



# Brief Facts

## WEST VIRGINIA WORKERS' COMPENSATION

### COMPENSABILITY

02  
FACT SHEET

#### I. Definition

- a. An injury is compensable if it is a "definite, isolated, fortuitous occurrence" or gradual injury by reason of the duties of employment. *Barnett v. State Workmen's Comp. Comm'r*, 172 S.E.2d 698 (1970); *Lilly v. State Workmen's Comp. Comm'r*, 225 S.E.2d 214 (1976).
- b. Injury must occur in the course of and must result from employment. W.Va. Code § 23-4-1 (a) (2018).

#### II. Burden of proof

- a. A workers' compensation claimant has the burden of proving his or her claim by proper and satisfactory proof. *Sowder v. State Workmen's Comp. Comm'r*, 189 S.E.2d 674, 676 (1972).

#### III. Preponderance of evidence

- a. For all awards...resolution of any issue...shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. W.Va. Code § 23-4-1g (a) (2003).

#### IV. Reporting

- a. Statute of limitations (W.Va. Code § 23-4-15)
  - i. Injury & death due to injury=six months from date of injury and/or date of death.
  - ii. Occupational pneumoconiosis
    - 1. Three years from date of last exposure or three years from date claimant advised of diagnosis, whichever occurs last.
    - 2. For deaths due to occupational pneumoconiosis, claim must be filed within two years of death.
  - iii. Other occupational diseases
    - 1. Three years from date of last exposure, or three years from date claimant advised of diagnosis, or three years from date claimant should reasonably have known, whichever occurs last.
    - 2. For deaths due to other occupational disease, claim must be filed within one year of death.
- b. Additional reporting provision
  - i. Regulations state that claimant must give written notice of injury to employer "immediately," which is defined as within two days, and failure to do so "dilutes the credibility and reliability of the claim" but cannot be the sole basis for denial. W.Va. C.S.R. § 85-1-3.1 (2009).

#### V. Multiple employers/occupational disease claims

- a. Occupational disease claims are not allocated among multiple employers. The last employer to employ claimant and expose him or her to the hazards of the occupational disease (for the requisite time period, if any) is solely chargeable for the claim, regardless of duration of employment with that company or any other. *Pioneer Pipe, Inc. v. Swain*, 791 S.E.2d 168 (2016).

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## COMPENSABILITY (*continued*)

### VI. Preexisting conditions

- a. A claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or condition was asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation. This presumption is not conclusive; it may be rebutted by the employer. Syl. pt. 5, *Moore v. ICG Tygart Valley, LLC*, No. 20-0028 (April 28, 2022).

### VII. Filing of claim when claimant aware of pending layoff, termination, unemployment claim, etc. may be given "probative weight." W.Va. Code § 23-4-1c (2009)

### VIII. Idiopathic falls – Many cases are difficult to reconcile

- a. Rejection of claims affirmed where fall occurred for no known reason or due to history of preexisting condition, such as transient ischemic attacks or syncope. *Sellers v. W.Va. University Bd. of Regents*, No. 15-0379 (March 25, 2016) (memorandum decision); *Price v. Kingsford Mfg. Co.*, No. 13-1272 (April 6, 2015) (memorandum decision).
- b. However, claims generally compensable if fall occurs in course of employment and there is no evidence that a preexisting condition caused the fall. *Cox v. Fairfield Inn*, No. 14-0871 (June 16, 2015) (memorandum decision).
- c. We recommend consultation with counsel on case-by-case basis.

### IX. Zone of employment / coming and going

- a. An injury incurred during the course of travel to or from the workplace and not on the premises of the employer is not compensable unless the place of injury was somehow brought within the scope of employment by an express or implied requirement of the employment. *Williby v. W.Va. OIC*, 686 S.E.2d 9 (2009).
- b. Exceptions include special errands at the employer's request, traveling salesmen, and other employment situations where the employee is injured off-premises during an activity expressly or impliedly required by the employment.
- c. Injuries on premises, including employer-owned parking lots, are usually compensable.

### X. Mental-mental

- a. Barred by statute, W.Va. Code § 23-4-1f (2011). There must be a physical injury.

### XI. Horseplay

- a. Not specifically mentioned in statute; the defense would be that the injury did not result from employment.

### XII. Intoxication

- a. Two potential statutes
  - i. Workers' Compensation Code
    - 1. Employer supposed to have "reasonable suspicion" to test unless "safety sensitive position".
    - 2. Must have blood test.
    - 3. For alcohol, testing must be obtained within two hours.
    - 4. Positive result = total bar to claim.
    - 5. Causation not mentioned in statute.
  - ii. WV Safer Workplaces Act
    - 1. Employer must have policy compliant with the Act.
    - 2. It allows random and post-accident testing.
    - 3. Any type of test (hair, blood, saliva, urine, etc.).
    - 4. Positive test = bar to indemnity benefits only.
    - 5. Claimant must be intoxicated at the time of injury.

## WEST VIRGINIA WORKERS' COMPENSATION COMPENSABILITY (*continued*)

### XIII. Unreasonable Denial

- a. If claimant litigates denial of claim and prevails after all appeals, he or she may file an allegation that the denial of the claim (or medical benefits, or temporary total disability benefits) was "unreasonable".
- b. This means that the claim administrator is unable to demonstrate evidence or legal basis/legal authority which is relevant and probative at the time of the denial and supported the denial  
W.Va. Code § 23-2C-21 (c) (2009).
- c. If proven, claimant receives award of reasonable attorneys' fees and costs actually incurred.



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