

WORKERS' COMPENSATION AND OTHER KINDS OF CONSTRUCTION INSURANCE

MAJOR TOPICS

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OVERVIEW OF WORKERS' COMPENSATION

The concept of **workers' compensation** developed as a way to allow injured employees to be compensated appropriately without having to take their employer to court. The underlying rationale for workers' compensation has two aspects: (1) fairness to injured employees, especially those without the resources to undertake often lengthy and expensive legal actions, and (2) reduction of costs associated with workplace injuries (e.g., legal, image, and morale costs). Workers' compensation is intended to be a no-fault approach to resolving workplace accidents by rehabilitating injured employees and minimizing the personal losses that result because of their reduced ability to perform and compete in the labor market.¹ Since its inception as a concept, workers' compensation has evolved into a system that pays out approximately \$70 million in benefits and medical costs annually. Some of the highest workers' compensation insurance rates are in construction fields (e.g., roofers).

Workers' compensation represents a compromise between the needs of employees and the needs of employers.

Employees give up their right to seek unlimited compensation for pain and suffering through legal action. Employers award the prescribed compensation (typically through insurance premiums) regardless of the employee's negligence. The theory is that, in the long run, both employees and employers benefit more than either would through legal action. As you will see later in this chapter, although workers' compensation has reduced the amount of legal action arising out of workplace accidents, it has not eliminated legal actions.

Objectives of Workers' Compensation

Workers' compensation laws are not uniform across states. In fact, there are extreme variations. However, regardless of the language contained in the enabling legislation in a given state, workers' compensation has several widely accepted objectives:

- Replacement of income for injured employees
- Rehabilitation of the injured employee
- Prevention of accidents
- Allocation of cost²

The basic premises underlying these objectives are described in the following paragraphs.

Replacement of Income. Employees injured on the job lose income if they are unable to work. For this reason, workers' compensation is intended to replace the lost income adequately and promptly. Adequate **income replacement** is viewed as replacement of current and future income (minus taxes) at a level of two-thirds of actual income (in most states). Workers' compensation benefits are required to continue, even if the employer goes out of business.

Rehabilitation of the Injured Employee.

A basic premise of workers' compensation is that the injured worker will return to work in every case possible, although not necessarily in the same job or career field. For this reason, a major objective of workers' compensation is to rehabilitate the injured **employee**. The **rehabilitation** program provides the necessary medical care at no cost to the injured employee until he or she is pronounced fit to return to work. The program also provides vocational training or retraining as needed. Both components seek to motivate the employee to return to the labor force as soon as possible.

Prevention of Accidents. Preventing future accidents is a major objective of workers' compensation. The theory underlying this objective of **accident prevention** is that employers will invest in accident-prevention programs to hold down compensation costs. The payoff to employers comes in the form of lower insurance premiums, which result from fewer accidents (theoretically).

Allocation of Cost. The potential risks associated with different occupations vary. For example, working as a roofer is generally considered more hazardous than working as an architect. The underlying principle of **cost allocation** is to spread the cost of workers' compensation appropriately and proportionately among industries ranging from the most to the least hazardous. The costs of accidents should be allocated in accordance with the accident history of the industry, so that high-risk industries pay higher workers' compensation insurance premiums than do low-risk industries.³ Construction is a high-risk industry.

Who Is Covered by Workers' Compensation?

Workers' compensation laws are written at the state level, and there are many variations among these laws. As a result, it is difficult to make generalizations. Complicating the issue further is the fact that workers' compensation laws are constantly being amended, revised, and rewritten. In addition, some states make participation in a workers' compensation program voluntary; others excuse employers with fewer than a specified number of employees.

In spite of the differences among workers' compensation laws in the various states, approximately 80 percent of the employees in the United States are covered by workers' compensation. Those employees who are not covered or whose coverage is limited vary as the laws vary. However, employees who are not can be categorized in general terms as follows:⁴

- Agricultural employees
- Domestic employees
- Casual employees
- Hazardous work employees
- Charitable or religious employees
- Employees of small organizations
- Railroad and maritime employees
- Contractors and subcontractors
- Minors
- Extraterritorial employees

Coverage in these types of employment, to the extent there is coverage, varies from state to state as follows:

- *Agricultural employees* have limited coverage in 38 states, Puerto Rico, and the Virgin Islands. In 15 states, workers' compensation coverage for agricultural employees is voluntary. In these states, employers are allowed to provide coverage if they wish, but are not required to do so.

- *Domestic employees* have coverage available in all 50 states and Puerto Rico. However, coverage tends to be limited and subject to minimum requirements regarding hours worked and earnings.
- *Casual employees* are employed in positions in which the work is occasional, incidental, and scattered at irregular intervals. Such employees are not typically afforded workers' compensation coverage.
- *Hazardous employment* is the only type afforded workers' compensation coverage in some states. To qualify, a particular type of employment must be on an approved list of hazardous or especially hazardous jobs. However, the trend in these states is to broaden the list of approved jobs.
- *Charitable or religious employees* are not afforded workers' compensation in most states when this work is irregular, temporary, or short term.
- *Small organizations* that employ fewer than a specified number of employees do not fall under the umbrella of workers' compensation in 26 states.
- *Railroad and maritime workers* are not typically covered by workers' compensation. However, in most cases, they are covered by the Federal Employer's Liability Act. This act disallows the use of common law defenses by employers if sued by an employee for negligence.
- *Contractors and subcontractors* are those who agree to perform a job or service for an agreed amount of money in a nondirected, nonsupervised format. In essence, contract and subcontract employees are viewed as being self-employed. For this reason, they are not covered by workers' compensation. Most states build in safeguards to prevent employers from setting up employees they supervise as subcontractors as a way to avoid paying workers' compensation premiums.
- *Minors* are afforded regular workers' compensation coverage as long as they are legally employed. In some states, the cost of coverage is significantly higher for minors who are working illegally.
- *Extraterritorial employees* are those who work in one state but live in another. In these cases, the employee is usually on temporary duty. Such employees are typically afforded the workers' compensation coverage in their home state.

HISTORICAL PERSPECTIVE

Before workers' compensation laws were enacted in the United States, injured employees had no way to obtain compensation for their injuries except to take their employer to court. Although common law did require employers to provide a safe and healthy work environment, injured employees had to prove that negligence in the form of unsafe conditions contributed to their injuries. Before passage of workers' compensation, employees often had to sue their employer to receive compensation for injuries resulting from a **workplace accident** or **occupational disease**.

SAFETY FACTS & FINES

Exposing workers to dust without taking the necessary precautions is dangerous and can be costly. A renovation contractor in West Seneca, New York, was fined \$176,620 for failing to provide proper respiratory devices and for the improper use of scaffolding. Workers were assigned to repoint brick on the outside of a building. Not only did they have no respiratory protection, the scaffold they were using was enclosed in plastic, thereby increasing the concentration of silica to which the workers were exposed.

Proving that an injury was the result of employer negligence was typically too costly, too difficult, and too time-consuming to be a realistic avenue of redress for most injured employees. According to Somers and Somers, a New York commission determined that it took from six months to six years for an injured worker's case to work its way through the legal system.⁵ Typically, injured workers, having lost their ability to generate income, could barely afford to get by, much less pay medical expenses, legal fees, and court costs. Another inhibitor was the **fear factor**. Injured employees who hoped to return to work after recovering were often afraid to file suit because they feared retribution by their employer. Employers not only might refuse to give them their jobs back, but also might **blackball** them with other employers. Add to this that fellow employees were often afraid to testify to the negligence of the employer, and it is easy to see why few injured workers elected to take their employers to court.

Even with all of these inhibitors, some injured employees still chose to seek redress through the courts in the days before workers' compensation. Those who did faced a difficult challenge, because the laws at that time made it easy for employers to defend themselves successfully. All an employer had to do to win a decision denying the injured plaintiff compensation was to show that at least one of the following conditions existed at the time of the accident:

1. *Contributory negligence.* **Contributory negligence** meant that the injured worker's own negligence contributed to the accident. Even if the employee's negligence was a very minor factor, it was usually enough to deny redress in the days before workers' compensation.
2. *Negligence on the part of a fellow worker.* As with contributory negligence, negligence by a fellow employee, no matter how minor a contributing factor it was, could be sufficient to deny compensation.
3. *Assumption of risk on the part of the injured employee.* If an employee knew that the job involved risk, he or she could not expect to be compensated when the risks resulted in accidents and injuries.⁶

Since the majority of workplace accidents involve at least some degree of negligence on the part of the injured worker or fellow employees, employers typically won these cases. Because it required little more than a verbal warning by the employer to establish grounds for **assumption of risk**, the odds against an injured employee being awarded compensation were great.

In his book *American Social Science*, Gagliardo gives an example of a case that illustrates how difficult it was to win redress

in the days before workers' compensation.⁷ He relates the case of an employee who contracted tuberculosis while working under clearly hazardous conditions. She worked in a wet, drafty basement that admitted no sunlight. Dead rats floated in the overflow of a septic tank that covered the basement floor, and a powerful stench permeated the workplace. Clearly, these were conditions that could contribute to the employee contracting tuberculosis. However, she lost the case and was denied compensation. The ruling judge justified the verdict as follows:

We think that the plaintiff, as a matter of law, assumed the risk attendant upon her remaining in the employment (217 N.Y. Supp. 173).

Situations such as this eventually led to the enactment of workers' compensation laws in the United States.

WORKERS' COMPENSATION LEGISLATION

Today, all 50 states, the District of Columbia, Guam, and Puerto Rico have workers' compensation laws. However, these laws did not exist before 1948. Considering that Prussia passed a workers' compensation law in 1838, the United States was obviously slow to adopt the concept. In fact, the first workers' compensation law enacted in the United States did not pass until 1908, and it applied only to federal employees working in especially hazardous jobs. The driving force behind passage of this law was President Theodore Roosevelt, who, as governor of New York, had seen the results of workplace accidents firsthand. Montana was the first state to pass a compulsory workers' compensation law. However, it was short lived. Ruling that the law was unconstitutional, the Montana courts overturned it.

In 1911, the New York Court of Appeals dealt proponents of workers' compensation a serious blow. The New York State legislature had passed a compulsory workers' compensation law in 1910. However, in the case of *Ives v. South Buffalo Railway Company* (201 N.Y. 271, 1911), the New York Court of Appeals declared the law unconstitutional based on the contention that it violated the due process clause in the Fourteenth Amendment to the U.S. Constitution.⁸

This ruling had a far-reaching impact. According to *Occupational Hazards* magazine, "The prestige of the New York court influenced legislation in many of the other states to believe that any compulsory law also would be held unconstitutional."⁹ However, even with such precedent-setting cases as *Ives* on the books, pressure for adequate workers' compensation grew as unsafe working conditions

continued to result in injuries, diseases, and deaths. In fact, shortly after the New York Court of Appeals released its due process ruling, tragedy struck in a New York City textile factory.

On March 25, 1911, the building that housed the Triangle Shirtwaist Factory on its eighth floor caught fire and burned.¹⁰ As a result of the fire, 149 of the company's 600 workers were dead and another 70 were injured. Although the cause of the accident could not be determined, it was clear to investigators and survivors alike that unsafe conditions created by the management of the company prevented those who died or were injured from escaping the fire. Exit passageways on each floor of the building were unusually narrow (20 inches wide), which made it difficult for employees to carry out bolts of material. A wider exit on each floor was kept locked to force employees to use the narrow exit. The two elevators were slow and able to accommodate only small groups at a time.

As the fire quickly spread, employees jammed into the narrow passageways, crushing each other against the walls and underfoot. With all exits blocked, panic-stricken employees began to jump out of windows and down elevator shafts. When the pandemonium subsided and the fire was finally brought under control, the harsh realization of why so many had been trapped by the deadly smoke and flames quickly set in.

The owners were brought into court on charges of manslaughter. Although they were not convicted, the tragedy did focus nationwide attention on the need for a safe workplace and adequate workers' compensation. As a result, new, more strict fire codes were adopted in New York, and in spite of the state court's ruling in *Ives*, the state legislature passed a workers' compensation law.

The next several years saw a flurry of legislation related to workers' compensation in other states. In response to demands from workers and the general public, several states passed limited or noncompulsory workers' compensation laws. Many such states held back out of fear of being overturned by the courts. Others, particularly Washington, publicly disagreed with the New York Court of Appeals and passed compulsory laws. The constitutionality debate continued until 1917, when the U.S. Supreme Court ruled that workers' compensation laws were acceptable.

MODERN WORKERS' COMPENSATION

Since 1948, all states have had workers' compensation laws. However, the controversy surrounding workers' compensation has not died. As medical costs and insurance premiums have skyrocketed, many small businesses have found it difficult to pay the premiums. Unrealistic workers' compensation rates are being cited more and more frequently as contributing to the demise of small business in America.

The problem has even become an economic development issue. Businesses are closing their doors in those states with the highest workers' compensation rates and moving to states with lower rates. States with lower rates are using this

as part of their recruiting package to attract new businesses. Where low-rate states border high-rate states, businesses are beginning to move their offices across the border to the low-rate state while still doing business in the high-rate state.

Critics are now saying that workers' compensation has gotten out of hand and is no longer fulfilling its intended purpose. To understand whether this is the case, one must begin with an examination of the purpose of workers' compensation. The U.S. Chamber of Commerce identified the following basic objectives of workers' compensation:

1. To provide an appropriate level of income and medical benefits to injured workers or to provide income to the workers' dependents, regardless of fault
2. To reduce the amount of personal injury **litigation** in the court system
3. To relieve public and private charities from the financial strain created by workplace injuries that go uncompensated
4. To eliminate time-consuming and expensive trials and appeals
5. To promote employer interest and involvement in maintaining a safe work environment through the application of an experience-rating system
6. To prevent accidents by encouraging frank, objective, and open investigations of the cause of accidents¹¹

Early proponents of workers' compensation envisioned a system in which both injured workers and their employers would win. Injured workers would receive prompt compensation, adequate medical benefits, and appropriate rehabilitation to allow them to reenter the workforce and be productive again. Employers would avoid time-consuming, expensive trials and appeals and improve relations with employees and the public in general.

Proponents of workers' compensation did not anticipate the following factors:

1. Employees who see workers' compensation as a way to ensure themselves a lifelong income without the necessity of working
2. Enormous increases in the costs of medical care with corresponding increases in workers' compensation insurance premiums
3. The radical differences among workers' compensation laws passed by the various states

Not all employees abide by the spirit of workers' compensation (e.g., rehabilitation in a reasonable amount of time). Attempted abuse of the system is perhaps inevitable. Unfortunately, such attempts result in a return to what workers' compensation was enacted to eliminate: time-consuming, drawn-out, expensive legal battles and the inevitable appeals.

Medical costs have skyrocketed in the United States since the 1960s, for many reasons. During this same period, the costs associated with other basic human needs, including food, clothing, transportation, shelter, and education, have

also increased markedly. Increases in medical costs can be explained, at least partially, as the normal cost of living increases experienced in other sectors of the economy. However, the costs associated with medical care have increased much faster and much more than the costs in these other areas. The unprecedented increases can be attributed to two factors:

1. Technological developments that have resulted in extraordinary but costly advances in medical care
2. A proliferation of litigation that has driven the cost of malpractice insurance steadily up

Each of these factors has contributed to higher medical costs. For example, X-ray machines that cost thousands of dollars have been replaced by magnetic resonance imaging systems that may cost millions. Malpractice suits that once might not even have gone to court now result in multimillion-dollar settlements. Such costs are, of course, passed on to whomever pays the medical bill—in this case, employers who must carry workers' compensation insurance.

Early supporters of the concept did not anticipate the radical differences among workers' compensation laws in the various states. The laws themselves differ, as do their interpretations. The differences are primarily in the areas of benefits, penalties, and workers covered. These differences translate into differences in the rates charged for workers' compensation insurance. As a result, the same injury incurred under the same circumstances, but in different states, can yield radically different benefits for the employee.

The potential for abuse, steadily increasing medical costs that lead to higher insurance premiums, and differences among workers' compensation laws all contribute to the controversy that still surrounds this issue. As business and industry continue to protest that workers' compensation has gotten out of hand, workers' compensation will continue to be a heated issue in state legislatures as states try to strike the proper balance between meeting the needs of the work-

force and simultaneously maintaining a positive environment for doing business.

WORKERS' COMPENSATION INSURANCE

The costs associated with workers' compensation must be borne by employers as part of their overhead. In addition, employers must ensure that the costs are paid even if they go out of business. The answer for most employers is workers' compensation insurance.

In most states, workers' compensation insurance is compulsory. Exceptions to this are New Jersey, South Carolina, Texas, and Wyoming. New Jersey allows 10 or more employers to form a group and self-insure. Texas requires workers' compensation for *carriers only*—as defined in Title 25, Article 911-A, Section II, of the Texas state statutes. Wyoming requires workers' compensation only for employers involved in specifically identified *extrahazardous occupations*.

A common thread woven through all of the various compensation laws is the requirement that employers carry workers' compensation insurance. There are three types: **state funds**, **private insurance**, and **self-insurance**. Figure 5-1 summarizes the methods of insurance coverage chosen; rates can vary greatly from company to company and state to state. Rates are affected by a number of factors, including the following:

- Number of employees
- Risk involved in types of work performed
- Accident history of the employer
- Potential future losses
- Overhead and profits of the employer
- Quality of the employer's safety program
- Estimates by actuaries

State	State Fund	Private Insurer	Individual Employer Self-Insurance	Group of Employers Self-Insurance
Alabama	No	Yes	Yes	Yes
Arkansas	No	Yes	Yes	Yes
California	Competitive	Yes	Yes	Yes
Florida	No	Yes	Yes	Yes
Indiana	No	Yes	Yes	No
Kansas	No	Yes	Yes	Yes
Maryland	Competitive	Yes	Yes	Yes
Montana	Competitive	Yes	Yes	Yes
Nebraska	No	Yes	Yes	No
New Jersey	No	Yes	Yes	No*
New Mexico	Competitive	Yes	Yes	Yes
Vermont	No	Yes	Yes	No
Washington	Exclusive	No	Yes	Yes
Wisconsin	No	Yes	Yes	No

FIGURE 5-1 Workers' compensation coverage methods that are allowed for selected states.

*Permits 10 or more employees licensed by the state to self-insure as a group.

Source: U.S. Department of Labor, January 2008.

Insurance companies use one of the following methods in determining the premium rates of employers:¹²

1. *Schedule rating.* Insurance companies establish baseline safety conditions and evaluate the employer's conditions against the baselines. This is known as **schedule rating**. Credits are awarded for conditions that are better than the baseline, and debits are assessed for conditions that are worse. Insurance rates are adjusted accordingly.
2. *Manual rating.* A manual of rates is developed that establishes rates for various occupations. This is known as **manual rating**. Each occupation may have a different rate based on its perceived level of hazard. The overall rate for the employer is a prorated combination of all the individual rates.
3. *Experience rating.* Employers are classified by type. Premium rates are assigned based on predications of average losses for a given type of employer. Rates are then adjusted either up or down according to the employer's actual experience over the past three years.
4. *Retrospective rating.* Employees pay an established rate for a set period. This is known as **retrospective rating**. At the end of the period, the actual experience is assessed and an appropriate monetary adjustment is made.
5. *Premium discounting.* Large employers receive discounts on their premiums based on their size. This is known as **premium discounting**. The theory behind this method is that it takes the same amount of time to service a small company's account as it does a large company's, but the large company produces significantly more income for the insurer. Premium discounts reward the larger company for its size.
6. *Combination method.* The insurer combines two or more of the other methods to arrive at premium rates.

The trend nationwide for the past decade has been for premiums to increase markedly. For example, over the past 10 years, some states experienced increases of more than 60 percent. This trend ensures that workers' compensation will remain a controversial issue in the state legislatures.

RESOLUTION OF WORKERS' COMPENSATION DISPUTES

One of the fundamental objectives of workers' compensation is to avoid costly, time-consuming litigation. Whether this objective is being accomplished is questionable. When an injured employee and the employer's insurance company disagree on some aspect of the compensation owed (e.g., weekly pay, length of benefits, degree of disability), the disagreement must be resolved. Most states have an arbitration board for this purpose. Neither the insurance company nor the injured employee is required to hire an attorney. However, many employees do. There are a number of reasons for this. Some don't feel they can adequately represent themselves. Others are fearful of the "big business running over

the little guy" syndrome. In any case, workers' compensation litigation is still very common and expensive.

In most states, allowable attorney fees are set by statute, administrative rule, or policy. In some states, attorney fees can be added to the injured employee's award. In others, the fee is a percentage of the award.

INJURIES AND WORKERS' COMPENSATION

The original workers' compensation concept envisioned compensation for workers who were injured in on-the-job accidents. What constituted an accident varied from state to state. However, all original definitions had in common the characteristics of being *sudden* and *unexpected*. Over the years, the definition of an accident has undergone continual change. The major change has been a trend toward the elimination of the *sudden* characteristic. In many states, the gradual onset of a disease as result of prolonged exposure to harmful substances or a **harmful environment** can now be considered an accident for workers' compensation purposes.

The harmfulness of an environment does not have to be limited to its physical components. Psychological factors (such as stress) can also be considered. In fact, the highest rate of growth in workers' compensation claims over the past two decades has been in the area of stress-related injuries.

The National Safety Council maintains statistical records of the numbers and types of injuries suffered in various industries in the United States. Industries are divided into the following categories: agriculture, mining, construction, manufacturing, transportation and public utilities, trade, services, and the public sector. Injuries in these industrial sectors are classified according to the type of accident that caused them. Accident types include overexertion, being struck by or against an object, falls, bodily reactions, being caught in or between objects, motor vehicle accident, coming in contact with radiation or other caustics, being rubbed or abraded, and coming in contact with temperature extremes.

When all industry categories are viewed in composite, more than 30 percent of total disabling work injuries are the result of overexertion. The next most frequent cause of injuries is being struck by or against objects (24 percent). Falls account for just over 17 percent. The remainder are fairly evenly distributed among the other accident types.¹³

AOE and COE Injuries

Workers' compensation benefits are owed only when the injury **arises out of employment (AOE)** or occurs in the **course of employment (COE)**. When employees are injured during work prescribed in their job description, work assigned by a supervisor, or work normally expected of employees, they fall into the AOE category. Sometimes, however, different circumstances determine whether the same type of accident is considered to be AOE. For example, say a welder burns her hand while joining two steel beams at her construction job. This injury would be classified as AOE.

Now suppose the same technician burns her hand while welding a personal project at home. This injury would not be covered, because the accident did not arise from her employment. Determining whether an injury should be classified as AOE or COE is often a point of contention in workers' compensation litigation.

Who Is an Employee?

Another point of contention in workers' compensation cases is the definition of the term *employee*. This is an important definition because it is used to determine AOE and COE status. A person who is on the company's payroll, receives benefits, and has a supervisor is clearly an employee. However, a person who accepts a service contract to perform a specific task or set of tasks and is not directly supervised by the company is not considered an employee. Although definitions vary from state to state, there are common characteristics. In all definitions, the workers must receive some form of remuneration for work done, and the employer must benefit from this work. Also, the employer must supervise and direct the work—both process and result. These factors—supervision and direction—are what set **independent contractors** apart from employees and exclude them from coverage. Employers who use independent contractors sometimes require the contractors to show proof of having their own workers' compensation insurance.

DISABILITIES AND WORKERS' COMPENSATION

Injuries that are compensable typically fall into one of four categories (Figure 5-2):

1. Temporary partial disability
2. Temporary total disability
3. Permanent partial disability
4. Permanent total disability

Determining the extent of disability is often a contentious issue. In fact, it accounts for more workers' compensation litigation than any other issue. Further, when a disability question is litigated, the case tends to be complicated because the evidence is typically subjective, and it requires hearing officers, judges, or juries to determine the future.

Temporary Disability

Temporary disability is the state that exists when it is probable that an injured worker, who is currently unable to work, will be able to resume gainful employment with no or only partial disability. Temporary disability assumes that the employee's condition will substantially improve. Determining whether an employee is temporarily disabled is not normally difficult. Competent professionals can usually determine the extent of the employee's injuries, prescribe the appropriate

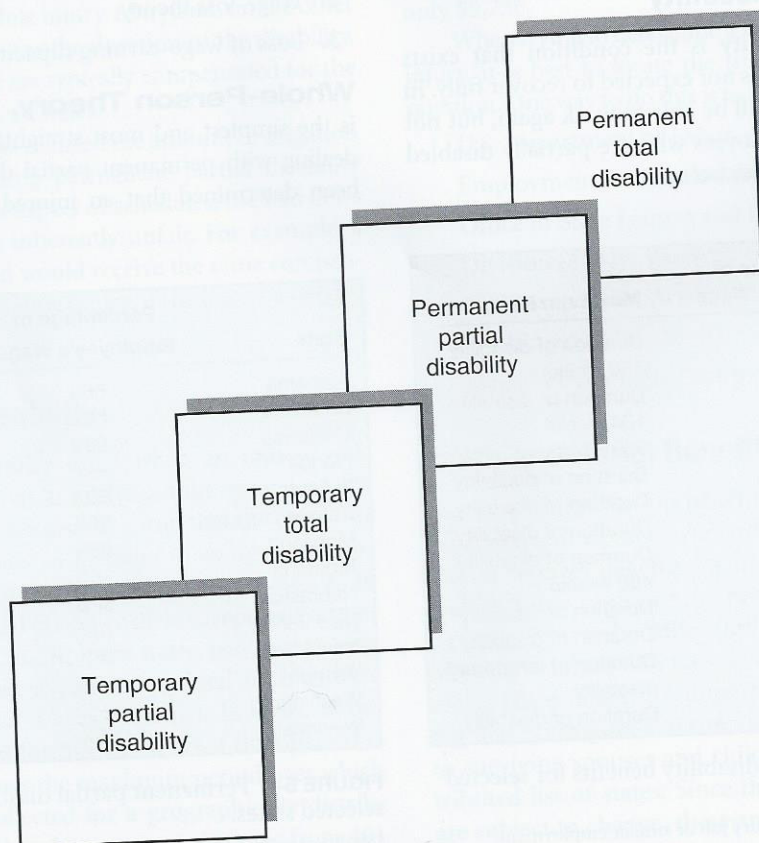


FIGURE 5-2 Types of Disabilities.

treatment, and establish a timeline for recovery. They can then determine if the employee will be able to return to work and when the return might take place.

There is an important point to remember when considering a temporary disability case. The ability to return to work relates only to work with the company that employed the worker at the time of the accident.

Temporary disability can be classified as either **temporary total disability** or **temporary partial disability**. A temporary total disability classification means the injured worker is incapable of any work for a period of time, but is expected to recover fully. Most workers' compensation cases fall into this classification. A temporary partial disability means the injured worker is capable of light or part-time duties. Depending on the extent of the injury, temporary partial disabilities sometimes go unreported. This practice is allowable in some states. It helps employers hold down the cost of their workers' compensation premium. This is similar to not reporting a minor fender-bender to your automobile insurance agent.

Most states prescribe in law the benefits owed in temporary total disability cases. Factors prescribed typically include a set percentage of an employee's wage that must be paid and a maximum period during which benefits can be collected. Figure 5-3 shows this information for a geographically distributed selection of states. Since workers' compensation legislation changes continually, this figure is provided only as an illustration of how benefits are prescribed in the laws of the various states. Actual rates are subject to change.

Permanent Partial Disability

Permanent partial disability is the condition that exists when an injured employee is not expected to recover fully. In such cases, the employee will be able to work again, but not at full capacity. Often employees who are partially disabled must be retrained for another occupation.

State	Percentage of Employee's Wage	Maximum Period
Alabama	66%	Duration of disability
Arkansas	66%	450 weeks
California	66%	Duration of disability
Florida	66%	104 weeks
Indiana	66%	500 weeks
Kansas	66%	Duration of disability
Maryland	66%	Duration of disability
Montana	66%	Duration of disability*
Nebraska	66%	Duration of disability
New Jersey	70%	400 weeks
New Mexico	66%	Duration of disability
Vermont	66%	Duration of disability
Washington	60-75	Duration of temporary disability
Wisconsin	60-75	Duration of disability

FIGURE 5-3 Temporary total disability benefits for selected states.

*Or until worker is released to preinjury job or similar employment.

Source: U.S. Department of Labor, January 2008.

Permanent partial disabilities can be classified as *schedule* or *nonschedule* disabilities. **Schedule disabilities** are typically the result of nonambiguous injuries, such as the loss of a critical but duplicated body part (e.g., arm, ear, hand, finger, or toe). Because such injuries are relatively straightforward, the amount of compensation that they generate and the period of time that it will be paid can be set forth in a standard schedule. A compilation of information from such schedules for a geographically distributed list of states is shown in Figure 5-4. Since workers' compensation legislation changes continually, this figure is provided only as an example. Actual rates are subject to continual change.

Nonschedule injuries are less straightforward and must be dealt with on a case-by-case basis. Disabilities in this category tend to be the result of head injuries—the effects of which can be more difficult to determine. The amount of compensation awarded and the period over which it is awarded must be determined by studying the evidence. Awards are typically made on the basis of a determination of percentage of disability. For example, if it is determined that an employee has a 25 percent disability, the employee might be entitled to 25 percent of the income he or she could have earned before the injury, with normal career progression taken into account.

Four approaches to handling permanent partial disability cases have evolved. Three of these are based on specific theories, and the fourth is based on a combination of two or more of these theories. The three theories are as follows:

1. Whole-person theory
2. Wage-loss theory
3. Loss of wage-earning capacity theory

Whole-Person Theory. The **whole-person theory** is the simplest and most straightforward of the theories for dealing with permanent partial disability cases. Once it has been determined that an injured worker's capabilities have

State	Percentage of Employee's Wage	Maximum Period
Alabama	66%	300 weeks
Arkansas	66%	450 weeks
California	66%	619.25 weeks
Florida*	—	364 weeks
Indiana	66%	500 weeks
Kansas	66%	415 weeks
Maryland	66%	Duration of disability
Montana	66%	350 weeks
Nebraska	66%	300 weeks
New Jersey	70	600 weeks
New Mexico	66%	500 weeks
Vermont	66%	330 weeks
Washington	—	—
Wisconsin	66%	1,000 weeks

FIGURE 5-4 Permanent partial disability benefits for selected states.

*Shall not exceed 66.67 percent.

Source: U.S. Department of Labor, January 2008.

been permanently impaired to some extent, this theory is applied like a subtraction problem. What the worker can do after recuperating from the injury is determined and subtracted from what he or she could do before the accident. Factors such as age, education, and occupation are not considered.

Wage-Loss Theory. The **wage-loss theory** requires a determination of how much the employee could have earned had the injury not occurred. The wages actually being earned are subtracted from what could have been earned, and the employee is awarded a percentage of the difference. No consideration is given to the extent or degree of disability. The only consideration is loss of actual wages.

Loss of Wage-Earning Capacity Theory.

The most complex of the theories for handling permanent partial disability cases is the **loss of wage-earning capacity theory**, because it is based not just on what the employee earned at the time of the accident, but also on what he or she might have earned in the future. Making such a determination is obviously a subjective undertaking. Factors considered include past job performance, education, age, gender, and advancement potential at the time of the accident, among others. Once future earning capacity has been determined, the extent to which it has been impaired is estimated, and the employee is awarded a percentage of the difference. Some states prescribe maximum amounts of compensation and maximum periods within which it can be collected. For example, in Figure 5-4, Alabama sets 300 weeks as the maximum period for collecting on a nonschedule injury. Maryland, on the other hand, awards compensation for the duration of the disability. Disabilities on the schedule are typically compensated for the duration of the disability in all states.

The use of schedules has reduced the amount of litigation and controversy surrounding permanent partial disability cases. This is the good news aspect of schedules; the bad news aspect is that they may be inherently unfair. For example, a surgeon who loses his hand would receive the same compensation as a laborer with the same injury, if the loss of a hand is scheduled.

Permanent Total Disability

A **permanent total disability** exists when an injured employee's disability means that he or she cannot compete in the job market. This does not necessarily mean that the employee is helpless. Rather, it means an inability to compete reasonably. Handling permanent total disability cases is similar to handling permanent partial disability cases except that certain injuries simplify the process. In most states, permanent total disability can be assumed if certain specified injuries have been sustained (e.g., loss of eyes or arms). In some states, compensation is awarded for life. In others, a time period is specified. Figure 5-5 shows the maximum period over which compensation can be collected for a geographically distributed list of states. Note that the time periods range from 401 weeks (in Texas) to life (in California and Wisconsin).

State	Maximum Paid
Alabama	Duration of disability
Arkansas	Duration of disability
California	Life
Florida	Duration of disability
Indiana	500 weeks
Kansas	Duration of disability
Maryland	Duration of disability
Montana	Duration of disability
Nebraska	Duration of disability
New Jersey	450 weeks (life in some cases)
New Mexico	Life
Vermont	Duration of disability*
Washington	Life
Wisconsin	Life

FIGURE 5-5 Permanent total disability benefits for selected states.

*Minimum of 330 weeks

Source: U.S. Department of Labor, January 2008.

MONETARY BENEFITS OF WORKERS' COMPENSATION

The **monetary benefits** accruing from workers' compensation vary markedly from state to state. The actual amounts are of less importance than the differences among them. Of course, the amounts set forth in schedules change frequently. However, for the purpose of comparison, consider that at one time the loss of a hand in Pennsylvania resulted in an award of \$116,245; the same injury in Colorado brought only \$8,736.

When trying to determine a scheduled award for a specific injury, it is best to locate the latest schedule for the state in question. One way to do this is to contact the following agency:

U.S. Department of Labor
 Employment Standards Administration
 Office of State Liaison and Legislative Analysis
 Division of State Workers' Compensation Programs
 200 Constitution Avenue, N.W.
 Washington, D.C. 20210
<http://www.dol.gov/dol/public/aboutdol/main.htm>

Death and Burial Benefits

Workers' compensation benefits accrue to the families and dependents of workers who are fatally injured. Typically, the spouse receives benefits for life or until remarriage. However, in some cases, a time period is specified. Dependents typically receive benefits until they reach the legal age of maturity—unless they have a condition or circumstance that makes them unable to support themselves even after attaining that age. Figure 5-6 contains the death benefits accruing to surviving spouses and children for a geographically distributed list of states. Since the actual amounts of benefits are subject to change, these are provided for the purpose of illustration and comparison only.

State	Percentage of Employee's Wage		Maximum Period
	(Spouse Only)	(Spouse and Children)	
Alabama	50	66%	500 weeks
Arkansas	35	66%	Widow/widowerhood Children until 18 or married
California	66%	66%	N/A
Florida	50	66%	Widow/widowerhood Children until 18
Indiana	66%	66%	500 weeks
Kansas	66%	66%	Widow/widowerhood; Children until 18
Maryland	66%	66%	Widow/widowerhood; Children until 18
Montana	66%	66%	Surviving spouse— 10 years; Children until 18
Nebraska	66%	75	Widow/widowerhood; Children until 18
New Jersey	50	70	Widow/widowerhood; Children until 18
New Mexico	66%	66%	700 weeks
Vermont	66%	76%	Widow/widowerhood until 62; Children until 18
Washington	60	70	Widow/widowerhood; Children until 18
Wisconsin	66%	N/A	300 weeks

FIGURE 5-6 Death benefits for surviving spouses and children for selected states.

Source: U.S. Department of Labor, January 2008.

Further expenses are provided in addition to death benefits in all states except Oklahoma. As is the case with all types of workers' compensation, the amount of burial benefits varies from state to state and is subject to change.

MEDICAL TREATMENT AND REHABILITATION

All workers' compensation laws provide for payment of the medical costs associated with injuries. Most states provide full coverage, but some limit the amount and duration of coverage. For example, in Arkansas, employer liability ceases six months after an injury occurs in cases in which the employee is able to continue working, or six months after he or she returns to work in cases in which there is a period of recuperation. In either case, the employer's maximum financial liability is \$10,000.¹⁴ In Ohio, medical benefits for silicosis, asbestosis, and coal miner's pneumoconiosis are paid only in the cases of temporary total or permanent total disability.¹⁵

The laws also specify who is allowed or required to select a physician for the injured employee. The options can be summarized as follows:

- *Employee selects physician of choice.* This option is available in Alaska, Arizona, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon,

Rhode Island, Texas, the Virgin Islands, Washington, West Virginia, Wisconsin, and Wyoming.

- *Employee selects physician from a list provided by the state agency.* This option applies in Connecticut, Nevada, New York, and the District of Columbia.
- *Employee selects physician from a list provided by the employer.* This option applies in Georgia, Tennessee, and Virginia.
- *Employer selects the physician.* This option applies in Alabama, Florida, Idaho, Indiana, Iowa, Maryland, Montana, New Jersey, New Mexico, North Carolina, South Carolina, and South Dakota.
- *Employer selects the physician, but the selection may be changed by the state agency.* This option applies in Arkansas, Colorado, Kansas, Minnesota, Missouri, Utah, and Vermont.
- *Employer selects the physician, but after a specified period of time, the employee may choose another.* This option applies only in Puerto Rico.

Rehabilitation and Workers' Compensation

Occasionally an injured worker needs rehabilitation before he or she can return to work. There are two types of rehabilitation: medical and vocational. Both are available to workers whose ability to make a living is inhibited by physical or mental work-related problems.

Medical rehabilitation consists of providing whatever treatment is required to restore—to the extent possible—any lost ability to function normally. This may include such services as physical therapy or the provision of prosthetic devices. **Vocational rehabilitation** involves providing the education and training needed to prepare the worker for a new occupation. Whether the rehabilitation services are medical or vocational in nature or both, the goal is to restore the injured workers' capabilities to the level that existed before the accident.

MEDICAL MANAGEMENT OF WORKPLACE INJURIES

Out-of-control workers' compensation cases led to the concept of **medical management of workplace injuries**.¹⁶ Through better management of workers' compensation claims, more than 30 states have merged the concepts of workers' compensation and managed care. The goals of these state-level efforts are to

1. speed up the processing of workers' compensation claims,
2. reduce costs,
3. reduce fraud and abuse, and
4. improve medical management of workplace injuries.

Workers' compensation and managed care have been merged through the creation of Health Partnership Programs (HPP). HPPs are tie-ups between employers and their state's Bureau of Workers' Compensation (BWC). Employers who choose to participate (some states mandate participation) are