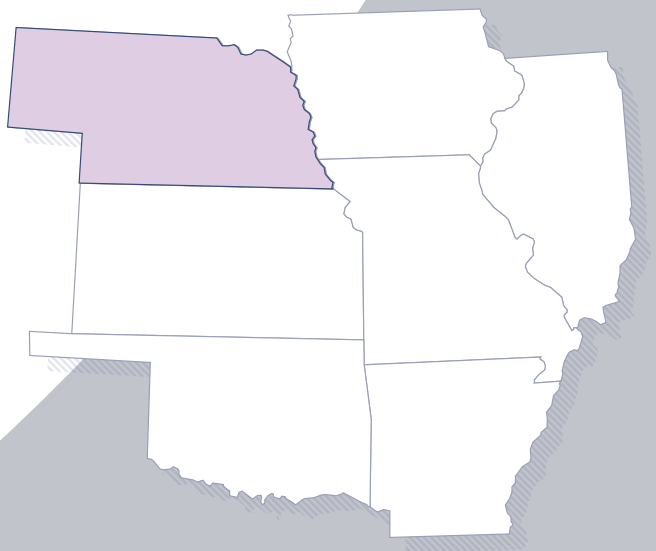
Workers' Compensation Reference Guide

Nebraska



NEBRASKA WORKERS' COMPENSATION

I. JURISDICTION - Neb. Rev. Stat. §§ 48-106, 48-186

A. Act will apply where:
   1. Injuries occurred or occupational diseases contracted in Nebraska while in the scope and course of employment.
   2. Employer is a resident employer performing work in Nebraska who employs one or more employees in the regular trade, business, profession, or vocation of the employer.
   3. Injuries received and occupational diseases contracted outside Nebraska, unless otherwise stipulated by the parties, if—
      a. The employer was carrying on a business or industry in Nebraska; and
      b. The work the employee was doing at the time of the injury was part of or incident to the industry being carried on by employer in Nebraska.
         i. Domicile of the employer or employee and the place where the contract was entered into may be circumstances to aid in ascertaining whether the industry is located within the state.

B. The Act will not apply where:
   1. Employer is a railroad engaged in interstate or foreign commerce.
   2. The employee is a household domestic servant in a private residence.
   3. The employer is engaged in agricultural operations and employees only agricultural employees, with certain exceptions.
   4. The employee is subject to a federal workers' compensation statute.

II. PERSONAL INJURY

A. Accident – Neb. Rev. Stat. § 48-151
   1. An unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
      a. For repetitive trauma—
         i. "Unexpected or unforeseen" requirement is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen;
         ii. "Suddenly and violently" element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment.
   2. An "injury" means violence to the physical structure of the body and such disease or infection as naturally results therefrom.
      a. Special cases—
         i. ***Heart attack*** – legal and medical causation;

(a) Legal: Court determines what kind of exertion satisfies "arising out of employment."

(b) Medical: Medical evidence establishes employee's exertion in fact caused his or her heart attack.

ii. ***Mental/Psychiatric*** – requires a physical component and medical testimony linking mental health disorder with physical injuries sustained or occupational disease contracted.

iii. ***Mental/Mental*** – requires condition causing the injury to be extraordinary or unusual when compared to the normal conditions of employment and causation established by competent medical evidence. Applies only to First Responders, ie Police, Firefighters, and EMTs.

3. An injury, to be compensable, must arise out of and in the course of the employment:

a. "Arise out of" – there must be a causal connection between the conditions under which the work was required to be performed and the resulting injury.

i. Special Cases—

(a) ***Risks to Public at Large/Acts of God***: generally not compensable unless employment duties put employee in position they might not otherwise be in which exposes them to risk, even though risk is not greater than that of general public (positional risk doctrine).

(b) ***Idiopathic cause***: non-compensable unless employment placed employee in position of increased risk.

(c) ***Horseplay***: compensable if deviation from work was insubstantial and did not measurably detracted from work.

(d) ***Assault***: injury may be compensable depending on reason for assault—

(i.) Work conditions: generally compensable.

(ii.) Personal animosity: generally not compensable.

b. "In the course of" – the injury must arise within the time and space boundaries of employment, and in the course of an activity whose purpose is related to the employment.

i. ***Coming and going:*** No recovery for injury while coming to or going from employer's workplace or jobsite. Injuries which occur on the employer's premises are generally compensable if no affirmative defenses apply.

ii. ***Exceptions***:

(a) Dual Purpose: If the employee is injured while on a trip which serves both a business and personal purpose, the injuries are compensable if the trip involves some service to the employer which would have caused the employee to go on the trip, and the employee selected a "reasonable and practical" route.

(b) Employer Created Condition: when a distinct causal connection exists between an employer-created condition and the occurrence of an injury, the injury will be compensable.

(c) Minor deviation: acts incidental to employment.

(d) Personal convenience: acts an employee may normally be expected to indulge in under the conditions of his work, if not in conflict with specific instructions, are generally compensable.

(e) Parking lot: If owned, maintained, or otherwise sponsored by employer.

(f) Employer-supplied transportation: If provided for work-related reason and not merely for employee benefit or convenience.

(g) Commercial traveler: If the employee's occupation requires that he or she travel, and there is no easily identifiable labor hub.

B. Occupational Disease – Neb. Rev. Stat. § 48-151

1. Occupational disease is a disease which is due to the causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment.
2. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable.
3. Employee "disabled", and thus eligible for compensation, when permanent medical impairment or medically assessed work restriction results in labor market access loss.
4. Date establishing employer liability is based on "last injurious exposure" or last exposure which bears a causal relationship to the disease. Employment need only be of the type which could cause the disease, given prolonged exposure.

III. NOTICE – Neb. Rev. Stat. § 48-133

A. Notice of injury is required "as soon as practicable" following the accident.

B. In repetitive trauma/occupational diseases, notice is required as soon as practicable from time employee's condition becomes an "injury."

C. The notice must be written and include the time, place and cause of the injury, except that if employee can show that employer had actual or constructive notice of the injury, no written notice is required.

D. Notice given five months after the injury is "unreasonable" per se.

IV. REPORT OF INJURY – Neb. Rev. Stat. § 48-144.01

A. FROI – First Report of Injury

1. For every Reportable Injury (including medical only injuries) arising out of and in the course of employment, a report of injury must be electronically filed with the Nebraska Workers' Compensation Court within ten days of the reportable injury.
    a. Reportable Injury means those injuries or diagnosed occupational diseases that result in:
        i. death, regardless of the time between the death and the injury or onset of disease;
        ii. time away from work;
        iii. restricted work or termination of employment;
        iv. loss of consciousness; or
        v. medical treatment other than first aid.
    b. Failure to file injury report within 10 days of accident results in tolling of statute of limitations under § 48-137 such that two year statute of limitations does not begin to run until the report is filed.
2. A First Report of Injury is required:
    a. In the event of an injury, even if liability is denied;
    b. A change is necessary to a previously filed report;
    c. A denial is made at any time;
    d. The claim has been acquired by another carrier.
3. Any employer who fails to file a report is guilty of a Class II Misdemeanor for each such failure.

B. SROI – Subsequent Report of Injury
1. in every case where a benefit payments have been made, a subsequent report of injury shall be electronically filed with the court by the employer or its insurance carrier.
2. A Subsequent Report of Injury is required when:
    a. The first indemnity payment has been made;
    b. A change is necessary to a previously filed report;
    c. A claim has been denied;
    d. Every 180 days the claim has been open
    e. Benefits have been reinstated;
    f. The claim has been closed;
    g. Jurisdiction has been changed.

V. CLAIM FOR COMPENSATION – Neb. Rev. Stat. §§ 48-137, 48-144.04

A. Employee has two years from the date of accident or the last date payment was received by the intended recipient for benefits to file a timely Petition.

B. If Employer fails to file an injury report within 10 days of accident, the two year statute of limitations does not begin to run until such report is filed.

VI. ANSWER TO PETITION – Neb. Rev. Stat. § 48-176

A. Petition served upon employer and carrier with Summons. Summons to be returned to Division within 7 days of service. Answer to Petition must be filed within 7 days of summons return to Workers' Compensation Court.

B. Failure to file timely answer may result in acceptance of facts in claim and default judgment.

VII. MEDICAL TREATMENT – Neb. Rev. Stat. § 48-120

A. Employer responsible for all reasonable medical/surgical/hospital services required by the nature of the injury, plus mileage for travel and incidental expenses necessary to obtain such services.

B. If employer does not participate in Managed Care Plan—
   1. Following injury, employer must notify employee of right to select a physician who has maintained the employee's medical records and has a documented history with the employee prior to an injury.
      a. If employer fails to notify employee, employee may choose any provider.
      b. If, after notification, employee fails to exercise the right to choose his or her provider, then employer may choose.
   2. Change of doctor only by agreement of the parties or by order of the compensation court.

C. If employer participates in Managed Care Plan—
   1. Employer must notify employee of right to select primary treating physician in accordance with above—
      a. Chosen physician, if outside Plan, must agree to the rules of the Plan; or
      b. Employee may choose among doctors already signed up with the Plan.
   2. Choice of physician rules do not apply if:
      a. Employer denies compensability;
      b. Injury involves dismemberment or major surgical operation;
      c. Employer fails to provide notice of right to select treating physician.
      d. Must be careful when answering petition for benefits. If employer denies compensability, employee may leave Plan and employer is liable for medical services previously provided.
   3. Employee may change primary treating physician within the Managed Care Plan at least once without agreement or court order.
   4. Employer, insurance carrier, or representative of the employer or insurance carrier has right to access all medical records of the employee. Failure to provide medical records may result in a Court order striking the medical provider's right to payment.
   5. Bills are paid pursuant to the Nebraska Fee Schedule.

VIII. VOCATIONAL REHABILITATION – Neb. Rev. Stat. §48-162.01

A. Employee entitled to vocational rehabilitation services if unable to perform suitable work for which he or she has previous training or experience.

B. Used to take a potential permanent total to another vocation or to reduce/eliminate loss of wage earning capacity.

C. Claimant must submit to evaluation by a vocational rehabilitation counselor who will, if necessary, develop and implement a vocational rehabilitation plan.

D. Claimant has right to accept or decline rehabilitation services, but refusal to participate in a court-approved plan, without reasonable cause, can result in penalties – vocational rehabilitation services may be terminated and compensation court may suspend, reduce, or limit compensation otherwise payable under Workers' Compensation Act.

E. Costs of vocational rehabilitation paid from Workers' Compensation Trust Fund; weekly temporary benefits and medical costs paid by employer.

IX. AVERAGE WEEKLY WAGE – Neb. Rev. Stat. §§ 48-121, 48-126

A. For continuous employments where the rate of wages was fixed by the day or hour or by the output of the employee, wage is average weekly income for the period of time ordinarily constituting his week's work, with reference to the average earnings for a working day of ordinary length, and using as much of preceding six months as was worked prior to accident. Overtime earnings excluded, unless the premium for the policy includes a charge for overtime wages.

B. Gratuity or tip and similar advantages are excluded in calculation of average weekly wage to the extent that the money value of such advantages was not fixed by the parties at the time of hiring.

C. Special Cases—
   1. ***Part-time employees***: for permanent disability only, must base average weekly wage on minimum 5-day workweek if paid by the day, minimum 40-hour workweek if paid by the hour or on whichever is higher if paid by output.
   2. ***Multiple employments***: base average weekly wage on wages of employer where accident occurred only, unless seasonal employee.
   3. ***Seasonal employment***: in occupations involving seasonal employment or employment dependent on the weather, average weekly wage is determined to be one-fiftieth of the total wages earned from all occupations during the year immediately preceding the accident.
   4. ***New employees***: where worker has insufficient work history to calculate average weekly wage, what would ordinarily constitute that employee's

average weekly income should be estimated by considering other employees working similar jobs for similar employers. Where available, such similar employees' work records should be considered for the 6-month period prior to the accident.

X. DISABILITY BENEFITS

A. Temporary Total Disability (TTD) – Neb. Rev. Stat. § 48-121(1)
   1. Compensation rate two-thirds Average Weekly Wage (AWW) up to maximum.
   2. Payable until maximum medical improvement reached, provided the employee does not secure alternative employment for the same, or a different, employer.
   3. Waiting period (Neb. Rev. Stat. § 48-119) – seven calendar days. Benefits must be paid for those seven days if claimant is disabled six or more weeks.
   4. Can be owed for scheduled as well as whole body injuries.

B. Temporary Partial Disability (TPD) – Neb. Rev. Stat. § 48-121(2)
   1. Employee able to return to work part-time while under medical care.
   2. Compensation rate two-thirds of difference between wages received at time of injury and earning power of employee afterwards, up to maximum.

C. Permanent Total Disability (PTD) – Neb. Rev. Stat. § 48-121(1)
   1. Definition: inability of the worker to perform any work which he or she has the experience or capacity to perform; workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.
   2. Compensation rate two-thirds AWW up to maximum, paid for life.
   3. Law does allow lump sum settlements based on present value of permanent total award if filed with and approved by the workers' compensation court – Neb. Rev. Stat. § 48-139. Generally saves 34% of total cost of obligation.

D. Permanent Partial Disability (PPD) – Neb. Rev. Stat. § 48-121(2), (3)
   1. Definition: a disability that is permanent in nature and partial in degree.
   2. Scheduled Member Injuries – "Loss of Use"
      a. Injury to a body member – ex. Arm, leg, foot, hand, etc.
      b. Compensation rate of two-thirds AWW, up to maximum, in accordance with schedule.
         i. Nebraska favors the 5th Edition of the AMA Guidelines for Permanent Impairment, but will accept a rating pursuant to the 6th Edition of the Guidelines to assist the trier of fact. The Court is not bound by the guidelines or a rating provided by a physician.
      c. Two-member injury rule – – total loss or total permanent loss of use of two members in one accident constitutes permanent total disability.
      d. If loss of use of more than one member does not constitute permanent

total disability, compensation is paid for each member with periods of benefits running consecutively.

e. No deduction for TTD benefits paid**.**

3. Body as a Whole Injuries – "Loss of Earning Capacity"
   a. Injury to trunk of body, neck or head, but not including shoulder or injuries below the trochanteric neck of the femur.
   b. Injuries to two scheduled members from the same accident which combine to create a loss of earnings of more than thirty percent are compensated on the basis of loss of earning capacity.
   c. Compensation rate is percentage of lost earning capacity multiplied by two-thirds of AWW.
   d. Payable for 300 weeks.
   e. Deduction for weeks TTD benefits paid**.**
4. Calculation of Permanent Partial Disability
   a. Scheduled Member Injury:
      i. Claimant has a rating of 10 percent permanent partial disability to the foot, which qualifies for 150 weeks of benefits.
      ii. Claimant qualifies for maximum compensation rate for his date of accident of $644.00.
      iii. Award would be $9660.00 (150 wks X 10% X $644).
      iv. No credit for TTD paid.
   b. Body as a Whole:
      i. Claimant qualifies for maximum compensation rate for his date of accident of $644.00.
      ii. Claimant has a 50% loss of earning capacity.
      iii. Claimant received TTD benefits for 20 weeks (300 – 20 = 280 wks payable).
      iv. Award would be $90,160.00 (280 wks X $644.00 X 50%).

E. Death - Neb. Rev. Stat. § 48-122
   1. Death resulting from accident/injury.
      a. Widow(er) entitled to weekly compensation benefits for life or until remarriage.
         i. No children - rate of compensation two-thirds AWW at time of death, up to maximum.
         ii. Children - rate of compensation three-quarters AWW at time of death, up to maximum.
      b. If spouse remarries, he/she receives two years of benefits in lump sum and payments cease.
      c. Dependent children receive weekly benefits payable to children during dependency or until age 19, or age 25 if incapable of support or a full-time student at an accredited institution.
      d. Lump sum settlements are allowed if filed with and approved by the

workers' compensation court – Neb. Rev. Stat. § 48-139

e. Reasonable expenses of burial, not exceeding $10,000.00.

XI. DEFENSES

A. Statutory:

1. ***Willful Negligence*** (Neb. Rev. Stat. §§ 48-127, 48-151): employer must prove (a) a deliberate act knowingly done; (b) such conduct as evidences a reckless indifference for safety; or (c) intoxication.
   a. "Reckless indifference for safety" means more than want of ordinary care. The conduct of the employee must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result.
   b. Intoxication:
      i. Burden on employer; must show that employee was intoxicated, either by alcohol or non-prescribed controlled substance, and that the intoxication was the cause of the accident.
      ii. Defense unavailable if employee was intoxicated with consent, knowledge, or acquiescence of employer.
2. ***Statute of Limitations*** (Neb. Rev. Stat. § 48-137): two years from date of accident or of last benefits paid, unless the injury report is not timely filed by the employer. In that case, the statute tolls the two-year limitation until the injury report is filed. Employer has 10 days from the date they are notified of the accident to file the injury report with the Workers' Compensation Court.
3. ***Timely Notice of Accident to Employer*** (Neb. Rev. Stat. § 48-133): Claimant must give written notice of the time, place, and nature of the injury as soon as practicable after the happening thereof. The Supreme Court has ruled that five months is per se unreasonable.

B. Other Defenses:

1. ***Failure to Use Provided Safety Devices***: compensable only if failure to use safety devices amounted to willful negligence.
2. ***Intoxication:*** Intoxication will bar recovery if, at the time of the injury, the Plaintiff was in a state of intoxication and the intoxication caused or contributed to the cause of the injury. The employer must not have known about the intoxication.
3. ***Violation of a Safety Rule***: An employer may prevail where the employer has:
   a. a reasonable rule designed to protect the health and safety of the employee,
   b. the employee has actual notice of the rule
   c. the employee has an understanding of the danger involved in the violation of the rule
   d. the rule is kept alive by bona fide enforcement by the employer, and
   e. the employee has no bona fide excuse for the rule violation.

4. ***Recreational Injuries:*** Generally compensable when:
   a. they occur on the premises as a regular incident of employment;
   b. the employer, by expressly or impliedly requiring participation brings the activity within the orbit of employment; or
   c. the employer derives substantial direct benefit from the activity beyond value of improvement in employee health and morale.
5. ***Independent Contractor:***
   a. "Independent Contractor" – one who, in course of independent occupation or employment, undertakes work subject to will or control of person for whom the work is done only as to result of the work and not as to methods or means used; such person is not employee within meaning of workers' compensation statutes.
      i. Exception – if the employer has created a scheme, artifice or device to enable them to execute work without providing workers' compensation coverage, then liability will be imputed to the employer.
   b. To be eligible for compensation under Workers' Compensation Act, alleged employee must prove that he or she is an "employee" in order to invoke jurisdiction of Workers' Compensation Court.

XII. PENALTIES

A. Absent a reasonable controversy, the employer or insurance carrier must pay, within thirty days, all medical and indemnity benefits due and owing to the employee and medical providers. Failure to do so will result in;
   1. A 50% penalty on all indemnity benefits due and owing, plus interest and/or;
   2. Attorney's fees and interest for securing payment of all medical expenses not timely made.

B. A reasonable controversy is;
   1. The existence of any reasonable factual dispute that, if proven true, would absolve the employer or insurance carrier of liability, or;
   2. Any unanswered question of law which bears on the outcome of compensability.

RECENTLY ASKED QUESTIONS IN NEBRASKA
FROM ISSUES ADDRESSED IN RECENT NEBRASKA CASES

Q. What are the requirements for termination of coverage?

A. In ***Greenwood v. JJ Hooligans/FirstComp***, the insurer moved to dismiss the petition arguing that they had given the employer proper notice of termination of coverage due to nonpayment of premiums in compliance with § 48-144.03. In support of the Motion to Dismiss, FirstComp provided evidence that notice of the cancellation was sent via electronic certified mail in November 2011, that notice of cancellation was filed with the Workers' compensation Court and evidence of a certified mail tracking number.

The Workers' Compensation Court dismissed the petition, however the Supreme Court reversed and remanded the case, finding that a material issue of fact existed as to whether notice was actually sent to the employer based on the electronic mailing system used by FirstComp. The court held that a tracking number alone does not establish certified mail service.

Accordingly, it is advisable that all insurers additionally send a physical copy of a notice of termination of coverage and document its delivery.

Greenwood v. JJ Hooligans/FirstComp, 297 Neb. 435 (2017).

Q. How do room and board factor into average weekly wage?

A. In ***Foster-Rettig v. Indoor Football Operating, LLC***, the employee was injured playing professional football for the Omaha Beef. While playing for the Beef, he was paid between $225 and $250 per game. The league also provided a room at a particular hotel in Omaha seven days a week during the football season. If he chose not to stay at the hotel on a particular night, however, he did not receive any additional compensation from Indoor Football. The injured worker also received "a stack of meal vouchers" every week so that he could eat three meals a day at local restaurants. The injured worker testified that he would receive at least 21 meal vouchers per week.

The Workers' Compensation Court found an average weekly wage of $231.25 without adding in the per diem of meals and lodging.

When adding extra weekly benefits ($350.00 cost of lodging and $322.00 vouchers for meals), his average weekly wage was $903.25 per week. The Court reasoned that the lodging and meals represented economic gain for the injured worker and thus should be included in his average weekly wage.

The employer appealed, citing prior case law that required evidence to demonstrate that (1) the money value of the advantages was fixed by the parties at the time of hiring and (2) the advantages constitute a real and reasonably definite economic gain to the

employee. They argued that the injured worker provided no evidence that the lodging and meal costs were fixed.

The Court of Appeals held that, despite the injured worker having no knowledge of the actual costs at the time of his employment, the costs to the employer for the benefits received were fixed and thus the higher wage was appropriate.

Foster-Rettig v. Indoor Football Operating, LLC, 25 Neb. App. 551 (2018).

Q. How does a Plaintiff moving effect from an urban to rural environment affect their Loss of Earning Capacity (LOEC)?

A. In ***Wiedel v. Lucile Duerr Hair Styling, Inc.***, the employee was injured while working as a cosmetologist in Lincoln, Nebraska. Following the accident, the employee gradually returned to working full duty. She later retired to and moved to Hebron, Nebraska to be closer to her family.

As a result of the accident, the injured worker was employable at the sedentary-light physical demand classification on a full-time basis. She was not qualified for up to constant standing or walking, but was qualified for up to constant sitting.

The vocational counselor assigned to this case initially determined the injured worker's LOEC when she had returned to work full time in Lincoln finding that she sustained a 25% LOEC. Following her move to the more rural Hebron, the injured worker sought an update analysis. The counselor affirmed the 25% LOEC. The injured worker then sought a rebuttal LOEC analysis and found a counselor to opine she sustained a 100% LOEC.

At trial, when addressing whether to use Lincoln or Hebron as the plaintiff's "Hub-Community," the court recognized that plaintiff's move from Lincoln to Hebron was prompted by her desire to be near relatives. Thus, the court rejected plaintiff's suggestion that her loss of earning capacity should be assessed from the hub-community of Hebron.

The plaintiff appealed, citing prior Nebraska case law that holds when an employee injured in one community relocates to a new community, the new community will serve as the hub-community from which to assess the claimant's earning capacity, provided that the change of community was done in good faith and not for improper motives.

Despite this precedent, the decision was affirmed as the plaintiff had returned to working full-duty in Lincoln prior to moving to a rural location

Wiedel v. Lucile Duerr Hair Styling, Inc., No. A-17-304, 2017 WL 5450758, (Neb. Ct. App. Nov. 14, 2017).

Q. How does the Court react when a plaintiff's attorney attempts to use trickery through discovery?

A. Unlike many states, Nebraska workers' compensation uses formal discovery similar to a civil matter. ***Wynne v. Menard, Inc.*** illustrates how plaintiffs' attorneys attempt to use trickery through discovery and how the Court reacts.

In ***Wynne***, one of the plaintiff's doctors issued extreme permanent work restrictions of sitting for only up to ten minutes at a time. While there was plenty of additional medical evidence that suggested other permanent work restrictions, the vocational counselor did note that if those particular restrictions were adopted, the plaintiff would be permanently and totally disabled.

Plaintiff counsel subsequently asked in a Request for Admission (RFA), "Admit that in [his] report . . . the vocational rehabilitation counselor opined that plaintiff had a loss of earning capacity of 100% as set out in attached Exhibit D."

Defense counsel admitted that in a portion of the report the vocational counselor did in fact find a 100% LOEC. Plaintiff's counsel filed a Motion for Summary Judgment, arguing that as defendant's responded affirmatively to plaintiff's RFA, defendant admitted that plaintiff was permanently and totally disabled.

The Court differentiated the Admission correctly, ruling that "pursuant to X restrictions, the plaintiff is permanently and totally disabled," is not at all the same as "the plaintiff is permanently and totally disabled."

The Court cited Section 48-168(1), which provides that the "Nebraska Workers' Compensation Court shall not be bound by the unusual common-law or statutory rules of evidence or by any technical or formal rules of procedure." While not a surprising ruling, this case serves as insight into some of the antics that can be brought via formal discovery.

Wynne v. Menard, Inc., 299 Neb. 710, 910 N.W.2d 96 (2018).

Q. Can an outdated mailing address provide sufficient basis for an award of waiting time penalties?

A. In ***Rice v. Sykes Enterprises, Inc.***, two parties entered into a settlement agreement regarding a workers' compensation claim. As part of the settlement agreement, the insurer would make an upfront payment of $15,000 and a second payment of $93,375.92. After reaching the agreement, the parties applied to the workers' compensation court for approval of the settlement agreement. An order approving the application for settlement was entered on January 26, 2016. Over a year later, on March 8, 2017, the plaintiff filed a motion for waiting time penalties, attorney fees, and interest.

The evidence showed that a check was initially issued on February 3 and mailed to the attorney's address on February 4, approximately one week after the settlement was

approved. This check, however, was returned to the defendant, stating “UNKNOWN AT THIS PO BOX NAME.”

Defendants re-issued the check and it was re-mailed on February 27, more than 30 days after the settlement was approved by the Court. Additional evidence showed that the address defendant initially mailed the check to was outdated. However, the first installment of the settlement agreement ($15,000) had been successfully mailed to that same address a month earlier.

The Court of Appeals concluded that the inclusion of an incorrect or outdated address on the check was, at most, a clerical error. Further, they noted it appeared reasonable for the defendant to have relied on the outdated address as being valid, because the address had been successfully utilized in the recent past. Accordingly no penalties were awarded.

Rice v. Sykes Enterprises, Inc., No. A-17-496, 2018 WL 1505425, (Neb. Ct. App. Mar. 27, 2018).

Q: What constitutes a “fixed place of employment” and an “employer-created condition” when determining compensability of a workers’ compensation claim?

A: In *Coughlin*, the case first clarifies the “fixed place of employment” when determining going to and coming from work. In this case, the deputy’s patrol car was always returned to the Department’s garage after the shift was finished so there was a fixed place of employment.

Additionally, the major issue dealt with in this case is what constitutes an employer-created condition. The facts of the case ask the question of whether the deputy’s use of his cell phone to communicate shift-change information while he was driving home was an employer-created condition. Because the Department did not specifically direct a method of communicating information, use of the cell phone was not employer-created. Because the use of the cell phone placed this outside of an employer-created condition, the accident was not causally connected and the going to and from work rule rendered the injury and death noncompensable.

Coughlin by and through Coughlin v. County of Colfax, 2019 WL 1442418 (Neb.Ct.App. April 2, 2019).

Q: Is a contractor a statutory employer under the Nebraska Workers’ Compensation Act even if they took steps to avoid responsibility?

A: This case held that a contractor was a statutory employer under the Nebraska Workers’ Compensation Act despite the fact that the contractor was out of state and had taken steps to circumvent its responsibility under the Nebraska Workers’ Compensation Act.

The Court also held that the findings of the compensation court were not clearly erroneous as to the award of earning capacity because the decision as supported by evidence in the record.

Martinez v. CMR Construction & Roofing of Texas, LLC, 924 N.W.2d 326 (Neb. 2019).

Q: What constitutes a sufficient basis for a court to exercise personal jurisdiction over a workers' compensation claim?

A: This case discusses Nebraska's Long-Arm Statute for purposes of exercising personal jurisdiction. The court held that although EM Pizza was not a Nebraska corporation, they did submit an application for insurance to Applied Underwriters at the Omaha office, faxed requests for service, allowed debiting bank accounts, and submitted payroll reports and customer service to the Omaha office. This was sufficient for minimum contacts to be established.

The Court then determined it was not reasonable to exercise personal jurisdiction because California law would likely be used so a California court would be better positioned to apply California workers' compensation laws. California also has a substantially greater interest in handling the dispute.

Applied Underwriters Captive Risk Assurance Company, Inc. v. E.M. Pizza, Inc., 923 N.W.2d 789 (Neb. 2019).

Q: Can a Court take judicial notice of disputed allegations?

A: No. The Court evaluated calculation of average weekly wage and found that the court cannot take judicial notice of disputed allegations.

Bortolotti v. Universal Terrazzo and Tile Company, 2019 WL 446630 (Neb.Ct.App. February 5, 2019).

Q: Is sending recruiters to Nebraska sufficient minimum contacts to establish jurisdiction in Nebraska?

A: The Court held that sending recruiters to Nebraska to hire an employee that ultimately was injured in another state was not sufficient to establish Nebraska jurisdiction. Thus, the petition for benefits in Nebraska was dismissed.

Hassan v. Trident Seafoods and Liberty Mutual Insurance, 921 N.W.2d 146 (Neb. 2019).

Q: Who is responsible for benefits if an injury is a recurrence of a prior injury?

A: The Court found no error in the compensation court finding that Freeman Expositions was an employer. There was evidence in the record both for and against but deferred to the judgment of the compensation court.

The court also held that if an injury is a recurrence of a prior injury, the insurer at risk at the time of the prior injury is liable rather than the insurer at the time of the recurrence.

The court held that when there is conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Weyerman v. Freeman Expositions, Inc., 922 N.W.2d 246 (Neb. 2018).

Q: Can an employee who has a compensable permanent total disability consistent with the Nebraska Workers' Compensation Act be deprived of ongoing disability benefits because of a subsequent non-compensable injury that independently causes permanent disability?

A: The Court held again that an appellate court will not substitute its judgment if there is conflicting evidence in the record unless there is a clear error.

In a matter of first impression, this case involved an injury and a subsequent stroke. The employer asked to "cut off" benefits at the time of the stroke. The question posed is whether an employee who has a compensable permanent total disability can, consistent with the Nebraska Workers' Compensation Act, be deprived of ongoing total disability benefits because of a subsequent non-compensable injury that independently causes permanent disability. The Court held that the employee was permanently and totally disabled as a result of a work accident and injury. The fact that she subsequently suffered a stroke that was neither medically nor causally related does not relieve the employer of its obligation to pay permanent total disability benefits under the Nebraska Workers' Compensation Act.

Krause v. Five Star Quality Care, Inc., 919 N.W.2d 514 (Neb. 2018).

Q: How should the Court treat medical opinions and are checkmark forms sufficient as medical opinion?

A: Challenges the admission of certain medical opinions and the court's conclusion that she did not suffer an injury to her lower back. Also challenges court's characterization of a doctor's billing record as a "checklist" which lacked credibility or weight.

No abuse of discretion found in finding opinions of Greater Omaha Packing's expert medical opinions. The opinions were supported by the record. It is the Court's discretion as to what weight and credibility should be given to medical opinions. When the record only presents conflicting medical testimony, the appellate court will not substitute its judgment.

The Court also cautioned the reliability of "checkmarks" on forms. The Court found that more detailed medical records were more reliable than checkmarks on a standard form. Additionally, resolving conflicts within a health care provider's opinion rests within the court's discretion as the trier of fact.

Diaz De Mora v. Greater Omaha Packing Company, Inc., 2018 WL 5279056 (Neb.Ct.App. October 23, 2018)

Q: How must medical opinion reports be signed?

A: The Court found that due to Rule 10, an evidentiary rule, the medical report must be signed by the physician, surgeon, vocational rehabilitation expert, physical therapist, or psychologist. A physician assistant does not satisfy Rule 10. Only the supervising physician in a physician-physician assistant relationship falls under the definition of physician as stated in Workers' Compensation Court rule 49(O).

The Court also reinforced that its jurisdiction does not extend to employment contractual disputes. It is limited to only that which is contained within the Nebraska Workers' Compensation Act. It does extend to contractual disputes concerning coverage by providers of workers' compensation insurance. The Court does not have jurisdiction over wrongful discharge claims.

The Court reinforced the "reasonable controversy" necessary in avoiding 50% penalties.

Bower v. Eaton Corporation, 918 N.W.2d 249 (Neb. 2018)

Q: How does the court construe indemnification agreements?

A: The Court reinforced that an indemnification agreement is construed according to general contract principles and an employer who enters an indemnity agreement need not affirmatively waive its workers' compensation immunity in order to be subject to indemnity claims brought by third parties based on employees' losses.

Jacobs Engineering Group, Inc. v. ConAgra Foods, Inc., 917 N.W.2d 435 (Neb. 2018)

Q: Does a Workers' Compensation Court have jurisdiction over third-party claims and is a scrivener's error sufficient to give rise to a reasonable controversy when assessing penalties?

A: Court held that the compensation court does not have authority to determine the credit the employer is entitled to in a third-party claim.

The Court affirmed, again, that the findings of the trial court will be viewed in the light most favorable to the successful party and every inference reasonably deduced will be given to the successful party. There must be clear error to reverse a decision on the evidence presented.

The Court also found that a scrivener's error will not give rise to a reasonable controversy when determining whether penalties should be awarded.

Gimple v. Student Transportation of America, 915 N.W.2d 606 (Neb. 2018)