

## Your Counsel: A primer on New York Workers' Compensation



By **STEVEN V. MODICA**

Lawyers tend to limit their practice to a few areas. Nonetheless, people come to us with myriad problems — many of which fall outside our realm of expertise.

Through this column, I provide practical information to help you assist those who have employment, disability benefit, workers' compensation, and related problems.

Here are the basics about New York Workers' Compensation ["NY-WC"]:

1. Almost all employers in New York are required to participate in the NY-WC system. Employers who do so are immune from being sued by their employees because workers' compensation is the exclusive remedy. This includes claims that an employee contracted COVID-19 due to their work.

2. Employees in the NY-WC system are covered for four work-related events: (a) injury (i.e., slip and fall causing a broken leg); (b) occupational disease (i.e., carpal tunnel caused by years of repetitive work); (c) consequential injury (i.e., left leg broken in slip & fall causes later injury to right leg from greater use); or (d) death.

3. Employees (or their representatives) must give notice of a work-related event within 30 days from its occurrence. Failure to do so can be excused if, for example, there is no prejudice to the employer.

4. Employees must commence a NY-WC case within two years from the date of the work-related event.

5. NY-WC provides lost income and medical benefits only. There is no payment for pain and suffering. If an employee is unable to work at all due to a work-related event, the amount of the tax-free lost-income benefit depends on their: (a) average weekly wage in the 52 weeks before the work-related event; (b) severity of condition (aka degree of disability); and (c) date of injury or illness (law sets a maximum lost-income benefit depending on that date (e.g., person injured between July 1, 2020 and June 30, 2021 cannot collect more than \$966.78/week). Lost-income benefits for an employee's death depends in part on who survives him or her.

6. If an employee is working (e.g., light duty) but is earning less than their average weekly wage due to a work-related event, they can collect a "reduced earnings" tax-free lost-income benefit of two-thirds of the wage loss but NOT more than the maximum amount in the law.

7. Average weekly wage includes ONLY the employee's regular earnings in the 52 weeks before the work-related event. It does not include pension and other employee benefits.

8. NY-WC pays 100% of the cost to treat the condition suffered by the employee for the rest of the employee's life. They should incur NO out of pocket expenses for medication or to travel to get medical treatment.

9. Unless the employee is TOTALLY disabled (100%), they must look for work within their physical restrictions to remain eligible for lost-income benefits in the NY-WC system.

10. Unless a judge has ruled that an

employee has a permanent disability, the employee must get medical treatment at least once every 90 days to remain eligible for lost-income benefits.

11. As part of most NY-WC cases, an employee will be examined by one or more medical professionals selected by the employer or its insurance carrier. These doctors can comment on just about any issue in the case, including the degree of disability.

12. If an employee's injury or illness is permanent, they may be entitled to additional lost-income benefits. More specifically, the employee may: (a) be classified as having a permanent total or permanent partial disability (usually applies to back and neck injuries); or (b) have a lump sum schedule loss of use award (usually applies to extremity injuries such as carpal tunnel syndrome).

13. Fees for professionals who represent injured workers are determined by a NY-WC Administrative Law Judge ["ALJ"]. If no lost-income benefits are paid, no legal fee is owed. If lost-income benefits are paid, the NY-WC ALJ determines the amount of legal fee that will be paid by the employee. When an employee receives a substantial lump sum of lost-income benefits, the legal fee typically is 15% or less of the lump sum.

14. The only way to settle for all time an NY-WC case is through a special agreement under Section 32 of the law.

15. The NY-WC website (<http://www.wcb.ny.gov/>) is an excellent resource.

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