



A Treatise of Wyoming Workers' Compensation Law

First Edition

Michael C. Duff



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Michael C. Duff
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CALI eLangdell® Press 2019

About the Author

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Notices

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Acknowledgements

To: My beloved family: Victoria, Isabel, and Daniel

With respect to the creation of this volume, I want to acknowledge the excellent and hard work of my principal student research assistants, John Hornbaker IV and Jeremy Meerkreebs, who are destined to be great lawyers. Thanks are also due to my former students (and now lawyers) Nathan Ridgway and Christopher Brennan, who performed important research on early chapter drafts. I am also grateful for the help I have received along the way from a group of Wyoming practitioners, who are almost impossibly generous with their time in responding to my frequent pinpoint practice questions. Nevertheless, in a work of this kind, there will doubtless be errors—even when supported by such an outstanding team. And all errors are mine and mine alone.

MCD

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1 INTRODUCTION TO THE WYOMING WORKERS' COMPENSATION ACT

1.1 History and Purpose of Workers' Compensation

Workers' Compensation is a system of benefits provided to injured workers in lieu of the workers' pursuit of tort damages, particularly in negligence. The idea of the system emerged in the industrialized world in Germany in about 1884,¹ though scattered historical antecedents to something like workers' compensation can be found earlier.² The original German workers' compensation system was part of a broader social insurance structure providing compensation to individuals for sickness and disability (from whatever origin), as well as for *work-related* injury leading to disability or incapacity for work.³ American workers' compensation statutes trace their origins primarily to the *British Workers' Compensation Act* of 1897,⁴ though it is important to note that by the time American states began enacting workers' compensation statutes in 1911 approximately twenty workers' compensation statutes had already been enacted around the world.⁵

Wherever enacted, workers' compensation arose as a dominant system because of the increase in the frequency and intensity of workplace injuries occasioned by industrialism.⁶ While these injuries could in theory be remedied through resort to civil lawsuits, such suits were expensive, and took a great deal of time to pursue. As a practical matter, workers were unable to "wait out" even meritorious suits wending their way through the cumbersome litigation system. Furthermore, in the United States, establishing legal entitlement to tort damages was difficult. The nature of the employer's duty to the injured worker was often unclear and, where a duty could be shown, breach of the duty and establishment of legal causation were obstacles to recovery. Typically, in tort, a plaintiff was required to show that a harm was foreseeably caused by a risk created by a departure from a legal duty. Pure accidents were not (and are not) compensable under a fault-based regime.

¹ 1 BRADBURY'S WORKMEN'S COMPENSATION AND STATE INSURANCE LAW (hereinafter "BRADBURY'S WORKMEN'S COMPENSATION I") xviii (1912)

² BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES, No. 203, 9 (1917) (hereinafter BLS BULLETIN No. 203)

³ BRADBURY'S WORKMEN'S COMPENSATION I at xvii-xxii

⁴ For a history of that law in the United Kingdom see DAVID G. HANES, THE FIRST BRITISH WORKMEN'S COMPENSATION ACT, 1897 (Yale University Press 1968); P. W. J. BARTRIP AND S. B. BURMAN, THE WOUNDED SOLDIERS OF INDUSTRY, INDUSTRIAL COMPENSATION POLICY 1833-1897, 190-206 (Clarendon Press 1983)

⁵ BRADBURY'S WORKMEN'S COMPENSATION I, xv-xxxii; BLS BULLETIN No. 203, 297-305

⁶ HERMAN MILES SOMERS AND ANNE RAMSAY SOMERS, WORKMEN'S COMPENSATION, PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY, 22-28 (John Wiley & Sons 1954)

Moreover, and in many respects more notably, even if an employer could be shown to have breached a duty to the employee, resulting in harm, the legal claim might still be defeated if the employee either *assumed the risk* of being harmed; or somehow *contributed*, through the employee's own negligence, to the occurrence of the harm. In either of these instances of "affirmative defense," the employee was completely deprived of damages. A third principle held that where an employee was injured because of the negligence of a fellow employee, the negligence was not imputable to the employer under principles of vicarious liability. This "**fellow-servant**" rule, along with the complete bars of assumption of the risk and contributory negligence, created a system of affirmative defenses sometimes disparagingly referred to as "**the unholy trinity.**"

Nevertheless, by the end of the first decade of the twentieth century, employers in the United States, perhaps fearing the *potential* for adaptation of tort law to permit recovery of damages (considering the terrific and mounting workplace injury toll), entered into what has popularly become known as a "Grand Bargain," or *quid pro quo*, with worker, governmental, and insurance stakeholders. **That bargain has become what we now call "workers' compensation."**

The nature of the bargain is that in exchange for **swift** and "**adequate**" statutory benefits employees agree to forfeit tort (lawsuit) damages and employers agree to forfeit tort defenses in exchange for **tort immunity**. Fault was entirely removed from the calculus.⁷ The measure of the benefits has been some percentage of the pre-injury average weekly or monthly wage, as a weekly or monthly **indemnity** benefit, and payment of **reasonable and necessary** medical expenses related to work injuries. In the case of death, tort remedies are exchanged on behalf of statutory beneficiaries for workers' compensation weekly or monthly benefits, calculated as some defined statutory percentage of the deceased worker's pre-injury wages. *One* way to think of this death benefit arrangement is that workers' compensation death benefits are exchanged for **wrongful death** compensatory damages. But because funeral expenses, medical benefits, and indemnity benefits based on medical expense and lost wages *after injury but before death* are *also* recoverable by statutory beneficiaries, workers' compensation death benefits *also* resemble certain aspects of **survival actions**.

From a public policy perspective, workers' compensation is a form of industrial insurance in which the premiums for the insurance are charged to industrial manufacturers and service providers with the understanding that the costs of the insurance will be recouped through 1) **increased prices** paid by the consuming public; and 2) **de facto reduced wages** paid to workers by employers who have been required to pay the premiums. Although the scheme sounds in the nature of

⁷In workers' compensation statutes, the concept of fault occasionally reemerges when an employer or employee is said to have engaged in "serious" or "willful" misconduct (or something of the like).

contract, it must always be remembered that **workers' compensation is a tort substitute**. **Workers' compensation is not a discretionary state welfare benefit.** To the extent workers' compensation does *not* adequately remedy workplace injury, the original premises of the *quid pro quo* are called into question, and constitutional infirmities undoubtedly emerge unless the original right to a tort remedy is promptly reestablished.⁸

1.2 History and Purpose of Wyoming Workers' Compensation

The enactment of Wyoming Workers' Compensation occurred during a wave of adoption of workers' compensation statutes around the country. The implementing bill was introduced in the labor committee, sent to the judiciary committee without comment, returned with minor amendments, and then put up for vote. A floor speech by Representative George Young Jr., from Rock Springs, expressed some opposition to the bill because, as he saw it, the benefits provided under the bill were insufficient. In the end, it appears that Representative Young supported the bill in hopes of subsequent benefit improvements. The bill, H.B. 147, passed unanimously in the House and then went to the Senate, where it was "engrossed" after passing with only a single "no" vote.⁹ An extended account of the historical origins of the Wyoming Workers' Compensation Act has been recounted elsewhere,¹⁰ but it is important to note that the Legislature preliminarily enacted a bill authorizing voters to **amend the Wyoming Constitution, which broadly prohibited limitations on damages in personal injury cases**.¹¹

The Wyoming workers' compensation statute was enacted for the same reasons as similar such statutes in the United States. It is noteworthy that in an early declaration of the purposes for Wyoming enacting workers' compensation, Governor Carey, in 1913, cited policy justifications enunciated by a *Wisconsin* legislative committee. The selection of Wisconsin as a comparator was significant because it was the *first* state enacting workers' compensation in the United States. Thus, **Governor Carey firmly connected Wyoming's policy aspirations to the national movement generally**. The stated objectives in 1913 were:

First, to furnish prompt and reasonable compensation to the injured employee;

⁸ This seems especially true in Wyoming where, as will be discussed in the next section, the right to remedy for personal injury is guaranteed by the Wyoming Constitution in Article 10, Section 4.

⁹ The Workers' Compensation Act, No. 147, 1915 Wyo. Sess. Laws ch. 124 (codified as amended at WYO. STAT. ANN. §§ [27-14-101](#) at seq.), hereinafter the shorter citation form "W.S." will be used instead of "Wyo. Stat."

¹⁰ See George Santini, *The Breaking of a Promise: An Analysis of Workers' Compensation Legislation, 1986-1997*, 33 LAND & WATER L. REV. 489, 489-92 (1998)

¹¹ Art. X, Section 4 of the Wyoming Constitution

Second, **to utilize for the injured employee a large portion of the great amount of money wasted under the present systems;**

Third, **to provide a tribunal where disputes between employer and employee in regard to compensation may be settled promptly, cheaply, and summarily;**

Fourth, **to provide a means for minimizing the number of accidents in industrial pursuits.**¹²

Thus, Wyoming appeared to enact workers' compensation for the same reasons it was being enacted elsewhere in the country.

In its *present* form, the legislative purpose of the Wyoming Workers' Compensation Act is stated as follows:

It is the intent of the legislature in creating the Wyoming worker's compensation division that the laws administered by it to provide a worker's benefit system be interpreted **to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the Worker's Compensation Act.** It is the specific intent of the legislature that benefit claims cases be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' benefits legislation shall not apply in these cases. The worker's benefit system in Wyoming is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Accordingly, the legislature declares that the Worker's Compensation Act is not remedial in any sense and is not to be given a broad liberal construction in favor of any party.¹³

It is evident there is some tension between original and modified statements of the Wyoming Act's purpose.

1.3 Uniqueness of Wyoming's Workers' Compensation Statute

Wyoming's workers' compensation statute is unique in several ways. To understand why it is so unique a bit more history will be canvassed. The Grand Bargain, referred to in Section 1.1 above, itself was *so* unique that many observers wondered whether courts would even uphold it as constitutional. Because of this

¹² See Santini, *Breaking of a Compromise* at 488, n.2; citing House Journal, 12th Leg. 40 (Wyo. 1913)

¹³ W.S. § [27-14-101](#) (b)

uncertainty, several states began implementing the workers' compensation model slowly and cautiously. For example, several states applied workers' compensation statutes *only* to extrahazardous employment.¹⁴ Some states preliminarily made participation in workers' compensation *elective* with respect to employers, employees, or both. (Texas is the only U.S. state never to have changed the completely elective nature of its system; in a few states workers' compensation has remained elective for *employees* in very narrow circumstances.) Eventually, after the United States Supreme Court upheld the constitutionality of one version of workers' compensation, the New York Act—mandatory only with respect to ultrahazardous employment—in the celebrated case *New York Central Railroad Company v. White*,¹⁵ many states became more audacious in applying their statutes in mandatory fashion to most employers, extrahazardous and non-extrahazardous alike. Eventually, all states except Wyoming (and perhaps Illinois) appear to have simply excised references to statutory application only to extrahazardous employments.¹⁶ Wyoming, for reasons that are somewhat unclear, has broadened (sometimes in counterintuitive ways) the class of employments defined as “extrahazardous.”¹⁷ Thus, Wyoming law still by its terms applies to “**extrahazardous**” employment, a reference that can be puzzling to out of state readers.

Another unique feature of Wyoming's statute is that the system of insuring employers against loss occasioned by exposure to liability for payment of benefits is “**monopolistic**.” A monopolistic system is one in which a state government is the exclusive guarantor and payor of workers' compensation benefits. At this writing only Wyoming, Ohio, North Dakota, and Washington possess monopolistic systems (there were as many as seven at one time). All other states permit private insurance carriers to insure employers against workers' compensation losses, though some states operate state funds **in addition to** overseeing a private workers' compensation market. Wyoming is also one of only two states—North Dakota is the other—not permitting employers to self-insure following the posting of an adequate bond.

Wyoming has also uniquely established by statute a “Medical Commission” to resolve conflicts in medical evidence—that is, situations in which some medical evidence seems to show that an injured employee is entitled to specific types of workers' compensation benefits while other evidence points to non-coverage. The approach of handling such evidentiary conflicts outside of a **traditional, unitary** administrative law adjudicatory body appears to be unique to Wyoming. While

¹⁴This is also true of workers' compensation prior to its American adoption. Some countries originally applied workers' compensation solely to especially dangerous industries like mining.

¹⁵ 243 U.S. 188 (1917)

¹⁶ See 1 Larson's Workers' Compensation Law § 2.07

¹⁷ See *id.* and *infra.* at Section 2

several states utilize systems in which cases are referred to “*independent*” or “*impartial*” medical examiners to resolve competing medical evidence generated by parties, no other states have taken the additional step of creating an entirely separate, workers’ compensation dedicated medical agency to hear and decide such cases. For example, under the Utah Act, a hearing officer may *refer* contested issues to a medical panel directly employed by the state but the referring hearing officer retains jurisdiction of and decides the case.¹⁸ In Wyoming, full hearing jurisdiction of the case lies with the Medical Commission once statutory predicates are satisfied.¹⁹ The process will be discussed more fully in Chapter 7 of this Treatise.

Finally, although **Wyoming was initially a “liberal construction” state**, “[i]n 1994, an amendment to the Wyoming Workers’ Compensation Act was adopted by the legislature with the apparent purpose of **rejecting the rule of liberal construction**.”²⁰ The statute now provides in pertinent part: (b) . . . It is the specific intent of the legislature that benefit claims cases be decided on their merits and that the common law rule of ‘liberal construction’ based on the supposed ‘remedial’ basis of workers’ benefits legislation shall not apply in these cases . . .”²¹

This amendment presents an interesting interpretive problem. In several areas of workers’ compensation law, the Wyoming Supreme Court rendered decisions with an eye to the generally applicable²² liberal interpretation canon. **The question is whether the law is somehow unsettled in connection with narrow issues decided under the prior liberal construction regime.** In general, “[c]ourts construe a new law as consistent with existing case law in the absence of weighty evidence that a legislature did not intend to adopt prior judicial interpretations when it enacted the new version of a law.”²³ Absent a legislative expression in 1994 to very broadly unsettle Wyoming workers’ compensation law, it would seem prudent for the Wyoming courts to follow this general interpretive rule. It is, of course, true that during the phase-in of the new statute, abolishing liberal construction, the Wyoming courts held that “the rule of liberal construction of a statute in favor of the claimant is applied when the statute at issue is silent as to the issue presented and precedes the legislature’s 1994 amendment to the preamble of the workers’ compensation statutes.”²⁴ But that rule does not help with the problem of what to do about issues that were decided under *provisions of prior*,

¹⁸ Utah Labor Code, § 34a-2-601

¹⁹ See W.S. § [27-14-616](#)(b)(iv)

²⁰ W.S. § [27-14-101](#)(b)

²¹ In re Collicott, [20 P.3d 1077](#) (Wyo. 2001); Wright v. Workers' Safety & Compensation Div., [952 P.2d 209](#), 212 n. 1 (Wyo. 1998)

²² See 3B Sutherland Statutory Construction § 75:3 (7th ed.) (“Courts generally have accorded workers' compensation statutes a liberal interpretation to realize the fullest possible potential of the humane and beneficial purposes of such enactments.”)

²³ *Id.* n.71 and accompanying text

²⁴ Brierley v. Workers’ Safety & Compensation Div., [52 P.3d 564](#) (Wyo. 2002); Wilkinson v. Workers’ Safety & Compensation Div., [991 P.2d 1228](#), 1242 (Wyo.1999)

liberal-construction versions of the statute that have been carried forward in newer versions of the statute enacted after the excising of the liberal construction preamble.

1.4 Fault is Irrelevant Under Wyoming Statute

Despite the uniqueness of the Wyoming statute, it remains a bedrock principle under Wyoming law (as under the law of all workers' compensation statutes) that in connection with work-related injuries tort law has been supplanted by workers' compensation and that fault on the part of the employer or employee is irrelevant. This, indeed, is one of the core concepts of the "quid pro quo" or "Grand Bargain" of workers' compensation. As an historical aside, this was a central feature of all original workers' compensation acts, American and International.²⁵ Wyoming has firmly adopted the principle.²⁶

1.5 Exclusive Remedy Rule Generally

In the American system, it is explicitly understood under the vast majority of modern statutes that workers' compensation benefits are an employee's **exclusive remedy** against her employer for workplace injury.²⁷ As mentioned in Section 1.3, however, many initial workers' compensation statutes, because of constitutional concerns, provided employees with the *option* to sue in tort rather than to pursue workers' compensation benefits. Texas, as mentioned, retains this feature of its statute; and, in some instances, state statutes preserve election for employers *in certain economic sectors* such as the *agricultural* sector, and for employees in very narrow circumstances.²⁸ Also, where employers are required to obtain workers' compensation coverage and do not, they may be liable to an injured employee in tort, and may be prevented in that litigation from raising traditional affirmative defenses to a negligence action.²⁹ This "deprivation of defenses" approach is similar to that taken under federal tort "liability statutes" preceding enactment of workers' compensation statutes, most notably the Federal Employers' Liability Act of 1908 (FELA),³⁰ which remains applicable to American railroad employers under present law.

²⁵ 1 BRADBURY'S WORKMEN'S COMPENSATION AND STATE INSURANCE LAW (hereinafter "BRADBURY'S") 2 (2nd Ed. 1914);

²⁶ Zancanelli v. Central Coal & Coke Co., [173 P. 981](#) (Wyo. 1918). Hotelling v. Fargo-Western Oil Co., [238 P. 542](#) (Wyo. 1925); In re Byrne, [86 P.2d 1095](#), 1101 (Wyo. 1939); Fuhs v. Swenson, [131 P.2d 333](#), 337 (1942); Cottonwood Steel Corp. v. Hansen, [655 P.2d 1226](#) (Wyo. 1982); Baker v. Wendy's of Montana, [687 P.2d 885](#) (Wyo. 1984)

²⁷ 9 LARSON'S WORKERS' COMPENSATION LAW § 100.01; *see also* MICHAEL C. DUFF, WORKERS' COMPENSATION LAW 7 (LexisNexis 2017)

²⁸ 9 LARSON'S WORKERS' COMPENSATION LAW § 102.01; *see also* Noe Rodriguez v West Brand Dairies, [378 P.3d 13](#) (N.M. 2016)

²⁹ 9 LARSON'S WORKERS' COMPENSATION LAW § 102.02;

³⁰ 45 U.S.C. § 51 et seq. (1908)

1.6 Exclusive Remedy Rule in Wyoming

Wyoming not only adheres statutorily to the exclusive remedy rule,³¹ it seems compelled to do so by the state's constitution.

The right of each employee to compensation from [the workers' compensation] fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to such fund in favor of any person or persons by reason of any such injuries or death.³²

This language has been interpreted by the Wyoming courts to mean that **tort actions by employees against their employers are absolutely barred**.³³ The current version of the Wyoming Workers' Compensation Act states,

The rights and remedies provided in this act for an employee including any joint employee, and his dependents for injuries incurred in extrahazardous employments are in lieu of all other rights and remedies against any employer and any joint employer making contributions required by this act, or their employees acting within the scope of their employment unless the employees intentionally act to cause physical harm or injury to the injured employee, but do not supersede any rights and remedies available to an employee and his dependents against any other person.³⁴

The Wyoming Act additionally holds that **an employer is liable to her employees in tort if the employer has not qualified for coverage under the Act or, if qualified, "has not paid the required premium on an injured employee's earnings within thirty (30) days of the date due."**³⁵ Nevertheless, **the immunity provisions of the Workers' Compensation Act are to be narrowly construed**.³⁶ An entity asserting **the defense of immunity under the worker's compensation**

³¹ W.S. § [27-14-104](#)

³² *Id.*

³³ *Jordan v. Delta Drilling Co.*, [541 P.2d 39](#), 48 (Wyo. 1975); *see also Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885 (Wyo.1984)

³⁴ W.S. § [27-14-104](#)(a)

³⁵ W.S. § [27-14-104](#)(c); *Robinson v. Bell*, [767 P.2d 177](#) (Wyo. 1989) ("The clear import of the statute is that, when an employer was not qualified under the Act at the time of injury to an employee, the employer had no immunity."). Ed. Note: Although decided under a prior version of the Wyoming Workers' Compensation Act the relevant provision under current law, W.S. § [27-14-104](#)(c), remains unchanged and *Robinson* seems good law.

³⁶ *Fiscus v. Atlantic Richfield Company*, [742 P.2d 198](#), 200 (Wyo.1987), appeal after remand [773 P.2d 158](#) (1989); *Markle v. Williamson*, [518 P.2d 621](#), 624 (Wyo. 1974); and *Barnette v. Doyle*, [622 P.2d 1349](#) (Wyo. 1981)

statute (Wyoming courts consistent with the Wyoming statute frequently speak of “exclusive remedy” in terms of “immunity”) must establish that it is (1) an employer, (2) who pays into the worker’s compensation fund, (3) as required by law.

In Wyoming, an important exception to the exclusive remedy rule exists where a type of injury is **categorically excluded** from coverage. In *Cook v. Shoshone First Bank*,³⁷ for example, an employee was put on administrative leave after \$1200 was discovered missing.³⁸ The distraught employee committed suicide and the deceased employee’s mother, as estate administrator, brought suit in (essentially) a survivor action under Wyoming law.³⁹ The district court granted the employer’s motion for summary judgment. The Wyoming Supreme Court affirmed the district court’s ruling **except insofar as it was based on the exclusive remedy rule**. In Wyoming, a mental injury is covered under the workers’ compensation act only if “it is caused by a compensable physical injury, it occurs subsequent to or simultaneously with, the physical injury and it is established by clear and convincing evidence . . .”⁴⁰ Moreover, “claims are not covered where the mental injury and resulting suicide were not caused by a compensable physical injury.”⁴¹ It followed that **the employee’s claim was not covered by workers’ compensation and, consequently, could not have acted as a bar to the employee’s death action**, which was ultimately found not to be substantively meritorious.⁴²

An even more recent example of the same principle may be found in *Collins v. COP Wyoming*.⁴³ In that case, the claimant filed a civil suit against the employer and a co-employee for negligent infliction of emotional distress in connection with the workers’ compensation-covered death of his son. Both father and son were employees of the employer, and the father witnessed the death on the job. The trial court dismissed the suit, finding that “the claims of the father were derivative of the covered death of the son and were therefore **barred by worker’s compensation immunity**.” The Wyoming Supreme Court **reversed**:

[The father’s] claim for emotional distress is a claim for a mental injury that is not caused by a compensable physical injury to him; therefore, **it is not compensable under Wyoming worker’s compensation, and neither COP Wyoming nor [the co-employee] is entitled to worker’s compensation immunity on that basis.**

³⁷ [126 P.3d 886](#) (Wyo. 2006)

³⁸ *Id.* at 888

³⁹ *Id.*

⁴⁰ *Id.* at 890

⁴¹ *Id.*

⁴² *Id.*

⁴³ [366 P.3d 521](#) (Wyo. 2016)

Furthermore, though the father's claimed emotional distress (a workers' compensation-excluded "mental injury," *see infra*. Section 3.12) was in a sense "derivative" of a covered workers' compensation injury, "[i]t is an injury which is outside of the 'grand bargain' because workers' compensation provides no remedy for it, and he should be permitted to go forward to try to establish his [tort] claim . . ."

*Unlike the situation in a majority of states,*⁴⁴ under the terms of Wyoming workers' compensation immunity, **the exclusive remedy rule applies even to an employer's intentional torts,**⁴⁵ as is implicitly evident from the prior discussion of *Collins v. COP Wyoming*,⁴⁶ which revolved around a claim of **intentional** infliction of emotional distress. Had mental injuries *not* been categorically excluded from coverage under the statute, the immunity/exclusive remedy bar to a tort suit *would* have applied. There is also no provision under Wyoming law for enhanced benefits if, for example, an employer's "serious and willful misconduct" causes a work-related injury.⁴⁷

One may argue about whether this model of absolute immunity provides adequate deterrence to encourage employer investment in employee safety. But it is at any rate not inconsistent with the statute's definition of "injury," which is broader than "injury by accident." It is always difficult to argue that a statute defining injury in terms of "accident" encompasses intentional conduct within its exclusivity provisions.⁴⁸

Lastly, it is sometimes not clear if an entity is in fact an "employer" eligible for workers' compensation tort immunity. The problem emerges periodically in the context of joint employment, where an employee attempts to sue in tort a joint employer whom the employee contends is not **the** employer. The Wyoming courts have held that "immunity provisions in the Wyoming Worker's Compensation Act should be narrowly construed."⁴⁹ As the Wyoming Supreme Court has explained, "[b]ecause the Act was not intended to abrogate common-law remedies, this court has held that amending legislation must contain clear and precise language before

⁴⁴ According to the *Larson's* treatise, thirty-nine states and the District of Columbia have by statute or case law created an exception to the exclusive remedy rule in the context of intentional torts. 9 LARSON'S WORKERS' COMPENSATION LAW § 103.01

⁴⁵ *Parker v. Energy Development Co.*, [691 P.2d 981](#), 985 (Wyo. 1984); *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885, 889 (Wyo. 1984) (implicitly overruled with respect to IIED allegation); *Mauch v. Stanley Structures, Inc.*, [641 P.2d 1247](#), 1250 (Wyo. 1982)

⁴⁶ See discussion *supra* in this section

⁴⁷ See 9 LARSON'S WORKERS' COMPENSATION LAW § 105.04

⁴⁸ See 9 LARSON'S WORKERS' COMPENSATION LAW § 103.01

⁴⁹ *Stratman v. Admiral Beverage Corp.*, [760 P.2d 974](#) (Wyo. 1988); *Wessel v. Mapco, Inc.*, [752 P.2d 1363](#) (Wyo. 1988); *Fiscus v. Atlantic Richfield Co.*, [742 P.2d 198](#) (Wyo. 1987); *Bence v. Pacific Power and Light Co.*, [631 P.2d 13](#) (Wyo. 1981). For more on *Admiral Beverage* see *infra*. at 2.16

common-law rights can be taken away.”⁵⁰ **“An entity asserting the defense of immunity under the worker's compensation statute must establish that it is (1) an employer, (2) who pays into the worker's compensation fund, (3) as required by law.”**⁵¹ Thus, the burden is on the putative joint employer to establish its immunity. (*See infra*. this Treatise at Section 2.16)

1.7 Co-Employee Immunity Generally

States sometimes extend the immunity from tort liability provided to employers by operation of the exclusive remedy rule to *co-employees* of an injured employee. The highly respected *Larson's* multistate workers' compensation treatise (which will be referred to frequently in this Treatise) states that six jurisdictions extend tort immunity *only* to the employer; while in thirty-four additional states, although co-employee liability for negligence has been abolished by statute, it has been retained, either by statute or by judicial decision, for *intentional* wrongs.⁵² In essence, these states hold either that co-employees are not “third parties,” which are almost universally *not* immune from tort suits under state workers' compensation systems, or that co-employees engaging in intentionally tortious conduct are not within the *quid pro quo* scheme.⁵³

The strongest argument *supporting* co-employee liability is that, if a statute does not explicitly distinguish co-employees from other third parties, courts should not read such a distinction into the structure.⁵⁴ This argument would seem to have greatest force where damages for personal injuries are protected by a state constitution. The strongest argument *against* co-employee liability is that employees, in giving up common law actions against their employer pursuant to the *quid pro quo*, might reasonably expect that litigation within the employment relation *generally* has been extinguished.⁵⁵ Some legislatures have concluded that allowing litigation between employees in such circumstances, among other things, “has a disruptive effect upon the relationship among employees and supervisory and management personnel.”⁵⁶

⁵⁰ *Bence v. Pacific Power and Light Co.*, *supra.*, 631 P.2d at 15

⁵¹ *Knight v. Estate of McCoy*, 341 P.3d 412, 416 (Wyo. 2015) *quoting* *Clark v. Industrial Co. of Steamboat Springs, Inc.*, [818 P.2d 626](#), 629 (Wyo.1991) *see also* *Stratman v. Admiral Beverage Corp.*, *supra.*, 760 P.2d at 979

⁵² 10 LARSON'S WORKERS' COMPENSATION LAW § 111.02

⁵³ 101 C.J.S. WORKERS' COMPENSATION § 1802

⁵⁴ *See e.g.* *Hockett v. Chapman*, [366 P.2d 850](#) (N.M. 1961)

⁵⁵ 10 LARSON'S WORKERS' COMPENSATION LAW § 111.03 [2]

⁵⁶ Code of Ala. § 25-5-14 upheld against constitutional attack in *Reed v. Brunson*, [527 So. 2d 102](#) (Ala. 1998)

1.8 Co-Employee Liability in Wyoming

W.S. § [27-14-104\(a\)](#) states that,

The rights and remedies provided in this act for an employee including any joint employee, and his dependents for injuries incurred in extrahazardous employments are in lieu of all other rights and remedies against any employer and any joint employer making contributions required by this act, **or their employees** acting within the scope of their employment **unless the employees intentionally act to cause physical harm or injury to the injured employee**, but do not supersede any rights and remedies available to an employee and his dependents against any other person.

“This definition tells us when a co-employee is not liable—he is not liable if he is merely negligent. The trouble this Court has repeatedly faced over the years has been trying to draw the line—somewhere beyond negligence—that results in liability.”⁵⁷ In *Formisano v. Gaston*,⁵⁸ the Wyoming Supreme Court upheld a district court’s granting of summary judgment for the defendant-employee where an employee alleged, in substance, that a co-employee’s failure to get adequate rest led to a truck going off the road, seriously injuring the plaintiff-employee’s back.⁵⁹ After cataloguing Wyoming co-employee cases,⁶⁰ the Court synthesized and endorsed the following test for co-employee liability in Wyoming:

A co-employee is liable to another co-employee if the employee acts intentionally to cause physical harm or injury. **To act intentionally to cause physical injury is to act with willful and wanton misconduct.** Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another. In the context of co-employee liability, willful and wanton misconduct requires the co-employee to have 1) **actual knowledge** of the hazard or serious nature of the risk involved; 2) **direct responsibility for the injured employee's safety and work conditions**; and 3) **willful disregard**

⁵⁷ *Formisano v. Gaston*, [246 P.3d 286](#), 290 (Wyo. 2011) (emphasis supplied)

⁵⁸ *Id.*

⁵⁹ *Id.* 289-290

⁶⁰ See e.g. *Hannifan v. American National Bank of Cheyenne*, [185 P.3d 679](#), 695 (Wyo.2008); *Bertagnolli v. Louderback*, [67 P.3d 627](#), 632 (Wyo.2003); *Smith v. Throckmartin*, [893 P.2d 712](#) (Wyo.1995); and *Harbel v. Wintermute*, [883 P.2d 359](#), 363 (Wyo.1994).

of the need to act despite the awareness of the high probability that serious injury or death may result.⁶¹

Subsequent Wyoming cases have continued to follow this standard.⁶² But there is a conceptual problem with limiting tort suits by injured employees against co-employees to instances of “intentional” acts. As noted above in Section 1.6 of this Treatise, Article X, Section 4 of the Wyoming Constitution states that, “No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person.” An exception under the same provision is made for the existence of workers’ compensation, and some very specific language concerning workers’ compensation immunity is set forth: “To the extent an employer elects to be covered by the state fund and contributes to the fund as required by law, the **employer** shall enjoy the same immunity as provided for extrahazardous employments.” **There is no mention of co-employee immunity.** If statutes in derogation of the common law must be strictly construed,⁶³ how much more is that the case when limitations on a common law right have been ensconced in the Wyoming Constitution?

⁶¹ Formisano, *supra.*, 246 P.3d at 291 (emphases supplied)

⁶² See Herrera v. Philipps, [334 P.3d 1225](#), 1231 (Wyo. 2014) and Vandre v. Kuznia, [310 P.3d 919](#), 922-923 (Wyo. 2013)

⁶³ State v. Heiner, [683 P.2d 629](#), 649 (Wyo. 1984); State v. Stovall, [648 P.2d 543](#), 547-548 (Wyo. 1982)

2 PERSONS COVERED BY THE WYOMING WORKERS' COMPENSATION ACT

Workers' compensation statutes are of specified jurisdiction. They apply to specific *persons* (*employees* and *employers* as statutorily defined) within specific "polities." Each *state* has a workers' compensation system as does the District of Columbia. Separate workers' compensation systems apply to *federal* employers and employees, and to Longshore and Harbor Workers,⁶⁴ and to maritime sailors under *federal* statutes.⁶⁵ Accordingly, when discussing differences between workers' compensation laws, it is probably most precise to say that "jurisdictions" differ (or are similar) rather than to limit comparisons to those between *states*.

2.1 Who is an Employee?

The common law customarily provided a very generic definition of employee. For example, *Black's Law Dictionary* supplies an 1822 definition of employee as, "Someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."⁶⁶ The definition usually assumes its greatest practical importance when there is a question as to whether an injured worker is an "employee" (workers' compensation applies) or an "independent contractor" (workers' compensation does not apply).

Throughout the ensuing discussion it will be important to bear in mind that states sometimes retain multiple definitions of "employee" depending on the state employment statute in question. For example, an individual may be an "employee" for purposes of unemployment compensation but not be an employee for purposes of workers' compensation.

2.2 Who is an Employee Under the Wyoming Workers' Compensation Act?

In Wyoming, an employee, **for purposes of workers' compensation law** is defined⁶⁷ as:

[A]ny person engaged in any extrahazardous employment under any appointment, contract of hire or apprenticeship, express or implied,

⁶⁴ 33 U.S.C.A. § 901 et seq.

⁶⁵ 46 U.S.C.A. § 30104

⁶⁶ BLACK'S LAW DICTIONARY (10th ed. 2014); see 5 LARSON'S WORKERS' COMPENSATION LAW § 60.01

⁶⁷ W.S. § [27-14-102](#) (a) (vii)

oral or written, and includes legally employed minors, aliens authorized to work by the United States department of justice, office of citizenship and immigration services, and aliens whom the employer reasonably believes, at the date of hire and the date of injury based upon documentation in the employer's possession, to be authorized to work by the United States Department of Justice, Office of Citizenship and Immigration Services.

The Wyoming statute then explicitly excludes⁶⁸ (in addition to aliens whom the employer does *not* reasonably believe to be authorized to work by the United States Department of Justice) several categories of workers from the definition:

- (A) Any individual whose employment is determined to be **casual labor**;
- (B) A **sole proprietor or a partner of a business partnership** unless coverage is elected pursuant to W.S. [27-14-108\(k\)](#);
- (C) An **officer of a corporation** unless coverage is elected pursuant to W.S. [27-14-108\(k\)](#);
- (D) Any individual engaged as an **independent contractor**;
- (E) A **spouse or dependent of an employer living in the employer's household**;
- (F) A **professional athlete**, except as provided in W.S. [27-14-108\(q\)](#);
- (G) An **employee of a private household**;
- (H) A **private duty nurse engaged by a private party**;
- (J) An **employee of the federal government**;
- (K) **Any volunteer** unless covered pursuant to W.S. [27-14-108\(e\)](#);
- (M) **Any adult or juvenile prisoner or probationer** unless covered pursuant to W.S. [27-14-108\(d\)\(ix\)](#);
- (N) An **elected public official or an appointed member of any governmental board** or commission, except for a duly elected or appointed sheriff or county coroner;

⁶⁸ W.S. § [27-14-102](#) (a)(vii)(A)-(R). The Wyoming legislature has enacted an additional exclusion, (S), effective July 1, 2018: “A responsible broker, associate broker or salesperson licensed under the Real Estate License Act, W.S. 33–28–101 through 33–28–401, who receives compensation for the services identified in W.S. 33–28–102(b)(xiv). The receipt of additional compensation for the performance of other real estate related services shall not negate this exemption.”

(O) The **owner and operator of a motor vehicle which is leased or contracted with driver to a for-hire common or contract carrier**. The owner-operator shall not be an employee for purposes of this act if he performs the service pursuant to a contract which provides that the owner-operator shall not be treated as an employee for purposes of the Federal Insurance Contributions Act, the Social Security Act, the Federal Unemployment Tax Act and income tax withholding at source;

(P) A **member of a limited liability company** unless coverage is elected pursuant to W.S. [27-14-108](#)(k);

(Q) A **foster parent providing foster care services** for the department of family services or for a certified child placement agency;

(R) An **individual providing child day care or babysitting services, whose wages are subsidized or paid in whole or in part by the Wyoming department of family services**. This exclusion from coverage does not exclude from coverage an individual providing child day care or babysitting services as an employee of any individual or entity other than the Wyoming department of family services.

It also appears that, under W.S. § [27-14-106](#), **a minor is an employee within the meaning of the Act**, though the statutory language is somewhat elliptical: “A minor shall be deemed *free of any legal disability for the purposes of this act* and no other person has any cause of action or right to compensation for his injury except as expressly provided in this act.” It does not appear that Wyoming courts have decided whether minors **illegally employed** under **state law** are bound by the remedies of the Act.

In *Maser v. L. and H. Welding*,⁶⁹ the claimant, a minor, argued he was not limited to remedies under the Wyoming Workers’ Compensation Act because his employment was illegal under federal child labor laws.⁷⁰ The argument had some force because the legislature amended the definition of employee in 1996 to specifically include “legally employed minors” as employees within the meaning of the Act.⁷¹ Because, as mentioned above, minors were already employees under the Act, an argument was available that the legislature by implication was excluding illegally employed minors from the Act’s coverage.⁷² The Court escaped the

⁶⁹ [1 P.3d 642](#) (Wyo. 2000)

⁷⁰ *Id.* at 643

⁷¹ *Id.* at 646

⁷² *Id.*

problem by concluding that the employment in question in the case was not “illegal” under Wyoming law and “that in the absence of a specific legislative directive to apply federal law, state law applies.”⁷³

This does not resolve the question of whether minors illegally employed under **state** law are limited to the Act’s remedies. The Court in dicta has opened the door to the possibility that they are not: “Taking the plain, unambiguous language of that statute, we conclude that **the legislature intended for Wyoming law to define whether a minor was ‘legally employed.’**”⁷⁴ Why bother to make the distinction if employed minors are already *universally* (that is, whether legally or illegally employed) employees within the Act?

2.3 Undocumented Workers in Wyoming

The Wyoming approach to undocumented workers is unique. In essence, an “alien” is an employee, within the meaning of the Wyoming Workers’ Compensation Act, **if the employee’s employer “reasonably believes, at the date of hire and the date of injury based upon documentation in the employer’s possession, [the putative employee] to be authorized to work by the United States Department of Justice, Office of Citizenship and Immigration Services.”** W.S. § [27-14-102\(a\)\(vii\)](#).⁷⁵ In *In re Arellano*,⁷⁶ for example, the Wyoming Supreme Court upheld a district court’s reversal of the Office of Administrative Hearing’s claim denial of an individual who “admitted that his social security card was a fake he bought on the street from someone . . . [and] also admitted that the information on the Form I-9 was therefore false, that he was a citizen of Mexico, and that he ‘didn’t know’ if he had permission to work in the United States.”⁷⁷ Responding to the employer’s general arguments that an individual procuring employment through fraud could not have been intended by the Wyoming legislature to qualify as a statutory employee, the Court said, “[w]e find the language of § [27-14-102\(a\)\(vii\)](#) to be clear, unambiguous and straightforward. It plainly requires only that an employer reasonably believe, based upon ‘documentation’ in its possession at the date of hire and at the date of injury, that the employee is authorized to work in the United States.”⁷⁸ It is not required that the documents in the employer’s possession be

⁷³ *Id.* at 646-647

⁷⁴ *Id.* at 646

⁷⁵ Emphases supplied. It seems likely that the development of the law in this area was influenced by *Romero v. Reiman Corp.*, see e.g. 2012 U.S. Dist. LEXIS 194044 (February 15, 2012) tried in the District Court of Wyoming. In that case, presided over Judge Nancy Freudenthal a federal court, sitting in diversity jurisdiction, awarded an injured undocumented worker a verdict of \$1,000,000 (less 10% for comparative negligence).

⁷⁶ [344 P.3d 249](#) (Wyo. 2015)

⁷⁷ *Id.* at 251

⁷⁸ *Id.* at 253

“authentic;” the only requirement is that they create in the employer a “reasonable belief” of the putative employee’s authorization to work in the United States.⁷⁹

The Court reaffirmed this conclusion in *Gonzalez v. Reiman Corp.*⁸⁰ In *Reiman Corp.*, a putative employee proffered false employment documents to the employer on two separate occasions, once upon initial hire, and a second time upon rehire in the following year. During the second period of hire, the putative employee was seriously injured.⁸¹ The “Division,” the title of the workers’ compensation administrative claims body in Wyoming, denied the putative employee’s ensuing claim for benefits.⁸² Both the employer and the employee appealed this determination but, interestingly, the employee thereafter withdrew his objection,⁸³ possibly because as a non-employee he could pursue a tort claim, a topic that will be taken up momentarily. The Office of Administrative Hearings, the main administrative body hearing appeals of administrative adjudications in Wyoming, found the putative employee entitled to benefits because the employer reasonably believed he was authorized to work in the United States, and the district court affirmed the Office of Administrative Hearings’ determination.⁸⁴ The Wyoming Supreme Court upheld the determination below, **rejecting** the argument that for reasonable belief to be established an “employer must have in its possession all documentation required by the federal Office of Citizenship and Immigration Services (OCIS) and such documentation must be inspected, completed, and maintained in a manner that complies with all OCIS regulations and requirements of the Immigration Reform and Control Act of 1986 (IRCA).”⁸⁵

As intimated above, the logical corollary of the proposition that an alien is a statutory employee if the employer reasonably believes the alien to be authorized for employment is that, **the alien is *not* a statutory employee if (a) the alien was not authorized to work in the United States and (b) the employer did not reasonably believe the alien was authorized.** Thus, for example, in *Herrera v. Phillippy*,⁸⁶ a pipe fuser, injured when a pipe exploded, brought a negligence suit against the entity for whom he was working, and an intentional tort suit against that entity’s acknowledged employee.⁸⁷ The defendants moved for summary judgment asserting the exclusive remedy/immunity bar of workers’ compensation, and the district court granted the motions.⁸⁸ Although the plaintiff was *not* authorized to

⁷⁹ *Id.*

⁸⁰ [357 P.3d 1157](#) (Wyo. 2015)

⁸¹ *Id.* at 1160

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1160-61

⁸⁵ *Id.* at 1162

⁸⁶ [334 P.3d 1225](#) (Wyo. 2014)

⁸⁷ *Id.* at 1227

⁸⁸ *Id.*

work in the United States, the parties disagreed about whether the putative employer was aware of the fact.⁸⁹ Ultimately, the Wyoming Supreme Court remanded the case to the district court because there were disputed issues of fact as to whether the putative employer *reasonably believed* the alien lacked work authorization; if the evidence showed that the “employer” did not have such a reasonable belief (based on the appropriate documentation), the employer was *not* immune from suit.⁹⁰

It is problematic that the existence of employee status for undocumented workers turns upon the *belief* of an employer as to work authorization. In the first place, all the worker apparently need do is to place in the employer’s hands a forged document that is good enough to create a “reasonable belief” in the employer that the worker is authorized to work. Possession of a document seems to set the floor of the reasonableness of the belief, but surely not all documents are equally susceptible of belief. Ultimately, the state of affairs may lead to the determination of tort versus workers’ compensation liability being premised on *a single credibility determination*. From a state constitutional perspective, one can easily imagine “open courts” arguments emerging in this prickly area.⁹¹ At a minimum, the law seems tailor-made for strategic behavior on all sides. For example, an employer who ascertains that an injured undocumented worker’s civil tort case is weak could simply “confess” to not having documents in its possession, on the date of hire and of injury, from which a reasonable belief that the worker was authorized to work could have been created. The ultimate result could be that the injured individual is entitled *neither* to a tort suit *nor* to a workers’ compensation claim. The avoided liability may, for the employer, exceed in benefit any countervailing legal costs or difficulties. Wyoming law in this area has probably been influenced by tort cases allowing “an award of such damages against a person responsible for an illegal alien’s employment when that person knew or should have known of that illegal alien’s status. The threat of tort liability acts as an incentive to reduce the risk of

⁸⁹ *Id.* at 1228

⁹⁰ *Id.* at 1230-31

⁹¹ See for example *Mills v. Reynolds*, [837 P.2d 48](#), 53 (Wyo. 1992): Generally, equal protection “mandates that all persons similarly situated shall be treated alike, both in the privileges conferred and in the liabilities imposed.” *Small v. State*, [689 P.2d 420](#), 425 (Wyo.1984), *cert. denied*, 469 U.S. 1224 (1985) (*quoting* *State v. Freitas*, 61 Haw. 262, [602 P.2d 914](#), 922 (1979)). In the workers’ compensation context, while the Wyoming Supreme Court does not yet appear to have taken on the question, it has emerged in other states. In Indiana, for example, the state supreme court recently said, “the Indiana Constitution’s Open Courts Clause allows unauthorized immigrants to pursue claims for decreased earning capacity damages.” *Escamilla v. Shiel Sexton Co.*, [73 N.E.3d 663](#), 664 (Ind. 2017).

injuries.”⁹² Regardless, the clear majority position in the United States is that undocumented workers are entitled to workers’ compensation benefits.⁹³

2.4 Extraterritoriality in Wyoming

In addition to falling under the statutory definition, **the employee, to be covered, must at the time of the injury be working under a contract for hire made in Wyoming for employment by an employer who has a principal place of business within the state and *the employment* must be within the United States, a United States territory, Canada or Mexico, but which is not *principally* localized in any other state, United States territory, Canada or Mexico.** The employee *may* also be covered if, at the time of the injury, the employee is working under a contract for hire made in Wyoming for employment principally localized in another state, United States territory, Canada or Mexico, *the workers’ compensation law of which jurisdiction does not require that the employment be covered by a workers’ compensation insurance policy issued under the laws of that jurisdiction.* Thus, even if the employee is working principally in another state, a work-related injury may be covered if *that* state did not require the employment in which the injury occurred to be covered. The law on these issues is set out in W.S. § [27-14-301](#).

2.5 Joint Employee in Wyoming

A “joint employee” means any person having an express or implied contract for employment with more than one joint employer simultaneously; and whose work is controlled by more than one joint employer; and who is engaged in the performance of work for more than one joint employer.⁹⁴

2.6 Employee Definitions Not Interchangeable in Wyoming

Under Wyoming’s *unemployment compensation* law, W.S. § [27-3-104](#)(a)(i), an “employee” is defined in accord with the standard Internal Revenue Code definition which has historically utilized **a 20-factor common law test**.⁹⁵ Under the *Wyoming Occupational Health and Safety statute*, W.S. § [27-11-103](#)(a)(iii), “employee” is defined as **“a person permitted to work by an employer in employment.”**

⁹² See generally *Rosa v. Partners in Progress*, [868 A.2d 994](#), 1000 (N.H. 2005) (discussing conflicting case law on this point).

⁹³ David B. Torrey and Justin D. Beck, *Foreign and Undocumented Workers: Eligibility, Law Addressing Return to Work, and Related Issues*, AMERICAN BAR ASSOCIATION (2017) available at <http://www.davetorrey.info/index.htm>.

⁹⁴ W.S. § [27-14-102](#)(a)(xxi)

⁹⁵ See generally *DC Production Service v. Wyoming Dept. of Employment*, [54 P.3d 768](#), 772 (Wyo. 2002)

“Employment” is in turn defined, in (a)(v) of the same provision as “all services for pay under a contract of hire.” While these appear to represent all the employee definitions in Wyoming’s **overall** Labor and Employment code, Title 27, the important point is that the employee definition for purposes of workers’ compensation law is distinct from these provisions. (See *supra*. in this Treatise at Section 2.2 above).

2.7 Wyoming Independent Contractor Law

Independent contractors are excluded from the statutory definition of “employee” and, thus, are extended no workers’ compensation benefits under Wyoming law. W.S. § [27-14-102](#)(a)(vii)(D). Unlike the nationally-dominant ten-factor Restatement Second of Agency test, to be discussed in greater detail below, **Wyoming applies a three-factor test.** While there is no magic to the number of factors utilized by legislatures or courts to determine independent contractor versus employee status, practitioners should be mindful that Wyoming’s test is somewhat unique when compared to more widely utilized tests throughout the country, to be discussed below. **In Wyoming, “independent contractor” means 1) an individual who performs services for another individual or entity and is free from control or direction over the details of the performance of services by contract and by fact; 2) represents his services to the public as a self-employed individual or an independent contractor; and 3) may substitute another person to perform his services.**⁹⁶ The standard is similar, though not identical, to the “ABC” test used by some other jurisdictions discussed below at section 2.6.

The lead case analyzing and explaining the independent contractor standard in Wyoming is the Wyoming Supreme Court’s 2014 opinion in *Circle C Resources, Inc. v. Kobielus*.⁹⁷ In *Circle C*, a host family provider fell and broke her ankle on Circle C’s premises. Unsurprisingly, first-level administrative fact finders initially found that the injury was compensable. Circle C objected, arguing that the host family provider was an independent contractor. Following a hearing, administrative authorities reaffirmed that the injury was compensable. Upon court appeal, the district court also affirmed. The Wyoming Supreme Court also ultimately affirmed.

In discussing the three factors, the Court first made clear that ***each factor must be established to prove independent contractor status.***⁹⁸ Although differentiating Wyoming statutory from *common law control*, central to analysis of the first factor, the Court emphasized that precedent analyzing common law control was merely “relevant” to the statutory control inquiry.⁹⁹ The Court recounted from prior

⁹⁶ W.S. § [27-14-102](#) (a) (xxiii)

⁹⁷ [320 P.3d 213](#) (Wyo. 2014)

⁹⁸ *Id.* at 216

⁹⁹ *Id.*

Wyoming cases the distinction between control of the “means and manner” of performance of work and control of the “result” of the work performed by a putative employee, and acknowledged Circle C’s argument that its concern was only about the result of the work.¹⁰⁰ The Court concluded that “[t]here is ample evidence in the record to support the hearing examiner’s conclusion that Circle C controlled the details of [the host family provider’s] performance of services beyond that required by state or federal regulation.”¹⁰¹

Noting that a written employment contract, when in existence, is a strong indication of the type of association intended by the parties,¹⁰² the Court observed that two “Host Family Provider Agreements,” entered into by the host family provider and Circle C, enumerated thirty-two separate responsibilities to be performed by the host family provider.¹⁰³ Although each of the agreements disavowed creation of an employment relationship, each also noted that the agreements were **terminable at will** by either party with 60 days’ notice.¹⁰⁴ **Under Wyoming law, “the right to terminate the services at will without incurring liability to the other, this embracing, of course, the right of the employer at any time to discharge the party performing the work . . . establish[es] the status of master and servant.”**¹⁰⁵

Continuing its analysis of control, the *Circle C* Court observed that Wyoming Supreme Court precedent establishes the **“method of payment” is a factor to be considered in evaluating the degree of control exercised over the performance of a worker’s services.**¹⁰⁶ The Court also discussed various aspects of Circle C’s arguable control-in-fact over the details of the host family provider’s work: determining the parameters of care; facilitating transportation and furnishing a residence complete with appliances; and paying utilities for the residence.¹⁰⁷ Ultimately, the Court opined that “[t]aken together, the facts set forth above provide substantial evidence to support the conclusion that [the host family provider] was

¹⁰⁰ *Id.* at 217; *accord* *Singer v. New Tech Eng’g L.P.*, [227 P.3d 305](#), 311 (Wyo. 2010) (“When a worker is an independent contractor, the employer is typically interested only in the results of the work and does not direct the details of how the work is performed.”)

¹⁰¹ *Id.*

¹⁰² *Accord* *Pool v. Dravo Coal Co.*, [788 P.2d 1146](#) (Wyo. 1990); *Noonan v. Texaco, Inc.*, [713 P.2d 160](#), 165 (Wyo.1986)

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 218

¹⁰⁵ Emphasis supplied. *Id. citing* *Coates v. Anderson*, [84 P.3d 953](#), 957 (Wyo. 2004); *see also* *Fox Park Timber Company v. Baker*, [84 P.2d 736](#) (Wyo. 1938)], *Brubaker v. Glenrock Lodge [Int’l Order of Odd Fellows]*, [526 P.2d 52](#) (Wyo. 1974)], *Combined Ins. Co. v. Sinclair*, [584 P.2d 1034](#) at 1042-43.

¹⁰⁶ *Circle C*, *supra.* at 218

¹⁰⁷ *Id.* at 219

not, by contract or by fact, free from control over the details of the performance of her services . . . ”¹⁰⁸

The Court quickly dismissed the case under the second and third elements of the statutory independent contractor test. There was no evidence that the host family provider represented her services to the public as a self-employed individual, and the Court easily upheld the hearing examiner’s finding in that regard.¹⁰⁹ The Court similarly upheld the hearing examiner’s conclusion that the host family provider was not “an individual who . . . [m]ay substitute another person to perform his services.”¹¹⁰ Indeed, the written agreement appeared to make clear Circle C’s control of substitution. It is also worth noting the Court’s observation that the third element “is not a commonly used element in determining whether a worker is an employee or an independent contractor.”¹¹¹

The balance of *Circle C* consists of the Court’s renewed acknowledgement of the parallels between the common law’s control tests and control within the meaning of the first statutory element of W.S. § [27-14-102\(a\)\(xxiii\)](#). *Circle C* appears to establish that **unless a putative independent contractor has held herself out to the public as a self-employed individual providing services like those in question in a case and is explicitly authorized to substitute workers in her stead to perform the services in question, a case will almost certainly be litigated on questions of control of the work, by agreement and in fact. In such situations control is the most important factor in Wyoming.**¹¹² But it might be argued that, *even if* an individual worker controls the details of work in a manner *strongly* suggestive of independent contractor status, she *still* might be found an employee if the “holding out” and “substitution” elements have *not* been satisfied, because the three-factor test, as explained in *Circle C*, requires satisfaction of all three factors.¹¹³

This emphasis on “control” is also somewhat differently articulated through the concept of the “employment relationship.” **Historically under Wyoming law the**

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 220

¹¹¹ *Id.*

¹¹² *Stratman v. Admiral Beverage Corp.*, 760 P.2d 974, 980 (Wyo. 1988); *Cline v. State, Dep’t. of Family Services*, [927 P.2d 261](#), 263 (Wyo. 1996); *Noonan v. Texaco, Inc.*, 713 P.2d 160, 164 (Wyo. 1986); *Coates v. Anderson*, 2004 WY 11, P 7, 84 P.3d 953, 957 (Wyo. 2004); *Tauer v. Williams*, [242 P.2d 518](#) (Wyo. 1952); *Burnett v. Roberts*, [121 P.2d 896](#) (Wyo. 1942)

¹¹³ An older case superficially suggesting otherwise, *Burnett v. Roberts*, *supra.*, was decided in 1942, when the Wyoming courts were using a common law standard, and the legislature had not yet enacted the three-factor test.

primary test to determine the existence of an employment relationship is the right of control of the putative employer.¹¹⁴

The structure of the Wyoming statute strongly suggests that the burden of proof is squarely on the party asserting independent contractor status, which is an important point considering the rather loose definition of employee in W.S. § [27-14-102](#)(a)(vii), and the specific exclusions of W.S. § [27-14-102](#)(a)(vii)(A)-(R). Furthermore, **an agreement between an employer and workers' compensation claimant which purports to establish an "independent contractor" relationship rather than an employer-employee relationship has been found by Wyoming courts not to be dispositive** because "it is . . . the actual relationship between the parties, not the designation of the employee, [that must] meet the test of a bona fide independent-contractor status."¹¹⁵

2.8 Tort Law versus Workers' Compensation Law Generally

Before moving on to a brief discussion of other national approaches to the employee versus independent contractor question, it may be useful to note that, under the common law, the distinction between employee (or "servant") and independent contractor was important for reasons having nothing to do with an employment statute. Because an employee/servant acting within the scope of employment potentially creates vicarious liability in the employer/master, courts in an earlier era were inclined to be especially cautious before finding that the employer's agent was in fact a "servant."¹¹⁶ In his workers' compensation classes, this writer has referred to this as the "push" phenomenon: an attempt by courts to *push employee status away*. In contrast, large "remedial" employment statutes aimed from their inception at broad coverage. This context at times inclined courts in doubtful cases to "*pull individuals into employee status*". This push-pull dynamic lives on in modern times as jurisdictions define employees differently under a variety of *workplace* laws and across *tort* law, as if, to repeat the colorful phrase of a famous judge, employee status was deployed analytically as a "universal solvent."¹¹⁷

2.9 Restatement Second of Agency Test (National)

The Restatement Second of Agency, Section 220(2), is one of the most widely utilized frameworks in the United States for distinguishing employees from

¹¹⁴ Claims of Naylor, [723 P.2d 1237](#) (Wyo. 1986); Tauer v. Williams, 242 P.2d 518 (Wyo. 1952); Fox Park Timber Co. v. Baker, [84 P.2d 736](#) (Wyo. 1938)

¹¹⁵ Flint Engineering & Const. Co. v. Richardson, [726 P.2d 511](#), 513 (Wyo. 1986)

¹¹⁶ One of the best discussions of these observations is the dissenting opinion in Powell v. Appeal Bd. Of Mich. Employment Sec. Commission, [75 N.W.2d 874](#) (Mich. 1956) *discussed in* DUFF, WORKERS' COMPENSATION LAW at 210-211

¹¹⁷ *Id.*

independent contractors.¹¹⁸ It must constantly be kept in mind, however, that it is possible for a jurisdiction to apply the Restatement test in *some* employment law contexts and a different test in the workers' compensation law context. Under the Restatement rubric, the following factors are assessed, and the totality of the circumstances determines whether an individual is an employee or an independent contractor:

- (a) the **extent of control** which, **by the agreement**, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a **distinct occupation** or business;
- (c) the **kind of occupation**, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the **skill** required in the particular occupation;
- (e) whether the **employer or the workman supplies the instrumentalities**, tools, and the place of work for the person doing the work;
- (f) the **length of time** for which the person is **employed**;
- (g) the **method of payment**, whether by the time or by the job;
- (h) whether or not the work is a part of the **regular business of the employer**;
- (i) whether or not the **parties believe they are creating the relation of master and servant**; and
- (j) **whether the principal is or is not in business**.

A great variety of outcomes can be reached utilizing these factors, and sometimes different outcomes can be reached on very similar sets of facts. As the *Larson's* treatise aptly puts it:

It is, however, the application of these rules to an infinite variety of borderline cases that brings about this amount of litigation and disagreement. It has been said that precedents may be found on both sides of almost every situation in which the question could arise. The explanation of this paradox—agreement on principles and disagreement in actual decisions—seems to lie partly in the relative weight given to the various tests of status and partly in the extent to

¹¹⁸ 5 LARSON'S WORKERS' COMPENSATION LAW § 60.01

which courts define status in view of the purpose served by the particular legislation rather than as a static concept.¹¹⁹

2.10 National Flurry of “Gig Laws” in 2018

It is not surprising to this writer that, given the variability of outcomes under the Restatement Second of Agency *employee versus independent contractor test* discussed in the previous subsection, some states would want to change their laws to better predict outcomes. The problem is that employee-status outcomes will likely always be variable because workplaces (and the nature of work) are variable. The only way to achieve consistent outcomes may be to put a thumb on the scale in one direction or another, and that is exactly what some states appear to be doing. Along those lines, *this* section of the Treatise will discuss an employee-independent contractor test seemed designed to make *more* likely that individuals fall on the *independent contractor* side of the ledger. The *next* section of the Treatise, on the other hand, will discuss an employee-independent contractor test designed to make more likely that individuals fall on the *employee* side of the ledger. While the two approaches seem equally plausible as a state law policy choice, there is an important difference. As mentioned earlier in this Treatise, workers’ compensation is the *quid pro quo* for a tort action. *Broadly* exclusionary policies call the workers’ compensation bargain into question. At some point, excluded workers may be provoked to file tort suits, and states could be forced into deciding thorny constitutional dilemmas, not to mention having to grapple with tricky questions that can arise when a workers’ compensation statute *excludes workers who would be considered employees under state tort (vicarious liability) law*.

In the spring of 2018, several states, primarily in the South but a few in the Midwest, enacted what became popularly known as “gig” laws. The underlying premise of such laws was that the nature of the economy was changing: work was becoming more ephemeral, more technological, more intellectual, and hence necessarily more “worker”-guided. Several commenters, including this writer, argued that, if employers were *in fact* not in control of work then existing law would *already* classify their workers as independent contractors. Ironically, it was a handyman company, Handy, Inc, using workers performing very non-technological, physical labor that was purportedly the moving agent in enactment of these laws. This was ironic because conceptually the defense of gig laws hypothesized high-tech computer programmers, or the like. A prototypical and representative gig law of the 2018 wave, upon which this Treatise will dwell for a moment, was the one enacted in Tennessee. The law was styled as applicable only to retired handymen, and similar part-time workers. But the text tells a different story.

¹¹⁹ *Id.*

Under the law, a “marketplace contractor” working for a “third party” at the direction of a “marketplace platform” is an independent contractor **as a matter of law** if (1) the platform and contractor agree that the contractor is an independent contractor; (2) the platform does not unilaterally prescribe specific hours of work (if the platform posts the contractor’s hours of work—at an unspecified location—that is not prescribing hours of work); (3) the platform does not prohibit the contractor from using other platforms; (4) the platform does not restrict the contractor from engaging in any other occupation or business; (5) the platform does not require contractors to use specific supplies or equipment; and (6) the platform does not supply on site supervision to the contractor.

The law defines a “marketplace contractor” as any individual, corporation, partnership, sole proprietorship, or other business entity that:

(A) Enters into an agreement with a marketplace platform to use the platform's online-enabled application, software, website, or system to be given an assignment, or otherwise receive connections, to third-party individuals or entities seeking its services in this state; and

(B) In return for compensation from the third-party or marketplace platform, offers or provides services to third-party individuals or entities upon being given an assignment or connection through the marketplace platform's online-enabled application, software, website, or system.

The law defines a “marketplace platform” as “a corporation, partnership, sole proprietorship, or other business entity operating in this state that offers an online-enabled application, software, website, or system that enables the provision of services by marketplace contractors to third-party individuals or entities seeking the services.”

In such a scheme it is easy to imagine a situation in which a contractor is subject to discipline if he or she does not comply with a work schedule “voluntarily” posted; to imagine a contractor who does not in fact use other “platforms.” It is also easy to foresee a contractor who does not in fact engage in any other occupation or business; or a contractor who in fact uses platform-provided supplies or equipment. Even more tellingly, a platform may in fact supply *offsite* supervision (an obvious indicator of control) to the contractor. In short, **many individuals who would traditionally be defined as employees under a restatement-type test will likely be classified as independent contractors under the “gig” test**, which appears to be broadly applicable to employment law cases, including workers’ compensation cases. In fact, it could be argued that the law erects a *presumption* of independent contractor status for all workers dispatched to a worksite by email. As with all

alternative approaches to determining employee status, gig laws will have to be scrutinized to verify that they apply, in a given state, specifically to workers' compensation cases.

2.11 ABC Approach (National)

Placing a thumb on the scale of employee-status is the ABC test, which is utilized in various contexts, most notably in Massachusetts, New Jersey, and California. Although the formulation can be stated differently across jurisdictions, the ABC test usually *presumes an individual is an employee* unless the employer can make certain showings regarding the individual employed, including: (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.¹²⁰

The standard makes clear that **the burden is on the employer to establish independent contractor status**. It is also evident that the employer must establish each of the independent contractor factors. Like the Wyoming independent contractor standard, it is possible that a putative contractor, though free from control or direction over the performance of a service, could nevertheless be found an employee because the work is not outside of the “employer’s” usual business, or because the putative contractor is not customarily engaged in an independently established trade, occupation, profession, or business. The standard, when applied to workers’ compensation cases, is consistent with compensation theory: the costs of industrial accidents or injuries are *broadly allocated to the relevant industry utilizing labor*.¹²¹

An excellent case for reviewing the complex variability between employee standards is the California Supreme Court’s opinion in *Dynamex Operations West v. Superior Court of Los Angeles*.¹²² The *Dynamex* opinion compelled use of the ABC employee test for certain industries governed by “wage orders” as defined under California law. During its analysis, the Court rejected a restatement-type standard for wage-order industries on policy grounds. The case is notable for showcasing the co-existence of multiple employee-independent contractor

¹²⁰ For a typical expression of the standard see *Hargrove v. Sleepy's, LLC*, [106 A.3d 449](#) (N.J. 2015)

¹²¹ 1 LARSON’S WORKERS’ COMPENSATION LAW § 1.03

¹²² [416 P.3d 1](#) (Cal. 2018)

standards in a single state. *Dynamex* did not, for example, apply to workers' compensation cases.

2.12 Who is an Employer in Wyoming?

The other logical “person covered” by a workers’ compensation statute is an “employer.” As is the case with employee definitions, employer definitions vary widely across the country. Often definitions can be circular. For example, a statute might declare that an “employer” is an entity providing “employment” to “an employee.” This complicates rather than simplifies the discussion. For efficiency of exposition, the *employer* discussion will be limited to Wyoming workers’ compensation law.

Under W.S. § [27-14-102](#)(a)(vii), **“employer” means any person or entity employing an employee engaged in any extrahazardous occupation or electing coverage under W.S. § [27-14-108](#)(j) or (k) and at least one of whose employees is described in W.S. § [27-14-301](#) (the extraterritoriality provision is discussed further in Section 2.4 of this Treatise).** For now, the general definition of employer may most easily be explained as follows. **An employer means any person or entity employing an employee in (a) explicitly covered extrahazardous employment¹²³ or (b) employment not covered, but concerning which the person or entity has opted or elected to be covered¹²⁴** (for the purpose, for example, of securing tort immunity).

2.13 Wyoming-Specific Employer Inclusions

In addition to the *general* definition of “employer” set out in the preceding section, the Wyoming statute, also in W.S. § [27-14-102](#)(a)(vii), specifically **mandates that certain entities be designated statutory employers**. The statutory language sets out the particulars:

- (A) Repealed
- (B) The **governmental entity for which recipients of public assistance perform work** if that work does not otherwise establish a covered employer and employee relationship;
- (C) The **governmental entity for which volunteers perform the specified volunteer activities** under W.S. § [27-14-108](#)(e);

¹²³ W.S. § [27-14-108](#)(a)-(g)

¹²⁴ W.S. § [27-14-108](#)(j)

(D) The **governmental entity for which prisoners and probationers work or perform community service** under W.S. § [27-14-108](#)(d)(ix) or (xv);

(E) An **owner-operator of a mine at which any mine rescue operation or training occurs**;

(F) A **temporary service contractor for a temporary worker**;

(G) Any **person, contractor, firm, association or corporation otherwise qualifying** under this paragraph as an employer and **who utilizes the services of a worker furnished by another contractor, joint employer, firm, association, person or corporation** other than a temporary service contractor, joint employer, independent contractor or owner and operator excluded as an employee under subparagraph (a)(vii)(O) of this section;

(H) Any **employer otherwise qualifying** under this paragraph as an employer and **participating in a school-to-work program** approved by the department of workforce services, any local school district board of trustees, community college district board of trustees or the department of education, and the employer previously elected coverage in writing pursuant to W.S. § [27-14-108](#)(m);

(J) Any **corporation, limited liability company, partnership or sole proprietorship electing coverage** pursuant to W.S. § [27-14-108](#)(k), **whether or not the corporation, limited liability company, partnership or sole proprietorship has other employees covered by this act**;

(K) A **collective group of county governments or county governmental entities** as specified under W.S. § [27-14-109](#).

2.14 Employers in Wyoming Sometimes Not Specifically Defined

Under this complicated employer structure, **“unless specifically defined by the legislature, the enumerated types of extrahazardous occupations or employees are to embrace jobs that reasonably and liberally fit a description,”**¹²⁵ effectively rendering those employing employees in those “fitted” occupations “employers.”

¹²⁵ Matter of Patch, [798 P.2d 839](#), 841 (Wyo. 1990)

2.15 Contract of Hire in Wyoming

Unlike the statutes of many jurisdictions, **Wyoming’s workers’ compensation statute does not contain an explicit, general “contract of hire” or “contract for hire” requirement as part of the employer definition.** The statutory provision on *extraterritoriality* does contain a contract of hire requirement, *see above* at Section 2.4 of this Treatise, but it is found nowhere else in the statute.¹²⁶ This is consistent with the employee definition of W.S. § [27-14-102](#)(a)(vii), *see* this Treatise above at Section 2.2, which similarly does not *require* a “contract of hire” to establish employee status (“appointments” and “apprenticeships” also suffice).

2.16 Joint Employer in Wyoming

A “joint employer” means any person, firm, corporation or other entity which employs joint employees, is associated by ownership, commonly managed or controlled and contributes to the workers’ compensation account as required by the Wyoming Workers’ Compensation Act.¹²⁷ Notwithstanding the foregoing principle in section 2.15, **Wyoming courts have adopted the “contract for hire” requirement in cases involving joint employment. Joint employment occurs when a single employee, under contract with two employers, and under the control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other.**¹²⁸ A leading case in Wyoming for this proposition is *Stratman v. Admiral Beverage Corp.*¹²⁹

In *Admiral Beverage*, an employee was killed by being pulled into a canning machine while employed at a Pepsi-Cola plant in Worland, Wyoming. A wrongful death action was brought by her surviving husband. The district court granted summary judgment to Admiral Beverage, the owner of the canning machine, *and* Fremont Beverages, the owner of the franchise, plant facility, and bottling operations. The district court certified the summary judgment as a final order for purposes of appeal to decide the question whether Admiral, as a closely affiliated corporation with Fremont, was a joint employer of the deceased employee, and therefore immune from the wrongful death suit by operation of the exclusive remedy bar. (See this Treatise at Section 1.6.)

¹²⁶ Clark v. Industrial Co. of Steamboat Springs, Inc., [818 P.2d 626](#), 629 (Wyo. 1991)

¹²⁷ W.S. § [27-14-102](#)(a)(xxi)

¹²⁸ This is consistent with the definition of joint employee under the Act at W.S. § [27-14-102](#)(a)(xxi)

¹²⁹ [760 P.2d 974](#) (Wyo. 1988)

Quoting the *Larson*'s treatise, the Wyoming Supreme Court adopted the joint employer definition set forth in this section.¹³⁰ The Court noted that the question of whether the elements of joint employment are present often arises with affiliated corporations, where the question becomes whether corporate separateness should be disregarded for exclusive remedy purposes.¹³¹ After surveying cases, the Court cited with approval a prior court's adoption of what the prior court characterized as the majority rule, "[i]n the absence of a 'contract of hire' between the 'employee' and the parent corporation, the bar of workmen's compensation may obtain only in those instances where the facts compel disregard of the subsidiary's separate existence."¹³²

Returning to the case under consideration, the Court concluded, "[o]n the question of the existence of a contract of hire, express or implied, the evidence is conflicting." The Court also found that there were unresolved factual issues concerning which entity had hired the employee, and which entity had the right to control working conditions at the plant.¹³³ Accordingly, the Court remanded the case to the district court.¹³⁴

The teaching of *Admiral Beverage*, and of cases that have followed it, is "that **an employee should not be required to give up his common-law right of action against his employer in favor of worker's compensation without an agreement on his part to the employment relationship.**"¹³⁵ Thus, in the context of "sharing" of exclusive remedy, or immunity, there must be more than a formal relationship between two entities, for example between a parent corporation and its subsidiary. **An employee must have entered into a contract of hire with each nominal entity claiming employer status, and each entity must have the right to control the working conditions of the involved employee.**¹³⁶

2.17 Extrahazardous Employment Generally

As the *Larson*'s treatise notes, "the distinction between hazardous and nonhazardous employment, a fairly familiar feature of early workers' compensation acts, is now of relevance in only one state—Wyoming."¹³⁷ Hence, this unique feature of Wyoming law must be analyzed and explained carefully.

¹³⁰ *Id.* at 980

¹³¹ *Id.* at 981

¹³² *Id.* citing *Peterson v. Trailways, Inc.*, [555 F.Supp. 827](#), 833 (D.Colo.1983)

¹³³ *Id.* at 983-84

¹³⁴ *Id.* at 988. The Court also remanded on the question of whether *Admiral* has contributed to the state fund in a manner contemplated by the statute.

¹³⁵ *Clark v. Industrial Co. of Steamboat Springs, Inc.*, *supra.*, 818 P.2d at 630. (Emphases supplied).

¹³⁶ See also 10 LARSON'S WORKERS' COMPENSATION LAW § 112.01

¹³⁷ 6 LARSON'S WORKERS' COMPENSATION LAW § 77.01

2.18 National History of Extrahazardous Statutes

The Workers' compensation *quid pro quo* was not upheld by the U.S. Supreme Court until 1917, *see above* at Section 1.3. Thus, states implementing their statutes before 1917 began cautiously by creating mainly elective systems that were compulsory only with respect to “extrahazardous” employers or occupations. This model, it was thought, would more likely lay within the purview of a state’s police powers under then-existing 14th Amendment due process jurisprudence. Indeed, it was just such a model that was upheld by the U.S. Supreme Court in 1917.¹³⁸

2.19 Wyoming’s Retention of Extrahazardous Concept

As the *Larson*’s treatise also explains, “[v]estigial traces of the ‘hazardousness’ requirement are still to be found in a few states,¹³⁹ but they appear to have no substantial operative importance.”¹⁴⁰ This is not so in Wyoming. As noted above, an “employer” means any person or entity employing an employee engaged in any *extrahazardous* occupation . . . and an employee means any person engaged in any *extrahazardous* employment . . .” Obviously, the concept of extrahazardous employment is explicitly central to the Wyoming workers’ compensation structure.

2.20 Wyoming Extrahazardous Employment Structure

The first important point to make about Wyoming extrahazardous employment is that the “Extrahazardous industries, employments, occupations . . .” section of the Wyoming statute¹⁴¹ is confusing to read. The second important point to make is that many, many occupations have been designated as “extrahazardous,” though they would not be deemed as such by an outside observer. Extrahazardous employments in the private sector are incorporated directly from “the most recent edition” of the North American Industry Classification System (NAICS) manual.¹⁴²

W.S. § [27-14-108\(a\)\(ii\)](#) deems all workers in certain industries, regardless of their occupations, to be engaged in extrahazardous employment.¹⁴³ W.S. § [27-14-108\(d\)](#),

¹³⁸ *See* 1.3 above. *See also* New York Central Railroad Company v. White, [243 U.S. 188](#) (1917)

¹³⁹ Illinois is a leading example. *See* 820 ILCS 305/3

¹⁴⁰ 6 LARSON’S WORKERS’ COMPENSATION LAW § 77.01

¹⁴¹ W.S. § [27-14-108](#)

¹⁴² The manual can be obtained online at <https://www.census.gov/eos/www/naics/>

¹⁴³ The enumerated major industries, at W.S. § [27-14-108\(a\)\(ii\)\(A\)-\(S\)](#) are forest and logging agriculture, mining, utilities, construction, manufacturing, certain subsectors of wholesale trade, certain subsectors of retail trade, certain subsectors of transportation and warehousing, certain subsectors of “information,” certain subsectors of real estate, certain subsectors of “Administrative and support and waste management and remediation services,” certain subsectors of Educational

in turn, applies the Act to governmental entities engaged in the classifications set out in W.S. § [27-14-108](#)(a)(ii), and further applies the Act to employees of governmental entities engaged in certain activities *or* specific occupations, even if not engaged in the 108(a)(ii) employments.¹⁴⁴ Finally, W.S. § [27-14-108](#)(e) applies the Act to several categories of volunteers.¹⁴⁵

The extrahazardous employments section also contains miscellaneous provisions. W.S. § [27-14-108](#)(o) permits Wyoming administrative officials to exclude arts, entertainment and recreation employment from coverage if it determines the primary source of revenue of the employer's business is derived from certain subsectors of the “Agriculture, forestry, fishing and hunting” sector.

W.S. § [27-14-108](#)(p) states that “[a]ny university of the state of Wyoming or any community college, school district or private or parochial school or college may elect to obtain coverage under this act for any person who may at any time be receiving training under any work or job training program for the purpose of training or learning trades or occupations. The bona fide student so placed shall be deemed an employee of the respective university, community college, school district or private or parochial school or college sponsoring the training or rehabilitation program.”

W.S. § [27-14-108](#)(q) requires workers’ compensation coverage for professional athletes.

services, certain subsectors of Health care and social services, with one exception arts, entertainment and recreation, Accommodation and food services, Other services, Public administration,

¹⁴⁴ The list includes: Janitors, groundskeepers and maintenance workers; Federal programs which require coverage for their participants; State employees and effective until June 30, 2002, employees of the University of Wyoming while traveling in the performance of their duties; Casual employees engaged in fighting forest or grass fires when employed by a governmental entity, Applicants or recipients of general welfare or relief who are employed by a governmental entity, All adult and juvenile prisoners and probationers when performing work pursuant to law or court order, Diagnostic and analytical laboratory employees, Hazardous substance workers, Power equipment operators, Motor delivery drivers, Workshop employees, Persons performing community service pursuant to a criminal sentencing order or a diversion agreement (subject to certain caveats), Public school educational assistants who provide services to special education students and certified special education teachers (as more extensively defined), County coroners and deputy county coroners, and Fire protection, including firefighters while performing under the direction of a duly authorized officer in charge (as more extensively defined).

¹⁴⁵ The list includes: Firefighters (while engaging in specified activities), search and rescue personnel, law enforcement personnel, search pilots, mine rescue workers, ambulance personnel, hazardous substance workers, emergency management agency personnel, Elected county or local officials volunteering to perform governmental services on behalf of the jurisdiction to which they are elected (with limitations), Volunteers working on projects approved by the Wyoming game and fish commission or the Wyoming department of state parks and cultural resources, and Law enforcement aides (while engaging in specified activities).

2.21 Discussion of Extrahazardous Employment in Wyoming

The statutory structure of Wyoming extrahazardous employment provisions is extraordinary. It seems likely that irregular accretions of employments to extrahazardous categorizations has been driven by mandates of the Wyoming Constitution. [Article 10, Section 4\(a\) of the Constitution](#), for example, states flatly: **“No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person.”** Because workers’ compensation is a law that necessarily limits the amount of damages that can be recovered by one person against another for causing injury or death, it was recognized immediately that the Wyoming Constitution would have to be amended to allow for implementation of workers’ compensation. The Constitution was amended to add Article 10, Section 4(c) as follows:

As to all extrahazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation as may be fixed by law according to proper classifications to each person injured in such employment or to the dependent families of such as die as the result of such injuries, except in case of injuries due solely to the culpable negligence of the injured employee. The fund or funds shall be accumulated, paid into the state treasury and maintained in such manner as may be provided by law. Monies in the fund shall be expended only for compensation authorized by this section, for administration and management of the Worker’s Compensation Act, debt service related to the fund and for workplace safety programs conducted by the state as authorized by law. The right of each employee to compensation from the fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to the fund in favor of any person or persons by reason of the injuries or death. Subject to conditions specified by law, the legislature may allow employments not designated extrahazardous to be covered by the state fund at the option of the employer. To the extent an employer elects to be covered by the state fund and contributes to the fund as required by law, the employer shall enjoy the same immunity as provided for extrahazardous employments.

Accordingly, the Wyoming Constitution authorizes limiting damages to be recovered for causing the injury or death of any person **only** with respect to employment **designated as extrahazardous**, or “[t]o the extent an employer **elects** to be covered by the state fund and contributes to the fund as required by law.” Given this constitutional scheme, the subsequent, odd statutory evolution can be

explained. Yet, at some point, it must have become obvious that repeatedly designating non-hazardous employment as extrahazardous would become confusing and possibly subject to tactical exploitation. It is a mystery to this writer why, at that point, the Constitution was not amended to transparently and explicitly broaden the scope of allowable, mandatory workers' compensation.

The obvious practical problem with the present structure is how to define a "proper" classification, as required by the constitutional provision. The Act's division of employments between private sector, government, and volunteer is rational, but private sector classification is dictated by W.S. § [27-14-108\(a\)](#), which states that "[t]his act applies . . . [to] . . . all workers employed in the following sectors, subsectors, industry groups and industries, as each is defined in the most recent edition of the North American Industry Classification System (NAICS) manual" Two problems are suggested by this approach. The first is one of delegation; the second one of precision.

With respect to delegation, it seems problematic to define the jurisdiction of the Act in terms of a private publication. The "most recent edition" language is evocative of a recent decision in Pennsylvania, *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, [161 A.3d 827](#) (Pa. 2017). In that case, the Pennsylvania Supreme Court found unconstitutional a provision of the Pennsylvania Workers' Compensation Act requiring "physicians to apply the methodology set forth in '**the most recent edition**' of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment" when determining the "degree of impairment" that is due to the claimant's compensable injury.¹⁴⁶ The issue presented was whether by *automatically* requiring *renewable* adherence to impairment standards modified by a private body from year to year the legislature had, in effect, delegated legislative power to that body (the American Medical Association) within the meaning of Pennsylvania law.¹⁴⁷ The Court found that "by any objective measure" the delegation was broader than in prior cases in which it *had* found unlawful delegation.¹⁴⁸ The Court noted that the private organization could essentially change definitions of impairment at will and that state workers' compensation fact finders would be bound by those changes.¹⁴⁹ Especially problematic for the Court was that the legislature did not include any procedural mechanisms to guard against "administrative arbitrariness and caprice."¹⁵⁰ Just as in *Protz*, it might be argued that mandatory, automatic NAICS designation of extrahazardous employments is an overbroad delegation without

¹⁴⁶ *Id.* at 830

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 835

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 836

explicit procedural safeguards. It is an issue that should be taken seriously by state policymakers.

The second evident problem with the extrahazardous employment provision is attempting to fit nonconforming employments into the scheme. Under the prior, “liberal construction” version of the Act, unless specifically defined by the legislature, the enumerated types of extrahazardous occupations or employees were found by Wyoming courts to embrace jobs that reasonably and liberally fit a description.¹⁵¹ It is difficult to conclude that this is still a valid statement of law. In *Araguz v. Workers’ Compensation and Safety Division*,¹⁵² the Wyoming Supreme Court upheld the administrative denial of benefits by two employees injured in a Walmart Distribution Center because “Walmart was not engaged in extrahazardous employment as defined by the legislature.”¹⁵³ The Court conceded that “[i]n all likelihood, the code assigned the Distribution Center would have been different from the code for Wal-Mart’s retail outlets under a pure NAICS classification system. However, the Division does not implement the NAICS methods for classifying Wyoming businesses.”¹⁵⁴ Indeed, the Division had promulgated a rule, Wyo. Rules & Regulations, Dep’t of Employment Workers’ Comp. Div., Ch. 2, § 4(a)(2011) (now [WY Rules and Regulations 053.0021.2 § 4](#)), presumably *interpreting* the extrahazardous provision, W.S. § [27-14-802\(a\)](#),

(a) Classification Procedures. The Division will assign an industrial classification or classifications pursuant to the North American Industry Classification System (NAICS) codes provided by the Federal Bureau of Labor Statistics.... The industrial classification(s) assigned will be that which best describes the primary business of the employer. Businesses conducted at one or more locations which normally prevail in the primary industrial classification will not be assigned separate classifications for supporting operations, with certain specific standard exceptions for clerical office occupations, inside sales occupations, outside sales occupations, or temporary help occupations.

Because the plaintiff was focused on the fact that the *jobs* of the injured workers were allegedly extrahazardous, the Court’s response was similarly focused on replying that “it is irrelevant that the appellants, pursuing the same responsibilities, may be covered by the Act under different employment; the assessment is based on the activities of the employer, not the employee.”¹⁵⁵ But the most puzzling part of

¹⁵¹ Matter of Patch, [798 P.2d 839](#), 841 (Wyo. 1990)

¹⁵² [262 P.3d 1263](#) (Wyo. 2011)

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1267

¹⁵⁵ *Id.*

the case is trying to discern the Division's rationale for concluding that all businesses of an employer should *presumptively* receive the same industrial classification as its primary business. This seems a questionable proposition—perhaps it is a practice of private insurance. Although the Court stated the conclusion was “in proper keeping with Wyoming statute, the rules and regulations promulgated by the Division, case law, and the Wyoming Constitution,” this writer could not locate authority within the case supporting the declaration. The final word should perhaps be that it is difficult to explain how it is ultimately good policy that the largest private sector employer in Wyoming (including its most hazardous business components) is apparently not presently covered by the Wyoming Workers' Compensation Act. While employees excluded from the workers' compensation scheme necessarily retain the right to sue their employers under Wyoming's constitutional right of access to courts,¹⁵⁶ to the extent Walmart-type alternative benefit plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA), tort suits for damages by employees electing coverage under the alternative plan may be preempted by federal law, and employee recoveries for injury may accordingly be severely limited.¹⁵⁷

¹⁵⁶ Mills v. Reynolds, *supra.*, [837 P.2d](#) at 53-54

¹⁵⁷ Vasquez v. Dillard's, Inc., [381 P.3d 768](#) (Ok. 2016)

3 WHAT IS COVERED BY WORKERS' COMPENSATION?

3.1 Workers' Compensation Coverage Generally

Workers' compensation benefits are paid under most statutes in the United States to statutory employees (engaged in statutory employment for a statutory employer) suffering an **injury by accident (and under some statutes an occupational disease) arising out of and in the course of employment.**¹⁵⁸ Unpacking this **causal connection** definition constitutes much of the substance of workers' compensation law. It should first be noted that **not all jurisdictions require that an injury have been suffered by "accident" to be compensable.** According to the *Larson's* treatise the phrase "by accident" "occurs in the statutes of twenty-five states. Nine states, the District of Columbia and the Longshoremen's Act use the phrase 'accidental injury.'"¹⁵⁹ **Because Wyoming's statute does not explicitly require the occurrence of an accident,**¹⁶⁰ this Treatise will not dwell on the variety of issues presented when interpreting the term "accident" or "accidental."

3.2 "Arising Out of" Generally

The "arising out of" and "in the course" of elements of the general definition set out above are embodied in the statutes of almost all jurisdictions,¹⁶¹ including Wyoming.¹⁶² The "arising out of" portion of the causal connection definition refers to the **causal origin** of an injury, and the "in the course of employment" portion of the definition refers to the **time, place, and circumstances** of the accident in relation to the employment.¹⁶³ There are three categories of risks which an employee may encounter during the course of employment: those that are solely employment related, those that are purely personal, and those that are neutral.¹⁶⁴ Throughout the United States, three theories related to these risks are utilized to determine if an injury "arose out of employment": the increased-risk, actual-risk, and positional-risk doctrines.¹⁶⁵ In the majority of jurisdictions, a workplace injury "arises out of" employment if the workplace increased the risk of the injury

¹⁵⁸ 1 LARSON'S WORKERS' COMPENSATION LAW § 1.01; DUFF, WORKERS' COMPENSATION LAW

¹⁵⁹ 3 LARSON'S WORKERS' COMPENSATION LAW § 42.01

¹⁶⁰ Matter of Barnes, [587 P.2d 214](#) (Wyo. 1978) ("[T]he term 'injury', as used in the Worker's Compensation Law, means compensable injury and is not used in the sense of the occurrence of an industrial accident giving rise to or causing the compensable injury."). The matter may not be entirely free from doubt in specialized contexts concerning, e.g., notice or cumulative injuries. See generally Bhutto v. Wyoming Workers' Compensation Div. [933 P.2d 481](#) (Wyo. 1997)

¹⁶¹ 1 LARSON'S WORKERS' COMPENSATION LAW § 3.01

¹⁶² See *infra*.

¹⁶³ 1 LARSON'S WORKERS' COMPENSATION LAW § 3.01

¹⁶⁴ See e.g. K-Mart Corp. v. Herring, [188 P.3d 140](#), 146 (Ok. 2008)

¹⁶⁵ *Id.*

occurring.¹⁶⁶ Commonly, in a *denied* case under the increased risk standard, the risk injuring the claimant is one to which the general public is equally exposed. In a **minority** of jurisdictions, an **injury “arises out of” employment if, but for the worker’s presence in the workplace, the injury would not have occurred.** This is known as the **“positional risk”** test.¹⁶⁷ A few jurisdictions utilize the **“actual risk”** test, which ignores whether the risk is common to the public and permits an employee to recover for his injury “when the employer subjects the worker to the very risk that injures him.”¹⁶⁸

3.3 “Arising Out of” in Wyoming

Under the Wyoming Workers’ Compensation Act, “[i]njury” means any harmful change in the human organism other than normal aging and includes damage to or loss of any artificial replacement and death, **arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer’s business requires an employee’s presence and which subjects the employee to extrahazardous duties incident to the business.**”¹⁶⁹ The question of what it means for an injury to occur “in the course of” employment will be taken up in the next section. For purposes of this section, the definition makes clear that **“arising out of” and “in the course of” elements are a statutory feature of Wyoming law just as in jurisdictions throughout the United States.** The statutory coverage language is also notable due to its omission of any explicit “accident” requirement. **“Arising out of” is not defined in the statute,** however, and case law has explained the meaning of that element under Wyoming law.

In *Workers’ Safety & Compensation Div. v. Bruhn*,¹⁷⁰ an employee sustained a compensable injury on January 25, 1991. Five years later, on March 18, 1996, the employee had an appointment to be seen and evaluated by a doctor in South Dakota, in connection with treatment and care required for the same, ongoing injury. The employee was killed while returning from the appointment. An administrative hearing officer awarded workers’ compensation death benefits to the employee’s survivors on the theory that there was an adequate causal relationship between the employee’s original injury and the death occasioned by the need to seek treatment for the injury. In reversing, the Court articulated the following “arising out of” standard:

¹⁶⁶ *Id.*; 1 LARSON’S WORKERS’ COMPENSATION LAW at § 3.03

¹⁶⁷ *Id.* at § 3.05

¹⁶⁸ See e.g. *Rio All Suite Hotel and Casino v. Phillips*, [240 P.3d 2](#), 6 (Nev. 2010)

¹⁶⁹ W.S. § [27-14-102](#)(a)(xi)

¹⁷⁰ [951 P.2d 373](#) (Wyo. 1997)

An injury “aris[es] out of” the employment when a causal connection exists between the injury . . . and the conditions under which the work is required to be performed. . . . Under these guidelines, “ ‘if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by **a reasonable person familiar with the whole situation** as a result of the exposure occasioned by the nature of the employment, then it arises “out of” the employment.’” . . . An injury is not compensable if it cannot fairly be traced to the employment as a contributing cause and if it comes from a hazard that the employee would have been equally exposed to outside of the employment.¹⁷¹

The case makes no mention of the “risk tests” discussed in the prior section and **close review of the reported cases suggests that increased risk, positional risk, and actual risk tests have played little or no role in analyzing “arising out of” in Wyoming workers’ compensation law.**¹⁷²

Furthermore, some Wyoming cases have appeared to deny that there is **any distinction** between “arising out of” and “in the course of.” In *Matter of Injury to Corean*,¹⁷³ for example (which will be discussed at greater length in this Treatise below at Section 3.13), the Wyoming Supreme Court stated, “[u]nlike the state courts discussed [earlier in the case], we have consistently refused to create a two-part analysis for the phrase ‘arising out of and in the course of employment.’ Instead, we have construed ‘arising out of’ employment to mean the same thing as ‘in the course of employment.’”¹⁷⁴ *Matter of Injury to Corean* cited for support of this proposition *Matter of Willey*,¹⁷⁵ which recited that “a causal connection is supplied when there is a nexus between the injury and some condition, activity, environment or requirement of the employment. It is this requirement, and only this

¹⁷¹ *Id.* at 376-77. Internal citations omitted but it is notable that the Court cited *only* Idaho authority for the standard which bears some similarity to a proximate cause standard in the law of negligence. One of the Idaho cases cited, *Kiger v. Idaho Corporation*, [380 P.2d 208](#), 210 (Id. 1963) lends questionable support taking into consideration the Idaho Supreme Court’s subsequent decision in *Kelley v. Blue Linen Supply*, [360 P.3d 333](#) (Id. 1995), which *awarded* benefits in factual circumstances very similar to *Bruhn*.

¹⁷² *Accord* *In re Worker’s Compensation Claim of Gomez*, [231 P.3d 902](#) (Wyo. 2010) (using fairly traced to employment standard; no risk analysis); *Finley v. Wyoming Workers’ Safety & Comp. Div.*, [132 P.3d 185](#), 188 (Wyo. 2006) (suggesting that one reason for noncompensability was that injury came from “a hazard that the employee would have been equally exposed to outside of the employment” but no mention of increased risk test); *Gonzales v. Workers’ Compensation Div.*, [970 P.2d 865](#) (Wyo. 1998) (finding injury compensable “when a causal connection exists between the injury and the conditions under which the work is required to be performed;” no risk analysis)

¹⁷³ [723 P.2d 58](#) (Wyo. 1986)

¹⁷⁴ *Id.* at 60

¹⁷⁵ [571 P.2d 248](#) (Wyo. 1977)

requirement, which is envisioned by the language contained in [the then-existing version of the Wyoming Act].”¹⁷⁶

The difficulty is the systemic pervasiveness of the separation of workers’ compensation causal connection into “arising out of” and “in the course of” “elements” throughout the history of workers’ compensation law.¹⁷⁷ *Matter of Injury Corean* and *Matter of Willey* each alluded to the *Larson’s* treatise discussion of a “quantum” theory of work-connection:

One is almost tempted to formulate a sort of quantum theory of work-connection: that a certain minimum quantum of work-connection must be shown, and if the “course” quantity is very small, but the “arising” quantity is large, the quantum will add up to the necessary minimum, as it will also when the “arising” quantity is very small but the “course” quantity is relatively large.¹⁷⁸

This might tempt one to end discussion of “arising of” law in Wyoming as nonexistent were it not for three small wrinkles. First, in *In re Carey*,¹⁷⁹ an employee was struck by lightning just after he had tendered his signed time card to his employer’s timekeeper.¹⁸⁰ One issue, of course, was whether the employee was in the course of employment when struck.¹⁸¹ But another issue, at least implicitly, was whether the injuries sustained from the lightening-strike arose out of employment.¹⁸² The district court hearing the case¹⁸³ found, among other things, that the lightning strike was an “Act of God.”¹⁸⁴ After reviewing authority from several states, the Court stated,

It can hardly be gainsaid that the fact that the transformers and wires leading to the office building of the Schroeder Mining Company without proper grounds being installed placed Carey, the workman, in a situation under all the circumstances here presented which was **different from that of the public generally**. There can be no doubt that the employer did not take steps to protect its office building from the intrusion of lightning, making an unnecessary hazard for

¹⁷⁶ *Id.* at 250

¹⁷⁷ The phraseology was, for example, contained in the New York workers’ compensation statute first deemed constitutional by the United States Supreme Court in the *White* case. *Enacted* New York Laws, Chapter 41, Acts of 1914 *see* Chapter 67, Art. 1, Sec. 3(7)

¹⁷⁸ 3 LARSON’S WORKERS’ COMPENSATION LAW § 29.01

¹⁷⁹ [283 P.2d 1005](#) (Wyo. 1955)

¹⁸⁰ *Id.* at 1006

¹⁸¹ *Id.* at 1007-1009

¹⁸² *Id.*

¹⁸³ District courts were direct fact finders in workers’ compensation cases under prior versions of the Wyoming workers’ compensation statute. *See infra*.

¹⁸⁴ *Carey, supra.*, 283 P2d at 1006

the workmen who were obliged to come there in the course of their duties as workmen for the company.¹⁸⁵

This passage suggests that, in the case of lightning, Wyoming courts may be utilizing, without saying so, *an arising out of, increased risk test*.

The second wrinkle concerns statutory language located at W.S. § [27-14-102\(a\)\(xi\)\(G\)](#): “Injury **does not include** . . . Any injury **resulting primarily from the natural aging process or from the normal activities of day-to-day living**, as established by medical evidence supported by objective findings.” The questions surfacing quickly are: 1) whether “normal activities of day-to-day living” means such activities at work, away from work, or both; and 2) whether “normal activities of day-to-day living” means the daily activities of the employee or the daily activities of the entire population. The language might be read to mean that an injury **arising out of** the employee’s own “normal” *work* activities is not compensable. Under that interpretation, even if the employee is injured *while at work performing work* the injury would not be compensable unless something about the work leading to the injury was *unusually* stressful when compared to normal work duties.¹⁸⁶ That sounds like an **arising out of, increased risk** standard.

The Wyoming Supreme Court appears to have resolved the interpretation of the day-to-day living provision in *Workers’ Safety & Compensation Div. v. Sparks*.¹⁸⁷ In *Sparks*, a nurse was performing her normal assigned nursing duties administering medication to patients, when she experienced severe pain while bending over to pick up a pill.¹⁸⁸ Her condition worsened and eventually her doctors discovered a disc herniation.¹⁸⁹ She filed a workers’ compensation claim.¹⁹⁰ The Division denied the claim arguing that the act of leaning over to pick up a pill was a normal activity of day-to-day living.¹⁹¹ On appeal, the Court remarked upon the breadth of the provision and observed that many compensable injuries might be rendered non-compensable if the Division’s position were upheld.¹⁹² A moment’s reflection will reveal that many activities at work are also “activities of daily living.” Rejecting the notion that the Wyoming legislature intended such a result, the Court considered the provision ambiguous and proceeded to interpret it narrowly in the absence of

¹⁸⁵ *Id.* at 1009

¹⁸⁶ This interpretation would come close to Virginia’s use of the actual risk test. *See e.g.* *Southside Virginia Training Center v. Ellis*, [537 S.E.2d 35](#), 37 (Va. 2000) (“ . . . an injury resulting from merely bending over to do something [at work] does not arise out of the employment . . . [because] merely bending over is a risk to which the general public is equally exposed.”)

¹⁸⁷ [973 P.2d 507](#) (Wyo. 1999)

¹⁸⁸ *Id.* at 508

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 509

case authority to the contrary.¹⁹³ Implicitly, **the entire discussion involved increased risk**. The Division was arguing that any injury suffered in the workplace while engaging in an activity also routinely performed outside the workplace was non-compensable. The Court responded that if the activity being performed was **under the control of the employer** it was *not an activity of day-to-day living within the meaning of the statute*.¹⁹⁴

The third wrinkle concerns what appears to be **“arising out of” increased risk rules embedded in miscellaneous provisions**. As a general proposition, the Wyoming legislature has required a kind of increased risk test in connection with very particular types of injuries. That is the subject of the next section of this Treatise.

3.4 Miscellaneous Increased Risk “Arising Out Of” Rules

Some categories of injuries are notoriously hard to analyze because it is difficult to separate work-related from non-work-related *causes* of the injuries in those categories. A heart attack is a classic example. A hernia is another. Cumulative injuries are a third. About the only thing that can be said with certainty within these specialized categories of injuries is that an injury resulting from a **purely personal** risk is not compensable.¹⁹⁵ Otherwise, the cases can take a great variety of forms in which the problem is that causes may be mixed. Under treatise law the outcome of these cases should be straightforward: “In broadest theoretical outline, the rule is quite simple. The law does not weigh the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat compensability.”¹⁹⁶ But in some instances legislatures decline to follow general workers’ compensation causation doctrine and intervene in outcomes by statute. In the interest of economy, this Treatise moves on in Sections 3.5 through 3.11 to discuss a variety of **Wyoming** statutory categories implicitly addressing “arising out of” problems, even if they are not characterized in that manner.

¹⁹³ *Id.* at 510

¹⁹⁴ *Id.* at 511

¹⁹⁵ 1 LARSON’S WORKERS’ COMPENSATION LAW § 4.02; *LaTourette v. Workers’ Compensation Appeals Board*, [951 P.2d 1184](#) (Cal. 1998); *Voeller v. HSBC Card Services, Inc.*, [834 N.W.2d 839](#), 844-45 (S.D. 2013). For a good discussion of “gray area cases” injuries *see* Emily A. Spieler and John F. Burton, *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers’ Compensation Benefits*, 55 AMERICAN J. OF INDUSTRIAL MEDICINE, 487, 500 (2012)

¹⁹⁶ 1 LARSON’S WORKERS’ COMPENSATION LAW § 4.04

3.5 Cumulative Injuries, Heart Attacks, and Herniation in Wyoming

From an “arising out of” perspective, the problem with cumulative injuries, heart attacks, and inguinal hernias is that each disabling condition or injury could easily have been “caused” outside of the workplace. The conditions could also have begun outside of the workplace but “culminated,” in the sense of creating work disability, within the workplace. In the words of Wyoming “arising out of” law, it can be hard to say that cumulative injuries, heart attacks, or hernias “can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment . . .”¹⁹⁷ Accordingly, apparently in recognition of these difficulties, the Wyoming legislature has placed limitations on, and made more difficult to establish, the compensability of each type of injury under W.S. § [27-14-603](#). Subsection (a) of the provision defines required elements to establish the compensability of injuries “*which occur over a substantial period of time*” (a Wyoming-specific description of injuries usually referred to nationally as “cumulative injuries”); subsection (b) of the provision covers “coronary conditions except those *directly and solely caused* by an injury;” and subsections (c) and (d) of the provision apply to hernias.

3.6 Injuries Which Occur “Over a Substantial Period of Time”

W.S. § [27-14-603](#)(a) states:

(a) The burden of proof in contested cases involving **injuries which occur over a substantial period of time** is on the employee to prove by competent medical authority that his claim arose out of and in the course of his employment and to prove by a preponderance of evidence that:

- (i) There is a **direct causal connection** between the condition or circumstances under which the work is performed and the injury;
- (ii) The **injury can be seen to have followed as a natural incident of the work** as a result of the employment;
- (iii) The injury can **fairly be traced to the employment as a proximate cause**;

¹⁹⁷ Bruhn, *supra.*, 951 P.2d at 376-77

(iv) The **injury does not come from a hazard to which employees would have been equally exposed outside of the employment**; and

(v) The injury is **incidental to the character of the business** and not independent of the relation of employer and employee.

The entire language of the subsection is **evocative of the increased risk test** previously discussed. **“When an injury arises over time, a claimant's burden of proof is enhanced.”**¹⁹⁸ **Although the statute specifically enumerates five elements, “they are closely related because each contributes to indicate whether the employment environment caused the injury. Therefore, the same evidence will often offer support to several of the elements.”**¹⁹⁹

For example, in *Sanchez v. Workers’ Safety & Compensation Div.*,²⁰⁰ Elsie Sanchez sought workers’ compensation benefits alleging that she developed thoracic outlet syndrome during her employment with Carbon County School District # 1. The Division denied Sanchez benefits, and, after a contested case hearing, the Medical Commission determined that Sanchez’s symptoms were not compensable. On appeal, the district court affirmed the Commission's decision.²⁰¹ The Wyoming Supreme Court, in upholding the denial, explained that the medical evidence in the case was conflicting and that in connection with the medical evidence credited by the Medical Commission—that based on “the claimant's entire medical history, that evidence did not exist to support a finding of occupational TOS”—the Medical Commission was justified in denying the claim because the claimant had failed to prove the claim through competent medical authority and especially in light of the enhanced burden of proof.²⁰²

In *Baxter v. Sinclair Oil Corp.*,²⁰³ on the other hand, the Wyoming Supreme Court reversed a decision of a hearing officer finding that Baxter was *not* entitled to benefits for a back condition. The hearing officer decided upon the denial, at least in part, because none of the medical evidence stated that “the injury did not come from a hazard outside employment and that the condition was incidental to Baxter's

¹⁹⁸ *Sanchez v. Wyoming Workers’ Safety and Compensation Division*, [134 P.3d 1255](#) (Wyo. 2006); *Yenne–Tully v. Workers' Safety & Comp. Div., Dept. of Empl.*, [12 P.3d 170](#), 172 (Wyo.2000)

¹⁹⁹ *Sanchez, supra.* at 1259 *citing* *Sinclair Trucking v. Bailey*, [848 P.2d 1349](#), 1353 (Wyo.1993), *overruled on other grounds* by *Newman v. Workers’ Safety & Comp. Div.*, [49 P.3d 163](#), 172 (Wyo.2002). *See also* *Baxter v. Sinclair Oil Corp.*, [100 P.3d 427](#), 432 (Wyo.2004) (reaffirming the *Sinclair Trucking* analysis of W.S. § [27–14–603](#)).

²⁰⁰ *See supra.*

²⁰¹ *Sanchez, supra.*, 134 P.2d at 1256

²⁰² *Id.* at 1261

²⁰³ 100 P.3d 427 (Wyo. 2004)

employment as a mechanic.”²⁰⁴ The Wyoming Supreme Court found, contrary to the hearing officer, that medical testimony in the record supported the view that it was Baxter’s work-related activities that caused his lower back pain over time. In addition to proving by competent evidence that his back condition arose out of and in the course of employment, the Court’s review revealed that one of the deposed physicians had considered whether Baxter’s condition was caused by aging or natural progression of his preexisting condition and had rejected those factors because of Baxter’s relative youth (he was thirty-eight) and heavy working conditions. At hearing, Baxter denied, without contradiction, having engaged in physically demanding outside activities, satisfying element four of the “substantial period of time” test. The Court concluded he satisfied the heightened proof requirements of Section 603(a).

Baxter highlights an interesting evidentiary and doctrinal problem with the fourth (“substantial period of time”) element. How can a plaintiff affirmatively prove that an injury “*does not come from* a hazard to which employees would have been equally exposed outside of the employment?” Since there are presumably a very large number of hazards that fit the bill, it is hard to know when a claimant will have eliminated enough possibilities to have satisfied the element. The claimant prevailed in *Baxter*, but *proving the negative* seems a daunting proof problem.

3.7 Coronary Conditions in Wyoming

W.S. § [27-14-603](#)(b) states:

Benefits for employment-related coronary conditions, except those **directly and solely** caused by an injury, are not payable unless the employee establishes by competent medical authority that:

- (i) There is a **direct causal connection between the condition under which the work was performed and the cardiac condition**; and
- (ii) The **causative exertion occurs during the actual period of employment stress clearly unusual to or abnormal for employees in that particular employment**, irrespective of whether the employment stress is unusual to or abnormal for the individual employee; and
- (iii) The **acute symptoms of the cardiac condition are clearly manifested not later than four (4) hours after the alleged causative exertion**.

²⁰⁴ *Id.* at 430

The first point to make is that **this provision applies only where a coronary condition is not directly and solely caused by a work-related injury. Where direct and sole causation is established, the coronary condition is compensable.**²⁰⁵ Under this provision it is not enough, for purposes of compensation, that a causal connection between work and the cardiac condition **is** made out. The language effectively creates an increased risk standard by *also* requiring that the exertion causing the coronary condition arises from work **considered unusual for employees in a particular employment (and not just for the particular, stricken employee).**²⁰⁶ Obviously, symptoms must also manifest within four hours.

A good example of how this analysis is applied by Wyoming courts is the Wyoming Supreme Court's opinion in *In re Worker's Compensation Benefits ex rel. Scherf*.²⁰⁷ In *Scherf*, an employee died from a heart attack he suffered at work while servicing a front-end loader.²⁰⁸ A subsequent claim for workers' compensation death benefits filed by his surviving spouse was denied in administrative proceedings.²⁰⁹ The Office of Administrative Hearings, in a decision affirmed by a district court, concluded that "although the Claimant had proved the required causal link between the work exertion and the heart attack, she [the death benefits claimant-spouse] had failed to prove that the exertion itself was unusual or abnormal for an employee servicing heavy equipment."²¹⁰ The employee's condition came on while changing the oil of a front end loader requiring access through a panel that was crusted over with mud, making the work more difficult than would otherwise be the case.²¹¹ The Office of Administrative Hearings concluded, "[e]ven if Mr. Scherf had to exert himself more than usual in opening and closing the panel to access the loader's engine oil on the day in question, while it may have been an employment stress unusual or abnormal for him, the Office is not convinced that it was clearly unusual or abnormal for oilers in this industry."²¹² In reversing the Office of Administrative Hearings finding (as affirmed by the district court), the Wyoming Supreme Court recounted that it was **necessary to apply an "objective test for determining whether Mr. Scherf's exertion was unusual to or abnormal for an oiler, which we apply by comparing Mr. Scherf's specific exertion to the usual exertion of the other employees engaged in that same or a similar activity."**²¹³ The Court noted that every one of the employer's employees testifying confirmed that the oiler's job

²⁰⁵ *Sheth v. Workers' Compensation Div.*, [11 P.3d 375](#), 379 (Wyo. 2000)

²⁰⁶ *Matter of Desotell*, [767 P.2d 998](#), 1001 (Wyo. 1989)

²⁰⁷ [360 P.3d 66](#) (Wyo. 2015)

²⁰⁸ *Id.* at 67

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 68

²¹² *Id.* at 71

²¹³ *Id.* at 73 *citing* *Loomer v. Workers' Safety & Comp. Div.*, [88 P.3d 1036](#), 1043 (Wyo.2004). (Emphases supplied)

was not generally a physically demanding or difficult task.²¹⁴ Thus, “[t]he overwhelming weight of the evidence establishes that it was unusual or abnormal to encounter an access panel that is stuck or physically ‘very hard’ to open or close.”²¹⁵ Accordingly, the Court remanded the case to the district court for entry of an order remanding to the Office of Administrative Hearings for entry of an order awarding benefits.²¹⁶

A sound analysis of the compensability of coronary conditions under current Wyoming law, as set out in *Matter of Desotell*²¹⁷ and reaffirmed in *Workers’ Compensation Div. v. Harris*²¹⁸ is that,

Given the way the statute is phrased, the **claimant must first prove that the injured employee experienced an “actual period of employment stress clearly unusual to, or abnormal for, employees in that particular employment . . .”** Next, and only after proof of the first requirement, **the claimant must establish legal causation, by proving a “causative exertion” during the proven period of actual unusual or abnormal stress.** Then, the claimant **must establish medical causation, by introducing competent medical testimony evidencing a direct causal connection between the causative exertion and the coronary condition.** Last, the **claimant must introduce evidence showing that the acute symptoms of that coronary condition were manifested within four hours of the causative exertion.**

This “unusual exertion rule,” as it is termed in the *Larson’s* treatise, “assumes that there is a quantum of exertion or exposure in any occupation which is usual or normal—an assumption which is questionable at best, and certainly difficult to apply.”²¹⁹ However, because Wyoming is *not* an “accident” jurisdiction, the unusual exertion rule is not subject to the critique that unusual exertion is not necessarily “unexpected.”²²⁰

3.8 Hernia Injuries in Wyoming

W.S. § [27-14-603](#)(c) and (d) state:

²¹⁴ *Id.* at 73

²¹⁵ *Id.* at 75

²¹⁶ *Id.* at 77

²¹⁷ *Matter of Desotell*, *supra.*, 767 P.2d at 1002

²¹⁸ 931 P.2d 255, 258-259 (Wyo. 1997)

²¹⁹ 3 LARSON’S WORKERS’ COMPENSATION LAW § 44.03

²²⁰ 3 LARSON’S WORKERS’ COMPENSATION LAW § 44.02

(c) if an employee suffers a hernia, he is entitled to compensation if he clearly proves that

(i) [t]he hernia is of **recent origin**;²²¹

(ii) [i]ts **appearance** was **accompanied by pain**;²²²

(iii) [i]t was **immediately preceded by** some **accidental strain** suffered in the course of employment; and

(iv) [i]t **did not exist prior** to the date of the alleged injury.

(d) If an employee establishes his right to compensation for a hernia as provided and elects not to be operated on, he shall not be compensated for the results of future strangulation of the hernia.

The primary issue in hernia compensation cases appears to be the immediacy of the hernia's appearance as a painful bulge after an accident in the course of employment. Originally, the requirements included the need for *discoloration*, but this was struck from an early version of the Wyoming Workers' Compensation Act by 1935.²²³ **Timely reporting requirements and the evidentiary burden showing the time of the hernia's descent** apparently exist to exclude *purely congenital* (and therefore non-work related) herniation. But even if congenital propensity for hernia exists the condition may still be compensated as an accident.²²⁴ Although Wyoming is *generally* not an "accident" jurisdiction,²²⁵ the hernia provision has historically required *an immediately preceding "accidental strain in the course of employment."*²²⁶

In one interesting case, *Workers' Compensation Div. v. Girardot*,²²⁷ a janitor slipped on a wet floor and sustained what was clearly a compensable hernia injury.²²⁸ While being evaluated for an operation to correct the hernia, he was discovered to have a life-threatening coronary condition.²²⁹ The coronary condition required immediate surgery before the hernia operation could be undertaken.²³⁰ The employee underwent surgery for the coronary condition (an arterial blockage of the heart) and then underwent the hernia operation.²³¹ Temporary total disability

²²¹ Big Horn Coal Co. v. LaToush, [501 P.2d 1250](#) (Wyo. 1972)

²²² In re Hardison, [429 P.2d 320](#) (Wyo. 1967)

²²³ See Wilson v. Holly Sugar Corp., [33 P.2d 253](#) (Wyo. 1934); statute amended in Ch 4. SL of 1935

²²⁴ In re Frihauf, [135 P.2d 427](#) (Wyo. 1943), *see also* In re Scrogam, [72 P.2d 200](#) (Wyo. 1937) (discussing effect of worker's predisposition to injury)

²²⁵ See *supra*. of the Treatise at § 3.1

²²⁶ In re Johnson, [63 P.2d 791](#) (Wyo. 1937)

²²⁷ [807 P.2d 926](#) (Wyo. 1991)

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

payments were paid without contest during the period of recovery from the hernia operation.²³² The employer and Division balked, however, when the employee submitted a \$35,000 bill *from the coronary procedure* for reimbursement.²³³ The claimant cited out of state authority, primarily in Arizona, for the proposition that an employer had a responsibility to compensate an injured employee for medical expense related to treatment of non-work-related conditions uncovered during the preoperative stage of a work-related condition.²³⁴ Finding the cases not squarely on point—most of them seemed simply to stand for the proposition that, once a preoperative state *related to* a work-related injury was underway, unexpected but related medical expenses encountered may be compensable—the Court simply said that preexisting conditions are not compensable in Wyoming.²³⁵ “There is no general Wyoming case law on this subject and, generally, these problems seem removed from mainstream litigation . . . Following the thesis of W.S. § [27-14-102\(a\)\(xi\)\(F\)](#), a rule of reasonableness for fund obligation in case of a non-work-related physical ailment should be applied.”²³⁶

One final point regarding hernias is that, although *hernia* generally refers to “inguinal” hernias, *non-inguinal* hernias have only rarely been discussed by Wyoming courts; but there is no suggestion in the case law that non-inguinal hernias would be treated differently than inguinal hernias.²³⁷

3.9 Preexisting Conditions in Wyoming

As was just seen, coronary conditions and hernia also implicate legal rules involving preexisting conditions, which the Wyoming statute explicitly excludes. Employing the logic of the “arising out of” phraseology, an injury cannot arise out of employment if it in fact has *exclusively* arisen from some other physical condition or cause. Under W.S. § [27-14-102\(xi\)\(F\)](#), “**Injury does not include . . . Any injury or condition preexisting at the time of employment with the employer against whom a claim is made.**” Yet, it has also long been Wyoming law that “**the employer must take the employee as he finds him**” . . . **Subsequent aggravation of a preexisting condition by employment is a compensable injury.**²³⁸

²³² *Id.*

²³³ *Id.* at 927

²³⁴ *Id.* at 928-929

²³⁵ *Id.* at 929

²³⁶ *Id.*

²³⁷ *Torres v. Workers’ Safety & Compensation Div.*, [105 P.3d 101](#), 112 (Wyo. 2005) (analyzing an “incisional hernia” under W.S. § [27-14-603\(c\)](#))

²³⁸ *In re Scrogam*, 73 P.2d 300, 306 (Wyo. 1937); *Matter of Injury to Carpenter*, [736 P.2d 311](#), 312 (Wyo. 1987) *citing* *Lindbloom v. Teton International*, [684 P.2d 1388](#) (1984); *Jim’s Water Service v. Eayrs*, [590 P.2d 1346](#) (1979). The principle continues to be recognized. *In re Torres*, 253 P.3d 175, 180 (Wyo. 2011); *In re Boyce*, [105 P.3d 451](#), 454-455 (Wyo. 2005); *Salas v. General Chemical*, [71 P.3d 708](#), 711-712 (Wyo. 2003)

To prove **aggravation of a preexisting injury**, a claimant must demonstrate by a *preponderance of the evidence* that the work contributed to a **material degree to the aggravation of the preexisting condition**.²³⁹ In proving such an aggravation of a preexisting injury or condition, Wyoming law requires that a claimant prove a present injury “**most likely,” or “probably” is the product of the workplace.**²⁴⁰ **Wyoming courts generally do not invoke a standard of “reasonable medical certainty” with respect to such causal connection.**²⁴¹ It should be briefly mentioned that some older cases citing the immediately preceding rule sometimes involve coronary conditions. Caution should be exercised when analyzing preexisting conditions involving coronary conditions (Treatise Section 3.7) and hernias (Treatise Section 3.8) where more recent specialized causation standards apply.

3.10 Second Compensable Injuries in Wyoming

A perennial problem in workers’ compensation occurs when a prior work-related injury combines with a subsequent injury (of any type) to cause present incapacity for work.²⁴² As the *Larson’s* treatise explains, “**once the work-connected character of any injury . . . has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.**”²⁴³ Of course, proof of progression and “non-causation” by an *independent* intervening cause is a medical question.²⁴⁴ In Wyoming, this problem is analyzed under what has become known as the “**second compensable injury.**”

To grasp Wyoming law in this area it is important to distinguish between two different situations. In **the first situation**, an employee suffers a work-related injury and either the employee alleges that the injury has worsened and requests additional benefits, or the Workers’ Safety and Compensation Division asserts that the injury has improved and seeks to reduce the employee’s benefits. In **the second situation**, an employee suffers a work-related injury and is paid benefits. Later, the employee alleges that **an entirely separate injury—a second compensable injury—has**

²³⁹ Claim of Vondra, [448 P.2d 313](#), 318 (Wyo. 1968); Lindbloom v. Teton International, *supra.*, 684 P.2d 1389-1390

²⁴⁰ In re Pino, [996 P.2d 679](#), 685 (Wyo. 2000); In re Armijo, [99 P.3d 445](#), 449-450 (Wyo. 2004)

²⁴¹ In re Pino, 996 P.2d at 685; Salas v. General Chemical, 71 P.3d 708 at 712;

²⁴² This writer, following other writers, has previously described the problem as one of “successive causation.” DUFF, WORKERS’ COMPENSATION LAW at 80

²⁴³ 1 LARSON’S WORKERS’ COMPENSATION LAW § 10.02

²⁴⁴ *Id.* Although cases often speak of *intervening* causes in these contexts, it is probably more accurate to say that subsequent injuries may be deemed noncompensable as a matter of law upon establishment of a **superseding** or **supervening** cause, which is “an intervening act or force that the law considers sufficient to override the cause for which the original tortfeasor was responsible, thereby exonerating that [actor] from liability.” BLACK’S LAW DICTIONARY (11th ed. 2019)

been caused by the original injury. In other words, a “‘second compensable injury’ includes . . . an initial compensable injury [that] ripens into a condition requiring additional medical intervention.”²⁴⁵

For an employee to receive *additional* benefits in the first situation, **a claim must be filed within four years** from the date of the last payment for additional benefits, and the employee must, among other things, prove by competent medical authority and **to a reasonable degree of medical certainty** (unlike the “probably” or “most likely” initial causation formulation discussed in this Treatise above at Section 3.9) that the condition is **directly related** to the original injury.²⁴⁶ An employee seeking benefits in the second situation **is not bound by the four-year limitations period (indeed, it appears there may be no limitations period)**²⁴⁷ and “the claimant only has to demonstrate that it is ‘more probable than not,’ that the first and second injuries are related.”²⁴⁸

²⁴⁵ Matter of Hall, 414 P.3d 622, 625 (Wyo. 2018) *quoting* Hardy v. Dep’t of Workforce Servs., Workers’ Comp. Div., 394 P.3d 454, 457 (Wyo. 2017); in turn *citing* Kenyon v. Wyo. Workers’ Safety & Comp. Div., 247 P.3d 845, 850 (Wyo. 2011), *quoting* Yenne-Tully v. Workers’ Safety & Comp. Div., Dep’t of Emp’t, 12 P.3d 170, 172 (Wyo. 2000) (Yenne-Tully I)

²⁴⁶ W.S. § [27-14-605](#). The provision in its entirety states:

- (a) If a determination is made in favor of or on behalf of an employee for any benefits under this act, an application may be made to the division by any party within four (4) years from the date of the last payment for additional benefits or for a modification of the amount of benefits on the ground of increase or decrease of incapacity due solely to the injury, or upon grounds of mistake or fraud. The division may, upon the same grounds and within the same time period, apply for modification of medical and disability benefits to a hearing examiner or the medical commission, as appropriate.
- (b) Any right to benefits shall be terminated and is no longer under the jurisdiction of this act if a claim for any benefit is not filed with the division within the four (4) year limitation prescribed under subsection (a) of this section.
- (c) A claim for medical benefits which would otherwise be terminated under subsection (b) of this section and barred under W.S. 27-14-503(a) and (b) may be paid by the division if the claimant:
 - (i) Submits medical reports to the division substantiating his claim;
 - (ii) Proves by competent medical authority and to a reasonable degree of medical certainty that the condition is directly related to the original injury; and
 - (iii) Submits to an examination by a health care provider selected by the division and results of the examination validate his claim.

²⁴⁷ “Under the second compensable injury rule, a worker who has received a compensable injury and received benefits for that injury can, **regardless of the passage of time**, receive more benefits for that compensable injury without meeting either of the time limits or increased burden of proof found in Wyo. Stat. Ann. § 27-14-605.” Yenne-Tully v. Workers’ Safety and Compensation Div., [48 P.3d 1057](#), 1062 (Wyo. 2002) (Yenne-Tully II). (emphasis supplied)

²⁴⁸ In re Kaczmarek, [215 P.3d 277](#), 282 (Wyo. 2009) *quoting* Pino v. State ex rel. Wyo. Workers’ Safety & Comp. Div., 996 P.2d 679, 685 (Wyo.2000)

The “second compensable injury” problem is partially addressed in connection with other jurisdictions in the *Larson’s* treatise: “when complications develop directly from the original injury, as when a claimant suffers further injuries in a fall caused by his original injury or aseptic necrosis develops from claimant’s broken hip, the reopening statute applies, and the limitation period cannot be escaped by calling the condition a new disability.”²⁴⁹ A corollary of the passage is that when a second, distinct work-related injury *is* in fact caused by a first work-related (compensable) injury the limitations period may *not* apply (or may be tolled in some fashion).

3.11 Occupational Disease Coverage in Wyoming

Because Wyoming’s current workers’ compensation statute **explicitly allows for the coverage of occupational diseases arising out of and in the course of employment**, Wyoming law is not currently troubled by some of the historical doctrinal issues²⁵⁰ that have arisen in other states about how to fit occupational disease within the workers’ compensation rubric.²⁵¹ Wyoming provides coverage of occupational diseases, as did the early Massachusetts, California, and Federal Employees Workers’ Compensation Acts, by generally including occupational diseases under the heading of “injury.” W.S. § [27-14-102](#)(xi) defines “injury” as **“any harmful change in the human organism . . . arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence, and which subjects the employee to extrahazardous duties incident to the business.”** Occupational injuries are not among the subsequent exclusions to this broad definition.²⁵²

²⁴⁹ 13 LARSON’S WORKERS’ COMPENSATION LAW § 131.03

²⁵⁰ Very early on in Wyoming workers’ compensation history this was not the case, however. *See In re Pero*, [52 P.2d 690](#) (Wyo. 1935) (finding employee’s silicosis clearly arising out of and in the course of employment to be an “accidental injury” under 1931 version of the Wyoming statute: “The words ‘injury and personal injury’ shall not include injury caused by the wilful act of a third person directed against an employee for reasons personal to such employee, or because of his employment; **nor a disease**, except, as it shall directly result from an injury incurred in the employment.”) (emphasis supplied)

²⁵¹ *See* 4 LARSON’S WORKERS’ COMPENSATION LAW § 52.02 (discussing the following arguments: only “accidents” were subject to the original quid pro quo; the problem should be dealt with under general health insurance; wide prevalence of certain diseases in certain injuries would result in the workers’ compensation system becoming overburdened)

²⁵² Those exclusions under W.S. § [27-14-102](#)(xi) are seriatim:

(A) Any illness or communicable disease unless the risk of contracting the illness or disease is increased by the nature of the employment;

(B) Injury caused by:

(I) The fact the employee is intoxicated or under the influence of a controlled substance, or both, except any prescribed drug taken as directed by an authorized health care provider. The division shall define “intoxicated” and “under the influence of a controlled substance” for purposes of this subparagraph in its rules and regulations; or

(II) The employee's willful intention to injure or kill himself or another.

(C) Injury due solely to the culpable negligence of the injured employee;

Additionally, many diseases are injuries which “occur over a substantial period of time” and are **explicitly or implicitly covered subject to the causation requirements previously set out in this Treatise at Section 3.6 through Section 3.8.**

Accordingly, occupational diseases are now so easily fit into the definition of injury under Wyoming’s statute that courts are not required to grapple with the questions of how a disease developed over time can be an “accident” or, if it is, when the accident can be said to have occurred.²⁵³

But at one time Wyoming possessed an Occupational Disease Law of the type discussed by the *Larson’s* treatise:

It was not until 1920 that New York adopted the first schedule-type act, following the English practice of listing not only particular diseases but the process in which they are acquired. While the schedule method was widely copied, the trend has been toward expansion into general coverage, either by abandoning the schedule altogether, or, as was done in New York, Ohio, and, more recently, Nevada, by leaving the list intact while saying that the act also covers all other occupational diseases.²⁵⁴

(D) Any injury sustained during travel to or from employment unless the employee is reimbursed for travel expenses or is transported by a vehicle of the employer;

(E) Any injury sustained by the prisoner during or any harm resulting from any illegal activity engaged in by prisoners held under custody;

(F) Any injury or condition preexisting at the time of employment with the employer against whom a claim is made;

(G) Any injury resulting primarily from the natural aging process or from the normal activities of day-to-day living, as established by medical evidence supported by objective findings;

(H) Any injury sustained while engaged in recreational or social events under circumstances where an employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer; or

(J) Any mental injury unless it is caused by a compensable physical injury, it occurs subsequent to or simultaneously with, the physical injury and it is established by clear and convincing evidence, which shall include a diagnosis by a licensed psychiatrist or licensed clinical psychologist meeting criteria established in the most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association. In no event shall benefits for a compensable mental injury be paid for more than six (6) months after an injured employee's physical injury has healed to the point that it is not reasonably expected to substantially improve.

²⁵³ 4 LARSON’S WORKERS’ COMPENSATION LAW § 52.03; In re Pero, *supra.*, 52 P.2d at 693-699 provides a striking example of a Wyoming court having to perform just that sort of grappling. The accident requirement was again circumnavigated in *Wright v. Wyoming State Training School*, [255 P.2d 211](#) (Wyo. 1953), when it was concluded that an employee contracting “contact dermatitis” had suffered an accidental injury. The rule of liberal construction was doubtless at work here.

²⁵⁴ 4 LARSON’S WORKERS’ COMPENSATION LAW § 52.02

In 1969, Wyoming established an independent Occupational Disease Law²⁵⁵ that was subsequently rescinded. The law contained a schedule of the type²⁵⁶ mentioned by the *Larson's* treatise in the preceding excerpted passage.²⁵⁷ This Treatise will omit extended discussion of the statute, which was abolished in 1975,²⁵⁸ other than to say that the requirements for proving the “arising out of,” or causal nexus of a disease claim under a later version of the Occupational Disease Law were almost identical to the requirements of W.S. § [27-14-603](#)(a) of the present Wyoming Workers’ Compensation Act.²⁵⁹

Finally, although not typically included under the heading of “occupational” disease, it is important to remember that **a covered injury does not include “[a]ny illness or communicable disease unless the risk of contracting the illness or disease is increased by the nature of the employment; . . .”** (Another instance of the “increased risk test” making a stealthy appearance in the Act). This statutory exception substantially limits the difficult analyses of infectious diseases that are common in other states.²⁶⁰

3.12 Mental Injury in Wyoming

In Wyoming, an employee may receive workers’ compensation benefits for “mental,” or psychological, injuries in certain **very narrowly defined circumstances**. The general rule is that “[mental] injuries are compensable where they are caused by a compensable physical injury which occurs **simultaneously or precedent to them.**”²⁶¹ The definition is set forth structurally as a statutory exclusion: under W.S. § [27-14-102](#)(a)(xi), an injury—generally defined as any harmful change in the human organism & etc.—does *not* include:

(J) **Any mental injury unless it is caused by a compensable physical injury, it occurs subsequent to or simultaneously with,** the physical injury and it is established by **clear and convincing**

²⁵⁵ Session Laws of Wyoming 1969, Chapter 200. See especially Section 23(b) amending Subsection III (b), Section 27-49, Wyoming Statutes 1957, Compiled 1967, excluding “disease from the definition of injury and stating that the words “injury and personal injury” were to be construed as meaning an injury “directly and solely caused” by a traumatic accident in the employment.

²⁵⁶ The schedule, at Section 3, listed forty-six compensable authorized diseases.

²⁵⁷ *Hammond v. Hitching Post Inn*, [523 P.2d 482](#) (Wyo. 1974) (denying dust inhalation chronic bronchitis claim); *Olson v. Federal American Partners*, [567 P.2d 710](#) (Wyo. 1977) (denying uranium radiation exposure claim)

²⁵⁸ Session Laws of Wyoming 1975, Chapter 149

²⁵⁹ The amended version of the Occupational Disease statute is discussed in *Hammond v. Hitching Post Inn*, *supra*. 523 P.3d at 483. Compare § 27-297(a), W.S.1957, 1973 Cum.Supp. to the present statutory provision in W.S. § [27-14-603](#)(a)

²⁶⁰ W.S. § [27-14-102](#)(xi)(A); see 4 LARSON’S WORKERS’ COMPENSATION LAW § 51.01; see also *Leib v. Dept. of Workforce Services*, [373 P.3d 420](#) (Wyo. 2016)

²⁶¹ W.S. § [27-14-102](#)(a)(xi)(J)

evidence, which shall include a diagnosis by a **licensed psychiatrist or licensed clinical psychologist** meeting criteria established in the **most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association.**²⁶² **In no event shall benefits for a compensable mental injury be paid for more than six (6) months after an injured employee's physical injury has healed** to the point that it is not reasonably expected to substantially improve.

Using the *Larson's* treatise taxonomy, mental injury “cases may be thought of, for convenience, in three groups: mental stimulus causing physical injury; physical trauma causing nervous injury; and mental stimulus causing nervous injury.”²⁶³ Wyoming compensates only the second group of cases, which is currently the minority rule approach in the United States.²⁶⁴ There do not appear to be reported cases in Wyoming under the “mental stimulus causing physical injury” category (for example, mental fright causes a physical aneurism). In *Wheeler v. Workers' Safety & Compensation Div.*,²⁶⁵ the claimant, a volunteer fireman, who suffered from post-traumatic stress syndrome and major depressive syndrome after seeing fellow firefighters killed on the job, argued that his conditions were *essentially* physical.²⁶⁶ The Wyoming Supreme Court interpreted the claimant's expert to be arguing that all mental injuries were essentially physical, and rejected the argument because if it equated “‘mental injury’ as being equivalent to ‘physical injury,’ subsection (J) would have no application.”²⁶⁷ Ultimately, because the Court denied that the disorders in question were physical it did *not* reach the issue of whether a physical injury caused by a mental stimulus was compensable. A classic example of this kind of injury arose in Massachusetts' *Egan's Case*,²⁶⁸ in which a cab driver, terrified by a violent encounter between police officers and criminals, which he observed in the course of his employment, caused the driver to suffer an aneurism.²⁶⁹ As the *Larson's* treatise notes, these kinds of cases are uniformly compensable throughout the country.²⁷⁰

²⁶² For commentary on “most recent edition” incorporations *see supra.* in this Treatise at Section 2.21

²⁶³ 4 LARSON'S WORKERS' COMPENSATION LAW § 56.01

²⁶⁴ 4 LARSON'S WORKERS' COMPENSATION LAW § 56.04

²⁶⁵ [245 P.3d 811](#) (Wyo. 2010)

²⁶⁶ *Id.* at 814-815

²⁶⁷ *Id.* at 816

²⁶⁸ [331 Mass. 11](#) (1954)

²⁶⁹ *See* a discussion of the case in DUFF, WORKERS' COMPENSATION LAW, *supra.* at 72-74

²⁷⁰ 4 LARSON'S WORKERS' COMPENSATION LAW § 56.02

In *Wheeler*, the Court reaffirmed other Wyoming cases, essentially applying the plain language of the current statute,²⁷¹ which requires that a claimant provide clear and convincing evidence to establish a compensable medical injury, and terminates benefits altogether after six months from the healing of the physical injury causing the mental injury.²⁷² While these heightened proof requirements undoubtedly exclude from statutory coverage an identifiable class of employees who may suffer mental injuries from work-related but purely mental stimuli, the statutory provision withstood an equal protection challenge in *Frantz v. Campbell County Memorial Hosp.*,²⁷³ a case in which the Wyoming Supreme Court identified a rational basis for such proof requirements:

Issues which relate to proof, causation, and frivolous or fraudulent claims create significant economic concerns with regard to the increased costs for processing and adjudicating mental injury claims. Economic concerns and burdens which are placed upon certain businesses are legitimate state interests . . . The legislature's attempt to ensure that claimants receive quick, efficient, fair, and predictable medical benefits as well as its effort to prevent fraud and abuse, thereby reducing the employers' costs, are rationally related to those legitimate state interests.²⁷⁴

The corollary to the categorical exclusion, of course, is that employees suffering such injuries would not be barred by operation of the exclusive remedy rule from pursuing tort actions.²⁷⁵

3.13 Idiopathic Falls, Unexplained Falls, and the Premises Rule

The general rule in workers' compensation law is that idiopathic falls—falls produced from events like non-work-related heart attacks, epileptic seizures, and other purely personal conditions—are not compensable unless “employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle.”²⁷⁶ There has been a great deal of case law over the years

²⁷¹ See *Cook v. Shoshone First Bank*, [126 P.3d 886](#), 890–91 (Wyo.2006); *Brierley v. Workers' Safety & Comp. Div.*, [52 P.3d 564](#), 565 (Wyo.2002); *Sechrist v. Workers' Safety & Comp. Div.*, [23 P.3d 1138](#), 1141 (Wyo.2001)

²⁷² *Id.*

²⁷³ [932 P.2d 750](#) (Wyo. 1997) *overruled on other grounds* *Torres v. Workers' Safety & Compensation Div.*, 95 P.3d 794 (Wyo. 2004) *reaffirmed in relevant part* *Pinkerton v. Workers' Safety & Compensation Div.*, [939 P.2d 250](#) (Wyo. 1997)

²⁷⁴ *Frantz*, *supra.*, 932 P.2d at 754

²⁷⁵ See discussion *supra.* Section 1.6 *citing* *Cook v. Shoshone First Bank*, 126 P.3d 886 (Wyo. 2006)

²⁷⁶ 1 LARSON'S WORKERS' COMPENSATION LAW § 9.01

around the country on *the extent to which employment must contribute to an injury to render an idiopathic fall compensable*. For example, a level floor is experienced inside and outside of the workplace and is arguably a neutral risk. Thus, the argument has gone, if an employee suffers an idiopathic fall and strikes a level floor in the workplace, an injury suffered therefrom is not compensable.²⁷⁷ The reason is, of course, that the injury suffered cannot be said to have “arisen out of” employment unless a very strict version of positional risk doctrine is resorted to. Logically, it follows that if on the way down to the floor the employee suffering from the idiopathic fall strikes a metal machine unique to the workplace, thereby suffering injuries, those injuries *are* compensable. One needs no more prompting to realize the great variety of cases and outcomes that have unfolded under such a rubric, and the *Larson’s* treatise is full of conflicting, and at times, incoherent doctrine.²⁷⁸

Similar problems have emerged when dealing with “**unexplained**” falls. There is a close relationship between idiopathic falls and unexplained falls because, when a claimant cannot explain how a fall occurred, employers and insurance carriers may suspect the claimant was overcome by an idiopathic, or purely personal, condition. The unexplained fall phenomenon is as simple as it sounds. An employee falls at work and is injured (or killed) and there is simply no work-related explanation for the event. A lead national case is *Circle K Store No. 1131 v. Industrial Comm’n of Ariz.*,²⁷⁹ in which an employee was injured just before going home at the end of a shift after throwing trash in a dumpster. The injury occurred as she was turning around to pick up her belongings, which she had temporarily placed on the ground.²⁸⁰ At hearing, she was unable to identify what had caused her to fall, despite considerable prompting by counsel.²⁸¹ After canvassing the major approaches throughout the country analyzing the unexplained fall problem, the *Circle K* court applied the positional risk doctrine, holding that because the employee was performing her work duties “a presumption arises that her injuries ‘arose out of’ her employment.”²⁸²

Wyoming’s approach to these falls has been altered significantly by formal judicial adoption and application, beginning in 1990,²⁸³ of the “**premises rule**,” which will be explained momentarily, to “causal connection” situations. In *Matter of*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ [796 P.2d 893](#) (Az. 1990)

²⁸⁰ *Id.* at 894-895

²⁸¹ *Id.* at 895

²⁸² *Id.* at 898

²⁸³ *Archuleta v. Carbon County School Dist. No. 1*, [787 P.2d 91](#) (Wyo. 1990) (“[W]e hold that where the elements of the premises rule, as set forth above, have been established, a rebuttable presumption arises that the employee's injury is causally connected to his employment.”)

Williams,²⁸⁴ for example, Mr. Williams suffered a head injury on the work site.²⁸⁵ While it was clear an injury had occurred at work,²⁸⁶ as Williams was working,²⁸⁷ there was evidence that the mechanism of the injury described by the claimant was not true. While Williams claimed he fell avoiding a flash fire, emergency personnel concluded such a fire did not occur.²⁸⁸ Moreover, it was possible that administrative officials based their denial of Mr. Williams' claim "solely on speculation that something other than work, such as something idiopathic, caused Mr. Williams to fall."²⁸⁹ The problem was quite simply that, as was the case in *Circle K* in the preceding paragraph, the injury was suffered "in the course of employment" (see next section of this Treatise), but whether the injury "arose out of" employment (or was "incident to" employment, if one prefers) was unknown. Arizona, as has been explained, formally applied the *positional risk* rule, creating a rebuttable presumption of compensability. The Court in *Matter of Williams* appears to have accomplished the same outcome by a different rationale:

In other words, the premises rule, which we adopted in *Archuleta*, provides that when an employee is injured on the work premises, that fact will not conclusively establish the required causal link, but it will raise a presumption that the injury is work related . . . Under the rule, once the employee makes a showing that the injury occurred on the work premises, the burden shifts to the Division (or employer) to present evidence that the injury was not work related . . . In this case, no evidence was presented that Mr. Williams suffered his head injury anywhere other than the work site, and the work site is where he was located when emergency personnel responded to his 911 call. Given these undisputed facts, we can only conclude that Mr. Williams presented sufficient evidence to raise the presumption that his head injury **arose out of** his employment. This presumption shifted to the Division the burden to present evidence to overcome the presumption.²⁹⁰

The problem is that *Archuleta* was an "in the course of" not an "arising out of" case. The question in that case was whether the claimant was in the course of employment when he was killed in his truck in the employer's parking lot but before leaving the "premises."²⁹¹ The employer never contended that the death had not "arisen out of" employment; the sole ground of dispute was whether the

²⁸⁴ [409 P.3d 1219](#) (Wyo. 2018)

²⁸⁵ *Id.* at 1228

²⁸⁶ *Id.* at 1229

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1223

²⁸⁹ *Id.* at 1228

²⁹⁰ *Id.* at 1227-1228 (Emphasis supplied)

²⁹¹ *Archuleta*, *supra.*, 787 P.2d at 91

claimant was barred by operation of the rule denying compensation to employees traveling to and from work, an in the course of employment question.²⁹² *Matter of Injury to Corean* made the precise point that the premises rule made no sense outside of the context of a jurisdiction applying separate “arising out of” and “in the course of” analyses, for it has only been applied to “in the course of” causal connection contexts.²⁹³ Indeed, the subject is discussed in the *Larson’s* treatise only in the “in the course of” section.²⁹⁴ Thus, it is clear that *Matter of Williams* has now superseded *Matter of Injury to Corean* and greatly expanded *Archuleta*.²⁹⁵ The *Williams* Court left little doubt about its expansion of the “premises rule” beyond its “in the course of” origins.²⁹⁶

Of course, *Matter of Williams* bears some relation to “**unexplained death**” cases. **“When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of the employment.”**²⁹⁷ This rule has been adopted by Wyoming courts.²⁹⁸ **The unexplained-death assumptions are rebuttable but apply as long as there is some evidence the employee continued in his or her course of employment.**²⁹⁹ Again, however, the rule has not been directly connected to the premises rule, which is an “in the course of” consideration. As the *Larson’s* treatise freely acknowledges,

The occurrence of the death within the course of employment at least indicates that the employment brought deceased within range of the harm, and the cause of harm, being unknown, is neutral and not personal. The practical justification lies in the realization that, when the death itself has removed the only possible witness who could prove causal connection, fairness to the dependents suggests some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability.³⁰⁰

²⁹² *Id.*

²⁹³ 723 P.2d at 60-61

²⁹⁴ 2 LARSON’S WORKERS’ COMPENSATION LAW § 13.04

²⁹⁵ Though *Murray v. Workers’ Safety & Compensation Div.*, [993 P.2d 327](#) (Wyo. 1999) may have foreshadowed the development. In that case the premises rule was applied to create a presumption that a skin condition had developed at work. *Id.* at 333

²⁹⁶ *Matter of Williams*, *supra.*, 409 P.3d at 1231: “In short, the Division’s evidence rebutted Mr. Williams’ claim that a fire occurred, but it did not rebut the presumption that Mr. Williams suffered a head injury that **arose out of his work.**” (emphasis supplied)

²⁹⁷ 1 LARSON’S WORKERS’ COMPENSATION LAW § 7.04 [2]

²⁹⁸ *Richard v. Workers’ Compensation Div.*, [831 P.2d 244](#), 246-247 (Wyo. 1992)

²⁹⁹ *Id.* at 247

³⁰⁰ 1 LARSON’S WORKERS’ COMPENSATION LAW § 7.04 [2]

Perhaps what the Wyoming Supreme Court has been doing in cases like *Matter of Williams* is utilizing what the *Larson's* treatise has referred to as a **“Quantum Theory” of Work connection**. In discussing how difficult it has been for jurisdictions to keep “arising out of” and “in the course of” in separate “airtight compartments”—something Wyoming courts have insisted they do not wish to do—the treatise stated,

One is almost tempted to formulate a sort of **quantum theory of work-connection**: that a certain minimum quantum of work-connection must be shown, and if the “course” quantity is very small, but the “arising” quantity is large, the quantum will add up to the necessary minimum, as it will also when the “arising” quantity is very small but the “course” quantity is relatively large.³⁰¹

The theory would seem to nicely fit the facts of *Matter of Williams*, where the quantity of “arising out of” evidence was small but the “in the course of” evidence was large, even without resort to the premises rule. **The “Quantum theory” may ultimately be more coherently explanatory of Wyoming cases in this area than resort to the premises rule.**

In any event, the Wyoming Supreme Court has made clear that an expanded presumption of causal connection as a **matter of law** does not obviate the requirement of the claimant to provide adequate **factual** medical evidence of causation where it would otherwise be required. Thus, in *Leib v. Department of Workforce Services*,³⁰² the Workers’ Compensation Division denied Ms. Leib’s claim for benefits premised on alleged contraction of a strep bacterial infection from manure-laced dirt. Affirming administrative proceedings below, the Wyoming Supreme Court stated, **“where a medical question is complex, and the fact finding must be done in a realm that appropriately relies upon technical medical knowledge and expertise, medical testimony should not be ignored.”**³⁰³ In light of conflicting medical evidence in the case the Court found that the fact-finder was entitled to find that causation of the claimant’s condition had not been established.³⁰⁴ It is worth noting that in many states the question of the compensability of infectious diseases often turns either on the relationship between the infectious disease and an occupational disease statute, or on whether an infectious disease can be classified an “accident.” Presumably because these questions are not germane to Wyoming law (which is focused on the definition of “injury”), *Leib* did not engage typical treatise discussions on infectious diseases.

³⁰¹ 3 LARSON’S WORKERS’ COMPENSATION LAW § 29.01. (emphasis supplied)

³⁰² [373 P.3d 420](#) (Wyo. 2016)

³⁰³ *Id.* at 425

³⁰⁴ *Id.* at 427

3.14 “In the Course of” Generally

As noted above, the “in the course of employment” portion of the causal connection definition refers to **the time, place, and circumstances of the accident in relation to the employment.**³⁰⁵ The *Larson*’s treatise divides “in the course” problems into those having to do with whether an injury occurred within the “**time and space boundaries of**” employment and those that involve **whether an injury occurred during an activity whose purpose is related to** the employment.³⁰⁶ The first set of problems is heavily focused on situations in which employees are arguably not where they are supposed to be, most frequently because they are travelling.³⁰⁷ The second set of problems is heavily focused on **what an employee was doing** at the time of injury and whether that activity was conferring a benefit on, or was in the interest of, the employer.³⁰⁸

A definition widely adopted is that an injury to an employee is in the course of the employee’s employment when it occurs within the period of the employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of the employment or engaged in doing something incidental to it.³⁰⁹

This Treatise will not attempt to catalogue the multitude of problems that have emerged under the broad “in the course of” heading. In the category of “time and space boundaries,” for example, just the number of *parking lot* cases over the years are sufficiently impressive to communicate the breadth of such a discussion.³¹⁰ In the “purpose related to employment” category, employees may be injured at the workplace while smoking, eating, going to the bathroom, engaging in horseplay, fighting, playing in a company-sponsored softball game, and many other activities besides.

Three concepts that are especially important for understanding Wyoming law in this area are the **premises rule** (already discussed in the “arising out of section” above), the **going and coming rule**, and the **personal comfort doctrine**. These concepts have assisted jurisdictions in drawing lines to help simplify analyses of causal connection and work-relatedness. This Treatise will first discuss the concepts in **general doctrinal terms**, and then move on to discuss how the general legal doctrine has specifically impacted **Wyoming law**.

³⁰⁵ 2 LARSON’S WORKERS’ COMPENSATION LAW § 12.01

³⁰⁶ *Id.*

³⁰⁷ 2 LARSON’S WORKERS’ COMPENSATION LAW § 12.01

³⁰⁸ 2 LARSON’S WORKERS’ COMPENSATION LAW § 20.01 et seq.; *see also* DUFF, WORKERS’ COMPENSATION LAW at 91-92

³⁰⁹ 99 C.J.S. WORKERS’ COMPENSATION § 423

³¹⁰ 2 LARSON’S WORKERS’ COMPENSATION LAW § 13.04

The **premises rule** and the **going and coming rule** are closely interrelated. From the inception of workers' compensation, it has been accepted that **injuries suffered by employees going to or coming from work are not compensable**.³¹¹ There are different ways of conceptualizing why this is the case, but, essentially, travel to and from work carries risks that are not related to the workplace and are shared equally by members of the general public. Inevitably, however, situations unfold that present equitably challenging facts. An employee may be injured mere feet from the workplace, and it can seem quite arbitrary to conclude that had an employee been injured just moments later the injury would have been covered. To deal consistently with some of these close questions, a majority of jurisdictions have enacted the premises rule: **for an employee having fixed hours and place of work, going to and from work is covered only on the employer's premises**.³¹² The *Larson's* treatise argues insistently that the premises rule should be accepted because it has stood the test of time and it has the virtue of being consistent.³¹³

One well-known exception to the premises rule is when the “off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the plant, and that therefore the **special hazards of that route become the hazards of the employment**.”³¹⁴ An equally well-known exception to the going and coming rule is that when “an employee, having identifiable time and space limits on the employment, makes an **off-premises journey which would normally not be covered** under the usual going and coming rule, **the journey may be brought within the course of employment by the fact that the** trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, **is itself sufficiently substantial to be viewed as an integral part of the service itself**.”³¹⁵

The **personal comfort doctrine** holds that “[e]mployees who, within the time and space limits of their employment, engage in acts which **minister to personal comfort do not thereby leave the course of employment, unless the** extent of the **departure is so great that an intent to abandon the job temporarily may be inferred**, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.”³¹⁶ The principal is cited to establish that workers in various

³¹¹ 2 LARSON'S WORKERS' COMPENSATION LAW § 13.01 [1]

³¹² 2 LARSON'S WORKERS' COMPENSATION LAW § 13.01 [1]

³¹³ 2 LARSON'S WORKERS' COMPENSATION LAW § 13.01 [2]

³¹⁴ 2 LARSON'S WORKERS' COMPENSATION LAW § 13.01 [3]

³¹⁵ 2 LARSON'S WORKERS' COMPENSATION LAW § 14.05

³¹⁶ 2 LARSON'S WORKERS' COMPENSATION LAW, CHAPTER 21.SYN

situations not **immediately** conferring a benefit on their employers should nevertheless be deemed eligible for benefits.

Before moving on to Wyoming “in the course of” doctrine, it is worth reviewing the following passage from the *Larson’s* treatise:

There are at least four situations in which the course of employment goes beyond an employee’s fixed hours of work: the time spent going and coming **on the premises**; an interval before working hours while waiting to begin or making preparations, and a similar interval after hours; regular unpaid rest periods taken on the premises, and unpaid lunch hours on the premises. A definite pattern can be discerned here. In each instance the time, although strictly outside the fixed working hours, is **closely contiguous** to them; the activity to which that time is devoted is **related to the employment**, whether it takes the form of going or coming, preparing for work, or ministering to personal necessities such as food and rest; and, above all, the employee is within the spatial limits of his or her employment.

It is important to remember that this section’s discussion of in the course of employment deals with employees with fixed times and places of employment. **Travelling employees** are a special “in the course of” case that will be discussed in a separate section.

3.15 “In the Course of” in Wyoming – Time, Place, and Circumstances: Fixed Times and Places of Employment

Wyoming follows the going and coming rule. **Injuries sustained by an employee who is “going to or coming from” the duties of his employment are not covered by worker’s compensation.** Historically, Wyoming courts followed the rule.³¹⁷ The principle is embedded by statute³¹⁸ in W.S. § [27-14-102\(a\)\(xi\)\(D\)](#): “‘Injury’ does not include . . . Any injury sustained during travel to or from employment **unless the employee is reimbursed for travel expenses or is transported by a vehicle of the employer** . . .” The “reimbursement for travel” and “transport

³¹⁷ In re Jensen, [178 P.2d 897](#), 900 (Wyo. 1947); Workmen’s Compensation Dept. v. Boston, [445 P.2d 548](#), 549 (Wyo. 1968); Matter of Willey, [571 P.2d 248](#), 250 (Wyo. 1977); Matter of Van Matre, [657 P.2d 815](#), 816 (Wyo. 1983); Claims of Naylor, [723 P.2d 1237](#), 1241 (Wyo. 1986); Matter of Injury to Corean, *supra.*, 723 P.2d at 61; Archuleta v. Carbon County School Dist. No. 1, *supra.*, 787 P.2d at 92; Chapman v. Meyers, [899 P.2d 48](#), 50 (Wyo. 1995)

³¹⁸ The principle was contained in much earlier versions of the Wyoming statute. See In re Jensen, *supra.*, 178 P.2d at 899-900 *citing* Section 124–106–7, W.R.S.1931 as finally reenacted in Section 2 of Chapter 128, Laws of Wyoming 1937

by employer vehicle” provisos codify prior Wyoming cases finding exceptions to the going and coming rule.³¹⁹

The premises rule was adopted in Wyoming in *Archuleta v. Carbon County School Dist. No. 1*.³²⁰ In *Archuleta*, a school district custodian was killed when he drove his pickup truck into a light pole in the parking lot of Rawlins High School, apparently during snowy weather.³²¹ The school district argued that the custodian’s claim was not compensable because he was not in the scope of employment. In disagreement, the Wyoming Supreme Court formally adopted the premises rule:

A trend toward adoption of a premises rule, insofar as it creates a rebuttable presumption of causal connection, has been foreshadowed by a number of our prior decisions. We have held, for instance, that “acts necessary to the life, comfort, or convenience of an employee while at work are incidental to the service, and an injury occurring while in the performance of such acts may be compensable.” . . . We have implicitly accepted the proposition that a causal relation exists between an injury and the employment where an employee is hurt during such diverse activities as using a bathroom on his employer’s premises or while taking lunch or coffee breaks in an area provided by the employer. It is a logical progression now to extend that proposition to such necessary incidents of the employee’s service as punching a time clock or entering and leaving the employer’s premises during those periods immediately before and after work. Indeed, we have previously upheld a worker’s compensation claim for an injury arising from a dangerous condition on the employer’s premises even though the claimant, at the time of the injury, had completed his daily shift and had finished filling out his time card. . . . We have also recognized that injuries occurring after an employee has quit or has been fired are compensable if they occur while he is in the process of winding up his affairs and leaving the premises if they occur within a reasonable time after his termination.³²²

Finding little difference between the case before it and prior cases of the kind it had discussed in which it had awarded benefits, the Court reversed the denial of the claim below.³²³

³¹⁹ In re Jensen, *supra.*, 178 P.2d at 900; Workers’ Compensation Dept. v. Boston, 445 P.2d at 549-550; Matter of Willey, *supra.*, 571 P.2d at 250-251

³²⁰ The “arising out of” aspect of the case was discussed above in Section 3.12 of the treatise.

³²¹ *Archuleta v. Carbon County School Dist. No. 1*, *supra.*, 787 P.2d at 91

³²² *Id.* at 93-94

³²³ *Id.* at 94

The precise rule articulated by the Court was that **a rebuttable presumption of a causal nexus between injury and employment is created where an employee has fixed hours and a fixed place of employment, and establishes that an accident occurred on the employer's premises.**³²⁴ Under the rule, **once the employee makes a showing that the injury occurred on the work premises, the burden shifts to the Division (or employer) to present evidence that the injury was not work-related.**³²⁵

The personal comfort Doctrine has also apparently been adopted in Wyoming. In *Rocky Mountain Tank & Steel Co. v. Rager*, the Wyoming Supreme Court stated,

As we indicated earlier, the question of responsibility under the Workmen's Compensation Law for injury **during times of rest and the like** is one which is indeed difficult and cannot be categorically resolved; but in general, it is said that acts necessary to the **life, comfort, or convenience** of an employee while at work are incidental to the service, and an injury occurring while in the performance of such acts may be compensable. Of course, this principle can be applied only restrictively and in the light of facts and circumstances arising in any given instance.³²⁶

The Court in *Archuleta v. Carbon County School Dist. No. 1* cited this passage with approval and arguably adopted it. The best evidence that the rule has been firmly embraced may be the language of the current statute. Injury is defined in W.S. § [27-14-102](#)(xi) as “any harmful change in the human organism . . . arising out of and in the course of employment **while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence and which subjects the employee to extrahazardous duties incident to the business.** Thus, if the harmful *change* to the claimant occurs:

- 1) **While at work;**
- 2) **In or about the premises** occupied, used, or controlled by the employer;
- 3) Is incurred while at work **in places where the employer's business requires an employee's presence;**

³²⁴ *Id.* at 93-94; *see also* Workers' Compensation Div. v. Miller, [787 P.2d 89](#), 90 (Wyo. 1990)

³²⁵ *Matter of Williams, supra.*, 409 P.3d at 1227-1228

³²⁶ [423 P.2d 645](#), 648 (Wyo. 1967)

- 4) **The presence subjects the employee to extrahazardous duties** incident to the business.

. . . the claimant is covered. This is essentially a codification of the judicially-created premises rule, and it greatly simplifies “in the course of” analyses by, among other things, effectively incorporating the Personal Comfort Doctrine.

3.16 “In the Course of” in Wyoming – Time, Place, and Circumstances: Travelling Employees

The immediately preceding discussion applied to employees with fixed places and times of employment. Some employees, however, travel regularly as part of their employment. To the extent that the employer has **paid for their travel, injuries sustained while in travel status are not excluded from workers’ compensation coverage** under W.S. § [27-14-102](#)(a)(xi)(D): “Injury does not include . . . Any injury sustained during travel to or from employment **unless the employee is reimbursed for travel expenses or is transported by a vehicle of the employer.**” The corollary of course is that, **if the employee is reimbursed for travel expenses or transported by a vehicle of the employer an injury otherwise connected to employment is compensable.**

This has been the state of the law in Wyoming for decades, even before it was included in the Wyoming Workers’ Compensation Act. In *In re Jensen*, for example, a seminal traveling employee case decided in the 1940s,³²⁷ Paul Jensen was injured in an automobile accident in which the employee-driver of the car and another employee-passenger were killed.³²⁸ The company had begun reimbursing employees for travel between their residences in Thermopolis and work on a well site 50 miles distant.³²⁹ Reversing a trial court dismissal of the claim on “going to or coming from” grounds, the Court focused on several factors:

. . . that the oil well where the claimant and the rest of the drilling crew worked was at a place where no arrangements for their accommodation had been made and approximately 50 miles from the place where they resided; that carriage by automobile was the only practical means of getting to and from the work at the well site; that the employer paid that member of the crew . . . who used his car to transport the remaining members of the crew to and from their homes; that both the company and these employees contemplated that free carriage to and from their homes was to be furnished them; that the consideration for the employer’s agreement to furnish this

³²⁷ [178 P.2d 897](#) (Wyo. 1947)

³²⁸ *Id.* at 899

³²⁹ *Id.* at 898

transportation was, in part at least, based on the performance of work for the company by the claimant at the oil well for ‘they didn’t receive transportation unless they worked tower’; that under the unusual war condition which prevailed in this state at that time, the arrangement and practice adopted was for the mutual advantage of both the employer and employee; and finally that whoever drove the car for which service he was paid by the company on a mileage basis as before stated, became as a matter of fact that day, the agent of the employer in furnishing the promised transportation, thereby establishing the vehicle in some measure within the control of the employer, we are constrained to conclude that the company supplied claimant with free transportation to and from his home as an incident of the contract of employment. As we have seen, the treasurer of the company admitted that ‘these men really got their transportation in addition to their wages.’ In consequence of this arrangement and the detailed facts above set forth, we also conclude that under the great weight of authority as we find it, the injuries suffered by claimant through the accident in question should be regarded as compensable under the Workmen’s Compensation Act of this state.³³⁰

It has now been well-established by statute that, while no compensable nexus with the employment is generally present when an employee is traveling between home and work, such a nexus *is* created where the employer has assumed the cost of that travel.³³¹ Still, novel questions have arisen under the provision. For example, in *In re Worker’s Compensation Claim of Barlow*,³³² the Wyoming Supreme Court upheld the administrative denial of a claim for an injury suffered when James W. Barlow injured his knee while climbing into his employer-provided truck as he was preparing to leave on a work-related trip.³³³ This somewhat surprising result generated dissents from Chief Justice Kite and Justice Burke.³³⁴

3.17 “In the Course of” in Wyoming—Deviations and Detours

Even if an employee is being paid by the employer for transportation, thereby bringing the employee within the protection of the Wyoming Workers’ Compensation Act (as explained in the previous section) that protection may be lost if the employee *deviates* from work on a “personal errand.”³³⁵ Two lead cases in

³³⁰ *Id.* at 907

³³¹ *Archuleta v. Carbon County School District No. 1*, supra., 787 P.2d at 92-93; *Claims of Naylor*, 723 P.2d 1237, 1241 (Wyo.1986); *Berg v. Workers’ Safety & Comp. Div.*, [106 P.3d 867](#) (Wyo. 2005)

³³² [259 P.3d 1170](#) (Wyo. 2011)

³³³ *Id.*

³³⁴ *Id.* at 1175-1178

³³⁵ *Boode v. Allied Mutual Ins. Co.*, [458 P.2d 653](#), 657 (Wyo.1969)

this area are in some tension. In *Workmen's Compensation Department v. Boston*,³³⁶ the claimant, a student-employee of the University of Wyoming was involved in an automobile accident in which a fellow student-employee was killed. The record showed that the student-claimant had (with his two, fellow student-employees) been drinking excessively,³³⁷ and the accident occurred five-hours after the claimant had deviated from paid travel to his authorized temporary residence.³³⁸ Nevertheless, the student was found entitled to workers' compensation benefits³³⁹ (the opinion provoked a vigorous dissent). In contrast, the claimant was denied workers' compensation benefits in *Shelest v. Workers' Safety & Compensation Div.*³⁴⁰ In that decision, an employee was injured when returning home from work-related training in another town on a scenic alternate route that required fifty miles, and one hour of travel more, than the most direct route.³⁴¹ The claimant, with a fellow employee and a supervisor, jointly decided to take the alternate route,³⁴² and there was no question the claimant was returning to his workplace.³⁴³ It is very difficult to harmonize *Boston* and *Shelest*, as the dissenting opinion of Justice Kite implicitly recognized.³⁴⁴ The *Shelest* analysis appears to approach a totality of the circumstances test:

. . . [A] specific personal errand makes it more apparent that a trip is a deviation. However, [prior cases] do not hold that an identifiable personal errand is a requirement in determining that a trip is a deviation. Here, all of the witnesses “agreed that while they had no person[al] errand or business to be accomplished by taking the alternate route, the sole reason for taking the scenic route was their personal pleasure and there was no benefit to the employer.” Enjoying the scenery and weather may not be a specific, identifiable errand, but **it is sufficiently personal in nature to support the hearing examiner's finding that Mr. Shelest was acting outside the scope of his employment while travelling the alternate route . . .** In addition, **the extent of the deviation should be considered when determining if a business trip has been converted into a personal side trip.** As noted earlier, Larson's treatise explains that **a small deviation should be disregarded as insubstantial. There is no precise formula to apply in evaluating this factor, but the greater the difference between the alternate**

³³⁶ [445 P.2d 548](#) (Wyo. 1968)

³³⁷ Probably six beers over a five-hour period. *Id.* at 552.

³³⁸ *Id.*

³³⁹ *Id.* at 551

³⁴⁰ [222 P.3d 167](#) (Wyo. 2010)

³⁴¹ *Id.* at 169

³⁴² *Id.*

³⁴³ *Id.* at 175

³⁴⁴ *Id.* at 175-176

route and the direct route, the more likely an alternate route will be deemed a deviation. The fact finder must apply judgment in assessing the extent of deviation, making this just the sort of question in which the hearing examiner's decision is entitled to deference.³⁴⁵

The problem is that, if the question of deviation is treated **solely as a question of fact**, with little or no legal guidance, a determination against the claimant will not be disturbed unless it is “contrary to the overwhelming weight of the evidence.”³⁴⁶ This outcome is problematic, though there is no denying that deviation problems are complicated and fact intensive.³⁴⁷

It is worth remembering that one of the chief virtues of the premises rule, in the context of employees having fixed places of employment, is avoidance of deviation problems *within* the workplace. However, even within the workplace questions of deviation can arise. In *Matter of Smith*,³⁴⁸ an employee, a cook, began experiencing pain after moving five-gallon buckets of chicken at her work (it was unclear whether the pain was work-related) and reported it to her doctor, who imposed a lifting restriction of fifteen pounds.³⁴⁹ One evening at work, she exceeded this lifting restriction, which the employer had specifically instructed her to observe, and injured her back.³⁵⁰ The employer objected to payment of benefits, and the district court denied the claim.³⁵¹ The Wyoming Supreme Court upheld the denial of the claim by the district court,³⁵² quoting the *Larson's* treatise distinction between “a work restriction on the ultimate work to be done and a work restriction concerning the method by which the ultimate work is to be done.”³⁵³ The Court then devised a test for when an employee can be “found to have acted outside the scope of employment by violating a work restriction”:

(1) the **employer expressly and carefully informs the employee that she must not perform a specific task** or tasks while in his employ;

³⁴⁵ *Id.* at 171-172 (Emphases supplied)

³⁴⁶ *Id.* at 173

³⁴⁷ 3 LARSON'S WORKERS' COMPENSATION LAW § 32.01

³⁴⁸ [762 P.2d 1193](#) (Wyo. 1988)

³⁴⁹ *Id.* at 1195

³⁵⁰ *Id.*

³⁵¹ *Id.* at 1195-1196

³⁵² “At the time *Smith* was decided the district court sat as the fact finder. The worker's compensation system was subsequently revised by the legislature, and OAH was designated to conduct the contested case proceedings under the Worker's Compensation Act.” *Perry v. Workers' Safety & Compensation Div.*, [134 P.3d 1242](#), 1246, n.1 (Wyo. 2006)

³⁵³ *Id.* at 1196

- (2) the **employee knows and understands** the specific restriction imposed;
- (3) the **employer has not knowingly continued to accept the benefit** of a violation of the restriction by the employee; and,
- (4) the injury for which benefits are claimed **arises out of conduct that clearly violates the specific restriction**.³⁵⁴

The *Smith* test was reaffirmed in *Perry v. Workers' Safety & Compensation Div.*³⁵⁵ In that case, a CNA violated a work rule by attempting to lift by herself a patient that had been classified as a “two-person” lift.³⁵⁶ Applying the *Smith* test, the Wyoming Supreme Court upheld administrative denial of the claim.³⁵⁷ Chief Justice Kite dissented, in an opinion joined by Justice Burke, arguing both that *Smith* was an outdated opinion (and quoting extensively the then-current *Larson's* treatise on the subject which had been significantly refined since *Smith*) but that, even if *Smith* applied, the employer had not carried its burden of establishing the exclusion.³⁵⁸

3.18 “In the Course of” in Wyoming – Employee Misconduct

In some instances, an employee may engage in arguable “misconduct” that leads to a workplace injury.³⁵⁹ The slippery problem with depriving an employee of workers’ compensation benefits in such circumstances is that one of the major reasons for which workers’ compensation was originally instituted was to end application of the negligence-based affirmative defenses—contributory negligence, assumption of the risk, and the fellow-servant rule—to defeat employee injury remedies.³⁶⁰ On the other hand, if an employee engages in substantial misconduct, it might be said that the employee is no longer performing activity in the course of “employment” but, rather, has abandoned the work. One of the earliest Wyoming decisions in this area, *Hotelling v. Fargo-Western Oil Co.*,³⁶¹ explained that the Wyoming Constitution explicitly requires that claims be denied in a narrow range of cases in which “culpable negligence” by the employee has been sufficiently established.³⁶² [Article 10, Section 4\(c\)](#) of the Wyoming Constitution states in relevant part that work-related injuries are compensable “except in case of injuries due solely to the culpable negligence of the injured employee.” As the Court

³⁵⁴ *Id.* at 1196-1197

³⁵⁵ [134 P.3d 1242](#) (Wyo. 2006)

³⁵⁶ *Id.* at 1244

³⁵⁷ *Id.* at 1249

³⁵⁸ *Id.* at 1249-1254

³⁵⁹ 2 LARSON'S WORKERS' COMPENSATION LAW § 17.01 and § 17.02.

³⁶⁰ See *Fuhs v. Swenson*, [131 P.2d 333](#), 337-338 (Wyo. 1942)

³⁶¹ [238 P. 542](#) (Wyo. 1925)

³⁶² *Id.* at 543

noted, however one defines the term *culpable*, as a matter of state *constitutional* law, “it is clear that the right to compensation should not be denied unless the injury was due solely to the negligence of the workman whose injury or death is the basis of the claim.”³⁶³ The courts from an early date recognized that “[t]he word ‘culpable’ is a strong term. Its ‘primary meaning was criminal, that is, deserving of punishment’, referring to the Latin derivation of the word . . .”³⁶⁴ Accordingly, Wyoming courts ascribed to the phrase “culpable negligence” a meaning not unlike a similar idea used by courts in other states and in the English Workmen’s Compensation Act (of 1897) that misconduct sufficient to cut off an employee’s entitlement to workers’ compensation benefits must be “serious and willful.”³⁶⁵

A recent statement of the law in this area may be found in *Shepherd of Valley Care Center v. Fulmer*.³⁶⁶ In *Shepherd*, a certified nursing assistant suffered an injury when lifting a patient by herself in circumstances where the employer’s rules arguably mandated a two-person lift.³⁶⁷ The employer objected to payment of workers’ compensation benefits, the Division denied the claim, and the Office of Administrative Hearings upheld the denial.³⁶⁸ The Wyoming Supreme Court reversed, quoting the following points of law:

The term “culpable negligence” means “willful and serious misconduct.” “Willful” means that the misconduct was done “purposely, with knowledge,” or that the misconduct was “of such a character as to evince a reckless disregard of consequences.” **To be culpable negligence, an act must be “intentional, unreasonable and taken in disregard of a known or obvious risk so great as to make it probable injury will follow.”** It requires more than a finding of unreasonable conduct. **A finding of culpable negligence requires “an extreme departure from ordinary care in a situation where a high degree of danger is apparent.” . . .** Thoughtless, heedless, or inadvertent acts or mere errors in judgment or simple inattention do not constitute culpable

³⁶³ *Id.* at 544

³⁶⁴ *Fuhs v. Swenson*, 131 P.2d at 338. The description of the misconduct sufficient to deprive an employee of workers’ compensation benefits as “quasi-criminal” is well established in the law. *See e.g. Scaia’s Case*, [69 N.E.2d 567](#), 568 (Mass. 1946)

³⁶⁵ *See Weidt v. Brannan Motor Co.*, [260 P.2d 757](#), 761 (Wyo. 1953) *quoting* *Hamilton v. Swigart Coal Mine*, [143 P.2d 203](#), 205. Over the years, courts in Wyoming and elsewhere have somewhat interchangeably utilized the terms “serious and wilful” and “wilful and serious” when considering the magnitude of employee misconduct. This treatise does not dwell on analytical distinctions between the two phrases. The important point is that the misconduct must involve more than ordinary negligence and approach in seriousness quasi-criminal conduct. *See generally* 3 LARSON’S WORKERS’ COMPENSATION LAW § 34.01

³⁶⁶ [269 P.3d 432](#) (Wyo. 2012)

³⁶⁷ *Id.* at 435

³⁶⁸ *Id.* at 436-437

negligence. The party claiming culpable negligence must prove that the claimant was acting with a state of mind that approaches intent to do harm to him or herself. This may be established by a showing that the claimant has intentionally committed an act of unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

Ultimately, the Court concluded that the record failed to support that the claimant, who had otherwise established the work-relatedness of her injury, engaged in culpable negligence.

Shepherd stands for the proposition that **mere departure from an employer's safety protocols is insufficient to deprive a claimant's entitlement to workers' compensation benefits under a culpable negligence theory.**³⁶⁹ Furthermore, **once a claimant has prima facie established entitlement to benefits the burden is on the party opposing benefits to establish that an exclusion—such as for culpable negligence—applies.**³⁷⁰

This proposition, however, must be tempered by the observation made in Section 3.17 of this Treatise that under the *Smith* test an employee may be “found to have acted outside the scope of employment by violating a work restriction.”³⁷¹

3.19 “In the Course of” in Wyoming – Employee’s Willful Intention to Injure or Kill Himself or Another

Unlike the situation in many jurisdictions,³⁷² **Wyoming has scant authority on whether employees injured while engaging in fighting or horseplay in the workplace are entitled to workers’ compensation benefits.** The Wyoming statute does not contain specific exclusions for this activity under W.S. § [27-14-102\(a\)\(xi\)](#), but the activity would at least arguably not be an injury “arising out of and in the course of employment” within the meaning of the same provision. The Wyoming statute *does* exclude from the definition of injury “Injury caused by . . . [t]he employee's willful intention to injure or kill himself or another.” W.S. § [27-14-102\(a\)\(xi\)\(B\)\(ii\)](#). Presumably, the definition could exclude injuries suffered by an employee-participant in a workplace physical altercation, or fight. In theory, the definition might also exclude injuries suffered in the context of horseplay or pranks, depending on the facts.

³⁶⁹ Compare 3 LARSON'S WORKERS' COMPENSATION LAW § 34.03 (discussing jurisdictions possessing an independent defense for intentional violations of safety rules)

³⁷⁰ *Id.* at 438 citing *Keck v. Workers' Safety & Comp. Div.*, [985 P.2d 430](#), 433 (Wyo.1999)

³⁷¹ See *Matter of Smith*, *supra.*, 762 P.2d at 1196-1197

³⁷² See generally 2 LARSON'S WORKERS' COMPENSATION LAW § 23

In *Workers' Compensation Division v. Espinoza*,³⁷³ a fifteen-year-old fast food cook broke the jaw of a front counter fast food employee of the same age during a fracas over delayed preparation of an apple pie.³⁷⁴ The Division rejected the ensuing claim, apparently on the theories that the injury was not suffered in the course of employment, and that the claimant's actions constituted a willful intention to injure her co-employee.³⁷⁵ The Court went to great lengths to characterize the episode as "horseplay that escalated," even quoting the legendary Justice Cardozo for the proposition that "[f]or workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to everyone who employs labor."³⁷⁶ But the episode was quite plainly a fight. No doubt the age of the combatants influenced the outcome significantly, and the case should probably be viewed carefully when assessing its precedential value. It is difficult to understand how a fight between employees would *not* represent a "willful intention to injure another" (that, after all, is largely the point of a fight) unless the injured fighting employee was engaging *strictly* in self-defense. If the altercation in *Espinoza* was horseplay, the Court handled the issue as a scope of employment rather than a misconduct issue, as recommended in the *Larson's* treatise,³⁷⁷ by emphasizing that the employee was in the course of her employment when the incident unfolded:

Espinoza's encounter with Trujillo was not a frolic of her own but a condition of her employment—an obstacle in the path of her efforts to further her employer's business objectives by providing prompt customer service. We hold that substantial evidence on the record supports the hearing examiner's finding that Espinoza suffered her injury in the course of her employment.³⁷⁸

The more complex "willful intention" cases have arisen in the context of suicide (or attempted suicide). At first blush, it might seem that compensation for suicide could not be compensable under workers' compensation (even if it arguably arose out of and in the course of employment) after application of Wyoming workers' compensation exclusions, both because such an injury is a "willful intention to kill," and because a suicide might have arisen from a "mental" injury. In *Brierley v. Workers' Safety & Compensation Div.*,³⁷⁹ these issues were at the center of a dispute respecting the compensability of medical expense produced when an already-workers' compensation-disabled employee "shot himself in the abdomen,

³⁷³ [924 P.2d 979](#) (Wyo. 1996)

³⁷⁴ *Id.* at 980-981

³⁷⁵ *Id.* at 980

³⁷⁶ *Id.* at 981 (internal citations omitted)

³⁷⁷ 2 LARSON'S WORKERS' COMPENSATION LAW § 23.07

³⁷⁸ *Id.* at 982

³⁷⁹ [52 P.3d 564](#) (Wyo. 2002)

inflicting injuries that he survived.”³⁸⁰ The Workers’ Safety and Compensation Division denied the employee’s claim in connection with the injuries on the ground that “the gunshot injuries were the result of his willful intent to injure or kill himself and, therefore, were not compensable under Wyo. Stat. Ann. § 27-14-102(a)(xi)(B)(II).”³⁸¹ The Office of Administrative Appeals Hearing Examiner, assuming for the sake of argument that the injuries suffered were compensable as a matter of law, denied the claim on factual grounds,³⁸² a conclusion the Wyoming Supreme Court rejected as arbitrary and capricious.³⁸³ As a matter of law, the Court rejected the Division’s argument³⁸⁴ that amendment of the Wyoming Act to exclude injuries caused by “willful intention to injure or kill” effectively overruled a prior decision authorizing compensation for suicide in certain circumstances, *Workers’ Compensation Div. v. Ramsey*.³⁸⁵ The Court concluded that, “[p]lainly, the meaning of ‘injury does not include ... [i]njury caused by ... [t]he employee’s willful intention to injure or kill himself or another’ **refers to those situations preceded by or simultaneous with a compensable physical injury.**”³⁸⁶ The chain of reasoning is that because the legislature made compensable mental injuries that are “**caused by a compensable physical injury which occurs simultaneously or precedent to them,**”³⁸⁷ **a suicide or injuries arising from an attempted suicide that occur as a result of a compensable mental injury are themselves compensable.** Although *Brierly*’s holding is not the model of clarity it appears to be that “**“suicide is compensable if the [work-related physical] injury produces mental derangement and the mental derangement produces suicide,” and . . . “this holding applies to attempted suicide.”**”³⁸⁸

One important caveat to the principle just discussed is that “the requisite ‘physical injury’ must be something outside of the biological changes in the brain associated with mental disorders.” As already discussed in this Treatise above in Section 3.12, in *Wheeler v. Workers’ Safety & Compensation Div.*,³⁸⁹ the Wyoming Supreme Court rejected the argument that a firefighter who experienced post-traumatic stress disorder after two of his fellow volunteer firefighters died in an explosion suffered

³⁸⁰ *Id.* at 566

³⁸¹ *Id.*

³⁸² *Id.* at 566-567

³⁸³ *Id.* at 571. It is somewhat unclear whether the Court was *also* applying the substantial evidence standard, *see Id.* (“The hearing examiner’s decision is based upon only a portion of the evidence before it and is **contrary to the overwhelming weight of the evidence**”) but resolution of that question is unimportant for present purposes.

³⁸⁴ *Id.* at 569

³⁸⁵ [839 P.2d 936](#), 940 (Wyo.1992) (holding that an employee’s suicide is compensable if a work-related injury “produces mental derangement and the mental derangement produces suicide,” *quoting* the then-current Larson’s treatise)

³⁸⁶ *Brierly v. Workers’ Safety & Compensation Div.*, *supra.* at 569

³⁸⁷ *See* this Treatise *supra.* at §3.12

³⁸⁸ *Brierly v. Workers’ Safety & Compensation Div.*, *supra.* at 569

³⁸⁹ [245 P.3d 811](#) (2010); *see* this Treatise, *supra.* at §3.12

from a compensable physical injury.³⁹⁰ Thus, a suicide resulting from such a depressive episode would probably not be compensable.

3.20 Intoxication in Wyoming

The Wyoming Workers' Compensation Act **excludes from coverage any “[i]njury caused by . . . [t]he fact the employee is intoxicated or under the influence of a controlled substance, or both, except any prescribed drug taken as directed by an authorized health care provider.** The division shall define ‘intoxicated’ and ‘under the influence of a controlled substance’ for purposes of this subparagraph in its rules and regulations.” W.S. § [27-14-102](#)(xi)(B)(I). “[T]he **burden is on the employer or the Division to prove that the employee’s injury was caused by intoxication.**”³⁹¹ **Once the Division (or employer) meets its burden** by producing evidence of intoxication, **the burden of production shifts** to the claimant-employee, though **the burden of persuasion remains with the Division (or employer).**³⁹² In this context, whether intoxication, or being under the influence of a controlled substance, caused an injury means, as a matter of law, whether the conduct was a **substantial factor** in bringing about the injuries.³⁹³

Under Chapter 1, Section 3(cc) of the Wyoming Rules and Regulations of the Wyoming Workers' Compensation Division (WY Rules and Regulations 053.0021.1 § 3(cc)), “intoxicated,” under the previously discussed statutory provision, means “a positive alcohol test result at or above .08 alcohol concentration level.”³⁹⁴ “Under the Influence of a Controlled Substance” means “a positive drug test conducted in accordance with the U.S. DOT drug and alcohol testing regulations from an HHS-certified laboratory.”³⁹⁵

It is worth noting that the Wyoming statute’s handling of the role of intoxication in a work-related injury occupies an intermediate position when compared to other states. On the one hand, the Wyoming Workers' Compensation Act requires *some* showing that intoxication in part *caused* the injury, unlike the Texas Act “where the defense requires only a showing that the claimant was intoxicated at the time, [and] the courts have held point-blank that any discussion of causal connection between the intoxication and the accident is irrelevant.”³⁹⁶ On the other hand, in Wyoming it is not necessary that the Division or employer show that intoxication

³⁹⁰ *Id.* at 817

³⁹¹ Johnson v. Workers' Compensation Div., [911 P.2d 1054](#), 1062 (Wyo. 1996) (Emphasis supplied)

³⁹² *Id.*

³⁹³ *Id.* at 1061; *see also* Coleman v. Workers' Compensation Div., [915 P.2d 595](#), 599 (Wyo. 1996)

³⁹⁴ WY Rules and Regulations 053.0021.1 § 3(cc); WSD WCD [Ch. 1](#), § 3(cc)

³⁹⁵ WY Rules and Regulations 053.0021.1 § 3(uu); WSD WCD [Ch. 1](#), § 3(uu)

³⁹⁶ 3 LARSON'S WORKERS' COMPENSATION LAW § 36.03, n.19 and accompanying text

be the “primary” or “sole” cause of an otherwise work-related injury, which is the case in some states.³⁹⁷

³⁹⁷ 3 LARSON'S WORKERS' COMPENSATION LAW § 36.03, n. 32-36 and accompanying text

4 Timing and Limitations

4.1 Notice and Claim Periods Generally

Because of the frequency with which timing issues arise in workers' compensation cases they will be treated separately in this section, and apart from procedure considered more generally, which is taken up later in Section 6 of this Treatise.

Workers' compensation statutes have *always* imposed deadlines by which an employee is required to report a work-related injury and file a claim in connection with the injury. The *Larson's* treatise aptly summarizes the law in this area:

Since the purpose of the notice requirement is to enable the employer to protect itself by prompt investigation and treatment of the injury, failure to give formal notice is usually no bar if the employer had actual knowledge or informal notice sufficient to indicate the possibility of a compensable injury, or if the employer furnished medical service or paid some compensation, or, in many jurisdictions, if the employer was not prejudiced by the lack of notice. Moreover, because the law does not exact the impossible of the employee, lateness of both notice and claim may be excused for various reasons, including the following: Impossibility of knowing that an apparently minor accident would later develop into a compensable injury; reasonable inability to recognize a disease or disabling condition in an early or latent stage; medical opinion that the injury is not serious or is nonindustrial; voluntary payment of benefits by the employer, or assurances that the employee will be taken care of, inducing the employee to refrain from making claim; and disability preventing the making of the claim, due to mental or physical incapacity, minority, and the like.³⁹⁸

Practitioners should be aware that the general reluctance of workers' compensation law to deprive beneficiaries of benefits, if it is reasonably possible to avoid doing so, should not be allowed to create the impression that procedural requirements are hollow formalities that may safely be disregarded. These requirements are not mere technicalities,³⁹⁹ and great attention should be given to the precise rules of individual states like Wyoming.

³⁹⁸ 11 LARSON'S WORKERS' COMPENSATION § 126.01

³⁹⁹ See 11 LARSON'S WORKERS' COMPENSATION § 126.04 [4]

4.2 Notice in Wyoming — Statutory and Regulatory Provisions

W.S. § [27-14-502](#)(a) prescribes notice requirements:

As soon as is practical but **not later than seventy-two (72) hours after the general nature of the injury became apparent**, an injured employee shall, in writing or by other means approved by the department, report the occurrence and general nature of the accident or injury to the employer. **In addition**, the injured employee shall **within ten (10) days after the injury became apparent, file an injury report with the employer and the division** in a manner and containing information prescribed by division rule and regulation.

Despite statutory authorization in this provision for “the department” to approve notice to the employer by means other than “in writing,” it is unclear whether the Division has done so other than by having internal hearings in individual cases (See below in this Treatise at Section 6.8). If the employee has provided a written injury report the issue is, of course, moot.

Regarding notice, **the Division’s rule** states:

The report of the injury is not a claim for benefits . . . The injured worker is required by the statute to report the occurrence and general nature of the injury to the employer as soon as practical within 72 hours after the injury becomes apparent, and to file a signed injury report on the required form with the Division within ten days after the injury becomes apparent. Otherwise, there is a statutory presumption that the claim shall be denied. However, this presumption may be rebutted if the worker can establish by clear and convincing evidence that the delay does not prejudice the employer or Division in investigating the injury and in monitoring medical treatment.

The rule by its terms requires the employee to provide a signed injury report but does not explicitly require written notice to the employer. In reviewing reported cases, it does not appear that a writing is essential to notice. Although no holding seems squarely on point, there are several cases in which *only oral notice* was provided to the employer and lack of written notice was not identified as an issue.

Under prior Wyoming law **both** the seventy-two-hour reporting **and** ten-day filing requirements had to be complied with to satisfy notice requirements.⁴⁰⁰ The dual reporting system has become more complicated, however.

W.S. § [27-14-502](#)(c) states (Emphases supplied):

Failure of the injured employee, any dependent or personal representative to report the accident or injury to the employer and to file the injury report in accordance with subsection (a) of this section is a *presumption* that the claim shall be denied. The **presumption may be rebutted if the employee establishes by clear and convincing evidence a lack of prejudice to the employer or division in investigating the injury and in monitoring medical treatment.**

Obviously, by operation of subsection (c), if an injured employee **both** fails to report an accident or injury **and** fails to file an injury report in connection with the accident or injury the “clear and convincing” presumption arises. But what result if an injured employee reports an accident or injury to the employer but fails to file an injury report with the employer and the Division?

In *Wesaw v. Quality Maintenance*,⁴⁰¹ Wesaw was exposed to sulfuric acid and reported the exposure to his supervisor immediately, on October 15, 1998, a Thursday.⁴⁰² His throat felt sore later that night, but he went to work the next day, Friday.⁴⁰³ He was convinced that his illness was due to an underlying asthma condition, so he took asthma medications during the ensuing weekend.⁴⁰⁴ Although he felt ill, he returned to work on the following Monday and Tuesday, but became so ill at work on Tuesday that he sought medical treatment after his employer drove him home. The next day, he was diagnosed with “dysphagia, which is pain with swallowing, and inhalation injury.”

Wesaw filed an injury report with the Division on November 3, by telephone. On November 5, the Division requested by letter additional information and explanation by December 3, and eventually denied the claim for other reasons.⁴⁰⁵ The employer, but not the Division, raised at hearing the issue of whether the

⁴⁰⁰ Clark v. Workers’ Safety & Compensation Div., [968 P.2d 436](#) (Wyo. 1998).

⁴⁰¹ [19 P.3d 500](#) (Wyo. 2001)

⁴⁰² *Id.* at 503

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ A major issue in the case was whether the Division adequately put Wesaw on notice of claim filing issues in advance of the hearing eventually held on the matter. That due process issue is beyond the scope of the present discussion.

employee had provided adequate notice.⁴⁰⁶ The hearing officer assigned to the case eventually ruled that,

Wesaw was aware that he had been injured on October 15, 1998, and was statutorily required to file an injury report within ten days of that date. The order found that his failure to timely file the report raised a rebuttable presumption that his claim should be denied, and he did not meet his burden of rebutting the presumption by clear and convincing evidence that no prejudice resulted when the accident could not be investigated and medical treatment monitored. Benefits were denied, and this appeal followed.⁴⁰⁷

The Wyoming Supreme Court reversed the hearing office on the notice issue:

The statute at issue here is subject to only one interpretation and is not ambiguous. Furthermore, the statutory language “after the general nature of the injury became apparent” remains unchanged, and these amendments do not replace our previous decisions applying the statute's requirements from the date a compensable injury is discovered. We do find, however, that the plain language of subsection (c) indicates that the statutory presumption does not arise unless an employee failed to report within 72 hours and failed to file an injury report within ten days. Here, the employer raised only the issue whether Wesaw reported within ten days. Unmistakably, this contention is insufficient to raise the statutory presumption of claim denial.⁴⁰⁸

The notice rule as it applies to presumption of denial and the “clear and convincing evidence” standard surfaced again in *In re Jensen*.⁴⁰⁹ In that case, Jensen alleged that he suffered a work-related lower back injury on February 26, 1998, a Thursday.⁴¹⁰ He further alleged that he reported the injury to his supervisor that day, or the following day.⁴¹¹ He did not work for the next four days due to soreness in his back.⁴¹² At that point, he believed he had experienced only muscle strain.⁴¹³ He returned to work that Friday for a half day and then saw a doctor the following

⁴⁰⁶ Wesaw v. Quality Maintenance, *supra.*, 19 P.3d at 503

⁴⁰⁷ *Id.* at 503-504

⁴⁰⁸ *Id.* at 506

⁴⁰⁹ [24 P.3d 1133](#) (Wyo. 2001)

⁴¹⁰ *Id.* at 1135

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

Monday, March 9.⁴¹⁴ The doctor prescribed muscle relaxants and pain medication, told him to rest, and informed him that his back would “clear nicely.”⁴¹⁵ Jensen returned to work on March 16, but could not work beyond March 18 because of his back pain and informed his employer of the fact.⁴¹⁶ The following day his doctor told him that he suspected a herniated disk.⁴¹⁷ Jensen claimed it was only on that day that he suspected he might have suffered a compensable injury.⁴¹⁸ On March 23, Jensen delivered a written report to his employer. (The Division received the report from the employer on April 6.)⁴¹⁹ On March 26, Jensen returned to work, but by March 27 could barely stand or walk.⁴²⁰ On March 30, Jensen underwent an MRI, which revealed that he had a severely herniated disk.⁴²¹ The Division denied his claim for, among other reasons, failure to file a written report within ten days after the injury.⁴²² At hearing, a hearing examiner granted the Division’s motion to dismiss the claim and “found that Mr. Jensen’s claim was untimely and he failed to demonstrate a lack of prejudice had accrued to the division.”⁴²³ On appeal, the district court reversed the hearing examiner finding that Jensen “did everything reasonable that was required of him under the circumstances” and to “deny him compensation is mean and cruel spirited, and in brutal departure from the entire purpose of the Worker’s Compensation system.”⁴²⁴

The Wyoming Supreme Court flatly upheld the district court’s reversal of the hearing examiner. Citing *Wesaw*, the Court said,

The uncontroverted evidence reveals that Mr. Jensen timely complied with the requirement that he report the occurrence and general nature of his injury to his employer within seventy-two hours after the injury became apparent. Therefore, upon proper application of *Wesaw*, the statutory presumption of claim denial does not arise. The hearing examiner’s ruling that Mr. Jensen did not meet his burden of proof was not in accordance with the law.⁴²⁵

Read in concert, *Clark*, *Wesaw*, and *Jensen* present a puzzle. *Clark* was decided under a prior version of the statute that stated that “failure of an employee to report the accident to the employer and to file the report with **the clerk of court** in

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* at 1136

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 1137

accordance with subsection (a) of this section is a presumption that the claim shall be denied.” The language in the statute governing *Clark* seems virtually identical to the language in the current statute except that filing of the injury report was with the district court instead of with the Division. Yet in *Clark* the Wyoming Supreme Court stated that failure **either** to report **or** to file triggered the “clear and convincing” presumption, while in *Wesaw* and *Jensen* the Court held that **both** reporting and filing must fail in order to trigger the presumption. One is inclined to simply conclude that the more recent pronouncements in *Wesaw* and *Jensen*, decided under the current statute, control. That interpretation fails to answer the very basic question of what happens if an employee timely reports an injury but fails to timely file with the Division. Under *Wesaw* and *Jensen*, the presumption does not apply. The last line of *Jensen* states, “We affirm the district court’s conclusion that a presumption of claim denial did not arise and its remand to the hearing examiner **for a determination of compensability.**” But, even though the hearing officer erroneously applied *the presumption of claim noncompensability*, the employee would seemingly retain on remand **the burden of proving all elements of the claim, including compliance with W.S. § 27-14-502(a).** Otherwise, “notice” might be effective any time the employee merely reported an injury within 72-hours. This is what Justice Golden seemed to suggest in his dissenting opinion in *Logue v. Workers’ Safety & Compensation Div.*: “In *Wesaw*, we stated that **if a claimant timely tells her supervisor of a work-related injury, her claim cannot be denied under Wyo. Stat. Ann. § 27-14-502.** *Wesaw*, ¶ 15.”⁴²⁶ In fact, *Wesaw* does not appear, fairly read, to have made this statement at ¶ 15,⁴²⁷ but it is respectfully suggested that Justice Golden perceptively identified the sticking point in this area of law.

4.3 Notice in Wyoming – Commencement of Notice Period

A common question in workers’ compensation law is when the notice period begins to run, and there is no ambiguity in Wyoming law on this point. **The notice and claim requirements of the worker’s compensation statutes do not begin to run until the employee becomes aware that an accident has caused an injury; and the term “injury” as used in the statutes means compensable injury.**⁴²⁸ This language should be carefully distinguished from a situation in which the employee is merely aware of the occurrence of an “accident” or an “event” of some type. It is not until an accident has “ripened” into a compensable injury that notice and claim timing requirements are triggered.

⁴²⁶ *Logue v. Workers’ Safety & Compensation Div.*, [44 P.3d 90](#), 96 (Wyo. 2002)

⁴²⁷ *Wesaw v. Quality Maintenance*, *supra.*, 19 P.3d at 506-507

⁴²⁸ *Baldwin v. Scullion*, [62 P.2d 531](#), 539 (Wyo. 1936); *Logue v. Workers’ Safety & Compensation Div.*, *supra.*, 44 P.3d at 94

When determining the time in which an injury became compensable—in other words when it ripened from an accident or event to a compensable injury—it should be asked: **When would a reasonable person, under the circumstances, have understood the full extent and nature of the injury and that the injury was related to his or her employment?**⁴²⁹

Notice cases can become tricky in the context of **medical diagnoses**. In general, in Wyoming **an injury becomes compensable when the claimant reasonably knows about the injury, not when an official or final diagnosis of injury is made by a physician**. It could be argued there is some circularity here. Would a reasonable person second-guess his or her physician who is not herself certain of the full extent and nature of an injury?⁴³⁰

In *Matter of Zielinske*,⁴³¹ for example, Zielinske, hired as a custodian by a school district in June 1993, began to experience sinus problems and headaches within a month of starting her job.⁴³² Although she requested and was promised a respiratory mask, one was not provided, and she did not complain again during the subsequent year.⁴³³ While she was plagued with respiratory issues that year, medical treatment providers counseled her that the problems were likely the consequence of working amidst school-aged, germ-transmitting children.⁴³⁴ Eventually, on June 27, 1994, a physician opined that Zielinske's problems were probably the result of underlying asthma and work-related exposure to chemicals aggravating the asthma, and that "her smoking is playing a significant role in this as well."⁴³⁵ From June 27 through July 28, Zielinske apparently deliberately exposed herself to the work chemicals to test their relationship to her condition, possibly exacerbating her asthma.⁴³⁶ There was conflict in testimony as to whether on July 27 she told her supervisor that her breathing problems were definitively work-related.⁴³⁷ Eventually, on July 28, conversation between various treating physicians lead to the conclusion that the breathing problem was "a potentially fatal condition and to re-enter the work place with caution."⁴³⁸ The physicians reviewed this conclusion with Zielinske on August 4, and she immediately informed her employer.⁴³⁹ Zielinske resigned immediately thereafter (no work accommodations were possible).⁴⁴⁰ She filed a report of injury

⁴²⁹ *Aanenson v. Workers' Compensation Div.*, [842 P.2d 1077](#), 1082 (Wyo. 1992); *Logue v. Workers' Safety & Compensation Div.*, *supra.*, 44 P.3d at 94

⁴³⁰ See 11 LARSON'S WORKERS' COMPENSATION § 126.06 n.1.1, and accompanying text

⁴³¹ [959 P.2d 706](#) (Wyo. 1998)

⁴³² *Id.* at 707

⁴³³ *Id.* at 708

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.* at 709

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

on August 9, identifying her date of injury as June 7.⁴⁴¹ Her school district-employer objected to the claim, the matter went to hearing, and a hearing examiner rejected the claim, at least partly because of “finding that Zielinske had not timely filed; [and] she had failed to rebut by clear and convincing evidence the statutory presumption that her claim should be denied.”⁴⁴²

On appeal to the Wyoming Supreme Court, Zielinske argued that “she timely reported her injury because her condition was not ‘properly diagnosed’ until she received the final diagnosis on August 4, 1994.”⁴⁴³ The Court rejected the argument because Zielinske began to suspect that her condition might be related to her work as early as June 1993, and then proceeded with a treatment specifically designed to establish the connection between her work and her injury.⁴⁴⁴ This suspicion, according to the Court, provided sufficient evidence to support the hearing examiner's conclusion that Zielinske had knowledge, on June 27, that “her respiratory problems **were a condition which could result in, or was likely to cause, a compensable injury.**”⁴⁴⁵

The “could result in, or is likely to cause, a compensable injury” standard seems in practice a difficult one to apply. Just how much must an employee know about an injury, and its possible relationship to work, before it becomes unreasonable for the employee not to report the injury to her employer?

The issue resurfaced at the Court in *Blommel v. Dept. Of Employment, Div. of Workers' Safety & Compensation*.⁴⁴⁶ In that case, a lumber stacker saw a physician's assistant for shoulder pain, was referred to an orthopedic surgeon, and made an appointment to see the surgeon on August 23. On July 10, she told her supervisor that she was experiencing pain in her right shoulder.⁴⁴⁷ On July 29, she informed her employer's human resources manager that she was quitting her job due to shoulder pain.⁴⁴⁸ On August 23, Blommel went to her planned appointment with the orthopedic surgeon, who diagnosed a rotator cuff tear.⁴⁴⁹ Three days later, she reported the injury to her now former employer's human resources manager.⁴⁵⁰ On August 27, she filed a report of injury with the Division, listing the date of injury

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.* at 510

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ [120 P.3d 1013](#) (Wyo. 2005)

⁴⁴⁷ *Id.* at 1014. According to the employer, Blommel said she hurt her shoulder while working for her second employer, Wal-Mart. *Id.*

⁴⁴⁸ *Id.* Again there was record testimony that she did not relate her shoulder pain to work with the employer. *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

as July 9.⁴⁵¹ The Division denied benefits and at hearing argued (among other things) that Blommel did not make a timely report of her injury.⁴⁵² The hearing examiner denied benefits, finding, among other things, that her report of injury was untimely because “it was reasonably apparent to [Blommel] at the time she quit her job . . . on or about July [29], 2002, that she was suffering from a shoulder condition which she attributed to a work place injury.”⁴⁵³ The district court affirmed the denial of benefits.⁴⁵⁴

The Wyoming Supreme Court reversed. The Court quoted from its prior opinion in *Iverson v. Frost Constr.*⁴⁵⁵:

Our law on determining the date of a compensable injury is well-established. We have consistently held that when a **correct diagnosis** or prognosis of present or likely future disability is communicated to the claimant, the injury is discovered, **it is compensable**, and the statute of limitations begins to run. “When determining the time a particular injury became compensable, it should be asked: When would a reasonable person, under the circumstances, have understood the full extent and nature of the injury and that the injury was related to his or her employment?” This question necessarily requires a careful evaluation of all facts to determine when an employee reasonably understood the nature and seriousness of his condition and that it was work-related.⁴⁵⁶

While this rule may have much to commend it, it does not seem consistent with *Zielinske* and, frankly, the hearing officer’s conclusion that the notice period began running when it was reasonably apparent to Blommel that her shoulder symptoms were work-related was more consistent with *Zielinski*. Justices Burke and Voigt argued in dissent that excusing the employee from reporting and claim filing until receipt of a definitive diagnosis “undermines our previous recognition that ‘[t]he employee ... may not ignore these requirements for compensable injuries because notice requirements and the statute of limitations exist to allow employers to investigate claims, monitor medical care, and avoid stale claims.’”⁴⁵⁷ The concern appears to be that an employee could be under medical care indefinitely, without a

⁴⁵¹ *Id.* at 1015

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ [81 P.3d 190](#) (Wyo. 2003)

⁴⁵⁶ *Blommel v. Wyoming Dept. of Employment, Div. of Workers’ Safety & Compensation, supra.*, 120 P.3d at 1016 *quoting* *Iverson v. Frost Constr., supra.*, 81 P.3d at 195

⁴⁵⁷ *Blommel v. Wyoming Dept. of Employment, Div. of Workers’ Safety & Compensation, supra.*, 120 P.3d at 1019 *quoting* *Torres v. Workers’ Safety & Compensation Div.*, [105 P.3d 101](#), 110 (Wyo. 2005)

definitive diagnosis but in circumstances that would suggest to a reasonable person the probable existence of a work-related injury.

The rationale of *Blommel* has not reappeared in Wyoming Supreme Court decisions for the point under discussion. In the medical diagnosis notice context, the *Larson*'s treatise states that "[a] medical diagnosis may be held to start the statute running even if it is not as precise or accurate as it should be, provided the diagnosis shows the condition to be work-related."⁴⁵⁸

4.4 Notice in Wyoming – Presumption of Claim Denial and Proving Lack of Prejudice

Leaving behind the question of when the notice (reporting and filing) period commences, this section presumes that the employee **both failed to report** an injury to the employer **and failed to file** an injury report with the Division. W.S. § [27-14-502\(c\)](#) states that in such situations there is **a presumption that the claim will be denied** which **may be rebutted if the employee establishes by clear and convincing evidence a lack of prejudice to the employer or Division in investigating the injury and in monitoring medical treatment.**

The first issue is what is meant by "clear and convincing" evidence. Surprisingly little doctrine exists on this question, but it appears evident that **conflicting evidence is not clear and convincing.**⁴⁵⁹

The next question is what it means to prove "a lack of prejudice to the employer or division in investigating the injury and in monitoring medical treatment." The first point to emphasize regarding "lack of prejudice" is that **neither the employer nor the Division is obligated to prove lack of prejudice.**⁴⁶⁰ **The burden is placed squarely on the employee.**⁴⁶¹ **The problem faced by claimants in this area is how to prove a negative.**

The Wyoming Supreme Court has **"found prejudice where the Division or the employer is denied access to medical records because of a claimant's failure timely to report an injury and where early monitoring of a claimant's treatment could have affected the amount of a claim."**⁴⁶²

⁴⁵⁸ 11 LARSON'S WORKERS' COMPENSATION § 126.05 n.20 and accompanying text

⁴⁵⁹ *Borelson v. Holiday Inn*, [911 P.2d 426](#) (Wyo. 1996). Under Wyoming law, "Clear and convincing evidence has been defined as 'that kind of proof which would persuade a trier of fact that the truth of the contention is highly probable.'" *W.N. McMurry Const. Co. v. Community First Ins., Inc. Wyo.*, [160 P.3d 71](#), 77 (Wyo. 2007).

⁴⁶⁰ *Matter of Zielinske*, *supra*. 959 P.2d at 710

⁴⁶¹ *Sherwin-Williams Co. v. Borchert*, [994 P.2d 959](#), 964 (Wyo. 2000)

⁴⁶² *In re Horn-Dalton*, [200 P.3d 810](#), 814 (Wyo. 2009) *citing* *Beitel v. Workers' Comp. Div.*, [991 P.2d 1242](#), 1247–1248 (Wyo.1999).

The Wyoming Supreme Court has **“generally found no prejudice where there was no range of treatment available and where the ability to impose work restrictions and monitor treatment would not have benefited the employer or the Division.”**⁴⁶³

Thus, it appears that in litigation a claimant might subpoena from the Division or the employer *evidence that access to medical records has in fact been denied* and offer a failure to provide such evidence as affirmative evidence of lack of prejudice in the claimant’s case-in-chief. The issue is somewhat thorny because this evidence would be within the possession of the party benefitting from the presumption. Whether early monitoring of treatment would have affected the amount of a claim, or whether there were a range of treatments for a particular injury, would themselves be *medical* inquiries. One potential issue is if the claimant’s satisfying its burden of production would shift the burden to the Division, or the employer, to rebut the claimant’s evidence on these questions.

It should be noted that **this is a common problem in other jurisdictions in which absence of prejudice is an excuse for late notice**. Consider how similar the relevant section of the *Larson*’s treatise is to Wyoming law:

The showing of lack of prejudice usually follows the pattern set by the two objectives of the notice statute: first, a showing that the claimant’s injury was not aggravated by reason of the employer’s inability to provide early diagnosis and treatment; and second, a showing that the employer was not hampered in making its investigation and preparing its case. Under the first category, absence of prejudice may be demonstrated by evidence that the claimant did indeed receive adequate medical care, or if the care proved less than adequate, that the provision of medical care by the employer would not have made matters any better because the company physician made the same wrong diagnosis as the claimant’s personal physician anyway, or because the employer was just as slow about treatment as the claimant was about notice, or because the same complications might have developed under the employer’s doctor’s care, or because no amount of medical treatment could have saved the claimant’s eye, or because the employer probably would not have supplied different or better medical treatment.

⁴⁶³ Horn-Dalton, *supra.*, 200 P.3d at 814 *citing* In re Worker’s Compensation Claim of Payne, [993 P.2d 313](#), 318 (Wyo.1999); Workers’ Safety & Comp. Div. v. Garl, [26 P.3d 1029](#), 1034 (Wyo.2001).

Under the second category, prejudice may be ruled out by a showing that after the delay, the employer had access to the same facts as if earlier notice had been given and would probably have used the same witnesses and evidence, or perhaps that at the time notice was due the employee and employer would have been equally ignorant of the true facts, as when neither knew until much later that the injury would result in disablement.⁴⁶⁴

4.5 Statute of Limitations in Wyoming — Statutory Provision

W.S. § [27-14-503](#)(a) and (b) prescribe statute of limitations requirements (Emphases supplied):

(a) A payment for benefits involving an injury which is the result of a **single brief occurrence** rather than occurring over a substantial period of time shall not be made unless in addition to the proper and timely filing of the injury reports, an application or claim for benefits is filed **within one (1) year after the date the injury occurred or** for injuries not readily apparent, **within one (1) year after discovery of the injury by the employee**. The injury report is not a claim for benefits.

(b) The right of compensation for an injury which occurs over a **substantial period of time** is barred unless a claim for benefits is filed **within one (1) year after a diagnosis of injury is first communicated to the employee, or within three (3) years from the date of last injurious workplace exposure to the condition causing the injury, whichever occurs last**, excluding injury caused by ionizing radiation to which the three (3) year limitation does not apply. If death results from ionizing radiation within one (1) year after a diagnosis of the medical condition is first communicated to the employee or if death occurs without the communication of a diagnosis to the employee, a claim shall be filed within one (1) year after the date of death.

4.6 Statute of Limitations in Wyoming — Commencement of Statute of Limitations Period

The notice and claim requirements of the workers' compensation statutes do not begin to run until the employee becomes aware that an accident has caused

⁴⁶⁴ 11 LARSON'S WORKERS' COMPENSATION LAW § 126.04 [3]

an injury.⁴⁶⁵ The law of commencement is identical in Wyoming under both notice and claim (statute of limitations) and the principles enunciated above in Section 4.3 with respect to notice apply equally to commencements of statute of limitations periods. Nevertheless, the timing requirements of each must be satisfied independently, and **the filing of notification of injury (which may or may not be timely) is insufficient to satisfy the requirement of filing a claim for benefits (and it should be obvious that informal methods of attempting to provide notice of injury, either to the Division of the employer—say, through a phone call—also is insufficient to qualify as a claim for benefits).** This is evident from the plain language of W.S. § [27-14-503](#)(a) (see above in this Treatise at Section 4.5) and has also been well-established in the case law.⁴⁶⁶ **Failure to timely file a claim for benefits is jurisdictional** and a court is **without subject matter jurisdiction** to hear any appeal of an underlying administrative proceeding in those circumstances.⁴⁶⁷

4.7 Statute of Limitations in Wyoming — Injuries Occurring over a Substantial Period of Time

By definition, gradual, or cumulative, injuries do not occur at a precise time in a manner making it (more or less) clear when to “start the clock” on the statute of limitations for the claim period. As a practical matter, these injuries are “latent” in the sense that, although an employee may be aware that adverse changes to the body are occurring, there is not awareness that the symptomology has risen to the level of an injury. In injury (not requiring an “accident”) states like Wyoming, “there is now almost complete judicial agreement that the claim period runs from the time compensable injury becomes apparent.”⁴⁶⁸ This, of course, is very close to the rule that is set forth above in Section 4.6, but under Wyoming law there is a twist for “**injuries occurring over a substantial period of time**” under W.S. § [27-14-503](#)(b).

Suppose a diagnosis of injury is made but the employee continues to be exposed to the condition. Under the language of the statute the potential for claims with very “long tails” would seem to exist (in other words, the claim is not quite extinguished on timing grounds). Suppose again the employee is diagnosed with an injury occurring over a long period of time in the first year of what turns out to be a lengthy condition, and thereafter fully complies with the reporting duty by notifying the employer and filing a written report with the Division. The employee then continues to work at the same job in the same working conditions for twenty years. The

⁴⁶⁵ Logue v. Wyoming Workers’ Safety & Compensation Div., [44 P.3d 90](#), 96 (Wyo. 2002); Aanenson v. Workers’ Compensation Div., [842 P.2d 1077](#), 1081 (Wyo. 1992)

⁴⁶⁶ Popick v. Workers’ Safety & Compensation Div., [118 P.3d 993](#), 996 (Wyo. 2005)

⁴⁶⁷ *Id.*

⁴⁶⁸ 11 LARSON’S WORKERS’ COMPENSATION LAW § 126.06 [1]

employee then leaves the job, but files a workers' compensation claim two years after departure (that is, within three years of *the last injurious exposure* to the condition). Under the literal language of the statute, it is difficult to see why the claim would not be compensable. This is not a fanciful set of facts. It tracks quite closely with *Matter of Barnes*,⁴⁶⁹ decided under an earlier version of the Wyoming Workers' Compensation Act. In that case, Barnes suffered a compensable back injury on March 29, 1967,⁴⁷⁰ and never filed a claim until February 25, 1976.⁴⁷¹ The facts showed that following a work-related back injury Barnes received brief treatment but never missed time from work.⁴⁷² The Wyoming Supreme Court upheld the district court's determination that Barnes was eligible for temporary total disability benefits despite the significant lapse of time.⁴⁷³

Or, perhaps, under the current version of the Wyoming Workers' Compensation Act, upon the diagnosis of injury the statute of limitations operates just as in the case of a single brief occurrence. Regardless, it seems clear under the statute that, whether or not a diagnosis of injury has been made, a *claim* must be commenced **within three years from the date of last injurious workplace exposure** to the relevant condition.

4.8 Statute of Limitations in Wyoming — Tolling and Equitable Estoppel

The Wyoming rule for when the commencement period begins to run is itself a general form of **statutory tolling, as opposed to equitable estoppel**. As explained in this Treatise above in Section 4.5, the limitations period may not begin to run until the employee becomes (or a reasonable employee would have become) aware of an injury. The word "aware" in this context is simply a species of synonym for the word "discovery." Courts sometimes *imply* allowance of discovery of an injury when statutes are silent on the issue of "extensions of time" in order to prevent, on equitable grounds, commencement of a statutory period until the facts establishing accrual of an action have become known to a plaintiff (or claimant). The Wyoming Workers' Compensation Act is not, however, silent on questions of limitations of time. In addition to the general discovery provision in the Wyoming statute, discussed in Section 4.6, there is also a *specialized* tolling provision.

W.S. § [27-14-505](#) states (Emphases supplied):

⁴⁶⁹ [587 P.2d 214](#) (1978)

⁴⁷⁰ *Id.* at 216

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.* at 218

If an injured employee is **mentally incompetent or a minor, or where death results from the injury and any of his dependents are mentally incompetent or minors**, at the time when any right or privilege accrues under this act, **no limitation of time provided for in this act shall run so long as the mentally incompetent or minor has no guardian.**

Thus, in the circumstances identified under the provision, the statute of limitations period does not commence so long as the claimant or his or her dependent (in the case of death) is mentally incompetent or a minor. Once a guardian is appointed, or otherwise obtained, the language suggests that the limitations period would commence. The statute does not explain what would occur if a worker injured in a single brief occurrence (or her dependent, if she is killed) timely notified her employer of the injury; timely filed an Injury Report with the Division; and then became mentally disabled and failed to file a claim for benefits within the one-year statute of limitations period.

Few Wyoming cases exist on the question of the statutory “tolling” provisions. In *In re Collicott*,⁴⁷⁴ the claimant, Collicott, filed a report of injury with the Division reporting a work-related shoulder injury that occurred almost a decade earlier.⁴⁷⁵ The Division denied the claim for benefits as untimely.⁴⁷⁶ The claimant objected to the denial, and the matter was referred for hearing.⁴⁷⁷ Collicott stipulated that the report of injury was not timely filed, but claimed the limitation period was tolled because he was mentally incompetent within the meaning of W.S. § [27-14-505](#).⁴⁷⁸ The hearing established that Collicott had long suffered from schizophrenia, which was originally diagnosed when he was thirteen, and that he had been treated continuously for the mental disorder since that time.⁴⁷⁹ Collicott averred that he had received a psychological discharge from the army, and had been receiving social security disability benefits since the early 1980s as a result of his mental condition.⁴⁸⁰ Collicott also testified that he did not have a guardian or a conservator appointed for him, and most of the time he was in control of his own finances.⁴⁸¹ The hearing examiner issued an order denying benefits and concluded Collicott had not met his burden of proving mental incompetence.⁴⁸² The rationale for the decision was that neither W.S. § [27-14-505](#), nor any other section of the Wyoming

⁴⁷⁴ [20 P.3d 1077](#) (Wyo. 2001)

⁴⁷⁵ *Id.* at 1078. An injury report is not a claim for benefits. W.S. § [27-14-503\(a\)](#)

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 1078-79

Workers' Compensation Act, defined the term "mentally incompetent."⁴⁸³ Borrowing from a Wyoming guardian statute, the hearing examiner applied the following definition: "'Mentally incompetent person' means an individual who is unable unassisted to properly manage and take care of himself or his property as the result of mental illness, mental deficiency or mental retardation."⁴⁸⁴ Finding that Collicott failed to meet this standard, the hearing examiner denied the claim.⁴⁸⁵

The Wyoming Supreme Court rejected the argument that bare ability to manage and take care of oneself established mental *competency* within the meaning of the Wyoming Workers' Compensation Act:

We hold the mental incompetence provision was intended **to toll the statute of limitations for those individuals whose medically diagnosed mental condition is so severe as to render them unable to protect their legal right to compensation by following the statutory procedures provided in the Wyoming Worker's Compensation Act.** We believe our interpretation is consistent with both the legislature's intent and the plain meaning of "mental incompetence" within the context of worker's compensation. The definition used by the Division and the Office of Administrative Hearings equates an individual's ability, in a routine manner, to properly manage and take care of himself or his property to an ability to comprehend the import and the requirements of worker's compensation statutory procedures.⁴⁸⁶

In applying this interpretation of the statute, the Court identified questions that must be answered: **"Does an individual with a medically diagnosed mental condition have the ability to comprehend that an injury is compensable? Furthermore, can that individual comprehend that certain statutory guidelines must be complied with in order to receive benefits?"**⁴⁸⁷ The Court subsequently remanded the case for further fact finding consistent with its newly-established standard.⁴⁸⁸

W.S. § [27-14-505](#) does not, of course, address situations *not* involving mental incompetency and minority. In narrow circumstances, the Wyoming Supreme Court has allowed late-filed claims on *equitable* estoppel theories.⁴⁸⁹ One example

⁴⁸³ *Id.* at 1079

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* 1080-81(Emphasis supplied)

⁴⁸⁷ *Id.* at 1081(Emphasis supplied)

⁴⁸⁸ *Id.*

⁴⁸⁹ See *Mitchell v. State Recreation Com'n Snowmobile Trails*, [968 P.2d 37](#), 41 (Wyo. 1998) ("[T]he statute of limitations contains no provision for tolling because of excusable neglect or to relieve

of such a case is *Workers' Compensation Div. v. Halstead*.⁴⁹⁰ In that case, a 16-year-old young man died from a work-related injury. His girlfriend at the time of death was pregnant, but it was not clear that the deceased worker was the father of the child. After birth, the paternity of the deceased worker was established, but not until the ordinary statute of limitations period had lapsed. The question presented was whether the operation of the limitations period could defeat the necessity to establish parentage as a condition precedent of eligibility for workers' compensation benefits. Grounding its decision in 14th Amendment constitutional considerations,⁴⁹¹ the Wyoming Supreme Court concluded:

Consequently, we find that **the date of determination of parentage was the date the right to claim benefits accrued**. Under the statute, the right to claim benefits would not have expired at the one-year period after the guardian had been appointed because the child's familial rights to be a claimant came to exist with his determination by a decree of parentage that the decedent worker was his father . . . We consequently hold that the statute of limitation began to run on June 2, 1988 with the entry of the parentage decree.⁴⁹²

In essence, the Court concluded that the state was equitably estopped from arguing that the statute of limitations had expired because the claim could not, on constitutional grounds, be found to have accrued.

Another example of an estoppel case, in this instance not including constitutional but more traditionally equitable principles, was *Bauer v. Workers' Compensation Div.*⁴⁹³ In *Bauer*, a member of an ambulance service suffered a ruptured eardrum arising out of and in the course of her employment, but was erroneously advised by her supervisor that she was a part-time employee ineligible for workers' compensation benefits.⁴⁹⁴ She suffered the injury in December 1981, reporting it to her employer the day after, and underwent surgery in March 1982.⁴⁹⁵ When more surgery became necessary in March 1983, "appellant requested that the hospital apply for payment under worker's compensation."⁴⁹⁶ The district court concluded that the claim was barred by the statute of limitations, but the Wyoming Supreme

hardship in particular circumstances . . . Thus, the statute of limitations is a bar to Mitchell's claim unless the doctrine of equitable estoppel prevents the employer or the Division from raising the statute of limitations as a defense."); see also

⁴⁹⁰ [795 P.2d 760](#) (Wyo. 1990)

⁴⁹¹ *Id.* at 764-765

⁴⁹² *Id.* at 763 (Emphasis supplied)

⁴⁹³ [695 P.2d 1048](#) (Wyo. 1985)

⁴⁹⁴ *Id.* at 1049

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

Court reversed.⁴⁹⁷ The Court, after canvassing the estoppel doctrines of a number of jurisdictions, concluded:

Appellant had a valid, meritorious claim that was not filed because of **reliance upon her employer's representation that she was not covered by worker's compensation.** We hold that the employer's misleading statements, although unintentional, were sufficient to constitute estoppel and prevent the employer and the state of Wyoming from invoking the statute of limitations as a defense.⁴⁹⁸

Thus, **even good faith misrepresentations of non-coverage by employers, if reasonably relied upon by employees, may justify late-filed claims. But originally erroneous representations of non-coverage cannot indefinitely continue to excuse a late-filed claim,** and that issue (among others) surfaced in the most recent equitable estoppel cases as of this writing, *Sweetalla v. Workers' Comp. Div.*⁴⁹⁹ In *Sweetalla*, an employee suffered an apparent work-related injury on January 16, 2014. The employee's employer "requested" the employee not file an injury report, kept him on full salary, and paid for two shoulder surgeries apparently related to the injury. The employee did not, however, return to work, and his employer thereafter terminated him on December 28, 2015, simultaneously informing him that he would not be paid additional sums for his work-related medical expense (nor, one presumes—though it is not mentioned explicitly in the reported case—for any other form of workers' compensation benefit). About six weeks after being fired, on February 14, 2016, the employee filed an *injury report*, which ordinarily must by statute be filed within ten days of sustaining a work-related injury (See above at Section 4.2). Subsequent to filing the injury report, "approximately one week later," the employee contacted a Workers' Compensation Division claims analyst, who told the employee "that because of our statutes of limitations an injury report must be filed within one year of the date of injury," which was a misstatement of law. The analyst went on to say that once the employee filed an injury report the *claim* would be denied, and the employee would then "need to request a hearing." At that point, in context, it was evident that the basis for denying the claim would be the failure of the employee to file an *injury report*. The analyst made no explicit mention of the failure to file a *claim* within the statute of limitations period. The Division denied the claim in writing in April 2016. In that denial, the Division made no reference to "a claim for benefits or the lack thereof." Eventually, in June 2016, the Division raised the lateness of claim filing as a "possible issue" and then as a full-blown issue. Subsequent to the ensuing contested case hearing, the Office of Administrative Hearings concluded;

⁴⁹⁷ *Id.* at 1050

⁴⁹⁸ *Id.* at 1053 (Emphases supplied)

⁴⁹⁹ [448 P.3d 825](#) (Wyo. 2019)

There is no dispute that Sweetalla failed to file a claim for benefits within one year that Sweetalla's injury occurred as is required by Wyoming Statute § 27-14-503. Sweetalla admitted he had suffered a work-related injury on January 16, 2014, and that it was more than just a minor injury. Sweetalla had surgery on his left shoulder on April 1, 2014. As of the date of the hearing, January 26, 2017, Sweetalla had not filed a claim for benefits or an application for benefits with the Division.

Sweetalla is somewhat unique because it contains *two* separate periods of time subject to equitable estoppel arguments. There was really no question that, from the January 6, 2014 date of injury until date of the employee's termination on December 28, 2015, the employer would be estopped from arguing that the employee's claim was barred by the limitations period. The real question, left open by cases like *Bauer*, was the nature of the employee's obligations *after* the employment terminated. If one accepts the factual conclusion that the employee could not reasonably have continued to believe he had no need to resort to legal process once his employment ended, then the legal conclusion in many jurisdictions (and now Wyoming) is:

The general rule appears to be that a plaintiff may not invoke the doctrine of equitable estoppel against a defendant unless the plaintiff exercises due diligence in commencing the appropriate legal proceeding after the circumstances giving rise to estoppel have ceased to be operational, that is, after plaintiff has notice, actual or constructive, that he must resort to legal recourse and may no longer rely upon agreements, promises, representations to the contrary, or conduct or deceptive practices which may have lulled him into a sense of security.⁵⁰⁰

Thus, unlike what the employee seemed to be arguing, the original action by the employer did not "eliminate" statute of limitations considerations in all subsequent phases of the claim. The additional complicating factor, however, was that here the *Division* was *also* subject to equitable estoppel arguments:

Here, the record reflects that the Division affirmatively and repeatedly conflated the injury reporting requirements with the claim requirements, and the Final Determination Regarding Compensability suggested that he had filed a claim when he had not. The Division then instructed Mr. Sweetalla that he could initiate a

⁵⁰⁰ *Id.* at 831 quoting Ilan E. Korpela, LL.B., Annotation, *Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations*, 44 A.L.R.3d 760 § 2[a]

contested case proceeding before OAH if he disagreed with its denial of benefits. It was only after Mr. Sweetalla requested a hearing that the Division asserted, vaguely and then more precisely, that Mr. Sweetalla's request for benefits should be denied because he failed to timely file a claim for benefits.⁵⁰¹

The Wyoming Supreme Court's ultimate conclusion was that "On the record as a whole, OAH could not reasonably conclude that Mr. Sweetalla did not meet his burden to establish that equitable estoppel barred the Division from asserting the statute of limitations as a defense."⁵⁰² Sweetalla is also a reminder that principles of equitable estoppel are applicable to government agencies as well as to employers.⁵⁰³

4.9 Statute of Limitations in Wyoming When Limitations Periods Have been Altered by the Legislature and Determining Dates of Injury

Provisions of the Workers' Compensation Act in force at the time of injury govern,⁵⁰⁴ and this principle also applies to statute of limitations provisions.⁵⁰⁵ Timing issues may arise when determining the date of injury in a permanent disability case, however. Imagine parties are jockeying for a date of injury because establishment of one date of injury may result in a claim being time-barred, while another date would not lead to the same outcome (or are jockeying for any other substantive reason). The correct rule is that **the statute in effect when the claimant becomes permanently disabled controls.**⁵⁰⁶ Normally, the version of the statute controlling is the one in effect on the date of "accident," but an "injury date," particularly in the context of determinations of permanent disability, can be different.⁵⁰⁷ (This problem is especially acute in scenarios involving *gradual injuries*.) The date of injury is generally "when the medical decision was made from which [the claimant] became aware that he was 100% disabled."⁵⁰⁸ In the absence of such a certification of permanent disability, the date on which a stipulation of permanent disability has been entered into by the parties, or the date to which the

⁵⁰¹ *Id.* at 832

⁵⁰² Sweetalla, *supra.*, 448 P.3d 825 at 834

⁵⁰³ See Appleby v. Workers' Safety & Comp. Div., [47 P.3d 613](#), 619 (Wyo.2002)

⁵⁰⁴ In re Collicott, [20 P.3d 1077](#), 1082 (Wyo. 2001)

⁵⁰⁵ Workers' Compensation Division v. Tallman, [589 P.2d 835](#), 838 (Wyo. 1979)

⁵⁰⁶ DeLauter v. Workers' Compensation Div., [994 P.2d 934](#), 937 (Wyo. 2000) *citing* Rodgers v. Workers' Compensation Div., [939 P.2d 246](#), 249 (Wyo. 1997)

⁵⁰⁷ Rodgers v. Workers' Compensation Div., *supra.*, 939 P.2d at 249; Claim of Nielson, [806 P.2d 297](#), 300 (Wyo. 1991)

⁵⁰⁸ Anderson v. Workers' Safety & Compensation Div., [245 P.3d 263](#), 268 (Wyo. 2010)

parties stipulate the disability occurred, if any, is the date of injury.⁵⁰⁹ It is the claimant's burden to establish when total disability occurred.⁵¹⁰

⁵⁰⁹ Rodgers, *supra.*, 939 P.2d at 249

⁵¹⁰ Claim of Nielson, *supra.*, 806 P.2d at 299

5 Benefits

5.1 Physical Impairment versus Incapacity for Work

One of the most essential concepts to grasp in all of workers' compensation law is the distinction between physical impairment and incapacity.⁵¹¹ A nuclear engineer may suffer a physical injury at work that causes physical impairment—in the sense of having caused a physically adverse impact on the body—but not “incapacitating” in the sense of having caused wage loss, *earning* impairment, or incapacity to engage in work. The conceptual distinction between physical injury to the body and interference with a worker's ability to earn is further complicated because jurisdictions use varying terminology to express the differences. Furthermore, primarily in the context of permanent partial incapacity benefits (to be explained below), some jurisdictions estimate the impact of a work-related injury on a worker's future ability to earn based on the worker's post-injury physical *impairment*. As the 1972 National Commission on Workmen's Compensation put the matter:

In practice there are several approaches to permanent partial benefits which combine the impairment and disability bases in different ways. The same statute may contain more than one of these bases.⁵¹²

As will be explained shortly, Wyoming has a statute containing more than one basis (impairment and disability).

5.2 Division of Indemnity Benefits Generally

Indemnity benefits are **wage-loss payments (usually weekly, but monthly in Wyoming)**, as opposed to payment for medical expense occasioned by a work-related injury. Indemnity benefits are generally divided into the categories **permanent total** benefits, **temporary total** benefits, **permanent partial** benefits, and **temporary partial** benefits. The surface meaning of the categories is nearly self-explanatory. Initially, it may be unclear whether a work-related injury is temporary or permanent. Benefits as a percentage of wages are paid for a time according to a statutory formula that varies from state to state – 66 2/3% of the **average pre-injury weekly wage** is common (though Wyoming, as will be

⁵¹¹ The *Larson's* treatise distinguishes *disability* as “physical impairment” from *incapacity* as “earnings impairment.” 6 LARSON'S WORKERS' COMPENSATION LAW § 80.02 and 85.05. But “impairment” is yet another term utilized throughout workers' compensation law in confusingly different ways.

⁵¹² 1972 REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 67 available at <http://workerscompresources.com/wp-content/uploads/2012/11/Introduction-Summary.pdf>.

explained more fully below, operates on a monthly wage structure). At a certain point, an injured worker either heals completely (the vast majority of claims) or is said to have reached “**maximum medical improvement.**” Any residual “incapacity,” “disability,” or “impairment,” after achievement of “**MMI,**” is the subject of **permanent** benefits, whether total or partial. In Wyoming, the term “**ascertainable loss**” is virtually identical to the concept of MMI.

There is an important and fundamental distinction between two ways in which an injured worker may be deemed to be **totally disabled**. The worker may be so significantly physically impaired that total disability is **conclusively presumed by operation of statute**. “A typical statute applies the presumption to loss or loss of use of both hands, both arms, both legs, both feet, both eyes, or any two of these.”⁵¹³ Alternatively, although an injured worker may possess a theoretical work capacity post-injury, the worker may nevertheless be deemed totally disabled. In the words of the *Larson’s* treatise (quoting the Minnesota Supreme Court): “An employee who is so injured that he or she can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled.”⁵¹⁴ This is known as the **odd lot doctrine**, and, as will be discussed below, the principle is recognized in Wyoming. Permanent total disability and fatality claims are rare nationally, making up less than one percent of indemnity claims in 2013, but are expensive, comprising as much as 7% of total workers’ compensation indemnity payments in the same year.⁵¹⁵

Temporary total benefits (although numerically the majority of claims fall in this group – see below) and **temporary partial benefits** do not usually generate unusual legal issues and the amount of benefits are usually established with direct reference to actual wage loss. As suggested above, in the typical injury situation, there is a period of healing and complete wage loss, during which, subject to any applicable waiting period (as will be discussed in the Wyoming context below statutes commonly do not provide benefits during a threshold waiting period), temporary total benefits are payable. This is followed by a recovery, or stabilization of the condition (**MMI**), and probably resumption of work without further legal or administrative questions. The matter is essentially processed like an auto insurance claim. Nationwide, most workers’ compensation claims do not involve *any* lost work time, so no indemnity payments are at issue.⁵¹⁶ Of the indemnity categories,

⁵¹³ 7 LARSON’S WORKERS’ COMPENSATION LAW § 83.08

⁵¹⁴ *Id.* at § 83.01

⁵¹⁵ WORKERS’ COMPENSATION: BENEFITS, COVERAGE AND COSTS, THE NATIONAL ACADEMY OF SOCIAL INSURANCE 37 (2017), https://www.nasi.org/sites/default/files/research/NASI_Workers%20Comp%20Report%202017_w eb.pdf

⁵¹⁶ *Id.* at 6

temporary total disability claims have in recent years accounted for more than 61% of all indemnity claims but just 34% of cash benefits paid.⁵¹⁷

In contrast, the most expensive claim category nationally is **permanent partial** benefits. As the National Academy of Social Insurance explains in connection with some of the most recent statistics available:

In 2013, PPD claims accounted for slightly less than 39 percent of indemnity claims, but more than 56 percent of cash benefits paid. PPD claims varied between 27-41 percent of indemnity claims in the years 1995-2013, but accounted for 56-69 percent of all cash benefits.⁵¹⁸

Given the expense of **permanent partial** claims it will come as no surprise that they are ordinarily the most controversial, and states have devised a variety of (disparate) ways⁵¹⁹ of calculating **partial benefits**:

- **Impairment-Based Approach.** A worker with an unscheduled permanent partial disability receives a benefit based entirely on the degree of impairment. Any future earnings losses of the worker are not considered.
- **Loss-of-Earning-Capacity Approach.** The partial benefit is linked to the worker's inability to earn or to compete in the labor market based on a forecast of the economic impact that the impairment will have on the worker.
- **Wage-Loss Approach.** Benefits are paid for the actual or ongoing financial losses that a worker incurs. In some states, the permanent partial disability benefit begins after it has been determined that maximum medical improvement has been achieved. In states that use this approach, permanent disability benefits can simply be the extension of temporary disability benefits until the disabled worker returns to employment.
- **Mixed Approach.** The benefit for a permanent disability depends on the worker's employment status at the time that the worker's condition is assessed, after the condition has stabilized. If the worker

⁵¹⁷ *Id.* at 35

⁵¹⁸ *Id.*

⁵¹⁹ See Peter S. Barth, "Compensating Workers for Permanent Partial Disabilities," Social Security Bulletin, Vol. 65, No. 4, 2003/2004 available at <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p16.html>

has returned to employment with earnings at, or near, the pre-injury level, the benefit is based on the degree of impairment. If the worker has not returned to employment, or has returned but at lower wages than before the injury, the benefit is based on the degree of lost earning capacity.

As will be explained below, Wyoming utilizes a mixed approach to providing permanent partial benefits.

5.3 Temporary Total Disability Benefits in Wyoming

W.S. § [27-14-102](#)(a)(xviii) defines temporary total disability as **“that period of time an employee is temporarily and totally incapacitated from performing employment at any gainful employment or occupation for which he is reasonably suited by experience or training. The period of temporary total disability terminates at the time the employee completely recovers or qualifies for benefits under W.S. § [27-14-405](#) [governing permanent partial disability] or W.S. § [27-14-406](#) [governing permanent total disability].”**

The purpose of awarding temporary total disability benefits in Wyoming is just as described above in Section 5.2 for workers’ compensation generally. **“The purpose of temporary disability compensation is to provide income for an employee during the time of healing from his injury and until his condition has stabilized.”**⁵²⁰

W.S. § [27-14-404](#) establishes a limitation on the amount of time that an injured worker may receive TTD benefits. The statute provides, in relevant part, as follows⁵²¹:

§ 27-14-404. Temporary total disability; benefits; determination of eligibility; exceptions for volunteers or prisoners; period of certification limited; temporary light duty employment.

(a) If after a compensable injury is sustained and as a result of the injury the employee is subject to temporary total disability as defined under W.S. 27-14-102(a)(xviii), the injured employee is entitled to receive a temporary total disability award for the period of temporary total disability as provided by W.S. 27-14-403(c). *The*

⁵²⁰ Pacific Power and Light v. Parsons, [692 P.2d 226](#), 228 (Wyo. 1984); accord Coggins v. Department of Workforce Services, Workers’ Compensation Division, [421 P.3d 555](#), 560 (Wyo. 2018); Phillips v. TIC-The Indus. Co. of Wyoming, Inc., [109 P.3d 520](#), 532 (Wyo. 2005).

⁵²¹ Quoted in Workers’ Safety & Compensation Div. v. Smith, [296 P.3d 939](#), 942 (Wyo. 2013).

period for receiving a temporary total disability award under this section for injuries resulting from any one (1) incident or accident shall not exceed a cumulative period of twenty-four (24) months, except that the division pursuant to its rules and regulations and in its discretion may in the event of extraordinary circumstances award additional temporary total disability benefits. The division's decision to grant such additional benefits shall be reviewable by a hearing examiner only for an abuse of discretion by the division.

(Emphasis added.)

“As authorized under this statute, the Division has issued rules and regulations relating to the receipt of additional TTD benefits in extraordinary circumstances. According to those rules,⁵²² **an award of additional TTD benefits shall not exceed twelve months**”⁵²³:

(b) Limitation on Period of Temporary Total Disability (TTD);
Extraordinary Circumstance.

(i) The period for receiving a TTD award under W.S. § 27–14–404 resulting from a single incident, accident, or period of cumulative trauma or exposure shall not exceed a cumulative period of 24 months, except that the Division, in its discretion, may award additional TTD benefits if the claimant establishes by clear and convincing evidence that the claimant:

(A) remains totally disabled, due solely to a work-related injury;

(B) has not recovered to the extent that he or she can return to gainful employment;

(C) reasonably expects to return to gainful employment within 12 months following the date of the first TTD claim occurring after the expiration of the 24-month period;

(D) does not have an ascertainable loss which would qualify for benefits under W.S. §§ 27–14–405 or 406; and,

⁵²² *Id.* quoting Wyoming Rules and Regulations, WSD WCD Ch. 7, § 2, WY ADC WSD WCD Ch. 7, § 2

⁵²³ *Id.*

(E) has taken all reasonable measures to facilitate recovery, including compliance with the recommendations of the treating physician.

(ii) No awards of additional TTD benefits pursuant to subsection (i) of this section shall exceed 12 cumulative calendar months.⁵²⁴

In *Department of Workforce Servs. v. Clements*,⁵²⁵ however, the Wyoming Supreme Court held that the Division exceeded its statutory powers by promulgating a rule limiting any extension of TTD benefits to a maximum of twelve months. According to the Court:

Giving the words used in the statute their plain and ordinary meaning, the legislative intent appears to have been to allow the Division to award additional TTD benefits beyond the statutory limit in cases where extraordinary circumstances warrant an additional award. The plain and ordinary meaning of the words used do not suggest the legislature intended the Division to set a limit on TTD benefits after which no TTD benefits can be awarded no matter what the circumstances. In special situations, justifying extraordinary treatment, the legislature intended the Division to have the authority to award more TTD benefits than the statutory maximum. While it clearly intended to limit TTD benefits in most cases, it also clearly intended to allow TTD benefits beyond the limit when exceptional circumstances exist. The Division cannot abrogate its responsibility to apply its discretion in exceptional circumstances.⁵²⁶

5.4 Benefit Amount for Temporary Total Disability

The benefit calculation for temporary total disability is explained in W.S. § [27-14-403\(c\)](#)⁵²⁷:

⁵²⁴ W.S. § [27-14-404](#)(b)(ii) is not applicable to *second* compensable injuries. See Treatise above at Section 3.10. The 24-month limitation applies to all injuries resulting from *any one incident or accident*, encompassing situations in which the claimant receives multiple injuries simultaneously or a subsequent compensable injury as the result of a single workplace accident. Matter of Hall, [414 P.3d 622](#), 628 (Wyo. 2018).

⁵²⁵ [326 P.3d 177](#) (2014)

⁵²⁶ *Id.* at 181. The *ultra vires* 12-month administrative cap, *see rules supra.*, appears to have been removed as of September 6, 2018.

⁵²⁷ See also Wyoming Rules and Regulations, WY Rules and Regulations 053.0021.7 § 1 (a)(i); WY ADC WSD WCD Ch. 7, § 1 (a)(i)

For temporary total disability . . . the award shall be paid monthly at the rate of 30% of the statewide average monthly wage or 2/3 of the injured employee's actual monthly earnings at the time of injury, whichever is greater, but shall not exceed the lesser of 100% of the injured employee's actual monthly earnings at the time of the injury or the statewide average monthly wage for the 12 month period immediately preceding the quarterly period in which the injury occurred with 1/2 of the monthly award paid on or about the fifteenth of the month and 1/2 paid on or about the thirtieth of the month.

In other words, there are **two calculations** that must be performed to calculate the temporary total disability benefit.

- 1) **EITHER** 30% of the statewide average monthly wage (SAMW) **OR** 2/3 of the employee's pre-injury monthly wage, **whichever is greater**.
- 2) **That figure "shall not exceed" the lesser of the employee's actual pre-injury monthly wage or the statewide average monthly wage** looking back twelve months from the immediately preceding quarterly period in which the injury occurred.

For many workers this will mean the benefits will consist of 2/3 of the employee's average monthly wage capped at the statewide average monthly wage (looking back a year from the quarter in which the injury occurred).

For example, assume an employee earning \$40 per hour pre-injury (about \$6,933 per month); and a SAMW of \$3,757 (which was the Quarter 2, 2018 figure). 30% of the SAMW is about \$1,127. 2/3 of the employee's pre-injury wage of \$6,933 is about \$4,624. The \$4,624 figure is obviously greater than \$1,127 and would have constituted the benefit amount *except that* it is greater than the SAMW of \$3,757, which acts as a cap. The employee's temporary total monthly benefit will be the SAMW of \$3,757.

5.5 Permanent Total Disability Benefits in Wyoming

"Permanent total disability' means the loss of use of the body as a whole or any permanent injury certified under W.S. § 27-14-406, which permanently incapacitates the employee from performing work at any gainful occupation for which he is reasonably suited by experience or training."⁵²⁸ In turn, W.S. § 27-14-406 states in relevant part that "upon certification by a physician licensed to practice surgery or medicine that an injury results in permanent total disability as

⁵²⁸ W.S. § 27-14-102(a)(xvi).

defined under W.S. § [27-14-102](#)(a)(xvi), an injured employee shall **receive for eighty (80) months** a monthly payment as provided by [benefit calculation provisions, *see infra*]. As written, W.S. § [27-14-102](#)(a)(xvi) is harsh, and nothing in W.S. § [27-14-406](#) appears to ameliorate the harshness. **It is rare for a workers' compensation statute to require as a condition precedent for total benefits loss of the use of the body as a whole.** As the Nebraska Supreme Court has stated:

Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of similar nature, for which the employee was trained or accustomed to perform, or any other kind of work which a person of the employee's mentality and attainments could do.⁵²⁹

The seeming harshness of the rule⁵³⁰ is perhaps ameliorated by the “odd lot doctrine,” to be discussed *infra*.

Another idiosyncratic aspect of permanent total benefits in Wyoming is their **durational limit to 80 months**. This limitation underscores that it is permanence of the disability that is being compensated and not (in any meaningful way) the permanence of loss of earnings. One may well ask what relationship such a benefits cap bears to a foregone tort remedy which would have been constrained by no such limitation on compensatory damages. It is certainly true, however, that the worker-victim of a pure accident would have been entitled to **no** damages under the tort regime, so with respect to that hypothetical individual 80 months of benefits might be argued to be generous.

Further complicating matters is the apparent discretionary ability of the Workers' Safety and Compensation Division to provide an additional award of benefits **beyond the 80-month limit**:

Following payment in full of any award . . . to an employee for permanent total disability or to a surviving spouse for death of an employee, an additional award for extended benefits may be granted subject to the following requirements and limitations:

(i) In the case of an employee:

⁵²⁹ Sherwood v. Gooch Milling & Elevator Co., [453 N.W.2d 461](#), 467 (Neb. 1990). The principle is emphasized in 7 LARSON'S WORKERS' COMPENSATION LAW § 83.01.

⁵³⁰ Under prior versions of the statute total “incapacity” was less restrictively defined as “the loss of both legs or both arms, total loss of eyesight, paralysis or other conditions permanently incapacitating the workman from performing work at any gainful occupation.” In re Iles, [110 P.2d 826](#), 828 (Wyo. 1941) *quoting* Rev.St.1931, Sec. 124-120(b); *see also* In re Hibler, [261 P. 648](#), 650 (Wyo. 1927)

(A) A claim for compensation is filed by the employee or someone on his behalf;

(B) The employee establishes a reasonable effort on his behalf has been made to return to part time or full time employment including retraining and educational programs;

(C) The division in determining entitlement under this paragraph shall consider the amount of the monthly award made to an injured worker pursuant to W.S. 27-14-403(a)(iv), all earned income of the injured worker, all employment based retirement income of the injured worker, all income derived by the injured worker as a result of the injury, excluding mortgage or any other loan credit insurance, or any supplemental income insurance purchased by or on behalf of the employee and any periodic payments from any other governmental entity to the injured worker. The division shall not consider any other income received by the injured worker or members of the injured worker's household;

(D) The maximum monthly amount of additional compensation shall not exceed the amount provided in subsection (c) of this section;

(E) The division may attach reasonable conditions to application for or receipt of awards under this subsection including retraining or educational programs and the award may be adjusted in accordance with fulfillment of the conditions;

(F) The division may decrease an award to qualify an employee eligible for maximum benefits under any other state or federal pension plan;

(G) Any award granted under this subsection shall not exceed twelve (12) months unless the division determines an award for a period exceeding twelve (12) months but not greater than four (4) years is appropriate.⁵³¹

The provision essentially directs the Division to evaluate work-search and retraining/rehabilitation efforts and to limit benefit amounts in various ways through the use of various set-offs. With respect to *entitlement* to the additional award, however, the statutory provision says only that “[t]he division may attach

⁵³¹ W.S. § [27-14-403](#)(g)(i)

reasonable conditions to application for or receipt of awards under this subsection . . .” Few standards appear provided to guide the Division’s exercise of discretion once an employee “establishes a reasonable effort on his behalf has been made to return to part time or full time employment including retraining and educational programs.”

5.6 Benefit Amount for Permanent Total Disability

The allowable indemnity benefit amounts for permanently, totally disabled injured employees derive from W.S. § [27-14-403](#)(c)(i)-(iii):

Employees whose *Actual Monthly Earnings* (AME) are less than 73% of the Statewide Average Monthly Wage (SAMW); the award = **92% of the injured employee’s AME**.

Employees whose AME are equal to or greater than 73% of the SAMW, but less than the SAMW; the award = **$\frac{2}{3}$ of the SAMW**.

Employees whose AME are greater than or equal to the SAMW; the award = **$\frac{2}{3}$ of the employee’s AME, capped at the SAMW**.

For example, the Statewide Average Monthly Wage for Quarter 2 in 2018 was \$3,757. 73% of that figure was \$2,742.61 (about \$632.91 per week). An employee making less than this amount on the date of injury could receive an award of 92% of what they were actually earning on the date of injury. An employee making between \$2,742.61 and \$3,757 per month could receive an award **66 2/3% of the Statewide Average Monthly Wage**, or about \$2,504. An employee making more than \$3,757 could receive **66 2/3% of his or her actual earnings capped at the same \$3,757 figure**. **Thus, in Wyoming workers’ compensation indemnity benefits are capped at the SAMW.**

By way of further example, imagine three employees: A, B, and C. A earns (on the date of injury) \$10 per hour (about \$1,733 per month). B earns (on the date of injury) \$15 per hour (about \$2,600 per month). C earns \$20 per hour (about \$3,467 per month). Assume the Quarter 2 2018 figure of \$3,757 from the preceding paragraph. The actual monthly earnings of both A and B are less than the 73% figure of \$2,742.61. Thus, **Employee A’s monthly benefit would be 92% x \$1,733 = \$1,594.36. Employee B’s monthly benefit would be 92% x \$2,600 = \$2,392.** Employee C’s actual monthly earnings of \$3,467 is more than 73% of the State Average Monthly Wage but less than the State Average Monthly Wage itself. Thus, **Employee C’s monthly benefit would be 66 2/3% of \$3,757 (the SAMW) = \$2,504.**

Now imagine a fourth employee, D, who earns (on the date of injury) \$25 per hour (about \$4,333 per month). D, who earns more than the State Average Monthly Wage, is entitled to 66 2/3% of actual monthly earnings capped at the State Average Monthly Wage. Step one of the calculation for D's monthly benefit is to multiply his **actual monthly earnings times 66 2/3% x \$4,333 = about \$2,886**. Because **\$2,886 is less than the SAMW of \$3,757, D will receive the entire benefit amount**.

Permanent total disability awards are adjusted for inflation.⁵³²

5.7 The Odd Lot Doctrine Generally

In the words of the *Larson's* treatise,

Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, **total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market**. The essence of the test is the probable dependability with which claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above crippling handicaps.⁵³³

The rule goes back at least to the early English Acts, and *Larson's* quotes an ancient, English King's Bench case for the same proposition. The language of the quote reveals that very little of the original principle has changed in the modern American cases:

[T]here are cases in which the **onus** of shewing that suitable work can in fact be obtained **does fall upon the employer** who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well known branch of the labour market—if in other words **the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well known lines of the labour market**, I think it is incumbent upon the employer to shew that such special employment can in fact

⁵³² W.S. § [27-14-403\(c\)\(v\)](#)

⁵³³ 7 LARSON'S WORKERS' COMPENSATION LAW § 83.01.

be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labour in the position of an **"odd lot"** in the labour market, the employer must shew that a customer can be found who will take it . . .⁵³⁴

Despite the apparent straightforwardness of the odd lot principle there is some potential for confusion of (1) a partial incapacity for which total benefits are paid because no work can be located within an injured worker's physical (and perhaps assorted personal) limitations; with (2) a worker who, **though not physically helpless**, is adjudged **at the outset** of a compensation proceeding to be **permanently**, totally incapacitated. The first situation might be conceived as a partially incapacitated worker (whether permanently or temporarily) who is **provisionally** found entitled to total benefits. A distinction between the two may be that in the first scenario the employer's burden of proof showing a regaining of work capacity in the injured worker is likely to be lower than in the second.⁵³⁵ Furthermore, the "100% partial" claimant (category (1) typically possesses *some work search* obligation to affirmatively demonstrate a *continuing* inability to locate work.

Larson's proposed formulation is that, "[i]f the evidence of degree of obvious physical impairment, coupled with other facts such as claimant's mental capacity, education, training, or age, places claimant prima facie in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant."⁵³⁶ Note that there is no requirement in this proposed standard that the claimant have the *initial* burden of providing evidence of a failed work search, and some courts have concluded that such a preliminary showing is not consistent with the rule.⁵³⁷

5.8 The Odd Lot Doctrine in Wyoming

Given the textual harshness of the total disability (*loss of use of the body as a whole*) standard described above in Section 5.5, the odd lot doctrine would seem to take on heightened importance in Wyoming. Strictly read, few claimants could meet a "loss of use of the body as a whole" standard even though they were

⁵³⁴ *Id.* at § 83.02 quoting *Cardiff Corp. v. Hall*, 1 K.B. 1009, 1020, 1021 (1911)

⁵³⁵ Compare *Blue Bell, Inc. v. Nichols*, [479 So.2d 1264](#) (Ala. 1985) (finding claimant totally incapacitated *ab initio*) with *Monaghan v. Jordan's Meats*, [928 A.2d 786](#) (Me. 2007) (explaining circumstances in which employee may be entitled to "100% partial benefits"); see also discussion in DUFF, WORKERS' COMPENSATION LAW 126-127. For a good discussion burden shifting complexities in odd lot cases see *Lombardo v. Atkinson-Kiewit*, [746 A.2d 679](#) (R.I. 2000). See also 7 LARSON'S WORKERS' COMPENSATION LAW § 84.01.

⁵³⁶ 7 LARSON'S WORKERS' COMPENSATION LAW § 84.01.

⁵³⁷ *Beecher v. Labor & Industry Review Com'n*, [682 N.W.2d 29](#), 48 (Wis. 2004).

functionally unemployable. Relatedly, the odd lot doctrine in Wyoming, as in some other jurisdictions, makes it unnecessary for a “partially incapacitated” employee to look for work **where such a search would be futile**. The letter of the odd lot doctrine holds that,

To be entitled to an award of benefits under the odd lot doctrine, an employee must prove: 1) **he is no longer capable of performing the job he had at the time of his injury** and 2) **the degree of his physical impairment coupled with other factors such as his mental capacity, education, training and age make him eligible for PTD benefits even though he is not totally incapacitated**. To satisfy this burden, an employee **must also demonstrate he made reasonable efforts to find work in his community after reaching maximum medical improvement or, alternatively, that he was so completely disabled by his work-related injury that any effort to find employment would have been futile**. If the employee meets his burden, **the employer** must then prove that light work of a special nature which the employee could perform but which is not generally available **in fact is available** to the employee.⁵³⁸

The futility proviso suggests that an employee *may* be determined *de facto* totally disabled even if he or she has *not* lost the use of the body as a whole **and** has *not* performed a search for work, though there is limited authority in Wyoming for this proposition.⁵³⁹ It has, however, become clearer that an employee need not search long distances from her home to find alternative employment, no small matter in a large rural state like Wyoming, though she may have to search a “reasonable” distance. Furthermore, an employee is not required to retrain or engage in vocational rehabilitation under the odd lot doctrine.⁵⁴⁰

A problem with the odd lot doctrine in Wyoming concerns what, precisely, the Division must show once the employee-claimant has come forward with evidence sufficient to show that he or she is not able to perform the job held at the time of injury; and that the work-related disability combined with the statutory factors

⁵³⁸ McIntosh v. Workers’ Safety & Compensation Div., [311 P.3d 608](#), 616 (2013).

⁵³⁹ Cases in other jurisdictions excusing work search requirements on futility grounds include Second Injury Fund v. Nelson, [544 N.W.2d 258](#) (Iowa 1995); Pomerinke v. Excel Trucking Transport, [859 P.2d 337](#), 342 (Idaho 1993) (claimant does not have to search for work as a prerequisite to odd-lot status if he shows his efforts would have been futile); Peoples v. Cone Mills Corp., [342 S.E.2d 798](#), 809 (N.C. 1986) (employee need not show that he had unsuccessfully sought work if he demonstrates that any “effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors”); Phillips v. Liberty Mut., [679 P.2d 884](#), 887 (Or. Ct. App. 1984) (“A claimant, however, need not make efforts to work if those efforts would be futile.”).

⁵⁴⁰ Stallman v. Workers’ Safety & Comp. Div., [297 P.3d. 82](#), 96 (Wyo. 2013)

renders him/her *de facto* unemployable. In *Moss v. Workers' Safety & Compensation Div.*,⁵⁴¹ for example, the Wyoming Supreme Court (after faulting the Medical Commission severely for the Commission's fact finding deficiencies)⁵⁴² independently found that the claimant (Moss) had prima facie satisfied odd lot doctrine requirements.⁵⁴³ Moving on with its analysis, the Court said "we consider whether the Division came forward with sufficient evidence to refute Mr. Moss's evidence and to prove work within his limitations was available."⁵⁴⁴ The Court stated that the Division had refuted Moss's evidence based on the following factors⁵⁴⁵:

- The opinion of three doctors that Mr. Moss was capable of gainful employment with restrictions
- "... [E]vidence that light duty work was available to Mr. Moss. Relying on a vocational evaluation performed at the request of Mr. Moss's attorney, the Division pointed out that the evaluator concluded Mr. Moss could find work in his geographic area in jobs such as cashier, rental clerk, telemarketer, desk clerk and customer representative."

Justice Hill's dissent in *Moss* took issue with the notion that the Division's evidence could be credited in any respect in light of the irregular fact finding in the case.⁵⁴⁶ This seems a supportable contention given the record. But there is an additional question concerning whether the Court's majority opinion may also be read to suggest that, even if Moss had satisfied his initial odd-lot burden the employer (or Division) proved "that light work of a special nature which the employee could perform but which is not generally available **in fact** [was] available to the employee."⁵⁴⁷ In this regard, Justice Hill quoted an important passage from *Schepanovich v. United States Steel Corp.*,⁵⁴⁸

... If the evidence of degree of obvious physical impairment, coupled with other facts such as the claimant's mental capacity, education, training, or age, places claimant prima facie in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. Certainly in such a case it should not be enough to

⁵⁴¹ [232 P.3d 1](#) (Wyo. 2010)

⁵⁴² *Id.* at 11

⁵⁴³ More precisely, the Court discredited the Medical Commission's reasons for finding the claimant had not made a prima facie showing and proceeded as if the claimant had in fact done so. *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.* at 12

⁵⁴⁶ *Id.* at 14-15

⁵⁴⁷ See standard *supra*.

⁵⁴⁸ [669 P.2d 522](#) (Wyo. 1983)

show that claimant is physically capable of performing light work, and then round out the case for noncompensability by adding a presumption that light work is available. . . .⁵⁴⁹

There was certainly no evidence in *Moss* that suitable work was “regularly and continuously available to the claimant.” One can only assume that the Court concluded *Moss* had not satisfied his odd lot prima facie case, though the record does not seem to support the conclusion.

Whatever the basis for the decision in *Moss*, a case seeming to hew more directly to the letter of the odd lot doctrine was the Wyoming Supreme Court’s opinion in *McMasters v. Workers’ Safety & Compensation Div.* In *McMasters*,⁵⁵⁰ a heating, ventilation and air conditioning (HVAC) journeyman who fell nine feet from a beam to a concrete floor, suffering a broken vertebrae in the process applied for but was denied permanent total disability benefits under the “odd lot” doctrine.⁵⁵¹ Finding that *McMasters* was obviously not capable of working at the job in which he was employed at the time of injury,⁵⁵² the Court went on to consider “the requirement that *McMasters* show that his physical impairment, coupled with other facts, such as mental capacity, education, training, or age qualify him for treatment under the odd lot doctrine.”⁵⁵³ Reciting voluminous evidence in the record satisfying this second prong of the odd lot claim (and contrary to the Medical Commission), the Court said,

we find there can be no question that *McMasters* met his burden of showing that the degree of his physical impairment combined with his mental capacity, education, training, and age make him eligible for permanent total disability benefits. Four separate professionals evaluated *McMasters* and concluded that the combination of his physical restrictions, pain and psychological condition has rendered him unemployable.⁵⁵⁴

Having thus concluded that *McMasters* had satisfied the odd lot prima facie case, the Court went on to consider whether “the Division met its burden of showing that light work of a special nature that *McMasters* could perform was available.”⁵⁵⁵ Finding the Division had not met its burden, the Court stated,

⁵⁴⁹ *Id.* at 528 adopted from 2 LARSON, WORKMEN'S COMPENSATION LAW, § 57.61, at 10–164.95 to 1–164.114 (1982); same principle as updated in 7 LARSON’S WORKERS’ COMPENSATION LAW § 84.01

⁵⁵⁰ [271 P.3d 422](#) (Wyo. 2012)

⁵⁵¹ *Id.* at 424

⁵⁵² *Id.* at 438

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* at 439

⁵⁵⁵ *Id.* at 442

[The Vocational Expert]’s report identified potential positions for McMasters in Casper, Wyoming, subject to the caveat that the physical demands of the jobs were not known and ‘[t]here is some question as to [McMasters]’ emotional state and how it is affecting his return to work.’ In other words, [the expert]’s report did not identify even a single available position that McMasters could perform. The most the report did was identify positions that, as [the expert] phrased it, McMasters “may want to consider researching further.”⁵⁵⁶

It is worth taking a moment to consider the vocational evidence the Division presented, as described by the Court⁵⁵⁷:

[The Vocational Expert] concluded that McMasters could return to employment and identified **potential positions**. The potential positions [the expert] specified as meeting McMasters’ transferable skills and physical capacity were: Assembler, Small Products; Order Clerk; Tutor; and Bill and Account Collector. For each of these positions, [the expert] **did not identify an available opening**, but instead indicated “[t]here have been openings in the last six months and there are expected openings.” Regarding these positions, [the expert] made the following observations:

The above jobs were identified based on Mr. McMasters[’] physical limitations. There is some question as to his emotional state and how it is affecting his return to work. However, Mr. McMasters has demonstrated an ability to return to one semester of college and according to his self-report, he passed all but one class. He would increase his vocational success if he:

1. Return [sic] to work with a therapist on depression, anxiety, somatization and anger (these conditions **have been known to** improve with treatment). There was also reference to a personality disorder. This condition **would have** existed long before his injury and Mr. McMasters has demonstrated and [sic] ability to be in the work force with the affects [sic] of the personality disorder. Counseling support would be helpful.

2. Work [sic] with his doctors to ensure his pain medication is compatible with a work environment. He will also need to ensure

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* at 434-435

his pain medication is appropriate for some one [sic] with “a long term history of alcohol, amphetamine and cannabis abuse in full time remission” (from 8/30/2007 Dr. Kaplan's impairment rating)

The job of newspaper delivery route driver was also researched but it did not demonstrate any availability[.]

[The expert] additionally identified the following **potential** positions specific to Casper, Wyoming: Call Center Sales; Collections Agent; and Gas Station Attendant. Regarding these positions, [the expert] provided the following prefatory comment:

An Internet job search was performed for Casper Wyoming 5/13/2010. The following jobs appear to meet his transferable skill level. Physical demands of the jobs are not always delineated on the Internet sight [sic] and it is not known if these jobs would meet his limitations. **However, these are positions he may want to consider researching further[.]**

That a workers' compensation administrative body (and a district court) may have accepted such transparently inadequate evidence as sufficient to satisfy the Division's burden under the odd lot doctrine is troubling because it evinces a thorough misunderstanding of the burden shifting mechanism.⁵⁵⁸ One possibility is that factfinders are confusing the work search requirements of W.S. § [27-14-405\(h\)\(iii\)](#) applicable to qualification for permanent partial impairment benefits—concerning which the employee has the unambiguous burden of production and persuasion⁵⁵⁹—with the odd-lot burden shifting mechanism.

5.9 Permanent Partial Workers' Compensation Benefits in Wyoming

As mentioned above in Section 5.2, Wyoming utilizes a “**mixed**” approach to provision of partial benefits. Essentially, the Wyoming scheme involves payment (when statutory predicates are satisfied) of a “**permanent partial impairment award**” **followed by** payment of a “**permanent disability award.**” **Each of these concepts will be explored in Section 5.9.**

As the Wyoming Supreme Court has explained,

⁵⁵⁸ See 7 LARSON'S WORKERS' COMPENSATION LAW § 83.03

⁵⁵⁹ See e.g. Ludwig v. Workers' Safety & Compensation Div., [86 P.3d 875](#) (Wyo. 2004); Hermosillo v. Workers' Safety & Compensation Div., [58 P.3d 924](#) (Wyo. 2002)

There is a distinction between the concepts of impairment and disability. This distinction is indicated by the Worker's Compensation Act itself, our precedent, and the AMA Guides to the Evaluation of Permanent Impairment (Guides), which are used to rate an injured worker's impairment pursuant to Wyo. Stat. Ann. § 27-14-405(g). Each of these authorities indicates that "impairment" connotes physical loss associated with an injury, whereas "disability" connotes economic loss associated with an injury.⁵⁶⁰

A. Permanent Partial Impairment Award (PPI): Under W.S. § [27-14-403\(c\)](#), **for permanent partial impairment the award shall be calculated⁵⁶¹ at the rate of $\frac{2}{3}$ of the statewide average monthly wage for the 12 month period immediately preceding the quarterly period in which the benefits are first paid. Then, however, under W.S. § [27-14-405\(g\)](#), an injured employee's impairment shall be rated by a licensed physician using the most recent edition of the American Medical Association's guide to the evaluation of permanent impairment. The award shall be paid as provided by W.S. [27-14-403](#) for the number of months determined by multiplying the percentage of impairment by sixty (60) months.**

Thus, imagine an injured employee who has suffered a 15% permanent impairment on a date when the statewide average monthly wage was \$3,757 (Q2, 2018). An employee's permanent impairment would be calculated as follows. First, under W.S. § [27-14-403\(c\)](#), calculate $\frac{2}{3}$ of the assumed SAMW of \$3,757, which is about \$2,504. Next, assume hypothetically that under the AMA Guides an employee is 15% impaired. Next, multiply the percentage of impairment by 60 months ($15\% \times 60 \text{ months} = 9 \text{ months}$). The impairment benefit is equal to **\$2,504 x 9 months = \$22,536**. Note that **this figure bears no relation to an employee's diminished earning capacity or loss of wages and is solely a function of the employee's percentage of impairment times a seemingly arbitrary 60-month multiplier.**

The Wyoming courts have emphasized that impairment is **"strictly a medical question and is unrelated to the claimant's ability to work."**⁵⁶² Accordingly, a worker suffering an impairment caused by work is entitled to an impairment benefit irrespective of the impairment's impact on the worker's earning capacity.

B. Permanent Partial Disability Award (PPD): The award is available to an injured employee who, under W.S. § [27-14-405\(h\)](#), is **unable to return to employment at a wage that is at least 95%** of the employee's average monthly

⁵⁶⁰ Workers' Safety & Compensation Div. v. Singer, [248 P.3d 1155](#), 1159 (Wyo. 2011)

⁵⁶¹ See also WY Rules and Regulations 053.0021.7 § 1(b); WY ADC WSD WCD Ch. 7, § 1(b)

⁵⁶² Himes v. Petro Engineering and Construction, [61 P.3d 393](#), 398 n.1 (Wyo. 2003)

wage on the date of injury; who has filed an application for permanent partial disability **not before 3 months after the date of ascertainable loss** or **3 months before the last scheduled impairment payment**, whichever occurs later, but **in no event later than 1 year following the later date**; and who **has actively sought suitable work**,⁵⁶³ considering the employee's health, education, training and experience.

(Ascertainable loss, which is—as was mentioned in Section 5.2—virtually identical to the concept of Maximum Medical Improvement in other jurisdictions, is an important predicate for determining both PPI and PPD benefits. This is consistent with most states' workers' compensation statutes. It is only upon establishment of MMI/ascertainable loss that meaningful assessments of permanent disability can be undertaken).⁵⁶⁴

With respect to the requirement that the employee be unable to return to work at a wage that is at least 95% of the pre-injury average monthly wage, the Wyoming Supreme Court has stated that in determining whether an employee has suffered *a loss of earning capacity* both medical and non-medical evidence may be relevant. Although no individual factor is determinative, the following considerations are *relevant* to the loss of earning capacity inquiry: the employee's **physical impairment**, including the nature and extent of his injury; **age**; **education**; **actual earnings**, including pre-injury and post-injury earnings; **ability**

⁵⁶³ “There is no magic formula for what constitutes actively seeking work and no particular level of education, training or experience required to decipher the phrase. One is either actively looking for work, or one is not.” *Aybeta v. Workers’ Safety & Compensation Div.*, [88 P.3d 1072](#), 1076 (Wyo. 2004). Of course, even a cursory perusal of any workers’ compensation case archive quickly suggests that this principle should perhaps not be so confidently asserted. Doubtless for this reason the Division has promulgated a rule defining “actively seeking work”:

For purposes of benefit eligibility, a claimant is actively seeking work if the claimant provides tangible evidence of the work search to the Division. Completion of the work search form will be considered tangible evidence. The work search must contain a minimum of five contacts per week over the course of a six week period. The six (6) week period must be immediately preceding the date the application is filed with the Division or immediately following the date the application is filed with the Division. The contacts listed on the work search must be made for work the claimant is reasonably qualified to perform and is willing to accept. Actions that would be considered an active search for employment include completing job applications, faxing or mailing resumes (include proof), and/or visiting the employers in person. Claimant must contact the employer he was working for at the time of injury to inquire if the employer has work available within their medically documented restrictions. Wyoming Rules And Regulations, WY ADC WSD WCD [Ch. 1, § 3](#) (2018).

The work search rule in this context should be carefully distinguished from the odd lot work search context.

⁵⁶⁴ DUFF, WORKERS’ COMPENSATION LAW at 120

to continue pre-injury employment; and post-injury employment prospects. The fact finder has the discretion to assign weight to the individual factors.⁵⁶⁵

The monthly **benefit calculation** for the PPD benefit is made under W.S. § [27-14-403\(c\)\(i\)-\(iii\)](#)⁵⁶⁶ in the same manner as explained in Section 5.6 of this Treatise, above, pertaining to benefits for permanent total disability. Accordingly, the examples used for calculating permanent and total disability benefits in that section will be repeated here.

Again imagine three employees: A, B, and C. A earns (on the date of injury) \$10 per hour (about \$1,733 per month). B earns (on the date of injury) \$15 per hour (about \$2,600 per month). C earns \$20 per hour (about \$3,467 per month). Assume the Quarter 2, 2018 figure of \$3,757 from the preceding paragraph. The actual monthly earnings of both A and B is less than the 73% figure of \$2,742.61. Thus, **Employee A's monthly benefit would be $92\% \times \$1,733 = \$1,594.36$. Employee B's monthly benefit would be $92\% \times \$2,600 = \$2,392$.** Employee C's actual monthly earnings of \$3,467 is more than 73% of the State Average Monthly Wage, but less than the State Average Monthly Wage itself. Thus, **Employee C's monthly benefit would be $66 \frac{2}{3}\%$ of \$3,757 (the SAMW) = \$2,504.**

Assume all of the W.S. § [27-14-405\(h\)](#) predicates discussed above have been satisfied (95% threshold; timely application; active search for suitable work). Starting with the monthly benefit figures in the preceding paragraph, W.S. § [27-14-405\(j\)](#), provides for additions of specific numbers of months of benefits (at the established monthly rate) taking into account predetermined statutory factors: **age; years of education; number of different occupations in an 8-year lookback period; engagement at the time of injury in formal or education or training program that was terminated because of permanent injury but had been expected to lead to earning in excess of the employee's pre-injury earnings; and additional "credits" awarded due to relatively advanced age. Taking all of these factors into account will yield a certain number of months that will then be multiplied by the monthly benefit amount to determine the permanent disability award.**

The foregoing paragraph was a condensed summary of the statutory language of W.S. § [27-14-405\(j\)](#) that will now be set out in full:

The disability award under subsection (h) of this section shall be payable monthly in the amount provided by W.S. 27-14-403 for the

⁵⁶⁵ *Bonsell v. Workers' Safety & Compensation Div.*, [142 P.3d 686](#) (Wyo. 2006); *Chavez v. Memorial Hosp. of Sweetwater County*, [138 P.3d 185](#), 189 (Wyo.2006)

⁵⁶⁶ *See also* WY Rules and Regulations 053.0021.7 § 1(a)(iii), WY ADC WSD WCD Ch. 7, § 1(a)(iii)

number of months determined by adding the number of months computed under this subsection as follows:

- (i) Fourteen (14) months, multiplied by a fraction in which the numerator is sixty-five (65) minus the employee's age at the date of injury and the denominator is forty-five (45);
- (ii) Eight and one-half ($8\frac{1}{2}$) months, multiplied by a fraction in which the numerator is four (4) minus the employee's completed years of education beyond the twelfth grade, not to exceed four (4) years, and the denominator is four (4);
- (iii) Six (6) months, multiplied by a fraction in which the numerator is four (4) minus the number of different occupations in which the employee has worked at least eighteen (18) months in the eight (8) year period preceding the injury but not to exceed four (4), and the denominator is four (4);
- (iv) Up to two (2) months if the employee at the time of injury was engaged in a formal education or training program for an occupation which was reasonably expected to pay more than the employee's employment at the time of injury and the employee, because of the permanent injury, will be unable to enter into the new occupation;
- (v) One (1) month if the employee is forty-five (45) to forty-nine (49) years of age at the time of injury, two (2) months if the employee is fifty (50) to fifty-four (54) years of age at the time of injury, and three (3) months if the employee is fifty-five (55) years of age or older at the time of injury.

Returning to the hypothetical employees earlier in the discussion, assume that Employee B, whom the reader will recall possessed a monthly benefit amount of \$2,392, is eligible for a permanent partial disability benefit. Employee B is 50 years old, has a two year associate's degree in business, has worked at two separate occupations, each for at least eighteen months, during the preceding 8 years, and was not engaged in a formal education or training program at the time of injury. The following calculations are made taken up the statutory factors seriatim:

- (i) $14 \times (65-50)/45 = 14 \times 15/45 = 14 \times 1/3 = \underline{\underline{4\frac{2}{3} \text{ months}}}$
- (ii) $8\frac{1}{2} \times (4-2)/4 = \underline{\underline{4\frac{1}{4} \text{ months}}}$
- (iii) $6 \times (4-2)/4 = \underline{\underline{3 \text{ months}}}$
- (iv) $N/A = \underline{\underline{0 \text{ months}}}$
- (v) 50 years old = **2 months**

$$\text{Total} = 13\frac{1}{4} \text{ months} \times \$2,392 = \$31,694$$

Note that this figure is theoretically supposed to bear a relationship to an employee's diminished earning capacity or loss of wages caused by a work-related injury. “Generally the loss of earning power of the worker is the theoretical basis for allowance of compensation.”⁵⁶⁷ It must be said, even if in passing, that while the disability assessment described above appropriately considers various factors that may impact on earning capacity,⁵⁶⁸ **it is very difficult to view the somewhat arbitrary addition of “benefit months” as anything resembling a rational proxy for de facto, long term loss of earning capacity.**

5.10 Timing of Delivery of Workers' Compensation Indemnity Benefits

As originally conceived workers' compensation was supposed to deliver ongoing, typically weekly benefits to injured workers. Nevertheless, in many jurisdictions in the country a robust tradition of “lump-summing” workers' compensation has become entrenched. One of the dangers inherent in this practice is the potential failure of injured workers to realize that the present-value lump sum settlement of a case usually represents the end of any non-medical claim the worker is able to make against the employer (or insurance carrier). In Wyoming, the relevant statutory language allows that “permanent total disability or death may, upon application to the division with a showing of **exceptional necessity** and notice to the employer, be paid in whole or in part in a lump sum. In no event shall an award for permanent partial impairment . . . be paid in a lump sum.” W.S. § [27-14-403\(f\)](#).⁵⁶⁹ Thus, employee awards are usually paid out over the number of months utilized in the calculation of PPI and PPD calculations.

5.11 Temporary Partial Benefits

In some circumstances, an injured worker may be able to return to work but be earning less than his or her pre-injury wage. In those cases, Temporary Partial Disability benefits (TPD) may be available to the worker.⁵⁷⁰ TPD benefits are determined by calculating **80% of the difference between the light duty (initial return to work) wage and the employee's actual monthly earnings at the time of injury**. A claimant in this situation may receive **both** 80% of the difference

⁵⁶⁷ McCarty v. Bear Creek Uranium Co., [694 P.2d 93](#), 95 (Wyo. 1985)

⁵⁶⁸ *Id. quoting* Vetter v. Alaska Workmen's Compensation Board, [524 P.2d 264](#), 266 (Alaska 1974)

⁵⁶⁹ “All lump sum payments shall be discounted using a discount factor determined by the State Treasurer's Office, based upon the average rate of return on the Division's investments for the prior fiscal year.” WY Rules and Regulations, 053.0021.7 § 2

⁵⁷⁰ *See* WY Rules and Regulations, 053.0021.7 § 1

between TPD benefits **and** light duty wages and the light duty wages themselves. The intent appears to be that the combined earnings and benefits *should* pay the claimant more than TTD, and as close to the pre-injury wage as possible. The combined total of benefits and wages may not, however, exceed the statewide average monthly wage applicable to the quarterly period in which the injury occurred.

The TPD benefit ceases upon the occurrence, in connection with the claimant, of one of six contingencies: **return to work** full time (with any employer), without limitations or restrictions; **light duty wages** are **95%** or more **of the pre-injury wage**; **more than one** light duty, modified, or part-time **job is obtained, and total wages** received **equal or exceed 95%** of the pre-injury wage; **work at a gainful occupation** for which the injured employee is reasonably suited by experience or training **cannot be obtained**, and the employee is **certified temporarily totally disabled by the treating physician**; an **ascertainable loss** from a work-related injury is obtained and leads to a PPI rating by the treating physician; light duty employment is voluntarily terminated for reasons not associated with the work-related injury.

5.12 Deduction of Partial Benefits from Total Benefits Entitlement Under Wyoming Law

It will be recalled that under the Wyoming statute permanent total disability benefits are usually only available for 80 months. This short time frame is aggravated by an additional statutory rule that requires a deduction from the 80 month maximum for “any previous awards under W.S. 27-14-405 which were involved in the determination of permanent total disability.”⁵⁷¹ Furthermore, the deduction applies in connection with both permanent partial impairment (PPI) and permanent disability (PPD) benefits.⁵⁷² Thus, to return to the example in Section 5.9.B above, it will be recalled that the hypothetical employee, B, was found entitled to 13 ¼ months of PPD benefits. Under current law, if that employee’s condition worsened to effectively create the employee’s permanent total disability, Employee B would only be entitled to 66 ¾ months of total benefits, an outcome that strikes this writer as potentially constitutionally problematic.

5.13 Death Benefits Generally

The story of death benefits in workers’ compensation law is an interesting one. Because of the dangerousness of work in the late 19th and early 20th centuries, a workers’ compensation model not providing for benefits for death caused by a

⁵⁷¹ W.S. § [27-14-406](#).

⁵⁷² Workers’ Safety & Compensation Div. v. Singer, [248 P.3d 1155](#), 1161 (Wyo. 2011)

work-related injury would have been wholly inadequate. Yet the idea that tort causes of action survived the death of the plaintiff did not begin to gain currency in the Anglo-American legal world until the passage of Lord Campbell's Act of 1846 in England.⁵⁷³ By 1871, thirty of the then-established thirty-seven United States had enacted "wrongful death" statutes and the development became universal soon thereafter.⁵⁷⁴ Thus, by the time of the American reception of the workers' compensation *quid pro quo*, the absence of a death benefit would have been noticeably asymmetrical. All states now provide for workers' compensation death benefits for the dependents—as carefully defined—of deceased injured workers.⁵⁷⁵

Workers' compensation death benefits vary from state to state but all such workers' compensation provisions possess similar features. Benefits are provided to "dependents" of workers who are killed as a result of a work-related injury. Dependency is carefully defined and eligibility is conditioned on the dependent belonging to a certain class of familiar relations. With respect to certain dependents, most commonly spouses and children, dependency is presumed. With respect to other potentially eligible beneficiaries, dependency (within the meaning of state law) must be established by the claimant.⁵⁷⁶ Statutes vary as to the amount and duration of the indemnity benefit paid to survivors/statutory beneficiaries.

5.14 Death Benefits in Wyoming

Workers' compensation death benefits are defined by statute under W.S. § 27-14-403 (b), (d) & (e) and W.S. § 27-14-601(a).

To begin with, case law holds that **"in order for death to be compensable, the initial injury must be the direct cause of the employee's death."**⁵⁷⁷ Somewhat more vaguely, the statute requires that to qualify for death benefits the death must come about **"as a result of" the work-related injury.**⁵⁷⁸ However, whether a work-related injury has "directly" caused or "resulted" in a death is sometimes a surprisingly fact-intensive inquiry. Thus in *In re Fisher*,⁵⁷⁹ a worker previously rendered quadriplegic by a work-related injury died in a non-work-related fire.⁵⁸⁰ The Wyoming Supreme Court, somewhat unusually deciding the case on behalf of lower tribunals, "conclude[d] that there is not substantial evidence to sustain the

⁵⁷³ See Malone, *American Fatal Accident Statutes—Part I: The Legislative Birth Pains*, 1965 DUKE L.J. 673, 678-82.

⁵⁷⁴ F. TIFFANY, DEATH BY WRONGFUL ACT 17-18 (1st ed.1893)

⁵⁷⁵ 8 LARSON'S WORKERS' COMPENSATION LAW § 96.01

⁵⁷⁶ DUFF, WORKERS' COMPENSATION LAW, 297-21

⁵⁷⁷ *In re Fisher*, 189 P.3d 866, 868 (Wyo. 2008) quoting Workers' Safety & Compensation Div. v. Bruhn, 951 P.2d 373, 377 (Wyo.1997)

⁵⁷⁸ W.S. § 27-14-403(e)

⁵⁷⁹ See *Fisher*, *supra.*, 189 P.3d at 866.

⁵⁸⁰ *Id.* at 867-868

hearing examiner's findings and, therefore, we will reverse and remand to the district court *with directions that it further remand to the hearing examiner with directions that the applicable death benefits be awarded to Mrs. Fisher.*"⁵⁸¹ The Court explained:

We conclude that "result" is used in its most general sense, and in this context, it simply means "something that results as a consequence, effect, issue, or conclusion <suffer from the [results] of war> <the causes and [results] of sleeping sickness>." Webster's Third New International Dictionary, 1937 (1986); also see "result," 37A Words and Phrases, 423–24 (2004). The testimony at trial was uncontradicted that it was the paraplegia that resulted in Mr. Fisher's death and that but for the effects of his workplace injury, he most likely would have fully recovered from the effects and consequences of the smoke inhalation.⁵⁸²

The agency below had argued that the claimant's decedent "did not die as a result of the work-related injury."⁵⁸³ The Court distinguished earlier precedent in *Workers' Safety & Compensation Div. v. Bruhn*,⁵⁸⁴ In *Bruhn*, the employee died as the result of injuries suffered in an automobile accident that occurred when she was returning home from a doctor's appointment at which she received care for the injury that she suffered at work.⁵⁸⁵ The Wyoming Supreme Court upheld the denial of death benefits. The Court quoted the Division's position in *Bruhn* with approval:

[I]t would be impossible to ever cut off compensability if we were to adopt the hearing examiner's interpretation of the causation requirement. Would we compensate an employee who wrecked her car and died because she fell asleep at the wheel while she was on her way to see her doctor? Would we compensate an employee who was killed by a drunk driver while she was on her way home from her doctor's appointment? A logical end would not exist to the causation test which the hearing examiner proposes. Furthermore, it would lead to too many abuses, and the worker's compensation fund would, in effect, become a general health and accident insurance fund, a purpose for which it was not intended.⁵⁸⁶

⁵⁸¹ *Id.* at 871

⁵⁸² *Id.* at 871

⁵⁸³ *Id.* at 867

⁵⁸⁴ *Bruhn, supra.*, 951 P.2d at 373.

⁵⁸⁵ *Id.* at 374

⁵⁸⁶ *Id.* at 377

This is, of course, a debate about *proximate* cause. And the black letter treatise response is that an injury or death is compensable if it “arises out of” or “in the course of” employment. But as this Treatise explained in Chapter 3, Wyoming law does not precisely track *general principles* of “national compensation law” with respect to *causation*. Thus, *Bruhn*’s discussion of the *Larson*’s treatise’s “quasi course” analysis seems oddly out of place.⁵⁸⁷ *Fisher*—which found a direct link between a work-related injury and subsequent death—does not grapple with this dilemma, and further case refinement appears necessary. Generic slippery-slope arguments seldom provide final words on important issues.

5.15 Continuation Upon Death of Benefits from Existing Workers’ Compensation Award Entitlement⁵⁸⁸

The Wyoming statute distinguishes between “death benefits” that are **in reality a continuation of disability benefits**, until *those* benefits are exhausted, and “true” death benefits.⁵⁸⁹ If an injured employee, *entitled* to receive⁵⁹⁰ or *actually* (already) *receiving* a permanent partial impairment, permanent partial disability, or permanent total disability award, **dies due to causes other than the work-related injury, the balance of the award is paid to the surviving spouse (if alive and not remarried) or to any surviving dependent children of the employee in the event the spouse has died or remarried.** In the latter case, each surviving dependent child receives a proportional share of the award.⁵⁹¹ If there is **no surviving spouse**, or if the spouse has remarried or died; and there are also **no dependent children**, or the children have either attained the age of majority or

⁵⁸⁷ Located currently at 1 LARSON’S WORKERS’ COMPENSATION LAW § 10.05:

When the injury following the initial compensable injury arises out of a quasi-course activity, such as a trip to the doctor’s office, the chain of causation should not be deemed broken by mere negligence in the performance of that activity, but only by intentional conduct which may be regarded as expressly or impliedly prohibited by the employer.

When, however, the injury following the initial compensable injury does not arise out of a quasi-course activity, as when a claimant with an injured hand engages in a boxing match, the chain of causation may be deemed broken by either intentional or negligent claimant misconduct.

⁵⁸⁸ W.S. § [27-14-403](#)(d)

⁵⁸⁹ Whatever type of “death benefits” are at issue, lump sum settlements are statutorily discouraged. W.S. § [27-14-403](#)(f)

⁵⁹⁰ Survivors of injured workers are not barred from filing for disability or impairment benefits where their decedent dies before an award could be made. Of course, the rule presumes that the claim is filed during the statute of limitations period and can otherwise be proved. *Matter of Cordova*, [882 P.2d 880](#) (Wyo. 1994).

⁵⁹¹ “ . . . in the proportion that the number of months from the death or remarriage until the child attains the age of majority, or if the child is physically or mentally incapacitated until the child attains the age of twenty-one (21) years, bears to the total number of months until all children will attain these ages.”

died,⁵⁹² the balance of the award is paid to a **surviving parent** of the employee, **if the parent received “substantially all of his financial support” from the employee at the time of injury**. If two remaining parents of the employee receiving “substantially all of their financial support” from the employee **at the time of the injury** survive the employee, **the balance of the award shall be divided equally between the two parents**. Payment of the award ceases if there is no surviving spouse, dependent children, or dependent parents; if the surviving spouse remarries or dies and there are no dependent children or dependent parents; if a dependent child dies as to payments to that child; and if a dependent parent dies as to payments to that parent.

5.16 Death Benefits Independent of Preexisting Entitlement to Disability Awards⁵⁹³

If an injured employee **dies as a result of the work-related injury, whether or not an award already has been made**, all other disability awards cease as of the date of death. Burial expenses not exceeding \$5,000 together with an additional amount of \$5,000 to cover other related expenses are payable unless other arrangements exist between the employer and employee under agreement. **The surviving spouse is entitled to monthly payments for 100 months**. If the surviving spouse dies before the award is entirely paid, or if there is no surviving spouse, the unpaid balance of the award is paid to the surviving dependent children of the employee. **If there are no dependent children, further payments cease as of the date of the spouse’s death.**

Each surviving child of an employee is entitled to \$250.00 per month until the child dies or reaches 21 years old, whichever first occurs. (This is the rate as of this writing, which became effective on July 1, 2009).⁵⁹⁴ **If physically or mentally incapacitated, a surviving child is entitled to payments until death** (unless receiving benefits under the Medicaid home and community based waiver program). If the surviving child is enrolled or preregistered in a post-secondary educational institution, including a four-year college, community college, or private trade school providing career, technical, or apprenticeship training, the child is eligible for benefits until age 25. Monthly benefits are subject to inflation adjustment.

⁵⁹² Twenty-one is the presumptive age of majority if the child is “physically or mentally incapacitated.”

⁵⁹³ W.S. § [27-14-403\(e\)](#)

⁵⁹⁴ W.S. § [27-14-403\(b\)](#)

For constitutional reasons, illegitimate or unborn children are valid beneficiaries of a deceased worker for the purpose of workers' compensation death benefits.⁵⁹⁵ Where necessary to determine paternity, the statute of limitations may be tolled.⁵⁹⁶ Generally, "substantial dependency" must be proven on behalf of children in order for them to qualify as beneficiaries. The Wyoming Supreme Court has said this is in order to ". . . eliminate the confusion and dispute existing before regarding stepchildren, adoption, legitimacy, lineage, and alienage."⁵⁹⁷

If the employee died with no surviving spouse or dependent children, but with one or two surviving parents who received at least one-half of his, her, or their financial support from the employee **at the time of injury, the surviving parent or parents receive a monthly payment for 60 months** until the parent or the survivor of them dies.

5.17 Amount of Death Benefit Award

The statute provides that in the case of death due to work-related causes **the death benefit award is not less than 80% of the statewide average monthly wage or 75% of the deceased employee's actual earnings at the time of injury (whichever is greater) to a ceiling of two times the statewide average monthly wage** for "the twelve month period immediately preceding the quarterly period in which the injury occurred . . ."⁵⁹⁸

5.18 Suicide

Beneficiaries of workers who committed suicide may be compensated where the suicide is a compensable injury.⁵⁹⁹

5.19 Hospital and Medical Benefits Generally

Workers' compensation statutes in the United States provide for payment of injured workers' *reasonable and necessary* medical expenses.⁶⁰⁰ According to the *Larson's* treatise, "[i]n forty-five states, District of Columbia and Puerto Rico, and under the

⁵⁹⁵ Heather v. Delta Drilling Co., [533 P.2d 1211](#) (Wyo. 1975); Workers' Compensation Div. v. Halstead, [795 P.2d 760](#) (Wyo. 1990)

⁵⁹⁶ Workers' Compensation Div. v. Halstead, 795 P.2d at 767.

⁵⁹⁷ Jim's Water Service v. Eayrs, [590 P.2d 1346](#), 1351 (Wyo. 1979) (reversed on other grounds)

⁵⁹⁸ W.S. § [27-14-403](#)(c)(iv)

⁵⁹⁹ See *supra*. in Treatise Section 3.19; see also Workers' Compensation Div. v. Ramsey, [839 P.2d 936](#) (Wyo. 1992).

⁶⁰⁰ WORKERS' COMPENSATION: BENEFITS, COVERAGE AND COSTS, THE NATIONAL ACADEMY OF SOCIAL INSURANCE 37 (2017), https://www.nasi.org/sites/default/files/research/NASI_Workers%20Comp%20Report%202017_web.pdf at 5; 8 Larson's Workers' Compensation Law § 94.03

Longshore and Harbor Workers' Act, and the Federal Employees' Compensation Act, such benefits are unlimited as to duration and amount."⁶⁰¹ While it is sometimes thought that the original statutes provided payment of medical expense, this actually is not true: the American Acts were modeled on the British Act, which, unlike the German Act, did *not* provide for payment medical treatment necessitated by work-related injury.⁶⁰² The United Kingdom, however, established universal health care in 1911, rendering compensation of medical expense through the workers' compensation system essentially moot.⁶⁰³

5.20 Medical, Hospital, and Ambulance Expenses in Wyoming

The allowance for payment of the medical and related expenses under the Wyoming statute is relatively straightforward and found in W.S. § [27-14-401](#):

(a) The expense of medical and hospital care of an injured employee shall be paid from the date of the compensable injury unless under general arrangement the employee is entitled to free medical and hospital care or the employer furnishes adequate and proper medical and hospital care to his employees.

(b) No fee for medical or hospital care under this section shall be allowed by the division **without first reviewing the fee for appropriateness and reasonableness in accordance with its adopted fee schedules.**

(c) Hospital care includes private nursing or nursing home care if approved by the director.

(d) **Medical and hospital care shall be obtained if possible within Wyoming, or in an adjoining state if the hospital or health care provider in the adjoining state is closer to the scene of the accident or to the usual place of employment of the employee than a hospital or health care provider in Wyoming,** unless otherwise authorized by the division. Except as otherwise authorized by the division, **reimbursements for travel** in obtaining medical and hospital care **shall not** be paid:

(i) For travel of **less than ten miles** one way except by ambulance travel as set forth in W.S. 27-14-401(e);

⁶⁰¹ 8 LARSON'S WORKERS' COMPENSATION LAW § 94.01

⁶⁰² 6 EDW. VII, C.58, FIRST SCHEDULE, AS REPRODUCED IN 2 HARRY B. BRADBURY 1735 (2nd. Ed. 1914).

⁶⁰³ See JOHN HENRY WATT, THE LAW RELATING TO NATIONAL INSURANCE: WITH AN EXPLANATORY INTRODUCTION 76 (Stevens and Sons 1913) (defining covered individuals as all persons employed).

(ii) For travel **other than that necessary to obtain the closest available medical or hospital care needed by the employee** except in those instances where travel within Wyoming is at a greater distance than travel outside of Wyoming;

(iii) In excess of the rates at which state employees are paid per diem and mileage.

(e) If transportation by **ambulance** is necessary, the division **shall allow a reasonable charge** for the ambulance service at a rate **not in excess of the rate schedule** established by the director under the procedure set forth for payment of medical and hospital care.

(f) Subject to subsection (h) of this section, **an employer or the division may designate health care providers to provide nonemergency medical attention to his employees or to claimants** under this act. Except as provided in subsection (h) of this section, **the employee may for any reason, select any other health care provider. If the employee selects a health care provider other than the one selected by the employer or the division, the employer or division may require a second opinion from a health care provider of their choice. The second opinion may include an independent medical evaluation, a functional capacity exam or a review of the diagnosis, prognosis, treatment and fees of the employee's health care provider.** The independent medical evaluation, a functional capacity exam or the review by the employer's health care provider **shall be paid for by the employer and the evaluation, a functional capacity exam or review by the division's health care provider shall be paid from the worker's compensation account.**

(g) The division may engage in and contract for medical bill review programs, medical case management programs and utilization review programs. The division may also negotiate with out-of-state health care providers regarding the payment of fees for necessary medical care to injured workers, not to exceed the usual, customary charges for the comparable treatment in the community where rendered or the amount payable for the same services by the worker's compensation fund or account of the state where rendered, whichever is less.

(h) In the case of an inmate employed in a correctional industries program authorized by W.S. 25-13-101 through 25-13-107 or

performing services pursuant to W.S. 7-16-202, the department of corrections shall select the health care provider for the inmate.

Sundry cases have been decided under these statutory provisions, a few of which seem worth discussing. To begin with, **venerable authority establishes that employees are entitled as a matter of both the Wyoming statute and the Wyoming Constitution to reasonable and necessary medical treatment occasioned by a work-related injury.**⁶⁰⁴ However, as the statutory language set forth above makes clear, and as Wyoming courts have emphasized, there are a few especially significant qualifications to the default right of reasonable and necessary medical care. First, **the Division is required to review bills in accordance with preestablished fee schedules before payment may be authorized.**⁶⁰⁵ Next, **there is clearly a strong statutory preference that medical and hospital care be within Wyoming, or in a nearby state if medical resources there are closer to the scene of the accident.**⁶⁰⁶

The Wyoming Supreme Court has also upheld Wyoming administrators' view that **"alternative" medicine is definitively not reasonable and necessary treatment.**⁶⁰⁷ In *Harboth v. Department of Workforce Services*,⁶⁰⁸ the Court upheld, as not arbitrary and capricious, the Medical Commission's determination that implantation of non-FDA-approved artificial discs at adjacent levels of the lumbar spine, *even if* not an "off-label" use of medical services, was unsupported by sufficient documentation of the procedure's safety and effectiveness (rendering the procedure "alternative medicine" for which benefits were properly denied). The Court reached this result even though surgery was *successful* and allowed the claimant to return to previous work duties with no restrictions and no pain medication.

On the other hand, "FDA approval of a medical device or treatment is not required to establish that it is reasonable and necessary; but, under Chapter 10, § 3 of the Division Rules, the Division may require a claimant requesting a non-FDA-approved medical device or treatment to produce reliable documentation of its safety and effectiveness against her specific medical condition."⁶⁰⁹ And "[a]n

⁶⁰⁴ Fuhs v. Swenson, [131 P.2d 333](#) (Wyo. 1942)

⁶⁰⁵ In re Armstrong, [991 P.2d 140](#) (Wyo. 1999); Moller v. Workers' Compensation & Safety Div., [12 P.3d 702](#) (Wyo. 2000) (upholding conclusion that personal items are not medical expenses unless approved in advance by Division).

⁶⁰⁶ Birch v. Workers' Safety & Compensation Div., [319 P.3d 901](#) (Wyo. 2014)

⁶⁰⁷ WY Rules and Regulations 053.0021.10 § 3; Workers' Compensation Division Rules, ch. 10, § 3.

⁶⁰⁸ [424 P.3d 1261](#) (Wyo. 2018)

⁶⁰⁹ *Id.* at 1271

appropriate diagnostic measure is not non-compensable merely because it fails to reveal an injury which is causally connected to an on-the-job injury.”⁶¹⁰

As discussed above in Section 3.10, **the second compensable injury rule may allow for coverage of future medical (and disability) benefits when it is more likely than not that a second injury has been caused by a first compensable injury.** Wyoming courts have recognized and continue to apply this principle.⁶¹¹ To repeat the point made in Section 3.10, great care should be taken to distinguish benefits for an original workers’ compensation claim—which are limited to a period of four years from the last benefit payment on that claim—from benefits in connection with a new injury caused by an original compensable claim. **A claimant seeking medical benefits for the second compensable injury is not (under current law) bound by the four year limitations period, nor is it clear whether there is a limitations period.**

Of course, any claimant for *future* medical benefits subsequent to a compensable work-related injury must establish that a current medical condition is causally related to that (or some) work-related injury.⁶¹² There is, however, a different causation standard in connection with the second compensable injury which was explained in some detail in *Hardy v. Workers’ Compensation Div.*:⁶¹³

In order to show that an injury qualifies under the second compensable injury principle, the claimant must show, by a preponderance of the evidence, that it is **more probable than not** that a causal connection exists between the first and second injuries . . . **This standard does not require the claimant to prove to a degree of medical certainty that the second injury is due solely to the first injury,** and medical testimony that establishes the first injury contributed to the second injury, or most likely caused the second injury, or probably caused the second injury suffices under this standard . . . However, medical testimony in **terms of “can,” “could,” or “possibly” is insufficient to meet a claimant’s burden of proof.**⁶¹⁴

⁶¹⁰ Snyder v. Workers’ Compensation Div., [957 P.2d 289](#) (Wyo. 1998)

⁶¹¹ Casper Oil Co. v. Evenson, [888 P.2d 221](#) (Wyo. 1995); Matter of Hall, [414 P.3d 622](#) (Wyo. 2018)

⁶¹² Spletzer v. Workers’ Safety & Compensation Div., [116 P.3d 1103](#) (Wyo. 2005)

⁶¹³ [394 P.3d 454](#) (Wyo. 2017)

⁶¹⁴ *Id.* at 458 (internal citations omitted)

5.21 Employee's Rights and Duties With Respect to Physician Selection

Workers with injuries compensable under the Act shall be provided reasonable and necessary health care benefits as a result of such injuries. A worker wishing to change treating health care providers while under treatment shall file a written request with the Division, stating all reasons for the change and the name of the intended new treating health-care provider. The Division shall send notice of the change to the employer, the worker, and the current and intended new treating health care providers.⁶¹⁵

Requests for reimbursement may be submitted to the Division by an injured worker for expense paid out-of-pocket for medical services deemed reasonable, necessary and directly related to the work-related injury on a form provided by the Division.⁶¹⁶

TTD benefits (and presumably other forms of indemnity benefits) shall be suspended if the worker fails to appear and cooperate in any examination or testing at an appointment with his or her health care provider, or one scheduled by the Division. Payment shall be suspended until such time as the worker appears at a subsequent rescheduled appointment.⁶¹⁷

The Wyoming statute has very little restriction on an injured employee's **initial, in-state** selection of a physician. Explanatory language from an older Wyoming Supreme Court opinion, *Dyna-Drill v. Wallingford*,⁶¹⁸ seems still to be good law in Wyoming:

In other states, the employee must submit to examination by the employer's physician, or by the physician of the worker's compensation department. Some states require the employer to furnish the medical treatment. See 2 Larson, Workmen's Compensation Law, s 61.12 (1976). Our Worker's Compensation Act is peculiar to our state. The Act requires the physician or hospital to give notice of acceptance of the case, but the choice of physician or hospital, at least initially, is that of the employee.⁶¹⁹

As explained at the end of the passage, is the requirement—still a feature of Wyoming law—that:

⁶¹⁵ WY Rules and Regulations 053.0021.7 § 3

⁶¹⁶ *Id.*

⁶¹⁷ *Id.*

⁶¹⁸ [605 P.2d 1301](#) (Wyo. 1980)

⁶¹⁹ *Id.* at 1303

Within thirty days after accepting the case of an injured employee and within thirty days after each examination or treatment, a health care provider or a hospital shall file without charge a written medical report with the division . . . The report shall state the nature of the injury, the diagnosis, prognosis and prescribed treatment. Any health care provider or hospital failing or refusing to file the report or transmit copies within the time prescribed by this subsection or presenting a claim for services not reasonably justified or which was not required as a result of the work related injury **shall forfeit any remuneration or award under this act for services rendered or facilities furnished the employee . . .**⁶²⁰

Of course, this is a right that properly inheres in the employee's treating physician and no duty appears imposed upon the employee. As also made plain in Section 5.20 of this Treatise **the freedom of selection is qualified in the case of out of state medical treatment.**

5.22 The Air Ambulance Controversy

In *EagleMed LLC v. Cox*,⁶²¹ the 10th Circuit Court of Appeals found that the federal Airline Deregulation Act preempts Wyoming's medical reimbursement schedule as it pertains to air ambulance expense.⁶²² The litigation surrounding *EagleMed* shone a national spotlight on what is normally a sleepy (if important) corner of state workers' compensation law. Other states have been facing a similar litigation conundrum in connection with workers' compensation rate regulation.⁶²³ The Circuit Courts consistently find that the ADA preempts all attempts by state workers' compensation regulators to set rates—any rates—applicable to air ambulance carriers. Driving the result is that air ambulance carriers are (curiously) under the ADA's jurisdiction. The ADA's aggressive preemption provision declares that states “may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to* a price, route, or service of an air carrier ...”⁶²⁴ In keeping with the ADA's aim to achieve maximum reliance on

⁶²⁰ W.S. § [27-14-501](#)

⁶²¹ [868 F.3d 893](#) (10th Cir. 2017)

⁶²² W.S. § [27-14-401](#)(e) applies to reimbursement ambulance services generally. No provision under the Wyoming Act specifically addresses air ambulance service reimbursement. The preemption issue arose because Wyoming treated air ambulance expense under the general ambulance reimbursement provision.

⁶²³ See e.g. *Valley Med Flight, Inc. v. Dwelle*, [171 F.Supp.3d 930](#) (Dist. North Dakota 2016); *Air Evac EMS, Inc. v. Sullivan*, [331 F.Supp.3d 650](#) (W.D. Texas 2018)

⁶²⁴ 49 U.S.C. § 41713(b). (The “related to” phraseology is strongly reminiscent of the preemption provision found in Section 514 of the Employee Retirement Income and Security act of 1974--ERISA).

competitive market forces, Congress sought to ensure that the states would not undo federal deregulation with regulation of their own by including a preemption provision prohibiting states from enacting or enforcing any law related to a price, route, or service of an air carrier.⁶²⁵ A full rehashing of the *EagleMed* litigation is beyond the scope of the present discussion. It may be enough to observe that air ambulance costs have been skyrocketing and that ultimately the state refused to pay full price, attempting to cap reimbursement to state-defined limits. As stated, the 10th Circuit rebuffed the effort.

Left undecided by *EagleMed* was what, precisely, was to happen post-preemption. On this question, the Circuit remanded to Wyoming officials. At the administrative level, hearing officials took the position that, with the fee schedule gone, the state was required to pay whatever the air ambulance companies charged. The state appealed, the attorney general arguing (essentially) that the state legislature would never have originally provided for reimbursement of air ambulance expense that was not reasonable.

Even if Wyoming could set an air ambulance fee ceiling, W.S. § [27-14-501](#)(a) states in relevant part, “**Fees or portions of fees for injury related services or products rendered shall not be billed to or collected from the injured employee.**” But it is difficult to see how the state (or any state contending with air ambulance expenses) can explicitly say anything at all about air ambulance services, let alone set rates for them.

5.23 Vocational Benefits

Vocational benefits are theoretically available under the Wyoming Workers’ Compensation Act, but the structure of the benefit suggests that most injured workers would prefer participating in the Federal/State vocational rehabilitation program under the Workforce and Innovation and Opportunity Act administered by the Rehabilitation Service Administration of the Department of Education.⁶²⁶

Under W.S. § [27-14-408](#), “[a]n injured employee may apply to the division to participate in a vocational rehabilitation program if” a work-related injury has caused or is reasonably expected to cause a permanent partial impairment that “will prevent the employee from returning to any occupation for which the employee has previous training or experience and in which the employee was gainfully employed at any time during the three year period before the injury.”⁶²⁷ Crucially, the employee must elect “in writing to accept vocational rehabilitation instead of any

⁶²⁵ *Dan’s City Used Cars, Inc. v. Pelkey*, [569 U.S. 251](#) (2013)

⁶²⁶ For a description see <https://www2.ed.gov/about/offices/list/osers/ras/wioa-reauthorization.html>

⁶²⁷ W.S. § [27-14-408](#)(a)(i)

permanent partial disability award under [W.S. 27-14-405](#)(h) and (j) arising from the same physical injury.”⁶²⁸ Furthermore, a vocational rehabilitation benefit “[s]hall not exceed five years or a total cost of thirty thousand dollars unless extended or increased for extenuating circumstances as defined by rule and regulation of the division.”⁶²⁹ It does not seem plausible that many employees would trade their entitlement to a permanent partial disability benefit for a maximum of \$30,000 of vocational rehabilitation benefits and for this reason this Treatise will not discuss them in further detail.

Vocational rehabilitation seems of greater financial significance in jurisdictions basing partial benefits on diminished earning capacity. In those jurisdictions an increase in earning capacity created by vocational rehabilitation has a direct impact on the amount of benefits payable to injured employees. While it is often claimed that vocational rehabilitation is generally considered part of a broad restitution for work-related injuries,⁶³⁰ a number of statutes (including Wyoming’s) do not appear to reflect such a restitutionary premise.

5.24 Permanent Disfigurement

W.S. [27-14-405](#)(k) states: “An employee incurring permanent disfigurement due to an injury to the face or head which affects his earning capacity or ability to secure gainful employment shall receive in proportion to the extent of the disfigurement, an additional physical impairment award not to exceed six (6) months of compensation payable monthly as provided by [W.S. 27-14-403](#)(c). Any previous disfigurement to the face or head of the employee shall be considered when authorizing the award.” This writer has been unable to locate significant case discussion of, or regulatory guidance on, the provision.

⁶²⁸ W.S. § [27-14-408](#)(a)(iv)

⁶²⁹ W.S. § [27-14-408](#)(e)(ii)

⁶³⁰ See 8 LARSON’S WORKERS’ COMPENSATION LAW § 95.01

6 Wyoming Workers' Compensation: Evidence and Procedure

6.1 Competency of Evidence Generally

As is often the case in workers' compensation cases conducted in administrative settings,

A hearing examiner in a worker's compensation hearing is not bound by the Wyoming Rules of Evidence . . . Instead, “irrelevant, immaterial or unduly repetitious evidence” is excluded . . . The decision regarding admissibility of evidence is committed to the sound discretion of the hearing examiner . . . A hearing examiner abuses his discretion when his decision “shocks the conscience of the court.”⁶³¹

Yet, this formulation is perhaps a bit too sweeping, for, as the Wyoming Supreme Court has also said in connection with an administrative agency's admitting hearsay evidence into the official administrative record,

[A]dministrative agencies acting in a judicial or quasi judicial capacity are not bound by technical rules of evidence that govern trials by courts or juries, and it is usually held that evidence will not be excluded merely because it is hearsay. Where hearsay evidence is by statute admissible in administrative proceedings, it is often held that it must be probative, trustworthy and credible; and, although it may not be the sole basis for establishing an essential fact and is insufficient to support an administrative decision it may be considered as corroborative of facts otherwise established.⁶³²

So while something less than a “shock to the conscience” may establish that an administrative decision hangs on insufficient evidentiary grounds—namely, something like a residuum rule⁶³³ is applied—it is very clear that most evidence in

⁶³¹ Matter of Everheart, [957 P.2d 847](#), 853 (Wyo. 1998) (internal citations omitted). The formulation is from the Wyoming Contested Case Procedures applicable in the state to administrative proceedings generally. *See infra*.

⁶³² Gray v. Workers' Safety & Compensation Div., [193 P.3d 246](#), 252 (Wyo. 2008) *quoting* Story v. Wyo. State Bd. Of Med. Exam'rs, [721 P.2d 1013](#), 1018 (Wyo. 1986)

⁶³³ The principle that an agency decision based partly on hearsay evidence will be upheld on judicial review only if the decision is founded on at least some competent evidence. BLACK'S LAW DICTIONARY (10th ed. 2014). In the realm of workers' compensation, according to *Larson's* treatise:

[T]he “residuum rule” has been followed in the majority of jurisdictions, although it has been under constant attack ever since it was announced. The controversy is

a Wyoming administrative proceeding will be admissible. Presumably, however, consistent with relaxed hearsay admissibility rules, *all* evidence not otherwise admissible under the formal rules of evidence must *generally* be “probative, trustworthy and credible; and probably may not be the sole basis for establishing an essential fact”⁶³⁴

6.2 Medical Causation Standard and When Medical Evidence is Necessary

As mentioned above in Section 3.9, an employee seeking compensation for a work-related injury must normally prove by competent medical authority **to a reasonable degree of medical probability** that his or her present condition is related to the injury.⁶³⁵ An employee seeking benefits for a *second* compensable injury has to demonstrate that it is ‘**more probable than not,**’ that a first (work-related) injury and the second injury are related.⁶³⁶

The causal connection between an accident or condition at the workplace is satisfied in the preceding two situations if the medical expert testifies that it is *more probable than not that the work contributed in “a material fashion to the precipitation, aggravation or acceleration of the injury.”*⁶³⁷ **Expressions of reasonable medical probability do not have to be expressed in any particular formula.** Testimony by the medical expert to the effect that the injury “most likely,” “contributed to,” or “probably” is the product of the workplace suffices under the established standard.⁶³⁸ “[U]nder either the ‘reasonable medical probability’ or ‘more probable than not’ standard, [a claimant succeeds] in demonstrating the causal connection by a preponderance of the evidence.”⁶³⁹

whether it should not be displaced by the rule permitting hearsay alone to support an award if, in all the circumstances, the hearsay evidence is of a character to satisfy a reasonable mind. It is significant to note that the same battle rages far beyond the compensation law field; for example, the Federal Administrative Procedure Act has codified the view permitting a finding to be based on hearsay, while the Model State Administrative Procedure Act would in effect retain the residuum rule

12 LARSON’S WORKERS’ COMPENSATION LAW § 127.02 (internal citations omitted)

⁶³⁴ See *supra*. The Wyoming workers’ compensation law on the competency of evidence is sparse. For the *Larson*’s discussion see 12 LARSON’S WORKERS’ COMPENSATION LAW § 127.02.

⁶³⁵ W.S. § 27-14-605(c)(ii).

⁶³⁶ In re Kaczmarek, [215 P.3d 277](#), 282 (Wyo. 2009) *quoting* Pino v. Workers’ Safety & Comp. Div., [996 P.2d 679](#), 685 (Wyo.2000)

⁶³⁷ Hall v. Workers’ Comp. Div., [37 P.3d 373](#), 378 (Wyo. 2001) *quoting* Pino v. Workers’ Safety & Comp. Div., *supra*., 996 P.2d at 685 (Wyo.2000)

⁶³⁸ *Id.*

⁶³⁹ *Id.*

In contrast, as mentioned above in Section 3.10, an employee seeking to *modify an original award* for payment of *additional* benefits must prove by competent medical authority and **to a reasonable degree of medical certainty** (unlike the “probably” or “most likely” initial causation formulation discussed in the beginning of this section) that a disabling condition is **directly related** to the original injury

While the claimant has the burden of proving every element of a claim, and this frequently requires resort to medical evidence—indeed, where a medical question is complex, the need for medical testimony is enhanced⁶⁴⁰—in an initial claim “medical testimony is **not** required if it is **not** essential to establish a causal connection between the accident and the injury.”⁶⁴¹ This principle has been more broadly recognized in the *Larson’s* treatise. Indeed, the concept has been applied in the context of both causation and both the existence and extent of disability. “[T]he causal connection between an injury, such as a fracture of the back, and ensuing disability that had not existed before the injury, may sometimes be established without medical support . . . The same may be true in certain cases involving the question of existence and even extent of disability.”⁶⁴²

The lines are not always easy to draw. For example, in a recent case, *Stevens v. Workers’ Safety & Compensation Div.*,⁶⁴³ the Wyoming Supreme Court upheld the Division’s denial of a claim the employee argued did not require medical evidence, given the close connection between a work-related event and subsequent physical symptoms. Stevens slipped and fell down a flight of stairs at work.⁶⁴⁴ All of her early reports of injury pertained to her left hand only.⁶⁴⁵ When she returned to work four days later, she felt pain in her *right hip* but thought it would go away.⁶⁴⁶ About a month after the fall, Stevens, for the first time, reported pain in her right hip to her doctor. About two and half months after the fall, the hip pain intensified, and Stevens had diagnostic tests performed that revealed an “AVN in the femoral head of her right hip. (AVN is the death of a bone due to lack of blood supply).”⁶⁴⁷ Her doctor, Rork, opined, “This is probably a post-traumatic event related to the slip and fall accident of 10/26/10.”⁶⁴⁸ Dr. Rork, following a subsequent examination, also said in office notes, “[Mrs. Stevens] was complaining of hip pain that occurred at the time of the initial injury, this was probably overshadowed by the pain in her left hand. What has occurred is that she has gone on to an AVN which may or may

⁶⁴⁰ *Murray v. Workers’ Safety & Comp. Div.*, [993 P.2d 327](#), 332 (Wyo. 1999)

⁶⁴¹ *Hansen v. Mr. D’s Food Center*, [827 P.2d 371](#) (Wyo.1992)

⁶⁴² *See* 12 LARSON’S WORKERS’ COMPENSATION LAW § 128.02

⁶⁴³ [338 P.3d 921](#) (Wyo. 2014)

⁶⁴⁴ *Id.* at 923

⁶⁴⁵ *Id.*

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.* at 924

⁶⁴⁸ *Id.*

not require surgical intervention.”⁶⁴⁹ Radiologists’ reports and interpretations also suggested arthritic changes.⁶⁵⁰ Eventually,

the femoral head on her right hip collapsed due to the AVN progression, and on December 14, 2011, Mrs. Stevens received a total right hip replacement . . . On February 18 and March 1, 2011, the Division issued its Final Determinations, denying all payments for Mrs. Stevens’ hip-related treatment based on the conclusion that “the right hip is not related to the original work injury to the left hand[.]”⁶⁵¹

Ultimately, the case against Stevens was built on her failure to report hip pain at the time of her original injury and is, in many respects, a standard “substantial evidence” case.⁶⁵² But for purposes of this section the case is significant for upholding the principle that,

The finder of fact is not necessarily bound by the expert medical testimony.... It is the hearing examiner’s responsibility, as the trier of fact, to determine the relevancy, assign probative value and ascribe the relevant weight given to medical testimony. The hearing examiner is also in the best position to judge the weight to be given to the medical evidence. The trier of fact may disregard an expert opinion if he finds the opinion unreasonable or not adequately supported by the facts upon which the opinion is based.⁶⁵³

The fact finder below, responding to the claimant’s argument, explicitly distinguished the case from the prior Wyoming Supreme Court opinion in *Murray v. Workers’ Compensation Div.*⁶⁵⁴ In *Murray*, a plant operator at the Chevron, Inc., Carter Gas Plant developed an outbreak of severe hives soon after drawing “a routine sample of raw gas.”⁶⁵⁵ The administrative fact finder concluded “that *Murray* is distinguishable in that the injury in the *Murray* case occurred within 15 or 20 minutes of the work related incident. The onset of Stevens[’] hip injury, and specifically her AVN is not so clear cut.”⁶⁵⁶ The fact finder thought the case closer

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.*

⁶⁵¹ *Id.*

⁶⁵² *Id.* at 930 (“If, in the course of its decision making process, the agency disregards certain evidence and explains its reasons for doing so based upon determinations of credibility or other factors contained in the record, its decision will be sustainable under the substantial evidence test.” *Dale v. S & S Builders, LLC*, . . . 188 P.3d 554, 561 (Wyo.2008).”)

⁶⁵³ *Id.* at 929 *citing* *Little v. Dep’t. of Workforce Servs.*, [308 P.3d 832](#), 843 (Wyo. 2013)

⁶⁵⁴ *See supra.*

⁶⁵⁵ *Murray, supra.*, 993 P.2d at 332

⁶⁵⁶ *Stevens, supra.*, at 927

to the Supreme Court's opinion in *Langberg v. Workers' Compensation Div.*,⁶⁵⁷ where a work-related injury was found to have *materially aggravated* a preexisting bone disease in a manner resulting in a compensable disability.⁶⁵⁸ Despite the ultimate finding of disability, the Court upheld the administrative determination that the bone disease, in itself, was not compensable.⁶⁵⁹ The Court found *Stevens* more complex than *Murray*; in *Stevens*,

The two experts disagreed regarding the cause of Mrs. Stevens' AVN. Mrs. Stevens made no documented report of her hip problems for over a month after her fall, and did not seek treatment for more than two months after the fall. While her co-workers testified that Mrs. Stevens immediately indicated pain in her hip following the injury, this testimony conflicted with the absence of documentation of any hip pain. Thus, the hearing examiner gave little weight to their testimony regarding the immediate onset of hip pain following Mrs. Stevens' fall. "Credibility determinations are the unique province of the hearing examiner, and we eschew re-weighing those conclusions."⁶⁶⁰

The takeaway from the discussion seems to be that medical evidence (which a hearing officer is generally free to accept or reject) will more likely be required where the etiology of a condition is complex and where there has been substantial passage of time between an arguably work-related injury and the onset of disabling symptoms. Put differently, when a single incident is alleged to have caused an injury, medical testimony may not be required to establish causation.⁶⁶¹ Again, this seems consistent with the *Larson's* treatise: "When the injury is not caused by a sudden and unexpected event, however, such as the onset of carpal tunnel syndrome, lay testimony alone will generally not be sufficient to support an award of compensation benefits."⁶⁶²

According to recently reaffirmed Wyoming Supreme Court jurisprudence, an employee's burden of proof in a workers' compensation case consists of two components: **the burden of production and the burden of persuasion.**⁶⁶³ The burden of production "involves the obligation of a party to present, at the

⁶⁵⁷ [203 P.3d 1098](#) (Wyo.2009)

⁶⁵⁸ *Langberg*, *supra*. at 1104

⁶⁵⁹ *Id.*

⁶⁶⁰ *Stevens*, *supra*. at 933

⁶⁶¹ *Accord* *Hayes v. Workers' Safety & Comp. Div.*, [307 P.3d 843](#), 849 (Wyo. 2013) *Hampton v. Workers' Safety & Comp. Div.*, [296 P.3d 934](#), 938 (Wyo. 2013); *Thornberg v. Workers' Comp. Div'n*, [913 P.2d 863](#), 867 (Wyo. 1996).

⁶⁶² 12 LARSON'S WORKERS' COMPENSATION LAW § 128.02

⁶⁶³ *Boyce v. Dept. of Workforce Services*, [402 P.3d 393](#), 400 (Wyo. 2017) (internal citations omitted)

appropriate time, evidence of sufficient substance on the issue involved to permit the fact finder to act upon it.”⁶⁶⁴ In turn, the burden of persuasion is “the burden of persuading the trier of fact that the alleged fact is true.”⁶⁶⁵ In simplified terms, where a claimant is required to *produce* medical evidence she must produce it or suffer likely dismissal of the claim. But **mere production of evidence does not guarantee persuasion** of the **fact finder** who, as will also be discussed in the next section on conflicting evidence, **has wide latitude to credit or discredit medical evidence**. The *Larson’s* treatise points out that many cases across the country have upheld administrative awards that expressly *contradicted* record medical evidence.⁶⁶⁶

However, in Wyoming, as in other states, rejection of medical testimony is bounded by a form of judicial review of administrative action requiring some articulation of rationality, a topic that will be taken up later in the chapter. In *In re Vandre*,⁶⁶⁷ for example, the Wyoming Supreme Court reversed the decision of the administrative fact finder rejecting the medical opinion of the claimant’s expert that a work accident exacerbated an underlying chronic obstructive pulmonary disease.⁶⁶⁸ The Court found that, contrary to what the hearing examiner contended, the expert had explained the basis for his opinion (both in writing and in testimony);⁶⁶⁹ had not simply been acting as the claimant’s “advocate,” restating Wyoming law holding that the criticism that a treating physician is acting as an advocate for his patient “could be said of any treating physician and, consequently, does not justify a wholesale disregard of her testimony;”⁶⁷⁰ was not subject to being completely discounted merely “because he is a family practice physician rather than a pulmonologist;”⁶⁷¹ and was not, in fact, “apparently unaware of the extent of [the claimant’s] smoking, even while he was treating [the claimant] and advising [claimant] to stop smoking.”⁶⁷² Accordingly, the Court unusually ordered remand of the decision to the fact finder “for entry of an order awarding benefits for the treatments covered by the four final determinations at issue herein.”⁶⁷³

6.3 Conflicting Medical Evidence

It is very common for medical evidence in workers’ compensation cases to conflict. Often, it is diametrically opposed. The *Larson’s* treatise seems to classify cases

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.*

⁶⁶⁶ 12 LARSON’S WORKERS’ COMPENSATION LAW § 128.03

⁶⁶⁷ [346 P.3d 946](#) (Wyo. 2015)

⁶⁶⁸ *Id.* at 961

⁶⁶⁹ *Id.* at 960

⁶⁷⁰ *Id.* at 960 *citing* Glaze v. Workers’ Safety & Comp. Div., [214 P.3d 228](#), 235 (Wyo. 2009)

⁶⁷¹ *Id.* at 961

⁶⁷² *Id.*

⁶⁷³ *Id.*

falling into this category—or rather classifies *awards* made in such a situation resolving the conflict—as awards “without medical testimony” *or* awards “contradicting medical testimony.”⁶⁷⁴ In many cases, however, an award will “contradict” one medical party’s testimony and embrace another party’s medical testimony *completely*. For relative outsiders to the system (law students, for example), it is hard to escape the conclusion that parties simply “doctor shop” until they obtain the desired medical opinion. He or she with the greatest resources obviously has an advantage in such a system. In the venerable 1954 text *Workmen’s Compensation*, authored by Somers and Somers,⁶⁷⁵ the mélange of competing medical opinions and party interests were collectively termed “court house medicine.”⁶⁷⁶ The same authors quoted another book, written in 1936, as follows: “[E]xperience has shown that when the physician is selected by either interested party the evidence in nine cases out of ten, and sometimes in the tenth, will unduly favor the interests of that party.”⁶⁷⁷

As Somers and Somers also noted in their text, typical proposals to assure disinterested medical opinion are to “have the State provide a fulltime medical staff to measure disability and resolve the ever current and difficult questions of causal relations. Or else, to have a panel of doctors in private practice but paid by the State when called on for expert medical testimony.”⁶⁷⁸ The authors concluded that such systems had been attempted since the early days of workers’ compensation under the British system but had not to that time proved satisfactory, and not only because of the partisan nature of medical evidence development,

Conflicting medical testimony is, of course, not solely a product of dishonesty or prejudice. A large part of the difficulty is caused by disagreements over medical theory (e.g., the effect of exertion on coronary thrombosis). The frequent disagreements among the impartial medical review boards in England emphasize the role of such legitimate differences. In addition there is the sheer incompetence of many medical witnesses.⁶⁷⁹

Nevertheless, a number of jurisdictions, including Wyoming, have attempted to address the problem of conflicting evidence through use of “neutral” systems. Wyoming, for example, has created a “**Medical Commission**,” an administrative

⁶⁷⁴ See generally 12 LARSON’S WORKERS’ COMPENSATION LAW § 128.02 & § 128.03

⁶⁷⁵ HERMAN MILES SOMERS AND ANNE RAMSAY SOMERS, WORKMEN’S COMPENSATION, PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY (John Wiley & Sons 1954)

⁶⁷⁶ SOMERS AND SOMERS, WORKMEN’S COMPENSATION at 174.

⁶⁷⁷ *Id.* at 176 *quoting* WALTER DODD, ADMINISTRATION OF WORKMEN’S COMPENSATION (Commonwealth Fund, N.Y. 1936)

⁶⁷⁸ SOMERS AND SOMERS, WORKMEN’S COMPENSATION at 176

⁶⁷⁹ *Id.* at 177

body that will be explained more fully in a subsequent section.⁶⁸⁰ Other states utilize, by various names, a system of “impartial medical examiners.” (IMEs). Practitioners must take great care in this area. An “independent” medical examiner sounds like a physician performing a workers’ compensation-related medical examination who is “independent” of the parties. But in Wyoming, “independent” seems to mean *independent* of the claimant’s treating doctor – in other words a “second” opinion.⁶⁸¹ It is worth noting that Wyoming law also appears to allow a hearing officer the discretion to appoint an “impartial” medical examiner,⁶⁸² but the provision seems an anachronism in light of the creation of the Medical Commission.⁶⁸³ Other states use the term “independent” medical examination to mean an “impartial” examination.⁶⁸⁴ Some states use different terminology altogether, but the gist of the process is similar.⁶⁸⁵ Each of the structures is meant to deal with the pervasive reality of conflicting medical evidence in workers’ compensation cases. Of course, although beyond the scope of this entry, a second important question would be to determine the *weight* to be afforded the testimony. For example, in Florida, the “expert medical advisor’s” report (another term for an IME) is entitled to a “presumption of correctness.”⁶⁸⁶ The findings of an independent medical examiner in Maine are required to be adopted by its workers’ compensation board “unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings.”⁶⁸⁷ Wyoming—for better or worse—has (as will be discussed shortly) circumnavigated that entire problem by, in effect, transforming medical experts from witnesses into governmental fact finders, so the question of the “weight of evidence” becomes, instead, the extent of judicial deference to the Medical Commission’s evaluation of witnesses. The structure is quite different, for example, from Utah. The Utah system also utilizes

⁶⁸⁰ See this Treatise Section 6.10

⁶⁸¹ The term, though mentioned, is not defined in either W.S. § [27-14-401](#)(f) or Department of Workforce Services, Workers’ Compensation Division Rule 10, Sec. 15 (053.0021.10.06072019). In the second paragraph of the just mentioned Sec. 15, the language specifically refers to “second opinions.”

⁶⁸² W. S. § [27-14-604](#)

⁶⁸³ See this Treatise at Section 6.10

⁶⁸⁴ The situation in Colorado is especially messy, for some independent medical examiners are procured by employers or insurance carriers (“respondent independent medical examination”) and others are ordered by the Colorado administrative agency subsequent to administrative appeal of maximum medical improvement determinations or impairment ratings (“division independent medical examination”). C.R.S. 8-43-404. Maine, on the other hand, limits service as an independent medical examiner to physicians who have not examined the employee at the request of an insurance company, employer or employee during the previous 52 weeks. M.R.S.A Title 39-A § 312. Massachusetts takes a very different route by maintaining a public roster of “impartial” medical examiners.

⁶⁸⁵ In Florida, an “independent medical examiner” is a party expert while an expert medical advisor (“EMA”) is a neutral. See Fl. St. 440.13 (1)(i), 5(a) & (9). In California, a neutral medical examiner is called a “QME,” a qualified medical evaluator. Calif. Labor Code § 4061.

⁶⁸⁶ Fl. St. § 440.13(9)(c), see *Abreu v. Riverland Elementary School/Broward County School Board*, No. 1D17-2755, (Fla. 1st DCA, June 18, 2019).

⁶⁸⁷ 39-A M.R.S.A. §312

medical panels, but the administrative judge has discretion to appoint the panel and “may base the administrative law judge's finding and decision on the report” and is not “bound” by it.⁶⁸⁸ In other words, the panel physicians retain their status as *witnesses* and are not fact finders.

Whether medical evidence is presented to the Medical Commission or the Office of Administrative Hearings as administrative fact finders, the consideration to be given medical opinion testimony is the same:

When presented with medical opinion testimony, **the hearing examiner**, as the trier of fact, **is responsible for determining relevancy, assigning probative values, and ascribing the relevant weight to be given to the testimony** . . . In weighing the medical opinion testimony, the fact finder considers: (1) **the opinion**; (2) **the reasons**, if any, given for it; (3) **the strength of it**; and (4) **the qualifications and credibility of the witness** or witnesses expressing it.⁶⁸⁹

One final point on conflicting evidence in a monopolistic workers’ system. Because the State of Wyoming is **both** the adjudicator of workers’ compensation disputes **and** a party to the same disputes, it is very difficult to see how a “neutral” system for evaluating conflicting medical evidence can be said to exist. The Medical Commission is not a “witness.” It evaluates medical evidence that is exclusively party-derived with one of the parties to dispute consisting of the State and the other a citizen-employee. The Due Process tensions inherent in the structure are self-evident.

6.4 Collateral Estoppel and Res Judicata

Because the medical condition of a human being is seldom static, issues at times arise as to whether and how prior legal determinations respecting work-related disability impact current legal determinations on the disability of the same claimant. The doctrines of collateral estoppel⁶⁹⁰ and res judicata⁶⁹¹ apply in the

⁶⁸⁸ UT ST § 34A-2-601(e)(i) & (e)(ii)

⁶⁸⁹ Workers’ Compensation Claim of Rodgers v. Workers’ Safety & Compensation Div., [135 P.3d 568](#), 576 (Wyo. 2006) *citing* Decker v. Medical Comm’n, [124 P.3d 686](#), 697 (Wyo.2005) *quoting* Baxter v. Sinclair Oil Corp., [100 P.3d 427](#), 431 (Wyo.2004) and Bando v. Clure Bros. Furniture, [980 P.2d 323](#), 329 (Wyo.1999)

⁶⁹⁰ The binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based. BLACK’S LAW DICTIONARY (11th ed. 2019)

⁶⁹¹ An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. BLACK’S LAW DICTIONARY (11th ed. 2019)

administrative context.⁶⁹² The Wyoming Supreme Court has noted that although the doctrines are often used interchangeably, in Wyoming “collateral estoppel is deemed to be more often appropriately used in an administrative setting.”⁶⁹³ Although many cases *speak* of res judicata in the administrative context, in practice they *actually* apply collateral estoppel because the controversy in question concerned relitigation of previously litigated *issues*.⁶⁹⁴ Res judicata on the other hand bars relitigation of *previously litigated claims or causes of action*.⁶⁹⁵ According to the Wyoming Supreme Court, since administrative decisions deal primarily with issues rather than causes of action or claims, collateral estoppel is the appropriate doctrine.⁶⁹⁶

With regard to collateral estoppel, the Wyoming Supreme Court considers four factors in determining whether the doctrine applies:

- (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action;**
- (2) whether the prior adjudication resulted in a judgment on the merits;**
- (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and**
- (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.**⁶⁹⁷

To determine whether **res judicata** applies, Wyoming courts analyze the following four factors:

- (1) identity in parties;**
- (2) identity in subject matter;**
- (3) the issues are the same and relate to the subject matter; and**

⁶⁹² Slavens v. Bd. of County Comm'rs for Uinta County, [854 P.2d 683](#), 685–86 (Wyo.1993).

⁶⁹³ Jacobs v. Workers' Safety & Comp. Div., [216 P.3d 1128](#), 1132 (Wyo. 2009)

⁶⁹⁴ See e.g. Salt Creek Freightways v. Wyo. Fair Employment Practices Comm'n, [598 P.2d 435](#), 437 (Wyo.1979)

⁶⁹⁵ Parklane Hosiery Co., Inc. v. Shore, [439 U.S. 322](#), 326, n.5 (1979)

⁶⁹⁶ Slavens, *supra*. at 854 P.2d at 685–86

⁶⁹⁷ Wilkinson v. Workers Safety & Comp. Div., [991 P.2d 1228](#), 1234 (Wyo.1999) *see also* Tozzi v. Moffett, [430 P.3d 754](#), 760 (Wyo. 2018)

(4) the capacities of the persons are identical in reference to both the subject matter and the issues between them.⁶⁹⁸

Res judicata bars not just issues that were actually litigated in the prior action, but issues that **could have** been raised in that action.⁶⁹⁹

The difficulty with applying these concepts to workers' compensation cases is that disability is ongoing and a workers' compensation adjudication reflects disability at only one point in time. If the disability is sufficiently compelling—say a claimant is a double amputee who is adjudicated to be permanently disabled and in need of lifetime medical care—it may be perfectly clear that the initial adjudication will be all-encompassing. But this not always the case. Any one of the required elements of either the collateral estoppel or res judicata doctrines could impact a case in unpredictable ways.

In *Porter v. Department of Workforce Services*,⁷⁰⁰ for example, the Division denied a claim for benefits in August 2014.⁷⁰¹ The claimant did not appeal the denial or request a hearing.⁷⁰² The claimant did, however, object, two months later, to the Division's refusal to pay the costs related to an MRI of the left knee that had been the subject of the original claim.⁷⁰³ The Office of Administrative Hearings upheld on summary judgment the denial of the Division's denial, ruling that the claimant "could not challenge the denial of benefits for the MRI because she did not object to the Division's August 2014 determination that her injury was not a work-related injury."⁷⁰⁴

On appeal from the district court's affirmance of the OAH ruling, the Wyoming Supreme Court reversed.⁷⁰⁵ Framing the issue as whether the claimant "was collaterally estopped from challenging the Division's October 2014 final determination because she failed to timely object to the Division's August 2014 compensability determination," the Court noted its extensive prior rulings that "an uncontested Division determination, either awarding or denying benefits, will not be given preclusive effect with respect to future determinations and objections."⁷⁰⁶ The Division attempted to distinguish the prior rulings by arguing that the provision governing initial compensability reflected an intention to treat the compensability

⁶⁹⁸ *Moore v. Moore*, [835 P.2d 1148](#), 1151 (Wyo. 1992)

⁶⁹⁹ *Tozzi v. Moffett*, *supra.*, 430 P.3d at 760.

⁷⁰⁰ [396 P.3d 999](#) (Wyo. 2017)

⁷⁰¹ *Id.* at 1000

⁷⁰² *Id.*

⁷⁰³ *Id.*

⁷⁰⁴ *Id.*

⁷⁰⁵ *Id.*

⁷⁰⁶ *Id.* citing *Matter of Claim of Hood v. Dep't of Workforce Servs.*, [382 P.3d 772](#), 777 (Wyo. 2016); *Osenbaugh v. Workers' Safety & Compensation Div.*, [10 P.3d 544](#), 549 (Wyo. 2000); and *Tenorio v. Workers' Compensation Div.*, [931 P.2d 234](#), 240 (Wyo. 1997)

determination as finally and fully litigated if a timely objection was not made to *that* determination. The Court rejected the argument both because “the legislature expressed a clear intention to make the OAH or Medical Commission the ‘court of competent jurisdiction’ for these determinations,”⁷⁰⁷ and also because “the preclusive effect of the Division’s determination . . . makes sense in light of the purpose served by the principle of collateral estoppel.”⁷⁰⁸ Simply put, the refusal to object was not a “prior adjudication [that] resulted in a judgment on the merits.”⁷⁰⁹

But just as the Division’s uncontested *denial* of benefits is not entitled to preclusive effect under collateral estoppel principles, neither is its uncontested *award* of benefits entitled to such effect. In *Matter of Claim of Hood*,⁷¹⁰ the Wyoming Supreme Court upheld the Medical Commission’s determination that a claimant had not proven that a 2013 need for back surgery was directly related to a 2008 neck injury and resulting surgery.⁷¹¹ Subsequent to the neck surgery, a fusion, the claimant suffered from repeated syncopal episodes.⁷¹² “[T]he Division paid for all of the treatment [the claimant] received for injuries suffered when he passed out and fell, and it paid for all of the diagnostic tests and evaluations conducted in an attempt to determine the cause of the syncope.”⁷¹³ The claimant alleged that he suffered a lower back injury from one of the episodes in about February 2013 and in August 2013 the claimant sought authorization from the Division to have surgery performed in connection with the lower back injury.⁷¹⁴ After physicians failed to identify the cause of the syncopal episodes, the Division denied payment for the lower back surgery.⁷¹⁵ The Medical Commission upheld the denial because medical causation was not established.⁷¹⁶ Responding to the claimant’s contention that the Division was estopped from denying his claim in light of its earlier payments, the Wyoming Supreme Court quoted a passage from its opinion in *Jacobs v. Workers’ Safety & Comp. Div.*,⁷¹⁷

The Division’s uncontested award of benefits is not a final adjudication that precludes the Division from challenging future benefits . . . The statutory language of the Wyoming Workers’ Compensation Act confers finality on the benefits paid to the employee through uncontested determinations, subject to [certain statutory] exceptions. The statutory language, however, does not

⁷⁰⁷ Porter, *supra.*, 396 P.3d at 1008

⁷⁰⁸ *Id.* at 1007-1008

⁷⁰⁹ *See supra.*

⁷¹⁰ [382 P.3d 772](#) (Wyo. 2016)

⁷¹¹ *Id.* at 773

⁷¹² *Id.* at 774. A syncope is a temporary loss of consciousness.

⁷¹³ *Id.*

⁷¹⁴ *Id.*

⁷¹⁵ *Id.* at 775

⁷¹⁶ *Id.*

⁷¹⁷ *Jacobs v. Workers’ Safety & Comp. Div.*, [301 P.3d 137](#) (Wyo. 2013)

guarantee a claimant future benefits on the basis of a . . . prior award nor does public policy favor the payment of an unjustified worker's compensation claim. . . Therefore, an employee/claimant must prove that he was entitled to receive benefits for all outstanding claims despite previous awards for the same injury.⁷¹⁸

These cases bear a certain relationship to cases from other states, notably Massachusetts⁷¹⁹ and Vermont⁷²⁰, in which insurance carriers and employers are authorized to pay claims preliminarily “without prejudice.” Early payment of such claims does not estop the payors from later merits challenges.

Outside of the context of the preclusive effect of unadjudicated Division determinations, the Wyoming Supreme Court's opinion in *Taylor v. Workers' Safety & Comp. Div.*⁷²¹ considered application of the doctrines of preclusion in the context of an Office of Administrative Hearings decision. In *Taylor*, a claimant had suffered a work-related injury in 1991.⁷²² In connection with the injury, the Division had approved chiropractic treatment until 1998, when it began denying payment for the treatment on the grounds that it was no longer related to the 1991 injury.⁷²³ Following appeal of the denial, the Office of Administrative Hearings, in 1998, reversed the Division “and concluded that his chiropractic treatment was related to the 1991 injury and ‘until further medical evidence would warrant a change, [the claimant] is entitled to receive medical benefits for continuing chiropractic care received twice per month.’”⁷²⁴ Eventually, in 2007, the Division again denied coverage.⁷²⁵ This time, the Medical Commission upheld the denial, accepting the testimony of Division experts that the chiropractic treatment no longer related to the original injury, pointing in particular to a nonwork-related motorcycle injury in 1987—though the claimant had suffered another automobile accident in 1999.⁷²⁶ The claimant appealed and, as germane to this discussion, argued “that the Commission committed an error of law when it considered any evidence that was, or could have been, presented at the 1998 contested case hearing. In particular, he challenges the Commission's reliance on evidence of his preexisting injury incurred in the 1987 motor vehicle accident to deny his claims for chiropractic care.”⁷²⁷ From the claimant's point of view, the Office of Administrative Hearings had implicitly concluded that the 1987 motorcycle

⁷¹⁸ Hood, *supra.*, at 777-778 quoting *Jacobs v. Workers' Safety & Comp. Div.*, *supra.*, 301 P.3d at 148

⁷¹⁹ M.G.L. Ch. 152 § 8(1)

⁷²⁰ Vt. St. T. 21 § 662

⁷²¹ [233 P.3d 583](#) (Wyo. 2010)

⁷²² *Id.* at 585

⁷²³ *Id.*

⁷²⁴ *Id.*

⁷²⁵ *Id.*

⁷²⁶ *Id.*

⁷²⁷ *Id.* at 586

accident was not a disqualifying preexisting condition when it ordered continuation of the chiropractic treatment in 1998. Accordingly, on the claimant's theory, the Medical Commission was collaterally estopped from reaching a contrary finding.⁷²⁸

The Wyoming Supreme Court disagreed. The Court's collateral estoppel analysis requires little discussion. It was simply not clear from the 1998 administrative proceeding that "the OAH considered the effect of [the claimant's] pre-existing shoulder and neck injury incurred in the 1987 accident on his 1991 work related injury at the hearing."⁷²⁹ Accordingly, the first prong of the collateral analysis, the issue decided in the prior adjudication was not identical with the issue presented in the present action.⁷³⁰ The Court's res judicata analysis seems more strained. As the Court acknowledged, "There is, of course, a general rule that '[c]laim preclusion principles of res judicata bar the relitigation of issues that were or could have been raised in the first action.' However, our statutes and case law indicate that application of the general principle is limited in the workers' compensation context."⁷³¹ It seems obvious that the question of causal contribution of the 1987 motorcycle accident to the claimant's disability in 1998 *could have been brought* by the Division. It seems an unsatisfying answer to this dilemma to recite that "the Wyoming legislature has made it very clear that workers' compensation claims can, and should, be separately decided."⁷³² The Court does not expand upon when res judicata *does* apply in workers' compensation claims, and taken to its logical conclusion the "should be separately decided" language may mean res judicata *never* applies. It is to be hoped that the Court will clarify the law in this area. Of course, the entire *Taylor* case might have been resolved under principles of *continuing causation*: the nonwork-related motorcycle injury may not have been a superseding cause of disability in 1998, but may later have become such a cause.⁷³³ Preclusion would be immaterial.

6.5 Judicial Notice

The Wyoming **Contested Case Procedures**,⁷³⁴ which, as will be discussed in the next section, govern workers' compensation adjudication in Wyoming, define the scope of judicial notice in Wyoming workers' compensation cases:

⁷²⁸ *Id.* at 587

⁷²⁹ *Id.*

⁷³⁰ *Wilkinson v. Workers Safety & Comp. Div.*, [991 P.2d 1228](#), 1234 (Wyo.1999) see also *Tozzi v. Moffett*, [430 P.3d 754](#), 760 (Wyo. 2018)

⁷³¹ *Taylor*, *supra.*, 233 P.3d at 587 *quoting* *Cermak v. Great West Cas. Co.*, [2 P.3d 1047](#), 1054 (Wyo.2000).

⁷³² *Taylor*, *supra.*, 233 P.3d at 588

⁷³³ See generally 1 LARSON'S WORKERS' COMPENSATION LAW § 10.02

⁷³⁴ Wyo. Stat. Ann. § 16–3–101 et seq.

Notice may be taken of judicially cognizable facts. In addition notice may be taken of technical or scientific facts within the agency's specialized knowledge or of information, data and material included within the agency's files. The parties shall be notified either before or during the hearing or after the hearing but before the agency decision of material facts noticed, and they shall be afforded an opportunity to contest the facts noticed.⁷³⁵

These general rules are straightforward, but cases implicating the principles occasionally arise. Thus, in *Workers' Compensation Claim of Rodgers v. Workers' Safety & Compensation Div.*, a claimant challenged the Division's refusal to pay a claim for benefits for the treatment of gastrointestinal problems allegedly caused by pain medications for a work-related back injury.⁷³⁶ The Medical Commission upheld the Division's denial of benefits, but was itself reversed by the Wyoming Supreme Court for a number of problems the Court found with the Commission's fact finding.⁷³⁷

One such problem was that the Medical Commission had taken judicial notice of a contested fact. A material issue to the case was when the claimant's "esophageal stricture" (narrowing of the esophagus) had first appeared.⁷³⁸ The claimant presented evidence that the stricture had occurred early in relation to his consuming of pain medication,⁷³⁹ which suggested a causal relationship between the pain medication and the stricture. The Medical Commission panel posited an alternative theory, however: "This Panel notes that a Schatzki's ring is also known as a lower esophageal ring and generally consists [of] thin rings of tissue that occur in the lower (distal) esophageal junction and is generally associated with hiatal hernia and is not caused by reflux."⁷⁴⁰ But as the Court noted, "[t]he record contains no information describing a Schatzki's ring or its cause, and [the claimant] therefore argues that the Medical Commission improperly took judicial notice of a contested fact when it made this finding. We agree."⁷⁴¹

The case was ultimately remanded with the unusual instructions:

Based on Dr. Kuckel's opinion, [the claimant's] use of narcotic pain medications to treat his chronic back pain caused his gastrointestinal problems which caused his esophageal stricture. **Only a "small portion" of [the claimant's] condition is related to the presence**

⁷³⁵ Wyo. Stat. Ann. § 16-3-101 et seq.

⁷³⁶ [135 P.3d 568](#), 571 (Wyo. 2006)

⁷³⁷ *Id.* 582-584

⁷³⁸ *Id.* at 581

⁷³⁹ *Id.*

⁷⁴⁰ *Id.*

⁷⁴¹ *Id.*

of *H. pylori* (an alternative causal explanation for the stricture) which all parties agree is not related to the pain medications. We therefore reverse the order of the district court and remand with directions to vacate the order denying benefits. Further, the district court is to remand the case to the Medical Commission for entry of an order awarding benefits for the diagnosis and treatment of [the claimant's] gastrointestinal problems and esophageal stricture, with the exception of any costs related solely to the treatment of claimant for the presence of *H. pylori*.⁷⁴²

It might be wondered why a fact finder would have been moved to judicially notice a medical condition, but it is really not so surprising. While a lay fact finder would be unlikely to attempt to diagnose or define a medical condition, the hearing panel were, after all, doctors, who routinely diagnose and define medical terms. The case underscores the challenges of medical fact finding. While the fact finder *possesses* medical expertise, it may not use that expertise as a *witness* in an affirmative evidentiary sense. It may only *assess* evidence presented by the parties. Thus the system differs from that utilizing a true IME structure, where neutrals are witnesses who *provide* evidence as they evaluate it.

6.6 Workers' Compensation and Administrative Law Generally

Originally, in Wyoming and elsewhere, workers' compensation was a court-based system. The 19th century English system was maintained in county courts, often under the auspices of the county clerk.⁷⁴³ All American states except Alabama, have now moved away from court-based workers' compensation adjudication and handle contested cases in administrative agencies.⁷⁴⁴ It should first be noted that most workers' compensation claims are routinely resolved informally by the workers' compensation insurance carrier.⁷⁴⁵ Contested claims can become like

⁷⁴² *Id.* at 585

⁷⁴³ 60 & 61 Vict., c. 37, 2nd Sched., (4) (1897)

⁷⁴⁴ I would like to thank my student Emily Madden for performing much of the research in the administrative law procedural section while completing a seminar paper with me during the spring semester of 2019. For a succinct summary reflecting the universal use of administrative agencies in workers' compensation adjudication see David B. Torrey, *The Workers' Compensation Judge and Finality of Fact-Finding Among States: Introduction and Tables*, NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY COMPARATIVE ADJUDICATION SYSTEMS PROJECT, at tbl. 1, 2 (2012), <http://www.davetorrey.info>. Since Judge Torrey's summary, Tennessee, possessing one of the last two court-based systems, has transitioned to an administrative agency based system. *Id.* Only Alabama remains as a court-based system. *Id.*; see also David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, [32 J. NAT. ASSOC. OF ADMIN. LAW JUDICIARY](#) 23, 35 (2012).

⁷⁴⁵ DUFF, WORKERS' COMPENSATION LAW at 391.

litigation, of course,⁷⁴⁶ and initially, therefore, contested workers' compensation claims were resolved by the courts.⁷⁴⁷ In 1986, as part of a national trend, the Wyoming legislature transformed the workers' compensation regime from a judicial to an administrative adjudicative process.⁷⁴⁸ This transformation has been justified on the grounds that administrative agencies are more efficient, and that claims decisions can and should be no more than a perfunctory conferral between physicians and administrative officials not requiring the intervention of civil court judges.⁷⁴⁹ Be that as it may, the result of the transformation has been that administrative agencies are tasked with receiving and processing claims for compensation,⁷⁵⁰ hearing contested cases,⁷⁵¹ and administering the insurance mechanism (where insurance companies are germane to the discussion).⁷⁵² Accordingly, substantive issues such as "whether an employee provided timely notice of injury, whether a worker is an employee within the meaning of the Act, and whether an injury occurred on an employee's premises, are initially decided by an administrative agency."⁷⁵³ Wyoming's regime in particular presents a more complicated dynamic because, in addition to its other responsibilities, the State, as has been noted, is both the exclusive guarantor and payor of workers' compensation benefits.⁷⁵⁴

⁷⁴⁶ *Id.* at 392. "A contested case is defined as a proceeding 'in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.'" Justin Newell Hesser, *Administrative Law—Deliberating in the Open? Applying Wyoming's Public Meetings Act to Contested Case Hearings; Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105 (Wyo. 2008), [10 WYO. L. REV.](#) 203 (2010); *see also* WYO. STAT. ANN. § 16-3-101(b)(ii) (2009). In Wyoming, "[i]nitial, pre-dispute claims processing is conducted directly by the Wyoming Safety and Compensation Division (WSCD)." Michael C. Duff, *A Tale of Two Standards*, [18 WYO. L. REV.](#) 1, 2 n.9 (2018).

⁷⁴⁷ David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 23, 109 (2012) ("Prior to [1986], contested compensation cases were entertained by judges in the district courts [of Wyoming]."); Hesser, *Deliberating in the Open*, *supra* at 209.

⁷⁴⁸ Torrey, *Master or Chancellor*, *supra* at 34. "The trend towards [administrative] fact-find[ing] in the system has not been widely noted or commented upon." *Id.*; *see* Webb v. Workers' Comp. Comm'n, [733 S.W.2d 726](#), 728 (Ark. 1987) (Newbern, J., concurring) (recognizing the trend towards an administrative state in workers' compensation). *But see* 11 LARSON'S WORKERS' COMPENSATION LAW § 124.02 (noting some implicit limits to relaxation of procedure); Hesser, *Deliberating in the Open*, *supra* at 209–10 (referring to the former workers' compensation commission as a quasi-judicial administration).

⁷⁴⁹ *See* Dean M. Hashimoto, *The Future Role of Managed Care and Capitation in Workers' Compensation*, 22 AM. J. L. M. 233, at 250.

⁷⁵⁰ W.S. § [27-14-601](#)(a) ("Upon receipt, the division shall review the initial injury reports to determine if the injury or death from injury is compensable and within the jurisdiction of this act.").

⁷⁵¹ *See* Torrey, *Master or Chancellor*, *supra* at 26.

⁷⁵² *Id.*

⁷⁵³ *See* Duff, *A Tale of Two Standards*, *supra* at 2.

⁷⁵⁴ Ohio, North Dakota, and Washington are the only other monopolistic workers' compensation systems—that is the state is the de facto (and only) workers' compensation insurer.

6.7 Wyoming Workers' Compensation Administrative Structure

Wyoming's administration of workers' compensation and its adjudication process for contested workers' compensation cases revolve around three administrative branches of Wyoming government: the Workers' Safety and Compensation Division (housed in turn within the Department of Workforce Services), the Office of Administrative Hearings (OAH), and the Medical Commission.

6.8 The Wyoming Workers' Safety and Compensation Division

The Workers' Safety and Compensation Division ("the Division") is a sub-part of Wyoming's Department of Workforce Services.⁷⁵⁵ Virtually all day-to-day informal case-handling matters are processed within the Division. While a full description of these activities is beyond the scope of this Treatise, the headings of the rules by which the Division is governed suggests its broad scope: General Provisions; Employer Coverage; Compliance; and Discount Programs; Failure of Employer to Comply; Injury Report Procedure, determinations by Division – Coverage & Compensability of Claims; Contested Case Proceedings; Benefits; Chiropractic Panel; Fee Schedules; Miscellaneous Medical Protocols; Workplace Safety Contracts; Fiscal Provisions; and Presumption of Disability for Certain Diseases. As the Department of Workplace Services website recommends, the rules may easily be accessed through the Wyoming Secretary of State's website at <https://rules.wyo.gov/>.⁷⁵⁶

In general, the Division makes a preliminary determination to approve or deny a bill or claim for medical or hospital care, or to approve or deny impairment disability or death benefits.⁷⁵⁷ **"A person seeking an award of benefits under the Act must submit a written application for benefits to the Division, on a form provided by the Division."**⁷⁵⁸ Furthermore, a "Report of Injury" is not a claim for benefits.⁷⁵⁹ An injured worker may initiate a claim by filing various "application" forms, which are available on the Department of Workforce Services website: "Employee's Application for Temporary Total Disability Benefits;" "Employee's Application For Temporary Total Disability Benefits: Extraordinary

⁷⁵⁵ W.S. § [27-14-102](#)(a)(vi)

⁷⁵⁶ The Department of Workforce Services [counsels](#) that one make the following selections: Agency: Workforce Services, Department of; Program: Workers' Compensation Division; Rule Type: (All Rule Types); Leave all other fields blank; Click on the Search button. All regulations can be reached here: <https://rules.wyo.gov/>

⁷⁵⁷ W.S. § [27-14-601](#)(a), (b), & (d)

⁷⁵⁸ WY Rules and Regulations 053.0021.5 § 4; *accord* Manning v. Worker's Compensation Div., [938 P.2d 870](#), 872 (Wyo.1997); Daiss v. Workers' Safety & Compensation Div., [965 P.2d 692](#), 694 (Wyo. 1998)

⁷⁵⁹ *Id.*

Circumstances;” and “Application for Death Benefits or Balance of Award.”⁷⁶⁰ The Division thereafter notifies both the employee and any involved health care provider of any portion of a claim for which the employee may be liable.⁷⁶¹

A primary duty of the Division is to administer the statutory claim procedures set out in § 27-14-501 through § 27-14-511. (The Division also acts through an Internal Hearings Unit to determine whether request for hearings are timely.)⁷⁶² An especially important part of the claims procedure occurs during the Division’s **Determination Procedure**⁷⁶³:

- The Division reviews the claim **within 15 days from the date any completed employer or employee injury report or claim** is filed and will issue either a final determination or request for additional information.
- At the earliest possible date **within 45 days following the request for additional information**, the **Division makes its final determination** as to whether the injury, or death resulting from injury, is compensable and within the jurisdiction of the Act or whether and in what amount a claim or bill is allowed.
- **Upon mutual consent of the worker, the employer, and the Division, the time limit for the determination by the Division may be extended. Otherwise, upon failure of the Division to make a decision within the time allowed by the Act, at the request of any affected party the matter shall be referred by the Division for hearing.**
- **The final determination** is mailed to all affected parties at their last known addresses, and, “when required by law,” includes a statement of reasons, and a notice of right to request a hearing and right to counsel. An affected party must immediately notify the Division, in writing, of any change of address or physical residence.
- **Any affected party may object to the Division's final determination by filing a written request for hearing with the Division within 15 days following the mailing of the determination. A timely written request for hearing is prerequisite to review by the appropriate hearing authority.**

⁷⁶⁰ See <http://www.wyomingworkforce.org/workers/workerscomp/docs/>

⁷⁶¹ W.S. § 27-14-601(b)

⁷⁶² Shenemen v. Division of Workers’ Safety & Compensation Internal Unit, [956 P.2d 344](#) (Wyo. 1998)

⁷⁶³ WY Rules and Regulations 053.0021.5 § 2

Of special note in the Determination Procedure is the allowance of a party to request a hearing if the Division fails to make a final determination within the preliminary fifteen or forty-five day periods. This allowance represents a significant departure from typical administrative exhaustion requirements.⁷⁶⁴ While not as significant when parties are appealing *within* the levels of an administrative body rather than *from an administrative agency to a court*, the failure to exhaust might otherwise have developed as an issue in future court litigation.

Once a party has sought a hearing as allowed by law and the workers' compensation case becomes formally contested—for example, where the Division has denied benefits (notice of the determination must be provided to both the employer and the claimant)⁷⁶⁵ and the claimant objects to the denial—the Division refers the case either to the Office of Administrative Hearings (OAH) or to the Medical Commission,⁷⁶⁶ with each referral depending on the issues in the case.⁷⁶⁷ The Division is, for example, required to refer “medically contested cases” to the Medical Commission.⁷⁶⁸ A **“medically contested” case “is one in which the primary issue requires the application of medical judgment to complex medical facts of conflicting diagnoses.”**⁷⁶⁹ The Division’s decision as to which sub-agency a contested case is referred is not subject to *administrative* review.⁷⁷⁰ While it may seem that the Division is a passive component of Wyoming’s administrative branch, it has been argued that the Division “has become one of the

⁷⁶⁴ See generally *Thomas Gilcrease Foundation for Gilcrease Hoback One Charitable Trust v. Cavallaro*, 397 P.3d 166, 170 (Wyo. 2017); *Apodaca v. Safeway, Inc.*, 346 P.3d 21, 23-24 (Wyo. 2015)

⁷⁶⁵ W.S. § [27-14-601](#)(d). Moreover, “[n]otice to any employee or his dependents . . . of a final determination by the division denying the compensability of an initial injury, a claim for medical or hospital care for which the employee or his dependents may be liable for payment or denying any impairment, disability or death benefit, shall include reasons for denial and a statement of the employee's or his dependents' rights to a hearing before a hearing examiner as provided by this act and to legal representation.” W.S. § [27-14-601](#)(j)

⁷⁶⁶ Low dollar claims (currently those less than \$2,000) may in limited cases be conducted as small claims hearings in which no attorney fees or other costs shall be allowed by the hearing officer on behalf of or for any party to a hearing. W.S. § [27-14-602](#)(b)

⁷⁶⁷ *Id.*; see also W.S. § [27-14-616](#)(b)(iv)

⁷⁶⁸ *Id.* The statute additionally provides that parties may agree to have a case transferred from the OAH to the Commission. *Id.* W.S. § [27-14-616](#)(e); *French v. Amax Coal West*, [960 P.2d 1023](#), 1030 (Wyo. 1998).

⁷⁶⁹ *French, supra.*, 960 P.2d at 1030. The definition includes those cases where the primary issue is whether: (1) a claimant’s percentage of physical impairment; (2) a claimant is permanently totally disabled; (3) a claimant who has been receiving temporary total disability benefits remains eligible for those benefits under W.S. § 27-14-404(c); or (4) any other issue, the resolution of which is primarily dependent upon the evaluation of conflicting evidence as to medical diagnosis, medical prognosis, or the reasonableness and appropriateness of medical care. *Id.*

⁷⁷⁰ W.S. § [27-14-616](#)(b)(iv).

most powerful agencies in state government . . .”⁷⁷¹ It is the gatekeeper of all workers’ compensation claims.

6.9 The Wyoming Office of Administrative Hearings

The OAH, created in 1992,⁷⁷² receives any workers’ compensation case that is not medically contested.⁷⁷³ Wyoming’s OAH is, in effect, a *central panel of administrative judges*, and is not exclusively devoted to workers’ compensation matters.⁷⁷⁴ Instead, OAH is tasked with conducting contested case hearings in disputes between Wyoming residents and Wyoming agencies.⁷⁷⁵ In particular, Wyoming’s OAH receives and hears contested cases spanning five broad categories: (1) contested workers’ compensation claims;⁷⁷⁶ (2) driver’s license actions involving alterations to driving privileges, such as restrictions, suspensions, or cancellations;⁷⁷⁷ (3) personnel hearings involving state employees;⁷⁷⁸ (4) mediation and arbitration services requested by state agencies;⁷⁷⁹ and (5) “any other state agency or board dispute where a request is made[.]”⁷⁸⁰ The OAH administrative judges/hearing officers are lawyers in good standing with the Wyoming State Bar.⁷⁸¹ According to the Mission Statement of the OAH,

The sole function of the OAH is to conduct fair and impartial contested case hearings statewide in disputes between Wyoming's residents or guests and state governmental agencies. The OAH is uniquely situated to act as an independent, impartial hearing authority because it is a separate operating agency with no agency interest in the substantive issues presented in any of the cases it

⁷⁷¹ George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Workers’ Compensation Legislation, 1986–1997*, 33 LAND & WATER L. REV. 489, 493 (1998).

⁷⁷² W.S. § [9-2-2202](#).

⁷⁷³ See *supra*.

⁷⁷⁴ For a brief discussion of central panels see H. Alexander Manuel, [Judges and the Administrative State](#), ABA Journal, May 9, 2008.

⁷⁷⁵ Deborah A. Baumer (former director of OAH), *The Office of Administrative Hearings*, WYO. LAWYER (Oct. 2007).

⁷⁷⁶ W.S. § [27-14-602](#)

⁷⁷⁷ [W.S. § 31-7-105](#)

⁷⁷⁸ W. S. § [9-2-1019](#)(a). The agency is the successor to the office of independent hearing examiners created by W.S. § [27-14-602](#) and the office of hearing examiners created by W.S. § [31-7-105](#). The legislative delegation to the office of independent hearing examiners of final administrative authority to decide the validity and amount of benefits to be paid under the Wyoming Worker’s Compensation Act has been deemed by the Wyoming Attorney General not to violate the separation of powers required by Article 2, § 1 of the Wyoming Constitution. Op.Atty.Gen. 90-010, (Nov. 20, 1990).

⁷⁷⁹ Baumer, *supra*.

⁷⁸⁰ See W. S. § [9-2-2202](#)(b); Baumer, *supra*.

⁷⁸¹ *French v. Amax Coal West*, 960 P.2d 1023, 1029 (Wyo. 1998) (*citing* W. S. § 9-2-2201(c)).

hears. The parties are therefore assured a neutral process that will favor neither side.⁷⁸²

As will be seen in the upcoming discussion on judicial review, decisions of administrative fact finders in Wyoming are afforded extraordinary deference by the courts, though their decisions are generally policed by Wyoming contested case proceedings.⁷⁸³

Three important aspects of the statutory mandate of the Office of Administrative Hearings, under W.S. § [9-2-2202](#), warrant discussion. First, “[h]earings will be conducted in an impartial manner **pursuant to the Wyoming Administrative Procedure Act, applicable provisions of the Wyoming Rules of Civil Procedure** and any rules for the conduct of contested cases adopted by the director of the office of administrative hearings **which shall take precedence over hearing rules promulgated by the requesting agency.**” Thus, to the extent the Division’s or the Medical Commission’s hearing rules conflict with the OAH’s rules, **the OAH’s rules control if the OAH has statutory jurisdiction of the underlying dispute.** Second, the OAH assumed all duties and responsibilities formerly exercised by the now-defunct Office of Independent Hearing Examiners, in particular driver’s license hearings and workers’ compensation hearings. As explained in the first paragraph of this section those duties appear to have expanded significantly. Third, the OAH has independent rulemaking authority. The rules the OAH has created, WY Rules and Regulations 270.0001.1 § 1 through 270.0001.7 § 3, substantially incorporate by reference relevant provisions of both the Contested Case Procedures and the Rules of Civil Procedure. Of particular relevance to workers’ compensation cases is the section of the rules titled **Special Rules Relating to Workers’ Compensation. WY Rules and Regulations 270.0001.5 § 1 through 270.0001.5 § 6.** Of particular interest to practicing attorneys is the following rule, which may serve as a trap to the unwary:

In all workers' compensation contested cases, the parties shall file all original documents, pleadings, and motions **with the Workers' Compensation Division**, with true and complete copies of the particular document, pleading, or motion properly served on all other parties or their attorneys, and this Office.

6.10 The Wyoming Medical Commission

In 1993, the Wyoming legislature created the Medical Commission (hereinafter “the Commission”) to provide an *additional* venue to adjudicate workers’

⁷⁸² See the OAH website available at <http://oah.wyo.gov/>

⁷⁸³ [W.S. § 27-14-602](#)(b)(ii) and § [16-3-107](#) through § 16-3-112

compensation claims.⁷⁸⁴ The Commission, which is comprised of eleven health care providers appointed by the governor,⁷⁸⁵ was created because of the prevalence of dispositive medical issues in workers' compensation cases.⁷⁸⁶ Upon the Division's determination that a case is medically contested, **it must refer it to the Medical Commission.**⁷⁸⁷ **But the Medical Commission does not have subject matter jurisdiction of a workers' compensation claim in the absence of a medically contested case.**⁷⁸⁸ Following referral of a case from the Division, a referral which as has already been noted is not subject to further administrative review but **is** subject to judicial review,⁷⁸⁹ the Commission is mandated by statute "[t]o furnish **three members of the commission to serve as a medical hearing panel to hear cases referred for hearing.**"⁷⁹⁰ At least one member of a panel must be a physician; and one member is designated by the Commission to serve as chair of the panel.⁷⁹¹ When hearing a medically contested case, **the panel shall serve as the hearing examiner and shall have exclusive jurisdiction to make the final administrative determination of the validity and amount of workers' compensation that is payable.**⁷⁹² **Thus, the Commission sits as hearing officer and is subject to the same standard of review as the Office of Administrative Hearings.**⁷⁹³

Though the Commission was "presumably intended to hear medical disputes,"⁷⁹⁴ the statute creating the Commission grants the sub-agency exclusive authority to make final determinations as to **all** issues presented when hearing a particular case, and does not limit the Commission's determination to the medical issues presented.⁷⁹⁵ Put another way, the Commission is granted authority to determine medical issues because of its medical expertise, but it also has authority to determine legal issues despite its lack of legal expertise.⁷⁹⁶ What is most unusual

⁷⁸⁴ McIntosh v. Med. Comm'n, [162 P.3d 483](#), 497 (Wyo. 2007) (Golden, J., dissenting) ("The Medical Commission is a welcome addition to the Workers' Compensation hearing process, but it is simply that—an addition. It is not a substitute for the OAH."); *see also* Torrey, Master or Chancellor, *supra*. at 109 ("The Wyoming statute maintains an unusual proviso whereby a dispute can be referred to a medical panel for fact-finding.")

⁷⁸⁵ § 27-14-616(a)

⁷⁸⁶ French v. Amax Coal West, [960 P.2d 1023](#), 1030 (Wyo. 1998).

⁷⁸⁷ McIntosh v. Med. Comm'n, 162 P.3d at 497

⁷⁸⁸ Jacobs v. Wyoming Medical Comm'n, [118 P.3d 441](#) (Wyo. 2005).

⁷⁸⁹ Bando v. Clure Bros. Furniture, [980 P.2d 323](#) (Wyo. 1999); Russell v Workers' Safety & Compensation Div., [944 P.2d 1151](#), 1154 (Wyo. 1997)

⁷⁹⁰ [W. S. § 27-14-616\(iv\)](#)

⁷⁹¹ [W. S. § 27-14-616\(iv\)](#)

⁷⁹² [W. S. § 27-14-616\(iv\)](#)

⁷⁹³ Workers' Compensation Claim of Rodgers v. Workers' Safety & Compensation Div, [135 P.3d 568](#), 571 (Wyo. 2006)

⁷⁹⁴ [W. S. § 27-14-616\(iv\)](#)

⁷⁹⁵ [W. S. § 27-14-616\(iv\)](#); McIntosh v. Med. Comm'n, 162 P.3d at 492 (quoting Rules, Regulations and Fee Schedules of the Wyoming Workers' Safety & Compensation Div., Chapter 6, § 1(a)(i)(D) (2004)).

⁷⁹⁶ French v. Amax Coal West, 960 P.2d at 1030

about the Commission's structure, in comparison with other neutral workers' compensation fact finding structures such as IMEs,⁷⁹⁷ is that it possesses plenary authority to determine non-medical legal issues in addition to deciding those issues that constitute a medical dispute. "There is no doubt that many contested workers' compensation claims involve *both* legal and medical issues."⁷⁹⁸ And it is equally clear the Commission as a body does not have legal expertise:

There is no doubt that many contested worker's compensation claims involve both legal and medical issues. The hearing examiners in the Office of Administrative Hearings, previously vested with sole jurisdiction to hear these claims, have professional legal training and must be members in good standing of the Wyoming State Bar. Wyo. Stat. § 9-2-2201(c) (1997). The law has long recognized the limitations of a legally trained fact finder in circumstances which require a special expertise accumulated through extensive professional training and experience. In many such instances, the courts have sought counsel from special masters to assist in a factual understanding of the complex issues presented. The creation of the Medical Commission reflects the legislature's recognition that many contested claims involve complex medical issues, and in some cases, those issues are dispositive. Thus, each medical hearing panel will have at least one physician, and all will be health care providers, with the expertise to determine the medical issues before them. **A medical hearing panel does not, however, have the legal training or expertise to determine the issues of law which may arise.**⁷⁹⁹

This has created, as Wyoming courts have at times frankly acknowledged, the potential for the Commission making factual and legal errors.⁸⁰⁰ It is one thing for

⁷⁹⁷ See this Treatise *supra*. at Section 6.3

⁷⁹⁸ French v. Amax Coal at 1029

⁷⁹⁹ *Id.* at 1029-1030 (emphasis supplied)

⁸⁰⁰ Watkins v. Med. Comm'n, [250 P.3d 1082](#), 1091 (Wyo. 2011) (Hill, W., dissenting) ("I dissent because my close reading of the record on appeal establishes that the Medical Commission and the Division committed many of the same errors we have pointed out to them, in more than dozen cases in the last several years."); Camilleri v. Workers' Safety & Comp. Div., [244 P.3d 52](#), 62-63 ("There is not so much as a scintilla of evidence to support such a finding and that this Commission would give voice to such a libelous accusation causes us great concern about the credibility of the Commission."); Glaze v. Workers' Safety & Comp. Div., [214 P.3d 228](#), 235 (Wyo. 2009) ("The Medical Commission's criticisms of Dr. Neal are especially perplexing because it frequently relies on 'paper reviews' made by physicians who never saw the patient, but still provide opinions about the patient that directly contradict information provided by the treating physician."); Straube v. Workers' Safety & Comp. Div., [208 P.3d 41](#), 48 (Wyo. 2009) ("Needless to say, it is not for doctors or the Medical Commission to question public policy, let alone thwart it."); Workers' Compensation Claim of Rodgers v. Workers' Safety & Compensation Div, [135 P.3d 568](#), 576 (Wyo. 2006) ("We find the Medical Commission's decision in this case runs afoul of the Wyoming [Administrative

the courts to seek counsel from special masters to assist in a factual understanding of complex issues. It would be quite another to allow those same masters to decide issues outside their areas of expertise, which is no doubt why the Commission is clearly without jurisdiction in the absence of a medically contested case. It is the “mixed” cases that will likely continue to be problematic.

A glaring example of this problem was showcased in *Moss v. Wyoming Workers’ Safety & Compensation Div.*⁸⁰¹ In *Moss*, the Commission rejected Moss’s testimony of pain and disability as not credible.⁸⁰² Moss was partially, but seriously, disabled; and after he exhausted his temporary total disability benefits, he applied for permanent and total disability benefits under Wyoming’s “odd lot doctrine,” the details of which were addressed in this Treatise at Section 5.8 above. Writing for the majority, Justice Kite found that “[g]iven the evidence Mr. Moss presented, there is no question but that he met his burden of showing that the degree of his physical impairment coupled with other factors such as his mental capacity, education, training and age make him eligible for PTD benefits.”⁸⁰³ The Commission’s fact finding drew a sharp rebuke from the Justice:

The record indicates that the Medical Commission disregarded relevant evidence, made incorrect assumptions about other evidence and, rather than considering the evidence fairly and objectively, generally viewed it in the light most likely to result in a denial of benefits. An employee has a right to be heard before an unbiased, fair and impartial tribunal . . . Some of the Medical Commission’s findings and conclusions cast doubt on whether the proceedings in this case satisfied that right.⁸⁰⁴

Despite the significant underlying irregularities in the Commission’s fact finding, Justice Kite upheld the Division’s decision concluding that “it came forward with sufficient evidence to refute Mr. Moss’s evidence and to prove work within his limitations was available.”⁸⁰⁵ Justice Kite held, “We cannot conclude that the Medical Commission’s ruling was against the overwhelming weight of the evidence.”⁸⁰⁶ Even putting the most charitable gloss on the case for the Commission, one is inclined to say that its fact finding was very badly received by the Court.

Procedure Act] because it failed to weigh all of the material evidence offered by the parties, it made ultimate findings of fact unsupported by any basic findings, and it improperly took judicial notice of a contested fact.”).

⁸⁰¹ *Moss v. Workers’ Safety & Compensation Div.*, [232 P.3d 1](#) (Wyo. 2010)

⁸⁰² *Id.* at 6–11

⁸⁰³ *Id.* at 7

⁸⁰⁴ *Id.* at 11

⁸⁰⁵ *Id.* at 11–12

⁸⁰⁶ *Id.* at 12

6.11 Wyoming Workers' Compensation Contested Case Proceedings

As noted, if a workers' compensation claim is denied, objections to the denial are adjudicated under the contested case procedures of the Wyoming Workers' Compensation Act and the Wyoming Administrative Procedure Act.⁸⁰⁷ **A contested case is “a proceeding including but not restricted to ratemaking, price fixing and licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . .”**⁸⁰⁸ The Wyoming Supreme Court has interpreted “hearing” to mean a “trial type hearing.”⁸⁰⁹

Parties to administrative proceedings are entitled to due process of law and the procedures outlined in the Wyoming Administrative Procedure Act are designed to provide them with that due process.⁸¹⁰ Contested case procedures, however, are not required unless the legislature has imposed a legal duty on an agency to utilize them.⁸¹¹ This is seldom an issue in Wyoming workers' compensation cases because the Workers' Compensation Act states that “[a]ll other requests for hearing not [a small claims hearing] **shall be conducted as a contested case in accordance with procedures of the Wyoming Administrative Procedure Act and the Wyoming Rules of Civil Procedure** as applicable under rules of the office of administrative hearings.”⁸¹²

But this does not mean that any controversy that could conceivably arise under the Workers' Compensation Act must be decided pursuant to a trial type hearing. In *Whiteman v. Wyoming Safety & Compensation Div.*,⁸¹³ for example, a claimant's lawyer was denied attorneys' fees after the claimant's motion to appoint counsel was, for reasons that were unclear, never acted upon.⁸¹⁴ Throughout the odd posture of the case,⁸¹⁵ which need not be set out for purposes of this discussion, counsel “may have” been representing claimant, but it was very clear he had never been

⁸⁰⁷ W.S. § [27-14-602\(b\)\(ii\)](#) and § [16-3-107](#) through § 16-3-112

⁸⁰⁸ W.S. § [16-3-101\(b\)\(2\)](#)

⁸⁰⁹ *Scarlett v. Town Council, Town of Jackson, Teton County*, [463 P.2d 26](#), 29 (Wyo.1969)

⁸¹⁰ *In re Board of County Com'rs, Sublette County*, [33 P.3d 107](#) (Wyo. 2001); *Amoco Production Co. v. Wyoming State Bd. of Equalization*, [7 P.3d 900](#), 905 (Wyo.2000); and *Basin Elec. Power Co-op., Inc. v. Department of Revenue, State of Wyo.*, [970 P.2d 841](#), 849 (Wyo.1998).

⁸¹¹ *Sheridan County Com'n v. V.O. Gold Properties, LLC*, [247 P.3d 48](#), 50 (Wyo. 2011); *In re Board of County Com'rs, Sublette County*, *supra.*, 33 P.3d 107; *Northfork Citizens for Responsible Dev. v. Bd. of County Comm'rs of Park County*, [228 P.3d 838](#), 855 (Wyo.2010); *In re Application for Certificate of Need by HCA Health Serv.*, [689 P.2d 108](#), 110–114 (Wyo.1984); *Carlson v. Bratton*, [681 P.2d 1333](#), 1338 (Wyo.1984)

⁸¹² W.S. § [27-14-602\(b\)\(ii\)](#)

⁸¹³ [984 P.2d 1079](#) (Wyo. 1999)

⁸¹⁴ *Id.* at 1081-1083

⁸¹⁵ *Id.*

formally appointed.⁸¹⁶ One of the complaints raised by the claimant was that her subsequent motion for attorneys' fees had been denied without a hearing. Here, the Wyoming Supreme Court agreed with the Division's argument that "neither the Act nor the Division rules require the OAH to grant a hearing before denying fees and costs."⁸¹⁷ Leaving to one side the question of whether the OAH could ever award counsel fees to an unappointed attorney, the Court agreed that "[i]f the matter is a contested case, [the contested case procedures] requires that the claimant receive a hearing."⁸¹⁸ But the court went on to say that the dispute over attorneys' fees was neither a contested case,⁸¹⁹ nor did it implicate procedural due process,⁸²⁰ so no hearing was required prior to the OAH denying the Motion for Attorneys' Fees.⁸²¹ This outcome begs the question of when a legal dispute *is* a contested case.

The answer to that question is generally found in language, set out in the first paragraph of this section, from W.S. § [16-3-101](#)(b)(ii), and *Whiteman* suggests that the Court will read the statutory phrase "required by law to be determined by an agency after an opportunity for hearing" narrowly to mean an explicit *statutory* requirement. The Wyoming Workers' Compensation Act by its terms **requires** that a hearing be conducted as a **small claims hearing** whenever **the amount at issue is less than two thousand dollars or whenever a request for hearing does not concern "an issue of the compensability of the injury pursuant to W.S. 27-14-601(a) and the division requests the hearing be held as a small claims hearing."**⁸²² This language suggests that where the Division does not make such a request, the OAH has discretion to conduct a controversy as a contested case. Furthermore, parties may object to the Division's request that a matter be conducted as a small claims hearing.⁸²³ A small claims hearing is essentially one that proceeds, under significantly streamlined procedures, on the strength of documents, filings, written evidence, and evidence . . . the hearing officer deems relevant to the issue.⁸²⁴ Parties are also allowed limited rebuttal evidence.⁸²⁵ Significantly, although a hearing officer may allow an in-person or telephonic hearing in connection with the case, it is not required under the statute.⁸²⁶ As already noted, all **other** "requests" for hearing "**shall** be conducted as a contested case in accordance with procedures of the Wyoming Administrative Procedure Act."⁸²⁷

⁸¹⁶ *Id.*

⁸¹⁷ *Id.* at 1082-1083

⁸¹⁸ *Id.* at 1083

⁸¹⁹ *Id.*

⁸²⁰ *Id.*

⁸²¹ *Id.*

⁸²² W.S. § [27-14-602](#)(b)(i)

⁸²³ *Id.* The Division conducts hearings in such controversies pursuant to its Small Claims rule. *See* WY Rules and Regulations 053.0021.6 § 3

⁸²⁴ *Id.*

⁸²⁵ *Id.*

⁸²⁶ *Id.*

⁸²⁷ W.S. § [27-14-602](#)(b)(ii)

Accordingly, within the Wyoming Workers' Compensation Act there is **both** a standalone "Contested Cases" *article* and incorporation by reference of the "procedures of the Wyoming Administrative Procedure Act and the Wyoming Rules of Civil Procedure as applicable under rules of the office of administrative hearings." In practice, the reference is to the Contested Case provisions of the Wyoming APA (W.S. § [16-3-107](#) through 112). The *Workers' Compensation Act's* "Contested Cases Generally" section (W.S. § [27-14-602](#))—**the focus of this subsection**—is efficiently reducible to a series of administrative rules:

- A hearing officer is designated by the OAH or a panel is formed by the Medical Commission.⁸²⁸
- The case is determined by a "hearing examiner" in accordance with **the law in effect at the time of the injury**.⁸²⁹
- Appeals may be taken from an administrative decision **by any affected party to the district court** as provided by the Wyoming Administrative Procedure Act (W.S. § [16-3-114\(a\)](#))⁸³⁰
- Hearings shall be held at a **location mutually convenient to the parties, as determined by the hearing officer. If the injury occurs at a location outside Wyoming, the hearing shall be held in the county in which the employer's principal place of business is located**, unless the hearing officer determines a different location is more convenient to the parties.⁸³¹
- Any hearing involving multiple sites **may be conducted through audio or video conferencing** at the discretion of the hearing officer or hearing panel.⁸³²
- Essentially **all case documents filed with the Division are "pleadings."**⁸³³
- The attorney general's office represents the division in all contested cases.⁸³⁴

⁸²⁸ W.S. § [27-14-602\(a\)](#)

⁸²⁹ W.S. § [27-14-602\(b\)](#)

⁸³⁰ W.S. § [27-14-602\(b\)\(iii\)](#)

⁸³¹ W.S. § [27-14-602\(b\)\(iv\)](#)

⁸³² W.S. § [27-14-602\(b\)\(v\)](#)

⁸³³ W.S. § [27-14-602\(c\)](#)

⁸³⁴ W.S. § [27-14-602\(c\)](#)

- The hearing examiner has exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable.⁸³⁵
- With limited exceptions, **court costs are paid from the worker's compensation account if the judgment is in favor of the employer or the division.**⁸³⁶
- **If judgment is against the employer**, and the employer contested the claim without being joined in the contest by the Division, **the court costs are paid by the employer.**⁸³⁷
- **When the employer or Division prevails, court costs do not affect the employer's experience rating.**⁸³⁸
- If judgment is against a health care provider, the court costs are paid by the health care provider.⁸³⁹

Various other features of the Workers' Compensation Contested Cases provision (Article 6) are discussed throughout this section, and indeed throughout this Treatise, as they touch on a wide variety of substantive and procedural issues. Finally, anecdotal reports from practitioners suggest that, **although the original objection and denial of a claim serve as the initial request for hearing, original issues may, upon good cause shown, be refined or changed by pleadings filed by the parties during the course of the preliminary administrative process.**

6.12 Wyoming Contested Case Procedures Generally

Though an extended exposition of the Wyoming Contested Case Procedures is beyond the scope of this Treatise, the essential characteristics of the **general procedure** of administrative adjudication can be summarized as follows. It should be kept in mind that several features of the contested case procedures have been incorporated by rule in the rules of the Office of Administrative Hearings at WY Rules and Regulations 270.0001.2 § 1 through 270.0001.2 § 29.

- All parties are afforded an **opportunity for hearing** after reasonable notice served personally or by mail.⁸⁴⁰
- The Notice of Hearing must include a statement of

⁸³⁵ W.S. § [27-14-602\(c\)](#)

⁸³⁶ W.S. § [27-14-602\(c\)](#)

⁸³⁷ W.S. § [27-14-602\(c\)](#)

⁸³⁸ W.S. § [27-14-602\(c\)](#)

⁸³⁹ W.S. § [27-14-602\(c\)](#)

⁸⁴⁰ W.S. § [16-3-107\(a\)](#)

- The **time, place and nature** of the hearing;
 - The **legal authority** and **jurisdiction** under which the hearing is to be held;
 - The particular **sections of the statutes and rules involved**;
 - A **short and plain statement of the matters** asserted⁸⁴¹
- Agencies have authority to administer oaths and affirmations, subpoena witnesses, and require the production of any books, papers or other documents relevant or material to an inquiry.⁸⁴²
 - District courts (but not agencies) have authority to enforce, on pain of contempt of court, agency administrative process (subpoena, deposition, or other discovery).⁸⁴³
 - Agencies must by rule provide that upon request by a case party it will issue a subpoena requiring the appearance of witnesses for the purpose of taking evidence or requiring the production of any books, papers or other documents relevant or material to the inquiry.⁸⁴⁴
 - Agencies may, upon motion, quash or modify subpoenas that are unreasonable and oppressive, or may condition denial of such motions upon the payment of costs by the issuer of the subpoena.⁸⁴⁵
 - With only very minor exceptions, the taking of depositions and discovery are available to the parties in accordance with the provisions of Wyoming Rules of Civil Procedure 26, and 28 through 37, as amended.⁸⁴⁶
 - Agencies are fully bound by rules of discovery (subject to rules protecting confidentiality and rules of privilege) and parties may seek orders compelling agency discovery compliance from either the presiding officer of a contested case or, if necessary, from a district court.⁸⁴⁷

⁸⁴¹ W.S. § [16-3-107\(b\)](#)

⁸⁴² W.S. § [16-3-107\(c\)](#)

⁸⁴³ W.S. § [16-3-107\(c\)](#)

⁸⁴⁴ W.S. § [16-3-107\(d\)](#)

⁸⁴⁵ W.S. § [16-3-107\(e\)](#)

⁸⁴⁶ W.S. § [16-3-107\(g\)](#)

⁸⁴⁷ W.S. § [16-3-107\(h\)](#)

- **Parties have the right to present evidence and argument on all issues.** A person compelled to appear before an agency has the right to be represented by counsel or, if permitted by the agency, other qualified representative.⁸⁴⁸
- **Parties have the right to appear** in person or through counsel in any agency proceeding in accordance with the agency’s rules and, where applicable, rules of the supreme court of Wyoming. So far as the orderly conduct of public business permits, any **interested** person may appear before an agency to ensure consideration of an issue in any stage of a proceeding (interlocutory, summary or otherwise) or in connection with any agency function.⁸⁴⁹
- **Agencies are required to proceed efficiently** to conclude contested matters except that the convenience and needs of the parties should be considered.⁸⁵⁰
- A person representing an agency at a hearing in a contested case in which the agency is a party **shall not in the same case serve as presiding officer or provide ex parte advice regarding the case to the presiding officer or to the body or any member of the body comprising the decision makers.**⁸⁵¹

With respect to the final of the bullet point items, ex parte prohibitions are expanded in W.S. § [16-3-111](#), which generally forbids presiding officials (e.g., workers’ compensation hearing officers) or their assistants, while working on a case, from directly or indirectly consulting with any other person on any issue in the case. An exception to the rule is that the presiding official *may* consult with “an agency member, officer, contract consultant or employee or other state or federal employee, any party other than the agency or with any agency employee, contract consultant or other state or federal employee who was engaged in the investigation, preparation, presentation or prosecution of the case” **upon notice and opportunity for all parties to participate.**⁸⁵² Of course, there is no general prohibition against agency employees generally discussing cases amongst themselves.⁸⁵³ But “[n]o officer, employee, contract consultant, federal employee or agent who has participated in the investigation, preparation, presentation or prosecution of a contested case shall be in that or a factually related case participate or advise in the

⁸⁴⁸ W.S. § [16-3-107\(j\)](#)

⁸⁴⁹ W.S. § [16-3-107\(k\)](#)

⁸⁵⁰ W.S. § [16-3-107\(k\)](#)

⁸⁵¹ W.S. § [16-3-107\(m\)](#). This rule is very similar to the federal ex parte rule under the Federal Administrative Procedure Act. 5 U.S.C. § 554(d)(2)

⁸⁵² W.S. § [16-3-111](#).

⁸⁵³ W.S. § [16-3-111](#)

decision, recommended decision or agency review of the decision, or be consulted in connection therewith except as witness or counsel in public proceedings.”⁸⁵⁴ For many years, an executive order apparently controlled ex parte contacts in Wyoming administrative proceedings, though its continued viability may be open to question given its age.⁸⁵⁵ Better current statements of Executive Branch ex parte policy (applicable to workers’ compensation cases) may be found in the rules of both the Office of Administrative Hearings and the Medical Commission. With respect to OAH, **WY Rules and Regulations 270.0001.2 § 10** states,

Except as authorized by law, a party or a party's attorney or representative shall not communicate with the hearing officer or hearing panel member in connection with any issue of fact or law concerning any pending contested case, except upon notice and opportunity for all parties to participate. Should ex parte communication occur, the hearing officer or hearing panel member shall advise all parties of the communication as soon as possible thereafter and, if requested, shall allow any party an opportunity to respond prior to ruling on the issue.

A very similar rule has been promulgated by the Medical Commission at **053.0019.4 § 6**:

Except to the extent authorized by law, a party or party's attorney shall not communicate, directly or indirectly, in connection with any issue of fact or law with the presiding officer concerning any pending case, except upon notice and opportunity for all parties to participate. Should ex parte communication occur, the presiding officer shall advise all parties of the communication as soon as possible thereafter, and if requested, allow any party an opportunity to respond.

Finally, there are a smattering of controversies which, because of the statutory or regulatory provisions from which they arise, may not require adjudication by the OAH or the Medical Commission but are still contested cases.⁸⁵⁶ (Some examples the Division has provided are cases concerning rate classification, whether a party’s late filing of claims is excused, and disputes over the Division's annual premium

⁸⁵⁴ W.S. § [16-3-111](#).

⁸⁵⁵ See Nancy D. Freudenthal and Roger C. Fransen, *Rulemaking and Contested Case Practice in Wyoming*, 31 LAND & WATER L. REV. 686, 694 (1996) (discussing the approximately 40 year old Exec. Order 1981-12 as a “non-statutory procedural requirement”)

⁸⁵⁶ See WY Rules and Regulations 053.0021.1 § 4

rate filing.)⁸⁵⁷ In such situations, the Division has by rule developed its own internal hearing procedures. Ex parte limitations in *those* rules do not seem to be explicit.⁸⁵⁸

6.13 Workers' Compensation Attorneys' Fees

Workers' compensation attorneys' fees are available by statute. During the contested case phase of a workers' compensation case, the Act provides that,

Upon request, the hearing examiner **may appoint an attorney** to represent the employee or claimants and **may allow the appointed attorney a reasonable fee for his services at the conclusion of the proceeding**. An appointed attorney shall be paid according to the order of the hearing examiner either from the worker's compensation account, from amounts awarded to the employee or claimants or from the employer. **In any contested case where the issue is the compensability of an injury, a prevailing employer's attorney fees shall also be paid according to the order of the hearing examiner from the worker's compensation account, not to affect the employer's experience rating. An award of attorney's fees shall be for a reasonable number of hours and shall not exceed the benefits at issue in the contested case hearing.** In all other cases **if the employer or division prevails, the attorney's fees allowed an employee's attorney shall not affect the employer's experience rating. Attorney fees allowed shall be at an hourly rate established by the director of the office of administrative hearings and any application for attorney's fees shall be supported by a verified itemization of all services provided. No fee shall be awarded in any case in which the hearing examiner determines the claim or objection to be frivolous and without legal or factual justification.** If the division or a hearing examiner determines that an injured worker's failure to meet any procedural deadline in this act is through the fault of the worker's attorney, the division shall reconsider its determination or a hearing examiner shall order the contested case returned to the division for redetermination of the contested issues.⁸⁵⁹

Some highlights emerge from this statutory language. The first is that the Wyoming attorneys' fees structure departs from the standard "American Rule" civil litigation scheme in which each party bears its own costs of litigation.⁸⁶⁰ Workers'

⁸⁵⁷ WY Rules and Regulations 053.0021.1 § 4

⁸⁵⁸ *Id.*

⁸⁵⁹ W.S. § [27-14-602\(d\)](#)

⁸⁶⁰ See 13 LARSON'S WORKERS' COMPENSATION LAW § 133.01

compensation statutes display wide variability with respect to attorney compensation. As the *Larson's* treatise explains,

Most states have statutes which fix maximum fees, sometimes accompanied by general commission supervision of fees and sometimes not. These, too, vary markedly. No two are quite alike. They range from 15 percent to 30 percent with no dollar maximum. Several allow 15 to 30 percent on the first \$300, \$500 or \$1,000, then a smaller percent, such as 10 percent, on the excess. Alaska is unique in that its statute sets a minimum fee, but no maximum.⁸⁶¹

Some additional aspects of the Wyoming statute pertaining to attorneys' fees warrant highlighting.

- A party must **request** an attorney before one will be appointed.
- A hearing examiner **may appoint counsel**, but is not technically required by the statute to do so.
- A hearing examiner **may award a reasonable attorney's fee**, but is not technically required by the statute to do so.
- An appointed attorney **is paid from the worker's compensation account, from amounts awarded to the employee or claimants or "from" the employer.**
- When the employer prevails in a contested case involving compensability of an injury, the hearing examiner may award the employer an attorney's fee, provided the hours expended on the matter are deemed reasonable.
- **The attorney's fee awarded to employer's counsel "shall not exceed the benefits at issue in the contested case hearing."**
- **Attorney fees allowed shall be at an hourly rate established by the director of the office of administrative hearings and any application for attorney's fees shall be supported by a verified itemization of all services provided.**
- **If the hearing examiner determines "the claim or objection to be frivolous and without legal or factual justification"** the examiner is mandated not to award an attorney's fee.
- **When the employer or the division prevail, litigation costs do not affect the employer's experience rating.** (In other words,

⁸⁶¹ 13 LARSON'S WORKERS' COMPENSATION LAW § 133.04 (internal citations omitted)

if the employer “wins” the claim, its “insurance” premium should not go up because it is not “riskier” than it was before the litigation.)

A very unique aspect of the Wyoming system is that the Wyoming Attorney General is, in effect, representing employers in many cases. In a private workers’ compensation environment, a private insurance carrier would retain private insurance counsel to assess whether cases should be litigated. If the cost of litigating the case and the likelihood of success on the merits counsel against litigation, the parties settle. It is hard to evaluate the dynamic when a state is paying for its lawyers from a workers’ compensation account, as is the case in Wyoming.

The Office of Administrative Hearings has promulgated a rule⁸⁶² specific to workers’ compensation cases detailing payment of attorneys’ fees at the administrative/contested case phase of a proceeding. In its current version the essentials of the rule provide:

- The hearing examiner may appoint an attorney to represent an employee or claimant.
- Upon entry of a final order, an appointed attorney may request payment of reasonable fees and costs. All requests for fees and costs shall be verified and shall detail time spent and work performed. Permitted fees include:
 - **Attorney’s fees** billed at an hourly rate of **\$150**;
 - **Paralegal and legal assistant fees** billed at an hourly rate of **\$40** (reimbursable paralegal and legal assistant fees are those tasks requiring legal skill and knowledge. Clerical and secretarial tasks are not reimbursable and shall not be billed at a paralegal or legal assistant rate);
 - **Costs:** appointed attorneys may request **reimbursement of actual expenses reasonably incurred, with respective invoices/bills attached** (e.g. *expert witness fees, costs to obtain pertinent medical records, reasonable and customary postage costs, and subpoena costs*). Copying costs shall be paid at no more than fifteen cents (15¢) per copy. If reasonably incurred, attorney’s travel time shall be paid at one-half the hourly rate for attorney’s fees; and

⁸⁶² WY Rules and Regulations 270.0001.5 § 3

- **Prevailing employer's attorney fees and costs** billed at the rates established in this section in any contested case **where the issue is the compensability of an injury.**
- All requests for fees and costs must be submitted within ninety days of the [contested case] final order.
- Requests for fees and expenses of appointed attorneys shall include the attorney's certification that the fee statement is true and correct. The request shall additionally indicate the source (i.e., from the workers' compensation account, from amounts awarded to the employee or claimant, or from the employer) from which the fees and expenses are proposed to be paid. Requests shall be properly served on all parties.
- No fee shall be awarded in any case in which the hearing examiner determines the claim to be frivolous or without legal or factual justification.

Attorneys' fees are also available when a party is appealing a decision of the Office of Administrative Hearings or the Medical Commission to the courts.

During the *appellate* phase of a workers' compensation case, the Act provides that,

The district court **may** appoint an attorney to represent the employee **during proceedings in the district court and appeal to the supreme court.** The **district court** may allow the attorney a **reasonable fee** for his services at the conclusion of the proceedings in district court and the **supreme court** may allow for **reasonable fees** for services at the conclusion of the proceedings in the supreme court. In any appeal where the issue is the compensability of an injury, **a prevailing employer's** attorney fees shall also be paid according to the order of the district court or supreme court **from the worker's compensation account**, not to affect the employer's experience rating. An award of attorney's fees shall be for a reasonable number of hours and shall not exceed the benefits at issue in the appeal. In all other cases, if the employer or division prevails in the district court or supreme court, as the case may be, the fees allowed an employee's attorney shall not affect the employer's experience rating.

Again, various points from the statute may be quickly highlighted.

- The *district court* **may appoint counsel both for proceedings in the district court and with respect to appeal in the**

supreme court, but is not technically required by the statute to do so.

- The district court **may award a reasonable attorney’s fee for services in the district court and the supreme court may award a reasonable attorney’s fee for services performed in the supreme court**, but neither courts are technically required by the statute to do so.
- **When the employer prevails** in a contested case involving compensability of an injury, the district and supreme courts may award the employer an attorney’s fee, provided the hours expended on the matter are deemed reasonable.
- **The attorney’s fee awarded to employer’s counsel “shall not exceed the benefits at issue in the contested case hearing.”**
- **Attorney fees allowed shall be at an hourly rate established by the director of the office of administrative hearings and any application for attorney’s fees shall be supported by a verified itemization of all services provided.**
- **If the hearing examiner determines “the claim or objection to be frivolous and without legal or factual justification”** the examiner is mandated not to award an attorney’s fee.
- **When the employer or the division prevail, litigation costs do not affect the employer’s experience rating.** (In other words, if the employer “wins” the claim, its “insurance” premium should not go up because it is not “riskier” than it was before the litigation.)

One noticeable omission from the attorneys’ fee provisions concerns counsel’s entitlement to payment for services rendered to a claimant engaged in a pre-contested case dispute with the Division. In *Painter v. Workers’ Compensation Div.*,⁸⁶³ the Wyoming Supreme Court concluded that “[t]he hearing examiner had jurisdiction to appoint an attorney and award attorney fees once the Division issued a final determination on the compensability of [claimant’s] injury.”⁸⁶⁴ A similar conclusion was reached in 2001 in *Workers’ Safety & Compensation Div. v. Gerrard*.⁸⁶⁵

⁸⁶³ 931 P.2d 953 (Wyo. 1997)

⁸⁶⁴ *Id.* at 956

⁸⁶⁵ [17 P.3d 20](#), 27 (2001)

There are some ambiguities to this somewhat broad allowance for pre-hearing/pre-contested case attorney fees, however. For one thing, there must be an actual dispute with the Division. In *Manning v. Workers' Compensation Div.*,⁸⁶⁶ for example, the Wyoming Supreme Court reaffirmed the principle from *Painter* “that an employee is entitled to paid legal representation when the Division issues a final determination regarding compensability of an injury or a claim, whether or not a formal request for a contested case is filed.”⁸⁶⁷ Here, however, the claimant sought the services of counsel upon a suspicion that she *would* have a formal dispute with the Division over a diagnostic medical examination sought for the purpose of ruling out the need for a third surgery on work-related injuries to her wrists.⁸⁶⁸ Ultimately, the Division did *not* agree to pay for the medical examination, but offered to pay for a “second opinion” if she obtained a referral from her treating doctor. The claimant declined to follow up on the offer and the “case” simply fizzled.⁸⁶⁹ The claimant then advised counsel she no longer wanted to be represented.⁸⁷⁰ Counsel in any event submitted a motion for a small fee award for the work that he *had* performed.⁸⁷¹ The Wyoming Supreme Court upheld denial of the motion: even though claimant’s instincts may have been sound in *anticipating* a claim denial—and, indeed, she likely saved the Division the cost of a third surgical procedure—**no claim had ever actually materialized, which the Court deemed a prerequisite for the allowance of attorneys’ fees.**⁸⁷² As discussed earlier,⁸⁷³ in *Whiteman v. Workers’ Safety & Compensation Div.*, a claimant’s motion for appointment of counsel had never been acted upon.⁸⁷⁴ Although the parties had not raised the issue, the Wyoming Supreme Court stated, *sua sponte*, **“The hearing examiner did not have the power, much less the discretion, to award attorney fees to a non-appointed attorney.”**⁸⁷⁵

Some additional ambiguity exists with respect to pre-contested case awards of attorneys’ fees. Before there has been an assignment of a case for a contested case hearing, there is no *hearing* examiner to award the fees. This author has conducted informal investigation on the matter and it appears that the *Division* be *de facto* awarding attorneys’ fees in these situations (or at least processes requests for fees), though it is unclear according to what statutory or regulatory authority. Perhaps the OAH or Medical Commission has promulgated an interpretive rule authorizing the

⁸⁶⁶ [938 P.2d 870](#) (Wyo. 1997)

⁸⁶⁷ *Id.* at 873

⁸⁶⁸ *Id.* at 872

⁸⁶⁹ *Id.*

⁸⁷⁰ *Id.*

⁸⁷¹ *Id.* at 872

⁸⁷² *Id.* at 873

⁸⁷³ See Section 6.11 of this Treatise

⁸⁷⁴ [984 P.2d 1079](#) (Wyo. 1999)

⁸⁷⁵ *Id.* at 1082 (emphasis supplied)

Division to act as an agent in dispensing awards of attorneys' fees.⁸⁷⁶ A similar arrangement with respect to the filing of documents, pleadings, and motions, all of which are by rule filed with the Division even when pertaining to an OAH-jurisdiction contested case.⁸⁷⁷ Under § [27-14-802](#)(a) the Division has broad authority to promulgate rules pertaining to *its* operation,⁸⁷⁸ but attorneys' fees appear not to fall within the Division's jurisdiction.

Despite the hearing examiner's broad discretion to award attorneys' fees—including the discretion to reduce a proposed fee award—the Wyoming Supreme Court has upheld, under an older version of the Wyoming Workers' Compensation Act, a district court's reversal of a hearing examiner's inadequately explained reduction of such an award. In *Workers' Compensation Div. v. Brown*,⁸⁷⁹ the Wyoming Supreme Court concluded that the hearing examiner's reduction of fees was arbitrary and capricious. Given the age of the case (which has not been overturned), it is probably safest to say that it continues to stand for the proposition that a hearing official should not award attorneys' fees according to an undisclosed policy rationale or depart sharply from established agency policy without explanation.

In a similar vein, district courts have historically enjoyed considerable discretion in awarding attorneys' fees under the Wyoming Workers' Compensation Act. Nevertheless, "that discretion is not unfettered."⁸⁸⁰ In *Gonzales v. Workers' Compensation Div.*, the Wyoming Supreme Court remanded a case in which the district court had reduced petitioned-for attorney's fees because "[t]he district court's order did not contain any findings of fact or conclusions of law and, therefore, the order awarding attorney's fees did not comply with the applicable rule. This constitutes an error of law. Although the court has considerable discretion in awarding attorney's fees, it 'does not enjoy any discretion with respect to an error of law.'"⁸⁸¹

⁸⁷⁶ See *Mountain Regional Services, Inc. v. Dept of Health*, [326 P.2d 182](#), 184 (Wyo. 2014). An interpretive rule is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them. Interpretive rules are statements as to what the agency thinks a statute or regulation means. Interpretative rules or statements of general policy are exempt from these formal procedures. *Id.*

⁸⁷⁷ WY Rules and Regulations 270.0001.5 § 2

⁸⁷⁸ *Shenemen v. Division of Workers' Safety and Compensation Internal Hearing Unit*, [956 P.2d 344](#), 349 (Wyo. 1998); *Appleby v. Workers' Compensation & Safety Div.*, [47 P.3d 613](#), 617 (Wyo. 2002); *Poll v. Dept. of Employment, Division of Workers' Safety & Compensation*, [963 P.2d 977](#), 978 (Wyo. 1998)

⁸⁷⁹ [805 P.2d 830](#) (Wyo. 1991)

⁸⁸⁰ *Gonzales v. Workers' Compensation Div.*, [992 P.2d 560](#), 562 (Wyo. 1999)

⁸⁸¹ *Id.* at 562

The Wyoming Supreme Court has also clarified that a claimant's attorney's fee is not limited to the amount of benefits at issue. That limitation applies only to prevailing employer's counsel.⁸⁸²

⁸⁸² In re Workers' Compensation Claim of Smith, [121 P.3d 150](#), 154 (Wyo. 2005); Workers' Safety & Compensation Div. v. Gerrard, [17 P.3d 20](#) (Wyo. 2001)

7 Judicial Review of Workers' Compensation Decisions

7.1 Judicial Review of Administrative Agencies Generally

As this Treatise has already explained, in Wyoming, as in almost every other state in the United States, facts in contested workers' compensation cases are developed within an administrative agency.⁸⁸³ So the typical workers' compensation issues—such as whether an injury is causally related to work, the degree of a workers' disability, an employee's average wage at the time of injury, whether an employee provided timely notice of injury, whether a worker is an employee within the meaning of the Act, and whether an injury occurred on an employer's premises—are initially decided by an administrative agency rather than a court. As discussed previously, in Wyoming the administrative fact finder subject to judicial review is either a hearing officer designated by the Office of Administrative Hearings (the OAH) or a medical panel convened by the Medical Commission. In all administrative law systems the question arises as to what level of “deference” courts should afford *administrative officials* engaging in workers' compensation fact finding, when the fact finding is challenged in a proceeding for judicial review. Wyoming, like nineteen other states and the federal Longshore Harbor Workers' Act, applies the “substantial evidence” standard of review.⁸⁸⁴

The reader will note that, although other forms of judicial review of administrative agencies may be possible⁸⁸⁵—and the next subsection will catalogue the kinds of

⁸⁸³ W.S. § [27-14-102](#)(a)(vi). For a succinct summary reflecting the universal use of administrative agencies in workers' compensation adjudication see David B. Torrey, *The Workers' Compensation Judge and Finality of Fact-Finding Among States: Introduction and Tables*, NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY COMPARATIVE ADJUDICATION SYSTEMS PROJECT, Tables 1 and 2 (2012) available at <http://www.davetorrey.info>. Since Judge Torrey's summary, Tennessee, possessing one of the last two court-based systems, has transitioned to an administrative agency based system. Only Alabama remains as a court-based system; see also David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 J. NAT. ASSOC. OF ADMIN. LAW JUDICIARY 23, 35 (2012).

⁸⁸⁴ 12 LARSON'S WORKERS' COMPENSATION LAW §130.01; W.S. § [16-3-114](#)(c)(ii)(E)

⁸⁸⁵ Under the Federal Administrative Procedure Act, 5 U.S.C. § 706(2), for example, courts shall:

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

agency review available in Wyoming—the vast majority of cases involving judicial review of administrative agency awards raise the simple question of whether the agency’s decision is supported by substantial evidence, which normally means simply whether the agency’s decision is supported by “such evidence as a reasonable mind could accept as supporting an agency’s decision.”⁸⁸⁶ The extensive history of the “reasonable mind” formulation is beyond the scope of this entry.⁸⁸⁷

7.2 Judicial Review of Administrative Agencies in Wyoming Workers’ Compensation

The Wyoming Contested Case Procedures establish the bases according to which administrative action in a workers’ compensation case can be challenged. **Any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction . . . is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken . . . or . . . in the district court for the county in which the party aggrieved or adversely affected by the administrative action or inaction resides or has its principal place of business.**⁸⁸⁸ With respect to the **scope** of review, § 16-3-114(c) states,

To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

- (i) Compel agency action unlawfully withheld or unreasonably delayed; and
- (ii) Hold unlawful and set aside agency action, findings and conclusions found to be:
 - (A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

⁸⁸⁶ See e.g. *Price v. Department of Workforce Services, Workers’ Compensation Division*, [388 P.3d 786](#), 789-90 (2017) (“Substantial evidence means ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”); this formulation of the rule is commonly ascribed to the Supreme Court’s opinion in *Consolidated Edison Co. v. NLRB*, [305 U.S. 197](#), 229 (1938)

⁸⁸⁷ Michael C. Duff, *A Tale of Two Standards*, [18 WYO. L. REV. 1](#), 19-20 (2018)

⁸⁸⁸ W.S. § [16-3-114\(a\)](#)

- (B) Contrary to constitutional right, power, privilege or immunity;
- (C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;
- (D) Without observance of procedure required by law; or
- (E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

The statutory text is almost identical to that found in the federal APA.⁸⁸⁹ But there are three important preliminary observations to make. First, **neither a district court nor the Wyoming Supreme Court has the authority in an administrative agency appeal to address a petition for review regarding the constitutionality of the workers' compensation statute.** Rather, the correct course for such a constitutional challenge in Wyoming is an independent action for declaratory judgment under Wyoming Rule of Appellate Procedure 12.12.⁸⁹⁰ The declaratory action requirement is said to be rooted in the fact that administrative agencies do not have the authority to make decisions regarding the constitutionality of a statute, so an appeal of an agency decision necessarily cannot address constitutionality.⁸⁹¹

The second preliminary observation is that, while an agency may certainly act “in excess of statutory jurisdiction authority or limitations or lacking statutory right”—for example, the agency does that which it simply has no statutory authority to do—such “statutory excess” cases seldom arise in Wyoming in “**interpretive**” contexts. In other words, in the **federal** sector agencies are at least putatively afforded *judicial deference* when reasonably interpreting **ambiguous** statutory language in their enabling statutes.⁸⁹² While Wyoming cases have occasionally stated this principle,⁸⁹³ **the dominant rule has been that the standard of review of an agency's conclusions of law is de novo.**⁸⁹⁴ The author has been unable to locate any case in which a Wyoming court has upheld a Wyoming administrative agency's

⁸⁸⁹ *See supra*.

⁸⁹⁰ *Torres v. Workers' Safety & Compensation Div.*, [95 P.3d 794](#), 795 (Wyo. 2004);

⁸⁹¹ *Araguz v. Workers' Safety & Compensation Div.*, [262 P.3d 1263](#), 1266 (Wyo. 2011)

⁸⁹² *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, [468 U.S. 837](#) (1984)

⁸⁹³ *Exxon Mobil Corp. v. Dept. of Revenue*, [219 P.3d 128](#), 140 (Wyo. 2009) (“While **we generally defer to an agency's interpretation of the statutes it administers**, an agency's statutory interpretation is entitled to little deference when it is contrary to prior practice and precedent.”) (emphasis supplied)

⁸⁹⁴ *Casiano v. Wyoming Department of Transportation*, [434 P.3d 116](#), 120 (Wyo. 2019); *Jacobs v. Workers' Safety & Compensation Div.*, [216 P.3d 1128](#), 1132 (Wyo. 2009); *Workers' Safety & Compensation Div. v. Garl*, [26 P.3d 1029](#), 1032 (Wyo. 2001)

interpretation of an ambiguous portion of its organic statute on *Chevron* deference-type grounds.

The third preliminary observation is that **on appeal the Wyoming Supreme Court gives no special deference to the decision of a district court.**⁸⁹⁵ In effect, the district court appeal is an exhaustion requirement most likely to dissuade litigants with limited resources.⁸⁹⁶

These preliminary observations suggest what seems empirically to be the case: **most workers' compensation appellate litigation (in Wyoming and elsewhere) centers on 1) whether an administrative agency's decision was "[a]rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;" and/or 2) whether an agency decision was "[u]nsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute."**

The Treatise will next lay out the substantial evidence and arbitrary and capricious rules with the caveat that, in the opinion of this writer, the rules are confused and need to be clarified. The substantial evidence rule, for example, is something other than what it is thought to be in other jurisdictions and legal practitioners should be wary of the distinctions between Wyoming substantial evidence law and "typical" expositions of substantial evidence.

7.3 The Substantial Evidence Rule

There are actually **two parts** to the substantial evidence rule in Wyoming, though it should be kept in mind that all analysis here proceeds from a single provision of the Wyoming Administrative Procedure Act, W.S. § [16-3-114\(c\)\(ii\)\(E\)](#). It is also important to remember that the language of this provision is virtually identical to substantial evidence language in the federal APA. A recent exposition of the Wyoming substantial evidence rule may be found in *Hart by and through Hart v. Department of Workforce Services*.⁸⁹⁷ First,

In reviewing findings of fact, we examine the entire record to determine whether there is substantial evidence to support an agency's findings. If the agency's decision is supported by substantial evidence, we cannot properly substitute our judgment for

⁸⁹⁵ *Kebschull v. Dep't of Workforce Services, Workers' Compensation Div.*, [399 P.3d 1249](#), 1255 (Wyo. 2017); *Price v. Dep't of Workforce Services, Workers' Compensation Div.*, [388 P.3d 786](#), 789 (Wyo. 2017); *Kenyon v. Workers' Safety & Compensation Div.*, [247 P.3d 845](#), 848 (Wyo. 2011)

⁸⁹⁶ *Newman v. Workers' Safety & Compensation Div.*, [49 P.3d 163](#), 166 (Wyo. 2002); *French v. Amax Coal West*, [960 P.2d 1023](#), 1027 (Wyo. 1998)

⁸⁹⁷ --P.3d---; [2018 WY 105](#)

that of the agency and must uphold the findings on appeal. Substantial evidence is **relevant evidence which a reasonable mind might accept in support of the agency's conclusions. It is more than a scintilla of evidence.**⁸⁹⁸

To this point, the substantial evidence rule looks the same as it would in most jurisdictions.⁸⁹⁹ But there is a second, non-standard component to the substantial evidence rule in Wyoming:

If the hearing examiner determines that the burdened party failed to meet his burden of proof, we will decide whether there is substantial evidence to support the agency's decision to reject the evidence offered by the burdened party by considering whether that conclusion was **contrary to the overwhelming weight of the evidence in the record as a whole.**⁹⁰⁰

There are at least two problems with this formulation. First, the courts are wrestling (as the courts have indicated they are – see below) with the distinction between the **weight** and the **character** of evidence. It is obviously, for example, within a state's authority to say that even if an administrative agency's decision is *not supported by a preponderance* of evidence the decision of the agency will be upheld (essentially for reasons of judicial efficiency). That is a question of *weight*. But weight is also a characteristic of the traditional substantial evidence rule—to uphold the agency a court must find that there is **more than a scintilla** of relevant evidence of a type that a reasonable mind might accept in support of the agency's conclusions. So part one of the rule would uphold an agency decision if supported by *more than a scintilla* of evidence, while part two of the rule would uphold an agency decision unless it is *clearly contrary to the overwhelming weight* of the evidence. Part two is not an articulation of the substantial evidence rule as commonly understood.⁹⁰¹

The second problem with the two-part substantial evidence articulation is that it is hard to imagine a case in which a party failed to prevail for any *evidentiary* reason other than that it did not satisfy its burden of proof. While there is a very specific case posture problem that has generated this “sub-standard” (*see infra.* of this Treatise at 7.5), it is difficult not to see it as surplusage with potential for doing mischief.

⁸⁹⁸ *Id.*, slip op. at 5

⁸⁹⁹ *See e.g.* the term as defined in BLACK'S LAW DICTIONARY (11th ed. 2019)

⁹⁰⁰ --P.3d--; [2018 WY 105](#), slip op. at 5

⁹⁰¹ *See generally* Duff, *A Tale of Two Standards*, [18 WYO. L. REV. 1](#) (2018)

7.4 Arbitrary and Capricious Review

In *Harboth v. Department of Workforce Services*,⁹⁰² the Wyoming Supreme Court re-articulated how it applies the arbitrary and capricious rule under the Wyoming Administrative Procedure Act, W.S. § [16-3-114](#)(c)(ii)(A):

We also apply the arbitrary and capricious standard as a “safety net” to catch agency action, “which prejudices a party’s substantial rights or which may be contrary to the other review standards under the Administrative Procedure Act, yet is not easily categorized or fit to any one particular standard.” . . . Examples of arbitrary and capricious actions include making inconsistent or incomplete findings of facts or conclusions of law, failing to admit testimony or other evidence that was clearly admissible, or violating a party’s right of due process.⁹⁰³

The standard is imprecise on its face, but the strong implication for its very existence is that at times the substantial evidence standard may be ineffective as an evidentiary review mechanism “to catch agency action, ‘which prejudices a party’s substantial rights . . .’” The reason the provision implicitly references the substantial evidence standard is that it makes little sense for it to be referencing the other review standards (after all, an agency has either violated the constitution, a statute, or a procedure or it has not).

7.5 Substantial Evidence versus Arbitrary and Capricious Review

Having laid out recent Supreme Court definitions of the substantial evidence and arbitrary and capricious standards, it is important to note the sometimes confusing relationship between the two. Several years of Wyoming cases discussing the substantial evidence and arbitrary and capricious standards of review were succinctly summarized by the Wyoming Supreme Court’s 2002 opinion in *Newman v. Workers’ Safety & Compensation Div.*⁹⁰⁴ In that case, the Court opined,

[i]n appeals of agency decisions, both the court and the parties have historically treated the applicable standard of review in an imprecise

⁹⁰² [424 P.3d 1261](#) (Wyo. 2018) (Implantation of non-FDA-approved artificial discs at adjacent levels of the lumbar spine was not an “off-label” use of medical services; but substantial evidence supported the Medical Commission’s determination that claimant failed to provide sufficient documentation of the procedure’s safety and effectiveness, rendering it “alternative medicine” for which benefits were properly denied and denial was not arbitrary and capricious).

⁹⁰³ *Id.* at 1272

⁹⁰⁴ [49 P.3d 163](#) (Wyo. 2002)

and, consequently, often inconsistent manner. Specifically, with regard to worker's [sic] compensation cases appealed pursuant to the Wyoming Administrative Procedure Act (WAPA), Wyo. Stat. Ann. § 16-3-114, it appears there has been an unintentional and incremental muddling of the arbitrary or capricious standard and the substantial evidence test when agency decisions are reviewed. **The blurring of these concepts has led to the citation of every possible administrative review standard in a scattergun effort to hit the target.** This particular case is no exception.⁹⁰⁵

The facts of *Newman* presented exactly the type of fact pattern that appears historically to have troubled the courts. Beri Newman injured her neck on March 13, 1998, while working at a restaurant in Casper.⁹⁰⁶ She sought chiropractic care and in response to the chiropractor's written office questionnaire stated she had sprained her back while carrying trays of dishes.⁹⁰⁷ She stated in the questionnaire she had felt pain in her lower back immediately after the accident.⁹⁰⁸ In answer to the form's fill-in-the-blank questions, she did not indicate she had ever had headaches or vision problems, but *did* indicate that, presently, she had low back problems, pain between her shoulders, neck problems, sore and weak muscles, and walking problems.⁹⁰⁹ In a separate form from the same chiropractor, entitled "Confidential Patient Case History," she stated that she had occasional headaches and had been previously treated by the same chiropractor for neck problems.⁹¹⁰ The insurance claim forms the chiropractor submitted to the Division stated that Newman received treatment from March through November of 1998 for low back pain and a lumbosacral sprain, and the Division paid benefits for that treatment.⁹¹¹ The chiropractor released Newman from care in November 1998, recording in a report that her condition was progressing and that she had made satisfactory progress.⁹¹²

Newman returned to the same chiropractor for care in July 1999.⁹¹³ The chiropractor promptly wrote to the Division chronicling his prior treatment of Newman and noting that the symptoms were similar to the earlier period of treatment.⁹¹⁴ Significantly (as it turned out), the chiropractor made no mention of complaints relating to severe intermittent headaches and double vision, symptoms

⁹⁰⁵ *Id.* at 166 (emphasis supplied)

⁹⁰⁶ *Id.* at 165

⁹⁰⁷ *Id.*

⁹⁰⁸ *Id.*

⁹⁰⁹ *Id.*

⁹¹⁰ *Id.*

⁹¹¹ *Id.*

⁹¹² *Id.*

⁹¹³ *Id.*

⁹¹⁴ *Id.*

which had also *not* been mentioned during Newman's previous period of treatment.⁹¹⁵ The Division denied payment of several subsequent chiropractic bills because, it contended, the services were not related "to the back" or "to the back and neck" (that is, some of the bills pertained to headaches and double vision, which were not a part of the documented symptom complex at the time of the original injury).⁹¹⁶ "The Division based its denial of benefits in large part on an August 19, 1999, medical review panel recommendation. The three chiropractors who participated on the panel questioned the relationship between the new problems and the initial injury and opined the most recent symptoms were not a continuation of the previous injury."⁹¹⁷ Newman appealed.⁹¹⁸ The OAH held a contested case hearing and concluded Newman had failed to prove that her headaches and double vision were an injury within the meaning of the Wyoming Workers' Compensation Act.⁹¹⁹ In reaching this determination, the hearing examiner found Newman's testimony lacked credibility because it was inconsistent with her original injury reports.⁹²⁰ Especially damaging was the hearing examiner's refusal to find that any injury *ever* occurred in March 1998 (rendering subsequent considerations of whether *that* injury continued to contribute to her symptoms irrelevant):

The evidence indicate[s] that Newman has told medical providers that she suffered a strain or sprain to her mid and lower back and neck as a result of a fall while carrying a tray of dishes on March 13, 1998. Newman filed a report of injury and did not indicate that she fell while carrying a tray of dishes. Nor did Newman indicate on forms she filled out in Dr. Graber's office that she had been injured by a fall while carrying dishes. The evidence shows that Newman has made oral reports of a fall with a tray of dishes[;] however, there are no written reports of a fall while carrying dishes . . . This Office finds that Newman's testimony lacks credibility.⁹²¹

Similarly, the hearing examiner concluded the supportive reports of the treating chiropractor and an independent medical examiner were of little evidentiary value because they were based on Newman's version of the events.⁹²²

On the one hand, *Newman* presents the garden variety workers' compensation factual scenarios of: 1) a judge disbelieving a claimant's medical evidence, which,

⁹¹⁵ *Id.*

⁹¹⁶ *Id.*

⁹¹⁷ *Id.*

⁹¹⁸ *Id.*

⁹¹⁹ *Id.* at 166

⁹²⁰ *Id.*

⁹²¹ *Id.* at 175

⁹²² *Id.*

as has been mentioned in this Treatise, a fact finder has broad authority to do;⁹²³ and 2) a judge impeaching a witness's credibility through the witness's failure to mention prior injuries in contemporaneous documents. On the other hand, the case presents a kind of administrative law conundrum involving the substantial evidence and arbitrary and capricious standards discussed above. The claimant (possessing the burden of proof) **produced** evidence. The State (the "nonburdened" party) produced **no** evidence. Had the Hearing Examiner credited *any* of the claimant's witnesses (providing medical causation), or the claimant herself (providing legal causation), "more than a scintilla" of evidence might have supported an award in favor of the claimant. Yet the Examiner appears to have *completely* discredited claimant's evidence (**including whether an injury the Division had actually paid benefits concerning ever occurred**) because (1) of inconsistencies between what claimant initially and subsequently reported and (2) the involved physicians created reports based on Newman's "version of events."⁹²⁴ (The reports being based on Newman's version of events might of course have buttressed and enhanced Newman's testimony *if* the Examiner had found her generally credible. But the Examiner found Newman incredible because of discrepancies between her hearing testimony in 2000 and injury reports from almost two years earlier.)⁹²⁵

This brings us to the crux of how the substantial evidence and arbitrary and capricious standards can become conflated. It is awkward to contend that an administrative decision is *supported by substantial evidence* when the "non-burdened party"—in this case the Division—has offered *no* evidence, and the evidence of the burdened party—in this case the claimant—has been *entirely* rejected. Although the claimant obviously had been found, in effect, not to have carried her burden of proof, it is surprisingly difficult to express how a court should articulate the outcome under current administrative law. The *Newman* court quoted an opinion of the Pennsylvania Supreme Court with respect to the issue:

where the burdened party is the only party to present evidence and does not prevail before the agency, the "substantial evidence" test falters. If no evidence was presented to support the prevailing party, there is no evidence upon which to apply the "substantial evidence" test: i.e., it is impossible to find substantial evidence to support a position for which no evidence was introduced. In such cases, therefore, the appropriate scope of review . . . is whether the agency erred as a matter of law or capriciously disregarded competent evidence . . .⁹²⁶

⁹²³ See the discussion in this Treatise at 6.2 above

⁹²⁴ *Newman v. Workers' Safety & Compensation Div.*, *supra.*, 49 P.3d at 166

⁹²⁵ *Id.*

⁹²⁶ *Id.* at 171 *quoting* *Russell v. Workmen's Compensation Appeal Board (Volkswagen of America)*, 550 A.2d 1364, 1365 (Pa. 1988)

In other words, if the decision **could not**, under what has become the plain meaning of substantial evidence, be **based on substantial evidence** because of a “failure of proof”—i.e. no credited record evidence, “arbitrary and capricious” was deemed an acceptable catch-all category. Wyoming courts began to follow this approach in 1995:

[W]e are satisfied such cases come within the argument ... with respect to ... the sufficiency of the evidence, and the case must be considered under the arbitrary, capricious, and contrary to law language of WYO. STAT. § 16–3–114(c)(ii) (1990).... An agency's decision totally contrary to the evidence in the record is subject to such a test. We would have no equivocation in reversing and remanding such a decision.⁹²⁷

In *Newman*, however, and in *Dale v. S&S Builders*,⁹²⁸ the Wyoming Supreme Court resolved the problem of what to do in this category of cases—the agency reaching decision when the nonburdened party had submitted no evidence and it is “awkward” to conclude that an agency’s decision is “supported” by “substantial evidence.” Wyoming courts now disregard the awkwardness in favor of a unitary standard of substantial review (as set forth above in Section 7.3 of this Treatise). The problem is that even a casual reading reveals it is *not* one standard, but two. Where one party has produced all the evidence, and the other side has produced no evidence, it is difficult to defend a rule that makes it *easier* for courts to uphold the agency when it finds *against* the “evidence-producer.” This perhaps explains the instinct of some courts to resort to arbitrary and capricious review in such circumstances. The problem is that this usage of arbitrary and capricious is “flexible,” in the bad sense of the word, and carries with it the potential for repeatedly “butting heads” with earlier interpretations of “arbitrary and capricious.” The other plausible option has always been to retain the substantial evidence test, but, as *Newman* frankly conceded, “[t]he substantial evidence test seems to require more of an agency than does the arbitrary or capricious standard,”:

In *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 143 [87 S.Ct. 1507, 18 L.Ed.2d 681] (1967), the Court said that the substantial evidence test provided “a considerably more generous judicial review than the ‘arbitrary and capricious’ test.” ... Four Justices emphasized the more demanding nature of the substantial evidence test in *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 705 [100 S.Ct. 2844, 65 L.Ed.2d 1010]

⁹²⁷ *Newman v. Workers’ Safety & Compensation Div.*, *supra.*, 49 P.3d at 170 *quoting* *City of Casper v. Utech*, 895 P.2d 449, 452 (Wyo.1995)

⁹²⁸ 188 P.3d 554 (Wyo. 2008)

(1980): “Careful performance of this task is especially important when Congress has imposed the comparatively rigorous ‘substantial evidence’ standard.” Finally, a unanimous Court characterized the arbitrary and capricious test as “more lenient” than the substantial evidence test in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402, 412 n. 7 [103 S.Ct. 1921, 76 L.Ed.2d 22] (1983).

Unfortunately, while the Court consistently characterizes the arbitrary and capricious test as less demanding than the substantial evidence test, the Court has never explained the difference between the two. Since the substantial evidence test is extremely deferential, circuit courts have experienced difficulty applying the distinction the Court continues to draw. Circuit courts frequently treat the two tests as identical, referring to their “tendency to converge” and to the distinction between the two as “largely semantic.”

2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.4 at 807 (4th ed.2002)⁹²⁹

Thus, this is not a Wyoming-only judicial review problem. But this writer thinks the “cure” of the two-in-one substantial evidence test makes the problem worse, not better. It “sounds” like a decision *could* be based on relevant evidence which a reasonable mind might **not** accept in support of the agency’s conclusions, but still be immune from judicial reversal because the decision was **nevertheless** not contrary to the **overwhelming** weight of the evidence. That seems a super-insulation of executive branch activity that could work to seriously undermine the personal injury damages guarantees of [Article 10, Section 4](#) of the Wyoming Constitution. The clearest solution to the problem at this juncture of doctrinal development in Wyoming is to simply state the **traditional** substantial test (and abandon the overwhelming weight language⁹³⁰ altogether) **whenever** reviewing factual findings, with *Dale*’s additional caveat:

The arbitrary and capricious standard remains a ““safety net” to catch agency action which prejudices a party’s substantial rights or which may be contrary to the other W.A.P.A. review standards yet is not easily categorized or fit to any one particular standard.” Newman, ¶ 23, 49 P.3d at 172. Although we explained the “safety net” application of the arbitrary and capricious standard in Newman, we will refine it slightly here to more carefully delineate that it is

⁹²⁹ Newman v. Workers’ Safety & Compensation Div., *supra.*, 49 P.3d at 170-171

⁹³⁰ Adoption of the language was, in this writer’s opinion, a mistake in the first place. Duff, *A Tale of Two Standards*, 18 WYO. L. REV. at 12-15

not meant to apply to true evidentiary questions. Instead, the arbitrary and capricious standard will apply if the hearing examiner refused to admit testimony or documentary exhibits that were clearly admissible or failed to provide appropriate findings of fact or conclusions of law. This listing is demonstrative and not intended as an inclusive catalog of all possible circumstances. *Id.*⁹³¹

One “circumstance” that could continue to be included in *Dale*’s “catalog” is the situation that led to this doctrinal development in the first place: **agency awards in favor of non-producers of evidence**. Arbitrary and capricious review in those circumstances might simply consist of a requirement that agencies “adequately explain” adjudicative decisions. As the U.S. Supreme Court has explained in the context of federal agency adjudication: “Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.”⁹³² It seems better to retain the relative coherence of the substantial evidence test, in the interest of separation of powers, even if that retention leads to sometimes messier arbitrary and capricious doctrine.

⁹³¹ *Dale v. S&S Builders, supra.*, 188 P.3d at 561

⁹³² *Allentown Mack Sales & Serv. v. NLRB*, [522 U.S. 359](#), 374 (1998)

8 Miscellaneous Topics

8.1 Third Party Actions Generally

While the exclusive remedy rule applies with respect to an employee's remedy from the employer for a workplace injury, there are many situations in which the injury may be caused, in whole or part, by a third party. Imagine the case of an employee injured by a piece of equipment that malfunctions at the workplace. Most, if not all workers' compensation statutes allow for tort recovery from this third party on the moral theory that "the ultimate loss from wrongdoing should fall upon the wrongdoer."⁹³³ While "in compensation law, social policy has dispensed with fault concepts to the extent necessary to ensure an automatic recovery by the injured worker . . . the disregard of fault goes no further than to accomplish that object, and, with payment of the worker assured, the quest of the law for the actual wrongdoer may proceed in the usual way. So, it is elementary that if a stranger's negligence was the cause of injury to claimant in the course of employment, the stranger should not be in any degree absolved of his or her normal obligation to pay damages for such an injury."⁹³⁴ But most jurisdictions also conclude that the claimant should not be allowed to keep the entire amount both of the workers' compensation award and the common-law damages recovered because it is thought to be a double recovery.⁹³⁵

8.2 Third Party Actions in Wyoming

Third party actions in Wyoming are governed by W.S. § [27-14-105](#). The statutory provision captures the essence of the principles explained above in Section 8.1.

- **An employee has the right under Wyoming law to pursue a third-party action.**
- **If the employee recovers from the third party or a coemployee⁹³⁶ in any manner including judgment, compromise, settlement or release, the state is entitled to be reimbursed for a maximum of one-third of the total proceeds of the recovery** without regard to the category of damages alleged in the third-party action.

⁹³³ 10 LARSON'S WORKERS' COMPENSATION LAW § 110.01

⁹³⁴ *Id.*

⁹³⁵ 10 LARSON'S WORKERS' COMPENSATION LAW § 117.01 ("Under most subrogation statutes the payor of compensation gets reimbursement for the amount of its expenditure as a first claim upon the proceeds of the third-party recovery.")

⁹³⁶ See this Treatise above at Sections 1.7 and 1.8

- **Any recovery by the state is reduced pro rata for attorney fees and costs in the same proportion as the employee is liable for fees and costs.**
- **All money received by the state is credited to the worker's compensation account and considered in computing the employer's experience rating.**⁹³⁷
- **The director of the Division and the attorney general must be served formally with a copy of the complaint filed in a third party action. This a jurisdictional requirement in order to maintain the action.**
- **The director of the Division and the attorney general must be formally notified in writing of any judgment, compromise, settlement or release entered into by an employee; and before even offering settlement to an employee, a third party or its insurer must notify the state of the proposed settlement and give the state fifteen days in which to object.**
- **If notice of proposed settlement is not provided, the state may initiate an independent action against the third party or its insurer for all payments made or reserved on behalf of the employee.**
- **The attorney general, representing the director, must be made a party in all negotiations for settlement, compromise or release of a third party action involving a workers' compensation claim.**
- **The attorney general and the director are authorized (in appropriate cases) to accept less than the state's total claim for reimbursement.**
- **The state has a lien on proceeds (of any judgment, settlement, compromise or release) for the state's claim for reimbursement, which remains in effect until the state is paid and the attorney general has released the state's claim.**
- **Where injury causes the death of the employee, the lawful personal representative of the employee is authorized to pursue available rights and remedies for the benefit of the deceased employee's dependents.**

⁹³⁷ See also W.S. § 27-14-201(d)("If the division, by a preponderance of the evidence, determines that an employee's injury was primarily caused by a third party, the injury shall not be charged to the employer's account.")

- An **attorney failing to notify** the director and attorney general of a **settlement** or failing to ensure the state receives its share of the proceeds of a settlement or judgment **will be reported to the grievance committee** of the Wyoming State Bar.
- Upon the **unsolicited written** request of an employee or the employee's estate, the **"department"** may commence a **third party action**, and **any amounts recovered in the action are subject to the state's reimbursement claims**, including anticipated future medical costs. **Any excess recovery must be paid to the injured employee or the employee's estate.**
- The department or employer have an additional six month limitation period (beyond the date on which an employee or his estate would be barred under the statute of limitations from commencing a claim for personal injury or wrongful death) in which to commence a third party action on behalf of the employee or his estate.

Two policies emerge quickly from the statutory provisions. First, by requiring reimbursement to the State *up to only a maximum of one-third of the third party recovery* **the state is aggressively signaling to injured workers that it is "worth it" for them to pursue third party actions.**⁹³⁸ It is a well-known problem that allowing the full recovery of a tort damages award to the "third party subrogee" disincentivizes the claimant to pursue the third party action.⁹³⁹ Second, it is very clear that "[o]ne of the significant provisions of the Wyoming Worker's Compensation Act, § 27-14-105(b) . . . is **designed to protect the state's lien rights**, in the event of a settlement or judgment in favor of the injured worker in an action involving third parties or others."⁹⁴⁰

The Wyoming Supreme Court has tended to interpret the third party action statutory provisions very strictly. In *Haney v. Cribbs*,⁹⁴¹ for example, the Wyoming Supreme Court dismissed the Haney's personal injury complaint against a third party defendant because "the Haney's served it on the Wyoming Attorney General and the Director of the Wyoming Department of Employment **by regular U.S. Mail, rather than by certified mail** return receipt requested."⁹⁴² As the Court explained:

RaNaye Haney was operating a City of Gillette garbage truck in Campbell County, Wyoming. She was struck from the rear by a truck driven by Steve Cribbs who was employed by DRM. Because

⁹³⁸ 10 LARSON'S WORKERS' COMPENSATION LAW § 110.02

⁹³⁹ *Id.*

⁹⁴⁰ *Streeter v. Amerequip Corp.*, [968 F.Supp. 624](#) (D.Wyo.1997)

⁹⁴¹ [148 P.3d 1118](#) (Wyo. 2006)

⁹⁴² *Id.* at 1119

her injuries occurred within the course and scope of her employment, Mrs. Haney received worker's compensation benefits of over \$196,000.00. On June 14, 2005, just days before the statute of limitations expired, the Haney's filed a complaint against DRM seeking to recover all damages she suffered in the accident. Such a suit is authorized by Wyo. Stat. Ann. § 27–14–105(a), although the attorney general and the department (or the worker's compensation division) must be given notice of it so that the State may perfect a limited lien on any damages awarded.² The statute of limitations applicable to this case is that found at Wyo. Stat. Ann. § 1–3–105(a)(iv)(C), which is four years.⁹⁴³

After the statute of limitations had expired on the civil damages suit, “DRM filed a motion to dismiss the complaint (and/or for summary judgment) for the reason that the district court lacked subject matter jurisdiction.” There was no question that—then, as now—the Haney's were required to notify the attorney general and the Director (then) of the Department of Employment **by certified mail** but had not done so.⁹⁴⁴ But the Haney's had made *some* attempt to notify. “Prior to the filing of the Haney's' complaint, the attorney general and the worker's compensation division received notice, from counsel for the Haney's, of their intent to file the lawsuit at issue here. Later, a copy of the complaint was sent to the attorney general and to the worker's compensation division in a timely manner.”⁹⁴⁵ While acknowledging that “[t]he provisions of the Act are to be viewed as a ‘sword’ for use by the State of Wyoming, and not as a ‘shield’ for third party tortfeasors” the Court nevertheless concluded, “the statutory requirements for notice are clear and unambiguous. Here, [the Haney's] failed to demonstrate compliance and their arguments that notice was provided via alternative means, while garnering [the] sympathy of this court, are legally unpersuasive.”⁹⁴⁶

There are some cases in which it is not clear if an entity is an employer within the meaning of the Workers' Compensation Act or is a “true” third party. For example, as discussed in this Treatise, above in Section 1.6, the parent corporation of a Wyoming subsidiary employer does not enjoy workers' compensation immunity unless it—the parent—has contributed to the workers' compensation fund.⁹⁴⁷ By implication such a non-contributing employer *is* a **third party as a matter of law with respect to a tort cause of action arising in the workplace**. For this reason there can be a complicated interrelationship between the issue of third party actions

⁹⁴³ *Id.* at 1119-1120

⁹⁴⁴ *Id.* at 1121

⁹⁴⁵ *Id.* at 1120

⁹⁴⁶ *Id.* at 1122. A refiled case involving the same facts was permitted to proceed but its complexity unnecessarily detracts from the clear general rule.

⁹⁴⁷ *Fiscus v. Atlantic Richfield Co.*, [742 P.2d 198](#), 200-201 (Wyo. 1987)

and the issue of whether joint employment exists in a workplace and, if so, which of the joint employers are immune from tort suits.⁹⁴⁸

In a number of Wyoming cases employees have attempted to sue co-employees as third parties. As the *Larson*'s treatise states: "The great majority of states and the Longshore Act now exclude co-employees from the category of 'third persons.' Of these, two-thirds recognize an exception for intentional wrongs, either by statutory provision or by judicial decision, based usually either on public policy or on the limitation of the act to accidental injury."⁹⁴⁹ Wyoming has followed this trend by statute. Section [27-14-104\(a\)](#) of the Act states:

The rights and remedies provided in this act for an employee including any joint employee, and his dependents for injuries incurred in extrahazardous employments are in lieu of all other rights and remedies against any employer and any joint employer making contributions required by this act, **or their employees acting within the scope of their employment unless the employees intentionally act to cause physical harm or injury to the injured employee**, but do not supersede any rights and remedies available to an employee and his dependents against any other person.

The Wyoming Supreme Court has interpreted this provision and has helpfully provided the following language for litigants and district courts to consider as an instruction on the issue of co-employee liability:

A co-employee is liable to another co-employee if the employee acts **intentionally to cause physical harm or injury. To act intentionally to cause physical injury is to act with willful and wanton misconduct. Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another.** In the context of co-employee liability, willful and wanton misconduct requires the co-employee to have 1) **actual knowledge of the hazard** or serious nature of the risk involved; 2) **direct responsibility for the injured employee's safety** and work conditions; and 3) **willful disregard of the need to act** despite the

⁹⁴⁸ See *Stratman v. Admiral Beverage Corp.*, [760 P.2d 974](#) (Wyo. 1988)

⁹⁴⁹ 10 LARSON'S WORKERS' COMPENSATION LAW § 111.03

awareness of the high probability that serious injury or death may result.⁹⁵⁰

Simply put, “the statute says that one employee is not liable to another if the former is only negligent.”⁹⁵¹ This means, of course, that no third party action is available by an injured employee against a co-employee unless the criteria in the previous inset paragraph have been satisfied.

A final point to make in this area is that **it does not appear the state ordinarily has independent authority to pursue a third party action on behalf of the injured employee where the employee declines to do so.** Under W.S. § [27-14-105](#)(e), the state may commence an action only “upon the unsolicited written request of the employee or estate.” W.S. § [27-14-105](#)(b) also says, “[i]f notice of proposed settlement is not provided, the state is entitled to initiate an independent action against the third party . . . for all payments.” But in that instance, the state’s right to initiation depends upon the injured employee’s preliminary pursuit of a third party action settlement. **In the absence of employee pursuit of a third party action there appears to be no statutory authority for the state to commence the action.**

8.3 Alternative Dispute Resolution

The Wyoming statute appears to authorize mechanisms for early resolutions of cases that forgo the need to go to formal hearing. Section [27-14-601](#)(e) of the Act states:

In accordance with this act, the division shall by rule and regulation establish necessary procedures for the review and settlement of the compensability of an injury or death resulting from injury and of claims filed under this act through interviews with employees, employers and health care personnel or through review of written reports. **Nothing in this act shall prohibit the employer or division from reaching a settlement of up to two thousand five hundred dollars under this subsection in any one case without an admission of compensability or that the injury was work related.** (emphasis supplied)

In addition, Chapter 10, Section 5 of the Medical Commission’s rules (WY Rules and Regulations 053.0019.10 § 5) states:

⁹⁵⁰ Formisano v. Gaston, [246 P.3d 286](#), 291 (Wyo. 2011)

⁹⁵¹ *Id.* at 290; *see also* Bertagnolli v. Louderback, 67 P.3d 627, 632 (Wyo.2003),

After referral to the Medical Commission, and prior to the contested case hearing, the executive secretary with consent of the parties may refer the case to the Office of Administrative Hearings for mediation. The executive secretary shall enter a written order assigning the matter for mediation and the Office of Administrative Hearings shall provide a mediator's report to the Medical Commission upon conclusion of the mediation. Thereafter, a final order shall be issued incorporating the terms and conditions of the mediation, if successful, or otherwise scheduling the matter for contested case proceedings before the Medical Commission.

Practitioners relate informally, however, that mediation and other forms of alternative dispute resolution (ADR) are rarely utilized. A close parsing of the statutory language reveals why. The value of most workers' compensation claims in a litigation posture will easily exceed twenty-five hundred dollars. Because the Division or employer would have to admit to the compensability or work-relatedness of an injury of greater value or liability—issues typically at the very heart of a workers' compensation dispute—there is a disincentive for them to settle. Interestingly, the Medical Commission rule does not reference W.S. § 27-14-601(e) and it is not clear on what statutory basis the rule was promulgated other than the Medical Commission's general rulemaking power.

It should also be mentioned that the rules of the Office of Administrative Hearings (OAH) specifically allow for ADR: "Parties to a contested case are encouraged to resolve the contested case through settlement, informal conference, mediation, arbitration, or other means throughout the duration of a contested case. If the parties choose to engage in mediation, they shall request mediation at least 30 days prior to hearing." Again, the regulatory authority of ADR may be based solely on the OAH's general rulemaking authority and there is no specific mention in the rule to § W.S. 27-14-601(e). The statutory limitation embedded in the Workers' Compensation Act, as discussed above, may explain the apparent underutilization of ADR in workers' compensation cases under the jurisdiction of the OAH.

The apparent absence of robust ADR in Wyoming is unfortunate and runs against the current (and probably efficient) trend of expanding ADR in workers' compensation systems around the country.⁹⁵²

⁹⁵² See DAVID B. TORREY AND MICHAEL C. DUFF, WORKERS' COMPENSATION INSURANCE CLAIMS IN RESOLVING INSURANCE CLAIM DISPUTES BEFORE TRIAL, AMERICAN BAR ASSOCIATION, TORT TRIAL & INSURANCE PRACTICE SECTION 257-300 (2018)

8.4 Experience Rating & Workers' Compensation Account

Outside of Wyoming, in a private workers' compensation insurance market the basic method of pricing private insurance is to calculate a rate per hundred dollars of employee remuneration.⁹⁵³ The inputs are payroll times an employment risk factor that is typically pegged to an industry classification code. Each classification carries its own particular rate per hundred dollars of payroll. The rate ideally should change to reflect the varying exposure to injury of different kinds of work. The details for determining risk classification can be complex and most states use the National Council on Compensation Insurance classification system. For most employers, only a few classification codes apply and the overriding classification principle is that **the overall business enterprise of the employer is classified, not the individual workplace exposures of employees**. For example, even though a university may employ workers who do dangerous work the **Governing Classification** of the university may be, for example, "academic institution." But many employers may employ employees who are routinely excepted by rate makers from the governing classification. In industry jargon, these types of employees fall under **Standard Exceptions**. The most common examples are *clerical employees* and *outside salespersons*. For any given employer, multiplying the employer's rate times its total payroll (per hundred dollars) yields what is known as the **manual premium**. That manual premium is then subject to adjustment through use of an **experience modification factor** based on the particular "loss experience" of a specific employer.

Most states do not themselves perform the rating function very briefly described in the foregoing paragraph. Instead, they rely on sophisticated third party advisory organizations or statistical agents—the **National Council on Compensation Insurance** is the best known of these entities—subject to examination and other oversight by state insurance regulatory officials. Wyoming's statute allows for *use* of such organizations but **defines by statute** certain aspects of the rating structure consistent with its monopolistic workers' compensation system. W.S. § [27-14-201](#) sets out the structure in detail. A full discussion of the provision is beyond the scope of this Treatise, but a few key points follow. It will be noted that a number of the statutory provisions discuss explicitly the ratemaking functions mentioned in the previous paragraph.

- **The worker's compensation program shall be neither more nor less than self-supporting.**
 - **This is not a minor point.** Insurance companies operate to make a profit and their conclusions regarding rates and

⁹⁵³ ED AND SCOTT PRIZ, WORKER'S COMPENSATION, ADVANCED INSURANCE MANAGEMENT LLC (2010)

premiums could cause the collapse of their businesses if their actuarial assumptions are wrong. Wyoming workers' compensation is not—and was never meant to be—a profit-generating enterprise. But neither may it lose money without exerting pressure on the public fisc.

- **Employments affected by this act shall be divided by the division into classes, whose rates may be readjusted annually as the division actuarially determines.**
- **An employer may contest the classification as determined by the Division following the contested case provisions of the Wyoming Administrative Procedure Act except that the Division has the burden of proving that the classification is correct.**
- **The Division determines hazards of different classes of employments and sets premiums at the lowest rate consistent with an actuarially sound worker's compensation account, surplus and reserves. It is also tasked with adopting a rating system that considers risks based on costs to the program and may, where necessary use consultants or rating organizations.**
- **No increase in the base rate for each employment classification may exceed 50% of the base rate imposed for that employment classification during the immediately preceding year.**
- **Rates are automatically adjusted to reflect reclassifications of industry codes in accordance with the North American Industry Classification System (NAICS) manual (See above at Section 2.20 of this Treatise), but any such increase is capped at 150% of the lowest base rate of any employer in that classification under the standard industrial classification manual for the preceding year.**
- **In addition, the rating plan must use an experience rating system based on three years of claim experience, or as much experience as is available, for employers enrolled under it.**
 - **The system rewards employers with a better than average claim experience, penalizes employers with a worse than average claim experience, and may provide for premium volume discount so long as the account remains actuarially sound.**

- Discounts from or penalties added to base employment classification rates because of claim experience shall not exceed 65% for rates through calendar year 2016 and shall not exceed 85% for rates beginning with calendar year 2017.

Despite the centrality of rate making to the operation of the workers' compensation system there appears to have been little litigation over these provisions. In *Matter of Nyquist*,⁹⁵⁴ an employer alleged to have had inadequate notice of an award of workers' compensation to its putative employee.⁹⁵⁵ The Division had first denied the claim, upon the employer's objection, but then abruptly reversed itself, apparently without notifying the employer.⁹⁵⁶ A few months later, after learning that the employee was, in fact, receiving workers' compensation benefits, the employer objected.⁹⁵⁷ The Division notified the employer that its objection was timely, and set the matter for hearing.⁹⁵⁸ Before the hearing, the parties settled the case, and stipulated to, among other things, that benefits paid would not be chargeable to the employer's experience rating but rather to an entire industrial classification under W.S. § [27-14-603\(e\)](#).⁹⁵⁹ That settlement agreement was, for reasons unnecessary to explore, scuttled, but a subsequent agreement, severing the non-chargeability issue, was eventually agreed to by all parties.⁹⁶⁰ Eventually, OAH determined that "there was not any statutory basis that provided for it to order that an employer's experience rating not be assessed for payments to an injured employee."⁹⁶¹ The Wyoming Supreme Court agreed, stating flatly that **the Division and not the OAH had authority to entertain chargeability disputes.**⁹⁶²

Nyquist illustrates that for employers, chargeability determinations are important because it determines the "premium" to which the employer will be subject. Outside the realm of chargeability, the Wyoming Supreme Court's arguably dismissive response to the challenge to the Division's Wal-Mart Distribution Center's coding as non-hazardous (See this Treatise's discussion of *Araguz* above at Section 2.21) may have suggested to potential litigants that, in the arena of the extrahazardous classification and experience rating of employers, the Division will be afforded extraordinary deference.

⁹⁵⁴ [870 P.2d 360](#) (Wyo. 1994)

⁹⁵⁵ *Id.* at 361

⁹⁵⁶ *Id.*

⁹⁵⁷ *Id.*

⁹⁵⁸ *Id.*

⁹⁵⁹ *Id.* at 361-362

⁹⁶⁰ *Id.* at 362

⁹⁶¹ *Id.*

⁹⁶² *Id.* at 363

Finally, all money received, earned or collected under the Act are credited to the “worker's compensation account.” All awards and claim determinations are paid from that account. Money collected but not immediately necessary for operations under the Act are required to be invested by the state treasurer in the same manner as other permanent state funds.

8.5 Penalties and Sanctions: Employees

Embedded within the Wyoming Workers’ Compensation Act are a variety of penalties and sanctions that may be assessed on parties for assorted forms of conduct. Discussion of some of the more notable of these penalties and sanctions follows. One of the more dramatic of these sanctions is **that an employee-claimant refusing to attend a medical examination at the direction of the Division or the employer may be subject to benefit termination.** This is especially clear in the context of Division reviews to determine if a claimant’s continued receipt of temporary total disability benefits is warranted (a review required by statute every six months). W.S. § [27-14-609](#)(c) states: **“If an employee refuses to submit to or obstructs the examination, his right to monthly payments shall be suspended until the examination has taken place. No compensation shall be paid during the period of refusal.”** The same point is again made (with some refinements) in W.S. § [27-14-404](#):

Payment under subsection (a) of this section **shall be suspended** if the injured employee fails to appear at an appointment with his health care provider. Payment shall be suspended under this subsection **until such time as the employee appears at a subsequent rescheduled appointment.** Payment shall not be suspended for failing to appear at an appointment if the employee notifies the case manager or the division prior to the appointment or within twenty-four hours after missing the appointment and the division determines, after recommendation by the case manager, that the employee made all reasonable efforts to appear at the appointment.

As is the case under many workers’ compensation statutes, and also under general principles of tort law,⁹⁶³ **an injured worker may not deliberately make her physical injury worse.** Under W.S. § [27-14-407](#):

⁹⁶³ The avoidable consequences doctrine holds that “a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach. • If the defendant can show that the plaintiff failed to mitigate damages, the plaintiff's recovery may be reduced.” BLACK’S LAW DICTIONARY (11th ed. 2019)

If an injured employee **knowingly engages or persists in an unsanitary or injurious practice which tends to imperil or retard his recovery, or if he refuses to submit to medical or surgical treatment reasonably essential to promote his recovery, he forfeits all right to compensation under this act.** Forfeiture shall be determined by the hearing examiner upon application by the division or employer.

The burden of establishing such a practice is on the employer,⁹⁶⁴ or the Division.⁹⁶⁵ The Wyoming courts have limited this longstanding provision of the Wyoming Act. In *In Re Williams*,⁹⁶⁶ for example, an employee died from a work-related automobile crash after refusing on religious grounds to accept blood products during treatment for his injuries. In the ensuing death benefit claim, the Division denied payment on the basis of W.S. § 27-14-407. In addition to problems of proof that the refusal of the treatment caused the death,⁹⁶⁷ the Wyoming Supreme Court emphasized the law's traditional caution when entertaining arguments for denying workers' compensation claims on "injurious practice" grounds. The Court, quoting earlier Wyoming authority, said,

In order to work a forfeiture of benefits for engaging or persisting in an unsanitary or injurious practice which tends to imperil or retard his recovery . . . 'proof of more than a mere possibility is required . . . We caution that **more is required than proof of a mere potential for harm or a possibility of harm; there must be proof that the worker's acts were not benign, but did, in some way, contribute to recovery problems.**⁹⁶⁸

The Wyoming Court has said that, "[w]e construe the forfeiture mandate strictly due to its harshness."⁹⁶⁹ The policy of restraint makes good sense when it is remembered that one of the major reasons for enacting workers' compensation statutes in the first place is that tort claims were too easily defeated through the affirmative defenses contributory negligence and assumption of the risk. Too generous a reading of W.S. § 27-14-407 could rekindle that problem.

Employees are subject to legal sanction for making misrepresentations in connection with a workers' compensation claim. Under W.S. § 27-14-510(a), "[a]ny person who knowingly makes, authorizes or permits any misrepresentation

⁹⁶⁴ Matter of Andren, [917 P.2d 178](#), 180 (Wyo. 1996); Kilburn Tire v. Meredith, [743 P.2d 874](#), 876 (Wyo.1987)

⁹⁶⁵ Matter of Andren, *supra.*, 917 P.2d at 180

⁹⁶⁶ [205 P.3d 1024](#) (Wyo. 2009)

⁹⁶⁷ *Id.* at 1029

⁹⁶⁸ *Id.* at 1033 *quoting* Workers' Compensation Div. v. Bergeron, 948 P.2d 1367, 1370 (Wyo.1997)

⁹⁶⁹ Matter of Andren, *supra.*, 917 P.2d at 180; Kilburn Tire v. Meredith, *supra.*, 743 P.2d at 876

or false statement to be made for the purpose of him or another person receiving payment of any kind under this act is guilty of” a misdemeanor, if the value of the payment is less than \$500; or a felony if the value of the payment is \$500 or more. Such a misdemeanor is punishable by a fine of not more than seven hundred fifty dollars, imprisonment for not more than six months, or both. The felony defined in this provision is punishable by a fine of not more than ten thousand dollars, imprisonment for not more than ten years, or both. There are few reported cases discussing this provision but two issues are worthy of mention.

First, the criminalization of workers’ compensation misrepresentations can create constitutional issues. In *Debyah v. Department of Workforce Services*,⁹⁷⁰ an employee asserted his Fifth Amendment right (and right under Article I, section 11 of the Wyoming Constitution) against self-incrimination in response to Division interrogatories in advance of a contested case hearing.⁹⁷¹ The hearing examiner dismissed the contested case as a sanction for the claimant’s failure to comply with discovery.⁹⁷² The Supreme Court remanded after setting out a standard to be employed when the Fifth Amendment privilege is invoked. First, quoting federal precedent, the Court acknowledged that “[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”⁹⁷³ The Wyoming Supreme Court concluded that the claimant gave a reasoned explanation for invoking the privilege, considering the criminal penalties for false statements in the Act, reasonably believed that his responses to the Division’s discovery requests could be used in a later criminal prosecution, and thus properly invoked his Fifth Amendment privilege.⁹⁷⁴ But even assuming claimant’s invocation of the Fifth Amendment privilege was reasonably invoked, the question remained as to whether his case was nevertheless subject to dismissal as a discovery sanction (under Rule 37 of the Wyoming Rules of Civil Procedure). The Court confirmed that in the face of a valid Fifth Amendment assertion an adjudicator must balance the right of a party to assert the privilege against any unfairness that may cause to the opposing party.⁹⁷⁵ Finding that the hearing officer had not balanced the Fifth Amendment privilege against the unfairness imposed on the Division—unfairness rendering it inevitable that the case would be dismissed as a discovery sanction—the Court remanded the case for the proper balancing test to be applied.⁹⁷⁶

⁹⁷⁰ [353 P.3d 711](#) (Wyo. 2015)

⁹⁷¹ *Id.* at 713

⁹⁷² *Id.*

⁹⁷³ *Id.* quoting *Hoffman v. United States*, [341 U.S. 479](#), 486–87 (1951); *Baker v. Limber*, [647 F.2d 912](#), 917 (9th Cir.1981)

⁹⁷⁴ *Debyah v. Department of Workforce Services*, *supra.*, 353 P.3d at 717

⁹⁷⁵ *Id.* at 718

⁹⁷⁶ *Id.*

In a second case involving W.S. § [27-14-510\(a\)](#), *In re Arellano*, the Wyoming Supreme Court reversed a decision of the OAH, which had applied the provision to an undocumented worker.⁹⁷⁷ As the Wyoming Supreme Court stated, even assuming that the involved employee had tendered fraudulent documents to obtain employment (and there was no evidence he misrepresented the facts of his injury):

There is a distinction between making a misrepresentation or false statement in obtaining employment and doing the same to obtain benefits under the Act. As one commentator explains, “it has been held that employment which has been obtained by the making of false statements—even criminally false statements—whether by a minor or an adult, is still employment; that is, the technical illegality will not of itself destroy compensation coverage.” 5 Larson, *supra*, § 66.04 (“False Statements at Hiring”). The majority of courts in this country are in agreement with this position, and with a few exceptions, illegal aliens are considered covered employees. *Id.*, § 66.03.⁹⁷⁸

This Treatise covers the issue of undocumented workers in greater detail above at Section 2.3.

8.6 Penalties and Sanctions: Employers

One of the primary sanctions against employers under the Act involves **suspension of civil legal immunity** in carefully described circumstances. W.S. § [27-14-104\(c\)](#) states:

This act does not limit or affect any right or action by any employee and his dependents against an employer for injuries received while employed by the employer when the employer at the time of the injuries has not qualified under this act for the coverage of his eligible employees, or having qualified, has not paid the required premium on an injured employee's earnings within thirty days of the date due. When an employee's employment starts within the same month as the injury, the status of delinquency or not contributing shall not apply until after the regular payroll reporting date.

Thus, an employer who has not qualified for coverage under the Act is subject to a tort action.

⁹⁷⁷ [344 P.3d 249](#) (Wyo. 2015)

⁹⁷⁸ *Id.* at 254-255

Under W.S. § [27-14-510](#)(b), an employer **making a false statement in a payroll report that results in the avoidance or reduction of the employer's workers' compensation premium obligation** is guilty of either a felony or misdemeanor depending on the magnitude of the avoided obligation. An avoided obligation of \$500 or more is a felony, potentially subjecting an employer to a fine of not more than \$10,000 or imprisonment of not more than 10 years, or both. An avoided obligation of less than \$500 is a misdemeanor, potentially subjecting an employer to a fine of not more than \$750 or imprisonment of not more than 6 months, or both. Under identical penalties for a variety of offenses (W.S. § [27-14-510](#)(c) and (d)) employers may be similarly liable: for **knowingly making a false statement in an injury report** with the intention of denying a worker benefits due under the Act (a misdemeanor if the value of benefits is less than \$500; a felony otherwise); or for **knowingly failing to establish a workers' compensation account or furnish a payroll report** required under the Act (a first conviction is a misdemeanor; subsequent convictions are felonies).

Under W.S. § [27-14-506](#)(c), an employer's **willful failure or gross negligence to report occurrences causing injury to any of his employees is a misdemeanor**, punishable by a fine of not more than \$750, imprisonment for not more than 6 months, or both.

As mentioned in this Treatise's section on *Extraterritoriality*, the Wyoming Act applies to employees of nonresident employers only if the workers' compensation or similar law of the nonresident employer's home state applies to all injuries and deaths occurring in that state; or the nonresident employer's home state and Wyoming have an active agreement under W.S. 27-14-306(d). In that event, the Act applies to all injuries and deaths occurring outside of Wyoming in employment under certain specified circumstances. One of the requirements applicable to nonresident employers, under W.S. § [27-1-106](#), is the posting of a bond. Under W.S. § [27-14-307](#), **"[t]he willful failure of any nonresident employer in a covered employment to give bond or other security required by this act constitutes a misdemeanor, punishable by a fine of not more than \$5,000.00), imprisonment for not more than 1 year, or both."**

8.7 Employee Anti-Retaliation Protections

In *Griess v. Consolidated Freightways Corp. of Delaware*,⁹⁷⁹ the Wyoming Supreme Court held that **a person whose employment is terminated for exercising rights under the workers' compensation statutes and who is not covered by the terms of a collective bargaining agreement has a cause of action**

⁹⁷⁹ [776 P.2d 752](#), 754 (Wyo. 1989)

in tort against the employer for damages. Noting protective public policy itself embedded in, among other places, W.S. § [27-14-104](#)(b) of the Act—“No contract, rule, regulation or device shall operate to relieve an employer from any liability created by this act except as otherwise provided by this act”—the Court explained the public policy rationale for allowing such an anti-retaliatory action as follows:

While these provisions do not directly address retaliatory discharge, they do evidence a strong public policy favoring unfettered exercise of the right to compensation for work-related injuries through the worker's compensation system. If employers could penalize employees for exercising statutory rights to compensation, this public policy would be defeated. **Fear of discharge would chill the exercise of a statutory right. Faced with a choice between receiving compensation and continuing their employment, many employees might choose the latter, thus reducing the number of claims filed. This reduction would directly affect the liability of the employer for premium payments, since under the Wyoming statutory scheme premium calculation is based in part on the number of claims paid.** W.S. 27-14-201. Actions by an employer which are intended to discourage valid compensation claims in order to reduce the employer's liability for premiums violate the public policy expressed by W.S. 27-14-104(b), quoted above.⁹⁸⁰

The Court also noted that under Art. 19, Section 7 of the Wyoming Constitution it is unlawful for an employer to require an employee to waive personal injury liability as a condition of employment, suggesting a strong public policy favoring unfettered exercise of the right to compensation for work-related injuries through the workers' compensation system (which is the only constitutionally authorized substitute for a tort remedy).⁹⁸¹

However, once establishing the theoretical availability of a cause of action in tort for retaliatory discharge, it remained unclear for several years how such a case could be proven when the employer defended an adverse employment action by asserting a different, non-retaliatory motive. The Court clarified the burden shifting mechanism to be used in such cases in *King v. Cowboy Dodge, Inc.*⁹⁸² In that case, the Wyoming Supreme Court first noted that “[t]he great majority of jurisdictions have recognized by statute or judicial decision that employees may recover in tort when they are discharged in retaliation for filing a worker's compensation claim.”⁹⁸³

⁹⁸⁰ *Id.* at 753

⁹⁸¹ *Id.*

⁹⁸² [357 P.3d 755](#) (Wyo. 2015)

⁹⁸³ *Id.* at 759

The Court added that *Griess* had not answered the question of “what proof must there be to avoid summary judgment and allow a jury to decide if a particular discharge was in retaliation for filing a claim when the employer has not admitted a retaliatory basis for it?”⁹⁸⁴ The Court discussed one of its earlier decisions,⁹⁸⁵ which in turn had quoted the *Larson*’s treatise:

Ordinarily the prima facie case must, in the nature of things, be shown by circumstantial evidence, since **the employer is not apt to announce retaliation as his motive. Proximity in time between the claim and the firing is a typical beginning-point, coupled with evidence of satisfactory work performance and supervisory evaluations. Any evidence of an actual pattern of retaliatory conduct is, of course, very persuasive.**⁹⁸⁶

In the case before the Court, the summary judgment facts were that the claimant had been fired eight days after the Division determined his injury to be compensable.⁹⁸⁷ At the subsequent workers’ compensation hearing:

[T]he employer presented documents critical of the claimant’s job performance because he failed to properly match the paint on two vehicles. There was evidently tension between King and his employer concerning blend time—the time required to match paint. In the first instance, the paint did not match, and the customer insisted on taking the vehicle to another body shop to redo the work. Cowboy Dodge had to refund the money it was paid by the insurance carrier. However, Gardner knew the paint did not match when he turned the vehicle over to the customer. A disciplinary action form related to this event was dated January 7, 2011, but it was not signed by King in a block for “employee signature,” nor was there any indication that King refused to sign.

The second vehicle also had to be repainted because the paint did not match. There is another written disciplinary action form dated February 18, 2011. In the place for “employee signature,” the words “Brian King” were printed, misspelling “Bryan.”

Gardner claimed to have discussed these problems with King when the forms were completed. King unequivocally denied that Gardner

⁹⁸⁴ *Id.* at 760

⁹⁸⁵ *Cardwell v. American Linen Supply*, [843 P.2d 596](#), 599–600 (Wyo.1992)

⁹⁸⁶ *King v. Cowboy Dodge, Inc.*, *supra.*, 776 P.2d at 760; the current *Larson*’s entry is 9 LARSON’S WORKERS’ COMPENSATION LAW § 104.07 [3]

⁹⁸⁷ *Id.* at 757

or anyone else ever complained or counseled him about these incidents or any other aspect of his job performance, and that he had ever seen those documents before the OAH hearing. He pointed out that his name is spelled “Bryan” and not “Brian,” as it appears in the signature block on the form relating to the second paint job. Confronted with this seeming inconsistency, Gardner explained that he just needed to write the employee's name somewhere on the form to indicate whose file it was to be placed in. Why he chose to write it in the place for the employee signature rather than somewhere else on the form is not clear.⁹⁸⁸

After surveying prior law on burden shifting, the Court quoted a burden shifting analysis drawn substantially from *Cardwell v. American Linen Supply*.⁹⁸⁹

1. **The employee must make a prima facie case showing employment, on-the-job injury, treatment that put the employer on notice that treatment had been rendered for a work-related injury, or that the employee had instituted, or caused to be instituted, procedures under the Wyoming Worker's Compensation Act, and consequent termination of employment.**
2. **After a prima facie case is established, the burden shifts to the employer to rebut the inference that its motives were retaliatory by articulating a legitimate non-retaliatory reason. Two such reasons may include the employee's inability to perform assigned duties, or bad faith pursuit of a compensation claim.** The employer need not persuade the court that it was actually motivated by the proffered reasons. **The burden is one of production**—the employer must raise a genuine issue of fact as to whether it retaliatorily discharged the employee.
3. **The employee may then meet its ultimate burden of persuasion by proving directly that the discharge was motivated by the exercise of his rights under the Act or by showing that the employer's proffered explanation is not worthy of credence, i.e., that it is a pretext.**

As the Court explained, the term “consequent” at step one of the *Cardwell* analysis was in turn derived from an older Oklahoma case “to describe the required causal

⁹⁸⁸ *Id.* at 758

⁹⁸⁹ *See supra.*

connection between seeking worker's compensation benefits and the termination.”⁹⁹⁰ Ultimately, however, the Court concluded:

We believe that **the “substantial and motivating factor” test is the appropriate one to be used in determining whether a plaintiff has proven the required causal connection between a compensation claim and discharge.** It protects workers' rights to make a compensation claim, and it recognizes that it may often be difficult to determine whether the filing of the claim was coincidental, the straw that broke the camel's back, or a motivation that led the employer to manufacture grounds for termination. These are questions that jurors, the majority of whom will either be employers or employees, are particularly well-suited to answer.

Where this seems to leave the law is that the “substantial and motivating factor” test is inserted at step one of the former *Cardell* factors.⁹⁹¹ As the 10th Circuit has noted, *what constitutes a substantial motivating factor evades precise definition*, but it is evident that under such a standard **an employee need not prove that protected activity is the sole reason for an adverse action.**⁹⁹² In *King v. Cowboy Dodge*, the Wyoming Supreme Court emphasized this point by **explicitly rejecting the U.S. Supreme Court’s “but for” causation standard recently imported into Title VII cases.**⁹⁹³

One final point on the burden shifting mechanism is that sometimes employers seek to defend retaliatory discharge actions with negative information about an employee that it discovered only after the employment was terminated.⁹⁹⁴ The better rule in these kinds of circumstances is that after-acquired evidence may not be a total bar to a claim of wrongful termination in retaliation for the filing of a workers’ compensation claim but may go to the question of damages.⁹⁹⁵

For purposes of the **evaluation of a prima facie case**, prima facie evidence is:

Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party’s claim or defense, and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or uncontradicted, is sufficient to

⁹⁹⁰ *King v. Cowboy Dodge, Inc.*, *supra.*, 776 P.2d at 761

⁹⁹¹ *See Kaufman v. Rural Health Development, Inc.*, 442 P.3d 303, 309 (Wyo. 2019)

⁹⁹² *See Copp v. Unified Sch. Dist. No. 501*, [882 F.2d 1547](#), 1554 (10th Cir. 1989)

⁹⁹³ *King v. Cowboy Dodge, Inc.*, *supra.*, 776 P.2d at 761, fn. 10

⁹⁹⁴ 9 LARSON'S WORKERS' COMPENSATION LAW § 104.07 [3]

⁹⁹⁵ *See Riddle v. Wal-Mart Stores, Inc.*, [998 P.2d 114](#) (Kan. 2000).

sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.⁹⁹⁶

At the summary judgment stage, the Wyoming Court has stated often that,

We examine the record from the vantage point most favorable to the party opposing the motion, and we give that party the benefit of all favorable inferences that may fairly be drawn from the record. A material fact is one which, if proved, would have the effect of establishing or refuting an essential element of the cause of action or defense asserted by the parties. If the moving party presents supporting summary judgment materials demonstrating no genuine issue of material fact exists, the burden is shifted to the nonmoving party to present appropriate supporting materials posing a genuine issue of a material fact for trial.⁹⁹⁷

⁹⁹⁶ King v. Cowboy Dodge, Inc., *supra.*, 776 P.2d at 762

⁹⁹⁷ *Id.* at 759