Workers Compensation [Details]

Prior to July 1, 1990, the "Workmen's Compensation Act of Colorado" was located in articles 40 to 54 of this title.

For the "Workers' Compensation Cost Containment Act", see article 14.5 of this title.

40. General Provisions [Details]

This article was numbered as article 1 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

For application of workers' compensation law to volunteer civil defense workers, see part 8 of article 33.5 of title 24.

Law reviews: For article, "1991 Update on Workers' Compensation Law", see 10 Colo. Law. 223 (1991); for article, "The Colorado Worker's Compensation Act and the ADA: An Incompatible Combination", see 21 Colo. Law. 2391 (1992); for article, "State Laws: A Growing Minefield for Employers", see 23 Colo. Law. 1089 (1984); for article, "Workers' Compensation, the ADA and the FMLA: The Top Ten Questions Most Commonly Asked by Colorado Employers", see 24 Colo. Law. 2293 (1995); for article, "Recent Workers' Compensation Decisions: An Update", see 24 Colo. Law. 2375 (1995); for article, "Recent Appellate Decisions in Workers' Compensation Law - Part I", see 26 Colo. Law. 79 (April 1997); for article, "Recent Appellate Decisions in Workers' Compensation Law - Part II", see 26 Colo. Law. 103 (May 1997); for article, "Recent Appellate Decisions in Workers' Compensation Law", see 26 Colo. Law. 51 (Dec. 1997); for article, "Recent Colorado Appellate Decisions in Workers' Compensation Law", see 27 Colo. Law. 107 (Sept. 1998); for article, "Update of Colorado Appellate Decisions in Workers' Compensation Law", see 28 Colo. Law. 83 (Jan. 1999); for article, "Update on Colorado Appellate Decisions in Workers' Compensation", see 28 Colo. Law. 77 (May 1999); for article, "Update on Colorado Appellate Decisions in Workers' Compensation", see 28 Colo. Law. 71 (Dec. 1999); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 29 Colo. Law. 83 (June 2000); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 29 Colo. Law. 97 (Sept. 2000); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 30 Colo. Law. 65 (Jan. 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (Feb. 2001); for article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 31 Colo. Law. 89 (Sept. 2002); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 32 Colo. Law. 87 (March 2003); for article, "Workers' Compensation: Rules, Rules, Rules, and More Rules", see 39 Colo. Law. 41 (Dec. 2010); for article, "Advising Colorado Employers in Response to Threats of Workplace Violence", see 42 Colo. Law. 47 (April 2013); for article, "Distributing Personal Injury Settlements and Workers' Compensation Awards in

Divorce", see 45 Colo. Law. 25 (Oct. 2016); for article, "Über Problems: Ride-Sharing Exclusions in Personal Automobile Insurance Policies", see 47 Colo. Law. 46 (Aug.-Sept. 2018).

§ 8-40-101. Short title

Articles 40 to 47 of this title shall be known and may be cited as the "Workers' Compensation Act of Colorado".

(L. 90: Entire article R&RE, p. 468, § 1, effective July 1.)

This section is similar to former § 8-40-101 as it existed prior to 1990.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Workmen's Compensation Law", see 1 Den. B. Ass'n Rec. 4 (1924). For article, "Practice and Procedure Under the Workmen's Compensation Act of Colorado", see 6 Dicta 3 (1929). For article, "Current Trends in Basic Principles of Workmen's Compensation", see 20 Rocky Mt. L. Rev. 1 (1947) and 20 Rocky Mt. L. Rev. 117 (1948). For comment on Continental Oil Co. v. Sirhall appearing below, see 23 Rocky Mt. L. Rev. 364 (1951). For article, "Damages, Workmen's Compensation and Labor Law", see 31 Dicta 460 (1954). For symposium article on workmen's compensation, see 31 Rocky Mt. L. Rev. 397 (1959). For article, "One Year Review of Corporations, Partnership and Agency", see 37 Dicta 11 (1960). For article, "One Year Review of Torts", see 38 Dicta 93 (1961). For note, "One Year Review of Colorado Law -- 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "Labor Law", see 59 Den. L.J. 319 (1982). For article, "Conflict Between Workers' Compensation Exclusive Remedy and Common Law Actions for Psychic Injuries", see 14 Colo. Law 1992 (1985). For article, "Work-Related Stress Claims", see 18 Colo. Law. 1529 (1989). For article, "Workers' Compensation Fraud: 'Trashing the System'", see 20 Colo. Law. 1119 (1991).

Annotator's note. Since § 8-40-101 is similar to § 8-40-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, relevant cases construing that provision have been included in the annotations to this section.

Act does not violate constitutional guarantees of equal protection. Difference in methods of calculating benefits for partial and total injuries is rationally related to the governmental interest in providing benefits efficiently and fairly, notwithstanding that the classification is not perfect and that inequality may result in individual cases. Duran v. Indus. Claim Appeals Office, 883 P.2d 477 (Colo. 1994).

Because the workers' compensation act implicates no fundamental rights, the rational basis test provides the appropriate gauge in determining whether a statutory classification comports with equal protection. Young v. Indus. Claim Appeals Office, 969 P.2d 735 (Colo. App. 1998).

The workmen's compensation act was passed under the police power of the state. Sch. Dist. No. 1 v. Indus. Comm'n, 66 Colo. 580, 185 P. 348 (1919).

The workmen's compensation act deals exclusively with matters growing out of the relationship of employer and employee, and is binding only upon such as elect to come within its provisions. All others are strangers to the act and their usual lawful rights and remedies are unaffected by it. Rocky Mt. Fuel Co. v. Indus. Comm'n, 105 Colo. 220, 96 P.2d 413 (1939).

Applied in Riley v. Indus. Comm'n, 628 P.2d 147 (Colo. App. 1981).

II. PURPOSES OF THE ACT.

The purpose of the act is to protect all workmen, save those specifically excluded, and provide an award of compensation in favor of an injured employee against all persons who may be liable therefor. Empire Zinc Co. v. Indus. Comm'n, 102 Colo. 26, 77 P.2d 130 (1938); Sechler v. Pastore, 103 Colo. 139, 84 P.2d 61 (1938); Fast Freight v. Walker, 103 Colo. 347, 85 P.2d 720 (1938); Drake v. Hodges, 114 Colo. 10, 161 P.2d 338 (1945); Univ. of Denver v. Memeht, 127 Colo. 385, 257 P.2d 423 (1953); City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967).

The purpose of the workmen's compensation act is to protect employees who sustain injuries arising out of their employment. Bellendir v. Kezer, 648 P.2d 645 (Colo. 1982).

The purpose of the act is to speedily and justly compensate employees for injuries incurred in performing their jobs regardless of the fault of the employee or the employer. Pub. Serv. Co. v. United Cable Television of Jeffco, Inc., 816 P.2d 289 (Colo. App. 1991).

The purpose of the Act is to provide the exclusive remedy to a covered employee for injuries sustained while performing services arising out of and in the course of employment and which are proximately caused by injury or occupational disease arising out of and in the course of employment. Ferris v. Local 26, 867 P.2d 38 (Colo. App. 1993).

Purposes of act, as stated in 1991 repeal and reenactment, cited in Duran v. Indus. Claim Appeals Office, 883 P.2d 477 (Colo. 1994).

The act provides a remedy in areas where remedies do not exist at common law. Chartier v. Winslow Crane Serv. Co., 142 Colo. 294, 350 P.2d 1044 (1960).

Another purpose of the workmen's compensation act is to provide a method whereby claims arising out of industrial accidents may be speedily resolved. Stanley Hotel v. Thomas, 153 Colo. 503, 387 P.2d 27 (1963); Bellendir v. Kezer, 648 P.2d 645 (Colo. 1982).

Primary purpose of the workmen's compensation act is to afford workmen compensation for job-related injuries, regardless of fault. Frohlick Crane Serv., Inc. v. Mack, 182 Colo. 34, 510 P.2d 891 (1973).

Compensation legislation is a system of benefits one of whose independent social objectives is to prevent destitution among dependents of workmen who lose their lives in industrial activity. In re Hampton v. State, 31 Colo. App. 141, 500 P.2d 1186 (1972).

Employee is compensated and employer immunized from common-law claims. The workmen's compensation act grants the employee compensation from the employer, even though the employee may be negligent and even if the employer is not negligent. In return, the employer who is responsible under the workmen's compensation act is granted immunity from common-law claims. Frohlick Crane Serv., Inc. v. Mack, 182 Colo. 34, 510 P.2d 891 (1973).

But workmen's compensation act is not to shield third-party tortfeasors from liability for damages resulting from their negligence. Frohlick Crane Serv., Inc. v. Mack, 182 Colo. 34, 510 P.2d 891 (1973).

Consideration of the mental state of a third party is consistent with no-fault character of workers' compensation act, as it is the fault of the claimant and employer that is generally disregarded. Bralish v. Indus. Claim Appeals Office, 81 P.3d 1091 (Colo. App. 2003).

Bad-faith handling of a claim by an insurer is similarly not a risk contemplated by the general coverage provisions of the act. Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985); McKelvy v. Liberty Mut. Ins. Co., 983 P.2d 42 (Colo. App. 1998).

Independent insurance adjusting firm, acting on behalf of a self-insured employer, owes a duty of good faith to an injured claimant in investigating and processing a claim despite lack of contractual privity. Johnson v. Scott

Wetzel Servs., Inc., 797 P.2d 786 (Colo. App. 1990), aff'd, 821 P.2d 804 (Colo. 1991).

Retaliation violates public policy. Since an employee is granted the specific right to apply for and receive compensation under this Act, an employer's retaliation for the exercise of such right violates public policy and provides the basis for a common-law claim by the employee to recover damages sustained by him as a result of that violation. Lathrop v. Entenmann's, Inc., 770 P.2d 1367 (Colo. App. 1989).

III. CONSTRUCTION OF THE ACT.

Annotator's note. Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with the power, previously exercised by the industrial commission, to enforce and administer the workmen's compensation act.

Act to be liberally construed. The workmen's compensation act is highly remedial and beneficent in purpose, and should be liberally construed so as to accomplish its evident intent and purpose. Indus. Comm'n v. Johnson, 64 Colo. 461, 172 P. 422 (1918); Employers' Mut. Ins. Co. v. Indus. Comm'n, 65 Colo. 283, 176 P. 314 (1918); Karoly v. Indus. Comm'n, 65 Colo. 239, 176 P. 284 (1918); Central Sur. & Ins. Corp. v. Indus. Comm'n, 84 Colo. 481, 271 P. 617 (1928); Danielson v. Indus. Comm'n, 96 Colo. 522, 44 P.2d 1011 (1935); McBride v. Indus. Comm'n, 97 Colo. 166, 49 P.2d 386 (1935); McNeil Coal Corp. v. Indus. Comm'n, 105 Colo. 263, 96 P.2d 889 (1939); Skjoldahl v. Indus. Comm'n, 108 Colo. 140, 113 P.2d 871 (1941); Pacific Employers Ins. Co. v. Kirkpatrick, 111 Colo. 470, 143 P.2d 267 (1943); Great Am. Indem. Co. v. Indus. Comm'n, 114 Colo. 91, 162 P.2d 413 (1945); Arvas v. McNeil Coal Corp., 119 Colo. 289, 203 P.2d 906 (1949); Nat'l Fuel Co. v. Arnold, 121 Colo. 220, 214 P.2d 784 (1950); Cont'l Oil Co. v. Sirhall, 122 Colo. 332, 222 P.2d 612 (1950); L.B. Cole Produce Co. v. Indus. Comm'n, 123 Colo. 278, 228 P.2d 808 (1951); Indus. Comm'n v. Golden Cycle Corp., 126 Colo. 68, 246 P.2d 902 (1952); Indus. Comm'n v. Corwin Hosp., 126 Colo. 358, 250 P.2d 135 (1952); Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953); Indus. Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957); Graden Coal Co. v. Yturralde, 137 Colo. 527, 328 P.2d 105 (1958); Univ. of Denver v. Indus. Comm'n, 138 Colo. 505, 335 P.2d 292 (1959); Indus. Comm'n v. Baldwin, 139 Colo. 268, 338 P.2d 103 (1959); Snyder v. Indus. Comm'n, 138 Colo. 523, 335 P.2d 543 (1959); Idarado Mining Co. v. Barnes, 148 Colo. 166, 365 P.2d 36 (1961); Martin Marietta Corp. v. Faulk, 158 Colo. 441, 407 P.2d 348 (1965); In re Hampton v. State, 31 Colo. App. 141, 500 P.2d 1186 (1972); James v. Irrigation Motor & Pump Co., 180 Colo. 195, 503 P.2d 1025 (1972);

Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979); Martinez v. Indus. Comm'n, 709 P.2d 49 (Colo. App. 1985).

The workmen's compensation laws are to be liberally construed to accomplish the beneficient social and protective purposes of such enactments. Puffer Mercantile Co. v. Arellano, 34 Colo. App. 434, 528 P.2d 966 (1974), rev'd on other grounds, 190 Colo. 138, 546 P.2d 481 (1975); Mtn. City Meat Co. v. Oqueda, 919 P.2d 246 (Colo. 1996).

The workmen's compensation act is broadly and liberally construed so as to provide just compensation for workmen and their families for injuries during employment. Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed. 2d 644 (1974).

The act is remedial and beneficent in purpose, and should be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families. Colo. Counties, Inc. v. Davis, 801 P.2d 10 (Colo. App. 1990).

The courts will construe the workmen's compensation law and interpret the legislative intent as it may appear from a consideration of the purpose and intent of the entire enactment. Univ. of Denver v. Indus. Comm'n, 138 Colo. 505, 335 P.2d 292 (1959).

The workmen's compensation provisions must not be pushed beyond the limits of their purpose, nor its funds diverted to those not clearly entitled thereto. Indus. Comm'n v. Baldwin, 139 Colo. 268, 338 P.2d 103 (1959).

Nonexistent provision may not be read into the act. The provision that the workmen's compensation act shall be liberally construed cannot be extended to clothe the court with power to read into it a provision which does not exist. Maley v. Martin, 111 Colo. 545, 144 P.2d 558 (1943); Md. Cas. Co. v. Indus. Comm'n, 116 Colo. 58, 178 P.2d 426 (1947); Snyder v. Indus. Comm'n, 138 Colo. 523, 335 P.2d 543 (1959).

The tort of wrongful termination in violation of public policy does not arise under the workers' compensation laws of Colorado. Rundle v. Frontier-Kemper Constructors, Inc., 170 F. Supp. 2d 1075 (D. Colo. 2001).

Where the provisions of the workmen's compensation act do not expressly limit the employee with respect to remedies, a court is not disposed to read or interpret such limitations into this act. Chartier v. Winslow Crane Serv. Co., 142 Colo. 294, 350 P.2d 1044 (1960).

However, consideration of the statute as a whole, together with its clear legislative intent, may persuade a court to impose such a limitation. Buzard v. Super Walls, Inc., 681 P.2d 520 (Colo. 1984).

And hypertechnical refinements in construction should be avoided. In order to carry out the intended purpose of the workmen's compensation act, it is necessary to avoid hypertechnical refinements in the construction of the terms and provisions of the act, especially where there is no prejudice to the employer. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); Martinez v. Indus. Comm'n, 709 P.2d 49 (Colo. App. 1985).

Mandatory provisions cannot be ignored. The doctrine of liberal construction to be applied to the act does not clothe the industrial commission with power to ignore its mandatory provisions. Stahura v. Indus. Comm'n, 103 Colo. 451, 86 P.2d 1080 (1939).

All portions should be construed together. To give full import to the purposes of the workmen's compensation act, all portions thereof should be read together and harmonized if possible. McBride v. Indus. Comm'n, 97 Colo. 166, 49 P.2d 386 (1935).

In workers' compensation cases, the substantive rights and liabilities of the parties are determined by the statute in effect at the time of a claimant's injury, while procedural changes in the statute become effective during the pendency of a claim. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973 (Colo. App. 2004); Colo. Comp. Ins. Auth. v. Jones, 131 P.3d 1074 (Colo. App. 2005); Brownson-Rausin v. Indus. Claim Appeals Office, 131 P.3d 1172 (Colo. App. 2005).

Workers' compensation carrier is responsible for pro rata payment of plaintiff's attorney fees and costs in third-party action, where carrier is subrogated against third-party tortfeasor, despite no active contribution by carrier to the prosecution of the claim or its settlement. Colo. Counties, Inc. v. Davis, 801 P.2d 10 (Colo. App. 1990).

Both the Colorado Auto Accident Reparations Act and this act apply when a person is injured in an auto accident during the course and scope of employment. County Workers Comp. Pool v. Folk, 895 P.2d 1083 (Colo. App. 1994).

§ 8-40-102. Legislative declaration

(1) It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation, recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike.

(2) The general assembly hereby finds that the determination of whether an individual is an employee for purposes of the "Workers' Compensation Act of Colorado" is subject to a great deal of speculation and litigation. It is the intent of the general assembly to provide an easily ascertainable standard for determining whether an individual is an employee. In order to further this objective, the test for determining whether an individual is an employee for the purposes of the "Workers' Compensation Act of Colorado" shall be based on the nine criteria found in section 8-40-202(2)(b)(II) which shall supersede the common law. The fact that an individual performs services exclusively or primarily for another shall not be conclusive evidence that the individual is an employee.

(L. 90: Entire article R&RE, p. 468, § 1, effective July 1. L. 91: Entire section amended, p. 1291, § 3, effective July 1. L. 93: Entire section amended, p. 355, § 1, effective April 12. L. 95: (2) amended, p. 343, § 1, effective July 1.)

This section is similar to former § 8-40-101.5 as it existed prior to 1990.

ANNOTATION

Claimant has burden of establishing rights to workers' compensation benefits. Younger v. City & County of Denver, 810 P.2d 647 (Colo. 1991).

Subsection (1) applied in Weld County Sch. Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998).

Subsection (1) does not confer eligibility for unemployment compensation benefits upon a claimant who is otherwise ineligible. McClaflin v. Indus. Claim Appeals Office, 126 P.3d 288 (Colo. App. 2005).

§ 8-40-201. [Effective Until 1/1/2022] Definitions

As used in articles 40 to 47 of this title, unless the context otherwise requires:

(1) "Accident" means an unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; or the effect of an unknown cause or, the cause, being known, an unprecedented consequence of it.

(2) "Accident", "injury", or "injuries" includes disability or death resulting from accident or occupational disease as defined in subsection (14) of this section.

(2.5) Repealed.

(3) "Board" means the board of directors of Pinnacol Assurance.

(3.4) "Chief executive officer" means the chief executive officer of Pinnacol Assurance.

(3.5) Repealed.

(3.6) "Claimant" means a person who either:

(a) Receives benefits under articles 40 to 47 of this title; or

(b) Has or asserts, in any administrative or judicial forum or in any communication with the director, the division, or an employer, insurer, or self-insured employer, a right to receive such benefits.

(4) "Division" means the division of workers' compensation in the department of labor and employment.

(5) "Director" means the director of the division of workers' compensation.

(6) "Employee" has the meaning set forth in section 8-40-202 and the scope of such term is set forth in section 8-40-301.

(7) "Employer" has the meaning set forth in section 8-40-203 and the scope of such term is set forth in section 8-40-302.

(8) "Employment" means any trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position, or process of manufacture in which any person may be engaged; except that it shall not include participation in a ridesharing arrangement, as defined in section 39-22-509(1)(a)(II), C.R.S., and participation in such a

ridesharing arrangement shall not affect the wages paid to or hours or conditions of employment of an employee; nor shall it include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program.

(9) "Examiner" means one of the industrial claim appeals examiners appointed to the industrial claim appeals panel in the industrial claim appeals office.

(10) "Executive director" means the executive director of the department of labor and employment.

(11) (Deleted by amendment, L. 2002, p. 1882, § 27, effective July 1, 2002.)

(11.5) "Maximum medical improvement" means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

(12) "Mediation" means a process through which parties involved in a dispute concerning matters arising under articles 40 to 47 of this title meet with a mediator to discuss such matter or matters, defining and articulating the issues and their positions on such issues, with a goal of resolving such dispute or disputes.

(13) "Mediator" means an individual who is trained to assist disputants in reaching a mutually acceptable resolution of their disputes through the identification and evaluation of alternatives.

(13.5) Repealed.

(14) "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

(15) "Order" means and includes any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge.

(15.5) "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

(16) "Panel" means the industrial claim appeals panel that conducts administrative appellate review pursuant to articles 40 to 47 of this title.

(16.5)

(a) "Permanent total disability" means the employee is unable to earn any wages in the same or other employment. Except as provided in paragraph (b) of this subsection (16.5), the burden of proof shall be on the employee to prove that the employee is unable to earn any wages in the same or other employment.

(b) Total loss of or total loss of use of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof shall create a rebuttable presumption of permanent total disability. "Total loss of use" shall be a medical determination, based upon objective findings, made by an independent medical examiner who is a level II accredited physician in the appropriate field.

(17) "Place of employment" means every place whether indoors, outdoors, or underground and the premises, workplaces, works, and plants appertaining thereto or used in connection therewith where either temporarily or permanently any industry, trade, or business is carried on; or where any process or operation directly or indirectly relating to any industry, trade, or business is carried on; or where any person is directly or indirectly employed by another for direct or indirect gain or profit.

(18) "State" includes any state or territory of the United States, the District of Columbia, and any province of Canada.

(18.5) "Temporary help contracting firm" means any person who is in the business of employing individuals and, for compensation from a third party, providing those individuals to perform work for the third party, under the supervision of the third party.

(19)

(a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

(b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment. Medicaid and other indigent health care programs are not health insurance plans for the purposes of this section.

(c) No per diem payment shall be considered wages under this subsection (19) unless it is also considered wages for federal income tax purposes.

(L. 90: Entire article R&RE, p. 469, § 1, effective July 1; (6) and (7) amended, p. 1843, § 28, effective July 1. L. 91: (2.5), (3.5), (11.5), (13.5), and (16.5) added and (4), (5), (8), (12), (15), and (19) amended, p. 1292, § 4, effective July 1. L. 94: (19) amended, p. 1285, § 1, effective May 22; (16.5) amended, p. 2000, § 1, effective July 1. L. 95: (2.5) and (3.5) amended, p. 12, § 1, effective March 9. L. 96: (2.5) amended, p. 151, § 1, effective July 1; (18.5) added, p. 827, § 1, effective July 1. L. 97: (3.6) and (15.5) added, p. 112, § 1, effective July 1. L. 98: (13.5) amended, p. 168, § 1, effective April 6. L. 2002: (3) and (11) amended and (3.4) added, p. 1882, § 27, effective July 1. L. 2003: (2.5) and (13.5) amended, p. 917, § 1, effective July 1. L. 2004: (8) amended, p. 904, § 26, effective May 21. L. 2010: (19)(b) amended, (SB 10-187), ch. 310, p. 1456, §1, effective July 1.)

(1) The provisions of this section are similar to provisions of several former sections as they existed prior to 1990.

(2) Subsection (3.5)(b)(I) provided for the repeal of subsection (3.5), effective July 1, 1996. (See L. 95, p. 12.)

(3) Subsection (3.4) was originally numbered as (3.5) in House Bill 02-1135 but has been renumbered on revision for ease of location.

(4) Subsections (2.5)(b)(I) and (13.5)(b)(I) provided for the repeal of subsections (2.5) and (13.5), respectively, effective July 1, 2014. (See L. 2003, p. 917.)

This section is set out more than once. See also C.R.S. §8-40-2012, effective 1/1/2022.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Independent Contractors and the Colorado Workers' Compensation Act -- Parts I and II", see 22 Colo. Law. 545 and 1281 (1993). For article, "Anderson v. Brinkoff: Finally, a Meaningful Definition of 'Occupational Disease'", see 23 Colo. Law. 383 (1994). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 83 (April 2004). For article, "Overview of General Liability, Workers' Compensation, and Employment Law Issues in K-12 Educational Institutions", see 44 Colo. Law. 25 (Oct. 2015).

Annotator's note. (1) Since § 8-40-201 is similar to §§8-41-102, 8-41-103, 8-41-108, and 8-46-201 as they existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, relevant cases construing those provisions have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under the act to the industrial claim appeals office.

II. ACCIDENT AND INJURIES.

Law reviews. For article, "A Significant Change in the Colorado Workmen's Compensation Act: 'Accidents', 'Injuries' and Heart Attack", see 41 Den. L. Ctr. J. 189 (1964). For article, "The Enterprise Liability Theory of Torts", see 47 U. Colo. L. Rev. 153 (1976).

The definition of "accident" under this section is an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury. T &

An "accident" under the workmen's compensation act is an occurrence traceable to a definite time, place, and cause. Colo. Fuel & Iron Corp. v. Indus. Comm'n, 154 Colo. 240, 392 P.2d 174 (1964); Miceli v. State Comp. Ins. Fund, 157 Colo. 204, 401 P.2d 835 (1965).

Prior to this section, the workmen's compensation statute did not contain any definition of the word "accident". Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

But an "accident" under the act had been interpreted to mean any unintended or unexpected loss or hurt apart from its cause. The term "accidental injury" was not then confined to a situation where the means or cause was an accident for it also included any injury which was itself an accident. Martin Marietta Corp. v. Faulk, 158 Colo. 441, 407 P.2d 348 (1965).

And this section is not intended to and does not alter the meaning of "accident" as that term came to be accepted by reason of court decisions. Denver-Golder Corp. v. Minikus, 159 Colo. 188, 410 P.2d 636 (1966); Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

Thus, by this section, the general assembly has done nothing more than to adopt and to place into the act the court's determination of what is an accident. Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

Since case law not overruled, demonstrative external violence need not be shown. The general assembly has not overruled the "case law"; therefore, it does not have to be shown that some demonstrative external violence was visited upon the body "causing a wounding, breaking, tearing, puncturing or disruption of the continuity of the body of the injured employee or his bodily tissue". Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

The former definitions of "accident" and "injury" in this section made them inseparably linked to trauma, but this traumatic connection was entirely eliminated in the 1965 amendment. For example, in the 1965 definition of "accident" there are the terms, "an unforseen event, occurring without the will or design of the person whose mere act causes it" and "an unexpected, unusual, or undesigned occurrence". T & T Loveland Chinchilla Ranch v. Bourn, 173 Colo. 267, 477 P.2d 457 (1970).

"Personal injury" limited. Because "personal injury" is not defined by the workmen's compensation act, it does not include damages which are based mainly on mental suffering and humiliation, and only peripherally on

physical suffering and pain. Luna v. City & County of Denver, 537 F. Supp. 798 (D. Colo. 1982).

Courts distinguish between "accident" and "injury". City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967).

In that accident is the cause and injury is the effect. It does not follow in every instance that the two occur simultaneously. At least, in many instances, the total or ultimate effect is not immediately apparent. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); Indus. Comm'n v. Bysom, 166 Colo. 502, 444 P.2d 627 (1968); Crest Fence Co. v. Cec, 175 Colo. 21, 485 P.2d 709 (1971).

And an injury takes place when one, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury. Crest Fence Co. v. Cec, 175 Colo. 21, 485 P.2d 709 (1971).

Therefore, to interpret the act in such a way that a person who reasonably discovers his injury long after the accident and is entitled to compensation is not entitled to his medical expenses is absurd, and a defeat of the purpose of the act. Crest Fence Co. v. Cec, 175 Colo. 21, 485 P.2d 709 (1971).

Series of traumatic events compensable. The fact that an injury results from a series of traumatic events does not prevent that injury from being compensable as proximately caused by accident. Martinez v. Indus. Comm'n, 40 Colo. App. 485, 580 P.2d 36 (1978).

The traditional test for distinguishing between accidental and occupational injuries is whether the injury can be traced to a particular time, place, and cause. Because the employee's ulnar nerve entrapment injury resulted from the conditions of her employment, rather than a specific accident or trauma, the injury is an occupational disease within the meaning of subsection (14). Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993).

If one can prove that the injury was a result of work, then the date of injury is irrelevant for purposes of medical compensation. The injured worker is entitled to medical compensation regardless of date of injury if he or she can prove injury as a result of work. Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999).

A claimant suffering from an occupational disease is entitled to reasonably necessary medical benefits, even if the disease has not yet

become disabling. Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999).

Applied in Eisnach v. Indus. Comm'n, 633 P.2d 502 (Colo. App. 1981); High v. Indus. Comm'n, 638 P.2d 818 (Colo. App. 1981); Stephen Equip. Co. v. Baca, 703 P.2d 1332 (Colo. App. 1985); City of Aurora v. Indus. Comm'n, 710 P.2d 1122 (Colo. App. 1985).

III. EMPLOYMENT.

This section is to be construed in relation to § 8-48-101. Betz v. Indus. Comm'n, 109 Colo. 385, 125 P.2d 958 (1942).

Determination of employment relationship depends upon facts in each case. Schultz v. Indus. Comm'n, 34 Colo. App. 122, 523 P.2d 164 (1974).

And determination must properly be made by commission rather than court, even though the facts are largely undisputed, because this matter is not within the court's scope of review. Schultz v. Indus. Comm'n, 34 Colo. App. 122, 523 P.2d 164 (1974).

One may be employee by virtue of the statute and not by common-law definition. An obligation to pay workmen's compensation may, in proper cases, be imposed against an owner where the common-law relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition. Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed. 2d 644 (1974).

Doubt resolved in claimant's favor. Any reasonable doubt as to whether a compensable accidental injury or death arose out of and in the course of employment must be resolved in favor of the claimant. Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979).

A company whose business is essentially that of processing, is within the meaning of "process of manufacture or any method of carrying on any such trade or process of manufacture" as used in this section. Betz v. Indus. Comm'n, 109 Colo. 385, 125 P.2d 958 (1942).

Harm or injury sustained by an employee while going to or from his work is not compensable, in the absence of special circumstances, and except in certain unusual circumstances. Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967); J. C. Carlile Corp. v. Antaki, 162 Colo. 376, 426 P.2d 549 (1967).

But injuries which occur to an employee while going to or from work may be compensable when it appears that at the time of such injuries he is engaged in doing an act, or performing a duty, which he is definitely charged with doing as a part of his contractual service, or under the express or implied direction of his employer. State Comp. Ins. Fund v. Keane, 160 Colo. 292, 417 P.2d 8 (1966); Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967); J. C. Carlile v. Antaki, 162 Colo. 376, 426 P.2d 549 (1967).

And an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly, an injury resulting from such an act arises out of, and in the course of, the employment; and this rule is applicable, even though the advantage to the employer is slight. Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967).

Thus, the test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967).

The test for whether reimbursed travel is within the course and scope of employment necessitates the following findings of fact: (1) The number of miles traveled; (2) the cost of driving the distance on a daily basis; (3) the extent to which the reimbursement covers actual travel costs; (4) the extent to which other employees travel to reach the job site; and (5) the difficulties of travel that provide a special benefit to the employer or poses an unusual risk to the employee. Sturgeon Elec. v. Indus. Claim Appeals Office, 129 P.3d 1057 (Colo. App. 2005).

Decedent's death arises out of his employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects. Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979).

Claim not barred by off-duty status. The fact that decedent police officer was off duty prior to the onset of the emergency does not bar a claim for compensation. Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979).

Voluntary participation in recreational event held during nonwork hours and off of employer's premises, with only benefit to employer being improvement of employee morale, held not to constitute

compensable situation if injury to employee occurs. Wilson v. Scientific Software-Intercomp, 738 P.2d 400 (Colo. App. 1987).

Even if the employer promoted the event, subsection (8) requires that the claimant's motive for participation be determined and that compensation be denied if participation in the activity was voluntary. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

An administrative law judge may consider evidence concerning whether an employer promoted, sponsored, or supported an activity because it is within the employer's power to enlarge the scope of employment. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

Causation may be established in the absence of the time and place factors set forth in City and County of Denver v. Lee, 168 Colo. 208, 450 P.2d 352 (1969), if there is a strong showing of the other factors. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

The fact that there was no evidence that anyone was punished for not having attended a party did not preclude a determination that attendance at the party was voluntary. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

The provision of this section providing that employment does not include participation in a ridesharing arrangement precludes a vicarious liability claim against the employer for injuries sustained by an employee in a car pooling arrangement. Smith v. Pinner, 891 F.2d 784 (10th Cir. 1989).

In the context of workers' compensation, the determination whether an accident occurred within the scope of employment depends on an examination of the totality of the circumstances, and if an employee's travel is at the express or implied request of the employer, or if the travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, then the travel is within the scope of employment. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993).

Where the employer agrees to provide its employee with the means of transportation or to pay the employee's cost of commuting to and from work, the scope of employment inferentially enlarges to include the employee's transportation. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993).

Where claimant worked full-time and there was no evidence that he was hired for the completion of single tasks, or on a per task basis, ALJ erred in concluding that he was not an actual employee. The "relative nature of the work" test, if applied, would show that the claimant was an actual employee under this section. Stampados v. Colo. D & S Enters., 833 P.2d 815 (Colo. App. 1992).

The term "employment" is applied in Loffland Brothers Co. v. Indus. Comm'n, 714 P.2d 509 (Colo. App. 1985).

IV. OCCUPATIONAL DISEASE.

Former section provided that an occupational disease would not be compensated as an accident. Colo. Fuel & Iron Corp. v. Indus. Comm'n, 162 Colo. 68, 424 P.2d 382 (1967).

Employment conditions acting on preexisting allergy or weakness in "occupational disease". Where employment conditions act upon a claimant's individual allergy, hypersensitivity, or preexisting weakness so as to disable him, he has a compensable occupational disease, provided other requirements for compensability have been met. Denver v. Hansen, 650 P.2d 1319 (Colo. App. 1982); IML Freight v. Indus. Comm'n, 676 P.2d 1205 (Colo. App. 1983).

As is condition acting on preexisting injury. Where, as a condition of his employment, claimant was required to wear safety shoes, which developed blistering on a foot on which he had previously suffered severe burns, this injury fits within the definition of occupational disease. CF & I Steel Corp. v. Indus. Comm'n, 650 P.2d 1332 (Colo. App. 1982).

Standard for disease. Disability benefits are not given only in those cases in which the disease is so overwhelming that it physically prevents a worker from attempting to perform his duties. Jefferson County Schs. v. Headrick, 734 P.2d 659 (Colo. App. 1986).

Under the definition of "occupational disease", the statute does not invite a weighing of hazards to which a worker has been exposed in his lifetime in determining whether a particular disease is occupational, it operates to ensure that a disease results from an occupational hazard. Where there is no evidence that occupational exposure to a hazard is a necessary prerequisite to the development of the disease, a claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. Anderson v. Brinkhoff, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

If any hazard encountered by a worker outside the worker's employment setting was at least an equal contributor to the employee's disease, no compensation can be awarded. Hall v. Indus. Claim Appeals Office, 757 P.2d 1132 (Colo. App. 1988); Cowin & Co. v. Medina, 860 P.2d 535 (Colo. App. 1992).

Therefore, if two or more causes contribute to a diseased condition, it is necessary to determine the extent to which the nonindustrial cause contributed to that condition. Cowin & Co. v. Medina, 860 P.2d 535 (Colo. App. 1992).

However, similar to the requirement that a tortfeasor assumes the burden of proving the ability to apportion responsibility between two or more causes of a disability, a disabled worker's employer bears the burden of proving the extent to which a nonoccupational hazard has contributed to that worker's disability. The failure to sustain this burden will render inapplicable the statutory exclusion from the general rule of compensation in this section. Cowin & Co. v. Medina, 860 P.2d 535 (Colo. App. 1992).

The fact that an occupational disease becomes acutely symptomatic does not ipso facto transform it into an accidental injury. Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993).

Occupational diseases are subject to a more rigorous test than occupational accidents/injuries before they can be found compensable. If the general assembly intended to subject occupational disease only to the "arising out of" test, there would be no need to include the language concerning hazards to which the worker would have been equally exposed outside of employment. Anderson v. Brinkhoff, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

The four-part test applied to determine whether an occupational disease is compensable amounts to a legislative declaration that it is necessary to limit the scope of occupational diseases to those diseases which result from working conditions which are characteristic of the vocation. It is this proof of causation that ensures that the Workers' Compensation Act will not become a general health insurance act. Anderson v. Brinkhoff, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

Occupational exposure as a contributory factor in disability. When there is no evidence that occupational exposure was a necessary precondition to development of the disease with which the claimant is afflicted, the claimant has sustained an occupational disease only to the

extent that the occupational exposure contributed to his overall disability. Masdin v. Gardner-Denver-Copper Indus., Inc., 689 P.2d 714 (Colo. App. 1984).

V. ORDER.

Written authority from the division of labor for the employer to close its file is not equivalent to an order finally adjudicating the claim, especially since there was no request made of claimant to advise whether he agreed that his case was closed. Granite Constr. Co. v. Leonard, 40 Colo. App. 20, 568 P.2d 500 (1977).

Letter of director was not an "order" within the meaning of this section but instead gave rise to a "controversy" which was properly submitted to a hearing officer for resolution. Romans v. Hewitt Elec. Corp., 723 P.2d 161 (Colo. App. 1986).

"Order" includes a procedural rule. Crowell v. Indus. Claim Appeals Office, 2012 COA 30, 298 P.3d 1014.

VI. OVERPAYMENT.

The statutory definition of the term "overpayment" is clear and unambiguous. Simpson v. Indus. Claim Appeals Office, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

There are three categories of possible overpayment included in the statutory definition of "overpayment" under subsection (15.5). The first category is for overpayments created when a claimant receives money that exceeds the amount that should have been paid. The second category is for money received that a claimant was not entitled to receive. The third category is for money received that results in duplicate benefits because of offsets that reduce disability or death benefits payable under articles 40 to 47 of this title. Simpson v. Indus. Claim Appeals Office, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

The disjunctive "or" in subsection (15.5) plainly demarcates three different categories of overpayments, only one of which involves statutory setoff. The statutory phrase "because of offsets that reduce disability or death benefits payable under said articles" applies only to the third category of overpayments in subsection (15.5). Simpson v. Indus. Claim Appeals Office, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

VII. PERMANENT TOTAL DISABILITY.

Classification for purposes of determining eligibility for permanent total disability is constitutional and does not violate equal protection guarantees. Lobb v. Indus. Claim Appeals Office, 948 P.2d 115 (Colo. App. 1997).

Position offered to claimant in which she would engage in a variety of activities and be compensated at a rate of $10 per hour, constituted "employment" within the meaning of subsection (8), making her ineligible for permanent total disability benefits. Administrative law judge's finding that the offer was a bona fide offer of employment rather than a charitable offer from claimant's former employer was supported by the record and is binding on appeal. Lobb v. Indus. Claim Appeals Office, 948 P.2d 115 (Colo. App. 1997).

Determination of "permanent total disability" is based on several factors, not just medical impairment. The 1991 amendment limiting determination of permanent partial disability to consideration of medical impairment does not limit determination of permanent total disability in the same manner. Thus, in determining permanent total disability, the ALJ was correct in considering claimant's physical condition, employment history, and educational background. Best-Way Concrete Co. v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995).

In making the determination whether a claimant is permanently and totally disabled, the ALJ may consider human factors such as education, ability, and former employment. Holly Nursing Care Ctr. v. Indus. Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999).

The determination of whether a claimant is permanently and totally disabled is a factual determination and thus, an ALJ's resolution that is supported by substantial evidence is binding on review. Holly Nursing Care Ctr. v. Indus. Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999).

A claimant who would not be able to access the labor market in the area where the claimant lives, a "reasonable commutable distance from home", is not capable of securing employment, was unable to earn any wages, and therefore was permanently and totally disabled. Brush Greenhouse Partners v. Godinez, 942 P.2d 1278 (Colo. App. 1996), aff'd sub nom. Weld County Sch. Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998).

Access to or availability of employment in a claimant's commutable labor market may be considered in determining a claimant's eligibility for permanent total disability benefits. The crux of the inquiry is whether employment exists that is reasonably available to the

claimant given his or her circumstances and can only be answered on a case-by-case basis. Weld County Sch. Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998).

The legislative history of the 1991 amendment to subsection (16.5)(a) indicates that the new definition of permanent total disability was intended to tighten and restrict eligibility for permanent total disability benefits. There is no evidence that the legislature intended to go further by abolishing consideration of a claimant's accessible labor market. Weld County Sch. Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998).

VIII. PLACE OF EMPLOYMENT.

The place of employment under the workmen's compensation act is not expressly limited to the state. Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

IX. STATE.

Law reviews. For note, "The Conflicts Problem as Applied to Workmen's Compensation in Colorado", see 22 Rocky Mt. L. Rev. 77 (1949).

Extraterritorial provisions reciprocal. The very inclusion of "any province of Canada" within the purview of this subdivision argues convincingly that the basic principle of the subdivision is the mutual recognition of extraterritorial provisions by voluntary reciprocal action of the various governing units contemplated by this subdivision; that the extraterritorial principle becomes applicable only to the extent that one state and then another enacts a similar reciprocal law. The fact that two neighboring states, Utah and Wyoming, have enacted simultaneously with this state very similar laws would seem to be persuasive in adopting this view. Frankel Carbon & Ribbon Co. v. Aaron, 113 Colo. 429, 158 P.2d 929 (1945).

Applied in State Comp. Ins. Fund v. Howington, 133 Colo. 583, 298 P.2d 963 (1956).

X. WAGES.

A. Generally.

Question whether subsection (19) is unconstitutional by virtue of preemption by federal legislation was properly a matter within the court of appeals' jurisdiction, and was not a matter subject to review by the administrative law judge. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

Exclusion of fringe benefits of employment from definition of "wages" of employees in agricultural industry violates equal protection guarantees. Higgs v. Western Landscaping & Sprinkler Sys., Inc., 804 P.2d 161 (Colo. 1991).

Barring a claimant who is capable of earning wages in "any" amount from receiving permanent total disability benefits does not offend equal protection guarantees. Christie v. Coors Transp. Co., 919 P.2d 857 (Colo. App. 1995), aff'd, 933 P.2d 1330 (Colo. 1997).

The exclusion of per diem payments in the calculation of wages does not result in disparate calculation of wages, but rather, serves to differentiate between payments intended to reimburse the employee for expenses incurred as a result of his employment and those meant to provide economic advantage, and is not a violation of equal protection. Young v. Indus. Claim Appeals Office, 969 P.2d 735 (Colo. App. 1998).

Inclusion of cost of continuing health insurance in definition of "wages" does not require preemption of subsection (19) under federal Employee Retirement Income Security Act of 1974 (ERISA). Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

Actual purchase of health insurance not required in order for cost of benefits to be included in calculating claimant's average weekly wage. Avalanche Indus. v. Indus. Claim Appeals Office, 166 P.3d 147 (Colo. App. 2007), aff'd, 198 P.3d 589 (Colo. 2008).

ERISA does not preempt former §8-47-101(1) and (2), as effective in May 1989, to the extent those subsections required that the value of ERISA-plan benefits be included in calculating an employee's average weekly wage for workers' compensation purposes. Hewlett-Packard Co. v. Diringer, 42 F. Supp. 2d 1038 (D. Colo. 1999).

Purpose of subsection (19) definition of "wages" (now found in subsection (19)(b)) is to calculate the money rate at which services are paid under the contract of hire in force at the time of injury, and to include any advantage or fringe benefit provided to the employee in lieu of wages. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

Non-cash benefits can comprise a substantial amount of a worker's wages. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995); Young v. Indus. Claim Appeals

Office, 969 P.2d 735 (Colo. App. 1998); Iler v. Indus. Claim Appeals Office, 207 P.3d 945 (Colo. App. 2009).

Subsection (19) contains no requirement that the employer provide any level of coverage for the employee. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

The term "wages" does not include employer's FICA tax payments for the purpose of calculating a claimant's average weekly wage even though employer's PERA contributions are included as "wages" for the same purpose. Case finds that there are significant differences between such payments which justify such different treatment. Floyd v. AMF Tuboscope, Inc., 817 P.2d 534 (Colo. App. 1990).

The phrase "any wages" in subsection (16.5)(a) cannot encompass the pre-injury wage rate level referred to in subsection (19)(a). McKinney v. Indus. Claim Appeals Office, 894 P.2d 42 (Colo. App. 1995).

Subsection (16.5)(a) and §8-43-303(3) are distinguishable because they affect persons who are not similarly situated to each other. The purpose of subsection (16.5)(a) is to define permanent total disability for purposes of initially determining whether a claimant is eligible for permanent total disability benefits. In contrast, the purpose of §8-43-303(3) is to set a standard which employers must meet before a case can be reopened to determine whether an employee who has already been awarded permanent total disability benefits should continue to receive such benefits. Christie v. Coors Transp. Co., 933 P.2d 1330 (Colo. 1997).

"Any wages" means that a claimant is disqualified from permanent disability benefits if he or she is capable of earning wages in any amount. McKinney v. Indus. Claim Appeals Office, 894 P.2d 42 (Colo. App. 1995); Christie v. Coors Transp. Co., 919 P.2d 857 (Colo. App. 1995), aff'd, 933 P.2d 1330 (Colo. 1997).

Employer cannot evade responsibility under Workers' Compensation Act by labeling a portion of compensation as "expense reimbursement" where there is no rational or realistic relationship between the employee's actual expenses and the amount claimed as reimbursement. Sneath v. Express Messenger, 881 P.2d 453 (Colo. App. 1994).

In determining the "money rate at which the services are rendered" pursuant to subsection (19), there must be included the value of the rate of accrual of the employee's leave time. Meeker v. Provenant Health Partners, 929 P.2d 26 (Colo. App. 1996).

Pension contributions are excluded from the determination of claimant's average weekly wage. City of Lamar v. Koehn, 968 P.2d 164 (Colo. App. 1998).

Panel correctly declined to include the value of claimant's vacation and sick leave in determining claimant's average weekly wage since the leave was subject to forfeiture after a specified maximum number of days had accrued and since the value of the claimant's leave time was dependent upon actual usage and would decline if not used. City of Lamar v. Koehn, 968 P.2d 164 (Colo. App. 1998).

Income from an investment or from a personally operated business does not necessarily constitute "wages". Because the general assembly did not intend to prohibit disabled persons from securing income other than wage income, claimant was not disqualified from receiving permanent total disability benefits simply because he received unspecified income from his investment in a bingo parlor and his former land scraper business. Best-Way Concrete Co. v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995).

B. Computation of Average Weekly Wage.

A claimant's average weekly wage is to be determined according to the contract of hire in force at the time of the injury. Drywall Prods. v. Constuble, 832 P.2d 957 (Colo. App. 1991).

Expense reimbursement of four cents per mile was not considered wages for federal income tax purposes and therefore could not be considered wages for purposes of computing a claimant's average weekly wage. Ernie Baylog, Inc. v. Indus. Claim Appeals Office, 923 P.2d 361 (Colo. App. 1996).

The cost of medicare insurance benefits is included in an injured claimant's average weekly wage once the continuation of the employers' group health insurance plan is terminated. Schelly v. Indus. Claim Appeals Office, 961 P.2d 547 (Colo. App. 1997).

Average weekly wage includes both the employer's and employee's contribution to group health insurance premiums. Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office, 26 P.3d 546 (Colo. App. 2001), aff'd, 145 P.3d 661 (Colo. 2006).

Claimant is not required to present proof that he or she actually purchased replacement coverage. The statute merely seeks to ensure that the claimant will have funds available to make the purchase. Humane Soc'y of Pikes Peak

Region v. Indus. Claim Appeals Office, 26 P.3d 546 (Colo. App. 2001); Ray v. Indus. Claim Appeals Office, 124 P.3d 891 (Colo. App. 2005).

Average weekly wage includes the cost of health insurance only when a claimant has continued the employer's coverage at his or her own cost pursuant to COBRA or §10-16-108,and thereafter, when that coverage ends and the claimant has converted to other coverage. An employee's contribution to his or her health care premium during the period of employment does not represent an amount included as wages for the purpose of calculating average weekly wages. Midboe v. Indus. Claim Appeals Office, 88 P.3d 643 (Colo. App. 2003).

An employee who has been terminated from employment, however, following an injury is not required to purchase a continuing policy and convert to an individual plan before that employee becomes entitled to have the cost of continuing the employer's plan included in the average weekly wage. Subsection (19)(b) does not require proof that the claimant has actually purchased coverage. Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office, 26 P.3d 546 (Colo. App. 2001); Ray v. Indus. Claim Appeals Office, 124 P.3d 891 (Colo. App. 2005).

Subsection (19)(b) states that the cost of converting to a similar or lesser insurance plan is included in the average weekly wage computation. When an employee converts to coverage comparable to or lesser than the employer's plan, the cost to the employee of the converted insurance is added to the employee's average weekly wage. Sears Roebuck & Co. v. Indus. Claim Appeals Office, 140 P.3d 336 (Colo. App. 2006).

The absence of comparable market forces does not preclude a claimant from proving a reasonable sum for room and board. Iler v. Indus. Claim Appeals Office, 207 P.3d 945 (Colo. App. 2009).

The mandate in subsection (19)(b) to include the cost of room and board does not require direct proof of actual cost or market value of the room and board, and it does not exclude replacement cost as a viable measure. Hence, claimant's testimony, based on claimant's expenses in Colorado, about the replacement value of food and lodging received while employed in Antarctica established a prima facie case and led to the reasonable inference that the room and board provided by the employer had some value. Iler v. Indus. Claim Appeals Office, 207 P.3d 945 (Colo. App. 2009).

C. Computation.

Increase in benefits was correctly applied retroactively. The case of Henderson v. RSI, Inc., 824 P.2d 91 (Colo. App. 1991), did not establish a new rule of law in finding that the benefits for an occupational disease should be based on the claimant's wages at the time the claimant became disabled rather than on wages at the time of the last injurious exposure. Subsequent Injury Fund v. Indus. Claim Appeals Office, 899 P.2d 220 (Colo. App. 1994).

§ 8-40-201. [Effective 1/1/2022] Definitions

As used in articles 40 to 47 of this title 8, unless the context otherwise requires:

(1) "Accident" means an unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; or the effect of an unknown cause or, the cause, being known, an unprecedented consequence of it.

(2) "Accident", "injury", or "injuries" includes disability or death resulting from accident or occupational disease as defined in subsection (14) of this section.

(2.5) Repealed.

(3) "Board" means the board of directors of Pinnacol Assurance.

(3.4) "Chief executive officer" means the chief executive officer of Pinnacol Assurance.

(3.5) Repealed.

(3.6) "Claimant" means a person who either:

(a) Receives benefits under articles 40 to 47 of this title; or

(b) Has or asserts, in any administrative or judicial forum or in any communication with the director, the division, or an employer, insurer, or self-insured employer, a right to receive such benefits.

(4) "Division" means the division of workers' compensation in the department of labor and employment.

(5) "Director" means the director of the division of workers' compensation.

(6) "Employee" has the meaning set forth in section 8-40-202 and the scope of such term is set forth in section 8-40-301.

(7) "Employer" has the meaning set forth in section 8-40-203 and the scope of such term is set forth in section 8-40-302.

(8) "Employment" means any trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position, or process of manufacture in which any person may be engaged; except that it shall not include participation in a ridesharing arrangement, as defined in section 39-22-509(1)(a)(II), C.R.S., and participation in such a

ridesharing arrangement shall not affect the wages paid to or hours or conditions of employment of an employee; nor shall it include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program.

(9) "Examiner" means one of the industrial claim appeals examiners appointed to the industrial claim appeals panel in the industrial claim appeals office.

(10) "Executive director" means the executive director of the department of labor and employment.

(11) (Deleted by amendment, L. 2002, p. 1882, § 27, effective July 1, 2002.)

(11.5) "Maximum medical improvement" means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

(12) "Mediation" means a process through which parties involved in a dispute concerning matters arising under articles 40 to 47 of this title meet with a mediator to discuss such matter or matters, defining and articulating the issues and their positions on such issues, with a goal of resolving such dispute or disputes.

(13) "Mediator" means an individual who is trained to assist disputants in reaching a mutually acceptable resolution of their disputes through the identification and evaluation of alternatives.

(13.5) Repealed.

(14) "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

(15) "Order" means and includes any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge.

(15.5)

(a) "Overpayment" means money received by a claimant that:

(I) Is the result of fraud;

(II) Is the result of an error due only to miscalculation, omission, or clerical error asserted in a new admission of liability filed within thirty days of the erroneous admission of liability;

(III) Is paid in error or inadvertently in excess of an admission or order that exists at the time that the benefits are paid to a claimant; or

(IV) Results in duplicate benefits because of offsets that reduce disability or death benefits payable under articles 40 to 47 of this title 8. Duplicate benefits include any wages earned by a claimant in the same or other employment while a claimant is also receiving temporary disability benefits.

(b) For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under articles 40 to 47 of this title 8.

(c) Nothing in this subsection (15.5):

(I) Prevents an insurance carrier or an employer from receiving a credit against permanent disability benefits for temporary disability benefits paid beyond the initial date of maximum medical improvement assigned by an authorized treating physician or the final date of maximum medical improvement established by any other means, whichever is later and to the extent that permanent disability benefits remain unpaid at the time of the filing of a final admission of liability; or

(II) Affects the power of the director or administrative law judges to determine overpayments and require repayment of overpayments pursuant to sections 8-42-113.5 and 8-43-207 (1)(q).

(16) "Panel" means the industrial claim appeals panel that conducts administrative appellate review pursuant to articles 40 to 47 of this title.

(16.5)

(a) "Permanent total disability" means the employee is unable to earn any wages in the same or other employment. Except as provided in paragraph (b) of this subsection (16.5), the burden of proof shall be on the employee to prove that the employee is unable to earn any wages in the same or other employment.

(b) Total loss of or total loss of use of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof shall create a rebuttable presumption of permanent total disability. "Total loss of use" shall be a medical determination, based upon objective findings, made by an independent medical examiner who is a level II accredited physician in the appropriate field.

(17) "Place of employment" means every place whether indoors, outdoors, or underground and the premises, workplaces, works, and plants appertaining thereto or used in connection therewith where either temporarily or permanently any industry, trade, or business is carried on; or where any process or operation directly or indirectly relating to any industry, trade, or business is carried on; or where any person is directly or indirectly employed by another for direct or indirect gain or profit.

(18) "State" includes any state or territory of the United States, the District of Columbia, and any province of Canada.

(18.5) "Temporary help contracting firm" means any person who is in the business of employing individuals and, for compensation from a third party, providing those individuals to perform work for the third party, under the supervision of the third party.

(19)

(a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

(b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). If, after the injury, the employer

continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment. Medicaid and other indigent health care programs are not health insurance plans for the purposes of this section.

(c) No per diem payment shall be considered wages under this subsection (19) unless it is also considered wages for federal income tax purposes.

(Amended by 2021 Ch. 149, §1, eff. 1/1/2022. L. 90: Entire article R&RE, p. 469, § 1, effective July 1; (6) and (7) amended, p. 1843, § 28, effective July 1. L. 91: (2.5), (3.5), (11.5), (13.5), and (16.5) added and (4), (5), (8), (12), (15), and (19) amended, p. 1292, § 4, effective July 1. L. 94: (19) amended, p. 1285, § 1, effective May 22; (16.5) amended, p. 2000, § 1, effective July 1. L. 95: (2.5) and (3.5) amended, p. 12, § 1, effective March 9. L. 96: (2.5) amended, p. 151, § 1, effective July 1; (18.5) added, p. 827, § 1, effective July 1. L. 97: (3.6) and (15.5) added, p. 112, § 1, effective July 1. L. 98: (13.5) amended, p. 168, § 1, effective April 6. L. 2002: (3) and (11) amended and (3.4) added, p. 1882, § 27, effective July 1. L. 2003: (2.5) and (13.5) amended, p. 917, § 1, effective July 1. L. 2004: (8) amended, p. 904, § 26, effective May 21. L. 2010: (19)(b) amended, (SB 10-187), ch. 310, p. 1456, §1, effective July 1.)

(1) The provisions of this section are similar to provisions of several former sections as they existed prior to 1990.

(2) Subsection (3.5)(b)(I) provided for the repeal of subsection (3.5), effective July 1, 1996. (See L. 95, p. 12.)

(3) Subsection (3.4) was originally numbered as (3.5) in House Bill 02-1135 but has been renumbered on revision for ease of location.

(4) Subsections (2.5)(b)(I) and (13.5)(b)(I) provided for the repeal of subsections (2.5) and (13.5), respectively, effective July 1, 2014. (See L. 2003, p. 917.)

This section is set out more than once. See also C.R.S. §8-40-2011, effective until 1/1/2022.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Independent Contractors and the Colorado Workers' Compensation Act -- Parts I and II", see 22 Colo. Law. 545 and 1281 (1993). For article, "Anderson v. Brinkoff: Finally, a Meaningful Definition of 'Occupational Disease'", see 23 Colo. Law. 383 (1994). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 83 (April 2004). For article, "Overview of General Liability, Workers' Compensation, and Employment Law Issues in K-12 Educational Institutions", see 44 Colo. Law. 25 (Oct. 2015).

Annotator's note. (1) Since § 8-40-201 is similar to §§8-41-102, 8-41-103, 8-41-108, and 8-46-201 as they existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, relevant cases construing those provisions have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under the act to the industrial claim appeals office.

II. ACCIDENT AND INJURIES.

Law reviews. For article, "A Significant Change in the Colorado Workmen's Compensation Act: 'Accidents', 'Injuries' and Heart Attack", see 41 Den. L. Ctr. J. 189 (1964). For article, "The Enterprise Liability Theory of Torts", see 47 U. Colo. L. Rev. 153 (1976).

The definition of "accident" under this section is an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury. T &

An "accident" under the workmen's compensation act is an occurrence traceable to a definite time, place, and cause. Colo. Fuel & Iron Corp. v. Indus. Comm'n, 154 Colo. 240, 392 P.2d 174 (1964); Miceli v. State Comp. Ins. Fund, 157 Colo. 204, 401 P.2d 835 (1965).

Prior to this section, the workmen's compensation statute did not contain any definition of the word "accident". Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

But an "accident" under the act had been interpreted to mean any unintended or unexpected loss or hurt apart from its cause. The term "accidental injury" was not then confined to a situation where the means or cause was an accident for it also included any injury which was itself an

accident. Martin Marietta Corp. v. Faulk, 158 Colo. 441, 407 P.2d 348 (1965).

And this section is not intended to and does not alter the meaning of "accident" as that term came to be accepted by reason of court decisions. Denver-Golder Corp. v. Minikus, 159 Colo. 188, 410 P.2d 636 (1966); Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

Thus, by this section, the general assembly has done nothing more than to adopt and to place into the act the court's determination of what is an accident. Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

Since case law not overruled, demonstrative external violence need not be shown. The general assembly has not overruled the "case law"; therefore, it does not have to be shown that some demonstrative external violence was visited upon the body "causing a wounding, breaking, tearing, puncturing or disruption of the continuity of the body of the injured employee or his bodily tissue". Indus. Comm'n v. Milka, 159 Colo. 114, 410 P.2d 181 (1966).

The former definitions of "accident" and "injury" in this section made them inseparably linked to trauma, but this traumatic connection was entirely eliminated in the 1965 amendment. For example, in the 1965 definition of "accident" there are the terms, "an unforseen event, occurring without the will or design of the person whose mere act causes it" and "an unexpected, unusual, or undesigned occurrence". T & T Loveland Chinchilla Ranch v. Bourn, 173 Colo. 267, 477 P.2d 457 (1970).

"Personal injury" limited. Because "personal injury" is not defined by the workmen's compensation act, it does not include damages which are based mainly on mental suffering and humiliation, and only peripherally on physical suffering and pain. Luna v. City & County of Denver, 537 F. Supp. 798 (D. Colo. 1982).

Courts distinguish between "accident" and "injury". City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967).

In that accident is the cause and injury is the effect. It does not follow in every instance that the two occur simultaneously. At least, in many instances, the total or ultimate effect is not immediately apparent. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); Indus. Comm'n v. Bysom, 166 Colo. 502, 444 P.2d 627 (1968); Crest Fence Co. v. Cec, 175 Colo. 21, 485 P.2d 709 (1971).

And an injury takes place when one, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury. Crest Fence Co. v. Cec, 175 Colo. 21, 485 P.2d 709 (1971).

Therefore, to interpret the act in such a way that a person who reasonably discovers his injury long after the accident and is entitled to compensation is not entitled to his medical expenses is absurd, and a defeat of the purpose of the act. Crest Fence Co. v. Cec, 175 Colo. 21, 485 P.2d 709 (1971).

Series of traumatic events compensable. The fact that an injury results from a series of traumatic events does not prevent that injury from being compensable as proximately caused by accident. Martinez v. Indus. Comm'n, 40 Colo. App. 485, 580 P.2d 36 (1978).

The traditional test for distinguishing between accidental and occupational injuries is whether the injury can be traced to a particular time, place, and cause. Because the employee's ulnar nerve entrapment injury resulted from the conditions of her employment, rather than a specific accident or trauma, the injury is an occupational disease within the meaning of subsection (14). Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993).

If one can prove that the injury was a result of work, then the date of injury is irrelevant for purposes of medical compensation. The injured worker is entitled to medical compensation regardless of date of injury if he or she can prove injury as a result of work. Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999).

A claimant suffering from an occupational disease is entitled to reasonably necessary medical benefits, even if the disease has not yet become disabling. Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999).

Applied in Eisnach v. Indus. Comm'n, 633 P.2d 502 (Colo. App. 1981); High v. Indus. Comm'n, 638 P.2d 818 (Colo. App. 1981); Stephen Equip. Co. v. Baca, 703 P.2d 1332 (Colo. App. 1985); City of Aurora v. Indus. Comm'n, 710 P.2d 1122 (Colo. App. 1985).

III. EMPLOYMENT.

This section is to be construed in relation to § 8-48-101. Betz v. Indus. Comm'n, 109 Colo. 385, 125 P.2d 958 (1942).

Determination of employment relationship depends upon facts in each case. Schultz v. Indus. Comm'n, 34 Colo. App. 122, 523 P.2d 164 (1974).

And determination must properly be made by commission rather than court, even though the facts are largely undisputed, because this matter is not within the court's scope of review. Schultz v. Indus. Comm'n, 34 Colo. App. 122, 523 P.2d 164 (1974).

One may be employee by virtue of the statute and not by common-law definition. An obligation to pay workmen's compensation may, in proper cases, be imposed against an owner where the common-law relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition. Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed. 2d 644 (1974).

Doubt resolved in claimant's favor. Any reasonable doubt as to whether a compensable accidental injury or death arose out of and in the course of employment must be resolved in favor of the claimant. Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979).

A company whose business is essentially that of processing, is within the meaning of "process of manufacture or any method of carrying on any such trade or process of manufacture" as used in this section. Betz v. Indus. Comm'n, 109 Colo. 385, 125 P.2d 958 (1942).

Harm or injury sustained by an employee while going to or from his work is not compensable, in the absence of special circumstances, and except in certain unusual circumstances. Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967); J. C. Carlile Corp. v. Antaki, 162 Colo. 376, 426 P.2d 549 (1967).

But injuries which occur to an employee while going to or from work may be compensable when it appears that at the time of such injuries he is engaged in doing an act, or performing a duty, which he is definitely charged with doing as a part of his contractual service, or under the express or implied direction of his employer. State Comp. Ins. Fund v. Keane, 160 Colo. 292, 417 P.2d 8 (1966); Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967); J. C. Carlile v. Antaki, 162 Colo. 376, 426 P.2d 549 (1967).

And an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually

compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly, an injury resulting from such an act arises out of, and in the course of, the employment; and this rule is applicable, even though the advantage to the employer is slight. Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967).

Thus, the test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967).

The test for whether reimbursed travel is within the course and scope of employment necessitates the following findings of fact: (1) The number of miles traveled; (2) the cost of driving the distance on a daily basis; (3) the extent to which the reimbursement covers actual travel costs; (4) the extent to which other employees travel to reach the job site; and (5) the difficulties of travel that provide a special benefit to the employer or poses an unusual risk to the employee. Sturgeon Elec. v. Indus. Claim Appeals Office, 129 P.3d 1057 (Colo. App. 2005).

Decedent's death arises out of his employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects. Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979).

Claim not barred by off-duty status. The fact that decedent police officer was off duty prior to the onset of the emergency does not bar a claim for compensation. Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979).

Voluntary participation in recreational event held during nonwork hours and off of employer's premises, with only benefit to employer being improvement of employee morale, held not to constitute compensable situation if injury to employee occurs. Wilson v. Scientific Software-Intercomp, 738 P.2d 400 (Colo. App. 1987).

Even if the employer promoted the event, subsection (8) requires that the claimant's motive for participation be determined and that compensation be denied if participation in the activity was voluntary. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

An administrative law judge may consider evidence concerning whether an employer promoted, sponsored, or supported an activity because it is within the employer's power to enlarge the scope of

employment. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

Causation may be established in the absence of the time and place factors set forth in City and County of Denver v. Lee, 168 Colo. 208, 450 P.2d 352 (1969), if there is a strong showing of the other factors. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

The fact that there was no evidence that anyone was punished for not having attended a party did not preclude a determination that attendance at the party was voluntary. Dover Elevator Co. v. Indus. Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998).

The provision of this section providing that employment does not include participation in a ridesharing arrangement precludes a vicarious liability claim against the employer for injuries sustained by an employee in a car pooling arrangement. Smith v. Pinner, 891 F.2d 784 (10th Cir. 1989).

In the context of workers' compensation, the determination whether an accident occurred within the scope of employment depends on an examination of the totality of the circumstances, and if an employee's travel is at the express or implied request of the employer, or if the travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, then the travel is within the scope of employment. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993).

Where the employer agrees to provide its employee with the means of transportation or to pay the employee's cost of commuting to and from work, the scope of employment inferentially enlarges to include the employee's transportation. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993).

Where claimant worked full-time and there was no evidence that he was hired for the completion of single tasks, or on a per task basis, ALJ erred in concluding that he was not an actual employee. The "relative nature of the work" test, if applied, would show that the claimant was an actual employee under this section. Stampados v. Colo. D & S Enters., 833 P.2d 815 (Colo. App. 1992).

The term "employment" is applied in Loffland Brothers Co. v. Indus. Comm'n, 714 P.2d 509 (Colo. App. 1985).

IV. OCCUPATIONAL DISEASE.

Former section provided that an occupational disease would not be compensated as an accident. Colo. Fuel & Iron Corp. v. Indus. Comm'n, 162 Colo. 68, 424 P.2d 382 (1967).

Employment conditions acting on preexisting allergy or weakness in "occupational disease". Where employment conditions act upon a claimant's individual allergy, hypersensitivity, or preexisting weakness so as to disable him, he has a compensable occupational disease, provided other requirements for compensability have been met. Denver v. Hansen, 650 P.2d 1319 (Colo. App. 1982); IML Freight v. Indus. Comm'n, 676 P.2d 1205 (Colo. App. 1983).

As is condition acting on preexisting injury. Where, as a condition of his employment, claimant was required to wear safety shoes, which developed blistering on a foot on which he had previously suffered severe burns, this injury fits within the definition of occupational disease. CF & I Steel Corp. v. Indus. Comm'n, 650 P.2d 1332 (Colo. App. 1982).

Standard for disease. Disability benefits are not given only in those cases in which the disease is so overwhelming that it physically prevents a worker from attempting to perform his duties. Jefferson County Schs. v. Headrick, 734 P.2d 659 (Colo. App. 1986).

Under the definition of "occupational disease", the statute does not invite a weighing of hazards to which a worker has been exposed in his lifetime in determining whether a particular disease is occupational, it operates to ensure that a disease results from an occupational hazard. Where there is no evidence that occupational exposure to a hazard is a necessary prerequisite to the development of the disease, a claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. Anderson v. Brinkhoff, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

If any hazard encountered by a worker outside the worker's employment setting was at least an equal contributor to the employee's disease, no compensation can be awarded. Hall v. Indus. Claim Appeals Office, 757 P.2d 1132 (Colo. App. 1988); Cowin & Co. v. Medina, 860 P.2d 535 (Colo. App. 1992).

Therefore, if two or more causes contribute to a diseased condition, it is necessary to determine the extent to which the nonindustrial cause contributed to that condition. Cowin & Co. v. Medina, 860 P.2d 535 (Colo. App. 1992).

However, similar to the requirement that a tortfeasor assumes the burden of proving the ability to apportion responsibility between two or more causes of a disability, a disabled worker's employer bears the burden of proving the extent to which a nonoccupational hazard has contributed to that worker's disability. The failure to sustain this burden will render inapplicable the statutory exclusion from the general rule of compensation in this section. Cowin & Co. v. Medina, 860 P.2d 535 (Colo. App. 1992).

The fact that an occupational disease becomes acutely symptomatic does not ipso facto transform it into an accidental injury. Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993).

Occupational diseases are subject to a more rigorous test than occupational accidents/injuries before they can be found compensable. If the general assembly intended to subject occupational disease only to the "arising out of" test, there would be no need to include the language concerning hazards to which the worker would have been equally exposed outside of employment. Anderson v. Brinkhoff, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

The four-part test applied to determine whether an occupational disease is compensable amounts to a legislative declaration that it is necessary to limit the scope of occupational diseases to those diseases which result from working conditions which are characteristic of the vocation. It is this proof of causation that ensures that the Workers' Compensation Act will not become a general health insurance act. Anderson v. Brinkhoff, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

Occupational exposure as a contributory factor in disability. When there is no evidence that occupational exposure was a necessary precondition to development of the disease with which the claimant is afflicted, the claimant has sustained an occupational disease only to the extent that the occupational exposure contributed to his overall disability. Masdin v. Gardner-Denver-Copper Indus., Inc., 689 P.2d 714 (Colo. App. 1984).

V. ORDER.

Written authority from the division of labor for the employer to close its file is not equivalent to an order finally adjudicating the claim, especially since there was no request made of claimant to advise whether he agreed that his case was closed. Granite Constr. Co. v. Leonard, 40 Colo. App. 20, 568 P.2d 500 (1977).

Letter of director was not an "order" within the meaning of this section but instead gave rise to a "controversy" which was properly submitted to a hearing officer for resolution. Romans v. Hewitt Elec. Corp., 723 P.2d 161 (Colo. App. 1986).

"Order" includes a procedural rule. Crowell v. Indus. Claim Appeals Office, 2012 COA 30, 298 P.3d 1014.

VI. OVERPAYMENT.

The statutory definition of the term "overpayment" is clear and unambiguous. Simpson v. Indus. Claim Appeals Office, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

There are three categories of possible overpayment included in the statutory definition of "overpayment" under subsection (15.5). The first category is for overpayments created when a claimant receives money that exceeds the amount that should have been paid. The second category is for money received that a claimant was not entitled to receive. The third category is for money received that results in duplicate benefits because of offsets that reduce disability or death benefits payable under articles 40 to 47 of this title. Simpson v. Indus. Claim Appeals Office, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

The disjunctive "or" in subsection (15.5) plainly demarcates three different categories of overpayments, only one of which involves statutory setoff. The statutory phrase "because of offsets that reduce disability or death benefits payable under said articles" applies only to the third category of overpayments in subsection (15.5). Simpson v. Indus. Claim Appeals Office, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

VII. PERMANENT TOTAL DISABILITY.

Classification for purposes of determining eligibility for permanent total disability is constitutional and does not violate equal protection guarantees. Lobb v. Indus. Claim Appeals Office, 948 P.2d 115 (Colo. App. 1997).

Position offered to claimant in which she would engage in a variety of activities and be compensated at a rate of $10 per hour, constituted "employment" within the meaning of subsection (8), making her ineligible for permanent total disability benefits. Administrative law judge's finding that the offer was a bona fide offer of employment rather

than a charitable offer from claimant's former employer was supported by the record and is binding on appeal. Lobb v. Indus. Claim Appeals Office, 948 P.2d 115 (Colo. App. 1997).

Determination of "permanent total disability" is based on several factors, not just medical impairment. The 1991 amendment limiting determination of permanent partial disability to consideration of medical impairment does not limit determination of permanent total disability in the same manner. Thus, in determining permanent total disability, the ALJ was correct in considering claimant's physical condition, employment history, and educational background. Best-Way Concrete Co. v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995).

In making the determination whether a claimant is permanently and totally disabled, the ALJ may consider human factors such as education, ability, and former employment. Holly Nursing Care Ctr. v. Indus. Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999).

The determination of whether a claimant is permanently and totally disabled is a factual determination and thus, an ALJ's resolution that is supported by substantial evidence is binding on review. Holly Nursing Care Ctr. v. Indus. Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999).

A claimant who would not be able to access the labor market in the area where the claimant lives, a "reasonable commutable distance from home", is not capable of securing employment, was unable to earn any wages, and therefore was permanently and totally disabled. Brush Greenhouse Partners v. Godinez, 942 P.2d 1278 (Colo. App. 1996), aff'd sub nom. Weld County Sch. Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998).

Access to or availability of employment in a claimant's commutable labor market may be considered in determining a claimant's eligibility for permanent total disability benefits. The crux of the inquiry is whether employment exists that is reasonably available to the claimant given his or her circumstances and can only be answered on a case-by-case basis. Weld County Sch. Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998).

The legislative history of the 1991 amendment to subsection (16.5)(a) indicates that the new definition of permanent total disability was intended to tighten and restrict eligibility for permanent total disability benefits. There is no evidence that the legislature intended to go further by abolishing consideration of a claimant's accessible labor market. Weld County Sch. Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998).

VIII. PLACE OF EMPLOYMENT.

The place of employment under the workmen's compensation act is not expressly limited to the state. Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

IX. STATE.

Law reviews. For note, "The Conflicts Problem as Applied to Workmen's Compensation in Colorado", see 22 Rocky Mt. L. Rev. 77 (1949).

Extraterritorial provisions reciprocal. The very inclusion of "any province of Canada" within the purview of this subdivision argues convincingly that the basic principle of the subdivision is the mutual recognition of extraterritorial provisions by voluntary reciprocal action of the various governing units contemplated by this subdivision; that the extraterritorial principle becomes applicable only to the extent that one state and then another enacts a similar reciprocal law. The fact that two neighboring states, Utah and Wyoming, have enacted simultaneously with this state very similar laws would seem to be persuasive in adopting this view. Frankel Carbon & Ribbon Co. v. Aaron, 113 Colo. 429, 158 P.2d 929 (1945).

Applied in State Comp. Ins. Fund v. Howington, 133 Colo. 583, 298 P.2d 963 (1956).

X. WAGES.

A. Generally.

Question whether subsection (19) is unconstitutional by virtue of preemption by federal legislation was properly a matter within the court of appeals' jurisdiction, and was not a matter subject to review by the administrative law judge. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

Exclusion of fringe benefits of employment from definition of "wages" of employees in agricultural industry violates equal protection guarantees. Higgs v. Western Landscaping & Sprinkler Sys., Inc., 804 P.2d 161 (Colo. 1991).

Barring a claimant who is capable of earning wages in "any" amount from receiving permanent total disability benefits does not offend equal protection guarantees. Christie v. Coors Transp. Co., 919 P.2d 857 (Colo. App. 1995), aff'd, 933 P.2d 1330 (Colo. 1997).

The exclusion of per diem payments in the calculation of wages does not result in disparate calculation of wages, but rather, serves to differentiate between payments intended to reimburse the employee for expenses incurred as a result of his employment and those meant to provide economic advantage, and is not a violation of equal protection. Young v. Indus. Claim Appeals Office, 969 P.2d 735 (Colo. App. 1998).

Inclusion of cost of continuing health insurance in definition of "wages" does not require preemption of subsection (19) under federal Employee Retirement Income Security Act of 1974 (ERISA). Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

Actual purchase of health insurance not required in order for cost of benefits to be included in calculating claimant's average weekly wage. Avalanche Indus. v. Indus. Claim Appeals Office, 166 P.3d 147 (Colo. App. 2007), aff'd, 198 P.3d 589 (Colo. 2008).

ERISA does not preempt former §8-47-101(1) and (2), as effective in May 1989, to the extent those subsections required that the value of ERISA-plan benefits be included in calculating an employee's average weekly wage for workers' compensation purposes. Hewlett-Packard Co. v. Diringer, 42 F. Supp. 2d 1038 (D. Colo. 1999).

Purpose of subsection (19) definition of "wages" (now found in subsection (19)(b)) is to calculate the money rate at which services are paid under the contract of hire in force at the time of injury, and to include any advantage or fringe benefit provided to the employee in lieu of wages. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

Non-cash benefits can comprise a substantial amount of a worker's wages. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995); Young v. Indus. Claim Appeals Office, 969 P.2d 735 (Colo. App. 1998); Iler v. Indus. Claim Appeals Office, 207 P.3d 945 (Colo. App. 2009).

Subsection (19) contains no requirement that the employer provide any level of coverage for the employee. Celebrity Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539 (Colo. App. 1995).

The term "wages" does not include employer's FICA tax payments for the purpose of calculating a claimant's average weekly wage even though employer's PERA contributions are included as "wages" for the same purpose. Case finds that there are significant differences between such

payments which justify such different treatment. Floyd v. AMF Tuboscope, Inc., 817 P.2d 534 (Colo. App. 1990).

The phrase "any wages" in subsection (16.5)(a) cannot encompass the pre-injury wage rate level referred to in subsection (19)(a). McKinney v. Indus. Claim Appeals Office, 894 P.2d 42 (Colo. App. 1995).

Subsection (16.5)(a) and §8-43-303(3) are distinguishable because they affect persons who are not similarly situated to each other. The purpose of subsection (16.5)(a) is to define permanent total disability for purposes of initially determining whether a claimant is eligible for permanent total disability benefits. In contrast, the purpose of §8-43-303(3) is to set a standard which employers must meet before a case can be reopened to determine whether an employee who has already been awarded permanent total disability benefits should continue to receive such benefits. Christie v. Coors Transp. Co., 933 P.2d 1330 (Colo. 1997).

"Any wages" means that a claimant is disqualified from permanent disability benefits if he or she is capable of earning wages in any amount. McKinney v. Indus. Claim Appeals Office, 894 P.2d 42 (Colo. App. 1995); Christie v. Coors Transp. Co., 919 P.2d 857 (Colo. App. 1995), aff'd, 933 P.2d 1330 (Colo. 1997).

Employer cannot evade responsibility under Workers' Compensation Act by labeling a portion of compensation as "expense reimbursement" where there is no rational or realistic relationship between the employee's actual expenses and the amount claimed as reimbursement. Sneath v. Express Messenger, 881 P.2d 453 (Colo. App. 1994).

In determining the "money rate at which the services are rendered" pursuant to subsection (19), there must be included the value of the rate of accrual of the employee's leave time. Meeker v. Provenant Health Partners, 929 P.2d 26 (Colo. App. 1996).

Pension contributions are excluded from the determination of claimant's average weekly wage. City of Lamar v. Koehn, 968 P.2d 164 (Colo. App. 1998).

Panel correctly declined to include the value of claimant's vacation and sick leave in determining claimant's average weekly wage since the leave was subject to forfeiture after a specified maximum number of days had accrued and since the value of the claimant's leave time was dependent upon actual usage and would decline if not used. City of Lamar v. Koehn, 968 P.2d 164 (Colo. App. 1998).

Income from an investment or from a personally operated business does not necessarily constitute "wages". Because the general assembly did not intend to prohibit disabled persons from securing income other than wage income, claimant was not disqualified from receiving permanent total disability benefits simply because he received unspecified income from his investment in a bingo parlor and his former land scraper business. Best-Way Concrete Co. v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995).

B. Computation of Average Weekly Wage.

A claimant's average weekly wage is to be determined according to the contract of hire in force at the time of the injury. Drywall Prods. v. Constuble, 832 P.2d 957 (Colo. App. 1991).

Expense reimbursement of four cents per mile was not considered wages for federal income tax purposes and therefore could not be considered wages for purposes of computing a claimant's average weekly wage. Ernie Baylog, Inc. v. Indus. Claim Appeals Office, 923 P.2d 361 (Colo. App. 1996).

The cost of medicare insurance benefits is included in an injured claimant's average weekly wage once the continuation of the employers' group health insurance plan is terminated. Schelly v. Indus. Claim Appeals Office, 961 P.2d 547 (Colo. App. 1997).

Average weekly wage includes both the employer's and employee's contribution to group health insurance premiums. Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office, 26 P.3d 546 (Colo. App. 2001), aff'd, 145 P.3d 661 (Colo. 2006).

Claimant is not required to present proof that he or she actually purchased replacement coverage. The statute merely seeks to ensure that the claimant will have funds available to make the purchase. Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office, 26 P.3d 546 (Colo. App. 2001); Ray v. Indus. Claim Appeals Office, 124 P.3d 891 (Colo. App. 2005).

Average weekly wage includes the cost of health insurance only when a claimant has continued the employer's coverage at his or her own cost pursuant to COBRA or §10-16-108,and thereafter, when that coverage ends and the claimant has converted to other coverage. An employee's contribution to his or her health care premium during the period of employment does not represent an amount included as wages for the purpose of calculating average weekly wages. Midboe v. Indus. Claim Appeals Office, 88 P.3d 643 (Colo. App. 2003).

An employee who has been terminated from employment, however, following an injury is not required to purchase a continuing policy and convert to an individual plan before that employee becomes entitled to have the cost of continuing the employer's plan included in the average weekly wage. Subsection (19)(b) does not require proof that the claimant has actually purchased coverage. Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office, 26 P.3d 546 (Colo. App. 2001); Ray v. Indus. Claim Appeals Office, 124 P.3d 891 (Colo. App. 2005).

Subsection (19)(b) states that the cost of converting to a similar or lesser insurance plan is included in the average weekly wage computation. When an employee converts to coverage comparable to or lesser than the employer's plan, the cost to the employee of the converted insurance is added to the employee's average weekly wage. Sears Roebuck & Co. v. Indus. Claim Appeals Office, 140 P.3d 336 (Colo. App. 2006).

The absence of comparable market forces does not preclude a claimant from proving a reasonable sum for room and board. Iler v. Indus. Claim Appeals Office, 207 P.3d 945 (Colo. App. 2009).

The mandate in subsection (19)(b) to include the cost of room and board does not require direct proof of actual cost or market value of the room and board, and it does not exclude replacement cost as a viable measure. Hence, claimant's testimony, based on claimant's expenses in Colorado, about the replacement value of food and lodging received while employed in Antarctica established a prima facie case and led to the reasonable inference that the room and board provided by the employer had some value. Iler v. Indus. Claim Appeals Office, 207 P.3d 945 (Colo. App. 2009).

C. Computation.

Increase in benefits was correctly applied retroactively. The case of Henderson v. RSI, Inc., 824 P.2d 91 (Colo. App. 1991), did not establish a new rule of law in finding that the benefits for an occupational disease should be based on the claimant's wages at the time the claimant became disabled rather than on wages at the time of the last injurious exposure. Subsequent Injury Fund v. Indus. Claim Appeals Office, 899 P.2d 220 (Colo. App. 1994).

§ 8-40-202. Employee

(1) "Employee" means:

(a)

(I)

(A) Every person in the service of the state, or of any county, city, town, or irrigation, drainage, or school district or any other taxing district therein, or of any public institution or administrative board thereof under any appointment or contract of hire, express or implied; and every elective official of the state, or of any county, city, town, or irrigation, drainage, or school district or any other taxing district therein, or of any public institution or administrative board thereof; and every member of the military forces of the state of Colorado while engaged in active service on behalf of the state under orders from competent authority. Police officers and firefighters who are regularly employed shall be deemed employees within the meaning of this paragraph (a), as shall also sheriffs and deputy sheriffs, regularly employed, and all persons called to serve upon any posse in pursuance of the provisions of section 30-10-516, C.R.S., during the period of their service upon such posse, and all members of volunteer fire departments, including any person receiving a retirement pension under section 31-30-1122, C.R.S., who serves as an active volunteer firefighter of a fire department subsequent to retirement pursuant to section 31-30-1132, C.R.S., or any person ordered by the chief or a designee of the chief's at the scene of an emergency or during the period of an emergency to become a member of that department for the duration of an emergency, and to perform the duties of a firefighter, and only if the person who is so ordered reports any claim within ten days of the cessation of the emergency, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams in any county, city, town, municipality, or legally organized fire protection district or ambulance district in the state of Colorado, and all members of the civil air patrol, Colorado wing, while said persons are actually performing duties as volunteer firefighters or as members of such volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, or volunteer search teams or as members of the civil air patrol, Colorado wing, and while engaged in organized drills, practice, or training necessary or proper for the performance of such duties. Members of volunteer police departments, volunteer police reserves, and volunteer police teams or groups in any county, city, town, or municipality, while actually performing duties as volunteer police officers, may be deemed employees within the meaning of this paragraph (a) at the option of the governing body of such county or municipality.

(B) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (I), any elected or appointed official of any county, city, town, or irrigation, drainage, or school district or taxing district who receives no compensation for service rendered as such an official, other than reimbursement of actual expenses, may be deemed not to be an employee within the meaning of this paragraph (a) at the option of the governing body of such county, city, town, or district. The option to exclude such officials as employees within the meaning of this paragraph (a) may be exercised as to any category of officials or as to any combination of categories of officials. Any such option may be exercised for any policy year by the filing of a statement with the division not less than forty-five days before the start of the policy year for which the option is to be exercised. If such a statement is in effect as to any category of such uncompensated officials, no official in said category shall be deemed an employee within the meaning of this paragraph (a). The governing body shall notify each official of such action promptly at the time such election to exclude is exercised.

(II) The rate of compensation of such persons accidentally injured, or, if killed, the rate of compensation for their dependents, while serving upon such posse or as volunteer firefighters or as members of such volunteer police departments, volunteer police reserves, or volunteer police teams or groups or as members of such volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, or volunteer search teams or as members of the civil air patrol, Colorado wing, and of every nonsalaried person in the service of the state, or of any county, city, town, or irrigation, drainage, or school district therein, or of any public institution or administrative board thereof under any appointment or contract of hire, express or implied, including nonsalaried elective officials of the state, and of all members of the military forces of the state of Colorado shall be at the maximum rate provided by articles 40 to 47 of this title; except that this subparagraph (II) shall apply to an official described in sub-subparagraph (B) of subparagraph (I) of this paragraph (a) only if no statement exercising the option to exclude such official as an employee within the meaning of this paragraph (a) is in effect.

(III) Any person who, as part of a rehabilitation program of the department of human or social services of any county or city and county, is placed with a private employer for the purpose of training or learning trades or occupations is deemed while so engaged to be an employee of such private employer. Any person who receives a work experience assignment to a position in any department or agency of any county or municipality, in any school district, in the office of any state agency or political subdivision thereof, or in any private for-profit or any nonprofit agency pursuant to the provisions of part 7 of article 2 of title 26 is deemed while so assigned to be

an employee of the respective department, agency, office, political subdivision, private for profit or nonprofit agency, or school district to which said person is assigned or, if so negotiated between the county and the entity to which the person is assigned, of the county arranging the work experience assignment. Any person who receives a work experience assignment to a position in any federal office or agency pursuant to part 7 of article 2 of title 26 is deemed while so assigned to be an employee of the county arranging the work experience assignment. The rate of compensation for such persons if accidentally injured or, if killed, for their dependents is based upon the wages normally paid in the community in which they reside for the type of work in which they are engaged at the time of such injury or death; except that, if any such person is a minor, compensation to such minor for permanent disability, if any, or death benefits to such minor's dependents must be paid at the maximum rate of compensation payable under articles 40 to 47 of this title 8 at the time of the determination of such disability or of such death.

(IV) Except as provided in section 8-40-301(3) and section 8-40-302(7)(a), any person who may at any time be receiving training under any work or job training or rehabilitation program sponsored by any department, board, commission, or institution of the state of Colorado or of any county, city and county, city, town, school district, or private or parochial school or college and who, as part of any such work or job training or rehabilitation program of any department, board, commission, or institution of the state of Colorado or of any county, city and county, city, town, school district, or private or parochial school or college, is placed with any employer for the purpose of training or learning trades or occupations shall be deemed while so engaged to be an employee of the respective department, board, commission, or institution of the state of Colorado or of the county, city and county, city, town, school district, or private or parochial school or college sponsoring such training or rehabilitation program unless the following conditions are met, in which case the placed person shall be deemed an employee of the employer with whom he or she is placed:

(A) The sponsoring entity and the employer agree that the employer shall cover the placed person under the employer's workers' compensation insurance;

(B) The employer does in fact insure and keep insured its liability for workers' compensation as provided in articles 40 to 47 of this title and does in fact cover the placed person under such insurance; and

(C) With respect to agreements between sponsoring entities and employers entered into after April 1, 1991, the employer has been provided with notice

of the provisions of this subparagraph (IV) and of subparagraphs (V) and (VI) of this paragraph (a).

(V) In the event a person placed with an employer is deemed an employee of the employer pursuant to subparagraph (IV) of this paragraph (a), the sponsoring entity shall not be subject to any liability for or on account of the death of or personal injury to the person so placed. In the event such person is deemed an employee of the sponsoring entity pursuant to the said subparagraph (IV), the employer shall not be subject to any liability for or on account of the death of or personal injury to the person and shall not be required to carry workers' compensation insurance or to pay premiums for workers' compensation insurance with respect to the person.

(VI) The rate of compensation for a person placed pursuant to subparagraph (IV) of this paragraph (a) if accidentally injured or, if killed, for dependents of such person shall be based upon the wages normally paid in the community in which such person resides or in the community where said work or job training or rehabilitation program is being conducted for the type of work in which the person is engaged at the time of such injury or death, as determined by the director; except that, if any such person is a minor, compensation for such minor for permanent disability, if any, or death benefits to such minor's dependents shall be paid at the maximum rate of compensation payable under articles 40 to 47 of this title at the time of the determination of such disability or death.

(b) Every person in the service of any person, association of persons, firm, or private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed, who for the purpose of articles 40 to 47 of this title are considered the same and have the same power of contracting with respect to their employment as adult employees, but not including any persons who are expressly excluded from articles 40 to 47 of this title or whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of the employer. The following persons shall also be deemed employees and entitled to benefits at the maximum rate provided by said articles, and, in the event of injury or death, their dependents shall likewise be entitled to such maximum benefits, if and when the association, team, group, or organization to which they belong has elected to become subject to articles 40 to 47 of this title and has insured its liability under said articles: All members of privately organized volunteer fire departments, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations while performing their respective duties as members of such privately organized volunteer fire departments, volunteer rescue teams

or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations and while engaged in organized drills, practice, or training necessary or proper for the performance of their respective duties.

(2)

(a) Notwithstanding any other provision of this section, any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists, unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service shall not be considered if such control is exercised pursuant to the requirements of any state or federal statute or regulation.

(b)

(I) To prove that an individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service, the individual and the person for whom services are performed may show by a preponderance of the evidence that the conditions set forth in paragraph (a) of this subsection (2) have been satisfied. The parties may also prove independence through a written document.

(II) To prove independence it must be shown that the person for whom services are performed does not:

(A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;

(B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

(C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;

(D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(E) Provide more than minimal training for the individual;

(F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

(H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

(III) A document may satisfy the requirements of this paragraph (b) if such document demonstrates by a preponderance of the evidence the existence of the factors listed in subparagraph (II) of this paragraph (b) as are appropriate to the parties' situation. The existence of any one of these factors is not conclusive evidence that the individual is an employee.

(IV) If the parties use a written document pursuant to this paragraph (b), such document must be signed by both parties and may be the contract for performance of service or a separate document. Such document shall create a rebuttable presumption of an independent contractor relationship between the parties where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. All signatures on any such document must be duly notarized.

(V) If the parties use a written document pursuant to this paragraph (b) and one of the parties is a professional whose license to practice a particular occupation under the laws of the state of Colorado requires such professional to exercise a supervisory function with regard to an entire project such supervisory role shall not affect such professional's status as part of the independent contractor relationship.

(c) Nothing in this section shall be construed to conflict with section 8-40-301 or to relieve any obligations imposed pursuant thereto.

(d) Nothing in this section shall be construed to remove the claimant's burden of proving the existence of an employer-employee relationship for purposes of receiving benefits pursuant to articles 40 to 47 of this title.

(e)

(I) Notwithstanding any other provision of this section, a written agreement between a nonprofit youth sports organization and a coach, specifying that the coach is an independent contractor and not an employee of the nonprofit youth sports organization and otherwise satisfying the requirements of this paragraph (e), shall be conclusive evidence that the relationship between the nonprofit youth sports organization and the coach is an independent contractor relationship rather than an employment relationship and that the nonprofit youth sports organization is not obligated to secure compensation for the coach in accordance with the "Workers' Compensation Act of Colorado".

(II) The written agreement shall contain a disclosure, in bold-faced, underlined, or large type, in a conspicuous location, and acknowledged by the parties by signature, initials, or other means demonstrating that the parties have read and understand the disclosure, indicating that the coach:

(A) Is an independent contractor and not an employee of the nonprofit youth sports organization;

(B) Is not entitled to workers' compensation benefits in connection with his or her contract with the nonprofit youth sports organization; and

(C) Is obligated to pay federal and state income tax on any moneys paid pursuant to the contract for coaching services and that the nonprofit youth sports organization will not withhold any amounts from the coach for purposes of satisfying the coach's income tax liability.

(III) A written agreement between a nonprofit youth sports organization and a coach in accordance with this paragraph (e) shall not be conclusive evidence of an independent contractor relationship for purposes of any civil action instituted by a third party.

(IV) As used in this paragraph (e), "nonprofit youth sports organization" means an organization that is exempt from federal taxation under section 501 (c)(3) of the federal "Internal Revenue Code of 1986", as amended, and is primarily engaged in conducting organized sports programs for persons under twenty-one years of age.

(3) Notwithstanding any other provision of this section, "employee" includes a person who participates in a property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

(Amended by 2018 Ch. 38, §2, eff. 8/8/2018. L. 90: Entire article R&RE, p. 470, § 1, effective July 1. L. 91: (1)(a)(IV) amended, p. 1364, § 1, effective April 20; (1)(a)(III) amended, p. 1870, § 23, effective July 1. L. 93: (2) added, p. 356, § 2, effective April 12. L. 94: (1)(a)(III) amended, p. 452, § 2, effective March 29. L. 95: IP(2)(b)(II), (2)(b)(III), and (2)(b)(IV) amended, pp. 343, 344, § 2, effective July 1. L. 97: (1)(a)(I)(A) amended, p. 170, § 3, effective March 28; (1)(a)(III) amended, p. 1239, § 35, effective July 1; (1)(a)(I)(A) and (1)(a)(II) amended, p. 1005, § 2, effective August 6. L. 2010: (2)(e) added, (HB 10-1108), ch. 119, p. 400, §2, effective April 15; (3) added, (HB 10-1076), ch. 162, p. 566, §1, effective August 11. L. 2018: (1)(a)(III) amended, (SB 18-092), ch. 38, p. 396, § 2, effective August 8.)

(1) This section is similar to former § 8-41-106 as it existed prior to 1990.

(2) Amendments to subsection (1)(a)(I)(A) by House Bill 97-1220 and Senate Bill 97-166 were harmonized.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Independent Contractors and the Colorado Workers' Compensation Act -- Parts I and II", see 22 Colo. Law. 545 and 1281 (1993). For article, "Independent Contractors in Colorado", see 34 Colo. Law. 53 (Dec. 2005). For article, "Overview of General Liability, Workers' Compensation, and Employment Law Issues in K-12 Educational Institutions", see 44 Colo. Law. 25 (Oct. 2015). For article, "'Statutory Employment'--What Kind of Work Is That?", see 45 Colo. Law. 53 (June 2016).

Annotator's note. (1) Since § 8-40-202 is similar to § 8-41-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section. For additional cases, see the annotations under former § 8-41-106 in the 1986 replacement volume.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its

powers, duties, and functions under the act to the industrial claim appeals office.

A governing body of the county or municipality must provide worker's compensation to a voluntary peace officer. The statutory language granting a county or municipality the option to not provide such coverage was repealed by implication by §16-2.5-110, which requires the reserve peace officers to be provided with worker's compensation benefits. City of Florence v. Pepper, 145 P.3d 654 (Colo. 2006).

Proper characterization of the employer-employee relationship depends on the facts of each case and is for the commission to determine. Melnick v. Indus. Comm'n, 656 P.2d 1318 (Colo. App. 1982).

To reap the benefits under the workmen's compensation act, a person must in fact first be an employee under the statutory definition. Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

The definition of employee is broad and obviously was so intended by the general assembly. Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Doyle v. Missouri Valley Constructors, Inc., 288 F. Supp. 121 (D. Colo. 1968).

The compensation act emphasizes the objective of protection of employees and in carrying out this objective gives a broad interpretation to the term "employee". Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed. 2d 644 (1974).

And even though the purpose of the workmen's compensation act is to protect all workmen, save those specifically excluded. Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

The definition of an employee entitled to coverage under this act includes "aliens" without distinguishing between legal and illegal aliens and therefore does not preclude, as a matter of law, an illegal alien from proving an entitlement to benefits. Champion Auto Body v. Indus. Claim Appeals Office, 950 P.2d 671 (Colo. App. 1997).

General contractor remains statutory employer of subcontractor's employee and is entitled to a corresponding immunity from suit, despite the fact that the subcontractor is an independent contractor of the general contractor. Frank M. Hall & Co. v. Newsom, 125 P.3d 444 (Colo. 2005).

One cannot be his own employee. Indus. Comm'n v. Bracken, 83 Colo. 72, 262 P. 521 (1927).

"Employee" does not include one injured during pre-employment testing. Applicant who was not under contract as an employee at the time of the accident is not an employee. Younger v. City & County of Denver, 796 P.2d 38 (Colo. App. 1990); Younger v. City & County of Denver, 810 P.2d 647 (Colo. 1991).

"Appointment", as used in the definition of employee set forth in subsection (1)(a) requires that the person making the designation be vested with authority and the designation be for the purpose of discharging the duty of some office or trust. A volunteer pitching coach permitted by a head baseball coach to work with the high school baseball team is not an employee subjecting the school district to workers' compensation liability since school district, and not head coach, is authorized to create additional coaching positions and a volunteer pitching coach position is not an office. Mesa County Valley Sch. D. 51 v. Goletz, 821 P.2d 785 (Colo. 1991).

Three requirements are set forth, any two of which when met can qualify an employee, as the term is used in the statutes, as coming under the workmen's compensation act. They are: (1) A contract of employment created in the state; (2) employment in the state under a contract created outside the state; and (3) substantial employment in the state. If any two of these conditions are met it makes no difference that the employee is not a resident of the state or is killed outside the state provided other statutory time limits on out-of-state employment are met. Platt v. Reynolds, 86 Colo. 397, 282 P. 264 (1929); Tripp v. Indus. Comm'n, 89 Colo. 512, 4 P.2d 917 (1931); Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

"Employee" entitled to workers' compensation benefits is a worker who performs a substantial portion of his work in this state and who is either injured in an accident in this state or has a contract in this state. Loffland Bros. Co. v. Indus. Comm'n, 714 P.2d 509 (Colo. App. 1985).

In determining whether or not a claimant is an employee, the measure of his compensation is not a controlling factor. De Beque Producers' Ass'n v. Indus. Comm'n, 83 Colo. 158, 262 P. 1019 (1928).

For in the statutory definition of employee there is no requirement that a salary be paid for the service rendered. Lyttle v. State Comp. Ins. Fund, 137 Colo. 212, 322 P.2d 1049 (1958).

An unpaid student intern must be deemed a "person placed pursuant to" subparagraph (1)(a)(IV) and is thus entitled to an imputed wage under subparagraph (1)(a)(VI) for purposes of calculating medical impairment benefits, notwithstanding the exception in subparagraph (1)(A)(IV), which exception relates only to who shall be deemed the employer, not whether an employee is entitled to an imputed wage. Kinder v. Indus. Claim Appeals Office, 976 P.2d 295 (Colo. App. 1998).

Whether an injured workman is an employee is a question of fact. N.J. Fid. & Plate Glass Ins. Co. v. Patterson, 86 Colo. 580, 284 P. 334 (1929); Sch. Dist. No. 60 v. Indus. Comm'n, 43 Colo. App. 38, 601 P.2d 651 (1979).

Determination of type of employee deemed question of law. Where the facts are undisputed, the question of whether an individual is an employee as defined by this section, or a constructive employee to whom work has been contracted out as defined by § 8-48-101(1), is a question of law, not a question of fact. Univ. of Colo. Med. Ctr. v. Indus. Comm'n, 622 P.2d 596 (Colo. App. 1980).

And the finding on conflicting evidence is conclusive on review. De Beque Producers' Ass'n v. Indus. Comm'n, 83 Colo. 158, 262 P. 1019 (1928); N.J. Fid. & Plate Glass Ins. Co. v. Patterson, 86 Colo. 580, 284 P. 334 (1929).

Moreover, where various findings are made, the last finding is conclusive. In a workmen's compensation case, although the commission and its referee made three different findings of fact, this did not nullify the rule that the last finding is conclusive. Indus. Comm'n v. Aetna Life Ins. Co., 88 Colo. 82, 292 P. 229 (1930).

So also fact findings sufficiently supported by the evidence will not be disturbed on review. State Comp. Ins. Fund v. Indus. Comm'n, 95 Colo. 309, 35 P.2d 849 (1934); London Guarantee & Accident Co. v. Indus. Comm'n, 95 Colo. 306, 35 P.2d 1010 (1934).

And a court exceeds its jurisdiction in a workmen's compensation case if it attempts to pass upon the weight of the evidence introduced before the director. Indus. Comm'n v. Aetna Life Ins. Co., 88 Colo. 82, 292 P. 229 (1930).

One may be employee by virtue of the statute and not by common-law definition. An obligation to pay workmen's compensation may, in proper cases, be imposed against an owner where the common-law

relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition. Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed. 2d 644 (1974).

Award of benefits of regular employee controlled by section. Where nurse claiming benefits was a regular employee of the University of Colorado Medical Center, subsection (1)(a)(I) controlled the award of benefits as opposed to § 8-48-101(1). Univ. of Colo. Med. Ctr. v. Indus. Comm'n, 622 P.2d 596 (Colo. App. 1980).

Award based upon erroneous interpretation of law sustained if award proper absent misinterpretation. Even though a court may determine that the industrial commission erroneously interpreted the law, if the commission's award would have been correct had the law been properly interpreted, that award will be sustained. Univ. of Colo. Med. Ctr. v. Indus. Comm'n, 622 P.2d 596 (Colo. App. 1980).

Applied in Kalmon v. Indus. Comm'n, 41 Colo. App. 259, 583 P.2d 946 (1978); Ellis v. Rocky Mt. Empire Sports, Inc., 43 Colo. App. 166, 602 P.2d 895 (1979); Peterson v. Trailways, Inc., 555 F. Supp. 827 (D. Colo. 1983); AGS Mach. Co. v. Indus. Comm'n, 670 P.2d 816 (Colo. App. 1983).

II. EMPLOYEE OR INDEPENDENT CONTRACTOR.

Subsection (1)(b) contemplates contractual and quasi-contractual relationships created by estoppel, and should be interpreted broadly to protect workers. Olsen v. Indus. Claim Appeals Office, 819 P.2d 544 (Colo. App. 1991).

"Contractor" is not necessarily outside of the category of "employee". The term "employee" has both a narrow, specific, and a wider generic meaning. Indus. Comm'n v. Cont'l Inv. Co., 78 Colo. 399, 242 P. 49 (1925).

But factors to be considered in determining whether one performing labor for another is a servant or a contractor are: Does the workman give all or only a part of his time to the work; does the contract contemplate labor on the job, or completion; has the laborer or the employee control of the details; which may employ, control, and discharge assistants; which furnishes the necessary tools and equipment; may either terminate the employment without liability to the others; is compensation measured by time, by piece, or by lump sum? Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

There are two tests for determining whether a worker is an actual employee or an independent contractor: the "control" test and the "relative nature of the work" test, and if either test is satisfied the worker is an employee. Stampados v. Colo. D & S Enters., 833 P.2d 815 (Colo. App. 1992).

The definition of an "independent contractor" in §40-11.5-102 was intended to apply to the Workers' Compensation Act. Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., 859 P.2d 323 (Colo. App. 1993).

A servant is one whose employer has the order and control of work done by him and who directs or may direct the means as well as the end. Arnold v. Lawrence, 72 Colo. 528, 213 P. 129 (1923); Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

And it is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Faith Realty & Dev. Co. v. Indus. Comm'n, 170 Colo. 215, 460 P.2d 228 (1969).

The right immediately to discharge involves the right of control. Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956).

Thus the most important point in determining the question of contractor or employee is the right to terminate the relation without liability. Indus. Comm'n v. Hammond, 77 Colo. 414, 236 P. 1006 (1925); Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Brush Hay Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963); Faith Realty & Dev. Co. v. Indus. Comm'n, 170 Colo. 215, 460 P.2d 228 (1969).

For the absolute right to terminate the relationship without liability is inconsistent with the concept of independent contractor. Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956).

Where compensation is based upon time or piece the workman is usually a servant and where it is based upon a lump sum for the task he is usually a contractor. Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

A person may be determined to be an independent contractor even if all nine criteria outlined in subsection (2)(b)(II) are not established. Nelson v. Indus. Claim Appeals Office, 981 P.2d 210 (Colo. App. 1998).

Presumption of independent contractor status recognized in subsection (5) may be overcome by clear and convincing evidence of control over the means and methods of performance that are wholly unrelated to the achievement of the end contracted for. Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., 859 P.2d 323 (Colo. App. 1993).

Ski patrol worker who negotiated for a ski pass in lieu of salary in exchange for services was not a "volunteer" for purpose of exclusion from coverage under this article. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

If the facts are undisputed as to whether a workman is an employee or a contractor, the question is one of law. Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925).

And may be reviewed by the supreme court. Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

But if the question of whether workman was employee or independent contractor is one of fact, to be determined from conflicting evidence, it is for the commission. Whitney v. Mtn. States Motors Co., 106 Colo. 184, 102 P.2d 743 (1940); Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

Claimant's relationship with newspaper publisher was an employment relationship where the newspaper exercised control over claimant by directing the time and place of newspaper delivery and delivery of newspapers was not a separate enterprise from the business of the newspaper. Contract which characterized claimant as an independent contractor was not controlling. Olsen v. Indus. Claim Appeals Office, 819 P.2d 544 (Colo. App. 1991).

Acceptance of premiums by insurance fund for employee made fund liable for claim. Actions of the state compensation insurance fund, which accepted workmen's compensation premium payments from employer based on employee status of carpenter constructing employer's private residence and which did not give employer notice that premium payment was accepted subject to appeal of determination that carpenter was employer's employee for workmen's compensation purposes, constituted

conduct which would convey impression that the fund intended to cover carpenter's workmen's compensation claim; therefore, the fund was liable for workmen's compensation benefits awarded carpenter. Drake v. Ins. Co. of N. Am., 736 P.2d 1244 (Colo. App. 1986).

Instances of employees. Indus. Comm'n v. Globe Indem. Co., 77 Colo. 251, 235 P. 576 (1925); Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); De Beque Producers' Ass'n v. Indus. Comm'n, 83 Colo. 158, 262 P. 1019 (1928); State Comp. Ins. Fund v. Indus. Comm'n, 95 Colo. 309, 35 P.2d 849 (1934); Indus. Comm'n v. Sontarelli, 109 Colo. 84, 122 P.2d 239 (1942); Kampt v. Disney, 110 Colo. 518, 135 P.2d 1019 (1943); Neely-Towner Motor Co. v. Indus. Comm'n, 123 Colo. 472, 230 P.2d 993 (1951); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Faith Realty & Dev. Co. v. Indus. Comm'n, 170 Colo. 215, 460 P.2d 228 (1969).

Instances of independent contractor. Indus. Comm'n v. Cont'l Inv. Co., 78 Colo. 399, 242 P. 49 (1925); London Guarantee & Accident Co. v. Indus. Comm'n, 95 Colo. 306, 35 P.2d 1010 (1934); Whitney v. Mtn. States Motors Co., 106 Colo. 184, 102 P.2d 743 (1940); Warner v. Messick, 108 Colo. 342, 117 P.2d 482 (1941); Wilkowski v. Indus. Comm'n, 113 Colo. 46, 154 P.2d 615 (1944); Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963); Sands v. Indus. Comm'n, 160 Colo. 42, 413 P.2d 702 (1966).

Subsection (2) cited in Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., 859 P.2d 323 (Colo. App. 1993).

III. CONTRACT FOR HIRE.

The requirement of contract of hire was written into the workmen's compensation act for two reasons: First, the necessity for a "contract" was felt to insure than an employee did not give up legal rights against an employer without receiving value in return; and second, the contract had to be one "of hire" because, absent the expectation of remuneration at some rate, there was no way to compute benefits. Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

And § 8-41-105 and this section speak of "any contract of hire, express or implied", indicating that several "contracts of hire" may exist in a given situation and recovery had upon "any". Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

Thus, both an express and implied "contract of hire" could exist between the same parties but covering different employment or covering the same employment but with differing parties. Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

When a claim is filed under the workmen's compensation act, the burden of proof is upon the claimant to prove that he was an employee by showing the existence of a contract of hire. Hall v. State Comp. Ins. Fund, 154 Colo. 47, 387 P.2d 899 (1963).

And where the evidence does not disclose any contractual obligation, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the act. State Comp. Ins. Fund v. Indus. Comm'n, 135 Colo. 570, 314 P.2d 288 (1957); Hall v. State Comp. Ins. Fund, 154 Colo. 47, 387 P.2d 899 (1963).

Claimant who received a ski pass for use by another person was an employee since the pass is a benefit comprising compensation. The lack of any wages as defined in §8-40-201(19) does not mean that no "contract of hire" exists under subsection (1)(b). Aspen Highlands Skiing Corp. v. Apostolou, 854 P.2d 1357 (Colo. App. 1992).

A contract of hire may be formed as long as the fundamental elements of contract formation are present even though not every formality attending commercial contractual arrangements is observed. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

Contract of hire found to exist where claimant was part-time ski patrol worker who agreed to work only in exchange for the benefit of daily ski pass in lieu of salary and who worked under the direction of the employer. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

IV. PUBLIC EMPLOYEES.

The statutory definition of "employees" includes employees of the state. Myers v. State, 162 Colo. 435, 428 P.2d 83 (1967).

And if working for a public employer must be a "public employee". Under the statutory classification of employer and employee, before a claimant can fix liability on a public employer, under the workmen's compensation act, for compensation for accidental injuries, he must be within the designation of "public employee". Indus. Comm'n v. State Comp. Ins. Fund, 94 Colo. 194, 29 P.2d 372 (1934).

All workers in service of the state are treated as state "employees", not as employees of separate entities, for purposes of workers' compensation benefits. Rodriguez v. Bd. of Dirs., 917 P.2d 358 (Colo. App. 1996).

Public employees. No intent can be found in the general assembly through the pertinent provisions of the workmen's compensation law to make any distinction in the classification of public employees between those who are engaged in governmental functions and those who are engaged in the proprietary branch of a political subdivision. The basic distinction of the act is between public employees and private employees. State Comp. Ins. Fund v. Alishio, 125 Colo. 242, 250 P.2d 1015 (1952).

A governmental entity cannot be a constructive employer pursuant to § 8-48-101(1). Antal v. Delta County Mosquito Control Dist. No. 1, 644 P.2d 87 (Colo. App. 1982).

Inmates are not employees of state or county. Orr v. Indus. Comm'n, 691 P.2d 1145 (Colo. App. 1984), att'd, 716 P.2d 1106 (Colo. 1986).

City as employer. State Comp. Ins. Fund v. Alishio, 125 Colo. 242, 250 P.2d 1015 (1952).

An unsalaried member of a state board or commission is an employee of the state, and within the coverage of the workmen's compensation law, and had the general assembly intended to exclude such persons from coverage, language other than the words actually used would have been employed. Lyttle v. State Comp. Ins. Fund, 137 Colo. 212, 322 P.2d 1049 (1958).

Furthermore, it is evident that the intent of the general assembly was to provide that the employees and appointees of the county, as specified therein, together with all nonsalaried employees, should be paid at the maximum rate of compensation. State Comp. Ins. Fund v. Keane, 160 Colo. 292, 417 P.2d 8 (1966).

The status of a juror is not that of an employee serving under this section, by "appointment or contract of hire, express or implied". The legislative branch of the government has not said that a juror is an employee of the county, and it does not lie with the judicial branch to belittle the functions of his great office by so declaring. Bd. of Comm'rs v. Evans, 99 Colo. 83, 60 P.2d 225 (1936).

Employer of student teachers. Section 22-62-105(2) deems a school district the employer of a student teacher whereas the general provision of subsection (1)(a)(IV) of this section designates the sponsoring institution as the employer of its job trainees. Section 22-62-105(2) merely shifts workmen's compensation liability for injury to student teachers to a different institution; where applicable, it is a legally enforceable specific

exception to the general rule prescribed by subsection (1)(a)(IV). Sch. Dist. No. 60 v. Indus. Comm'n, 43 Colo. App. 38, 601 P.2d 651 (1979).

Claimant was participating as a volunteer fireman, and not merely as a patriotic citizen, at the time of his injury, while participating in a public patriotic celebration. Nw. Conejos Fire Prot. Dist. v. Indus. Comm'n, 39 Colo. App. 367, 566 P.2d 717 (1977).

The rate of compensation for persons accidentally injured while serving as volunteer firefighters shall be at the maximum rate provided by the Workers' Compensation Act. Subsection (1)(a)(II) creates an exception to the usual measure of calculating disability benefits. To the extent that subsection (1)(a)(II) gives injured volunteer firefighters a windfall, such a result has been mandated by the general assembly. Parker Fire Prot. Dist. v. Poage, 843 P.2d 108 (Colo. App. 1992).

Volunteer member of civil air patrol traveling on duty to attend organized training when injured suffers an injury which arises out of and in the course of his employment. Colo. Civil Air Patrol v. Hagans, 662 P.2d 194 (Colo. App. 1983).

Volunteer member of county search and rescue team, who served as president and incident commander, was an "employee" for purposes of compensation for injuries suffered while traveling to a fire chiefs' meeting to discuss planning and coordination of rescue activities. Although the meeting was not mandatory, it was part of his duties pursuant to the custom and practice in which the county acquiesced and from which the county benefitted. Teller County v. Indus. Claim Appeals Office, 2015 COA 52, 410 P.3d 561.

National Guard training is not "active service" for purposes of the receipt of workers' compensation benefits. A member of the National Guard may not be considered to be on "active service" and hence qualified for workers' compensation benefits unless he or she has been ordered by the governor to provide full-time service in response to an emergency confronting the state. Sullivan v. Indus. Claim Appeals Office, 22 P.3d 535 (Colo. App. 2000).

V. PRIVATE EMPLOYEES.

A. In General.

Attorney regularly employed by a corporation is an "employee". An attorney at law who is employed by a corporation regularly, and whose time and services are subject to the call of the employer under the terms of

the employment, is an "employee" as that word is used in this section. Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934).

For in none of the provisions of the act is there language which expressly excludes members of the professions, attorney or other, if otherwise within the statute, from the enjoyment of its protecting purpose. Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934).

Workmen's compensation acts are being extended even to employees of charitable institutions. Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

Student paid by university for particular service is employee subject to act. Where a stipulated monthly amount is paid by a university for a particular service rendered by one who is also a student, it cannot be said that the university is merely "assisting" the student to obtain an education, and that the student, if injured in the course of his employment, cannot have the benefits of the compensation law. Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

Student employee status in job training program. To be an "employee" of the school district one must, at the time of injury, be receiving training under a work or job training program sponsored by the school district and one must have been placed by the school district with an employer for the purpose of training or learning trades or occupations. Further, the trainee is deemed an "employee" only "while so engaged" in such programs. Denver Pub. Sch. v. De Avila, 190 Colo. 184, 544 P.2d 627 (1976).

A critical requirement of the statute is that in order for the claimant to become an "employee" it was necessary that she be "placed" with the hospital for the purpose of training. The evidence discloses that at the time of her injury the claimant was not so "placed" where it is explicit that at the time of her injury the claimant was attending classes conducted exclusively by instructors employed by the school district. Under such circumstances, claimant does not come within the definition of "employee" and the school district is not liable for the injury sustained as the result of her mishap. Denver Pub. Sch. v. De Avila, 190 Colo. 184, 544 P.2d 627 (1976).

Discharged employee is thereafter a mere volunteer not subject to the act. The employee having been discharged, he was a mere volunteer, wrongfully engaged in driving the car of his former employer at the time of the accident; neither the doctrine of ratification nor estoppel had the slightest application to the case, even though the employer subsequently received the regular fare for the trip from the claimants, and upon no

possible theory could the claimants recover compensation at the hands of the employer. Burke v. Indus. Comm'n, 70 Colo. 394, 201 P. 891 (1921).

B. Casual Employment.

Law reviews. For comment on Heckman v. Warren appearing below, see 24 Rocky Mt. L. Rev. 396 (1952).

For subsection (1)(b) exclusion to apply, casualness and course of business must exist. Brogger v. Kezer, 626 P.2d 700 (Colo. App. 1980).

Exclusion inapplicable where home deemed necessary facet of business. The maintenance of a home which serves as a company office and is used for entertaining customers is a necessary facet of the employer's business, and, thus, the exclusion of subsection (1)(b) is not applicable. Brogger v. Kezer, 626 P.2d 700 (Colo. App. 1980).

Casual is an antonym of regular. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

Casual employment is that which is occasional, incidental, temporary, emergent or haphazard. An employment, therefore, is casual within the meaning and intent of the workmen's compensation act when it is not regular, periodic or certain in nature. Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

But the fact that the employment is casual is not enough to exclude an employee from the count in determining whether employer had four employees. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Hoshiko v. Indus. Comm'n, 83 Colo. 556, 226 P. 1114 (1928); Comerford v. Carr, 86 Colo. 590, 284 P. 121 (1930); Kamp v. Disney, 110 Colo. 518, 135 P.2d 1019 (1943); Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951); Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

For the employment must also not be in the usual course of trade, business, or occupation of employer. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Hoshiko v. Indus. Comm'n, 83 Colo. 556, 266 P. 1114 (1928); Comerford v. Carr, 86 Colo. 590, 284 P. 121 (1930); Kamp v. Disney, 110 Colo. 518135 P.2d 1019 (1943); Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951); Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

And one is employed in the usual course of trade, business, profession or occupation of his employer when he is engaged in work

of the kind required in the business of the employer, and such work is in conformity with the established scheme or system of the business. If it is work of the kind required in the employer's business and in conformity with his established scheme or system of doing business, then it is in the usual course thereof. The term "usual course of business" has reference to the normal operations constituting the regular business of the employer. Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

Thus the workmen's compensation act is inapplicable if, at the time of an employee's injuries, his employment was casual "and not in the usual course of trade, business, profession or occupation of his employer". Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

But the fact that the servant is not employed for any specified time does not render his employment casual. Indus. Comm'n v. Funk, 68 Colo. 467, 191 P. 125 (1920).

So that casual employment in usual course of employer's business is sufficient. Even where the employment is casual, if at the time of the accident the employee was engaged in the usual course of the employer's business, he still is an employee within the terms of this title. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Hoshiko v. Indus. Comm'n, 83 Colo. 556, 226 P. 1114 (1928); Royal Indem. Co. v. Indus. Comm'n, 105 Colo. 25, 94 P.2d 697 (1927).

Employment not casual. Claimant who was employed on an hourly basis to perform part of the work of constructing a small office building on a used car lot was not a casual employee of the operator of the lot, and his employment was in the usual course of the operator's business. Neely-Towner Motor Co. v. Indus. Comm'n, 123 Colo. 472, 230 P.2d 993 (1951).

"Usual course of trade or business" does not apply to a single act of building by a farmer in a neighboring town. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926).

Emergency employee not active in usual course of business. Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

An attorney at law regularly employed by a corporation is not a casual employee and his employment is in the usual course of a company's business. Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934).

(1) For the scope of the term "employee", see §8-40-301.

(2) For the legislative declaration in the 2010 act adding subsection (2)(e), see section 1 of chapter 119, Session Laws of Colorado 2010.

(3) For the legislative declaration in SB 18-092, see section 1 of chapter 38, Session Laws of Colorado 2018.

§ 8-40-203. Employer

(1) "Employer" means:

(a) The state, and every county, city, town, and irrigation, drainage, and school district and all other taxing districts therein, and all public institutions and administrative boards thereof without regard to the number of persons in the service of any such public employer. All such public employers shall be at all times subject to the compensation provisions of articles 40 to 47 of this title.

(b) Every person, association of persons, firm, and private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, who has one or more persons engaged in the same business or employment, except as otherwise expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied.

(c) Repealed.

(L. 90: Entire article R&RE, p. 473, § 1, effective July 1. L. 91: (1)(c) repealed, p. 1294, § 5, effective July 1.)

This section is similar to former § 8-41-105 as it existed prior to 1990.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Corporations, Partnership and Agency", see 37 Dicta 11 (1960). For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L. J. 82 (1970).

Annotator's note. Since § 8-40-203 is similar to § 8-41-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

The definition of "employer" in this section should be broadly or liberally construed, in order to effectuate the purpose of the legislation. Conover v. Indus. Comm'n, 125 Colo. 388, 244 P.2d 875 (1952).

Consequently, the workmen's compensation act extends the concept of "employer" far beyond the meaning of that term at common law. Doyle v. Missouri Valley Constructors, Inc., 288 F. Supp. 121 (D. Colo. 1968).

But the rule of liberal construction cannot be extended to a case that is removed by the statute itself. Smith v. Indus. Comm'n, 134 Colo. 454, 306 P.2d 254 (1957).

Proper characterization of the employer-employee relationship depends on the facts of each case and is for the commission to determine. Melnick v. Indus. Comm'n, 656 P.2d 1318 (Colo. App. 1982).

An employment contract need not provide for the payment of "wages" in order for one employed under such a contract to qualify as an "employee" under this article. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

Applied in Hefley v. Morales, 197 Colo. 523, 595 P.2d 233 (1979); Ellis v. Rocky Mt. Empire Sports, Inc., 43 Colo. App. 166, 602 P.2d 895 (1979); Stampados v. Colo. D & S Enters., 833 P.2d 815 (Colo. App. 1992).

II. PUBLIC EMPLOYERS.

All state agencies are considered a single "employer" and all persons in the service of the state are its employees. Rodriguez v. Bd. of Dirs., 917 P.2d 358 (Colo. App. 1996).

A city becomes an employer of those persons defined as employees in § 8-41-106. State Comp. Ins. Fund v. Alishio, 125 Colo. 242, 250 P.2d 1015 (1952).

III. PRIVATE EMPLOYERS.

Where two or more companies form a joint venture, the joint venture itself is an "association of persons" and an "employer" within the meaning of the workmen's compensation act. Being of that status, a joint venture and its insurance carrier could be made to respond to claims asserted under the act. D. E. Jones Constr. Co. v. Heirs of Jones, 29 Colo. App. 482, 487 P.2d 822 (1971).

And the joint venture and each of its participants are jointly and severally liable for claims asserted by or on behalf of an employee engaged in work being prosecuted by the joint venture. As to a claimant for benefits, there is nothing which makes the liability of any one of such parties primary to, or exclusive of, the liabilities of the others. The insurance coverage of one liable as a participant in the joint venture extends to and follows that participant within the joint venture operations. Consequently, an employee, may assert his claim against the joint venture itself, or any or all members thereof and their respective insurer or insurers must discharge

the claim. Indus. Comm'n v. Lopez, 150 Colo. 87, 371 P.2d 269 (1962); D. E. Jones Constr. Co. v. Heirs of Jones, 29 Colo. App. 482, 487 P.2d 822 (1971).

Thus, employer status not divested by engaging in joint venture. Where a joint venture is in furtherance of business in which two cement contractors are engaged, and each is an employer with respect to his own operation, they cannot divest themselves of such status by engaging in a joint venture in the same business in which each is individually engaged, notwithstanding they employ less than four employees on particular job. Indus. Comm'n v. Lopez, 150 Colo. 87, 371 P.2d 269 (1962).

An "association of persons" need not measure up to the requirements of a partnership in order to come within the meaning of "employer" as used in this section. Conover v. Indus. Comm'n, 125 Colo. 388, P.2d 875 (1952).

Employment of employee need not be same as his employer. There is no discernible legislative intent in this section which would require that the employment of the employee be the same as that of the employer. Schultz v. Indus. Comm'n, 34 Colo. App. 122, 523 P.2d 164 (1974).

Parent corporation, sued by employee of its wholly-owned subsidiary, is not an "employer" entitled to immunity from tort liability under the workmen's compensation act. Peterson v. Trailways, Inc., 555 F. Supp. 827 (D. Colo. 1983).

Unincorporated self-employed repairman not "employer". Self-employed sheet metal and heating repairman, using the name "M. Kunz and Sons, Inc.", although he had not completed incorporation, is not an "employer" and not required to carry workmen's compensation insurance for himself. Canda v. Indus. Comm'n, 44 Colo. App. 70, 607 P.2d 403 (1980).

The requirement of contract of hire was written into the workmen's compensation act for two reasons: First, the necessity for a "contract" was felt to insure that an employee did not give up legal rights against an employer without receiving value in return; and second, the contract had to be one "of hire" because, absent the expectation of remuneration at some rate, there was no way to compute benefits. Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

And this section and § 8-41-107 speak of "any contract of hire, express or implied", indicating that several "contracts of hire" may exist in a given situation and recovery had upon "any". Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

So that both an express and implied "contract of hire" could exist between the same parties but covering different employment or covering the same employment but with differing parties. Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

Usual master-servant relationship. If the relationship between the parties is that of the usual master-servant variety, then workmen's compensation liability is determined by analyzing the factual situation in terms of the statutory inclusions and exclusions stated in this section. Schultz v. Indus. Comm'n, 34 Colo. App. 122, 523 P.2d 164 (1974).

A general servant of one party may be loaned by his master for some special purpose so as to become for that service the servant of the party to whom he is loaned and to impose on him the usual liabilities of a master. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

Thus, there may exist at one time the relationship of general employer and a special employer as to one employee. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

Liability of employer determined by "control" or "whose business" test. The liability of a general or special employer is sometimes determined by ascertaining who has control of the borrowed employee and equipment used in rendering the service, and sometimes it is determined by ascertaining in whose business the special employee was engaged. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

The control test is that the relation of master and servant exists whenever one person stands in such a relation to another that he may control the work of the other and direct the manner in which it shall be performed. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

The whose business test holds the owner of the business liable if a servant or employee at the time of a negligent act resulting in damages to others is actually engaged in performing work or labor for the special, rather than the general, employer. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

But each case must be determined in the light of the existing facts and circumstances, and frequently it is necessary that both the control test and whose business test be considered in determining upon whom the liability shall rest where there is a general, as well as a special, employer, and damages are claimed because of the negligence of an employee. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

A real estate brokerage concern which manages properties for others as a part of its business, collecting rent and making improvements and repairs, and which employs men to wash the walls of a building it has in charge, is an employer within the definition of this section. Alson Inv. Co. v. Youngquist, 107 Colo. 1, 108 P.2d 228 (1940).

But the act does not apply to nonresident employers. Hall v. Indus. Comm'n, 77 Colo. 338, 235 P. 1073 (1925).

For the scope of the term "employer", see §8-40-302.

§ 8-40-301. [Effective Until 7/1/2024] Scope of term "employee" - definition

(1)

(a) "Employee" excludes any person employed by a passenger tramway area operator, as defined in section 12-150-103(1), or other employer, while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment, regardless of whether such person is utilizing, by discount or otherwise, a pass, ticket, license, permit, or other device as an emolument of employment.

(b)

(I) "Employee" excludes any person employed by an out-of-state employer performing incidental work in Colorado where the employee is covered at the time of injury under the workers' compensation act of another state regardless of where the contract for employment was created.

(II) For purposes of this section, "incidental work" means work that is randomly or fortuitously in Colorado.

(III) This section only applies to a workers' compensation act of another state that includes a reciprocal provision exempting Colorado employers from liability under the other state's act for incidental work.

(2) "Employee" excludes any person who is a licensed real estate sales agent or a licensed real estate broker associated with another real estate broker if:

(a) Substantially all of the sales agent's or associated broker's remuneration from real estate brokerage is derived from real estate commissions; and

(b) The services of the sales agent or associated broker are performed under a written contract specifying that the sales agent or associated broker is an independent contractor; and

(c) Such contract provides that the sales agent or associated broker shall not be treated as an employee for federal income tax purposes.

(3)

(a) Notwithstanding the provisions of section 8-40-202(1)(a)(IV), "employee" excludes any person who is confined to a city or county jail or any department of corrections facility as an inmate and who, as a part of such confinement, is working, performing services, or participating in a training or rehabilitation or work release program; except that "employee"

includes an inmate of a department of corrections facility or a city, county, or city and county jail who is working, performing services, or participating in a training, rehabilitation, or work release program that has been certified by the federal prison industry enhancement certification program pursuant to the federal "Justice System Improvement Act of 1979", 18 U.S.C. sec. 1761(c). For the purposes of articles 40 to 47 of this title, an inmate participating in a program certified by the federal prison industry enhancement certification program is an employee of that certified program, which certified program shall carry workers' compensation insurance pursuant to articles 40 to 47 of this title. No inmate participating in a certified program shall be deemed to be an employee of the state, city, county, or city and county that owns, operates, or contracts for the operation of the facility or jail in which the inmate is incarcerated.

(b) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate who is working for a private employer under a contract of hire wherein the private employer is required to maintain workers' compensation insurance for its employees pursuant to articles 40 to 47 of this title. Such inmate shall be an employee of such private employer for purposes of articles 40 to 47 of this title.

(c) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate working for a joint venture established pursuant to the provisions of section 17-24-119 or 17-24-121, C.R.S. Such inmate shall be an employee of such joint venture for purposes of articles 40 to 47 of this title.

(d) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate working for a private person or entity pursuant to the provisions of section 17-24-122, C.R.S. Such inmate shall be an employee of such private person or entity for purposes of articles 40 to 47 of this title.

(4) "Employee" excludes any person who volunteers time or services for a ski area operator, as defined in section 33-44-103(7), C.R.S., or for a ski area sponsored program or activity, notwithstanding the fact that such person may receive noncash remuneration for such person or such person's designee in conjunction with such person's status as a volunteer. No contract of hire, express or implied, is created between any volunteer pursuant to this section and a ski area operator. Notice shall be given to such volunteer in writing that the volunteering of time or services under this subsection (4) does not constitute employment for purposes of the "Workers' Compensation Act of Colorado" and that such person is not entitled to benefits pursuant to said act.

(5) "Employee" excludes any person who is working as a driver under a lease agreement pursuant to section 40-11.5-102, C.R.S., with a common carrier or contract carrier.

(6) Any person working as a driver with a common carrier or contract carrier as described in this section shall be eligible for and shall be offered workers' compensation insurance coverage by Pinnacol Assurance or similar coverage consistent with the requirements set forth in section 40-11.5-102(5), C.R.S.

(7) Persons who provide host home services as part of residential services and supports, as described in section 25.5-10-206(1)(e), C.R.S., for an eligible person, as defined in section 25.5-6-403(2)(a), C.R.S., pursuant to the "Home- and Community-based Services for Persons with Developmental Disabilities Act", part 4 of article 6 of title 25.5, C.R.S., and pursuant to a contract with a community-centered board designated pursuant to section 25.5-10-209, C.R.S., or a contract with a service agency as defined in section 25.5-10-202, C.R.S., shall not be considered employees of the community-centered board or the service agency.

(8) For the purposes of articles 40 to 47 of this title 8, "employee" excludes any person who performs services for more than one employer at a race meet as defined by section 44-32-102(20) or at a horse track as defined by section 44-32-102(8).

(9) Notwithstanding any other provision of this section, "employee" includes a person who participates in a property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

(Amended by 2019 Ch. 136, §20, eff. 10/1/2019. Amended by 2018 Ch. 26, §4, eff. 10/1/2018. Amended by 2017 Ch. 317, §2, eff. 7/1/2017. L. 90: Entire article R&RE, p. 473, § 1, effective July 1. L. 92: (5) and (6) added, p. 1798, § 1, effective June 6. L. 93: (3) amended, p. 2129, § 3, effective September 1. L. 94: (4) amended, p. 1288, § 1, effective July 1. L. 95: (1) and (3)(c) amended, p. 1091, § 1, effective May 31. L. 97: (3)(c) amended, p. 1031, § 66, effective August 6. L. 2000: (7) added, p. 1497, § 1, effective August 2. L. 2002: (6) amended, p. 1882, § 28, effective July 1. L. 2003: (8) added, p. 728, § 1, effective March 20. L. 2006: (7) amended, p. 1998, § 30, effective July 1. L. 2010: (3)(a) amended, (HB 10-1109), ch. 171, p. 606, §1, effective August 11; (9) added, (HB 10-1076), ch. 162, p. 566, §2, effective August 11. L. 2013: (7) amended, (HB 13-1314), ch. 323, p. 1800, § 17, effective March 1, 2014. L. 2017: (1) amended, (HB 17-1119), ch. 317, p. 1705, § 2, effective July 1. L. 2018: (8) amended, (HB 18-1024), ch. 26, p. 321, § 4, effective October 1.)

This section is similar to former § 8-41-106 as it existed prior to 1990.

This section is set out more than once. See also C.R.S. §8-40-3012, effective 7/1/2024.

ANNOTATION

Annotator's note. Since § 8-40-301 is similar to § 8-41-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

Inmates are not employees of state or county. Orr v. Indus. Comm'n, 691 P.2d 1145 (Colo. App. 1984), att'd, 716 P.2d 1106 (Colo. 1986).

Subsection (5) is not ambiguous and includes a driver who is working for an independent contractor under a conforming lease with a contract carrier. FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

The word "under" in subsection (5) is not ambiguous. FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

The legislative intent appears clear to exclude independent contractors and their drivers from the class of statutory employees. FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

Had the general assembly intended to exclude only independent contractors from the provisions of this section, it would not have allowed independent contractors to use assistants pursuant to §40-11.5-102(1)(f). FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

The traditional test set forth in City and County of Denver v. Lee, 450 P.2d 352 (Colo. 1969), for determining when recreational activities fall within the course and scope of employment remain valid under subsection (1) as amended in 1989 in determining whether an employee engaged in a recreational activity is within the coverage of the workers' compensation act. Karlin v. Conrad, 876 P.2d 64 (Colo. App. 1993).

Exclusion provided by subsection (5) is conditional not absolute. It takes effect only when the lease agreement required by §40-11.5-102 includes complying coverage. USF Distribution Servs., Inc. v. Indus. Claim Appeals Office, 111 P.3d 529 (Colo. App. 2004).

Ski instructor injured while skiing recreationally was not entitled to workers' compensation benefits as injury did not occur in course and scope of employment. Dunavin v. Monarch Recreation Corp., 812 P.2d 719 (Colo. App. 1991).

Evidence that claimant agreed to act as a member of the ski patrol only after negotiating with the supervisor to receive a special benefit is sufficient to support the administrative law judge's finding that, without such consideration, claimant would have refused to render any services as a patrol member and therefore claimant was not a volunteer under the statute. Aspen Highlands Skiing Corp. v. Apostolou, 854 P.2d 1357 (Colo. App. 1992).

Ski patrol worker who negotiated for a ski pass in lieu of salary in exchange for services was not a "volunteer" for purpose of exclusion from coverage under this article. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

Under this section, any employee who participates in employer-sponsored recreation due to pressure exerted by employer rather than at employee's own initiative is entitled to benefits for injuries sustained during activity. However, any employee who is injured while voluntarily engaging, upon his own initiative, in recreational activity which does not benefit the employer or fulfill any job duties is not entitled to compensation. Dunavin v. Monarch Recreation Corp., 812 P.2d 719 (Colo. App. 1991).

A leased driver was not limited to workers' compensation benefits for injuries received while performing duties within the lease agreement. The leased driver was not an employee for purposes of workers' compensation because section (5)(b) is an exception to the more general workers' compensation statutes. Scott v. Matlack, Inc., 1 P.3d 185 (Colo. App. 1999), rev'd on other grounds, 39 P.3d 1160 (Colo. 2002).

Leased driver was entitled to benefits at least equivalent to workers' compensation benefits under subsection (6). USF Distribution Servs., Inc. v. Indus. Claim Appeals Office, 111 P.3d 529 (Colo. App. 2004).

The definition of an employee entitled to coverage under this act includes "aliens" without distinguishing between legal and illegal aliens and therefore does not preclude, as a matter of law, an illegal alien from proving an entitlement to benefits. Champion Auto Body v. Indus. Claim Appeals Office, 950 P.2d 671 (Colo. App. 1997).

§ 8-40-301. [Effective 7/1/2024] Scope of term "employee" - definition

(1)

(a) "Employee" excludes any person employed by a passenger tramway area operator, as defined in section 12-150-103(1), or other employer, while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment, regardless of whether such person is utilizing, by discount or otherwise, a pass, ticket, license, permit, or other device as an emolument of employment.

(b)

(I) "Employee" excludes any person employed by an out-of-state employer performing incidental work in Colorado where the employee is covered at the time of injury under the workers' compensation act of another state regardless of where the contract for employment was created.

(II) For purposes of this section, "incidental work" means work that is randomly or fortuitously in Colorado.

(III) This section only applies to a workers' compensation act of another state that includes a reciprocal provision exempting Colorado employers from liability under the other state's act for incidental work.

(2) "Employee" excludes any person who is a licensed real estate sales agent or a licensed real estate broker associated with another real estate broker if:

(a) Substantially all of the sales agent's or associated broker's remuneration from real estate brokerage is derived from real estate commissions; and

(b) The services of the sales agent or associated broker are performed under a written contract specifying that the sales agent or associated broker is an independent contractor; and

(c) Such contract provides that the sales agent or associated broker shall not be treated as an employee for federal income tax purposes.

(3)

(a) Notwithstanding the provisions of section 8-40-202(1)(a)(IV), "employee" excludes any person who is confined to a city or county jail or any department of corrections facility as an inmate and who, as a part of such confinement, is working, performing services, or participating in a training or rehabilitation or work release program; except that "employee"

includes an inmate of a department of corrections facility or a city, county, or city and county jail who is working, performing services, or participating in a training, rehabilitation, or work release program that has been certified by the federal prison industry enhancement certification program pursuant to the federal "Justice System Improvement Act of 1979", 18 U.S.C. sec. 1761(c). For the purposes of articles 40 to 47 of this title, an inmate participating in a program certified by the federal prison industry enhancement certification program is an employee of that certified program, which certified program shall carry workers' compensation insurance pursuant to articles 40 to 47 of this title. No inmate participating in a certified program shall be deemed to be an employee of the state, city, county, or city and county that owns, operates, or contracts for the operation of the facility or jail in which the inmate is incarcerated.

(b) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate who is working for a private employer under a contract of hire wherein the private employer is required to maintain workers' compensation insurance for its employees pursuant to articles 40 to 47 of this title. Such inmate shall be an employee of such private employer for purposes of articles 40 to 47 of this title.

(c) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate working for a joint venture established pursuant to the provisions of section 17-24-119 or 17-24-121, C.R.S. Such inmate shall be an employee of such joint venture for purposes of articles 40 to 47 of this title.

(d) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate working for a private person or entity pursuant to the provisions of section 17-24-122, C.R.S. Such inmate shall be an employee of such private person or entity for purposes of articles 40 to 47 of this title.

(4) "Employee" excludes any person who volunteers time or services for a ski area operator, as defined in section 33-44-103(7), C.R.S., or for a ski area sponsored program or activity, notwithstanding the fact that such person may receive noncash remuneration for such person or such person's designee in conjunction with such person's status as a volunteer. No contract of hire, express or implied, is created between any volunteer pursuant to this section and a ski area operator. Notice shall be given to such volunteer in writing that the volunteering of time or services under this subsection (4) does not constitute employment for purposes of the "Workers' Compensation Act of Colorado" and that such person is not entitled to benefits pursuant to said act.

(5) "Employee" excludes any person who is working as a driver under a lease agreement pursuant to section 40-11.5-102, C.R.S., with a common carrier or contract carrier.

(6) Any person working as a driver with a common carrier or contract carrier as described in this section shall be eligible for and shall be offered workers' compensation insurance coverage by Pinnacol Assurance or similar coverage consistent with the requirements set forth in section 40-11.5-102(5), C.R.S.

(7) Persons who provide host home services as part of residential services and supports, as described in section 25.5-10-206 (1)(e), for an eligible person, as defined in section 25.5-6-403 (2)(a), pursuant to the "Home- and Community-based Services for Persons with Developmental Disabilities Act", part 4 of article 6 of title25.5, and pursuant to a contract with a service agency as defined in section 25.5-10-202 (34) are not considered employees of the service agency.

(8) For the purposes of articles 40 to 47 of this title 8, "employee" excludes any person who performs services for more than one employer at a race meet as defined by section 44-32-102(20) or at a horse track as defined by section 44-32-102(8).

(9) Notwithstanding any other provision of this section, "employee" includes a person who participates in a property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

(Amended by 2021 Ch. 83, §4, eff. 7/1/2024. Amended by 2019 Ch. 136, §20, eff. 10/1/2019. Amended by 2018 Ch. 26, §4, eff. 10/1/2018. Amended by 2017 Ch. 317, §2, eff. 7/1/2017. L. 90: Entire article R&RE, p. 473, § 1, effective July 1. L. 92: (5) and (6) added, p. 1798, § 1, effective June 6. L. 93: (3) amended, p. 2129, § 3, effective September 1. L. 94: (4) amended, p. 1288, § 1, effective July 1. L. 95: (1) and (3)(c) amended, p. 1091, § 1, effective May 31. L. 97: (3)(c) amended, p. 1031, § 66, effective August 6. L. 2000: (7) added, p. 1497, § 1, effective August 2. L. 2002: (6) amended, p. 1882, § 28, effective July 1. L. 2003: (8) added, p. 728, § 1, effective March 20. L. 2006: (7) amended, p. 1998, § 30, effective July 1. L. 2010: (3)(a) amended, (HB 10-1109), ch. 171, p. 606, §1, effective August 11; (9) added, (HB 10-1076), ch. 162, p. 566, §2, effective August 11. L. 2013: (7) amended, (HB 13-1314), ch. 323, p. 1800, § 17, effective March 1, 2014. L. 2017: (1) amended, (HB 17-1119), ch. 317, p. 1705, § 2, effective July 1. L. 2018: (8) amended, (HB 18-1024), ch. 26, p. 321, § 4, effective October 1.)

This section is similar to former § 8-41-106 as it existed prior to 1990.

2021 Ch. 83, was passed without a safety clause. See Colo. Const. art. V, § 1(3).

This section is set out more than once. See also C.R.S. §8-40-3011, effective until 7/1/2024.

ANNOTATION

Annotator's note. Since § 8-40-301 is similar to § 8-41-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

Inmates are not employees of state or county. Orr v. Indus. Comm'n, 691 P.2d 1145 (Colo. App. 1984), att'd, 716 P.2d 1106 (Colo. 1986).

Subsection (5) is not ambiguous and includes a driver who is working for an independent contractor under a conforming lease with a contract carrier. FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

The word "under" in subsection (5) is not ambiguous. FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

The legislative intent appears clear to exclude independent contractors and their drivers from the class of statutory employees. FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

Had the general assembly intended to exclude only independent contractors from the provisions of this section, it would not have allowed independent contractors to use assistants pursuant to §40-11.5-102(1)(f). FFE Trans. Servs. v. Indus. Claim Appeals Office, 93 P.3d 630 (Colo. App. 2004).

The traditional test set forth in City and County of Denver v. Lee, 450 P.2d 352 (Colo. 1969), for determining when recreational activities fall within the course and scope of employment remain valid under subsection (1) as amended in 1989 in determining whether an employee engaged in a recreational activity is within the coverage of the workers' compensation act. Karlin v. Conrad, 876 P.2d 64 (Colo. App. 1993).

Exclusion provided by subsection (5) is conditional not absolute. It takes effect only when the lease agreement required by §40-11.5-102 includes complying coverage. USF Distribution Servs., Inc. v. Indus. Claim Appeals Office, 111 P.3d 529 (Colo. App. 2004).

Ski instructor injured while skiing recreationally was not entitled to workers' compensation benefits as injury did not occur in course and scope of employment. Dunavin v. Monarch Recreation Corp., 812 P.2d 719 (Colo. App. 1991).

Evidence that claimant agreed to act as a member of the ski patrol only after negotiating with the supervisor to receive a special benefit is sufficient to support the administrative law judge's finding that, without such consideration, claimant would have refused to render any services as a patrol member and therefore claimant was not a volunteer under the statute. Aspen Highlands Skiing Corp. v. Apostolou, 854 P.2d 1357 (Colo. App. 1992).

Ski patrol worker who negotiated for a ski pass in lieu of salary in exchange for services was not a "volunteer" for purpose of exclusion from coverage under this article. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

Under this section, any employee who participates in employer-sponsored recreation due to pressure exerted by employer rather than at employee's own initiative is entitled to benefits for injuries sustained during activity. However, any employee who is injured while voluntarily engaging, upon his own initiative, in recreational activity which does not benefit the employer or fulfill any job duties is not entitled to compensation. Dunavin v. Monarch Recreation Corp., 812 P.2d 719 (Colo. App. 1991).

A leased driver was not limited to workers' compensation benefits for injuries received while performing duties within the lease agreement. The leased driver was not an employee for purposes of workers' compensation because section (5)(b) is an exception to the more general workers' compensation statutes. Scott v. Matlack, Inc., 1 P.3d 185 (Colo. App. 1999), rev'd on other grounds, 39 P.3d 1160 (Colo. 2002).

Leased driver was entitled to benefits at least equivalent to workers' compensation benefits under subsection (6). USF Distribution Servs., Inc. v. Indus. Claim Appeals Office, 111 P.3d 529 (Colo. App. 2004).

The definition of an employee entitled to coverage under this act includes "aliens" without distinguishing between legal and illegal aliens and therefore does not preclude, as a matter of law, an illegal alien from proving an entitlement to benefits. Champion Auto Body v. Indus. Claim Appeals Office, 950 P.2d 671 (Colo. App. 1997).

§ 8-40-302. Scope of term "employer"

(1) Repealed.

(2) Articles 40 to 47 of this title are not intended to apply to employees of eleemosynary, charitable, fraternal, religious, or social employers who are elected or appointed to serve in an advisory capacity and receive an annual salary or an amount not in excess of seven hundred fifty dollars and are not otherwise subject to the "Workers' Compensation Act of Colorado".

(3) Articles 40 to 47 of this title are not intended to apply to employers of casual farm and ranch labor or employers of persons who do casual maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer if such employers have no other employees subject to said articles 40 to 47, if such employments are casual and are not within the course of the trade, business, or profession of said employers, if the amounts expended for wages paid by the employers to casual persons employed to do maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer do not exceed the sum of two thousand dollars for any calendar year, and if the amounts expended for wages by the employer of casual farm and ranch labor do not exceed the sum of two thousand dollars for any calendar year.

(4) Articles 40 to 47 of this title are not intended to apply to employers of persons who do domestic work or maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the private home of the employer if such employers have no other employees subject to said articles 40 to 47 and if such employments are not within the course of the trade, business, or profession of said employers. This exemption shall not apply to such employers if the persons who perform the work are regularly employed by such employers on a full-time basis. For purposes of this subsection (4), "full-time" means work performed for forty hours or more a week or on five days or more a week.

(5)

(a) Any employer excluded under this section may elect to accept the provisions of articles 40 to 47 of this title by purchasing and keeping in force a policy of workers' compensation insurance covering said employees.

(b) Notwithstanding any other provision of articles 40 to 47 of this title, any working general partner or sole proprietor actively engaged in the business may elect to be included by endorsement as an employee of the insured and

shall be entitled to elect coverage regardless of whether such working general partner or sole proprietor employs any other person under any contract of hire.

(6) Articles 40 to 47 of this title are intended to apply to officers of agricultural corporations; but effective July 1, 1977, any such agricultural corporation may elect to reject the provisions of articles 40 to 47 of this title for any or all of said officers.

(7)

(a) Any employer, as defined in section 8-40-203, who enters into a bona fide cooperative education or student internship program sponsored by an educational institution for the purpose of providing on-the-job training for students shall be deemed an employer of such students for the purposes of workers' compensation and liability insurance pursuant to articles 40 to 47 of this title.

(b) If the student placed in an on-the-job training program does not receive any pay or remuneration from the employer, the educational institution sponsoring the student in the cooperative education or student internship program shall insure the student through the institution's workers' compensation and liability insurance or enter into negotiations with the employer for the purpose of arriving at a reasonable level of compensation to the employer for the employer's expense of providing workers' compensation and liability insurance while such student is participating in on-the-job training with said employer. This paragraph (b) shall not apply to a student teacher participating in a program authorized pursuant to article 62 of title 22, C.R.S.

(c) As used in this subsection (7), "cooperative education or student internship program" means a program sponsored by an educational institution in which a student is taught through a coordinated combination of specialized in-the-school instruction provided through an educational institution by qualified teachers and on-the-job training provided through a local business, agency, or organization or any governmental agency in cooperation with the educational institution.

(L. 90: Entire article R&RE, p. 474, § 1, effective July 1. L. 91: (1) repealed, p. 1294, § 6, effective July 1. L. 93: (5) amended, p. 455, § 1, effective April 19.)

This section is similar to former § 8-41-105 as it existed prior to 1990.

ANNOTATION

I. GENERAL CONSIDERATION.

Annotator's note. Since § 8-40-302 is similar to § 8-41-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

II. EXEMPT EMPLOYERS.

A. Casual Labor.

Even if employee was a casual laborer, the exemption under subsection (4) (now subsection (3)) does not apply because the employee's duty of maintaining the racetrack and its equipment were within the course of the employer's business of operating a racetrack. Butland v. Indus. Claim Appeals Office, 754 P.2d 422 (Colo. App. 1988).

B. Farm and Ranch Labor.

Exclusion of farm and ranch labor in this section does not constitute a violation of equal protection. Anaya v. Indus. Comm'n, 182 Colo. 244, 512 P.2d 625 (1973).

Farm and ranch labor falls within the field of agriculture which in general refers to any activity incident to the cultivation of land for the growing of crops, the harvesting thereof, and the care and feeding of livestock. It includes tillage, seeding, husbandry, and all things incident to farming in the widest sense of that term. Great W. Mushroom Co. v. Indus. Comm'n, 103 Colo. 39, 82 P.2d 751 (1938); Billings Ditch Co. v. Indus. Comm'n, 127 Colo. 69, 253 P.2d 1058 (1953); Smith v. Indus. Comm'n, 134 Colo. 454, 306 P.2d 254 (1957).

The whole character of the employment must be looked to in order to determine whether one is a farm laborer. Neither the pending task nor the place where it is being performed is the test. Billings Ditch Co. v. Indus. Comm'n, 127 Colo. 69, 253 P.2d 1058 (1953).

Construction of exemption clause. The workmen's compensation law is to be construed liberally and in every reasonable manner to accomplish the evident intent and purpose of the act; but in applying this rule, the court must not forget the exemption clause which frees those who employ farm and ranch labor from the provisions of the act, unless they voluntarily elect to come under it. The court must, therefore, be equally cautious to see to it that this exemption be not so restricted, limited and constricted in the interpretation of its terms and provisions as to destroy its effect. Billings Ditch Co. v. Indus. Comm'n, 127 Colo. 69, 253 P.2d 1058 (1953).

Not modified by § 8-48-101. The contracting-out provision of § 8-48-101 does not modify the exemption for farm and ranch labor of this section. Hefley v. Morales, 197 Colo. 523, 595 P.2d 233 (1979).

While the employer of farm or ranch labor may elect to accept coverage under the workmen's compensation act by filing a written statement to the effect that he accepts the provisions of the act, the filing of an unsigned printed card by someone other than the employer; and without his knowledge or direction, is not sufficient to charge such employer with liability under the act. Smith v. Indus. Comm'n, 134 Colo. 454, 306 P.2d 254 (1957).

The burden of proof is on a claimant to establish by competent evidence that the employer himself, or some person by him duly authorized, filed a written statement accepting the provisions of the act. Smith v. Indus. Comm'n, 134 Colo. 454, 306 P.2d 254 (1957).

Worker on threshing machine may not be "farm labor". Where a farmer traveled about the country with his machine doing threshing for others, for compensation, it is held under the facts disclosed, that one who was employed by him in such work was not a farm laborer within the meaning of this section, and was entitled to compensation for an accidental injury. Hoshiko v. Indus. Comm'n, 83 Colo. 556, 266 P. 1114 (1928).

Employee sorting potatoes for potato grower engaged in farm labor. Employee, who was injured while sorting potatoes for potato grower in cellars maintained by grower where only his potatoes were sorted and stored, was engaged in farm labor and, thus, not entitled to workmen's compensation. Anaya v. Indus. Comm'n, 182 Colo. 244, 512 P.2d 625 (1973).

Employee held to be engaged in farm labor. Where employee left a hoist job at his own request, and a man was employed to succeed him on that job, and employee anticipated early enlistment in the Army, it was held that this was not a case of conflicting evidence, that the employee was engaged in farm labor, and that he had not been just temporarily transferred from his regular employment to work on the farm, so that he was a farm laborer within the meaning of the statute. Maley v. Martin, 111 Colo. 545, 144 P.2d 558 (1943).

C. Contracts for Hire.

A contract for hire may be formed as long as the fundamental elements of contract formation are present even though not every formality attending commercial contractual arrangements is observed. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).