

Non-Occupational Exclusion

In General

An injury caused by, attributable to, or occurring during the course of any employment of work for which remuneration of any kind is expected and/or received. When the claim forms indicate that disability resulted from an occupational injury, benefits are not payable and the employer should be instructed to refer the case to its workers' compensation carrier.

Where disability is due to an injury and a possible occupational element is involved the test is factual and the questions are:

- How, when, and where did injury occur?
- Can injury be established as arising out of and in the course of employment?

Employment sometimes includes not only the actual doing of the work, but also a reasonable margin of time and space necessary in passing over employer's premises, with the consent of the employer, to and from the place where the work is to be done.

An occupationally-related illness may include, but is not limited to, the following medical problems:

- Heart disease (hypertension, heart attack, e.g.) resulting from stress
- Mental illness (nervous breakdown, e.g.) resulting from stress
- Anthrax (a disease resulting from handling wool hair bristles, hides or skins).

Occupational Illness

Such can include, but is not limited to, the following medical problems:

- Heart disease (hypertension, heart attack, e.g.) resulting from stress
- Mental illness (nervous breakdown, e.g.) resulting from stress
- Anthrax (a disease resulting from handling wool, hair bristles, hides or skins)
- Poisoning (lead nitrous fumes, radium, benzol, e.g.) resulting from direct contact with substances or inhalation of fumes
- Respiratory, gastro-intestinal or physiological nerve and eye disorders resulting from the contact with petroleum products and their fumes or other irritants
- Gastro-intestinal disorders (ulcer, e.g.) resulting from emotional stress
- Dermatitis resulting from the use of or direct contact with acids, alkalis, oil, cement, lime concrete, mortar or other chemicals
- Silicosis or asbestosis resulting from exposure to silica, asbestos, or other harmful dust

- Bursitis or synovitis resulting from continuous friction or pressure on the areas affected
- Cervical, lumbar and other orthopedic diagnoses resulting from lifting or bending, etc.

The benefit examiner should be alert to accidents while on:

- Business travel
- Commuting travel
- Company activities
- Company facilities.

The Schedule of Benefits sets forth whether the exclusion is *nonoccupational* or *workers' compensation* related. The examiner needs to carefully distinguish between these two methods.

- ***Nonoccupational***
Any occupational-related accident/illness is not covered regardless of whether or not workers' compensation will pay.
- ***Workers' Compensation Excluded***
All occupational accident/illness claims are paid *except* those covered by workers' compensation.

The nonoccupational is the narrower and the less expensive of the two forms. An example will illustrate:

John's wife is covered under John's policy as a dependent spouse; she has a one-person decorator firm. She falls from a ladder while on-the-job. She does not carry workers' compensation coverage, either because of the cost or unavailability.

- ***Workers' Compensation Excluded Plan***
Her benefits would be paid.
- ***Nonoccupational Plan***
Her benefits would not be paid.

Workers' Compensation V. Non-Occupational

Facts. Parents are covered under a self-funded plan which has the workers' compensation exclusion, as opposed to the nonoccupational exclusion. Parent's child John, age 16, worked by permit in a fast food restaurant. Their residence is in a state which permits minors to recover from work-related injuries under the workers' compensation or common law negligence. Parents file the \$15,000 against the parent's family plan, citing John's refusal to accept workers' compensation settlement from the restaurant's carrier. The parents intend to get the \$15,000 paid by their plan and then sue the restaurant thereby having double recovery. Employer contests, citing the availability of workers' compensation coverage. Will parents get double benefits or will employee's plan successfully deny?

Commentary. The parents will in all likelihood enjoy double recovery. With so many minors employed-often in hazardous occupations-the above facts are not rare.

Solution is to always cover *only* nonoccupational injuries and illnesses; such exclusion would have avoided the above-cited unintended result.

State/Federal Employees Compensation Acts

Payment under the plan may not be made for any items and services if payment has been made or can reasonable be expected to be made for them under a workers' compensation law or plan of the United States or a state. If the plan has paid for items or services which can be, or could have been, paid for under workers' compensation, the plan payment constitutes an overpayment.

This rule also applies to the federal workers' compensation plans provided under the Federal Employees' Compensation Act, the U.S. Longshoremen's and Harbor Workers' Compensation Act and its extensions, and the Federal Coal Mine Health and Safety Act of 1969 as amended (the Federal Black Lung Program). These programs provide workers' compensation protection for federal civil service employees and certain other employees not covered, or not adequately covered, under state workers' compensation programs; e.g., coal miners totally disabled due to pneumoconiosis, maritime workers (with the exception of seamen), employees of companies performing overseas contracts with the United States government, employees of American companies who are injured in an armed conflict, employees paid for non-appropriated federal funds (such as employees of post exchanges), and offshore oil field workers.

The Federal Employer's Liability Act, which covers merchant seaman and employees of interstate railroads, is not a workers' compensation law or plan for purposes of this provision. Similarly, some states have employers' liability acts. These also are not considered workers' compensation acts for purposes of this provision.

All workers' compensation acts require that the employer furnish the employee with necessary medical and hospital services, medicines, transportation, apparatus, nursing care, and necessary restorative items and services. However, in some states, there are limits to the amount of medical and hospital care provided. For specific information regarding the workers' compensation plan of a particular State or territory, contact the appropriate agency of the individual state or territory.

If payment for services cannot be made by workers' compensation because they were furnished by a source not authorized by workers' compensation, they can be paid for by the Plan.

The beneficiary is responsible for taking the necessary action to obtain payment under the workers' compensation program. Payment under that system can reasonably be expected (upon timely filing a claim and furnishing the necessary information). If failure to take proper and timely action results in a loss of workers' compensation benefits, Plan benefits are not payable to the extent that payment could reasonably have been expected under workers' compensation.

Definitions

Workers' Compensation Law or Plan. A workers' compensation law or plan is a government-supervised and employer-supported system for compensating employees for injury or disease suffered in connection with their employment, whether or not the injury

was the fault of the employer. Workers' compensation does not usually cover agriculture employees, interstate railroad employees, employees of small businesses, employees whose work is not in the course of the employer's business (e.g., domestic), casual employees, and self-employed people. All States provide compensation for a least some occupational diseases.

Workers' Compensation Agency. The term *workers' compensation agency* means any governmental entity that administers a federal or state workers' compensation law. This includes workers' compensation commission, industrial commissions, industrial boards, workers' compensation funds, workers' compensation courts and, in the case of federal workers' compensation program, the U.S. Department of Labor.

Workers' Compensation Carrier. The term *workers' compensation carrier* means any insurance carrier authorized to write workers' compensation insurance under the state or federal law, the state compensation fund where the state administers the workers' compensation program, and the beneficiary's employer where the employer is self-insured.

Lump Sum Commutation Settlement. A settlement in which the beneficiary accepts a lump sum payment as compensation for all future medical expenses and disability benefits related to the work injury or disease.

Lump Sum Compromise Settlement. A settlement which provides less in total compensation than the individual would have received if the claim had not been compromised. This may occur when compensability is contested.

Effects of Payments Under a Workers' Compensation Plan

General. No plan payment may be made if workers' compensation has paid an amount which;

- Equals or exceeds the gross amount payable by the Plan without regard to any deductible and coinsurance.
- Equals or exceeds the provider's charges for the Plan's covered services.
- The provider accepts or is required under the workers' compensation law to accept as payment in full.

Deductibles. Payments made under workers' compensation cannot be applied toward the plan deductible.

Benefit Utilization. In most instances, where an injury or illness is covered under a workers' compensation plan, that plan pays all hospital and medical expenses.

Workers' Compensation and Liability Claims

Most state laws provided that if an employee is injured at work due to the negligent act of a third party, the employee cannot receive payments from both workers' compensation and the third party of the injury. Generally, workers' compensation benefits are paid while the third party claim is pending. However, once a settlement of the third party is reached or an award made, workers' compensation may recover the benefits it paid from the third party settlement and may deny future claims for that injury up to the amount of the liability payment made to the individual.

If workers' compensation does not pay for services or recovers benefits it previously paid for services solely because a third party is liable, the plan is not secondary under this provision, to the extent of the nonpayment or recovery by workers' compensation. However, the plan may be secondary under the liability insurance provision.

Workers' Compensation and Auto Liability and No-Fault

Where services are covered in part by workers' compensation and also under automobile medical or no-fault insurance, workers' compensation pays first, the automobile medical or no-fault insurance pays second and the plan is the residual payer.

Contested Workers' Compensation Claims

General. An employee may appeal the refusal of an employer to pay workers' compensation benefits, or an employer may appeal the award of benefits by the workers' compensation agency. Appeals are generally heard by a hearing officer or judge of the agency, with further appeal to the workers' compensation agency or appeals board and to the courts. Sometimes contested claims are settled by compromise with the approval of the workers' compensation agency.

In general, the plan should accept a decision by a state workers' compensation agency on a contested claim, or a compromise settlement which has been approved by the workers' compensation limitation, except where the settlement did not make reasonable provision for payment under workers' compensation of all work-related medical expenses. Thus, where an individual has been denied workers' compensation benefits for a particular illness or injury, allow claims for treatment of that condition, unless the decision or settlement is clearly inconsistent with the medical facts and applicable state law and has the effect of shifting to the plan, liability for medical expenses which are the responsibility of the State Workers' Compensation program, where it is clear that an attempt was made to shift responsibility, deny the Plan claim. In your denial notice explain your conclusions in detail and state that the beneficiary may wish to request a reopening under the workers' compensation law.

Conditional Plan Payment. There is frequently a long delay between an injury and the decision by the state workers' compensation agency in cases where compensability is contested. A denial of plan benefits pending the outcome of the final decision means that beneficiaries might use their own funds for expenses which are eventually borne by either workers' compensation or the plan. To avoid imposing a hardship pending a decision, conditional plan payments may be made. They are conditioned upon reimbursement to the plan fund if it is determined that the services are covered by workers' compensation.

Lump Sum Workers' Compensation Settlements

If a workers' compensation agency approves a lump sum settlement or a case where compensability is contested, the settlement is deemed to be a workers'

compensation payment, even if the agreement stipulates that there is no workers' compensation liability.

If the beneficiary agrees to a compromise lump sum settlement, i.e., a settlement which provides less in total compensation than the individual would have received if the claim had not been compromised, *and* the settlement has given reasonable recognition to the income replacement objectives of the workers' compensation law, the settlement may be accepted as a basis for applying the workers' compensation limitation.

The plan does not accept manipulation of any settlement proceedings intended to shift liability to the plan. Where such manipulation is apparent, deny payment.

If the individual signed a final release of all rights under workers' compensation (which precludes the possibility of further workers' compensation benefits) medical expenses incurred after the date of the final release are reimbursable by the plan, insofar as they were not contemplated by, and incorporated into, the settlement.

Where the settlement specifies that a portion of the settlement is for future medical expenses, the plan may not pay for those expenses until the beneficiary has submitted bills related to the injury or illness totaling the amount of the lump sum settlement allocated to medical treatment.

Where the award does not identify the items of medical or hospital expenses it is intended to cover, apply the amount allocated to medical and hospital expenses incurred up to the date of the award at the prevailing workers' compensation schedule in that jurisdiction in the following manner:

- First to services covered by workers' compensation but not by the Plan
- Second to expenses covered by workers' compensation and by the Plan (including any deductible and coinsurance)
- Third any remainder as payment for provider services.

Calculate the sum of the award deemed to be payment of medical and hospital expenses.

Right of Recovery

All plan payments are conditioned on reimbursement to the appropriate plan funds when notice or other information is received that payment with respect to the same items or services has also been made, or could be made, under a workers' compensation law or plan of the United States a State or a territory.

Relevant Court Decisions

1. Covered person took a noon break and napped while completely off-duty. A fan fell on him while asleep. Resultant accident was not work-related.
2. John did odd jobs on the weekend for pick-up money. While doing such odd jobs he fell from a roof and incurred medical bills. Insurer could not claim the occupational exclusion.

3. Court held participant could not recover from her employer's group plan (with a workers' compensation exclusion) where she had already collected a workers' compensation benefit.
4. Agent said the coverage was workers' compensation excluded when in fact it was non-occupational. Because an accident claim was non-occupational and yet not covered by workers' compensation it was turned back. Court held for the insurer and also held that agent was not guilty of fraud or negligence.
5. Employee X requested an airplane ride with a business associate; such associate's trip was business related. Plane had an accident. Employee X not entitled to workers' compensation because X had no business purpose nor did X realize associate was on a business trip.
6. Court upheld non-occupational exclusion when clearly written.
7. Being shot while tending a store was held to be an occupational accident.
8. Court upheld the non-occupational exclusion (as opposed to the workers' compensation exclusion).
9. Court upheld the non-occupational v. workers' compensation exclusion distinction. In this instance, for a self-employed worker.
10. Court upheld non-occupational v. workers' compensation exclusion distinction. Court held to collect from workers' compensation as an occupational and also from the group plan as a non-occupation is repugnant.
11. Plan had an occupational exclusion (not a workers' compensation exclusion), dependent husband hurt while working at a service station when a tire exploded. Court held claim was deniable.
12. Plan had non-occupational exclusion; employees covered spouse, self-employed, was hurt on the job without workers' compensation protection. Court held plan not liable.
13. Insured hurt in an occupational accident. Workers' compensation denied as did the insurer. Insured brought action against the insurer. Court held the insurer not liable; by the time the court decided, it was too late to bring action against workers' compensation coverage.
14. Owner had an occupational accident. Owner had excluded himself for workers' compensation under the voluntary waiver right. Owner wanted insurer or group plan to pay. Insurer refused. Court held for the insurer.

15. Court upheld insurer's *non-occupational* exclusion (as opposed to workers' compensation exclusion).
16. Plan had a non-occupational exclusion. Dependent hurt occupationally but was not covered by workers' compensation. Court upheld the denial of the benefit.
17. Injury was occupational and not covered by workers' compensation. Plan had non-occupational exclusion. Court held that benefit properly denied.
18. Insurer paid benefits while the workers' compensation issue was being determined. It was later determined that workers' compensation was liable. Court held the insurer could recover.
19. Employee had been hurt and was not on the job when coverage became effective. Insurer accepted the enrollment form knowing of such disability. Court held that insurer's acceptance did not waive the actively-at-work provision.
20. Participant collected benefits from VA for a debatable service-related condition; he also claimed benefits under his employee's group plan. Employer said he couldn't have it both ways by doctrine of estoppel. Court held that the determination of the condition being service-related, or not, was judicially covered and the estoppel doctrine applied.
21. Plan had workers' compensation exclusion. Participant settled with workers' compensation for \$1,000. Insurer had also paid. Court held insurer could recover \$1,000 from the participant.
22. Court held insurer could collect back from the participant and overpayments due to the plan's workers' compensation exclusion.