

Commission on Health and Safety and Workers' Compensation



Background Paper on Workers' Compensation Causation and Apportionment

Prepared for Assemblyman Rick Keene
and Senator Charles Poochigian

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Introduction

In November 2003, Assemblyman Rick Keene and Senator Charles Poochigian formally requested that CHSWC prepare a background study which would provide research on laws of compensability and apportionment in California as compared with other states. The study would address the impact of compensability being defined as a "major contributing factor" as it is done in some states.

In response to the request, CHSWC's legal consultant prepared a background analysis on compensability and apportionment. Also, CHSWC staff developed a description of the various states' laws relating to these two areas and provided alternative recommendations for consideration.

California Law on Causation and Apportionment¹

Causation

One of the reasons that California workers' compensation costs are higher than other states despite lower temporary and permanent disability compensation weekly payment rates may be, and probably is, that many injuries are compensable in California that would not be compensable in other jurisdictions. This is true notwithstanding the fact that the statutory language may be essentially the same, although some jurisdictions use the term "accident" rather than "injury." California Labor Code §3600 uses the word "injury," and compensation is obtainable for disability resulting from a single incident, a disease, an emotional disorder, or a series of minor traumatic insults (cumulative trauma).

The basic California statutory requirement is that to be compensable, an injury must arise out of and in the course of the employment. Labor Code §3600(a). Other statutory conditions of compensability included in Labor Code §3600 are that: (1) neither employer nor employee is excluded by statute; (2) the employee is performing service incidental to the employment at the time of injury; (3) the injury is proximately caused by the employment; (4) the injury is not caused by the employee's intoxication; (5) the injury is not intentionally self-inflicted; (6) the employee did not willfully and deliberately cause his or her own death; (7) the injury did not arise out of an altercation in which the injured employee was the initial physical aggressor; (8) the injury is not caused by the injured employee's commission of a felony; (9) the injury did not arise out of voluntary participation in an off-duty recreational, social, or athletic activity; and (10) the claim was not post termination.

Although language of the conditions of compensability seems clear enough on its face, the conditions have been subjected to extensive liberalization by judicial interpretation. With minor periods of fluctuation, the judicial trend toward liberalization has been persistent, although the Legislature has on occasion stemmed the extension of the outer limits of compensability. In 1978, what is now Labor Code §3600(a)(9) was enacted to

¹ Memo prepared for CHSWC by C. L. Swezey, Consultant to CHSWC, "California Law on Causation and Apportionment," November 20, 2003.

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limit compensability of injuries sustained during off-duty recreational, social, or athletic activities. In 1982, Labor Code §3202.5 was adopted to preclude use of liberal interpretation in fact finding. In 1986, Labor Code §3600(a)(8) was added to preclude recovery for injuries incurred during commission of a felony. Later, in 1993, Labor Code §3208.3 was amended to require that the employment be the preponderate cause of psychiatric injuries and to exclude several kinds of psychiatric claims; Labor Code §3600(a)(10) was added to limit post-termination claims. Most recently, in 1994, Labor Code §3600.8 was added to provide that employees voluntarily participating in government-sponsored alternative commute programs are not acting in the course of their employment while traveling to or from work unless they are paid their regular wage or salary for the travel periods.

Performing Services Not Required

Perhaps the most extreme example of beneficent judicial construction is the interpretation of the requirement that the employee be performing service at the time of injury (Labor Code §3600(a)(2)). Through a series of steps outlined by the late Warren Hanna in an essay entitled "*Thaumaturgic Hermeneutics*" in earlier editions of Hanna, *California Law of Employee Injuries and Workmen's Compensation*, the California Supreme Court arrived at the conclusion that recovery of compensation is not conditional upon the employee's rendering service to the employer at the time of the injury. *Heaton v Kerlan* (1946) 27 C2d 716, 720, 166 P2d 857, 859, 11 CCC 78, 79. Thus, notwithstanding Labor Code §3600(a)(2), injuries sustained while performing personal acts during the employment can be compensable. *Dalsheim v IAC (Hinman)* (1932) 215 C 107, 111, 8 P2d 840, 18 IAC 161 (worker ignited fluid to satisfy own curiosity as to its flammability).

Acts of personal comfort and convenience are deemed incidental to the employment and injuries sustained while engaging in such acts arise out of and in the course of the employment. *State Compensation Ins. Fund v WCAB (Cardoza)* (1967) 67 C2d 925, 64 CR 323, 32 CCC 525 (employee drowned while bathing in canal adjacent to employer's premises during break). Injuries during coffee and lunch breaks are frequently found compensable even if off-premises. See *Western Greyhound Lines v IAC (Brooks)* (1964) 225 CA2d 517, 520, 37 CR 580, 582, 29 CCC 43, 44.

Employment Need Not Be Sole Cause

The third condition of compensation is that the injury be proximately caused by the employment. Labor Code §3600(a)(3). Proximate cause in workers' compensation is not the same as proximate cause in negligence cases. Nearly a half century ago, the California Supreme Court declared that proximate cause exists when the employment brings the worker within the range of the danger which causes the injury. *Madin v IAC (Richardson)* (1956) 46 C2d 90, 292 P2d 892, 21 CCC 49 (bulldozer set in motion by a third party crashed into the employer's premises injuring employee). The employment need not be the sole cause of the injury; it need only be a substantial contributing cause. *State Compensation Ins. Fund v IAC (Wallin)* (1959) 176 CA2d 10, 1 CR 73, 24 CCC 302 (proximate cause in workers' compensation defined). All that is needed is proof of a reasonable probability. *McAllister v WCAB* (1968) 69 C2d 408, 33 CCC 660.

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California industry takes an employee as it finds her or him. If disability results from the acceleration, aggravation, or "lighting up" of a pre-existing condition, the employer is required to compensate for the entire disability even though the injury might have caused little or no disability in a healthier person. *Tanenbaum v IAC* (1935) 4 C2d 615, 52 P2d 215, 20 IAC 390.

Intoxication Difficult to Prove

The fourth condition of compensation precludes recovery for an injury caused by the injured employee's intoxication. The employer has the burden of proving intoxication as a proximate cause of the injury. *Douglas Aircraft Co., Inc. v IAC* (MacDowell) (1957) 47 C2d 903, 906, 306 P2d 425, 427, 22 CCC 24, 26. It is not sufficient to show that the worker was intoxicated at the time of his accident. See *Smith v WCAB* (1981) 123 CA3d 763, 46 CCC 1053 (for defense of intoxication to be sustained, it must be shown that the intoxication was a substantial cause of the injury).

An employer that condones or encourages the drinking may be estopped from asserting the intoxication defense. *Tate v IAC* (1953) 120 CA2d 657, 261 P2d 759, 18 CCC 246. The Supreme Court Decision in *McCarty v WCAB* (1974) 12 C3d 677, 39 CCC 712 (employer estopped to raise intoxication because it permitted the consumption of alcohol at Christmas party) led many employers to seriously curtail employer-sponsored holiday festivities. See the ninth condition of compensability that was added to Labor Code §3600 in 1978 in response to the McCarty decision.

Suicide Can Be Compensable

The sixth condition of compensation purports to make suicide non compensable, but to defeat a claim for death benefits, the employer must show not only that the employee voluntarily committed suicide, but also that the impulse to self-destruction could have been resisted. *Donovan v WCAB* (Finnerty) (1982) 138 CA3d 323, 327, 187 CR 869, 872, 47 CCC 1411, 1413. If the medical evidence shows that without the injury there would have been no suicide, the injury is a proximate cause of the death. *Burnight v IAC* (1960) 181 CA2d 816, 828, 5 CR 786, 793, 25 CCC 128 ("where an employee receives an industrial injury and the resultant pain is such that he believes he cannot continue to stand it, where he becomes so depressed that he feels that there is only one way out, where any condition results which causes him to feel that death will afford him his only relief, his act of suicide is one directly resulting from his injury, unless it appears that he could have resisted the impulse to so act").

This rationale may also apply to intentionally self-inflicted injuries that are ostensibly made non compensable by §3600(a)(5). See *Guerra v WCAB* (1985) 168 CA3d 195, 214 CR 58, 50 CCC 270.

Horseplay Not Altercation

The seventh condition of compensation precludes recovery by the initial physical aggressor for an injury sustained in an altercation, but the person making the first

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physical contact is not necessarily the initial physical aggressor. *Matthews v WCAB* (1972) 6 C3d 719, 100 CR 301, 37 CCC 124 (the initial physical aggressor is the first person engaging in conduct amounting to an assault). The initial physical aggressor exclusion, however, has no application to horseplay unless it develops into a true altercation. Disabilities resulting from skylarking or horseplay are compensable if the injured worker was not a participant in the horseplay or if the horseplay was condoned by the employer. *Argonaut Ins. Co. v WCAB (Helm)* (1967) 247 CA2d 669, 682, 55 CR 810, 818, 32 CCC 14, 23 (horseplay in bunkhouse).

Despite the disparity between the recognized compensability of injuries sustained in a real fight which the worker did not start and the noncompensability of injuries suffered in a friendly scuffle, the horseplay exception is well-established and continues to withstand attack. See *Hodges v WCAB* (1978) 82 CA3d 894, 147 CR 546, 43 CCC 870.

Arising Out of the Employment

"Arising out of" conveys the idea of a causal relationship between the employment and the workers' disability. It has even been suggested that the requirement of proximate causation that is discussed above adds little to the requirement that the injury arise out of the employment. See *Maher v WCAB* (1983) 33 CA3d 729, 734 n3, 190 CR 904, 906 n3, 48 CCC 326, 329 n3. An injury arises out of the employment if it occurs by reason of an incident of the employment. *Employers Mut. Liab. Ins. Co. v IAC (Gideon)* (1953) 41 C2d 676, 679, 263 P2d 4, 6, 18 CCC 286, 288 (idiopathic seizure itself not compensable but an injury resulting from striking head on concrete floor of employment premises is). So also if it is a consequence of a risk connected with the employment. *Kimbol v IAC (Douglas)* (1916) 173 C 351, 353, 160 P 150, 151, 3 IAC 421, 422 (injury resulting from the condition of the employer's premises or equipment arises out of the employment even though the employer had no control over the instrumentality).

Injuries from neutral risks to an employee engaged in normal work activities are also compensable. *Truck Ins. Exch. v IAC (Patterson)* (1957) 147 CA2d 460, 305 P2d 55, 22 CCC 15 (injury caused by a bullet fired without any relationship to either the employee or the employer). The same general principles are applied to injuries caused by street and travel risks, explosions, weather, earthquakes, animals, poisonous plants, medical attention, clothing, and weapons. 1 *California Workers' Compensation Practice* §2.39 (4th ed., Cal CEB 2003).

Course of the Employment

The phrase "arising out of" refers to the proximate cause of an injury; the phrase "course of employment" refers to the time and place where the injury occurred. *St. Clair et al., California Workers' Compensation Law and Practice* §5:01 (James 2000). As contemplated by the original act, the employment relationship began and the employee was within the course of his employment when the employee reached the employer's premises at the start of his work day and continued until the employee left those premises at the end of the work day. *Ocean Acc. & Guar. Co. v IAC (Slattery)* (1916) 173 C 313, 3 IAC 406. Later, however, the "employer's premises" was extended to include a necessary area for entry or departure even if it was not owned by the employer nor under

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the employer's control. *Freire v Matson Navigation* (1941) 19 C2d 8, 11, 118 P2d 809, 811, 6 CCC 302, 303. The current rule is that a worker is in the course of employment while off the employer's premises if engaged in activity that is expressly or impliedly authorized by the employer. *Lockheed Aircraft Corp. v IAC (Janda)* (1946) 28 C2d 756, 760, 172 P2d 1, 3, 11 CCC 209, 211.

In 1943, the Supreme Court indicated that any reasonable doubt as to whether any particular activity that the employee is engaged in at the time of his industrial injury was in fact contemplated by his employment is to be resolved in favor of the employee. *Tingey v IAC* (1943) 22 C2d 636, 8 CCC 174. [In 1982, Labor Code §3202.5 was adopted to provide that nothing in the liberal interpretation provision (Labor Code §3202) relieves a party from proving its claim by a preponderance of the evidence. This would not, however, prevent a trier of fact from broadly interpreting the term "course of employment."]

The Bunkhouse Rule

Consistent with the rule that a worker is in the course of employment when engaged in activity that is expressly or impliedly authorized by the employer, the premises of an employer may be extended to residential facilities supplied by the employer. Thus, an employee who is either required to use employer-owned housing facilities as an adjunct of his employment for the convenience of the employer or as a part of his or her compensation is within the course of his employment during the reasonable and necessary use of those facilities. *Truck Ins. Exch. v IAC (Dollarhide)* (1946) 27 C2d 813, 167 P2d 705, 11 CCC 94.

Commercial Traveler Rule

Similar to the bunkhouse rule is the commercial traveler rule to the effect that an employee on a business trip or another employment mission is in the course of the employment during all reasonably contemplated activities during the business travel. *Wiseman v IAC* (1956) 46 C2d 570, 21 CCC 192 (banker on a business trip fatally injured by a hotel room fire while sharing the room with a woman not his wife). The Supreme Court's rationale in *Wiseman* was that the use of the hotel room was contemplated by the employment, and the fact that decedent may have incidentally been engaged in some immoral activity was not relevant. The Labor Code §3600(a)(8) limitation on recreational, social, or athletic activity adopted in 1978 has modified the commercial traveler rule to the extent that the employer did not direct, request, or tacitly expect participation in the activity.

Injuries On The Way To Or From Work

The judicially created Going and Coming Rule which precludes compensation for injuries sustained en route to and from work had its origin in the concept that the employment relationship is suspended from the time the employee leaves work to go home until he or she arrives back at the employer's premises for work. *Ocean Acc. & Guar. Co. v IAC (Slattery)* (1916) 173 C 313, 3 IAC 406. The rule, however, soon became riddled with

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exceptions, e.g., when (1) the employer provides or contributes to the cost of the transportation, or (2) the employee is on a special errand for the employer.

The first exception provides another example of how the outer limits of compensability expanded over the years. In *Kobe v IAC (Ruble)* (1950) 35 C2d 33, 215 P2d 736, 15 CCC 85, the Supreme Court said that if the employer pays the expense of travel or compensation for travel time, it can reasonably be inferred that the workday starts when the travel begins. This permissible inference soon turned into a rule that if the employee is paid more than a nominal amount for travel, the trip to or from work will be considered in the course of employment. See *Zenith National Ins. Co. v WCAB (De Carmo)* (1967) 66 C2d 944, 32 CCC 236. Presumably, this was the reason for the adoption in 1994 of Labor Code §3600.8 which provides that employees voluntarily participating in government-sponsored or mandated alternative-commute programs are not within the course of their employment unless they are paid their regular compensation for the periods of travel.

The special errand exception has been used to award benefits to an employee who: could not complete her work during her normal work day and was transporting materials home to finish her work (*Bramall v WCAB* (1978) 78 CA3d 151, 43 CCC 288); attended a night school course that the employer encouraged (*Dimmig v WCAB* (1972) 6 C3d 860, 37 CCC 211); transported tools used on the job (*Sun Indemnity Co. v IAC (Doolittle)* (1926) 76 CA 165, 13 IAC 159); was directed to arrive at work early (*Schreifer v IAC* (1964) 61 C2d 289, 29 CCC 103); and was required to have an automobile available for use at work (*Smith v WCAB* (1968) 69 C2d 814, 73 CR 253, 33 CCC 771).

Because the exceptions were so numerous and swallowing the rule, the Supreme Court suggested restating it in positive terms with a single exception, i.e., travel to and from work is deemed to be in the course of the employment unless it is an ordinary commute to a fixed place at a fixed time. *Hinojosa v WCAB* (1972) 8 C3d 150, 157, 104 CR 456, 461, 37 CCC 734, 739.

Criminal Activity

Recent cases tend to hold that although performing work in an illegal or forbidden manner may be serious and willful misconduct, it does not take the worker out of the course of the employment. See *Williams v WCAB* (1974) 41 CA3d 937, 116 CR 607, 39 CCC 619 (delivery driver injured when he crashed while eluding police during a 90 mile-an-hour chase after running a red light). The rule is:

Employee misconduct, whether negligent, willful, or even criminal, does not necessarily preclude recovery under workers' compensation law. In the absence of an applicable statutory defense, such misconduct will bar recovery only when it constitutes a deviation from the scope of employment.

Westbrooks v WCAB (1988) 203 CA3d 249, 252 CR 26, 53 CCC 157 (injury sustained by a bus driver in an accident for which he was convicted of reckless driving). Such a criminal conviction did not take the worker outside the course of employment because he was performing the activity for which he was employed, even though in a negligent or reckless and criminal manner.

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A partial statutory defense (Labor Code §3600(a)(8), the eighth condition of compensability) had been adopted in 1986, but it requires conviction of a felony, and Westbrooks' injury was before its effective date.

Time

Course of employment is limited by time as well as by space. Although a worker who works at a fixed location enters the course of employment on arrival at the employer's premises and leaves it on departure, he or she is entitled to a reasonable margin of time between arrival at the employer's premises and the actual commencement of work. *Fireman's Fund Indem. Co. v IAC (Vragnizan)* (1943) 61 CA2d 335, 143 P2d 104, 8 CCC 251. The cases, however, tend to treat time and space with the same rules. Thus, when an employer required an employee to stay at work an additional six hours, the court held that his commute had been converted to a special mission and that an attack by an unknown assailant on him as he left his vehicle and was walking toward his house was in the course of employment. *Safeway Stores v WCAB (Pointer)* (1980) 104 CA3d 528, 163 CR 750, 45 CCC 410). So far, however, the courts have resisted finding that a commute in an employer-provided vehicle begins before the employee gets in the car. *State Lottery Comm'n v WCAB (Garcia)* (1996) 50 CA4th 311, 57 CR2d 745, 61 CCC 1134.

Compensable Consequences

The broad definition of "proximate cause" in workers' compensation law extends to the effects of the injury. *State Compensation Ins. Fund v IAC (Wallin)* (1959) 176 CA2d 10, 1 CR 73, 24 CCC 302 (employer liable for amputation when defective vision from industrial eye injury caused injured worker to cut off a finger while cutting firewood with power saw at home). This doctrine of compensable consequences has been extended to such subsequent events as: a fall from a ladder caused by weakness from an industrial arm injury (*Beaty v WCAB* (1978) 80 CA3d 397, 43 CCC 444); a motorcycle accident on way to doctor for follow-up treatment of an industrial injury (*Laines v WCAB* (1975) 48 CA3d 872, 40 CCC 365); and an injury during a rehabilitation program following an industrial injury (*Rodgers v WCAB* (1985) 168 CA3d 567, 13 CWCR 141, 50 CCC 299).

Apportionment

As noted in the discussion of causation, California employers take employees as they find them at the time of employment, and when an injury lights up or aggravates a previously existing condition rendering it disabling, liability for the full disability without proration is imposed. *Colonial Ins. Co. v IAC (Pedroza)* (1946) 29 C2d 79, 83, 172 P2d 884, 887, 11 CCC 226, 228. Thus, if the injury contributes to the need for medical treatment or temporary disability compensation, there can be no apportionment of the

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award. *Granado v WCAB* (1968) 69 C2d 399, 33 CCC 647. An employer whose employment contributed to temporary disability or the need for medical treatment is liable for the full amount even though other employment contributed if the other employers involved are not reachable. *Buhlert Trucking Co. v WCAB (Gilpin)* (1988) 199 CA3d 1530, 53 CCC 53.

Permanent disability, on the other hand, is apportionable but not to causation. No apportionment of permanent disability may be made merely because of the existence of a disease or pathological condition that was asymptomatic and did not cause "labor disablement" before the industrial injury. *Ferguson v IAC* (1958) 50 C2d 469, 326 P2d 145, 23 CCC 108. The employer is liable for all permanent disability proximately caused by the injury but is not liable for any permanent disability that would have been present if the injury had not occurred. *Franklin v WCAB* (1978) 79 CA3d 224, 235, 145 CR 22, 29, 43 CCC 310, 315.

Permanent disability may consist of one or more of the following: (1) disability directly caused by the injury; (2) disability caused by the acceleration, aggravation, or "lighting up" of some pre-existing condition; (3) disability that existed before the injury; (4) disability resulting from the normal progress of some pre-existing condition apart from the effects of the injury. The first two are the liability of the employer, but the third (Labor Code §4750) and fourth (Labor Code §4663) are not. *California Workers' Compensation Practice* §5.15 (4th ed., Cal CEB 2003). Labor Code Section 5500.5(a), however, precludes apportionment to a prior uncompensated cumulative injury in a cumulative injury case. These legal principles are well settled, but the judicially established rules regarding kind and quality of evidence required to justify apportionment are strict.

The employer has the burden of proving the proportion of disability attributable to nonindustrial factors. Apportionment under Labor Code §4750 requires proof of actual labor disablement before the injury. This cannot be established by a "retroactive prophylactic work restriction" postulated after the subsequent industrial injury, i.e., it is speculative for a doctor to say that he would have imposed work restrictions on a prophylactic basis if he had seen the worker before the injury. *Ditler v WCAB* (1982) 131 CA3d 803, 814, 182 CR 839, 846, 47 CCC 492, 499. A medical opinion that recommends apportionment merely on the basis of a previous pathological condition or disease that did not cause labor disablement is based on incorrect legal theory and extends beyond the area of the physician's expertise. *Berry v WCAB* (1968) 68 C2d 786, 69 CR 68, 33 CCC 352. Labor Code Section 4750 does not permit apportionment in all cases of successive injuries; it is applicable only to successive permanent disabilities. *Wilkinson v WCAB* (1977) 19 C3d 491, 498, 138 CR 696, 42 CCC 406.

Labor Code Section 4663 requires proof that a demonstrable part of the disability would exist as the result of the normal progression of a nonindustrial condition if the industrial injury had not occurred. *Pullman Kellogg v WCAB (Normand)* (1980) 26 C3d 450, 454, 161 CR 783, 785, 45 CCC 170, 173. It is the disability resulting from the nonindustrial disease rather than the cause of the disease that is the proper subject of apportionment. Evidence that the disease would have caused disability at some indefinite future date is not sufficient. *Franklin v WCAB* (1978) 79 CA3d 224, 243, 145 CR 22, 33, 43 CCC 310, 322. Medical testimony that 80 percent of a worker's heart disability "would have been anticipated" absent industrial factors has been held insufficient to justify apportionment

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under Labor Code § 4663. Creel v Southern Cal. Rapid Transit Dist (1986) 14 CWCR 44.

CHSWC Recommendations

It is the view of the Commission that the laws on apportionment could reasonably be revised by:

- (1) Limiting the rule barring "retroactive" prophylactic restrictions.
- (2) Precluding a single employee from receiving PD awards exceeding 100 percent over his or her lifetime for the same part of the body, as defined.
- (3) Creating a presumption that a permanent disability once determined will continue to exist at the time of any subsequent industrial injury.
- (4) Nullifying the rule of *Ashley v WCAB* (1995) 37 CA4th 320, 23 CWCR 216, 60 CCC 683, that one may not apportion to subsequent non-industrial conditions.

APPENDIX A

Different Models of States' Laws Relating to Compensability and Apportionment ²

According to a survey of various states conducted as part of the Oregon Major Contributing Cause Study, in the majority of states, a disability is considered compensable even if it results from a combination of a work-related incident and a pre-existing condition or weakness. The study points out that historically, accidental injuries have been compensable under workers' compensation if they arise out of and in the course of employment.

Some states have adopted different standards in recent years that have made the standard of compensability more stringent:

- ?? Four jurisdictions have adopted a very high standard for compensability called a major contributing cause standard.
- ?? Others have adopted less stringent standards:
- ?? Seven states have adopted a substantial contributing cause.
- ?? Three states utilize a significant contribution standard that can usually be met by testimony of a credible physician that the contribution of the work to the disability was "significant."
- ?? New Jersey uses the material contributing factor standard.

Standards of Compensability

In 1990, Oregon adopted a standard that a disability is compensable only if work is the "major contributing cause." The major contributing cause standard is also used in Florida, Arkansas, and South Dakota.

Major Contributing Cause

State	Comment
Arkansas	Major contributing cause is defined as more than 50% in the statute (11-9-102 ARK Code)
Florida	Major contributing cause is defined as more than 50% in the statute (Florida statute 440.09)
Oregon	Determining the major contributing cause involves evaluating the relative contribution of different causes of an injury or disease and deciding which is the primary cause; according to interviews conducted as part of the Oregon Major Contributing Cause Study, there was general consensus that work contribution must be at least 51%. (ORS 656.005 7 (a))
South Dakota	No injury is compensable unless the employment or employment-related activities are a major contributing cause of the condition complained of.(South Dakota 62-1-1-7 (a)); Under South Dakota's laws, the courts have determined that the doctor has to specify that the employment is the major contributing cause of the condition. ³

²Welch, Ed, Final Report: Oregon Major Contributing Cause Study (October 5, 2000)

³ Per James Marsh, Director of the South Dakota Division of Labor and Management

Substantial Contributing Cause

State	Comment
Arizona	Excludes heart and perivascular conditions from coverage unless “some injury, stress or exertion related to the employment was a substantial contributing cause of the heart-related or perivascular injury, illness or death. (23-1043.01)
California	For psychiatric injuries that “resulted from being a victim of a violent act, the employee has to demonstrate by a preponderance of evidence that actual events of employment were a substantial cause of the injury. Substantial cause is defined as at least 35 to 40 % of the causation from all sources combined. (LC 3208.3)
Missouri	Work must be a “substantial factor in the cause of the resulting medical condition or disability.” (R.S. MO. 287.020 and 287.067)
Nevada	Employer must prove by a preponderance of evidence that the occupational disease is not a substantial contributing cause of the worker’s condition. (Nevada revised statutes 617.366)
North Dakota	Preexisting condition is excluded from coverage unless “the employment substantially accelerates its progression or substantially worsens its severity.” (North Dakota code 65-01-02)
Texas	In cases of a heart attack, the preponderance of the medical evidence must indicate that the employee’s work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack. (Texas Labor Code 408.008)
Virginia	If employment substantially increases the risk of sexual assault, an injured worker in Virginia may receive workers’ compensation benefits and also sue the assailant even if that person is the employer or co-employee. (VA.Code 65.2-301)

Significant Contribution Standard

State	Comment
Maine	“If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.” (39A M.R.S. 201)
Michigan	Covers mental disabilities and conditions of the aging process “if contributed to or aggravated or accelerated by the employment in a significant manner.” (MSA 17.237 (301))
Mississippi	Only injuries that are “contributed to or aggravated or accelerated by the employment in a significant manner” are compensable. (MISS Code 71-3-3)

Material Contributing Factor

State	Comment
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New Jersey	Applies to compensation of cases for injury or death from cardiovascular or cerebral vascular causes. The burden is on the claimant to prove by a preponderance of credible evidence that the injury in reasonable medical probability was caused in a material degree by the cardiovascular injury or death which resulted..; Material degree by means an appreciable degree substantially greater than de minimis. (NJ stat 34:15-7.2)
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Compensability in Cases of Preexisting Conditions

States that Eliminate Compensability When a Preexisting Condition is Involved

State	Comment
Arkansas, Florida, Oregon, South Dakota	<p>Compensability is barred when injury combines with a preexisting condition, unless the injury is a major contributing cause of the combined condition complained of (See Appendix C for the statutes of each of these states); Florida and Arkansas specify the major contributing cause as more than 50%. Oregon’s threshold according to interviews conducted is also more than 50%. In South Dakota, the doctor has to specify that the injury is a major contributing cause per James Marsh, Director of Labor Management Division of South Dakota.</p> <p>For a Summary of States that use the Major Contributing Cause Standard Compared with California. (See Appendix C)</p>
New Hampshire	Excluded from occupational disease coverage any disease that existed at the commencement of the employment. (RSA 281-A:2)
Wyoming	Does not cover “any injury or condition preexisting at the time of employment with the employer against whom a claim is made.” (Wyo.stat 27-14-102)
Georgia	“Injury” and “personal injury” shall include the aggravation of a preexisting condition by accident arising out of and in course of employment, but only for so long as the aggravation of the preexisting condition continues to be the cause of the disability. (O.C.G.A. 34-9-1)
Massachusetts	“If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable, to cause or prolong disability, the resultant condition shall be compensable only to the extent that such compensable injury or disease remains a major but not necessarily a predominant cause of disability or need for treatment.

States that Reduce Benefits Statutorily When a Preexisting Condition is Involved

State	Comment
Alabama	If the degree of duration of disability resulting from an accident is increased or prolonged because of a preexisting injury or infirmity, the employer shall be liable only for the disability that would have resulted from the accident had the earlier injury or infirmity not existed. (Code of Alabama 25-5-58)
Arizona, Delaware, Florida, Iowa, Kansas, Maryland, Utah	When an occupational disease combines in some fashion with another condition, the worker is only entitled to the compensation that would be payable if the occupational disease were the sole cause of the disability or death.
California	If an injury or disease aggravates a prior disease, compensation is limited to the proportion of disability "reasonably attributed" to the work-related injury. (LC 4750.5)
Connecticut	For aggravation of a preexisting disease, compensation shall be allowed only for the portion of the disability due to the aggravation of the preexisting disease as may be reasonably attributed to the injury upon which the claim is based. (Conn. Statute 31-275)
Idaho	In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury/disease is increased or prolonged because of a preexisting condition, the employer shall be liable only for the additional disability from the industrial injury/disease. (Idaho code 72-406)
Mississippi	When the worker reaches maximum medical recovery, compensation benefits are reduced if a preexisting condition is a "material contributing factor in the results following injury." Compensation is reduced by the proportion by which the preexisting condition "contributed to the production of the results following the injury." (MISS Code 71-3-7)
Nebraska	The aggravation of a preexisting occupational disease is compensable but the employer is liable only for the degree of aggravation of the preexisting occupational disease. (RRS Nebraska 48-151)

Other Model: Texas

Although Texas does not have a major contributing cause standard, it does have certain threshold criteria that must be met in order to prove contribution from a previous injury. This criteria was established by the Appeals Panel Decision of the Texas Workers' Compensation Commission.

In order to prove contribution from a previous injury, the insurance carrier in Texas has to show to the Commission:

- 1) Documentation that there existed a prior compensable injury.
- 2) Evidence of impairment rating for the previous injury and the current injury based on the most current version of the AMA Guides used in Texas.
- 3) The cumulative impact of the two injuries (Statute 408.084 and Appeals Board Decisions).

APPENDIX B

California Compared to Major Contributing Cause States

The chart below provides a summary of the major contributing cause states' laws relating to compensability and apportionment compared with California.

State	Establishment of Compensability	Compensability Threshold	Compensable Injury Combined with Preexisting Conditions	Burden of Proof	Other Comments
California		<p>No particular threshold except for psychiatric injuries. Injury has to arise out of, or occurred in the course of employment</p> <p>Other applicable conditions specified in LC 3600.</p>	<p>When a pre-existing condition existed that affected the injured workers' ability to work prior to the current injury, the disability from a subsequent injury may be apportioned to the previous injury.</p> <p>Only permanent disability can be apportioned.</p>	<p>Employee has to demonstrate by a preponderance of evidence that certain conditions apply. (See LC 3600). One of the conditions is that: the employee's medical records existing prior to the notice of termination or layoff contain evidence of the injury;</p> <p>In cases relating to apportionment, The employer has the burden of proving the proportion of disability attributable to non-industrial factors.</p>	<p>LC 3600, LC 4750, LC 4663</p>

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State	Establishment of Compensability	Compensability Threshold	Compensable Injury Combined with Preexisting Conditions	Burden of Proof	Other Comments
Arkansas	Compensability must be established by medical evidence supported by objective findings.	<p>“Major Cause” threshold of more than 50% exists:</p> <p>Threshold of more than 50% for temporary benefits exists for injuries not caused by a specific incident or which are unidentifiable by time and place (repetitive motion injury, back injury and hearing loss). Permanent benefits awarded if a compensable injury was more than 50% of the cause of the disability.</p>	More than 50% in order to receive permanent benefits	<p>Employee has to demonstrate by a preponderance of evidence;</p> <p>In occupational disease cases, Arkansas requires the worker to prove the causal connection between employment and the disease by clear and convincing evidence. (Ark. Stat. Ann. § 11-9-601.)</p>	Arkansas Code 11-9-102

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State	Establishment of Compensability	Compensability Threshold	Compensable Injury Combined with Preexisting Conditions	Burden of Proof	Other Comments
Florida	The injury or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings.	<p>50% Threshold:</p> <p>The accidental compensable injury must be the major contributing cause of any resulting injuries. "Major contributing cause" means the cause which is more than 50 % responsible for the injury.</p> <p>Major contributing cause must be demonstrated by medical evidence only.</p> <p>(Florida Statute 440.09 (1))</p>	<p>50% Threshold:</p> <p>If an injury arising out of and in the course of employment combines with a preexisting condition to cause or prolong disability, the employer must pay compensation to the extent that the injury arising out of and in the course of employment is more than 50 % responsible for the injury as compared to all other causes combined and remains the major contributing cause of the disability or need for treatment.</p>	?	

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State	Establishment of Compensability	Compensability Threshold	Compensable Injury Combined with Preexisting Conditions	Burden of Proof	Other Comments
Oregon	Needs to be established by medical evidence supported by objective findings	The compensable injury has to be a “major contributing cause” (more than 50% per Welsh 2000) of the consequential condition.	If an injury combines with a preexisting condition, the combined condition is compensable so long as the first compensable injury is the major contributing cause (51%) of the disability of the combined condition.	Worker must prove by a preponderance of evidence that the injury is compensable. (Oregon Statute 656.262)	

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State	Establishment of Compensability	Compensability Threshold	Compensable Injury Combined with Preexisting Conditions	Burden of Proof	Other Comments
South Dakota		The employment or employment-related activities have to be a major contributing cause of the condition complained of.	<p>a) If a preexisting injury is non-industrial, and the injury combines with a preexisting disease or condition to cause disability, the condition complained of is compensable if the employment is and remains a major contributing cause of the disability.</p> <p>b) If a preexisting injury was compensable, the subsequent injury is compensable if the subsequent employment contributed independently to the disability.</p>	Worker has the burden of proof to establish compensability.	For the employment to be a “major contributing cause” of a disability, the doctor has to find that the employment or employment-related activities are a “major contributing cause.”

Sources:

Information for Florida, Arkansas, and Oregon obtained from Final Report: Oregon Major Contributing Cause Study (October 5, 2000).; Statutes of the jurisdictions found on websites; and interviews with David Schneider, Legal Adviser Attorney, Arkansas Workers’ Compensation.

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California information from California statutes. Background Memo prepared by Larry Swezey.
South Dakota: James Marsh, Director, South Dakota Labor and Management Division.

APPENDIX C

Selected States' Statutes Relating to Compensability

The following are the statutes relating to compensability and apportionment from the states of Arizona, Arkansas, California, Florida, Oregon, South Dakota, and Texas.

ARIZONA

23-1021. [Right of employee to compensation; definitions](#)

A. Every employee coming within the provisions of this chapter who is injured, and the dependents of every such employee who is killed by accident arising out of and in the course of his employment, wherever the injury occurred, unless the injury was purposely self-inflicted, shall be entitled to receive and shall be paid such compensation for loss sustained on account of the injury or death, such medical, nurse and hospital services and medicines, and such amount of funeral expenses in the event of death, as are provided by this chapter.

B. Every employee who is covered by insurance in the state compensation fund and who is injured by accident arising out of and in the course of employment, and the dependents of every such employee who is killed, provided the injury was not purposely self-inflicted, shall be paid such compensation from the state compensation fund for loss sustained on account of the injury and shall receive such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as provided in this chapter.

C. An employee's injury or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter if the impairment of the employee is due to the employee's use of alcohol or the unlawful use of any controlled substance proscribed by title 13, chapter 34 and is a substantial contributing cause of the employee's personal injury or death. This subsection does not apply if the employer had actual knowledge of and permitted, or condoned, the employee's use of alcohol or the unlawful use of the controlled substance proscribed by title 13, chapter 34.

D. Notwithstanding subsection C of this section, if the employer has established a policy of drug testing or alcohol impairment testing in accordance with chapter 2, article 14 of this title, is maintaining that policy on an ongoing manner and, before the date of the employee's injury, the employer files the written certification with the industrial commission as required by subsection F of this section, an employee's injury or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter, if the employee of such an employer fails to pass, refuses to cooperate with or refuses to take a drug test for the unlawful use of any controlled substance proscribed by title 13, chapter 34 or fails to pass, refuses to cooperate with or refuses to take an alcohol impairment test that is administered by or at the request of the employer not more than twenty-four hours after the employer receives actual notice of the injury, unless the employee proves any of the following:

1. The employee's use of alcohol or the employee's use of any unlawful substance proscribed by title 13, chapter 34 was not a contributing cause of the employee's injury or death.

2. The alcohol impairment test indicates that the employee's alcohol concentration was lower than the alcohol concentration that would constitute a violation of section 28-1381, subsection A and would not create a presumption that the employee was under the influence of intoxicating liquor pursuant to section 28-1381, subsection G.

3. The drug test or alcohol impairment test used cutoff levels for the presence of alcohol, drugs or metabolites that were lower than the cutoff levels prescribed at the time of the testing for transportation workplace drug and alcohol testing programs under 49 Code of Federal Regulations part 40.

E. Subsection D of this section does not apply if the employer had actual knowledge of and permitted or condoned the employee's use of alcohol or the employee's unlawful use of any controlled substance proscribed by title 13, chapter 34.

F. An employer that establishes a policy of drug testing or alcohol impairment testing in accordance with chapter 2, article 14 of this title shall file a written certification to that effect with the industrial commission and provide notification to its employees in a manner consistent with section 23-493.04, subsection A that the employer is maintaining that policy.

G. Nothing contained in this section shall be construed to enhance or expand the reporting requirements prescribed in section 23-908, subsection D.

H. For the purposes of this section:

1. "Refuses to cooperate" means that the employee engages in any act or omission that impedes the ability of the employer, the insurance carrier or the agents of the employer or insurance carrier to obtain an accurate result on a drug test or an alcohol impairment test.

2. "Substantial contributing cause" means anything more than a slight contributing cause.

ARKANSAS

11-9-102

(4)(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence; or

(c) Hearing loss which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

(iii) Mental illness as set out in § [11-9-113](#);

(iv) Heart or cardiovascular injury, accident, or disease as set out in § [11-9-114](#);

(v) A hernia as set out in § [11-9-523](#); or

(vi) An adverse reaction experienced by any employee of the Department of Health or any employee of a hospital licensed by the Department of Health related to vaccination with Vaccinia vaccines for smallpox, including the Dryvax vaccine, regardless of whether the adverse reaction is the result of voluntary action by the injured employee.

(B) "Compensable injury" does not include:

(i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which said assault or combat amounts to a deviation from customary duties; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries;

(ii) Injury incurred while engaging in or performing or as the result of engaging in or performing any recreational or social activities for the employee's personal pleasure;

(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated; or

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

(C) The definition of "compensable injury" as set forth in this subdivision (4) shall not be deemed to limit or abrogate the right to recover for mental injuries as set forth in § [11-9-113](#) or occupational diseases as set forth in § [11-9-601](#) et seq.

(D) A compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section.

(E) Burden of Proof. The burden of proof of a compensable injury shall be on the employee and shall be as follows:

- (i) For injuries falling within the definition of compensable injury under subdivision (4)(A)(i) of this section, the burden of proof shall be a preponderance of the evidence; or
- (ii) For injuries falling within the definition of compensable injury under subdivision (4)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

(F) Benefits.

- (i) When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter.
- (ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.
- (iii) Under this subdivision (4)(F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.
- (iv) Nothing in this section shall limit the payment of rehabilitation benefits or benefits for disfigurement as set forth in this chapter;

11-9-601

Compensation Generally

- (a) Where an employee suffers from an occupational disease as defined in this subchapter and is disabled or dies as a result of the disease and where the disease was due to the nature of the occupation or process in which he or she was employed within the period previous to his or her disablement as limited in subsection (g) of this section, then the employee, or, in case of death, his or her dependents, shall be entitled to compensation as if the disablement or death were caused by injury, except as otherwise provided in this subchapter.
- (b) No compensation shall be payable for an occupational disease if the employee, at the time of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represented himself or herself in writing as not having previously been disabled, laid off, or compensated in damages or otherwise, because of the disease.
- (c)(1) Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable shall be reduced and limited to the proportion only of the compensation that would be payable if the occupational disease

were the sole cause of the disability or death as the occupational disease, as a causative factor, bears to all the causes of the disability or death.

(2) The reduction in compensation is to be effected by reducing the number of weekly or monthly payments or the amounts of the payments, as under the circumstances of the particular case may be for the best interest of the claimant.

(d) No compensation for death from an occupational disease shall be payable to any person whose relationship to the deceased which, under the provisions of this chapter, would give right to compensation arose subsequent to the beginning of the first compensable disability except to afterborn children of a marriage existing at the beginning of the disability.

(e)(1)(A) "Occupational disease", as used in this chapter, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is defined in this chapter.

(B) However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

(2) No compensation shall be payable for any contagious or infectious disease unless contracted in the course of employment in or immediate connection with a hospital or sanatorium in which persons suffering from that disease are cared for or treated.

(3) No compensation shall be payable for any ordinary disease of life to which the general public is exposed.

(f)(1) Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease and the carrier, if any, on the risk when the employee was last injuriously exposed under the employer shall be liable.

(2) The amount of the compensation shall be based upon the average weekly wage of the employee when last injuriously exposed under the employer, and the notice of injury and claim for compensation, as required pursuant to this subchapter, shall be given and made to the employer.

(g)(1) An employer shall not be liable for any compensation for an occupational disease unless:

(A) The disease is due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process, or employment and is actually incurred in his or her employment. This includes any disease due to or attributable to exposure to or contact with any radioactive material by an employee in the course of his or her employment;

(B) Disablement or death results within three (3) years in case of silicosis or asbestosis, or one (1) year in case of any other occupational disease, except a diseased condition caused by exposure to X rays, radioactive substances, or ionizing radiation, after the last injurious exposure to the disease in the employment; or

(C) In case of death, death follows continuous disability from the disease, commencing within the period above limited, for which compensation has been paid or awarded or timely claim made as provided in this subchapter and results within seven (7) years after the last exposure.

(2) However, in case of a diseased condition caused by exposure to X rays, radioactive substances, or ionizing radiation only, the limitations expressed do not apply.

CALIFORNIA

3600. (a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: (1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division. (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment. (3) Where the injury is proximately caused by the employment, either with or without negligence. (4) Where the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee. As used in this paragraph, "controlled substance" shall have the same meaning as prescribed in Section 11007 of the Health and Safety Code. (5) Where the injury is not intentionally self-inflicted. (6) Where the employee has not willfully and deliberately caused his or her own death. (7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor. (8) Where the injury is not caused by the commission of a felony, or a crime which is punishable as specified in subdivision (b) of Section 17 of the Penal Code, by the injured employee, for which he or she has been convicted. (9) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post the notice shall not constitute an expression of intent to waive the provisions of this subdivision. (10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply: (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff. (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury. (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff. (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff. For purposes of this paragraph, an employee provided notice pursuant to Sections 44948.5, 44949, 44951, 44955, 44955.6, 72411, 87740, and 87743 of the Education Code shall be considered to have been provided a notice of termination or layoff only upon a district's final decision not to reemploy that person. A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this paragraph, and this paragraph shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this paragraph inapplicable to the employee. (b) Where an

employee, or his or her dependents, receives the compensation provided by this division and secures a judgment for, or settlement of, civil damages pursuant to those specific exemptions to the employee's exclusive remedy set forth in subdivision (b) of Section 3602 and Section 4558, the compensation paid under this division shall be credited against the judgment or settlement, and the employer shall be relieved from the obligation to pay further compensation to, or on behalf of, the employee or his or her dependents up to the net amount of the judgment or settlement received by the employee or his or her heirs, or that portion of the judgment as has been satisfied.

4663. In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury.

4750. An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.

5500.5. (a) Except as otherwise provided in Section **5500.6**, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner: For claims filed or asserted on or after: The period shall be: January 1, 1979 three years January 1, 1980 two years January 1, 1981 and thereafter one year In the event that none of the employers during the above referenced periods of occupational disease or cumulative injury are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof. Any employer held liable for workers' compensation benefits as a result of another employer's failure to secure the payment of compensation as required by this division shall be entitled to reimbursement from the employers who were unlawfully uninsured during the last year of the employee's employment, and shall be subrogated to the rights granted to the employee against the unlawfully uninsured employers under the provisions of Article 1 (commencing with Section 3700) of Chapter 4 of Part 1 of Division 4. If, based upon all the evidence presented, the appeals board or workers' compensation judge finds the existence of cumulative injury or occupational disease, liability for the cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining the liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of

apportionment. (b) Where a claim for compensation benefits is made on account of an occupational disease or cumulative injury which may have arisen out of more than one employment, the application shall state the names and addresses of all employers liable under subdivision (a), the places of employment, and the approximate periods of employment where the employee was exposed to the hazards of the occupational disease or cumulative injury. If the application is not so prepared or omits necessary and proper employers, any interested party, at or prior to the first hearing, may request the appeals board to join as defendant any necessary or proper party. If the request is made prior to the first hearing on the application, the appeals board shall forthwith join the employer as a party defendant and cause a copy of the application together with a notice of the time and place of hearing to be served upon the omitted employer; provided, the notice can be given within the time specified in this division. If the notice cannot be timely given or if the motion for joinder is made at the time of the first hearing, then the appeals board or the workers' compensation judge before whom the hearing is held, if it is found that the omitted employer named is a necessary or proper party, may order a joinder of the party and continue the hearing so that proper notice may be given to the party or parties so joined. Only one continuance shall be allowed for the purpose of joining additional parties. Subsequent to the first hearing the appeals board shall join as a party defendant any additional employer when it appears that the employer is a proper party, but the liability of the employer shall not be determined until supplemental proceedings are instituted. (c) In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers. Where such an election is made, the employee must successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits. If, during the pendency of any claim wherein the employee or his or her dependents has made an election to proceed against one or more employers, it should appear that there is another proper party not yet joined, the additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the liability of the employer shall not be determined until supplemental proceedings are instituted. Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board's final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his or her dependents such information as will enable the employer to determine the time, place, and duration of the alleged employment. On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted. (d) (1) In the event a self-insured employer which owns and operates a work location in the State of California, sells or has sold the ownership and operation of the work location pursuant to a sale of a business or all or part of the assets of a business to another self-insured person or entity after January 1, 1974, but before January 1, 1978, and all the requirements of subparagraphs (A) to (D), inclusive, exist, then the liability of the employer-seller and employer-buyer, respectively, for cumulative injuries suffered by employees employed at the work location immediately before the sale shall, until January 1, 1986, be governed by the provisions of this section which were in effect on the date of that sale. (A) The sale constitutes a material change in ownership of such work location. (B) The person or entity making the purchase continues the operation of the work location. (C) The person

or entity becomes the employer of substantially all of the employees of the employer-seller. (D) The agreement of sale makes no special provision for the allocation of liabilities for workers' compensation between the buyer and the seller. (2) For purposes of this subdivision: (A) "Work location" shall mean any fixed place of business, office, or plant where employees regularly work in the trade or business of the employer. (B) A "material change in ownership" shall mean a change in ownership whereby the employer-seller does not retain, directly or indirectly, through one or more corporate entities, associations, trusts, partnerships, joint ventures, or family members, a controlling interest in the work location. (3) This subdivision shall have no force or effect on or after January 1, 1986, unless otherwise extended by the Legislature prior to that date, and it shall not have any force or effect as respects an employee who, subsequent to the sale described in paragraph (1) and prior to the date of his or her application for compensation benefits has been filed, is transferred to a different work location by the employer-buyer. (4) If any provision of this subdivision or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of this subdivision which can be given effect without the invalid provision or application, and to this end the provisions of this subdivision are severable. (e) At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. The proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his or her dependents, but shall be limited to a determination of the respective contribution rights, interest or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss the employer and amend its original award in such manner as may be required. (f) If any proceeding before the appeals board for the purpose of determining an apportionment of liability or of a right of contribution where any employee incurred a disability or death resulting from silicosis in underground metal mining operations, the determination of the respective rights and interests of all of the employers joined in the proceedings either initially or supplementally shall be as follows: (1) All employers whose underground metal mining operations resulted in a silicotic exposure during the period of the employee's employment in those operations shall be jointly and severally liable for the payment of compensation and of medical, surgical, legal and hospital expense which may be awarded to the employee or his or her estate or dependents as the result of disability or death resulting from or aggravated by the exposure. (2) In making its determination in the supplemental proceeding for the purpose of determining an apportionment of liability or of a right of contribution of percentage liabilities of the various employers engaged in underground metal mining operations the appeals board shall consider as a rebuttal presumption that employment in underground work in any mine for a continuous period of more than three calendar months will result in a silicotic exposure for the employee so employed during the period of employment if the underground metal mine was driven or sunk in rock having a composition which will result in dissemination of silica or silicotic dust particles when drilled, blasted, or transported. (g) Any employer shall be entitled to rebut the presumption by showing to the satisfaction of the appeals board, or the workers' compensation judge, that the mining methods used by the employer in the employee's place of employment did not result during his or her employment in the creation of silica dust in sufficient amount or concentration to

constitute a silicotic hazard. Dust counts, competently made, at intervals and in locations as meet the requirements of the Division of Occupational Safety and Health for safe working conditions may be received as evidence of the amount and concentration of silica dust in the workings where the counts have been made at the time when they were made. The appeals board may from time to time, as its experience may indicate proper, promulgate orders as to the frequency with which dust counts shall be taken in different types of workings in order to justify their acceptance as evidence of the existence or nonexistence of a silicotic hazard in the property where they have been taken. (h) The amendments to this section adopted at the 1959 Regular Session of the Legislature shall operate retroactively, and shall apply retrospectively to any cases pending before the appeals board or courts. From and after the date this section becomes effective no payment shall be made out of the fund used for payment of the additional compensation provided for in Section 4751, or out of any other state funds, in satisfaction of any liability heretofore incurred or hereafter incurred, except awards which have become final without regard to the continuing jurisdiction of the appeals board on that effective date, and the state and its funds shall be without liability therefor. This subdivision shall not in any way effect a reduction in any benefit conferred or which may be conferred upon any injured employee or his dependents. (i) The amendments to this section adopted at the 1977 Regular Session of the Legislature shall apply to any claims for benefits under this division which are filed or asserted on or after January 1, 1978, unless otherwise specified in this section.

FLORIDA

440.09 Coverage.--

(1) The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries. For purposes of this section, "major contributing cause" means the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought. In cases involving occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence. Pain or other subjective complaints alone, in the absence of objective relevant medical findings, are not compensable. For purposes of this section, "objective relevant medical findings" are those objective findings that correlate to the subjective complaints of the injured employee and are confirmed by physical examination findings or diagnostic testing. Establishment of the causal relationship between a compensable accident and injuries for conditions that are not readily observable must be by medical evidence only, as demonstrated by physical examination findings or diagnostic testing. Major contributing cause must be demonstrated by medical evidence only.

(a) This chapter does not require any compensation or benefits for any subsequent injury the employee suffers as a result of an original injury arising out of and in the course of employment unless the original injury is the major contributing cause of the subsequent injury. Major contributing cause must be demonstrated by medical evidence only.

(b) If an injury arising out of and in the course of employment combines with a preexisting disease or condition to cause or prolong disability or need for treatment, the employer must pay compensation or benefits required by this chapter only to the extent that the injury arising out of and in the course of employment is and remains more than 50 percent responsible for the injury as compared to all other causes combined and thereafter remains the major contributing cause of the disability or need for treatment. Major contributing cause must be demonstrated by medical evidence only.

(c) Death resulting from an operation by a surgeon furnished by the employer for the cure of hernia as required in s. 440.15(6) [F.S. 1981] shall for the purpose of this chapter be considered to be a death resulting from the accident causing the hernia.

(d) If an accident happens while the employee is employed elsewhere than in this state, which would entitle the employee or his or her dependents to compensation if it had happened in this state, the employee or his or her dependents are entitled to compensation if the contract of employment was made in this state, or the employment was principally localized in this state. However, if an employee receives compensation or damages under the laws of any other state, the total compensation for the injury may not be greater than is provided in this chapter.

(2) Benefits are not payable in respect of the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, the Defense Base Act, or the Jones Act.

(3) Compensation is not payable if the injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician; or by the willful intention of the employee to injure or kill himself, herself, or another.

(4)(a) An employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105 or any criminal act for the purpose of securing workers' compensation benefits. For purposes of this section, the term "intentional" shall include, but is not limited to, pleas of guilty or nolo contendere in criminal matters. This section shall apply to accidents, regardless of the date of the accident. For injuries occurring prior to January 1, 1994, this section shall pertain to the acts of the employee described in s. 440.105 or criminal activities occurring subsequent to January 1, 1994.

(b) A judge of compensation claims, administrative law judge, or court of this state shall take judicial notice of a finding of insurance fraud by a court of competent jurisdiction and terminate or otherwise disallow benefits.

(c) Upon the denial of benefits in accordance with this section, a judge of compensation claims shall have the jurisdiction to order any benefits payable to the employee to be paid into the court registry or an escrow account during the pendency of an appeal or until such time as the time in which to file an appeal has expired.

(5) If injury is caused by the knowing refusal of the employee to use a safety appliance or observe a safety rule required by statute or lawfully adopted by the department, and brought prior to the accident to the employee's knowledge, or if injury is caused by the knowing refusal of the employee to use a safety appliance provided by the employer, the compensation as provided in this chapter shall be reduced 25 percent.

(6) Except as provided in this chapter, a construction design professional who is retained to perform professional services on a construction project, or an employee of a construction design professional in the performance of professional services on the site of the construction project, is not liable for any injuries resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under this chapter, unless responsibility for safety practices is specifically assumed by contracts. The immunity provided by this subsection to a construction design professional does not apply to the negligent preparation of design plans or specifications.

(7)(a) To ensure that the workplace is a drug-free environment and to deter the use of drugs and alcohol at the workplace, if the employer has reason to suspect that the injury was occasioned primarily by the intoxication of the employee or by the use of any drug, as defined in this chapter, which affected the employee to the extent that the employee's normal faculties were impaired, and the employer has not implemented a drug-free workplace pursuant to ss. 440.101 and 440.102, the employer may require the employee to submit to a test for the presence of any or all drugs or alcohol in his or her system.

(b) If the employee has, at the time of the injury, a blood alcohol level equal to or greater than the level specified in s. 316.193, or if the employee has a positive confirmation of a drug as defined in this act, it is presumed that the injury was occasioned primarily by the intoxication of, or by the influence of the drug upon, the employee. If the employer has implemented a drug-free workplace, this presumption may be rebutted only by evidence that there is no reasonable hypothesis that the intoxication or drug influence contributed to the injury. In the absence of a drug-free workplace program, this presumption may be rebutted by clear and convincing evidence that the intoxication or influence of the drug did not contribute to the injury. Percent by weight of alcohol in the blood must be based upon grams of alcohol per 100 milliliters of blood. If the results are positive, the testing facility must maintain the specimen for a minimum of 90 days. Blood serum may be used for testing purposes under this chapter; however, if this test is used, the presumptions under this section do not arise unless the blood alcohol level is proved to be medically and scientifically equivalent to or greater than the comparable blood alcohol level that would have been obtained if the test were based on percent by weight of alcohol in the blood. However, if, before the accident, the employer had actual knowledge of and expressly acquiesced in the employee's presence at the workplace while under the influence of such alcohol or drug, the presumptions specified in this subsection do not apply.

(c) If the injured worker refuses to submit to a drug test, it shall be presumed in the absence of clear and convincing evidence to the contrary that the injury was occasioned primarily by the influence of drugs.

(d) The agency shall provide by rule for the authorization and regulation of drug-testing policies, procedures, and methods. Testing of injured employees shall not commence until such rules are adopted.

(e) As a part of rebutting any presumptions under paragraph (b), the injured worker must prove the actual quantitative amounts of the drug or its metabolites as measured on the initial and confirmation post-accident drug tests of the injured worker's urine sample and provide additional evidence regarding the absence of drug influence other than the worker's denial of being under the influence of a drug. No drug test conducted on a urine sample shall be rejected as to its results or the presumption imposed under paragraph (b) on the basis of the urine being bodily fluid tested.

(8) If, by operation of s. 440.04, benefits become payable to a professional athlete under this chapter, such benefits shall be reduced or setoff in the total amount of injury benefits or wages payable during the period of disability by the employer under a collective bargaining agreement

OREGON

656.005 Definitions. (1) "Average weekly wage" means the Oregon average weekly wage in covered employment, as determined by the Employment Department, for the last quarter of the calendar year preceding the fiscal year in which the injury occurred.

(2) "Beneficiary" means an injured worker, and the husband, wife, child or dependent of a worker, who is entitled to receive payments under this chapter. "Beneficiary" does not include:

(a) A spouse of an injured worker living in a state of abandonment for more than one year at the time of the injury or subsequently. A spouse who has lived separate and apart from the worker for a period of two years and who has not during that time received or attempted by process of law to collect funds for support or maintenance is considered living in a state of abandonment.

(b) A person who intentionally causes the compensable injury to or death of an injured worker.

(3) "Board" means the Workers' Compensation Board.

(4) "Carrier-insured employer" means an employer who provides workers' compensation coverage with a guaranty contract insurer.

(5) "Child" includes a posthumous child, a child legally adopted prior to the injury, a child toward whom the worker stands in loco parentis, an illegitimate child and a stepchild, if such stepchild was, at the time of the injury, a member of the worker's family and substantially dependent upon the worker for support. An invalid dependent child is a child, for purposes of benefits, regardless of age, so long as the child was an invalid at the time of the accident and thereafter remains an invalid substantially dependent on the worker for support. For purposes of this chapter, an invalid dependent child is considered to be a child under 18 years of age.

(6) "Claim" means a written request for compensation from a subject worker or someone on the worker's behalf, or any compensable injury of which a subject employer has notice or knowledge.

(7)(a) A "compensable injury" is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means, if it is established by medical evidence supported by objective findings, subject to the following limitations:

(A) No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition.

(B) If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.

(b) "Compensable injury" does not include:

(A) Injury to any active participant in assaults or combats which are not connected to the job assignment and which amount to a deviation from customary duties;

(B) Injury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities primarily for the worker's personal pleasure; or

(C) Injury the major contributing cause of which is demonstrated to be by a preponderance of the evidence the injured worker's consumption of alcoholic beverages or the unlawful consumption of any controlled substance, unless the employer permitted, encouraged or had actual knowledge of such consumption.

(c) A "disabling compensable injury" is an injury which entitles the worker to compensation for disability or death. An injury is not disabling if no temporary benefits are due and payable, unless there is a reasonable expectation that permanent disability will result from the injury.

(d) A "nondisabling compensable injury" is any injury which requires medical services only.

(8) "Compensation" includes all benefits, including medical services, provided for a compensable injury to a subject worker or the worker's beneficiaries by an insurer or self-insured employer pursuant to this chapter.

(19) "Objective findings" in support of medical evidence are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm. "Objective findings" does not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable.

(24)(a) "Preexisting condition" means, for all industrial injury claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment, provided that:

(A) Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis; and

(B)(i) In claims for an initial injury or omitted condition, the diagnosis or treatment precedes the initial injury;

(ii) In claims for a new medical condition, the diagnosis or treatment precedes the onset of the new medical condition; or

(iii) In claims for a worsening pursuant to ORS 656.273 or 656.278, the diagnosis or treatment precedes the onset of the worsened condition.

(b) "Preexisting condition" means, for all occupational disease claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment and that precedes the onset of the claimed occupational disease, or precedes a claim for worsening in such claims pursuant to ORS 656.273 or 656.278.

(c) For the purposes of industrial injury claims, a condition does not contribute to disability or need for treatment if the condition merely renders the worker more susceptible to the injury.

656.225 Compensability of certain preexisting conditions. In accepted injury or occupational disease claims, disability solely caused by or medical services solely directed to a worker's preexisting condition are not compensable unless:

(1) In occupational disease or injury claims other than those involving a preexisting mental disorder, work conditions or events constitute the major contributing cause of a pathological worsening of the preexisting condition.

(2) In occupational disease or injury claims involving a preexisting mental disorder, work conditions or events constitute the major contributing cause of an actual worsening of the preexisting condition and not just of its symptoms.

(3) In medical service claims, the medical service is prescribed to treat a change in the preexisting condition as specified in subsection (1) or (2) of this section, and not merely as an incident to the treatment of a compensable injury or occupational disease. [1995 c.332 §3]

656.262

(6)(a) Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the employer has notice or knowledge of the claim. Once the claim is accepted, the insurer or self-insured employer shall not revoke acceptance except as provided in this section. The insurer or self-insured employer may revoke acceptance and issue a denial at any time when the denial is for fraud, misrepresentation or other illegal activity by the worker. If the worker requests a hearing on any revocation of acceptance and denial alleging fraud, misrepresentation or other illegal activity, the insurer or self-insured employer has the burden of proving, by a preponderance of the evidence, such fraud, misrepresentation or other illegal activity. Upon such proof, the worker then has the burden of proving, by a preponderance of the evidence, the compensability of the claim. If the insurer or self-insured employer accepts a claim in good faith, in a case not involving fraud, misrepresentation or other illegal activity by the worker, and later obtains evidence that the claim is not compensable or evidence that the insurer or self-insured employer is not responsible for the claim, the insurer or self-insured employer may revoke the claim acceptance and issue a formal notice of claim denial, if such revocation of acceptance and denial is issued no later than two years after the date of the initial acceptance. If the worker requests a hearing on such revocation of acceptance and denial, the insurer or self-insured employer must prove, by a preponderance of the evidence, that the claim is not compensable or that the insurer or self-insured employer is not responsible for the claim. Notwithstanding any other provision of this chapter, if a denial of a previously accepted claim is set aside by an Administrative Law Judge, the Workers' Compensation Board or the court, temporary total disability benefits are payable from the date any such benefits were terminated under the denial. Except as provided in ORS 656.247, pending acceptance or denial of a claim, compensation payable to a claimant does not include the costs of medical benefits or burial expenses. The insurer shall also furnish the employer a copy of the notice of acceptance.

(b) The notice of acceptance shall:

(A) Specify what conditions are compensable.

(B) Advise the claimant whether the claim is considered disabling or nondisabling.

(C) Inform the claimant of the Expedited Claim Service and of the hearing and aggravation rights concerning nondisabling injuries, including the right to object to a decision that the injury of the claimant is nondisabling by requesting reclassification pursuant to ORS 656.277.

(D) Inform the claimant of employment reinstatement rights and responsibilities under ORS chapter 659A.

(E) Inform the claimant of assistance available to employers from the Reemployment Assistance Program under ORS 656.622.

(F) Be modified by the insurer or self-insured employer from time to time as medical or other information changes a previously issued notice of acceptance.

(c) An insurer's or self-insured employer's acceptance of a combined or consequential condition under ORS 656.005 (7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition.

(d) An injured worker who believes that a condition has been incorrectly omitted from a notice of acceptance, or that the notice is otherwise deficient, first must communicate in writing to the insurer or self-insured employer the worker's objections to the notice pursuant to ORS 656.267. The insurer or self-insured employer has 60 days from receipt of the communication from the worker to revise the notice or to make other written clarification in response. A worker who fails to comply with the communication requirements of this paragraph or ORS 656.267 may not allege at any hearing or other proceeding on the claim a de facto denial of a condition based on information in the notice of acceptance from the insurer or self-insured employer. Notwithstanding any other provision of this chapter, the worker may initiate objection to the notice of acceptance at any time.

(7)(a) After claim acceptance, written notice of acceptance or denial of claims for aggravation or new medical or omitted condition claims properly initiated pursuant to ORS 656.267 shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the insurer or self-insured employer receives written notice of such claims. A worker who fails to comply with the communication requirements of subsection (6) of this section or ORS 656.267 may not allege at any hearing or other proceeding on the claim a de facto denial of a condition based on information in the notice of acceptance from the insurer or self-insured employer.

(b) Once a worker's claim has been accepted, the insurer or self-insured employer must issue a written denial to the worker when the accepted injury is no longer the major contributing cause of the worker's combined condition before the claim may be closed.

(c) When an insurer or self-insured employer determines that the claim qualifies for claim closure, the insurer or self-insured employer shall issue at claim closure an updated notice of acceptance that specifies which conditions are compensable. The procedures specified in subsection (6)(d) of this section apply to this notice. Any objection to the updated notice or appeal of denied conditions shall not delay claim closure pursuant to ORS 656.268. If a condition is found compensable after claim closure, the insurer or self-insured employer shall reopen the claim for processing regarding that condition.

656.268. Claim closure; termination of temporary total disability benefits; reconsideration of closure; procedure, penalty and attorney fee on reconsideration; medical arbiter to make findings of impairment for reconsideration; credit or offset for fraudulently obtained or overpaid benefits.

(1) One purpose of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker. The insurer or self-insured employer shall close the worker's claim, as prescribed by the Director of the Department of Consumer and Business Services, and determine the extent of the worker's permanent disability, provided the worker is not enrolled and actively engaged in training according to rules adopted by the director pursuant to ORS 656.340 and 656.726, when:

(b) The accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions pursuant to ORS 656.005 (7). When the claim is closed because the accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions, and there is sufficient information to determine permanent impairment, the likely impairment and adaptability that would have been due to the current accepted condition shall be estimated.

656.273 Aggravation for worsened conditions; procedure; limitations; additional compensation. (1) After the last award or arrangement of compensation, an injured worker is entitled to additional compensation for worsened conditions resulting from the original injury. A worsened condition resulting from the original injury is established by medical evidence of an actual worsening of the compensable condition supported by objective findings. However, if the major contributing cause of the worsened condition is an injury not occurring within the course and scope of employment, the worsening is not compensable..

656.802 "Occupational disease" defined. (1)(a) As used in this chapter, "occupational disease" means any disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein, and which requires medical services or results in disability or death, including:

(A) Any disease or infection caused by ingestion of, absorption of, inhalation of or contact with dust, fumes, vapors, gases, radiation or other substances.

(B) Any mental disorder, whether sudden or gradual in onset, which requires medical services or results in physical or mental disability or death.

(C) Any series of traumatic events or occurrences which requires medical services or results in physical disability or death.

(b) As used in this chapter, "mental disorder" includes any physical disorder caused or worsened by mental stress.

(2)(a) The worker must prove that employment conditions were the major contributing cause of the disease.

(b) If the occupational disease claim is based on the worsening of a preexisting disease or condition pursuant to ORS 656.005 (7), the worker must prove that employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease.

(c) Occupational diseases shall be subject to all of the same limitations and exclusions as accidental injuries under ORS 656.005 (7).

(d) Existence of an occupational disease or worsening of a preexisting disease must be established by medical evidence supported by objective findings.

(e) Preexisting conditions shall be deemed causes in determining major contributing cause under this section.

(3) Notwithstanding any other provision of this chapter, a mental disorder is not compensable under this chapter unless the worker establishes all of the following:

(a) The employment conditions producing the mental disorder exist in a real and objective sense.

(b) The employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of

employment or employment decisions attendant upon ordinary business or financial cycles.

(c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community.

(d) There is clear and convincing evidence that the mental disorder arose out of and in the course of employment.

(4) Death, disability or impairment of health of firefighters of any political division who have completed five or more years of employment as firefighters, caused by any disease of the lungs or respiratory tract, hypertension or cardiovascular-renal disease, and resulting from their employment as firefighters is an "occupational disease." Any condition or impairment of health arising under this subsection shall be presumed to result from a firefighter's employment. However, any such firefighter must have taken a physical examination upon becoming a firefighter, or subsequently thereto, which failed to reveal any evidence of such condition or impairment of health which preexisted employment. Denial of a claim for any condition or impairment of health arising under this subsection must be on the basis of clear and convincing medical evidence that the cause of the condition or impairment is unrelated to the firefighter's employment. [Amended by 1959 c.351 §1; 1961 c.583 §1; 1973 c.543 §1; 1977 c.734 §1; 1983 c.236 §1; 1987 c.713 §4; 1990 c.2 §43; 1995 c.332 §56]

TEXAS

401.011

(10) "Compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.

(11) "Compensation" means payment of a benefit.

(12) "Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:

(A) transportation to and from the place of employment unless:

(i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;

(ii) the means of the transportation are under the control of the employer; or

(iii) the employee is directed in the employee's employment to proceed from one place to another place; or

(B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:

- (i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and
- (ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

406.033

§ 406.033. Common-Law Defenses; Burden of Proof

(a) In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that:

- (1) the employee was guilty of contributory negligence;
- (2) the employee assumed the risk of injury or death; or
- (3) the injury or death was caused by the negligence of a fellow employee.

(b) This section does not reinstate or otherwise affect the availability of defenses at common law, including the defenses described by Subsection (a).

(c) The employer may defend the action on the ground that the injury was caused:

- (1) by an act of the employee intended to bring about the injury; or
- (2) while the employee was in a state of intoxication.

(d) In an action described by Subsection (a) against an employer who does not have workers' compensation insurance coverage, the plaintiff must prove negligence of the employer or of an agent or servant of the employer acting within the general scope of the agent's or servant's employment.

(e) A cause of action described in Subsection (a) may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable.

Acts 1993, 73rd Leg., ch. 269, § 1, eff. Sept. 1, 1993.

Amended by Acts 2001, 77th Leg., ch. 1456, § 16.01, eff. June 17, 2001.

408.084

§ 408.084. Contributing Injury

(a) At the request of the insurance carrier, the commission may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.

(b) The commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

(c) If the combination of the compensable injuries results in an injury compensable under Section 408.161, the benefits for that injury shall be paid as provided by Section 408.162.

Acts 1993, 73rd Leg., ch. 269, § 1, eff. Sept. 1, 1993.

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Terms used in this title, unless the context otherwise plainly requires, shall mean:

...(7) "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, is subject to the following conditions:

(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or

(b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.

(c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought....

S.D. Codified Laws § 62-8-1. Definition of terms

Wherever used in this chapter:

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...(4) "Injurious exposure" and "harmful quantities" where used in this chapter shall be construed as synonymous terms and shall mean that concentration of toxic material which would, independently of any other cause whatsoever (including the previous physical condition of the claimant) produce or cause the disease for which claim is made.

...(6) "Occupational disease" means a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment and includes any disease due or attributable to exposure to or contact with any radioactive material by an employee in the course of his employment....

S.D. Codified Laws § 62-1-1.3. Presumption that certain non-compensable injuries are nonwork related --

Coverage under other insurance policy

If an employer denies coverage of a claim on the basis that the injury is not compensable under this title due to the provisions of subsections 62-1-1 (7) (a), (b), or (c), such injury is presumed to be nonwork related for other insurance purposes, and any other insurer covering bodily injury or disease of the injured employee shall pay according to the policy

provisions. If coverage is denied by an insurer without a full explanation of the basis in the insurance policy in relation to the facts or applicable law for denial, the director of the Division of Insurance may determine such denial to be an unfair practice under chapter 58-33. If it is later determined that the injury is compensable under this title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified in § 54-3-16.

S.D. Codified Laws § 62-8-3. Contracted and incurred defined

The terms "contracted" and "incurred," as used in this chapter when referring to an occupational disease, shall be deemed the equivalent of the phrase "arising out of and in the course of," as used in the workers' compensation law.

S.D. Codified Laws § 62-8-12. Conditions of liability -- Burden of proof

The burden of proof shall be upon the claimant to establish each and every fact under §62-8-11 by competent medical evidence.

S.D. Codified Laws § 62-1-15. Evidence of injury supported by medical findings

In any proceeding or hearing pursuant to this title, evidence concerning any injury shall be given greater weight if supported by objective medical findings.