

NEVADA WORKERS' COMPENSATION CHRONICLE



Department of Business & Industry (B&I)

Division of Industrial Relations (DIR)

A Publication of the Workers' Compensation Section (WCS)

Spring Edition (Mar. – May 2011)

This newsletter is not intended to provide legal advice to the reader. Legal opinions or interpretations of statutes and regulations referenced should be sought from legal professionals.

WHY DO MY FAMILY MEMBERS NEED WORKERS' COMP?

A common question WCS receives comes in many forms but is basically "Does an employer have to provide workers' compensation coverage for family members working at his business as employees?" A short recap of information found in the [Nevada Employer's Guide to Workers' Compensation](#) can be found at: <http://dirweb.state.nv.us/wcs/Brochures/employer.pdf>

Employers who have one or more employees must provide workers' compensation insurance coverage, unless excluded by law. Some employees are excluded by [NRS 616A.110](#) due to unique criteria. Employment exempt from workers' compensation insurance coverage requirements includes:

- Employment related to those interstate commerce entities that are not subject to the legislative power of the State of

Nevada.

- Employment covered by private disability and death benefit plans which comprehend compensation payments of equal or greater amounts than those provided in [NRS 616](#) and which have been in effect for one year prior to July 1, 1947;
- Employees who are brought into Nevada on a temporary basis and who are insured in another state if extraterritorial coverage provisions are in effect with the other state. ([NRS 616B.600](#))
- Casual employment (employment lasting not more than 20 days and having a total labor cost of less than \$500) is exempt if employment is not in the course of trade, business, profession or occupation of the employer.

Construction trade employers are always required (continued on page 4)

THE COMING AND GOING RULE

A question addressed periodically in this newsletter is "What about coming and going" in workers' comp law? Nevada's workers' compensation statutes state that if an employee who is acting in the course and scope of his or her employment is injured that worker is entitled to compensation. Most injuries occur on a specific job site or at the business' location. However, the accidents that occur in other places raise thorny coverage questions. A few years ago, the Nevada Supreme Court elaborated on Coming and Going, especially as related to "special errands" in the case of *Bob Allyn Masonry v. Murphy*.

Basics of Coming and Going

In most cases, if you commute to work and you make it to the company's parking lot, your coverage begins then. Likewise when you leave work, you are covered until you leave the lot. Here are some examples of the basic coming and going rule in workers' compensation:

If your boss sends you on an errand such as going to the bank or the office supply store, then you are covered the entire time you are gone unless you deviate from that errand and take care of some personal business, such as picking up your dry cleaning or stopping by the grocery store. These are questionable deviations.

If a salesman in a company car is visiting clients and he's (continued on page 3)

Mileage Reimbursement Change for 2011

Effective **January 1, 2011**, standard mileage for transportation incurred while using a private vehicle for official state business increased from 50 cents per mile to **51 cents** per mile. Per [NAC 616C.150](#): Under appropriate conditions, reimbursement for the cost of transportation for an injured employee must be computed at a rate equal to the mileage allowance for state employees. To minimize any underpayments of mileage reimbursements, all adjusters should note this change. <http://dirweb.state.nv.us/wcs/mileage.pdf> *



HOT TOPIC

PPD Recalculation Explained

March 2011 marks one year since I joined the DIR team as the Southern District Manager. Big thanks go to the experienced, professional DIR staff who have made my transition so smooth and have worked with me to improve the way we do audits, enforce coverage compliance, store information and carry-out our regulatory duties. Also, regulated stakeholders have been very helpful in increasing our public outreach and on-site training. In fact, an issue that has surfaced in office visits and WCSHelp e-mails is confusion about Permanent-Partial Disability present-day value recalculation.



When making a PPD award offer, the third-party administrator or insurer must be aware that the date the injured employee elects the award is the effective date of the award calculation. The determining factors for the calculation of an award in a lump sum are the year and month of the injured employee's birth date and the year and month they elected the award in a lump sum. Pursuant to [NRS 616C.495 \(5\)](#), payment of a lump sum must be equal to the present value of the compensation awarded, less any advance payment or lump sum previously paid. Therefore, once the injured employee elects the award in a lump sum, the award calculations must be brought current through the end of the month prior to the date of the election.

In cases where (continued on page 3)

- ① Family Members Covered under WC
- ① Coming & Going Rule
- ① 2011 Mileage Reimbursement Change
- ① Hot Topic: PPD Recalculations
- ② Confusion Corner: Drug Testing
- ② NAIW: Measuring Success
- ③ Form Focus—C-3s
- ④ Insurer Reporting: Occ Disease Mandatory
- ④ Spring Training: March - May 2011
- ④ WCS Contact Information
- ④ State Holiday Office Closures

CONFUSION CORNER

Workers' Comp &
Drug Testing



Nevada Attorney for Injured Workers



Measuring Success

A question came up at a recent training session suggesting a misunderstanding in the Nevada Workers' Compensation community that appears to be fairly widespread: "How long after an employee reports an injury must he or she submit a valid drug test that can be used in the acceptance or denial of that claim?"

This question seems to be a straightforward query about drug testing and the workers' comp statutory timeline. What makes the question even more beguiling is that most stakeholders in the Nevada Workers' Compensation System have some familiarity with **NRS 616C.230** which covers grounds for denial, reduction or suspension of compensation; and evidence of and examination for use of alcohol or controlled substance.

Among other provisions, NRS 616C.230 states:

1. Compensation is not payable pursuant to the provisions of [chapters 616A to 616D](#), inclusive, or [chapter 617](#) of NRS for an injury: ...

(d) Proximately caused by the employee's use of a controlled substance. If the employee had any amount of a controlled substance in his system at the time of his injury for which the employee did not have a current and lawful prescription issued in his name or that he was not using in accordance with the provisions of [chapter 453A](#) of NRS, the controlled substance must be presumed to be a proximate cause unless rebutted by evidence to the contrary.

Also, regarding testing NRS 616C.230 states:

2. For the purposes of paragraphs (c) and (d) of subsection 1:

(a) The affidavit or declaration of an expert or other person described in [NRS 50.315](#) is admissible to prove the existence of any alcohol or the existence, quantity or identity of a controlled substance in an employee's system. If the affidavit or declaration is to be so used, it must be submitted in the manner prescribed in [NRS 616C.355](#).

Every agency of state government measures its efforts at performing its core functions. According to the statutes ([616A.435](#)) creating the office of the Nevada Attorney for Injured Workers (NAIW), the agency was created to represent injured workers without charge and upon appointment by the Appeals Officers of the Hearings Division. In addition, the statutes provide for NAIW to give advice to the public regarding the rights of injured workers and the procedures for enforcing those rights. Thus, the agency has two core functions: representing injured workers with compensation claims and providing information to the public about the process. The agency measures its success in performing these core functions by constantly reviewing many statistics.



The staff at NAIW handled over 4,700 inquiries for information from the public in the six month period between July 2010 and December 2010. Our legal research assistants manning the phones take calls eight hours a day, five days a week, in Spanish and English, and pride themselves on getting nearly all of the calls returned and answered the same day they are received. They are intimately familiar with procedures in the workers' compensation arena and follow up most calls by mailing the caller printed material for future use. These assistants also maintain the agency's website which receives approximately 1,300 visitors each month, on average.

The office of NAIW opened 755 new cases in the six month period from July through December. This number includes cases appointed by the Appeals Officers in Carson City and Las Vegas and it also includes cases opened by the agency in the state district courts and in the Nevada Supreme Court. The caseload is spread among six lawyers in Carson City and eight lawyers in Las Vegas, and is in addition to the open cases each lawyer carried from before July of 2010.

The initial proceedings in the Hearings Division occur before the Hearings Officer. These are generally informal proceedings and the injured worker frequently does not have an attorney present. However, the Appeals Officer level is more formal. Quite often expert medical evidence is presented and the record created in those hearings becomes the record on appeal. Many injured workers retain private attorneys to represent them before the Appeals Officers. However, for those claimants who wish to be represented but do not retain private counsel, the Appeals Officer can appoint an attorney from NAIW. In the six-month period recently studied, the fourteen lawyers in the agency received appointment of more than 30% of the cases filed with the Appeals Officers in Las Vegas and more than 40% of the cases filed with the Appeals Officers in Carson City. This is a substantial percentage of the cases at the Appeals Officer level given the total number of private attorneys available for claimants.

Looking at the raw number of cases opened or the percentage of the Appeals Officers' cases assigned to NAIW does not, however, tell the complete story. The value of the services provided must also be considered. One way to measure that service is the cost the clients saved by using NAIW attorneys as opposed to retaining private counsel. Although we do not charge for our services, we do keep track of the hours we spend on each case. If a client were to retain an attorney for handling a workers' (continued on page 3)

(b) When an examination requested or ordered includes testing for the use of alcohol or a controlled substance, the laboratory that conducts the testing must be licensed pursuant to the provisions of [chapter 652](#) of NRS.

However, despite the presumption of proximate cause and details verifying the presence of alcohol or a controlled substance, there is no explicit drug testing timeline in Nevada's workers' compensation statutes. Nor is there a legal require-

ment that an injured employee submit a drug test result.

In fact, when it comes to drug testing, workers' comp considerations are secondary to personnel policies. In most cases, the company's human resources department needs to have well-understood drug testing policies and programs already in place prior to the injury before a worker can be compelled to submit to a drug test. Ideally, the worker will have agreed to these policies in (continued on page 3)

(Hot Topic, cont. from page 1)

there is no response to the PPD award offer or the injured employee appeals the offer, and the TPA or insurer elects to initiate forced PPD installment payments, then at a later date the employee elects the award in a lump sum, the award must be re-calculated to the present day value by using the end of the month prior to the lump sum election.

Also, in cases where the injured employee initially elects the award in installment payments and then years later decides to take the remainder of the balance in a lump sum, the award must be re-calculated to the present value using the end of the month prior to the date of the election as the catalyst for the calculation. The previous amount of the award that has already been paid must be deducted from the new amount and the injured employee is paid the difference.

Those with questions on this topic or any other regulatory matter are welcome to contact me directly at **702-486-9105**; or e-mail ssayegh@business.nv.gov

Suhair Susan Sayegh,
WCS, Southern District Manager

(Confusion Corner, cont. from page 2)

writing during the orientation phase of employment. Human resources departments have the latest information on employer and employee rights regarding drug testing.

As a reminder, even though there is no statutory timeline for testing for controlled substances, per **NRS 616C.065** insurers still have only 30 days after receiving the C-4 Form to accept a claim, begin payment and provide required notification or deny a claim and provide required notifications. *

WCS EDUCATION COMMITTEE

- Mike Brooks, Chair, WCS
- Suhair (Susan) Sayegh, WCS
- Dock Williams, WCS
- Christi Mosher, Genex
- Kelly Spina, Employers
- Gary Watson, NAIW
- Cindi Rivera, Certified Vocational Srvc.
- Yvette Bouldin, York Claims Service



WCS Mission Statement

The purpose of the Workers' Compensation Section (WCS) is to impartially serve the interests of Nevada employers and employees by providing assistance, information, and a fair and consistent regulatory structure focused on:

-  Ensuring the timely and accurate delivery of workers' compensation benefits.
-  Ensuring employer compliance with the mandatory coverage provisions.

(NAIW, cont. from page 2)

compensation claim, the client might expect to pay \$200 per hour for the attorney's time. Given the total number of hours NAIW attorneys spend on their cases each year, the value of that service when measured at \$200 each hour can exceed \$3 million.

Another way to measure the success of the agency is to look at the value of the award received by the client at the conclusion of the case. Depending on the nature of the case, the client may get a small medical bill paid, or get an operation costing thousands of dollars, or get a large settlement for a lifetime disability, or receive substantial benefits as the surviving spouse of a deceased worker. Over the course of a year, the value of these "wins" can be calculated in the millions.

Statistics also track how quickly the cases resolve, how many continuances are requested, how many cases settle without going to hearing, and how many cases each attorney is carrying. Statistics, though, do not tell the whole story. Most important in measuring the success of NAIW is the satisfaction of our clients. Our clients come to us in very real need of help. For many they are physically injured and for the first time they are at odds with their employer. Getting each client all the benefits to which they are entitled promptly and with as little stress as possible is true measure of success for each of NAIW's 31 employees.

Evan Beavers,
Nevada Attorney for Injured Workers
<http://naiw.nv.gov/>

FORM FOCUS: C-3s



TPAs Delay Claims Waiting For C-3s

[NRS 616C.045](#) describes in detail an employer's requirement to file an employer's report of industrial injury or occupational disease on a form prescribed by the Administrator. That form is the C-3 – this basic fact is well-known. However, it's come to the attention of the DIR/WCS staff that some insurers and third-party administrators are delaying action on claims while awaiting receipt of a C-3 form. This practice is not supported by any statute or regulation and, in fact, contravenes the intent of NRS 616C.065 which lists an insurer's duties and a 30-day deadline upon receipt of a C-4 claim form. Delays caused awaiting C-3s will not be considered reasonable and as such a late insurer or TPA is liable for a benefit penalty three times the original payment due. *

(Coming & Going, cont. from page 1)

involved in a car accident during the day, no question, he's covered. But if he's allowed to take the car home at night and on weekends, then is he covered if the accident occurs while he is going to the local 7-Eleven to get a Slurpee? Probably not! But what if that 7-Eleven is also a client of his? Then he might also be covered.



A third scenario might be if an employee takes the company's banking with her when she goes home at night and is also doing personal banking when the accident occurs. She is probably covered because the employer had knowledge that the errand was being done as a "special errand."

What about the employee who is sent out of state for a short time? Is he covered 24-hours a day? Many insurers would probably deny these claims if they occurred outside of normal work hours. The burden of proof would be on the injured worker to show he was acting within the course and scope of his employment.

Nevada Supreme Court on 'Special Errands'

The Court's 2008 ruling includes the following discussion: "... It is well established that employers are not liable for injuries sustained by employees due to the hazards of daily living. Accordingly, when determining whether an injury that is sustained outside of the actual period of employment or off of the employer's premises nonetheless arose in the course of employment, we consider 'whether the employee [was] in the employer's control.' To ensure that employers are not held liable for injuries sustained when an employee is outside of the employer's control, this court has adopted the going and coming rule, which originated in tort law and 'preclude[s] compensation for most employee injuries that occur during travel to or from work.'"

The Court further contends that "... Under the special errand exception, injuries that are normally exempted from coverage on the ground that they did not arise in the course of employment are brought within the scope of coverage if they occur while the employee is in transit to or from the performance of an errand outside the employee's normal job responsibilities."

In addition: "... we [the Court] now clarify that just as injuries sustained while traveling to perform a special errand arise in the course of employment, so too do injuries sustained when returning from the performance of the (continued on page 4)

(Family Members, cont. from page 1)

to have workers' compensation insurance. No exemptions. There is no exemption for family members. If, however, a family member working for the business is also listed on the business license as a co-owner, that person also qualifies as an employer, not an employee.

In addition, also note that employers who do not provide workers' compensation will be charged with an administrative fine up to \$15,000; appropriate premium penalties; may be ordered to close the business until insurance has been obtained; and will be held financially responsible for all costs arising from a work-related injury. In addition, the uninsured employer may be subject to a criminal penalty for those claims resulting in substantial bodily harm or death. ([NRS 616D.200](#) & [NAC 616D.345](#))

Those employers' rationalizing not covering a family member in the blissful assumption that this unlawful situation will never come to light, in addition to the harsh penalties mentioned above, should realize that they are cheating their relative out of substantial benefits designed to help injured workers.

These benefits may include, among others: Medical treatment; lost time compensation; permanent partial disability; permanent total disability; vocational rehabilitation; dependent's benefits in the event of death; and other claims-related benefits or expenses (i.e., mileage and lifetime re-opening). Besides, as seen on many court TV shows, family members are not above suing each other when the winds change and rancor is mixed with perceived loss of money or benefits.

However, Nevada has "exclusive remedy," which means that injured workers' benefits are set forth in the statutes. Employers who provide coverage for their employees, with few exceptions, at the time of injury are protected from any additional damages claimed by their employees as a result of an injury on the job. *

Direct comments or suggestions about this newsletter to: *Mike Brooks, Editor*, or *Terry Simi, Assistant Editor*, (702) 486-9019 or: mbrooks@business.nv.gov

HOW TO CONTACT WCS

Department of Business and Industry
 Division of Industrial Relations
 Workers' Compensation Section
SOUTHERN NEVADA
 (702) 486-9080 / Fax: (702) 990-0364
NORTHERN NEVADA
 (775) 684-7270 / Fax: (775) 687-6305
<http://dirweb.state.nv.us/WCS/wcs.htm>

(Coming & Going, cont. from page 3)

special errand. But an employer's liability certainly cannot extend indefinitely beyond the performance of a special errand. It is for the fact-finder to determine, taking into account the totality of the circumstances in each individual case, when the employee ceased returning from the special errand and resumed a journey solely personal in nature. In making this determination, the appeals officer should consider whether the location at which the injuries occurred was on a portion of the roadway that the employee would not have otherwise been if he had not been performing the special errand. An injury will not be compensable if it is sustained after the employee has resumed the personal portion of his journey, as indicated by the employee's location at the time of the accident on a portion of the roadway where the employee would have been traveling anyway to perform a task solely personal in nature. Injuries sustained after the employee is no longer returning from the special errand do not fall under its exception and are thus noncompensable under the going and coming rule."

The complete text of this ruling is available via this link—once there click on document #-8-11434:

<http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=15896> *

Holiday Office Closures:
Memorial Day
 Monday, May 30, 2011

E-mail Notification



Stay connected to what's new in Nevada's workers' compensation by registering to receive e-mail notifications. <http://dirweb.state.nv.us/WCS/wcs.htm>

SPRING 2011 TRAINING SESSIONS

The **WCS Orientation** is a comprehensive overview of workers' compensation in Nevada. **Specified Forums** offer specified advanced topics. All sessions are free and open to the public.

NORTHERN NEVADA

The Carson City / Reno sessions are tentatively scheduled at Western Nevada Community College in Carson City.

WCS Orientation

Wednesday, March 30, 2011
 Thursday, May 19, 2011

For reservations, please contact:

✉ tmills@business.nv.gov
 ☎ (775) 684-7261

SOUTHERN NEVADA

Division of Industrial Relations
 1301 North Green Valley Pkwy.,
 Ste. 200, Henderson, NV 89074

WCS Orientation

Tuesday, March 8, 2011
 Thursday, May 19, 2011

WCS Specified Forum

Employer Tuesday, April 19, 2011

For reservations, please contact:

✉ tsimi@business.nv.gov
 ☎ (702) 486-9019



REPORTING REMINDERS

OCCUPATIONAL DISEASE MANDATORY REPORTING

Occupational Disease Claim Report(s) (OD-8) is an ongoing reporting requirement as outlined in [NRS 617.357](#), whereby certain occupational diseases of the heart or lungs and infectious diseases or cancer are required to be reported to the Division of Industrial Relations. The claim must be reported to the DIR within 30 days after the insurer accepts or denies the claim. Additionally, the insurer is required to notify the DIR in writing within 30 days after the claim is appealed; affirmed, modified or reversed on appeal; or is closed or reopened.

Not all occupational disease claims require OD-8 submissions. Some examples of non-reportable claims are: repetitive motion, non-contagious dermatitis/rash, reflux, and hearing loss claims. Insurers who have no reportable claims during a calendar year are required to file an Occupational Disease Claim Statement of Inactivity form within 5 working days of the end of the calendar year for which they are reporting.

Failure to file required OD-8 reports or Statements of Inactivity may result in administrative fines pursuant to [NAC 616D.415\(1\)\(d\)](#).

OD-8 reporting forms are available on the Workers' Compensation Section website at: <http://dirweb.state.nv.us/WCS/insurer.htm>. The **CY 2010 Occupational Disease Claims Report** required by NRS 617.357(3) and compiled by the WCS is also available at this site. OD-8 questions should be directed to the Research & Analysis Unit at wcsra@business.nv.gov or 702-486-9080.