

ALABAMA: SUMMARY OF WORKERS' COMPENSATION PROVISIONS

COMPENSATION BY CIVIL ACTION

Filing Suit: Alabama is judicial (not administrative). Either party may file a verified complaint in the circuit court of the county that would have jurisdiction of an action between the parties arising out of tort. Ala. Code § 25-5-88.

Venue: Venue proper in county where claimed injury occurred or where the employee resides (if the employer does business there).

Notice: Failure to effect notice within 90 days is an absolute bar to recovery of benefits. The general rule (Ala. Code § 25-5-78) requires written notice within five days after an accident. However, actual notice is still sufficient if within 90 days of claimed injury and given to a supervisor (not a co-employee). Notice must be specific enough to indicate injury is work related (awareness of a medical problem, by itself, is not sufficient for actual notice). Notice provision does not apply to occupational disease claims (given latency of diseases/conditions and lack of awareness by employees).

Statute of Limitations (SOL): Two-year SOL for acute injuries from date of injury or last compensation paid (not payment of medical bills). Two-year SOL for occupational diseases/cumulative trauma claims starts *from date of last exposure*. No SOL with medical benefits.

Injuries Covered: Traumatic/"single occurrence" and occupational disease injuries (including respiratory and repetitive use) are covered. Psychiatric claims must be proximately caused by *some physical injury* to the body.

Evidence: *Preponderance of the evidence standard* for all cases except gradual deterioration or cumulative physical stress disorders (which require clear and convincing proof). Note: payment of benefits under the Act are encouraged but not equal to an admission of liability. Ala. Code § 25-5-56.

Defenses:

- 1. Self-inflicted Injuries/Acts:** Not compensable if did not arise out of employment.
- 2. Willful Misconduct/Horseplay:** Not compensable if did not arise out of employment. If arose out of "sphere of employment," then employee may recover benefits; non-participating victims may also recover benefits. Compensation benefits will be denied for employees whose injuries occurred by their own willful misconduct/breach of employer's reasonable rules/regulations.
- 3. Drug/Alcohol Intoxication** Ala. Code § 25-5-51: Bar to "compensation," but may still get medical benefits. The most common defense. A positive drug test, properly conducted, shall be a conclusive presumption of impairment. The employee cannot introduce evidence he was not impaired if he/she failed the test. However, the employer must still prove the injury was "due to" the intoxication or drugs (a causal relationship between the impairment and the injury, wherein the impairment caused the accident, by poor judgment, slowed reactions, etc.). Employees refusing post-accident drug tests will be denied compensation, but they must have been warned in writing.
- 4. Misrepresentation:** If an employee knowingly and falsely misrepresented (in writing) a physical or mental condition (when hired) and he/she is aggravated or reinjured on the job, the employee may be denied "workers' compensation benefits." This defense requires a written warning at hiring in bold type (Ala. Code § 25-5-51). There is a three-pronged test for the application of this defense: (1) an employee's misrepresentation, (2) an employer's reasonable reliance on the misrepresentation and (3) some causal relationship between the misrepresentation and current injury.
- 5. Pre-existing Conditions** Ala. Code § 25-5-58: No liability if disability is increased or prolonged because of a pre-existing condition or infirmity. However, case law holds that if the employee was performing the job as a "normal man," this defense does not apply. These situations then look at what accommodation, if any, the employer made for the employee before the injury? If the employer accommodated the employee (changed the job, took away duties, etc.), the employer could use this defense.
- 6. Willful Failure or Refusal to Use or Wear a Safety Device:** This defense to payment of "compensation," under Ala. Code § 25-5-51, requires that the employee willfully failed or refused to use a safety device "provided by the employer." The company has to prove the safety device would have prevented the injury.
- 7. Acts of God:** Generally do not arise out of employment and are not compensable.
- 8. Deviation From Employment:** If not arising out of and in the course of employment, then not compensable.

Return to Work: Generally, an employer does not have to pay more than the judicially determined physical impairment (as determined within the trial court's broad discretion) if the employee returns to work earning the same or more than when injured. However, payment of the amount based on the impairment rating assigned by a doctor may help preclude an award of costs at trial. Ala. Code § 25-5-57 (a)(3).

Procedure Ala. Code § 25-5-81: Circuit court judges decide comp cases, but an employee or employer may demand a jury if a willful misconduct defense exists (intentional acts, intoxication, drug use or refusal of a safety device – jury on that issue only). Ala. Code § 25-5-88: work comp trials are preferred actions (set expeditiously). Final judgments must contain a statement of the law, facts and conclusions. The employee bears the burden of proof to show that injuries were caused by an accident arising out of and in the course of employment. Judicial discretion to award costs under Ala. Code § 25-5-89 (employers may avoid costs if a written offer of compensation made pre-suit). The employee's attorney may be awarded a fee up to 15 percent (Ala. Code § 25-5-90).

Settlements: Settlements may resolve compensation, medical and vocational benefits. Settlements for less than provided for under the Act generally require court approval under Ala. Code § 25-5-56. Settlements may also be handled free by an Alabama DOL Ombudsman (60-day window for a party to back out of same for good cause). Payment of extra amount to resolve right to re-open benefits is often a good idea.

Appeal: Either party may appeal to the Court of Civil Appeals of Alabama within 42 days from entry of a final order of judgment (a supersedeas bond equal to 125 percent of amount due and owing (per order) is required).

Re-opening Permanent and Total Disability Awards: Possible if employee is able to obtain gainful employment.

Third-Party Subrogation: Available to recover compensation and medical benefits paid (or future medical benefits), and employer/carrier may need to intervene in third-party lawsuit to protect subrogation. Subrogation recovery reduced by plaintiff's attorney's "saver's fee" under the Fitch formula. Should an injured employee (or dependents in a death case) not file a civil action to recover tort damages against a third-party tortfeasor, the employer or insurance carrier has an additional six months to file a civil action for damages against the third-party tortfeasor. Ala. Code § 25-5-11(d). Note: If injured employee recovers damages against a culpable third party prior to filing a work comp suit (based on the same injuries), the employer is entitled to a credit for same against any work comp award.

Loss of Exclusive Remedy Protections: The Act provides the employee's exclusive civil remedy, with employer, co-employee and insurer (or insurer's agents) immunity from tort claims/jury exposure. Ala. Code § 25-5-52, 53, 113 and 114. Exceptions: Immunity may be lost under the following circumstances (and exposure to tort damages of lost wages, mental anguish and punitive damages):

- a. **Dual Capacity Doctrine:** Employer "may become liable in tort to his . . . employee if he occupies, in addition to his capacity as an employer, a second capacity that confers on him obligations independent of those imposed on him as employer."
- b. **Retaliatory Discharge:** An employer may not terminate an employee who has made a workers' compensation claim or solely because the employee filed a written notice of safety violation of a safety rule, without a legitimate business reason.
- c. **Intentional Torts – Fraud, the Tort of Outrage and Sexual Harassment:** Intentional/fraudulent/deceitful acts (clear and convincing evidence required) or sexual harassment can strip an employer's exclusivity protections. Alabama courts have also recognized torts against insurers for actions "so severe that they rise to the level of outrage."
- d. **Willful Acts by Co-Employees:** An injured employee can maintain a cause of action against a co-employee for willful or intentional acts, for violation of a specific written safety rule and for removal of safety guard.
- e. **Minor Injured in Utero:** The exclusivity provisions do not bar a minor's tort claims (a non-employee), injured while in utero, from the mother's employment.

Every case is different. For further questions, please call Trey Dowdey at 205.314.2409 or email at trey.dowdey@swiftcurrie.com.

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SWIFT, CURRIE, MCGHEE & HIERS, LLP
1355 PEACHTREE STREET, NE, SUITE 300 • ATLANTA, GEORGIA 30309 • 404.874.8800
2 NORTH 20TH STREET SUITE 1405 • BIRMINGHAM, ALABAMA 35203 • 205.314.2401
www.swiftcurrie.com