Workers' Compensation

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Workers' Compensation Concepts

Workers' compensation is a "no-fault" compensation system based on insurance principles. Under the workers' compensation system, if a worker is injured on the job, s/he no longer has a traditional tort claim against the employer; instead, the employee's exclusive remedy may be an award of workers' compensation, whether the injury was "caused" by the employer, the worker, a third party or a natural disaster.

Compensable Injury Requirement

An employee automatically is entitled to certain benefits whenever the employee suffers from an **accidental personal injury (or in some states, occupational disease) arising out of and in the course or scope of employment**. There are differences among the states as to the exact language employed, and different states give various meanings to these words.

- *"Arising out of"* - The injury was caused by a risk to which the worker was subjected by his or her employment.
- *"In the course of"* - This is a term of art involving consideration of the time, place and circumstances of the accident in relation to the employment. Thousands of state court decisions can be found discussing such issues as going to and from work, walking into the plant from the parking lot, coffee breaks, lunch breaks, trips between employment locations, company-sponsored picnics or sporting events, etc.

Fault Is Irrelevant

Fault on the part of the employer and/or the employee largely is immaterial, although exceptions generally can be found in cases of intoxication and willful disobedience to the instructions of the employer.

Employee vs. Independent Contractor

Coverage is limited to those having the status of an *employee*, as opposed to an *independent contractor*.

Statutory Immunity of Employer & Third Party Suits

The employee, in exchange for the certainty of receipt of benefits regardless of fault, under most states' laws, is deemed to have given up his or her common law right to sue the employer for negligence and damages for any injury the statute covers. This is called the *"statutory immunity"* of employers. Most states retain the right of the employee to sue an outsider (a person or company other than the employer) for negligence or any other tort theory of liability, such as product liability or medical malpractice (associated with the rendering of medical care for the workers' compensation injury). These are called *third party suits*.

Insurance

In most states, employers are required to purchase insurance to cover workers' compensation claims. As a result, most cases involve third party insurance carriers. Some states, however, allow larger employers to self-insure.

Distinction between Covered Injuries & Occupational Diseases

Covered Injury - In many states an injury must be an event taking place within a relatively short time frame, producing physical harm to the injured worker. Some states require a form of trauma. Some states with laws containing the term "accidental injury" will disallow claims for lifting or strain injuries not produced by a traumatic event such as slipping, tripping and falling, unless the amount of lifting required of the employee can be shown to be unusual for the particular employment.

Occupational Disease - The common element in most occupational disease statutes is a disease or condition which is characteristic of the trade or occupation of the worker, and is shown by medical evidence to be causally related to the trade. In other words, diseases that might be contracted in other occupations or in everyday life apart from employment usually are not compensable.

Types of Disability Benefits

Temporary Total Disability Benefits - This benefit is payable when the injured worker has an injury that temporarily prevents him or her from working.

Temporary Partial Disability Benefits - An employee may be eligible for temporary partial disability when s/he is able to do some work but still is recuperating from the effects of the injury, and thus temporarily limited in the amount or type of work that s/he can perform compared to the pre-injury work.

Permanent Partial Disability Benefits - These benefits are awarded for certain types of permanent conditions that do not cause the employee to be totally unable to work.

Permanent Total Disability Benefits - To receive this type of benefit, the employee typically must be unable to return to work in any capacity at any time in the future.

Disfigurement/Mutilation - A state's workers' compensation law may permit the employee to be compensated for disfigurement or scarring, frequently in the absence of any actual impairment, and sometimes in addition to actual impairment.

Death Benefits - Most states provide some form of compensation for survivors of workers who are killed as a result of job-related accidents. The compensation most often is an effort to replace the lost stream of income to the decedent's surviving dependents. However, there is great variability among the comp laws of the various states regarding who can qualify as a survivor

entitled to compensation for the death of the worker and the amount they are entitled to receive. It is important to note that, unlike a civil damage claim in the court system, in workers' compensation the focus is not upon grief, mental pain and suffering, or loss of society and companionship. Thus, with respect to seeking death benefits, the focus in workers' compensation claims is on the loss of income earned by the deceased worker for the surviving beneficiaries.

Hospital, Medical and Vocational Rehabilitation Expenses - All reasonable and necessary medical care required by the injured worker generally is covered, including prescriptions, medical appliances, etc. The medical condition requiring treatment must be causally related to the injury. Some states regulate the amount the medical care providers may charge for treatment; in these states, charges by a medical care provider that are in excess of the permitted amounts are unenforceable. States differ on the right of the injured worker to choose the person(s) who will provide his/her medical care, with some states leaving this choice entirely up to the claimant and other states heavily regulating it by requiring that physicians be chosen from panels or selected by the employer.

Where to File

When evaluating a workers' compensation case, it is first important to determine under which workers' compensation system a worker should file. This typically is determined by where the worker worked and was injured, and whether the employee worked for the government or a private employer.

- If the employee worked in the private sector in DC, she must file with the DC Office of Workers' Compensation at the DC Department of Employment Services. *See* **DC Employees of Private Companies** section below.
- If the employee worked for the DC government, she must file under the DC Government Comprehensive Merit Personnel Act. *See* **DC Government Employees** section below.
- If the employee worked for the federal government, s/he must file with the U.S. Department of Labor's Office of Workers' Compensation Programs. *See* **Federal Employees** section below.
- If the employee worked in the private or public sector in MD, she must file with the Maryland Workers' Compensation Commission. *See* **Maryland Employees** section below.
- If the employee worked in the private or public sector in VA, she must file with the Virginia Workers' Compensation Commission. *See* **Virginia Employees** section below.

It may be difficult to decide where a worker should file if the employee worked in more than one locality, was injured in a jurisdiction where s/he typically did not work, or if the worker was not located in the employer's principal place of business. There may be advantages and disadvantages to filing in a particular jurisdiction depending on the specific situation.

DC Employees of Private Companies

Employees of private companies in the District of Columbia are covered by the 1979 District of Columbia Workers' Compensation Act and its amendments. The office that administers this law is the Office of Workers' Compensation of the DC Department of Employment Services, 4058 Minnesota Ave., NE, 3rd Floor, Washington, DC 20019. The telephone number is (202) 671-1000. The office is open from 8:30 a.m. to 5:00 p.m., Monday to Friday.

Jurisdiction

To be compensable, the injury or death must occur in the District of Columbia or, if it occurs outside DC, the employment must be **localized principally** in DC. *See* DC Code § 32-1503(a); 7 DCMR § 201.2. An injury is not compensable, however, just because it occurs in the District of Columbia. Employees working for non-resident companies who temporarily enter DC are not covered. *See* DC Code § 32-1503(a-3); *see also Petrilli v. DOES*, 509 A.2d 629 (1986).

Because DC is so small and many companies do work in DC, Maryland and Virginia, a number of workers' compensation cases have turned on the interpretation of the phrase, "localized principally." The leading case is *Hughes v. DOES*, 498 A.2d 567 (DC 1985). *Hughes* listed factors to determine if the employment is localized principally in DC:

(1) The location of the employer's business office or facility at which or from which the worker performs the principal services for which she was hired;
(2) If no such office exists, the location of the place where the contract is made, and the place of performance; and
(3) If neither 1 nor 2 is applicable, the location of the worker's base of operations.

After establishing the location of the employment relationship, the contacts between the District and the employment relationship must be more substantial than the contacts with any other jurisdiction. *See also, Shipkey v. DOES*, 955 A.2d 718 (DC 2008) (holding the most important factor to be the percentage of time worked in DC compared to Maryland and Virginia). A statutory exception to the principally localized rule is non-prisoners working in prison industries programs of DC correctional facilities and certain other prison industry programs. *See* DC Code § 32-1503(e).

Coverage

Is the worker an employee?

"Employee" is defined as "every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied[.]" DC Code § 32-1501 (9).

In the past, DC courts have used two tests to determine whether an employee-employer relationship exists: right to control and relative nature of the work. In *Munson v. DOES*, 721

A.2d 623 (D.C. 1998), the Court of Appeals remanded the case for the director to determine which test applied in the determination of whether the claimant met the definition of a statutory employee. On remand, the director determined that the relative nature of the work test was the exclusive test for determining whether an employee-employer relationship existed. *See Munson v. Hardy & Son Trucking Co., Inc.*, Dir. Dkt. No. 96-176, OWC No. 0029805 (April 19, 1999). The relative nature of the work test is satisfied (and the worker is determined to be an employee) if the work done is an integral part of the regular business of the employer and if the worker does not furnish a professional service or run an independent business.

Contractors are Liable for Employees of Subcontractors

The employer who subcontracts with another is liable for compensation to employees of the subcontractor unless the subcontractor secures payment. *See* DC Code §32-1503(c); 7 DCMR § 201.4.

Exemptions from Coverage

The following employees are exempt from coverage under DC's private workers' compensation statute:

- Federal government employees. *See* DC Code § 32-1501(9)(A).
- DC government employees. *See* DC Code § 32-1501(9)(B).
- Casual employees who do not work in the usual course of trade, business, occupation, or profession of the employer. The best example is someone who cuts the lawn of a private homeowner. Someone who mows lawns for a landscape company, however, is not a casual employee. *Id.* § (9)(E).[98]
- Domestic workers employed in and around a private home by someone who employed domestic household workers for less than 240 hours during any calendar quarter in the same or previous year.[99] *Id.*
- Non DC residents working for non-DC employers provided that 1) they entered into a contract for hire in another state; and 2) the employer has workers' compensation coverage in another state. *Id*. at § 32-1503(a-3).
- Workers with injuries caused solely by the worker's own intoxication. *Id.* § 32-1503(d).
- Workers with injuries that occur because of the worker's own willful intention to injure or kill himself or another. *Id.*
- Workers with injuries that occurred before July 26, 1982. Such injuries are covered by the Longshoremen's and Harbor Workers' Compensation Act, a federal law administered

[98] Whether employment is casual, and thus excluded from coverage under DC law regarding workers' compensation, is determined by the employment contract, or if one does not exist, by the nature of the services rendered. Determination of whether an employee is casual requires an evaluation of the service performed and whether or not it is stable and settled, or casual and incidental. Employment is considered casual when it arises fortuitously and has no fixed duration. Unanticipated employment is also considered casual.

[99] For example, if the injury occurred on October 31, 1998, did the employer employ one or more domestic workers (including the injured worker) for more than 240 hours in any calendar quarter of 1998 or 1997? If so, then there is no exemption from coverage. A calendar quarter most likely will be interpreted as January through March, April through June, July through September and October through December. Two hundred and forty hours equals 20 hours for 12 weeks, or 40 hours for 6 weeks.

by the U.S. Department of Labor. *See* 33 U.S.C. § 901.

- Other limited exceptions include service employees of Congress, real estate brokers and railroad employees. *See* DC Code § 32-1501(9).

Undocumented Workers

Undocumented workers are not prohibited from receiving workers' compensation benefits in the District of Columbia. *See* DC Code § 32-1501(9). This rule may apply even if immigration status has been misrepresented. In *Asylum Co. v. District of Columbia Dept. of Employment Services*, the District of Columbia Court of Appeals held that an undocumented alien was entitled to workers' compensation benefits. 10 A.3d 619, 626 (D.C. 2010) (holding that an undocumented worker is an "employee" under the District of Columbia Workers' Compensation Act.)

Compensable Injuries

Causation - Is the Injury, Illness or Disability Work-Related?

To be **work-related**, the injury or harm to the worker must arise out of and in the course of employment. The definition is very broad and includes specific injuries, such as a broken leg, occupational disease or infection. *See* DC Code § 32-1501(12).

Factual Causation

Injuries that occur **during the performance of obligations or duties of employment** generally are said to arise out of employment. This includes injuries that occur during paid work time, while the worker is on working premises, and where there is a substantial nexus between the injury and the workplace facility.

An injury caused by the willful act of a third person against a worker because of his or her employment also is covered by the DC workers' compensation system. If the injury is the result of a third person, however, the injured employee still may be able to recover tort remedies against that third person and should consider consulting a personal injury lawyer.

Injuries occurring en route to or from work have been held to be non-compensable. *See Grayson v. D.O.E.S.,* 516 A2d 909 (DC 1986) (holding employee injured pulling out of parking lot to go on unsupervised lunch break was not entitled to workers' compensation). An injury was held to be non-compensable when it occurred during off-duty hours in an apartment the employer provided rent-free. *See Mosley v. DC. DOES*, 573 A.2d 776 (1990).

However, an injury was held compensable based on a traveling exception to the coming or going rule when a bus driver was injured while walking from a bus terminal to his hotel during an out-of-town assignment. *See Kolson v. DC DOES,* 699 A.2d 357 (1997).

Medical Causation

Even if the injury occurs at work and during work hours, the employee still may be called upon to present medical evidence that the event occurring at work could have caused his or her injury within a reasonable degree of medical certainty. Thus, it is always advisable for an employee to request a written medical opinion from his or her treating physician that explains in medical terms the connection between the injury-causing event at work and the resulting injury.

This is particularly important in cases involving the aggravation of a pre-existing condition. If a worker re-injures or aggravates a pre-existing condition, the current employer is completely liable. Liability shall be "as if the subsequent injury alone caused the subsequent amount of disability." DC Code § 32-1508(6)(A).

Occupational Disease

Liability for diseases such as pneumoconiosis, radiation diseases, asbestos exposure, and any other recognized occupational disease, rests on the employer where the last known exposure occurred. *See* DC Code §32-1510; 7 DCMR § 227.1. The employer may not be liable for any occupational diseases resulting from a hazard to which the worker has had greater exposure outside of the employment. 7 DCMR § 227.2.

Emotional Injury

Emotional injury claims are compensable when the actual conditions of employment, as determined by objective standards and not merely the claimant's subjective perception of his working conditions, caused his emotional injury. Many emotional disability claims involve persons with prior psychological histories. Until 2008, the claimant was required to show that the working conditions would have caused a similar disabling emotional condition that was so stressful that a person of ordinary sensibilities would have reacted in the same manner. In *McCamey v. DC Dep't of Emp. Servs.,* 947 A.2d 1191 (2008), the Court overruled the previous test and held that the "person of ordinary sensibilities" standard was inconsistent with the purposes of the act.

Sexual Harassment

Injuries sustained as the result of sexual harassment are not compensable under the DC workers' compensation law. *See Parkhurst v. DOES,* 710 A.2d 854 (1998), *on remand, Parkhurst v. WMATA,* Dir. Dkt. No. 93-96 (Oct. 7, 1998); *Estate of Underwood v. National Credit Union Admin.,* 665 A.2d 621 (1995) (holding that as a matter of law, sexual harassment is not a risk involved in or incidental to employment). Workers, however, may file lawsuits under the relevant anti-discrimination and harassment laws.

For additional information on this subject, please see this manual's chapters on *Discrimination* and *Sexual Harassment.*

Compensation

Under the act, an employer, or its insurance carrier, is required to provide wage loss benefits, if appropriate, and payment of all medical expenses related to a worker's compensable injury. In appropriate cases, the employer, or its insurance carrier, also may be required to pay for scheduled loss benefits, vocational rehabilitation, death benefits, and attorney's fees.

Wage Replacement

Wage replacement is available for as long as the injured worker cannot work, with a maximum of 500 weeks in the case of temporary or permanent partial disability (9.6 years). *See* DC Code §§ 32-1508, 32-1505(b).[100] Wage replacement is two-thirds of the worker's previous salary, but cannot be more than the average weekly wages of insured employees in DC. *See* DC Code § 32-1505(b)-(e). Compensation must be made within 14 days of the knowledge of the injury and every two weeks thereafter unless such payment is disputed. *See* DC Code §32-1515; 7 DCMR 209.2. If the employer disputes the claim, the employer must notify the Office of Workers' Compensation of such dispute within 14 days. *Id.*

The amount of monetary benefits a claimant is entitled to depends on: 1) whether the injury results in a partial or total disability; and 2) whether the disability is permanent or temporary.

Total v. Partial Disability Benefits

Total Disability Benefits: (1) In accordance with DC Code § 32-1508, (2) if a disability is total, the employee should be paid monetary compensation equal to 66 2/3 percent of his or her monthly pay while the worker is totally disabled.

If a disability is partial, the employee is paid monetary compensation equal to 66 2/3 percent of the difference between her weekly pay before the injury and her weekly pay after becoming disabled. If the employee voluntarily limits her income or fails to accept employment commensurate with her disabilities, then the wages after she becomes disabled will be deemed the amount she would earn if she did not limit her income voluntarily.

Permanent v. Temporary Disability

A disability is permanent if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration. An injury is not permanent if recovery from an injury merely requires a typical healing period. An injury also may be considered permanent when it has reached "maximum medical improvement" or "MMI." An injury has reached MMI if the injury has healed to the extent possible, and is unlikely to be improved by further medical treatment.

If an injury is permanent, the employee is entitled to a "scheduled award." The code and

[100] Workers can apply for an additional 167 weeks if an Independent Medical Exam (IME) ordered by the mayor finds continued whole body impairment exceeding 20 percent. *See* DC Code § 32-1505(b) (Supp. 1999).

regulations list payment "schedules," a macabre list of what the loss of the use of body parts is worth. *See* DC Code § 32-1508(3). For example, a lost arm is entitled to 312 weeks compensation and a lost thumb is worth 75 weeks. Note that for injuries occurring after April 16, 1999, the schedule award is reduced by 25 percent. *Id*. at § 32-1508(3)(V)(iii). This scheduled award is in addition to the compensation awarded for any temporary total or temporary partial disability that might be paid.

Three-Day Waiting Period

There is no compensation allowed for the first three days of the disability unless the injury results in more than 14 days of disability. *See* DC Code § 32-1505(a). If the claim is not contested, the first payment should be made within 14 days of the notice of injury. *See* 7 DCMR § 209.2.

No Taxes

Workers' compensation benefits are not taxed as income for federal or DC income tax purposes. Thus, the worker should not receive a 1099. If the worker does receive a 1099, s/he may contact the worker's claims examiner to have it rescinded.

Medical Services

The Workers' Compensation Act requires the provision of medical care for the injury, including travel expenses for going to and from the doctor, medicine, false teeth, eye-glasses, and/or artificial or prosthetic appliances. *See* DC Code §32-1507(a).

The worker has the right to be examined by the physician of his or her choice, although if the nature of the injury requires immediate care and the worker is unable to select a physician, the employer can choose one. *See* DC Code § 32-1507(b)(3). The worker, however, still has the right to select his or her treating physician of choice as soon as s/he is aware of the right to do so. If the worker does not change doctors, then the worker is deemed to have adopted the employer's doctor.

Medical care is a contentious issue under workers' compensation. Employers can challenge the necessity of medical procedures, and the law provides for utilization reviews as the mechanism for resolving disputes. An organization or individual certified by the Utilization Review Accreditation Commission must conduct this review. The medical care provider can ask for reconsideration of the reviewer's findings within 60 days. *See* DC Code § 32-1507(b)(6)(C). Following the utilization review, if a dispute still exists, any party can petition for a hearing (*see* below for hearing procedures). *Id.* at § (b)(6)(D). The employer must pay for the cost of the utilization review if the worker seeks the review and is the prevailing party.

Note: If a worker receives treatment from an unauthorized physician who is not the treating physician, she may not be able to recover for those costs.

Vocational Rehabilitation

Vocational rehabilitation is supposed to lead the worker to reinstatement to a position similar to the one held before the injury occurred. The worker may be entitled to reimbursement for the cost of rehabilitation services if the worker requested that the government supply such services, the government failed to do so, and it is later determined that the services were appropriate. *See* DC Code §32-1507(c); 7 DCMR §229 (1994).

Health Insurance Must Continue

If the worker had health insurance at the time of injury, it must continue and the employer must pay all premiums (including the employee-paid portion) for as long as eligibility for workers' compensation benefits lasts. *See* DC Code §32-1507 (a-1).

Death

If a worker dies due to a work-related event, the employer must pay for reasonable funeral expenses, up to $5,000. *See* DC Code § 32-1509(1). In addition, a surviving spouse is entitled to payments of 50 percent of the deceased's wages. Children are entitled to an additional one-sixth of the wages each, to a family maximum of two-thirds of the deceased's wages. If there are children but no spouse, the first child receives 50 percent of the deceased's wages and each additional child receives one-sixth, to a maximum of two-thirds of the deceased's wages.

Other relatives who are dependent on the worker, such as grandchildren, brothers, sisters, parents or grandparents, may receive compensation if there is no widow, widower, or child, or if the amount paid to a widow, widower, or child is less than two-thirds of the average wages of the deceased. *Id.* at § 32-1509(4).

Misrepresentation of Physical Condition as Bar to Recovery

A worker is barred from receiving workers' compensation if: 1) the worker knowingly and willfully made a false representation of her physical condition; 2) the employer substantially relied on the misrepresentation when hiring the worker and 3) there was a causal connection between the false representation and the injury. *See Smith v. George Hyman Construction*, H&AS No. 91-783 (Feb. 26, 1993). In *Castano v American Painting & General Contractors*, H&AS No. 93-115 (Nov. 29, 1993), the claimant was not barred, however, when he misrepresented his immigration status.

Workers' Compensation Procedure

Employee Responsibilities – File Notice Form and Claim Form

<u>Notice of Injury</u>

Notice must be given to the employer within 30 days of the injury or within 30 days after the worker becomes aware of the relation between injury and employment. *See* DC Code §32-

1513; 7 DCMR § 206.1.

The notice should be in writing, and must contain: the name, address, and business of the employer; the name, address, and occupation of the worker; the cause and nature of injury or death; and the year, month, day, hour, and locality where the incident occurred. *See* DC Code §32-1513(b); 7 DCMR 206.2 (1994). The notice must be signed by the worker or by any person claiming the benefit or compensation (such as a surviving spouse). However, failure to provide notice does not bar a claim if the employer or insurance carrier has knowledge, or if the mayor excuses the failure to report. *Id.* at § 32-1513(d).

Practice Tip: Form 7, "Employee's Notice of Accidental Injury or Occupational Disease," is available from the DC Office of Workers' Compensation and is used to provide notice to the mayor and the employer. The form is available online at http://does.dc.gov/ and http://wrmanual.dcejc.org/29. This form also is available at the Workers' Rights Clinics. The Workers' Compensation regulations state that the forms must be used, but the office may excuse the failure for good cause shown. *See* 7 DCMR § 202.1.

Filing the Claim

Claims must be filed within one year of injury or death, but at least three days after the injury. *See* DC Code § 32-1520(a). As with the notice requirement, the deadline (or statute of limitations) for filing begins to run once the worker becomes aware of the injury and/or the relation between the injury and employment is shown. *Id.* at §32-1514; 7 DCMR § 207.2. Expiration of the statute of limitations will not be a bar to recovery unless objection is made at the first hearing. *See* D.C. Code § 32-1514(b). The one-year time limit for filing a claim does not begin to run if the employer fails to file the report required by § 32-1532 and the employer or insurance carrier has been given notice of the injury. (See *Employer Responsibilities*, below) Mental incompetence can extend the time limits, but only if the person has no guardian or other authorized representative. *Id*. at § (c).

Once a claim is filed, the OWC is supposed to notify the employer and other interested parties, by personal service or certified mail, that a claim has been filed. *Id.* § 32-1520(b).

Practice Tip: Form 7a "Employee's Claim Application" is available from the Office of Workers' Compensation, (4058 Minnesota Ave. NE) and also at the Workers' Rights Clinics. The form is also available online at: http://does.dc.gov/ and http://wrmanual.dcejc.org/30. The Workers' Compensation regulations state that the forms must be used, but the office may excuse the failure for good cause shown. *See* 7 DCMR § 202.1.

Practice Tip: The notice of injury form and the claim form (Forms 7 and 7a) both may be filed at the same time. However, do not file the notice of injury form and the claim form on the same day if the injury did not occur more than three days earlier. Hold the claim form until three days have passed.

Employer Responsibilities

Employers are required to provide a report of the worker's condition to the Office of Workers' Compensation (OWC) within 10 days of the injury or knowledge of the injury. *See* DC Code §32-1532; 7 DCMR § 204. The worker's one-year time limit for filing a claim does not begin to run if the employer or insurance carrier has been given notice of the injury and the employer fails to file a report to the OWC. *See* DC Code § 32-1532(f).

If the Employer Disputes the Claim

Notice of Controversion

If payment is contested, the employer must provide notice of controversion to the Office of Workers' Compensation within 14 days after the worker has filed a formal claim. *See* DC Code § 32-1515(d); *Ratliff v. WMATA*, 159 F.3d 637 (DC Cir.1998).

The notice of controversion must include the name of both the employer and the worker, the date of the injury, a statement that the right to compensation is contested as well as the basis for such a statement, the name and address of the employer's representatives and insurance carrier, and any other information the office requires. *See* 7 DCMR §210.3. The employer must send the notice of controversion by certified mail, return receipt requested, to the worker at the worker's last known address or place of residence. *Id*.

Informal Conference

The OWC may use informal conferences to resolve a contested claim, provided that both parties participate voluntarily. Informal conferences may be conducted over the phone or at the office. *See* 7 DCMR § 219.

If, after the conference, the parties come to an agreement, a memorandum must be issued within 14 days of making that agreement. If no agreement is reached, the OWC evaluates all the information and prepares a Memorandum of Informal Conference containing recommendations. *Id.*

The parties then have 14 working days to respond in writing regarding whether they agree or disagree with the OWC recommendations. If they agree, then a final order is issued. If they do not agree, either party can file for a formal hearing. This must be done within 34 working days after the issuance of the Memorandum of Informal Conference. If no formal hearing is requested, the OWC will issue a final order. *Id*.

Practice Tip: Attorney's fees are not allowed if no informal conference was requested. Claimants and advocates, even if representing a client *pro bono*, should request an informal conference. Not requesting an informal conference can cause the claimant problems later if the case needs to be referred to a private attorney. See the Filing Application for Attorney's Fees section below.

Application for Formal Hearing

An application for a formal hearing must be made in writing and filed with the OWC, with copies to the opposing parties or known representatives. *See* DC Code § 32-1520; 7 DCMR § 220.

Practice Tip: Form 20, Application for Formal Hearing, is available from the OWC. http://wrmanual.dcejc.org/31 (Note: The address on this form is not current; however in 3/2014 this was the most recent version of this form available online.)

The Application for Formal Hearing should be filed with the DC Government, Department of Employment Services, Office of Hearings and Adjudications, 64 New York Avenue, NE, Washington, DC 20001. A formal hearing is supposed to be held within 90 days after applying. *See* DC Code § 32-1520(c). Discovery is allowed.

Pre-Hearing Order

Prior to the formal hearing, a joint pre-hearing order normally is required. *See* 7 DCMR § 222. The pre-hearing order is similar to a pre-trial statement, including a statement of disputed and undisputed facts, list of witness, time estimate and a statement that settlement was considered. *Id*.

Note: A request for an interpreter for people with limited English proficiency must be filed with the administrative law judge.

Formal Hearing Procedures

Formal hearings are conducted by administrative judges within the Office of Hearings and Adjudication. The claimant and employer may present evidence at the hearing. *See* DC Code § 32-1520(d). Each party may be represented by any person authorized in writing. *Id.*[101]

At the hearing, the following presumptions apply: that the claim comes within the provisions of this chapter; that sufficient notice of the claim was given; that the injury was not occasioned solely by the intoxication of the injured employee; and that the injury was not occasioned by the willful intention of the injured employee to kill himself or another. *Id*. at § 32-1521. This means the employer has the burden of proving a controversion of these four items.

Hearing procedures are spelled out in regulations at 7 DCMR § 223. The administrative law judge (ALJ) should inquire fully into all matters at issue and accept all relevant evidence, but the Memorandum of the Informal Conference is not accepted into evidence under any circumstance. The ALJ also may direct the parties to submit new evidence, and allow the parties to open evidence for additional material. *Id*.

[101] Note that the statute allows for non-attorney representatives, but attorney's fees are available only to licensed attorneys. *See* DC Code § 32-1530.

Issuance of Compensation Order

After a formal hearing, the ALJ's decision, called a **compensation order**, is supposed to be handed down within 20 business days of the hearing. *See* DC Code § 32-1520(c). In practice, compensation orders rarely are issued within 20 days. It can take three months to a year or more to issue a compensation order.

Either party disagreeing with a compensation order may file an application for review within 30 days with the Compensation Review Board. *Id.* at § 32-1522. If no application is filed, the compensation order becomes final. In making a determination, the Compensation Review Board must defer to the administrative law judge's decision if the decision 1) states findings of fact on each material, contested factual issue; 2) makes findings based on substantial evidence; and 3) makes conclusions of law that rationally follow findings. *See Hyman v. DOES*, 498 A.2d 563; *Dell v. DOES*, 499 A.2d 102 (1985).

Administrative and Judicial Review

Under DC Code § 32-1522(3) and the DC Administrative Procedure Act, DC Code §§ 1-1501 to 1542, the claimant can appeal an adverse final order to the DC Court of Appeals.

Attorney's Fees

Attorney's fees in connection with the representation of an injured worker are regulated by the District of Columbia Workers' Compensation Act and the Department of Employment Services. An attorney representing an injured worker in a workers' compensation claim in the District of Columbia cannot take a fee unless that fee is approved by the Department of Employment Services, and the attorney cannot charge any fees upfront.

If an employer refuses to pay benefits within 30 days of a claim and the worker or beneficiary thereafter uses an attorney to successfully prosecute his claim, a reasonable counsel fee may be awarded against the employer or carrier in an amount approved by the mayor. *See* DC Code § 32-1530.

If the employer pays all requests for compensation within 30 days of an injury, the employer will not be liable for attorney's fees. If the employer agrees to compensate the worker for his or her injuries but disagrees as to the degree of the worker's injuries or the amount to be paid, then the employer only will be required to pay attorney's fees if, after 14 days, it refuses to pay any additional compensation recommended by the mayor. *See* DC Code § 32-1530(c); *National Geo. Soc., et. al. v. DOES*, 721 A.2d 618, 621 (DC 1998).

Attorney's fees are capped at 20 percent of the worker's actual benefits, including medical expenses secured by the claimant through the attorney services. *See* DC Code § 32-1530(f). In determining the amount of attorney's fees, the following factors must be considered:

a) The nature and complexity of the claim, including the adversarial nature
b) The actual time spent on developing and presenting the case

c) The dollar amount of potential future benefits obtained and dollar amount of potential future benefits resulting from the efforts of the attorney
d) The reasonable and customary local charge for similar services
e) The professional qualifications of the attorney

See 7 DCMR § 224.2.

Applications for fees must be filed within one year of the final compensation order and all appeals. *See* 7 DCMR § 224.7.

Note: An attorney may be barred from fees if no informal conference was requested. *See National Geographic Society v. DOES*, 721 A.2d 618 (DC 1998) (assessing attorney's fees against the employer or insurer).

Retaliation for Filing a Workers' Compensation Claim

A worker may not be discharged or discriminated against for making or attempting to make a formal or informal claim regarding workers' compensation, or for testifying or preparing to testify in a workers' compensation proceeding. *See* DC Code § 32-1542. A worker whose employer has retaliated against him for filing a workers' compensation claim may raise this matter at the informal conference; however, the employer, not the insurer, must respond to this claim (typically only the insurer attends an informal conference on behalf of the employer). Generally, only limited relief is available – e.g., reinstatement (in the case of a termination) and/or back pay. Workers' compensation retaliation does not give rise to a wrongful termination claim based on a violation of public policy.

Even if a worker is discharged, it should have no effect on his wage replacement benefits, which should continue as long as the worker is unable to work, subject to the statutory maximums discussed above.

Enforcement of Retaliation Claims

Once the notice of injury has been filed in a timely manner, then a claim for retaliation may be brought up at any time. Employees who prevail under this section are entitled to reinstatement and back pay. Civil penalties between $100 and $1,000 may be assessed by the mayor. *See* DC Code §32-1542.

A worker cannot bring a claim for wrongful discharge as a way to forego pursing a claim for benefits within the workers' compensation system. *See Nolting v. National Capital Group*, 621 A.2d 1387 (DC 1993) (because worker could file claim for benefits, her case was dismissed).

The Special Fund

The Special Fund is made up of payments from employers such as civil penalties and a $5,000 payment required when a worker dies as a result of a workplace injury, and no survivor is

eligible for compensation. *See* DC Code § 32-1540(d); 7 DCMR § 231. Workers may apply to the special fund in order to:

- Pay for vocational rehabilitation benefits when the employer fails or refuses to provide adequate vocational rehabilitation. *See* DC Code § 32-1507(c).
- Pay for treatment a physician recommends, but not generally recognized by the medical community. Id. at § 32-1507(e).
- Receive benefits when judgment cannot be satisfied because of the insolvency of the employer or other circumstances precluding payment. Id. at § 32-1519(b).

Procedures for Accessing the Special Fund

To apply for money from the Special Fund, the claimant must have an award and judgment through the hearing process. *See* 7 DCMR § 231.17. Application must be made within 24 months of the date of judgment along with a statement of attempts to enforce the judgment. *Id.* at §231.18.

Applications may be filed with the Custodian of the Special Fund, Office of Workers' Compensation, 4058 Minnesota Ave., NE, Washington, DC 20019. Fax (202) 671-1929. The associate director will investigate the claim and issue an order within 20 days of the application. *Id*. at §231.20; § 231.21.

Self-Insured Employers

Most employers pay premiums to an outside insurance company which insures them for workers compensation claims their employees file. Some (usually larger) employers, however, are self-insured. To be a self-insured employer, the employer must be authorized by the mayor on the basis of proof of its ability to pay compensation awards. *See* DC Code § 32-1534 (a)(2). Typical factors the Office of Workers' Compensation examines when considering an employer's application to be self-insured are: the financial standing of the employer; the nature of the work in which the employer is engaged; the degree of hazard to which employees are exposed; the amount of the employer's payroll; etc. *See* 7 DCMR § 217.7. Generally, the fact that an employer is self-insured does not substantially impact the process for filing a claim and receiving workers' compensation benefits in DC.

Termination of Benefits

Workers who collect workers compensation for a protracted period of time will frequently be sent to Independent Medical Examiners (IMEs). IMEs are doctors retained by employers or insurers to examine recipients of workers' compensation to determine if they are still disabled and entitled to continuing benefits. If an IME believes that the worker is recovered and can go back to work, the worker's benefits might be terminated. If a worker's benefits are terminated as a result of an independent medical exam, the worker will receive a notice of termination of benefits that includes information about the worker's right to appeal the determination. The beneficiary usually will have 30 days to appeal the termination of benefits and the opportunity to request a formal hearing that will follow the same format described above.

Miscellaneous

Requesting a File

Interested parties may request copies of any documents related to a workers' compensation claim. *See* DC Code § 32-1520(g). Regulations state that the costs of copying should be paid by the requestor. *See* 7 DCMR § 208.7. Indigent claimants and their representatives should request a waiver of any fees, or ask to examine the file at the OWC office. *See* 7 DCMR § 208.5.

Dealing with Medical Providers in Workers' Comp Cases

A few sections of the workers' compensation law can help claimants who owe money to medical providers. First, the law says that "medical care providers shall not hold employees liable for services rendered in connection with a compensable injury under [the workers' compensation law]." DC Code § 32-1507(b)(7). The regulations further provide that "in no event shall a physician attempt to collect a disputed bill for medical services provided pursuant to the act from the claimant or beneficiary prior to a final determination by the office that the insurer is not liable to pay the bill." 7 DCMR §212.8.

Doctors' offices and hospitals that are having problems being paid by the insurers can file a complaint with the Office of Workers' Compensation, and the Office of Workers' Compensation will investigate and attempt to resolve the complaint. 7 DCMR §212.6; 212.7.

DC Government Employees

Note: The cited codes and cases, while accurate, are not always adhered to by the third party administrator or the Office of Hearings and Adjudication. The claimant and his or her advocate must be diligent in knowing and protecting the claimant's rights.

Workers' Compensation claims for DC government employees are governed by different legal standards and procedures than claims of private sector workers within the District of Columbia. The claims of DC government employees injured on the job are considered under the 1978 District of Columbia Government Comprehensive Merit Personnel Act, as amended, DC Code 1-623.01, *et seq*. (the "act"). The program, referred to as the DC Public Sector Workers' Compensation Program (PSWCP), is administered by the Office of Risk Management (ORM) and a third party administrator contracted by ORM, with adjudicatory functions delegated to the Department of Employment Services (DOES) Office of Hearings and Adjudication.

Coverage

The DC public sector workers' compensation system applies to paid civil officers and employees, as well as those rendering personal service without pay or for nominal pay, and petit and grand jurors. Student employees, as defined under 5 U.S.C. § 5351, also are covered.

Members of the Metropolitan Police Department and the DC Fire Department who are pensioned or pensionable under sections 701 through 724 of chapter 6 of the DC Code, however, are not covered under the act. Employees also are ineligible for compensation if they were "employed by the District of Columbia or the federal government before October 1, 1987, and [are] receiving disability benefits from the federal government for the same injury." DC Code §1-623.16(a-1).

To be eligible for public sector workers' compensation benefits, the employee must sustain an injury while in the "performance of . . . duty." *See* DC Code §1-623.02. The specific statutory language is as follows:

> The District of Columbia government shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty, unless the injury or death is:
>
> (1) Caused by willful misconduct of the employee;
> (2) Caused by the employee's intention to bring about the injury or death of himself or herself or of another; or
> (3) Proximately caused by the intoxication of the injured employee. *Id.*

Whereas the private sector Workers' Compensation Act contains a presumption that disability is caused by an accident at work, the public sector act contains no such presumption. Claimants must establish the link between their disability and their work. *Lerner v. Dept. of Human Srvs.*, 2005 WL 1904495, CRB No. 05-216 (2005) ("unlike the DC Workers' Compensation Act which governs 'private sector' claims, there is no such presumption under the 'public sector' statute").

Definition of "Injury"

The term "injury" under the act is defined as an "accidental injury or death arising out of and in the course and scope of employment, and such occupational disease or infection as arises naturally out of such employment, or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his or her employment. The term 'injury' also includes damage to or destruction of eyeglasses, hearing aids, medical braces, artificial limbs, and other medical devices and such time lost while such device is being replaced or repaired." DC Code § 1-623.01(5).

While in the Performance of Duty

The phrase "while in the performance of duty" is not defined in the act itself; however, it has been interpreted as mandating that the injury both arise out of and occur in the course of claimant's employment. *See Nixon v. DC Dep't of Empl. Servs.* 954 A.2d 1016, 1024-25 (DC 2008). First, the injury must take place where the employee may reasonably be expected to be ("occur in the course of claimant's employment"). Second, the injury must be causally related to

("arise out of") the duties and responsibilities of the employment. *Anderson v. DC Child and Family Servs.*, 2012 DC Wrk. Comp. LEXIS 138, AHD No. PBL: 11-045 (Mar. 8, 2012) (claimant who suffered an injury to her back while handling files, bending, stooping, sitting and walking at work was injured in the performance of her duties). In meeting this test, the claimant bears the burden of both proof and production of evidence. *See Stevenson v. Dept. of Human Services*, 2004 WL 3606427, OHA No. PBL 03-034 (Sept. 13, 2004).

Going and Coming Rule

The "going and coming rule" refers to the fact that, generally, a worker's injury sustained off the employer's premises or en route to or from work "do[es] not occur in the course of employment" and thus, is not compensable under workers' compensation. *See Vieira v. District of Columbia Dept. of Employment Services*, 721 A.2d 579, 582 (DC 1998).

There is an exception however to the going and coming rule for traveling employees. "When a traveling employee is injured while engaging in a reasonable and foreseeable activity that is reasonably related to or incidental to his or her employment, the injury arises in the course of employment." *Kolson v. District of Columbia Dep't of Employment Serv*., 699 A.2d 357, 361 (DC 1997). In *Kolson*, a Greyhound bus driver was assaulted while walking to a hotel provided by his employer after finishing his shift at 4:00 a.m. The court held that Kolson's injury arose out of the course of his employment because his walk to the hotel was related to his employment. *Id.* at 362; *see also Stevenson v. Dept. of Human Services*, 2004 WL 3606427, OHA No. PBL 03-034 (Sept.13, 2004) (finding compensable a worker's slip and fall injury that occurred while the claimant was walking to the entrance of the work building long before his shift began to conduct union business involving the employer).

Mental Injuries

The statute was amended by the fiscal year 2011 Budget Support Emergency Act of 2010 to preclude mental injuries. The act now excludes from coverage "mental stress or an emotional condition or disease resulting from a reaction to the work environment" or a reaction to a variety of enumerated employment actions, such as denial of promotion or adverse personnel action. DC Code §1-623.02(b). This exclusion does not apply to employees hired before January 1, 1980. DC Code §1-623.02(c).

Workplace Harassment

Injuries that arise out of workplace harassment usually are not compensable. *See Robinson v. District of Columbia*, 748 A.2d 409, 412 (DC 2000). The rationale is that although the injuries might have been sustained within the temporal and spatial boundaries of the claimant's employment, the injury is not causally related to the duties and responsibilities of the employment.

Note: If the worker has been harassed, there may be remedies under Title VII, the DC Human Rights Act, the collective bargaining agreement (if the worker is covered by one) or other DC or federal law.

Aggravation is Compensable

The "aggravation of a pre-existing condition by work related events or conditions is a compensable injury." *Lerner v. Dept. of Human Srvs.*, 2005 WL 1904495, CRB No. 05-216 (2005); *see also Metropolitan Poultry v. DOES*, 706 A.2d 33, 35 (DC 1998); *Hensley v. Wash. Metro. Area Transit Auth.*, 655 F.2d 264, 268 (DC Cir. 1981) (bus driver whose psoriasis was severely aggravated by construction on bus route awarded workers' compensation after court determined aggravation arose in the course of employment); *Ferreira v. DC Department of Employment Serv.*, 531 A.2d 651 (DC 1987).

Cumulative Trauma is Compensable

The statute does not require that an injury be the result of a single event or accident. Injuries caused by repeated trauma, or cumulative exposure to harmful conditions, which contribute to disability or death, satisfy the causation requirement. *See Ferreira*, 531 A.2d at 656 (1987); *Washington Post v. DOES*, 853 A.2d 704, 707-08 (DC 2004).

Recurrence of Injury

The recurrence of an injury is compensable as long as the injury already had been accepted as work-related. *See Harris v. District of Columbia Office of Workers' Compensation*, 660 A.2d 404, 408 (DC 1995). The prevailing law governing a recurrence of injury does not place a time limit on when a petitioner can file a notice of recurrence. Where a recurrence is alleged, there is no need to prove a continuous entitlement to compensation. The claimant only needs to prove by substantial, reliable, and probative evidence that the current disability is causally related to the previous work-related injury. If the claimant cannot prove the recurrence, he or she may be able to prove, alternatively, that the injury is an aggravation or exacerbation of a pre-existing condition.

Compensation

The compensation provided under the Public Sector Workers' Compensation Program is similar to that of private sector workers' compensation systems.

Continuation of Pay Benefits

When an employee misses work due to a work-related injury, she is entitled to continuation of pay. If the employee was hired before January 1, 1980, the continuation of pay is for up to 45 days. For all other employees, continuation of pay benefits are for 21 days or until the disability compensation program has either upheld or denied the employee's right to continuation of pay or issued its determination upon the claim. DC Code § 1-623.18; 7 DCMR §109.4. An employee however is not entitled to continuation of pay benefits if her injury only forced her to miss a total of three or fewer work days. No compensation is allowed for the first three days of the disability unless the injury results in more than 14 days of disability. *See* 7 DCMR § 109.2. Injuries of less than four days generally are not considered disabling events.

If an employee wishes to claim continuation of pay benefits, she should inform the agency for which she works as well as the third party administrator (TPA). *See* D.C. Code 1-623.18. The PSWCP may challenge the worker's entitled to continuation of pay benefits by issuing a notice of controversion. *See* 7 DCMR § 109.5. If a worker is awarded continuation of pay benefits and it is later determined that she was not eligible, she must elect whether to pay back the money or have the days deducted for sick or annual leave. *See* 7 DCMR § 109.6.

Wage Replacement

Wage replacement is available for as long as the injured worker cannot work. *See* DC Code §§ 1-623.05, 1-623.06. Wage replacement is 66 2/3 percent of the worker's previous salary, but there are minimum and maximum compensation levels set by statute that vary depending on when the claimant began employment with the DC government. DC Code § 1-623.12.

The amount and length of receipt of wage replacement benefits a worker will receive depends on: 1) whether the injury results in a partial or total disability; and 2) whether the disability is permanent or temporary.

Total v. Partial Disability Benefits

Total Disability Benefits: In accordance with DC Code § 1-623.05, if a disability is total, the employee should be paid monetary compensation equal to 66 2/3 percent of his or her monthly pay while the worker is totally disabled.

Partial Disability Benefits: In accordance with DC Code § 1-623.06, if a disability is partial, the employee should be paid monetary compensation equal to 66 2/3 percent of the difference between his or her weekly pay before the injury, and his or her weekly pay after becoming disabled. If the employee voluntarily limits her income or fails to accept employment commensurate with her disabilities, the wages after becoming disabled will be deemed the amount she would earn if she did not voluntarily limit her income.

Permanent v. Temporary Disability

A disability is *permanent* if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration. An injury is not permanent if recovery from an injury merely awaits a typical healing period. An injury also may be considered permanent when it has reached "maximum medical improvement" or "MMI." An injury has reached MMI if the injury has healed to the extent possible, and is unlikely to be improved by further medical treatment.

When an injury is permanent and accompanied by a loss of function or disfigurement of a body part, the employee is entitled to a "schedule award." DC Code § 1-623.07. The statute and regulations specify compensation levels for different body parts and levels of function lost. *See* DC Code § 1-623.07; 7 DCMR § 121. For example, the total loss of one arm is worth 312 weeks of compensation at 66 2/3 percent of the worker's former weekly wage. If a medical evaluation

determines that the employee has lost 50 percent use of one arm, the employee would be entitled to 156 weeks of compensation at 66 2/3 percent of the former weekly wage.

To be awarded permanent total disability, a claimant must present substantial credible evidence that 1) the condition in maximally medically improved, and 2) he or she is unable to return to his/her usual employment or any other employment as a result of the injury. *See Logan v. DC Dep't of Emp't Servs.*, 805 A.2d 237, 239 (DC 2002).

For all injuries classified as temporary total or temporary partial disability, the payment for benefits cannot exceed 500 weeks. The claimant is entitled to a hearing before an Administrative Law Judge within the last 52 weeks of this 500-week period to determine whether s/he has a permanent disability. This limitation does not apply to employees who were hired before January 1, 1980. DC Code § 1-623.06a.

No Taxes

Workers' compensation benefits are not taxed as income for federal or DC income tax purposes. Thus, the worker should not receive a 1099. If the worker does receive a 1099, s/he should contact the claims examiner to have it rescinded.

Cost of Living Adjustments

Under DC Code §1-623.41, the PSWCP is required to increase compensation levels to adjust for increases in the cost of living. Such adjustments are tied to the percentage increase in salary granted to the category of DC employees who are not covered by a collective bargaining agreement. To be eligible for the cost-of-living adjustment, the disability must have occurred at least one year before the effective date of the increase.

Increase or Decrease of Compensation

Injured as a student: If a worker was injured while a student, the worker's wage-earning capacity would probably have increased over time but for the injury. *See* DC Code § 1-623.13(a). On review of the award, pay must be recomputed prospectively "on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity." *Id.*

Failure to comply with vocational rehabilitation: Compensation can be decreased or suspended if the employee does not in good faith comply with vocational rehabilitation when directed to do so by the PSWCP. DC Code §1-623.13(b).

Augmented compensation for dependents: If an injured worker has dependents (minor children, children who are students, disabled children, or dependent parents), he is entitled to have the basic compensation for disability augmented upward. DC Code § 1-623.10.

Additional compensation for services of attendants: The mayor may provide an additional sum of up to $500 per month to employees who are so disabled that they are in need of a personal attendant. DC Code § 1-623.11.

Additional compensation for vocational rehabilitation: The PSWCP may pay employees undergoing vocational rehabilitation additional compensation necessary for their maintenance, but the amount may not exceed $200 a month. *Id.*

Income off-sets: While an employee is receiving PSWCP benefits, she cannot get any other form of remuneration from the DC government except payment for services actually performed and military benefits. *See* DC Code § 1-623.16(a). A claimant's receipt of other government benefits may impact the amount of workers' compensation benefits that can be received under the act at the same time. *See* DC Code § 1-623.16. Although the private sector Workers' Compensation Act has a provision for offsetting workers' compensation with SSDI benefits, the public sector act does not contain a similar provision. The Social Security Act and Regulations, however, do contain provisions that may result in a reduction of SSDI benefits based on receipt of workers' compensation benefits. *See* 20 C.F.R. 404.408(a)(2). So, the appropriate offset likely will have already occurred.

Medical Care: Restrictions on Treatment

To be reimbursed for medical treatment, an employee only must seek treatment from certain physicians the mayor approves. *See* DC Code § 1-623.03. An injured employee initially may select one of these pre-approved physicians to provide treatment. *See* 7 DCMR §123.4. Once an employee has selected a physician, he cannot change to another physician without authorization. 7 DCMR §123.9. If a worker wants to change physicians, he must do so by written request to the third party administrator (TPA). 7 DCMR § 123.10. This request should include justifications for why the worker wants to switch physicians, including reasons why he is not satisfied with the medical care his current physician provides. *Id.*

A physician is prohibited from attempting to collect from the employee a disputed payment for medical services provided to an employee in connection with a compensable claim under the act. *See* DC Code §1-623.23(a-3); 7 DCMR § 123.22

The mayor or the TPA must provide the claimant with written authorization for payment of any treatment or procedure within 30 days after the physician files a written request to the mayor or the TPA. *See D.C. Code* 1-623.03(f). If the mayor or the TPA fails to provide the claimant with written authorization for treatment within 30 days of the request, the treatment is deemed to be authorized, unless they commence a utilization review within 30 days of the request. *Id.*

In cases of emergency where the employee is unable to contact a physician, the employee may seek treatment at an emergency care facility. *See* 7 DCMR § 123.8. If emergency services are used, the employee must provide the TPA with notice of these services within 30 days afterwards. *Id.*

Any medical care provided or scheduled to be provided is subject to a utilization review. An employee or the PSWCP may initiate a utilization review of the medical services provided if it appears that the necessity, character, or sufficiency of medical treatment is improper or if clarification is needed on medical services. *See* DC Code § 1-623.23(a-2)(1)-(3); 7 DCMR

§126.3. When a utilization review is conducted, a report must be provided to the PSWCP and the employee who sets forth rational medical evidence to support each finding. *See* 7 DCMR §126.5. The utilization review must be completed within 60 days. *See* DC Code §1-623.23(a-2). If the utilization review is not completed within 120 days of the request, then the medical treatment under review is deemed approved. *Id.* If the mayor or the TPA does not approve the treatment because the medical care provider or the claimant has not provided enough information, the provider or the claimant may re-request approval for the treatment by providing new information. *Id.*

If a medical care provider disagrees with the opinion in the utilization review report, that provider may submit a written request to the utilization review organization asking for reconsideration of the opinion. The request should contain reasonable medical justification for the request and should be made within 60 days from the receipt of the utilization review report. DC Code § 1-623.23(a-2)(3); 7 DCMR §126.8-126.9.

If a dispute arises between the medical care provider, the employee, and the PSWCP about the necessity or sufficiency of medical care, the dispute must be resolved by the Department of Employment Services director at an administrative hearing. DC Code §1-623.23(a-2)(4); 7 DCMR §126.10. If an employee seeks utilization review and wins, the PSWCP must bear the cost of utilization review. DC Code § 1-623.23(a-2)(5); 7 DCMR §126.13.

Restoration of Leave

When an employee is forced to use leave as a result of an injury approved by the PSWCP, they may be able to get that leave restored. *See* DC Code § 1-623.43. Claimants should advocate with their employing agencies and work with their union representatives to make sure that their leave is properly restored.

Career Retention Rights

If the injured worker is able to return to work with the District government, the time the employee was receiving compensation will be credited to the employee for purposes of seniority and benefits based upon length of service. DC Code §1-623.45(a). If the injury or disability is overcome within two years of the date compensation began, the agency where the employee was last employed is required to give the employee the right to resume his former position, or an equivalent position. If the employee overcomes the injury after more than two years has passed, the agency is required to make all reasonable efforts to place the employee in his former position or an equivalent position within that agency or another agency. *Id.* at § 1-623.45(b).

Note: Injured workers should advocate with their employing agencies and work with their union representatives to make sure they are not terminated in violation of this provision. In addition, workers should consult with their unions to see if their collective bargaining agreement provides additional protections from termination and attempt to pursue claims under the 1990 Americans with Disabilities Act, arguing that leave is a reasonable accommodation and not an undue hardship on the employer.

Rights to Retain Health Insurance

Workers covered by employer-sponsored health care insurance at the time of the injury will continue to receive health insurance coverage while on workers' compensation, with the premiums deducted from their workers' compensation benefits. 7 DCMR § 113.1.

Death Benefits

Section 1-623.33 of the DC Code provides that if an employee dies as a result of an injury sustained in the performance of duty the government shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with a specific schedule based on family status.

Special Note Re: D.C. Public School Teachers' Disability Retirement

This is an alternative to public sector workers' compensation for DC teachers. The teacher must meet the following conditions to be eligible for disability retirement in DC:

- be physically or mentally disabled ("not due to vicious habits, intemperance or willful misconduct");
- be incapable of satisfactorily performing the duties of the teacher's position;[102]
- have completed five years of eligible service; and
- apply for disability retirement before leaving DCPS or within six months of leaving.

See DC Code § 38-2021.04(a)

The teacher must be examined under the direction of a health officer of DC and be found disabled by the health officer. Alternatively, a two-thirds majority of the members of the Board of Education can qualify a teacher for disability retirement. *Id.* Every worker who retires because of a disability is subject to an annual medical examination to ascertain the nature and degree of disability. If the worker recovers before reaching retirement age, she will be reinstated in accord with the rules applicable (similar or equal position). Payment will continue until the worker is reinstated. DC Code at § 38-2021.04(b).

If, before reaching the age of retirement but after retiring due to a disability, the worker earns income of not less than 80 percent of the current rate of pay for the position that the worker occupied before retirement, the retirement income will be terminated. DC Code § 38-2021.04(c). The retired worker can have her payments reinstated if she shows that she is earning less than the 80 percent and demonstrates that the reduction in wage is not due to normal income fluctuations. *Id.*

[102] This is exact language from the statute, so advocates can resist an attempt by the DCPS to suggest other suitable employment or arguments that the person is not disabled from all employment.

Claims Procedures

ORM has subcontracted the process of claims administration to a private, third party sub-contractor, commonly referred to as a third party administrator (TPA). TPA processes workers' compensation claims for all DC government workers (except fire personnel and police).

Giving Notice

An employee injured on the job must **give written notice of the injury to his supervisor within 30 days.** *See* DC Code § 1-623.19.

DC Code § 1-623.19 provides that notice must be given by the employee or someone acting on his or her behalf, and must: (1) be given within 30 days; (2) be given to the immediate superior by personal delivery, or by depositing it in the mail properly stamped and addressed; (3) be in writing; (4) state the name and address of the employee; (5) state the year, month, day, hour and location where the injury was suffered; (6) state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; (7) be signed and contain the address of the person giving the notice; and (8) be accompanied by a form authorizing access to related medical and earnings data concerning the claimant.

After the claimant provides the initial notice, the official superior of the employee is supposed to notify the TPA immediately by telephone. If this does not happen, or if the employee wants to check on the status of the notice, the employee should contact the TPA or ORM at (202) 727-8600.

Once the supervisor has given the employee's notice to the TPA, the TPA is required to complete the proper form and return it to the claimant or claimant's representative for review, revision and execution. *See* 7 DCMR §108.4. The TPA also is required to enclose a medical release form for execution by the claimant employee. 7 DCMR at 108.6. Once the claimant receives the form from the TPA, s/he must return it to the TPA within 30 days of the injury or within 15 days of the date from which it was mailed or delivered, whichever is later. 7 DCMR § 7-108.9. The claimant also is required to provide a copy of the completed form to his immediate supervisor. 7 DCMR § 108.8.

Failure to meet these notice requirements can result in the loss of claim, even if it seems clear that the person was injured on the job and would otherwise be entitled to benefits. If the 30-day period has passed, the employee still should give notice as soon as possible and attempt to establish an excuse that is allowed by statute or case law. *See* DC Code § 1-623.03.

The code provides that in the case of a latent disability, "the time for giving notice of injury begins to run when the employee is aware or, by the exercise of reasonable diligence, should have been aware that his or her condition is causally related to his or her employment, whether or not there is a compensable disability." DC Code § 1-623.22(b).

Section 1-623.22(d) of the DC Code provides some excuses for the late filing of claims.

That section provides that the time period for filing claims will not apply (1) against a minor until he reaches 21 or has a legal representative appointed; (2) against an incompetent individual while he is incompetent and has no legal representative; or (3) against any individual whose failure to comply is excused by the mayor on the ground that such notice could not be given due to "exceptional circumstances." DC Code 1-623.22(d).

Although the "exceptional circumstances" provision is found in a section primarily pertaining to untimely claims, the director has interpreted this section as excusing untimely notice regardless of whether the claim was timely filed. *See Nickelson v. DC Dept. of Human Servs.*, 1998 D.C. Wrk. Comp. LEXIS 630 (Feb. 20, 1998). In *Nickelson*, the claimant failed to give written notice of injury until more than six months after the injury, but filed the claim for compensation on time. *Id.* at *4-5. The claimant argued that this failure to give notice should have been excused because the agency lost her original claim file, which thereby prejudiced her rights. *Id.* at *6. The director explained that Section 1-623.22(d)(3) "does excuse noncompliance with the notice provisions if the failure to comply was due to exceptional circumstances," and that in that case the claimant's noncompliance was due to such exceptional circumstances. *Id.*

Claimants also can argue that verbal notice was sufficient if they could not give written notice, *see e.g., Nickelson v. DC Dept. of Human Servs.*, 1998 DC Wrk. Comp. LEXIS 630 (Feb. 20, 1998) (verbal notice may be sufficient when the employee is unable to provide written notice) (citing *Delany v. Dept. of Recreation*, ECAB No. 90-8 (April 16, 1991)), or that the employer had actual notice of the injury and was not prejudiced by the claimant's failure. Finally, claimants can attempt to make equitable arguments, although it is not clear whether such arguments would be successful.

Filing a Claim

In addition to giving notice of the injury, a claimant also must file a claim for benefits to receive compensation.

Claims for compensation must be **filed within two years** after the injury or death for which compensation is sought. DC Code § 1-623.22(a); 7 DCMR § 119.1. A claim filed after two years might be allowed in cases where the supervisor had actual knowledge of the injury within 30 days, DC Code § 1-623.22(a)(1); where written notice was given within 30 days, § 1-623.22(a)(2); in the case of latent disability, § 1-623.22(b); in the case of a minor for the period in which s/he is under age 21 and does not have a legal representative, DC Code § 1-623.22(d)(1); in the case of an incompetent individual who does not have a legal representative, DC Code § 1-623.22(d)(2); or where failure to comply is excused by the mayor when there are "exceptional circumstances," DC Code § 1-623.22(d)(3); *see also* 7 DCMR § 119.2-119.4.

Claims must be made in accordance with the requirements of § 1-623.21, DCMR § 7-108, on forms approved by the mayor, DC Code § 1-623.21(a)(3), and submitted to the TPA.

Once a claim is submitted, the TPA is required to complete the claim form and send it back to the claimant for review, revision and execution. The processing of a claim can be delayed while the TPA waits for the claimant's supervisor and doctor to return forms, so

claimants must send in forms in a timely manner and also prod their supervisor and doctor to do the same.

Note: Claimants should contact the TPA to make sure that they are using the most current forms. Despite the requirement for a claim form that is distinct from the notice form, it is not clear whether the TPA actually requires the submission of a separate claim form. To avoid confusion, it is recommended that claimants file a separate written claim following submission of the written notice of accident.

Administrative law judges do not have the authority to award compensation if a claim has not been filed for the disability. *See Jones v. DC Dept. of Corrections*, 2001 DC Wrk. Comp. LEXIS 363; Dir. Dkt. No. 22-00 (Apr. 20, 2001) (Dir. Irish) ("Compensation for a disability only may be made if a claim is filed.") (*citing* DC Code § 1-623.21 (1981)). Hearing examiners will not consider claims at the formal hearing if it is not clear that a claim was filed and considered by the TPA.

Investigation & Consideration of Claim

Submission to Physical Examination

Claimants can be required to submit "to examination by a medical officer of the District of Columbia government, or by a physician designated or approved by the mayor, after the injury and as frequently and at the times and places as may be reasonably required. DC Code § 1-623.23; 7 DCMR § 123.15, 124.1. If a claimant refuses to submit to an examination, her right to compensation can be suspended until the refusal or obstruction stops. DC Code § 1-623.23(d). Claimants can have their own physician present to participate in the examination; however, claimants must bear the cost. DC Code § 1-623.23(a). Claimants are entitled to be reimbursed for expenses incident to an examination required by the PSWCP. These expenses include transportation and loss of wages incurred as a result of the time spent attending the examination. These expenses are paid to claimants out of the Employees' Compensation Fund. *See* DC Code § 1-623.23(b). The fees paid to doctors performing examinations are set by the PSWCP and are paid from the Employees' Compensation Fund. *See* DC Code §1-623.23(c).

Note: PSWCP will provide transportation to an examination when the worker cannot otherwise get to the appointment. The worker should request transportation from the claims examiner in advance if s/he thinks it will be necessary.

Consideration of Claims

The TPA is required to make a decision on the claim, which includes making a finding of facts and an award or denial, within 30 days of the application for benefits. *See* D.C. Code § 1-623.24(a); 7 DCMR § 111.1. The TPA is required to consider the claim presented by the employee and the report from the claimant's supervisor. The TPA also must complete whatever other investigation it deems necessary. 7 DCMR § 112.1. If the TPA does not make an eligibility determination within 30 days on a newly filed claim, the claim is automatically deemed approved and the government must begin payment of benefits. DC Code § 1-623.24(a-3)(1).

Unfortunately, the application of this code provision often is thwarted by a later denial of eligibility or decision to controvert the claim. In practice, the TPA rarely meets its 30-day requirement.

Accepted Claims

During the period that a claimant is receiving benefits, the TPA will administer the claim, and the claimant will be assigned a claims examiner. The claimant should communicate with his/her claims examiner regarding any issues that arise, such as the need for medical care or monetary benefits.

Report of Earnings

Claimants can be required to file a report of earnings, which includes a release of income tax returns and a signed, notarized affidavit reporting any other earnings. *See* 7 DCMR § 104. Failure to respond on time to a request for a report of earnings can be the basis for suspension of benefits. *See* DC Code 1-623.06(b)(2) & (4); 7 DCMR §104.2. The report will be used to determine whether the claimant is receiving the correct amount of partial disability wage replacement benefits, or as a basis for terminating the benefits of a claimant who appears to have returned to work.

Vocational Rehabilitation

While receiving benefits, claimants have a duty to cooperate with vocational rehabilitation the PSWCP arranges. If an individual without good cause fails to apply for and/or undergo vocational rehabilitation when so directed, his/her benefits may be suspended until the non-compliance ceases. DC Code § 1-623.13(b); 7 DCMR § 140.5. *See Smith v. D.C. Public Schools*, 2000 D.C. Wrk. Comp. LEXIS 115 (April 7, 2000) (claimant was found able to participate in vocational rehabilitation process and termination of benefits was upheld); *but see, Dua v. D.C. Pub. Sch.*, 2000 DC Wrk. Comp. LEXIS 360; Dir. Dkt. No. 04-99 (Aug. 11, 2000) (Director Irish) (suspension overturned on the grounds that there was no evidence the vocational rehabilitation requirements were within the claimant's medical restrictions).

In addition to vocational rehabilitation, the employer sometimes will send recovering claimants to a work hardening program. The purpose of such programs is to improve their physical strength so that they can return to work. Failure to cooperate with work hardening may lead to a suspension of benefits.

The act was amended by the fiscal 2011 Budget Support Act of 2010 to place limits on the duration of vocational rehabilitation. DC Code § 1-623.04 now states:

"(c) The initial vocational rehabilitation services provided pursuant to this section shall be for a period not to exceed 90 days after the claimant reaches maximum medical improvement and vocational rehabilitation is initiated.

(d) After the initial 90-day period has expired, the vocational rehabilitation services may be extended, at the discretion of the mayor, for good cause shown, for incremental periods of 90 days, not to exceed one year from the initiation of the initial vocational rehabilitation plan."

Denial of Benefits

If a claim is denied, the claimant will receive a Notice of Determination ("NOD" or "notice") denying his or her claim. A claimant not satisfied with the eligibility decision can request a hearing within 30 days of the decision.

Note: If any adverse determination is made and the claimant does not receive a notice (if it is made by letter or orally, for example), the claimant or his/her advocate can make a request in writing to the claims examiner in charge of the claim that a formal notice be issued. It is the notice that will trigger the reconsideration and appeal rights.

Application for Formal Hearing

Claimants who wish to appeal a denial of benefits have to submit an application for a formal hearing before an administrative law judge to the Office of Hearings and Adjudication **within 30 days** of the issuance of the decision being appealed. *See* DC Code § 1-623.24(b)(1); 7 DCMR § 129. A blank form for submission is normally attached to the notice or the final order for which the claimant seeks review. If it is not attached, a copy may be obtained by contacting OHA or the Office of Risk Management. The application must be filed at OHA, and a copy must be sent to the Chief for the Office of Personnel and Labor Relations, Office of the Attorney General ("OAG") for DC *See generally* 7 DCMR § 106. The DC OAG is located at 441 4th Street, NW, Suite 1060N, Washington, DC 20001.

If an application is not filed in a timely manner, the request can be dismissed for lack of jurisdiction. *See Chambers v. DC St. Elizabeths Hospital*, 2001 DC Wrk. Comp. LEXIS 317; Dir. Dkt. No. 02-01 (Dec. 17, 2001) (Dir. Irish) (no jurisdiction for hearing). If the claimant does not receive notice of the decision sought to be appealed, or notice of appeal rights, the 30- day period will not begin to run. *See Thomas v. DC Dept. of Empt. Servs.*, 490 A.2d 1162 (DC 1985) ("Limitation on appeal rights does not begin to run until adequate notice of those rights has been received.") *See also Morgan v. DC Dept. of Empt. Servs.*, 2001 D.C. Wrk. Comp. LEXIS 21; Dir. Dkt. No. 27-00 (Feb. 26, 2001) (Dir. Irish) (affirming finding that notice had been received based on signature on return receipt card and history of cashing checks mailed to the same address); *Wells v. DC Dept. of Pub. Works*, 2003 DC Wrk. Comp. LEXIS 13 at * 3-4 (Jan. 30, 2003) (Middleton, J.) (employer's reference to the "standard procedures" used by the TPA was insufficient to meet employer's burden of demonstrating claimant had been properly informed of his rights).

After the claimant files an application for formal hearing, an administrative law judge (ALJ) will be assigned to the claim, and a scheduling order will be issued to the parties. In addition to setting the hearing date, the scheduling order will provide the rules and deadlines for other portions of the proceedings such as deadlines for discovery, requests for extensions of time, requests for interpreters, requests for a pre-hearing conference, and sanctions for failure to

comply with the scheduling order.

Note: Because the deadlines are very short in these proceedings, it is critical that advocates study the contents of the scheduling order as soon as it arrives. If the scheduling order is not received within two to three -3 weeks of filing the request for hearing, OHA should be contacted.

Hearings before the ALJ typically are conducted in the same manner as other hearings or bench trials, with openings, closings, direct and cross examination, and evidentiary objections. *See* 7 DCMR § 133. The treating physicians and AME (Additional Medical Examination) doctors generally will not appear in person. The doctors' reports will, however, be accepted into evidence as their testimony.

A decision, called a recommended Final Compensation Order (FCO), is supposed to be issued within 30 days of the close of the hearing. DC Code § 1-623.24(b)(1); 7 DCMR § 130.13 This rarely occurs in practice. It generally takes six months to a year, and sometimes longer, to get a decision.

Appeals to the Compensation Review Board

If a party is not satisfied with the FCO, s/he may petition for review by the Compensation Review Board. The petition must be filed **within 30 days** following date of issuance of the FCO. *See* DC Code § 1-623.28(a); 7 DCMR § 135.2. Instructions for filing generally are included with the FCO. These instructions should be reviewed carefully.

The petition for review should contain the claimant's name, address and telephone number; a statement about whether the claimant is injured or deceased; a detailed description of the claimant's injury; the identity of the claimant's DC government agency employer; the name and telephone number of the claimant's immediate supervisor; the case file number; the effective date of the FCO; a statement regarding what relief is sought; a list of the documents the claimant wants considered (attaching the same); the representative's name, address, telephone number, and bar number; and a statement of the claimant's objections to the FCO. The claimant also may submit a brief for consideration. The opposing party then will have 15 days to file a brief in opposition. *See* 7 DCMR § 258.7-258.8.

The DC Code and regulations provides that the FCO "shall be affirmed if supported by substantial competent evidence on the record." DC Code § 1-623.28(a). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *See Marriott Int'l v. DOES*, 834 A.2d 882, 885 (DC 2003).

Additionally, three requirements must be met. First, the findings must address each material issue of fact. Second, there must be sufficient evidence to support the factual findings made, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Finally, there must be a rational connection between the findings made and the decision reached. *See Link v. DC Dept. of Corrections,* 2000 DC Wrk. Comp. LEXIS 440; Dir.

Dkt. No. 18-99 (Sept. 25, 2000) (citing *Douglas M. Riggans*, ECAB No. 84-3 (Dec. 20, 1985)); *see also George Hyman Construction Co. v. DC Dep't of Employment Servs*., 498 A.2d 563 (DC 1985) (explaining and applying substantial evidence review of hearing examiner's decision).

Appeals to the DC Court of Appeals

A party dissatisfied with a decision of the Compensation Review Board can seek review in the DC Court of Appeals. The petition for review must be filed in the Court of Appeals within 30 days of the issuance of the director's decision. *See* DC Code § 1-623.28(b); DC Ct. App. R. 15.

Note: Because so few claimants are represented by counsel, very few cases under the act reach the Court of Appeals. Thus, there are very few published decisions interpreting the act. Pro bono attorneys are encouraged to take cases to the Court of Appeals, especially when valuable precedent can be established.

On legal issues, the Court of Appeals reviews the decisions de novo. *See Harris v. DC Dept.of Empt. Servs.*, 660 A.2d 404, 407 (DC 1995) (The court's "review of the agency's legal rulings is de novo, for 'it is emphatically the province and duty of the judicial department to say what the law is,' and the judiciary is the final authority on issues of statutory construction.") Otherwise, the DC Court of Appeals is substantially constrained and reluctant to overrule agency decisions.

Termination, Suspension or Modification of Benefits

The DC Code provides that the PSWCP may modify (including terminate, suspend or reduce) an award of compensation if it has reason to believe that a change of condition has occurred. *See generally* DC Code § 1-623.24(d); 7 DCMR § 127.

Most of these actions are taken on the basis of an additional medical exam (AME). The DC government hires the doctors who perform these exams. Under the 2006 regulations, "[p]rior to any determination of coverage based upon the recommendation(s) of an AME, the injured employee's treating physician shall have thirty (30) days from receipt of a copy of the AME to submit written comments to the program regarding the AME finding(s)."

Once the claimant receives a notice of determination denying, terminating, suspending or modifying his or her benefits, the claimant has 30 days to file a request for reconsideration or a request for a formal hearing. The claimant must elect one of these two options for challenging the notice of determination.

Requests for Reconsideration

The benefit of requesting reconsideration, as opposed to requesting a formal hearing, is that, in some instances, benefits currently being paid will continue during the reconsideration process, until ORM makes a decision on the request for reconsideration; whereas, a request for a formal hearing will not continue the payment of benefits. The regulations specify that benefits

will continue while a request for reconsideration is pending, where the modification, suspension or termination of benefits is based upon the following: 1) the cessation or lessening of a compensable injury; 2) the condition is no longer causally related to the claimant's former employment; 3) the condition has changed from a total disability to a partial disability; 4) the initial award of benefits was in error; or 5) any other circumstance not listed in section 127.3 (a) through (k). 7 DCMR §127.4.

Benefits will not be continued pending decision on a request for reconsideration in many circumstances, including the following: 1) the award for compensation was for a specific period of time, which has now expired; 2) claimant has returned to work; 3) claimant has died; 4) benefits were suspended due to claimant's failure to participate in vocational rehabilitation, failure to cooperate with a request for an AME, or failure to follow prescribed courses of medical treatment; or 5) claimant has been released to return to work, either by his or her treating physician or by an AME, where the treating physician has either agreed with the AME physician's opinion or has not responded to the AME report. 7 DCMR §128.4, 127.5. In these cases, the claimant may want to go directly to a formal hearing, rather than incurring the delay of waiting for a decision on a request for reconsideration.

Formal Hearings

Hearings are held before an Administrative Law Judge (ALJ) at the DOES Office of Hearings and Adjudication. At the hearing, it is the employer's burden to demonstrate that the modification or termination of benefits is justified. *See Stith v. DC Public Schools,* 2002 DC Wrk. Comp. LEXIS 31; Dir. Dkt. No. 25-00 (Jan. 27, 2002) ("It is well established that once a claim has been accepted for work-related injury, employer must produce persuasive evidence to modify or terminate an award of benefits."); *Chase*, ECAB No. 82-9 (July 9, 1992); *Mitchell*, ECAB No. 82-28 (May 28, 1983); and *Stokes*, ECAB No. 82-33 (June 8, 1983). In addition, the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh, in addition to being probative and persuasive of a change in medical status. *See Robinson*, ECAB No. 90-15 (September 16, 1992).

For the employer to meet its burden of proof, it must show three things: (1) that the employee's condition does not prevent him or her from returning to work; (2) that persuasive medical evidence exists to justify the modification; and (3) that the employer has made certain efforts to assist the worker in returning to work.

If the employer can meet its burden of proving that a change in condition has occurred, the burden switches to the claimant to show a continuing entitlement to benefits. *See Lucas v. DC Nat. Guard/Armory Board*, 2000 DC Wrk. Comp. LEXIS 22 (Jan. 2000) (Middleton, J.) (once employer met its burden, the burden of adducing evidence shifted to claimant, who was required to bring forth persuasive medical evidence sufficient to prove any present disability was causally related to work injury).

Evidence Regarding Ability to Work

Whether a claimant will be able to perform the duties of a position will depend on the

employee's background, education, experience and physical limitations. *See Kelpy v. Metropolitan Police Dept.*, 2000 DC Wrk. Comp. LEXIS 114 (Apr. 28, 2000) (Russell, J.) ("Employer has produced insufficient evidence that there exist any jobs or class of jobs in the Washington, DC metropolitan area that are suitable alternative employment in light of claimant's background, education, experience, and the physical limitations caused by the injury to his back.")

To do this, the employer generally will introduce medical evidence that the claimant's condition has resolved. It will then use the claimant's old job description to show that s/he can now perform the requirements of his or her previous job. If the employer cannot show this, it may conduct and use a labor-market survey that an AME has reviewed to show the claimant can do other alternative jobs currently available in the area.

Medical Evidence to Justify Modification

The employer "must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits." *Cooper v. DC Dept. of Human Servs.*, 2002 DC Wrk. Comp. LEXIS 83; OHA no. PBL 01-043 (Mar. 12, 2002) (Middleton, J.).

For example, the employer also will need to introduce medical evidence of the worker's ability to perform the physical requirements of the position. *See Queen v. DC Dept. of Human Servs.*, 1996 DC Wrk. Comp. LEXIS 393 at *5-8; ECAB No. 95-13 (Aug. 23, 1996) (internal citations omitted) ("This board held previously that the office should inquire definitively whether a [claimant] could perform the duties of the selected position. In order to make this determination the office must refer a [claimant], along with his/her medical history and file to a physician for an opinion regarding whether the [claimant] can perform the position chosen by the office. The physician's opinion should include whether the [claimant] would be able to perform the duties given the restrictions placed upon him or her…. Until a medical opinion regarding whether the physical requirements of a position match or come close to the limitations of a particular petitioner the [employer] has not sustained its burden to modify benefits.")

The employer generally uses the AME report for this purpose. The AME report, however, must be fresh to have any value. *See Jones v. DC Dept. of Corrections*, 2000 DC Wrk. Comp. LEXIS 534; Dir. Dkt. No. 07-99 (Dec. 19, 2000) (Director Irish) (hearing examiner should not have relied on medical opinions from mid-1990s during 1998 hearing).

Efforts to Assist Worker in Finding Employment

The employer must also make certain efforts to assist a disabled worker in returning to the labor force:

> The office's investigation should not, however, end with the doctor's opinion. After the physician renders a determination whether the [claimant] can perform the duties of a certain position, the office should, as they had in this case, do a market survey to determine if there are positions in the commuting area which are commensurate with the [claimant's] limitations. Thereafter, the office should

> provide the [claimant] with the identified positions and schedule interviews with the prospective employers.

See Queen v. DC Dept. of Human Servs., 1996 DC Wrk. Comp. LEXIS 393 at *5-6; ECAB No. 95-13 (Aug. 23, 1996) (internal citations omitted); *Lightfoot v. DC Dep't of Consumer and Regulatory Affairs*, 1986 DC Wrk. Comp. LEXIS 386; ECAB No. 94-25 (July 30, 1996).

Efforts may include vocation rehabilitation. Claimants remain entitled to benefits, however, while they are attending these sessions and until they are able to return to their jobs or a suitable alternative job. *See Amaechi v. DC Dept. of Corrs.*, 2002 DC Wrk. Comp. LEXIS 47 at *6; Dir. Dkt. No. 12-00 (Jan. 9, 2002) (Dir. Irish); *Lightfoot v. DC Dep't of Consumer and Regulatory Affairs*, 1986 DC Wrk. Comp. LEXIS 386; ECAB No. 94-25 (July 30, 1996).

Applications for Attorneys' Fees & Penalties

A claimant who wishes to be represented in a proceeding before an ALJ must submit a written appointment of the individual to the OHA, or on the record during a hearing. 7 DCMR § 131.1. A claimant who is represented by an attorney in the successful prosecution of his/her claim is entitled to reasonable attorney's fees. DC Code § 1-623.27(b)(2). The award for attorneys' fees may not exceed 20 percent of the benefit awarded.

Claimants are entitled to penalty payments when benefits are paid late. The penalty amount is roughly one month of compensation for every 30 days that the compensation is late, not to exceed 12 months of compensation. DC Code § 1-623.24(g). A claimant also may also file a lien with the DC Superior Court against the Disability Compensation Fund, the DC General Fund, or any other District fund or property to pay the compensation award. *Id*. The court determines the terms and manner of enforcement of the lien.

Settlements

OAG occasionally will pursue settlement agreements with claimants. *See* 7 DCMR § 136. Settlement agreements must be in writing and signed by the mayor or his designee. DC Code § 1-623.35(a); *Leonard v. District of Columbia*, 801 A.2d 82 (DC 2002).

Recovery of Overpayments

The act provides that the government may seek to recover money incorrectly paid to a claimant. "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, under rules and regulations prescribed by the mayor, either recovery of the overpayments shall be required of the individual or adjustment shall be made by decreasing later payments to which the individual is entitled." DC Code § 1-623.29(a).

If the government seeks to recover an overpayment from the employee, the employee can seek a waiver of the recovery. The act provides that recovery or adjustment "may be waived when incorrect payment has been made to an individual who is without fault and when recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

DC Code § 1-623.29(b)(1); *see also Meachum v. DC Pub. Sch.*, 1997 DC Wrk. Comp. Lexis 184; H&AS No. PBL 97-28 (July 7, 1997). Claimants for whom repayment would cause significant financial hardship, or who may not be able to repay the money at all, may be candidates for a waiver. In addition, if the employer shares in the fault for the overpayment, the equities may dictate that waiver would be appropriate.

Additional Resources

For additional information about workers' compensation for DC government employees, **please see the EJC's DC Public Sector Workers' Compensation manual**.

Maryland Workers' Compensation

Workers' compensation in Maryland is administered by the Maryland Workers' Compensation Commission, located at 10 E. Baltimore St., Baltimore, Maryland 21202. The telephone number is (800) 492-0479, and it is open from 8:00 a.m. to 4:30 p.m. The website for the commission (http://www.wcc.state.md.us/) is very helpful.

Coverage

Types of Employees Covered & Excluded

Similar to the law in other states, Maryland Workers' Compensation law protects employees only. An employee is defined as "an individual in the service of an employer under an express or implied contract of apprenticeship or hire for whom a person, a governmental unit, or a quasi-public corporation." *See* Md. Code Ann., Lab. & Emply.§ 9-202. This definition includes, among others:

- Workers who regularly distribute or sell newspapers, *see* Md. Code Ann., Lab. & Emply. §9-208;
- An individual who is employed as a domestic servant in a private home if the individual earns at least $750 in cash in a calendar quarter from that household, *see* Md. Code Ann., Lab. & Emply. §9-209;
- Certain migrant farmworkers are covered by the statute and some are not, *see* Md. Code Ann., Lab. & Emply. §9-210; and
- Workers on welfare to work programs, *see* Md. Code Ann., Lab. & Emply. §9-224;

The definition does not include casual employees. *See* Md. Code Ann, Lab. & Emply. § 9-205. Consult Md. Code Ann., Lab. & Emply. §§ 9-205 – 9-236 for more information about exceptions to the definition of employee, including discussions of whether the statute covers such categories of employees as "helper," "jockey," "juror," "miner," a member of a "militia," a "corporate or limited liability company officer," a "crew member" for the Department of Natural Resources, "fire fighters," "official of a political subdivision," an "owner operator of a Class F tractor," a "partner," a "police officer," a "prisoner," a "maintenance worker," a "school aid,"

and "worker for aid or sustenance," among others.

Undocumented Workers

Undocumented workers are not prohibited from receiving workers' compensation benefits in Maryland. Thus, undocumented workers should be encouraged to apply for benefits.

Covered Injuries

Accidental Personal Injury

Just as in other workers' compensation systems, an injury must be work-related for it to be compensable under Maryland workers' compensation law. Unlike many other jurisdictions, however, simply being hurt on the job is not necessarily enough to qualify for benefits. Instead, in Maryland, workers' compensation only covers an accidental personal injury an employee sustains. *See* Md. Code Ann., Lab. & Emply. § 9-501. In *Harris v. Board of Education*, 825 A.2d 365 (2003), the Maryland Court of Appeals overruled many years of previous decisions which had held that the term "accidental" required that an injury result from an unusual strain or exertion, or a true accident such as slipping, tripping, etc. The court ruled that what must be accidental is the injury and not the incident giving rise to the injury and that an injury is accidental as long as it was unexpected or unintended. Therefore, if a claimant injures his/her back while lifting, it should be considered an accident.

Arising in the Course of Employment

The injury also must arise in the "course of employment," which refers to the time, place and circumstances of the injury. A worker's injury will be said to arise in the "course of employment" and likely will be covered if it occurred during work hours, at work or some other place where the employer told the employee to go, and while the employee was completing work duties. *See Technologies v. Ludemann*, 148 Md. App. 272, 811 A.2d 845 (2002).

Injuries that are intentional or self-inflicted, or result from the attempt to injure another, are not covered injuries. *See* Md. Code Ann., Lab. & Emply. § 9-506.

Compensation

After establishing that the injury is covered, an injured worker in Maryland may receive wage benefits (temporary total, temporary partial, permanent partial or permanent total disability benefits), death benefits, vocational rehabilitation, and/or medical benefits.[103]

Maryland's workers' compensation law provides that an injured worker who is temporarily totally disabled is entitled to receive two-thirds of his average weekly wage at the time of his injury. There is no time limit on the duration of temporary total disability benefits,

[103] The definition of each type of wage benefit is discussed in the Workers' Compensation Concepts section at the beginning of this chapter.

but there is a cap on the weekly amount of benefits. The cap is based on a formula that takes into account the average weekly wage of all workers in the state of Maryland for the year of the injury. *Id.* at § 9-621.

Temporary partial disability benefits are 50 percent of the difference between the workers' average weekly wage before the injury and the wage-earning capacity upon return to part-time or light-duty work. Again, there is a cap on the weekly benefit. *Id.* at § 9-615.

If an injured worker reaches maximum medical improvement (MMI) but is unable to return to the job he previously performed, he is entitled to vocational rehabilitation services, such as additional training, education or job placement services. *Id.* at § 9-672. During the period in which an evaluation for vocational rehabilitation is taking place and then during the period of vocational rehabilitation itself, the worker is entitled to be paid as if he is temporarily totally disabled.

Permanent partial disability benefits are calculated based on a complex formula that includes the percentage of permanent partial industrial disability sustained by the injured worker, a statutory number of weeks set forth in the law for the particular type of injury, the employee's average weekly wage, and a cap on the weekly benefit for the year of the injury. The worker must obtain a disability rating from a doctor to either the body as a whole or to the injured limb or extremity. Injuries limited to individual fingers, hands, arms, toes, feet, legs, eyes and ears are called "scheduled members." Injuries to the head, neck, shoulders, hips, back and any other part of the body not included within the listed "scheduled members" are called "other cases" injuries, and compensation is awarded based upon a finding by the commissioner of a percentage of industrial disability to the body as a whole sustained by the claimant. In making this determination, the commissioner will consider, among other things, the percentage impairment ratings of the doctors as well as the age, education, experience and training of the injured worker. *Id.* at § 9-627. The worker or his representative must present evidence of these factors to the commissioner in the context of a hearing.

After a claimant receives a permanent partial disability award, he can later reopen the comp claim based upon proof of a worsening condition; however, he may not seek to re-open the claim more than five years after the receipt of his last payment.

Permanent total disability results when the injured worker is rendered permanently unable to return to substantial gainful employment. The weekly benefit is the same as for temporary total disability, but there are annual cost-of-living increases. The permanently totally disabled worker is entitled to be paid for the rest of his or her life.

If an injury results in the death of the injured worker, the dependents of the injured worker are entitled to file a workers' compensation claim for death benefits. *Id.* at § 9-678.

The injured worker is entitled to have his causally related medical expenses paid for the rest of his life. *Id.* at § 9-660. There is no deductible or dollar limit on the total of all medical expenses. However, there is a medical fee schedule adopted by the Maryland Workers' Compensation Commission to which all medical care providers must adhere, and the injured

worker cannot be made to pay the balance of a doctor's bill over the amount permitted under the medical fee schedule. Although insurance carriers pay most medical bills voluntarily, in the absence of such a voluntary agreement, the Maryland Workers' Compensation Commission must first approve medical fees before collection.

Similarly, the Maryland Workers' Compensation Commission regulates all attorney's fees in accordance with an attorney fee schedule adopted by the commission. *See* COMAR §§ 14.09.01.24-25. The attorney fee schedule is binding upon all attorneys, and attorneys must first get approval before collecting a fee. Attorney's fees are based on a contingency fee system, meaning they are a percentage of the benefits collected. If no benefits are collected, no attorney's fee is owed. The Maryland Workers' Compensation Commission's attorney's fee schedule is structured in such a way that anyone can afford to have an attorney, and since even the most experienced workers' compensation attorneys are bound by the fee schedule, it will not cost the injured worker any more money to have an attorney from a large, experienced firm that has handled thousands of workers' compensation claims.

Procedures

Employee's Notice of Injury

An employee must give oral or written notice of injury to the employer within ten days of the injury. *See* Md. Code Ann., Lab. & Empl. § 9-704(b)(1). When an employee dies, notice must be given with 30 days of the injury. *Id.* § 9-704(b)(2). Failure to give notice may bar the claim, but some excuses and exceptions are provided by § 9-706 when there is a sufficient reason for failure to comply and the employer has not been prejudiced by the failure to comply.

Filing a Claim

Under § 9-709, an employee typically must file a claim of injury within 60 days after the date of the accidental personal injury. The code provides several exceptions if the deadline is missed; however, the claim will be barred completely if the claim is not filed within two years of the injury.

Contesting a Claim

Once the employee has filed a claim, the employer has 21 days to start paying the benefits to the employee, or to file a response with the commission contesting the claim. *See* Md. Code Ann., Lab & Empl. § 9-713.

Claim Processing

Within 30 days of the filing of a claim, the Maryland Workers' Compensation Commission will issue an award or put the case in line for a hearing because the employer has contested the claim.

Virginia Workers' Compensation

Introduction

Both procedurally and substantively, individuals whose injuries fall within the jurisdiction of the Virginia Workers' Compensation Act, Code section 65.2-100 ,*et. seq*., are at a disadvantage compared to workers whose injuries are covered by DC or Maryland law.

The Virginia law is uniquely treacherous for injured workers attempting to navigate the system. Obstacles include: the highly restrictive definition of injury by accident; the exclusion of "unexplained" falls; the obscure "arising out of" criteria; the numerous statutes of limitations and multiple filing requirements; the ability of employers to lull injured workers into believing that their claims are protected by paying benefits and providing a claim number; the difficulty of qualifying for temporary partial disability benefits; and benefit forfeitures when employers terminate workers. Virginia ranks in the bottom three states in terms of relative premium costs. A positive feature of the system is that all claims documents, including medical records, letters, filings, and judicial decisions are available online on "Webfile."

Since even workers with non-disputed claims are at risk of losing their rights, it is very important for injured workers to seek out and receive competent advice, whether their claims are accepted or disputed.

The Virginia Workers Compensation Commission

The commission headquarters is located at 1000 DMV Drive in Richmond, VA, 23220, and there are regional offices in Fairfax, Manassas, Roanoke, Lebanon, Harrisonburg, and Virginia Beach. Evidentiary hearings for disputed claims are heard by deputy commissioners at locations throughout the state. There are twenty deputy commissioners who decide approximately 5,000 cases annually.

Three commissioners head the agency, one of whom serves as chair. The General Assembly elects the commissioners for six-year terms. By statute, no more than one of the commissioners is an employer representative and no more than one is an employee representative. The commissioners serve as an appellate judicial panel, deciding approximately 1,200 cases per year. The commissioners also enforce insurance coverage requirements; manage the uninsured employers' fund and regular self-insured employers; and administer the Criminal Injuries Compensation Fund. In addition to adjudicating workers' compensation and insurance coverage issues, the commission has jurisdiction over the Virginia Birth-Related Neurological Injury Act. The website address is www.vwc.state.va.us. *The toll free phone number is* 1-877-664-2566.

Jurisdiction

Va. Code Section 65.2-101 provides that any employer who has "three or more regular employees" in the same business in Virginia is required to furnish workers' compensation coverage at no cost to the employee. "Regular" includes part-time workers. There are certain categories of workers excluded in this section. If an employer defends a claim on the grounds that it is not covered by the act, the employer must prove that it had fewer than three employees in service in Virginia, and if so, that its "established mode of performing business" does not regularly require three or more employees.

The worker must prove an employer/employee relationship. This is governed by the common law definition of employment, most importantly right of control of the means and methods of performing the work, as well as the right to hire and fire, etc.

Undocumented workers are covered, but the employer does not have to pay temporary partial disability benefits to any employee not eligible for lawful employment.

An injury that happens outside of the Commonwealth may fall within the jurisdiction of Virginia if: the employment contract of was made in the Commonwealth; and the employer's place of business is in the Commonwealth, provided the contract was not for services exclusively outside of the Commonwealth. Section 65.2-508.

Coverage of Accidental Injuries

The employee has the burden of proving a compensable injury which occurred by accident. Ongoing disability is not presumed, so frequent medical excuses generally are needed. Requirements for compensability are that there must be an "**injury by accident**," "**arising out of**" and "**in the course of"** the employment.

"Injury by accident"

An injury by accident must be: 1) an identifiable incident; 2) at a reasonably definite time; and 3) causing an obvious sudden structural or mechanical change in the body.

Gradual injuries are not compensable. Cumulative trauma by repetitive motion is not compensable, with specific exceptions for carpal tunnel syndrome and hearing loss, which fall within the occupational disease provision.

Practice Tip: Insurance adjusters frequently will take a recorded statement after an accident in which an injured worker might describe generally what he or she was doing when hurt, but not give a specific incident. This can result in a denied claim because of the lack of specificity. The injured worker should reflect back on how the incident happened and try to recall if there was an initial moment when they felt a pull or twinge. Even if the injury got worse gradually, it is compensable if there was a sudden incident that initiated the bodily change.

Compensable consequence versus a new injury

The employer is responsible for a natural consequence that flows from the original injury, if it is a direct and natural result of the primary injury. *See Leonard v. Arnold*, 218 Va. 210,237 S.E.2d 97 (1977). There are three exceptions to the employer's responsibility for compensable consequences: (1) an aggravation of an earlier industrial accident is not compensable as a consequence of the first accident if the new injury results from an accident that is independently compensable under the Act, *see First Federal Savings & Loan v. Gryder*, 9 Va. App. 60, 63,383 S.E.2d 755, 757 (1989); (2) an employer is not responsible for a consequence that results from an "independent intervening cause attributable to a claimant's own intentional conduct," *See Morris v. Badger Powhatan/Figgie Int'l, Inc*., 3 Va. App. 276, 283, 348 S.E.2d 876, 879 (1986) (citing A. Larson, The Law of Workmen's Compensation §§ 13 and 81.30); and (3) the doctrine of compensable consequences does not apply to a compensable consequence of a compensable consequence, *see Amoco Foam Products Co. v. Johnson*, 257 Va. 29, 33, 510 S.E.2d 443, 445 (1999).

Psychological injuries

Psychological injuries from "sudden fright or shock" may be compensable as an injury by accident. Post-traumatic stress disorder also may be a disease under the act.

"Exposure" over time

Exposure over time may be compensable as an injury by accident. *See Southern Express v. Green*, 257 Va. 191, 509 S.E. 2d836 (1999) (exposure to cold for four hours). *See Lewis v. Newport News Shipbuilding*, VWC File No. 231-27-21 (2008) (flood water); *See Harrison v. Yellow Transportation*, VWC File No. 229-88-25 (2008) (exhaust fumes); *See Hoffman v. Carter*, 50 Va. App.; 199, 648 SE 2d 318 (2007) (plaster dust).

Pre-existing conditions

An employer takes the employee as it finds him or her. (Note: this does not apply to pre-existing diseases.)

"Arising out of"

The definition of "arising out of" also is restrictive. The injury generally must becaused by the particular conditions of employment and not simply occur at work. ("Actual risk," not "positional risk.")

"An injury arises out of the employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. It excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a

hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood…" *Conner v. Bragg*, 203 Va. 204, 123 S.E. 2d 393 (1962).

Unexplained Falls

It is important to know that unexplained falls are not compensable. This means that if a worker says he or she does not know why the accident occurred, this can cause the claim to fail. It is the employee's burden to prove an explanation for the accident. In *Lazarte v. Century Contracting Corp.*, the claimant fell from a scaffold but did not recall falling. A co-worker witnessed the fall but did not know what caused the claimant to tumble. This was not compensable because it was not explained (VWC File No. 214-42-81, 3/22/2004). In *PYA Monarch v. Harris*, a trucker slipped and fell while climbing into his truck. He didn't know why he fell. This was not compensable (22 Va. App. 215, 468 SE 2d 688, 1996).

Sometimes there can be an inference that can explain the fall. In *Basement Waterproofing & Drainage v. Beland*, the claimant was applying sealant on a wall with both hands while standing on a ladder and he fell. The Court of Appeals said this was uniquely dangerous and not routinely encountered. (43 Va. App. 352, 597 SE 2d 286, 2004).

"Idiopathic" falls**,** as opposed to unexplained falls, may be compensable if the employment increased the dangerous effects of the fall, such as on a height, near machinery, or in a moving vehicle. An idiopathic fall is caused by a pre-existing personal disease such as a syncopal episode.

Injuries not "arising out of" the employment

Examples of injuries that do not arise out of the employment: simple acts of bending and turning (*Southside Virginia Training Center v. Ellis*, 33. Va. App. 824, 537 S.E. 2d 35, 2000); knee gave way when turning on steps (*County of Chesterfield v. Johnson*, 237 Va. 180, 376 S.E. 2d 73, 1989); tying shoelaces (*UPS v. Fetterman*, 230 Va. 257, 336 SE 2d 892, 1985); bending over to pick up a pipe (*Plumb Rite Plumbing Service v. Barbour*, 8 Va. App. 482, 382 SE 2d 305, 1989); fall down steps (*Southside Virginia Training Center v. Shell*, 20 Va. App. 199, 455 SE2d 761, 1995).

Practice Tip: If a worker has fallen down a staircase or step, the worker must provide a specific description explaining why he or she fell, linking the fall to a defect on the step or a condition of employment.

Injuries "arising out of" the employment

Examples of injuries that were found to arise out of the employment: installing a furnace and leaning over it for four to five minutes and then couldn't stand (*Richard E. Brown Inc. v. Caporaletti*, (12 Va App. 242, 402 SE2d 709 (1991); bending and using pipes in an **awkward**

position (*Grove v. Allied Signal Inc.*, 15 Va. App. 17, 421 SE 2d 32, 1992); looking overhead while refueling aircraft for 15 minutes (*Ogden Allied Aviation Services v. Shuck*, 17 Va. App. 53, 434 SE 2d 921, 1993); slip on steps while looking back at prison guard (*Marion Correctional Treatment Center v. Henderson*, 20 Va. App. 477; traveling nurse crashed when driving because distracted by cell phone light (*Turpin v. Wythe County Community Hospital*, VWC File No. VA000000183028, 12/29/2010); claimant looked down to put on ID badge while walking down incline (*Tudor v. Henrico County*, VWC File No. 215-71-76, 5/5/2005).

Assaults

To be compensable, the assault must be directed against a claimant as an employee, not as a random or personal victim. (Long distance driver robbed at night not compensable, *Hill City Trucking v. Christian*, 238 Va. 735, 385 SE 2d 377, 1989); robbery of daily business receipts is compensable, *Continental Life Insurance Co. v. Gough*, 161 Va. 755, 172 SE 264, 1934.

Sexual assault: May be compensable, but the employment must substantially increase the risk. Code section 65.2-301c.

Horseplay: Innocent victim of horseplay is entitled to benefits (assault with defibrillator not compensable, *Hilton v. Martin*, 275 Va. 176, 654 S.E. 2d 572, 2008; throwing ice chips in restaurant is compensable, *Simms v. Ruby Tuesdays*, Rec . No. 091762, 1/13/2011).

Recreational injury: May be compensable if it is an accepted and normal activity within the employment. For social functions, the consideration is not just whether the attendance was required, but also whether the employer derived a benefit from the activity, sponsored it, participated in it, whether it was on the premises, when it occurred, and the frequency of the activity. (Basketball before work against employer's instructions not compensable, *Mullins v. Westmoreland Coal Co.*, 10 Va. App. 304, 391 SE 2d 609, 1990).

Natural environment: Heat stroke may be compensable if working conditions placed the employee at greater risk than the general public (*Byrd v. Stonega Coke & Coal Co.*, 182 Va. 212, 28 SE 2d 725, 1944). Same standard for lightning strikes, tornadoes, insect bites.

Death presumption: When an employee dies in the course of employment and there is no evidence to show why the death occurred, a presumption arises that the death arose out of the employment. This does not apply if the employee is unconscious, but does not immediately die. A new amendment effective July 2011 states that where an employee does not die but is unable to physically or mentally testify about the incident there is a presumption of compensability if there is unrebutted prima facie evidence that it was work-related.

"In the course of employment"

The requirement that an accident occur in the course of employment refers to the time and place where the accident occurs. This requirement is generally not as contentious or difficult as proving "injury by accident" and "arising out of."

When and where

An accident occurs in the course of the employment when it takes place within the period of employment at a place where the employee may be reasonably fulfilling the duties of his or her employment. Firefighters are in the course of their employment even when off duty or outside an assigned shift or work location when undertaking rescue activity. Va. Code Section 65.2-102.

Coming and going rule

In general, accidents sustained while the employee is going to or from work are not compensable, with these exceptions: 1) when the employer provides the means of transportation or pays for the time spent commuting; 2) when the employer furnishes the means of transportation; or 3) when the accident occurs in the sole means of ingress or egress to the place of employment. Accidents while traveling between worksites are in the course of the employment.

Personal comfort doctrine

If the employee uses the employer's premises for satisfying personal necessities, such as food, rest or use of restrooms, injuries are in the course of the employment.

Deviations from employment

The primary question is whether the deviation was so substantial that it can be said that the activity was personal or forbidden and removed the employee from the course of employment.

Employer Defenses

While the employee has the burden of proving compensability and entitlement to benefits, the employer has the burden of proving that the accident is not compensable because it was the result of willful misconduct, the violation of a safety rule, or intoxication. Employer defenses are enumerated in Virginia Code section 65.2-306.

Willful Misconduct

The employer must prove that the claimant violated a safety rule that was enforced by the employer and known by the employee.

Intoxication

Benefits are denied if intoxication was a cause of the injury. If the employee has a positive drug test or a blood alcohol level above the legal driving limit, there is a rebuttable presumption of intoxication.

Occupational Diseases

Occupational diseases are diseases that arise out of and in the course of the employment, but not ordinary diseases of life to which the general public is exposed. Va. Code Section 65.2-400. Occupational diseases account for less than 3 percent of all claims in Virginia.

The date of communication to the employee that he or she has a work-related disease is the equivalent of the date of the accident for purposes of statute of limitations and average weekly wage. Medical benefits do not start until 15 days prior to this communication of diagnosis. The statute of limitations is two years from the date of communication of diagnosis or five years from last injurious exposure, whichever is first (with certain exceptions). Notice to the employer must be within 60 days, but there has to be clear prejudice to the employer for this to bar a claim.

Ordinary diseases of life

Ordinary diseases of life can be compensable as an occupational disease if causation is established by clear and convincing evidence. This includes carpal tunnel syndrome, but not other repetitive motion conditions such as tenosynovitis or epicondylitis. The worker must provide medical evidence proving causation and the doctor must specifically exclude other activities as causative. Other than carpal tunnel syndrome, cumulative trauma diseases are generally not compensable. Hearing loss is compensable as an ordinary disease of life. Section 65.2-401.

Post-Traumatic Stress Disorder

Post-traumatic stress disorder can be an occupational disease. In Fairfax County Fire & Rescue Department v. Mottram, the Supreme Court found PTSD as an occupational disease for a paramedic who suffered repeated exposures to traumatic stressors in his employment. 263 Va. 365, 559 SE 2d 698 (2002). Also, in Wells v. City of Petersburg Fire and Rescue, the 16-year firefighter experienced nightmares from events he had observed in the previous five years of work. The commission found this was a compensable occupational disease.

Pre-existing Conditions Excluded

Aggravation of a pre-existing disease is not a compensable disease. *Ashland Oil Co. v. Bean*, 225 Va. 1, 300 SE 2d 739 (1983).

Presumption as to death or disability from respiratory disease, hypertension or heart disease, cancer.

See Va. Code Section 65.2-402. This applies to firefighters, police and other safety officers. The claimant must establish (1) that he or she is a member of the covered class and (2) that he or she is totally or partially disabled. The burden shifts to the employer to prove that: (1) the work did not cause the disease; and (2) there is a non-work-related cause of the disease.

Benefits Provided by the Virginia Workers' Compensation Act

Temporary Total Disability (TTD)

Compensation for temporary total disability is due when the employee is unable to work in any capacity. A partially disabled employee also may be able to receive TTD if the person proves that he or she has fully marketed their residual capacity in good faith but was unable to obtain employment. 65.2-500. See National Linen Service v. McGuinn, 8 Va. App. 267. 380 S.E. 31, (1989).

Practice Tip: An injured worker who is capable of performing light duty work should immediately engage in a job search. The job search must be more extensive than the search required by the Virginia Employment Commission to receive unemployment benefits. The worker should keep a log of dates, names of potential employers, and applications filed.

The commission has issued guidelines for what constitutes an adequate search for light duty work. However, decisions are unpredictable, and workers should search as much as possible for work in order to qualify for benefits.

The burden of proving incapacity and marketing is on the claimant. There is no presumption of ongoing disability. Therefore, injured workers should regularly obtain work excuses from their doctor.

Benefits are payable for up to 500 weeks. The benefit amount is two-thirds of the employee's average weekly wage. It is not paid for first seven days of disability unless there are three weeks or more of disability, in which case the first week is paid. State maximum and minimum benefits change every year based on the state's average weekly wage. The maximum benefit is $935 until July 1, 2013. The minimum benefit is $233.75.

A cost of living adjustment is payable annually, but must be requested by the employee.

Temporary Partial Disability (TPD)

Section 65.2-502 of the Virginia Code provides that a partially incapacitated employee earning less than the pre-injury wage may be entitled to 66 2/3 percent of the difference between the pre-injury wage and the post-injury wage. If an employee refuses selective employment suitable to the employee's physical capacity, benefits may be suspended. Case law in recent years makes it extremely difficult to qualify for temporary partial disability benefits. There is an onerous and vague requirement that the partially disabled worker continue to search for higher paying work while employed at light duty, even if working full time. Also, employers who find a reason to terminate a previously injured worker may be absolved of all future liability for partial benefits. Cases involve anomalous labor law concepts such as "justified cause" which is either a conscious act or misconduct, poor performance or something in between.

Practice Tip: Injured workers who can perform some work should try to find a job that pays close to what the pre-injury job paid. If a partially disabled worker is terminated by the pre-injury employer, there is a risk of permanent forfeiture of benefits. If a partially disabled worker is terminated from a different job that she found on her own, there is not a risk of permanent forfeiture.

If an employee is terminated from a light duty job for cause of a certain magnitude, benefits for partial incapacity may be forfeited permanently. If an employee is terminated for cause while working at full capacity, and subsequently becomes partially disabled, s/he also may have permanently forfeited the right to temporary partial disability benefits. *Shenandoah Motors, Inc. v. Smith*, 53 Va. App. 375, 672 S.E.2d 127 (2009).

To be eligible for TPD, the employee must continue to look for more work and higher paying work even while working full time at a light duty job. See *Ford Motor Co. v. Favinger*, 275 Va. 83, 654 S.E. 2d 575 (2008).

Practice Tip: Generally speaking, a worker who is terminated from light duty work who finds another comparable job within six months may possibly preserve the right to future disability benefits.

Permanent Partial Disability (PPD)

Virginia Code section 66.2-503 provides for compensation for the loss of, or loss of use of a member, loss of vision or hearing, disfigurement, and various stages of pneumoconiosis. This does not apply to the neck or spinal column. Eligibility for PPD does not depend on incapacity for work or loss of earnings. PPD may not be awarded until the injury has reached maximum medical improvement. There is a schedule that includes, for example, 60 weeks' compensation for loss of a thumb, 125 weeks for loss of a foot, etc. There is a **three-year** statute of limitations for filing for PPD.

Permanent Total Disability

Total and permanent incapacity for work is defined by Section 65.2-503 as "the loss of both hands, both arms, both feet, both legs, both eyes…[or any] injury for all practical purposes resulting in total paralysis as determined by the commission based on medical evidence, [or an] injury to the brain which is so severe as to render the employee permanently unemployable in gainful employment." The normal 500-week limitation on benefits does not apply.

Death Benefits

Benefits for dependents of employees whose death is the result of a compensable accident are provided for in section 65.2-512. Burial expenses are up to $10,000.

Medical Benefits

An employee is entitled to reasonable, necessary and causally related care by an authorized physician for as long as necessary ("lifetime medical benefits"). The employee must choose an authorized treating physician from a panel of at least three physicians provided by the employer. If employer does not offer a valid panel or denies the claim, the employee can select his or her own treating physician. However, by visiting a doctor on several occasions, that physician may be deemed the authorized treating physician, and the employee would have to get permission from the employer to change doctors. An injured worker can request a hearing to change physicians, but there is a high burden.

Travel expenses

An employer must reimburse the injured worker for the cost of travel to treatment (50.5 cents per mile).

Refusal of Care

The employer may suspend wage loss benefits if the employee engages in an unjustified refusal of medical care.

Medical Reports

Under Code Section 65.2-604, the physician is required to furnish the injured employee with a copy of any medical report.

Practice Tip: Medical records are frequently the key to establishing entitlement to benefits. Workers need to request copies of all of their medical records and to send copies to the commission. In addition to requesting copies of all medical reports (not just medical bills), the worker should ask the doctor to write a letter stating that the injury was caused by a sudden accident, and that the claimant was totally disabled for the specific dates being claimed.

Vocational Rehabilitation

Vocational rehabilitation can be a stick the employer uses to pressure the employee to settle his or her case. The claimant must cooperate, and refusal of vocational rehabilitation can result in suspension of disability benefits.

Vocational rehabilitation can include counseling, job placement, on the job training, or retraining. Workers with permanent disabilities can actually request that the commission order the employer to provide specific education or job training, but it is rarely ordered.

Procedures under the Virginia Workers' Compensation Act

Whether the claim is accepted or disputed, the employee has critical responsibilities and deadlines. Never rely on the employer to "take care of" the claim. Employers in Virginia can lull the claimant into a false sense of security by paying all benefits until deadlines are missed.

Practice Tip: In Virginia, employers are allowed to tell workers that their claim is accepted, assign the injury a claim number, and pay the worker for two years until the claim is time-barred. Workers must always, always file a claim with the commission whether the claim is accepted or disputed.

Notice

The injured worker must give notice of the accident to the employer within 30 days. Va. Code section 65.2-600. The statute says "written" notice, but in practice it is not necessary that it be written. Verbal notice or actual notice will suffice. For occupational diseases, the worker must give notice within 60 days after a diagnosis of a work-related disease is communicated to the employee.

Occasionally a claimant can recover even if timely notice was not given. If the employee offers a reasonable excuse for failure to give notice, the employee's compensation may not be barred. The employer is required to show prejudice barring recovery only after the employee has given a reasonable explanation for failure to give timely notice. If the employee has been prejudiced by the failure to give notice within the 30-day period, compensation will be barred. The employee has the burden of presenting a reasonable excuse, and if the employee satisfies that burden, the burden shifts to the employer to prove prejudice.

Filing a Claim

The right to compensation is forever barred unless the injured worker files a claim with the commission within two years after the accident. Va. Code Section 65.2-601.

Practice Tip: Every injured worker should file an initial claim within two years of the accident. Every time a worker misses additional work, a new claim form should be filed using the JCN (Jurisdictional Claim Number) of the initial claim.

Rarely, a claim may be salvaged if the employee did not file within two years of the accident. If an employer has received timely notice of the accident, and has failed to file a first report of accident as required by section 65.2-900, and if that conduct prejudices the rights of the employee, the statute of limitations may be tolled until the employer files the first report of accident. However, if the employee has received a notification letter or booklet from the commission, rights are deemed not prejudiced.

If the employer has not filed an accident report (EAR), the claim can't be filed online, but the worker should file a paper claim.

Practice Tip: There is one claim form with Parts A and B. Part A is a protective filing and must always be filled out. Part B is optional. It is filled out when there is a subsequent period of disability, a new body part, a request to change doctors, a request for a hearing on any issue, a request for a specific award, a request for PPD, etc. See http://wrmanual.dcejc.org/32.

The employer is supposed to file an Employer's Accident Report (EAR) with the commission within 10 days. This is NOT the filing of a claim. Usually employers don't file these reports within 10 days and there is no penalty.

How to "associate" your claim on Webfile

After it receives the Employer's Accident Report, the commission sends the employee a "Notification of Injury." This letter contains a Jurisdictional Claim Number (JCN) for the accident. The commission attaches a Claim Form.

The commission then mails the employee a Notification of Injury Letter Follow Up which contains a PIN number. With the PIN number, the claimant will be able to access her file online and make filings.

To access your claim on line: Go to Webfile at: https://webfile.workcomp.virginia.gov/ Click on "Claimant Registration" link in the upper right hand corner and enter your email address. You will receive an email with a temporary password. Log on to Webfile with your user name and password. To "associate your claim," to your account, enter the date of injury, the JCN, and your PIN number. Now you can access your claim.

The most important step is to file a claim for benefits in the "Submit Claim for Benefits/Request Hearing" tab under the Claim Summary.

Agreement to Pay Benefits

If the employer accepts the claim, it should provide an Agreement to Pay Benefits (Award Agreement) for the claimant to sign. However, there is no penalty if employers don't provide the agreement form. The most important section is "Body Parts/Injuries Accepted."

Practice Tip: The injured worker needs to make sure he or she files a claim for all injured body parts. Each agreement form and award must reflect all injured body parts. The two year time limit runs for each body part, so don't leave any out.

When the agreement is filed with the commission, the commission enters an Award Order. Check the dates and the body parts. The two-year statute of limitations runs for each body part. This means that if a body part is omitted from the award, even if the employer has accepted and treated that body part, the right to benefits expires after two years.

If the claimant returns to pre-injury work, the employer can offer an Agreement to Terminate Benefits.

Filing Claims for Each Subsequent Period of Disability

Although workers are entitled to up to 500 weeks of disability benefits, that right expires after a worker has not missed work for two years and not been paid benefits pursuant to an award.

Practice tip: Workers with serious injuries should not "tough it out" and keep working beyond two years without missing any work. If you need to miss work for even a day, do so within two years to keep your claim alive.

Every time a worker misses work, he or she should file a claim form with the Commission indicating the dates missed. This is called a "change in condition" claim. Using the JCN number for the initial claim, the employee should file a claim for <u>each subsequent period of disability</u> even if the employer voluntarily pays. The deadline is two years from the final date for which disability benefits were paid pursuant the award, but benefits are only given for 90 days back from the filing. Section 65.2-708. So, employees should file Part B of the claim form for each subsequent period of disability within 90 days.

Practice Tip: Employers can cause your disability claim to expire by paying wages when you miss work. Be sure to file a claim even if you are partially disabled and being paid.

The injured worker should file Part B of the claim form indicating every subsequent period of disability, within 90 days of the disability, and within two years from the date for which benefits were last paid pursuant to an award.

Under section 65.2-708c, the time limit for change in condition may be extended beyond two years where the injured worker has been working light duty for full pay.

Filing Claims for Permanent Partial Disability

A change in condition claim for permanent disability pursuant to Va. Code Section 65.2-503 must be filed within 36 months from the last day for which compensation was paid pursuant to an award.

Filing Claims after Expiration of Permanent Partial Award.

After compensation has been paid pursuant to the schedule in Va. Code Section 65.2-503, a claim for continuing disability must be filed either one year or two years from the date for which benefits were paid pursuant to the PPD award, depending on whether the disability condition has medically changed.

Exceptions to the two-year statute of limitations for filing a claim

The two-year statute of limitations is jurisdictional. However, under the doctrine of imposition, the commission has jurisdiction to pursue full and complete justice. If an employer engages in improper conduct that causes the employee to not file a claim, it is possible to toll the statute of limitations. But in *Adkins v. Nabisco Biscuit*, 20 Va., App. 228, 456 SE2d 140 (1995), the employer accepted the claim, paid all benefits for over two years, and lulled the severely disabled employee into believing that his benefits were protected. After two years had passed, the employer told the employee it would no longer pay any benefits. The Court of Appeals ruled that the claim was barred because the employee did not file a claim within two years.

Disputed Claims Process

If the employer disputes the claim, the injured worker should file both Part A and Part B of the claim form and request a hearing. An evidentiary hearing by the commission is a judicial proceeding, where all witnesses testify under oath and a record is kept. The hearing officer is a deputy commissioner.

Workers should be prepared with medical evidence and evidence of marketing residual capacity.

Medical Evidence

The injured workers should get copies of all his or her medical records, and they should be submitted to the commission.

Practice Tip: To be successful in a workers' compensation hearing, it is important to ask your treating physician to write a letter supporting your case. That includes a statement that the injury was caused by a sudden accident as well as dates when the worker was totally unable to work or restricted to light duty.

Evidence of Marketing Residual Capacity (job search)

If the claimant is only partially disabled, he or she must present evidence of an intensive job search, including dates, places, applications filed, etc. The requirements are vague and onerous, so look for work as much as possible and keep a log.

Appeal to Full Commission

Rule 3 governs the form and filing procedures associated with filing an application for review by the commission. The review request must be in writing and filed with the clerk of the commission within 30 days of the date of the decision or award. A copy must be furnished to the opposing party. Rule 3.2 provides that the commission will advise of a briefing schedule. Oral arguments may be requested. The commission's decision is based on the record established at the evidentiary hearing.

Appeal to the Court of Appeals

These appeals are of right. Virginia Code section 65.2-706(B) provides that notice of appeal must be filed within 30 days of the date of the decision.

Federal Government Employees

The information for this section was adapted from Federal Employees' Legal Survival Guide, by the Attorneys of Passman & Kaplan, P.C., published by the National Employee Rights Institute.

Federal Workers' Compensation Procedures

Injured workers should file Form CA-1, Notice and Claim within 30 days of the injury in order to receive continuation of pay. To make a claim for occupational illness or disease, workers should file Form CA-2, Notice and Claim.

Notice of injury should generally be given with 30 days, and the claim must be filed

within three years from the time the worker realized the injury, disease, or illness was caused or aggravated by employment. *See* 5 U.S.C. §§ 8119-8121. The burden is on the claimant to prove that the injury is work-related. If the claim is denied by the District office, workers can ask for a short oral hearing or written review conducted by a hearing officer. The hearing office will issue a recommendation. *Id*. at §§ 8124-8128. The worker can request reconsideration by the OWCP within one year of the initial decision, and submit additional evidence. Adverse decisions can be appealed within 90 days to the Employee Compensation Appeals Board, U.S. Department of Labor. For good cause, this time limit can be extended to one year. Review is limited to evidence on the record. The decision of the ECAB is not subject to judicial review. *See* 5 U.S.C. § 8128.

Attorney's Fees

Fees must be approved by OWCP. Attorneys have to wait a long period before collecting fees, and as a result, very few attorneys handle federal cases. The National Association of Federal Injured Workers maintains a list of attorneys who do this work. *See* 5 U.S.C. § 8127; 5 U.S.C. § 8130.

Coverage Issues Specific to the Federal Government System

Emotional distress

To make a claim for emotional distress, the disability must result from a worker's "emotional reaction to his regular or specially-assigned work duties or to a requirement imposed by the employment." *Lillian Cutler*, 28 EACB 125.

Restoration Rights

If the worker recovers from disability within one year, s/he should be returned to his/her former, or an equivalent, position. If the disability lasts for more than one year, workers receive priority placement for two years, including "all reasonable efforts" from the agency. *See* 5 U.S.C. § 8151; 5 C.F.R. § 353

Miscellaneous Issues Specific to the Federal Government System

Problems with Health Insurance Companies

Health insurance companies are supposed to pay for work-related injuries and be reimbursed later if the claim is approved. If they fail to do so, the worker can file a complaint with the U.S. Office of Personnel Management, the federal agency charged with managing federal employee health insurance programs.

Disability Retirement vs. Workers' Compensation

In most cases, the coverage under Workers' Compensation will be better, because under workers' compensation, the benefits are more generous than disability retirement, workers'

compensation benefits are not taxable, and employees are entitled to reemployment rights.