

A Treatise of Wyoming Workers' Compensation Law

Second Edition

Michael C. Duff Winston S. Howard Distinguished Professor of Law University of Wyoming College of Law

CALI eLangdell® Press 2021

About the Author

Michael C. Duff, a Professor at the College of Law since 2006, is a scholar-member of the Center for Progressive Reform and a member of the National Academy of Social Insurance. He is also a fellow of both the American Bar Foundation and the Pound Civil Justice Institute.

Professor Duff is widely considered a national expert on workers' compensation law and on the National Labor Relations Act. He has written extensively on various complex labor and employment matters and has been quoted frequently on such matters in various national publications including the Associated Press, the Guardian, Bloomberg Law, the Huffington Post, the Nation, ThinkProgress, In These Times, WorkCompCentral, Law 360, Moyers on Democracy, and Politico. Professor Duff is the author of a workers' compensation textbook and the co-author of a labor law textbook, each published by Carolina Academic Press. He is also the author of the only treatise on Wyoming Workers' Compensation Law (published by CALI eLangdell Press). Professor Duff is founder and co-editor of the highly-regarded Workers' Compensation Law Professors' Blog, which was cited in a 2018 Rand Corporation study on workers' compensation.

Professor Duff teaches the College of Law's courses in Torts, Labor Law, Workers' Compensation Law, and Evidence. He has also taught Bankruptcy, Employee Benefits Law, Administrative Law, Alternative Dispute Resolution in the Workplace, and Introduction to Law. In 2020, students selected Professor Duff "Most Outstanding Faculty."

An experienced legal practitioner, Professor Duff spent nearly a decade working as an attorney, adjudicative official, and investigator in various National Labor Relations Board offices immediately prior to joining the College of Law's faculty. Before engaging in federal government law practice, Professor Duff worked for two years as an associate attorney in a high-volume, progressive law firm in Maine—McTeague, Higbee & MacAdam—where he represented injured workers and labor unions. In his work life preceding the study of the law, Professor Duff was for eleven years a Teamsters shop steward and blue-collar ramp service worker in the airline industry, leaving that occupation in 1992 to study labor law at the Harvard Law School.

Professor Duff enjoys playing his Martin and Gretsch guitars but should have listened more closely to his late dad (a jazz guitarist) about the virtues of maintaining technically precise hand positions.

Notices

This is the second edition of A Treatise of Wyoming Workers' Compensation Law, updated June, 2021. Visit https://www.cali.org/the-elangdell-bookstore for the latest version and for revision history.

This work by Michael C. Duff is licensed and published by <u>CALI eLangdell Press</u> under a <u>Creative Commons Attribution-NonCommercial-ShareAlike 4.0</u> <u>International (CC BY-NC-SA 4.0)</u>. CALI and CALI eLangdell Press do not assert copyright in US Government works or other public domain material included herein. Permissions beyond the scope of this license may be available through feedback@cali.org.

In brief, the terms of that license are that you may copy, distribute, and display this work, or make derivative works, so long as

- you give CALI eLangdell Press and the author credit;
- you do not use this work for commercial purposes; and
- you distribute any works derived from this one under the same licensing terms as this.

Suggested attribution format for original work:

Michael C. Duff, *A Treatise of Wyoming Workers' Compensation Law*, Published by CALI eLangdell Press. Available under a Creative Commons BY-NC-SA 4.0 License.

CALI® and eLangdell® are United States federally registered trademarks owned by the Center for Computer-Assisted Legal Instruction. The cover art design is a copyrighted work of CALI, all rights reserved. The CALI graphical logo is a trademark. Should you create derivative works based on the text of this book or other Creative Commons materials therein, you may use this book's cover art and the aforementioned logos, as long as your use does not imply endorsement by CALI. For all other uses beyond the scope of this license, please request written permission from CALI.

This material does not contain nor is intended to be legal advice. Users seeking legal advice should consult with a licensed attorney in their jurisdiction. The editors have endeavored to provide complete and accurate information in this book. However, CALI does not warrant that the information provided is complete and accurate. CALI disclaims all liability to any person for any loss caused by errors or omissions in this collection of information.

About CALI eLangdell Press

<u>The Center for Computer-Assisted Legal Instruction</u> (CALI®) is: a nonprofit organization with over 200 member US law schools, an innovative force pushing legal education toward change for the better. There are <u>benefits to CALI membership</u> for your school, firm, or organization. <u>ELangdell®</u> is our electronic press with a mission to publish more open books for legal education.

How do we define "open?"

- Compatibility with devices like smartphones, tablets, and e-readers; as well as print.
- The right for educators to remix the materials through more lenient copyright policies.
- The ability for educators and students to adopt the materials for free.

Find available and upcoming eLangdell titles at <u>elangdell.cali.org</u>. Show support for CALI by following us on <u>Twitter</u>, and by telling your friends and colleagues where you received your free book.

Acknowledgements

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

With respect to the creation of the original volume, I want to acknowledge the excellent and hard work of my principal student research assistants, John Hornbaker IV and Jeremy Meerkreebs, who have since embarked on their journey as 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

Contents

ABO	OUT THE AUTHOR I
NOT	TICESII
ABO	OUT CALI ELANGDELL PRESSIII
ACK	NOWLEDGEMENTSIV
	INTRODUCTION TO THE WYOMING WORKERS' MPENSATION ACT1
1.1	History and Purpose of Workers' Compensation1
1.2	History and Purpose of Wyoming Workers' Compensation3
1.3	Uniqueness of Wyoming's Workers' Compensation Statute4
1.4	Fault is Irrelevant Under Wyoming Statute7
1.5	Exclusive Remedy Rule Generally7
1.6	Exclusive Remedy Rule in Wyoming8
1.7	Co-Employee Immunity Generally11
1.8	Co-Employee Liability in Wyoming12
	PERSONS COVERED BY THE WYOMING WORKERS' MPENSATION ACT16
2.1	Who is an Employee?16
2.2	Who is an Employee Under the Wyoming Workers' Compensation Act?16
2.3	Undocumented Workers in Wyoming19
2.4	Extraterritoriality in Wyoming22
2.5	Joint Employee in Wyoming22
2.6	Employee Definitions Not Interchangeable in Wyoming22
2.7	Wyoming Independent Contractor Law23
2.8	Tort Law versus Workers' Compensation Law Generally26

2.9	Restatement Second of Agency Test (National)	26
2.10	National Flurry of "Gig Laws" in 2018	28
2.11	ABC Approach (National)	30
2.12	Who is an Employer in Wyoming?	31
2.13	Wyoming-Specific Employer Inclusions	32
2.14	Employers in Wyoming Sometimes Not Specifically Defined	33
2.15	Contract of Hire in Wyoming	33
2.16	Joint Employer in Wyoming	33
2.17	Extrahazardous Employment Generally	35
2.18	National History of Extrahazardous Statutes	35
2.19	Wyoming's Retention of Extrahazardous Concept	35
2.20	Wyoming Extrahazardous Employment Structure	36
2.21	Discussion of Extrahazardous Employment in Wyoming	37
3 V	WHAT IS COVERED BY WORKERS' COMPENSATION?	41
3.1	Workers' Compensation Coverage Generally	41
3.2	"Arising Out Of" Generally	41
3.3	"Arising Out Of" in Wyoming	42
3.4	Miscellaneous Increased Risk "Arising Out Of" Rules	46
3.5	Cumulative Injuries, Heart Attacks, and Herniation in Wyoming	47
3.6	Injuries Which Occur "Over a Substantial Period of Time"	47
3.7	Coronary Conditions in Wyoming	49
3.8	Hernia Injuries in Wyoming	51
3.9	Preexisting Conditions in Wyoming	53
3.10	Second Compensable Injuries in Wyoming	54

3.11	Occupational Disease Coverage in Wyoming	56
3.12	Mental Injury in Wyoming	59
3.13	Idiopathic Falls, Unexplained Falls, and the Premises Rule	61
3.14	"In the Course of" Generally	66
3.15 Time	"In the Course of" in Wyoming – Time, Place, and Circumstances: Fixed es and Places of Employment	68
3.16 Trav	"In the Course of" in Wyoming – Time, Place, and Circumstances: elling Employees	71
3.17	"In the Course of" in Wyoming – Deviations and Detours	73
3.18	"In the Course of" in Wyoming – Employee Misconduct	75
3.19 Kill l	"In the Course of" in Wyoming – Employee's Willful Intention to Injure or Himself or Another	
3.20	Intoxication in Wyoming	80
4	TIMING AND LIMITATIONS	82
4.1	Notice and Claim Periods Generally	82
4.2	Notice in Wyoming – Statutory and Regulatory Provisions	83
4.3	Notice in Wyoming – Commencement of Notice Period	87
4.4 Preju	Notice in Wyoming – Presumption of Claim Denial and Proving Lack of idice	91
4.5	Statute of Limitations in Wyoming – Statutory Provision	.93
4.6 Limi	Statute of Limitations in Wyoming – Commencement of Statute of tations Period	93
4.7 Perio	Statute of Limitations in Wyoming – Injuries Occurring over a Substantial od of Time	
4.8	Statute of Limitations in Wyoming – Tolling and Equitable Estoppel	95
4.9 Alter	Statute of Limitations in Wyoming When Limitations Periods Have been red by the Legislature and Determining Dates of Injury	.01

5	BENEFITS	103
5.1	Physical Impairment versus Incapacity for Work	. 103
5.2	Division of Indemnity Benefits Generally	. 103
5.3	Temporary Total Disability Benefits in Wyoming	. 106
5.4	Benefit Amount for Temporary Total Disability	. 108
5.5	Permanent Total Disability Benefits in Wyoming	. 109
5.6	Benefit Amount for Permanent Total Disability	. 112
5.7	The Odd Lot Doctrine Generally	. 113
5.8	The Odd Lot Doctrine in Wyoming	. 114
5.9	Permanent Partial Workers' Compensation Benefits in Wyoming	. 119
5.10	Timing of Delivery of Workers' Compensation Indemnity Benefits	. 124
5.11	Temporary Partial Benefits	. 124
5.12 Wyd	Deduction of Partial Benefits from Total Benefits Entitlement Under oming Law	. 125
5.13	Death Benefits Generally	. 125
5.14	Death Benefits in Wyoming	. 126
5.15 Awa	Continuation Upon Death of Benefits from Existing Workers' Compensa and Entitlement	
5.16 Awa	Death Benefits Independent of Preexisting Entitlement to Disability ards	. 129
5.17	Amount of Death Benefit Award	. 130
5.18	Suicide	. 130
5.19	Hospital and Medical Benefits Generally	. 130
5.20	Medical, Hospital, and Ambulance Expenses in Wyoming	. 131
5.21	Employee's Rights and Duties With Respect to Physician Selection	. 135
5.22	The Air Ambulance Controversy	.136

5.23	Vocational Benefits	137
5.24	Permanent Disfigurement	138
	WYOMING WORKERS' COMPENSATION: EVIDENCE AND CEDURE	139
6.1	Competency of Evidence Generally	139
6.2	Medical Causation Standard and When Medical Evidence is Necessary.	140
6.3	Conflicting Medical Evidence	144
6.4	Collateral Estoppel and Res Judicata	147
6.5	Judicial Notice	153
6.6	Workers' Compensation and Administrative Law Generally	155
6.7	Wyoming Workers' Compensation Administrative Structure	156
6.8	The Wyoming Workers' Safety and Compensation Division	156
6.9	The Wyoming Office of Administrative Hearings	159
6.10	The Wyoming Medical Commission	161
6.11	Wyoming Workers' Compensation Contested Case Proceedings	164
6.12	Wyoming Contested Case Procedures Generally	168
6.13	Workers' Compensation Attorneys' Fees	171
	UDICIAL REVIEW OF WORKERS' COMPENSATION ISIONS	179
7.1	Judicial Review of Administrative Agencies Generally	179
7.2 Comp	Judicial Review of Administrative Agencies in Wyoming Workers' bensation	180
7.3	The Substantial Evidence Rule	182
7.4	Arbitrary and Capricious Review	184
7.5	Substantial Evidence versus Arbitrary and Capricious Review	184

8	MISCELLANEOUS TOPICS
8.1	Third Party Actions Generally191
8.2	Third Party Actions in Wyoming191
8.3	Alternative Dispute Resolution196
8.4	Experience Rating & Workers' Compensation Account198
8.5	Penalties and Sanctions: Employees201
8.6	Penalties and Sanctions: Employers204
8.7	Employee Anti-Retaliation Protections205
9 AD	APPENDIX: ASSORTED WYOMING WORKERS' COMPENSATION MINISTRATIVE RULES

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 <u>bargain</u> 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

2

_

⁷ In 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).

been required to pay the premiums. Although the scheme sounds in the nature of 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. An extended account of the historical origins of the Wyoming Workers' Compensation Act has been recounted elsewhere, 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:

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. §§ <u>27-14-101</u> at seq.), hereinafter the shorter citation form "W.S." will be used instead of "Wyo. Stat."

¹⁰ See George Santini, The Breaking of a Compromise: 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

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

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

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

¹³ W.S. § <u>27-14-101</u> (b)

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 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." 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

15 243 U.S. 188 (1917)

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.

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

¹⁷ See id. and infra. at Section 2

approach of handling such evidentiary conflicts outside of a **traditional**, **unitary** administrative law adjudicatory body appears to be unique to Wyoming. While 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**. 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 applicable 22 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

¹⁸ Utah Labor Code, § 34a-2-601

¹⁹ See W.S. § 27-14-616(b)(iv)

²⁰ W.S. § <u>27-14-101</u>(b)

²¹ In re Collicott, <u>20 P.3d 1077</u> (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

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*, *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

²⁴ Brierley v. Workers' Safety & Compensation Div., <u>52 P.3d 564</u> (Wyo. 2002); Wilkinson v. Workers' Safety & Compensation Div., <u>991 P.2d 1228</u>, 1242 (Wyo.1999)

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., <u>173 P. 981</u> (Wyo. 1918). Hotelling v. Fargo-Western Oil Co., <u>238 P. 542</u> (Wyo. 1925); In re Byrne, <u>86 P.2d 1095</u>, 1101 (Wyo. 1939); Fuhs v. Swenson, <u>131 P.2d 333</u>, 337 (1942); Cottonwood Steel Corp. v. Hansen, <u>655 P.2d 1226</u> (Wyo. 1982); Baker v. Wendy's of Montana, <u>687 P.2d 885</u> (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, <u>378 P.3d 13</u> (N.M. 2016)

²⁹ 9 Larson's Workers' Compensation Law § 102.02;

workers' compensation statutes, most notably the Federal Employers' Liability Act of 1908 (FELA),³⁰ which remains applicable to American railroad employers under present law.

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 <u>absolutely barred</u>.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 <u>is</u> liable to her employees in tort if the employer has <u>not</u> 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

³⁰ 45 U.S.C. § 51 et seq. (1908)

³¹ W.S. § <u>27-14-104</u>

³² *Id*.

³³ Jordan v. Delta Drilling Co., <u>541 P.2d 39</u>, 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. § <u>27-14-104</u>(c); Robinson v. Bell, <u>767 P.2d 177</u> (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. § <u>27-14-104</u>(c), remains unchanged and *Robinson* seems good law.

provisions of the Workers' Compensation Act are to be narrowly construed.³⁶ An entity asserting the defense of immunity under the worker's compensation 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**:

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

³⁷ 126 P.3d 886 (Wyo. 2006)

³⁸ *Id.* at 888

³⁹ *Id*.

⁴⁰ *Id*. at 890

⁴¹ *Id*.

⁴² *Id*.

⁴³ <u>366 P.3d 521</u> (Wyo. 2016)

[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 coemployee] is entitled to worker's compensation immunity on that basis.

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 <u>absolute</u> 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

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., <u>691 P.2d 981</u>, 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., <u>641 P.2d 1247</u>, 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

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 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,

⁴⁹ Stratman v. Admiral Beverage Corp., <u>760 P.2d 974</u> (Wyo. 1988); Wessel v. Mapco, Inc., <u>752 P.2d 1363</u> (Wyo. 1988); Fiscus v. Atlantic Richfield Co., <u>742 P.2d 198</u> (Wyo. 1987); Bence v. Pacific Power and Light Co., <u>631 P.2d 13</u> (Wyo. 1981). For more on *Admiral Beverage see infra*. at 2.16 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., <u>818 P.2d 626</u>, 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, <u>366 P.2d 850</u> (N.M. 1961)

⁵⁵ 10 Larson's Workers' Compensation Law § 111.03 [2]

"has a disruptive effect upon the relationship among employees and supervisory and management personnel." ⁵⁶

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 <u>not</u> liable if he is <u>merely negligent</u>. 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-

⁵⁶ Code of Ala. § 25-5-14 upheld against constitutional attack in Reed v. Brunson, <u>527 So. 2d 102</u> (Ala. 1998)

⁵⁷ Formisano v. Gaston, <u>246 P.3d 286</u>, 290 (Wyo. 2011) (emphasis supplied)

⁵⁸ *Id*.

⁵⁹ *Id.* 289-290

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

employee liability, willful and wanton misconduct requires the coemployee 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 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 coemployees 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: First, "[t]he 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."63 Next, "[t]o 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."64 There is no mention of "co-employee immunity." It is true that injuries due solely to the culpable negligence of a co-employee are not covered by workers' compensation.⁶⁵ But the text of the Constitution simply does not say that co-employees who are not culpably negligent are immune in tort. To the extent cases suggest otherwise that is judicial gloss. To the extent the legislature legislates otherwise the acts are in evident tension with the plain text of the Constitution. If statutes in derogation of the common law must be strictly construed, 66 how much more is that the case when limitations on a common law right have been ensconced in the Wyoming Constitution?

Some of this tension was recently revisited in *Ramirez v. Brown*, ⁶⁷ a case in which an employee sustained multiple fractures to his arm and hand, the appendages being drawn into an unguarded "spin-straightener," a machine that straightened pipes as

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

⁶² See Herrera v. Phillipps, <u>334 P.3d 1225</u>, 1231 (Wyo. 2014) and Vandre v. Kuznia, <u>310 P.3d 919</u>, 922-923 (Wyo. 2013)

⁶³ Wyoming Constitution, Art. X, Sec. 4(c)

⁶⁴ *Id*.

⁶⁵ *Id*.

⁶⁶ State v. Heiner, <u>683 P.2d 629</u>, 649 (Wyo. 1984); State v. Stovall, <u>648 P.2d 543</u>, 547–548 (Wyo. 1982)

⁶⁷ 466 P.3d 285 (Wyo. 2020)

long as 34 feet and as wide as three inches in diameter. ⁶⁸ The employee sued three supervisory employees, Messrs. Brown, Wartenbee, and Mitchell, for intentionally injuring him. The gravamen of the complaint was that the named employees knew the machine, if unguarded, was hazardous; and had received prior complaints about the dangers the machine presented, yet failed to correct the hazard. ⁶⁹ Although not explicitly explained in the decision, the case was brought originally in district court on the theory that the named defendants were liable in tort because workers' compensation immunity does not apply to intentional conduct by co-employees. The district court granted summary judgment to each of the co-employee supervisors because the claimant "failed to establish a genuine issue of material fact to rebut the co-employee supervisors' prima facie showing they had no actual knowledge of the serious risk involved and did not intentionally act to cause Mr. Ramirez's injury."⁷⁰

As to Wartenbee and Brown, the Wyoming Supreme Court upheld the district court's grant of summary judgment in favor of the defendants: although they had responsibility for safety and working conditions, the Court concluded that the evidence did not show they willfully disregarded the need to act, even if they had knowledge of the serious hazard posed by the machine or the dangerous manner in which it was used and maintained. 71 Standing alone, the conduct of Wartenbee and Brown still boiled down to ordinary negligence.⁷² Mitchell, the third supervisory co-employee defendant, presented a different problem because he "was supposed to report any complaints he received to Mr. Brown and Mr. Wartenbee. The record suggests he reported none of the complaints concerning the spin-straightener to either Mr. Brown or Mr. Wartenbee. If proven true, Mr. Mitchell's failure to report verbal complaints or submit stop cards could reflect an intent not to act, in willful disregard of the serious risk posed to Mr. Ramirez and others."⁷³ Accordingly, with respect to Mitchell "the facts as to whether Mr. Mitchell's inaction was willful or merely inadvertent are in genuine dispute and should be decided by a jury after receiving and evaluating all the evidence and testimony."⁷⁴ The case was remanded to the district court, and no subsequent litigation history has been reported.

Two conceptual problems in this area of law once again present themselves in Ramirez. First, it continues to seem anomalous that an employer enjoys absolute immunity from tort liability (see Section 1.6 above) while a co-employee's immunity is qualified. Typically in workers' compensation law, qualified

⁶⁸ *Id.* at 288

⁶⁹ *Id*.

 $^{70 \}overline{Id}$. at 289

⁷¹ *Id*. at 290-294

⁷² *Id*. at 295

⁷³ *Id*.

⁷⁴ *Id.* at 296

immunity is symmetrical: *either* employer or employee may lose immunity if something akin to culpably negligent conduct is present.⁷⁵

Second, while it is standard practice for states to significantly limit co-employee workplace injury liability as a matter of general policy, grounded in an alleged original understanding of the "Grand Bargain," few if any of those states contain state Constitutional provisions analogous to Article 10, Section 4 of the Wyoming Constitution. As discussed previously that provision describes with precision which persons' tort damages may be diminished. One wonders if Wyoming's effectively lowering the threshold of co-employee immunity from "intentional" to "culpably negligent" conduct has something to do with the thin state constitutional justification for limiting co-employee damage suits at all (it is very difficult to see Mitchell's conduct in *Ramirez* as "purposeful" or as evincing a desire to injure the claimant). Mitchell's omissions probably could be found "willful and wanton" given that phrase's capacious rendering under Wyoming law, as explained earlier in this section. But the policy of the capaciousness of the phrase is essentially what has been under discussion here.

_

⁷⁵ This is so because approximately forty states (as of this writing) decline to extend immunity to employers who intentionally injure their employees, particularly when the intentional conduct is assaultive. It follows that, in those states in which co-employee tort liability is limited to situations in which employees act intentionally or with culpable or gross negligence (which is the majority rule, *see* 10 LARSON'S WORKERS' COMPENSATION LAW § 111.03), the employer also may be subject to liability for actions undertaken under similar mental states. *See generally* 9 LARSON'S WORKERS' COMPENSATION LAW § 105.

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,⁷⁶ and to maritime sailors under *federal* statutes.⁷⁷ 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." 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 defined 79 as:

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

⁷⁶ 33 U.S.C.A. § 901 et seq.

⁷⁷ 46 U.S.C.A. § 30104

 $^{^{78}}$ Black's Law Dictionary (10th ed. 2014); see 5 Larson's Workers' Compensation Law \S 60.01

⁷⁹ W.S. § <u>27-14-102</u> (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 excludes⁸⁰ (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. <u>27-14-108(k)</u>;
- (C) An **officer of a corporation** unless coverage is elected pursuant to W.S. <u>27-14-108(k)</u>;
- (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. $\underline{27-14-108}(q)$;
- (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. <u>27-14-108(d)(ix)</u>;
- (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;

⁸⁰ W.S. § <u>27-14-102</u> (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)(xlv). 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. § <u>27-14-106</u>, 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 <u>illegally employed</u> under **state law** are bound by the remedies of the Act.

In *Maser v. L. and H. Welding*,⁸¹ 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.⁸² 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.⁸³ 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.⁸⁴ The Court escaped the

^{81 1} P.3d 642 (Wyo. 2000)

⁸² *Id.* at 643

⁸³ Id. at 646

⁸⁴ *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."

This does <u>not</u> 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."⁸⁶ Why bother to make the distinction if employed minors are <u>already</u>** *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).⁸⁷ In *In re Arellano*, ⁸⁸ 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."89 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."90 It is not required that the documents in the employer's possession be

⁸⁵ Id. at 646-647

⁸⁶ Id. at 646

⁸⁷ 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).

^{88 344} P.3d 249 (Wyo. 2015)

⁸⁹ Id. at 251

⁹⁰ *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.⁹¹

The Court reaffirmed this conclusion in Gonzalez v. Reiman Corp. 92 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.⁹³ The "Division," the title of the workers' compensation administrative claims body in Wyoming, denied the putative employee's ensuing claim for benefits.⁹⁴ Both the employer and the employee appealed this determination but, interestingly, the employee thereafter withdrew his objection, 95 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. 96 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)."97

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. Phillipps, 98 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. 99 The defendants moved for summary judgment asserting the exclusive remedy/immunity bar of workers' compensation, and the district court granted the motions. 100 Although the plaintiff was not authorized to

⁹¹ *Id*.

^{92 357} P.3d 1157 (Wyo. 2015)

⁹³ *Id.* at 1160

⁹⁴ *Id*.

⁹⁵ *Id*.

⁹⁶ *Id.* at 1160-61

⁹⁷ *Id.* at 1162

^{98 334} P.3d 1225 (Wyo. 2014)

⁹⁹ *Id.* at 1227

 $^{^{100}}$ *Id*.

work in the United States, the parties disagreed about whether the putative employer was aware of the fact. 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. 102

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. 103 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

¹⁰¹ *Id*. at 1228

¹⁰² *Id.* at 1230-31

¹⁰³ See *for example* Mills v. Reynolds, <u>837 P.2d 48</u>, 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, <u>689 P.2d 420</u>, 425 (Wyo.1984), *cert. denied*, 469 U.S. 1224 (1985) (*quoting* State v. Freitas, 61 Haw. 262, <u>602 P.2d 914</u>, 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., <u>73 N.E.3d 663</u>, 664 (Ind. 2017).

injuries."¹⁰⁴ Regardless, the clear majority position in the United States is that undocumented workers are entitled to workers' compensation benefits. ¹⁰⁵

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. ¹⁰⁶

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. 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

¹⁰⁴ See generally Rosa v. Partners in Progress, <u>868 A.2d 994</u>, 1000 (N.H. 2005) (discussing conflicting case law on this point).

¹⁰⁵ 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.

¹⁰⁶ W.S. § <u>27-14-102</u>(a)(xxi)

¹⁰⁷ See generally DC Production Service v. Wyoming Dept. of Employment, <u>54 P.3d 768</u>, 772 (Wyo. 2002)

employment." "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 tenfactor 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. 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. Kobielusz.*¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ The Court recounted from prior

¹⁰⁸ W.S. § <u>27-14-102</u> (a) (xxiii)

¹⁰⁹ <u>320 P.3d 213</u> (Wyo. 2014)

¹¹⁰ *Id*. at 216

¹¹¹ *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. 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."

Noting that a written employment contract, when in existence, is a strong indication of the type of association intended by the parties, ¹¹⁴ 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. ¹¹⁵ 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. ¹¹⁶ **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." ¹¹⁷**

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. 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. 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

¹¹² *Id.* at 217; *accord* Singer v. New Tech Eng'g L.P., <u>227 P.3d 305</u>, 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.")

¹¹³ *Id.*

¹¹⁴ *Accord* Pool v. Dravo Coal Co., <u>788 P.2d 1146</u> (Wyo. 1990); Noonan v. Texaco, Inc., <u>713 P.2d 160</u>, 165 (Wyo.1986)

¹¹⁵ *Id*.

¹¹⁶ *Id*. at 218

¹¹⁷ Emphasis supplied. *Id. citing* Coates v. Anderson, <u>84 P.3d 953</u>, 957 (Wyo. 2004); *see also* Fox Park Timber Company v. Baker, <u>84 P.2d 736</u> (Wyo. 1938)], Brubaker v. Glenrock Lodge [Int'l Order of Odd Fellows], <u>526 P.2d 52</u> (Wyo. 1974)], Combined Ins. Co. v. Sinclair, <u>584 P.2d 1034</u> at 1042-43.

¹¹⁸ Circle C, supra. at 218

¹¹⁹ Id. at 219

not, by contract or by fact, free from control over the details of the performance of her services . . ."¹²⁰

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. 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." 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." 123

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 <u>and</u> 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. ¹²⁴ 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. ¹²⁵

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

 $^{^{120}}$ *Id*.

¹²¹ *Id*.

¹²² Id. at 220

¹²³ *Id*.

¹²⁴ 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)

¹²⁵ 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. 126

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." 127

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." 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." 129

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

¹²⁶ Claims of Naylor, <u>723 P.2d 1237</u> (Wyo. 1986); Tauer v. Williams, 242 P.2d 518 (Wyo. 1952); Fox Park Timber Co. v. Baker, <u>84 P.2d 736</u> (Wyo. 1938)

¹²⁷ Flint Engineering & Const. Co. v. Richardson, <u>726 P.2d 511</u>, 513 (Wyo. 1986)

¹²⁸ One of the best discussions of these observations is the dissenting opinion in Powell v. Appeal Bd. Of Mich. Employment Sec. Commission, <u>75 N.W.2d 874</u> (Mich. 1956) *discussed in DUFF*, WORKERS' COMPENSATION LAW at 210-211 ¹²⁹ *Id*.

independent contractors.¹³⁰ 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

_

¹³⁰ 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.¹³¹

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.

28

¹³¹ *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.

Given the intervening pandemic, it is unsurprising little Gig-specific state legislative activity transpired in 2020 (but see the entry on California in the next section). The author suspects that, if the United States economy experiences a downturn in 2021 and 2022, the low wage Gig economy could expand, potentially setting up a confrontation between states and current federal labor authorities that have made misclassification of employees a centerpiece of enforcement policy. Workers' compensation attorneys will have to be alert to differences in employee definitions from state to state, definitional differences between federal and state employment (and tax) law, and even differences between various state employment statutes in the same state.

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.¹³²

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

30

¹³² For a typical expression of the standard *see* Hargrove v. Sleepy's, LLC, <u>106 A.3d 449</u> (N.J. 2015)

of industrial accidents or injuries are broadly allocated to the relevant industry utilizing labor. 133

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*. ¹³⁴ 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 standards in a single state. *Dynamex* did not, for example, apply to workers' compensation cases.

The California saga has continued in 2020 and 2021. In fall 2020, California voters approved a referendum carving out "app-based" drivers from vast swaths of employment law. The referendum had no direct impact on workers' compensation law, which continues to define employees in accordance with a traditional common law-type factor test. App-based drivers may be more easily defined as independent contractors for purposes of workers' compensation, however. The referendum was the most expensive ballot initiative in American history with Gig economy companies reported to have spent \$200 million. Similar proposed measures in New York have not prevailed as of June 2021 and the political winds seem to be blowing against them.

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

-

¹³³ 1 Larson's Workers' Compensation Law § 1.03

¹³⁴ 416 P.3d 1 (Cal. 2018)

¹³⁵ Suhauna Hussain, Johana Bhuiyan, Ryan Menezes, "How Uber and Lyft persuaded California to vote their way," Los Angeles Times, November 13, 2020 *available at* https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22

described in W.S. § <u>27-14-301</u> (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 employment ¹³⁶ or (b) employment <u>not</u> covered, but concerning which the person or entity has opted or elected to be covered¹³⁷ (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. § <u>27-14-102(a)(vii)</u>, specifically <u>mandates that certain entities be designated statutory employers</u>. 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. § <u>27-14-108</u>(e);
- (D) The governmental entity for which prisoners and probationers work or perform community service under W.S. $\frac{27-14-108}{0}(d)(ix)$ 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

32

¹³⁶ W.S. § <u>27-14-108</u>(a)-(g)

¹³⁷ W.S. § <u>27-14-108(j)</u>

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," effectively rendering those employing employees in those "fitted" occupations "employers."

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. This is consistent with the employee definition of W.S. § <u>27-14-102(a)(vii)</u>, *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. ¹⁴⁰ 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

¹³⁸ Matter of Patch, 798 P.2d 839, 841 (Wyo. 1990)

¹³⁹ Clark v. Industrial Co. of Steamboat Springs, Inc., <u>818 P.2d 626</u>, 629 (Wyo. 1991)

¹⁴⁰ W.S. § <u>27-14-102</u>(a)(xxi)

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. A leading case in Wyoming for this proposition is Stratman v. Admiral Beverage Corp. 142

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.)

Quoting the *Larson*'s treatise, the Wyoming Supreme Court adopted the joint employer definition set forth in this section. 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. After surveying cases, the Court cited with approval a prior court's adoption of what the prior court characterized as the majority rule, In 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.

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. Accordingly, the Court remanded the case to the district court. ¹⁴⁷

¹⁴¹ This is consistent with the definition of joint employee under the Act at W.S. § $\underline{27-14-102}(a)(xxi)$

¹⁴² 760 P.2d 974 (Wyo. 1988)

¹⁴³ *Id.* at 980

¹⁴⁴ Id. at 981

¹⁴⁵ *Id.* citing Peterson v. Trailways, Inc., <u>555 F.Supp. 827</u>, 833 (D.Colo.1983)

⁴⁶ Id.at 983-84

¹⁴⁷ *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.

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." 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.

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." Hence, this unique feature of Wyoming law must be analyzed and explained carefully.

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 1917.¹⁵¹

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, ¹⁵² but they appear to have no substantial operative importance." 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.

¹⁴⁸ Clark v. Industrial Co. of Steamboat Springs, Inc., *supra.*, 818 P.2d at 630. (Emphases supplied).

¹⁴⁹ See also 10 Larson's Workers' Compensation Law § 112.01

 $^{^{150}\,6}$ Larson's Workers' Compensation Law $\S~77.01$

¹⁵¹ See 1.3 above. See also New York Central Railroad Company v. White, <u>243 U.S. 188</u> (1917)

¹⁵² Illinois is a leading example. See 820 ILCS 305/3

^{153 6} LARSON'S WORKERS' COMPENSATION LAW § 77.01

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 statute¹⁵⁴ 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. ¹⁵⁵

W.S. § <u>27-14-108</u>(a)(ii) deems all workers in certain industries, regardless of their occupations, to be engaged in extrahazardous employment. W.S. § <u>27-14-108</u>(d), in turn, applies the Act to governmental entities engaged in the classifications set out in W.S. § <u>27-14-108</u>(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. Finally, W.S. § <u>27-14-108</u>(e) applies the Act to several categories of volunteers.

¹⁵⁴ W.S. § <u>27-14-108</u>

¹⁵⁵ The manual can be obtained online at https://www.census.gov/eos/www/naics/

¹⁵⁶ The enumerated major industries, at W.S. § <u>27-14-108(a)(ii)(A)-(S)</u> 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 services, certain subsectors of Health care and social services, with one exception arts, entertainment and recreation, Accommodation and food services, Other services, Public administration,

¹⁵⁷ 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).

¹⁵⁸ 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).

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. § <u>27-14-108</u>(q) requires workers' compensation coverage for professional athletes.

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 <u>only</u> 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.¹⁵⁹ 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.¹⁶⁰ The Court found that "by any objective measure" the delegation was broader than in prior cases in which it *had* found unlawful delegation.¹⁶¹ 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.¹⁶² Especially problematic for the Court was that the legislature did not include any procedural mechanisms to guard against "administrative arbitrariness and caprice."¹⁶³ Just as in *Protz*, it might be argued that mandatory, automatic NAICS designation of extrahazardous employments is an overbroad delegation without 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. 164 It is difficult to conclude that this is still a valid statement of law. In Araguz v. Workers' Compensation and Safety Division, 165 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." 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." ¹⁶⁷ 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

¹⁵⁹ *Id.* at 830
160 *Id.*161 *Id.* at 835
162 *Id.*163 *Id.* at 836
164 Matter of Patch, 798 P.2d 839, 841 (Wyo. 1990)
165 262 P.3d 1263 (Wyo. 2011)
166 *Id.*167 *Id.* at 1267

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." 168 But the most puzzling part of 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, ¹⁶⁹ 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. 170

-

¹⁶⁸ Id.

¹⁶⁹ Mills v. Reynolds, supra., 837 P.2d at 53-54

¹⁷⁰ Vasquez v. Dillard's, Inc., <u>381 P.3d 768</u> (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.**¹⁷¹ 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." **Because Wyoming's statute does not explicitly require the occurrence of an accident**, ¹⁷³ 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, ¹⁷⁴ including Wyoming. ¹⁷⁵ 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. ¹⁷⁶ 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. ¹⁷⁷ 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. ¹⁷⁸ In the majority of jurisdictions, a workplace injury "arises out of" employment if the workplace increased the risk of the injury

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

^{172 3} LARSON'S WORKERS' COMPENSATION LAW § 42.01

¹⁷³ Matter of Barnes, <u>587 P.2d 214</u> (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. <u>933 P.2d 481</u> (Wyo. 1997)

^{174 1} LARSON'S WORKERS' COMPENSATION LAW § 3.01

¹⁷⁵ See infra.

¹⁷⁶ 1 Larson's Workers' Compensation Law § 3.01

¹⁷⁷ See e.g. K-Mart Corp. v. Herring, <u>188 P.3d 140</u>, 146 (Ok. 2008)

¹⁷⁸ *Id*.

occurring.¹⁷⁹ 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.¹⁸⁰ 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."¹⁸¹

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." 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*, ¹⁸³ 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:

¹⁷⁹ Id.; 1 LARSON'S WORKERS' COMPENSATION LAW at § 3.03

¹⁸⁰ *Id.* at § 3.05

¹⁸¹ See e.g. Rio All Suite Hotel and Casino v. Phillips, 240 P.3d 2, 6 (Nev. 2010)

¹⁸² W.S. § <u>27-14-102</u>(a)(xi)

¹⁸³ 951 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. 184

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.¹⁸⁵

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*, ¹⁸⁶ 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." *Matter of Injury to Corean* cited for support of this proposition *Matter of Willey*, ¹⁸⁸ 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

¹⁸⁴ *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, <u>380 P.2d 208</u>, 210 (Id. 1963) lends questionable support taking into consideration the Idaho Supreme Court's subsequent decision in Kelley v. Blue Linen Supply, <u>360 P.3d 333</u> (Id. 1995), which *awarded* benefits in factual circumstances very similar to *Bruhn*.

¹⁸⁵Accord In re Worker's Compensation Claim of Gomez, <u>231 P.3d 902</u> (Wyo. 2010) (using fairly traced to employment standard; no risk analysis); Finley v. Wyoming Workers' Safety & Comp. Div., <u>132 P.3d 185</u>, 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., <u>970 P.2d 865</u> (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)

¹⁸⁶ 723 P.2d 58 (Wyo. 1986)

¹⁸⁷ *Id.* at 60

¹⁸⁸ <u>571 P.2d 248</u> (Wyo. 1977)

requirement, which is envisioned by the language contained in [the then-existing version of the Wyoming Act]."¹⁸⁹

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. 190 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.¹⁹¹

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*,¹⁹² an employee was struck by lightning just after he had tendered his signed time card to his employer's timekeeper.¹⁹³ One issue, of course, was whether the employee was in the course of employment when struck.¹⁹⁴ But another issue, at least implicitly, was whether the injuries sustained from the lightening-strike arose out of employment.¹⁹⁵ The district court hearing the case¹⁹⁶ found, among other things, that the lightning strike was an "Act of God."¹⁹⁷ 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

¹⁸⁹ *Id*. at 250

¹⁹⁰ 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)

¹⁹¹ 3 Larson's Workers' Compensation Law § 29.01

¹⁹² 283 P.2d 1005 (Wyo. 1955)

¹⁹³ *Id.* at 1006

¹⁹⁴ Id. at 1007-1009

¹⁹⁵ *Id*.

¹⁹⁶ District courts were direct fact finders in workers' compensation cases under prior versions of the Wyoming workers' compensation statute. *See infra*.

¹⁹⁷ 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. 198

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. ¹⁹⁹ 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.*²⁰⁰ 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.²⁰¹ Her condition worsened and eventually her doctors discovered a disc herniation.²⁰² She filed a workers' compensation claim.²⁰³ 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.²⁰⁴ On appeal, the Court remarked upon the breadth of the provision and observed that many compensable injuries might be rendered noncompensable if the Division's position were upheld.²⁰⁵ 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

¹⁹⁸ *Id.* at 1009

¹⁹⁹ This interpretation would come close to Virginia's use of the actual risk test. *See e.g.* Southside Virginia Training Center v. Ellis, <u>537 S.E.2d 35</u>, 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.")

²⁰⁰ 973 P.2d 507 (Wyo. 1999)

²⁰¹ Id. at 508

 $^{^{202}}$ *Id*.

²⁰³ *Id*.

 $^{^{204}}$ *Id*.

²⁰⁵ *Id.* at 509

case authority to the contrary.²⁰⁶ 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*.²⁰⁷

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. ²⁰⁸ 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."209 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.

²⁰⁶ *Id.* at 510

²⁰⁷ *Id.* at 511

²⁰⁸ 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) ²⁰⁹ 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 . . ."210 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;

_

²¹⁰ 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 <u>evocative of the increased risk test</u> previously discussed. "When an injury arises over time, a claimant's burden of proof is enhanced."²¹¹ 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."²¹²

For example, in *Sanchez v. Workers' Safety & Compensation Div.*, ²¹³ 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. ²¹⁴ 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. ²¹⁵

In *Baxter v. Sinclair Oil Corp*,²¹⁶ 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

²¹¹ Sanchez v. Wyoming Workers' Safety and Compensation Division, <u>134 P.3d 1255</u> (Wyo. 2006); Yenne–Tully v. Workers' Safety & Comp. Div., Dept. of Empl., <u>12 P.3d 170</u>, 172 (Wyo.2000)

²¹² Sanchez, *supra*. at 1259 *citing* Sinclair Trucking v. Bailey, <u>848 P.2d 1349</u>, 1353 (Wyo.1993), *overruled on other grounds* by Newman v. Workers' Safety & Comp. Div., <u>49 P.3d 163</u>, 172 (Wyo.2002). *See also* Baxter v. Sinclair Oil Corp., <u>100 P.3d 427</u>, 432 (Wyo.2004) (reaffirming the Sinclair Trucking analysis of W.S. § 27–14–603).

²¹³ See supra.

²¹⁴ Sanchez, *supra*., 134 P.2d at 1256

²¹⁵ *Id.* at 1261

²¹⁶ 100 P.3d 427 (Wyo. 2004)

employment as a mechanic."²¹⁷ 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.

-

²¹⁷ *Id.* at 430

The first point to make is that **this provision applies** <u>only</u> where a coronary condition is <u>not</u> directly and solely caused by a work-related injury. Where <u>direct and sole</u> causation is established, the coronary condition is compensable.²¹⁸ Under this provision it is not enough, for purposes of compensation, that a causal connection between work and the cardiac condition <u>is</u> 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).²¹⁹ 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.²²⁰ In Scherf, an employee died from a heart attack he suffered at work while servicing a front-end loader.²²¹ A subsequent claim for workers' compensation death benefits filed by his surviving spouse was denied in administrative proceedings.²²² 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."²²³ 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. 224 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."²²⁵ 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."²²⁶ The Court noted that every one of the employer's employees testifying confirmed that the oiler's job

²¹⁸ Sheth v. Workers' Compensation Div., <u>11 P.3d 375</u>, 379 (Wyo. 2000)

²¹⁹ Matter of Desotell, 767 P.2d 998, 1001 (Wyo. 1989)

²²⁰ 360 P.3d 66 (Wyo. 2015)

²²¹ Id. at 67

²²² Id.

²²³ *Id*.

²²⁴ *Id*. at 68

²²⁵ *Id*. at 71

²²⁶ *Id.* at 73 *citing* Loomer v. Workers' Safety & Comp. Div., <u>88 P.3d 1036</u>, 1043 (Wyo.2004). (Emphases supplied)

was not generally a physically demanding or difficult task.²²⁷ 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."²²⁸ 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.²²⁹

A sound analysis of the compensability of coronary conditions under current Wyoming law, as set out in *Matter of Desotell*²³⁰ and reaffirmed in *Workers' Compensation Div. v. Harris*²³¹ 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."²³² 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."²³³

3.8 Hernia Injuries in Wyoming

W.S. § <u>27-14-603</u>(c) and (d) state:

²²⁸ Id. at 75

²²⁷ *Id.* at 73

²²⁹ *Id*. at 77

²³⁰ Matter of Desotell, *supra.*, 767 P.2d at 1002

²³¹ 931 P.2d 255, 258-259 (Wyo. 1997)

²³² 3 LARSON'S WORKERS' COMPENSATION LAW § 44.03

²³³ 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**;²³⁴
 - (ii) [i]ts appearance was accompanied by pain;²³⁵
 - (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 1935.²³⁶ 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.²³⁷ Although Wyoming is *generally* not an "accident" jurisdiction,²³⁸ the hernia provision has historically required *an immediately preceding "accidental strain in the course of employment.*"²³⁹

In one interesting case, *Workers' Compensation Div. v. Girardot*,²⁴⁰ a janitor slipped on a wet floor and sustained what was clearly a compensable hernia injury.²⁴¹ While being evaluated for an operation to correct the hernia, he was discovered to have a life-threatening coronary condition.²⁴² The coronary condition required immediate surgery before the hernia operation could be undertaken.²⁴³ The employee underwent surgery for the coronary condition (an arterial blockage of the heart) and then underwent the hernia operation.²⁴⁴ Temporary total disability

²³⁴Big Horn Coal Co. v. LaToush, 501 P.2d 1250 (Wyo. 1972)

²³⁵ In re Hardison, 429 P.2d 320 (Wyo. 1967)

²³⁶ See Wilson v. Holly Sugar Corp., <u>33 P.2d 253</u> (Wyo. 1934); statute amended in Ch 4. SL of 1935

²³⁷ In re Frihauf, <u>135 P.2d 427</u> (Wyo. 1943), *see also* In re Scrogham, <u>72 P.2d 200</u> (Wyo. 1937) (discussing effect of worker's predisposition to injury)

²³⁸ See supra. of the Treatise at § 3.1

²³⁹ In re Johnson, 63 P.2d 791 (Wyo. 1937)

²⁴⁰ 807 P.2d 926 (Wyo. 1991)

 $^{^{241}}$ *Id*.

²⁴² *Id*.

²⁴³ *Id*.

²⁴⁴ *Id*.

payments were paid without contest during the period of recovery from the hernia operation. The employer and Division balked, however, when the employee submitted a \$35,000 bill *from the coronary procedure* for reimbursement. 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. 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. 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."

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.²⁵⁰

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.²⁵¹

²⁴⁵ *Id*.

Id.

²⁴⁶ *Id.* at 927

²⁴⁷ *Id.* at 928-929

²⁴⁸ *Id*. at 929

²⁴⁹ *Id*.

²⁵⁰ Torres v. Workers' Safety & Compensation Div., <u>105 P.3d 101</u>, 112 (Wyo. 2005) (analyzing an "incisional hernia" under W.S. § 27-14-603(c))

²⁵¹ In re Scrogham, 73 P.2d 300, 306 (Wyo. 1937); Matter of Injury to Carpenter, <u>736 P.2d 311</u>, 312 (Wyo. 1987) *citing* Lindbloom v. Teton International, <u>684 P.2d 1388</u> (1984); Jim's Water Service v. Eayrs, <u>590 P.2d 1346</u> (1979). The principle continues to be recognized. In re Torres, 253 P.3d 175, 180 (Wyo. 2011); In re Boyce, <u>105 P.3d 451</u>, 454-455 (Wyo. 2005); Salas v. General Chemical, <u>71 P.3d 708</u>, 711-712 (Wyo. 2003)

To prove <u>aggravation of a preexisting injury</u>, a claimant must demonstrate by a preponderance of the evidence that the work contributed to a <u>material degree</u> to the aggravation of the preexisting condition. 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. Wyoming courts generally do not invoke a standard of "reasonable medical certainty" with respect to such causal connection. 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. 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." Of course, proof of progression and "non-causation" by an *independent* intervening cause is a medical question. 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**

²⁵² Claim of Vondra, <u>448 P.2d 313</u>, 318 (Wyo. 1968); Lindbloom v. Teton International, *supra*., 684 P.2d 1389-1390

²⁵³ In re Pino, <u>996 P.2d 679</u>, 685 (Wyo. 2000); In re Armijo, <u>99 P.3d 445</u>, 449-450 (Wyo. 2004)

²⁵⁴ In re Pino, 996 P.2d at 685; Salas v. General Chemical, 71 P.3d 708 at 712;

 $^{^{255}}$ This writer, following other writers, has previously described the problem as one of "successive causation." DUFF, WORKERS' COMPENSATION LAW at 80

²⁵⁶ 1 LARSON'S WORKERS' COMPENSATION LAW § 10.02

²⁵⁷ *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."²⁵⁸

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 <u>medical certainty</u> (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. ²⁵⁹ An employee seeking benefits in the second situation is not bound by the four-year limitations period (indeed, it appears there may be <u>no</u> limitations period)²⁶⁰ and "the claimant only has to demonstrate that it is '<u>more probable than not</u>,' that the first and second injuries are related."

²⁵⁸ 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)

(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.

²⁵⁹ W.S. § <u>27-14-605</u>. The provision in its entirety states:

²⁶⁰ "Under the second compensable injury rule, a worker who has received a compensable injury and received benefits for that injury can, <u>regardless of the passage of time</u>, 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., <u>48 P.3d 1057</u>, 1062 (Wyo. 2002) (Yenne-Tully II). (emphasis supplied)

²⁶¹ In re Kaczmarek, <u>215 P.3d 277</u>, 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." 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 issues²⁶³ that have arisen in other states about how to fit occupational disease within the workers' compensation rubric.²⁶⁴ 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. ²⁶⁵

²⁶² 13 LARSON'S WORKERS' COMPENSATION LAW § 131.03

²⁶³ 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)

²⁶⁴ 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)

²⁶⁵ Those exclusions under W.S. § <u>27-14-102</u>(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.²⁶⁶

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.²⁶⁷

⁽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.

²⁶⁶ 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.

²⁶⁷ 4 Larson's Workers' Compensation Law § 52.02

In 1969, Wyoming established an independent Occupational Disease Law²⁶⁸ that was subsequently rescinded. The law contained a schedule of the type²⁶⁹ mentioned by the *Larson's* treatise in the preceding excerpted passage.²⁷⁰ This Treatise will omit extended discussion of the statute, which was abolished in 1975,²⁷¹ 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. § <u>27-14-603</u>(a) of the present Wyoming Workers' Compensation Act.²⁷²

Although diseases incident to employment may be covered "injuries" under Wyoming law, it is obvious that claimants must convince the fact finder that the disease arose out of employment. In the recent case *McMillan v. Department of Workforce Services*,²⁷³ the Wyoming Supreme Court upheld the Medical Commission's denial of an employee's claim that his contraction of smoldering multiple myeloma was caused by his work notwithstanding the contrary opinion of two expert witnesses.²⁷⁴ Given Wyoming's daunting judicial review cases, an agency decision that the claimant has not carried his burden of proof will be upheld unless "contrary to the overwhelming weight of the evidence." (*See infra*. Section 7.3). Given *that* standard, it will continue to be difficult to prevail in *any* case in which administrative officials fail to credit medical evidence proffered by a claimant.

Although not typically discussed 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; . . ."²⁷⁵ (Another instance of the "increased risk test" making a stealthy appearance in the Wyoming Act). This statutory increased risk/communicable disease exclusion substantially restricts the difficult analyses of infectious diseases that can be applicable in some other

²⁶⁸ 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.

²⁶⁹ The schedule, at Section 3, listed forty-six compensable authorized diseases.

²⁷⁰ Hammond v. Hitching Post Inn, <u>523 P.2d 482</u> (Wyo. 1974) (denying dust inhalation chronic bronchitis claim); Olson v. Federal American Partners, <u>567 P.2d 710</u> (Wyo. 1977) (denying uranium radiation exposure claim)

²⁷¹ Session Laws of Wyoming 1975, Chapter 149

²⁷² 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. § <u>27-14-603(a)</u>

²⁷³ 464 P.3d 1215 (2020)

²⁷⁴ *Id.* at 1221-1222.

²⁷⁵ W.S. § <u>27-14-102</u>(xi)(A)

states.²⁷⁶ Nevertheless, the Wyoming Court has recently made clear, in *Matter of Workers' Claim of Vinson*,²⁷⁷ that where an infectious disease is itself a consequence of a different, clearly established work-related injury, disability related to the disease is compensable, assuming medical causation is established.²⁷⁸

Covid-19 presented a difficult causation problem for Wyoming workers' compensation law (and for workers' compensation nationally). But despite what some commentators contended there is no inherent doctrinal obstacle to covering disability caused by "contagion" (except where states have *categorically* excluded contagious diseases), and workers' compensation has in fact covered such disability in the past.²⁷⁹ Each case would have to be decided on its merits, of course. Wyoming, like a number of other states,²⁸⁰ decided to enact a presumption of Covid-19 causation when the disease was reliably diagnosed.²⁸¹ This was, in this writer's view, a defensible time-pressured policy decision given the looming difficulty, time, and expense surrounding Covid-19 causation litigation during a public emergency.

3.12 Mental Injury in Wyoming

In Wyoming, an employee may receive workers' compensation benefits for "mental," or psychological, injuries in certain <u>very narrowly defined</u> <u>circumstances</u>. 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."²⁸² The definition is set forth structurally

²⁷⁶ W.S. § <u>27-14-102</u>(xi)(A); see 4 LARSON'S WORKERS' COMPENSATION LAW § 51.01; see also Leib v. Dept. of Workforce Services, <u>373 P.3d 420</u> (Wyo. 2016)

²⁷⁷ 473 P.3d 299 (Wyo. 2020)

²⁷⁸ *Id.* at 311. In essence, the ensuing disability represents a ripening of the original injury.

²⁷⁹ LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 5.05[2]. A partial list of cases cited by the *Larson*'s treatise includes Roe v. Boise Grocery Co., 53 Idaho 82, 21 P.2d 910 (1933) (Rocky Mountain spotted fever); Fidelity & Cas. Co. v. Industrial Accident Comm'n, 84 Cal. App. 506, 258 P. 698 (1927) (typhoid); Lothrop v. Hamilton Wright Orgs., Inc., 45 A.D.2d 784, 356 N.Y.S.2d 730 (1974) (viral hepatitis); Engels Copper Mining Co. v. Industrial Accident Comm'n, 183 Cal. 714, 192 P. 845 (1920) (influenza); Sacred Heart Med. Ctr. v. Carrado, 92 Wn.2d 631, 600 P.2d 1015 (1979), rev'g, 20 Wn. App. 285, 579 P.2d 412 (1978) (hepatitis); Smith v. Capital Region Med. Ctr., 412 S.W.3d 252 (Mo. Ct. App. 2013) (influenza)

²⁸⁰ JOSH CUNNINGHAM, COVID-19: WORKERS' COMPENSATION, NATIONAL CONFERENCE OF STATE LEGISLATURES *available at* https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx

²⁸¹ W.S. § 27-14-102(xi)(A) ("For the period beginning January 1, 2020 through December 30, 2020, if any employee in an employment sector for which coverage is provided by this act is infected with the COVID-19 Coronavirus, it shall be presumed that the risk of contracting the illness or disease was increased by the nature of the employment."). The language does not quite create a presumption of causation because it only addresses legal (increased risk) rather than factual (medical) causation. It is not yet clear whether this distinction has made a practical difference in litigation, but no cases along these lines have been reported.

²⁸² W.S. § <u>27-14-102</u>(a)(xi)(J)

as a statutory exclusion: under W.S. § <u>27-14-102(a)(xi)</u>, 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 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.²⁸³ 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."284 Wyoming compensates only the second group of cases, which is currently the minority rule approach in the United States. 285 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., 286 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.²⁸⁷ 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."288 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, ²⁸⁹ 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

²⁸³ For commentary on "most recent edition" incorporations *see* supra. in this Treatise at Section

²⁸⁴ 4 LARSON'S WORKERS' COMPENSATION LAW § 56.01

²⁸⁵ 4 LARSON'S WORKERS' COMPENSATION LAW § 56.04

²⁸⁶ 245 P.3d 811 (Wyo. 2010)

²⁸⁷ *Id.* at 814-815

²⁸⁸ Id. at 816

²⁸⁹ 331 Mass. 11 (1954)

aneurism.²⁹⁰ As the *Larson*'s treatise notes, these kinds of cases are uniformly compensable throughout the country.²⁹¹

In *Wheeler*, the Court reaffirmed other Wyoming cases, essentially applying the plain language of the current statute,²⁹² 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.²⁹³ 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.*,²⁹⁴ 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. ²⁹⁵

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.²⁹⁶

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

²⁹⁰ See a discussion of the case in DUFF, WORKERS' COMPENSATION LAW, supra. at 72-74

²⁹¹ 4 LARSON'S WORKERS' COMPENSATION LAW § 56.02

²⁹² See Cook v. Shoshone First Bank, <u>126 P.3d 886</u>, 890–91 (Wyo.2006); Brierley v. Workers' Safety & Comp. Div., <u>52 P.3d 564</u>, 565 (Wyo.2002); Sechrist v. Workers' Safety & Comp. Div., <u>23 P.3d 1138</u>, 1141 (Wyo.2001)

²⁹⁴ <u>932 P.2d 750</u> (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., <u>939 P.2d 250</u> (Wyo. 1997)

²⁹⁵ Frantz., *supra*., 932 P.2d at 754

²⁹⁶ See discussion supra. Section 1.6 citing Cook v. Shoshone First Bank, 126 P.3d 886 (Wyo. 2006)

"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."²⁹⁷ There has been a great deal of case law over the years 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.²⁹⁸ 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.²⁹⁹

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...³⁰⁰ 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.³⁰¹ At hearing, she was unable to identify what had caused her to fall, despite considerable prompting by counsel.³⁰² 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."303

²⁹⁷ 1 Larson's Workers' Compensation Law § 9.01

²⁹⁸ *Id*.

²⁹⁹ Id.

³⁰⁰ 796 P.2d 893 (Az. 1990)

³⁰¹ *Id.* at 894-895

³⁰² *Id*. at 895

³⁰³ *Id.* at 898

Wyoming's approach to these falls has been altered significantly by formal judicial adoption and application, beginning in 1990,³⁰⁴ of the "premises rule," which will be explained momentarily, to "causal connection" situations. In Matter of Williams, ³⁰⁵ for example, Mr. Williams suffered a head injury on the work site. ³⁰⁶ While it was clear an injury had occurred at work, 307 as Williams was working, 308 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. 309 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."310 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.³¹¹

³⁰⁴ Archuleta v. Carbon County School Dist. No. 1, <u>787 P.2d 91</u> (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.")

³⁰⁵ 409 P.3d 1219 (Wyo. 2018)

³⁰⁶ *Id.* at 1228

³⁰⁷ *Id.* at 1229

³⁰⁸ *Id*.

³⁰⁹ *Id*. at 1223

³¹⁰ *Id.* at 1228

³¹¹ *Id.* at 1227-1228 (Emphasis supplied)

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." The employer never contended that the death had not "arisen out of" employment; the sole ground of dispute was whether the claimant was barred by operation of the rule denying compensation to employees traveling to and from work, an in the course of employment question. 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. Indeed, the subject is discussed in the Larson's treatise only in the "in the course of" section. Thus, it is clear that Matter of Williams has now superseded Matter of Injury to Corean and greatly expanded Archuleta. The Williams Court left little doubt about its expansion of the "premises rule" beyond its "in the course of" origins. The

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."³¹⁸ This rule has been adopted by Wyoming courts. 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. 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

³¹² Archuleta, *supra*., 787 P.2d at 91

³¹³ LA

^{314 723} P.2d at 60-61

^{315 2} LARSON'S WORKERS' COMPENSATION LAW § 13.04

³¹⁶ Though Murray v. Workers' Safety & Compensation Div., <u>993 P.2d 327</u> (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

³¹⁷ 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)

³¹⁸ 1 Larson's Workers' Compensation Law § 7.04 [2]

³¹⁹ Richard v. Workers' Compensation Div., <u>831 P.2d 244</u>, 246-247 (Wyo. 1992)

³²⁰ Id. at 247

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.³²¹

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.³²²

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*,³²³ 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."³²⁴ 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.³²⁵ It is worth noting that in many states the question of the compensability of infectious diseases often turns either on the relationship

³²¹ 1 Larson's Workers' Compensation Law § 7.04 [2]

^{322 3} LARSON'S WORKERS' COMPENSATION LAW § 29.01. (emphasis supplied)

^{323 373} P.3d 420 (Wyo. 2016)

³²⁴ *Id.* at 425

³²⁵ *Id.* at 427

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.

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**.³²⁶ The *Larson*'s treatise divides "in the course" problems into those having to do with whether an injury occurred within the "<u>time and space boundaries of</u>" employment and those that involve whether an injury occurred <u>during an activity</u> whose purpose is related to the employment.³²⁷ 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.³²⁸ 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.³²⁹

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.³³⁰

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.³³¹ 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.

³²⁶ 2 LARSON'S WORKERS' COMPENSATION LAW § 12.01

 $^{^{327}}$ *Id*.

³²⁸ 2 LARSON'S WORKERS' COMPENSATION LAW § 12.01

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

³³⁰ 99 C.J.S. Workers' Compensation § 423

³³¹ 2 LARSON'S WORKERS' COMPENSATION LAW § 13.04

Three concepts that are especially important for understanding Wyoming law in this area are the <u>premises rule</u> (already discussed in the "arising out of section" above), the <u>going and coming rule</u>, and the <u>personal comfort doctrine</u>. 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**.

The **premises rule** and the **going and coming rule** are closely interrelated. From the inception of workers' compensation, it has been accepted that <u>injuries suffered</u> **by employees going to or coming from work are not compensable**. 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**. 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. 334

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."³³⁵ 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."³³⁶

The <u>personal comfort doctrine</u> holds that "[e]mployees who, within the time and space limits of their employment, engage in acts which **minister to personal**

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

³³³ 2 Larson's Workers' Compensation Law § 13.01 [1]

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

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

³³⁶ 2 Larson's Workers' Compensation Law § 14.05

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."³³⁷ The principal is cited to establish that workers in various 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. <u>Injuries sustained by an employee</u> who is "going to or coming from" the duties of his employment are not covered <u>by worker's compensation</u>. Historically, Wyoming courts followed the rule.³³⁸

_

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

³³⁸ In re Jensen, <u>178 P.2d 897</u>, 900 (Wyo. 1947); Workmen's Compensation Dept. v. Boston, <u>445 P.2d 548</u>, 549 (Wyo. 1968); Matter of Willey, <u>571 P.2d 248</u>, 250 (Wyo. 1977); Matter of Van Matre, <u>657 P.2d 815</u>, 816 (Wyo. 1983); Claims of Naylor, <u>723 P.2d 1237</u>, 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, <u>899 P.2d 48</u>, 50 (Wyo. 1995)

The principle is embedded by statute³³⁹ in W.S. § <u>27-14-102(a)(xi)(D)</u>: "'Injury' does not include . . . Any injury sustained during travel to or from employment <u>unless the employee is reimbursed for travel expenses or is transported by a vehicle of the employer</u> . . ." The "reimbursement for travel" and 'transport by employer vehicle" provisos codify prior Wyoming cases finding exceptions to the going and coming rule.³⁴⁰

The premises rule was adopted in Wyoming in Archuleta v. Carbon County School Dist. No. 1.³⁴¹ 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.³⁴² 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, 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

⁻

³³⁹ 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

³⁴⁰ 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

³⁴¹ The "arising out of" aspect of the case was discussed above in Section 3.12 of the treatise.

³⁴² Archuleta v. Carbon County School Dist. No. 1, *supra.*, 787 P.2d at 91

up his affairs and leaving the premises if they occur within a reasonable time after his termination.³⁴³

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.³⁴⁴

The precise rule articulated by the Court was that <u>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. 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. 346</u>

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.³⁴⁷

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:

³⁴³ *Id.* at 93-94

³⁴⁴ *Id*. at 94

³⁴⁵ *Id.* at 93-94; see also Workers' Compensation Div. v. Miller, 787 P.2d 89, 90 (Wyo. 1990)

³⁴⁶ Matter of Williams, *supra.*, 409 P.3d at 1227-1228

³⁴⁷ 423 P.2d 645, 648 (Wyo. 1967)

- 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;
- 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,³⁴⁸ Paul Jensen was injured in an automobile accident in which the employee-driver of the car and another employee-passenger were killed.³⁴⁹ The company had begun reimbursing employees for travel between their residences in Thermopolis and work on a well site 50 miles distant.³⁵⁰ 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

^{348 178} P.2d 897 (Wyo. 1947)

 $[\]frac{1}{1}$ Id. at 899

³⁵⁰ *Id.* at 898

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 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.³⁵¹

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. Still, novel questions have arisen under the provision. For example, in *In re Worker's Compensation Claim of Barlow*, 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. This somewhat surprising result generated dissents from Chief Justice Kite and Justice Burke.

351 Id. at 907

 ³⁵² 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., <u>106 P.3d 867</u> (Wyo. 2005)

³⁵³ <u>259 P.3d 1170</u> (Wyo. 2011)

³⁵⁴ Id.

³⁵⁵ *Id.* at 1175-1178

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," Two lead cases in this area are in some tension. In Workmen's Compensation Department v. Boston, 357 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 studentemployees) been drinking excessively, ³⁵⁸ and the accident occurred five-hours after the claimant had deviated from paid travel to his authorized temporary residence.³⁵⁹ Nevertheless, the student was found entitled to workers' compensation benefits³⁶⁰ (the opinion provoked a vigorous dissent). In contrast, the claimant was denied workers' compensation benefits in Shelest v. Workers' Safety & Compensation Div. 361 In that decision, an employee was injured when returning home from workrelated training in another town on a scenic alternate route that required fifty miles, and one hour of travel more, than the most direct route. 362 The claimant, with a fellow employee and a supervisor, jointly decided to take the alternate route, ³⁶³ and there was no question the claimant was returning to his workplace.³⁶⁴ It is very difficult to harmonize Boston and Shelest, as the dissenting opinion of Justice Kite implicitly recognized.³⁶⁵ 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

³⁵⁶ Boode v. Allied Mutual Ins. Co., <u>458 P.2d 653</u>, 657 (Wyo.1969)

³⁵⁷ 445 P.2d 548 (Wyo. 1968)

³⁵⁸ Probably six beers over a five-hour period. *Id.* at 552.

³⁵⁹ Id

³⁶⁰ *Id*. at 551

³⁶¹ 222 P.3d 167 (Wyo. 2010)

 $[\]frac{362}{Id}$. at 169

³⁶³ *Id*.

³⁶⁴ *Id.* at 175

³⁶⁵ *Id.* at 175-176

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 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. 366

The problem is that, if the question of deviation is treated <u>solely as a question of fact</u>, 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." This outcome is problematic, though there is no denying that deviation problems are complicated and fact intensive. 368

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*, ³⁶⁹ 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. ³⁷⁰ One evening at work, she exceeded this lifting restriction, which the employer had specifically instructed her to observe, and injured her back. ³⁷¹ The employer objected to payment of benefits, and the district court denied the claim. ³⁷² The Wyoming Supreme Court upheld the denial of the claim by the district court, ³⁷³ 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." ³⁷⁴ The Court

³⁶⁶ *Id.* at 171-172 (Emphases supplied)

³⁶⁷ *Id.* at 173

^{368 3} LARSON'S WORKERS' COMPENSATION LAW § 32.01

^{369 762} P.2d 1193 (Wyo. 1988)

³⁷⁰ *Id.* at 1195

³⁷¹ Id

³⁷² *Id.* at 1195-1196

³⁷³ "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., <u>134 P.3d 1242</u>, 1246, n.1 (Wyo. 2006)

³⁷⁴ *Id.* at 1196

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;
- (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.³⁷⁵

The *Smith* test was reaffirmed in *Perry v. Workers' Safety & Compensation Div.*³⁷⁶ 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.³⁷⁷ Applying the *Smith* test, the Wyoming Supreme Court upheld administrative denial of the claim.³⁷⁸ 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.³⁷⁹

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.³⁸⁰ 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.³⁸¹ 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

³⁷⁵ *Id.* at 1196-1197

³⁷⁶ 134 P.3d 1242 (Wyo. 2006)

 $[\]overline{Id}$. at 1244

³⁷⁸ Id. at 1249

³⁷⁹ *Id.* at 1249-1254

³⁸⁰2 LARSON'S WORKERS' COMPENSATION LAW § 17.01 and § 17.02.

³⁸¹ See Fuhs v. Swenson, <u>131 P.2d 333</u>, 337-338 (Wyo. 1942)

decisions in this area, Hotelling v. Fargo-Western Oil Co., 382 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.³⁸³ 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 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." 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 . . . "385 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." 386

A recent statement of the law in this area may be found in *Shepherd of Valley Care Center v. Fulmer*.³⁸⁷ 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.³⁸⁸ The employer objected to payment of workers' compensation benefits, the Division denied the claim, and the Office of Administrative Hearings upheld the denial.³⁸⁹ 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." <u>To be culpable negligence</u>, an act must be "intentional,"

³⁸² 238 P. 542 (Wyo. 1925)

 $[\]frac{10}{10}$ at 543

³⁸⁴ *Id.* at 544

³⁸⁵ 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)

³⁸⁶ See Weidt v. Brannan Motor Co., <u>260 P.2d 757</u>, 761 (Wyo. 1953) quoting Hamilton v. Swigart Coal Mine, <u>143 P.2d 203</u>, 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

³⁸⁷ <u>269 P.3d 432</u> (Wyo. 2012)

 $[\]frac{388}{Id}$. at 435

³⁸⁹ *Id.* at 436-437

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 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 <u>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. ³⁹⁰ 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. ³⁹¹</u>

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."³⁹²

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,³⁹³ 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

77

³⁹⁰ Compare 3 LARSON'S WORKERS' COMPENSATION LAW § 34.03 (discussing jurisdictions possessing an independent defense for intentional violations of safety rules)

³⁹¹ *Id.* at 438 *citing* Keck v. Workers' Safety & Comp. Div., 985 P.2d 430, 433 (Wyo.1999)

³⁹² See Matter of Smith, supra., 762 P.2d at 1196-1197

³⁹³ See generally 2 LARSON'S WORKERS' COMPENSATION LAW § 23

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.

In Workers' Compensation Division v. Espinoza, 394 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. ³⁹⁵ 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.³⁹⁶ 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."397 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, ³⁹⁸ 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.³⁹⁹

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

³⁹⁴ 924 P.2d 979 (Wyo. 1996)

³⁹⁵ *Id.* at 980-981

³⁹⁶ *Id*. at 980

³⁹⁷ *Id.* at 981 (internal citations omitted)

^{398 2} LARSON'S WORKERS' COMPENSATION LAW § 23.07

³⁹⁹ Id. at 982

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. 400 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, inflicting injuries that he survived."401 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)."402 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, 403 a conclusion the Wyoming Supreme Court rejected as arbitrary and capricious. 404 As a matter of law, the Court rejected the Division's argument⁴⁰⁵ 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. 406 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."⁴⁰⁷ 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,"408 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."409

_

⁴⁰⁰ <u>52 P.3d 564</u> (Wyo. 2002)

 $^{^{401}}$ *Id.* at 566

⁴⁰² *Id*.

⁴⁰³ *Id.* at 566-567

⁴⁰⁴ *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.

 $^{^{405}}$ *Id.* at 569

⁴⁰⁶ <u>839 P.2d 936</u>, 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)

⁴⁰⁷ Brierly v. Workers' Safety & Compensation Div., *supra*. at 569

⁴⁰⁸ See this Treatise supra. at §3.12

⁴⁰⁹ Brierly v. Workers' Safety & Compensation Div., *supra*. at 569

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.*,⁴¹⁰ 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 from a compensable physical injury.⁴¹¹ Thus, a suicide resulting from such a depressive episode would probably not be compensable.

3.20 Intoxication in Wyoming

"[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." 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). 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.

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." "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." "416

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*

⁴¹⁰ 245 P.3d 811 (2010); see this Treatise, supra. at §3.12

⁴¹¹ *Id.* at 817

⁴¹² Johnson v. Workers' Compensation Div., <u>911 P.2d 1054</u>, 1062 (Wyo. 1996) (Emphasis supplied)

⁴¹³ *Id*.

⁴¹⁴ Id. at 1061; see also Coleman v. Workers' Compensation Div., 915 P.2d 595, 599 (Wyo. 1996)

⁴¹⁵ WY Rules and Regulations 053.0021.1 § 3(cc); WSD WCD <u>Ch. 1</u>, § 3(cc)

⁴¹⁶ WY Rules and Regulations 053.0021.1 § 3(uu); WSD WCD Ch. 1, § 3(uu)

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." On the other hand, in Wyoming it is not necessary that the Division or employer show that intoxication be the "primary" or "sole" cause of an otherwise work-related injury, which is the case in some states. 418

_

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

 $^{^{418}}$ 3 Larson's Workers' Compensation Law \S 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. 419

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, ⁴²⁰ and great attention should be given to the precise rules of individual states like Wyoming.

^{419 11} LARSON'S WORKERS' COMPENSATION § 126.01

⁴²⁰ See 11 Larson's Workers' Compensation § 126.04 [4]

4.2 Notice in Wyoming – Statutory and Regulatory Provisions

W.S. § <u>27-14-502(a)</u> 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 <u>both</u> the seventy-two-hour reporting <u>and</u> ten-day filing requirements had to be complied with to satisfy notice requirements.⁴²¹ The dual reporting system has become more complicated, however.

W.S. § <u>27-14-502</u>(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*,⁴²² Wesaw was exposed to sulfuric acid and reported the exposure to his supervisor immediately, on October 15, 1998, a Thursday.⁴²³ His throat felt sore later that night, but he went to work the next day, Friday.⁴²⁴ He was convinced that his illness was due to an underlying asthma condition, so he took asthma medications during the ensuing weekend.⁴²⁵ 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.⁴²⁶ The employer, but not the Division, raised at hearing the issue of whether the

⁴²¹ Clark v. Workers' Safety & Compensation Div., 968 P.2d 436 (Wyo. 1998).

⁴²² 19 P.3d 500 (Wyo. 2001)

⁴²³ *Id.* at 503

⁴²⁴ *Id*.

⁴²⁵ *Id*.

⁴²⁶ 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.⁴²⁷ 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.⁴²⁸

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. 429

The notice rule as it applies to presumption of denial and the "clear and convincing evidence" standard surfaced again in *In re Jensen*.⁴³⁰ In that case, Jensen alleged that he suffered a work-related lower back injury on February 26, 1998, a Thursday.⁴³¹ He further alleged that he reported the injury to his supervisor that day, or the following day.⁴³² He did not work for the next four days due to soreness in his back.⁴³³ At that point, he believed he had experienced only muscle strain.⁴³⁴ He returned to work that Friday for a half day and then saw a doctor the following

⁴²⁷ Wesaw v. Quality Maintenance, supra., 19 P.3d at 503

⁴²⁸ *Id.* at 503-504

⁴²⁹ Id. at 506

^{430 24} P.3d 1133 (Wyo. 2001)

⁴³¹ Id. at 1135

⁴³² *Id*.

⁴³³ *Id*.

⁴³⁴ *Id*.

Monday, March 9.435 The doctor prescribed muscle relaxants and pain medication, told him to rest, and informed him that his back would "clear nicely." ⁴³⁶ 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. 437 The following day his doctor told him that he suspected a herniated disk. 438 Jensen claimed it was only on that day that he suspected he might have suffered a compensable injury. 439 On March 23, Jensen delivered a written report to his employer. (The Division received the report from the employer on April 6.)⁴⁴⁰ On March 26, Jensen returned to work, but by March 27 could barely stand or walk.⁴⁴¹ On March 30, Jensen underwent an MRI, which revealed that he had a severely herniated disk. 442 The Division denied his claim for, among other reasons, failure to file a written report within ten days after the injury. 443 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."444 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."445

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. 446

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

⁴³⁶ *Id*.

⁴³⁵ *Id*.

⁴³⁷ *Id*.

⁴³⁸ *Id*.

⁴³⁹ *Id*.

⁴⁴⁰ *Id*.

⁴⁴¹ *Id*.

⁴⁴² *Id*.

⁴⁴³ *Id*.

⁴⁴⁴ Id. at 1136

⁴⁴⁵ *Id*.

⁴⁴⁶ *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."447 In fact, Wesaw does not appear, fairly read, to have made this statement at ¶ 15.448 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. 449 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.

-

⁴⁴⁷ Logue v. Workers' Safety & Compensation Div., 44 P.3d 90, 96 (Wyo. 2002)

⁴⁴⁸ Wesaw v. Quality Maintenance, *supra.*, 19 P.3d at 506-507

⁴⁴⁹ Baldwin v. Scullion, <u>62 P.2d 531</u>, 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?"⁴⁵⁰

Notice cases can become tricky in the context of <u>medical diagnoses</u>. In general, in Wyoming <u>an injury becomes compensable when the claimant reasonably knows about the injury, not when an official or final diagnosis of injury is <u>made by a physician</u>. 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?⁴⁵¹</u>

In *Matter of Zielinske*, ⁴⁵² 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. 453 Although she requested and was promised a respiratory mask, one was not provided, and she did not complain again during the subsequent year. 454 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. 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." 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. 457 There was conflict in testimony as to whether on July 27 she told her supervisor that her breathing problems were definitively work-related.⁴⁵⁸ 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." The physicians reviewed this conclusion with Zielinske on August 4, and she immediately informed her employer. 460 Zielinske resigned immediately thereafter (no work accommodations were possible). 461 She filed a report of injury

⁴⁵⁰ Aanenson v. Workers' Compensation Div., <u>842 P.2d 1077</u>, 1082 (Wyo. 1992); Logue v. Workers' Safety & Compensation Div., *supra.*, 44 P.3d at 94

⁴⁵¹ See 11 LARSON'S WORKERS' COMPENSATION § 126.06 n.1.1, and accompanying text

⁴⁵² 959 P.2d 706 (Wyo. 1998)

⁴⁵³ *Id.* at 707

⁴⁵⁴ Id. at 708

⁴⁵⁵ *Id*.

⁴⁵⁶ *Id*.

⁴⁵⁷ *Id*.

⁴⁵⁸ *Id*.

⁴⁵⁹ Id. at 709

⁴⁶⁰ *Id*.

⁴⁶¹ *Id*.

on August 9, identifying her date of injury as June 7.⁴⁶² 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."

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." 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. 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."

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*. 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. On July 29, she informed her employer's human resources manager that she was quitting her job due to shoulder pain. On August 23, Blommel went to her planned appointment with the orthopedic surgeon, who diagnosed a rotator cuff tear. Three days later, she reported the injury to her now former employer's human resources manager. On August 27, she filed a report of injury with the Division, listing the date of injury

⁴⁶² *Id*.

⁴⁶³ *Id*.

⁴⁶⁴ *Id*. at 510

⁴⁶⁵ *Id*.

⁴⁶⁶ *Id*.

^{467 &}lt;u>120 P.3d 1013</u> (Wyo. 2005)

⁴⁶⁸ *Id.* at 1014. According to the employer, Blommel said she hurt her shoulder while working for her second employer, Wal–Mart. *Id.*

⁴⁶⁹ *Id.* Again there was record testimony that she did not relate her shoulder pain to work with the employer. *Id.*

⁴⁷⁰ *Id*.

⁴⁷¹ *Id*.

as July 9.⁴⁷² The Division denied benefits and at hearing argued (among other things) that Blommel did not make a timely report of her injury.⁴⁷³ 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."⁴⁷⁴ The district court affirmed the denial of benefits.⁴⁷⁵

The Wyoming Supreme Court reversed. The Court quoted from its prior opinion in *Iverson v. Frost Constr.* ⁴⁷⁶:

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. 477

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." The concern appears to be that an employee could be under medical care indefinitely, without a

⁴⁷² Id. at 1015

⁴⁷³ *Id*.

⁴⁷⁴ *Id*

⁴⁷⁵ Id

^{476 81} P.3d 190 (Wyo. 2003)

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

⁴⁷⁸ Blommel v. Wyoming Dept. of Employment, Div. of Workers' Safety & Compensation, *supra*., 120 P.3d at 1019 *quoting* Torres v. Workers' Safety & Compensation Div., <u>105 P.3d 101</u>, 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."⁴⁷⁹

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 <u>both</u> failed to report an injury to the employer <u>and</u> failed to file an injury report with the Division. W.S. § <u>27-14-502</u>(c) states that in such situations there is <u>a presumption that the claim will be denied</u> 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.⁴⁸⁰

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. The burden is placed squarely on the employee. The problem faced by claimants in this area is how to prove a negative.

The Wyoming Supreme Court has "<u>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."</u>

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

⁴⁸⁰ Borelson v. Holiday Inn, <u>911 P.2d 426</u> (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.*, <u>160 P.3d 71</u>, 77 (Wyo. 2007).

⁴⁸¹ Matter of Zielinske, *supra*. 959 P.2d at 710

⁴⁸² Sherwin-Williams Co. v. Borchert, <u>994 P.2d 959</u>, 964 (Wyo. 2000)

⁴⁸³ In re Horn-Dalton, <u>200 P.3d 810</u>, 814 (Wyo. 2009) *citing* Beitel v. Workers' Comp. Div., <u>991 P.2d 1242</u>, 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."

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.

92

⁴⁸⁴ 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.⁴⁸⁵

4.5 Statute of Limitations in Wyoming – Statutory Provision

W.S. § <u>27-14-503</u>(a) and (b) prescribe statute of limitations requirements (Emphases supplied):

- (a) A payment for benefits involving an injury which is the result of a <u>single brief occurrence</u> 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 <u>substantial period of time</u> 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

^{485 11} LARSON'S WORKERS' COMPENSATION LAW § 126.04 [3]

an injury. 486 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. 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. 488

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." 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

⁴⁸⁶ Logue v. Wyoming Workers' Safety & Compensation Div., <u>44 P.3d 90</u>, 96 (Wyo. 2002); Aanenson v.Workers' Compensation Div., <u>842 P.2d 1077</u>, 1081 (Wyo, 1992)

⁴⁸⁷ Popick v. Workers' Safety & Compensation Div., <u>118 P.3d 993</u>, 996 (Wyo. 2005)

^{489 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*, ⁴⁹⁰ decided under an earlier version of the Wyoming Workers' Compensation Act. In that case, Barnes suffered a compensable back injury on March 29, 1967, ⁴⁹¹ and never filed a claim until February 25, 1976. ⁴⁹² The facts showed that following a work-related back injury Barnes received brief treatment but never missed time from work. ⁴⁹³ 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. ⁴⁹⁴

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):

⁴⁹⁰ <u>587 P.2d 214</u> (1978)

 $[\]frac{491}{Id}$ at 216

⁴⁹² *Id*.

⁴⁹³ *Id*.

⁴⁹⁴ *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, 495 the claimant, Collicott, filed a report of injury with the Division reporting a work-related shoulder injury that occurred almost a decade earlier. 496 The Division denied the claim for benefits as untimely. 497 The claimant objected to the denial, and the matter was referred for hearing. 498 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. § 27–14–505.⁴⁹⁹ 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. ⁵⁰⁰ 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.⁵⁰¹ 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.⁵⁰² The hearing examiner issued an order denying benefits and concluded Collicott had not met his burden of proving mental incompetence.⁵⁰³ The rationale for the decision was that neither W.S. § 27-14-505, nor any other section of the Wyoming

⁴⁹⁵ 20 P.3d 1077 (Wyo. 2001)

⁴⁹⁶ *Id.* at 1078. An injury report is not a claim for benefits. W.S. § 27-14-503(a)

⁴⁹⁷ Id

⁴⁹⁸ *Id*.

⁴⁹⁹ *Id*.

⁵⁰⁰ *Id*.

⁵⁰¹ *Id*.

⁵⁰² *Id*.

⁵⁰³ *Id.* at 1078-79

Workers' Compensation Act, defined the term "mentally incompetent." 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." Finding that Collicott failed to meet this standard, the hearing examiner denied the claim. 506

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. 507

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?" The Court subsequently remanded the case for further fact finding consistent with its newly-established standard. 509

W.S. § <u>27-14-505</u> 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.⁵¹⁰ One example

⁵⁰⁴ *Id.* at 1079

⁵⁰⁵ *Id*.

⁵⁰⁶ *Id*.

⁵⁰⁷ *Id.* 1080-81(Emphasis supplied)

⁵⁰⁸ *Id.* at 1081(Emphasis supplied)

⁵⁰⁹ Id.

⁵¹⁰ See Mitchell v. State Recreation Com'n Snowmobile Trails, <u>968 P.2d 37</u>, 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.*⁵¹¹ 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, ⁵¹² 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. ⁵¹³

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.*⁵¹⁴ 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.⁵¹⁵ She suffered the injury in December 1981, reporting it to her employer the day after, and underwent surgery in March 1982.⁵¹⁶ When more surgery became necessary in March 1983, "appellant requested that the hospital apply for payment under worker's compensation."⁵¹⁷ 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

⁵¹¹ 795 P.2d 760 (Wyo. 1990)

⁵¹² *Id.* at 764-765

⁵¹³ *Id.* at 763 (Emphasis supplied)

⁵¹⁴ <u>695 P.2d 1048</u> (Wyo. 1985)

⁵¹⁵ *Id.* at 1049

⁵¹⁶ *Id*.

⁵¹⁷ *Id*.

Court reversed.⁵¹⁸ 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 <u>reliance upon her employer's representation that she was not covered by worker's compensation</u>. 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. ⁵¹⁹

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. 520 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 workrelated 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;

⁵¹⁸ *Id.* at 1050

⁵¹⁹ *Id.* at 1053 (Emphases supplied)

⁵²⁰ 448 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. 521

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

⁵²¹ *Id.* at 831 quoting llan 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.⁵²²

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." Sweetalla is also a reminder that principles of equitable estoppel are applicable to government agencies as well as to employers. S24

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, 525 and this principle also applies to statute of limitations provisions. 526 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**. 527 **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. 528 (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." 529 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

⁵²³ Sweetalla, *supra*., 448 P.3d 825 at 834

⁵²² *Id.* at 832

⁵²⁴ See Appleby v. Workers' Safety & Comp. Div., <u>47 P.3d 613</u>, 619 (Wyo.2002)

⁵²⁵ In re Collicott, <u>20 P.3d 1077</u>, 1082 (Wyo. 2001)

⁵²⁶ Workers' Compensation Division v. Tallman, 589 P.2d 835, 838 (Wyo. 1979)

⁵²⁷ DeLauter v. Workers' Compensation Div., <u>994 P.2d 934</u>, 937 (Wyo. 2000) *citing* Rodgers v. Workers' Compensation Div., <u>939 P.2d 246</u>, 249 (Wyo. 1997)

⁵²⁸ Rodgers v. Workers' Compensation Div., *supra.*, 939 P.2d at 249; Claim of Nielson, <u>806 P.2d</u> <u>297</u>, 300 (Wyo. 1991)

⁵²⁹ 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.⁵³⁰ It is the claimant's burden to establish when total disability occurred.⁵³¹

For the state of t

5 Benefits

different ways.

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. 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.⁵³³

As will be explained shorty, 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

⁵³² 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

 $^{^{533}}$ 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."534 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."535 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.⁵³⁶

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. ⁵³⁷ Of the indemnity categories,

^{534 7} LARSON'S WORKERS' COMPENSATION LAW § 83.08

⁵³⁵ *Id.* at § 83.01

⁵³⁶ 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

⁵³⁷ *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.⁵³⁸

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. 539

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) ways⁵⁴⁰ of calculating **partial benefits**:

- <u>Impairment-Based Approach</u>. 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.
- <u>Loss-of-Earning-Capacity Approach</u>. 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.
- <u>Wage-Loss Approach</u>. 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.
- <u>Mixed Approach</u>. 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

⁵³⁸ *Id.* at 35

⁵³⁹ Id

⁵⁴⁰ 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." 541

W.S. § <u>27–14–404</u> establishes a limitation on the amount of time that an injured worker may receive TTD benefits. The statute provides, in relevant part, as follows⁵⁴²:

- § 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*

⁵⁴¹ Pacific Power and Light v. Parsons, <u>692 P.2d 226</u>, 228 (Wyo. 1984); *accord* Coggins v. Department of Workforce Services, Workers' Compensation Division, <u>421 P.3d 555</u>, 560 (Wyo. 2018); Phillips v. TIC-The Indus. Co. of Wyoming, Inc., <u>109 P.3d 520</u>, 532 (Wyo. 2005).

⁵⁴² 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, 543 an award of additional TTD benefits shall not exceed twelve months" 544:

- (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,

 $^{^{543}}$ Id. quoting Wyoming Rules and Regulations, WSD WCD Ch. 7, \S 2, WY ADC WSD WCD Ch. 7, \S 2

⁵⁴⁴ *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.⁵⁴⁵

In *Department of Workforce Servs. v. Clements*,⁵⁴⁶ 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.547

5.4 Benefit Amount for Temporary Total Disability

The benefit calculation for temporary total disability is explained in W.S. $\frac{27-14-403}{(c)^{548}}$:

⁵⁴⁵ W.S. § <u>27–14–404</u>(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, <u>414 P.3d 622</u>, 628 (Wyo. 2018).

⁵⁴⁶ 326 P.3d 177 (2014)

⁵⁴⁷ *Id.* at 181. The *ultra vires* 12-month administrative cap, *see rules supra*., appears to have been removed as of September 6, 2018.

⁵⁴⁸ 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 ½ of the monthly award paid on or about the fifteenth of the month and ½ paid on or about the thirtieth of the month.

In other words, there are <u>two calculations</u> 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 preinjury 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 <u>capped at the statewide average monthly wage</u> (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." 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

⁵⁴⁹ W.S. § <u>27-14-102</u>(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. 550

The seeming harshness of the rule⁵⁵¹ 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:

⁵⁵⁰ Sherwood v. Gooch Milling & Elevator Co., <u>453 N.W.2d 461</u>, 467 (Neb. 1990). The principle is emphasized in 7 LARSON'S WORKERS' COMPENSATION LAW § 83.01.

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.⁵⁵²

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

_

⁵⁵² W.S. § <u>27-14-403</u>(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. § <u>27-14-403(c)(i)-(iii)</u>:

Employees whose *Actual Monthly Earnings* (AME) <u>are less than</u> <u>73% of the</u> *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.⁵⁵³

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.⁵⁵⁴

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**

.

⁵⁵³ W.S. § 27-14-403(c)(v)

⁵⁵⁴ 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 . . . ⁵⁵⁵

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. 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." 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. 558

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

⁵⁵⁵ *Id.* at § 83.02 *quoting* Cardiff Corp. v. Hall, 1 K.B. 1009, 1020, 1021 (1911)

⁵⁵⁶ 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.

⁵⁵⁷ 7 Larson's Workers' Compensation Law § 84.01.

⁵⁵⁸ Beecher v. Labor & Industry Review Com'n, <u>682 N.W.2d 29</u>, 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. 559

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. 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. Search

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

⁵⁵⁹ McIntosh v. Workers' Safety & Compensation Div., <u>311 P.3d 608</u>, 616 (2013).

Second Injury Fund v. Nelson, <u>544 N.W.2d 258</u> (Iowa 1995); Pomerinke v. Excel Trucking Transport, <u>859 P.2d 337</u>, 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., <u>342 S.E.2d 798</u>, 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., <u>679 P.2d 884</u>, 887 (Or. Ct. App. 1984) ("A claimant, however, need not make efforts to work if those efforts would be futile.").

⁵⁶¹ 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.*, ⁵⁶² for example, the Wyoming Supreme Court (after faulting the Medical Commission severely for the Commission's fact finding deficiencies) ⁵⁶³ independently found that the claimant (Moss) had prima facie satisfied odd lot doctrine requirements. ⁵⁶⁴ 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." ⁵⁶⁵ The Court stated that the Division had refuted Moss's evidence based on the following factors ⁵⁶⁶:

- 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.⁵⁶⁷ 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."⁵⁶⁸ In this regard, Justice Hill quoted an important passage from *Schepanovich v. United States Steel Corp.*,⁵⁶⁹

... 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

⁵⁶² 232 P.3d 1 (Wyo. 2010)

 $[\]frac{1}{Id}$. at 11

⁵⁶⁴ 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.*⁵⁶⁵ *Id.*

⁵⁶⁶ *Id*. at 12

⁵⁶⁷ *Id.* at 14-15

⁵⁶⁸ See standard supra.

⁵⁶⁹ 669 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. . . 570

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*,⁵⁷¹ 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.⁵⁷² Finding that McMasters was obviously not capable of working at the job in which he was employed at the time of injury,⁵⁷³ 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."⁵⁷⁴ 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.⁵⁷⁵

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." Finding the Division had not met its burden, the Court stated,

 $^{^{570}}$ 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

⁵⁷¹ 271 P.3d 422 (Wyo. 2012)

 $^{572 \, \}overline{Id}$. at 424

⁵⁷³ *Id.* at 438

⁵⁷⁴ *Id*.

⁵⁷⁵ *Id.* at 439

⁵⁷⁶ *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."577

It is worth taking a moment to consider the vocational evidence the Division presented, as described by the Court⁵⁷⁸:

[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

⁵⁷⁷ Id.

⁵⁷⁸ *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. 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 persuasion 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" <u>followed by</u> payment of a "permanent *disability* award." Each of these concepts will be explored in Section 5.9.

As the Wyoming Supreme Court has explained,

⁵⁷⁹ See 7 Larson's Workers' Compensation Law § 83.03

⁵⁸⁰ See e.g. Ludwig v. Workers' Safety & Compensation Div., <u>86 P.3d 875</u> (Wyo. 2004); Hermosillo v. Workers' Safety & Compensation Div., <u>58 P.3d 924</u> (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. ⁵⁸¹

A. Permanent Partial Impairment Award (PPI): Under W.S. § $\frac{27-14-403}{403}$ (c), for permanent partial impairment the award shall be calculated state the rate of % 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. § $\frac{27-14-405}{27-14-405}$ (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. $\frac{27-14-403}{27-14-403}$ 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 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% x 60 months = 9 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."⁵⁸³ 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. <u>Permanent Partial Disability Award</u> (PPD): The award is available to an injured employee who, under W.S. § <u>27-14-405(h)</u>, is **unable to return to employment at a wage that is at least 95%** of the employee's average monthly

⁵⁸¹ Workers' Safety & Compensation Div. v. Singer, 248 P.3d 1155, 1159 (Wyo. 2011)

⁵⁸² See also WY Rules and Regulations 053.0021.7 § 1(b); WY ADC WSD WCD Ch. 7, § 1(b)

⁵⁸³ Himes v. Petro Engineering and Construction, <u>61 P.3d 393</u>, 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, 584 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). ⁵⁸⁵

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

⁵⁸⁴ "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.

⁵⁸⁵ 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. 586

The monthly **benefit calculation** for the PPD benefit is made under W.S. § <u>27-14-403</u>(c)(i)-(iii)⁵⁸⁷ 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% 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.

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

⁵⁸⁶ Bonsell v. Workers' Safety & Compensation Div., <u>142 P.3d 686</u> (Wyo. 2006); Chavez v. Memorial Hosp. of Sweetwater County, <u>138 P.3d 185</u>, 189 (Wyo.2006)

⁵⁸⁷ 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 ½) 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) $14 \times (65-50)/45 = 14 \times 15/45 = 14 \times 1/3 = 4^{2/3}$ months
- (ii) $8 \frac{1}{2} \times (4-2)/4 = 4 \frac{1}{4} \text{ months}$
- (iii) $6 \times (4-2)/4 = 3 \text{ months}$
- (iv) N/A = 0 months
- (v) 50 years old = 2 months

$Total = 13\frac{1}{4}$ months x \$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." 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, ⁵⁸⁹ 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). 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.⁵⁹¹ 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

⁵⁸⁸ McCarty v. Bear Creek Uranium Co., <u>694 P.2d 93</u>, 95 (Wyo. 1985)

⁵⁸⁹ *Id. quoting* Vetter v. Alaska Workmen's Compensation Board, <u>524 P.2d 264</u>, 266 (Alaska 1974)

⁵⁹⁰ "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

⁵⁹¹ 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**, <u>and total wages</u> 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." Furthermore, the deduction applies in connection with both permanent partial impairment (PPI) and permanent disability (PPD) benefits. 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

-

⁵⁹² W.S. § <u>27-14-406</u>.

⁵⁹³ Workers' Safety & Compensation Div. v. Singer, <u>248 P.3d 1155</u>, 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.⁵⁹⁴ By 1871, thirty of the then-established thirty-seven United States had enacted "wrongful death" statutes and the development became universal soon thereafter.⁵⁹⁵ 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.⁵⁹⁶

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. 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." 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. 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*, 600 a worker previously rendered quadriplegic by a work-related injury died in a non-work-related fire. 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

⁵⁹⁴ See Malone, American Fatal Accident Statutes—Part I: The Legislative Birth Pains, 1965 Duke L.J. 673, 678-82.

⁵⁹⁵ F. TIFFANY, DEATH BY WRONGFUL ACT 17-18 (1st ed.1893)

⁵⁹⁶ 8 LARSON'S WORKERS' COMPENSATION LAW § 96.01

⁵⁹⁷ DUFF, WORKERS' COMPENSATION LAW, 297-21

⁵⁹⁸ In re Fisher, <u>189 P.3d 866</u>, 868 (Wyo. 2008) *quoting* Workers' Safety & Compensation Div. v. Bruhn, <u>951 P.2d 373</u>, 377 (Wyo.1997)

⁵⁹⁹ W.S. § 27-14-403(e)

⁶⁰⁰ See Fisher, supra., 189 P.3d at 866.

⁶⁰¹ *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." 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. 603

The agency below had argued that the claimant's decedent "did not die as a result of the work-related injury." The Court distinguished earlier precedent in *Workers' Safety & Compensation Div. v. Bruhn*, 605 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. 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.⁶⁰⁷

⁶⁰² *Id.* at 871

⁶⁰³ Id. at 871

⁶⁰⁴ *Id*. at 867

⁶⁰⁵ Bruhn, supra., 951 P.2d at 373.

⁶⁰⁶ Id. at 374

⁶⁰⁷ *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. 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 Entitlement⁶⁰⁹

The Wyoming statute distinguishes between "death benefits" that are <u>in reality a continuation of disability benefits</u>, until *those* benefits are exhausted, and "true" death benefits.⁶¹⁰ If an injured employee, *entitled* to receive⁶¹¹ 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.⁶¹² 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

When the injury following the initial compensable injury arises out of a quasicourse 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.

⁶⁰⁸ Located currently at 1 LARSON'S WORKERS' COMPENSATION LAW § 10.05:

⁶⁰⁹ W.S. § <u>27-14-403</u>(d)

⁶¹⁰ Whatever type of "death benefits" are at issue, lump sum settlements are statutorily discouraged. W.S. § 27-14-403(f)

⁶¹¹ 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).

⁶¹² "... 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,⁶¹³ 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 Awards⁶¹⁴

If an injured employee <u>dies as a result of the work-related injury</u>, 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. <u>The surviving spouse is entitled to monthly payments for 100 months</u>. 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). 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.

⁶¹³ Twenty-one is the presumptive age of majority if the child is "physically or mentally incapacitated."

⁶¹⁴ W.S. § <u>27-14-403</u>(e)

⁶¹⁵ 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. 616 Where necessary to determine paternity, the statute of limitations may be tolled. 617 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." 618

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 . . ."619

5.18 Suicide

Beneficiaries of workers who committed suicide may be compensated where the suicide is a compensable injury.⁶²⁰

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. 621 According to the *Larson*'s treatise, "[i]n forty-five states, District of Columbia and Puerto Rico, and under the

⁶¹⁶ Heather v. Delta Drilling Co., <u>533 P.2d 1211</u> (Wyo. 1975); Workers' Compensation Div. v. Halstead, <u>795 P.2d 760</u> (Wyo. 1990)

⁶¹⁷ Workers' Compensation Div. v. Halstead, 795 P.2d at 767.

⁶¹⁸ Jim's Water Service v. Eayrs, <u>590 P.2d 1346</u>, 1351 (Wyo. 1979) (reversed on other grounds) ⁶¹⁹ W.S. § 27-14-403(c)(iv)

⁶²⁰ See supra. in Treatise Section 3.19; see also Workers' Compensation Div. v. Ramsey, <u>839 P.2d</u> 936 (Wyo. 1992).

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." 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. The United Kingdom, however, established universal health care in 1911, rendering compensation of medical expense through the workers' compensation system essentially moot. Description of medical expense through the workers' compensation system essentially moot.

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. § <u>27-14-401</u>:

- (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);

^{622 8} LARSON'S WORKERS' COMPENSATION LAW § 94.01

⁶²³ 6 Edw. VII, c.58, First Schedule, as reproduced in 2 Harry B. Bradbury 1735 (2nd. Ed. 1914).

⁶²⁴ 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. 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. 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. Accident.

The Wyoming Supreme Court has also upheld Wyoming administrators' view that "alternative" medicine is definitively not reasonable and necessary treatment. In Harboth v. Department of Workforce Services, 29 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." And "[a]n

⁶²⁵ Fuhs v. Swenson, 131 P.2d 333 (Wyo. 1942)

⁶²⁶ In re Armstong, <u>991 P.2d 140</u> (Wyo. 1999); Moller v. Workers' Compensation & Safety Div., <u>12 P.3d 702</u> (Wyo. 2000) (upholding conclusion that personal items are not medical expenses unless approved in advance by Division).

⁶²⁷ Birch v. Workers' Safety & Compensation Div., 319 P.3d 901 (Wyo. 2014)

⁶²⁸ WY Rules and Regulations 053.0021.10 § 3; Workers' Compensation Division Rules, ch. 10, § 3.

^{629 424} P.3d 1261 (Wyo. 2018)

⁶³⁰ 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."⁶³¹

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. 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.⁶³³ 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*.:⁶³⁴

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 <u>does not require the claimant to prove to a degree of medical certainty that the second injury is due solely to the first injury</u>, 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. 635

⁶³¹ Snyder v. Workers' Compensation Div., 957 P.2d 289 (Wyo. 1998)

⁶³² Casper Oil Co. v. Evenson, <u>888 P.2d 221</u> (Wyo. 1995); Matter of Hall, <u>414 P.3d 622</u> (Wyo. 2018)

⁶³³ Spletzer v. Workers' Safety & Compensation Div., <u>116 P.3d 1103</u> (Wyo. 2005)

⁶³⁴ 394 <u>P.3d 454</u> (Wyo. 2017)

⁶³⁵ *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.

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.⁶³⁷

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.⁶³⁸

The Wyoming statute has very little restriction on an injured employee's **initial**, **instate** selection of a physician. Explanatory language from an older Wyoming Supreme Court opinion, *Dyna-Drill v. Wallingford*, ⁶³⁹ 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. 640

As explained at the end of the passage, is the requirement—still a feature of Wyoming law—that:

⁶³⁶ WY Rules and Regulations 053.0021.7 § 3

⁶³⁷ *Id*.

⁶³⁸ Id.

^{639 605} P.2d 1301 (Wyo. 1980)

 $[\]frac{640}{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** . . . 641

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,⁶⁴² 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.⁶⁴³ 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.⁶⁴⁴ 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 ..."⁶⁴⁵ In keeping with the ADA's aim to achieve maximum reliance on

⁶⁴¹ W.S. § <u>27</u>-14-501

^{642 868} F.3d 893 (10th Cir. 2017)

⁶⁴³ W.S. § <u>27-14-401</u>(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.

⁶⁴⁴ See e.g. Valley Med Flight, Inc. v. Dwelle, <u>171 F.Supp.3d 930</u> (Dist. North Dakota 2016); Air Evac EMS, Inc. v. Sullivan, <u>331 F.Supp.3d 650</u> (W.D. Texas 2018)

⁶⁴⁵ 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. 646 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. 647

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."648 Crucially, the employee must elect "in writing to accept vocational rehabilitation instead of any

⁶⁴⁶ Dan's City Used Cars, Inc. v. Pelkey, <u>569 U.S. 251</u> (2013)

⁶⁴⁷ For a description see https://www2.ed.gov/about/offices/list/osers/rsa/wioareauthorization.html

⁶⁴⁸ 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."⁶⁴⁹ 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."⁶⁵⁰ 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, ⁶⁵¹ a number of statutes (including Wyoming's) do not appear to reflect such a restitutionary premise.

5.24 Permanent Disfigurement

W.S. <u>27-14-405</u>(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 <u>W.S. 27-14-403</u>(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.

⁶⁴⁹ W.S. § <u>27-14-408</u>(a)(iv)

⁶⁵⁰ W.S. § <u>27-14-408</u>(e)(ii)

⁶⁵¹ 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." 652

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.⁶⁵³

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 rule⁶⁵⁴ is applied—it is very clear that most evidence in

⁶⁵² Matter of Everheart, <u>957 P.2d 847</u>, 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*.

⁶⁵³ Gray v. Workers' Safety & Compensation Div., <u>193 P.3d 246</u>, 252 (Wyo. 2008) *quoting* Story v. Wyo. State Bd. Of Med. Exam'rs, <u>721 P.2d 1013</u>, 1018 (Wyo. 1986)

⁶⁵⁴ 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 . . ."⁶⁵⁵

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. 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.

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.*" 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. "[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."

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)
⁶⁵⁵ 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.
⁶⁵⁶ W.S. § 27-14-605(c)(ii).

⁶⁵⁷ In re Kaczmarek, <u>215 P.3d 277</u>, 282 (Wyo. 2009) *quoting* Pino v. Workers' Safety & Comp. Div., <u>996 P.2d 679</u>, 685 (Wyo.2000)

⁶⁵⁸ Hall v. Workers' Comp. Div., <u>37 P.3d 373</u>, 378 (Wyo. 2001) *quoting* Pino v. Workers' Safety & Comp. Div., *supra.*, 996 P.2d at 685 (Wyo.2000)

⁶⁶⁰ *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 enhanced⁶⁶¹—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."⁶⁶² 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." ⁶⁶³

The lines are not always easy to draw. For example, in a recent case, Stevens v. Workers' Safety & Compensation Div., 664 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. 665 All of her early reports of injury pertained to her left hand only. 666 When she returned to work four days later, she felt pain in her right hip but thought it would go away. 667 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)."668 Her doctor, Rork, opined, "This is probably a post-traumatic event related to the slip and fall accident of 10/26/10."669 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

⁶⁶¹ Murray v. Workers' Safety & Comp. Div., 993 P.2d 327, 332 (Wyo. 1999)

⁶⁶² Hansen v. Mr. D's Food Center, <u>827 P.2d 371</u> (Wyo.1992)

⁶⁶³ See 12 Larson's Workers' Compensation Law § 128.02

^{664 338} P.3d 921 (Wyo. 2014)

⁶⁶⁵ *Id.* at 923

⁶⁶⁶ *Id*.

⁶⁶⁷ *Id*.

⁶⁶⁸ Id. at 924

⁶⁶⁹ *Id*.

not require surgical intervention."⁶⁷⁰ Radiologists' reports and interpretations also suggested arthritic changes.⁶⁷¹ 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[.]⁶⁷²

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.⁶⁷³ 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.⁶⁷⁴

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.*⁶⁷⁵ 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."⁶⁷⁶ 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."⁶⁷⁷ The fact finder thought the case closer

⁶⁷¹ *Id*.

⁶⁷⁰ *Id*.

⁶⁷² *Id*.

⁶⁷³ *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).")

⁶⁷⁴ *Id.* at 929 *citing* Little v. Dep't. of Workforce Servs., <u>308 P.3d 832</u>, 843 (Wyo. 2013)

⁶⁷⁵ See supra.

⁶⁷⁶ Murray, supra., 993 P.2d at 332

⁶⁷⁷ Stevens, supra., at 927

to the Supreme Court's opinion in *Langberg v. Workers' Compensation Div.*,⁶⁷⁸ where a work-related injury was found to have *materially aggravated* a preexisting bone disease in a manner resulting in a compensable disability.⁶⁷⁹ Despite the ultimate finding of disability, the Court upheld the administrative determination that the bone disease, in itself, was not compensable.⁶⁸⁰ 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."

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. 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."

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**.⁶⁸⁴ The burden of production "involves the obligation of a party to present, at the

⁶⁸¹ Stevens, supra. at 933

^{678 203} P.3d 1098 (Wyo.2009)

⁶⁷⁹ Langberg, supra. at 1104

⁶⁸⁰ *Id*.

⁶⁸² Accord Hayes v. Workers' Safety & Comp. Div., <u>307 P.3d 843</u>, 849 (Wyo. 2013) Hampton v. Workers' Safety & Comp. Div., <u>296 P.3d 934</u>, 938 (Wyo. 2013); Thornberg v. Workers' Comp. Div'n, <u>913 P.2d 863</u>, 867 (Wyo. 1996).

^{683 12} LARSON'S WORKERS' COMPENSATION LAW § 128.02

⁶⁸⁴ Boyce v. Dept. of Workforce Services, <u>402 P.3d 393</u>, 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."685 In turn, the burden of persuasion is "the burden of persuading the trier of fact that the alleged fact is true." 686 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.⁶⁸⁷

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, 688 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. 689 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);⁶⁹⁰ 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;"691 was not subject to being completely discounted merely "because he is a family practice physician rather than a pulmonologist;⁶⁹² 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." 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."694

Conflicting Medical Evidence 6.3

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

⁶⁸⁵ *Id*. ⁶⁸⁶ *Id*. 687 12 LARSON'S WORKERS' COMPENSATION LAW § 128.03 688 <u>346 P.3d 946</u> (Wyo. 2015) ⁶⁸⁹ *Id.* at 961 ⁶⁹⁰ *Id.* at 960

⁶⁹¹ *Id.* at 960 *citing* Glaze v. Workers' Safety & Comp. Div., <u>214 P.3d 228</u>, 235 (Wyo. 2009) 692 Id. at 961

⁶⁹³ 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."⁶⁹⁵ 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, ⁶⁹⁶ the mélange of competing medical opinions and party interests were collectively termed "court house medicine." 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." ⁶⁹⁸

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." 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.⁷⁰⁰

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

145

⁶⁹⁵ See generally 12 Larson's Workers' Compensation Law § 128.02 & § 128.03

⁶⁹⁶ HERMAN MILES SOMERS AND ANNE RAMSAY SOMERS, WORKMEN'S COMPENSATION, PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY (John Wiley & Sons 1954)

⁶⁹⁷ SOMERS AND SOMERS, WORKMEN'S COMPENSATION at 174.

⁶⁹⁸ *Id.* at 176 *quoting* Walter Dodd, Administration of Workmen's Compensation (Commonwealth Fund, N.Y. 1936)

⁶⁹⁹ SOMERS AND SOMERS, WORKMEN'S COMPENSATION at 176

⁷⁰⁰ *Id.* at 177

body that will be explained more fully in a subsequent section.⁷⁰¹ 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. 702 It is worth noting that Wyoming law also appears to allow a hearing officer the discretion to appoint an "impartial" medical examiner, ⁷⁰³ but the provision seems an anachronism in light of the creation of the Medical Commission.⁷⁰⁴ Other states use the term "independent" medical examination to mean an "impartial" examination. 705 Some states use different terminology altogether, but the gist of the process is similar. 706 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." 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." 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

70

⁷⁰¹ See this Treatise Section 6.10

⁷⁰² The term, though mentioned, is not defined in either W.S. § <u>27-14-401</u>(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."

⁷⁰³ W. S. § <u>27-14-604</u>

⁷⁰⁴ See this Treatise at Section 6.10

⁷⁰⁵ 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.

⁷⁰⁶ 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.

⁷⁰⁷ 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).

⁷⁰⁸39-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.⁷⁰⁹ 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.⁷¹⁰

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 estoppel⁷¹¹ and res judicata⁷¹² apply in the

_

⁷⁰⁹ UT ST § 34A-2-601(e)(i) & (e)(ii)

⁷¹⁰ Workers' Compensation Claim of Rodgers v. Workers' Safety & Compensation Div., <u>135 P.3d</u> <u>568</u>, 576 (Wyo. 2006) *citing* Decker v. Medical Comm'n, <u>124 P.3d 686</u>, 697 (Wyo.2005) *quoting* Baxter v. Sinclair Oil Corp., <u>100 P.3d 427</u>, 431 (Wyo.2004) and Bando v. Clure Bros. Furniture, <u>980 P.2d 323</u>, 329 (Wyo.1999)

⁷¹¹ 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)

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.⁷¹³ 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."⁷¹⁴ 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*.⁷¹⁵ Res judicata on the other hand bars relitigation of *previously litigated claims or causes of action*.⁷¹⁶ 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.⁷¹⁷

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.⁷¹⁸

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

⁷¹³ Slavens v. Bd. of County Comm'rs for Uinta County, <u>854 P.2d 683</u>, 685–86 (Wyo.1993).

⁷¹⁴ Jacobs v. Workers' Safety & Comp. Div., <u>216 P.3d 1128</u>, 1132 (Wyo. 2009)

⁷¹⁵ See e.g. Salt Creek Freightways v. Wyo. Fair Employment Practices Comm'n, <u>598 P.2d 435</u>, 437 (Wyo.1979)

⁷¹⁶ Parklane Hosiery Co., Inc. v. Shore, <u>439 U.S. 322</u>, 326, n.5 (1979)

⁷¹⁷ Slavens, *supra*. at 854 P.2d at 685–86

⁷¹⁸ Wilkinson v. Workers Safety & Comp. Div., <u>991 P.2d 1228</u>, 1234 (Wyo.1999) *see also* Tozzi v. Moffett, <u>430 P.3d 754</u>, 760 (Wyo. 2018)

(4) the capacities of the persons are identical in reference to both the subject matter and the issues between them.⁷¹⁹

Res judicata bars not just issues that were actually litigated in the prior action, but issues that **could have** been raised in that action.⁷²⁰

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*,⁷²¹ for example, the Division denied a claim for benefits in August 2014.⁷²² The claimant did not appeal the denial or request a hearing.⁷²³ 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.⁷²⁴ 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."⁷²⁵

On appeal from the district court's affirmance of the OAH ruling, the Wyoming Supreme Court reversed. 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." The Division attempted to distinguish the prior rulings by arguing that the provision governing initial compensability reflected an intention to treat the compensability

```
    719 Moore v. Moore, <u>835 P.2d 1148</u>, 1151 (Wyo. 1992)
    720 Tozzi v. Moffett, supra., 430 P.3d at 760.
    721 <u>396 P.3d 999</u> (Wyo. 2017)
    722 Id. at 1000
    723 Id.
    724 Id.
    725 Id.
    726 Id.
```

⁷²⁷ *Id. citing* Matter of Claim of Hood v. Dep't of Workforce Servs., <u>382 P.3d 772</u>, 777 (Wyo. 2016); Osenbaugh v. Workers' Safety & Compensation Div., <u>10 P.3d 544</u>, 549 (Wyo. 2000); and Tenorio v. Workers' Compensation Div., <u>931 P.2d 234</u>, 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," 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." Simply put, the refusal to object was not a "prior adjudication [that] resulted in a judgment on the merits."

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, 731 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. 732 Subsequent to the neck surgery, a fusion, the claimant suffered from repeated syncopal episodes. 733 "[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."734 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. 735 After physicians failed to identify the cause of the syncopal episodes, the Division denied payment for the lower back surgery. 736 The Medical Commission upheld the denial because medical causation was not established. 737 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., 738

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

7

⁷²⁸ Porter, *supra*., 396 P.3d at 1008

⁷²⁹ *Id.* at 1007-1008

⁷³⁰ See supra.

⁷³¹ 382 P.3d 772 (Wyo. 2016)

 $^{^{732}}$ *Id.* at 773

⁷³³ *Id.* at 774. A syncope is a temporary loss of consciousness.

⁷³⁴ *Id*.

⁷³⁵ *Id*.

⁷³⁶ *Id*. at 775

⁷³⁷ Id

⁷³⁸ Jacobs v. Workers' Safety & Comp. Div., <u>301 P.3d 137</u> (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. ⁷³⁹

These cases bear a certain relationship to cases from other states, notably Massachusetts⁷⁴⁰ and Vermont⁷⁴¹, 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. 742 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 1991.⁷⁴³ 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.⁷⁴⁴ 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." Eventually, in 2007, the Division again denied coverage. 746 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 1999.⁷⁴⁷ 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."748 From the claimant's point of view, the Office of Administrative Hearings had implicitly concluded that the 1987 motorcycle

⁷³⁹ Hood, *supra.*, at 777-778 *quoting* Jacobs v. Workers' Safety & Comp. Div., *supra.*, 301 P.3d at 148

⁷⁴⁰ M.G.L. Ch. 152 § 8(1)

⁷⁴¹ Vt. St. T. 21 § 662

^{742 233} P.3d 583 (Wyo. 2010)

⁷⁴³ *Id.* at 585

⁷⁴⁴ *Id*.

⁷⁴⁵ *Id*.

⁷⁴⁶ *Id*.

⁷⁴⁷ *Id*.

⁷⁴⁸ *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.⁷⁴⁹

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."⁷⁵⁰ 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.⁷⁵¹ The Court's res judicata analysis seemed 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." ⁷⁵² It appears 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."⁷⁵³ The Court did not expand upon when res judicata does apply in workers' compensation claims, and, taken to its logical conclusion, the "should be separately decided" language could be read to mean res judicata never applies. Hopefully, the Court will clarify the law in this area. 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. 754 Preclusion would be immaterial.

Recently, the Wyoming Supreme Court held, in *Lower v. Peabody Powder River Services*, *LLC*,⁷⁵⁵ that an Office of Administrative Hearings "Order Vacating Hearing and Awarding Benefits" was not a final appealable order giving rise to collateral estoppel. As the Court stated, "[i]n the absence of a final adjudication, the doctrine of collateral estoppel does not apply."⁷⁵⁶ The Workers' Compensation and Safety Division had first determined that Lower's development of a flesh-

⁷⁴⁹ *Id.* at 587

⁷⁵⁰ *Id*.

⁷⁵¹ Wilkinson v. Workers Safety & Comp. Div., <u>991 P.2d 1228</u>, 1234 (Wyo.1999) see also Tozzi v. Moffett, <u>430 P.3d 754</u>, 760 (Wyo. 2018)

⁷⁵² Taylor, *supra.*, 233 P.3d at 587 *quoting* Cermak v. Great West Cas. Co., <u>2 P.3d 1047</u>, 1054 (Wyo.2000).

⁷⁵³ Taylor, *supra.*, 233 P.3d at 588

⁷⁵⁴ See generally 1 Larson's Workers' Compensation Law § 10.02

^{755 459} P.3d 443 (2020)

 $^{^{756} \}overline{Id}$. at 447

eating bacterial condition (that eventually led to leg amputation) was not work-related and denied his claim.⁷⁵⁷ Lower appealed and the case was referred to the Office of Administrative Hearings.⁷⁵⁸ Subsequent to the referral an "IME" physician opined that the condition was work-related, and the Division withdrew its denial of benefits.⁷⁵⁹ The OAH, learning of the Division's withdrawal issued an order "vacat[ing] the pending hearing; directed that the disputed claims be paid; dismissed the proceedings; and returned the case to the Division."⁷⁶⁰ The Division subsequently issued a new order awarding benefits and affording a right of appeal to the involved parties.⁷⁶¹ The Employer appealed from this order but had not appealed from the OAH order.⁷⁶² The Wyoming Supreme Court concluded, however, that the OAH never had the authority to award benefits in its procedural order.⁷⁶³ At the end of the day, the entitlement to benefits had not been decided in a prior adjudication so collateral estoppel could not have attached.⁷⁶⁴

6.5 Judicial Notice

The Wyoming **Contested Case Procedures**,⁷⁶⁵ 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:

Notice may be taken of <u>judicially cognizable facts</u>. In addition notice may be taken of <u>technical or scientific facts within the agency's specialized knowledge or of information, data and <u>material included within the agency's files</u>. 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 <u>shall</u> be afforded an opportunity to contest the facts noticed.⁷⁶⁶</u>

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.⁷⁶⁷ The Medical Commission

```
757 Id. at 446
758 Id.
759 Id.
760 Id.
761 Id.
762 Id.
763 Id. at 447
764 Id.
765 Wyo. Stat. Ann. § 16–3–101 et seq.
766 Wyo. Stat. Ann. § 16–3–101 et seq.
767 135 P.3d 568, 571 (Wyo. 2006)
```

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.⁷⁶⁸

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. The claimant presented evidence that the stricture had occurred early in relation to his consuming of pain medication, 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." 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."

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 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. 773

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

⁷⁶⁸ Id. 582-584

⁷⁶⁹ *Id.* at 581

⁷⁷⁰ *Id*.

⁷⁷¹ *Id*.

⁷⁷² *Id*.

⁷⁷³ *Id.* at 585

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.⁷⁷⁴ All American states except Alabama, have now moved away from court-based workers' compensation adjudication and handle contested cases in administrative agencies.⁷⁷⁵ It should first be noted that most workers' compensation claims are routinely resolved informally by the workers' compensation insurance carrier.⁷⁷⁶ Contested claims can become like litigation, of course,⁷⁷⁷ and initially, therefore, contested workers' compensation claims were resolved by the courts.⁷⁷⁸ In 1986, as part of a national trend, the Wyoming legislature transformed the workers' compensation regime from a judicial to an administrative adjudicative process.⁷⁷⁹ This transformation has been

⁷⁷⁴ 60 & 61 Vict., c. 37, 2nd Sched., (4) (1897)

The Workers' Compensation Judician Since Judge Torrey's summary, Tennessee, possessing one of the last two court-based systems, has transitioned to an administrative agency based system. *Id.*; see also David B. Torrey, *Matter or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 J. Nat. Assoc. of Admin. Law Judiciary 23, 35 (2012).

⁷⁷⁶ DUFF, WORKERS' COMPENSATION LAW at 391.

⁷⁷⁷ *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, <i>A Tale of Two Standards*, 18 Wyo. L. Rev 1, 2 n.9 (2018).

⁷⁷⁸ 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.

⁷⁷⁹ 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.

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. Be that as it may, the result of the transformation has been that administrative agencies are tasked with receiving and processing claims for compensation, hearing contested cases, and administering the insurance mechanism (where insurance companies are germane to the discussion). 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." 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.

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. 786 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

Comm'n, <u>733 S.W.2d 726</u>, 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).

⁷⁸⁰ See Dean M. Hashimoto, The Future Role of Managed Care and Capitation in Workers' Compensation, 22 Am. J. L. M. 233, at 250.

⁷⁸¹ W.S. § <u>27-14-601(a)</u> ("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."). ⁷⁸² *See* Torrey, *Master or Chancellor, supra* at 26.

⁷⁸³ *Id*.

⁷⁸⁴ See Duff, A Tale of Two Standards, supra at 2.

⁷⁸⁵ 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.

⁷⁸⁶ W.S. § 27-14-102(a)(vi)

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/. 787

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. 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. The Furthermore, a "Report of Injury" is not a claim for benefits. 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 Circumstances;" and "Application for Death Benefits or Balance of Award." 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.

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.)⁷⁹³ An especially important part of the claims procedure occurs during the Division's **Determination Procedure**⁷⁹⁴:

 The Division reviews the claim within 15 days from the date any completed employer or employee injury report or claim is filed

⁷⁸⁷ The Department of Workforce Services <u>counsels</u> 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/

⁷⁸⁸ W.S. § <u>27-14-601</u>(a), (b), & (d)

⁷⁸⁹ 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)

⁷⁹⁰ *Id*.

⁷⁹¹ See http://www.wyomingworkforce.org/workers/workerscomp/docs/

⁷⁹² W.S. § <u>27-14-601(b)</u>

⁷⁹³ Shenemen v. Division of Workers' Safety & Compensation Internal Unit, <u>956 P.2d 344</u> (Wyo. 1998)

⁷⁹⁴ WY Rules and Regulations 053.0021.5 § 2

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.

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. 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

_

⁷⁹⁵ 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)

claimant)⁷⁹⁶ 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,⁷⁹⁷ with each referral depending on the issues in the case.⁷⁹⁸ The Division is, for example, required to refer "medically contested cases" to the Medical Commission.⁷⁹⁹ A "medically contested" case "is one in which the primary issue requires the application of medical judgment to complex medical facts of conflicting diagnoses."⁸⁰⁰ The Division's decision as to which sub-agency a contested case is referred is not subject to administrative review.⁸⁰¹ 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 most powerful agencies in state government . . ."⁸⁰² It is the gatekeeper of all workers' compensation claims.

6.9 The Wyoming Office of Administrative Hearings

The OAH, created in 1992,⁸⁰³ receives any workers' compensation case that is not medically contested.⁸⁰⁴ Wyoming's OAH is, in effect, a *central panel of administrative judges*, and is not exclusively devoted to workers' compensation matters.⁸⁰⁵ Instead, OAH is tasked with conducting contested case hearings in disputes between Wyoming residents and Wyoming agencies.⁸⁰⁶ In particular,

⁷⁹⁶ W.S. § <u>27-14-601</u>(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. § <u>27-14-601(j)</u>

⁷⁹⁷ 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 are allowed by the hearing officer on behalf of or for any party to a hearing. W.S. § <u>27-14-602(b)</u>

⁷⁹⁸ *Id.*; see also W.S. § <u>27-14-616(b)(iv)</u>

⁷⁹⁹ *Id.* The statute additionally provides that parties may agree to have a case transferred from the OAH to the Commission. *Id.* W.S. § <u>27-14-616</u>(e); French v. Amax Coal West, <u>960 P.2d 1023</u>, 1030 (Wyo. 1998).

⁸⁰⁰ 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*.

⁸⁰¹ W.S. § 27-14-616(b)(iv).
802 George Santini The Breaking of a Compromise: An Ana

⁸⁰² George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Workers' Compensation Legislation*, 1986–1997, 33 LAND & WATER L. REV. 489, 493 (1998).

⁸⁰³ W.S. § 9-2-2202.

⁸⁰⁴ See supra.

⁸⁰⁵ For a brief discussion of central panels see H. Alexander Manuel, <u>Judges and the Administrative</u> State, ABA Journal, May 9, 2008.

⁸⁰⁶ Deborah A. Baumer (former director of OAH), *The Office of Administrative Hearings*, WYO. LAWYER (Oct. 2007).

Wyoming's OAH receives and hears contested cases spanning five broad categories: (1) contested workers' compensation claims;⁸⁰⁷ (2) driver's license actions involving alterations to driving privileges, such as restrictions, suspensions, or cancellations;⁸⁰⁸ (3) personnel hearings involving state employees;⁸⁰⁹ (4) mediation and arbitration services requested by state agencies;⁸¹⁰ and (5) "any other state agency or board dispute where a request is made[.]"⁸¹¹ The OAH administrative judges/hearing officers are lawyers in good standing with the Wyoming State Bar.⁸¹² 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 hears. The parties are therefore assured a neutral process that will favor neither side.⁸¹³

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.⁸¹⁴

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

⁸⁰⁷ W.S. § <u>27-14-602</u>

⁸⁰⁸ W.S. § 31-7-105

⁸⁰⁹ W. S. § <u>9-2-1019</u>(a). The agency is the successor to the office of independent hearing examiners created by W.S. § <u>27-14-602</u> and the office of hearing examiners created by W.S. § <u>31-7-105</u>. 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).

⁸¹⁰ Baumer, supra.

⁸¹¹ See W. S. § <u>9-2-2202</u>(b); Baumer, *supra*.

⁸¹² French v. Amax Coal West, 960 P.2d 1023, 1029 (Wyo. 1998) (citing W. S. § 9-2-2201(c)).

⁸¹³ See the OAH website available at http://oah.wyo.gov/

⁸¹⁴ W.S. § 27-14-602(b)(ii) and § 16-3-107 through § 16-3-112

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 <u>with the Workers'</u> <u>Compensation Division</u>, 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' compensation claims. The Commission, which is comprised of eleven health care providers appointed by the governor, was created because of the prevalence of dispositive medical issues in workers' compensation cases. Upon the Division's determination that a case is medically contested, it must refer it to the Medical Commission. But the Medical Commission does not have subject matter jurisdiction of a workers' compensation claim in the absence of a medically contested case. 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, the Commission is mandated by statute "[t]o furnish

⁸¹⁵ 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.")

⁸¹⁶ § 27-14-616(a)

⁸¹⁷ French v. Amax Coal West, 960 P.2d 1023, 1030 (Wyo. 1998).

⁸¹⁸ McIntosh v. Med. Comm'n, 162 P.3d at 497

⁸¹⁹ Jacobs v. Wyoming Medical Comm'n, 118 P.3d 441 (Wyo. 2005).

⁸²⁰ Bando v. Clure Bros. Furniture, <u>980 P.2d 323</u> (Wyo. 1999); Russell v Workers' Safety & Compensation Div., <u>944 P.2d 1151</u>, 1154 (Wyo. 1997)

three members of the commission to serve as a medical hearing panel to hear cases referred for hearing."821 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.822 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.823 Thus, the Commission sits as hearing officer and is subject to the same standard of review as the Office of Administrative Hearings.824

Though the Commission was "presumably intended to hear medical disputes," 825 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. 826 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. 827 What is most unusual about the Commission's structure, in comparison with other neutral workers' compensation fact finding structures such as IMEs, 828 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." 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

821 W. S. § 27-14-616(iv)

⁸²² W. S. § 27-14-616(iv)

⁸²³ W. S. § 27-14-616(iv)

⁸²⁴ Workers' Compensation Claim of Rodgers v. Workers' Safety & Compensation Div, <u>135 P.3d</u> <u>568</u>, 571 (Wyo. 2006)

⁸²⁵ W. S. § 27-14-616(iv)

⁸²⁶ 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)).

⁸²⁷ French v. Amax Coal West, 960 P.2d at 1030

⁸²⁸ See this Treatise supra. at Section 6.3

⁸²⁹ French v. Amax Coal at 1029

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. 830

This has created, as Wyoming courts have at times frankly acknowledged, the potential for the Commission making factual and legal errors.⁸³¹ It is one thing for 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. 832 In Moss, the Commission rejected Moss's testimony of pain and disability as not credible. 833 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

⁸³⁰ *Id.* at 1029-1030 (emphasis supplied)

⁸³¹ 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 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.").

⁸³² Moss v. Workers' Safety & Compensation Div., 232 P.3d 1 (Wyo. 2010)

⁸³³ Id. at 6-11

physical impairment coupled with other factors such as his mental capacity, education, training and age make him eligible for PTD benefits."⁸³⁴ 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. 835

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." Justice Kite held, "We cannot conclude that the Medical Commission's ruling was against the overwhelming weight of the evidence." 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.

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. 838 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... "839 The Wyoming Supreme Court has interpreted "hearing" to mean a "trial type hearing."840

Parties to administrative proceedings are entitled to due process of law and the procedures outlined in the Wyoming Administrative Procedure Act are

⁸³⁴ *Id.* at 7 835 *Id.* at 11 836 *Id.* at 11-12 837 *Id.* at 12 838 W.S. § 27-14-602(b)(ii) and § 16-3-107 through § 16-3-112 839 W.S. § 16-3-101(b)(2)

⁸⁴⁰ Scarlett v. Town Council, Town of Jackson, Teton County, 463 P.2d 26, 29 (Wyo.1969)

designed to provide them with that due process.⁸⁴¹ Contested case procedures, however, are not required unless the legislature has imposed a legal duty on an agency to utilize them.⁸⁴² 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."⁸⁴³

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., 844 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. 845 Throughout the odd posture of the case, 846 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 formally appointed.⁸⁴⁷ 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."848 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."849 But the court went on to say that the dispute over attorneys' fees was neither a contested case, 850 nor did it implicate procedural due process, 851 so no hearing was required prior to the OAH denying the Motion for Attorneys' Fees. 852 This outcome begs the question of when a legal dispute is a contested case.

84

⁸⁴¹ In re Board of County Com'rs, Sublette County, <u>33 P.3d 107</u> (Wyo. 2001); Amoco Production Co. v. Wyoming State Bd. of Equalization, <u>7 P.3d 900</u>, 905 (Wyo.2000); and Basin Elec. Power Co-op., Inc. v. Department of Revenue, State of Wyo., <u>970 P.2d 841</u>, 849 (Wyo.1998).

⁸⁴² Sheridan County Com'n v. V.O. Gold Properties, LLC, <u>247 P.3d 48</u>, 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, <u>228 P.3d 838</u>, 855 (Wyo.2010); In re Application for Certificate of Need by HCA Health Serv., <u>689 P.2d 108</u>, 110–114 (Wyo.1984); Carlson v. Bratton, 681 P.2d 1333, 1338 (Wyo.1984)

⁸⁴³ W.S. § <u>27-14-602</u>(b)(ii)

^{844 984} P.2d 1079 (Wyo. 1999)

⁸⁴⁵ *Id.* at 1081-1083

⁸⁴⁶ *Id*.

⁸⁴⁷ *Id*.

⁸⁴⁸ Id. at 1082-1083

⁸⁴⁹ Id. at 1083

⁸⁵⁰ *Id*.

⁸⁵¹ *Id*.

⁸⁵² *Id*.

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."853 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. 854 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. 855 Parties are also allowed limited rebuttal evidence. 856 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.⁸⁵⁷ 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."858

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.⁸⁵⁹
- The case is determined by a "hearing examiner" in accordance with **the law in effect at the time of the injury.** 860

⁸⁵³ W.S. § 27-14-602(b)(i)

 $^{^{854}}$ Id. The Division conducts hearings in such controversies pursuant to its Small Claims rule. See WY Rules and Regulations 053.0021.6 \S 3

⁸⁵⁵ *Id*.

⁸⁵⁶ *Id*.

⁸⁵⁷ *Id*.

⁸⁵⁸ W.S. § 27-14-602(b)(ii)

⁸⁵⁹ W.S. § <u>27-14-602</u>(a)

⁸⁶⁰ W.S. § <u>27-14-602</u>(b)

- 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))⁸⁶¹
- 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.
- Any hearing involving multiple sites **may be conducted through audio or video conferencing** at the discretion of the hearing officer or hearing panel. 863
- Essentially all case documents filed with the Division are "pleadings." 864
- The attorney general's office represents the division in all contested cases. 865
- The hearing examiner has exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable.⁸⁶⁶
- 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.⁸⁶⁷
- 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.⁸⁶⁸
- When the employer or Division prevails, court costs do not affect the employer's experience rating.⁸⁶⁹

⁸⁶¹ W.S. § 27-14-602(b)(iii)

⁸⁶² W.S. § 27-14-602(b)(iv)

⁸⁶³ W.S. § <u>27-14-602</u>(b)(v)

⁸⁶⁴ W.S. § <u>27-14-602</u>(c)

⁸⁶⁵ W.S. § 27-14-602(c)

⁸⁶⁶ W.S. § 27-14-602(c)

⁸⁶⁷ W.S. § 27-14-602(c)

⁸⁶⁸ W.S. § <u>27-14-602(c)</u>

⁸⁶⁹ W.S. § <u>27-14-602</u>(c)

• If judgment is against a health care provider, the court costs are paid by the health care provider. 870

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.⁸⁷¹
- The Notice of Hearing must include a statement of
 - o 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:
 - o A short and plain statement of the matters asserted⁸⁷²
- 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.⁸⁷³

⁸⁷⁰ W.S. § 27-14-602(c)

⁸⁷¹ W.S. § 16-3-107(a)

⁸⁷² W.S. § 16-3-107(b)

⁸⁷³ W.S. § <u>16-3-107</u>(c)

- District courts (but not agencies) have authority to enforce, on pain of contempt of court, agency administrative process (subpoena, deposition, or other discovery).⁸⁷⁴
- 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.⁸⁷⁵
- 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.⁸⁷⁶
- 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.⁸⁷⁷
- 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.⁸⁷⁸
- 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. 879
- 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.⁸⁸⁰

⁸⁷⁴ W.S. § <u>16-3-107</u>(c)

⁸⁷⁵ W.S. § <u>16-3-107</u>(d)

⁸⁷⁶ W.S. § 16-3-107(e)

⁸⁷⁷ W.S. § <u>16-3-107</u>(g)

⁸⁷⁸ W.S. § 16-3-107(h)

⁸⁷⁹ W.S. § 16-3-107</sup>(j)

⁸⁸⁰ W.S. § 16-3-107(k)

- Agencies are required to proceed efficiently to conclude contested matters except that the convenience and needs of the parties should be considered.⁸⁸¹
- 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.

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. 883 Of course, there is no general prohibition against agency employees generally discussing cases amongst themselves.⁸⁸⁴ 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 decision, recommended decision or agency review of the decision, or be consulted in connection therewith except as witness or counsel in public proceedings."885 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. 886 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

⁸⁸¹ W.S. § 16-3-107(k)

⁸⁸² W.S. § <u>16-3-107(m)</u>. This rule is very similar to the federal ex parte rule under the Federal Administrative Procedure Act. 5 U.S.C. § 554(d)(2)

⁸⁸³ W.S. § 16-3-111.

⁸⁸⁴ W.S. § 16-3-111

⁸⁸⁵ W.S. § 16-3-111.

⁸⁸⁶ 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)

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.⁸⁸⁷ (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 rate filing.)⁸⁸⁸ 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.⁸⁸⁹

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

171

⁸⁸⁷ See WY Rules and Regulations 053.0021.1 § 4

 $^{^{888}}$ WY Rules and Regulations 053.0021.1 $\S~4$

⁸⁸⁹ *Id*.

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.⁸⁹⁰

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. 891 Workers' 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. 892

Some additional aspects of the Wyoming statute pertaining to attorneys' fees warrant highlighting.

• A party must **request** an attorney before one will be appointed.

-

⁸⁹⁰ W.S. § 27-14-602(d)

⁸⁹¹ See 13 Larson's Workers' Compensation Law § 133.01

^{892 13} LARSON'S WORKERS' COMPENSATION LAW § 133.04 (internal citations omitted)

- 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.
- <u>If the hearing examiner determines</u> "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.)

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 rule⁸⁹³ specific to workers' compensation cases detailing payment of attorneys' fees at the

⁸⁹³ WY Rules and Regulations 270.0001.5 § 3

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:
 - o 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);
 - o 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
 - 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 precontested case dispute with the Division. In *Painter v. Workers' Compensation Div.*, 894 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." A similar conclusion was reached in 2001 in *Workers' Safety & Compensation Div. v. Gerrard.* 896

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.*, ⁸⁹⁷ 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." 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. ⁸⁹⁹ 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. ⁹⁰⁰ The

^{894 931} P.2d 953 (Wyo. 1997)

⁸⁹⁵ *Id.* at 956

^{896 17} P.3d 20, 27 (2001)

^{897 938} P.2d 870 (Wyo. 1997)

⁸⁹⁸ *Id.* at 873

⁸⁹⁹ Id. at 872

⁹⁰⁰ *Id*.

claimant then advised counsel she no longer wanted to be represented. 901 Counsel in any event submitted a motion for a small fee award for the work that he had performed. 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. 903 As discussed earlier, 904 in Whiteman v. Workers' Safety & Compensation Div., a claimant's motion for appointment of counsel had never been acted upon. 905 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." 906

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 Division to act as an agent in dispensing awards of attorneys' fees. ⁹⁰⁷ 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. ⁹⁰⁸ Under § 27-14-802(a) the Division has broad authority to promulgate rules pertaining to *its* operation, ⁹⁰⁹ 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'

⁹⁰¹ *Id*.

⁹⁰² Id. at 872

⁹⁰³ Id. at 873

⁹⁰⁴ See Section 6.11 of this Treatise

^{905 984} P.2d 1079 (Wyo. 1999)

⁹⁰⁶ *Id.* at 1082 (emphasis supplied)

⁹⁰⁷ See Mountain Regional Services, Inc. v. Dept of Health, <u>326 P.2d 182</u>, 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*.

⁹⁰⁸ WY Rules and Regulations 270.0001.5 § 2

⁹⁰⁹ 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)

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*, 910 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, <u>district courts</u> have historically enjoyed considerable discretion in awarding attorneys' fees under the Wyoming Workers' Compensation Act. Nevertheless, "that discretion is not unfettered." 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."

The Wyoming Supreme Court has also clarified that a <u>claimant's</u> attorney's fee is <u>not</u> limited to the amount of benefits at issue. That limitation applies only to prevailing <u>employer's</u> counsel.⁹¹³

^{910 &}lt;u>805 P.2d 830</u> (Wyo. 1991)

⁹¹¹ Gonzales v. Workers' Compensation Div., 992 P.2d 560, 562 (Wyo. 1999)

⁹¹² Id. at 562

⁹¹³ In re Workers' Compensation Claim of Smith, <u>121 P.3d 150</u>, 154 (Wyo. 2005); Workers' Safety & Compensation Div. v. Gerrard, <u>17 P.3d 20</u> (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. 914 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. 915

The reader will note that, although other forms of judicial review of administrative agencies may be possible and the next subsection will catalogue the kinds of

⁹¹⁴ 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).

^{915 12} LARSON'S WORKERS' COMPENSATION LAW §130.01; W.S. § 16-3-114(c)(ii)(E)

⁹¹⁶ 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." The extensive history of the "reasonable mind" formulation is beyond the scope of this entry. 918

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. ⁹¹⁹ 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:

⁹¹⁷ See e.g. Price v. Department of Workforce Services, Workers' Compensation Division, <u>388 P.3d 786</u>, 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, <u>305 U.S. 197</u>, 229 (1938)

⁹¹⁸ Michael C. Duff, A Tale of Two Standards, <u>18 Wyo. L. Rev 1</u>, 19-20 (2018)

⁹¹⁹ W.S. § <u>16-3-114</u>(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. 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. 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. 922

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. ⁹²³ While Wyoming cases have occasionally stated this principle, ⁹²⁴ the dominant rule has been that the standard of review of an agency's conclusions of law is de novo. ⁹²⁵ The author has been unable to locate any case in which a Wyoming court has upheld a Wyoming administrative agency's

⁹²⁰ See supra.

⁹²¹ Torres v. Workers' Safety & Compensation Div., <u>95 P.3d 794</u>, 795 (Wyo. 2004);

⁹²² Araguz v. Workers' Safety & Compensation Div., 262 P.3d 1263, 1266 (Wyo. 2011)

⁹²³ See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984)

⁹²⁴ Exxon Mobil Corp. v. Dept. of Revenue, <u>219 P.3d 128</u>, 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)

⁹²⁵ Casiano v. Wyoming Department of Transportation, <u>434 P.3d 116</u>, 120 (Wyo. 2019); Jacobs v. Workers' Safety & Compensation Div., <u>216 P.3d 1128</u>, 1132 (Wyo. 2009); Workers' Safety & Compensation Div. v. Garl, <u>26 P.3d 1029</u>, 1032 (Wyo.2001)

interpretation of an ambiguous portion of its organic statute on *Chevron* deference-type grounds.

The third preliminary observation is that <u>on appeal the Wyoming Supreme Court</u> gives no special deference to the decision of a district court. ⁹²⁶ In effect, the district court appeal is an exhaustion requirement most likely to dissuade litigants with limited resources. ⁹²⁷

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*. 928 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

⁹²⁶ Kebschull v. Dep't of Workforce Services, Workers' Compensation Div., <u>399 P.3d 1249</u>, 1255 (Wyo. 2017); Price v. Dep't of Workforce Services, Workers' Compensation Div., <u>388 P.3d 786</u>, 789 (Wyo. 2017); Kenyon v. Workers' Safety & Compensation Div., <u>247 P.3d 845</u>, 848 (Wyo. 2011)

 ⁹²⁷ Newman v. Workers' Safety & Compensation Div., <u>49 P.3d 163</u>, 166 (Wyo. 2002); French v. Amax Coal West, <u>960 P.2d 1023</u>, 1027 (Wyo. 1998)

^{928 --} P.3d---; 2018 WY 105

that of the agency and must uphold the findings on appeal. Substantial evidence is <u>relevant evidence which a reasonable mind might accept in support of the agency's conclusions. It is more than a scintilla of evidence.</u>

To this point, the substantial evidence rule looks the same as it would in most jurisdictions. ⁹³⁰ 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.⁹³¹

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. ⁹³²

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.

⁹²⁹ *Id.*, slip op. at 5

⁹³⁰ See e.g. the term as defined in BLACK'S LAW DICTIONARY (11th ed. 2019)

⁹³¹ --P.3d---; <u>2018 WY 105</u>, slip op. at 5

⁹³² 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*, 933 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. 934

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.* 935 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

⁹³³ <u>424 P.3d 1261</u> (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).

⁹³⁴ Id. at 1272

^{935 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. 936

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. 937 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. 938 She stated in the questionnaire she had felt pain in her lower back immediately after the accident. 939 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. 940 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. 941 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.⁹⁴² 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.⁹⁴³

Newman returned to the same chiropractor for care in July 1999. 944 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. 945 Significantly (as it turned out), the chiropractor made no mention of complaints relating to severe intermittent headaches and double vision, symptoms

⁹³⁶ *Id.* at 166 (emphasis supplied)

⁹³⁷ *Id*. at 165

⁹³⁸ *Id*.

⁹³⁹ Id.

⁹⁴⁰ *Id*.

⁹⁴¹ *Id*.

⁹⁴² *Id*. ⁹⁴³ *Id*.

⁹⁴⁴ *Id*.

⁹⁴⁵ *Id*.

which had also not been mentioned during Newman's previous period of treatment. 946 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).⁹⁴⁷ "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."948 Newman appealed.949 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. 950 In reaching this determination, the hearing examiner found Newman's testimony lacked credibility because it was inconsistent with her original injury reports. 951 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. 952

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. 953

On the one hand, Newman presents the garden variety workers' compensation factual scenarios of: 1) a judge disbelieving a claimant's medical evidence, which,

⁹⁴⁷ Id.

⁹⁴⁶ *Id*.

⁹⁴⁸ *Id*.

⁹⁴⁹ *Id*.

⁹⁵⁰ Id. at 166

⁹⁵¹ *Id*.

⁹⁵² *Id.* at 175

⁹⁵³ *Id*.

as has been mentioned in this Treatise, a fact finder has broad authority to do; 954 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." (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.)⁹⁵⁶

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 . . . 957

_

⁹⁵⁴ See the discussion in this Treatise at 6.2 above

⁹⁵⁵ Newman v. Workers' Safety & Compensation Div., supra., 49 P.3d at 166

⁹⁵⁷ *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. 958

In Newman, however, and in Dale v. S&S Builders, 959 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]

188

_

⁹⁵⁸ 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)

^{959 188} 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)⁹⁶⁰

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 superinsulation 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 language⁹⁶¹ 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

⁹⁶¹ 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

⁹⁶⁰ Newman v. Workers' Safety & Compensation Div., supra., 49 P.3d at 170-171

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. 962

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." 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.

_

⁹⁶² Dale v. S&S Builders, supra., 188 P.3d at 561

⁹⁶³ Allentown Mack Sales & Serv. v. NLRB, <u>522 U.S. 359</u>, 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."964 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."965 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. 966

8.2 Third Party Actions in Wyoming

Third party actions in Wyoming are governed by W.S. § <u>27-14-105</u>. 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 coemployee 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.

^{964 10} LARSON'S WORKERS' COMPENSATION LAW § 110.01

⁹⁶⁵ *Id*.

⁹⁶⁶10 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.")

⁹⁶⁷ 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.⁹⁶⁸
- 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 <u>not</u> 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.

_

⁹⁶⁸ 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.** 969 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. 970 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." 971

The Wyoming Supreme Court has tended to interpret the third party action statutory provisions very strictly. In *Haney v. Cribbs*, ⁹⁷² for example, the Wyoming Supreme Court dismissed the Haneys' personal injury complaint against a third party defendant because "the Haneys 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." 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

^{969 10} LARSON'S WORKERS' COMPENSATION LAW § 110.02

⁹⁷⁰ Id

⁹⁷¹ Streeter v. Amerequip Corp., 968 F.Supp. 624 (D.Wyo.1997)

^{972 &}lt;u>148 P.3d 1118</u> (Wyo. 2006)

⁹⁷³ *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 Haneys 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. 974

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 Haneys were required to notify the attorney general and the Director (then) of the Department of Employment by certified mail but had not done so. ⁹⁷⁵ But the Haneys had made *some* attempt to notify. "Prior to the filing of the Haneys' complaint, the attorney general and the worker's compensation division received notice, from counsel for the Haneys, 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." 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 Haneys] failed to demonstrate compliance and their arguments that notice was provided via alternative means, while garnering [the] sympathy of this court, are legally unpersuasive."977

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. ⁹⁷⁸ 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

⁹⁷⁴ *Id.* at 1119-1120

⁹⁷⁵ *Id*. at 1121

⁹⁷⁶ *Id*. at 1120

⁹⁷⁷ *Id.* at 1122. A refiled case involving the same facts was permitted to proceed but its complexity unnecessarily detracts from the clear general rule.

⁹⁷⁸ Fiscus v. Atlantic Richfield Co., <u>742 P.2d 198</u>, 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.⁹⁷⁹

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." 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

-

⁹⁷⁹ See Stratman v. Admiral Beverage Corp., 760 P.2d 974 (Wyo. 1988)

^{980 10} Larson's Workers' Compensation Law § 111.03

awareness of the high probability that serious injury or death may result.⁹⁸¹

Simply put, "the statute says that one employee is not liable to another if the former is only negligent." 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 <u>27-14-601(e)</u> 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:

⁹⁸¹ Formisano v. Gaston, <u>246 P.3d 286</u>, 291 (Wyo. 2011)

⁹⁸² *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. 983

_

⁹⁸³ 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.⁹⁸⁴ 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

198

⁹⁸⁴ 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 <u>classes</u>, whose <u>rates may be readjusted annually</u> as the division <u>actuarially</u> 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.
- <u>No increase in the base rate</u> for each employment classification <u>may exceed 50% of the base rate</u> imposed for that employment classification <u>during the immediately preceding year</u>.
- 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 Nyauist, 985 an employer alleged to have had inadequate notice of an award of workers' compensation to its putative employee. 986 The Division had first denied the claim, upon the employer's objection, but then abruptly reversed itself, apparently without notifying the employer.⁹⁸⁷ A few months later, after learning that the employee was, in fact, receiving workers' compensation benefits, the employer objected.⁹⁸⁸ The Division notified the employer that its objection was timely, and set the matter for hearing. 989 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). 990 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. 991 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." The Wyoming Supreme Court agreed, stating flatly that the Division and not the OAH had authority to entertain chargeability disputes. 993

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.

^{985 870} P.2d 360 (Wyo. 1994)

 $^{^{986}}$ *Id.* at 361

⁹⁸⁷ *Id*.

⁹⁸⁸ *Id*.

⁹⁸⁹ Id.

⁹⁹⁰ *Id.* at 361-362

⁹⁹¹ *Id.* at 362

⁹⁹² Id.

⁹⁹³ 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, 994 an injured worker may not deliberately make her physical injury worse. Under W.S. § 27-14-407:

-

⁹⁹⁴ 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, ⁹⁹⁵ or the Division. ⁹⁹⁶ The Wyoming courts have limited this longstanding provision of the Wyoming Act. In *In Re Williams*, ⁹⁹⁷ 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, ⁹⁹⁸ 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. ⁹⁹⁹

The Wyoming Court has said that, "[w]e construe the forfeiture mandate strictly due to its harshness." 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

⁹⁹⁵ Matter of Andren, <u>917 P.2d 178</u>, 180 (Wyo. 1996); Kilburn Tire v. Meredith, <u>743 P.2d 874</u>, 876 (Wyo.1987)

⁹⁹⁶ Matter of Andren, supra., 917 P.2d at 180

^{997 205} P.3d 1024 (Wyo. 2009)

 $^{998 \}overline{Id}$. at 1029

⁹⁹⁹ *Id.* at 1033 *quoting* Workers' Compensation Div. v. Bergeron, 948 P.2d 1367, 1370 (Wyo.1997)

¹⁰⁰⁰ 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, 1001 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. 1002 The hearing examiner dismissed the contested case as a sanction for the claimant's failure to comply with discovery. 1003 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." 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. 1005 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. 1006 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. 1007

_

^{1001 353} P.3d 711 (Wyo. 2015)

¹⁰⁰² Id. at 713

¹⁰⁰³ *Id*.

¹⁰⁰⁴ *Id. quoting* Hoffman v. United States, <u>341 U.S. 479</u>, 486–87 (1951); Baker v. Limber, <u>647 F.2d</u> <u>912</u>, 917 (9th Cir.1981)

¹⁰⁰⁵ Debyah v. Department of Workforce Services, supra., 353 P.3d at 717

¹⁰⁰⁶ *Id*. at 718

¹⁰⁰⁷ *Id*.

In a second case involving W.S. § <u>27-14-510</u>(a), *In re Arellano*, the Wyoming Supreme Court reversed a decision of the OAH, which had applied the provision to an undocumented worker. ¹⁰⁰⁸ 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. 1009

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. § <u>27-14-104</u>(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.

10

¹⁰⁰⁸ <u>344 P.3d 249</u> (Wyo. 2015)

¹⁰⁰⁹ 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. § <u>27-14-506</u>(c), an employer's <u>willful failure or gross negligence to</u> <u>report occurrences causing injury to any of his employees is a misdemeanor</u>, 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*, ¹⁰¹⁰ 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

¹⁰¹⁰ 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. § <u>27-14-104(b)</u> 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. 1011

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).¹⁰¹²

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.*¹⁰¹³ 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

¹⁰¹¹ Id. at 753

¹⁰¹² *Id*.

¹⁰¹³ 357 P.3d 755 (Wyo. 2015)

claim."¹⁰¹⁴ 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?"¹⁰¹⁵ The Court discussed one of its earlier decisions, ¹⁰¹⁶ 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. 1017

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. 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."

¹⁰¹⁴ Id. at 759

¹⁰¹⁵ *Id*. at 760

¹⁰¹⁶ Cardwell v. American Linen Supply, <u>843 P.2d 596</u>, 599–600 (Wyo.1992)

¹⁰¹⁷ 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]

¹⁰¹⁸ Id. at 757

Gardner claimed to have discussed these problems with King when the forms were completed. King unequivocally denied that Gardner 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. 1019

After surveying prior law on burden shifting, the Court quoted a burden shifting analysis drawn substantially from *Cardwell v. American Linen Supply*: 1020

- 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.

¹⁰¹⁹ *Id.* at 758

¹⁰²⁰ See supra.

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 connection between seeking worker's compensation benefits and the termination." 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. 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. 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.

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. 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. 1026

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

¹⁰²¹ King v. Cowboy Dodge, Inc., supra., 776 P.2d at 761

¹⁰²² See Kaufman v. Rural Health Development, Inc., 442 P.3d 303, 309 (Wyo. 2019)

¹⁰²³ See Copp v. Unified Sch. Dist. No. 501, <u>882 F.2d 1547</u>, 1554 (10th Cir. 1989)

¹⁰²⁴ King v. Cowboy Dodge, Inc., *supra.*, 776 P.2d at 761, fn. 10

^{1025 9} LARSON'S WORKERS' COMPENSATION LAW § 104.07 [3]

¹⁰²⁶ See Riddle v. Wal-Mart Stores, Inc., <u>998 P.2d 114</u> (Kan. 2000).

which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. 1027

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. 1028

¹⁰²⁷ King v. Cowboy Dodge, Inc., *supra.*, 776 P.2d at 762

APPENDIX: WORKERS' COMPENSATION ADMINISTRATIVE RULES

Three separate Wyoming administrative units are statutorily authorized to promulgate rules relevant to operation of the Wyoming workers' compensation system—the Wyoming Workers' Compensation and Safety Division, the Wyoming Medical Commission, and the Wyoming Office of Administrative Hearings. Although all of these rules may be located through the website of the Wyoming Secretary of State, the author of this work felt inclusion of the rules as an appendix to the treatise might make for convenient reference. The reader is cautioned, however, that administrative rules change frequently and that those included herein were effective as of the date of this edition of the treatise. Prudent practitioners will check the rules frequently for modifications and updates. The treatise can do no more than to provide a snapshot of the regulatory terrain in existence as the publication is going to press.

RULES OF THE WYOMING MEDICAL COMMISSION

The Wyoming Medical Commission administratively adjudicates "medically contested" cases. The rules that follow have been promulgated by and are applicable to the Medical Commission. For a fuller discussion of the Commission see the Treatise at Chapter 6.10.

RULES AND REGULATIONS MEDICAL COMMISSION WORKERS' COMPENSATION DIVISION

CHAPTER 1

GENERAL PROVISIONS AND DEFINITIONS

Section 1. <u>AUTHORITY</u>. These rules of practice and procedure are promulgated by the Medical Commission under the authority of W. S. §27-14-616 (LexisNexis 2001) and W. S. § 16-3-102 (LexisNexis 2001). The commission was created as a separate and independent impartial hearing body funded under the workers' compensation account.

Section 2. DEFINITIONS.

- (a) "Access point" means a designated site where the party must go for purposes of attending the medically contested case hearing through the videoconference format:
- (b) "Commission" means the Wyoming Medical Commission as set forth in W.S. §27-1 4-616;
- (c) "Division" means the Workers' Compensation Division of the Department of Workforce Services;
- (d) "Executive secretary" means the employee designated by the division to assist the commission in the conduct of its activities; including acting as Hearing Officer

for all contested cases, ruling on all discovery, pretrial and procedural motions, conducting all preliminary hearings, and other procedural matters to facilitate the expeditious resolution of all contested cases.

- Section 3. <u>PURPOSE OF RULES</u>. These rules are intended to set forth clear and comprehensive procedures for the conduct of contested cases by the Medical Commission pursuant to the Wyoming Administrative Procedure Act W.S. §16-3-101 through §16-3-115 (1977 and Cum. Supp. 1993).
- Section 4. <u>APPLICATION OF RULES</u>. These rules shall apply to the conduct of contested cases before the Medical Commission as authorized by W.S. §27-14-616. Cases shall be determined by the Medical Commission in accordance with the contested case procedure of the Wyoming Administrative Procedure Act and the Wyoming Rules of Civil Procedure, as applicable under these rules and regulations.
- Section 5. <u>CONSTRUCTION</u>. These rules are to be liberally construed to assure the unbiased, fair, expeditious and impartial conduct of contested case proceedings before the Medical Commission.
 - (e) "Medically contested case" means a case in which the primary issue is:
 - (i) a worker/claimant's percentage of physical impairment;
 - (ii) whether a worker/claimant is permanently totally disabled;
- (iii) whether a worker/claimant who has been receiving temporary total disability benefits remains eligible for those benefits under W.S. § 27-14-404 (c).
- (iv) any other issue, the resolution of which is primarily dependent upon the evaluation of conflicting evidence as to medical diagnosis, medical prognosis, the reasonableness and appropriateness of fees charged by a health care provider.
- (f) "Medical hearing panel" means three members of the medical commission selected by the executive secretary, under the supervision and guidance of the chairman of the medical commission, to conduct and decide a medically contested case hearing;
- (g) "Parties" means the employee, employer, health care provider or division. A party may choose to not participate in a matter by failure to make an appearance at the initial pre-hearing conference after notice.

COMMISSION MEMBERSHIP

- Section 1. <u>MEMBERS</u>. The commission shall consist of 22 health care providers, eleven (11) members and no more than eleven (11) associate members as appointed by the Governor and as set forth in W.S. § 27-14-616 (a).
- Section 2. <u>ASSOCIATE MEMBERS.</u> Associate members may participate in all aspects of commission activities, including the development of rules and regulations for the operation of the commission. Associate members do not hold voting privileges, except in their capacity as members of individual hearing panels reaching final administrative decisions in medically contested cases.
- Section 3. <u>OFFICERS.</u> Members shall annually elect a chairperson and a vice-chairperson. The chairperson shall preside over all meetings of the commission membership and the vice-chairperson shall do so in the chairperson's absence.
- Section 4. <u>VACANCIES</u>. Commission vacancies shall be filled by the Governor. The Executive Secretary, in conjunction with the director of the Wyoming Workers' Safety and Compensation Division and the Director of the Department of Labor shall submit written recommendations for the Governor's consideration. When vacancies arise on the commission, names will be forwarded from this roster to the Governor for appointment consideration. Members who have completed a term on the commission may also be reappointed to serve additional terms.
- Section 5. <u>ANNUAL MEETING.</u> Medical commission members and associate members shall attend an annual business meeting to discuss the concerns of the medical commission.

REFERRAL OF MEDICALLY CONTESTED CASES

Section 1. FROM THE DIVISION.

- (a) The commission shall accept for hearing those cases determined by the division to be medically contested cases, and which have been submitted in writing to the commission.
- (b) Following proper referral by the division, the medical hearing panel shall have jurisdiction to hear and decide all issues related to the written determinations of the division filed pursuant to W.S. §27-14-601 (k).
- Section 2. <u>FROM THE OFFICE OF ADMINISTRATIVE HEARINGS</u>. Pursuant to W.S. §27-14-616(e), upon agreement of all parties to a case, the hearing examiner in a contested case which has been referred to the Office of Administrative Hearings may:
- (i) transfer a medically contested case to the commission for hearing and decision by a medical hearing panel; or
- (ii) seek the advice of the commission on specified medical issues pursuant to written request of the administrative hearing officer. The advice will be in writing and transmitted to the hearing examiner for distribution to the parties and incorporation into the contested case record.

COMMENCEMENT OF CONTESTED CASE PROCEEDINGS

Section 1. FILING AND SERVICE OF PAPERS.

- (a) The case number of the medically contested case shall be the same number as previously assigned by the division. All documents, motions, pleadings and orders filed thereafter shall be signed and shall contain:
- (i) conspicuous reference to the case number and a clear delineation that the matter is before the office of the medical commission;
 - (ii) a caption setting forth the title of the contested case proceeding;
 - (iii) a brief designation describing the document filed;
- (iv) the name, address and telephone number of the person who prepared the document; and
- (v) certificate of service indicating that a true and complete copy of the document has been properly served on all parties.
- (b) In all medically contested cases, the parties shall file all original documents, pleadings and motions with the Wyoming Workers' Safety and Compensation Division, CBC Building, 1510 E. Pershing Blvd., 1st Floor, Cheyenne, WY 82001, with true and complete copies of the particular document, pleading or motion properly served on all other parties or their attorneys and the Office of the Medical Commission, P.O. Box 20247, Cheyenne, WY 82003. If a party is represented, service of the medically contested case documents, pleadings and motions shall be made upon that party's attorney or other representative of record.

Section 2. INITIAL SCHEDULING CONFERENCE.

- (a) After referral, the executive secretary may set the matter for an initial scheduling conference, which shall be conducted by telephone initiated by the medical commission.
- (i) Presence of the employee/claimant is not required if the employee/claimant is represented by counsel.
- (ii) Failure of an employer to participate in an initial scheduling conference shall preclude the employer from further involvement in the proceedings, unless leave to participate is otherwise granted by the hearing officer.

- (b) The medical commission and parties will continue to provide copies of all material and pleadings to any non-participating employer.
- (c) The purpose of the initial scheduling conference is to provide a preliminary procedure in which to identify the primary issues, identify potential conflicts with the medical commission panel members, and to set forth a timetable in which to conduct and set the formal evidentiary hearing. The initial scheduling conference shall be conducted in an informal fashion and a taped record of the initial scheduling conference shall be maintained by the medical commission.

Section 3. PRETRIAL CONFERENCE.

- (a) At a mutually convenient date there shall be a pretrial conference in all cases unless deemed unnecessary by the executive secretary. The pretrial conference shall be held prior to the date of the filing of disclosure statements. The parties shall be prepared to discuss:
 - (i) the names of witnesses,
 - (ii) exhibits to be submitted,
 - (iii) status of discovery,
 - (iv) settlement discussions,
 - (v) anticipated length of trial, and
 - (vi) any other issues relevant to these proceedings.

Section 4. <u>DISCLOSURE STATEMENT.</u>

- (a) After completion of the initial scheduling conference, the commission shall issue an order setting the hearing and notice to the parties of the deadline to file disclosure statements. The disclosure statements shall contain:
- (i) a brief statement of the contentions of the party, including identifying all final determinations in dispute and the benefits sought or denied;
 - (ii) significant uncontroverted facts;
 - (iii) contested medical issues to be determined at the hearing;
- (iv) name, address and a brief description of the testimony of each witness the party intends to present at the hearing;
- (v) copies of all exhibits to be introduced (this does not foreclose the introduction of other exhibits which become available or are discovered later);
- (b) At the discretion of the commission, the case may be dismissed for failure to timely file a disclosure statement.

- (c) The disclosure statements referred to above shall be due fifteen (15) calendar days prior to the contested case hearing. Four complete copies shall be submitted to the medical commission in order to provide each medical panel member with the disclosure statement and attachments.
- (d) At the discretion of the Hearing Officer, a joint disclosure statement prepared by counsel for the Employee/Claimant and signed and approved by counsel for the division may be submitted in lieu of separate disclosure statements.
- Section 5. <u>DOCUMENTS IN THE OFFICIAL CASE FILE</u>. The medical commission will not take administrative notice in medically contested cases of the official case file maintained by the division. Individual documents in the official case file must be marked as exhibits, included in the party's disclosure statement and offered into evidence at the contested case hearing.

Section 6. <u>EX PARTE</u>. 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.

MOTIONS AND ORDERS

Section 1. MOTIONS.

- (a) An application to the commission for an order shall be by written motion and shall state with particularity the grounds and relief sought.
- (b) Any hearing on any subject raised by motion shall be heard at the discretion of the hearing examiner. The hearing examiner may require the filing of briefs or other authority as may be deemed necessary.
- (c) The hearing examiner may require the express written approval of the Employee/Claimant to any continuance of the proceedings.

Section 2. REQUESTS FOR CONTINUANCE AND EXTENSIONS OF TIME.

- (a) Generally, motions requesting continuances or extensions of time are disfavored, yet they may be granted sparingly and only upon a showing of good cause or when necessary to assure fairness and otherwise avoid manifest injustice. Continuances will not ordinarily be granted ex parte.
- (b) Unless time does not permit, motions for a continuance of any scheduled hearing or conference shall be in writing, shall state the reasons therefore and shall be filed and served on all parties.
- (c) Motions for an extension of time for the doing of any act required or allowed by these rules or by order of the commission shall be filed and served on all parties prior to the expiration of the applicable time period.

SELECTION OF HEARING PANELS

Section 1. SELECTION OF HEARING PANELS.

- (a) The selection of commission members to serve on specific hearing panels for medically contested cases shall be made by the executive secretary under the supervision and guidance of the commission chairperson. Three commission members shall serve as a medical hearing panel and one panel member shall be designated by the executive secretary as the chairperson of that panel. W.S. §27-14-616(b)(iv).
- (b) To the extent possible, the commission members' expertise relevant to the circumstances of the contested case shall guide selection of the panel. No panel appointment will be made of a commission member:
- (i) whose practice has previously received compensation for care or opinion rendered to a party specific to the issue presented in the medically contested case:
- (ii) who currently or previously has had a personal or professional relationship with the treating health care provider with respect to the case or issues before the panel; or
 - (iii) who has any other possible conflict of interest.
- (c) Any party opposing the selection of any medical panel member shall file the objection to the panel member in writing, setting forth with specificity the basis of the objection. The written motion must be filed within ten (10) days of receipt of the order setting hearing.
- (d) Upon receipt of the motion challenging a panelist, the executive secretary shall immediately set the matter for hearing on the motion.
- (e) At any time while a case is pending, any member of the medical hearing panel or the presiding officer may recuse himself or herself from consideration of the case and must do so once he or she is aware that a conflict exists as described in Chapter 6, Section 1 (b)(i) or (ii). A notice of recusal shall be filed with the commission for service on all parties.

Section 2. <u>DESIGNATION AND AUTHORITY OF PRESIDING OFFICER</u>.

- (a) The presiding officer of all hearings shall be the executive secretary of the medical commission or his designee. The functions of the presiding officer shall be conducted in an impartial manner.
- (b) Pursuant to Section W.S. §16-3-112(b), a presiding officer shall have all powers necessary to conduct a fair and impartial hearing, including but not limited to the following:
 - (i) administer oaths and affirmations;
 - (ii) issue subpoenas;
 - (iii) rule upon offers of proof and receive relevant evidence;
 - (iv) provide for discovery and determine its' scope;
 - (v) preside over and regulate the course of the hearing;
- (vi) hold conferences for settlement, review, or simplification of the issues;
 - (vii) dispose of procedural requests or similar matters;
 - (viii) make a recommended decision for the hearing panel's consideration;
- (ix) sign all orders on the commission's behalf, except final decisions in medically contested cases; and
- (x) take any other action authorized by the commission's rules and consistent with law.

Section 3. <u>APPOINTED ATTORNEY</u>.

(a) Upon request, the presiding officer may appoint an attorney to represent an employee under W.S. §27-14-602(d) and allow a reasonable fee upon entry of a final order. All requests for attorney fees shall be in detail showing time spent and work performed. Pursuant to *Painter v. State ex rel.*, *Wyoming Workers' Compensation Division*, 931 P.2d 953 (Wyo. 1997), attorneys' fees and costs are payable from the date of the Final Determination letter from the division. Fees allowed by the presiding officer shall be at an hourly rate set by the director of the Office of Administrative Hearings pursuant to 27-14-602(d). Appointed attorneys shall be reimbursed for costs necessarily and reasonably incurred as set forth by the Office of Administrative Hearings.

- (b) No fee shall be awarded in any case in which the presiding officer determines the claim to be frivolous and without legal or factual justification.
- (c) Applications for attorneys' fees shall be submitted within ninety (90) days of the entry of a final order.
- (d) Objections to attorneys' fees by any party shall be filed as a motion for reconsideration of attorneys' fees and must be in writing and filed within ten (10) days of the executive secretary's order awarding attorney's fees.

DISCOVERY

Section 1. GENERALLY

- (a) Discovery documents or notices shall not be filed with the commission except when relief is sought pursuant to W.S. §16-3-107(c).
- (b) Unless otherwise prohibited by law or limited by these rules or commission order, the taking of discovery shall be available to the parties in accordance with the provisions of §16-3107(g) and Rules 26, 28 through 37 (excepting 37(b)(1) and 37(b)(2)(D) therefrom) of the Revised Wyoming Rules of Civil Procedure.

EVIDENCE

Section 1. EVIDENCE AND TESTIMONY.

- (a) Generally, the taking of evidence at the medically contested case hearing shall be governed by W.S. §16-3-108 and case law thereunder.
 - (b) All testimony shall be given under oath or affirmation.
- (c) Irrelevant, immaterial or unduly repetitious evidence shall be excluded, without regard to whether such evidence is in verbal or written form.
- (d) The law of privileged communication between health care provider and patient shall not apply. Health care providers may be required to testify under the provisions of W.S. §27-14-610.

Section 2. SUBPOENAS.

- (a) Subpoenas for appearance and to produce books, papers, documents or exhibits may be issued by the commission, upon written motion of any party, or on the commission's own motion, pursuant to W.S. §16-3-107(c).
 - (b) Subpoenas may be enforced pursuant to W.S. §16-3-107(c).

EVIDENTIARY HEARING PRACTICE AND PROCEDURE

Section 1. NOTICE OF HEARING.

(a) A medically contested case evidentiary hearing shall be set by Order Setting Hearing and Requiring Disclosure which shall provide the time, place and nature of the evidentiary hearing, the division's number assigned to the case, the legal authority and jurisdiction under which the evidentiary hearing is to be held, the particular sections of the statutes and the rules involved, the panel members who will hear the case, the access points if the case is to be heard via video conferencing, and a short and plain statement of the matters asserted. The order setting hearing shall be sent by mail or personally to all parties at least thirty (30) days before the date set for the evidentiary hearing.

Section 2. ORDER OF PROCEDURE AT HEARING.

- (a) The evidentiary hearing shall be presided over by the executive secretary or his designee. As nearly as possible, evidentiary hearings shall be conducted in accordance with the following order of procedure:
- (b) The executive secretary shall conduct the hearing, shall announce that the hearing is convened, shall indicate the docket number and title of the case to be heard, and shall identify all parties present.
 - (c) The executive secretary shall then take up any motions or preliminary matters to be heard.
 - (d) Opening statements to briefly explain the party's position may be made or waived by the parties. Opening statements may be limited at the discretion of the executive secretary.
- (e) The party with the burden of proof will be the first to present evidence, all other parties being allowed to cross-examine in an orderly fashion. When the party with the burden of proof rests, other parties will then be allowed to present their evidence, again allowing for cross-examination. The members of the medical hearing panel may ask questions of any witness for the purpose of clarifying their understanding of the case. Rebuttal and surrebuttal evidence will be allowed only at the discretion of the executive secretary.
- (f) Closing statements may be made at the conclusion of the presentation of evidence by both parties. These statements may include summaries of the evidence and legal arguments. Closing statements may be limited in time at the discretion of the executive secretary. In appropriate circumstances, written closing statements may be ordered in lieu of oral arguments.

- (g) The executive secretary may ask for proposed findings of fact and conclusions of law from both parties, at a date established by the executive secretary.
- (h) After all proceedings have been concluded, the chairperson shall dismiss and excuse all parties and declare the hearing closed. The medical hearing panel may request parties to submit supplemental briefs or other evidentiary items after the hearing is closed and during consideration of the case. The executive secretary shall advise the parties that the final decision shall be announced within due and proper time following consideration of all matters presented at the hearing.
- Section 4. <u>TELEPHONE CONFERENCES</u>. At the discretion of the executive secretary, telephone conference calls may be used to conduct any hearing or other proceeding. At the discretion of the executive secretary, parties or their witnesses may be allowed to participate in hearings by telephone.

Section 5. <u>VIDEO CONFERENCES</u>.

- (a) At the discretion of the executive secretary, video conferencing may be used to conduct any hearings or other proceeding. The access points for the video conferencing shall be appropriately designated in the order setting hearing.
- Section 6. <u>RECORDING AND REPORT OF PROCEEDINGS</u>. The presiding officer shall assure that a record of the proceedings is kept pursuant to W.S. §16-3-107(p). The proceedings, including all testimony shall be reported verbatim by any appropriate means, including audio or video or written record. A copy of such proceedings will be furnished to any party upon written request.

Section 7. SPECIAL PROCEEDINGS.

(a) <u>Small Claims.</u> Small claims hearings shall be conducted under the provisions of W.S. §27-14-602(b)(i). For the purpose of considering an objection of a party that a matter be conducted as a small claims hearing, the executive secretary of the medical commission shall act as 'hearing officer' or appoint a presiding officer to act as 'hearing officer.'

CASE DISPOSITION

Section 1. <u>INFORMAL DISPOSITION</u>.

- (a) Informal disposition may be made of any case or any issue by stipulation or settlement.
- (b) If the parties reach a settlement, the settlement shall be in writing and the executive secretary shall be presented with the terms thereof. The executive secretary may disapprove a settlement only if it clearly violates provisions of law or public policy. The executive secretary shall enter a final order dismissing the case upon such approved settlement or upon notice by the petitioner or division that the disputed claim is withdrawn.
- (c) The executive secretary may require the signature of the Employee/Claimant on settlement documents.

Section 2. <u>DEFAULT ORDER</u>.

- (a) If a party fails to attend or participate in an initial scheduling conference, hearing, or other stage of a contested case proceeding, the executive secretary may serve upon all parties written notice of a proposed default order, including a statement of the grounds.
- (b) Within ten (10) days after service of a proposed default order, the party against whom it was issued may file a written motion requesting the proposed order be vacated and stating the grounds therefore.
 - (c) The executive secretary shall issue or vacate the default order promptly after expiration of the time within which the Party may file a written motion under subsection (b).
- (d) Upon issuance of a default order, the executive secretary shall conduct, without the participation of the party in default, any further proceedings necessary to complete the contested case and determine all issues in the proceeding, including those affecting the defaulted party.

Section 3. FINAL DECISION.

(a) The medical hearing panel shall make and enter a written decision and order containing findings of fact and conclusions of law, separately stated. The findings of fact shall be derived from the evidence of record in the proceeding, matters officially noticed in that proceeding, and matters within the medical hearing panel's knowledge as acquired through performing its functions and duties. Such findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely upon the

conduct of their serious affairs, even if such evidence would be inadmissible in a civil trial. The medical hearing panel's experience, technical competence and specialized knowledge may be utilized in evaluating the evidence.

- (b) When the medical hearing panel requests that counsel draft a proposed final order, counsel shall forward the original to the division, concurrently serving copies of the proposed order on all other parties along with notice that any objections to the form of the proposed order must be made within ten (10) days.
- (c) All written decisions of the medical hearing panel shall be kept on file in the office of the medical commission and the original will be provided to the division for filing, and will, without further action, become the final decision and order as a result of the hearing. Upon filing, a copy of the decision shall be sent to all parties in the contested case.

Section 4. MOTION FOR RECONSIDERATION.

- (a) Within ten (10) days of the date of the decision, any party may petition the commission for reconsideration of the decision and order by filing a motion with the commission for any of the following grounds:
 - (i) irregularity in the proceedings;
 - (ii) fraud, misrepresentation, or other misconduct of the prevailing party;
 - (iii) error in the assessment of the amount of recovery;
- (iv) newly discovered evidence regarding material or evidence which the party could not, with reasonable diligence, have discovered and produced at the hearing; or
 - (v) error of law contained within the decision.
- (b) The executive secretary shall issue a written order in response to the motion for reconsideration. A motion for reconsideration does not affect the finality of the decision and order and is not a prerequisite for judicial review.
- (c) Clerical mistakes in final decisions or other parts of the record may be corrected by the commission at any time, of its own initiative, or on the motion of any party and upon notice to all parties. During the pendency of judicial review, such mistakes may be corrected only with leave of the court having jurisdiction.

Section 5. <u>MEDIATION</u>. 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.

Section 6. <u>JUDICIAL REVIEW</u>. Any party aggrieved or adversely affected by a final decision in a contested case or the Division Director as provided by W.S. §27-14-614, is entitled to judicial review in the appropriate district court pursuant to W.S. §16-3-114, §27-14-602, and Rule 12, Wyoming Rules of Appellate Procedure. §27-14-602(c).

SPECIAL PROCEEDINGS

Section 1. Expedited Medically Contested Cases.

- (a) Upon request of a party or on the commission's own motion, a medically contested case may be expedited if the case is:
 - (i) a matter in which there are no disputed issues of material fact; or
 - (ii) a matter in which the parties agree to an expedited proceeding.
- (b) If the matter is scheduled on the commission's own motion, any party shall have ten (10) days from the date of the commission order scheduling a matter as an expedited case to request reconsideration.
- (c) An expedited medically contested case shall consist of review of any written argument and evidence. Limited oral argument after submission of all written material shall be permitted upon written request of a party.
- (d) The commission retains the authority to convert, at any time, an expedited proceeding to a regular medically contested case when it appears that oral testimony is essential to permit adequate presentation of evidence and disposition of the case.

Section 2. Small Claims Hearings

- (a) Small claims hearings shall be conducted under the provisions of W.S. §27-14-602 (b) (i).
- (b) For the purpose of considering an objection of a party that a matter be conducted as a small claims hearing, the Chairperson of the Medical Commission shall act as "hearing officer" or appoint a presiding officer to act as "hearing officer".

RULES OF THE WYOMING WORKERS' COMPENSATION DIVISION

The following rules are applicable to the Wyoming Workers' Compensation Division/Workers' Compensation and Safety Division. They generally do not apply to the Medical Commission. For a fuller discussion of the Wyoming workers' compensation administrative structure see the Treatise at Chapter 6.7 et seq.

GENERAL PROVISIONS

- **Section 1. Authority.** These rules, regulations and fee schedules are adopted by the Administrator pursuant to the requirements and authority of the Wyoming Workers' Compensation Act (the "Act"). Specific authority and direction is found in Wyoming Statute §§ 27-14-102(a)(i), 102(a)(xii), 201(o), 201(q), 202(e), 205(b), 306(d), 401(e), 402, 404(a), 408(e)(ii), 501(a), 502(a), 506(a) and (b), 601(e), 616(b)(i) and (ii), 616(d), 802(a) and (c) and in the requirements of the Wyoming Administrative Procedure Act, W. S. §§ 16-3-101 through 115.
- **Section 2. Effective Date.** These rules, regulations and fee schedules become effective on the date filed with the Wyoming Secretary of State, and replace all prior rules and regulations of the Employment Tax Division and Workers' Compensation Division within the Wyoming Department of Workforce Services. However, to the extent these rules affect a worker's substantive right to benefits; the rules in effect at the time of injury apply. Pursuant to W. S. § 27-14-602, eligibility for and amount of benefits are determined pursuant to the law in effect on the date of injury.

Section 3. Definitions.

- (a) 49 CFR Part 40 means Title 49, Part 40 of the Code of Federal Regulations (CFR) as revised January 1, 2018.
- (b) AB Rated. Drug products made by different distributors and/or repackagers that are considered therapeutically equivalent based on demonstrated bioequivalence.
- (c) 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.
 - (d) Actual Monthly Earnings.
- (i) Income the employee was receiving from all employment at the time of injury and which is lost due to the injury, including:

- (A) Actual value of board, lodging, rent, or housing and per diem expenses to be included within the actual wage as remuneration, if such board, lodging, rent or housing and per diem is lost as a result of the injury;
 - (B) Commissions and bonuses;
- (C) The average amount of overtime pay received in the six (6) months before the injury or guaranteed by written agreement between the employer and employee entered into before the injury;
- (D) Gratuities received in the course of employment, from others than the employer, only when such gratuities are received with the knowledge of the employer and reported to the United States Internal Revenue Service by the employee or the employer;
- (E) Wages earned from employment at more than one occupation or employer other than the employer at the time of injury, if those wages are lost due to a compensable injury; and
- (F) Unemployment insurance benefits paid to the injured employee during the twelve (12) months preceding the month of injury will be taken into account when computing the actual monthly earnings in cases where there are special circumstances under which the actual monthly earnings cannot be determined.
 - (ii) The term "actual monthly earnings" does not include:
 - (A) Severance pay;
- (B) The cash value of health, medical, life or other insurance benefits or retirement benefits;
 - (C) Social security benefits;
- (D) Passive investment income such as income from stocks, bonds, trust accounts, or individual retirement accounts;
- (E) Any adjustments to the employee's income, as defined in paragraph (i) of this subsection, made subsequent to the date of accident or incident causing the original injury; and
- (F) The amount reimbursed to an employee for any special expense incurred by the employee by the nature of the employment.
- (e) Alcohol. Ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl, from whatever source or by whatever process produced.

- (f) Alcohol Test means an analysis of breath or saliva or any other analysis, which determines the presence and level or absence of alcohol, as authorized by the United States Department of Transportation in its rules and guidelines concerning alcohol testing and drug testing.
- (g) Certified Laboratory. Any United States laboratory certified by the United States Department of Health and Human Services (HHS) under the National Laboratory Certification Program as meeting the minimum standards of Subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs.
- (h) Chain of Custody. The methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances, and providing for accountability at each stage in handling testing, storing specimens, and reporting test results.
- (i) Claim. An application for benefits under the Act using the forms provided by the Division.
- (j) Clerical Office Occupations. Employees whose duties are confined to keeping the books and records of the business or who are engaged wholly in office work. Employees shall have a physical separation from exposure to the hazards associated with the business' normal activities. Employees shall not have direct contact with, supervision of, or be involved in physical labor of, the employer's operation, except, if incidental. Employees who qualify may include employees who work with financial or employee records, correspondence, or telephone duties. Employees qualifying for the clerical office occupation classification who perform any duties outside of the clerical office area or who perform duties which are not directly related to the performance duties inside the clerical office, become disqualified for the clerical office occupation classification for the reporting period when the non-clerical work is performed. The limited exceptions allowed are solely for the direct travel to and from a local post office, bank, office supply store or the primary business location if travel is being compensated by the employer.
- (i) Employers must request the clerical coverage classification in writing on a form prescribed by the Division showing the number of clerical positions needed and a detailed description of job duties and responsibilities for the clerical coverage being requested. An election under this subsection shall become effective the first day of the calendar quarter following the calendar quarter in which the election is made.
- (ii) The Division may revoke the clerical office occupation classification when sufficient cause is found such as miscategorization of wages.
- (k) Chiropractic Utilization Guidelines means the *Chiropractic Utilization Guidelines* for the Care and Treatment of Injured Workers (3/1/18), as policy for the determination of compensability of appropriate and reasonable chiropractic treatment in the provision of care for injured workers. This does not include any later amendments or editions of the incorporated matter. These guidelines are available upon request through the Division and may be obtained on-line at: http://www.wyomingworkforce.org/_docs/providers/Chiropractic-Guidelines.pdf

(l) Collective Group of County Governments or County Government Entities. County government employer means any employer operating with a primary classification of "county government". Only one county collective system may exist for workers' compensation reporting purposes under W. S. § 27-14-109.

(m) Computation of Time.

- (i) In computing any period of time prescribed by the Act or these rules, except the seventy-two (72) hour period prescribed in W. S. § 27-14-502 and Wyoming Uniform Rules for Contested Case Practice and Procedure, Chapter 2, Section 12, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or legal holiday, or, when the act to be done is the filing of a paper, a day on which weather or other conditions have made agency offices inaccessible, in which event the period runs until the end of the following day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. When the period of time prescribed or allowed is eleven (11) or more days, intermediate Saturdays, Sundays, and legal holidays shall be included in the computation. As used in this rule, "legal holiday" includes any day officially recognized as a legal holiday in this state by designation of the legislature or appointment as a holiday by the governor.
- (ii) Whenever a party has the right or is required to do some act within a prescribed period after service of a notice or other paper upon the party, and the notice or paper is served upon the party by mail or by delivery to the agency for service, three (3) days shall be added to the prescribed period.
- (n) Concurrent Review. Concurrent review is performed while the injured worker is still an inpatient and services are being rendered. The review can occur if there is a need to extend a current hospitalization, during an emergency admission, or when a provider/facility notifies the Division of an admission for a non-emergent procedure and a preauthorization was not performed.
- (o) Confirmation Test. A second analytical procedure used to identify the presence of a specific drug, alcohol or metabolite in a specimen. The confirmation test shall be different in scientific principle from that of the initial test procedure. The confirmation method shall be capable of providing requisite specificity, sensitivity, and quantitative accuracy.
- (p) Corporate Officers, Members of Limited Liability Companies, Partners, and Sole Proprietors.
- (i) Elective coverage for officers of a corporation, members of a limited liability company, partners or sole proprietors under W. S. § 27-14-108(k) must be requested in writing on a form provided by the Wyoming Workers' Compensation Division ("Division").

- (ii) Corporations which elect to obtain coverage under the act must notify the Division within 30 days of a change in corporate officers. The election of corporate officers will transfer from the prior individual to the newly elected officer in the same position.
- (iii) Corporate officers shall be clearly identified as such on all reports to the Division.
- (iv) Coverage will be discontinued at the end of the month in which the position no longer exists or the position becomes vacant. The Division must be notified in writing within 30 days of such changes.
- (q) County government or county government entities means any employer operating with a primary classification of county government.
- (r) Drug. Marijuana, Cocaine, Amphetamine, Opiate, Phencyclidine (PCP), a metabolite of any of the substances, or any other controlled substance subject to testing pursuant to drug testing regulations adopted by the United States Department of Transportation.
- (s) Drug Test means any chemical, biological, or physical instrumental analysis administered by a certified laboratory for the purpose of determining the presence, or absence of a drug or its metabolites pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation.
- (t) Elective Surgery. Elective Surgery is surgery, which may be required in the process of recovery from an injury or illness but need not be done as an emergency to preserve life, function or health.
- (u) Emergency Health Care Services. Emergency health care services means health care services for a medical condition manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to place the injured worker's health in serious jeopardy.
- (v) Expert Reviewer. Expert reviewer means a physician competent to evaluate the specific clinical issues involved in the medical treatment services and where these services are within the scope of the physician's practice.
- (w) Filing. Except as otherwise provided in the Act or these rules and regulations, a document shall be deemed to have been filed with the Division on the date it is received by the Division in the manner prescribed by the Act or these rules and regulations.
- (x) Fiscal Year. A 12-month period of time used for State budgetary purposes which commences on July 1 of each year and ends on June 30 in the following year.
- (y) Fixed Base of Operations. See definition for "Principal Place of Business" in subsection (nn) of this section.

- (z) Gainful Employment. The individual having returned to work at a wage of no less than minimum wage, for at least 20 hours per week for a period of two consecutive months. W. S. §§ 27-14-404(b) and 27-14-408(a)(ii).
- (aa) Hearing Examiner or Officer. See Wyoming Uniform Rules for Contested Case Practice and Procedure, Chapter 2, Section (e) or refer to: http://psc.state.wy.us/pscdocs/dwnload/OAH/All%20Chapters%20-%20Clean%20Copy.pdf
- (bb) Inside Sales. (Automotive Vehicle Sales) A position predominantly engaged in automotive vehicle sales at the premises of the business. Positions with duties involving servicing equipment do not qualify for coverage under the sales classification.
- (i) Employers must request the inside sales (automotive vehicle sales) classification in writing on a form provided by the Division. An election under this subsection shall become effective the first day of the calendar quarter following the calendar quarter in which the election is made.
- (ii) The Division may revoke the inside sales occupation classification when sufficient cause is found such as miscategorization of wages.
- (cc) Intoxicated means pursuant to W. S. § 27-14-102(a)(xi)(B)(I) a positive alcohol test result at or above .08 alcohol concentration level.
- (dd) Maximum Medical Improvement (MMI). A medical condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated. This term may be used interchangeably with the term "ascertainable loss", defined in W. S. § 27-14-102(a)(ii).
- (ee) Medical and Hospital Care. For purposes of W. S. § 27-14-102(a)(xii), "personal items" are defined as:
 - (i) Clothing;
- (ii) Footwear, unless such items are professionally altered to accommodate the compensable injury;
- (iii) Hot tubs, spas or any other devices wherein water is heated and/or circulated;
- (iv) Programs, aids, medications or dietary supplements primarily intended to help the worker stop smoking or lose weight;
 - (v) Exercise equipment;
 - (vi) Beds, mattresses or mattress toppers; and

- (vii) Recliners or lift chairs.
- (ff) Medical Service. Means any medical, surgical, diagnostic, chiropractic, hospital, nursing care, ambulances, prescription medicine, prosthetic appliances, and physical restorative services.
- (gg) Medically Necessary. "Medically necessary treatment" means those health services for a compensable injury that are reasonable and necessary for the diagnosis and cure or significant relief of a condition consistent with any applicable treatment parameter.
- (hh) Mentally Incompetent. For purposes of W. S. § 27-14-505, an individual is mentally incompetent if, due to a medically diagnosed mental disorder, the individual lacks the ability to comprehend that an injury is compensable and lacks the ability to comprehend that certain statutory guidelines must be complied with in order to receive benefits.
- (ii) Normal Activities of Day-to-Day Living (ADL). Routine activities that people tend to do every day without needing assistance. There are six (6) basic ADLs: eating, bathing, dressing, toileting, transferring (walking) and continence as used in W. S. § 27-14-102(a)(xi)(G).
- (jj) Other Related Expenses. As used in W.S. § 27-14-403(e)(ii), "other related expenses" means expenses related to a funeral, burial or cremation, including a wake or reception, headstone or marker, transportation, and lodging for the immediate family in those situations where a work-related injury culminated in death.
- (i) The surviving family member or guardian, eligible to receive reimbursement for other related expenses must submit a request for reimbursement on a form provided by the Division and follow the procedure outlined in Chapter 7, Section 3(a)(iii) of these Rules.
- (A) The term "immediate family" is defined as the spouse, child(ren), step-child(ren), grandchild(ren), parent(s), step-parent(s), parent in-laws, grandparent(s), step grandparent(s), grandparent in-law(s), sibling(s), step-sibling(s), half sibling(s), and sibling in-law(s) of the deceased.
- (kk) Outside Sales. A position with duties predominantly engaged in sales or collections away from the premises of the business. The position may include duties performed at the business premises that are necessary to the position's outside sales duties. Positions with duties involving servicing equipment or delivery of the employer's product do not qualify for coverage under the outside sales classification.
- (i) Employers must request the outside sales classification in writing on a form provided by the Division. Duties for each outside sales classification position must be clearly identified.
 - (ii) An election under this subsection shall become effective the first day of

the calendar quarter following the calendar quarter in which the election is made.

- (iii) The Division may revoke the outside sales occupation classification when sufficient cause is found such as miscategorization of wages.
- (ll) Prescription Medication. A drug or medication lawfully prescribed by a physician for an individual and taken in accordance with the prescription.
- (mm) Primary Treating Health Care Provider. The health care provider selected by the employee to administer and direct medical treatment for his/her compensable injury W. S. § 27-14-401(f).
- (nn) Principal Place of Business. For purposes of W. S. § 27-14-301(b) and W. S. § 27-14-107(j), a "principal place of business within the state established for legitimate business-related purposes" must have the following characteristics:
 - (i) Exclusive use of fixed premises with a recognizable physical address;
- (ii) A business sharing building or trailer space must have a clearly defined location used exclusively for its business.
- (iii) At least one employee who regularly performs most of his services for the business in or based out of the fixed premises;
 - (iv) Is accessible by mail or other recognized delivery service; and
- (v) Regularly conducts its primary business or necessary ancillary services at the fixed premises.

(oo) Rating System:

- (i) Base Rate. As used in these rules and regulations, the term "base rate" means that percentage of total payroll necessary to maintain an actuarially sound workers' compensation insurance program. Each major industry classification shall have a separate base rate based upon that industry's primary nature of business regardless of individual occupations within that industry.
- (ii) Experience Rating. As used in these rules and regulations, the term "experience rating" means that percentage increase or decrease which is applied to the base rate of an employer account. The experience rating is based upon frequency and severity of injuries reported to the Division.
- (iii) Consolidated Accounts. Employers electing a consolidated account as provided in W. S. § 27-14-202(d) shall report each worker within the classification for which the worker performs the largest percentage of services.

- (iv) Presumed Pay of Specified Workers. Deemed income for those categories of workers identified in W. S. § 27-14-205(b) shall be calculated by determining the amount of premium income necessary to pay actuarially anticipated losses in each category during the rating period, and considering the anticipated number of covered workers and the appropriate premium rate for each category.
- (v) Pursuant to W. S. § 27-14-102(K), a collective group of county governments is defined as all county government employers consolidating into one workers' compensation account in order to operate as defined under W. S. § 27-14-109.
- (pp) Reasonable Period of Recuperation. As used in W. S. § 27-14-404(b), a "reasonable period of recuperation" includes the day of surgery and the period of recuperation for the surgery performed.
- (qq) Rehabilitation Therapy Utilization Guidelines. Means the May 2015 edition of the of the *Rehabilitation Therapy Utilization Guidelines for the Care and Treatment of Injured Workers*, as policy for the determination of compensability of appropriate and reasonable physical, occupational and speech therapy treatment in the provision of care for injured workers. These guidelines are available upon request through the Division and may be obtained on-line at: http://www.wyomingworkforce.org/providers/
- (rr) Remuneration. Except as provided in W. S. § 27-14-102 (a)(ix), if board, lodging or any other payment in kind, considered as payment for services performed by a worker, is in addition to or in lieu of a monetary wage, the Division shall determine or approve the cash value of such payment in kind, and the employer shall use these cash values in computing the employee's wages and contributions due under the law. Remuneration shall not include per diem payments, if the employer maintains an "Accountable Plan" as required in Chapter 2, Section 14 of these rules.
- (ss) Specimen means tissue, fluid, or a product of the human body capable of revealing the presence of alcohol, drugs or their metabolites.
- (tt) Suitable Employment. Employment for which the worker has the necessary physical capacities, knowledge, transferable skills and abilities. W. S. § 27-14405(h)(iii).
- (uu) Under the Influence of a Controlled Substance means pursuant to W. S. §27-14-102(a)(xi)(B)(I) a positive drug test conducted in accordance with the U.S. DOT drug and alcohol testing regulations from an HHS-certified laboratory.
- (vv) United States Territories. United States territories include: American Samoa, Bajo Nuevo Bank, Baker Island, Howland Island, Guam, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Northern Mariana Islands, Puerto Rico, Serranilla Bank, U.S. Virgin Islands and Wake Island, W. S. § 27-14-301(a)(ii).
 - (ww) University of Wyoming:

- (i) UW Professionals with Lab. Professional faculty, administrators, and support personnel of institutions of learning whose duties include performing in a scientific laboratory environment.
- (ii) UW Professional without Lab. Professional faculty, administrators, and support personnel of institutions of learning whose duties do not include performance in a scientific laboratory environment.
- (iii) UW Clerical. Support staff of institutions of learning who typically work in an office environment, whose duties do not include performing in a scientific laboratory environment.
- (iv) UW Non-Professional. Positions not defined in (i), (ii) or (iii) of this subsection.
- (xx) Usual and Customary. The provider's charge to the general public for the same or similar service.

Section 4. Rules of Procedure for Hearings before the Workers' Compensation Division.

(a) Applicability. These rules and procedures shall apply to all contested cases, as defined by the Wyoming Administrative Procedure Act (W. S. §§ 16-3-101 through 115), which are not required to be referred to the Office of Administrative Hearings (OAH) or Workers' Compensation Medical Commission. For example, this section shall govern contested cases over such matters as rate classification and the Division's annual premium rate filing.

(b) Definitions.

- (i) Department. The Department of Workforce Services.
- (ii) Director. The Director of the Department of Workforce Services or the Director's deputy, examiner or assistant appointed by the Director in writing.
- (iii) Petitioner. The person(s) or organization(s) requesting a hearing as provided in the Wyoming Workers' Compensation Act and the Administrative Procedure Act.
- (iv) Hearing. The evidentiary proceeding in any "contested case" as defined in the Wyoming Administrative Procedure Act which is not required to be referred to the Office of Administrative Hearings (OAH) or Workers' Compensation Medical Commission.
- (v) Hearing Officer. The Administrator of the Division or such person or persons as the Administrator designates in writing to preside over the contested case and conduct the hearing. No person shall serve as hearing officer who directly participated in making the determination which is the subject of the contested case.

- (vi) Commencement of Case. All contested case proceedings shall be commenced by filing a written petition/request for hearing with the Division. The petition shall include:
 - (A) The name, address and telephone number of each petitioner.
- (B) A statement of the facts upon which the petition is based, including, whenever applicable, particular reference to the determination, statutes, rules, regulations and orders that the applicant believes are relevant to the case.
 - (C) The determination or other relief requested by the petitioner.
- (c) Notice upon filing of a petition. The Division shall issue a notice as required by the Wyoming Administrative Procedure Act, stating:
 - (i) The time, place and nature of the hearing;
 - (ii) The legal authority and jurisdiction under which the hearing is to be held;
 - (iii) The particular sections of the statutes and rules involved; and
 - (iv) A short and plain statement of the matters asserted.
- (d) Service of Notice. Notice may be served personally, by mail or by publication, as provided by the Wyoming Administrative Procedure Act. Service by mail shall be deemed complete at the date of mailing. The hearing officer may require additional notice to be given in such manner, as the hearing officer shall direct.
- (e) Docket. When a petition/request for hearing is filed, it shall be assigned a docket number in accord with a system established by the Division. The Division shall establish a separate file for each hearing in which shall be systematically placed all related papers, pleadings, documents, transcripts, evidence and exhibits. All documents filed in the case shall note the docket number assigned and the date of filing.
- (f) Subpoenas. As authorized by the Administrative Procedure Act and Workers' Compensation Act, subpoenas for appearance and to produce books, papers, documents or exhibits will be issued by the hearing officer upon written request of any party.
- (g) Hearing. At the date, time and place of hearing, the hearing officer shall hear all matters presented in accord with the Wyoming Administrative Procedure Act. Parties shall appear in person or by telephone and may be represented by counsel, provided that such counsel be duly authorized to practice law in the State of Wyoming or is otherwise associated at the hearing with one or more attorneys authorized to practice law in this State.
- (h) Order of Procedure at Hearing. Hearings shall generally be conducted informally, in accordance with the following procedure:

- (i) The hearing officer shall announce that the hearing is convened, the title of the matter and case to be heard and shall note for the record all subpoenas issued and all appearances. The hearing officer shall state that the hearing is informal, that strict rules of evidence will not apply, and shall briefly describe the method in which the hearing will be conducted.
- (ii) Short opening statements may be permitted at the discretion of the hearing officer.
- (iii) Presentation of evidence by petitioner(s). Witnesses may be cross-examined by the Division or other parties. All exhibits shall be marked for identification.
- (iv) Presentation of evidence by the Division. Witnesses may be cross-examined by the other parties. All exhibits shall be marked for identification.
- (v) Closing statements or arguments may be made at the discretion of the hearing officer.
- (vi) After all proceedings have been concluded, the hearing officer shall excuse all witnesses and declare the hearing closed. The record may be supplemented with additional evidence or written briefs at the discretion of the hearing officer and within such time as directed by the hearing officer.
- (i) Witnesses to be Sworn. All persons testifying at any hearing shall stand and be administered the following by the hearing officer: "Do you swear (or affirm) to tell the truth, the whole truth and nothing but the truth in this hearing now before the hearing officer?"
- (j) Applicable Rules of Civil Procedure to Apply. The Wyoming Rules of Civil Procedure shall apply and be followed in hearings before the Division to the extent not inconsistent with these rules.
- (k) Presence of Attorney General. In all hearings before the Division, the Division may request the Attorney General of the State of Wyoming, or a representative of his staff, to be present to assist and advise the Division.
- (l) Record of Proceedings-Reporter. Hearings shall be electronically recorded unless a party provides for a court reporter at its own expense. The hearing officer may direct the party or parties requesting a transcript to assume the cost of the transcript.
- (m) Depositions. In all contested cases the taking of depositions and discovery shall be available to the parties as provided in the Wyoming Rules of Civil Procedure and the Administrative Procedure Act.
- (n) Decision, Findings of Fact and Conclusions of Law, and Order. The hearing officer shall make a written decision and order containing Findings of Fact, Conclusions of Law and Recommended Decision. Such decision and order shall be filed with the Division within fifteen (15) days of the close of the hearing. The Division shall send a copy by prepaid mail to

each party or their attorneys of record. The Administrator shall act on the recommendation of the hearing officer within thirty (30) days of receiving the hearing officer's report.

- (o) Appeals to District Court. Appeals to the district court from decisions of the hearing officer are governed by the Wyoming Administrative Procedure Act and Rule 12 of the Wyoming Rules of Appellate Procedure.
- (p) Transcript in Case of Appeal. In case of an appeal to the district court, the party appealing shall secure and file a transcript of the testimony and all other evidence offered at the hearing, which transcript must be verified by the oath of the person who transcribed the testimony as a true and correct transcript of the testimony and other evidence in the case. The compensation of the person making the transcript and all other costs involved in the appeal shall be borne by the party prosecuting the appeal unless otherwise ordered by the district court at the conclusion of the appeal.
- (q) Pre-Hearing Conference. At any time on or before the day of any hearing, the hearing officer may direct the parties to appear before the hearing officer for a pre-hearing conference. Such conferences shall be conducted informally. The hearing officer shall prepare an order reciting or shall read into the record the results of the conference. The pre-hearing order will control the course of the hearing unless modified by the presiding officer to prevent manifest injustice. A party who believes a pre-hearing order does not fully cover the issues presented, or is unclear, may petition for a further ruling within ten (10) days after receipt of the order. The pre-hearing conference shall be convened to consider:
 - (i) The simplification of the issues;
 - (ii) The necessity or desirability of amending the pleadings;
- (iii) The possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;
 - (iv) Formulating additional procedures to govern the hearing; and
 - (v) Other matters as may aid in the disposition of the case.
- (r) Additional Rules for Contested Ratemaking Proceedings. The following additional rules shall apply to contested cases involving the Division's annual rate filing pursuant to W. S. § 27-14-201(c) *et seq*.
- (i) Any employer wishing to contest the rate filing shall file a written request for hearing with the Division, received by the Division no later than thirty (30) days after the mailing of the proposed rates by the Division. Counsel for any employer shall enter a written appearance within the same time period.
- (ii) The contested rate hearing shall be held no later than seventy-five (75) days after the mailing of the proposed rates by the Division. Only those employers who fileda

timely written request for hearing directly or through counsel will be permitted to participate in the hearing.

- (iii) Written interrogatories shall be filed no later than thirty (30) days before the scheduled hearing date. Responses to interrogatories shall be served on the requesting party ten (10) days after receipt of the interrogatories. Depositions shall be completed at least ten (10) days before the hearing.
- (iv) Pre-hearing conferences may be conducted informally by the hearing officer, without prior written notice if such notice is impractical, but the hearing officer shall keep a detailed log of the date, time and subject matter of all contacts by parties to the contested case. Such log shall be made a part of the formal record in the case.
- (v) At the hearing, those employers wishing to make an unsworn statement may do so in writing or shall be heard before the taking of any sworn testimony or evidence. Unsworn statements shall not be subject to cross-examination. The Division shall proceed next, presenting evidence in support of the rate filing, followed by those employers desiring to present sworn testimonial and documentary evidence against the proposed rate filing.
- (vi) All parties shall have an opportunity to present proposed findings of fact and conclusions of law within ten (10) days after the close of the evidence.
- (vii) The hearing officer shall render findings of fact, conclusions of law and recommended orders within thirty (30) days after the close of the evidence, and shall serve such findings, conclusions and orders upon the Administrator, Director, and all employers and counsel of record. The Director shall act on the recommendations of the hearing officer by written decision within thirty (30) days of receiving the hearing officer's report.

Section 5. Hearing Requests Regarding Timeliness.

(a) Hearing. Upon timely request or appeal, the party filing or paying in an apparently untimely manner shall be given a hearing on the question of the timeliness of the filing or paying.

Section 6. Rules Governing Public Records Requests.

Repeal (2020).

CHAPTER 2

EMPLOYER COVERAGE, COMPLIANCE, AND DISCOUNT PROGRAMS

Section 1. General.

- (a) Application for Determination of Coverage. No employer subject to the Wyoming Workers' Compensation Act, Wyoming Statute § 27-14-101, et seq., shall commence business or engage in any work in Wyoming without applying for coverage and receiving a statement of coverage from the Division. The application shall supply such information as the Division requests regarding the nature, location, extent and duration of the intended work. Employers determined by the Division to be non-resident employers must comply with the bond or security requirements of W.S. §§ 27-1-106 and 27-14-302; a non-resident employer is defined in W.S. § 27-14-102(a)(xiii).
 - (b) Proof of Coverage (POC) Certificate.
- (i) For the purposes of W.S. § 27-14-306 a POC certificate shall further include all of the following:
 - (A) The applicable time-frame of the certificate; and
- (B) A statement as to the applicability of insurance coverage for employees of the nonresident employer, to specifically address employees that are Wyoming residents; and
- (C) A list of all employees who are insured under the proof of coverage certificate.
- (c) Employer Number; Corporations. Every employer participating under the Act shall be assigned an employer number by the Division. Employers who are incorporated must provide a copy of the certificate of authority issued by the Secretary of State of Wyoming authorizing the employer to do business in the state of Wyoming. A copy of the corporate minutes that identifies the corporate officers of the corporation must also be filed with the Division.
- (d) Reports When No Premiums Have Accrued. Every employer subject to the Act is required to send in the regular reports even though no premiums have accrued with respect to a particular reporting period. Employers shall file reports for such period and shall continue to file such reports until the Division has received and approved a notification to discontinue filing reports.

Section 2. Successor Employer.

- (a) For purposes of W.S. § 27-14-207(b), "account" includes: premium rate, experience modification rating, premium credit program, safety discount program, drug and alcohol testing discount program, health and safety consultation discount program, and outstanding accounts receivable including past due or delinquent premium, interest, penalties, small employer group credit, and claims reimbursement, until recalculated for the subsequent rate year.
- (b) For purposes of W.S. § 27-14-207(c), "account" includes: premium rate, experience modification rating, premium credit program, safety discount program, drug and alcohol testing discount program, health and safety consultation discount program, and small employer group credit, until recalculated for the subsequent rate year.

Section 3. Experience Rating.

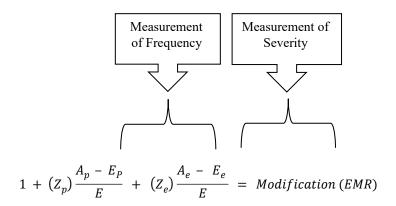
- (a) One (1) experience modification rating (EMR) shall be assigned to each employer number for those eligible employers under the Act. An employer who elects to establish a separate employer number for each separate legal entity of the employer's businesses shall be assigned an experience rating for each employer number.
- (b) An employer's EMR is computed by using three (3) years claims experience [or maximum available portions of three (3) years] for each eligible employer.
- (i) Private sector employers will receive an EMR based on three (3) years claims experience effective January 1 of their fifth (5th) calendar year.
- (ii) Public sector employers will receive an EMR based on three (3) years claims experience effective July 1 of their sixth (6th) fiscal year.
- (c) Pursuant to W.S. § 27-14-207(j), the non-resident employer must direct their insurance company to submit their EMR history directly to the Division.
- (i) If a non-resident employer expanding or moving their operations to Wyoming has previously been self-insured, and does not have any experience history available from a third party workers' insurance company, they will be assigned an EMR of one (1) and will be charged at the industry base rate for their classification.
- (ii) The Division will use the employers experience history to calculate the EMR according to the current EMR split-plan calculation.
- (d) For an employer having less than one (1) full year (private employers follow a fiscal year; public employers follow a calendar year) of premium obligation during the EMR period, the employer's EMR will be equal to a modification of one (1).

- (e) For an employer having greater than one (1) full year of premium obligation during the EMR period, but less than three (3) full years of premium obligation, the actual premium obligation will be based on the employer's actual experience as recorded by the Division in the quarterly or monthly reports in the premium year.
- (f) The Division, through the qualified actuary, as defined by W.S. § 27-14-201(b), shall annually determine key parameters of the EMR plan to meet the requirements of W.S. § 27-14-201(d). The Division will notify each employer who qualifies for an EMR of the key parameters, (i, ii, iii) of this sub-section, on the yearly EMR notice. The key parameters will also be published on the Division website for any employer to inspect.
- (i) Split Point. The claim cost amount at which an employer's EMR moves from the measure of frequency to the measure of severity.
- (ii) Group Premium Rate. There will be five (5) groups for premium bands. Each Group Premium Rate will have a credit/debit maximum percent amount to affect the employer's EMR. At no time shall this exceed +/- eighty-five percent (85%). Individual employer groups are based on the amount of premium over a three (3) year period and the actuarial process.

```
Group 1 not to exceed +/- 20%
Group 2 not to exceed +/- 25%
Group 3 not to exceed +/- 45%
Group 4 not to exceed +/- 65%
Group 5 not to exceed +/- 85%
```

- (iii) Chargeable Minimum and Maximum There will be a claim cost minimum on medical only cases, which are not ratable to the employer and will not affect the EMR. There will also be a claim cost maximum at which point claim cost above the maximum single loss are not ratable and will not affect the EMR.
- (g) For employers in Group I, the experience adjustment for claims occurring within the three (3) year EMR period shall be as follows:
- (i) Zero percent (0%) if the employer's account has been charged with one (1) claim which exceeds the annual minimum claim cost amount.
- (ii) Twenty percent (20%) penalty if the employer's account has been charged with two (2) or more claims which exceed the annual minimum claims cost amount.
- (iii) Twenty percent (20%) credit if the employer's account has not been charged with a claim exceeding the annual minimum claims cost amount.

(h) The formula for computing the split plan EMR is defined below.



Where: Zp = Credibility Primary Value

Ap = Actual Primary Losses

Ep = Expected Primary Losses

Ze = Credibility Excess Value

Ae = Actual Excess Losses

Ee = Expected Excess Losses

E = Expected Losses

(See Glossary of Terminology in Section 15.)

- (i) Contesting EMR. Any employer may contest the annual EMR or case reserve amounts assigned by the Division. Contest shall be made by filing a written objection with the Division within thirty (30) days after notification by the Division as provided in W.S. § 27-14-201(h). The Division shall resolve the matter administratively within forty-five (45) days after the filing of the objection. If the matter is not resolved within forty-five (45) days then the Division shall refer the objection to an independent hearing officer appointed for such purpose, pursuant to these rules and the Wyoming Administrative Procedure Act.
- (j) Contesting Chargeability of Claims Costs. An employer may apply for non-chargeability of claims costs pursuant to W.S. § 27-14-201(d).
- (i) An employer who is current on premium payments required by the Act may contest the chargeability of claims costs by filing a written application with the Division on a form supplied by the Division.
- (ii) The application to determine chargeability must be filed no later than one (1) year after the determination of compensability for an injury occurring on or after July 1, 2015.

- (iii) Upon receipt of said application, the Division shall schedule a time and date for a hearing. The employer shall be notified of the time and date of the hearing.
- (iv) The hearing shall be conducted pursuant to the Division's Rules, Chapter 1, Section 4 or https://rules.wyo.gov/Search.aspx?mode=1
- (v) The hearing shall be conducted by a panel from the Division, including the Administrator of the Workers' Compensation Division, the Program Manager of Employer Services, the Program Manager of Claims, the District Manager from the appropriate district, the claims analyst assigned to the underlying claim, a representative from OSHA, and a representative from the Attorney General's Office.
- (vi) The employer will present its case to the panel after which the panel shall take the issue under advisement and issue a written, final determination.
- (vii) If an employer fails to appear for the hearing, the initial determination on chargeability will become the final agency action.
- **Section 4.** Classifications. The employer shall provide a true and accurate description of its business operations prior to commencing operations, which require coverage under the Act for eligible workers in the State of Wyoming. The employer is required to notify the Division in writing of any change in business operations, which affect the industrial classification of the business for purposes of workers' compensation. The employer shall grant reasonable access to the Division's representative to verify information provided by the employer with respect to the business operations.
- (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 via the Internet or in a printed manual dated 2002 or later. 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.
- (b) Classification Revisions. The Division shall correct industrial classifications which it determines to be incorrect. The Division shall give the employer written notification of any change in industrial classification and such changes shall become effective on the first day of the reporting period following the reporting period in which the Division gives written notification.
- (c) Contesting Classification. Any employer may contest the industrial classification assigned by the Division. Contest shall be made by written objection to the Division within thirty (30) days of the employer's notification of the classification assigned by the Division. The

Division shall resolve the matter administratively within forty-five (45) days or refer the objection to an independent hearing officer appointed for such purpose, pursuant to the Wyoming Administrative Procedure Act.

- **Section 5. Audits.** Investigation and examination of an employer's records may be conducted in accordance with W.S. § 27-14-803. The Division may examine books, accounts, payrolls or the business operation of any employer to determine if the employer has engaged in activity in violation of the Act, to verify information provided to the Division by the employer, and for the administration of this Act. The employer shall grant reasonable access to the Division's representative to examine information pertinent to the employers' business operations.
- (a) Audit Procedures. The Division's representative will conduct an audit and review the preliminary findings with the employer. These audit findings will then undergo final review by the Division with correction of any findings, which it determines to be incorrect. The Division will then issue a Final Audit Determination Notice to the employer upon completion of the audit.
- (i) Any unreported payments made to any individual, as found in an audit of an employer's records, shall be presumed to be unreported gross wages unless documentation is provided by the employer that the individual meets the statutory requirements of W.S. § 27-14-102(a)(xxiii) as an independent contractor. The burden is upon the employer to provide such documentation.
- (b) Contesting Audit. Any employer may contest the audit conducted by the Division. Contest shall be made by filing a written objection with the Division within thirty (30) days after notification by the Division as provided by the Final Audit Determination Notice. The Division shall resolve the matter administratively within forty-five (45) days or refer the objection to an independent hearing officer appointed for such purpose, pursuant to the Wyoming Administrative Procedure Act.

Section 6. Non-Resident Employers' Surety Bond.

- (a) Pursuant to W.S. § 27-1-106, all firms, corporations or employers of any kind who are non-resident employers as defined in W.S. § 27-14-102(a)(xiii) and expect to pay wages above the set statutory threshold in the state of Wyoming, are required to file a surety bond or other security with the Division.
- (b) Non-resident employer definitions for: Individual, Sole Proprietor, Limited Liability Company (LLC), Limited Liability Partnership (LLP), Limited Partnership (LP), and/or Corporations:
- (i) Employer and/or Individual or Sole Proprietor is not domiciled in Wyoming for at least twelve (12) months; or

- (ii) If any partner or LLC, LLP or LP member is not domiciled in Wyoming for at least twelve (12) months; or
- (iii) If more than three fourths (3/4) of the capital stock of the business is owned by individuals not domiciled in Wyoming for at least twelve (12) months (Corporations).
 - (c) Employers are exempt from security if:
- (i) Expected wages paid to Wyoming employees are below the set threshold per W.S. § 27-1-106; or
- (ii) Employer is a charitable or religious organization as defined in W.S. § 27-1-106(g).
- (d) Acceptable Forms of Security. A surety bond or security can be filed with the Division in the form of:
 - (i) Cash bond;
 - (ii) Surety bond;
 - (iii) Letter of credit; or
- (iv) Real property. Real property may be pledged in lieu of a bond if the non-resident employer delivers the following documentation on real property located in Wyoming to the Division.
- (A) An appraisal on the subject property conducted by a licensed Wyoming appraiser that is ninety (90) days old or less which shows the value of the subject property is greater than the amount of the required bond;
- (B) A title policy or other certification issued by a Wyoming title company showing that the subject property is owned by employer and is free from any other liens or encumbrances; and
- (C) A recordable instrument signed by a duly authorized representative of the employer noting the Department's lien interest in the subject property.
- (e) Duration. Surety bond or security is required for a minimum of two (2) years. This may be extended if the employer does not comply for the two (2) year period.
- (f) Penalties. The penalties for willful failure of any covered non-resident employer to give bond or other security are contained in W.S. § 27-14-307.
- (g) Forfeiture. Prior to proceedings for forfeiture of a bond by a non-resident employer, the Division shall notify the employer in writing of the events triggering a possible

forfeiture, the amount of the bond to be forfeited, and the employer's right to avoid forfeiture by paying an equivalent amount to the Division within thirty (30) days. The amount to be forfeited shall be the sum of the following:

- (i) The remaining reserved amounts for compensable injuries to the employer's workers less the cumulative premiums paid by the employer;
- (ii) All unpaid premiums, penalties and interest accruing as a result of late payment or non-payment of said premiums, and reasonable auditing expenses; and,
- (iii) Any and all amounts due to the Department of Workforce Services and, any other section under W.S. Title 27 Labor and Employment.

Section 7. Deductible Program.

- (a) Pursuant to W.S. § 27-14-201(t)(i), an employer may apply to participate in a deductible program. Employers must apply for the deductible program in writing on a form prescribed by the Division. Terms of the deductible program shall be defined by contract entered into between the employer and Division.
- (b) The Division may require applying employers to undergo a financial audit to ensure financial stability. The audit may include a credit check and review of company financial reports. The Division shall analyze each applicant based on risk analysis and sound business practices. The Division may refuse any applicant into the deductible program if it determines that the proposed contract does not represent a sound business practice or decision.
- (c) For any employer enrolled in the deductible program, the Division will process and pay claims in accordance with the Act. The employer shall reimburse the Division for all costs paid by the Division on individual claims up to the amount of the contractually agreed deductible.
- (d) The deductible levels available are: \$1,000.00, \$5,000.00, \$10,000.00, \$25,000.00, \$50,000.00, \$75,000.00, or \$100,000.00. The maximum deductible level offered to an employer by the Division shall not be more than fifty percent (50%) of the employer's standard premium.
- (e) The amount of the contractually agreed upon deductible will be applied to the employer's industry base rate before any discounts under, Sections 8-10, of this chapter are calculated and applied.

Section 8. Safety Program; Employer Discount.

(a) Pursuant to W.S. § 27-14-201(o) employers may receive a premium base rate discount, as determined through the Division's premium rate setting process for its employment classification, by participating in a safety program.

- (b) Employers must have at least one (1) employee to participate in the program, establish and maintain certificates of good standing with Wyoming Workers' Compensation, Unemployment Insurance, and the Secretary of State. Certificates of good standing shall be reviewed on an annual basis to ensure compliance. If certificates of good standing cannot be established and maintained by the employer, that employer shall be disqualified from the program until such time as the employer reapplies for the program and all program requirements have been met.
- (c) Pursuant to W.S. § 27-14-803 and in accordance with Section 5 of this chapter, the Division may investigate and examine the employer's documentation as pertains to compliance with its approved health and safety program(s). If the Division finds the employer to be in noncompliance after reviewing the relevant documentation, participation in the employer base rate discount program may be revoked or reduced.
- (d) This program shall comply with some or all of the following provisions dependent on the level of discount participation:
- (i) A formal, written declaration by the company's safety coordinator explaining the company-wide loss prevention policy;
 - (ii) A formal creation of a safety committee with at least one member;
- (iii) Employees have undergone appropriate hazard and injury prevention training as necessary for their job;
 - (iv) Written policies/procedures on claims management; and
- (v) A substance abuse training plan along with written policies and procedures establishing a drug-free workplace, which may include an employee assistance program to assist employees with alcohol or other drug problems. These policies shall be posted in a conspicuous place where they may be regularly viewed by employees:

(A) The policy shall:

- (I) Establish that the unlawful use, possession, transfer or sale of illegal drugs or controlled substances and the misuse of alcohol by employees during work hours are prohibited;
- (II) Provide an explanation of the consequences of violation of the employer's drug-free policy, which may include a referral for therapeutic help, discipline and/or discharge; and
- (III) Encourage the designation of totally or partially smoke free workplace.

- (B) Employers shall post a list of community resources that provide substance abuse treatment and prevention services in a conspicuous place where they may be regularly viewed by employees. The Wyoming Department of Health shall provide the list on the website of the Substance Abuse Division or in hard copy to employers requesting the list.
- (C) Employers are not required to pay the costs of treatment or any other intervention to qualify for the safety discount program.
- (D) Employers enrolling on or after the effective date of these rules shall comply with the drug-free workplace requirements upon enrollment.
- (e) Applications to participate in this program may be submitted to the Division at any time, and upon approval, premium base rate discounts shall be implemented in the subsequent calendar quarter.
- (i) To receive a three and one-third percent (3.33%) discount to its premium base rate, an employer must have a documented health and safety program;
- (ii) To receive a six and two-third percent (6.66%) discount to its premium base rate, an employer must have a documented health and safety program and have an established Health and Safety committee with documented monthly safety meetings; and
- (iii) To receive a ten percent (10%) discount, an employer must meet the above requirements and achieve and maintain a loss ratio of equal to or less than ten percent (10%).
- (f) Premium base rate discount renewals shall be in effect each year only in the event that a renewal application has been submitted along with any updates to the employer's Health and Safety policy. If an audit is conducted and the employer is found to be out of compliance with any of the previous requirements the employer shall be removed from the program until such time as the employer reapplies for the program and all program requirements have been met.

Section 9. Drug and Alcohol Testing Program; Employer Discount

- (a) Pursuant to W.S. § 27-14-201(o), employers may receive a premium base rate discount, as determined through the Division's premium rate setting process for their employment classification, by participating in a drug and alcohol testing program approved by the Division.
- (b) Employers must have at least one (1) employee to participate in the program, establish and maintain certificates of good standing with Wyoming Workers' Compensation, Unemployment Insurance, and the Secretary of State. Certificates of good standing shall be reviewed on an annual basis to ensure compliance. If certificates of good standing cannot be established and maintained by the employer, that employer shall be removed from the program until such time as the employer reapplies for the program and all program requirements have been met.

- (c) Applications to participate in the drug and alcohol testing program may be submitted to the Division at any time and, upon approval, premium base rate discounts shall be implemented in the subsequent calendar quarter.
- (d) Upon receipt of a completed application, the Division shall review the application for compliance with these rules and either approve or deny the application. The Division shall deny an application if an applicant fails to meet all of the requirements of these rules. The Division shall also refuse to renew an application if the employer no longer meets or has violated any provision of these rules.
- (e) After approval or renewal, the applicable premium base rate discount shall be applied to the following four (4) calendar quarters unless revoked pursuant to these rules.
 - (f) Applications shall be submitted annually.
- (g) Applications shall include the employer's name, employee's printed name and title of the officer/owner, signature of the officer/owner, and date attesting the information contained in the application is a true and factual representation of the drug-free workplace program. A drug-free workplace program shall contain all of the following:
 - (i) The written policy, which shall include all of the following:
- (A) A statement providing for inclusion of all Workers' Compensation covered employees in the substance abuse testing program.
 - (B) A statement of required types of substance abuse testing.
- (C) A statement of actions the employer may take against an employee or job applicant on the basis of a positive confirmed test result.
- (D) A statement of consequences of an employee's or job applicant's refusal to submit to a drug test.
 - (E) A general confidentiality statement.
- (F) A statement advising employees with a positive confirmed test result that he or she may contest or explain within five (5) working days after written notification of the test result.
- (G) A statement informing an employee or job applicant of the federal Drug-Free Workplace Act, if applicable.

- (H) A statement affording provision of a sixty (60) day notice prior to implementation of substance abuse testing, if a new policy is implemented in order to enter into this discount program.
- (I) A statement that substance abuse testing is required to be on vacancy announcements, when applicable.
- (J) A statement informing employees where substance abuse testing information is posted on the employer's premises.
- (K) A statement informing employees and job applicants that copies of the substance abuse policy are available in a suitable location on the employer's premises.
- (ii) Substance abuse testing, to the extent permitted by federal codes, Wyoming state statutes, and local ordinances, shall include all of the following:
- (A) Pre-employment, random, reasonable suspicion and post-accident testing.
- (B) Drug and alcohol testing protocols as specified in Chapter 10, Section 2 shall apply to all random, reasonable suspicion and post-accident testing.
- (I) Pre-employment substance abuse testing is exempt from the protocol as specified in Chapter 10, Section 2, with strong recommendation that one hundred (100%) percent of new employees be tested prior to his/her hire date. Alcohol testing is not required for job applicants.
- (II) For random and reasonable suspicion testing, a commercially available urine or hair follicle test consisting of synthetic amphetamines; amphetamines; synthetic marijuana "spice"; marijuana; cocaine; opiates and PCP with specific gravity incorporating Substance Abuse and Mental Health Services Administration (SAMHSA) cutoff levels shall be utilized by a Third Party Administrator. A negative test shall require no further testing unless use of another drug not included on the on-site test is suspected, in such case the sample would be processed as if it were a positive on-site test. A positive drug or low specific gravity onsite urine test shall be immediately processed pursuant to Chapter 10, Section 2. Protocol shall require transfer of the specimen in front of the employee to a container supplied by a certified laboratory, and sealed per instruction with the employee initialing the evidence seal.
- (III) Post-accident testing shall be exclusively processed per Chapter 10, Section 2 with strong recommendation that the specimen be a blood sample.
- (C) To the extent permitted by federal codes, Wyoming state statutes, and local ordinances, random testing shall be conducted, at a minimum, on twenty percent (20%) of the average staff on an annual basis.

- (iii) Resources must be made available for employee's needing assistance. Such assistance must include either a statement advising employee of an Employee Assistance Program (EAP) or a statement advising employee of employer's resource file of assistance programs and other persons, entities, or organizations designed to assist employees with personal or behavior problems.
- (iv) Employee Education. The employer shall provide at least one (1) hour of employee substance abuse education training per year. Employers shall retain records, to include attendees' signatures, and dates and training topics, to document employee participation in education.
- (v) Supervisor Training. The employer shall provide at least two (2) hours of substance abuse education training per year to all supervisors. Supervisors shall receive training to encompass at least sixty (60) minutes on alcohol misuse and at least sixty (60) minutes on drug use. Training shall incorporate physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of drugs. Employers shall retain records, to include attendees' signatures, and dates and training topics, to document supervisory participation in training.
 - (h) Drug-free workplace program compliance and revocation.
- (i) An employer shall maintain compliance with their drug-free workplace program during the time period for the discount program.
- (ii) An employer shall be responsible for document retention to substantiate compliance with the substance abuse testing provisions in the employer's approved annual drug free workplace program. An employer shall preserve such records for a period of two (2) years after the calendar year in which the respective program was approved by the Division.
- (iii) Pursuant to W.S. § 27-14-803 and in accordance with Section 5 of this chapter, the Division may investigate and examine the employer's documentation as pertains to compliance with their approved drug-free workplace program(s). If the Division finds the employer to be in noncompliance after reviewing the relevant documentation, participation in the employer base rate discount program for alcohol and drug testing will be revoked. Employers shall have their premium rates adjusted to the industry classification base rate as adjusted by the experience rating.
- (iv) The Drug and Alcohol Testing Program; Employer Discount shall be in effect each year unless an audit is conducted and the employer is found to be out of compliance with any of the program requirements. If the preceding occurs, the employer shall be removed from the program until such time as the employer reapplies for the program and all program requirements have been met.

Section 10. Health and Safety Consultation Employer Discount Program.

- (a) Pursuant to W.S. § 27-14-201(o), employers may receive a premium base rate discount, as determined through the Division's premium rate setting process for its employment classification, by participating in a health and safety consultation program.
- (b) Applications to participate in this program may be submitted to the Division at any time and upon approval premium base rate discounts shall be implemented in the subsequent calendar quarter.
- (c) Employers must have at least one (1) employee to participate in this program, establish and maintain certificates of good standing with Wyoming Workers' Compensation, Unemployment Insurance, and the Secretary of State. Certificates of good standing shall be reviewed on an annual basis to ensure compliance. If certificates of good standing cannot be established and maintained by the employer, that employer shall be disqualified from this program until such time as the employer reapplies for the program and all program requirements have been met.
- (d) Pursuant to W. S. § 27-14-803 and in accordance with Section 5 of this chapter the Division may investigate and examine the employer's documentation as pertains to compliance with its approved health and consultation safety program(s). If the Division finds the employer to be in noncompliance after reviewing the relevant documentation, participation in the health and safety consultation employer discount program may be revoked or reduced to a lower tier.
- (i) If an audit is conducted and the employer is found to be out of compliance, and/or an employer has a workplace related fatality, and/or an employer has an inspection where they are issued a repeat serious or willful citation during any time while receiving this discount they shall be immediately removed from the program until such time that they have abated all hazards and they have completed any other required obligations with state agencies. Upon completion of abatement and obligations the employer can reapply for the discount and all program requirements have been met.
- (e) Health and Safety Consultation Employer Discount Program premium base rate discounts shall be applied on a quarterly basis and be in effect for up to three (3) years.
 - (f) Discounts shall be calculated as follows:
- (i) To participate in the Tier 1 premium base rate discount of three percent (3%), an employer must complete:
 - (A) a full service, onsite survey; and,
 - (B) abates all serious hazards.
- (ii) To participate in the Tier 2 premium base rate discount of five percent (5%), an employer must complete:

- (A) a full service, onsite survey;
- (B) abates all serious hazards; and,
- (C) the Safety & Health Assessment Form. The employer must score 2's on the twenty (20) pre-selected items on the Safety & Health Program Assessment Form.
- (iii) To participate in the Tier 3 premium base rate discount of seven percent (7%), an employer must complete:
 - (A) a full service, onsite survey;
 - (B) abates all serious hazards;
- (C) the Safety & Health Program Assessment Form and score 2's on the twenty (20) pre-selected items on the Safety & Health Program Assessment Form; and,
- (D) obtain injury and illness rates known as the Total Recordable Cases (TRC) and Days Away Restricted Time (DART) below the Bureau of Labor Statistics (BLS) current rates for their company per North American Industry Classification (NAIC's) code.
- (iv) To participate in the Tier 4 premium base rate discount of ten percent (10%), an employer must complete:
 - (A) a full service, onsite survey;
 - (B) abates all serious hazards;
- (C) the Safety & Health Assessment Form and score 3's on 10% and 2's on the remaining items to complete all 58 items on the Safety & Health Assessment Form; and
- (D) obtain injury and illness rates known as the Total Recordable Cases (TRC) and Days Away Restricted Time (DART) below the Bureau of Labor Statistics (BLS) current rates for their company per North American Industry Classification (NAIC's) code.
- (v) The Safety & Health Program Assessment Form shall be conducted by Wyoming OSHA Consultation or Compliance Assistance, a State Mine Inspector, Workers' Compensation Safety Specialist or a qualified third-party health and safety professional approved by the Department.
- (g) A third-party health and safety professional shall meet the following requirements to conduct audits and recommend discounts for this program:

- (i) complete and submit the Health & Safety Consultation Employer Discount application;
 - (ii) submit copies of any health or safety certificates/certifications,
- (iii) submits copy of health or safety degree or any other health and safety paperwork for approval consideration; and,
- (iv) include a copy of the letter from the State of Wyoming Office of the Attorney General, Division of Criminal Investigation's Western Identification Network or equivalent showing no criminal record.

Section 11. Specifically Enumerated Volunteers; Elected, County or Local Officials; School-to-Careers Program.

- (a) A governing body's election of coverage as defined in W.S. § 27-14-108(e)(ix), shall be on forms provided by the Division containing information as requested by the Division.
- (b) The school-to-careers program applies to those employers and participants who are not eligible for coverage under a qualifying employer-employee relationship. Participants under this program are not eligible for temporary total wage benefits under the Act.
- (c) If the school district or community college district chooses to make the reports and payments for the employer, the wage calculation will be based on the presumed pay of the participant. The premium rate used to calculate the payment will be that of the specific school district or community college district making the report. All claims will be reported and processed against the reporting school district or community college district.
- (d) If an employer-employee relationship exists, the participant will be treated as any other employee under the Act.

Section 12. Exclusions.

(a) Private Schools. Any private entity classified under NAICS 519 and 611 Education Services, is excluded from coverage under the Act, unless an election of coverage is made as provided in W.S. § 27-14-108(j).

Section 13. Concurrent Coverage.

(a) Employers covered under the Act having employees working in a state that requires workers' compensation coverage in addition to the employer's Wyoming coverage, must submit written proof of coverage from the other state. The employer may then submit its payroll report, which lists only the wages paid for hours worked in Wyoming. The proof of coverage shall be submitted on forms required by the Division. When the Division receives proof of coverage, it

will not require premium payments and coverage in Wyoming during the time the employee is working and being covered in another state.

- (b) The employer and employee must notify the Division of any claim for benefits filed in another state for any injury reported in Wyoming. An employer's experience rating to be computed by using three (3) years (or maximum available portions thereof) of claims experience for each eligible employer.
- (c) Three (3) years claims experience shall begin July 1 of the fifth (5th) calendar year prior to the rating year and end June 30 of the second (2nd) calendar year prior to the rating year.

Section 14. Employer Reimbursements or Allowances for Employee Business Expenses.

- (a) Employer reimbursements or allowances of employee business expenses are not considered gross earnings if the employer has appropriate records to substantiate that an "accountable plan" has been established and implemented as follows:
- (i) There must be a business connection for expenses incurred while performing services as an employee, officer or member of the employer.
 - (ii) The expense must be reasonable.
- (iii) There must be actual accounting for the expense, by the employer and the employee, officer or member.
- (A) For travel expenses reimbursed at established federal per diem rates, documentation of the trip will be considered actual accounting.
- (B) For business entities with federally recognized expense allowances, the U. S. Treasury allowance will be considered actual accounting.
- (iv) All excess reimbursement or allowance must be repaid by the employee, officer or member to the employer within one-hundred and twenty (120) days after the expense was paid or incurred.
- (b) Payments that do not include all of the above or exceed federal per diem or federal allowances will be deemed to be wages gross earnings.

Section 15. Glossary of Terminology

(a) Actual (A) Losses. The incurred loss amounts for workers' compensation claims submitted by the employer, which have event dates in the three (3) year window of time used for experience rating. The losses will include the case reserves as of the evaluation date set by the

plan, and will have applicable plan minimums and caps applied for use in the experience rating formula.

- (b) Actual Excess (Ae) Losses. The Actual Excess Losses for each claim represents the more random and less controllable portion of the claim. For each claim, the Actual Excess Loss is computed as the difference between the Total Actual Loss for the claim and Actual Primary Loss for the claim.
- (c) Actual Primary (Ap) Losses. The experience rating plan segregates the Total Actual Loss on each claim into two components primary and excess. The Actual Primary Loss for each claim represents the more predictive and controllable portion of the claim. The Actual Primary Loss value for each claim is obtained by the formula: Actual Primary Loss = Total Actual Loss if Total Loss is less than ten thousand dollars (\$10,000.00); = ten thousand dollars (\$10,000.00) if Total Loss is equal to or greater than ten thousand dollars (\$10,000.00).
- (d) Credibility (Z) Value. A measure of the predictive value in a given application that the actuary attaches to a particular set of data, such as the claims experience used for determining EMRs.
- (e) Credibility Excess (Ze) Value. The Credibility Excess, or Ze Value, is the weight given to the risk's Actual Excess Losses relative to the average Expected Excess Losses for a similarly-sized risk in the same standard classification(s). It is intended to reflect the actuarial predictability of a risk's excess loss experience. The larger the risk is, the greater the weight is given to the excess loss experience and the greater the Ze. The excess experience of very small experience rated risks has essentially no predictive value and, as a result, the Ze for these risks may be zero (0). The complement of the Ze, (1 Ze), is the weight given to the risk's Expected Excess Losses. The Ze Value varies with a risk's Expected Losses.
- (f) Credibility Primary (Zp) Value. The Credibility Primary (Zp) Value, is the weight given to the risk's Actual Primary Losses relative to the average Expected Primary Losses for a similarly-sized risk in the same standard classification(s). It is intended to reflect the actuarial predictability of a risk's primary loss experience. The larger the risk is, the greater the weight is given to the primary loss experience and the greater the Zp. The complement of the Zp value (1 Zp), is the weight given to the risk's Expected Primary Losses. The Zp Value varies with a risk's Expected Losses.
- (g) Expected (E) Losses (also referred to as Total Expected Loss). The Expected Losses are the basis to which actual losses are compared in the experience rating formula. They are derived for each classification as the product of the payroll for the classification and the expected loss rate applicable to the classification. They are also computed as the sum of the Expected Primary Losses and the Expected Excess Losses. For other than per capita classifications, this product is then divided by one hundred (100). The Expected Loss Rate for a classification is the average rate of losses per one hundred dollars (\$100.00) of payroll that is expected for the classification during an experience rating period.

- (h) Expected Excess (Ee) Losses. The Expected Excess Losses are the portion of the Expected Losses that is considered excess, and are used in the experience rating formula in combination with the Actual Excess Losses. The Expected Excess Losses for a classification are determined by multiplying the Excess Expected Loss Rate for the classification per \$100 of employer payroll for the classification. The total Expected Excess Losses are the sum of the Expected Excess Losses over all classifications.
- (i) Expected Primary (Ep) Losses. The Expected Primary Losses are the portion of the Expected Losses that is considered primary, and are used in the experience rating formula in combination with the Actual Primary Losses. The Expected Primary Losses for a classification are determined by multiplying the Primary Expected Loss Rate for the classification by the employer payroll for the classification. The total Expected Primary Losses are the sum of the Expected Primary Losses over all classifications.
- (j) Multiple Claim Occurrence (MCO). Claims with multiple claimants or catastrophe claims combines claims together which then have a \$500,000.00 limit (2 X the Maximum Single Loss Amount of \$250,000.00).
- (k) Multiple Single Loss Amount. Maximum Single Loss is the maximum limit of incurred loss, not to exceed the state accident limit of \$250,000.00.
- (l) Split Plan. A method for calculating EMRs that balances the effect of more frequent losses that fall below a "split point" with more severe losses that occur above the split point.
- (m) Split Point. A loss amount determined by the state based on actuarial recommendations. Losses falling below the split point are considered Primary Losses. Any remaining losses above the Primary Losses and below the Maximum Single Loss Amount are considered the Excess Losses.
- (n) Maximum Loss Cap. The Maximum Loss Cap is the state's accident limit per a single claim or two (2) times the state's accident limit for multiple claimants or catastrophe.

CHAPTER 3

FAILURE OF EMPLOYER TO COMPLY

Section 1. Delinquency – Case Liability.

- (a) Employers will be charged for all injury case costs if the employers' account is in non-compliance in the following circumstances:
- (i) Delinquent During the Reporting Period the Injury Occurred. Employers whose accounts are in a delinquent status for the reporting period during which an injury occurred will be charged case costs for the life of any such injury.
- (ii) Injured Worker not Reported. Employers who omit the name of any injured worker on the Division's report form corresponding to the month of injury and fail to pay premium on that injured worker's earnings will be charged case costs for the life of any such injury.
- (iii) No Account on Date of Injury. Employers who fail to establish an account, or fail to reactivate an inactive account on any date of injury will be charged case costs for the life of any such injury.
- (b) Employers shall be deemed delinquent if premiums remain unpaid more than 30 days following the due date.

Section 2. Civil Liability.

- (a) When a payroll report or payment of premium is past due, pursuant to Wyoming Statutes § 27-14-202(a), the Division shall send to the employer a notice that the report and/or premium is past due and that the employer's account will become delinquent if the required report and payment are not postmarked within 30 days of the date due. When an employer's account becomes delinquent, the Division shall send to the employer a notice of delinquency.
- (b) For purposes of all penalties and rights of action under the Act, an employer shall be considered delinquent if a payroll report or any payment required by the Act is not postmarked within 30 days of the due date.
- (c) Applying Payments. When an employer makes a payment to the Division, the Division shall apply it to the oldest premium or interest owed by the employer unless the employer has specified in writing that the payment should be applied to a particular portion of the employer's debt. However, bankruptcy laws or reorganization plans take priority over the employer's written specification.
- **Section 3. Cancellation of Optional Coverage.** Coverage for an employer with optional coverage will be terminated if the account remains delinquent 30 days following notification by certified mail to the employer that the employer has been delinquent in reporting of payment of premium for one calendar quarter. The employer remains liable for the unpaid

premium and case cost reimbursement, as applicable, through the date of termination. Following termination under this section, the employer shall not be eligible for reinstatement of optional coverage for a period of six months.

- **Section 4. Notice to Administrator.** Employees of the Division who identify a possible violation by any party shall immediately notify the Administrator of the Workers' Compensation Division in writing.
- **Section 5. Waiver and Settlement Tax.** Upon good and sufficient cause, the Administrator of the Workers' Compensation Division may waive, compromise or otherwise settle any amount owed to the Division by an employer.
- **Section 6. Out of State Employers Experience Modification Rating.** If an employer who meets the criteria under Wyoming Statutes § 27-14-207(h) refuses or fails to provide the Division with the experience history from their insurance company, that employer will be assigned the maximum experience modification rating (EMR) of 1.85.

CHAPTER 4 - INJURY REPORT PROCEDURE

Section 1. Worker Report of the Injury. The report of the injury is not a claim for benefits. W.S. § 27-14-503(a). 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.

- **Section 2**. <u>Contents of the Worker's Report</u>. The report shall be on a form provided by the Division, available from the Division or employer, and shall contain the following information:
- (a) The worker's full name, mailing address, telephone number and Social Security Number;
 - (b) The worker's birth date, sex, marital status and number of dependents;
 - (c) The employer's full name, address and telephone number;
 - (d) The worker's date of hire and job title;
- (e) A statement of whether the worker is a regular worker, volunteer, inmate, a governmentally subsidized work experience program participant, or has an interest in the business as owner, partner, or corporate officer;
 - (f) The worker's current monthly earnings;
 - (g) The date, time and location of the accident or injury;
- (h) A statement of how the injury occurred, including what the worker was doing at the time and what objects or substances caused the injury;
 - (j) A statement identifying the parts of the worker's body affected by the injury;
 - (k) The name(s) of any witness(es) to the events causing the injury;
- (l) The names and addresses of all health care providers who have treated or provided medical services to the worker for the injury being reported;
- (m) If the report is prepared by a person other than the worker, the full name, address and telephone number of the person preparing the report, and that person's relationship to the worker;

- (n) Such additional information as the Division deems appropriate; and
- (o) The report form shall be signed and dated by the worker, or his personal representative if the worker is incapacitated.
- **Section 3**. Employer Report of the Injury. The employer must file a report of injury within ten days after the date on which the employer is notified of the injury. Failure by an employer to report may result in a fine or jail. W.S. § 27-14-506(c). The report must be filed with the Division; it shall be on the required form, dated, signed by the employer or employer's authorized representative and shall contain the following information:
 - (a) The worker's date of hire and job title;
- (b) A statement of whether the worker is a regular employee, volunteer, inmate, governmentally subsidized work experience program participant, or has an interest in the business as owner, partner or corporate officer;
 - (c) The worker's current monthly earnings;
- (d) The opinion of the employer as to whether the worker suffered a work-related injury that is compensable under the Act; and
- (e) If the employer's opinion is that the injury is not compensable under the Act, the employer shall specify its reason for that opinion. Those matters will be addressed by the Division as part of the determination process.
- **Section 4**. <u>Injury Report Forms.</u> Injury report forms are available, without charge, from the Division or its district offices. W.S. § 27-14-502(a) and (c). The limitation of time for filing does not apply if the worker is mentally incompetent or a minor and has no guardian. W.S. § 27-14-505. The report form shall contain a statement in boldface type that the report is not a claim for benefits.
- **Section 5**. **Notification of Injury.** Any affected party may give notice, by electronic means to the Division, of an occurrence of injury to a worker in covered employment. Upon receipt of notice of injury, the Division will mail the appropriate forms to the injured worker and the employer for completion and signatures.
- (a) If notification was electronically submitted within the deadline prescribed in W.S. § 27-14-502(a) and the Division receives the signed report within ten days of its mailing by the Division, the report shall be deemed to have been timely filed. In such a case, the Division's allotted time to respond will begin when it receives the signed report.
- (b) If the Division receives the signed report more than ten days after its mailing by the Division, the report shall be deemed filed on the date the signed report is received by the Division.

- (c) The Division will not approve any award nor pay any claim prior to its receipt of a signed waiver from the injured employee, on a form provided by the Division, authorizing the Division to release benefit, employment or medical information to those parties designated recipients in W.S. § 27-14-805(d).
- (d) Nothing in this section shall relieve any party of the duty to submit documents bearing original signatures, when required by the Act or these Rules.

CHAPTER 5 - DETERMINATIONS BY THE DIVISION: COVERAGE, COMPENSABILITY AND CLAIMS

Section 1. <u>Coverage.</u>

- (a) Upon receipt of the injury report, the Division will investigate and review the matter and will address questions of jurisdiction and compensability. The Division may gather additional facts prior to the determination. W.S. §§ 27-14-601(k) and 27-14-801(d). The procedures for review, determination, redetermination and request for hearing shall be as provided in Sections 2 and 3 of this chapter.
- **Section 2.** <u>Determination Procedure</u>. The following procedures apply to all determinations by the Division, including coverage/compensability determinations, all benefits claim applications, and all medical bill reviews.
- (a) The Division will review the matter 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.
- (b) At the earliest possible date within 45 days following the request for additional information, the Division will make 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.
- (c) 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.
- (d) The final determination shall be mailed to all affected parties at their last known addresses, and, when required by law, shall include a statement of reasons, and a notice of right to request a hearing and right to counsel. An affected party shall immediately notify the Division, in writing, of any change of address or physical residence.
- (e) <u>Objection</u>. 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. W.S. § 27-14-601. A timely written request for hearing is prerequisite to review by the appropriate hearing authority.

Section 3. Redetermination Procedure.

(a) The Division may issue a redetermination within one year following the issuance of a final determination if the Division receives sufficient information to establish the compensability of the case or claim. W.S. § 27-14-601(k)(vi).

- (i) The Division will not issue a redetermination, or award benefits to an injured worker, if information substantiating the compensability of a case or claim is submitted more that one year after the Division issued the final determination denying the compensability of the case or claim.
- (ii) The redetermination shall be formal written notification sent to the employee, employer, and known treating health care provider(s).
- (A) Any affected party may object to the Division's redetermination by filing a written request for hearing within 15 days following the issuance of the redetermination.
- (B) A timely request for hearing is prerequisite to review by the appropriate hearing authority.
- **Section 4.** Claims for Benefits . 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. A report of injury is not a claim for benefits. W.S. § 27-14-503(a). A claim for benefits may be filed by the injured worker, that worker's personal representative, or, in case of an injured worker who is mentally incompetent or a minor, the worker's legal guardian. In order to make an application, a claimant shall submit one of the following:
- (a) <u>Claim for Reimbursement.</u> A claim for reimbursement of any expense(s) incurred by an injured worker because of his work-related injury must be submitted on a form provided by the Division according to the procedure outlined in Chapter 7, Section 3(a)(iii) <u>Medical</u> Reimbursement to Injured Worker.
 - (b) <u>Claim for Temporary Total Disability (TTD) Benefits (Lost Wages).</u>
- (i) <u>When Submitted</u>. A claim for TTD must be filed within 60 days after the first day of certified temporary total disability. W.S. § 27-14-404(d).
- (ii) <u>Certification</u>. An award of TTD cannot be made without certification from a treating health care provider that the worker is temporarily and totally disabled (that is, incapacitated from performing any gainful employment for which the worker is reasonably suited by experience or training). The certification shall specify the reasons for the total disability and the expected period of disability.
- (iii) A physician assistant shall be deemed a health care provider for purposes of examinations and TTD certifications pursuant to W.S. §§ 27-14-404(d)(ii), 404(g) and 501(b), if the TTD certification is accompanied by or the Division has on file, a written statement, signed and dated by the supervising licensed physician, stating "I [insert name of physician] certify that the physician assistant signing this form has authority to do so and that the certification is provided under my supervision." W.S. § 33-26-502(b). Both the supervising physician and the physician assistant shall have a continuing duty to notify the Division immediately if a previously-designated physician assistant is no longer employed by the physician, is no longer

licensed as a physician assistant in Wyoming, or is no longer authorized by the physician to certify TTD.

- (iv) Where Submitted. A claim for TTD benefits must be filed with the Division. W.S. § 27-14-501(3).
- (c) <u>Claim for Temporary Partial (Light Duty) Disability (TPD</u>). An employer may make a written bona fide offer of temporary light duty work to an employee receiving temporary total disability in accordance with W.S. § 27-14-404(j).

(d) <u>Initial Claim for Permanent Partial Impairment (PPI) Benefits.</u>

- (i) When Submitted. An application for PPI benefits may be filed when a worker has suffered an ascertainable loss as defined in W.S. § 27-14-102(a)(ii).
- (ii) Applications For PPI Award. If a physician determines that the injury has resulted in a permanent impairment according to the *American Medical Association's Guide to the Evaluation of Permanent Impairment* or its successor, the physician shall notify the Division in writing. The Division shall file the written documentation of permanent impairment, copying all parties. Based upon the rating given by the physician, the worker may apply with the Division for the appropriate award, pursuant to W.S. §§ 27-14-405 or 406.

(e) Claim for Vocational Rehabilitation Benefits.

- (i) At any time after the injury when medical evidence indicates that an injured worker cannot return to employment as outlined in W.S. § 27-14-408(a)(ii) the worker may submit an application to the Division on a form provided by the Division for vocational rehabilitation benefits.
- (ii) The Division may extend or increase a rehabilitation program's limits defined in W.S. § 27-14-408(e)(ii) upon consideration of one of the following extenuating circumstances:
- (A) The injured worker's disability is so severe as to limit his ability to complete his vocational rehabilitation plan within specified time frames;
- (B) Medical services or complications prevent the injured worker from completing his vocational rehabilitation program on time;
- (C) The educational institution's scheduled course offerings prevent the injured worker from completing the vocational rehabilitation program on time; or
- (D) Any other circumstance mutually agreed upon by the Division, Division of Vocational Rehabilitation and the injured worker.

- (iii) The application for vocational rehabilitation shall include a statement that the applicant elects to accept vocational rehabilitation instead of any PPD award under W.S. § 27-14-405(h) and (j) arising from the same physical injury.
- (f) <u>Application for Permanent Partial Disability (PPD) Benefit.</u> An application for PPD may be filed no sooner than three months after the date of ascertainable loss or threemonths before the last scheduled PPI payment, whichever date is later. and must be filed within one year of the later date. W.S. § 27-14-405(h)(ii).

(g) <u>Miscellaneous Benefit Application</u>.

- (i) Applications for other benefits, including death benefits, permanent total disability, benefits for dependents or survivors, and extended benefits shall be made to the Division as soon as practical after the applicant becomes aware of entitlement to such benefits and within applicable statutes of limitations.
- (ii) Where death results from an injury, the claim for death benefits shall be filed by the surviving spouse, by the guardian of a surviving spouse who is incompetent, by the guardian of dependent minor children, by the worker's dependent parent(s), or by the guardian of the worker's incompetent dependent parent(s).
- (iii) Application for extended children's benefits for education beyond the age of 18 and until the age of 21 may be made with the Division. Beneficiaries will receive notification and must complete and submit a Verification of Enrollment Form provided by the Division.
- **Section 5**. <u>Waiver and Settlement Benefits</u>. Upon good and sufficient cause the Administrator or designee(s) of the Workers' Compensation Division may waive, compromise or otherwise settle any claim for benefits.

CHAPTER 6 CONTESTED CASE PROCEEDINGS

Section 1. Referral for Hearing.

- (a) Upon receipt of a request for hearing, the Division shall immediately transmit a copy of the request and a notice of request for hearing to the Office of Administrative Hearings (OAH) or Workers' Compensation Medical Commission as appropriate. For purposes of judicial review of agency inaction under W.S. § 16-3-114(a), the Division is deemed to have denied any timely, written request for a hearing pursuant to W.S. § 27-14-601(k)(iv) when it has failed to transmit a notice of request for hearing within 30 days after receipt of the request.
- (i) For purposes of referring contested cases to the Workers' Compensation Medical Commission for hearing, W.S. § 27-14-616(b)(iv), the phrase "medically contested cases" shall include those cases in which the primary issue is:
 - (A) a claimant's percentage of physical impairment;
 - (B) whether a claimant is permanently totally disabled;
- (C) whether a claimant who has been receiving TTD benefits remains eligible for those benefits under W.S. § 27-14-404(c); or,
- (D) 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.
- **Section 2**. **Establishment of Fees for Members of Medical Commission.** Members of the medical commission established pursuant to W.S. § 27-14-616 shall be compensated at the rate of \$200 per hour for their professional services on behalf of the commission, including necessary travel time. In addition, members of the commission shall be reimbursed for necessary travel expenses to the same extent and upon the same conditions as Wyoming State employees are reimbursed under the rules and regulations of the State Auditor.
- **Section 3**. **Small Claims.** If the Division requests that the matter be resolved as a small claims hearing, the Notice of Referral shall include the following notice:
- (a) The Division determines that the amount at issue is less than \$2,000 and does not involve an issue of the compensability of the injury. The Division therefore requests that the matter be resolved as a small claims hearing as provided in W.S. § 27-14-602(b)(i).
- (b) The purpose of a small claims hearing is to provide expedited review by a hearing examiner. In a small claims hearing, the Division will not pay a claimant's attorney, nor will the Office of the Attorney General represent the Division.

(c) If any party objects to a small claims hearing request within 15 days of the notice, the hearing examiner will decide whether a small claims hearing or a contested case hearing is appropriate.	

CHAPTER 7

BENEFITS

Section 1. Awards of Compensation.

- (a) Computation of Disability Awards.
 - (i) Procedure for Determining Temporary Total Disability (TTD).
 - (A) Temporary wage rate is computed as follows:
- (I) Hourly rate multiplied by the total number of hours worked within the employer's established work week = weekly rate;
- (II) Weekly rate multiplied by 52 and divided by 12 = monthly rate.
- (B) Overtime will be considered if verification is received from the employer as outlined in the definition of actual monthly earnings Chapter 1, Section 3(d)(i)(C).
- (C) If a worker is paid other than hourly, weekly or monthly, the worker shall verify income by documenting at least three months of wage history with the worker's employer(s) at the time of the injury. If the worker cannot obtain three months of information, the Division shall obtain verification of average monthly wages from the employer(s).
- (ii) Procedure for Determining Temporary Partial Disability (TPD). TPD benefits will be calculated by taking 80% of the difference between the light duty wage and the employee's actual monthly earnings at the time of injury.
- (A) The claimant will receive TPD benefits plus light duty wages. The combination of earnings and benefits is intended to pay the claimant more than TTD alone, and as close to pre-injury wage as possible, but cannot exceed the statewide average monthly wage for the quarterly period in which the injury occurred.
 - (B) TPD will terminate when any of the following occurs:
- (I) The claimant returns to work in a full duty capacity, without limitations or restrictions, with the pre-injury or new employer;
- (II) The light duty wages are 95% or more of the claimant's pre-injury wage;

- (III) The claimant is working more than one light duty, modified, or part-time job, and the total wages earned equal or exceed 95% of the pre-injury wage;
- (IV) The claimant is unable to work at a gainful occupation for which he is reasonably suited by experience or training, and is certified temporarily totally disabled by his treating physician;
- (V) The claimant incurred an ascertainable loss from the work-related injury and was given a PPI rating by his treating physician;
- (VI) The claimant voluntarily terminates light duty employment due to non-injury related reasons.
- (iii) Procedure for Determining Permanent Partial Disability (PPD). The award shall be calculated using the statutory formula which adds months to the award for each of five labor market factors: The worker's remaining work-life (14 months maximum), experience in other occupations (six months maximum), education (eight and one half months maximum), career plans (two months maximum) and age over 40 (three months maximum). The application for the award shall contain such information as the Division deems necessary to apply the formula. Workers older than 65 at the time of ascertainable loss will be deemed to be 65 years old for purposes of the formula.
- (b) Computation of Impairment Award. The calculation of the award pursuant to W.S. § 27-14-405(g) will be based upon the percentage of whole body impairment as determined by the most recent edition of the American Medical Association Guides to the Evaluation of Physical Impairment or its successor publication.
- (i) Permanent Partial Impairment Rating (PPI) Benefits Payment. After the Division receives a PPI rating from a physician, the Division shall compute the amount of benefits due, and offer a PPI award to the injured worker.
- (A) If the injured worker disagrees with the PPI rating and requests a second impairment rating, the Division will schedule an appointment with an independent physician.
- (I) Upon receipt of the second impairment rating the Division shall consider both ratings and issue a final determination.

Section 2. Benefit Suspension, Limitations and Discounting.

(a) Failure to Appear for Medical Appointment. TTD benefits shall be suspended if the worker fails to appear and cooperate in any examination or testing at an appointment with his health care provider(s), or one scheduled by the Division. Payment shall be suspended until such time as the worker appears at a subsequent rescheduled appointment. Payment will not be

suspended if:

- (i) The worker notifies the Division prior to the appointment or within 24 hours after missing the appointment. The worker should call his claims analyst at the claims analyst's direct number and leave a message if the claims analyst is not available;
- (ii) The Division determines that the worker made all reasonable efforts to appear at the appointment.
- (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;
- (E) Has taken all reasonable measures to facilitate recovery, including compliance with the recommendations of the treating physician.
- (c) Discounting of Lump Sum Payments. Pursuant to W.S. § 27-14-403(f), awards to an injured worker or an injured worker's spouse for PPD, Permanent Total Disability (PTD) or death, or any part of such awards, may be discharged by the payment of a lump sum if the Administrator determines that a lump sum payment is justified by exceptional necessity. 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.

Section 3. Medical and Hospital Care.

- (a) Health Care Benefits.
- (i) Workers with injuries compensable under the Act shall be provided reasonable and necessary health care benefits as a result of such injuries.

- (ii) Change of Health Care Provider. 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.
- (iii) Medical Reimbursement to Injured Worker. Requests for reimbursement may be submitted to the Division by an injured worker for expense paid out-of-pocket for medical service(s) deemed reasonable, necessary and directly related to his work-related injury on a form provided by the Division.
- (A) Requests for reimbursement will be considered only if the original receipt, which must be itemized, displays the transaction date, and substantiates proof of payment, is submitted with the Division's form.
- (B) The Division may reimburse an injured worker 100% for the initial expense including taxes, paid out-of-pocket for prescribed medical service, prescribed drug or supply required to treat a compensable injury, when the service, drug or supply had been provided prior to the Division's notifying the injured worker of the case number assigned to his reported injury. The Division will not reimburse an injured worker for insurance co-pays or deductibles.
- (C) Expenses incurred by an injured worker for over-the-counter (OTC) medication or medical supplies prescribed or recommended by the treating health care provider will be reimbursed at 100% of the purchase price, including taxes.
- (iv) Travel Reimbursement. Reimbursement for travel necessary to obtain the closest available medical or hospital care needed by the employee will be payable at the rates provided for state employees in the rules and regulations of the State Auditor. W.S. § 27 14-401(d)(iii).
- (A) Reimbursement for mileage will be based on map mileage from address to address and travel within the community of residence will only be paid if the distance exceeds ten miles one way.
- (B) Requests for reimbursement of meal, lodging, bus, air travel, cab, train, parking, and other travel expenses must be accompanied by the original receipt. Reimbursement will not be paid for car rental expenses under any circumstances.
- (C) Reimbursement for meals shall be paid as provided for state employees in the rules and regulations of the State Auditor.
- (D) Unless medically necessary, there shall be no reimbursement for the travel and associated expenses incurred by other persons or for phone charges incurred

during such travel. Necessity for accompanied travel should be reflected in the documentation provided from the health care provider.

- (E) Reimbursement for travel will be considered only if filed on the appropriate form provided by the Division.
- (F) Claims for reimbursement shall be submitted to the Division within one (1) year from the date travel or other expenses were in

Rules, Regulations and Fee Schedules of the Wyoming Workers' Compensation Division

CHAPTER 8 - CHIROPRACTIC PANEL; REHABILITATION PANEL

Section 1. Chiropractic Panel. The Administrator shall establish a Chiropractic Panel to provide guidance to the Division in making recommendations and establishing utilization guidelines, which shall address the appropriateness and reasonableness for the care and treatment of injured workers, for use in auditing and adjudicating chiropractic claims. Membership on the panel is limited to those chiropractors that have a current license to practice in the state of Wyoming; are in good standing with the applicable state regulatory bodies; and have demonstrated special competence and interest in industrial health. The panel will provide guidance to the Division on utilization matters and standards of care, and will function as peer review for Division issues. The Administrator will solicit expressions of interest in serving on the panel from the membership of the Wyoming Chiropractic Association.

Section 2. Rehabilitation Panel. The Administrator shall establish a Rehabilitation Panel to provide guidance to the Division in making recommendations and establishing utilization guidelines, which shall address the appropriateness and reasonableness for the care and treatment of injured workers, for use in auditing and adjudicating physical, occupational and speech therapy claims. Membership on the panel is limited to those therapists that have a current license to practice in the state of Wyoming; are in good standing with the applicable state regulatory bodies, and have demonstrated special competence and interest in industrial health. Recruitment of the panel members will be by the Administrator who will solicit expressions of interest in serving on the panel from each therapy discipline's state association. This panel may include, but is not limited to members of Wyoming Physical Therapy Association, Wyoming Occupational Therapy Association, and/or Wyoming Speech-Language-Hearing Association.

CHAPTER 9 FEE SCHEDULES

Section 1. General Guidelines. Pursuant to Wyoming Statutes § 27-14-401(b), (e), and (g) medical and or hospital care shall be reviewed for appropriateness and reasonableness and shall be reimbursed according to the adopted schedule(s). The following guidelines are applicable to each section within this chapter.

- (a) All claims shall be paid in accordance with the fee schedule in effect at the time of service.
- (b) Certain services may be subject to preauthorization pursuant to Chapter 10 of these rules. These guidelines can be found at: http://www.wyomingworkforce.org/providers/preauth/
- (c) The Division shall use accepted medical resources and publications to aid in adjudicating bills. This shall include, but not be limited to, the American Medical Association (AMA) (2020), Current Procedural Terminology codebook (CPT) (2020), the AMA Knowledge Base System (2020), and The American Academy of Orthopaedic Surgeons (2020), Complete Global Values Service Data for Orthopaedic Surgery Guidelines (2020), Centers for Medicare and Medicaid Services (CMS), and the Division's medical advisors.
- (d) The Division may change billed codes to achieve compliance with the current rules and regulations. The provider payment statement shall advise of code changes and the right to appeal.
- (e) Codes designated as Relativity Not Establish (RNE), or By Report (BR) shall be assigned the unit value of a comparable procedure or procedures.
- (f) In no case shall any provider bill for charges greater than those charged the general public for like services.
 - (g) The Division shall not pay more than the total billed amount.

Section 2. Fee Schedules.

- (a) The Division adopts *Relative Values for Physicians (RVP)* (2020 ed.), as published by Optum360, LLC, as authored by Relative Value Studies, Inc., insofar as it addresses medical matters under the Act unless otherwise defined in this chapter. The Division adopts *Relative Values for Dentists (RVD)* (2020 ed.), as published and authored by Relative Value Studies, Inc., Thornton, Colorado, insofar as it addresses dental matters under the Act.
- (i) The Division has determined that incorporation of the full text in these rules would be cumbersome or inefficient given the length or nature of the rules;

- (ii) The incorporation by reference does not include any later amendments or editions of the incorporated matter beyond the applicable date identified in subsection (a) of this section;
- (iii) The incorporated code, standard, rule or regulation is maintained at 5221 Yellowstone Road, Cheyenne, WY 82002 and is available for public inspection and copying at cost at the same location.
 - (b) Each code incorporated by reference in these rules is further identified as follows:
- (i) Relative Values for Physicians (RVP) and Relative Values for Dentists (RVD), (2020 ed.), as they were in effect on January 1, 2020, and adopted by the Department of Workforce Services, Wyoming Workers' Compensation Division.
- (ii) National Correct Coding Initiative/Medicare Unlikely Edits, NCCI and MUE as they were in effect on January 1, 2020, and adopted by the Department of Workforce Services, Wyoming Workers' Compensation Division found at: https://www.cms.gov/Medicare/Coding/NationalCorrectCodInitEd
- (c) Conversion Factors for Professional Fees. The Division adopts the following conversion factors.

SPECIALTY GROUP	CONVERSION FACTOR
Anesthesia	\$ 51.06
Surgeon	\$ 120.21
Radiology/Nuclear Medicine	\$ 21.97
Pathology/Laboratory	\$ 15.23
Medicine	\$ 7.91
Physical Medicine	\$ 6.39
Evaluation and Management	\$ 8.34
Dental	\$ 55.73

- (d) Modifiers for Anesthesia and Surgical Assistants.
 - (i) Surgical Assistants.
 - (A) MD assistants shall be paid 20% of the surgical allowance.
 - (B) Non-MD assistants shall be paid 15% of the surgical allowance.
 - (ii) Anesthesia.
- (A) All services are paid in accordance with the Wyoming Fee Schedules in effect at the time that services are rendered.

- (B) Modifiers P1-P6 are suggested but not required.
- (C) AA-anesthesia services performed by the Anesthesiologist, are paid at one hundred percent (100%) of the allowable fees.
- (D) AD-medical supervision by a Physician with more than four (4) concurrent anesthesia procedures are paid at fifty percent (50%) of the allowable fees.
- (E) QK-medical direction of two (2), three (3) or four (4) concurrent anesthesia procedures involving qualified individuals are paid at fifty percent (50%) of the allowable fees.
- (F) QX-qualified non-physician Anesthetist with medical direction by a Physician are paid at fifty percent (50%) of the allowable fees.
- (G) QY-medical direction of one qualified non-physician Anesthetist by an Anesthesiologist are paid at fifty percent (50%) of the allowable fees.
- (H) QZ-CRNA (Certified Registered Nurse Anesthetist) without medical direction by a Physician are paid at one hundred percent (100%) of the allowable fees.
- (e) Fees for Independent Medical Evaluations (IME), Permanent Partial Impairment Ratings (PPI), Medical Testimony and Deposition(s). See Chapter 10, and Chapter 9, Section 1 for additional guidelines. Medical bills must indicate total time spent on review of records, actual examination and writing of the report on the written report and the CMS-1500 claim form. The medical report must include a breakdown of the total time spent. Medical bills must also include time spent on travel, if applicable.
- (i) Independent Medical Evaluations (IME) or Impairment Ratings. The Division shall pay according to the following fee schedule:
- (A) If the IME or Impairment Rating is completed by the physician, use Code 99455. If the IME or Impairment Rating is completed by a physician, other than the treating healthcare provider, use Code 99456.

<u>Code</u>	<u>Time</u>	Payment
99455-99456	1 st hour	\$750.00
	Each additional 15 minutes	\$93.75

(ii) Medical Testimony and Deposition Charges. The Division shall pay according to the following fee schedule:

<u>Code</u>	<u>Time</u>	Payment
99075	1 st hour	\$750.00
	Each additional 15 minutes	\$65.00

Section 3. Fees for Home Health Nursing.

(a) The Division adopts the following fee-based schedule guidelines for home health nursing services being provided by independent Medicare/Medicaid certified agencies. This is a straight fee, no overtime, holiday rate, or shift differential shall be paid and Fair Labor Standards Act (FSLA) exempt. A visit equals a range of fifteen (15) minutes to a maximum of four (4) hours per day. See Chapter 10, Section 17 and Chapter 9, Section 1 for additional guidelines.

Type of Nursing	Per Visit Rate	
RN	\$146.50	
LPN	\$146.50	
CNA	\$66.34	

(b) The Division adopts the following fee-based schedule guidelines for Private duty services/attendant care. This fee schedule is for long term daily care at home and is Fair Labor Standards Act (FSLA) exempt. This is a straight hourly fee, no overtime, holiday rate or shift differential shall be paid. See Chapter 10, and Chapter 9, Section 1 for additional guidelines.

Type of Nursing	Hourly Rate
RN	\$35.00
LPN	\$35.00
CNA	\$16.00
*Attendant	*Federal minimum wage

^{*}Attendant care includes personal care for activities of daily living. A physician prescription and time limit is required. Attendant care shall be provided by individuals approved by the primary treating health care provider.

Section 4. Fees for Supplies, Implants, Durable Medical Equipment (DME), Orthotics and Prosthetics.

- (a) The Division adopts the Wyoming Medicare rate plus thirty percent (+30%) of the Healthcare Common Procedure Coding System (HCPCS) as the rates were published as of January 1, 2020 for the payment of supplies, DME, orthotics and prosthetic devices prescribed by a health care provider. See Chapter 9, Section 1 for additional guidelines. The Division shall not pay for any supplies, DME, orthotics, or prosthetics unless prescribed by the primary health care provider.
- (i) The Division has determined that incorporation of the full text in these rules would be cumbersome or inefficient given the length or nature of the rules;
- (ii) The incorporation by reference does not include any later amendments or editions of the incorporated matter beyond the applicable date identified in subsection a of this section;
 - (iii) The incorporated code, standard, rule or regulation is maintained at 5221

Yellowstone Road, Cheyenne, WY 82002 and is available for public inspection and copying at cost at the same location.

- (b) Each code incorporated by reference in these rules is further identified as follows:
- (i) Reference to Wyoming Medicare rate of the Healthcare Common Procedure Coding System (HCPCS) is adopted by the Division and effective on January 1, 2020, found at: https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/DMEPOSFeeSched/DMEPOSFee-Schedule.html
- (c) Any related charges for supplies, DME, orthotics and prosthetics not listed in the Medicare HCPCS fee schedule shall be paid at eighty percent (80%) of billed charges. Charges deemed excessive shall require additional documentation for justification.
- (i) Any single supply/implant charged at \$1,000.00 or more, shall require a suppliers' invoice. Reimbursement shall be at 130% of invoice cost. Shipping and handling charges shall not be reimbursed.
- (ii) The Division shall not provide direct payment to suppliers or manufacturers for implantable items.
 - (d) The preceding fees are not intended to address newly developed items or technologies.
- **Section 5. Fees for Hearing Aids/Prescription Lenses.** See Chapter 10, and Chapter 9, Section 1 for additional guidelines.
- (a) The Division shall pay 130% of the supplier's/manufacturer's invoice price for hearing aids when the provider submits the invoice to the Division.
- (b) The Division shall reimburse for frames and lenses as prescribed for compensable vision loss, or replacement due to a work-related accident, not to exceed 80% HCPCS usual and customary benchmarks as determined annually by the Division. The Division may demand additional documentation and justification for any charges deemed excessive by the Division.
- (c) The Division shall reimburse an injured worker for the repair or comparable replacement of a hearing aid device or prescription lens damaged or destroyed in a work- related accident.
- **Section 6. Fees for Pharmacy Items.** Pharmaceuticals must be billed with a National Drug Code (NDC). See Chapter 10, and Chapter 9, Section 1 for additional guidelines.
 - (a) Pharmaceuticals shall be reimbursed at the lower of:
 - (i) Average Wholesale Price (AWP) minus 10% plus a \$5.00 dispensing fee; or
- (ii) The provider's usual and customary charge. In no case shall any provider bill for charges greater than those charged to the general public for like services. The Division reserves the right to review such charges and reimburse at the usual and customary rate if a discrepancy is found.

- (b) Reimbursement shall be decreased by \$2.50 per prescription if a paper claim is submitted unless:
- (i) The provider has received prior approval from the Division to submit a claim on paper.
- (ii) Electronic billing is unavailable at the time of service making and it is unreasonable to submit the claim through the online process.
- (c) Over the counter items that do not have a valid NDC number shall be considered supplies and shall not be paid with an added dispensing fee. See Chapter 9, Section 4 for additional guidelines.
- (i) Please see the nutritional supplements section in Chapter 10, Section 18 for additional information.
- (d) If the pharmaceutical is a repackaged drug, as determined by the NDC for the product dispensed, reimbursement shall be calculated per Section 6(a) using the AWP of the lowest cost therapeutic equivalent product.
- (e) If a pharmaceutical intended for outpatient use is dispensed through the office of a medical care provider, reimbursement will be calculated per Section 6(a) (d), equivalent to the reimbursement provided to a retail pharmacy.
- **Section 7. Fees for Compounded Medications.** See Chapter 10, Section 7, and Chapter 9, Section 1 for additional guidelines.
- (a) Physicians billing for compounded drugs must provide the pharmacy invoice. The Division shall pay 130% of the supplier's/manufacturer's invoice price.
- (b) Compounding pharmacies that bill directly, shall be compensated for the drugs prescribed and related materials in accordance with Chapter 9, Section 6. The Division shall allow a fee for compounding services. Compounding medications shall be reimbursed per line item if each ingredient is determined to be coverable per Chapter 10, Section 7, Compound Prescription Medications.

Section 8. Fees for Ambulance Services.

- (a) Ambulance services shall be paid the lesser of the billed charge or the maximum allowable rate for the code appropriate for the documented service. The maximum allowable rates are all-inclusive. Mileage shall be reimbursed per documented loaded statute mile. See Chapter 9, Section 1 for additional guidelines. Contact the Division for additional information regarding Air Ambulance codes and reimbursement.
- (b) The Division adopts CMS Medicare rates plus 10%, these rates can found at: https://med.noridianmedicare.com/web/jfb/fees-news/fee-schedules/ambulance-fees

(c) The following codes shall be recognized by the Division:

Code	Short Descriptor	Maximum Allowable – Medicare plus 10%
A0425	Mileage, Ground	\$8.45 per statute mile
A0426	Advance Life Support – 1, Non-Emergent	\$387.60
A0427	Advance Life Support - 1, Emergent	\$613.69
A0428	Basic Life Support, Non-Emergent	\$322.99
A0429	Basic Life Support, Emergent	\$516.79
A0433	Advance Life Support – 2	\$888.24
A0434	Specialty Care Transport	\$1,049.74

Section 9. Facility Fees.

- (a) Fees for Inpatient Hospital Services.
- (i) Inpatient hospital services shall be reimbursed in accordance with the CMES IPPS (Inpatient Prospective Payment System) payment methodology. With the Wyoming Base Rate (\$5,801.13 + 30%): \$7,541.47 and the MS-DRG (Medicare Severity-Diagnosis Related Group) weight according to the CMS Table 5 (for the corresponding year of service) found at: https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/FY2020-IPPS-Final-Rule-Home-Page-Items/FY2020-IPPS-Final-Rule-Tables
 - (ii) Required documentation to support billed charges are as follows:
 - (A) Detailed itemization;
 - (B) Anesthesia graphic;
 - (C) Operative report;
 - (D) History and physical;
 - (E) Discharge summary;
 - (F) Implant Log/itemization; and,
- (G) Supplier's invoice for any single supply/implant charged at one thousand dollars (\$1,000.00) or more. Such items shall be reimbursed at one hundred thirty percent (130%) of invoice amount if the MS-DRG allows for a device special payment for device intensive procedures. Shipping and handling charges shall not be reimbursed.
- (I) List of MS-DRGs that may quality for device special payment can be found at: https://www.cms.gov/medicaremedicare-fee-service-paymentacuteinpatientppsacute-inpatient-files-download/files-fy-2020-final-rule-and-correction-notice

- (iii) Bills shall be audited for unidentified and unrelated services and/or items.
- (iv) The Division shall provide a copy of the audit upon request.
- (v) Critical Access Hospitals (CAH) will be paid in accordance with the Tricare Cost-to-Charge Ratio's plus a twenty percent (20%) increase for the year of service submitted. More information can be found at: https://www.tricare-west.com/content/hnfs/home/tw/prov/claims/billing_tips/CAH_Reimbursement.html
 - (b) Fees for Skilled Nursing Services.
- (i) Inpatient Skilled Nursing Services shall be reimbursed in accordance with the Annual Skilled Nursing Facility Per Diem Room Rate Survey conducted by the Division.
- (ii) The per diem room rates for a semi-private bed shall be the usual and customary rates charged to the general public. Such rates shall be effective automatically on the first day of each calendar year.
- (A) The per diem room rates will be all inclusive of the care for the claimant for the day. This includes but is not limited to:
 - (I) Administration of oxygen and related medication;
 - (II) Hand feedings;
 - (III) Incontinence Care;
 - (IV) Tray Service;
- (V) Therapy Services, including physical therapy, occupational therapy, speech and language therapy;
 - (VI) Over the counter medications.
- (B) Certain items are permitted to be billed outside of the per diem rate, such as:
 - (I) Ambulance services when medically necessary;
 - (II) Some durable medical equipment (DME) items;
 - (III) Wheelchairs;
 - (IV) Braces;
 - (V) Medical services including laboratory, radiology and surgical

procedures;

(VI) Physician and other practitioner services, excluding physical therapy, occupational therapy and speech and language therapy;

(VII) Prosthetics.

- (c) Fees for Inpatient Rehabilitation Services.
- (i) Inpatient Rehabilitation Services shall be reimbursed at eighty percent (80%) of billed charges.
 - (ii) Required documents to support billed charges are as follows:
 - (A) History and physical;
- (B) Daily Notes including physician visits, therapy notes, nursing notes, etc.; and,
 - (C) Discharge summary, if applicable.
 - (iii) Bills shall be audited for unidentified and unrelated services and/or items.
 - (iv) The Division shall provide a copy of the audit upon request.
 - (d) Fees for Ambulatory Surgery Services.
- (i) Ambulatory Surgery Services shall be reimbursed in accordance with Wyoming Medicare ASC (Ambulatory Surgery Center) rates at one hundred thirty percent (130%) of the allowed amount, found at: https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Hospital-Outpatient-Regulations-and-Notices-Items/CMS-1717-FC
 - (ii) Required documentation to support billed charges are as follows:
 - (A) Operative report.
- (B) Implant Log/itemization if applicable (device allowance will be calculated into the ASC total allowance).
 - (iii) Bills shall be audited for unidentified and unrelated services and/or items.
 - (iv) The Division shall provide a copy of the audit upon request.
 - (e) Fees for Outpatient Facility Services.
 - (i) Outpatient Services shall be reimbursed in accordance with Wyoming Medicare

APC (Ambulatory Payment Classifications) rates at one hundred thirty percent (130%) of the allowed amount, found at: https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Hospital-Outpatient-Regulations-and-Notices-Items/CMS-1717-FC

- (ii) Required documentation to support billed charges are as follows:
 - (A) Treatment notes to support the billed services.
 - (B) Physicians Order/Prescription.
- (iii) Bills shall be audited for unidentified and unrelated services and/or items.
- (iv) The Division shall provide a copy of the audit upon request.

CHAPTER 10

MISCELLANEOUS MEDICAL PROTOCOLS

Section 1. Acupuncture.

- (a) The Division shall pay for acupuncture procedures only if the services are performed by a health care provider as defined in W.S. § 27-14-102(a)(x), who is certified to perform acupuncture. Before the Division will issue any payment for acupuncture services, the health care provider shall submit to the Division proof of certification in acupuncture from an accredited school or a school that is a candidate for accreditation.
- (i) The Division shall pay for acupuncture procedures performed by Acupuncturists who have been issued a license to practice acupuncture by the Wyoming Board of Acupuncture. The Division will only consider payment to a fully licensed Acupuncturist upon receipt of written orders from the injured worker's treating health care provider specifying the diagnosis and number of sessions or time frame. To verify licensure go to: http://acupuncture.wyo.gov

Section 2. Alcohol and Drug Testing Protocols.

- (a) Nothing in this rule is intended to authorize any employer to test any employee for alcohol or drugs in any manner inconsistent with constitutional, federal or statutory requirements.
- (b) Nothing in this rule shall be construed to require an employer to test, or create a legal obligation upon the employer to request an employee to undergo drug or alcohol testing. An employer's decision to post-accident test should be consistent with their substance abuse and testing policy.
- (c) All drug and alcohol testing, initial and confirmation, conducted in conjunction with the employer's drug-free workplace policy will be at the employer's expense.
- (i) All testing for alcohol and controlled substances will be conducted in accordance with the requirements of 49 CFR Part 40, which procedures are designed toprotect the employee and the integrity of the testing process, safeguard the validity of the test results, and ensure those results are attributed to the correct employee.
- (ii) Pursuant to 49 CFR Part 40, a covered employer may test for any and all metabolites: including synthetic forms of: Amphetamines; Marijuana (cannabinoids); Cocaine (benzolylecgonine); Opiates (codeine, morphine, heroin); PCP (phencyclidine); Alcohol; or any controlled substance subsequently subject to testing pursuant to drug testing regulations adopted by the United States Department of Transportation.
- **Section 3. Alternative Medicine.** Except as provided in Section 10 of this Chapter, the Division will not authorize or pay for any alternative medicine treatments, defined as any medical practice or intervention that lacks sufficient documentation for safety or effectiveness

against specific conditions, or lacks a valid scientific base.

- **Section 4. Biofeedback.** Biofeedback services shall be paid according to Chapter 9, Section 2 of these rules. The following conditions apply:
 - (a) individual meets the definition of "injury" under W.S. 27-14- 102(a)(xi); and,
 - (b) the services must be prescribed by the primary treating healthcare provider.
- (c) Administration of biofeedback treatment is limited to those practitioners who are certified by the Biofeedback Certification Institute of America;
- (d) Practitioners must submit a current copy of their biofeedback certification to the Division of Workers' Compensation;
 - (e) Treatment can be authorized when the following is presented to the Division:
 - (i) An evaluation report documenting:
 - (A) the basis for the injured worker's condition;
 - (B) the condition's relationship to the work injury;
- (C) an evaluation of the injured worker's functional measurable modalities (e.g., range of motion, uptime, walking tolerance, medication intake, etc.);
 - (D) an outline of the proposed treatment program; and,
 - (E) an outline of the expected restoration goals.
- (ii) The injured worker's progress must be documented in the medical records to include continued medical necessity, expected number of sessions, and ability to facilitate any further positive functional gains.
- **Section 5. Biological or Chemical Exposure Injury.** The Division shall pay for the laboratory testing of any specimen collected from the body of an employee in order to determine his exposure to biological or chemical agents in covered employment, if such tests are ordered by the treating health care provider.
- (a) If medical emergency response personnel determine that an employee should be treated in a hospital emergency room, the Division will pay for ambulance transportation from the place of exposure to the nearest hospital.
- (b) The Division shall pay for hospitalization of the employee, subsequent to his receipt of treatment in an emergency room, if it is determined by the treating physician that in-patient confinement is necessary to establish the existence and extent of exposure, and to

diagnose the effects of the exposure.

(i) Except to the extent expressly provided, nothing in this section shall relieve a worker of the burden to prove the elements of an "injury" as defined by W.S. § 27-14-102(a)(xi).

Section 6. Blood-borne Pathogen Testing and Prophylactic Care.

- (a) Benefits for human blood-borne pathogen testing and prophylactic care under W.S. § 27-14-501(a) shall be limited to the cost of reasonable and necessary initial and follow-up testing and reasonable and necessary prophylactic treatment. Benefits under this section shall be available only to workers reasonably believed to have incurred a potentially significant exposure.
- (b) Nothing in this section shall limit benefits for testing and prophylactic care to any particular covered occupation or group of covered occupations included in the definition of "injury" under W.S. § 27-14-102(a)(xi) and prescribing reasonable prophylactic medical treatment during the disease's latency period.
- (c) Except to the extent expressly provided, nothing in this section shall relieve a worker of the burden to prove the elements of an "injury" as defined by W.S. § 27-14-102(a)(xi).
- (d) Nothing in this subsection shall limit benefits for an exposure to a disease that has resulted in an "injury" as defined in W.S. § 27-14-102(a)(xi).
- (e) The Division will follow current recommendations of the Centers for Disease Control and Prevention for post-exposure prophylaxis.
- **Section 7. Compound Prescription Medications.** The Division shall pay for compound prescription medications per Wyoming Workers' Compensation formulary listed at: http://www.wyomingworkforce.org/providers/bulletins/, National Drug Code (NDC) and the fee schedule listed in Chapter 9, Section 7 of these rules.
- **Section 8. Durable Medical Equipment (DME).** The limitations in this section are in addition to any other limitations or restrictions that may apply to the Division's rental or purchase of any physical item or apparatus as a benefit under the Act.
- (a) The Division will not rent or purchase or provide reimbursement for any physical item or apparatus for use by an injured employee unless there is proof that the item:
 - (i) is medically necessary for the documented compensable work injury;
 - (ii) is prescribed by a health care provider;
 - (iii) is the most cost effective method of meeting the medical need;

- (iv) is not considered to be experimental or investigational;
- (v) is designed to withstand repeated use in the home;
- (vi) generally is not useful to a person in the absence of an illness or injury;
- (vii) has primary purpose other than enhancing the personal comfort of the claimant or providing convenience for the claimant or caregiver;
- (viii) is the type of item that is suitable and commonly provided for home use or mobility under employer provided health insurance coverage, Medicare or Medicaid; and,
 - (ix) generally has an expected lifetime of at least three (3) years.
- (b) The Division may choose to rent or purchase any physical item or apparatus depending on its assessment as to which option is most reasonable and cost effective.
- (c) DME Repair or Replacement. Requests for repair or replacement of equipment purchased by the Division shall be reviewed on an individual case-by-case basis. Approval will be dependent upon evidence the equipment was used in a safe and appropriate manner and, due to normal wear and tear, needs to be repaired or replaced. Evidence of improper use or abuse of equipment may warrant denial of the repair or replacement of the equipment.
- (d) An injured worker or claimant shall be responsible for reasonable care and maintenance of any physical item or apparatus provided.
- (i) The Division may cover needed repairs and maintenance when a professional is required and the services are not covered under warranty within the warranty period.
- (ii) Providers shall not bill for equipment, parts, or services covered under manufacturer warranty within the warranty period.
- (iii) The Division may require a copy of a warranty from the provider to be submitted upon request.
- **Section 9. Emergency or After Office Hours Care.** Emergency or necessary after office hours care performed in a non-emergency room setting shall be coded 99058. This code shall be paid in addition to other services provided during the same visit. Emergency department services shall be billed using the appropriate CPT codes.
- **Section 10. Experimental Care**. Experimental care is defined as any device, drug, procedure or test used in the delivery of medical, pharmaceutical, surgical or therapeutic services that are not customary and considered investigational, unusual, controversial and/or obsolete. The Division will neither authorize nor pay for these services.

Section 11. Functional Capacity Evaluation. A functional capacity evaluation

can be requested by the Division, the health care provider, or the employer to measure general residual functional capacity to perform work or provide other general evaluation information, including musculoskeletal evaluation. The functional capacity evaluation must be performed by a licensed physical therapist or occupational therapist credentialed or experienced in performing functional capacity evaluations, or a licensed medical doctor who practices rehabilitation medicine or physiatry and is credentialed or experienced in performing functional capacity evaluations. The functional capacity evaluation must have objective components which measure the validity of the test results.

- **Section 12. Hearing Aids**. If it has been determined through medical examination and testing that an injured worker incurred a hearing impairment as a result of a compensable injury, the Division shall pay for examinations and testing of the ear(s), and the purchase of hearing aid device(s) approved by the Food and Drug Administration (FDA), and respective supplies, in order to restore the injured worker's hearing as close to pre-injury status as possible.
- (a) A hearing test must be performed, and the results submitted to the Division, in order to substantiate the existence of a compensable hearing loss and to establish a base line from which to measure any potential increase in hearing impairment in the future.
- (b) The Division shall pay for a replacement hearing aid only if the treating physician submits a written report to the Division, specifying that a new hearing aid is required due to an increase in hearing impairment which is directly related to the compensable injury. The report must include the results of a current hearing test, which evidences an increase in hearing impairment over the base line, or the results of the last hearing test on file with the Division.
- (c) If the Division verifies that an employee's pre-existing hearing aid, not his hearing, was damaged or destroyed as a result of a work-related accident, the Division shall pay for one comparable replacement hearing aid.
- (i) The Division will not pay for a cochlear implant, tympanoplasty, or other similar surgery as a replacement for a damaged or destroyed hearing aid device.
- (ii) The Division will not pay for a subsequent replacement hearing aid if the first replacement hearing aid was lost, stolen, or broken.

Section 13. Home and Vehicle Modifications.

(a) Workers who have experienced a catastrophic injury may be eligible for home and vehicle modifications. Catastrophic injuries include, but are not limited to paralysis, quadriplegia, severe head trauma, amputation and multiple traumas. Requests for home or vehicle modifications will be reviewed by Division staff to determine if the home or vehicle modification meets the injured worker's needs for safety, mobility, and activities of daily living. Only one residence and one current vehicle of a catastrophically injured worker will be modified. Modifications must be reasonable and appropriate for the injured worker's actual functional disability and level of care.

- (i) A home modification is defined as a physical structural change to an injured worker's permanent residence. If the injured worker does not own the property of his residence, he must obtain and submit to the Division written permission for structural modification and proof of ownership from the property owner before modifications will be considered.
- (A) The Division will not pay for any structural modifications performed prior to the Division giving written consent.
- (B) The Division will not pay to restore the modified structure to its original condition when the injured worker ceases to reside on the property.
- (ii) Modifications can be done at the time a home is being built, but the Division shall only pay for the cost difference between a standard home structure and the modified structure. The modifications must be in compliance with accessibility standards.
- (iii) The Division will not purchase any real estate or new or used motor vehicle for the injured worker.

Section 14. Impairment Ratings-Requirements.

- (a) Pursuant to W.S. § 27-14-405(g) any physician determining permanent physical impairment shall:
- (i) have a current, active, and unrestricted license to practice medicine, issued by a state medical board; and,
- (ii) use the instructions and complete all required measurements referencing all tables contained in the *American Medical Association's Guide to the Evaluation of Permanent Impairment*. The Division requires impairment ratings to be submitted in the same format as the forms contained within that publication.
- **Section 15. Independent Medical Evaluation**. The Division may require an employee to submit to an Independent Medical Evaluation by a non-treating health care provider for the purpose of obtaining a second opinion regarding the diagnosis, prognosis or treatment of an employee's injury complaints, or to obtain a permanent partial impairment rating of the residual affects attributed to a compensable injury per W.S. § 27-14-401(f). The evaluation may include: review of medical records, diagnostic studies, or other relevant materials; examination of the injured worker; consultations with other health care providers or Division representatives; and, any technical preparation by office staff.
- (a) The Division may request a non-treating health care provider to conduct a paper review of an injured worker's medical records for the purpose of obtaining a second opinion regarding the diagnosis, prognosis, or treatment of an employee's injury complaints. When conducting a paper review, the health care provider conducting the review will be paid at the same rate as a physician who performed an Independent Medical Evaluation for the Division.

- **Section 16. Massage Therapy.** Massage therapy treatment will be permitted when given by a massage practitioner upon written orders from the injured worker's treating health care provider. Massage therapy treatment must be under the direct supervision of a healthcare provider as defined in W.S. § 27-14-102(a)(x) and it is in conjunction with other therapy modalities.
- **Section 17. Nursing Services.** No fee 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.
 - (a) Home Health Nursing Services.
- (i) Home Health Nursing Services shall be intermittent, medically necessary, related to the work injury, documented in a plan of treatment, expected to last six (6) months or less, and ordered by a physician.
- (ii) Initial prescriptions/orders for home health nursing services shall include the reason for home health skilled nursing, frequency, and duration.
- (iii) Face to face visit. All new home health orders shall be accompanied by documentation of a face to face visit having occurred within ninety (90) days prior to the start of home health services.
- (iv) Only independent Medicare/Medicaid certified agencies may provide home health nursing care;
- (v) Only Certified Nurses Assistants, Licensed Practical Nurses, Licensed Vocational Nurses or Registered Nurses working for a Medicare/Medicaid certified agency can provide home health nursing care;
- (vi) If the injured worker's residence is not within a fifty (50) mile radius of a Medicare/Medicaid certified agency, the Division may approve other alternatives such as Private Duty Nursing Services. Any such arrangement must have prior approval from the Division.
- (vii) Home Health Nursing Services beyond six (6) consecutive months shall be reviewed by the Division to determine continued medical necessity.
- (viii) Private Duty Services/Attendant Care. Private duty services/attendant care for long term daily care at home not being provided by a Home Health Agency, includes but not limited to; personal care for activities of daily living.
- (ix) Initial prescriptions/orders for services shall include the reason for private duty services/attendant care, frequency, and duration.
 - (x) Private duty services/attendant care shall be provided by individuals who

are approved by the primary treating health care provider.

- (xi) Private duty services/attendant care shall be paid for a maximum of twelve (12) hours per day per provider.
- (xii) Private duty services/attendant care required beyond twelve (12) consecutive months shall be reviewed by the Division; every twelve (12) months thereafter to determine continued medical necessity.
- (b) Disclaimer of Employment. Persons performing services in the home of an injured worker are not employees of the State of Wyoming. The provider or the provider's employer shall retain all responsibility for the payment of any and all federal income tax, state or federal unemployment insurance, state or federal social security premiums, and workers' compensation premiums that may be due.
- (c) Fees. See Chapter 9, Section 3 for specific information on fees for homehealth nursing, private duty services and attendant care.
 - (d) Nursing Facility Care Referral Process.
- (i) A referral for nursing facility placement shall be made by the treating health care provider. The referral shall be communicated to the Division by the treating health care provider and, when possible, the nursing facility, indicating the injured worker's medical needs require admission to or on the premises of a nursing facility. The request shall be reviewed by the Division for relatedness to the work injury and approved by the Director or designated representative. See Chapter 10, Section 28, Special Agreements for additional information on fee schedules and/or payment rates.
- **Section 18. Nutritional Supplements**. The Division shall reimburse nutritional supplements, vitamins, and non-prescription drugs recommended by the treating health care provider, only if FDA approved and the supporting medical records document severeclinical dietary problems attributed to the compensable injury.
- Section 19. Off-label use of Medical Services. Medications, treatments, procedures or other medical services used for other than the approved Food and Drug Administration (FDA) indications. These services should be medically necessary, i.e., have a reasonable expectation of cure or significant relief of a condition consistent with any applicable treatment parameter (Rules and Regulations Chapter 1, Section 3, Subsection (gg)). The Health Care Provider must document in the medical record the off-label use is medically necessary, and will submit to the Division a comprehensive review of the medical literature. This review will include at least two (2) reliable prospective, randomized, placebo-controlled, double-blind trial. The Division will consider the quality of the evidence and determine medical necessity.

Section 20. Payment for Medical Services and Professional Fees.

(a) Claims for medical services provided to an employee for a compensable injury, and any associated fees charged by professionals, will be denied if: they fail to comply with the

following standards for content of medical records:

- (i) If handwritten, medical notes must be legible to anyone reading them,
- (ii) If handwritten notes are illegible, medical notes must be typewritten,
- (iii) Medical notes must include date of patient visit,
- (iv) Medical notes must specify the reason for the encounter/visit and be described using the patient's own words,
- (v) Medical notes must include a history and physical exam focused relative to patient's complaint to include a description of the findings of the examine relating to the reason for the complaint,
- (vi) Medical notes must specify the diagnosis relative to the patient presenting complaint,
- (vii) Medical notes must delineate a course of treatment consistent with the diagnosis,
- (viii) The studies ordered of the patient must pertain to the complaint being addressed,
 - (ix) Medical notes must delineate the education instruction to the patient,
- (x) Medical notes must contain an indication of the specifics of the follow-up care plan and include return-to-work expectations.

Section 21. Physical Medicine and Restorative Services.

- (a) Chiropractors, physical therapists, physical therapist assistants, occupational therapists, and occupational therapist assistants may perform treatment modalities in the management of soft tissue injuries for the progressive development of strength and mobility, and to improve functional outcomes. An initial evaluation should document the diagnoses or clinical impression consistent with the presenting complaint(s) and the results of the examination and diagnostic procedures conducted. Subsequent visits performed require documentation of measured, objective, significant findings.
- (b) The Division shall pay physical therapy and occupational therapy services only if they are provided pursuant to a prescription from the injured employee's primary treating health care provider, as defined in Chapter 1, Section 3 (mm) of these Rules.
- (c) The Division shall monitor claims for services and may require provider to submit a formal written treatment plan or supplemental report detailing the medical necessity, specific goals, number of sessions and timeframes for review and authorization to continue the service. If the injured worker is not responding within the recommended duration periods, per

the assessment of the provider, other treatment interventions, further diagnostic studies or consultation may be considered.

- (d) The Administrator adopts the *Rehabilitation Therapy Utilization Guidelines* For The Care And Treatment of Injured Workers and Chiropractic Utilization Guidelines For The Care And Treatment Of Injured Workers, which will be used by the Division in its evaluation and payment of physical therapy and chiropractic claims. These guidelines are available at: http://www.wyomingworkforce.org/providers/.
- **Section 22. Podiatry Treatment**. Fees for services of a podiatrist will be limited to those allowed for minor surgery under the General Surgery section of the Relative Values for Physicians, as adopted in Chapter 9, Section 2 of these Rules.
- **Section 23. Preauthorization.** The Division pursuant to its rules and regulations may issue a determination of preauthorization for an injured worker's nonemergency hospitalization, surgery or other specific medical care. W.S. § 27-14-601(o) as amended.
- (a) Treatment rendered by a health care provider to a Wyoming workers' compensation claimant for injuries, will be professionally reviewed and preauthorized on issues of whether proposed treatment is reasonable, medically necessary and in compliance with the Division's rules, regulations and treatment guidelines. Such treatment guidelines shall be predicated on relevant medical literature consistent with current evidence-based medicine, or insurance industry standards or practices, or the guidance of the Medical Commission, and shall be available upon request. Policy establishing treatment guidelines shall be available in written format and also maintained on the Division's Internet web site located at: www.wyomingworkforce.org/providers/preauth/
- (b) The Division will institute procedures of preauthorization and utilization review. Policy outlining the description, medical definitions, and a required list of treatments to be preauthorized shall be developed, implemented and maintained.
- (c) The Division will inform Health Care Providers when treatment guidelines are expanded or modified, or there are changes in division policy or procedures.
 - (d) The Preauthorization Process
 - (i) Health Care Provider notification to the Division.
- (A) The Health Care Provider must complete the request for preauthorization review form in writing, in advance of the injured worker receiving treatment for hospitalizations, surgeries or health care requiring preauthorization and submit it to the Division by fax, mail, or e-mail. The Provider Request for Preauthorization form can be obtained from the Division or through the Internet at:

 www.wyomingworkforce.org/providers/preauth/
- (B) Concurrent with submission of the Provider Request for Preauthorization, the Health Care Provider must supply relevant clinical information. This

will include chart notes that document the injured worker's history, physical examination findings, diagnostic test results, treatment plan, and prognosis.

- (ii) The Division will make a determination to authorize or deny treatment as requested per the preauthorization review form, pursuant to the procedures outlined in W.S. 27-14-601(k).
- (e) The Administrator or the Administrator's designee will make medical coverage decisions to ensure quality of care and prompt treatment of injured workers. Medical coverage policies and procedures will include, but are not limited to, decisions on health care services, hospitalizations, surgical procedures, medical care, pharmaceuticals, rehabilitative modalities, devices, diagnostic tests, ambulatory services, and supplies rendered for the purpose of diagnosis, treatment or prognosis.
- **Section 24. Pregnancy Tests.** The Division shall pay for a pregnancy test only if it is ordered by an injured worker's treating health care provider to rule out pregnancy prior to performing a procedure or treatment considered potentially harmful to a fetus.

Section 25. Prescribed Drugs and Pharmacy Services.

- (a) The Division shall pay for prescription and over-the-counter medications only if a prescription, written by the treating care provider is valid at the time of service.
- (b) When medications prescribed for a compensable injury are dispensed on an outpatient basis, the Division will cover a brand name drug with an AB rated generic equivalent only if there is a documented medical necessity for utilization of the brand name. Prior authorization may be required for a brand name drug with an AB rated generic equivalent with the exception of certain drugs to be determined by the Division, to include specific anticonvulsant medications. The prescribing physician must provide the Division with medical justification for brand name medications, excluding anticonvulsants prescribed specifically for seizure control secondary to work injury.
- (i) An injured worker may choose to pay the difference between the generic and the name brand product, in which case the Division shall pay only the wholesale generic price or substitute equivalent plus a dispensing fee.
- (c) Healthcare providers directly dispensing prescriptions will be paid based on the original manufacturer's NDC code and the Wyoming Fee Schedule for pharmaceuticals as set forth in the *Rules Wyo. Dep't of Workforce Servs., Workers' Com. Div., Ch. 9, § 6(2019).*
- **Section 26. Prescription Lenses.** If it has been determined through medical examination and testing that an injured worker incurred a visual impairment as a result of a compensable injury, the Division shall pay for examinations and testing of the eye(s), and the purchase of prescription lenses to restore the injured worker's vision as close to pre-injury status as possible.
- (a) A vision test must be performed, and the results submitted to the Division, in order to substantiate the existence of a compensable vision loss and to establish a base-line

from which to measure any potential increase in visual impairment in the future.

- (b) The Division shall pay for the replacement of prescription lenses only if the treating physician, ophthalmologist, or optometrist submits a written report to the Division which specifies that new lenses are required due to an increase in visual impairment which is directly related to the compensable injury. The report must include the results of a current eye examination, which results in an increase in visual impairment over the baseline, or the results of the last eye examination on file with the Division.
- (c) If the Division verifies that an employee's prescription lenses and/or frames, not his vision, were damaged or destroyed as a result of a work-related accident, the Division shall only pay for one replacement of prescription lenses and/or frames and associated examination costs.
- (i) The Division will not pay for cosmetic refractive procedures, or other laser type surgery as a replacement for damaged or destroyed prescription lenses.

Section 27. Smoking Cessation.

- (a) Tobacco Cessation products, including varenicline (Chantix), nicotine patches, gum and lozenges, and bupropion (generic Zyban), will be covered for appropriate clients undergoing a surgical procedure (including spinal fusion surgery), suffering from an orthopedic fracture or break, or with a wound in which healing may be negatively affected by smoking.
- (b) A maximum coverage period of six (6) months will be approved for designated therapies.
- **Section 28. Special Agreements**. The Division may enter into special agreements for services provided by, or under the direction of, licensed providers authorized to treat Wyoming claimants. Special agreements may be made for services not covered under the fee schedules adopted by the Division, and may include multi-disciplinary or interdisciplinary programs, pain management, work hardening, and physical conditioning, rehabilitation programs, and long-term nursing care. The Division shall establish payment rates for special agreements based on individual cases and may establish outcome criteria, measures of effectiveness, minimum staffing levels, certification requirements, special reporting requirements, and other criteria to ensure injured workers receive good quality and effective services at a reasonable cost. The Division may terminate special agreements and programs upon 30 days written notice to the provider.
- Section 29. Therapeutic Injections. Therapeutic injections such as trigger point injections, facet joint injections, facet nerve blocks, sympathetic nerve blocks, epidurals, nerve root blocks, and peripheral nerve blocks shall be compensable only if administered to anatomical sites where they are reasonably calculated to treat the compensable injury. Prior to the first injection, the health care provider shall document in the injured worker's medical record the medical necessity for the injections, other active modalities, and instructions for the injured worker's home exercise plan. If additional injections are indicated, the prescribing

health care provider shall provide subsequent documentation indicating the medical necessity and continued need for service in the injured worker's medical record. Payment for injections shall be based upon the appropriate CPT code. The Division will not pay for injections beyond a period of six (6) consecutive months unless the health care provider certifies the medical necessity and need for additional injections in the injured worker's medical record.

- **Section 30.** Third Party Payments. No fee shall be paid to a third party unless the place of service or point of sale is identified on each bill.
- **Section 31. Vocational Evaluation.** The Division may require an injured worker to participate in a vocational evaluation to determine his future employment potential, after he has applied for a permanent award, including permanent partial disability, loss of earnings for injuries occurring before July 1, 1994, and permanent total disability.
 - (a) A vocational evaluation must be performed by a qualified vocational evaluator.
- (i) An evaluator is considered qualified if he possesses: a B.A. or B.S. degree and three years of experience in completing vocational evaluations; a Master's degree in Vocational Rehabilitation; or national certification as a vocational evaluator (CVE).
- (b) The vocational evaluation report must be submitted in the format determined by the Division.
- **Section 32. Spinal Cord Stimulators.** The Division shall not authorize payment for any neurostimulator procedures, including spinal cord dorsal stimulators and dorsal root ganglion neuroaugmentation, or any medical or surgical costs related to the placement, revision, or removal of any spinal cord stimulator.

CHAPTER 11

WORKPLACE SAFETY CONTRACTS

- **Section 1. Authority.** The Department of Workforce Services (DWS) is authorized under the Department of Workforce Services Act W.S. 9-2-2602(b)(vi) and W.S. 9-2-2608(c), and the Wyoming Administrative Procedures Act, W.S. 16-3-101, *et seq.* to promulgate rules and regulations to be used by the Department of Workforce Services in the discharge of its functions.
- **Section 2. Purpose.** The Workplace Safety Contracts program provides opportunities for public and private sector employers to enhance or implement workplace safety programs, including assistance in purchasing occupational health or safety equipment or for the provision of workplace safety training, which exceed OSHA and/or MSHA standards. These rules and regulations are adopted by the Department of Workforce Services pursuant to the requirements and authority granted by W.S. 9-2-2601(g)(vii) and W.S. 9-2-2608(a) through (d).

Section 3. Definitions.

- (a) "Administrator" means the Administrator of the Department of Workforce Services, Standards and Compliance, or his/her designee.
- (b) "Applicant" means any business, proprietor or business entity that applies for a Workplace Safety Contract.
- (c) "Consultation" means technical assistance, consultation program, and safety specialists within the Department of Workforce Services.
- (d) "Department" means the Department of Workforce Services (DWS), Workers' Compensation Division.
 - (e) "Director" means the Director of the Department of Workforce Services.
- (f) "Employee" means any person as defined by W.S. 27-14-102(a)(vii)(A) through (R).
- (g) "MSHA" means the Mine Safety and Health Administration or Wyoming Mine Inspector.
- (h) "OSHA" means the Occupational Safety and Health Administration, a division within the Department of Workforce Services.

- (i) "Panel" means the group of DWS professionals reviewing applications; comprised of at least the DWS Director or Administrator or his/her designee, a Consultation member, Safety Specialist, a Risk Manager and the State Occupational Epidemiologist.
 - (j) "Program" means the Workplace Safety Contracts Program.

Section 4. Application Process and Eligibility Requirements.

- (a) Eligibility. Program eligibility requires the Applicant to be registered and in good standing with the Department at the time of application submission and contract payment. The program also requires the applicant be in good standing with Wyoming Unemployment Insurance and the Secretary of State.
- (i) Preference will be granted to Applicants who are currently enrolled in the Safety Discount Program, Drug-Free Workplace Program, Health & Safety Consultation Discount Program or the Deductible Program.
- (b) Application Process. Applications for the Program will be reviewed on a quarterly basis. Applications will be reviewed by the Panel to determine the following:
- (i) The application demonstrates how the purchase of equipment or training will alleviate existing or potential hazards in the Applicant's workplace.
- (ii) The equipment or training applied for goes above and beyond OSHA or MSHA minimum requirements for the Applicant's industry.
- (iii) The Applicant indicates how funding from the program will reduce workplace injury frequency and severity.
- (iv) The Applicant has clearly shown what equipment or training will be purchased, to include product or course information and cost information.
 - (v) The Applicant has applied for allowable expenses, such as:
 - (A) Equipment directly related to the Applicant's employee safety.
- (B) Direct training costs which include tuition, registration, class fees, class materials, and trainee travel costs directly related to the training; along with instructor's fees and instructor travel fees when the instructor is brought to the Applicant's location for training when the instructor is not an employee of the Applicant.

(vi) an automatic denial, v		ations requesting non-allowable items, as listed below, may receive review by the Panel.
	(A)	Capital construction of any kind;
	(B)	Employee wages or benefits of any kind;
cost of training;	(C)	Assessments, testing and certification exams not included in the
OSHA or MSHA min	(D) nimum s	Any and all equipment or training intended to meet minimum tandard;
limited to chairs, anti-	(E) -fatigue	Office interventions or ergonomic equipment, including but not mats, standing desks, etc.;
minimum industry sta	(F) andards;	Any personal protective equipment (PPE) required to meet
	(G)	Passive Devices;
	(H)	Basic equipment replacements;
end loaders, bobcats,	(I) mules, t	Heavy equipment, including, but not limited to skid steers, front forklifts, scissor lifts etc.;
	(J)	Powered hand tools;
industry advantage;	(K)	Equipment which would provide the Applicant with a competitive
	(L)	Rented or leased equipment;
Defibrillators (AED's	(M) s);	Any and all first aid equipment, including Automated External
	(N)	Lighting;
	(O)	Vehicle lifts;

- (P) Vehicles: all driven vehicles, including but not limited to cars, trucks, utility vehicles, gators, tractors, ATV's, four wheelers, personal watercraft;
- (Q) Health or safety subscriptions, including but not limited to magazine and video libraries; or,
- (R) Any equipment or training purchased prior to the application submission and/or prior to contract execution;
- (c) Approval Process. Once an application has been approved, the Department will enter into a contract with the Applicant, to be written by a Risk Manager and signed by the Attorney General. The contract will state that:
- (i) One hundred percent (100%) of the funds for the program not including matching funds shall be remitted to the Applicant after the contract is fully executed.
 - (ii) Funds will be paid directly to the Applicant.
- (iii) Funds expended through the Program must be used within ninety (90) days of contract execution, unless an extension has been granted by the Administrator and/or his/her designee.
- (d) Denial of Application. Should an application for funding be denied, the Applicant may request an appeal or reconsideration within thirty (30) days. The request must:
 - (i) Be submitted to the Panel in writing.
 - (ii) Clearly outline why the Panel should reconsider the application.
- (iii) State whether or not the Applicant would like a meeting scheduled to discuss the appeal with the Panel.
- **Section 5. Applicant Reporting.** An Applicant who has been approved for funding through the Program shall submit reports, in a format provided by the Department, as outlined in the Program contract and W.S. 9-2-2608(b).
- **Section 6. Remittance of Unused Program Funds.** The Applicant shall repay the Department any portion of funding not used for the approved training and/or equipment, as delineated by the Program Contract.

CHAPTER 12 FISCAL PROVISIONS

- **Section 1. Rehabilitation Expenses-Funds Transfer.** Expenses incurred for administrative costs under W.S. § 27-14-408 shall be paid by the Division of Vocational Rehabilitation (DVR) of the Department of Workforce Services. The funds for program expenses shall be advanced by the Workers' Compensation Division on not more than a quarterly basis. The amount to be advanced shall be determined by the established caseload average expenses. If the client is eligible under state criteria the Workers' Compensation Division will advance the total expenses incurred within the limits allowed under W.S. § 27-14-408(e)(ii). If the client meets federal criteria, the Workers' Compensation Division will advance the nonfederal share of expenses up to the required state matching rate under the Federal Rehabilitation Act within the limits allowed under W.S. § 27-14-408(e)(ii).
- (a) DVR shall develop an Individualized Plan for Employment, which will itemize or identify all costs of the Plan not to exceed \$30,000.00. The total cost of each Plan will be charged to the employer's workers' compensation account in the following manner:
 - (i) 100% of the stipend paid to an injured worker for living expenses; and
- (ii) 21.3% of any additional expenses which may include, but are not limited to, tuition, books, supplies, equipment, and program expenditures.

CHAPTER 13

PRESUMPTION OF DISABILITY FOR

CERTAIN DISEASES

Section 1. Authority.

- (a) These rules are promulgated pursuant to authority granted in Wyoming Statute § 27-14-616.
- (b) These rules only apply to claims submitted under Wyoming Statutes §§ 27-15-101-27-15-103.

Section 2. Hearing Requirements.

(a) All requests for hearings will follow W.S. $\S 27-14-601$, W.S. $\S 27-14-602$ and W.S. $\S 27-14-616$.

RULES OF THE WYOMING OFFICE OF ADMINISTRATIVE HEARINGS APPLICABLE TO WORKERS' COMPENSATION CASES

The Wyoming Office of Administrative Hearings ("OAH") has jurisdiction over any workers' compensation case that is not medically contested. The following section contains rules promulgated by the OAH applicable to workers' compensation hearings held before it. These rules are distinct from rules promulgated by the Medical Commission or those promulgated by the Wyoming Safety and Compensation Division. For a fuller discussion of the OAH see the Treatise at Chapter 6.9.

CHAPTER 5

SPECIAL RULES RELATING TO WORKERS' COMPENSATION

- Section 1. **General Construction.** These special rules relating to workers' compensation contested case proceedings before the Office are intended to supplement the foregoing provisions of Chapter 2. To the extent that any difference exists, the special rule takes precedence over any foregoing provision.
- Section 2. **Filing and Service of Papers.** 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. Wyo. Stat. Ann. §§ 27-14-601(n) and 27-14-602.

Section 3. Appointed Attorney.

- (a) The hearing examiner may appoint an attorney to represent an employee or claimant.
- (b) 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:
- (i) attorney's fees billed at an hourly rate of one hundred fifty dollars (\$150.00);
- (ii) paralegal and legal assistant fees billed at an hourly rate of forty dollars (\$40.00). 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;
- (iii) 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 (15ϕ) per copy. If reasonably incurred, attorney's travel time shall be paid at one-half the hourly rate for attorney's fees; and
- (iv) 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.
- (c) All requests for fees and costs shall be submitted to the Office within ninety (90) days of the final order. Any request for fees and costs not timely submitted shall be denied unless good cause is shown. 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.

- (d) 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.
- Section 4. **Record of Proceedings.** The presiding hearing officer shall assure that a record of the proceeding is kept pursuant to Wyoming Statute § 16-3-107(p). The cost of reporting the contested case evidentiary hearing shall be paid in accordance with Wyoming Statute § 27-14-602(c).

Section 5. Referral to the Medical Commission.

- (a) Upon agreement of all the parties to a case, the hearing examiner may refer a medically contested case to the Medical Commission for hearing and final decision of all issues in the case.
- (b) Upon agreement of all the parties to a case, the hearing examiner may refer a case to the Medical Commission for advice on specified medical issues. The hearing examiner will make the final decision on all issues in the case, and referrals for advice will be made only after the evidence in the case is closed. The parties shall have an opportunity to file written exceptions to the advice received from the Medical Commission and any exceptions, along with the advice received, shall become part of the record in the case.
- Section 6. **Hearing Deadline.** In all workers' compensation cases, the contested case hearing shall be conducted, and the official record closed, no more than eleven (11) months after the first order setting hearing is issued. The hearing examiner shall issue final findings of fact, conclusions of law, and order no more than thirty (30) days after the record is closed.