.

\* The parties also need to execute a joint stipulation to dismiss any petition filed with the Compensation Court.

\*\* Rules 46 and 47 contain a detailed description of the requirements for each settlement discussed above.

## **XXV. General Compliance**

- A. Verify filing of the First Report of Injury - must be filed electronically.
- B. Gather the entire personnel file and wage statement.
- D. Gather statements and lists of witnesses to the alleged incident, including description of injury.
- E. Obtain a detailed history in the own words of the injured claimant.
- F. **Late payments after 30 days without a dispute subject to 50% penalty.**
- G. Consult for IME and FCE scheduling and coordination.
- H. Consult for appointment of vocational counselor.
- I. Provide fee schedule audits of all medical bills claimed prior to trial.
- J. **Subsequent Reports (Rule 30)**
  1. File within 14 days after initial payment of benefits -even on med only
  2. File within 14 days after denial of claim/change in prior payment report.
  3. File within 6 months after date of accident and every 180 days until closed.
  4. File within 14 days of file closure, award, or lump sum settlement.