

# **A HANDBOOK FOR INJURED WORKERS IN MASSACHUSETTS**

Joseph P. McKenna, Jr.  
Segal Roitman LLP

111 Devonshire Street  
5th Floor  
Boston, MA 02109

Phone: (617) 742-0208  
Fax: (617) 742-2187

The content of this Handbook is general in nature and is not intended as legal advice related to individual situations. Counsel should be consulted for specific legal advice.

## TABLE OF CONTENTS

<u>Topic</u>	<u>Page</u>
I. INTRODUCTION.....	1
II. INJURIES.....	2
III. PROCEDURE: Reporting and Litigating Claims .....	3
A. Reporting the Injury and Insurer's Response .....	4
B. Conciliation.....	6
C. Conference .....	7
D. Hearing.....	7
E. Further Appeals.....	8
F. Discontinuance of Benefits.....	8
IV. BENEFITS.....	10
A. Disability Benefits .....	10
1. Waiting Provision.....	10
2. Average Weekly Wage.....	11
3. Workers' Compensation Rate.....	11
4. Temporary Total Disability Benefits ..	13
5. Partial Disability Benefits.....	14
6. Permanent and Total Disability Benefits .....	15
7. Death Benefits / Inchoate Rights...	15

B. Medical Benefits .....	16
C. Benefit for Loss of Function.....	17
1. Charts for Calculating Loss of Function Benefits.....	18-21
2. Chart for Calculating Disfigurement..	22
Benefit 15	
D. Vocational Rehabilitation .....	23
E. Miscellaneous Benefits.....	24
V. ATTORNEYS' FEES, LUMP SUM SETTLEMENT PROVISIONS .....	24
VI. SOCIAL SECURITY DISABILITY .....	25
VII. THIRD PARTY SUITS .....	27
VIII. DISCRIMINATION CLAIMS.....	32
IX. CONCLUSION .....	34

## **INTRODUCTION**

The Commonwealth of Massachusetts requires that nearly every employer in the state carry Workers' Compensation Insurance. Workers' Compensation is a wage replacement system for workers who become disabled as a result of injuries or illnesses which arise out of and occur in the course of their employment. Workers' Compensation is usually the exclusive remedy for an injured worker against his/her employer. In almost all instances, benefits are due to the injured worker without regard to fault. A worker may bring a claim under the Massachusetts Workers' Compensation Act (M.G.L. c.152) for injuries occurring in Massachusetts or even for injuries occurring out of state if the hiring took place in Massachusetts. In fact, Massachusetts may exercise jurisdiction if the state has a substantial connection with the employer/employee and a legitimate interest in addressing the injury, even if the injury occurred elsewhere.

Claims for workers' compensation benefits are brought before the Department of Industrial Accidents. A single administrative judge has the responsibility of deciding whether the injured worker is entitled to

compensation. The judge may award three basic benefits: compensation for lost wages, medical benefits, and benefits for bodily loss of function and/or disfigurement. In addition to the right to litigate his/her claim before the Department of Industrial Accidents, a worker may choose to enter into an agreement with the company's insurer to resolve the claim by means of a lump sum settlement. Such settlements may resolve the case in its entirety or may resolve the issue of monetary benefits while allowing the worker to continue to receive medical treatment after the settlement. It is important to note that such settlements must be approved by an administrative judge.

## **II. INJURIES**

The definition of an injury is broad. The provision that "injuries must arise out of and in the course of the employment" includes injuries which result from a traumatic event such as a fall or a lifting incident. Yet, injuries that occur over many years, such as cumulative trauma and repetitive motion injuries, may also be compensable. Carpal tunnel syndrome is one example of a repetitive motion injury. Arthritis and degenerative disc/joint disease

are examples of cumulative trauma.

Occupational Diseases are illnesses that develop over an extended period of time. Conditions such as chemical sensitivity, asbestosis, pulmonary conditions, and dermatitis, have all been held to be compensable injuries. Cardiac related conditions such as heart attack and strokes also can be work related if something in the workplace can be shown to have caused, hastened or aggravated the condition.

Stress related conditions may also be compensable injuries. Proving the job related nature of stress related conditions is often difficult. A worker must demonstrate that the employment is the predominant contributing cause of the disability and that the injury/illness occurred as a result of an event or series of events within the employment. Any emotional disability that arises principally out of a personnel action (promotion, demotion, transfer, termination) is not compensable unless the personnel action was intended to inflict emotional harm.

Physical injuries do not require such a high burden of proof to be compensable. In general, the employer accepts the employee

“as is”. Physical injuries are compensable regardless of a preexisting condition if the workplace is the major cause of the disability. Since the employee is taken “as is”, the issue becomes whether the event at the workplace precipitated the disability. If so, the injury is compensable.

### **III. PROCEDURE: Reporting and Litigating Claims**

#### **A. Reporting the Injury and the Insurer’s Response**

When a job related injury or illness occurs it should be reported to supervisors and management immediately or as soon as possible after the injury is sustained. Failure to report the injury or file a timely accident report with your employer may result in your claim being denied by the insurance company. If it is not medically prudent to take the time to file an accident report or report your injury at once, do so immediately after you have received the necessary medical treatment. Failure to report the claim immediately after the accident, however, is not a bar to compensation but timely reporting is recommended. There is a four

(4) year statute of limitations for filing claims at the Department of Industrial Accidents, which may be extended if the injury cannot be discerned at the time of its occurrence. Asbestosis is one example of an injury which may manifest years after the initial exposure.

When you seek medical treatment, you need to give an accurate history as to the events surrounding your work related injury/illness. The insurance company often will review the medical records of your initial medical treatment when deciding whether to pay benefits.

After you notify your employer of your injury/illness, it is required to notify the insurer of the accident within seven calendar days.

The insurer, after receiving a notice of injury from the employer, or directly from the injured worker by means of a claim for benefits, must either pay benefits or send out a notification of a denial of benefits to the injured worker within fourteen days.

If the insurer denies benefits or has not received a claim notification from the employer, either you or your attorney must file a claim with the Department of Industrial Accidents. In cases where the insurer has not received

a report of injury or has not responded to a report of injury by the employer, the law requires at least thirty days of lost time before a claim for disability benefits may be filed. Other technical provisions exist with respect to filing and processing a claim for benefits. An attorney may be consulted and prove helpful in this process. The cost of retaining an attorney is primarily borne by the insurer.

## **B. Conciliation**

Within several weeks of receiving your claim, the Department of Industrial Accidents will schedule a conciliation. The conciliation will occur at the regional office of the Department of Industrial Accidents which is nearest you. Currently, five regional offices exist: Boston, Fall River, Lawrence, Worcester, and Springfield.

The conciliation is an informal meeting between the insurer, the injured worker, and a conciliator of the Department of Industrial Accidents. Often, the insurer and the injured worker are represented by attorneys. The conciliator reviews the medical evidence and other documents brought by the parties and tries to help them to resolve any dispute. The conciliator is able to resolve disputes only

if all parties agree, and has no authority to force agreement.

### **C. Conference**

In the event that the dispute cannot be resolved at conciliation, the case is forwarded to an Administrative Judge, who will hold an initial proceeding called a conference. This usually occurs several months after the conciliation. At conference, the parties, through their respective attorneys, present oral arguments to the judge and submit medical evidence and other documentation in support of their respective positions. The judge may ask the attorneys and/or the injured worker questions regarding the claim. This proceeding, however, is brief and no testimony is taken. Shortly after the conference, the administrative judge will issue a temporary order either granting or denying benefits.

### **D. Hearing**

If either party is not satisfied with the conference order, they may appeal and ask for a full hearing. The appeal must be filed within fourteen days of issuance of the order. The hearing will take place before the same Administrative Judge. A hearing, like a trial, is a more formal proceeding. No jury

is present, but sworn testimony is taken and witnesses are subject to cross examination. In addition, the injured worker usually must submit to an impartial medical examination by a physician retained by the Department of Industrial Accidents. This impartial examiner is not the independent medical physician (IME) whom the insurance company hires to examine an injured worker. The hearing is conducted after the impartial examination, and the hearing usually occurs at least several months after the conference. Once the Administrative Judge has considered all the evidence, a written decision is issued. The decision will contain the issues, findings of fact, and the basis for an award or denial of benefits.

### **E. Further Appeals**

If either party is dissatisfied with the decision of the Administrative Judge, further appeal may be taken to the Department of Industrial Accidents reviewing board and thereafter to the Appeals Court. These appeals are limited to issues of law and not to issues of fact or credibility.

### **F. Discontinuance of Benefits**

If the insurer pays benefits voluntarily within

fourteen days of receipt of the claim, payment is without prejudice for the first one hundred and eighty days of disability. The term “without prejudice” means that an insurer may stop benefits if it desires if it provides the injured worker with seven days’ advance notice of an intention to stop paying benefits. The “payment without prejudice” period may be extended for up to one year after the accident by mutual agreement. This means that the insurer is free to cease paying disability and/or medical benefits and deny any responsibility for the claim at any time within either the one hundred and eighty day or the extended one year time frame permitted by law. After the payment without prejudice time frame has expired, the insurer may stop payment only: 1) by order or decision of an Administrative Judge; 2) by agreement of the parties; 3) by the injured worker returning to work earning at least pre-injury wages; 4) by a medical report of the treating or impartial physician indicating that the injured worker is able to return to the former job or a suitable job accompanied by a written statement by the employer that such job is available; 5) by exhaustion of disability benefits permitted under the law; 6) by incarceration of the

worker for a felony or misdemeanor; 7) by the worker failing to attend or obstructing the insurer's medical exam; 8) by the worker failing to respond within thirty days to a request to provide an earnings report; or 9) by the worker failing to meet and cooperate with the Office of Education and Vocational Rehabilitation.

In the event that the worker contests the discontinuance of benefits, then the worker or his/her attorney must file a claim as outlined above to bring the dispute before an Administrative Judge.

## **IV. BENEFITS**

Pursuant to Massachusetts General Laws, Chapter 152, benefits under the Workers' Compensation Act fall under four basic categories; disability benefits, medical benefits, loss of function and disfigurement benefits, vocational rehabilitation benefits and some miscellaneous benefits.

### **A. Disability Benefits**

#### **1. Waiting Provision**

Disability benefits are payable once the worker loses at least five calendar days of

work as the result of an industrial injury. But, if a worker is disabled less than twenty-one days, payment is due only from the sixth day. If the worker is out of work more than twenty-one days, payment is due retroactive to the first day of disability.

## **2. Average Weekly Wage**

Disability payments are based on the worker's average weekly wage. The average weekly wage is usually calculated by averaging the fifty-two weeks prior to the employee's date of injury. Overtime work and bonuses should be included in the calculation. Concurrent employment, roughly defined as earnings from additional jobs with an employer covered by the workers' compensation statute, usually is included in the calculation of an average weekly wage. Some fringe benefits are included in the calculations but others are not. Lodging and transportation allowances are frequently included. Health insurance is not included.

## **3. Workers' Compensation Rates**

An injured worker will receive sixty percent of his/her average weekly wage for total disability benefits up to a statutory maximum benefit (see State Average Weekly Wages

table below). With respect to partial disability, an injured worker is entitled to sixty percent of the difference between his/her pre-injury wage and his/her current earning capacity. An injured worker who is permanently and totally disabled is entitled to two-thirds of his/her average weekly wage.

The maximum Workers' Compensation rate in Massachusetts is set each October by the State Department of Labor. This maximum provision serves to cap disability benefits for high wage earners. A minimum Workers' Compensation rate of twenty percent of the state average weekly wage also is assessed by the Department of Labor. The maximum benefit rates for recent years are listed below.

## STATE AVERAGE WEEKLY WAGES

If injured on or after	Maximum Weekly Benefit
2005	\$958.58
2004	\$918.78
2003	\$884.46
2002	\$882.57
2001	\$890.94
2000	\$830.89
1999	\$749.69
1998	\$699.91
1997	\$665.55
1996	\$631.03
1995	\$604.03
1994	\$585.66
1993	\$565.94
1992	\$543.30
1991	\$515.52
1990	\$490.57

### **4. Temporary Total Disability Benefits**

For an injury occurring after December 23, 1991, the maximum period of time a worker can receive total benefits under the Workers' Compensation Act is one hundred and fifty-six weeks (3 years).

## **5. Partial Disability Benefits**

For an injury occurring after December 23, 1991, the usual maximum duration of partial disability benefits is two hundred and sixty weeks (5 years). In most cases, combined total and partial disability benefits cannot exceed three hundred and sixty-four weeks (7 years). (The current benefit limits represents a more than fifty percent reduction from the old Workers' Compensation Law, which provided for five years of temporary total disability and eleven and one-half years of partial disability benefits, for a combined total of sixteen and one-half years of benefits.)

The partial disability rate cannot exceed seventy-five percent of the worker's temporary total disability rate. For example, if a worker has an average weekly wage of \$700.00, his/her Section 34 temporary total disability rate would be \$420.00. His/her partial disability rate will be \$315.00 ( $.75 \times \$420.00$ ). An Administrative Judge does have the option of setting a partial disability rate between zero and the seventy-five percent maximum based upon the Judge's perception of the employee's post-injury earning capacity.

## **6. Permanent and Total Disability Benefits**

A worker who is permanently and totally disabled from performing any and all forms of employment may receive Workers' Compensation benefits as long as the disability continues; no time limit is imposed. This benefit is based upon two-thirds of the employee's average weekly wage, but in some cases a yearly cost of living increase may be added.

## **7. Death Benefits / Inchoate Rights**

If a worker dies as a result of a job related disability, his/her spouse is entitled to receive benefits at a rate of two-thirds of his/her average weekly wage for two hundred and sixty weeks (5 years). Thereafter, if the spouse is not wholly self-supporting, benefits may continue indefinitely. Spousal benefits are terminated if the spouse remarries.

If the deceased worker was not married or was divorced, dependency benefits will be awarded to the deceased worker's minor children, or in some cases, to other individuals who were dependent on the deceased worker.

Cost of living adjustments are made yearly for the surviving spouse or dependents of the deceased worker. In addition to the inchoate/dependent benefit, a burial allowance of four thousand dollars is provided.

## **B. Medical Benefits**

An injured worker is entitled to payment of medical expenses for all reasonable and necessary treatment related to his/her injury. Medical expenses are not limited to hospital and doctor expenses. They include payment for prescription medication, travel to and from doctors or other medical providers, and prosthetic devices. Payment for hospital and physician costs is determined by a rate-setting board. The employee is not responsible for paying the difference between the Workers' Compensation rate and the medical provider's full rate.

To help insurers decide whether to pay medical benefits, the Workers' Compensation Act provides a utilization review process. Reviewers employed by the insurer determine in advance of hospitalization and doctors' visits whether these treatments are related to the injury, and whether the treatment is reasonable and necessary.

Approval of treatment by utilization review does not guarantee payment by the insurer. Sometimes insurers deny payment for treatments approved by their utilization review staff. The injured worker has a right to appeal a denial of payment made by the utilization review agent or the insurer. Any such appeal must be made to the Department of Industrial Accidents.

### **C. Benefits for Loss of Function and Disfigurement**

These benefits have been severely curtailed by the 1991 amendment to the Workers' Compensation Act. For example, payment for a scar-based disfigurement currently is limited only to scars on the face, neck, or hands. Non-scar based disfigurements such as a limp, or the use of a cane or prosthetic device remain compensable. Both disfigurements and losses of function are calculated based upon multiples of the maximum state average weekly wage at the time of the injury. The Department of Industrial Accidents requires a physician's report to support any claim for these benefits. The request must contain a description of the disfigurement (length, width, discoloration) and an assessment of the percentage of loss of function based upon

## **GUIDE FOR CALCULATING LOSS OF FUNCTION BENEFITS FOR INJURIES OCCURRING ON OR AFTER DECEMBER 24, 1991**

### **EYES**

Section 36, Paragraphs (a), (b) & (c)

a. **Total loss of vision, or reduction to 20/70 of one eye with glasses.**

Loss of single binocular vision.

**SAWW x 39**

b. **Total loss of vision, or reduction to 20/70 of both eyes with glasses.**

**SAWW x 96**

c. **For any correctable permanent but partial reduction in acuity or field of vision, an amount in proportion to the total loss or use or the reduction to 20/70 of normal vision.**

**20/30**      **SAWW x 10**      **20/35**      **SAWW x 12.5**

**20/40**      **SAWW x 14.5**      **20/45**      **SAWW x 19.5**

**20/50**      **SAWW x 24.5**      **20/60**      **SAWW x 34.5**

**20/70**      **SAWW x 39**

### **EARS**

Section 36, Paragraph (d)

d. **Total loss of hearing of one ear**

**SAWW x 29**

Total loss of hearing of both ears

**SAWW x 77**

### **ARMS**

Section 36, Paragraph (e)

For amputation or permanent loss of use - major arm

**SAWW x 43**

For amputation or permanent loss of use - minor arm	<b>SAWW x 39</b>
For amputation or permanent loss of use - both arms	<b>SAWW x 96</b>
Elbow joint - 65% of arm	shoulder - 60% of arm
<b>HANDS &amp; WRISTS</b>	
For amputation or permanent loss of use - major hand	<b>SAWW x 34</b>
For amputation or permanent loss of use - minor hand	<b>SAWW x 29</b>
For amputation or permanent loss of use - both hands	<b>SAWW x 77</b>
<b>FINGERS</b>	
Thumb - 40% of hand	One phalanx of thumb - 75%
Index - 25% of hand	One phalanx of finger - 45%
Middle - 20% of hand	Two phalanges of finger - 80%
Ring - 10% of hand	Little - 5% of hand
<b>LEGS</b>	
For amputation or permanent loss of use - either leg	<b>SAWW x 39</b>
For amputation or permanent loss of use - both legs	<b>SAWW x 96</b>
Knee - 50% of leg	
Hip - 25% of leg	
<b>FEET &amp; ANKLES</b>	
For amputation or permanent loss of use - either foot at any point above ankle joint	<b>SAWW x 29</b>
For amputation or permanent loss of use - both feet at any point above ankle joint	<b>SAWW x 68</b>
Large toe - 18% of foot (first joint - 13.5% of foot)	Other toes - 5% of foot (first joint - 2% of foot)

## GUIDE FOR CALCULATING LOSS OF FUNCTION BENEFITS VARIOUS LOSSES OF FUNCTION

### Section 36, Paragraph (j)

Spine	Dorsal, lumbar sacrum Total loss	SAWW x 32 SAWW x 24
Equilibrium	Cervical - 75% of maximum Total loss of ability to stand	SAWW x 21
Lung	Loss of one lung	SAWW x 16
Kidney	Loss of one kidney	SAWW x 16

Language comprehension	Total loss	SAWW x 32
Sexual function	Total loss	SAWW x 10
Taste or smell	Total loss of either	SAWW x 16 (both = SAWW x 32)
Spleen	Loss of spleen	SAWW x 10
Urinary or bowel	Total loss of either	SAWW x 29
Teeth	Loss of each	SAWW x 1

---

NOTE: This list is not intended to be exhaustive of the functional losses compensable under Section 36(1)(j).

**GUIDE FOR CALCULATING "PURELY SCAR-BASED" DISFIGUREMENTS  
FOR INJURIES OCCURRING ON OR AFTER DECEMBER 24, 1991  
MAXIMUM DISFIGUREMENTS AWARD = \$15,000.00**

Section 36, Paragraph (k)

**FACE (Maximum \$15,000.00)**

Linear scar, no discoloration  
 Linear scar, with discoloration  
 Wide scar, no discoloration  
 Wide scar, with discoloration

2 x SAWW per inch  
 3.25 x SAWW per inch  
 3.5 x SAWW per inch  
 6.5 x SAWW per inch

**HAND (22 x SAWW)**

Linear scar, no discoloration  
 Linear scar, with discoloration  
 Wide scar, no discoloration  
 Wide scar, with discoloration.

1 x SAWW per inch  
 1.75 x SAWW per inch  
 2 x SAWW per inch  
 2.5 x SAWW per inch

(In no instance shall amount for disfigurements to fingers exceed allowances for amputations.)

**NECK OTHER THAN FACE (22 x SAWW)**

Linear scar, no discoloration  
 Linear scar, with discoloration  
 Wide scar, no discoloration  
 Wide scar, with discoloration

1 x SAWW per inch  
 1.75 x SAWW per inch  
 1.75 x SAWW per inch  
 2 x SAWW per inch

the American Medical Association guidelines. The following charts set out the method of payment, which is based upon multiples of the maximum state average weekly wage in effect at the time of the injury.

#### **D. Vocational Rehabilitation**

The Office of Education and Vocational Rehabilitation (OEVR) provides injured workers with assistance to help them return to work. Such assistance sometimes includes retraining. OEVR first determines whether a return to work with the current employer in the worker's prior position is possible. If not, OEVR will assess whether a return to work with the current employer is possible through job reassignment or modification. If the first two options are not feasible, then OEVR will try to assist the injured worker in securing other jobs utilizing his/her past work experience, education and skills. If that is not possible, then OEVR may instruct the insurer to pay for up to one hundred and four weeks of retraining. The injured worker must apply to OEVR to request benefits while receiving disability benefits up to two years after receiving a lump sum settlement.

## **E. Miscellaneous Benefits**

Section 28 of the Workers' Compensation Act provides that an employee can receive double benefits in the event that the employer intentionally, willfully or through gross negligence created a condition which caused the employee's injury. This benefit is seldom imposed against an employer. Section 27 bars the collection of all benefits if the employee is guilty of certain types of misconduct.

## **V. ATTORNEYS' FEES, LUMP SUM SETTLEMENT PROVISIONS**

Attorneys' fees are regulated by the Workers' Compensation Act. Attorneys may not charge clients on an hourly basis. An attorney is entitled to a payment only upon successful litigation of the claim. The amount of the fee varies from one type of proceeding to another and is paid either fully or mostly by the insurance company. In addition, the insurer must reimburse the employee or his/her attorney for out-of-pocket expenses.

In the event of a lump sum settlement, the employee's attorney is entitled to a statutorily based contingent fee. If the insurer pays a

lump sum settlement to the worker but does not accept liability for the injury (so that no obligation exists to pay medical benefits after the lump sum), an attorney's fee of up to 15% may be approved by the Administrative Judge. If the settlement includes ongoing liability for medical benefits and vocational benefits, an attorney's fee of up to 20% of the lump sum settlement may be approved by the Administrative Judge. All attorneys' fees in lump sum settlement settlements and the settlements themselves must be approved by an Administrative Judge.

## **VI. SOCIAL SECURITY DISABILITY**

In addition to workers' compensation benefits, or independently of a workers' compensation claim/benefits, most injured workers may apply for Social Security Disability benefits. Generally, a worker who is receiving workers' compensation benefits, who also is receiving Social Security Disability benefits, receives Social Security disability at a reduced amount. Yet, for high wage earners, often no offset exists.

It is not necessary to show any connection to a job related illness/injury to receive

Social Security benefits. For example, heart problems or arthritis may not necessarily arise out of an accident at work but can be found to be the basis for an award of Social Security Disability benefits. Furthermore, disability benefits can be awarded based on a combination of injuries or impairments rather than a singular injury/illness.

Two requirements must be met to receive Social Security Disability benefits: First, the disabled claimant usually must have paid social security taxes for twenty out of the forty quarters preceding onset of disability (five of the last ten years). If this coverage requirement is not met, no claim for Social Security Disability income benefits can be filed. (However, a claim for Social Security Supplemental income benefits — a financial need based benefit — may be pursued.) The second requirement is that the claimant establish that he/she suffers from a medically determinable impairment of such severity that he/she is unable to engage in any substantial gainful work activity, on a sustained work day basis, and that the degree of severity will last for at least twelve consecutive months. It should be noted that the first 5 months of disability constitute a waiting period and

disability benefits are paid from month 6 forward.

Once awarded Social Security benefits the worker, if suffering from an ongoing disability, may receive such benefits up to age 65. At that point, the disability benefits convert to old age retirement benefits.

Municipal and State employees, as well as other quasi-state governmental agencies, who do not pay Social Security taxes, are members of a separate retirement system. The State-run system, like the Social Security Administration, provides benefits for those workers who suffer permanent disabilities which prevent them from performing either their own jobs or like jobs for which they are qualified. Disability retirement benefits are divided into work related and non-work related disabilities. Claims for either disability benefit are subject to review by a medical panel and approval by the State-run retirement agency.

## **VII. THIRD PARTY LAWSUITS AND RELATED CLAIMS**

While Chapter 152 bars lawsuits against employers in most cases, an employee may

still sue a “third party” who was responsible for the employee’s injury. Workers’ compensation law only prohibits suits against employers and co-workers. Others, such as the supplier of a defective product or a negligent contractor or subcontractor, may be liable for the employee’s damages. In such a suit, often called a “third party lawsuit,” the injured employee may recover all of his/her lost wages, medical bills, out of pocket expenses, past pain and suffering, future pain and suffering, loss of enjoyment of life, diminution of future earnings, loss of function, and future medical expenses. An injured person’s spouse and children may claim loss of consortium if the injury deprived them of the society, aid, companionship, and affection of the injured person. These damages are broader than those available to injured workers under the Workers’ Compensation Act.

### **A. Types of Third Party Claims**

Typical third party claims include:

1. **Construction Site Accidents.** A mason working for a subcontractor falls from scaffolding that the general contractor knew had missing guard rails. After filing

a workers' compensation claim against his employer, the mason brings suit against the general contractor to recover for his full damages, including pain and suffering, lost future earnings, and future medical bills. In another case, an ironworker is struck by a beam improperly lowered by a subcontractor. After filing a workers' compensation claim against his employer, the ironworker brings suit against the subcontractor and the general contractor and recovers his damages for pain and suffering and loss of future earnings in addition to receiving his workers' compensation benefits from his own employer.

2. Other On-The-Job Injuries. An office worker slips on oil leaking from a defective machine on the employer's premises. After filing a workers' compensation claim against her employer, she brings a claim against the manufacturer and supplier of the defective machine for supplying a defective product and failing to warn her about it. Another employee, a mechanic working on a truck, suffers burns from an improper fuel injection system that sprayed him with gasoline that ignited. After filing a workers' compensation claim against

his employer, he brings a claim against the truck manufacturer for his medical expenses, pain and suffering, continuing medical expenses, and scarring.

## **B. Other Related Claims**

Other types of claims often brought by employees include:

1. **Employers Without Workers' Compensation Insurance.** If an employer does not have proper workers' compensation insurance, it can be sued directly for the employee's full damages. Such damages include pain and suffering and all the other elements of damage available in any ordinary negligence suit.
2. **Transportation Accidents.** Although Massachusetts workers' compensation law does not usually provide any compensation for injuries suffered on the way to and from work, an employee can sue a responsible party to recover for injuries suffered as a result of that party's negligence. For example, a blind woman was injured falling in the gap between the train and the platform and recovered from the railroad company for her pain and suffering, medical expenses, lost wages, and emotional distress from the

accident.

### **C. What to Do About a Potential Third Party Claim**

If you think you may have a third party claim, you should seek legal advice as soon as possible. Evidence, particularly on a construction site, often disappears in a short time. If preservation of evidence is a problem, contact a lawyer immediately for help. In addition to considering legal advice, you should:

- write down the names, addresses, and phone numbers of all witnesses to the accident or injury;
- photograph and videotape the site of the accident or injury, with particular focus on the cause of the injury and its condition, and all safety violations at the site;
- if possible, secure any defective product or equipment involved in the accident, either by seeking permission to store it or having the employer store it safely;
- find out if similar injuries occurred at the same place or in the same manner and write down the particulars, including the names and addresses of other injured

persons;

- if the injury was caused by a product or machine, try to obtain the product literature, bill of sale, and the names of any vendors, suppliers, or repairers of the product;
- photograph and videotape the injured person, showing the injury as clearly as possible;
- give a careful and accurate description of the accident to every doctor who examines or treats you;
- keep careful notes of medical visits, orders, and prescriptions;
- report the accident to your supervisor, job steward and employer. Consider carefully any statement you give, especially to insurance representatives who call or visit you at home or in the hospital. Such statements will be used in any litigation.

## **VIII. DISCRIMINATION CLAIMS**

Although the Workers' Compensation Act bars most claims against an employer, it does not bar all claims against an employer.

If you have been discriminated against on

the basis of race, sex, religion, age, national origin, sexual preference, or disability, you may be entitled to bring a claim of unlawful discrimination against your employer. In some instances, the discrimination is so severe that you may also have a compensable workers' compensation claim. For example, if an employee is sexually harassed on the job, and suffers physical or emotional injuries sufficiently severe that he or she cannot work, that employee may have rights under both the Workers' Compensation Act and antidiscrimination law.

An employee who files for workers' compensation may also find that his or her employer refuses reemployment because of an actual or perceived disability, or simply in retaliation for having filed for compensation. This type of employer conduct may be actionable.

The discrimination laws have very short statutes of limitation — as short as six months under State law. For this reason, employees should consider any action as soon as possible.

## **IX. CONCLUSION**

The discussion of the workers' compensation statute as well as other related claims represents a basic overview of an individual's potential rights. Each area of law, however, is significantly more complex than represented in this booklet. For this reason, it is recommended that one seek competent advice when considering and/or pursuing a particular claim.



