Workers' Compensation Jury Instructions

Introduction by Andrew H. Kahn

Workers' compensation practitioners have long recognized that the workers' compensation jury instructions currently published in the MSBA volume of Pattern Jury Instructions are inadequate. The fact that few of our circuit court judges have actually practiced workers' compensation law further compounded this problem. Accordingly, a committee of experienced workers' compensation practitioners, who are members of the Maryland Association for Justice, undertook the task of drafting a comprehensive supplement to the existing instructions and re-drafting the instructions which were felt to be inadequate. These instructions have been submitted to the MSBA. The MSBA will be publishing a major revision to the existing Pattern Jury Instructions with a targeted publication date of early 2010. A committee is being assembled to review our submission and obtain input from other interested groups. Regardless of the outcome of the MSBA editing process we hope that you will find these instructions helpful.

Accidental Injury

An accidental personal injury is:

A. Any injury that arises out of and in the course of employment; or
B. An injury caused by a willful or negligent act of a third person directed against the covered Employee in the course of the employment of the covered Employee; or
C. A disease or infection that arises from an accidental injury that arose out of and was in the course of the employment of the covered Employee.

In order to find that (Name of Employee) sustained an accidental injury, you must find that the elements of any of the three categories of accidental injury have been proven. The failure to prove one of the elements means that you cannot find that (Name of Employee) sustained an accidental injury.

Comments:

Md. Code Ann., Lab. & Empl. §§ 9-101(b) and 9-501. An accidental injury is any unexpected or unintended injury sustained by a covered Employee that arose while the Employee was in the course of the Employee's employment. If the Employee sustained an unusual or unintended physical change to his or her person that arose from and in the course of the Employee's employment, then the Employee sustained an accidental personal injury. *Harris v. Board of Education*, 375 Md. 21, 825 A.2d 365 (2003). Mental or psychological injuries that arose from a compensable physical injury that occurred in the course of the Employee's employment are accidental injuries. *Belcher v. T. Rowe Price*, 329 Md. 709, 621 A.2d 872 (1993).

Occupational Disease

An occupational disease is:

A. A disease contracted by the covered Employee that causes disablement; and
B. Occurs as a result of and in the course of employment; and
C. Causes the Employee to be disabled; and
D. The occupational disease:
    1. Is due to the nature of the employment in which the hazards of the disease exist; or
    2. The disease symptoms are consistent with those symptoms that are known to result from exposure to biological, chemical, or physical agents that are attributable to the type of the Employee's employment.

In order to find that (Name of Employee) sustained an occupational disease, you must find that all the elements of an occupational disease have been proven. The failure to prove one of the elements means that you cannot find that (Name of Employee) sustained an occupational disease.

Comments:

Md. Code Ann., Lab & Empl. §§ 9-101(g) and 9-502. The conditions of an occupational disease develop over time. *LeCompte v. UPS*, Inc., 90 Md. App. 651, 602 A.2d 261 (1992). An occupation disease is an ailment, disorder, illness, or medical condition, which afflicts an employee while the employee, performs work under conditions naturally inherent and inseparable from the employment. *Foble v. Knefely*, 176 Md. 474, 6 A.2d 48 (1939).

Causal Relationship

Causal Relationship is proof that the requested benefit is necessary more likely than not because of the compensable accidental injury or occupational disease.

Comments:

Md. Code Ann., Lab & Empl. § 9-101(b); *Reeves Motor Co. v. Reeves*, 204 Md. 576, 105 A.2d 236 (1954). No intervening or preexisting cause would have been likely to manifest the need for the requested benefit. *S.B. Thomas, Inc. v. Thompson*, 114 Md. App. 357, 689 A.2d 1301 (1997). Medical testimony must establish a link between the compensable injury or disease and the need for a

medical service. *Jewel Tea Co. v. Blamble*, 227 Md. 1, 174 A2.d 764 (1961); *Kantar v. Grand Marques Café*, 169 Md. App. 275, 900 A.2d 295 (2006).

Aggravation of Pre-Existing Condition (Accidental Injury)
Aggravation of pre-existing medical conditions because of an accidental injury that arose out of and occurred in the course of the Employee's employment is compensable.

Comments:
T.B. Gatch & Sons Contracting & Building Co., 164 Md. 672, 166 A. 39 (1933); *Cabell Concrete Block Co. v. Yarborough*, 192 Md. 360, 64 A.2d 292 (1949); *Old v. Cooney Detective Agency*, 215 Md. 517, 138 A.2d 889 (1958); *Whiting-Turner Contracting Co. v. McLaughlin*, 11 Md. App. 360, 274 A.2d 390 (1971). There are special requirements for certain hernia claims. Md. Code Ann. Lab & Empl. § 9-504 (See Hernia Jury Instruction).

Aggravation of Pre-Existing Condition (Occupational Disease)
Aggravation of a pre-existing non-work-related medical condition is not compensable. However, if a workplace hazard that the Employee was exposed to would have injured the Employee regardless of the existence of a pre-existing non-work-related medical condition, then the existence of a pre-existing non-work-related medical condition should not be considered.

Comments:
Md. Code Ann. Lab. & Empl. §§ 9-504 and 9-608; *Blake v. Bethlehem Steel Corp*., 225 Md. 196, 170 A.2d 204 (1961); *Allied-Signal, Inc. v. Bobbitt*, 96 Md. App. 157, 623 A.2d 1311 (1993).

Date of Disablement
Date of disablement is:
A. The day in which the covered Employee became partially or totally incapacitated because of the occupational disease; and
B. The covered Employee was unable to perform the work required by the Employer because of the Employee's exposure to the hazards of the occupational disease.

Comments:
Md. Code Ann., Lab & Empl. § 9-502(a); *CES Card Establishment Services, Inc. v. Doub*, 104 Md. App. 301, 656 A.2d 332 (1995).

Idiopathic Condition
An idiopathic condition is a medical condition or trait that is personal to the Employee that exists separate and apart from the Employee's employment. If an Employee sustains an accidental injury or occupational disease that is solely due to the Employee's idiopathic condition, then the accidental injury or occupational disease is not compensable.

However, if the Employee's idiopathic condition was:
A. Aggravated or triggered by the Employee's employment; or
B. The Employee's employment contributed to the hazard created by the idiopathic condition, then the accidental injury or occupational disease is compensable despite the existence of an idiopathic condition.

Comments:
Watson v. Grimm, 200 Md. 461, 90 A.2d 180 (1952*); J. Norman Geipe, Inc. v. Collett*, 172 Md. 165, 190 A. 836 (1937); *Youngblud v. Fallston Supply Co., Inc*., 180 Md. App. 389, 951 A.2d 118 (2008); *Cam Construction v. Beccio*, 92 Md. App. 452, 608 A.2d 1264 (1992); *Franquet v. Imperial Management*, 27 Md. App. 653, 341 A.2d 881 (1975).

Arising Out of Employment
An accidental injury or occupational disease arises out of the Employee's employment when the injury or disease results from work conditions. The work conditions can be either a natural incident, or because the employment obligations required the Employee to be where the accident occurred.

Comments:
Department of Corrections v. Harris, 232 Md. 180, 192 A.2d 479 (1963); *Scherr v. Miller*, 229 Md. 538, 184 A.2d 916 (1962); *Spencer v. Chesapeake Paperboard Co.*, 186 Md. 522,
47 A.2d 385 (1946). An Employee should be given wide latitude when determining if an accidental injury or occupational disease arose out of an employee's employment. *Austin v. Thrifty Diversified Inc*., 76 Md. App. 150, 543 A.2d 889 (1988). Arising out of and in the course of employment are two requirements of a single test that must both be found before an injury can be considered a compensable injury under Workers' Compensation law. The same or different evidence presented may satisfy these requirements, and deficiencies in the evidence of one requirement may be made up by the strength of the other. *Livering v. Richardson's*, 374 Md. 566, 823 A.2d 687 (2003); *Pariser Bakery v. Koontz*, 239 Md. 589, 212 A.2d 324 (1965); *Perdue v. Brittingham*, 186 Md. 393, 47 A.2d

491 (1946); *Mulready v. University Research Corp.*, 128 Md. App. 392, 738 A.2d 331 (1999), rev'd on other grounds, 360 Md. 51, 756 A.2d 575 (2000). *Montgomery County v. Smith*, 144 Md. App. 548, 799 A.2d 406 (2002); *CAM Constr. Co. v. Beccio*, 92 Md. App. 452, 608 A.2d 1264 (1992); *King Waterproofing Co. v. Slovsky*, 71 Md. App 247, 524 A.2d 1245 (1987).

In the Course of Employment

An accidental injury or occupational disease occurs in the course of employment when the Employee sustains an injury:

A. During the time the Employee is working for the Employer;
B. In a location where the Employee may reasonably be during the period of work for the Employer; and
C. In circumstances that are consistent with the fulfillment of the Employee's work for the Employer.

Comment:

Knoche v. Cox, 262 Md. 447, 385 A.2d 1179 (1978); *Maryland Casualty Co. v. Insurance Co. Of North America*, 248 Md. 704, 238 A.2d 88 (1968); *Miller v. Coles*, 232 Md. 522, 194 A.2d 614 (1963); *Watson v. Grimm*, 200 Md. 461, 90 A.2d 180 (1952).

Statutory Employment

Statutory employment occurs when an Employer who does not directly employ an Employee, but is liable for an Employee's compensable injury or disease because the statutory Employer is the principal contractor for the Employee's direct Employer. A principal contractor will become a statutory Employer for an injured employee if:

A. The work undertaken by the principal contractor is part of the principal contractor's trade, business or occupation;
B. There is a prior contract under which the principal contractor was to perform the work;
C. The principal contractor contracted with another person or business entity as a subcontractor to perform the work in whole or in part.
D. The subcontractor employed the injured Employee.
E. In order to find that (Name of Potential Statutory Employer) is the statutory Employer of (Name of Employee), you must find that all elements are proven. The failure to prove one of these elements means that you cannot find that (Name of Potential Employer) is the statutory Employer of (Name of Employee).

Comments:

It is possible for a principle contractor to contract with more than one subcontractor. If principle contractor contracted with subcontractor #1, who in turn contracted with subcontractor #2, who in turn employed the injured Employee, then element (D) is satisfied. There must be a direct connection between the contracted person or business entity of each level of contractors from the injured Employee to the principle contractor. If there are multiple possible principle contractors or subcontractors, this jury instruction should be altered for the jury to accurately consider the various potential levels of contractor relationship. Md. Code Ann., Lab. & Empl. § 9-508(a); *Rodrigues-Novo v. Recchi America, Inc*., 381 Md. 49, 846 A.2d 1048 (2004); *Brady v. Ralph Parsons Co.*, 308 Md. 486, 520 A.2d 717 (1986); *Coffey v. Derby Steel Co.*, 291 Md. 241, 434 A.2d 564 (1981); *W.C. & A.N. Miller Dev. Co. v. Honaker*, 40 Md. App. 185, 388 A.2d 562 (1978), aff'd in part, 285 Md. 216, 401 A.2d 1013 (1979) *Inner Harbor Warehouse & Distrib., Inc. v. Myers*, 80 Md. App. 1, 559 A.2d 376 (1989); *Anderson v. Bimblich*, 67 Md. App. 612, 508 A.2d 1014 (1986).

Employer

An Employer is a person, entity, governmental unit or quasi-public corporation that has at least one covered Employee.

Comments:

Md. Code Ann., Lab & Empl., § 9-201.

Covered Employee

A covered Employee is a person who is in the service of another person, entity, governmental unit or quasi-public corporation. Whether a person is in the service of another person, entity, governmental unit or quasi-public corporation is determined by the following eight factors:

A. Did the Employer select and hire the person;
B. Does the Employer pay wages or benefits to the person;
C. Does the Employer have the power to dismiss the person;
D. Does the Employer control the person's time, place and manner of the work to be performed by the person;
E. Is the work performed by the person a part of the regular business of the Employer;
F. Did the Employer and the person believe that an Employer-Employee relationship began upon the creation of a relationship between the person and the Employer;
G. Did the Employer supervise the work performed by the person or the environment in which the work by the person was performed;
H. What is the level of skill required in the occupation.

In order to find that (Name of Person) is the Employee of (Name of Employer), you must find that these factors, taken together, prove that (Name of Person) is the Employee of (Name of Employer). The most important of the factors to consider is if the Employer controlled the person's time, place and manner of the work to be performed by the person.

Comments:
Md. Code Ann,, Lab & Empl., §9-202. *Rodrigues-Novo v. Recchi America, Inc*., 381 Md. 49, 846 A.2d 1048 (2004); *Brady v. Ralph Parsons Co.*, 308 Md. 486, 520 A.2d 717 (1986); *Whitehead v. Safway Steel Prods., Inc.*, 304 Md. 67, 497 A.2d 803 (1985); *Mackall v. Zayre Corp.*, 293 Md. 221, 443 A.2d 98 (1982); *Edith A. Anderson Nursing Homes, Inc. v. Walker*, 232 Md. 442, 194 A.2d 85 (1963); *L. & S. Constr. Co. v. State Accident Fund*, 221 Md. 51, 155 A.2d 653 (1959); *William J. Burns Int'l Detective Agency, Inc. v. Ferris*, 16 Md. App. 568, 299 A.2d 487 (1973).

Independent Contractor
An independent contractor is a person who contracts to perform certain work for another person, entity, governmental unit or quasi-public corporation according to his or her means or methods, free from control of the Employer in all details connected to the work except as to the product or result of the work. If the Employer does not possess the skills that the Employee does, it is more likely that the Employee is an independent contractor.

Comments:
Marine v. Service Trucking Co., 225 Md. 315, 318, 170 A.2d 188 (1961); *North Chesapeake Beach Land & Improvement Co. v. Cochran*, 156 Md. 524, 144 A.2d 505 (1929); *Gale v. Greater Washington Softball Umpires Ass'n*, 19 Md.App. 481, 311 A.2d 817 (1973).

Casual Employment
Casual employment is employment that is irregular, unpredictable and brief in nature. The criteria to consider in determining if the Employee's employment with the Employer is casual is:
A. The nature of the work performed;
B. The duration of the employment;
C. Was the employment occasional, incidental or accidental;
D. Was the work performed by the person naturally accompanying or following from the Employer's business.
In order to find that (Name of Employee) is a casual Employee of (Name of Employer), you must find that these factors, taken together, show that (Name of Person) is only a casual Employee of (Name of Employer).

Comments:
Wood v. Abell, 268 Md. 214, 300 A.2d 665 (1973); *Lupton v. McDonald*, 241 Md. 446, 217 A.2d 262 (1966); *Clayburn v. Soueid, Inc.*, 239 Md. 331, 211 A.2d 728 (1965); *Leonard v. Fantasy Imports, Inc.*, 66, Md. App. 404, 504 A.2d 660 (1985). *Johnson v. Helicopter and Airplane Servs. Corp*., 389 F.Supp. 509 (D.Md.) (1974).

Accidental Injuries That Occur Outside of the Formal Scope of Employee's Duties
An accidental injury arises out of and in the course of Employee's employment even if it the accidental injury arose and occurred outside of the formal scope of the Employee's duties if the following factors support that the Employee was acting to the benefit of the Employer at the time of the injury:
A. Did the Employer encourage or subsidize the Employee's activity that lead to or caused the
B. accidental injury;
C. Did the Employer's manage or direct the Employee's activity;
D. Did the Employer require or compel the Employee's attendance or participation in the activity; or
E. Did the Employer expect or receive a benefit from or because of the Employee's participation in the activity, by way of improved employer-employee relationships, greater employee efficiency, partial employee compensation or advertising the employer's business.
F. Was the work performed by the Employee at the time of the accidental injury customarily done by the Employee for the Employer's benefit.
If these factors, taken together, show that (Name of Employee) suffered an accidental injury that arose from and in the course of employment, then you must find that (Name of Employee) sustained a compensable accidental injury.

Comments:
City of Salisbury v. Parks, 57 Md. App. 295, 469 A.2d 1275 (1984).

Average Weekly Wage
The average weekly wage of a covered Employee is determined by adding the wages earned by the Employee for the fourteen weeks prior to the date the Employee sustained a compensable injury or date of disablement for a occupational disease and then dividing by fourteen. Wages include actual pay earned, tips, the reasonable value of housing, lodging, meals, rent and other similar advantages.

Average weekly wage does not include fringe benefits such as Employer contributions to pension plans. If, as a result of an Employee's experience or age, the wages of the covered Employee can be expected to increase, this increase may be taken into account in calculating the average weekly wage.

Comments:
Md. Code Ann., Lab & Empl. §§ 9-602(a). *Uninsured Employers' Fund v. Pennel*, 133 Md. App. 279, 754 A.2d 1120 (2000); *Barnett v. Sara Lee Corp.*, 97 Md. App. 140, 627 A.2d 86 (1993).

Dual Employment
One or more Employers can employ an Employee at the time the Employee sustains a compensable injury or disease. In order for an Employee to be employed by more than one Employer, the Employee must be employed by a general Employer. There must also be a second Employer who borrowed or hired the Employee from the general Employer. Based on the following factors, you may decide that (Name of Employee) is an Employee of (Name of General Employer), (Name of Second Employer) or both. The factors for you to use to make your determination are as follows:
A. Whether Employer selected and hired the Employee;
B. Whether Employer paid wages to the Employee;
C. Whether Employer had the power to dismiss the Employee;
D. Whether Employer controlled of the Employee's conduct;
E. Was the work performed part of the regular business of the Employer;
F. Did either or both Employers believe they were creating an employer-employee relationship or a contractor-independent contractor relationship with the Employee;
G. Where was the work of the Employee usually done, in what environment, under the direction of which Employer or by a specialist without supervision;
H. What is the level of skill required in the occupation.
The factors shall be considered for each potential Employer of the Employee.

Comments:
Whitehead v. Safway Steel Prods., Inc., 304 Md. 67, 497 A.2d 803 (1985); *Mackall v. Zayre Corp*., 293 Md. 221, 443 A.2d 98 (1982); *Edith A. Anderson Nursing Homes, Inc. v. Walker*, 232 Md. 442, 194 A.2d 85 (1963); *L. & S. Constr. Co. v. State Accident Fund*, 221 Md. 51, 155 A.2d 653 (1959); *William J. Burns Int'l Detective Agency, Inc. v. Ferris*, 16 Md. App. 568, 299 A.2d 487 (1973); *Loving Helicopter v. Kaufman*, 13 Md. App. 418, 283 A.2d 640 (1971).

Intoxication
A covered Employee is not entitled to compensation or benefits if the injuries were caused solely by the Employee's intoxication. If the Employee's intoxication was a primary cause of the accidental injury, then the Employee is entitled only to medical benefits. Compensation shall not be denied to an Employee if the covered Employee was taking a controlled dangerous substance as prescribed by a physician and its use was not abusive or excessive. There is a presumption that the use of the controlled dangerous substance or the intoxication of the covered Employee was neither the sole nor the primary cause of the injuries of the Employee. To overcome this presumption, the Employer must produce substantial evidence to the contrary.

Comments:
Md. Code Ann. Lab & Empl. § 9-506(b-d).

Willful Misconduct
A. A covered Employee is not entitled to compensation or benefits if the accidental injury was caused by the Employee's willful misconduct. Willful misconduct is the deliberate violation of an Employer's rules by the Employee who sustained the accidental injury. The injured Employee must have also known or should have known about the potential risk of injury because of the deliberate violation of the Employer's rule. To prove willful misconduct, the Employer must show that:
B. A rule or regulation of the Employer existed;
C. The rule or regulation was known by the Employee;
D. The Employee knew or should have known of the potential risk of injury if the rule or regulation was violated;
E. That Employee deliberately violated the rule or regulation; and
F. The injury sustained by the Employee was a direct result of the Employee's violation of the rule or regulation.
It is presumed that an accidental injury sustained by an Employee was not caused by the Employee's willful misconduct. To overcome this presumption, the Employer must produce substantial evidence that the Employee's accidental injury was as a result of willful misconduct.

Comments:
Md. Code Ann. Lab & Empl. § 9-506(e).

Hernia
A hernia is compensable if:
A. The hernia did not exist before the work injury; or
B. As a result of an accidental injury, a preexisting hernia became so aggravated, incarcerated or strangulated that an immediate operation was needed.

Comments:
Md. Code Ann. Lab & Empl. § 9-504.

Susceptibility to Injury
An Employer is responsible for all benefits arising from an otherwise compensable injury or disease even if the Employee was particularly susceptible to the injury or disease that is the subject of the Employee's claim. It is not relevant that an injury or disease would have been less serious in another similarly situated Employee.

Comments:
Modified from MPJI 10:3

Causal Relationship of Secondary Injury
If a subsequent injury or disease was caused by the weakened or altered state of the Employee's medical condition, or due to the need for medical treatment to treat the original compensable injury or disease, then the subsequent injury or disease is causally related to the original injury or disease and also compensable.

Comments:
This is true even if the subsequent injury or disease occurs while the worker is not pursuing the Employer's business. *Mackin v. Harris*, 342 Md. 1, 673 A.2d 110 (1996); *Great A&P Tea Company v. Hill*, 201 Md. 630, 95 A.2d 84 (1953).

Subsequent Injury Fund: Responsibility for Providing Compensation Generally
The Subsequent Injury Fund was created by statute to compensate certain permanently impaired employees who suffer from injuries or diseases prior to the Employee's accidental injury or occupational disease in this case. The Subsequent Injury Fund is not funded by the State of Maryland. The Subsequent Injury Fund may be responsible for a portion of the permanent disability payments to the Employee if a prior injury, disease, or congenital condition is likely, or likely to be at anytime in the future, a hindrance or obstacle to the ability of the employee to find or maintain any form of employment.

Comment:
Md. Code Ann. Lab & Empl. §§ 9-802 & 9-803.

Subsequent Injury Fund: Requirement of Disability at the Time of the Subsequent Injury
The Subsequent Injury Fund is only responsible for paying compensation for injuries, diseases or congenital conditions that existed prior to the compensable event which is the subject of this claim.

Comment:
The Subsequent Injury Fund is responsible for providing compensation for prior injuries or diseases only as they existed at the time of the compensable injury. In *Subsequent Injury Fund v. Thomas*, 275 Md. 628, 342 A.2d 671, (1975). Although often referred to as a "defense", the Thomas case does not so much provide a defense to liability, but rather is a case of statutory interpretation that more clearly defines the limits of the Subsequent Injury Fund's liability pursuant to Md. Code Ann. Lab. & Empl. §§ 9-802 and 9-803.

Subsequent Injury Fund: Requirement That The Employee's Permanent Total Disability Not Be the Result of the Subsequent Injury Alone
If an employee is permanently totally disabled by virtue of the compensable subsequent injury or disease alone, the Employer is responsible for paying all of the compensation due to the Employee.

Comment:
When a prior injury, though possibly disabling, need not even have existed for the employee to be permanently totally disabled, because the employee would be permanently totally disabled as a result of the subsequent injury alone, the Subsequent Injury Fund has no liability. *Subsequent Injury Fund v. Compton*, 28 Md. App. 526, 346 A.2d 475 (1975), aff'd sub nom, *Anchor Motor Freight, Inc. v. Subsequent Injury Fund*, 278 Md. 320, 363 A.2d 505
(1976). Although this case is usually referred to as providing a "defense", it is actually a case of statutory interpretation that more clearly defines the limits of the Subsequent Injury Fund's liability pursuant to Md. Code Ann., Lab. & Empl. §§ 9-802 and 9-803. Those statutes require that an employee's disability be substantially greater because of the "combined effects" of the prior injury or

disease and the subsequent injury or disease (greater than the employee's disability would have been from the subsequent injury by itself), and this statutory language provides the basis for the Compton case.

Entitlement to Vocational Rehabilitation Benefits
Every Employee who sustains a compensable injury or disease who is unable to perform work for which the Employee was previously qualified, is entitled to vocational rehabilitation benefits. The inability to perform work for which the Employee was previously qualified need not be permanent. A temporary inability of the Employee to do so is sufficient.

Comment:
Md. Code Ann., Lab. & Empl. §§ 9-672 and 9-670.

Vocational Rehabilitation Services: Returning an Employee Back to Work
The Employer is required to provide vocational rehabilitation services reasonably necessary to return the Employee to suitable gainful employment. Suitable gainful employment is defined as employment, including self-employment, which returns the Employee, to the extent possible, to the level of support the Employee enjoyed at the time of the accidental personal injury or occupational disease. Suitable gainful employment must take into consideration the following factors:
A. The Employee's qualifications, interests, and incentives;
B. A comparison of the Employee's actual pre-injury earnings on the date of the accidental personal injury or date of disablement for an occupational disease, with employee's potential proven post-injury earning capacity;
C. The nature and extent of the temporary or permanent disability the Employee sustained as a result of the accidental injury or occupational disease; and
D. The current and future condition of the job market.

Comment:
Md. Code Ann., Lab. & Empl. §§ 9-670(c) and 9-673(a)(b); See also COMAR 14.09.01.20.

Vocational Rehabilitation: Employee Self-Rehabilitates
An Employee may be entitled to reimbursement for the costs of vocational rehabilitation services, even if the Employee did not first give the Employer an opportunity to provide alternative vocational rehabilitation services regardless if the alternative vocational rehabilitation services may have cost less as long as the vocational rehabilitative services paid for by the Employee were reasonable.

Comment:
The Employee is not required to give notice to the Insurer or the to Workers' Compensation Commission before taking action to self-rehabilitate. However, the Employee must prove that the vocational rehabilitation services already received were reasonable in all respects, including costs. *Arnstrom v. Excalibur Cable Common,* Ltd., 142 Md. App. 552, 790 A. 2d 764 (2002).

Death Benefits: Wholly Dependent and Partially Dependent
Dependency is established by providing evidence that (Name of Dependant) was actually financially supported by the deceased employee. A person is wholly dependent when, on the date of the accidental injury or date of disablement for an occupational disease, (Name of Dependent) relied substantially on the earnings of the deceased employee for the reasonable necessities of life. Temporary or occasional financial assistance or benefits from other sources other than the deceased employee does not prevent a person from being wholly dependent. A person who was actually financially supported by the deceased employee, but not wholly dependent is partially dependent.

Comment:
Larkin v. Smith, 183 Md. 274, 37 A.2d 340, (1944). A legal or moral obligation to support someone, in the absence of actual support, does not create dependency within the meaning of the Workers' Compensation Act. *Havre De Grace Fireworks Co. v. Howe*, 206 Md. 158, 110 A.2d 666 (1955). A finding of total dependency does not require destitution. The receipt of financial assistance from other sources, which do not substantially affect or modify their status, does not disqualify an individual from a finding of total dependency. *Superior Builders, Inc. v. Brown*, 208 Md. 539, 119 A.2d 376 (1956).

Occupational Disease: Presumption Cases for Hypertension, Heart Disease or Lung Disease
The occupational disease of (Name of Presumptive Disease) is presumed to be caused by the Employee's employment as a (Name of Presumptive Employment) and therefore compensable if you find that:
A. The Employee has (Name of Presumptive Disease); and
B. That the (Name of Presumptive Disease) has resulted in either:
    1. a temporary partial, temporary total, permanent partial, or permanent total disability; or
    2. death.
The presumption that the Employee's (Name of Presumptive Disease) was caused by the Employee's employment as a (Name of Presumptive Occupation) is sufficient evidence that Employee's occupational disease claim is compensable. The Employee need not

produce any other evidence in order to prove the existent of a compensable occupational disease. The Employer is only entitled to a verdict if the Employer establishes, by a preponderance of the evidence, that non-occupational factors were the cause of the Employee's (Name of Presumptive Disease) despite the evidentiary weight of the presumption.

Comment:
Md. Code Ann., Lab. & Empl. § 9-503 provides whom the presumption applies to and the requirements of proving a presumed occupational disease. "Disability may take on four main forms: (1) temporary partial; (2) temporary total; (3) permanent partial; and (4) permanent total disability." *Mayor and City Council of Baltimore v. Schwing*, 116 Md. App. 404, 696 A.2d 511 (1997). An Employee's presumptive disease does not have to be solely caused by employment. The Employee's employment needs only to be a factor that contributed to the presumptive disease to make a compensable disease. *City of Frederick v. Shankle*, 367 Md. 5, 785 A.2d 749 (2001); *Montgomery County v. Pirrone*, 109 Md. App. 201, 674 A.2d 98 (1996). Md. Code Ann., Lab. & Empl. § 9-608.

Employee's Right to Necessary, Reasonable and Causally Related Medical Treatment
Every Employee who sustains a compensable injury or disease is entitled to medical treatment that is necessary, reasonable, and related to the injury or disease. The Employee has the right to choose medical providers. The Employee does not have to utilize medical providers suggested by the Employer. Medical treatment includes:
A. Medical, surgical, or other attendance or treatment;
B. Hospital and nursing services;
C. Medicine and prescriptions;
D. Crutches and other apparatus;
E. Artificial arms, feet, hands, and legs and other prosthetic appliances; and
F. The cost of transportation to and from medical appointments.

Comment:
Md. Code Ann., Lab. & Empl. §§ 9-660 and 9-661; *Breitenbach v. N.B. Handy*, 366 Md. 467, 784 A.2d 569 (2001); *Baltimore Transit Co. v. Harroll*, 217 Md. 169, 141 A.2d 912 (1958).

Temporary Total Disability
Temporary total disability is defined as the inability to work, because of a compensable injury or occupational disease, while recuperating from the injury or disease. Temporary total disability is not complete helplessness. Proof that the Employee can earn occasional wages or perform certain kinds of work does not prohibit the Employee from receiving temporary total disability benefits if the Employee is physically incapable of performing services for which a reasonable stable market exists, then the Employee may be considered totally disabled. Temporary total disability benefits shall be paid to the Employee until the Employee has returned to employment or when the Employee reaches the state of maximum medical improvement, whichever occurs first.

Comments:
Md. Code Ann., Lab. & Empl. § 9-621; *Baltimore v. Oros*, 301 Md. 460, 483 A.2d 748 (1984); *Babcock & Wilcox, Inc. v. Steiner*, 258 Md. 468, 265 A.2d 871 (1970); *Jackson v. Bethlehem-Fairfield Shipyard, Inc.*, 185 Md. 335, 44 A.2d 811 (1945); *Alexander v. Montgomery County*, 87 Md. App. 275, 589 A.2d 563 (1991); *Bullis School v. Justus*, 37 Md. App. 423, 377 A.2d 876 (1977). Whether or not the Employee loses wages from employment is irrelevant with regard to the Employee's entitlement to temporary total disability benefits. The issue to be considered is whether or not the Employee is capable of working during a period of recuperation. The Employee is not required to be employed directly prior to receiving temporary total disability benefits. *Bowen v. Smith*, 342 Md. 449, 677 A.2d 81 (1996); *Victor v. Proctor & Gamble Mfg. Co*., 318 Md. 624, 569 A.2d 697 (1990).

Temporary Partial Disability
Temporary partial disability is defined as the period of time during which the Employee is unable to work full time, or is working at a different position at a lower rate of pay while recuperating from a compensable injury or disease. Temporary partial disability benefits shall be paid to the Employee until the Employee has reached maximum medical improvement.

Comments:
Md. Code Ann., Lab. & Empl., § 9-615*; Jackson v. Bethlehem-Fairfield Shipyard*, Inc., 185 Md. 335, 44 A.2d 811 (1945).

Permanent Total Disability
Permanent total disability is defined as the incapacity of the Employee to perform any type of work for which a reasonably stable market exists. Permanent total disability is not complete helplessness. Proof that the Employee can earn occasional wages or perform certain kinds of work does not prohibit the Employee from receiving permanent total disability benefits. If the Employee is capable of only work that is so limited in quality, dependability, or quantity that a reasonably stable market for such services does not exist, then the Employee is permanently totally disabled. Absent conclusive proof otherwise, an Employee is permanently totally disabled if the Employee has lost, or has lost the use of: both arms, both eyes, both feet, both hands, both legs, or a combination of any two: arm, eye, foot, hand, or leg.

Comments:
Md. Code Ann., Lab. & Empl. § 9-636; *Montgomery County v. Buckman*, 333 Md. 516, 636 A.2d 448 (1994); *Gillespie v. R&J Construction Co.*, 275 Md. 454, 341 A.2s 417 (1975); *Babcock & Wilcox, Inc. v. Steiner*, 258 Md. 468, 265 A.2d 871 (1970); *Bullis School v. Justus*, 37 Md. App. 423, 377 A.2d 876 (1977); *Dent v. Cahill*, 18 Md. App. 117, 305 A.2d 233 (1973).

Permanent Partial Disability
Permanent partial disability is defined as a medical condition or the effects of a medical condition that continue even though the Employee reached maximum medical improvement. The medical condition or effects from the medical condition must exist because of the compensable injury or disease. Permanent partial disability does not mean the Employee is completely unable to function or to work, but that the injury or disease partially limits the Employee's ability to function or to work. You should consider if there is an effect because of the injury or disease on the Employee's use of the injured part of the body, any pain and suffering to the Employee, or any effect on the Employee's wage-earning capacity. In order to find that (Name of Employee) sustained a permanently partial disability, you must first decide if (Name of Employee) has reached maximum medical improvement. If you find that (Name of Employee) has reached maximum medical improvement, then you must decide if the injury or disease partially limits the Employee's ability to function or to work. If you find that the injury or disease permanently, but only partially, limits the Employee's ability to function or to work, then you must find that the Employee sustained a permanent partial disability.

Comments:
Md. Code Ann., Lab. & Empl. § 9-627*; Alexander v. Montgomery County*, 87 Md. App. 275, 589 A.2d 563 (1991).

Apportionment
An Employer is only responsible for the portion of the Employee's permanent partial disability or permanent total disability that was the result of the Employee's compensable injury or disease. If an Employee has a permanent partial disability or permanent total disability that is due in whole or in part to an unrelated injury or disease, the Employer is entitled to a determination as to how much, if any, of the permanent partial disability or permanent total disability is reasonably attributable to the unrelated injury or disease.

Comments:
Md. Code Ann., Lab. & Empl. § 9-656. Apportionment can occur because of: (1) preexisting injuries or diseases, (2) subsequently occurring injuries or diseases that are not causally related to the compensable injury or disease, (3) any waiver agreed to by the Employee and Employer when the contract for employment was created, (4) a determination of responsibility between two Employers, and (5) a determination of responsibility by the Subsequent Injury Fund. Md. Code Ann., Lab. & Empl. §§ 9-656, 9-657, 9-659, 9-802; *Subsequent Injury Fund v. Thomas*, 275 Md. 628, 342 A.2d 671 (1975); *Marshall v. University of Maryland Medical System Corp.*, 161 Md. App. 379, 869 A.2d 291 (2005); *Gray v. Subsequent Injury Fund*, 71 Md. App. 656, 527 A.2d 54 (1987). There is only apportionment for permanent injuries or diseases. *Martin v. Allegany County Board of County Commissioners*, 73 Md. App. 695, 536 A.2d 132 (1988). Even if there is a prior injury or diseases that resulted in a preexisting permanent partial disability, the fact finder is free to not find apportionment. *Giant Food, Inc. v. Coffey*, 52 Md. App. 572, 451 A.2d 151 (1982).

Industrial Loss
Industrial loss is the effect of the injury or disease on the Employee's wage-earning capacity.

Comments:
Md. Code An.., Lab. & Empl. §9-636; *Queen v. Agger*, 287 Md. 347, 412 A.2d 733 (1980*); Hall v. Willard Sand & Gravel Co*., 60 Md. App. 260, 482 A.2d 159 (1984); *Giant Food, Inc. v. Coffey*, 52 Md. App. 572, 451 A.2d 151 (1982).

Maximum Medical Improvement
An Employee has reached maximum medical improvement when any additional medical treatment for the Employee's compensable injury or disease will not meaningfully improve the Employee's physical or mental condition beyond its current state. The Employee may require additional medical treatment now or in the future, but the nature of any additional medical treatment is intended to assist the Employee with maintaining the Employee's current condition instead of improving the Employee's medical condition beyond its current state.

Comments:
Alexander v. Montgomery County, 87 Md. App. 275, 589 A.2d 563 (1991).