



STATE OF NEVADA WORKERS' COMPENSATION COVID-19 QUICK GUIDE

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GENERAL NEVADA PROVISIONS

Choice of Physician

Employer	Control via MCO or PPN and after 90 days treatment
Employee	Has initial choice and alternative choice first 90 days

Time Periods for Filing

Employee	Notice of Accident or Injury:	7 days after accident
	Notice of occupational disease:	7 days after notice disability is work-related
	Supporting medical documentation:	3 work days after initial treatment
Employer	Employer's Accident Report:	6 work days after receipt of claim for compensation
	Waiting Period for TTD:	5 consecutive days; 5 cumulative days in 20-day period
	Recovery of Waiting Period:	Yes
	Payment of lump sum settlement:	Yes, 10 days or period set by agreement or order
	Payment pursuant to award:	Yes, lump sum and installments
	Filing for dependency benefits:	Within 1 year after death; otherwise 90 days after accident or after disability from OD.

Statutes of Limitations

Injury by Accident	90 days after accident, unless legal excuse proven.
Change of Condition	1 year if no TTD or PPD; 1 year after final determination denying COC; otherwise lifetime right.
Claim for Permanent Disability	70 days after claim closure determination; also after claim closes under certain circumstances including failure to provide PPD evaluation.
Death	1 year, unless legal excuse proven.
Occupational Disease	90 days after notice disability from disease is work-related.
Appeal – 1st level	70 days after date of written determination.

COMPENSABILITY

In Nevada, we will likely see COVID-19 claims filed as an occupational disease or an accidental injury.

Occupational Disease

Occupational diseases are governed initially by NRS 617.358, wherein the statute states in part, “an employee or the dependents of the employee are not entitled to receive compensation pursuant to the provisions of this chapter unless the employee or the dependents of the employee establish by a preponderance of the evidence that the employee’s occupational disease arose out of and in the course of his or her employment.” NRS 617.358(1).

Secondarily, Pursuant to NRS 617.440:

An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:

(a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;

(b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;

(c) It can be fairly traced to the employment as the proximate cause; and

(d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.

2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.

3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.

As evidenced in NRS 617.440(1), the exposure to the virus would have had to be directly causally connected between the conditions under which the work is performed and the occupational disease, flow as a natural consequence of such work, traced a proximate cause to that work, and *did not come from a hazard to which workers would have been equally exposed outside of the employment*. Furthermore, under subsection two, the disease must be incidental to the character of the business and not independent of the relation of the employer and employee. Given the seemingly ubiquitous and airborne nature of COVID-19 known to date, it would appear most employees would be only generally or equally exposed to this disease as much as a member of the general public outside of the work environment, barring the special circumstances given above.

Accidental Injury

If filed as an accidental injury, it is important to note that Nevada is an increased risk state. The Nevada Supreme Court has offered guidance in applying Nevada public policy and interpreting the above-mentioned statutes by delineating the types of risk generally contemplated as compensable under our workers' compensation statutes. Specifically, as generally applied in national jurisprudence, in order to be a compensable accidental injury the injury must both 'arise out' and 'in the course of employment.' NRS 616C.150(1); *see also*, *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 604, 939 P.2d 1043, 1045-46 (1997) and *Rio All Suite Hotel & Casino v. Phillips*, 240 P.3d 2, 126 Nev. Adv. Op. 34 (2010). The courts have interpreted the "arising out of" requirement to involve a certain class of accidental injuries where the claimant can demonstrate a "causal connection between the injury and the employee's work," in which 'the origin of the injury is related to some risk involved within the a scope of employment.'" *See Phillips*, 240 P.3d at 4 (citing *Gorsky*, 113 Nev. at 605). The Nevada Supreme Court has stressed that determining the type of risk encountered by the employee "is an important first step in analyzing whether the employee's injury arose out of employment." *See Phillips*, 240 P.3d at 4. The types of risk of injury an employee may encounter include: employment related risk of injury, personal risks of injury, and neutral risks of injury. *Id.* Employment related risks of injury are inherent to the employment itself and injuries arising out of that risk are generally compensable. *Id.* Personal risks of injury are those that are "so clearly personal that, even if they take effect while the employee is on the job they could not possibly be attributable to the employment." *Id.* (citing 1 Larson & Larson, *Larson's Workers' Compensation Law* §§ 4.01-4.03, at 4-2 to 4-3 (2010)). Finally, neutral risks of injury are neither distinctly employment nor distinctly personal in nature. *Id.*

To analyze whether an injury by a neutral risk "arose out of" employment, courts generally apply one of three tests: increased-risk of injury test, actual-risk of injury test, or positional-risk of injury test. *Id.* The Nevada Supreme Court has expressly rejected both the actual-risk test and positional-risk test for various public policy reasons. *Id.* In adopting the most widely accepted increased-risk of injury test, the Court explains that under this test, "an employee may recover if she is subjected 'to a risk greater than that to which the general public [is] exposed.'" *Id.* at 7 (citing *K-Mart Corp. v. Herring*, 188 P.3d 140, 146 (Okla.2008)). The court explains that such a test strikes a balance between the employee's right to benefits and the employer's right not to be held responsible for every injury occurring in the workplace. *Id.*

In *Phillips*, the claimant injured her ankle while descending a staircase at work. *Phillips*, 240 P.3d at 3. The claimant testified that she stepped down onto one of the steps and her ankle "just twisted over." She indicated that she never missed a step or lost her balance or slipped or tripped, it just twisted. *Id.* The court concluded that the claimant's risk of injury fell into the neutral risk category as her injury occurred while traversing a staircase that "was free of defects, and there is no evidence that a risk personal to [the claimant] caused her to fall." *Phillips*, 240 P.3d at 6. The Court, in applying the increased risk test, noted that the act of descending a staircase at work, in and of itself, does not present a greater risk than that faced by the general public and such a claim would normally not be compensable under Nevada law. However, in *Phillips* there was abundant evidence that the requirements of her employment required her to traverse this stairways many times in a particular day and that her employment caused her to use the

stairs far in excess of that of a member of the general public so as to present an increased risk of injury from use of the stairs. *Id.*

Psychiatric Claims

Psychiatric claims are generally permissible as long as they arise out of and in the course of the employment pursuant to NRS 616C.180. However, there are limitations. Claims for any ailment or disorder suffered as a result of gradual mental stimulus are not compensable. NRS 616C.180(2). In order for an psychiatric claim to become compensable, an employee would have to prove by clear and convincing evidence that; (a) The employee has a mental injury caused by extreme stress in time of danger; (b) The primary cause of the injury was an event that arose out of and during the course of his or her employment; and (c) The stress was not caused by his or her layoff, the termination of his or her employment or any disciplinary action taken against him or her. NRS 616C.180(3). Generally, the requirement that “the mental injury was caused by extreme stress in time of danger,” has been interpreted to mean physical peril similar to an armed robbery scenario, however, this is where there may be some room for argument if the stress is associated with a known exposure to a COVID-19 infected individual under the right circumstances.

There special provisions for first responders, however, they are generally limited to those who directly witness the death, or the aftermath of the death, of a person as a result of a violent event, including, without limitation, a homicide, suicide or mass casualty incident or an injury, or the aftermath of an injury, that involves grievous bodily harm of a nature that shocks the conscience. NRS 616C.180(4).

If a person contracted COVID-19 while traveling on business, would that result in a compensable claim?

The Nevada courts will likely apply the increased risk test in this situation, meaning that if the work travel placed the employee at risk for contracting the virus greater than that to which the general public is exposed, the claim would be compensable if the employee is otherwise able to prove causation.

If a person is injured while teleworking, would those injuries be compensable? Yes, so long as the injuries arose out of and in the course of employment, and the employee’s home is regarded as a worksite. Factors used in that determination are: 1) the quantity and regularity of work performed at home; 2) the presence of work equipment at home; 3) the special circumstances of the employment rendering it necessary and not personally convenient to work at home; and, 4) whether the employer acquiesced to the employee’s regular use of the home as a work site or reasonably should have known the employee was working from home.

BENEFITS

An employee would be entitled to temporary disability benefits, either total or partial, medical treatment, permanent partial disability benefits, and, potentially, dependency benefits. It is unknown to what extent COVID-19 will result in permanent disability benefits, but there is some early suggestion that the disease may result in diminished lung capacity which could yield a permanency finding, and, to the

extent that there is psychiatric overlay, there exists the potential for permanency as a result of psychiatric impairment. Should an employee be unable to return to work as a result of permanent symptoms, vocational rehabilitation may be awarded as well.

If an employee is working on light duty as a result of a workers' compensation claim and there is a layoff due to the economic downturn or government-mandated closure, is the employee entitled to TTD? Most likely, yes. The Nevada Supreme Court requires a claimant to prove both prongs of a two-factor test to establish entitlement to temporary total disability. *See generally Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 455, 916 P.2d 786 (1996). Namely, the Claimant must prove actual wage loss and that the wage loss is caused by the compensable condition or disability. *Id.* Furthermore, discharge from employment for reasons other than gross misconduct does not limit an injured employee's entitlement to receive benefits for temporary total disability. NRS 616C.232(4). Therefore, we presume that most administrative law judges will award temporary disability benefits even where the reason for the unavailability of modified duty is economical and not personal in nature.

May an employer terminate medical benefits due to non-compliance with treatment as a result of fear of going to a health care provider during the pandemic? An employer/insurer may terminate benefits due to non-compliance with medical care, but a person's fear of attending treatment visits due to COVID-19 is likely justifiable, and it is highly unlikely that a termination of benefits would be upheld under these extraordinary circumstances. Similarly, administrative law judge would likely be sympathetic to an employee that refuses to go to an IME appointment for similar reasons.

Other considerations regarding benefits: Of note, there are also various Nevada statutes and regulations which can affect the management of claims which are considered potentially compensable under certain circumstances. Namely, NRS 616C.052, governs exposure of police officers, firefighters or arson investigators to contagious disease and provides certain reporting and testing requirements. NRS 616A.035, enumerates the type of "accident benefits" otherwise due under a compensable claim to include preventive treatment administered as a precaution to an employee who is exposed to a contagious disease while providing medical services, including emergency medical care, in the course and scope of his or her employment or preventive treatment administered as a precaution to a police officer, a salaried or volunteer firefighter or an arson investigator who was exposed to a contagious disease upon battery by an offender or while performing the duties of a police officer, firefighter or arson investigator, if the exposure is documented by the creation and maintenance of a report concerning the exposure pursuant to subsection 1 of NRS 616C.052.

AREAS OF INQUIRY DURING COVID-19 INVESTIGATIONS

- Employee's job duties/length of employment
- Employee's symptoms/diagnosis/treatment/test results
- Employee's allegation regarding exposure (i.e., have co-workers/vendors/clients/patients tested positively?)
- Other possible sources of exposure (i.e., roommates/family/friends?)
- Recent travel (personal and/or business) – what/when/where/for how long/purpose

- Secondary employment
- Use of mass transit/public transportation/carpools
- Hobbies/recent events prior to diagnosis (e.g., concerts/sporting events/rallies)
- Social media activity
- Medical canvasses
- Experts (e.g., epidemiologists/infectious disease specialists/industrial hygienists)
- Results of governmental investigations (OSHA/CDC/local health authorities)
- Employer precautions (e.g., did the employer follow CDC guidelines, what other measures did employer take to prevent spread?)

HELPFUL LINKS

- [CDC Workplace Guidance](#)
- [Centers for Disease Control and Prevention – COVID-19](#)
- [EEOC's COVID-19 Page](#)
- [OSHA's COVID-19 Page](#)
- [OSHA's Guidance on Preparing Workplaces for COVID-19](#)
- [World Health Organization COVID-19 Updates](#)

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