

## Changes in workers' compensation laws, 2002

*Changes in State compensation laws ranged from increasing death benefit and burial expense amounts, to revising the criteria for eligibility for disability benefits, to expanding coverage for rescue workers whose health was affected or whose life was terminated by the events of September 11, 2001*

Glenn Whittington

California enacted major changes to its workers' compensation statutes in 2002. One of the more significant provisions included increasing the maximum weekly benefit for temporary disability and permanent total disability to \$602 for injuries occurring on or after January 1, 2003; to \$728 for injuries occurring on or after January 1, 2004; and to \$840 for injuries occurring on or after January 1, 2005. Beginning January 1, 2006, and each January 1 thereafter, the maximum weekly benefit will be increased by an amount equal to the percentage in the State average weekly wage. Also, effective January 1, 2006, death benefits will be increased from \$125,000, \$145,000, and \$160,000 to \$250,000, \$290,000, and \$320,000, respectively, according to the number of surviving dependents.

In Florida, the Division of Workers' Compensation was

transferred from the Department of Labor and Employment Security to the Department of Insurance. Workers' compensation medical services were transferred to the Agency for Health Care Administration and workers' compensation rehabilitation and reemployment services to the Department of Education.

In Kentucky, certain presumptions of disability were created for claimants diagnosed with pneumoconiosis on the basis of X-ray and spirometric test values.

Maximum burial expenses were increased from \$5,000 to \$15,000 in Rhode Island and from \$2,500 to \$5,000 in Wyoming.

In New Jersey and New York, coverage issues resulting from the terrorist attacks of September 11, 2001, were addressed.

### Alaska

A resident of the State temporarily engaged as a civilian volunteer in an emergency or a disaster relief function in another State or country who suffers injury or death during the course, and within the scope, of providing such aid is

considered an employee of that State or country for workers' compensation purposes. The requirements for determining whether someone qualifies as a volunteer are outlined in detail.

### California

The maximum weekly benefit for temporary disability and for permanent total disability was increased to \$602 for injuries occurring on or after January 1, 2003; to \$728 for injuries occurring on or after January 1, 2004, and to \$840 for injuries occurring on

or after January 1, 2005.

Beginning January 1, 2006, and each January 1 thereafter, the maximum and minimum temporary disability and permanent total disability benefit will be increased by an amount equal to the percentage in the State average weekly wage.

The maximum weekly permanent partial-disability benefit, currently between \$140 and \$230 per week, will be increased to \$230 in 2006 for all partial-disability ratings below 70 percent and to \$270 for those above 70 percent.

Effective January 1, 2006, death benefits

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will be increased from \$125,000, \$145,000, and \$160,000 to \$250,000, \$290,000, and \$320,000, respectively, according to the number of surviving dependents.

Death benefit payments for a totally dependent child who is physically or mentally incapacitated and therefore unable to earn a salary shall continue until the death of that child.

An employer and an attorney-represented employee may agree to settle the employee's right to prospective vocational rehabilitation services with a one-time payment to the employee not to exceed \$10,000 for the employee's use in self-directed vocational rehabilitation. The settlement agreement must be approved by the administrative director's vocational rehabilitation unit.

It is unlawful to knowingly make, or cause to be made, a fraudulent material statement or representation for the purpose of obtaining or denying benefits or reimbursement provided in the Return-to-Work Program, or for discouraging an employer from claiming any benefits or reimbursement provided in the Return-to-Work Program.

All workers' compensation administrative law judges appointed on or after January 1, 2003, shall be attorneys licensed to practice law in California for 5 or more years prior to their appointment and shall have experience in workers' compensation law.

The director of industrial relations is required to establish and maintain a program to encourage, facilitate, and educate employers in providing appropriate conditions for the early and sustained return to work of employees after an occupational injury or illness.

For workers' compensation purposes, a collective bargaining agreement between a private employer or groups of employers engaged in the aerospace or timber industries and a union shall be recognized as valid and binding, as long as the agreement establishes (1) an alternative dispute resolution system, (2) the use of an agreed-upon list of medical providers and qualified medical evaluators, (3) joint labor-management safety committees, (4) a light-duty, modified job or return-to-work program, and (5) a vocational rehabilitation or retraining program. An employer or group of employers and the collective bargaining representative must meet certain criteria in order to establish or continue to participate in such an agreement.

In the event that no person qualifies as a total or partial dependent of a deceased employee, then the surviving parent or parents of the deceased employee shall be

conclusively presumed to be wholly dependent for support upon the deceased employee.

If the director of industrial relations determines that an employer has been uninsured for a period in excess of 1 week during the calendar year, the employer may be assessed a penalty of twice the amount the employer would have paid in workers' compensation premiums during the period the employer was uninsured or \$1,000 per employee employed during the period the employer was uninsured.

The administrative director is required to publish an official pharmaceutical fee schedule that shall establish reasonable maximum fees paid for medicines and medical supplies.

The Workers' Occupational Safety and Health Education fund was created as a special account. Proceeds of the fund may be expended by the Commission on Health and Safety and Workers' Compensation for the purposes of establishing and maintaining a workers' occupational safety and health training and education program and an insurance loss services coordinator. Funding will come from a fee assessed against insurers.

### **Colorado**

The assessment capacity of the Colorado Guaranty Fund was increased from 1 to 2 percent.

The exposure to or contraction of hepatitis C by a firefighter, emergency services provider, or peace officer shall be presumed to be within the course and scope of employment if certain preestablished conditions are met.

The Colorado Compensation Insurance Authority has been replaced by Pinnacle Assurance, which will operate as a domestic mutual insurance company. All moneys in the Pinnacle Assurance fund have been transferred out of the State treasury and into the custody of the board of Pinnacle Assurance.

### **Florida**

Effective July 1, 2002, the Division of Workers' Compensation was transferred from the Department of Labor and Employment Security to the Department of Insurance. Workers' compensation medical services were transferred to the Agency for Health Care Administration and workers' compensation rehabilitation and reemployment services to the Department of Education.

The Department of Insurance is allowed

to share confidential information with the Agency for Health Care Administration in furtherance of the Department's official duties. The Department requires the Agency to maintain the confidential nature of the information.

The penalty associated with carriers failing to pay 90 or more percent of their compensation benefits or medical bills on time was eliminated. Penalties for late payments will be imposed pursuant to the provisions of the insurance code.

The authority to order an examination by an expert medical advisor was transferred from the Division of Workers' Compensation to the Agency for Health Care Administration.

The responsibility for the Preferred Worker program was transferred from the Department of Labor to the Departments of Education and Insurance.

The authority to regulate individual self-insurers of workers' compensation was transferred from the Division of Workers' Compensation to the Department of Insurance and the Florida Self-Insurers Guaranty Association. The Association will review employer applications and make a recommendation to the Department of Insurance. The recommendation is binding upon the Department, unless it is shown by clear and convincing evidence that the Association erred.

The authority to require employers to post a qualifying security deposit has been transferred to the Department of Insurance, acting on the recommendation of the Florida Self-Insurers Guaranty Association. The security deposit is now deposited with the Association rather than the Division of Workers' Compensation.

The blanket prohibition against the use of State funds of any kind by or for the Florida Self-Insurers Guaranty Association would be removed. State funds cannot be used for claims payments, but funds could be paid to the Association under a contract for performing "services required by law."

A firefighter who is engaged in fire fighting within Florida, but outside of the employer's jurisdiction, and a firefighter who is off duty, neither of whom is engaged in services by a private employer, are now considered to be acting within the course of employment and are thereby covered by workers' compensation. Similar coverage was provided for emergency medical technicians and paramedics.

### **Georgia**

The requirement that income benefit checks

be drawn on a Georgia depository was eliminated.

## Idaho

Equal workers' compensation benefits are now paid to widows and widowers in death claims.

## Kansas

For purposes of workers' compensation coverage, a volunteer member of a regional emergency medical response team shall be considered a person in the service of the State in connection with authorized training and upon activation for emergency response, except when such duties arise in the course of employment or as a volunteer for an employer other than the State.

If a party or a party's attorney believes that the administrative law judge to whom a case is assigned cannot afford that party a fair hearing in the case, the party or attorney may file a motion for change of administrative law judge.

## Kentucky

The commissioner shall maintain a list of duly qualified "B" reader physicians who are licensed in the Commonwealth and who have agreed to interpret chest X rays for a fee. Physicians from the "B" reader list shall be utilized as necessary to obtain consensus classifications of chest films in coal workers' pneumoconiosis claims. A consensus classification shall be presumed to be the correct classification of the employee's condition, unless overcome by clear and convincing evidence. A "B" reader is a physician who has demonstrated proficiency in evaluating chest X rays to determine their quality and in the use of the International Labor Organization classification for interpreting chest X rays for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination.

In submitting medical evidence in a coal-related occupational pneumoconiosis claim, the chest X ray must have been interpreted by a "B" reader certified by the National Institute of Occupational Safety and Health.

In coal workers' pneumoconiosis claims, the employer's notice of denial or acceptance of a claim shall be filed within 30 days of the issuance of the notice of the consensus reading by the commissioner,

unless the consensus reading is that no evidence of coal workers' pneumoconiosis exists. The commissioner is required to determine whether X rays submitted by the employee and an employer-selected physician are in consensus. If they are not, then the commissioner specifies the method for resolving the issue by having the X rays read by additional "B" readers.

If an employee has a radiographic classification of category 1/0 pneumoconiosis and a respiratory impairment, as evidenced by spirometric test values of 55 or more percent, but less than 80 percent, of predicted normal levels, or if the employee has a radiographic classification of category 1/1 or 1/2 pneumoconiosis and spirometric test values of 80 or more percent of predicted normal levels, the employee shall be awarded a one-time-only retraining incentive benefit equal to 66-2/3 percent of the employee's average weekly wage, but not more than 75 percent of the State average weekly wage, payable semimonthly for a period not to exceed 104 weeks. The criteria for receiving these benefits were revised.

If an employee has a radiographic classification of category 1/0 pneumoconiosis and spirometric test values of less than 55 percent of predicted normal levels; or category 1/1 or 1/2 pneumoconiosis and spirometric test values of 55 or more percent, but less than 80 percent, of predicted normal levels; or category 2/1, 2/2, or 2/3 pneumoconiosis and spirometric test values of 80 or more percent of predicted normal levels, there shall be an irrebuttable presumption that the employee has a disability rating of 25 percent, resulting from exposure to coal dust, and the employee shall be awarded an income benefit in the amount equal to 66 2/3 percent of the employee's average weekly wage, but not to exceed 75 percent of the State average weekly wage. The award shall not exceed 425 weeks.

If an employee has a radiographic classification of category 1/1 or 1/2 pneumoconiosis, and spirometric test values of less than 55 percent of the predicted normal levels; or category 2/1, 2/2, or 2/3 pneumoconiosis and spirometric test values of 55 or more percent, but less than 80 percent, of predicted normal levels; or category 3/2 or 3/3 pneumoconiosis and spirometric test values of 80 or more percent of predicted normal levels, there shall be an irrebuttable presumption that the employee has a disability rating of 50 percent, resulting from exposure to coal dust, and the employee shall be awarded an income benefit in the amount equal to

66-2/3 percent of the employee's average weekly wage, but not to exceed 75 percent of the State average weekly wage. The award shall not exceed 425 weeks.

If an employee has a radiographic classification of category 2/1, 2/2, or 2/3 pneumoconiosis and spirometric test values of less than 55 percent of predicted normal levels; or category 3/2 or 3/3 pneumoconiosis and spirometric test values of 55 or more percent, but less than 80 percent, of predicted normal levels, there shall be an irrebuttable presumption that the employee has a 75-percent disability rating, resulting from exposure to coal dust, and the employee shall be awarded an income benefit in the amount equal to 66-2/3 percent of the employee's average weekly wage, but not to exceed 75 percent of the State average weekly wage. The award shall not exceed 520 weeks.

If a miner has 15 or more years of employment in coal mines or processing facilities and has developed pneumoconiosis and respiratory impairment, it shall be rebuttably presumed that coal dust exposure was a significant contributing factor in the development of the impairment.

A miner 55 years or older on the date of his or her last occupational exposure to coal dust, or a miner who has been granted an exemption from retraining, but who is otherwise entitled to an award of retraining incentive benefits, may elect to receive an award equal to 66-2/3 percent of the employees' average weekly wage, but not to exceed 75 percent of the State average weekly wage, multiplied by a disability rating of 25 percent. The award is not to exceed 425 weeks.

The commissioner is required to promulgate regulations for the reconsideration of claims filed between December 12, 1996, and April 13, 2002.

The commissioner is required to maintain a list and assess the performance of "B" readers.

## Maine

Any person engaged in harvesting forest products is not an "employee" for workers' compensation purposes if the person contracts directly with the landowner and meets the criteria for obtaining a certificate of independent status or a predetermination of independent contractor status.

A contractor engaged in harvesting forest products must notify, within 3 business days, any of its employees and the landowner to whom the person is under contract of the cancellation of the contractor's workers' compensation insurance.

The definition of "employee" now includes a member of a limited liability company.

### **Maryland**

The termination provision set for September 30, 2002, that governs certain types of collective bargaining agreements between an employer and a certified exclusive bargaining representative regarding workers' compensation and generally relating to collective bargaining agreements with respect to workers' compensation was repealed.

The total amount of benefits to be paid for a period of partial dependency in case of death was increased from \$45,000 to \$60,000.

The Workers' Compensation Commission may not modify an award, unless the modification is applied for within 5 years after the latest of (1) the date of the accident, (2) the date of disablement, or (3) the last compensation payment.

### **Minnesota**

An injured employee or a dependent of an employee who is either a minor or incapacitated shall have a guardian or conservator to represent the interests of the employee or dependent if the employee receives or is eligible for permanent total disability benefits, supplementary benefits, or permanent partial disability benefits totaling more than \$3,000. A parent is presumed to be the guardian if he or she has legal custody of the employee or dependent.

The commissioner of labor and industry no longer has to keep a list of neutral physicians for the purpose of having an injured worker examined in a disputed case.

The act of altering information on a document to be filed with the State Department of Labor and Industry without the notice and consent of any person who previously signed the document and who would be adversely affected by the alteration is prohibited.

On or before April 1 of each year, all self-insured employers shall report paid indemnity losses, and insurers shall report paid indemnity losses and standard workers' compensation premiums, in the form and manner prescribed by the commissioner. On June 1 of each year, the commissioner shall determine the total amount needed to pay all estimated liabilities, including administrative expenses, of the special fund for the following fiscal year. At least one-half of the payment shall be made to the commissioner for deposit into the special compensation fund on or before

August 1 of the same calendar year, and the balance is due on February 1 of the following calendar year.

### **New Jersey**

A law enforcement officer, firefighter, emergency medical technician, or paramedic employed by a municipality, county, or fire district of the State of New Jersey or of a State that participated in a search-and-rescue task force or team in response to the terrorist attacks of September 11, 2001, without the authorization of the municipality, county, or fire district or the said State and who suffered injury or death as a result of his or her participation shall be deemed an employee of New Jersey for the purpose of payment of workers' compensation benefits as would have accrued if the injury or death had occurred in the performance of duties in the territorial jurisdiction in which the individual is or was employed. A similar provision also was passed for volunteer police, fire, and emergency personnel.

Whenever a law enforcement officer, firefighter, emergency medical technician, or paramedic employed by a municipality, county, or fire district of the State of New Jersey or of another State participates in a national, multistate, State, county, municipal, or regional search-and-rescue task force or team without the authorization of the municipality, county, or fire district or the said State, but, pursuant to a Declaration of Emergency by the Governor of the State of New Jersey specifically authorizing volunteers to respond immediately to the emergency without requiring the authorization of the municipality, county, or fire district or the State, and the law enforcement officer, firefighter, emergency medical technician, or paramedic suffers injury or death as a result of his or her participation, the individual shall be deemed an employee of New Jersey for the purpose of payment of workers' compensation benefits as would have accrued if the injury or death had occurred in the performance of duties in the territorial jurisdiction in which the person is or was employed. A similar provision also was passed for volunteer police, fire, and emergency personnel.

Certain emergency volunteers are now exempt from the State's 7-day waiting period for collecting workers' compensation benefits.

### **New York**

The workers' compensation law was amended in order to address issues affecting the victims of the terrorist attacks of September 11, 2001, and their families.

Specifically, the amendments state that (1) the law does not permit insurance carriers to assert a lien against awards from the Federal victim compensation fund and (2) the filing of a claim for an award from the fund does not provide such carriers with the right to terminate workers' compensation benefits being paid as a result of the terrorist attacks.

Death benefits and funeral expenses were made available to domestic partners of persons who perished as a result of the terrorist attacks of September 11, 2001.

Any exposure of a State or local correction officer to the blood or bodily fluid of an individual, incarcerated or otherwise, during the course of the officer's employment that is reported in writing to his or her employer within 24 hours of the exposure shall be presumed, in the absence of substantial evidence to the contrary, to be an injurious exposure if the officer subsequently is diagnosed with a bloodborne disease, including, but not limited to, hepatitis.

A licensed insurance agent or broker is not covered under workers' compensation if substantially all of the remuneration for the services performed by such agent or broker is directly related to sales.

### **Oklahoma**

Employers and personnel service companies that are authorized in writing by a worker to be the worker's representative in order to conduct a search of the worker's prior claims records is exempt from the \$1 search fee.

An independent medical examiner is prohibited from deriving any direct or indirect economic benefit from the performance of surgery on, or the provision of treatment for, a patient, unless both the examiner and the patient agree to such benefit, in writing, before the patient makes any appointment with, is referred to, or gives notice to the examiner.

### **Pennsylvania**

A municipality or an area of a municipality that receives emergency services pursuant to a contract, a standing agreement, or an arrangement from a volunteer emergency service provider located in a host municipality shall reimburse the host municipality for a portion of the cost of the workers' compensation premiums covering the members of the volunteer emergency service provider.

### **Rhode Island**

Effective January 1, 2003, whenever a

general employer contracts with a special employer to supply an employee or employees for work, the special employer shall require written evidence that the general employer carries workers' compensation insurance. In the event that the special employer fails to obtain the written documentation from the general employer, the special employer is deemed to be the employer for workers' compensation purposes.

An alternative workers' compensation scheme can now be approved by the director and the chief judge of the workers' compensation court.

Burial expenses were increased from \$5,000 to \$15,000.

The demand by an injured worker to be reinstated to his or her former position must now be made in writing.

In any case in which an employee or, in case of death, the administrator of the employee's estate, fails to exercise the employee's right to sue a third party within 2 years and 8 months after an injury, the self-insured employer or the employer's insurance carrier may proceed with such action. If the self-insured employer or the employer's insurance carrier recovers, from the third party, damages or benefits in excess of the amount of the lien, after expenses and costs of action have been paid, then any such excess shall be paid to the injured employee or the employee's estate.

### **South Dakota**

The requirement that volunteer firefighters had to complete the wildland firefighter training course before becoming eligible for workers' compensation was eliminated.

### **Tennessee**

An employer, an insurer, or the Department of Labor and Workforce Development may have an employee who has been declared permanently totally disabled examined from time to time, at the expense of the requesting party, in the event that the second-injury fund is involved. However, the request for an examination may not be made until 24 months have elapsed following the entry of a final order and may not be requested more than every 24 months. The employee is required

to certify, on an annual basis, that he or she continues to be permanently totally disabled.

A "mental injury" means a loss of mental faculties or a mental or behavioral disorder, the proximate cause of which is a compensable physical injury resulting in a permanent disability or an identifiable work-related event resulting in a sudden or unusual mental stimulus. A mental injury does not include a psychological or psychiatric response due to the loss of employment or employment opportunities.

Each group of employers qualifying as self-insurers must submit a statement of the group's financial condition to the commissioner of commerce and insurance. The statement must be audited by an independent certified public accountant on or before the last day of the 6th month following the end of the group's fiscal year.

In workers' compensation cases, a request for medical records shall, if available, include a medical or anatomical impairment rating.

### **Vermont**

No later than July 1, 2004, all first reports of injury are to be filed electronically by the insurance carrier in question. The commissioner may grant an insurance carrier a variance if the carrier documents, to the satisfaction of the commissioner, the fact that compliance would cause the insurance carrier "undue hardship," meaning significant difficulty or expense.

### **Virginia**

Secretaries and administrative assistants for officers and members of the State General Assembly shall be deemed employees of the Commonwealth.

The presumption that hypertension or heart disease causing the death or any health condition or impairment resulting in the total or partial disability of an individual is an occupational disease was extended to officers of the police force established and maintained by the Metropolitan Washington Airports Authority.

In addition to the Virginia Employment Commission and the Department of Social

Services, the Workers' Compensation Commission shall make its records containing information about an injured worker available to the Virginia Retirement System.

If an employer contests a claim on the basis that an employee's intoxication or use of a nonprescribed controlled substance was the cause of an accident, the presumption that such employee was intoxicated when he or she tested positive for the substance is not available if the employee dies as a result of his or her injuries.

Hepatitis, meningococcal meningitis, tuberculosis, and HIV were added to the infectious disease presumption for certain groups of Virginia employees or volunteers.

The presumption as to death or disability from a respiratory disease, hypertension, heart disease, or cancer was extended to a commercial vehicle enforcement officer or motor carrier safety trooper employed by the Department of State Police, or a full-time sworn member of the enforcement division of the Department of Motor Vehicles.

The Workers' Compensation Commission is permitted to require annual written certifications from a surviving spouse or parent confirming that the portion of such payments for the benefit of a minor child has been used for that purpose.

### **Wyoming**

The definition of "employee" was amended to include county coroners.

A limited liability company may now elect to provide workers' compensation coverage for its members.

Any university of the State of Wyoming or any community college, school district, or private parochial school or college in the State may elect to obtain workers' compensation coverage for any person who may, at any time, be receiving training under any work or job training program for the purpose of learning a trade or an occupation.

The burial expenses for a deceased employer were increased from \$2,500 to \$5,000.

The Standard Industrial Classification system was replaced with the North American Industry Classification System for purposes of determining employers' rates for premiums for workers' compensation. □