



Questions & Answers about Workers' Compensation for Employers in Georgia

Timeless Values.
Progressive
Solutions.

**Swift
Currie**
— ATTORNEYS AT LAW —

Introduction

The Georgia Workers' Compensation Act provides for the recovery of medical expenses and lost income for workers injured in the course and scope of employment. While the statute may appear complicated, an understanding of the general concept and requirements is beneficial to all employers hoping to contain and control costs associated with workplace injuries.

While this handbook is not a comprehensive overview of the Act and the Rules of the State Board of Workers' Compensation, it does answer many of the questions heard most frequently from employers in this state. As additional questions arise, please contact a Swift Currie attorney for assistance.



Based on more than 50 years of representing clients in Georgia and throughout the country, Swift, Currie, McGhee & Hiers, LLP has evolved into a law firm capable of handling all areas of civil law and litigation. With more than 85 attorneys, Swift Currie possesses the resources and abilities to tackle the most complex legal problems while at the same time providing its clients with individualized prompt and cost-effective service. Our law firm has a wealth of experience across numerous practice areas and our depth of legal talent allows us to tailor such strengths to individual cases.

Our firm's philosophy is to provide our clients with creative, aggressive and professional representation of their interests. We also strive to conduct ourselves in a manner consistent with the legacy of our four founding partners.

No matter what the issue is in dispute, Swift Currie has attorneys ready to assist you. We believe we have a well-deserved reputation for high-quality legal services and dedicated attorneys.

Finding creative solutions to complex problems – that is our commitment to our clients.

Table of Contents

Section 1

Insurance Coverage page 1

Section 2

*Interaction of the Workers' Compensation System with
Unemployment, Employer-Funded Disability Plans,
and the Americans with Disabilities Act (ADA)* page 3

Section 3

Preventive Measures page 5

Section 4

Panel of Physicians page 7

Section 5

Investigation of Accidents page 9

Section 6

Payment of Workers' Compensation Benefits page 13

Section 7

Return to Work. page 15

Section 8

Recouping Workers' Compensation Benefits. page 17

Section 9

Litigation. page 19

*The information contained in this handbook should not be
construed as legal advice or opinion on specific facts.
For more information, please contact one of our attorneys. Thank you.*

Section 1

Insurance Coverage

Q As an Employer, must I have workers' compensation coverage?

A In general, yes. Most employers in Georgia are required to obtain workers' compensation insurance or be a qualified self-insured employer. One of the more common exceptions is when an employer has fewer than three employees within the same business in Georgia. If so, the workers' compensation laws may not apply and no insurance is required. Other exceptions include certain common carriers, railroad employees, farm laborers, domestic servants and certain licensed real estate sales persons or associate brokers. An employer, who otherwise would not come within the workers' compensation laws based on one of the above exceptions, can choose to be bound and purchase workers' compensation insurance.

Q What employees are covered under a workers' compensation policy?

A All persons whose employment is in the usual course of the trade, business, occupation or profession of the employer are considered employees for purposes of workers' compensation. The courts generally interpret who is an employee broadly so as to ensure that the worker has a source of payment for his medical bills and any lost time. However, your insurance policy may state what types of employees are covered under the policy and whether there is coverage in Georgia, if you do business in several states.

Independent contractors are generally not considered employees. Whether an individual employee is considered an employee or an independent contractor depends on a number of factors, most of which center on whether the employer had control over the time, manner, methods and means of performance of the work

performed by the individual. The judge will look at such facts as payment to employee (salary vs. per unit), intent of parties, length of time of employment, who has the right to select materials and tools, control over work hours, skill and experience required and the overall control of the employer over the employee.

Q If an employee is injured at my company and I later change workers' compensation insurance carriers, how will that affect the claim?

A Under many circumstances, it will have no effect whatsoever. The date of accident controls workers' compensation benefits. Therefore, if the accident occurred during the policy period with the first insurance company, then the first insurance company will remain responsible for workers' compensation benefits. However, during the policy period with the (subsequent) second insurer, it is possible the employee might have a new "legal" accident, even if the employee does not reinjure himself. This frequently occurs when an employee is injured during the first policy period but does not miss any time from work until the second policy period begins. The State Board of Workers' Compensation may consider the date the employee stops working as a new "legal" accident in addition to the date the employee was initially injured. Benefits due for the second "accident" may be different than benefits due for the initial accident. In these instances, you should always notify both insurance companies of the situation, so they can make a decision regarding which insurer will be responsible for the claim.

Section 2

Interaction of the Workers' Compensation System with Unemployment, Employer-Funded Disability Plans, and the Americans with Disabilities Act (ADA)

Q Can an injured employee receive both workers' compensation benefits and unemployment at the same time?

A Yes, but with limitations. An employer and its workers' compensation insurance carrier are entitled to a dollar for dollar credit for any unemployment benefits paid to an employee. For instance, if an employee is receiving workers' compensation benefits of \$300 per week and subsequently receives unemployment benefits of \$200 per week, then the workers' compensation insurance company is only obligated to pay the employee \$100 per week for every week the employee receives \$200 in unemployment benefits. It is important to let your insurer or attorney know if unemployment benefits have already been paid as it is possible to take a credit for these by filing the appropriate forms.

Q Can an injured employee receive both workers' compensation benefits and short- or long-term disability benefits for the same time period?

A Again, the answer is yes, with limitations. In the unemployment situation, the employer is entitled to a dollar for dollar credit. In the short- or long-term disability situation, the employer and insurance company are entitled to a credit based on the amount the employer contributes to the disability plan. For example, if the employer funds a company disability plan 100%, then the

employer is entitled to a dollar for dollar credit just as in the unemployment example. However, if the employer only funds 50% of the premium for the disability plan and the employee is responsible for the remaining 50%, then the employer and insurance company can take a \$.50 credit against workers' compensation benefits for each dollar the employee receives in disability benefits.

Note: Some short- or long-term disability plans may not pay any benefits if the employee is receiving workers' compensation benefits. Consult your plan for specifics. Also note, even if the employer funded the disability plan 100%, your attorney should be made aware of the plan as there may be evidence to indicate the injury was not work related.

Q What effect will the filing of an Americans with Disabilities Act (ADA) claim have on the workers' compensation claim?

A No direct effect. An ADA claim is a federal action where the employee alleges discrimination on the basis of his disability. A workers' compensation claim is based on state law. An employee is entitled to simultaneously file an ADA claim and a workers' compensation claim. However, there may be an overlap of issues. For instance, an employee may contend his employer fired him because of an injury he sustained on the job. He could pursue an ADA claim on the basis that the only reason he was fired was due to his injury. He could also file a workers' compensation claim seeking payment for lost time following his termination. It is possible that an employer may win an ADA claim and lose the workers' compensation claim and vice versa. If an employer settles or loses an ADA claim, the employer and insurance carrier will not be able to credit the settlement payment or verdict against the workers' compensation benefits that may be owed.

Section 3

Preventive Measures

Q What can I do during the hiring process to reduce my potential exposure for workers' compensation claims?

A There are several steps you can take. Generally, you cannot ask a prospective employee questions about his medical history or prior accidents; however, you can have an employee complete a post-offer of employment medical questionnaire asking questions about his medical history. This may be helpful information if the employee is injured while working for your company. Another preventive measure likely to result in fewer accidents is a comprehensive orientation in which safety is emphasized. You should institute regularly scheduled safety meetings. You also will want to inform all new employees of what to do in the event they are injured on the job, including reporting the incident and using the posted panel of physicians. Finally, inform employees that you may be able to make light duty work available following an accident, if necessary. It is also important to document all of the actions listed above. For example, you may want to take a picture of the employee standing next to the posted panel to maintain in your employee file.

Q What are the advantages of a safety program?

A First and foremost, a safety program will allow you to show your employees the company's emphasis on maintaining a safe work environment. Most work place accidents can be avoided. A safety-conscious work force is more likely to report safety issues before such issues become a serious problem and result in accidents. Furthermore, if an employee is injured, it is less likely there will be communication problems which could decrease productivity and increase costs.

Q Are there any benefits from instituting a drug and alcohol policy?

A Yes. You may qualify for certification for a premium discount under your workers' compensation policy if you have a drug and alcohol policy. To qualify, employers must meet the requirements of the Drug Free Workplace Program which include: 1) a written policy statement, 2) substance abuse testing, 3) resources available to employees through an Employee Assistance Provider, 4) employee education, and 5) supervisor training. Your insurance agent and insurance company can provide you with more information on how to qualify.

One of the defenses available to employers is the intoxication defense. The best use of this defense occurs when the employer has a Drug Free Workplace Program in effect.

Section 4

Panel of Physicians

Q What is the Panel of Physicians?

A The Panel of Physicians is a list of doctors and/or facilities authorized to treat an employee following a work-place accident. The employer, usually in consultation with the insurer, selects the doctors on the panel. If an employee is injured, he must choose a physician from the panel, unless he needs emergency care. This list allows employers and insurance companies to have some control over who will be treating their employees and allows you to become familiar with the medical providers in your area.

Q What are the requirements of the Panel of Physicians?

A In Georgia, there are three types of panels. The traditional panel is a list of at least six unaffiliated physicians or clinics. On this type of panel there must be: 1) at least one physician who specializes in orthopedic surgery, 2) no more than two industrial clinics, and 3) at least one “minority” physician, which generally is based on race or gender. As of July 1, 2008, it is no longer necessary to use pink paper, but it would be advisable to use a bright color that stands out.

There are two other types of panels — a Conformed Panel of Physicians and a Managed Care Organization “panel.” These types are alternatives to the traditional Panel of Physicians. For specific information regarding these types of panels, please consult with your insurance company.

Q What must I explain to employees regarding the function of the panel?

A At employee orientation, during safety meetings and certainly following any accident, you should explain to your employees that after an accident, they are entitled to choose a physician from the panel of physicians who will become the employee's "authorized treating physician." That physician is permitted to make referrals to other physicians for specialized care. The injured employee is also allowed to make one change of physician within the panel without permission from you, the insurance company or the State Board of Workers' Compensation. After one change of treating physician from the panel, the employee must then obtain the permission from the employer and insurance company or petition the State Board of Workers' Compensation before making another change.

Q What is the "posting" requirement?

A An employer is required to post the panel of physicians in "prominent places" within the business. Good locations for the panel include the employee breakroom and others areas where employee notices are posted. The employer is also required to ensure that the employee understands the function of the panel, that is, his right to choose a physician from the panel and make one change of physician from the panel without permission. It is absolutely imperative that the panel be accessible to the employee during work hours; therefore, it should never be kept behind locked office doors.

Section 5

Investigation of Accidents

Q What accidents are covered under workers' compensation?

A Generally, any accident which both "arises out of" and occurs "within the course of" the employee's employment is covered under workers' compensation. In most cases, this means that not only must the accident occur while the employee is working, but there must be some connection between the work performed and the injury.

Although each situation will vary, an aggravation of an injury while on the job, even if the initial injury occurred outside of work, may be covered by workers' compensation. Injuries due to the negligence of the injured employee or other employees are also covered. Even situations where an employee is walking from the employer parking lot into the place of work, but has not yet clocked in, are generally found to be work-related.

On the other hand, an employee who was on a regularly scheduled lunch break and not performing any work on behalf of the employer will not likely be entitled to workers' compensation benefits. Also, employees engaged in horseplay resulting in an injury may be denied workers' compensation benefits.

Accidents do not need to occur at the workplace to be considered work-related. Employees who are "on call," or fall within the category of "continuous employment" (an off-duty police officer, possibly), may be covered if injured.

Every situation is unique. If you have questions regarding the circumstances of a particular accident, please consult with your insurance company or attorney.

Q If an employee aggravates a pre-existing injury while working, is that considered an accident?

A Yes. If the on-the-job aggravation requires medical treatment or disables the employee from working, he will be entitled to workers' compensation benefits. However, he is only entitled to workers' compensation benefits as long as the aggravation continues. Therefore, a medical opinion from the treating physician that the employee's aggravation has subsided and that he has returned to his baseline condition prior to the aggravation may relieve you of responsibility for any further workers' compensation benefits.

Q What type of notice does an employee have to give regarding an accident?

A Only general notice. From a legal standpoint, the employee is required to give notice of an accident within thirty days of its occurrence. If the employer is already aware of the accident, no additional notice from the employee is necessary. The employee is not required to provide specific notice of a work-related accident; the notice need only provide the employer with enough information so they can conduct an investigation to determine if the injury is work-related.

Q When should I complete a First Report of Injury, Form WC-1?

A You should fill out a First Report anytime an employee seeks medical treatment for an injury on the job or misses work as a result of an injury. Also, if an employee is contending she was injured on the job, but you dispute that contention, you should still complete a First Report and send it to your insurance company. If you have any doubt as to whether you should complete a

First Report, contact your insurance company for direction. Disputing the occurrence of the accident does not relieve you of the responsibility of completing a First Report. Similarly, completing a First Report is never an admission you agree the employee sustained an accident on the job, as it generally cannot be used in court. Once completed, send the First Report to your insurance company immediately.

Q What type of investigation should I conduct following an accident?

A The supervisor should interview the injured employee to determine how, when and why the accident occurred. At that point, the supervisor and other human resources employees can broaden the investigation by interviewing witnesses and taking a written statement from the employee and any witnesses. It is also important to maintain notes of anything that seems contradictory to the employee's report, as information may be forgotten with the passage of time.

Q What information is my insurance company likely to want from me?

A The company's insurance carrier will need as much information, as quickly as possible. There are deadlines which must be met shortly after an accident or even an alleged accident. The insurance company will conduct their own investigation, but the more detailed information you can provide immediately following the accident will prevent delays. The insurance company will need copies of all written statements and accident reports. They will also want the names of all witnesses. You will also need to provide your insurance company with payroll records of the employee, usually for the 13 weeks before the accident date, and a copy of your posted panel with information as to where it is posted and what steps you have taken to insure your employees understand its location and purpose.

Questions to Ask When Investigating an Accident

1. When and where did the accident happen?
2. Were there any witnesses?
3. Who did you first tell about the accident?
4. How did you hurt yourself?
5. Did someone else or something, like a machine, cause the accident?
6. What parts of your body did you injure?
7. Have you ever injured those body parts before?
8. Do you need medical treatment? If not, why not?

Make certain to tell the employee that if he remembers anything else about the accident, needs medical treatment or has any questions, the employee should contact you immediately.

Also, get him to circle which doctor he wants to see on a copy of the posted panel and initial and date it as this will serve as evidence you offered him medical treatment from the panel.

Section 6

Payment of Workers' Compensation Benefits

Q What type of benefits is an injured employee entitled to receive?

A There are three different types of benefits. First, employees are entitled to medical treatment related to their accident. Second, employees are entitled to payment of lost time — temporary total or temporary partial disability benefits — if they miss more than seven days from work, with a doctor's excuse. Third, employees may be entitled to permanent partial disability benefits.

Q What type of medical treatment is the employee entitled to?

A The employee is entitled to medical treatment for the injury or injuries sustained at work. In most cases, the physician or hospital will bill the insurance company directly. If you receive any medical bills, forward them immediately to your insurance company or claims administrator so they can either pay the bill or file a denial. As of July 1, 2001, there are specific penalties for late payment of medical bills.

Q How are lost time benefits calculated?

A The amount of weekly benefits — which is called temporary total or temporary partial disability benefits — depends on the employee's "average weekly wage." The average weekly wage is calculated by taking the average of the 13 weeks of pay prior to the injury. Two-thirds of the average weekly wage becomes the compensation rate, subject to a maximum amount. As of

July 1, 2007, the maximum weekly amount is \$500. If an employee is not working at all, he is entitled to temporary total disability benefits, the equivalent of the compensation rate. If an employee returns to work, but is required to work at a reduced pay or reduced hours because of his injury, he may be entitled to temporary partial disability benefits to compensate him for a reduction in wages due to his injury. The insurance company will calculate temporary partial benefits based on two-thirds of the difference between the pre-accident average weekly wage and the post-accident weekly wage. As of July 1, 2007, the maximum weekly amount for temporary partial disability is \$334.

Q What are permanent partial disability (PPD) benefits?

A The treating physician may assign an impairment rating by following certain medical guidelines. The impairment rating is a percentage indicating the degree to which an injury results in permanent impairment. The physician consults a book known as the *Guides to the Evaluation of Permanent Impairment* published by the American Medical Association which is used in an equation resulting in a monetary payment to the employee. The payment is in addition to the weekly, lost time benefits.

Section 7

Return to Work

Q Am I required to make light duty work available for an injured employee?

A No. However, the ability to make light duty work available will likely reduce the total payout in workers' compensation benefits. If an employee is on light duty restrictions, but no light duty work is available, he will continue to receive workers' compensation benefits. Experience has shown the longer an employee remains out of work on workers' compensation benefits, the less likely he is to return to work. Additionally, an offer of light duty provides a great deal of leverage in getting a claim closed.

Q What is the procedure for offering an injured employee a light duty job?

A In general, the procedure is as follows: 1) the treating physician indicates the employee can return to light duty and provides specific restrictions, 2) the employer prepares a job description for the light duty position that falls within the restrictions using the form WC-240 or similar document, 3) the insurance company will send the job description to the treating physician to obtain his approval, 4) assuming the light duty position is approved, the employee will be formally offered the position on a form called a "WC-240," and 5) the employee must be given at least ten days notice of the job availability and, if he does not return to work, his lost time benefits may be suspended.

Make certain the appropriate supervisor is aware of the offer of light duty work so the employee will be expected and will not be sent home inadvertently by a manager who had not provided for the employee on the work schedule.

Q Can I terminate an employee who is performing light duty work?

A Yes, but there may be significant ramifications. You cannot terminate an employee because of his injury. However, you can terminate an employee "for cause," as you would terminate any other employee who is not injured. The employee cannot be singled out because he has an injury. It is important you document all previous warnings prior to the decision to terminate. Since you are terminating an employee, you can expect the employee and his attorney will attempt to convince a judge the termination in some way was not genuine and was related to the fact he was injured on the job.

Section 8

Recouping Workers' Compensation Benefits

Q What is the Subsequent Injury Trust Fund (SITF)?

A The SITF is an agency which is responsible for reimbursing employers and insurers certain benefits for accidents on the job if the employee had a pre-existing permanent injury or condition. The objective of the Fund is to encourage employers to hire and retain employees with pre-existing conditions. The SITF will no longer reimburse claims for any date of accident after June 30, 2006.

Q What information and documentation do we need to make a Subsequent Injury Trust Fund claim?

A Your insurance company should take the lead in pursuing an SITF claim. However, in general, you need to show the following: 1) a pre-existing permanent impairment, 2) employer knowledge of that impairment prior to the on-the-job injury, and 3) "merger" between the pre-existing permanent impairment and the accident on the job. Item three means the on-the-job injury was complicated/made worse by the existence of the pre-existing condition/injury.

You can help most with item two, the employer knowledge. The supervisors that have knowledge of the pre-existing injury may be asked to complete an Employer Knowledge Affidavit stating they knew of the pre-existing condition/injury, when they knew of it and why they considered it to be a permanent impairment.

Q If a third-party is responsible for the employee's injury, can I recover any money from the third-party?

A Yes, with limitations. This is called workers' compensation subrogation. For example, if a machine malfunctions injuring an employee, and the manufacturer of the machine is at fault, then you may be able to recover a certain amount of workers' compensation benefits paid if the employee sues the manufacturer. This lawsuit is separate from the workers' compensation case and the purpose of subrogation is so the employee does not "double-dip," or receive money for the same injury from both his workers' compensation case and from a separate lawsuit against the negligent party. There are limitations regarding this right to recover. For instance, the employee/plaintiff must recover some money through a verdict or settlement and the employer and insurer can only recover after the employee has been "fully and completely compensated" for all economic and non-economic injuries.

Section 9

Litigation

Q What are the different courts in the workers' compensation system?

A Workers' compensation cases fall within the jurisdiction of the State Board of Workers' Compensation. The main office is in Atlanta; however, there are numerous offices throughout the state. If the injured employee files a lawsuit against an employer seeking workers' compensation benefits, the case will be heard by an administrative law judge in or near the county of injury. There is no jury, but it otherwise is like any other trial. There are witnesses and evidence and each side may cross-examine witnesses for the other side. Usually, you will receive a decision from the judge within sixty days of the hearing. You can appeal a decision you do not agree with to a three-judge panel within the State Board of Workers' Compensation known as the Appellate Division. If you are not successful at the Appellate Division, you may appeal further to the appropriate Superior Court, but your chances of reversing a decision diminish as the number of appeals increase.

Q What do I do if I receive a notice the injured employee has a lawyer?

A Forward all written communications you received either from the employee or his attorney to the insurance company. There are certain deadlines that must be met and you could jeopardize your case by not responding quickly. The most common communications you may receive from an attorney are the following: 1) a letter indicating the attorney is now representing the employee, 2) a notice of a claim and/or request for hearing, and 3) written discovery, which may include Requests for Admissions, Interrogatories and Requests for Production of Documents. Do not talk about the case to the employee once an attorney is obtained until the employee's attorney gives you permission to do so.

Q What is discovery?

A In its broadest sense, discovery is the process whereby each side attempts to find out as much about the case from the other by asking questions, either in written form or in person. In certain situations, you may receive from the employee's attorney Requests for Admissions, Interrogatories and/or Request for Production of Documents. These should immediately be forwarded to the insurance company. If it appears your insurance company has already received a copy of this written discovery, contact the insurance company to be certain.

The other common form of discovery is the deposition. In most workers' compensation cases in Georgia, the attorney representing both you and your insurance company will take the deposition of the employee at his attorney's office. Occasionally, the employee's attorney might take the deposition of a witness or supervisor. Sometimes the parties will need to take a doctor's deposition to clarify various medical issues.

Q What type of documents are likely to be requested from me as part of the discovery process?

A The employee's attorney may seek a copy of the employee's personnel file, payroll records to calculate the average weekly wage, the posted Panel of Physicians, accident reports, medical notes and disability slips, and witness lists. You should not provide this information directly to the employee's attorney, but forward it to your attorney, who will review it first. Your attorney might also request additional documents from you which may include notes you have taken since the injury. In many situations, the employee's attorney will not be entitled to this information, but it may be helpful to your attorney to have this documentation in preparing a defense of the case.

Q Under what circumstances might someone from the company have to testify at the hearing?

A It depends on the reason the case is in court. If there is a dispute regarding whether an incident actually occurred, the supervisor may need to testify regarding whether the alleged incident was ever witnessed or reported. If there is another employee who witnessed the employee engaged in horseplay, that witness will most likely need to testify. Your attorney will speak with company witnesses before the hearing.

Notes

Swift
Currie
— ATTORNEYS AT LAW —

The Peachtree | 1355 Peachtree Street NE | Suite 300

Atlanta, Georgia 30309 | 404.874.8800

www.swiftcurrie.com