

Chapter 10

Workers' Compensation and Seniors

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10-1. Workers' Compensation Overview

Workers' compensation is a state insurance program designed to compensate workers who are injured on the job. The Colorado state legislature determines eligibility for benefits as well as amounts and duration of benefits.

Every employer in the State of Colorado is required to buy workers' compensation coverage for its employees, or qualify under the state's strict standards to be self-insured. The Colorado workers' compensation program is administered by a state agency, the Colorado Department of Labor and Employment, Division of Workers' Compensation. To learn more about the Colorado workers' compensation system, call the Division of Workers' Compensation customer service unit at (303) 318-8700, or visit their website at www.colorado.gov/cdle/dwc. The Division of Workers' Compensation website is very informative and user friendly.

Employees who qualify for workers' compensation benefits cannot sue their employers in a federal or state district court using personal injury, negligence, or other "common law" theories of liability. This is because workers' compensation is considered an "exclusive remedy" for injury claims. An employee who is injured on the job, however, is not prohibited from suing his or her employer for violation of a federal anti-discrimination law such as the Americans with Disabilities Act (as amended) or Title VII (discrimination based on race,

age, gender, national origin, religion, etc.), or for sexual harassment, violation of the Family and Medical Leave Act, the Older Workers Benefit Protection Act, or the Age Discrimination in Employment Act.

The Colorado workers' compensation system is not easily understood by laypersons since it is governed by statutes, rules, and case law that are ever-changing and complicated. If you have questions about the workers' compensation system, call customer service at the Division of Workers' Compensation, or retain an attorney who specializes in workers' compensation.

10-2. Benefits Available

There are eight types of benefits available under the Colorado workers' compensation system:

Medical Benefits

An injured worker is entitled to all medical benefits that are reasonably necessary to cure or alleviate the effects of the industrial accident. Those benefits can include hospitalization costs, prescriptions, x-rays, surgery, physical therapy, medical transportation costs, prosthetic devices, bandages, and much more. Medical providers can only charge a certain amount for medical services and equipment, which is paid by the insurance company or self-insured employer. The injured worker does not make any co-payment. Medical benefits are available as long as necessary, sometimes even for life.

Temporary Total Disability

If a worker cannot work at his or her regular job at all, the worker is entitled to a wage replacement benefit known as temporary total disability (TTD). TTD is paid at the rate of $\frac{2}{3}$ of the worker's average weekly wage, up to a state maximum amount. The state maximum amount for TTD from July 1, 2018, through June 30, 2019, is \$987.84. These benefits are usually paid every two weeks. TTD lasts until the worker is at maximum medical improvement, released to regular employment, returns to work at full wage, misses a rescheduled doctor's appointment, or fails to return to an offer of modified duty.

Temporary Partial Disability

Temporary partial disability (TPD) benefits are paid when a worker returns to work earning less than his or her regular wage. In such a case, the worker is paid TPD by the following formula:

Average weekly wage at time of injury - average weekly wage after return to work $\times \frac{2}{3}$ = TPD rate.

For example, a worker who earns \$600 per week at the time of injury who returns to work half-time earning gross wages of \$300 per week would receive \$200 per week in temporary partial disability benefits (\$600 **minus** \$300 $\times \frac{2}{3}$ = \$200).

Bodily Disfigurement

Bodily disfigurement is paid in addition to other benefits when a worker is left with a scar, amputation, or other bodily disfigurement. Beginning July 1, 2018, a worker may receive up to \$5,229.18 for certain bodily disfigurements, and up to \$10,457.52 for more serious bodily disfigurements. The maximum amount available for bodily disfigurement increases each year. Bodily disfigurement can be admitted by the insurance company or self-insured employer, or an injured worker may submit photographs to an administrative law judge (ALJ) for evaluation. Alternatively, the injured worker may appear live before an ALJ at a disfigurement hearing.

Permanent Partial Disability

The purpose of permanent partial disability (PPD) benefits is to compensate the injured worker for anticipated wage loss due to the effects of an industrial injury. Injured workers are compensated for their permanent partial disability based on a formula that varies depending on whether the injury is to a specific body part or to the "whole person." The formula for injuries to specific body parts (knees, eyes, wrists) does not take into consideration the age or average weekly wage of the injured employee. An injury to the "whole person" (for example, back, neck, or hernia) does take into consideration age and average weekly wage. Since the formulas for calculating permanent partial disability are not easily understood, an injured worker should consult with the Division of Workers' Compensation or an experienced attorney to determine whether an insurance company has properly calculated his or her PPD.

Permanent Total Disability

If an injured worker is unable to earn any wages for the same or any other employer, he or she can collect permanent total disability (PTD) benefits. PTD benefits are potentially payable until the death of the injured worker. Such benefits are paid at the rate of 2/3 of the worker's average weekly wage, without a cost of living increase. If a worker is entitled to permanent total disability benefits, he or she may currently ask for a lump-sum payment of those benefits up to \$91,126.84. After the lump sum is paid, the remaining benefits due will be paid at a lower rate (amortized). The standard for proving entitlement to permanent total disability is rigorous, and it is very difficult to qualify for such benefits. An injured worker who turns down an offer of employment or vocational rehabilitation may not qualify for permanent total disability benefits. If an insurer can demonstrate that the worker has returned to work earning \$4,000 or more, permanent total disability benefits may end.

Vocational Rehabilitation

Vocational rehabilitation is not a mandatory benefit in the Colorado workers' compensation system. Insurers do offer vocational rehabilitation services on occasion, however, in order to avoid a determination of permanent total disability.

Death Benefits

Death benefits are paid to the dependents of a deceased employee whose death is related to his or her work injury. Benefits are payable at a rate that is 2/3 of the average weekly wage of the deceased worker, up to a state maximum. Dependent spouses are eligible for death benefits for life or, upon remarriage, for two years beyond the date of remarriage. Minor children are eligible for dependent benefits until the age of 18 or, upon full-time enrollment in an accredited institution of higher learning, until they are 21 years of age. If there are multiple dependents, all dependents share one amount. Death benefits are reduced by 50 percent of Social Security benefits received by the dependent(s).

10-3. Filing a Workers' Compensation Claim

There are three basic types of workers' compensation claims: **traumatic injury**, **occupational disease**, and **mental impairment**. A **traumatic injury** is an accidental injury that occurs at a specific time and place. An **occupational disease** is an injury due to the conditions at work that, over time, cause injury or disease. An example of an occupational disease is a carpal tunnel condition caused by repetitive motion at work. The third type of injury is **mental impairment**, which is an accidental injury that does not necessarily involve a physical injury and is due to an event or conditions of employment and that would cause symptoms of distress in a similarly situated employee. A mental impairment claim must be supported by evidence from a physician, it must result in either lost time from work or medical attention, and it must be primarily caused by some event or conditions at work. A mental impairment claim cannot be caused in full or in part by conditions of employment that are common to all fields of employment such as termination, promotion, suspension, or other disciplinary action at work.

If a worker feels that he or she has been injured because of work, the worker should notify the employer of the claim *in writing* within four working days. Alternatively, the employee may file a claim with the Division of Workers' Compensation by completing a form known as the "Worker's Claim for Compensation." This form, which can be found online at www.colorado.gov/cdle/dwc, is easily understood and can be completed by a lay person. If you need assistance in completing the Claim for Compensation, consult with a representative from the Division of Workers' Compensation or retain an attorney to file one for you. There are no filing fees associated with filing a claim for workers' compensation or any subsequent document.

Once the employer is notified of the work-related injury, the employer must offer the worker a choice of at least four medical providers (four physicians, four clinics, or a combination of physicians and clinics), unless the worker lives in a rural area. Failure to offer at least four treating providers within a short time after notice of the injury will result in the worker's right to choose his or her own provider.

Once the worker selects a medical provider, there are two ways to accomplish a change of treating physician. If the worker has not reached maximum medical improvement and no more than 90 days have passed after the date of injury, the worker may request a change of physician to one of the other medical providers offered at the time of injury. This request will automatically be granted. At any time, an injured worker may submit a written request for a change of treating physician to the insurance carrier. If the carrier does not respond within 20 days of the written request, the request will automatically be granted.

Once a claim is filed, the Division of Workers' Compensation notifies the worker's employer and the insurance company about the claim. The employer and its insurance company (known as "respondents"), then file a response to the Claim for Compensation indicating whether they will accept or deny your claim. If the respondents accept your claim, they file a "General Admission of Liability." If they deny your claim, they file a "Notice of Contest." If respondents deny the claim, a claimant may file an "Application for Hearing." Once an Application for Hearing is filed, the respondents will file a "Response to Application for Hearing" that indicates their position on issues the injured worker has endorsed, and endorsing their own defenses and offsets as appropriate. The Response to Application for Hearing will tell the injured worker a great deal about what the respondents think about the worker's claim.

Once a claim is filed, the parties may gather information from each other about the facts and theories known to them. This is called "discovery," and is usually conducted through questionnaires known as "Interrogatories and Requests for Production of Documents." Sometimes the parties will agree to take a deposition of an important witness, such as an employer representative or a doctor.

At any time after the Application for Hearing is filed, the parties may proceed to a prehearing conference to discuss procedural issues, or a settlement conference to try to resolve some or all of the issues in the case. Prehearings and settlement conferences are conducted by special judges known as Prehearing Administrative Law Judges. These judges have the power to make rulings concerning disputes about producing information, or when a hearing can commence. They also can help the parties settle the issues in dispute.

If the parties cannot resolve the issues on their own, they will proceed to a hearing before an Administrative Law Judge, known as a "merits judge." The merits judge, who is a specialist in workers' compensation claims, will decide all issues pertaining to the workers' compensation claim.

If a party disagrees with the decision of an Administrative Law Judge, it may appeal the order to an appellate body known as the Industrial Claim Appeals Office. A further level of appeal is the Colorado Court of Appeals. The ultimate appellate body for workers' compensation cases is the Colorado Supreme Court. Very few workers' compensation cases, however, are reviewed by the court of appeals or the supreme court.

10-4. Basic Forms

Most of the following forms can be found in the “Forms” section of the Division of Workers’ Compensation website at www.colorado.gov/cdle/dwc.

► **Workers’ Claim for Compensation**

This is a form that a claimant completes to give information concerning his or her claim. This form could suffice as the employee’s notice of injury that the employee is required to submit within four working days after an accidental traumatic injury, or 30 days from the “first distinct manifestation” of an occupational disease.

► **Notice of Contest**

This is a form completed by the insurance company or third-party administrator on behalf of the employer by which the respondents deny a claim. Sometimes the respondents specify a legal or factual basis for the denial, but often they simply indicate “pending further investigation.” In the latter case, a claimant should inquire about what information or documents the respondents need to complete their investigation.

► **Employer’s First Report of Injury**

For certain injuries, an employer is required to file an Employer’s First Report of Injury with its carrier within 10 days. The carrier or third-party administrator, in turn, will, as appropriate, file the Employer’s First Report of Injury with the Division of Workers’ Compensation to advise the Division and the injured worker about the claim.

► **General Admission of Liability**

Respondents admit for benefits on a form known as the General Admission of Liability. An injured worker does not need to respond to this notice, but he or she should review it carefully to make sure the respondents have admitted to all benefits that are appropriate.

► **Application for Hearing**

This is the form that any party to a claim can file if the party wants a hearing on an issue before an Administrative Law Judge. (Available from the Office of Administrative Courts, www.colorado.gov/dpa/oac.)

► **Response to Application for Hearing**

This form, usually filed by respondents, is used to advise the other side about their position pertaining to the issues endorsed on the Application for Hearing and to state any affirmative defenses or offsets they may have.

► **Order**

An order is the written decision of an Administrative Law Judge or any appellate body such as the Industrial Claim Appeals Office, the Colorado Court of Appeals, or the Colorado Supreme Court, or even the Director of the Division of Workers’ Compensation. If a party is dissatisfied with an order, he or she may appeal it within 20 days from the date on the certificate of mailing of that order. Failure to appeal an order within 20 days makes the order final and there is no further right to appeal.

► **Final Admission of Liability**

When respondents seek to close out most or all issues in the case, they will file a Final Admission of Liability. Injured workers should review the Final Admission very carefully, because they have only 30 days from the date on the certificate of mailing to object to the Final Admission of Liability. If they fail to object in writing within 30 days, their case will be closed with respect to the issues concerned.

► **Objection to Final Admission of Liability**

This is the form that must be filed by the injured worker within 30 days from the date on the certificate of mailing of the Final Admission of Liability or else the claim will be closed as to the issues noted in the Final Admission of Liability.

► **Notice and Proposal to Select an Independent Medical Examiner**

Either the claimant or respondents can advise the other side that they wish to have an independent physician review a determination of the treating physician with respect to maximum medical improvement or permanent impairment, or other medical issues as well. The "Notice and Proposal," as it is called in shorthand, must be filed within 30 days from the treating physician's determination of maximum medical improvement and permanent impairment or 30 days from the mailing date of the Final Admission of Liability.

► **Application for Division Independent Medical Examination (DIME)**

This form, which is used to apply for a DIME, will indicate whether a DIME physician has been negotiated, whether the Division of Workers' Compensation needs to give the parties a panel from which they can select a DIME physician, and what issues the parties want the DIME physician to address.

If the parties cannot negotiate a doctor before the DIME, the Division of Workers' Compensation will provide three names randomly selected from a computer program. The requesting party will strike one of those names and the nonrequesting party will strike another. The remaining physician will conduct the DIME.

Usually, a DIME costs \$675, but there is a recent trend by DIME physicians to charge \$1,000 for more complicated cases.

► **Request for Lump Sum Payment**

An injured worker can ask for a lump sum of up to \$10,000 of permanent disability benefits simply by writing the insurance carrier or a third-party administrator for a self-insured employer. If the worker wants the remainder of his or her award, up to \$91,126.84, paid in a lump sum, he or she must complete a "Request for Lump Sum Payment" form. The claimant must submit this form to the Division, which will usually enter an order for a lump sum payment and payments for the amortizing balance of benefits due.

10-5. Special Workers' Compensation Issues Pertaining to Seniors

► Permanent Partial Disability

If an injured worker's injury is to a specific part of the body (for example, eye, knee, or wrist), the amount of benefits received is calculated with a formula that has nothing to do with the person's age. If the injured worker, however, suffers a "whole person injury" to the neck, back, spine, head, or internal organs, the worker's benefits are calculated with a formula that does reflect their age. By means of a number known as the "age factor," a carrier determines a person's disability. In Colorado, older workers have lower "age factors" than younger people, and therefore they usually receive less in permanent partial disability benefits when they have a whole person injury.

► Permanent Total Disability

As described above in section 10-2, "Benefits Available," an injured worker who can prove that he or she cannot earn any wages from the same or any other employer can qualify for permanent total disability benefits. These benefits, which are measured by 2/3 of the worker's average weekly wage at the time of injury, are usually payable for life. The older a worker is at the time of injury, the higher the probability of qualifying for permanent total disability benefits.

► Apportionment for "Old Age"

The only means of reducing workers' compensation benefits because of age is use of the age factor (see above) in calculating permanent partial disability benefits. No other benefit may be reduced or paid differently for seniors. Apportionment may be available, however, when the effects of older age create a nonindustrial impairment that can be measured and subtracted out from the industrial impairment. Apportionment is a very complicated area of workers' compensation law, so injured workers should consult with the Division of Workers' Compensation or an attorney when they feel that respondents have unfairly apportioned out benefits in their case.

► Offsets

An injured worker's benefits may be reduced pursuant to a statutory formula when that worker receives unemployment compensation, Social Security disability benefits, Social Security retirement benefits, Public Employees' Retirement Association (PERA) benefits, or employer-funded disability or retirement benefits. The amount of the offset depends on the type of benefits received. In certain cases, the respondents may require the claimant to file for periodic disability benefits. Failure to do so may result in suspension of workers' compensation benefits.

► "Responsible for Separation from Employment"

In some cases, an injured worker may not receive temporary total disability benefits if an Administrative Law Judge determines that he or she is "responsible for separation from employment." If an employee violates an employer's rule, does not show up for work, or voluntarily leaves employment for reasons unrelated to the injury, the carrier may refuse to pay temporary disability benefits. If the rea-

son for separation is due to the injury, however, the carrier must pay full benefits. If seniors are scheduled to retire before or even after their injury, the carrier may take the position that they are "responsible for separation from employment," so the prudent worker is honest with the employer about the real reasons that he or she is unable to return to work.

► **Intoxication Penalty**

An older worker may have his or her temporary disability benefits reduced by 50 percent if, at the time of injury, he or she has a blood alcohol level of .10 or more, or if he or she has any non-prescribed controlled substance in his or her body. Seniors should be aware that usage of marijuana, whether for medical or recreational purposes, may result in reduction of benefits. The same is true if the older worker is using someone else's prescribed medication at the time of injury.

► **Pre-Employment Testing**

Because some older workers bring a history of prior injuries and reduced physical capacity, some employers are administering physical fitness tests between conditional job offers and job placement. Such tests are legal under the Americans with Disabilities Act (as amended) if properly conducted. A job applicant, regardless of age, is required to be honest about his or her physical condition at all stages of the application process. Willfully misleading an employer about an applicant's ability to perform the essential functions of the job may result in a 50 percent reduction of nonmedical benefits if the worker is subsequently injured.

► **Fitness for Duty Testing**

Both the Americans with Disabilities Act (as amended) and the Family and Medical Leave Act allow fitness for duty testing of certain employees within certain narrow guidelines. Like other employees, senior workers may be requested to demonstrate that they are "fit for duty" by completing medical questionnaires and physical examinations. Current employees have greater rights under the Americans with Disabilities Act, the Americans with Disabilities Act Amendments Act of 2008, the Older Workers Benefit Protection Act, and the Age Discrimination in Employment Act, so an employer must be careful in disciplining, demoting, or terminating a senior worker based on the results of a fitness for duty examination. The prudent employer will follow a clearly understood process for evaluation of accommodations for a senior employee who has difficulties successfully completing a fitness for duty examination.

► **Attorney Fees**

Because Colorado workers' compensation is complicated, injured seniors may need the assistance of an experienced attorney. Most attorneys offer services with a payment option of an hourly fee or a contingency fee. By statute, a contingency fee of 20 percent of contested benefits is presumed to be reasonable. Claimants are responsible for paying all expenses, including fees for DIMEs, medical records, and medical expert opinions. If a senior wants access to a list of experienced workers' compensation practitioners or has questions about the reasonableness of attorney fees and costs, he or she can call the customer service unit at the Division of Workers' Compensation at (303) 318-8700.

10-6. Resources

For additional information about the Colorado workers' compensation system, see:

- ▶ Division of Workers' Compensation website: www.colorado.gov/pacific/cdle/dwc.
- ▶ *Workers' Compensation Guide for Employees*, published by the Division of Workers' Compensation. Available online at the Division of Worker's Compensation website (www.colorado.gov/pacific/cdle/dwc) or in hard copy by calling the Customer Service Unit at the Division of Workers' Compensation: (303) 318-8700 or toll-free at (888) 390-7936.
- ▶ American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 5th ed. (rev. 2017).