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# breakfast briefing

*Presented by Kirby Smith, Esq.  
with Panelist Malani Kotchka, Esq.*

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## workers' compensation in Nevada:

A SURVEY OF THE LAW,  
PLUS ISSUES AND ANSWERS



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# The History of Workers' Compensation

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- 1792 B.C. Hammurabi's Code
- 1911 Wisconsin
- 1913 Nevada
- 1947 Occupational Disease Act added
- 1980 Self-insurers allowed
- 1999 Private carriers allowed

# What is workers' compensation?

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- "No-fault" insurance and benefits for workers
- "Protection" from civil suits for employers

# we don't want worker's compensation coverage?

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1. Administrative fines
2. Premium penalty retroactively
3. Closure of business
4. Criminal penalties

...more

# we don't want worker's compensation coverage?-cont'd

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5. Financial responsibility for all workers  
compensation benefits
6. Amenable to civil lawsuit

No modification by contract allowed!

# Immunity from Lawsuits

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NRS 616A.020, 617.017:

The rights and remedies provided...shall be exclusive, except as otherwise provided..., of all other rights and remedies of the employee... on account of such injury [or disease].

# Immunity -- Who is a deemed employee?

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- ❑ Aliens and illegals
- ❑ Minors
- ❑ All employees, subcontractors, and independent contractors of “principal contractors”
- ❑ Apprentices and trainees pursuant to Chapter 610 of NRS
- ❑ Real estate licensees?
- ❑ Newspaper deliverers
- ❑ House bands



## Immunity -- Who is not an “employee”?

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- NRS 616A.110:
  - stage performers
  - casual employees
  - solicitors
  - household domestics
  - real estate licensees?
  - agricultural labor
  - occasional musicians
  - volunteer ski patrol
  - sports official/timekeeper
  - Churchman, Rabbi etc.

## Immunity --Not an “employee”?– cont’d

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2. “Independent contractors”
3. Sole owners/proprietors?
4. Partners?
5. A hired attorney

# Immunity—Who is an employer?

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1. Principal Contractor cases
2. Realtors
3. Other cases

# Immunity–Contractor Cases

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- If the principal contractor has a Nevada *Ch. 624 license*, the owner, principal contractor, and every subcontractor get immunity from every employee

# Immunity—Contractor Cases

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Owner's immunity only applies to the extent the claims were incurred in the scope of the work contracted for

# Immunity – Other Cases

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## Statutory Employers– the “normal work” test

- *Unlicensed* principal contractors, and all other employers, are immunized when they contract with “independent enterprises,” i.e., someone in a separate business who:
  - owns, rents, or leases property, OR
  - has a license in its own name

# Immunity – Other Cases

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## Statutory Employers– the “normal work” test

- ❑ Joint venturer/partnership exception
- ❑ Labor broker/temp agency exception

# Immunity – Other Cases

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## Real estate brokers or salesmen

1. Might be eligible to file disease claims, but must have “opted in” in order to file an injury claim
2. Not a statutory employer when hiring an independent contractor to maintain or repair real estate
3. Might be a statutory employer when hiring an independent enterprise not in the same business



# Is the injury a Nevada problem?

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- The question arises whenever the employer or employee are out-of-state
  1. Out-of-state employees temporarily in Nevada may be exempted
  2. Nevada employee working exclusively in another state may be exempted
- Choice of law provisions
- The DIR administrator has authority to enter into interstate agreements

# Immunity – cont'd-- Exceptions

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1. What if the employer violated an independent statutory duty which led to the accident?
2. What if the employee receives workers comp benefits, then sues?
3. What if the employment is exceptionally hazardous?
4. What if the employer commits an intentional tort on the employee?

...more

## Immunity – cont'd-- Exceptions

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5. What if the employer failed to maintain insurance?
6. Can an employee sue the property owner?
7. Can an employee sue the manufacturer who supplied the employer with a defective product that caused the injury?
8. Can the employee sue a third party who caused the accident?

# Subrogation

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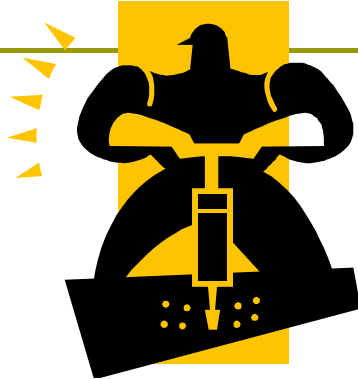
- ❑ Definition: recovery of paid benefits from a responsible third party
- ❑ Independent action versus lien
- ❑ Offsets when the employer is responsible

# Subrogation– cont'd

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- Employer follow-up important
- Trial considerations
- “Breen” formula

# Now what?



## An "employee" was injured...

# Notifying the Employer

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- ❑ Claimant must notify employer of an injury, in writing, within 7 days after an alleged accident  
Form C-1
- ❑ Claimant, or treating physician, must file a claim within 90 days (one year if death)  
Form C-4
- ❑ Employer or employee may request examination by a doctor even if no formal report of an accident has been submitted
- ❑ Employer must then file Form C-3 injury report within six working days

# Notifying the Employer -- Excuses

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1. The injury to the employee or another cause beyond his control prevented him from providing the notice or claim;
2. The failure was caused by the employee's or dependent's mistake or ignorance of fact or of law;
3. The failure was caused by the physical or mental inability of the employee or the dependent; or
4. The failure was caused by fraud, misrepresentation or deceit.



# Do a thorough investigation

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- Collect records of this accident, plus personnel file and previous accidents
- Interview witnesses, including claimant, preferably on tape
  - Who, What, Where, When, Why, How
  - Detailed description of injuries
  - List of witnesses

# An Employee Entitled to Accident Benefits?

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1. An "accident"
2. Causing "injury"
3. Which "arises out of" employment
4. Which occurred "in the course of employment"

# Burden of Proof

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- ❑ Claimant must prove his case by a preponderance of the evidence
- ❑ Cases are no longer “liberally construed” in favor of claimant
- ❑ Testifying doctors must state causation to *a degree of reasonable medical probability*

# Definition of “Accident”

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- “Accident means an unexpected or unforeseen event...
- happening suddenly and violently,...
- with or without human fault, and...
- producing at the time objective symptoms of an injury.” [NRS 616A.030]

# Definition of a “Injury”

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- “Injury” means a sudden and tangible happening of a traumatic nature...
- Producing an immediate or prompt result...
- Which is established by medical evidence [NRS 616A.265]

# Comparison of “Accident” & “Injury”

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- “Accident means an unexpected or unforeseen event...
- happening **suddenly** and **violently**, with or without human fault, and...
- producing **at the time objective symptoms** of an injury.”

## Two Similar Statutes

- “‘Injury’ means a **sudden** and tangible happening of a **traumatic** nature
- producing an **immediate or prompt result** which is **established by medical evidence.**”

# Injury “arise out of and in the course of employment?”

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## Definition of Arising out of Employment

- A “causal connection between the injury and the employee’s work” in which “the origin of the injury is related to some risk involved within the scope of employment”
- Injuries while engaged in an athletic or social event sponsored by the employer are not covered, except school district employees are covered

...try “arise out of and in the  
course of employment?”

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Arising out of employment – cont’d  
Employers are **not absolutely liable**  
for any injury that might happen at  
work

-- 5 examples

1. The employee falls in a hallway
2. The employee falls down a flight of stairs...



try “arise out of and in the  
course of employment?”

---

Arising out of employment – cont’d  
Employers are **not absolutely liable**  
for any injury that might happen at  
work

-- some more examples

3. An employee is sexually assaulted
4. An employee is shot at
5. An employee is killed by an insane  
fellow employee

# Injury “arise out of and in the course of employment?”-cont’d

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## Definition: “Course of employment”

- ❑ In the “course of employment” refers to whether the injury occurs at work, and while the employee is reasonably performing her duties
- ❑ When is an employee not at work?
  - The “Going and Coming Rule”
- ❑ When is an employee not performing his duties during working hours?

# Why “arise out of and in the course of employment?”-cont’d

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## Course of employment – cont’d

### The Going and Coming rule:

Generally, employees not entitled to benefits for injuries sustained while traveling to and from work

- ❑ Employees on the employer’s premises within a reasonable time before or after work are eligible
- ❑ Employees paid to travel are covered
- ❑ Deviation from employment not covered
- ❑ Travel for medical care covered
- ❑ On-call employees are covered

# Injury “arise out of and in the course of employment?”-cont’d

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## Post Termination Presumption

- ❑ Failure to file a notice of injury or disease before employment is terminated establishes a “rebuttable presumption” injury not caused on job
- ❑ Termination can be for any reason

# Why “arise out of and in the course of employment?”-cont’d

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## Stress

- ❑ Any ailment caused by “any gradual mental stimulus” is not compensable
- ❑ Extreme stress in time of danger is compensable
- ❑ But, stress caused by dealing with an injury is compensable – see “doctrine of compensable consequences”

# Injury “arise out of and in the course of employment?”-cont’d

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## Doctrine of Compensable Consequences

- ❑ Definition: subsequent health conditions – physical or mental – caused by the original accident are covered
- ❑ Example: stress caused by dealing with an injury is compensable
- ❑ Newly developed injury or disease can be added if a causal relationship exists

# Aggravation, Precipitation, or Acceleration of a Pre-Existing Condition

		<u>Previous condition</u>	
		Industrial	Nonindustrial
<u>New aggravating condition</u>	Industrial	Compensable. See "Last Injurious Exposure Rule"	Compensable if new condition is a substantial contributing cause
	Non-ind...	Compensable if previous condition is a substantial contributing cause	Not compensable

# For Current Employer: Last Injurious Exposure Rule

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## PRIOR INJURY

### “Aggravation”

- Liability on the current employer/carrier
- Definition: when a specific, intervening, work-related, accidental injury independently contributes to the subsequent disabling condition

### “Reoccurrence”

- Liability on the previous employer/carrier
- Definition: when no specific incident can independently explain the worsened condition; or when only symptoms are worse



## Other Useful Statutes— NRS 616C.230

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No compensation is payable for injuries or diseases if...

1. Caused by the employee's willful intention to injure himself
2. Or the willful intention to injure another

## Other Useful Statutes— NRS 616C.230

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No compensation is payable for injuries or diseases if...

- ❑ Employee was intoxicated, or
- ❑ Because of the use of a controlled substance

## Other Useful Statutes– Misconduct

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No compensation is payable for injuries or diseases after discharge for misconduct if...

- ❑ Discharge was solely for misconduct, and not related to claim for compensation; &
- ❑ Employee's inability to return to work with employer is solely caused by the discharge, and not his injury

# OCCUPATIONAL DISEASES

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- ❑ “Excluded employees”
- ❑ Employer immunity issues
- ❑ Notice requirements
- ❑ What is a disease? Listed diseases
- ❑ Proximate causes (six factors)
- ❑ When is it severe enough?
- ❑ Aggravation of non-industrial conditions
- ❑ Willful misconduct

# Diseases – Which employees qualify

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- Generally, same as injuries
- Are clergy and real estate brokers covered for diseases but not injuries?

# Diseases – Employer Immunity

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- ❑ Principal contractors (PC) are not liable for independent contractors (IC) if:
  1. IC agrees in a *written* contract to maintain coverage for occup'al diseases
  2. Proof of coverage is given to the PC
  3. The PC is not doing a construction job
  4. IC is not in the same business as the PC
- ❑ You are also not the employer if you have contracted with a "independent enterprise"

# Diseases– Notice Requirements

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- Notice shall be provided within 7 days after knowledge of disability *and its relationship to the employment*
- Claim must be filed within 90 days; or, one year after death

# Diseases– Scheduled Diseases

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- ❑ Tenosynovitis and prepatellar bursitis
- ❑ Anthrax, Chrome ulceration, Compressed air illness, Epithelioma cancer
- ❑ Silicosis, other asbestos diseases, any disease of the respiratory tract caused by dusts
- ❑ Hepatitis (A, B, C), tuberculosis, HIV
- ❑ Poisoning by arsenic, brass or zinc, carbon monoxide, lead, manganese dioxide, mercury, phosphorus, carbon bisulfide, chlorine, flour, burned grease, kitchen fumes, food products, gasoline, benzene, naphtha, other petroleum products, wood alcohol, potassium cyanide, radium, or sulfur dioxide
- ❑ Any infection or inflammation of the skin due to oils, lubricants, dusts, liquids, fumes, gases or vapors
- ❑ Any disability due to radioactive properties or substances such as x-rays



# Diseases – Proximate Cause

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1. A “direct causal connection” between the work conditions and the disease
2. The disease followed as a “natural incident” to the exposure at work
3. The disease can be “fairly traced to the employment as the proximate cause”
4. There is not equal exposure outside of the employment to the hazard
5. The disease must be “incidental to the character of the business”
6. The disease must appear to have had its origin in a risk connected with work and to have flowed from it as a “natural consequence”

## Diseases – When is it severe enough?

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- When it disables, i.e., prevents work--  
“The right to compensation flows not from the mere contraction of an occupational disease, but from the disablement resulting from such disease.”

# Diseases – Pre-Existing Conditions

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- Occupational disease versus non-industrial condition
  - Is it a substantial contributing cause?
- Autopsy rights by insurer

# Diseases – Willful Misconduct

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- ❑ Willful misconduct or willful self exposure voids benefits
- ❑ Knowingly and falsely representing prior exposure or disease when hired voids benefits

## Diseases -- Miscellaneous

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- ❑ No owner immunity with contractor
- ❑ No loss of affirmative defenses if you fail to provide coverage and lose all immunity
- ❑ Injury and disease statutes are not mutually exclusive
- ❑ Claim acceptance/denial by certified mail, no benefit penalty
- ❑ Special reporting obligations

# To accept or deny claims?

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- ❑ Denial keeps compensation costs low
- ❑ Denial eliminates immunity from suit
- ❑ Denial increases litigation costs

30 days to accept or deny



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# Now what?

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The claim has  
been accepted!

# What Benefits Are Required to Be Paid?

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1. Medical treatment?
2. Temporary total disability?
3. Permanent partial disability?
4. Temporary partial disability?
5. Vocational rehabilitation?
6. Permanent total disability?
7. Death benefits?





# 1. Medical Treatment

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- Types of expenses compensable, and not compensable
  - Hot Tub?
  - Car?
  - Gym membership?
- Selection/Change of doctor



## Medical Treatment– cont'd

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- ❑ Medical costs paid by the insurer at fee schedule rates
- ❑ Election by employer to provide accident benefits
- ❑ The patient cannot be charged for any treatment related to the industrial injury
- ❑ Travel for medical treatment
- ❑ Proper communication with the doctor

## 2. Temporary Total Disability (TTD)

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Definition: temporary wage payments during claim when claimant is off work

- ❑ Off work for five or more days in any 20 day period
- ❑ Valid off-work slip requirements
  1. Include the period of disability
  2. Describe the physical limitations imposed on the work of the employee
  3. Specify permanent or temporary
  4. Be signed by a doctor
- ❑ 66 2/3 percent of “average monthly wage”

## TTD – cont'd

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### What is the “average monthly wage”?

- ❑ All money, goods and services received
- ❑ Over a fixed period of time
- ❑ Time away from work for medical treatment must be compensated
- ❑ First payment within 14 working days of receipt of the initial off-work slip
- ❑ Maximum: 150% of state average

## TTD – cont'd

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What is the “average monthly wage”?  
-cont'

- All money, goods and services received *over a fixed period of time* (12 weeks, one year, or full period of employment)
- As calculated back from the date of the disability

## TTD – cont'd– When does it stop?

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- Until (1) A doctor “determines employee is physically capable of any gainful employment” for which employee is suited
  - education, training and experience
  - light vs. full duty release,  
or
- (2) Acceptable temporary light duty is offered, or
- (3) Incarceration of claimant, or
- (4) PPD is ordered

# TTD – When does it stop? -- cont'd

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- TTD continues until...
    - (2) **Acceptable temporary light duty is offered** which
      - meets physical limitations
      - substantially similar hours/location
      - equal benefits and pay
- Notes: Contents of the offer letter  
When light duty ends

# TTD – When does it stop? -- cont'd

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- Advantages to light duty offer
  - TTD stops
  - Better employees
- TTD continues until...
  - (1) Gainful Employment
  - (2) Acceptable temporary light duty is offered which meets physical limitations
  - (3) Incarceration
  - (4) PPD is ordered



## 3. Permanent Partial Disability (PPD)

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Definition: payment for results of injury/disease

- ❑ When Dr. determines the claimant may have suffered a permanent disability and his medical condition is stable and ratable
- ❑ PPD is not related to the ability to return to work
- ❑ Choosing amongst several PPDs

## 3. Permanent Partial Disability (PPD)

---

Definition: payment for results of  
injury/disease

- Nonphysical impairments cannot be rated

## PPD-cont'd-Amount of Money

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- ❑ \$ based on age, average monthly wage, and percent of disability
- ❑ Apportionment of disability when prior impairment
- ❑ Lump sum of up to 25% disability rating is allowed

# PPD-cont'd-Subsequent Injury Fund

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- ❑ Definition: full reimbursement to employer of PPD when prior disability is a key factor
- ❑ Any prior impairment qualifies, if  $\geq 6\%$
- ❑ Combined disability must be “substantially greater”
- ❑ EICN insured employees do not qualify
- ❑ Written record: (1) employer knowledge when hired, (2) employee retained after knowledge, or (3) detrimental reliance on relevant false representations
- ❑ Time limitations

## 4. Permanent Total Disability (PTD)

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Definition: permanent wage benefits  
for permanent, total disability

- ❑ Scheduled PTD injuries
- ❑ Odd-lot doctrine – when employee unable to engage in any occupation
- ❑ Apportionment if previous disability contributing to total disability

## PTD– cont'd

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- 66 2/3 of average monthly wage for life
- But not if incarcerated or dead
- PTD can be revisited later

## 5. Vocational Rehabilitation

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Definition: training because of an inability to return to prior job

1. Permanent restrictions based on medically objective, detailed findings on the ability to work pre-injury job
2. Pre-accident employer is unable to accommodate the restrictions with a light-duty job
3. Other employers unable to accommodate the restriction at 80% of prior wage

# Voc Rehab– cont'd-- Exceptions

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- ❑ Citizenship matters
- ❑ No benefits if incarcerated
- ❑ No benefits just because former position is “unavailable” – discontinued position versus employee misconduct



cont'd—

## Permanent Light Duty

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- ❑ Valid offer terminates voc rehab benefits
- ❑ No offer/invalid offer means waiver of employer's role in voc rehab process
- ❑ Requirements of a valid offer
  - compatible with restrictions
  - not demeaning, etc.
  - same benefits as before
  - $\geq 80\%$  of pre-accident wage, and = regular starting salary for that job
  - reasonable prospect for continued employment

## Voc Rehab– cont'd

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- ❑ 28 day mandatory determination of physical limitations
- ❑ 90 day optional written assessment



# Voc Rehab– cont'd-- Priorities

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1. Return to the pre-injury job
2. Return to a job with the pre-injury employer
3. Obtain a job with another employer utilizing “existing skills”
4. Provide training for the employee while he is working in another vocation
5. Provide formal training or education in a new vocation

## Voc Rehab– cont'd– The Rehab Plan

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- ❑ No 90 day assessment: program developed compatible with employee's age, sex and physical condition
- ❑ 90 day assessment: Existing marketable skills = job placement only for 6 mths
- ❑ 90 day assessment: No existing marketable skills = training linked to PPD

## Voc Rehab– cont'd– The Rehab Plan

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- If no existing marketable skills and if 90 day assessment then
  - PPD  $\leq 6\%$  =  $\leq 9$  months training
  - PPD 6-10% =  $\leq 12$  months
  - PPD  $\geq 11\%$  =  $\leq 18$  months
- Extensions possible

## Voc Rehab– cont'd

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- ❑ What if claimant refuses rehabilitation services offered?
- ❑ Motor vehicle? Tools and equipment? Babysitting for the kids?
- ❑ What about self-employment?
- ❑ What if his circumstances change?

## Voc Rehab– cont'd

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- ❑ Maintenance payments – 66 2/3%
- ❑ What if you cannot find the employee?
- ❑ Subsequent voc rehab plans permitted
- ❑ What if the employee is discharged for good cause?

# Voc Rehab– cont'd– final points

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- Lump-sum possible
  - 40% minimum
  - waiver of future voc rehab benefits



# Voc Rehab– cont'd– final points

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-- Nevada residence issues

## 6. Temporary Partial Disability (TPD)

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Definition: supplemental temporary wage payments during claim

- If reemployment wage is less than TTD (<66 2/3 %)
- 24 month maximum

## 7. Death Benefits

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- ❑ Burial expenses <\$5000
- ❑ TTD to spouse of decedent until death, or remarriage of spouse plus two years
- ❑ Effect of wholly dependent parents or siblings

# Death Benefits– cont'd

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## Effect of surviving children of the deceased employee

- Eligible until death, marriage, 18 or 22, or incapable of supporting self
- Effect of subsequent death or remarriage of spouse

# Other Useful Benefits Statutes

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Compensation can be reduced or suspended to the extent an employee's...

1. Disability is aggravated by a failure to follow medical advice
2. Unsanitary or injurious practices retarding his recovery

Unless the employee elects treatment through prayer!

3. Receives SSA disability payments

## Other Useful Benefits Statutes

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- ❑ Compensation can be suspended if a correctable, non-industrial condition prevents medical treatment
- ❑ Payments due to knowing misrepresentation or concealment of material fact by the employee can be ordered reimbursed
- ❑ Overpayments can be recaptured but only for 30 days

# Closing a claim

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- When all benefits paid
- Before all benefits paid
- Small claims (<\$300)

## Re-opening a closed claim

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- *Within one year after closure, only if...*
  - medical evidence shows an objective change in medical condition
  - clear and convincing evidence primary cause of change is the same injury
- *More than one year after closure, if...*
  - doctor certificate shows a change of circumstances that would warrant an increase of compensation
  - preponderance shows primary cause of change is the same injury



## Re-opening– cont'd -- Definitions

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- *Within or after one year...* primary cause of change is the same injury...
- *Within one year...* medical evidence shows an objective change in medical condition,
- *More than one year...* a change of circumstances that would warrant an increase of compensation...

## Re-opening – cont'd

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- ❑ Reopening for medical investigation only
- ❑ Reopening for voc rehab services only
- ❑ Small claims (no PPD, no off work) must be reopened within one year

## Re-opening – cont'd

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- ❑ TTD, and voc rehab maintenance, must be paid again
- ❑ Prior causation decisions are not redone
- ❑ Amount of benefits is fixed as of the date of the disability
- ❑ No waiver allowed

# Miscellaneous Topics: “no no’s”

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## Thou shall not...

1. Induce a claimant to fail to report a claim, or refuse to process the claim
2. Persuade a claimant to settle for a less than reasonable amount, or to accept less than the compensation found to be due him without “justification”
3. Unreasonably delay or refuse payment (30 days after decision, 10 days otherwise)
4. Intentionally failed to comply with any workers compensation statute or regulation
5. FIRE THE EMPLOYEE FOR FILING A CLAIM

# Attorneys: The Nevada Attorneys for Injured Workers (NAIW)

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- Private counsel allowed at any stage
- NAIW – free to claimant
- When can NAIW decline representation?
  - HO level: “may give advice”
  - AO level: if claim is frivolous
  - Appeals: if appeal is meritless

## Misc. topics: Self-insured employers

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- ❑ Sufficient administrative and financial resources proven
- ❑ Five or more employers can form an association
- ❑ Are not insurers for purposes of the NIGA

# Misc. topics: Index of Claims

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Definition: a repository of prior claim information of claimants

- ❑ Administrator must keep an index of claims
- ❑ Insurers are required to provide a history of claims to the administrator

## Misc. Topics: Getting Medical Records

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- ❑ General waiver of physician-patient privilege upon filing of claim
- ❑ Specific waiver of privilege in certain cases
  1. Treating doctors required to testify
  2. Pre-existing conditions required to be disclosed
  3. Previous disabilities must be disclosed
- ❑ D36 form Medical Authorization



# Now what?

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You or the  
claimant want to  
appeal a  
determination

# THE APPEALS PROCESS

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Four different levels

- MCO/Hearing officer
- Appeals officer
- District Court
- Supreme Court



# Should we appeal?

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- ❑ Attorneys fees
- ❑ 9% interest to claimants on contested claims
- ❑ Travel expenses and lost wages to employee if employer's appeal fails
- ❑ What if you are self-insured?
  
- ❑ Note: Personal identifying information must be deleted from any submittal to court!

## Level I-A: MCO grievance

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- *If* MCO has a grievance procedure, employee must appeal first to the MCO
- 14 days to file; 14-30 days to resolve
- 70 days to appeal to A.O.

Note: add three days to time limits  
for mail with all appeals

# Level I-B: Hearing Officer

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Initiating...

- ❑ Begins with a “determination letter”
- ❑ Letter must inform claimant that letter must be appealed within 70 days; letter should include appeal form (D-12a)
- ❑ A brief should be filed
- ❑ Hearing will be scheduled within 30 days; decided within 15 days
- ❑ If there is a medical question, the H.O. may refer the employee to a doctor
- ❑ Discovery is optional

# Level I-B: Hearing Officer – cont'd

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## The Hearing

- ❑ Relatively informal – attorneys not required; but, witnesses and subpoenas can be used
- ❑ Typically lasts five to 10 minutes
- ❑ Petitioner has the burden of proof
- ❑ Written, appealable decision rendered in 15 days or less
- ❑ Hearing can be waived

# Level II: Appeals Officer

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## Initiating...

- ❑ 30 days to file appeal from date of hearing officer decision
- ❑ A motion for stay of the hearing officer decision may be filed
- ❑ Pretrial: document packet within 30 days, appellant's brief due 14 days before hearing; respondent's 7 days before

## Level II: Appeals Officer

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### Initiating...cont'd

- ❑ Motions must be in writing and served, but do not require points and authorities
- ❑ Discovery is optional, but beneficial
- ❑ Legal briefs are optional, but beneficial



# Level II: Appeals Officer-cont'd

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## The Appeals Officer Hearing

- More formal and court-like proceeding
- Legal counsel required
- Hearings are *de novo*
- Rules of Evidence are still relaxed

## Level II: Appeals Officer-cont'd

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### The Appeals Officer Hearing...cont'd

- ❑ Testifying doctors are poorly compensated
- ❑ If there is a medical issue, the employee may be referred to a doctor, or an “external review organization”
- ❑ Transcript? 7 days
- ❑ Rehearing? 15 days

# Level III: Judicial Review (Dist. Ct.)

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## PROCEDURE

- 30 days to appeal Appeal Officer's decision
- Motion for stay may be filed within 30 days (A.O. or district court)

## Level III: Judicial Review (Dist. Ct.)

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### Should we appeal?

- ❑ Standard for review: clear error, arbitrary and capricious, or abuse of discretion
- ❑ Court may not substitute its judgment on a question of fact
- ❑ Court may independently review administrative construction of statutes
- ❑ Costs and attorneys fees can be awarded if appeal is frivolous
- ❑ Don't forget the 9% interest

## Level IV: Judicial Review (Supr. Ct.)

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- Supreme Court standard for review: same as district court

# Misc. Topics: The Appeals Panel

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- The Appeals Panel: a 7 member board appointed by the Governor
- Jurisdiction:
  - experience modification factor
  - classification of risk
  - supplementary rate

# Settlements

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- ❑ Avoiding reopening rights
- ❑ The employee should agree in writing he was not coerced into settling

# Final Thoughts

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- ❑ Benefits must be authorized by a statute to be valid
- ❑ Not all regulations are created equal





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