

## WORKERS' COMPENSATION ADMINISTRATION – THE ACT

This chapter of the report reviews the major provisions of the current Workers' Compensation Act (the Act) including the insurance coverage requirement, available methods of insurance and benefits.

### Insurance Coverage

The New Mexico Workers' Compensation Act states that employers who have three or more employees must carry workers' compensation insurance to cover their liability for work-related injuries and illnesses. Employers in construction, historically New Mexico's industry with the greatest exposure to injuries and illnesses, must have workers' compensation insurance regardless of the number of employees (§52-1-6).

There are a few exceptions to the insurance requirement. Private domestic workers, farm and ranch laborers, and real estate salespersons are exempt from mandatory coverage. Executive employees of corporations and limited liability companies or a sole proprietor may choose to exempt themselves from the insurance coverage requirement by filing an affirmative election not to accept the provisions of the Act with the Administration (section 52-1-7). Employers may obtain workers' compensation insurance for these individuals and come under the provisions of the Act voluntarily in order to avoid costly tort settlements for work-related injuries. Other workers not included under the state law are railroad workers involved in interstate commerce (§52-1-14), maritime workers and federal employees. Federal workers' compensation programs cover these workers. Tribes, pueblos and nations may elect to cover employees of their economic enterprises under their own law or to be bound by New Mexico law.

### Methods of Insurance

The Act provides several options for obtaining workers' compensation insurance so employers can choose the one that best meets their needs. Workers' compensation insurance may be obtained from any property and casualty insurance carrier who is approved by the New Mexico Department of Insurance. Employers in a high-risk category or new businesses that do not have a loss-experience record obtain insurance from the state's assigned risk pool administered by NCCI (§52-9-1 to §52-9-25). Employers may apply to self-insure their liability (§52-5-4.1 and §52-8-1 to §52-8-12) or they may join a self-insured group of employers engaged in the same or similar type of business (§52-6-1 to §52-6-25). Self-insured employers assume the obligation of providing workers' compensation benefits directly to injured workers. Self-insurers must meet the eligibility criteria for becoming self-insured that are listed in the statute and WCA Rules governing individual, group and pool self-insurance.

### Benefits

The Act defines benefits to New Mexico's injured workers including medical (§52-1-49), indemnity (§52-1-26 and §52-1-40 to §52-1-45) and funeral benefits (§52-1-46). Medical benefits cover the costs of surgical, physical therapy, medical, psychiatric, psychological, osteopathic, chiropractic, dental, optometry and hospital services and medicine. An injured worker may receive reasonable and necessary medical care for the work-related injury for life, as Table 3.1 indicates.

Under the Act, there are three types of benefits designed to replace a portion of income while the worker is disabled. These benefits are temporary total disability (TTD), permanent partial disability (PPD), and permanent total disability (PTD).

Workers who have lost more than seven days of work because of a work-related injury or illness may be entitled to TTD benefits. In general, TTD benefits cover the period from the eighth day of lost work following an injury to the date a physician releases the worker to return to employment or indicates that the worker has reached maximum medical improvement (MMI). For disabilities lasting more than 28 days, compensation is also paid for the first seven days of lost time. The benefit amount is based on the worker's average weekly wage when the injury occurred and whether or not the worker returns to work with the same employer before reaching MMI, as Table 3.1 explains. In most cases, TTD benefits are equal to the compensation rate, which is two-thirds of the worker's average weekly wage up to a maximum based on the state's average weekly wage.

PPD benefits are paid for injuries resulting in a permanent impairment or loss of use that continues beyond the date of MMI. The Workers' Compensation Act divides permanent partial disabilities into two categories: whole body injuries and scheduled injuries. Two different methods are used for determining benefit awards, depending on the type of injury.

Whole body injuries include the back, head, shoulder, neck, hip and other parts of the body not listed in §52-1-43 as a scheduled injury. To be eligible for PPD benefits of this type, a worker must have a permanent impairment that has been assessed by a health care provider based on the American Medical Association Guides to the Evaluation of Permanent Impairment. The amount of the benefit award is based on the compensation rate, impairment rating and in cases where the worker's post-MMI wage is less than the pre-MMI wage, a modification formula. The modification formula includes certain background factors: the worker's age, education, training, job experience, and pre-injury and post-MMI physical capacity, as Table 3.1 indicates. The modification formula is in §52-1-26 of the Act.

Table 3.1 Workers' Compensation Benefits

<b>DISABILITY COMPENSATION RATE</b>	
<i>Maximum:</i>	The rate of compensation is 66-2/3% of the worker's average weekly wage up to a maximum of 100% of the state average weekly wage for injuries: 2005 max. benefit = \$563.32/week; 2006 max. benefit = \$585.89/week; 2007 max. benefit = \$595.67/week; 2008 max. benefit = \$635.46; 2009 max benefit = \$669.21; 2010 max benefit = \$666.02.
<i>Minimum:</i>	The minimum weekly benefit is \$36.00.
<b>TEMPORARY TOTAL DISABILITY (TTD)</b>	
<i>Amount:</i>	TTD benefits are paid for work-related injuries involving more than seven days of lost work time. If prior to the date of maximum medical improvement (MMI) the worker is not released by the health care provider to return to work, benefits are paid at the workers' compensation rate. If the worker is released to return to work prior to MMI and the employer offers work at less than the pre-injury wage, the benefit is paid at 2/3 of the difference between pre- and post-injury wage.
<i>Duration:</i>	TTD benefits are paid through the day prior to MMI. For disabilities lasting more than 28 days, compensation is also paid for the first seven days of lost time.
<b>PERMANENT PARTIAL DISABILITY (PPD)</b>	
<i>Whole Body Amount:</i>	PPD benefits begin on the MMI date. PPD is paid for injuries to parts of the body not listed as a scheduled injury (e.g., back, etc.). To be eligible, a worker must have a permanent impairment for which a health care provider has given an impairment rating that is based on the AMA Guides to the Evaluation of Permanent Impairment. The benefit amount is adjusted according to the worker's pre- and post-MMI earnings. If worker's post-MMI wage is less than the pre-injury wage, benefits are a percentage of the compensation rate calculated according to a formula including the impairment rating and modifiers for the worker's age, education, specific vocational preparation, training and residual physical capacity (§52-1-26.1, .2 and .3). If worker's post-MMI wage is equal to or greater than pre-injury wage, benefits are limited to the percentage of impairment.
<i>Whole Body Duration:</i>	For whole body injuries, benefits are paid for 500 weeks if the disability rating is less than 80 percent; and for 700 weeks if the disability rating is equal to or greater than 80 percent. The maximum benefit duration for a primary mental impairment and secondary mental impairment is also 500 and 700 weeks.
<i>Scheduled Injury Amount:</i>	Benefits are paid for the loss or loss of use of body members including an arm, hand, finger, leg, foot, toe, sight or hearing and are paid as a percentage of the compensation rate computed from the loss of use percentage. The loss of use is not the same as impairment. Loss of use usually is significantly more than the percentage of impairment.
<i>Scheduled Injury Duration:</i>	Benefits are paid for the number of weeks specified in the statute for that body member (§52-1-43). Scheduled injury benefits are not reduced by any weeks where temporary total disability benefits were paid.
<b>PERMANENT TOTAL DISABILITY (PTD)</b>	
<i>Amount:</i>	For the permanent and total loss of or loss of use of both arms, hands, legs, feet, eyes or any combination of two; or a brain injury which by itself results in an impairment rating of 30 percent or more (effective July 1, 2003). PTD benefits are paid at the compensation rate.
<i>Duration:</i>	Benefits are paid for the worker's lifetime.
<b>DEATH</b>	
<i>Funeral Expenses:</i>	If an accidental injury results in death within two years.
<i>Indemnity Amount:</i>	Up to a maximum of \$7,500 effective June 18, 1999. Benefits are paid to the worker's dependents up to the full compensation rate, contingent upon the dependent's relationship to the worker and the number of eligible dependents (§52-1-46).
<i>Duration:</i>	Up to a maximum of 700 weeks.
<b>MEDICAL</b>	
	The worker may continue to receive reasonable and necessary medical treatment related to the work injury for life.

The physical capacity formula was modified effective July 1, 2003, to add a point for some workers. The payment period for whole body injuries is either 500 or 700 weeks based on the magnitude of the disability rating, which may include the impairment rating and the modification formula, depending on the case.

Scheduled injuries include the loss or loss of use of an arm, hand, finger, leg, foot, toe, sight or hearing. The benefit amount is determined from the compensation rate and the loss of use percentage. Loss of use (*See* Scheduled injury, Table 3.1) is not the same as impairment. Loss of use can be significantly more than the percentage of impairment, but the judge normally will determine this amount based on all the circumstances of the case if the parties cannot agree on the percentage of loss of use;

medical impairment is not an essential element for a finding of loss of use to a scheduled injury member. The payment period, ranges from seven to 200 weeks, and may be doubled if the extremity has been amputated, and is specified for each scheduled injury in §52-1-43 of the Workers' Compensation Act.

Permanent Total Disability benefits are paid for the total loss of or loss of use of both arms, hands, legs, feet, eyes or any two of them. PTD benefits are paid at the workers' full compensation rate. Effective July 1, 2003, workers with serious brain injuries also qualify for PTD. The brain injury must, by itself, result in an impairment rating of 30 percent or more according to the AMA Guides. The payment period is the worker's lifetime.

**Table 3.2 Miscellaneous Provisions of the Act**

<b>CHOICE OF HEALTH CARE PROVIDER</b>
The employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection. After 60 days, the party who did not make the initial selection may select a health care provider. The other party must be notified of the change at least 10 days before treatment begins. If one party objects, that party must file a notice of objection with the WCA within three days of receipt of the change notice (§52-1-49).
<b>RE-EMPLOYMENT OF INJURED WORKER</b>
The employer is required to rehire an injured worker if: (1) the former job or similar modified job is available, (2) the health care provider certifies that the injured worker is fit to perform the work without significant risk of injury, and (3) the injured worker applies for the job (§52-1-50.1).
<b>LUMP SUM SETTLEMENTS</b>
Provisions for lump sum settlement of benefits: (1) A worker may elect to receive a lump sum settlement of indemnity benefits after returning to work for at least six months and earning at least 80 percent of the pre-injury wage. (2) After reaching MMI, a worker may elect to receive a partial lump sum settlement of indemnity benefits for the purpose of paying debts accumulated during the disability. (3) The worker and employer may also elect to resolve a claim for injury with a lump-sum payment to worker for all or a portion of past, present and future payments of compensation benefits, medical benefits or both in exchange for a release of the employer from liability for such compromised benefits. Lump sum payment agreements must be submitted to a WCA judge for approval (§52-5-12,13,14).
<b>ATTORNEY FEES</b>
Attorneys' fees including, but not limited to, representation before the WCA and courts on appeal, costs for paralegal services, legal clerk services and related services on behalf of a worker or an employer for a single claim shall not exceed \$16,500 (beginning July 1, 2003). The limitation applies whether or not multiple attorneys represent the claimant or employer. A WCA judge must approve the worker's attorney fees. Usually, half the worker's attorney fees are paid by the worker and half by the employer (§52-1-54).
<b>EMPLOYER PENALTIES</b>
Worker may be entitled to a 10 percent increase in indemnity benefits if the employer failed to provide a safety device and that failure resulted in the accident or increased the severity of injury (§52-1-10). The worker may be entitled to an increase in indemnity benefits up to 25 percent if the employer or insurer acted in bad faith or committed unfair claims practices. The director may also impose administrative penalties for retaliatory firing, unfair claims processing, oppressive conduct, late reporting of injuries or late payment of benefits.
<b>WORKER PENALTIES</b>
Indemnity benefits may be reduced by 10 percent if the worker failed to use safety devices provided or failed to observe statutory regulations pertaining to safe conduct (§52-1-10). A worker can lose benefits if alcohol is a causal factor of the accident (based on laboratory test; §52-1-12.1) and can lose benefits if drug use is the <i>sole</i> cause of the accident.

Death benefits include payment for the deceased worker's funeral expenses up to a maximum of \$7,500. Surviving dependents are eligible for indemnity benefits. The amount is contingent upon the dependent's relationship to the deceased worker and the number of eligible dependents, as detailed in §52-1-46 of the Act. Benefits are paid for a maximum of 700 weeks.

Table 3.2 explains other provisions of the Act that are of general interest including the selection of a health care provider, payment for vocational rehabilitation services, requirements for rehiring an injured worker, limits on lump-sum settlements, limits on attorney fees and penalties against employers and workers.

Chapter 52 of the New Mexico Statutes and the latest updates may be purchased from the New Mexico Compilation Commission at (505) 827-4821 and on the Internet at: <http://www.nmcompcomm.us/>