

Alabama Workers' Compensation Summary

Time Periods:

Notice of injury to employer (§25-5-78).....90 days
 Report to Dept. of Industrial Relations (§25-5-4).....15 days
 Uncontroverted First Payment Due (§25-5-59).....30 days
 Penalty for failure to make timely initial payment.....15%
 Time after 1st payment to report to DIR.....10 days on Combination Supp. & Claim Summary Form
 Time to report termination of payments to DIR..... 10 days after termination on Combination Supp. & Claim Summary Form
 Report of Settlement of Claim, other than court approved.....10 days
 Waiting period for TTD benefits is 3 day, but is paid if TTD lasts 21 days

Average Weekly Wage (AWW)

W-2 earning of employee for 52 weeks prior to injury, divided by 52. It does not include "fringe benefits," which are employer portion of the cost of any life, health, and disability insurance, if the employer continues to pay those benefits post-injury. If employee worked less than 52 weeks, divide amount earned by number of weeks worked, unless the employment is seasonally affected or the figure is unreliable. Then use a similarly situated co-employee. If none, similar employee in the industry.

Medical Treatment (§25-5-77)

Since 1975, the Act has provided unlimited, lifetime medical benefits for "reasonably necessary medical attention...as a result of the accident." The Act gives the employer the right to choose the doctor, but case law holds the employer cannot choose the pharmacy.

Panel of Physicians (Panel of 4)

If the employee is dissatisfied with the initial treating physician, he or she may request a panel of 4 physicians from which to select a replacement. Once the claimant exhausts the panel request, he or she may request another panel *only* if surgery is recommended and they are dissatisfied with the surgeon. The physicians on the panel may not be in the same practice, and it can be for less than 4 in the event there are not 4 in the area.

Date of Maximum Medial Improvement (MMI)

MMI is when the employee has recovered as much as medically possible from the injury. The employee does not have to be completely cured or make a total recovery. MMI is a date in the judgment of the authorized treating physician. If the employee did not fully recover, any deficit would be considered permanent, and would result in a Permanent Partial or Total impairment.

Permanent Partial Impairment Ratings:

When the employee reaches MMI, the ATP will usually give an impairment rating. The doctor may give it him/herself, or send the employee for a FCE, and then agree with the subsequent assignment by the therapist. The PPI may be to a scheduled member, body as a whole, or both. While settlement based upon the physician-assigned impairment rating is an option at the time, it is not mandatory. It is ultimately the duty of the Judge to render a decision as to a claimant's final impairment rating, and the Judge is not bound by the physician-assigned impairment rating.

Scheduled Injuries or Injuries to the Body as a Whole (BAW)

The Alabama Code §25-5-57(a)(3) contains a "schedule" certain parts of the body, and provide for weeks of benefits for the loss of the part. If the injury is to a "scheduled member," the claimant will be entitled to compensation benefits for the number of weeks specified therein, or the percentage of the loss to the member.

When the injury is to a part of the body not on the schedule (i.e. shoulder, hip, back, neck, etc.), the Act provides the claimant is entitled to weekly payments for a total of 300 weeks, less any weeks of TTD paid, for an injury to the BAW (sometimes called "the whole man").

Scheduled injuries which affect or extend to other parts of the body may be treated as an injury to the body as a whole. An example is a leg injury which affects the gait, and causes hip or back pain.

There can be a substantial difference in the calculations because of the \$220 cap on PPI. The value of a scheduled injury is virtually the same for all employees now.

Types of Disability Benefits

Temporary Total Disability (TTD)

TTD benefits are 2/3 of the AWW subject to maximum and minimum rates below. TTD begins after the 3 day waiting period, is payable through the date of MMI or recovery period, and thus, is "temporary." TTD benefits are suspended when the employee returns to work, or is released to, full duty at the pre-injury rate of pay. Whichever event occurs first gives the employer the right to terminate TTD benefits without consulting the DIR. It must be reported, however.

Temporary Partial Disability (TPD)

TPD is 2/3 of the difference between what the employee earned before the injury and after the injury, when the employee returns to work on limited hours or duty, at reduced pay. As with TTD, it ends at MMI. It is only payable for 300 weeks.

Permanent Partial Disability (PPD)

PPD is calculated differently for scheduled injuries and BAW. For scheduled injuries, it is 2/3 of AWW x Percentage of disability for the number of weeks for which compensation is due per schedule, with a maximum of \$220 per week. For BAW, it is 2/3 of AWW for 300 weeks, less any weeks of TTD, also capped at \$220 per week. At trial, the disability rating is a finding made by the Judge, who is not bound by the doctor's rating, but bases it on "all the evidence."

"Return to Work" Provision (Ala. Code §25-5-57(a)(3)(i))

The Act provides once the employee is at MMI, if he or she returns to work at a wage equal to or in excess of the worker's pre-injury wage, the worker's PPD rating shall be equal to his/her physical impairment, and the court shall not consider evidence of vocational disability.

Permanent Total Disability (PTD)

Permanent inability to perform ones trade or obtain gainful employment
 2/3 of AWW (subject to max. and min.) for life
 Can terminate if client returns to work elsewhere

Death Benefits

0 Dependants = \$7,500 payment to claimants estate
 1 Dependant = 1/2 AWW x 500 weeks
 2 or more Dependants = 2/3 AWW x 500 weeks
 \$3,000 Burial Expense

Maximum and Minimum Compensation Rates for Benefits

<u>Date or Injury</u>	<u>Max.</u>	<u>Min.</u>	<i>Minimum applies to:</i>
7/1/09-6/30/10	\$729	\$200	* Temporary Total
7/1/08-6/30/09	\$706	\$194	* Permanent Partial
7/1/07-6/30/08	\$682	\$188	(scheduled only)
7/1/06-6/30/07	\$651	\$179	* Permanent Total
7/1/05-6/30/06	\$629	\$173	* Death Benefits
7/1/04-6/30/05	\$607	\$167	<i>Maximum applies to:</i>
7/1/03-6/30/04	\$587	\$161	* Temporary Total
7/1/02-6/30/03	\$569	\$156	* Temporary Partial
7/1/01-6/30/02	\$549	\$151	* Permanent Total
			* Death Benefits

The maximum for Permanent Partial Disability, Scheduled or BAW, is \$220. The minimum compensation rate does not apply to Permanent Partial Disability to the Body as a Whole, nor to Temporary Partial benefits. Also, the "minimum" will never be higher than the employee's actual wages. The employee will not get a "raise" for being off on comp, and therefore a \$150 a week employee will have that as a minimum, rather than the current amount determined each July 1st by the DIR. Lastly, the benefits are "set" at whatever was in place at the time of the injury, and do not change over the course of the claim.

DEFENSES

Pre-existing Conditions

The Code, at §25-5-58, provides the employer will not be liable if a disability is increased or prolonged because of a pre-existing condition or infirmity. However, case law has consistently held if the employee was performing the job as a “normal man” the section would not apply. The question becomes, “what if any accommodation did the employer make for the employee prior to the injury?”. If the employer changed the job, took away duties, allowed off for doctor’s appointments, or accommodated the employee, there is at least a chance the employer would be allowed to apply the section. This section also does not apply if the accident combines with a pre-existing or latent condition.

Misrepresentation

If an employee knowingly and falsely misrepresents in writing a physical or mental condition, and that condition is aggravated or re-injured in an on the job accident, the employee will not be entitled to compensation. This defense is premised on the employer having warned the employee in writing at the time of the offer of employment, in bold type, “**Misrepresentations as to pre-existing physical or mental conditions may void your Workers’ Compensation benefits.**” (§25-5-51) There is a 3-pronged test for the application of this defense. The employer must establish a misrepresentation by the employee, the reasonable reliance by the employer on the misrepresentation, and some causal relationship between the misrepresentation and current injury.

Statute of Limitations for Accidental Injuries

The statute runs 2 years after the date of injury, or last payment of compensation. Comp payments toll the Statute, but medical payments do not.

Statute of Limitations in Cumulative Trauma and Occupational Disease Cases

With cumulative trauma/gradual deterioration and occupational disease cases time does not begin to run until the date of the “last injurious exposure.” This is the last time the employee was exposed to the risk that caused the injury or disease.

Lack of Notice

The Act provides 2 different time periods for notice: 5 days, and 90 days. If not reported within 5 days, the employee is basically not entitled to benefits until notice is given. If not given within 90 days after the occurrence or injury, the employee is barred from recovery altogether. The notice must be given to someone of supervisory capacity, and not a co-employee, and must indicate the injury is work-related. Although the Act says “written notice,” case law holds actual notice will suffice, so it can be done orally. The notice provision does not apply to claims for occupational disease.

Refusal to use or wear a Safety Device

For this defense, the employer must show the employee *willfully* failed or refused to use a safety device “provided by the employer.” The employer has to prove it supplied the safety gear, not just that it required it to be used. The company has to supply the safety goggles to use this as a defense, and prove that the device would have prevented the injury.

Intoxication or Impairment

The most common defense available to employers, is that the claimant intoxicated or under the influence of illegal drugs at the time of injury. A positive drug test, properly conducted, shall be a conclusive presumption of **impairment**. The employee cannot introduce evidence that he was not impaired if he/she failed the test. However, the employer must prove the injury was “due to” the intoxication or drugs. (§25-5-51) The “due to” requirement means there is a causal relationship between the impairment and the injury, and usually requires testimony about how the impairment caused the accident, by slowed reaction, clouded judgment, *etc.* An intoxicated passenger injured in an accident will not meet the “due to” standard, unless they took some action which caused or contributed to the accident. However, even if the employee wins the argument, he will be much less sympathetic to the judge. Also, employees who refuse drug tests after an accident or injury will be denied compensation, but they must have been warned in writing.

Juries

Workers’ comp claims are non-jury, but either side may request a jury when the employer raises a “willful misconduct” (including intentional act, intoxication, refusal of a safety device) either party may demand a jury to decide that issue only.

Weeks of Permanent Partial Disability

		<u>Payable</u>			
Whole Body Injuries	300	Foot	139	2 Hands	400
Thumb	62	Leg	200	2 Legs	400
Index Finger	43	Eye	124	2 Feet	400
2 nd Finger	31	Total Hearing Loss (both ears)	163	1 Arm & Other Hand	400
4 th Finger	22	Total Hearing Loss (1 ear)	53	1 Hand & 1 Foot	400
“Pinky” Finger	16	Eye & Leg	350	1 Leg & Other Foot	400
Great Toe	32	Eye & Arm	350	1 Hand & 1 Leg	400
Any other Toe	11	Eye & Hand	325	1 Arm & 1 Foot	400
Hand	170	Eye & Foot	300	1 Arm & 1 Leg	400
Arm	222	2 Arms	400		

Herbert B. Sparks, Jr.

(205) 226-5465

hsparks@constangy.com

CONSTANGY, BROOKS & SMITH, LLP

ONE FEDERAL PLACE

SUITE 900

1819 FIFTH AVENUE NORTH

BIRMINGHAM, ALABAMA 35203

TELEPHONE: (205) 252-9321 · FACSIMILE: (205) 323-7674