



STATE OF NEW MEXICO

# Workers' Compensation Administration

## System Challenges

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# Administration Mission

- To assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers.

*See NMSA 1978, § 52-5-1.*

- To assure that every person who suffers a compensable injury with resulting disability should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards.

*See NMSA 1978, § 52-1-26.*

# Advisory Council Mission

- The mission of the Advisory Council on Workers' Compensation and Occupational Disease Disablement is:
  - to monitor the performance of the workers' compensation and occupational disease disablement system; and
  - to make recommendations to the Governor, Legislature, regulatory agencies and participating industries, related to the adoption of rules and legislation and the method and form of statistical data collections;in order to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to employers.

*See NMSA 1978, § 52-1-1.2.*

# System Challenges

- Lack of clarity in the law
  - The system depends on clarity in the law so that claims can be paid predictably and consistently . . . and without WCA involvement and adjudication
- Incentives for return-to-work eroded
  - 1990 legislative reforms sought to encourage return to work and discourage reliance on compensation benefits

# 2017 Legislative Opportunities

## Return to Work

- Clarify standards and outcomes when an employer offers an injured employee work
- Workers' outcomes are much better when they can return to work with the at-injury employer (34 days v. 478 days).
- Recent appellate cases discourage return to work by requiring employers to pay benefits even when they offer the injured employee a return to work offer, but the employee declines.
- Encourage employers to make return to work offers while clarifying employers' rights when an injured worker, after rehire, engages in misconduct or is terminated for cause unrelated to the work injury

## References

*An Evaluation of NM Workers' Compensation Permanent Partial Disability and Return to Work*, RAND Institute for Civil Justice, 2001

*Cordova v. KSL Union*, 2012-NMCA-083

*Hawkins v. McDonald's*, 2014-NMCA-048

# Work Comp Benefits and Employee Misconduct

## *(Hawkins v McDonald's)*

- **Worker's Compensation is important for economic development**

The State Economic Competitiveness Index shows that work comp is in the top 15 of criteria businesses consider when deciding to do business in a state. NM ranks 31 in average work comp costs. It also shows that NM is 34<sup>th</sup> in Economic Outlook Rankings. NM ranks 45 in terms of litigation and impartiality of the court system. There are a number of court decisions regarding workers' compensation that further the perception that NM is not business friendly. Let's balance our work comp laws and give businesses one more reason to bring jobs to New Mexico.

<https://www.alec.org/app/uploads/2016/04/2016-ALEC-Rich-States-Poor-States-Rankings.pdf>

# Work Comp Benefits and Employee Misconduct

*(Hawkins v McDonald's) continued*

- **Encouraging Bad Behavior: Misconduct and Work Comp benefits**

In surrounding states, when an injured worker has returned to work after his/her injury, chooses to engage in misconduct, and is subsequently terminated for that misconduct, indemnity/wage replacement benefits are not paid to the worker, as to not reward poor behavior.

The entire structure of the Workers' Compensation system is such that there are rewards for return to work and penalties for not returning to work. This was not meant to be one sided. It is not only the employer's responsibility to offer return to work whenever possible, it is the worker's responsibility to accept and remain at work whenever possible.

Recent court decisions have inappropriately removed the worker's responsibility to work by mandating wage loss benefits to a worker that had been back to work, but chose to engage in misconduct and was terminated from employment, regardless of the reason for termination.

Language needs to be added to the current statute to hold both the worker and the employer accountable for their actions. The statutory language needs to be specific and balanced, not one sided.

# Work Comp Benefits and Employee Misconduct

*(Hawkins v McDonald's) continued*

What about bad behavior on the part of the employer? Great care will be needed in crafting the language of the proposed statute such that the statute cannot be abused by the employer either. It should not be allowed that an employer can manufacture a reason to terminate an employee merely to get out of paying benefits. That said, we should not leave this issue untended merely because there is a possibility for abuse. Work needs to be done to ensure the issues is handled in a balanced manner.

**The worker should and does continue to receive related medical care related to their work injury.** However, it is poor public policy to encourage bad behavior by mandating wage replacement benefits when a worker has been terminated for cause.



# Worker's Compensation and Return to Work Incentives

- In workers' compensation, recovery and return to work are the foundation of what makes the system work. **Section 52-1-26**. Permanent partial disability, states in part A., "As a guide to the interpretation and application of this section, the policy and intent of this legislature is declared to be that every person who suffers a compensable injury with resulting permanent partial disability should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards.
- There are times, however, when a worker is so badly injured that they cannot return to work. There are expanded benefits built into the statute for those badly injured workers. However, language in that section is such that loopholes exist to expand benefits to workers that are able to go back to work. When a law lacks specificity in a given area, it is left to the courts to decide how to apply the sometimes vague language in statute. When court decisions are made that are contrary to the spirit of the law, it is up to the legislature to correct any ambiguity in the statute to preserve the spirit of the Act.

# Worker's Compensation and Return to Work Incentives

*continued*

- In *Cordova v KSL-Union* (2012), the NM Court of Appeals expanded the group of injured workers who can receive Permanent Partial Disability modifiers, a benefit that was designed only for those with seriously injured workers who could not return to work.
- In this *Cordova* case, the worker was able to return to work, but instead chose to retire. While a judge should not be able to prevent someone from retirement, the courts should also not set the legal standard that rewards a person with expanded workers' compensation benefits when they chose not to work.
- This *Cordova* case is used as a basis for other cases to expand benefits where a worker is able to go back to work but refused a job offer. The court considers whether it is "reasonable" for the worker to refuse return to work when they are medically cleared to do so. The courts do not consider reasonableness from the employer's perspective.
- Statutory language needs to close this loophole and preserve these expanded benefits for the seriously injured that are unable to return to work, as was intended.

# Issue: Recovery from an At-Fault Third-Party / Subrogation / Right of Reimbursement

## **Brief Explanation of the Issue:**

Often times when a worker is injured it is neither the worker nor the employers fault, nor any co-worker. In these situations the worker was injured due to the negligence of some other at-fault party.

## **Example case:**

- A plumber for ABX Plumbing is driving to a residence for a service call. An inattentive driver runs through a red light and crashes into the ABX Plumbing vehicle damaging the plumbing vehicle and also causing injury to the plumber who is driving the ABX van.
- ABX can make a claim against the at-fault driver's auto insurance and make a full recovery of all of ABX's property (vehicle) damage costs.
- However, ABX and their workers' compensation insurance carrier are strictly limited, by case law, not statute, as to what they can recover to be re-paid for all of the workers' compensation benefits that are paid to the injured worker and the injured workers' medical providers.

# Issue: Recovery from an At-Fault Third-Party / Subrogation / Right of Reimbursement *(continued)*

## **What the Bill Will Accomplish?**

The bill that will be brought before the legislature in the 2017 session will deal with how the injured employee, the injured employee's employer and the insurer providing workers' compensation benefits can pursue an action against that outside, at-fault, third-party, to be properly compensated. As such, if the employee elects to receive benefits from the employer, the employer will have a right of indemnity or is subrogated to the right of the employee to recover damages against the other party.

## **Why Is This Issue Coming Up Now?**

New Mexico's current workers' compensation laws took effect on Jan 1, 1991 and were the result of a special legislative session in 1990. Referring to the example case above, under the laws enacted in 1990 both the injured employee and the employer/insurer could pursue the at-fault party for full recovery. What changed? - Over time the employer/insurer's recovery options have been limited and/or restricted, resulting in employers stuck with bad losses, and higher insurance rates, even when neither the employer nor an employee did anything wrong. At this time the employer/insurer have only a right of reimbursement action and can only pursue this limited action if the injured worker also takes action against the at-fault party.

# Issue: Recovery from an At-Fault Third-Party / Subrogation / Right of Reimbursement

## How Do Other States Handle This Issue?

In most states the injured employee must make a choice – either pursue workers' compensation benefits from the employer or pursue a claim/lawsuit against the at-fault party. Two examples:

1. Minnesota – injured worker may proceed either at law against the at-fault party or against the employer for work comp benefits, but not both
2. Arizona – similar to Minnesota but injured worker has one year to decide pursuit of work comp benefits or claim/lawsuit against at-fault party