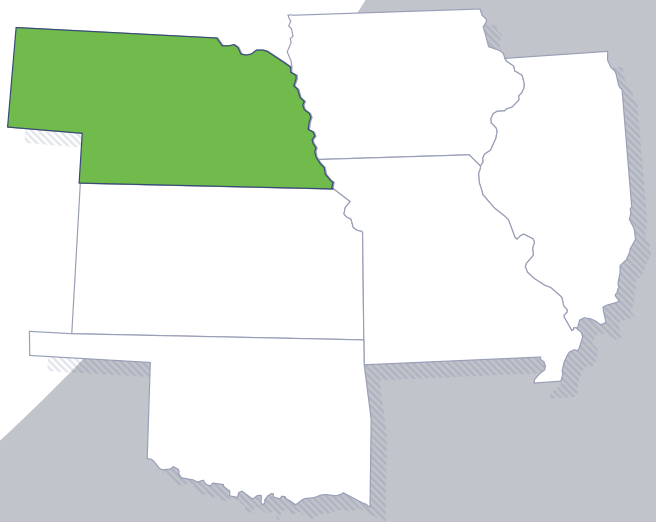
Workers' Compensation Reference Guide

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 employs 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, i.e. 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 detract 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.

1. The term "as soon as practicable" has been interpreted to mean as soon as it is feasible to report the injury given the circumstances

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.

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 the 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 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.
    i. Loss or loss of use of multiple parts of the same arm, including the hand and fingers, or loss or loss of use of multiple parts of the same leg, including the foot and toes, resulting from the same accident or illness does not entitle the employee to receive compensation based upon the employee's 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 $1,094.00.
        iii. Award would be $16,410.00 (150 wks X 10% X $1,094).
        iv. No credit for TTD paid.
    b. Body as a Whole:
        i. Claimant qualifies for maximum compensation rate for his date of accident of $1,094.00.
        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 $153,160.00 (280 wks X $1,094.00 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 $11,600 as of July 1, 2024.

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.

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. ***Does Neb. Rev. Stat. § 48-121(3) provide that an employee is entitled to receive benefits based on a loss of earning capacity when they sustain multiple injuries along the same extremity?***

A. No. When attempting to understand Neb. Rev. State. § 48-121, it is essential to know that the first three subdivisions of the statute address three different categories of disability and allows for various processes of determining compensation for each. Subdivision (1) addresses compensation for total disability; subdivision (2) addresses compensation for partial disability, except in cases covered by subdivision (3); and subdivision (3) lists the compensation that is to be paid for injuries to several specified parts of the body. Typically, § 48-121(1) and (2) governed a claimant's loss of earning capacity, while subdivision § 48-121(3) "provide[d] for compensation based on designated amounts for scheduled member injuries, but no loss of earning capacity." An amendment to § 48-121(3) enacted in 2007 aimed to increase benefits for workers who suffered injuries to two or more extremities in a single accident. It specified that "the loss of earning capacity would be at the court's discretion where there is a loss or loss of use of more than one member which results in at least a 30-percent loss of earning capacity."

Initially, this statutory language was applied as originally intended until the Supreme Court, in the case of *Espinoza*, interpreted it to allow employees with injuries to two or more parts of the same extremity in one accident (e.g., right elbow and right wrist) to qualify for permanent disability based on their loss of earning capacity. Attorneys sought to persuade the Supreme Court to interpret the statute in line with its original legislative intent, but the Court upheld its broader interpretation. In response, LB 1017 was drafted and became effective on July 18, 2024. The legislative change restricts eligibility for permanent disability benefits based on loss of earning capacity to employees who have sustained injuries to two or more parts of different extremities in a single accident (e.g., left wrist and right elbow). This amendment clarifies the eligibility criteria in accordance with the original legislative intent that was overridden by the Espinoza decision.

2023 Bill Text NE L.B. 1017

Q. ***How have recent amendments affected medical fee schedules and lump sum settlement applications in Nebraska?***

A. Nebraska Workers' Compensation Court recently implemented revisions to several rules and Addendum 2, which became effective January 24, 2024, following their adoption on December 28, 2023. Amendments to Rules 5, 13, 14, and 15 addressed updates such as interpreter usage, fax filings, exhibits, and records checked out. However, the most noteworthy changes are seen in Rules 26 and 47. Rule 26 now dictates a revised Medical Service Fee Schedule for services rendered from January 1, 2024, onward, available for reference on the Nebraska Workers' Compensation Court's official website at newcc.gov. Meanwhile, Rule 47 modified Lump Sum Settlement Applications by updating the table

within Addendum 2, replacing the 2019 U.S. Life expectancy Table with the updated 2020 version. The 2020 U.S. Life Expectancy Table introduces minor adjustments from its predecessor, yet these nuances can significantly impact calculations involving future and present values.

Q. *Should we focus on the period of exposure before contracting an illness, rather than the circumstances during the hearing, when determining if it qualifies as an 'ordinary disease of life'?*

A. Yes. In *Thiele v. Select Medical Corp.*, the Nebraska Supreme Court overturned the denial of Christine Thiele's workers' compensation claim for COVID-19 contracted while working as a nurse liaison in Omaha. Thiele claimed COVID-19 was an occupational disease under Nebraska law, unique to healthcare workers due to their work conditions, not an ordinary disease of life. Initially denied by the Workers' Compensation Board, Thiele appealed and won, arguing COVID-19 posed a specific risk to healthcare workers during the pandemic. The 4-3 split decision highlighted differing views on whether COVID-19 qualifies as an 'ordinary disease of life'. The majority opinion stressed focusing on the period of exposure prior to contraction or onset of symptoms, rather than circumstances at the time of the hearing to determine if COVID-19 qualifies as an 'ordinary disease of life'. Dissenting judges argued COVID-19 spread similarly in all settings and should not be classified differently based on timing or occupation. Although it did not settle the issue indefinitely, Thiele's case sets a precedent for future workers' compensation claims related to COVID-19 in Nebraska. The Court's opinion suggests that one must focus on the period of exposure when determining if an illness, specifically COVID-19, is an ordinary disease of life.

Thiele v. Select Med. Corp., 316 Neb. 338, 4 N.W.3d 858 (Apr. 19, 2024)

Q. *When workers' compensation serves as the exclusive remedy, can an employee assert tort theories of recovery against their employer in district court?*

A. No. *In Lopez v. Catholic Charities of the Archdiocese of Omaha*, an employee filed claims for assault and intentional infliction of emotional distress in district court following injuries she sustained during a training drill at work. The district court dismissed these claims, citing the Nebraska Workers' Compensation Act which provides the exclusive remedy for employees, thus preventing them from pursuing tort claims against their employers in district court.

The Nebraska Supreme Court recently upheld the dismissal of the employee's claims, affirming that under the Nebraska Workers' Compensation Act, the statutory benefits constitute the sole recourse for employees injured on the job. The Court's decision also addressed and rejected the employee's arguments seeking to limit the scope of the exclusivity rule and asserting that dismissing her claim violated public policy. This case law emphasizes the exclusivity of the workers' compensation remedy, which is derived from statute, and underscores the principle that employees surrender their rights to any other method, form, or amount of compensation when their injury is covered by the

Nebraska Workers' Compensation Act. This principle ensures that employees receive no-fault benefits quickly for most economic losses from work-related injuries, in exchange for giving up the potential for complete compensation under tort law.

Lopez v. Cath. Charities of Archdiocese of Omaha, 315 Neb. 617, 998 N.W.2d 31 (Dec. 15, 2023)

Q. What constitutes timely notice of an injury under Nebraska workers' compensation law when an employee experiences delayed onset of symptoms related to a workplace incident, as opposed to pre-existing conditions?

A. In *Candia v. Orchard Park Assisted Living*, the Nebraska Workers' Compensation Court decided that waiting for a period of 2 to 3 weeks before notifying the employer was reasonable. This delay was justified because it took the employee this long to determine that her current pain was caused by the workplace incident rather than her existing back issues.

An employee experienced a sudden "pop" in her back while lifting a patient who had fallen. Due to previous episodes of back pain, she initially treated the discomfort with over-the-counter medications. However, after enduring persistent pain for 2-3 weeks despite the medications, she concluded that this new pain resulting from the workplace incident was distinct from her previous issues, and promptly informed her employer.

According to Section 48-133, an injured party must notify their employer of the injury "as soon as practicable." The key question is whether the injury was reported as soon as it was feasible, considering the specifics of the case, rather than focusing solely on the time elapsed since the injury. The Court determined that the employee's notification was timely because it occurred as soon as she recognized her back pain was linked to the workplace incident rather than her pre-existing condition.

Therefore, in situations where an employee delays reporting an injury to differentiate it from previous instances of pain, each case must be examined based on its unique circumstances. Factors such as previously existing conditions, whether medical treatment was sought, timing of notification, and other relevant details will influence whether the notice was given "as soon as practicable."

Debra Candia, Plaintiff, No. Doc: 220 No: 0059, 2021 WL 3540227 (Neb. Work. Comp. Ct. Aug. 4, 2021)

Q. *Does the Nebraska Workers' Compensation Court (WCC) have statutory authority to modify an award to grant additional rehabilitative services?*

A. Yes. According to Neb. Rev. Stat. § 48-162.01(7), the WCC has the statutory authority to modify the original award in order to accomplish the goal of restoring the injured employee to gainful and suitable employment.

In *Spratt*, Employee, James Spratt, obtained an award granting medical rehabilitation services for his lumbar back. Six weeks after the issuance, Claimant's treating physician sought permission to treat his thoracic back pain. The physician opined that the original

lumbar back pain was "generated" from Claimant's thoracic back. Employer denied treatment, and the Nebraska WCC denied the request for modification.

The Nebraska Supreme Court explains that in 1969, the Legislature first expressed a goal, as the section now reads, "One of the primary purposes of the Nebraska Workers' Compensation Act is restoration of the injured employee to gainful employment." From then on, the power to modify remained codified in subsection (7). Thus, the WCC erred in its conclusion that it lacked the power to modify the original award to treat Spratt's thoracic back. The Nebraska Supreme Court emphasized that nothing in the opinion should be read to "suggest how the compensation court should exercise its power pursuant to § 48-162.01(7), or to limit or preclude the court in making findings of fact." Thus, the Court concluded that the WCC had authority pursuant to § 48-162.01(7) to modify the original award.

Spratt v. Crete Carrier Corp., 971 N.W.2d 335 (Neb. 2022).

Q. ***Is an employee entitled to temporary total disability (TTD) benefits when the employee had still been receiving regular pay?***

A. No. According to *Anderson v. Cowger*, if wages paid are intended to be in lieu of compensation, credit for the wages is allowed. 65 N.W.2d 51 (Neb. 1954). Here, Employee received her regular wage when she was not at work due to the workplace injury, thus, Employer is entitled to credits for payments made and does not have to pay extra TTD benefits.

In *Simpson*, Employee, Lynne Simpson, was hit on the head by a steel tray when working as a special education paraeducator. Simpson sought, among other things, additional TTD benefits on days where she could not work due to doctor's appointments. The WCC held that Simpson was not entitled to any additional TTD benefits because Simpson received her regular wages in lieu of compensation on the additional dates requested.

The Court of Appeals of Nebraska affirmed this decision, citing *Anderson v. Cowger*. There, the court held that "if an employee is paid his or her regular wage although he or she does no work at all, it is a reasonable inference that the allowance is in lieu of compensation." Simpson received her regular wage when she was not at work due to the workplace injury and was not forced to use accrued vacation time or sick time to visit the doctor. Thus, the appellate court found that Employer was entitled to credit for the payments made to Simpson as her regular wages in lieu of workers' compensation benefits. The court found that the WCC's determination that Simpson is not entitled to any additional TTD benefits was not clearly erroneous.

Simpson v. Lincoln Pub. Sch., 971 N.W.2d 347 (Neb. Ct. App. Jan. 25, 2022).

Q. ***Can the Nebraska Workers' Compensation Court (WCC) find a claimant to be permanently disabled before all injuries have reached maximum medical improvement?***

A. No. The Nebraska Court of Appeals held that the determination of permanent partial disability is premature when not all injuries resulting from the accident have reached maximum medical improvement.

In *Copley*, Employee, Winfield Scott Copley, was operating a forklift when it tipped forward and Copley was thrown into the "roll cage" where he struck the left side of his face and left shoulder. He received medical treatment for his left eye and shoulder, and he was eventually released at Maximum Medical Improvement (MMI) for his left shoulder. The WCC awarded Copley permanent partial disability for his shoulder and ordered continuing temporary total disability payments for his left eye. The WCC also held that Copley was permanently disabled due to his shoulder injury.

Addressing the WCC's finding of permanent disability, the appellate court reasoned that it was entirely possible that Copley's eye injury may affect his ability to work before it ever reaches MMI. However, the court states, "Such a factual scenario is precisely the reason that permanent impairment and, thus, permanent disability, should not be determined until all of the claimant's injuries have reached maximum medical improvement." Accordingly, the appellate court held that the WCC finding of permanent disability due to claimant's shoulder was premature.

Copley v. Advanced Servs., Inc., No. A-21-209, 2022 WL 598761 (Neb. Ct. App. Mar. 1, 2022).

Q. Is an Employee entitled to vocational rehabilitation if they have not suffered permanent medical impairment?

A. No. Pursuant to *Green v. Drivers Management Incorporated*, "Without a finding of permanent medical impairment, there can be no permanent restrictions. Without impairment or restrictions, there can be no disability or labor market access loss." 639 N.W.2d 94 (Neb. 2002). If one is able to return to work, he or she is not entitled to vocational rehabilitation.

In *Serna*, Employee, Maria Ronquillo Serna was injured while performing work duties and filed for workers' compensation. The Nebraska Workers' Compensation Court (WCC) held that she had many pre-existing issues and that Serna's injuries did not make her permanently disabled. Accordingly, the WCC found that she was not entitled to permanent disability benefits, future medical benefits, or vocational rehabilitation. Serna appealed.

The Court of Appeals of Nebraska affirmed the decision of the WCC. The appellate court cites *Green v. Drivers Management Incorporated* stating, "Without a finding of permanent medical impairment, there can be no permanent restrictions. Without impairment or restrictions, there can be no disability or labor market access loss." The appellate court finds credible the opinion of a physician who states that Serna suffered no permanent impairment as a result of the work injury. Thus, because the WCC found the impairment not attributable to Serna's injury and that she was not entitled to an award of permanency, Serna is not entitled to vocational rehabilitation.

Serna v. Advance Servs. Inc., No. A-21-811, 2022 WL 1634265 (Neb. Ct. App. May 24, 2022).

Q*. Can an employee unilaterally change their form 50 physician?*

A. No. According to Neb. Rev. Stat. Ann. § 48-120(2), an employee cannot unilaterally change their Form 50 physician without the agreement of the employer or an order from the compensation court. In *Rogers*, employee, Sheryl Rogers, was being treated by a Nebraska physician who prescribed opioid treatment in 2001. Appellant-employer, Jack's Supper Club, and Nebraska Workers' Compensation Court (WCC) expressed concerns about this type of treatment. In 2010, Rogers moved to Florida where she began seeing Dr. Daitch, a Florida physician. Rogers told Jack's that Daitch was her new Form 50 physician. Jack's stopped paying for her medical treatment, saying that she could not unilaterally change her Form 50 physician according to Neb. Rev. Stat. Ann. § 48-120.

The court in Rogers emphasized that a new Form 50 physician can be selected either through mutual agreement between the employee and employer or by seeking approval from the compensation court. This is particularly relevant when the original Form 50 physician is no longer available, such as in cases of death or the employee moving out of state. Additionally, the case clarifies that the compensation court has the authority to order a change of physician if it deems it necessary, ensuring that employees continue to receive appropriate medical care even when their circumstances change.

Rogers v. Jack's Supper Club, 308 Neb. 107, 953 N.W.2d 9 (2021).

Q. *(1) Determining whether an injured worker qualifies as an employee, entitling them to workers' compensation benefits, or as an independent contractor. (2) What is the key factor in distinguishing an employment relationship from that of an independent contractor?*

A. (1) The court will consider several factors to determine if an injured worker is an employee or an independent contractor, including: (1) the extent of control, as defined by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.

In *Wright*, the plaintiff's estate claimed that the plaintiff was an employee of the defendant and sought workers' compensation benefits. The defendant denied the claim, arguing that the plaintiff was an independent contractor. They presented several factors to support their position. Evidence showed that the plaintiff owned his own company and performed jobs for defendant intermittently for several years. The defendant invoiced the plaintiff for completed jobs, paid him per job, and issued him 1099 tax forms instead of W2 forms. The plaintiff had the freedom to decline jobs from the defendant, which he had done periodically. Plaintiff operated his own checking account and filed tax returns where he deducted significant business expenses such as vehicles, contract labor, and insurance. Plaintiff indicated on his tax returns that he was an independent contractor and plaintiff

was urged by his insurance agent to purchase workers' compensation insurance, but never did and instead carried general liability insurance. For these reasons, the Court of Appeals found plaintiff was not an employee of defendant and dismissed the petition.

Wright v. H & S Contracting, Inc., 29 Neb. App. 581, 581–82 (2021).

A. (2) In *Cajiao*, the Nebraska Court of Appeals emphasized that the key factor distinguishing between an employment relationship and that of an independent contractor is the extent of control. The Court elaborated, stating, "It was important to distinguish control over the means and methods of the assignment from the control over the end product of the work to be performed."

Oscar Cajiao was injured in a motor vehicle accident while driving a semi-trailer tractor leased by Arga Transport, Inc. (Argo). Cajiao alleged he was an employee of Arga and thus entitled to workers' compensation. The Nebraska Workers' Compensation Court (WWC), however, held that Cajiao was an independent contractor. Cajiao appealed.

Cajiao's argument relied heavily on the lease agreement language between Cajiao and Arga, which provided Arga should have exclusive possession, control, and use of the equipment, and should assume responsibility for the operation of the equipment. The appellate court disagreed, noting that such provisions are required to be in every lease that an authorized carrier enters into for equipment. The court stated that this language alone does not show the degree of control a company exercised over the method and manner of performing the work. Although Arga may have exercised control over the result of the work, the court found that Arga did not exercise control over the actual operation of the truck or the manner in which Cajiao completed the delivery. Thus, the Court of Appeals affirmed the decision of the WCC that Cajiao was an independent contractor and therefore is not entitled to workers' compensation benefits.

Cajiao v. Arga Transp., Inc., 972 N.W.2d 433 (Neb. Ct. App. Mar. 1, 2022).

Q. *Is claimant-employee entitled to award of penalties and attorney fees if reasonable controversy exists as to compensability of claim and nature and extent of injuries?*

A. No. Neb. Rev. Stat. Ann. § 48-125 provides for a waiting-time penalty and attorney fees when the employer fails to pay compensation within 30 days of notice of disability so long as no reasonable controversy exists.

In *Boring*, employee Martin Boring filed a petition in the Nebraska WCC against Zoetis LLC in 2018. He claimed a compensable injury arising out of his employment with Zoetis, and he claimed that Zoetis refused to make payments of compensable medical and mileage expenses. In 2020, the WCC awarded Boring temporary and permanent benefits, and it ordered Zoetis to pay penalties and attorney fees. The WCC claimed that Zoetis admitted in its answer that Boring sustained a work accident and injuries arising out of course of employment and that this admission entitled Boring to penalties and attorney fees under Neb. Rev. Stat. Ann. § 48-125. Zoetis appealed to the Nebraska Court of Appeals, which affirmed the benefits, but reversed and vacated the award of penalties and attorney fees on the ground that there was reasonable controversy as to the nature and extent of the injury.

The Court of Appeals of Nebraska reasoned that Zoetis' admission constituted only an admission to some accident suffered by Boring on the day of injury. In its answer, Zoetis

disputed the nature and extent of that injury and the benefits attributable thereto. The Court of Appeals held that penalties and attorney fees awarded under Neb. Rev. Stat. Ann. § 48-125 may only be awarded when no reasonable controversy exists. The court found that Zoetis most certainly denied the nature and extent of Boring's injuries. Here, the Nebraska Supreme Court affirmed the lower court's decision but added a few points. They mentioned that Neb. Rev. Stat. Ann. § 48-125(3) does not authorize penalties for delinquent payment of medical expenses. Also, the WCC erred when it failed to examine the trial evidence to determine whether there was a reasonable controversy. The WCC is not bound by formal rules of procedure, meaning here that although one party may have made a judicial admission, the opposing party did not take advantage of said admission at trial and therefore was not relieved of the burden of producing evidence in support of his allegation.

Here, although Zoetis admitted that Boring suffered an accident in scope of employment, a reasonable controversy regarding nature and extent of injury still existed, therefore, penalties and attorney fees under Neb. Rev. Stat. Ann. § 48-125 were not permitted.

Boring v. Zoetis LLC, 309 Neb. 270 (2021).

Notes Pages

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