

**NC WORKERS COMP
POCKET GUIDE**

*Your Free Guide to Helping
You to Understand
The North Carolina
Workers Compensation System*

*A free resource
provided to the general public
by the law firm of*



Smith, Dickey & Dempster, PA
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INTRODUCTION

This is a public service to the injured workers of North Carolina for the purpose of helping them to understand the workers compensation system and help them to understand their rights. However, it is not meant to take the place of hiring competent, experienced legal counsel. The articles written here in many cases give just a partial view of the law, without going into full detail, as such depth would require the length of a legal treatise. The wide variety of topics covered by the North Carolina Workers Compensation Act are so wide that we could not begin to fully cover them in this booklet. This is merely a collection of articles on what we think are some of the key topics that often come up in Workers Compensation to help you understand your rights. Please seek legal advice on the issues covered in this booklet to see how they relate to the facts of your case; as well as the many issues that are not covered in this booklet.

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I. WHAT IS WORKERS COMPENSATION?

Workers Compensation is a system of medical and disability benefits that are available to workers who are injured on the job or who develop an occupational disease as set forth in the North Carolina Workers Comp Act. What most do not understand is that this is a negotiated system of benefits that does not provide recoveries for all injuries on the job; only for those that fit the criteria set forth in the law. The purpose of the Act was to provide swift and certain remedy to an injured worker. It does not always do this, but does have some key benefits that are beneficial to injured workers. It is not meant to fully compensate, but to provide a safety net that reduces the financial strain of those injured on the job. Unlike a regular personal injury action, it is not necessary to prove the employer was negligent. If the worker can establish that he or she was injured in a work related accident, UNDER CERTAIN CRITERIA, the employer and its insurance company have a legal duty to provide necessary medical treatment and weekly disability benefits when the injured worker is unable to work and a doctor says he can not work, as well as certain other benefits and/or payments.

II. TYPES OF WORKERS COMPENSATION BENEFITS

All injuries on the job are different, and present different types of issues. If you are injured on the job, you may be entitled to workers compensation benefits. The nature of benefits you are entitled to will depend on the unique facts of your case and severity of your injury, as well as your wage rate.

Forms of Benefits

Before injured workers can receive any form of compensation, they must file their workers compensation claim. If the employer denies the claim, the employee must file for a hearing with the North Carolina Industrial Commission. It is best to seek legal advice early in the process, to make sure you don't do anything that might jeopardize you getting full and fair compensation for your claim. Here are some of the types of cash benefits and wage replacement benefits you may be entitled to.

Temporary Total Disability – (TTD)

In North Carolina You may be entitled to Temporary Total Disability (TTD) if you have been injured on the job. This is the main protection that North Carolina Workers Compensation Law provides to meet a family's financial needs while a wage earner is out of work. TTD is payable when employees become totally disabled on a temporary basis as a result of workplace activities. After a seven day waiting period, employees are entitled to obtain weekly benefits equal to two thirds of their average weekly wage up to the maximum amount allowed by North Carolina Law. If the disability continues for more than 21 days, the employee is entitled to receive these workers comp benefits for the first seven days as well.

There are many factors that can affect your entitlement to TTD, as well as the amount of TTD you are entitled to. Call us for experienced, reputable, and aggressive legal advice and representation.

Partial Permanent Disability – (PTD)

Insurers are often very aggressive in defending cases; Partial Permanent Disability is an issue that you may be facing opposition on from your employer's insurer. Partial Permanent Disability is a form of workers compensation benefits that injured workers may be entitled to after they have returned to work, but are earning less than they were at the time of the injury. In these situations the employee may be entitled to two thirds of the difference between their post and pre-injury wages. A worker who is entitled to or is receiving PTD should seek counsel from an experienced attorney in representing injured workers.

Permanent Partial Disability – (PPD)

PPD benefits are recoverable when employees have sustained a permanent disability to a specific body part. Benefits for less than the total loss of a body part are calculated by the treating physician on a percentage basis. This is called your PPD rating. There are also benefits for damage to internal organs. The North Carolina Workers Comp Act is very case specific on these issues. What especially requires experienced advice is when to settle, when to go after other workers comp benefits that may be more substantial than PPD benefits, and other issues.

When considering what PPD benefits you are entitled to, it is first of all important for you to know when and whether to seek a second opinion from the treating physicians's opinion regarding rating. Quite

often PPD benefits can be resolved by a form 26 resolution; this is not always in the employee's best interest. It is important to get experienced advice from an attorney that can explain the law to you, and what is in your best interests based on the facts of your case; and explain ALL the settlement options available to you.

III. THE FIRST THINGS YOU SHOULD DO IF INJURED ON THE JOB

First

Report your injury to your Employer and seek out appropriate medical treatment.

Your employer may have a health care provider on your work site and if consistent with your employer's instructions present yourself to that health provider if appropriate.

If you do not have access to an on-site health provider, your employer may have instructed you to present yourself to a designated health care office in case of work related injuries. If appropriate to the seriousness of your injury, report to that facility.

If there is no employer on-site or designated off-site health care provider, seek medical care appropriate to your medical needs. Depending on your circumstances, appropriate health care may be obtained from your family doctor or a hospital emergency room.

Second

Tell your health care provider that your injury is related to your work and the name of your employer. This information allows the health care provider to bill treatment as a Workers' Compensation claim.

Third

As soon as possible, inform an appropriate manager of your employer or the owner of your company that you have experienced a work related accident. If you can personally report your injury, do so. If you are unable to report your injury because of your medical condition, have a family member, friend or health care provider notify your employer of the injury as soon as possible.

Fourth

As soon as practical after the accident, and within thirty days, give

written notice to your employer. A simple written statement giving the date of the accident and a brief description of the injury is all that is necessary. If you cannot write the letter, have a friend or family member write it for you and send it to the employer. Keep a copy of the letter for your records.

Fifth

Follow your physician's instructions for medical treatment. The goal of the Workers' Compensation System in North Carolina is to ensure that you get good health care to restore you as nearly as possible to the health and ability to work that you had prior to your injury.

Following these five simple steps will ensure that your injury is properly reported, you receive appropriate health care quickly and that your employer can initiate workers' compensation medical benefits.

IV. WHAT IS AN ACCIDENT BY INJURY?

We are trying to write these articles so that they are understandable to our clients or persons seeking information or representation. So we are dealing with a very real tension to make things understandable and clear, while at the same time providing substantive information that is helpful. Injury by Accident is a key issue; it addresses the basic beginning point of a workers comp claim. Without meeting these legislative requirements, you have no claim. Many people think that if an injury occurs on the job, then the employee has a workers comp claim. Unfortunately, the act is more limited and nuanced than this. Generally speaking, to have a claim under the North Carolina Workers Compensation Act an employee must prove three things.

1. That he suffered an injury by accident.
2. That the injury arose out of employment.
3. AND, that the injury was sustained in the course of employment.

We will deal with the first element in this article, what is an accident by injury? The first thing to do is to distinguish it from an occupational disease. An injury by accident occurs when there is a specific, definite event which can be fixed by time and place, as opposed to an occupational disease that develops gradually over a long period of time. Accidents have been ruled to occur when unusual situations or conditions are created which are likely to produce unanticipated results

or consequences. The law in this area is very fact specific. The main idea in this body of caselaw is focused on the event being very unusual. (Back and Spine Cases are an exception, we will deal with in a minute). This means that for example, slipping on a banana peel would be an unexpected event that is covered. Bending over and picking up a box and your knee going out would not be covered. Defendants have also tried to add to this that you must have an immediate onset of pain as part of this requirement, but Courts have rejected this. Nevertheless, the closer the pain is related to the incident, the easier it is to prove and have a medical provider give a helpful opinion on causation.

With regard to backs, the unexpectedness requirement is not part of the law. In 1983 the legislature created an exception for back injuries. So if you injure your back doing something part of your regular routine, it still can be compensable. Going back to the example given earlier, if you injure your knee lifting a box, it is not covered. But if you injure your back while lifting a box, it is covered.

In addition to the unexpected aspect of this, the injury must be a specific traumatic incident to be an injury by accident under the law. A person that develops pain over several hours because of lifting heavy objects has not met this burden, whether it is a back injury or any other type of injury. That is why it is so important to seek legal counsel early. We have had many employees sabotage their cases because of how they worded the incident in recorded statements or incident reports. We had one client who was carrying a box with another individual up stairs and injured his shoulder in a significant way. His statement was that he injured his shoulder by carrying a box. When we got involved at a much later date in representing him, we were able to get more detail that the large box was very unwieldy, and that it shifted suddenly causing him to have to react, thereby causing his injury. The more detailed version, while it might have been contested by defendants, was probably a compensable event under the North Carolina Workers Comp Act.

Words have meaning. How you describe the event which caused your injury may mean the difference between having a claim, and not having a claim. Seek counsel early, and hopefully you can avoid yourself some grief in your workers compensation claim

V. DISABILITY BENEFITS

When you are injured on the job and are out of work, you are entitled to receive what is called indemnity, a fancy word for getting paid while you are out of work. First of all, you are not entitled to receive any compensation until you are out of work for 7 days. However, if the injury causes you to be out of work for more than 21 days, then compensation will be allowed to cover those original 7 days of disability as well. You are also allowed to use your sick time for the first seven days of disability if you desire.

When trying to determine the amount of benefits you are entitled to, you are trying to arrive at what is called your average weekly wage. There are 4 methods of doing this.

1. The primary method is to take your pay over the 52 weeks prior to the injury, and come up with the average.
2. If you have not been employed 52 weeks, you take the amount of time you have worked and use that average.
3. Where there is extremely short employment, and it is impractical to compute the average weekly wage, the finder of fact is allowed to consider what other employees of similar grade and character made during that time period, with consideration given to the community or locality it occurred in as well during the 52 weeks prior to the injury.
4. Where these other 3 methods are unjust to the employer or the employee, where it would violate basic ideas of fairness and equity, then parties are allowed to argue for the average weekly wage which would most likely reflect what the employee would have made but for the injury. This method may not be used unless there is a specific finding that using the other methods would result in an unjust result.

Once you have your average weekly wage, you can compute your compensation rate, which is two thirds of your average weekly wage (but tax free). Once again, there are many many issues and factors that have been developed by the case law that impact your average weekly wage and which method should be used. This guide is a good starting point, but do not rely on it in the final analysis. Consult an experienced workers comp attorney.

VI. WHAT BUSINESSES HAVE TO CARRY WORKERS COMPENSATION COVERAGE?

(This information is from the North Carolina Industrial Commission Website)

The North Carolina Workers' Compensation Act requires that all businesses which employ three or more employees, including those operating as corporations, sole proprietorships, limited liability companies and partnerships, obtain workers' compensation insurance or qualify as self-insured employers for purposes of paying workers' compensation benefits to their employees. The only exceptions to this requirement are (a) employees of certain railroads; (b) casual employees, i.e., individuals who do not perform "work pertaining to the regular course of defendant's business"; (c) domestic servants directly employed by the household; (d) farm laborers when fewer than 10 full-time, non-seasonal farm laborers are regularly employed by the same employer; (e) federal government employees in North Carolina; and (f) "sellers of agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer."

Businesses with just one employee, whose work involves the presence of radiation, are required to have workers' compensation coverage.

Individuals who are sole proprietors, members of LLCs, and partners are not counted automatically as employees. Corporate officers may elect to be excluded from coverage but are still counted in determining whether a business has three or more employees.

An employer is not relieved of its liability under the Act by calling its employees "independent contractors." Even if the employer refers to its workers as independent contractors and issues a Form 1099 for tax purposes, the Industrial Commission may still find that the workers were in fact employees, based upon its analysis of several factors, including but not limited to the degree of control exercised by the employer over the details of the work.

If you subcontract work to a subcontractor who does not have workers' compensation insurance, you may be liable for the work-related

injuries of the subcontractor's employees, regardless of the number of employees you or the subcontractor employs. Different laws apply to trucking companies.

If You Fail to Carry Workers' Compensation Insurance, You May:

- 1) Face stiff financial penalties;
- 2) Be charged with a misdemeanor;
- 3) Be charged with a felony; and
- 4) Be imprisoned.

VII. PARTIAL PERMANENT DISABILITY UNDER THE NORTH CAROLINA WORKERS COMPENSATION ACT

Permanent Partial Disability is payable at the employee's compensation rate based on the following schedule, which sets forth the number of weeks of compensation paid for a total 100 percent loss of the affected body part:

Thumb . . . . .	.75 weeks
First Finger . . . . .	.45 weeks
Second Finger . . . . .	.40 weeks
Third Finger . . . . .	.25 weeks
Fourth Finger . . . . .	.20 weeks
Great Toe . . . . .	.35 weeks
Any Other Toe . . . . .	.10 weeks
Hand . . . . .	.200 weeks
Arm . . . . .	.240 weeks
Foot . . . . .	.144 weeks
Leg . . . . .	.200 weeks
Eye . . . . .	.120 weeks
Back . . . . .	.300 weeks

Typically the treating physicians give ratings once the employee has reached maximum medical improvement, which is another way of saying you are as well as you are going to get in your recovery. These ratings are typically not 100 percent. Attorneys that practice in the area

of workers compensation extensively are familiar with what ratings are appropriate for specific types of injuries, treatments, and outcomes based on the ratings guidelines and also practically representing hundreds of employees over the years. It is often advisable to seek a second opinion on rating, but not always. A second opinion can result in a lower rating. Also, in some cases where it is unlikely the employee can return to work the rating is really not that significant an issue. Once again, consulting an experienced attorney early in the process is very important.

VIII. GETTING REIMBURSED FOR MILAGE IN WORKERS COMPENSATION CLAIMS

One question often covered is whether you can get milage paid for doctors visits for treatment of injuries covered by the workers comp act. The answer is yes, if your doctor visit is more than 20 miles from your home round trip, the Defendant Carrier is required to pay 56 cents a mile for milage. In certain situations, if the employee does not have transportation, the employer will provide transportation. These milage reimbursements should be paid regularly as they are incurred, they are not an expense that the employee should have to wait for until the case is resolved

IX. CAN I BE FIRED FOR FILING A WORKERS COMPENSATION CLAIM?

A frequent question that comes up in workers compensation cases is whether the employer can fire and employee during a workers compensation claim. The answer to this is it depends on the reason for firing. If the employer is firing the employee to punish him or her for filing a claim, this is illegal. It is called retaliatory discharge and can be pursued by a separate lawsuit against the employer. This would be a totally separate action from the workers compensation claim, and would be best handled by an employment law attorney. These are hard cases to win unless you have direct evidence of the employers intent. As a side note, it is also a Class H felony for an employer to threaten or coerce an employee into agreeing to compensation or agreeing to forego compensation under the North Carolina Workers Comp Act. (NCGS 97-88.2(a)).

The main situation, however, that comes into play is whether the employer has to keep the employees job open while he or she is out of work. First of all, the job must at a minimum be kept open for twelve weeks. That is prescribed by federal law in the Family Medical Leave Act. After that the employer can fire the employee or let him go for any reason except a reason against public policy, because North Carolina is a Right To Work State. Here are some examples of firings that would be against public policy

1. Retaliatory Discharge
2. Race
3. Sex
4. Age
5. Religion

This seems harsh, but the public policy argument that is made in favor of being a right to work state is that employers, particularly small employers, can only do without key employees for so long, and it is hard to stay in business. Larger employers that deal with labor unions often have more protection for employees through negotiated contracts with the employee labor unions. North Carolina law in this area, though, is significantly slanted to favor the rights of employers. If the employer does fire the employee while they are out of work because of physical limitations, it is not all bad news for the injured worker though. Quite often the injured worker's who has significant permanent physical restrictions really has the best chance to go back to work for his employer at the time of the injury. He is usually experienced at that job, the employer has alot invested in training the employee, and can make allowances that are helpful to both employee and employer. When the employee is fired, or let go, then the employer is faced with paying ongoing Temporary Permanent Disability Payments until the plaintiff finds a job, or the employer through a vocational rehabilitation specialist helps the employee find a job. This typically drives up the settlement value of the plaintiff's claim significantly. So an employer letting a good employee go during a workers comp claim can significantly affect the amount of money that employer pays on the claim.

X. FALLS IN WORKERS COMPENSATION CLAIMS

North Carolina has adopted a rule known as the unexplained fall rule, which states that if an injured worker falls at work and there is no evidence that it was caused by something other than the employment, then compensation should be allowed. There is no necessity to show that an unusual or unexpected event occurred because the fall itself is held under this rule to be a compensable accident under North Carolina Workers Compensation Law. For example, if a grocery store clerk is putting up stock and when reaching up to do so falls, that worker's fall is a compensable accident. So this is another exception to the injury by accident provisions of the law.

One defense insurance companies try to use in these situations, as well as others, is ideopathic conditions. An ideopathic condition is basically a pre-existing condition the employee had prior to and unrelated to an incident causing injury. If a fall is caused solely from an idiopathic condition, and there are no other factors at play in causing the injury, then the injury would not be compensable. For example, a pre-existing back or knee condition causing the incident, or a seizure. When the injury is caused by both a special hazard peculiar to the employment, and an ideopathic condition, the claim may still be compensable. When this is the case, it is typical for the employer to deny the claim and make you litigate the issue and sustain your burden of proof.

XI. INJURIES WHEN TRAVELLING TO AND FROM WORK

Under the North Carolina Workers Compensation Laws, generally speaking, injuries that occur when travelling to and from work are not compensable. (Not covered by the Workers Comp Act). The main reason for this is that the general risks or hazards associated with commuting to work are the same as they are for the general public. However there are some notable exceptions. We have been successful in many different cases in helping our clients recover under these exceptions.

The first exception is that the plaintiff may recover when going to or leaving from work if he or she is on the premises of the employer when

the injury occurs. The reasoning behind this is that if an injury occurs that close to the place of employment it is held to be incidental to the employment. However, if the injured worker is responsible in some way for a delay prior to the injury, then courts have held that the injury is not compensable.

Another exception is when an employer has a duty that he has contracted with the worker for to transport the injured worker or furnish the means of transportation as part of his contract of employment; then the injury can be covered by the Workers Comp Act even when the injured worker is travelling to or from work. If the transportation is not part of the employment contract with the injured worker, however, and is just given as a favor or for any other gratuitous reason, then the claim may not be compensable. One case, for example, did not allow recovery when the employer picked up the plaintiff to give him a ride to work because he had a problem getting transportation that day.

There is also an exception called "The Special Errand Rule." This applies when the worker is injured when performing a special errand or mission for the employer beyond or outside his normal duties. The main question in these situations is whether the employee was acting for the benefit of the employer.

Finally, there is a travelling salesman exception. There are many nuances to this exception. Some of the key factors are whether the injured worker kept a home office and whether his car is provided for him as part of his employment contract, as stated above. If this exception applies, the workers comp act applies even in situations where the employee is on a slight deviation from employment when the incident occurs. There are many cases that have developed over the years to clarify this exception.

As you can see, the Workers Comp Act is very nuanced and fact specific. If you are injured, consult with an experienced local attorney who concentrates his practice in the area of representing injured workers.

XII. CAN I SUE MY EMPLOYER?

The short answer to this is no, you generally cannot sue your employer if you are injured on the job by his negligence. There was a case called Woodson several years ago that allowed you to sue your

employer if he was grossly negligent, but the subsequent cases from the Court of Appeals and Supreme Court have severely limited this cause of action. In fact, they have almost eliminated it. Suffice it to say it must be extremely reckless and intentional conduct that would allow this.

The legislative rationale between not allowing you to sue your employer for negligence is part of the compromise that the workers compensation system is. It was decided that having employees having to sue their employers was generally not good as a matter of public policy. So the system is an attempt to limit liability of employers, while also allowing employees to recover without the burden and stress of having to prove the negligence of their employer.

There may be a lawsuit, however, that you can pursue for negligence when you are hurt on the job. That would involve when a third party other than your employer is negligent. It could be an independent contractor, a machine manufacturer, or any other third party whose negligence caused your injury on the job. In these situations you need to pursue a workers comp action against your employer and also a tort action against the negligent third party.

XIII. INJURIES OCCURRING ON EMPLOYER'S PREMISES

Injuries occurring on the premises of the employer, even in situations where the work shift has not begun, very often are still recoverable. That means that even though you may not have clocked in yet and are injured, the workers comp act may still define this as a compensable claim. This includes injuries in parking lots owned by employers. We have recovered in many cases where the injury occurred in the parking lot.

One of the main issues in these cases is whether the injury arose out of the employment; and is related to the employment. Basically if you are on the premises of your employer because of issues related to your job, and you are doing what you are expected to be doing and given permission, expressly or impliedly to do, then there is a good chance your injury is arising out of your employment. The variables and factors that enter into this issue are complex and very fact specific. For example here is case in fact that held an employee picking up his last paycheck and who was not on the clock was kept from recovering because the

injury occurred in an area he was not authorized to be in. But for being in the wrong area it would have been compensable, because he was doing something related to his employment, picking up his paycheck. If the employee is in the parking lot, and coming in for work, then the injury is probably compensable. But once again, there are many factors at play. If the parking lot is, for example a mall and you work at a store in the mall, then the injury occurring there is probably not compensable, because the employer does not control that area.

Another of the issues that will come into play when you are injured on the premises of the employer is whether the employee is exposed to any greater danger than the general public. Lunch hour cases are very fact specific as well. If you are on the premises of your employer when your are injured while eating lunch, there is a chance the claim is compensable, depending on several other factors.

It is very difficult to give a one size fits all answer to these scenarios, because the workers comp act is so fact specific. The law states principles and the case law tries to apply those principles to various fact patterns.

XIV. INDEPENDENT MEDICAL EXAMS

This is the applicable statute regarding the duty of a plaintiff to undergo an independent medical exam.

Workers' Compensation Act.

Section

§97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

After an injury, and so long as the employee claims compensation, the employee, if so requested by his or her employer or ordered by the Industrial Commission, shall submit to independent medical examinations, at reasonable times and places, by a duly qualified physician who is licensed and practicing in North Carolina and is designated and paid by the employer or the Industrial Commission, even if the employee's claim has been denied pursuant to G.S. §97-18(c). The independent medical examination shall be subject to the following provisions:

- (1) The injured employee has the right to have present at the independent medical examination any physician provided and paid by the employee.
- (2) Notwithstanding the provisions of G.S. §8-53, no fact communicated to or otherwise learned by any physician who may have attended or examined the employee, or who may have been present at any examination, shall be privileged with respect to a claim before the Industrial Commission.
- (3) Notwithstanding the provisions of G.S. §97-25.6 to the contrary, an employer or its agent shall be allowed to openly communicate either orally or in writing with an independent medical examiner chosen by the employer regardless of whether the examiner physically examined the employee.
- (4) If the examiner physically examined the employee, the employer must produce the examiner's report to the employee within 10 business days of receipt by the employer, along with a copy of all documents and written communication sent to the independent medical examiner pertaining to the employee.
- (5) If the employee refuses to submit to or in any way obstructs an independent medical examination requested and provided by the employer, the employee's right to compensation and to take or prosecute any proceedings under this Article shall be suspended pursuant to G.S. §97-18.1 until such the refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. When the employer seeks to suspend compensation under this subdivision, it shall not be necessary for the employer to have first obtained an order compelling the employee to submit to the proposed independent medical examination. Any order issued by the Commission suspending compensation pursuant to G.S. §97-18.1 shall specify what action the employee

should take to end the suspension and reinstate the compensation.

- (b) In any case arising under this Article in which the employee is dissatisfied with the percentage of permanent disability as provided by G.S. §97-31 and determined by the authorized health care provider, the employee is entitled to have another examination solely on the percentage of permanent disability provided by a duly qualified physician of the employee's choosing who is licensed to practice in North Carolina, or licensed in another state if agreed to by the parties or ordered by the Commission, and designated by the employee. That physician shall be paid by the employer in the same manner as health care providers designated by the employer or the Industrial Commission are paid. The Industrial Commission must either disregard or give less weight to the opinions of the duly qualified physician chosen by the employee pursuant to this subsection on issues outside the scope of the G.S. §97-27(b) examination. No fact that is communicated to or otherwise learned by any physician who attended or examined the employee, or who was present at any examination, shall be privileged with respect to a claim before the Industrial Commission. Provided, however, that all travel expenses incurred in obtaining the examination shall be paid by the employee.
- (c) The employer, or the Industrial Commission, has the right in any case of death to require an autopsy at its expense. (1929, c. 120, s. 27; 1959, c. 732; 1969, c. 135; 1973, c. 520, s. 2; 1977, c. 511; 1991, c. 636, s. 3; 2011; 2012.)

XV. MOTOR VEHICLE ACCIDENTS AND WORKERS COMP CLAIMS (THIRD PARTY CLAIMS)

If you were hurt by the negligence of someone other than your employer, and you were on the job at the time or doing some things related to your job; you have two claims. Your first claim is against the negligent third party, who is known as the tortfeasor. You can recover all damages allowed by law against the tortfeasor, including pain and suffering, medical expenses, lost wages and other costs. In certain situations if it goes to trial you can also recover attorneys fees on top of the judgement, so that you recover more and put more in your pocket. Usually these “third party claims” involve motor vehicle accidents, but not always. You can also be injured on the job by someone else’s negligence; for example the paving contractor at your place of work does something to cause an injury.

In these situations you also have a workers compensation claim. It is important to file your form 18 with the North Carolina Industrial Commission within 30 days. If you don’t file within 30 days it does not automatically mean you have no claim, but your safest bet is to file within 30 days. The workers compensation carrier will send you to doctors they choose, and quite often it is necessary to have an attorney from the beginning to help protect against such issues as the comp carrier sending you to unqualified doctors or overly biased doctors. Quite often doctors refer you to specialists and the comp carrier refuses to approve it. In these situations you need to timely file for a hearing to get the needed treatment.

One of the biggest issues when you have both a workers compensation claim and a motor vehicle accident or tort claim is when to settle. Our position is it depends on the case. There are so many different factors that come in to play on this issue. What we will say is that it really depends on the facts of each case; but in many situations there is a clear answer which should be done first.

The final issue to discuss is the worker compensation lien. If you settle your workers compensation claim first, the workers compensation carrier has a lien on the recovery in the third party claim. Many individuals and even attorneys will work out a negotiated settlement

or waiver of this lien as part of the workers compensation settlement. My position is you should never do this. If you get the workers compensation lien reduced or waived, then in all probability you will not be able to use that element of damages in the third party claim. In other words, if you get a \$ 50,000.00 workers compensation lien reduced to \$30,000.00, then you in all likelihood reduced the value of your third party claim by more than \$ 20,000.00. The best approach is to settle or try your third party claim, then work on the lien. The way we handle this is to negotiate at that point with the workers compensation carrier. The applicable statute is NCGS 97-10.2. This allows us to reduced the lien automatically by one third. It also allows for us to file a motion in the Superior Court of Cumberland County, or the county where the incident arose, and ask a judge to reduce or waive the lien. We have had great success in reducing and waiving these liens. How much it can be reduced depends on the facts of each case. We can say that to date we have never had to pay out more than one third of the total recovery, and sometimes less than that.

So it is important in these cases to get an attorney in both trying jury trials in motor vehicle cases and handling workers compensation claims.

XVI. FUNCTIONAL CAPACITY EXAMS IN WORKERS COMP

Quite often in workers compensation claims when injured workers have reached maximum medical improvement, they are asked to attend a “ Functional Capacity Exam”. Occasionally the employee is asked to perform a functional capacity exam prior to reaching maximum improvement to see if the employee is able to perform his or her job duties. The purpose of this exam is for a physical therapist to test the injured workers’ ability to perform specific tasks. For example, they will test your ability to lift up to shoulder height, your ability to bend, your ability to lift above the shoulder, your hand strength, and so on. This can be very helpful in assisting the doctor in setting work restrictions and in also comparing the results with the injured worker’s job description. These tests are well accepted by The North Carolina Industrial Commission and cannot be avoided if sought by the treating doctor

or even by the employer in most cases. There are some concerns, however, that should be considered with functional capacity exams.

1. **Tester Bias** – It is just a fact of life that workers comp carriers have their interests and agenda's, and are going to choose doctors and medical providers quite often that are more likely to see things as the defendant does. (the defendants are the employer and the employers insurance company). The same problem exists with physical therapists that are often chosen to do functional capacity exams. Some, probably most, are objective and fair. However, there are a few that are so biased in favor of the employer that they will not give an opinion that can be trusted. The attorneys who have large workers comp practices know who these biased physical therapists are, as well as the biased doctors. We network through the North Carolina Advocates for Justice to make sure we stay on top of these issues. The Industrial Commission and Court of Appeals have actually given little weight to some of these physical therapists that do functional capacity exams because of their well documented bias. Whether to avoid these biased exams depends on the facts of each case.
2. **Endurance** – These tests are conducted on one day, and injured workers who participate are asked to and should give their maximum effort. However, quite often endurance is not measured. For example, an injured worker with chronic back pain may be able to perform well for one day, but wake up the next morning and not be able to get out of bed. A better test would be taken over several days. After all, employees typically work 40 hour work weeks. So a functional capacity exam is not always a fair representation of what the employee can do 40 hours a week. A good doctor might take this into account, and interacting with the doctor on this issue is one way of dealing with the limitations of functional capacity exams.
3. **Validity Profile** – The physical therapist in a functional capacity exam have what they term “validty profiles” which are supposed to test whether the employee is giving full effort. It is very important to give maximal effort because of this. This test is to test if someone is malingering or faking. However, many of the biased functional capacity exam givers find malingering a

majority of the time, based on my experience; which makes their findings suspect. Another problem related to this is an employee may be limiting his or her effort because they are limited by pain; which is not so easily quantified by validity profile tests. We also see clients fail validity profile and it not be that relevent because the basic findings still find that the employee cannot work. It is important to have an attorney experienced in workers comp and dealing with all these issues.

XVII. WHEN TO SETTLE YOUR WORKERS COMPENSATION CLAIM

As an attorney who concentrates on litigating workers compensation and personal injury claims, and having done so for over 25 years, I have a perspective on when to settle a case that is seasoned with alot of experience. Having also over ten years experience in mediating case as a certified mediator also gives me a great deal of insight on this issue. In fact, my main objective in mediating cases (it is a small part of my practice), was to gain perspective through the mediation process of how plaintiffs and defendants tend to think, as well as to know what factors affect the value of cases. It has also been helpful to help in determining what cases are settling for, although I have other means of doing that. Most of my experience, however, comes from the hundreds of cases I have mediated and litigated and handled.

Knowing when to settle your workers compensation claim is a wisdom issue mainly, based on the law, and strategic planning and foresight of what may ahead in the process. I have always said that workers compensation is a frustrating area of practice to me. What I mean by that is when I have a tort or negligence case, if I don't like the conduct of the defendant I just file a lawsuit and in ten or twelve months I am picking a jury and they will tell us what the case is worth and we are done for the most part. Not so with workers comp. It is a process that you have to play out in order protect the rights of the employee and maximize your recovery. It may sound a bit lame but you have to know when to hold them and know when to fold them. (that great philospher Kenny Rogers).

The timing of when to settle depends on many things; how much medical treatment has been completed, how much is needed in the

future, have you received a disability rating from the doctor, are you back to work; if you are not back to work, what is the likelihood you will be able to back to work, or how long will it take you to find a new job if your restrictions don't let you return to your old job. Another concern is what type of settlement to get, a form 26A settlement which is based on your disability rating and keeps the insurance company on the hook for medical expenses for at least two more years, or a clincher which settle the entire case including future medicals. Another factor to consider is how much medical treatment in the future you may need and whether you have any insurance to pay for future medical treatment. Because there are so many variables, there is no easy answer to these questions. Another key issue is whether you are likely to be on Social Security Disability in the near future. This affects whether you will need what is called a medicare set aside, which is required in certain cases, and which may be avoided in other cases by the timing of the settlement. (a medicare set aside basically adds money that the defendant has to put in the settlement in a separate account to take into account future medical bills related to the injury that medicare would have to pay). This quite often affects negatively what the plaintiff can recover or can make the case one that cannot settle because of the amount of the medicare set aside amount.

Our approach is to be aggressive in seeking treatment that is needed. If the insurance company stonewalls on needed medical treatment, we file a motion with the North Carolina Industrial Commission to get that treatment. We also are engaged with the issue of employees returning to work and not being pressured or forced to work beyond the restrictions the doctor has set in place. So in a sense workers comp practice involves plaintiffs being reactionary. We go through each step of the process, protecting our clients rights and interacting when needed. We also interact constantly with adjusters and nurse case managers regarding the medical care and what is next. Part of this is reacting when the insurance companies try to send plaintiffs to doctors that are not fair in their evaluations and treatment. So reactionary does not mean passive. And of course, if the employer is denying the claim we ask for a hearing immediately, which takes some time to get to.

Some law firms are in a hurry to settle, to close their file and move on. Some plaintiffs have this perspective as well. While in personal

injury cases you are able to do this a bit more, it is generally not a good idea in workers compensation. There is typically a time in the case when it is a good time to consider settlement. That time is typically after the plaintiff has reached maximum medical improvement and been rated. If the employee is still out of work, it is a good time as well, as insurance companies settle cases based on exposure they have, and if they are weekly paying the plaintiff his indemnity payments, they have more exposure and the case typically settles for more. If you wait too long or are too aggressive in your settlement demands, and the defendant voc rehabs you and finds you a job, your case could be worth half or a third of what it would have been otherwise, depending on your specific facts.

We believe that waiting on the correct time to settle is extremely important to maximize our clients' recoveries. We want to make sure all medical issues have been taken care of and plaintiff has gotten the medical treatment they need. In some cases the plaintiff is back to work but we are not sure physically the plaintiff can continue to do the job much long. In those situations we believe in waiting it out to once again make sure we are maximizing our client's recovery. Wisdom, experience, knowledge, aggressiveness, and patience; these are all key elements in navigating the complicated waters of workers compensation practice and knowing when to settle claims.

XVIII. THE LAST CHAPTER

Naming this section the last chapter is somewhat obvious for a name for a last chapter, but I have more reasons than than for the name. In workers compensation it is often hard to get to the last chapter, or end of your case. Because it is a system and a process it can be frustrating to go through, as with any bureaucratic systems. I want this guide to be a help to you in going through this process. It is stressful as your job is an important part of your life. Putting food on the table for your family is important, and the possibility of your means of a living being impacted or taken away is a big deal. That is why we want your last chapter in your workers comp claim to be the right one; the best ending to a hard story. Don't end it the wrong way; know your rights and seek experienced legal advice from an attorney you can trust. This booklet is helpful, but it will not replace the advice and representation of a good workers comp attorney. This booklet gives a broad outline on

many issues, but it is not exhaustive in its content nor meant to be. It is not meant to be relied on as the final word, as the courts have gone into greater detail in addressing the nuances of some of these issues. I hope you will consider giving me a call for good, honest, experienced and aggressive legal representation. I will sit down and give you a free consultation on the issues in your case and whether you could benefit from legal representation.

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