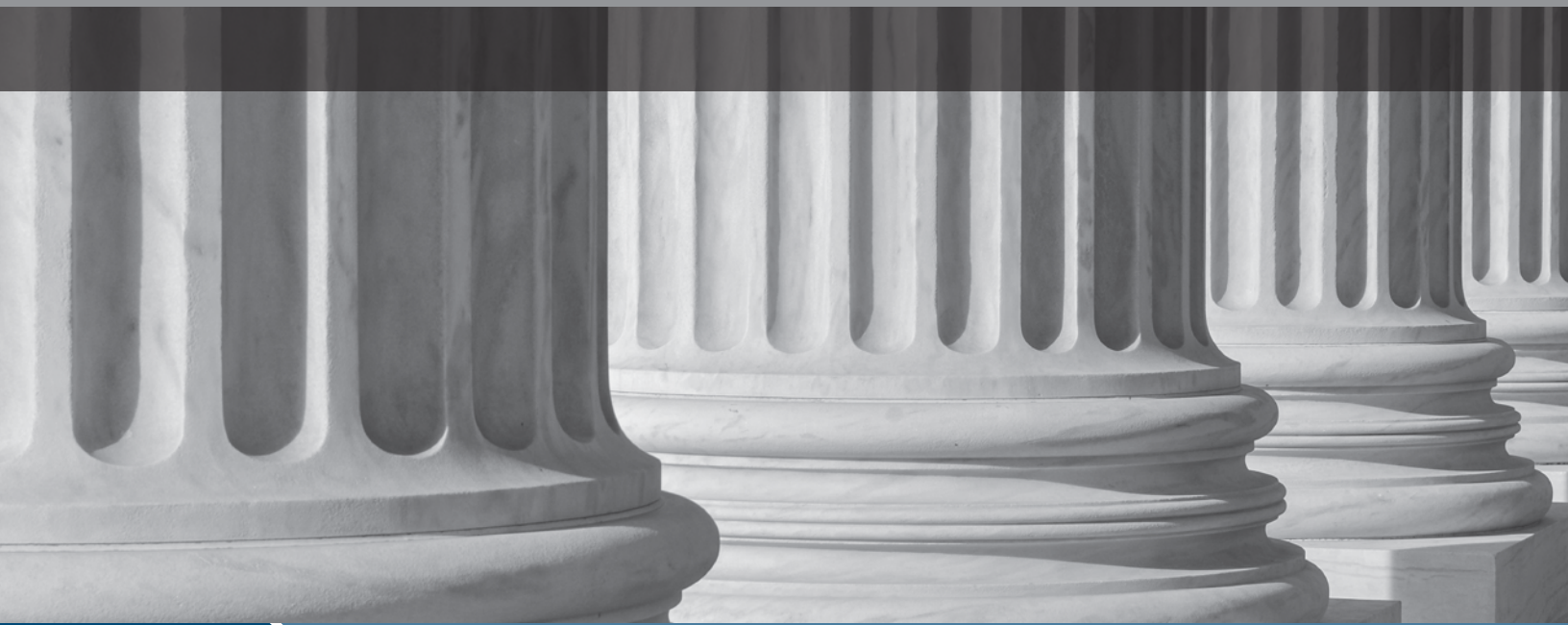


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DELAWARE Overview of Workers' Compensation Law

AN OVERVIEW OF DELAWARE WORKERS' COMPENSATION LAW

I. The Delaware Workers' Compensation Statutory Framework

- A. Delaware Workers' Compensation is governed by Workers' Compensation Act, **19 Del. C. § et. Seq.**

The statute has two purposes; to provide scheme for assured compensation for work related injuries without regard to fault and to relieve the employees and employers of the burden of civil litigation.

- B. Exclusivity

Compensable injuries are the exclusive remedy available to the employee, **19 Del. C. § 2304.**

An employer may still be subject to liability based upon a breach of contract or other contractual provision such as an indemnification and hold harmless clause with a third party.

- C. Industrial Accident Board

1. Workers' Compensation claims are heard before the Industrial Accident Board (hereinafter "Board"). The administrative duties are handled by the Department of Labor.
2. Two board members will hear each case and act as finders of fact. They are assisted by a Hearing Officer, a lawyer employed by the Department of Labor, who will advise them on legal matters that arise during the hearing, such as evidentiary questions and objections. The Hearing Officers draft the Board's opinions.
 - a. A Hearing Officer may hear a case as a finder of fact if both parties stipulate to it. **19 Del. C. § 2301 B (a)(4).**
 - b. Hearing Officers also rule upon Motion for Continuance of hearings.
3. Hearings are held in two locations, one in New Castle County (Wilmington) and one in Kent County (Dover).
4. Hearings are held in a location serving the county in which the accident had occurred. If the accident occurred out of state, the hearing will be held

in the county in which the claimant resides. Kent and Sussex County accidents are held in Dover.

II. Scope of Compensability

A. Employee/Employer Relationship

1. Employee is defined generally as any person in the service of a corporation, association, firm or person, except where specifically excluded, under a contract of hire performing services for valuable consideration. **19 Del. C. § 2301 (10)**. An employer is generally any entity who employs one or more employees unless specifically excluded by a provision in the statute.
2. Examples of employees not covered by the statute would be domestic servants or farm laborers.

B. Independent Contractors

1. The statute provides that contractors and subcontractors have a specific relationship as follows: Any Contractor or general contractor is required to obtain verification of Workers' Compensation insurance for all independent contractors that they retain or obtain a waiver of coverage for an exemption as to executive officers or limited liability company members. If a contractor fails to obtain proof of insurance or exemption, the contractor will be liable to pay workers' compensation for injured subcontractors and their employees.
2. In all other cases the Delaware statute follows the Restatement 2nd of Agency § 220 for a determination of whether an individual is an employee or independent contractor. There is a ten part test which considers factors such as the method of payment, the length of term of service, the control over the work, whether the work is skilled or unskilled, and whether the individual is supplied with tools or has his own tools to perform the job.
3. Types of covered injuries and the standard of proof.
 - a. An employee is entitled to benefits for personal injury or death by accident arising out of and in the course of employment.

The injury must both arise out of the employment and have occurred during the scope of employment. Practically, most injuries that occur on the employers' premises will almost always be compensable. An exception to this would be an idiopathic fall.

b. Single accident.

1. An employee has the burden of proof that he sustained an injury during the course and scope of employment and that injury occurred at a fixed time and place. The standard of proof applied is “but for” the accident the injury would not occurred. *Reese v. Home Budget Center*. Del. Supr., 619 A. 2d 907 (1992).
2. Generally, injuries that occur while the employee is traveling to and from work are not compensable with certain exceptions. Traveling for employment will generally be covered, as well as if the employee is “on call”. If an injury occurs on the employers premises even though the employee has not yet officially clocked in it may still be compensable. *Tickles v. PNC Bank*, Del Supr., No. 133, 1997.

c. Cumulative detrimental effect.

1. In order to prove that the employment had a cumulative detrimental effect on a physical condition the employee must show that the ordinary stress and strain of employment was “a substantial cause” of the injury. *Duvall v. Charles Connell Roofing*, Del. Supr. No. 564 A. 2d 1132 (1989).
2. Generally this type of claim is the typical repetitive use claim such as carpel tunnel syndrome, certain tendinitis claims and low back problems from years of lifting.

d. Compensable occupational disease.

1. A compensable occupational disease arises out of the employment and the exposure occurs in connection with the employment. 19 *Del. C.* § 2301 (4). Normally results from peculiar nature of employment.
2. Delaware uses the last injurious exposure rule to determine the employer/carrier on the risk for prolonged exposure. The rule provides that the most recent employer where the worker was exposed is liable for the entire claim. In Delaware the last rule applies to the last in-state employer which is subject to the jurisdiction of the Workers’ Compensation Act.

3. Burden of proof

The claimant has the burden to prove exposure to a disease causing agent in the work place.

4. Standard of review

Proximate causation is determined in a case of compensable occupational disease by the “but for” standard. *Reese*.

e. Psychological injuries

The State of Delaware recognizes a compensable mental injury absent any physical trauma. *State v. Cephas*, 637 A. 2d. 20 (del. 1994). The claimant must prove that the mental illness was the result of stressful working conditions by an objective causal nexus test. The claimant must prove both the existence of the stressful working conditions and relate those conditions to the mental disorder. The standard whether the working conditions were a substantial cause of the claimant’s condition.

f. Work accident can aggravate, accelerate, cause or contribute to pre-existing injuries.

C. Defenses and Injuries That Are Excluded from Compensation.

1. The three day rule.

a. The “three day rule” requires that an employee be incapacitated from earning full wages for a period of three days before any benefits are available. 19 *Del. C.* § 2321.

b. Exceptions to this rule are for permanent impairment to hearing or vision, amputations and hospitalization.

c. Three days need not be missed at the time of the accident but can occur at any time during the limitations period. In order to recover benefits for a permanent injury the disability need not be actual missed time, but could have been work restrictions resulting in modified job duties.

d. If 7 days are missed, then all compensation is paid from day one.

2. Intoxication

- a. If an employee is injured as a result of his intoxication he will forfeit compensation. The employer has a burden to prove this forfeiture of benefits by establishing that the employee was intoxicated and that this intoxication was the proximate cause of the injuries. *Finocchiaro v. Dominos Pizza*, C.A. No. 06A-05-003 (Del. Supr. 2006). Not enough to show intoxication aggravated injury.
- b. The employee may also forfeit compensation for a willful and wanton act. 19 *Del C.* § 2353 (b). An employee whose behavior demonstrates a deliberate and reckless indifference to danger may forfeit benefits i.e., voluntary horseplay, assault if personally motivated and no connection to work. This includes an employee's intention to injure another employee or if there was a willful failure to use safety devices provided by the employer.
- c. If the employee refuses an offer of reasonable employment by the employer within the physical restrictions established by a physician, then compensation may be forfeited. 2353 (c).
- d. Suspension of benefits
 - 1. During a period of incarceration wage replacement benefits including total or partial disability may be suspended upon adjudication of guilt.
 - 2. Refusal of the employee to attend a defense medical examination may result in suspension of benefits.
- e. Horseplay

Generally under Delaware law, an employee not participating in horse play may recover for injuries sustained as a result of horse play initiated by other employees. However, participation by the employee voluntarily in the horseplay generally disqualifies him from benefits. *Seinsoth v. Rumsey Electric Supply*, 2001 WL 845661 (Del.Super.).

D. Assault or Assaults

Employee subject to an assault that is neutral or not directed against the employee for personal reason are compensable. *Rose v. Cadillac Fairview Shopping Center*, Del. Supr. 668a 2d 782 (1995). A claimant must be able to show that an assault was

within the scope of employment or somehow connected to the employment and that it was not personal in nature. A personally motivated assault is not compensable. *Brogan v. Value City Furniture*, Del Supr. C.A. No. 01A-06-002 (2702).

III. Benefits Available.

A. Temporary Total Disability (TTD)

1. The employee is unable to work at all due to the injuries sustained in the industrial accident. 19 Del. C. § 2324. Benefits are calculated by determining the claimant's average weekly wage (AWW) and multiplying that by 2/3 to obtain his compensable rate. This rate is set at the time of the accident.
2. The AWW is subject to a maximum and minimum set by the Department of Labor on an annual basis. If an employee's average weekly wage exceeds the maximum then his rate for total disability will be set at the maximum compensation rate. However, he may have an increased rate for permanent impairment or disfigurement benefits if he was at the maximum or minimum rate at the time of the accident, then his rate is recalculated when he is rated for permanent impairment subject again to the maximum and minimum. If an employee's average weekly wage is less than the minimum, then his rate for total disability will be set at his average weekly wage.
3. The average weekly wage is calculated by averaging the previous 26 weeks of weekly gross wages received by the employee. This includes any overtime hours or bonuses. 19 Del. C. § 2302.
4. Temporary total disability benefits continue until such time as the Board signs an Order terminating the benefits or the claimant voluntarily signs a Final Receipt indicating that the benefits have ended or that he has returned to work. A carrier or employer may not unilaterally stop paying benefits once an agreement has been reached and benefits have started. The employer may file a Petition for Review of the Agreement in order to terminate the benefits, if it has a medical opinion or functional capacity evaluation indicating that the claimant may return to work with or without physical restrictions. 19 Del. C. § 2347.

B. Temporary Partial Disability (TPD)

1. The claimant may return to work but with restrictions that may result in a loss of earning capacity. 19 Del. C. § 2325.
2. TPD is capped at 300 weeks.

3. Carrier may use a vocational expert to conduct a labor market survey (LMS) to determine job availability within the claimant's restrictions. This also is used to estimate the wage loss in order to calculate the temporary partial disability.
4. TPD is calculated by taking the AWW at the time of the accident subtracted by the current earnings or the potential current earnings established on the LMS, then divided by 2/3. The TPD rate cannot be above the State maximum compensate rate, but can be below the minimum (for example, \$5.00 weekly).

IV. Permanent Partial Disability (PPD) 19 *Del. C.* § 2326

A. 19 *Del. C.* § 2326

1. Section 2326 of the statute contains a schedule of weeks for a 100% loss to certain body parts (please note permanency is to the specific body part and not whole person). Unscheduled losses are subject to a maximum number of 300 weeks.
2. The presumption for permanent partial impairment is that there is adverse effect on the earning capacity based on a reduction of function of the injured body part.
3. The applicable compensation rate is fixed when the claimant is at maximum medical improvement. This is usually one year post accident or one year post surgery. If the employee was at the maximum or minimum rate at the time of his injury he may be entitled to an increased rate for permanent impairment and disfigurement benefits.
4. PPD is calculated by taking the scheduled loss amount and multiplying that by the percentage assigned by the medical expert, usually in accordance with the AMA Guides to the Evaluation of Permanent Impairment, and obtaining a number of weeks which is then multiplied by applicable rate.

V. Disfigurement Benefits

- A. The employee may obtain up to 150 weeks of benefits for serious permanent disfigurement. The standard of review is "visible and offensive when the body is clothed normally, including for recreational activities" (the bathing suit test). *Dean v. Chrysler Corp.*, Del. Supr., 332A. D. 143 (1975).
- B. If the disfigurement is part of a body part subject to a permanent impairment award then the amount may be established permanency plus 20%.

VI. Medical Expenses

- A. Medical expenses are compensable to the extent that they are reasonable necessary and causally related to the industrial accident. **19 Del. C. § 2322.**
- B. The 2007 Reform Legislation took effect May 23, 2008 establishing provider certification, practice guidelines, utilization review, forms and a fee schedule.
- C. Practice Guidelines
 - 1. Treatment under practice guidelines creates presumption that treatment is reasonable and necessary. The goal was to mainstream care and eliminate abuse.
Seven Current Guidelines:
 - Carpal Tunnel
 - Chronic Pain
 - Cumulative Trauma Disorder
 - Low Back
 - Shoulders
 - Cervical Spine – effective 6/1/09
 - Lower Extremities – effective 6/13/11
- D. Provider Certification
 - 1. Certification by doctors who agree to take fee schedule and not balance bill the Claimant. This is required to insure payment without pre-authorization. Doctors who are not certified are only paid one office visit without pre-authorization.
 - 2. Providers billing for services rendered under the Workers' Compensation Act can become certified by the Department of Labor. A certified medical provider providing treatment in a compensable case has a presumption that the bills are reasonable and necessary. The provider is subject to the practice guidelines. 19 Del. C. § 2322 F.
 - 3. In a denied or contested case a carrier opt to pay benefits without prejudice subject to clear guidelines in 19 Del. C. § 2322(h).
 - 4. Bills submitted by certified health care providers subject to the health care practice guidelines (HCPG) must be paid or denied within thirty (30) days of receipt of the invoice and documentation sustaining the charges. Failure to pay within this timeframe subjects the invoice to interest at a rate of 1% per month payable to the provider. Failure to pay could also subject the carrier to a fine of up to \$5,000.00 per occurrence.

5. An employer or carrier who wishes to contest an invoice subject to the HCPG can file for a utilization review (UR). The carrier has 15 days from the date of denial of the bill to submit the invoice to the Department of Labor for Utilization Review. The UR will either certify the treatment as within the practice guidelines or indicate that the treatment is not certified. Either side has the ability to then appeal within 45 days of the date of the receipt of the UR decision. The appeal results in a *de novo* hearing before the IAB. UR Guidelines are set forth on www.delawarehealthworks.com.
6. Medical expenses for treatment rendered that is not subject to the Health Care Practice Guidelines is not subject to UR, and if a claim for these benefits is denied a standard petition before the IAB must be filed.
7. Vocational rehabilitation is not considered medical expenses and is not recoverable by a claimant. However, the Board itself may order Vocational Rehabilitation and refusal to attend by the claimant may result in forfeiture of benefits.

VII. Attorney Fees.

- A. Generally speaking, a claimant is entitled to attorney's fees whenever a claimant is successful in prosecuting a Petition or a settlement is reached within 30 days of a hearing date for a petition which is more than offered outside of the 30 day rule. The attorney fees would be either 30% of the award or 10 times the average weekly wage as set by the Secretary of Labor at the time of the award, whichever is smaller. 19 *Del. C.* § 2320.
- B. In a petition to determine causation an award for attorney fees can still be made even if there is no monetary award.

VIII. Medical Witness Fees

- A. The carrier may be responsible for reimbursing to the claimant the costs incurred by the claimant to have medical experts testify.
- B. There is a limitation on claimant costs of \$2,000.00 for deposition testimony and \$3,500.00 for a live appearance. These maximums are subject to the discretion of the Board.

IX. "Huffman" Damages.

- A. If the claimant demands payment for an award or agreed upon benefit and the carrier is in default by more than 30 days after the demand for payment the claimant may file Civil litigation for liquidated damages. 19 *Del. C.* § 2357, 19 *Del. C.* § 1101.

Huffman v. C.C. Oliphant and Sons, Inc., Del. Supr., 432 A. 1207 (1981) stands for the proposition that the failure to pay benefits owing for workers' compensation may result in penalties under the wage payment and collection act.

- B. If a demand is made for payment a penalty is applicable if, after thirty days no payment is made, the penalty is at 10% per day up to 100% of the outstanding amount plus attorney fees and costs.
- C. A "Huffman" demand is applicable in the following instances:
 - 1. A unilateral cessation of benefits.
 - 2. Failure to pay a Board Award timely.
 - 3. Failure to pay benefits per a settlement agreement in 14 days.
 - 4. Failing to pay medical expenses that were the subject of a Board Order.
- D. The standard in a "Huffman" case is whether the funds were withheld without a good faith basis. All the claimant must show is that a demand was made for the funds and they were not paid within thirty days of that demand.

X. Petitions

- A. Petition to Determine Compensation Due. (DCD)
 - 1. A DCD petition is the employer's initial petition for benefits upon failure to reach agreement as to compensation. The Burden of Proof is on the employee to prove compensability by a preponderance of evidence.
 - 2. There is a notice requirement in 19 *Del. C.* § 2341 that provides an employee must provide notice of a claim to the employer in 90 days. Failure to do so will result in disqualification for benefits until notice is provided to the employer.
 - 3. If the claimant provides notice to the carrier or the employer prior to filing a petition the carrier must state a position on compensability within 15 days of receipt of the first report of injury. (Board Rule 4). Additionally, in a compensable case the carrier must either pay or deny medical expenses within 30 days of receipt of the bill and documentation thereof.
- B. Petition to Determine Additional Compensation Due.
 - 1. This petition is used for all other claims for benefits on a compensable case except for disfigurement benefits or an Appeal of UR. Once a board decision has been reached awarding compensability to a claimant or an

agreement to compensation has been filed this is the petition that must be utilized.

2. Recurrence of Disability

- a. When there is a claim for recurrence of disability or the need for medical expenses the claimant can file this petition. If the claimant has returned to work and there is a new carrier on the risk, then there may be an issue over which carrier is liable for benefits. The burden is on the first carrier to show that there was a new event in order to shift liability to the subsequent carrier. *Standard Distributing Company v. Nally*, Del. Supr., 630 A. 2d. 640 1993.
- b. When a claimant's disability benefits have been terminated and the claimant wishes to claim a recurrence of disability, then the burden is on the claimant to prove by a preponderance of evidence that he is now entitled to additional disability benefits.

3. Permanent Impairment

- a. When a claimant wishes to file a claim for permanent impairment he uses the Determine Additional Compensation Due petition.
- b. Permanent impairment petition is to be accompanied by a report from the claimant's doctor indicating the percentage of impairment.
- c. Permanent impairment benefits may not be apportioned between a preexisting asymptomatic condition and the current injury which may have triggered this preexisting condition. *Sewell v. Delaware River and Bay Authority*, Del.Supr., 796 A. 2d., 655 (2000).

C. Disfigurement Benefits

A special Petition has been created for the filing of benefits to determine the amount of compensation for disfigurement.

D. Petition to Appeal Utilization Review

Parties file a special Petition within 45 days of the receipt of the UR determination.

E. Petition to Determine Compensation Due to Dependents of Deceased Employee.

F. Death Benefits

1. A claimant's beneficiaries are entitled to compensation for the death of the employee. The children will obtain compensation of $66 \frac{2}{3}$ of the wages of the deceased employee with 10% additional for each child in the excess of two. If there is a surviving spouse, the spouse gets $66 \frac{2}{3}$ of the wages with increases depending on the number of dependent children. 19 Del.C. § 2330.
2. Compensation for children is payable until the child reaches 18 years or if over 18 years if a full time student living at home and in such case enrollment ceases or the child reaches 25. The surviving spouse is entitled to 400 weeks of compensation and benefits will continue after this period until the surviving spouse dies or remarries.

G. Petition for Commutation

1. The claimant may reach an agreement with a carrier for a lump sum payment of any or all benefits. This includes medical expenses which may be subject to a Medicare set aside.
2. Any commutation of benefits other than a lump sum payment of permanent impairment benefits must be approved by the Board.

H. Petition to Review Compensation Agreement (Petition to Terminate)

1. Once the claimant is receiving disability benefits, i.e., on an open agreement for benefits, this disability continues until terminated by agreement or by order of the Board. If the carrier has any release of claimant to return to work, the carrier can then file a Petition to Review Compensation Agreement and obtain a Board Order terminating benefits.

If the carrier should stop payments without filing a petition or without having received an order voluntarily signed by the claimant then this may result in penalties including "Huffman" Damages.

2. If a claimant returns to work and refuses to sign a Final Receipt for benefits then the carrier must file a petition. The carrier may obtain a credit for any benefits paid subsequent to the claimants return to work.
3. The employer must prove that the employee has been medically cleared to return to work, and in addition, the employer must show job availability through a vocational expert and a labor market survey or show proof of a reasonable job offer by the Employer.

4. If the employee has been released by his own doctor, then the employee has a duty to take a reasonable job search and failure of the claimant to show he has taken a reasonable job search may result in the termination of benefits.
5. The employer can make the employee a job offer within the doctor's restrictions which can be accepted by the Board and may result in the termination of benefits to the claimant.
6. If the employer does not have work available within the claimant's restrictions the employer should send a letter putting the claimant on notice that there is nothing available. This can be done through the attorney.

XI. Statute of Limitations

A. Two-year statute of limitations pursuant to 19 *Del. C.* § 2361.

1. The claimant has two years from the date of injury to either enter into an agreement, or file a petition before the IAB.
2. Upon receiving notice of a claim and providing its denial of same, a carrier must provide notice of this two year statute of limitations directly to the claimant. Failure to provide this notice results in a tolling of the statute of limitations.

B. Compensable occupational disease, statute of limitations of one year.

This statute begins to run from the time the claimant had knowledge that his disease was triggered by his employment.

C. Five-year limitation period for compensable claims.

Once a claim has been accepted there is a five year statute of limitations beginning from the date of the last payment made by the carrier. If five years lapses from the time of the last payment the entire claim is time barred.

XII. Wage Calculation

A. Average Weekly Wage (AWW)

1. The average weekly wage for the claimant is determined by averaging 26 weeks of payment prior to the accident. If the employee worked less than 26 weeks but at least 13 weeks then the average weekly wage is still based on the total wage earned by the employee divided by the number of weeks actually worked.

2. If the employee sustained an injury before completing 13 weeks of work than the calculation is based on either the number of hours worked for each week multiplied by the hourly rate or by taking the average weekly wage for similar services performed by other employees for the past 26 weeks.
3. The weekly compensation is subject to a statutory maximum and minimum as promulgated by the Department of Labor annually.
4. The compensation rate is 66 2/3% of the average weekly wage.

B. Part Time Employment

The general rule is that part time employees' average weekly wage is calculated as above.

C. Concurrent Employment

Where a claimant is working 2 jobs, the wages are calculated using only the wages from the job where the injury occurred. *Peterman v. Claulk*, Del.Supr., 612 A.2d 159 (1992). There can be a scenario of dual employment, where the claimant is under the control of 2 employers simultaneously and the services are the same or closely related, and in that case the wages are combined. *A.Mazzetti & Sons, Inc. V. Ruffin*, Del.Super. 427 A.2d 1120 (1981).

D. Rate Chart

State Maximum AWW and RATE CHART

Max = 66-2/3% of the State AWW

Min = 22-2/3% of the State AWW

	State AWW	Max. Rate	Min. Rate
7/01/2019	\$1,088.84	\$725.89	\$241.96
7/01/2018	\$1,070.48	\$713.65	\$237.88
7/01/2017	\$1,030.49	\$686.99	\$229.00
7/01/2016	\$1,034.18	\$689.45	\$229.82
7/01/2015	\$1,019.44	\$679.63	\$226.54
7/01/2014	\$998.35	\$665.57	\$221.86
7/01/2013	\$991.19	\$660.79	\$220.26
7/02/2012	\$967.52	\$645.01	\$215.00
6/22/2011	\$933.08	\$622.05	\$207.35
6/22/2010	\$914.73	\$609.82	\$203.27
6/16/2009	\$916.00	\$610.67	\$203.55

XIII. Appeals

A. Generally

1. An appeal from an award or decision from the IAB is taken to the Superior Court and it is “on the record”, meaning that the Court can consider only that evidence which was before the Board. 19 *Del. C.* § 2349, 2350.
2. The appellant must file a notice of appeal setting forth the grounds for the appeal and the specific issues to be appealed to the Superior Court. *Supr. Ct. Civ. R.* 72. The appeal is filed in the county in which the injury occurred.

B. Appeal Period

1. The statute provides that a party has 30 days in which to file a Notice of Appeal from the date the award was mailed to the parties. If after 30 days, neither party has filed an appeal the Board’s award becomes the final.
2. Cross appeals in the Superior Court are permitted within 10 days after the first notice of appeal was filed.

C. Scope of Review

1. The appellant review of the Boards decision is limited to two issues:
 - a. Did the board err as matter of law or;
 - b. Is there substantial evidence to support the Boards determination, or stated another way, did the Board ignore substantial evidence incoming to its conclusions. *General Motors Corp. v. Freeman*, Del. Supr., 164 A. 2d 686 (1960).
2. The substantial evidence standard has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”. *State of Delaware v. Cephas*, Del. Supr., 637 A. 2d 2023 (1994). Accepting one doctor opinion over another is substantial evidence.

D. Supreme Court Review

A decision of the Superior Court may be appealed to the Supreme Court if it is a final order, i.e., the Superior Court did not remand the decision to the Board for further determination. Again this is a review on the record and the Supreme Court will review the Superior Court decision and the Board decision to determine

whether there were errors of law or whether the Court ignored substantial evidence. *Lester C. Newton Trucking Co., v. Neil*, Del. Supr., 204 A. 2nd, 393 1964.

E. Attorneys' Fees

Attorneys' fees are recoverable at the discretion of the Superior court in situation were the "claimant's position in the hearing before the board is affirmed on appeal". 19 *Del. C.* § 2350 (f).

XIV. Third Party Recovery and Liens

A. Statutory Provisions.

1. 19 *Del. C.* § 2363 controls the recovery of workers' compensation liens from third parties responsible for the employees injury.

- a. Section 2363 provides that the claimants acceptance of workers' compensations benefits is not an election of remedies and the claimant still has a viable cause of action against a third party tort feisor.
- b. Any recovery by the employee is subject to a lien by the carrier. The lien of the carrier is a priority lien except to the extent that the lien consists of expenses that were originally, or could have been paid by personal injury protection benefits in a motor vehicle accident context. In that case, the carrier does not have lien but has an independent right of subrogation in the same manner as a PIP or no fault carrier. 21 *Del. C.* § 2118.
- c. If the claimant or his representative does not bring suit within 260 days of the accident, the carrier may elect to do so in the name of the claimant. In order to do so the carrier must give the claimant 30 days' notice of its intent by registered mail.
- d. Settlement by one party does not include additional recovery by the other.

2. Recoverable Liens

- a. The carrier will be responsible for its proportionate share including expenses for attorneys' fee. *Keeler v. Hartford Mutual Insurance Co.*, Del. Supr., 207, Walsh, J. (Feb. 29, 1996).

- b. The order of distribution is as follows:
1. Expenses and recovery, including attorneys' fees,
 2. Carrier to the extent money has already been paid, and;
 3. Employee with a credit to the carrier in the amount received by the employee.
 4. The Workers' Compensation carrier will have a priority lien over third party recoveries. The third party responsible for the compensable injury cannot be a co-employee, if both this party and the claimant were in the course and scope of their employment when the accident occurred.
 5. The carrier can go to the IAB for an order seeking to perfect its credit on future benefits. As a practical matter the settlement of a third party case, in the consideration of the lien can be combined with a commutation of the remaining benefits available in the workers' compensation case.

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