

# **OVERVIEW OF LOUISIANA WORKERS' COMPENSATION LAW**

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**2010**

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## **I. THE SCOPE OF LA WC & THE PARTIES**

### **A. “Employee” & “Employer”**

1. Borrowed Servant
2. Independent Contractors
3. Statutory Employers
4. Successive Employers

### **B. Outside the Scope of Louisiana WC**

1. Retaliatory Discharge Claims
2. Intentional Acts
  - (a) Accidents deemed intentional
  - (b) Intentional injury
3. Intentional Torts (Weber v. State)

## **II. THE ACCIDENT/INJURY**

### **A. “Accident”**

1. Statutory definition: an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, . . . and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration.
2. Louisiana OWC courts usually require testimony regarding an “event” only before they will hold that an “accident” has occurred.

### **B. Heart Attacks and Strokes**

1. Must result of extraordinary and unusual physical work stress.
2. The physical work stress must be the predominant & major cause.
3. Must not be some other cause, e.g. mental stress, smoking, etc.

4. Evidence must be clear and convincing.

### **C. Mental Injuries**

1. Must have diagnosis listed in the most recent DSM by a licensed psychiatrist or licensed clinical psychologist.
2. Evidence must be clear and convincing.
3. If mental injury is the result of work related stress the event must be the result of a sudden, unexpected and extraordinary stress related to the employment.

### **D. Aggravation of Pre-existing Problem & SIF Recovery**

1. Employer/carrier are liable for aggravations of pre-existing conditions.
2. Employer/carrier may obtain Second Injury Fund (SIF) reimbursement of medical & indemnity benefits paid if:
  - a. the employer was aware of the previous injury/disability before the OJI; and
  - b. a claim is filed with the SIF Board within one year of the first WC benefit payment.
3. Deductibles in the amount of \$7,500 if the first \$10,000 for medical and a 102 weeks for indemnity apply to SIF reimbursement claims arising out of OJI's which occur before 7/2/04.
4. However, deductibles for SIF reimbursement claims arising out of OJI's which occur on or after 7/2/04 increase to \$25,000 for medical and a 130 weeks for indemnity.
5. The SIF Board will not reimburse the employer/carrier for settlement payments without its advance approval of the compromise terms.

### **E. Off the Job Accident/Injury which Aggravates OJI**

1. The employer and carrier in general are liable for continued benefits even if the aggravation is not job related, although they may not be liable for the aggravation.
2. Employer and carrier may be entitled to claim contribution from negligent

third parties and/or subsequent employers.

## **F. Occupational Diseases**

1. Must be peculiar to the occupation.
2. The occupational disease claim is not compensable unless it is filed within one year of:
  - a) diagnosis,
  - b) manifestation, and
  - c) employee knowledge that disease is work related.
3. Carpal Tunnel Syndrome (CTS) is specifically covered.
4. Statutory presumption that disease is **not** the result of employment applies if the claimant is employed by insured for less than twelve months/one year, but can be overcome by simple preponderance of the evidence.
5. May be able to successfully deny compensability if disease is present but employee does not reveal it in post hire medical history questionnaire (§1208.1).

## **III. STATUTORY DEFENSES**

### **A. Outside Course and Scope of Employment**

1. Injury to participant in “horseplay” is not compensable.
2. Injury resulting from altercation over purely personal matters is not compensable.
3. Injuries that occur “off the clock” and away from the work site are generally not compensable unless:
  - a) the employer benefits from the activity,
  - b) the employer sponsors and/or funds the activity,
  - c) there is an increased risk to employee versus general public and/or
  - d) there is no third party tort claim available.

## **B. Failure to Reveal Previous Injury/Disability (Section 1208.1)**

1. The employee's right to benefits may be forfeited if:
  - a) the OJI is an aggravation or a reinjury and the employee failed to reveal the previous injury/disability on a medical history questionnaire which is unambiguous and in the required statutory format, and
  - b) the injury/condition was not revealed on the questionnaire directly relates to the new injury, and
  - c) the failure to reveal the previous injury/condition adversely affects the employer's SIF claim.

## **C. Intentional Misrepresentation/Fraud (Section 1208)**

1. The employee is prohibited from recovering WC benefits of any kind if it is established that he or she willfully made false statements or representations for the purpose of obtaining WC benefits.
2. In addition to forfeiture of all benefits, the La. Act also provides for the assessment of both civil and criminal penalties in the case of a fraudulent claim.
3. The OWC judge has discretion to order restitution/repayment of all benefits in the case of fraudulent claims up to the date the employer or carrier discovered the fraud.
4. Section 1208 also provides for the assessment of civil and criminal penalties against the employer and/or the carriers' representatives if it is determined that false statements or representations were made for the purpose of defeating the subject claim.
5. The anti fraud section applies not only to the employee, the employer and the carrier but to all individuals who directly or indirectly participated in the violative conduct.

## **D. Employees' Intoxication**

1. If post accident drug testing demonstrates a blood alcohol level of .1 or greater and/or the presence of any non-prescribed controlled substances, it is presumed that the employee was intoxicated at the time of the injury and no benefits are due.

2. However, evidence of intoxication typically will not be considered unless the drug testing was performed pursuant to a written and promulgated drug testing program of the of the employer.
3. If the employee refuses to participate in the drug testing a statutory presumption of intoxication is in effect.

#### **E. Receipt of Unemployment Benefits**

1. The La. Act provides that the injured employee is not entitled to receive WC benefits while he or she is also receiving state unemployment compensation benefits,
2. State unemployment benefits typically terminate after 26 weeks/6 months.

#### **F. Initial Aggressor Defense**

If the employee is injured in a physical altercation he or she is not entitled to benefits if he or she was found to be the initial aggressor in the altercation.

#### **G. Incarceration**

La. claimants are not entitled to benefits during any periods of incarceration unless they are able to prove they have dependants who rely on the compensation benefit for support.

#### **H. Compromise of Third Party Suit without Consent**

1. If the employee settles a third party lawsuit arising out of the OJI without the express written consent of the employer, the employee forfeits the right to WC benefits from that point forward.
2. However, the employee has the right to buy back the right to future benefits for the amount of benefits paid not to exceed 50% of the net recovery in the third party claim.
3. If the employer/carrier has intervened in the third party suit and the employee settles without the consent of the employer/carrier, the defendant in the third party action may be liable for all benefits paid to date.

## IV. PENALTIES AND ATTORNEYS' FEES

### A. Failure to Provide Medical Reports

A penalty in the amount of \$250 per report plus attorneys' fees may be awarded if the employer/carrier fails to provide the employee with a copy of medical records/reports within 30 days of the written request for the same.

### B. Failure to Pay Benefits in a Timely Manner

1. TTD and SEB are not due for the first week of disability unless the disability continues for six weeks or longer in which case the first week must be paid.
2. TTD, PTD and SEB benefits must be initiated within 14 days of injury or knowledge of entitlement to benefits, unless reasonably controverted.
3. PPD benefits must be paid within 30 days after receipt of medical documentation establishing entitlement, unless reasonably controverted.
4. Once initiated, all indemnity benefits are due thereafter on a weekly or bi-weekly (TTD, PTD & PPD) or monthly (SEB) basis, unless reasonably controverted.
5. Medical benefits are due and payable within 60 days of receipt, unless reasonably controverted.
6. Failure to pay indemnity and/or medical benefits in a timely fashion and/or an inappropriate discontinuance of those benefits may result in liability for a penalty equal to \$50 per day up to \$2,000 per violation and  $\times$  \$8,000 if multiple violations or 12% of the amount past due, whichever is greater, **plus** reasonable attorneys' fees.
7. Improper failure to consent to the employee's request to select a treating physician or to change physicians may also subject the employer/carrier to a award of penalties & reasonable attorneys fees.
8. An award of penalties and attorneys fees can be avoided if the employer/carrier reasonably controverts the claim or if the failure to pay and/or late payment results from conditions over which the employer /carrier has no control.

### **C. The Failure to Timely Pay a Final Judgment**

The penalty for failure to pay off a final judgment within 30 days is \$100 per day up to \$3,000 or 24% of the total judgment with interest, whichever is greater, plus attorney fees.

## **V. CALCULATION OF AVERAGE WEEKLY WAGES & WEEKLY/MONTHLY BENEFIT AMOUNT**

### **A. Average Weekly Wage (AWW)**

1. Hourly employees: See discussion below.
2. Employees paid monthly:  $AWW = \text{monthly earnings} \times 12 \div 52$
3. Employees paid annually:  $AWW = \text{annual salary} \div 52$
4. Seasonal employees work (< 44 weeks per year):  $AWW = \text{annual income} \div 52$ . If not employed for at least one year pre accident, a formula utilizing average income of employees in the same or similar class is used.
5. Piecework commission or other:  $\text{Gross wages in 26 weeks pre accident} \div \text{number of days actually worked} \times \text{average number of days worked per week}$ .

### **B. AWW for Regular Hourly Employees Detailed**

1. If hired to work full time (generally 40 hours or more per week):  $AWW = \text{hourly rate} \times \text{total hours or 40 hours, whichever is greater, in each of the 4 full weeks pre-accident} \div 4$ .
2. If hired to work at least 40 hours per week but does not by his own choice,  $AWW = \text{total earnings in 4 weeks pre-accident} \div 4$ .
3. If hired as a "part time" employee and position customarily provides less than 40 hours per week,  $AWW = \text{hourly wage rate} \times \text{total hours worked in 4 weeks pre-accident} \div 4$ .

### **C. Hourly Employees with Overtime [not specifically provided for in statute]**

If hired to work at least 40 hours per week and if paid an overtime rate,  $AWW = \text{base hourly rate} \times 40 + \text{overtime hourly rate} \times \text{overtime hours worked in 4 weeks}$

each of the 4 weeks pre-accident ÷ 4.

#### **D. Moonlighting Employee**

If injured while working for employer “A” while moonlighting for employer “B” and OJI prevents RTW with “A” and “B”, AWW = hourly rate working for employer “A” x total hours worked in each of the 4 weeks pre-accident for both employers or 40 hours, whichever is greater, ÷ 4.

#### **E. Fringe Benefits**

The La. Act provides that no amount shall be included in the calculation of AWW “which is not taxable to an employee for federal income tax purposes,” although tax deferred amounts withheld at the request of the employee from wages shall be included.

#### **F. Weekly Rates & Application of Max/Min Rate Table \***

1. Weekly rates are paid for Temporary Total Disability (TTD), Permanent Total Disability (PTD) and Permanent Partial Disability (PPD).
2. Weekly rates (in general) = AWW X .6667 unless the result is greater than the max rate or less than the min rate shown on the table.
3. If the AWW X .6667 is greater than the max rate shown on the table, the weekly rate is the max shown on the table.
4. If the AWW X .667 is less than the min rate shown on the table, then the AWW is the weekly rate to be paid.
5. The date of injury determines which max/min rate to be applied from the table.

#### **G. Calculation of Supplemental Earnings Benefits (SEB) Rate**

1. SEB should be paid monthly. SEBs = .6667 X the difference between pre accident average monthly wages (AMW) and post accident average monthly wages (AMW), subject to the max/min table.
2. Use the weekly figures from the max/min table as a basis to determine the maximum and minimum monthly SEB payments applicable to the claim at issue.

## **H. Recommended SEB Strategy**

1. The statute provides that if the employee is not totally disabled, he or she is entitled to SEB benefits *only if the employee proves that he or she is not physically able to earn 90% or more of the pre accident AWW.*
2. The La. OWC courts generally find that an injured employee is entitled to SEB benefits if the employee is not specifically offered a job for pre accident wages by the insured employer and if the employee testifies that he or she made a reasonable attempt to look for work which is within his or her restrictions.
3. A labor market survey by a licensed vocational rehabilitation counselor with job descriptions approved by the treating physician is recommended in questionable cases to reduce or eliminate SEB exposure.
4. In order to fall within the requirements of the statute, the employment opportunities described in the LMS should be located within “the employee’s or the employer’s community or reasonable geographic region”.
5. The La. courts have held that whether the employment opportunity is realistic or not depends upon not only the physical requirements of the job but also employee’s age, experience, education, training, and other factors.

## **VI. PERMANENT PARTIAL DISABILITY/SCHEDULED LOSS BENEFITS [§1221(4)]**

### **A. Amputation of Member or Loss of Use**

1. Section 1221(4) provides a detailed listing of the scheduled losses provided for in the La Act. PPD awards are due for anatomical loss of use or function or amputation of the listed body parts/members.
2. Benefits are awardable only if the anatomical loss is to one of the listed members as established by the MD under the most recent edition of the *AMA Guides to the Evaluation of Permanent Impairment.*
3. The amount of PPD benefits due equals the number of weeks awardable for a total loss under the statute times the percentage loss.
4. For example, if the statute provides for payment of 60 weeks worth of benefits for the total loss of use of the member, and the rating issued by the doctor under the *AMA Guides* is 50%, thirty weeks of benefits would be

owed as a scheduled loss. (60 X 50%=30)

5. PPD benefits are payable whether or not the employee has returned to work and no matter what he is earning post accident.
6. The employer/carrier is entitled to take a credit towards the total number of weeks owed for a PPD claim to the extent of PTD, TTD, or SEB benefits paid.

**B. Scarring [Subsection (p)]**

- Benefits may be awarded for “serious and permanent disfigurement” not to exceed 100 weeks of benefits. The number of weeks awardable is discretionary with the OWC judge.

**C. Abdominal Cavity System Injuries [Subsection (p)]**

- Where the function of the respiratory, gastrointestinal or genito-urinary system is seriously and permanently impaired, benefits not to exceed 100 weeks are awardable.

**D. Hernias [Subsection (r)]**

- Benefits are awardable for an inguinal hernia only if:
  - a) The OJI caused the hernia,
  - b) The OJI was reported “promptly to the employer”; and
  - c) The employee was treated within 30 days.

**E. Catastrophic Losses [Subsection (s)]**

- A lump sum \$30,000 benefit is owed in the case of paraplegia, quadriplegia, double amputation or severe burns.

**F. Hearing Loss [Subsection (p)]**

- Where the employee suffers a permanent hearing loss solely as a result of a single traumatic accident up to 100 weeks of benefits may be awarded.

## **VII. NON SCHEDULED LOSS BENEFITS**

### **A. Temporary Total Disability (TTD)**

1. Under the strict wording of the statute, TTD ceases “when the physical condition has resolved itself to the point that a reasonably reliable determination of the extent of the disability may be made AND continued, regular treatment is not required,” i.e. when the employee is at MMI.
2. In order to limit exposure for TTD benefits it is helpful to re-establish that the employee is not *totally* disabled from *any* employment through medical reports such that the employee can be converted to SEB benefits or benefits can be terminated.

### **B. Permanent Total Disability (PTD)**

1. PTD benefit are payable for the life of the employee.
2. Most if not all PTD employees are also receiving Social Security Disability Income Benefits and therefore analysis of a possible reverse offset should be made.
3. Most if not all PTD employees are also either receiving Medicare or are Medicare eligible and therefore Medicare approval of any full and final settlement is required such that a Medicare Set-aside (MSA) may also be necessary.

### **C. Supplemental Earnings Benefits (SEB)**

1. SEB benefits are payable for a maximum of 520 weeks/10 years.
2. For cases arising after 1996, the employer/carrier is entitled to take a credit towards the 520 weeks max exposure for the number of weeks that TTD or other weekly benefits have been paid.
3. While SEB benefits may be terminated at the point the employee “retires”, the La. courts have rarely upheld benefit termination on this basis. However, if terminated, a minimum of two years (104 weeks) are payable in that case.

### **D. Death Benefits**

1. Death benefits to the surviving spouse terminate on the death or remarriage

of the surviving spouse although in the case of remarriage, two (2) years of benefits are due in a lump sum.

2. Death benefits are payable to a mentally incapacitated child as long as the incapacity exists.
3. Death benefits to a minor terminate when said child dies, marries or reaches the age of 18 or if enrolled as a full time student, until he or she graduates or reaches the age of 23.

## **VIII. OFFSETS, REDUCTIONS & DEDUCTIONS**

**A.** A direct offset for SSDI benefits is no longer available in Louisiana.

**B. SSDI Reverse Offset**

1. A reverse offset may be available where the employee is PTD and is receiving SSDI benefits.
2. OWC approval is required before the employer/carrier may invoke a reverse offset.

**C. Social Security Old Age Benefits Offset Not Available**

1. Previously available only if employer funded portion of old age benefits plus WC benefits exceeds 66 2/3% of AWW. Has since been removed from the La. Act as an unconstitutional age based discrimination.

**D. Disability Insurance Offset**

1. Applicable only if employer funded portion of disability insurance benefit plus WC benefits exceed 66 2/3% of AWW.
2. Prior judicial approval of this offset is recommended.

## **IX. MEDICAL BENEFITS**

**A. General Rule**

- The La. WC claimant is entitled to “all necessary medical, surgical, hospital services and medicines or any non medical treatment recognized by the state’s laws as legal” (e.g. chiropractors).

## **B. Mileage**

- The employer/carrier is also responsible for the actual mileage expenses incurred by the employee for travel in order to obtain the medical services or medicines (36 cents per mile as of 7/1/05, See Max/Min Table with Mileage Rate attached as Appendix "I").

## **C. Limit on Non Emergency Care Not Pre-Authorized**

1. The La. act establishes a \$750 per provider limit on non emergency care without prior approval by the employer/carrier.
2. This statute provides that if the health care provider fails to obtain the pre-authorization, all charges over the \$750 limit shall not be an enforceable obligation against the employer, the carrier or the employee.

## **D. Emergency Care**

- The \$750 limit regarding pre-authorization does not apply in an emergency care situation.

## **E. Reimbursement/Fee Schedule**

- Under the La. Act, where employer/carrier has accepted compensability, the health care providers are limited to the amounts provided for in the La. Workers' Compensation Reimbursement/Fee Schedule.

## **F. Where Compensability is Denied**

1. The pre-authorization requirement does not apply in situations where the employer/carrier has denied compensability.
2. Where there is a denial of compensability neither the pre-authorization nor the fee schedule apply.

## **G. Claims by Health Care Providers**

1. The La. Workers' Compensation Act was amended in 1999 to provide that treating health care providers have a right of action within the La. OWC system to file claims against employers/carriers for outstanding fees.
2. The employee need not have a pending claim for the HCP to pursue payment, penalties and attorney's fees.
3. Effective 8/15/99, the state funded Medicaid program also has a right to

recover Medicaid payments made on behalf of the employee, from the employer/carrier.

## **H. Choice of Physician**

1. Both the employee and the employer/carrier are entitled to an evaluation of the claimant by a physician of their own choosing.
2. The La. employee may also select additional treating physicians provided they are in different fields or specialties. The employer/carrier has the same right.
3. The employee however must obtain prior consent from the employer/carrier before changing physicians within a particular field or specialty.
4. Generally, the La. courts will allow claimants to change physicians provided it does not appear they are “doctor shopping”.
5. Employer/carrier should require employee to sign a choice of physician form if employee continues to treat with a provider who is not his or her choice initially.

## **I. State IME**

1. If a dispute between physicians arises as to the “condition of the employee,” either party may request a state appointed independent medical examination.
2. If the matter is not in litigation, the OWC central staff will select the physician for the IME.
3. If the matter is in litigation, the parties may request a state appointed IME from the presiding WC judge.
4. The state appointed IME is required to produce a comprehensive verified report within 30 days of the examination and said physician is not subject to subpoena for trial or a deposition.

## **J. Refusal to Submit to Employer’s M.D.**

1. If the employee refuses to submit to the medical examination at the request of the employer and/or to a state appointed physician, the employee’s right to receive continued benefits may be suspended until the examination takes place provided the employee is given 14 days advance written notice of the examination.

2. Where the employee refuses to submit to such an examination, the employer/carrier is entitled to an expedited hearing before an OWC judge, if the matter is already in litigation or not, upon written motion.

## **X. REHABILITATION**

### **A. Requirements**

1. If the employee is unable to earn post accident wages equal to his pre accident wages, the employer/carrier must provide “prompt rehabilitation services”.
2. An employee claiming rehabilitation is entitled to 26 weeks of rehab, at a minimum, with TTD benefits during that time period.
3. If the employee refuses to cooperate with the employer/carriers’ rehabilitation efforts, the employee’s weekly compensation benefits may be reduced by ½ for each week during the period of such refusal.

### **B. Recommended Rehab Strategy**

1. If potential future exposure for indemnity and medical benefits is not insignificant, it is recommended that aggressive rehabilitation be assigned to reduce exposure and/or to foster a reasonable “full and final” settlement of the claim.

## **XI. Selected Office of Workers' Compensation Forms/Publications (Available for downloading and printing at [www.laworks.net](http://www.laworks.net))**

- A. Notice of Payment LDOL-WC 1002** Form mailed to OWCA when the first compensation payment is made and within 10 days of modification/suspension of such payment, a change to SEB, or the payment of a death benefit
- B. Stop Payment LDOL-WC 1003** Form mailed to OWCA within 30 days of the closure of the claim. It should include all indemnity payments and expenses related to the claim
- C. Request for Social Security Benefits LDOL-WC 1004** Form used to gather information from the Social Security Administration and to calculate the amount of any offset (workers’ compensation)

- D. **Employer's Report of Injury or Illness - Form 1007** LDOL-WC 1007 First report of injury form that must be mailed to OWCA by the employer within 10 days of their knowledge of an occupational injury or illness
- E. **Disputed Claim for Compensation - Form 1008** LDOL-WC 1008 Form to be filed with the Workers' Compensation district office when there is any disputed issue in a claim
- F. **Request for Independent Medical Exam - Form 1015** LDOL-WC 1015 Form used to request that an independent medical examination be ordered by the Director of the OWC
- G. **Employee's Monthly Report of Earnings - Form 1020** LDOL-WC 1020 Form filed monthly with the employer's insurer by the injured worker to report any earnings (Workers' compensation)
- H. **Certificate of Compliance - Form 1025ee** LDOL-WC 1025. ee Form filed by Injured workers explaining rights and responsibilities while receiving workers' compensation benefits and penalties for failure to comply
- I. **Doctor Choice Form LDOL-WC 1121** This form explains an injured employee's right to select his treating physician
- J. **Average Weekly Wage Computation** AWW Computation Instructions for computing an employee's average weekly wage (workers' compensation)
- K. **Notice of Claim with Second Injury Fund** SIB Form A Form to be completed and submitted by the insurer, self-insured employer, or third party administrator, along with documentation listed on the form with each new claim filed









