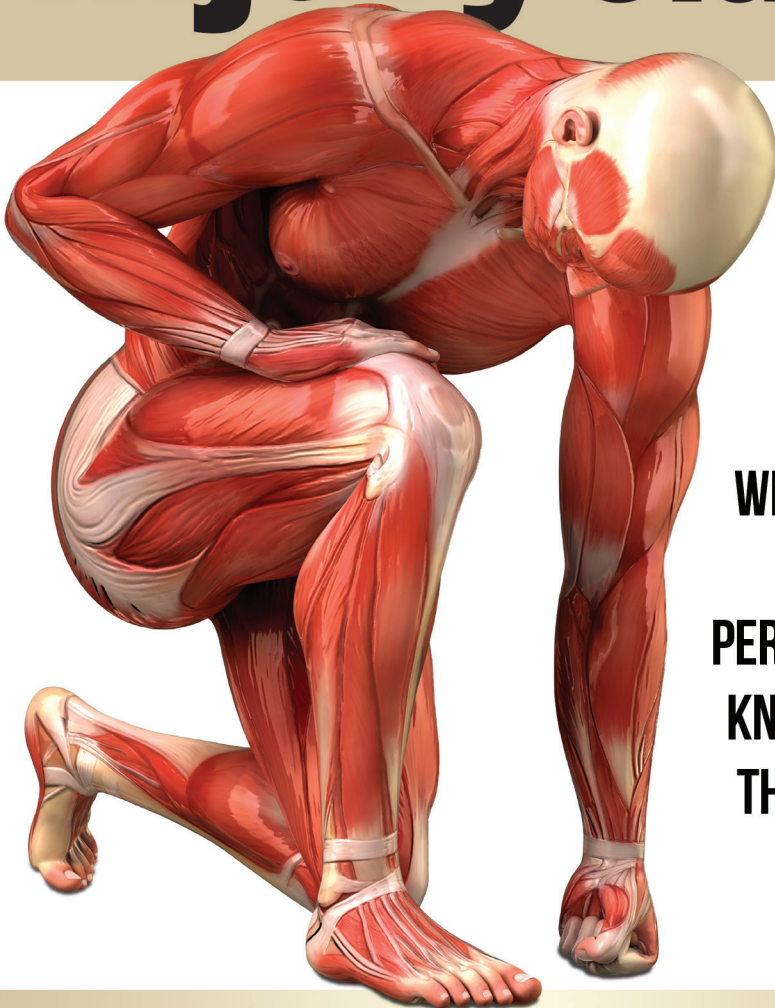


**YOUR DELAWARE INJURY CLAIMS GUIDE**

# **Anatomy of a Personal Injury Claim**



**WHAT EVERY  
INJURED  
PERSON MUST  
KNOW ABOUT  
THEIR CLAIM**

The Personal Injury Group Attorneys of Morris James LLP

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# INTRODUCTION

Being injured in an accident, whether in a motor vehicle accident or at work, can be a frightening experience, especially when someone else is ultimately to blame for your injuries. You may be facing medical bills, lost wages, and other significant expenses, all because of the carelessness of someone else. Fortunately, you and your family may be entitled to seek financial compensation following your injury.

At Morris James, our attorneys and staff understand how difficult it can be to live with an injury. That is why we have dedicated ourselves and our group to protecting our clients and ensuring that they and their families are fairly treated and compensated. Any kind of accident caused by the negligence of another which results in injury or death is considered to be a “personal injury claim.” The most typical types of personal injury claims arise from:

- Motor Vehicle Accidents;
- Motorcycle Accidents;
- Truck Accidents;
- Work-Related Accidents;
- Slip and Fall Incidents on Commercial Properties;
- Dog Bites;
- Cases Where Defective Products are Involved.

While the attorneys of Morris James' Personal Injury Group represent injured clients in all of the above types of cases, the focus of this guide is on motor vehicle accidents and work-related accidents.

If you have been injured in an accident, we would like to discuss your case with you. To learn more about how we can help you, visit the Personal Injury Group website at:

**[depersonalinjury.com](http://depersonalinjury.com)**

We are part of a full-service law firm with over 70 attorneys with offices located in all three Delaware counties. If you would like more information about services provided by our attorneys, please visit the firm website at:

**[morrisjames.com](http://morrisjames.com)**

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# ANATOMY OF A MOTOR VEHICLE INJURY CLAIM

*You have just been injured in a motor vehicle accident that was caused by Charlie Careless. You were stopped at a red light while driving your Delaware insured car when Charlie rear-ended your vehicle. You were rushed to the hospital where you were treated. You remain in pain. Your car is damaged, and the doctor has said you are unable to work. Your peaceful, orderly life has just been disrupted. What do you do?*

The above tragic story is one that is repeated day after day to the attorneys and staff of Morris James' Personal Injury Group.

## **Motor Vehicle Accident Checklist**

1. Call 911 to report the accident. They will be in contact with EMS if necessary and send an officer to help file necessary reports;
2. Retrieve relevant information from the other driver. This may include their license plate number, insurance information, and contact detail;
3. Identify witnesses and gather their contact information;
4. Take photos of all involved automobiles and the accident scene; and
5. Contact an experienced attorney specializing in motor vehicle accidents.

## **WHOSE FAULT IS IT ANYWAY?**

In our daily lives, each of us is responsible for acting carefully so as not to injure others. Failure to use reasonable care which results in injury to another is known as “negligence” in the legal world. To be negligent is to be legally “at fault” for injuring another. If you are injured as a result of someone’s negligent conduct, you may be entitled to compensation. What happens if you are negligent to some degree? For instance, what happens if you are the driver of a motor vehicle that is involved in a collision with another motor vehicle, and it is not clear which driver had the right of way? Fault must then be



apportioned between the drivers. In Delaware, if your actions constitute more than 50% of the fault, then you will not be compensated. If your percentage of fault represents 50% or less of the total fault, you may be compensated, but your compensation is reduced by the percentage of your fault.

## **WHAT ABOUT MY CAR?**

While injuries are the number one concern arising from an accident, one of the more immediate questions on someone's mind is "what about the car?" Following an accident, you may present a claim for property damage. It can include damage to the car and items inside the car. The claim may be presented either to your insurance carrier (if you have collision coverage) or to the insurance carrier for the responsible party. Whichever insurance carrier handles the claim will arrange for an estimate of the damage to your car. Typically, if the estimate of repair is 80% or less than the total value of the car, the repairs will be made.

While the car is being repaired, you are entitled to a rental if there is rental coverage available. If you have rental coverage under your own policy, it is typically limited to around \$25 per day for 30 days. At \$25 per day, it is often difficult to find a rental vehicle comparable to the one you were

driving. However, if your claim is being handled by the insurance company of the at-fault driver (the “liability carrier”), they are required to provide a rental vehicle comparable to your own.

In addition to paying for the rental, the liability carrier is obligated to pay for towing from the accident scene and storage costs for a reasonable period of time.

### **Diminished Value Claim**

Once a car is repaired, we are often confronted with the question of whether there is a claim because the car is less valuable since it was in an accident. This is referred to as a diminished value claim. However, unless you are planning on selling or trading in your repaired vehicle in the immediate future, the diminished value claim is very difficult to prove. Pursuing this claim requires expert testimony from a person familiar with the value of vehicles.

If you sell your vehicle immediately after it is repaired, an expert may easily and accurately determine your loss. On the other hand, if you plan on holding on to your repaired vehicle for the foreseeable future, the loss in value becomes very speculative.

For example, if the diminished value of your vehicle today is \$4,000.00, it will be significantly less 3 years

from now and perhaps zero 5-10 years down the road. The reality is, a successful diminished value claim requires that you first sell or trade-in your vehicle. Of course, this needs to be accomplished within the applicable legal deadline known as a “statute of limitations.” Failure to meet the deadline destroys the claim. Consulting an attorney is the best way to avoid this fate.

## ***ALERT!***

*Failure to meet the deadline destroys the claim.*

### **Total Loss Claim**

What if your car’s repair cost is greater than 80% of the value of the car? In this situation, you are dealing with what is called a total loss claim. When the car is a total loss, you are entitled to the fair market value of the car at the time of the loss. The fair market value of the car is determined by what similar cars have sold for on the open market. **Kelly’s Blue Book** and **National Automobile Dealers Association (NADA)** are useful references to assist in determining the fair market value. These references can be found on the internet. What is not considered in determining fair market value is how much is owed on your car and, to a lesser extent, whether recent repairs were done.

If a car is totaled, you have the choice of keeping the car or having the insurance company dispose

of it. If you elect to keep the car, a salvage title will be issued and the total loss value of your car will be reduced by the salvage value of your car.

### **What is Gap Insurance?**

One of the most frustrating circumstances is when your car is totaled and the amount owed on your car is greater than the fair market value of your car. The total loss value is paid directly to the finance company, you have no car and you still owe money on your wrecked car which is now in the junk yard. Talk about adding insult to injury. This situation can be avoided by obtaining gap insurance at the time of purchasing your vehicle. Gap insurance will literally pay for the “gap” that exists between the fair market value of your car and the amount owed to the finance company.

## **WHO WILL PAY MY MEDICAL BILLS AND LOST WAGES?**

Medical bills and lost wages resulting from your injuries caused by an accident can be significant. When you are involved in a motor vehicle accident while in a Delaware insured car, your medical bills and wage loss are paid by the automobile insurance covering the car you are occupying – regardless of which driver is at fault. The coverage is known as **Personal Injury Protection (PIP)** coverage, and is also referred to as no-fault coverage.

## The PIP Coverage

PIP coverage is required to be carried on every Delaware registered motor vehicle. Delaware law requires that at a minimum, each car carry \$15,000 per person/\$30,000 per accident coverage. Higher limits are available. It is recommended you purchase the highest amount of PIP coverage you can afford. It is typically not very expensive and can provide some peace of mind knowing there is sufficient coverage for your medical bills and wage loss. To the extent medical bills and wages exceed the available PIP coverage, the excess bills and wages can be collected from the at-fault person's insurance company in the event there is sufficient liability coverage limits.

PIP coverage applies to all occupants of a car. It also generally applies to any relative residing in your household who is in an accident in a car that does not carry no-fault coverage or carries insufficient coverage. If you are a pedestrian or on a bicycle and are struck by a car, you are entitled to PIP coverage from the striking vehicle.

### **ALERT!**

*It is recommended you purchase the highest amount of PIP coverage you can afford.*

A PIP claim is started by asking the PIP carrier to send you a PIP application. The application must be sent to you within ten days. Once the application is completed, it needs to be sent back to the carrier

immediately. No bills or wages will be paid until the carrier receives the PIP application.

## **Deadlines**

While Delaware law provides a 3-year window to challenge the denial of PIP benefits, there is a more critical deadline to keep in mind. All medical bills and requests for wage loss must be submitted to the PIP insurance company within 2 years of the day of your accident. There is a 3-month grace period following the 2-year period to submit those medical bills and wages that were “impractical” to submit within the 2-year period. Failure to comply with the overall 27 month deadline is fatal to your PIP Claim.

### **ALERT!**

*Failure to comply with the overall 27 month deadline is fatal to your PIP Claim.*

## **Lost Wages**

If a claim for wages is being made as a result of a car accident, the PIP carrier will require you to provide a Disability Slip signed by a doctor, and a Wage Verification Form signed by the employer. The Wage Verification Form verifies your employment, your wage history and that you were working at the time of the accident.

In calculating your wages, you are entitled to your “net” lost earnings (take home pay). If you make

different amounts each pay period, the insurance company will calculate your average take home pay (typically a 3 month average). If you are self-employed, the situation is more complicated, and you may be forced to supply more detailed financial information, including tax returns.

If you are covered by a disability plan that pays wages while you are out of work due to your injuries, **you may not be entitled to PIP wages.**

If your employer provided the disability plan to you without charge, then typically PIP reduces your wages by the amount of the disability plan payment. If you did pay any portion of the premium for the disability plan, then you may recover disability payments and PIP wages. However, the disability carrier may have a right to collect its payments from any monies you receive from the at-fault party upon the settlement of your claim. If this is the case, you will need to discuss the best approach with your attorney.

### ***ALERT!***

*The disability insurance carrier may claim a portion of your settlement funds.*

## **Medical Bills**

PIP pays for all accident-related medical bills incurred within two years of the accident. PIP does not require pre-certification or referrals from

your primary care provider. You are free to go to any medical provider you choose. The insurance company must continue to pay the bills until either the two-year mark or until they have medical support that continued treatment is no longer necessary, or the treatment is not accident related. (See **IME Challenge** section below). PIP may be required to pay medical bills and wage loss related to surgical or dental procedures that occur after two years from the date of the accident. However, to extend the benefit period for surgical and dental procedures, a special letter must be written by a doctor and provided to the PIP carrier before the two year anniversary date of the accident.

### **The IME Challenge**

Your insurance company may challenge your right to medical bill and lost wage coverage by sending you to their doctor to conduct an

examination. The purpose of the

**insurance medical examination**

(sometimes referred to as an **IME**) is to determine whether your medical treatment is reasonable, necessary, and related to injuries caused by the accident. If you have been disabled from work, the IME doctor will also evaluate whether your disability is reasonable, necessary and related

### **ALERT!**

*The insurance company's doctor and your doctor will often disagree on the extent of your injuries and need for treatment.*



to injuries caused by the accident. The IME doctor will produce a report. Often times the IME report concludes that no additional treatment is necessary and that you may return to work full duty. Just as often this directly conflicts with your own doctor's view and recommendations. Under these circumstances, the PIP carrier will cut off any further benefits. We typically recommend our clients follow the advice of their

### **Non-Auto Accident Claims**

If your claim arises from a non-motor vehicle accident (for example, a slip and fall due to a dangerous condition), medical bills and lost wages are handled differently. Any wage benefit will have to come from your employment (i.e., disability benefits, vacation, and/or sick time). Medical bills will be covered by your private health insurance carrier. To the extent the private health insurance pays benefits, they will seek to recover their money out of any settlement you obtain from any responsible party. This is called a subrogation right and this right is contained in almost all medical insurance policies.

There are times when PIP coverage may be available to you even if you weren't injured in an automobile accident. PIP coverage is available to anyone injured during the operation, maintenance or use of the vehicle. If you slip and fall on ice while pumping gas or loading groceries into your trunk, you may be entitled to such coverage.

Sometimes a commercial property owner has an insurance policy with a medical bills payment provision (MedPay). If that coverage exists, your attorney can explore how that coverage can be accessed.

treating doctor. Once your treating doctor has released you from care, we will pursue the PIP carrier (through litigation if necessary) for any unpaid medical bills or wage loss. Handled appropriately, a favorable resolution of the outstanding medical bills and wage loss with the PIP carrier is consistently achieved.

### **Substitute Services**

PIP coverage also provides benefits for substitute services. Substitute services include amounts you pay for services you can no longer perform due to your injuries. Substitute services are dependent on: 1) Having a doctor write you a disability note limiting your activities; and 2) Receipts showing payment for the services. Common examples of substitute services include yard work and house cleaning.

### **My Liability Claim Against the Other Driver**

When you are injured in an accident caused by the negligence of another driver, a claim is made for your pain and suffering as well as any medical bills, lost wages, or substitute services incurred after any available PIP coverage has been used through your policy of insurance. Provided that your accident was caused by someone driving a Delaware registered and insured motor vehicle, they must have at least \$25,000.00 in coverage per person with a maximum of \$50,000.00 per accident. The attorneys of Morris

James' Personal Injury Group will actively investigate the availability of all potential insurance that could apply to the at-fault vehicle including the applicability of any other policies in their household or whether there may be an employer or vehicle owner that has responsibility and available coverage. The attorneys in Morris James' Personal Injury Group will continuously monitor your case to determine when it is an appropriate time to discuss settlement. Once at least \$12,500.00 in medical bills, lost wages, and/or substitute services have been incurred, we will request that the liability carrier disclose the extent of liability coverage. Provided that there is sufficient coverage, discussions about settlement can generally occur when you have sufficiently recovered from your injuries.

## **MY ACCIDENT WAS CAUSED BY SOMEONE WITH NO INSURANCE OR NOT ENOUGH INSURANCE**

You are hurt in a car accident that wasn't your fault, and discover that the at fault driver has no insurance. Are you out of luck? Not necessarily. If there is uninsured motorist coverage available, you will have a claim.

Under Delaware Law, uninsured motorist coverage applies in four situations:

1. The at-fault driver has no liability insurance;
2. The insurance company insuring the at-fault driver is insolvent;
3. The insurance company for the at-fault driver denies coverage; or
4. The accident was caused by a hit and run driver.

Underinsured motorist coverage applies when the value of your injuries are greater than the at-fault person's insurance coverage.

Provided that you have uninsured/underinsured motorist coverage available under your policy of insurance, the minimum coverage is \$25,000 per person with a maximum of \$50,000 per accident. To the extent the claim is for underinsured motorist coverage, this coverage is afforded to you above and beyond the amount of coverage available from the at-fault driver's insurance company.

## **ALERT!**

*Sometimes it is necessary to file a lawsuit against your insurance company.*

In Delaware, an insurance company must properly offer uninsured/underinsured motorist coverage in an amount equal to the amount of your liability coverage. If the insurance company has failed to make a proper offer, the underinsured coverage can be

increased even after the accident. An experienced Delaware personal injury attorney will be on the lookout for this issue, and will take the appropriate steps to have your automobile insurance coverage “reformed” to a greater amount. Sometimes it is necessary to file a lawsuit against your insurance company to accomplish this objective. This is known as a reformation action.

## **WHAT ARE “DAMAGES,” AND WHAT IF THERE IS A DEATH FROM THIS ACCIDENT?**

Money paid to anyone injured (or damaged) in an accident is commonly referred to as **“damages.”**

A motor vehicle accident often results in various forms of damage to an individual. Your claim for money damages may include some or all of the following forms of damage:

1. Past medical expenses (in motor vehicle cases, any amount payable by PIP is excluded);
2. Future medical expenses (this requires a physician to lay out specifically what treatment is required and how much it will cost);
3. Past lost earnings (in motor vehicle cases, any amount payable by PIP is excluded);

4. Future lost earnings (this will require medical expert testimony, along with testimony from a vocational expert);
5. Past and future pain and suffering, which includes mental anguish; and
6. Permanent impairment.

### **Coordination of Insurance Benefits**

A person injured in a motor vehicle accident is often faced with immediate loss of income and is confronted with medical bills. It is important to gather all of the information regarding potential sources of insurance for payment of medical bills and wage loss. Often insurance coverage is available from unexpected sources you may not be aware of. To coordinate all available insurance benefits, the following questions need to be asked:

1. What insurance company covered the car you were in at the time of the accident? (We are trying to ascertain the amount of PIP and uninsured/underinsured motorist coverage available to you for this accident);
2. Are you employed and, if so, does your employer provide you with short and/or long-term disability insurance and, if so, who pays the premium? (We are trying to ascertain if you are entitled to lost wages under PIP or under any employer sponsored disability plan.) If you have short and long-term disability insurance available, whether you can collect both PIP and disability benefits depends on who pays the premium for the short/long term disability insurance;
3. Do you (or any relative you live with) own any cars not

involved in the accident that carry Delaware insurance? (We are trying to determine whether there is additional PIP or uninsured/underinsured motorist coverage available to you for this loss);

4. Do you have private health insurance? (We are trying to determine if there is another source for medical bill payment beyond PIP and what referral rules need to be followed for care.) For automobile accidents, some doctors refuse to submit medical bills to private health insurance and instead require payment of medical bills out of your settlement; and
5. Were you in the course and scope of your employment at the time of the motor vehicle accident? (We are trying to determine if you are entitled to workers' compensation benefits).

When a person loses their life as the result of someone else's fault, the law allows for the filing of a **wrongful death claim**. There are two parts of the claim. The first part is called a "survival" action. This is an action that allows the decedent's estate to make a claim for the decedent's pain and suffering (but only if there was conscious pain and suffering), medical bills, lost wages, and funeral expenses. Damages paid to the estate will flow through to the beneficiaries of the estate. The second part of the claim is brought under Delaware's Wrongful Death Statute. This statute allows for compensation to certain members of the decedent's family.

**The Wrongful Death Statute** allows for a jury to consider the following elements of damage:

1. The decreased value of the decedent's estate because of her/his premature death;
2. Loss of contributions for support;
3. Loss of parental, material and household services;
4. Reasonable funeral expenses not to exceed \$7,000; and
5. Mental anguish to qualifying family members.

## **WHAT DOES “CASE VALUE” MEAN AND HOW DOES IT AFFECT MY CASE?**

The value of any type of personal injury case involves a variety of factors, including: the type of injury; the frequency of treatment; the length of time the effects of the injury last (any permanent effects?); the impact on the injured person's activities of daily living; the prior medical history of the injured person; and whether medical expenses and lost wages may be claimed in the case. Taking into consideration all of these factors, the overall value of a case is determined by the parties based upon what juries have awarded in similar prior cases.



Jury results are often unpredictable. In Delaware, no one may suggest to a jury the value of a case. Juries are only instructed to use their common sense and arrive at a fair award. With surprisingly little guidance, Delaware juries are required to determine the value of a particular case. Accordingly, jury verdicts for similar kinds of cases may vary widely. The jury of 12 must be unanimous. Each individual juror brings his or her own biases and prejudices to the decision, which contributes to the unpredictability of the award.

In order for a case to be ready for settlement, all of the critical information must be known. More often than not, a final medical report from your treating doctor needs to be obtained. Usually a doctor is not able to write a final report until, at the earliest, 10 to 12 months following the accident. Once all of the information is obtained, the material is sent to the insurance company.

After the assigned adjuster has reviewed everything, the parties enter into settlement discussions to attempt to resolve the case. If the case can be settled through negotiations, then you will be required to sign a document known as a "Release" (releasing all claims you may have against the at-fault party) in exchange for a check from the insurance company. If the case cannot be settled, it proceeds to litigation.

## **The Litigation Process**

***File a Lawsuit:*** If your personal injury case cannot be resolved through a voluntary settlement, your attorney must be prepared to file a personal injury lawsuit and proceed to a jury trial, if necessary, to achieve a fair and reasonable result for you. A lawsuit is initiated by the filing of a Complaint. The Complaint is a document which briefly describes the accident and your injuries and provides notice to the at-fault person and/or company of the types of damages you are seeking. It must be filed with the Court within two years of the date of the accident. As the party filing the Complaint, you are known as the “Plaintiff.”

After the lawsuit is filed, the Complaint must be delivered to the at-fault party (known as the “defendant”). The act of delivering the complaint is known as “service of process.” It is typically accomplished by the Sheriff or a specially appointed process server. Once service has been made, the defendant’s insurance company will hire a lawyer who, in response to the Complaint, will file a document known as an Answer.

With the filing of the Answer, the insurance company must disclose the amount of insurance coverage available to the defendant. Also, at the time the Answer is filed, the defense attorney will require that the injured party sign an authorization allowing him/her to obtain your current and prior medical

records as well as employment records. The defense attorney also has the right to request that you be examined by a doctor chosen by the defendant's insurance company.

**Discovery Phase:** At this point, the case is in the discovery phase. In the initial phase of discovery, you will be expected to assist your attorney in answering written questions (called interrogatories). You will also be asked to give a deposition. A deposition is a proceeding where the defendant's attorney asks you questions about the case. Your attorney will prepare you for your deposition, and will attend the deposition with you. Your deposition will typically be held at the defense attorney's office. At some point in the midst of the discovery process, or after discovery is completed, the parties usually go to a mediation hearing.

**Mediation Phase:** Mediation is a proceeding used to attempt to get cases resolved. In mediation, both sides meet together with a mediator (usually an attorney or former judge) to attempt to settle a case. In advance of the mediation, each side submits a confidential statement to the mediator. The confidential statement outlines the case and the issues.

The mediator begins the session by having all sides meet jointly. During this joint session, the mediator will explain the ground rules which will include each participant signing a confidentiality

agreement. The mediator will ask questions of both sides. At the conclusion of the joint session, the mediator will separate the parties. At this point, the mediator will go back and forth between the parties carrying settlement offers and demands until either the case is settled or it appears clear that the parties cannot reach a voluntary settlement.

Mediation requires compromise from both sides. It requires each side to determine whether they are prepared to proceed to a jury trial and at what cost.

***Jury Trial:*** A personal injury case can resolve at any time in the litigation process. However, if it does not settle, your case will end up in front of a jury. A jury trial usually takes two to five days. You and your doctors will testify, along with the defense witnesses, and defense doctors. Under the Delaware Rules of Evidence the jurors are given very little guidance in what to award you for your injuries. No one is permitted to suggest a dollar figure and any previous settlement offers may not be disclosed to the jury. Without any real guidance, the jury is told to use their common sense and achieve a fair result.

Trying a case to a jury is a very expensive proposition. Depending on the outcome, some of the expenses may be recovered from the other side. In certain limited instances, interest can be awarded on the amount of the judgment in your favor.

## **WHAT'S NEXT?**

If you are reading this guide because you were injured in a motor vehicle accident, then you will have armed yourself with important information and can move forward with confidence in dealing with your accident. It is highly recommended you go to Section Three, which addresses the very important question “Do I need an attorney to handle my injury claim?” It is not always necessary to hire an attorney. However, more often than not, having an attorney on your side is the best way to assure that you are treated fairly throughout the course of a confusing and sometimes complicated process.

# ANATOMY OF A WORKERS' COMPENSATION CLAIM

*You have just been injured at work. You were lifting a patient from an examining table into their wheelchair when you felt a pop in your neck and excruciating pain and tingling from your neck down into your right arm and into your dominant right hand. Your supervisor wrote a report of the incident and called an ambulance to take you to the hospital where you were treated and released. You remain in pain. The emergency room doctor has said that you cannot work. Your peaceful, orderly life has just been disrupted. What do you do?*

Similar stories are reported to us day after day.

## **Workers' Compensation Accident Checklist:**

1. Immediately notify the employer in writing of the injury or occupational disease and request medical services. Failure to give notice or to accept medical services may deprive you of the right to compensation;
2. Give the employer, directly or through a supervisor, notice of any claim for compensation for the period of disability beyond the third day after the accident. In case of fatal injuries, notice must be given by a relative, dependent or personal representative of the deceased;
3. If an agreement with the employer in regard to compensation can't be reached, file an application with the Office of Workers Compensation for a hearing before the Industrial Accident Board to address the matters at issue within two years of the date of the work injury (or within one year of being diagnosed with an occupational disease or an ionizing radiation injury); and
4. Contact an experienced attorney specializing in work related accidents.

Navigating a workers' compensation case can be very challenging if you are not well versed in the unique and specific benefits and worker protections available under the **Delaware Workers' Compensation Statute**.

# WHAT IS WORKERS' COMPENSATION?

Workers' compensation is a system, created by the Delaware legislature, which has become by law automatically part of your employment contract and provides benefits to workers who are injured while working. Employers with one or more employees are required to carry workers' compensation insurance. The workers' compensation statute prohibits an employer from firing or, in any other manner, discriminating against an employee for filing a claim for benefits.

The Delaware Workers' Compensation Law provides substantial protections and benefits to the injured worker. However, as with any law, it can be a very complicated process to muddle through. It is also an adversarial process putting the injured worker in need of benefits against the workers' compensation insurance carrier which is interested in limiting benefits.

## **Who Pays for Workers' Compensation Insurance?**

Workers' compensation benefits are paid by the employer or the employer's workers' compensation insurance carrier. The benefits are outlined in Title 19 of the Delaware Code and administered by



the Office of Workers' Compensation (part of the Delaware Department of Labor). These benefits include lost wages, medical care, permanency, disfigurement, mileage reimbursement, and death benefits. The insurance company for your employer

## **ALERT!**

*Disputes between you and your employer regarding benefits are handled by the Industrial Accident Board or "IAB"*

is not required to advocate for you or to even inform you of some of the various categories of benefits that you may be entitled to. In addition, some of the benefit categories may be best pursued on a time table unique to your case that needs to be chosen with your maximum recovery and long term interests in mind. Disputes between you and your employer regarding benefits are handled by the **Industrial Accident Board** or

"IAB." The IAB is basically the court of first resort for workers' compensation disputes.

## **HOW ARE LOST WAGES PAID TO ME?**

**Temporary Total Disability:** We have found over the years that claimants are very surprised to learn they are not entitled to 100% of their net lost earnings. If your doctor totally disables you from

work as a result of a work related accident, you are entitled to receive a percentage of your lost wages. The workers' compensation law refers to this benefit as **Temporary "Total" Disability (TTD)**. An injured employee is entitled to receive 66-2/3% of their gross wages at the time of the accident, subject to a maximum and a minimum that are set by the Secretary of Labor in June of every year. You can call one of our offices to obtain the current minimum and maximum rates.

## **ALERT!**

*Once the average weekly wage and compensation rate is filed, it can never change for the lifetime of the claim.*

Temporary Total Disability continues until you are no longer disabled. The workers' compensation insurance company may challenge your disability status by filing a petition to terminate benefits. When a petition to terminate benefits is filed, benefits continue to be paid from a separate fund, created by contributions from all workers

### **How Gross Wages are Calculated**

Gross wages include overtime, gratuities, and regularly paid bonuses. They do not include fringe benefits (i.e. health insurance). A worker's "weekly wage" for purposes of workers' compensation is determined by calculating the average gross wages for the 26 week period immediately before the accident, and then taking 66-2/3% of that average. The "weekly

wage” may have to be adjusted up or down in order to comply with the maximum or minimum weekly wage set by the Secretary of Labor. One of the important reasons to obtain experienced legal counsel early in the process is that generally, once the average weekly wage and resultant compensation rate is set or agreed to and filed with the IAB, it never changes for the lifetime of the claim, which can include the natural life of the injured worker.

compensation carriers in Delaware, until the IAB determines at a hearing whether you are disabled. Benefits under this fund may be paid each week for up to four (4) months or more, while the hearing date is approaching. These substituted benefits are available to an injured worker who signs a properly worded affidavit demonstrating entitlement to these benefits.

This process will be pursued by your attorney, who will be in a position to advise you of obligations you have during this time to continue to qualify for payments from the fund. In the event the insurance company’s petition to terminate TTD benefits is successful, you do not have to repay the fund for the period between the filing of the petition to terminate and the hearing. However, the insurance company does have the repayment duty back to the fund if it fails to carry its burden of proof in support of its petition to terminate benefits.

## Temporary Partial Disability

An injured employee is entitled to **Temporary “Partial” Disability (TPD)** benefits if they can go back to some kind of work. For example, the injury may prevent you from returning to your previous higher paying job and you now have to take a lower paying job, or even resort to part time employment because of your injuries. In this event you are entitled to two-thirds of the difference between the wages from the old job and the wages from the new job. The maximum amount that applies to Temporary Total Disability applies to the Temporary Partial Disability benefits.

The maximum period of time that you can receive Temporary Partial benefits is 300 weeks. These 300 weeks of partial disability benefits do not have to be recovered continuously in one time block, but are the maximum weeks of recovery of such benefits over the lifetime of the injury. It is important for you to utilize these benefits wisely since they do max out at 300 weeks.

### ***ALERT!***

*The maximum period of time that an injured employee can receive Temporary Partial benefits is 300 weeks.*

# WHO WILL PAY MY MEDICAL BILLS?

When you are injured at work, all necessary medical treatment must be paid by the employer or the employer's insurance carrier pursuant to statutory guidelines. In an attempt to establish a payment system that helps to control costs, Delaware's General Assembly created a workers' compensation health care payment system which includes payment rates, instructions, treatment guidelines, and payment guides and policies. Further information can be found at [www.delawareworks.com](http://www.delawareworks.com).

Under the statute, you have the right to choose your treating doctor. Moreover, any health care provider may provide services during one office visit, or other single instance of treatment, without having to obtain prior authorization from the employer. However, after that initial service, the health care provider must obtain authorization for additional treatment. In order to alleviate the need for health care providers to obtain pre-authorization for each and every treatment, health care providers within the State of Delaware must be certified as a Delaware Workers' Compensation provider. Provider certification is not required for out-of-state providers. However, treating with out-of-state providers can result in complications that the attorneys at Morris James can help guide you through.

## **Delaware Workers' Compensation Certification**

The certification process is explained and the forms are provided online at [www.delawareworks.com](http://www.delawareworks.com) for use by the administrative staff in the doctor's office. As a certified provider, medical providers agree to render services in accordance with the payment guidelines and practice guidelines contained in the Delaware Workers' Compensation Act. Certification also eliminates the need for prior authorization from the employer before treating the worker. This is very important for the injured worker.

**The injured worker must confirm that any medical provider (doctor, nurse practitioner, chiropractor, physical therapist, etc.) they choose has been certified under the Delaware Workers' Compensation Act.**

The employer or its insurance company has the right to contest payment of medical bills and treatment and frequently does so. A few of the reasons the employer or its insurance company may contest payment of the medical bills and treatment include: the treatment is not related to the work incident; the treatment is not provided by a workers' compensation certified medical provider;

## **ALERT!**

*The most important benefit in being treated by a certified medical provider is that there is a legal presumption that each treatment is to be paid within thirty (30) days of providing a properly formatted bill to the carrier.*

or the treatment rendered is not within the practice guidelines.

However, the most important benefit in being treated by a certified medical provider is that there is a legal presumption that each treatment is to be paid within thirty (30) days of providing a properly formatted bill to the carrier. The employer or its insurance company must either promptly pay the bill of a certified provider, or send the records and bills to a Utilization Review Company to render an opinion as to whether the specific treatment rendered and bills incurred are within the practice guidelines. If the Utilization Review concludes that the treatment is not within Delaware's treatment guidelines, the insurance carrier will not have to pay the expenses. Should the Utilization Review (UR) rule that the bill(s) must be paid, the carrier can appeal that decision to the IAB.

The same appeal right exists in favor of an injured worker faced with an unfavorable UR decision provided the appeal is filed within 45 days from the receipt of the UR decision. If this occurs, a hearing before the IAB is necessary to determine whether the treatment and medical bills are reasonable, necessary, and related to the work incident. The decision of the IAB as to whether the medical bills must be paid or denied is appealable to the Superior Court of Delaware. Most often the decisions of the IAB are upheld on appeal.

# WHAT HAPPENS IF I'M PERMANENTLY DISABLED OR DISFIGURED?

When the work accident has resulted in a permanent impairment or loss of use of a body part, you have a claim for **Permanent Partial Disability (PPD)** benefits. Your doctor is asked to assign a percentage of permanent impairment to each affected body part. Once the doctor concludes there is a percentage of permanent impairment to the affected body part(s), then a formula is utilized to determine the dollar amount of Permanent Partial Disability benefits to which you are entitled. The formula appears in the Delaware Workers' Compensation Statute in the form of a schedule.

The value of permanent impairment of a particular body part is measured in terms of your weekly workers' compensation wages. For example, the schedule provides 250 weeks of compensation for the injured worker who has lost 100% use of an arm. If your doctor instead determines you have only lost 10% use of your arm, then your permanency award would be 25 weeks of compensation (i.e., 10% of 250 weeks). If your weekly workers' compensation wage rate is \$600, then the permanency award of 25 weeks of compensation would amount to \$15,000.00.



You are not entitled to present a claim for permanent impairment until one year from the date of the incident or one year from the date of any surgery. Typically the insurance carrier challenges the percentage rating of your doctor by having you examined by a doctor of their choice. Invariably, the insurance carrier's doctor assigns a lesser percentage rating. If you choose not to accept the percentage of permanency offered by the insurance company, you can file a Petition with the IAB. The Board will decide the amount of permanency benefits to be paid after hearing testimony from you and both doctors.

### **Disfigurement Benefits**

When a work accident results in physical scarring or disfigurement, you are entitled to disfigurement benefits. To be compensable, the disfigurement or scarring must be visible and offensive when the body is clothed normally. Disfigurement is generally considered fixed or permanent one year post-accident or post-surgery. If the parties cannot agree on an acceptable number of weeks (at your average weekly wage) for the disfigurement claim, you may file a Petition to Determine Disfigurement with the IAB. Board members or hearing officers will view the disfigurement and measure the scar with a ruler at the hearing. You will provide

testimony at the Disfigurement Hearing regarding how the scar impacts your life.

## **WHAT OTHER BENEFITS DOES WORKERS' COMPENSATION OFFER?**

### **Mileage Reimbursement**

You are entitled to reimbursement for round trip mileage expenses incurred for treatment of the work-related injuries. This includes trips to doctors, physical therapists, diagnostic testing facilities, hospitals and/or pharmacies. The current rate of reimbursement is based on 40 cents per mile.

### **Death Benefits**

When a job-related accident or illness results in the worker's death, benefits, including funeral expenses, are payable to the dependents of the worker. Death benefits are payable to the surviving spouse of the deceased employee for a period of 400 weeks. The amount of the benefit to the surviving spouse is greater if there are 2 or more children. Death benefits for children will be paid beyond 400 weeks until the child reaches age 18. For children enrolled full-time in an accredited educational institute,

benefits may be paid until such child ceases to be so enrolled or reaches the age of 25.

## **Commutation**

In certain cases, it is in your best interest to consider a negotiated agreement with the insurance carrier whereby all future workers' compensation benefits are paid out to you in a lump sum. This is known as a "commutation" of benefits. The commutation must be approved by the IAB.

The total amount due is based upon your life expectancy, weekly compensation rate, projected future permanency and, in most cases, the projected medical expenses. If you are a recipient of Social Security Disability Insurance (SSDI), Medicare or Medicaid at the time the commutation petition is filed, or anticipate filing for those benefits in the next 30 months, a commutation may not be appropriate.

## **Contested or Accepted Claims**

The benefits available under the Delaware Workers' Compensation Law may be paid voluntarily or it may be necessary to petition the IAB due to a challenge by the employer. An employer may choose to contest the claim for a variety of reasons. Some common arguments presented by the employer include:

1. The incident did not happen at work as claimed;
2. The injuries are not a result of an incident at work but are pre-existing; or
3. The employee was on the job inebriated and therefore forfeited his/her benefits.

If a claim is contested by an employer, the employee/claimant may file a Petition to Determine Compensation Due with the IAB and a hearing will be held approximately four months thereafter. The claimant has the right to be represented by an attorney of his/her choice at that hearing.

If an employer accepts a claim as compensable under the Delaware Workers' Compensation statute, the claimant and employer sign an Agreement. It is extremely important that all facts contained in the Agreement (filed with the IAB) are accurate. A claim number will be assigned by the workers' compensation insurance carrier to your case.

## **WHAT IF I DISAGREE WITH THE SETTLEMENT OFFER FROM MY EMPLOYER?**

If we are unable to resolve a workers' compensation case through a voluntary settlement, we are prepared to file a Petition with the IAB and proceed to litigate to achieve a recovery for you. After the Petition is filed, a defense attorney will enter their appearance on behalf of the employer. The defense attorney will require you to sign an authorization allowing

him/her to obtain all current and prior medical and employment records. The defense attorney and insurance company also have the right to require that you be examined by a doctor of their choosing.

A pretrial stipulation outlining the contested issues and the names of all witnesses to be called will be signed by the attorneys and filed with the IAB. The case will be assigned a hearing date which generally takes place about four months after the case is filed.

Normally the expert physicians for each side will testify by deposition in advance of the actual IAB hearing. The expert's testimony is transcribed by a certified court reporter. On occasion, some physicians testify in person at the hearing. Doctors charge for their time in rendering expert testimony. Trying a case, therefore, can be very expensive. The hearing is presided over by two IAB Board Members (who are appointed by the Governor) and a hearing officer (who is a Delaware licensed attorney). The parties may stipulate to have the matter heard solely by a hearing officer.

At the hearing each side presents their witnesses and evidence. Each witness is subject to cross-examination by the other attorney. Often the Board Members and Hearing Officer ask questions of the witnesses. When the physicians are not testifying in person, the attorneys read pertinent portions of the expert physicians' transcripts into the record.

During the testimony of witnesses, pertinent documents can be marked and entered into evidence. The Hearing Officer will rule on any legal objections made during the hearing. Each attorney is granted a limited time to present closing statements summarizing the evidence and certain points of testimony to substantiate their argument. A decision is not provided on the day of the hearing. A written decision is mailed to the attorneys a number of weeks after the hearing has occurred.

Once the opinion is mailed by certified mail to the parties, each has a deadline to file a written appeal to the Delaware Superior Court. The Court decides whether the IAB committed an error of law, or whether the decision of the IAB is supported by any substantial evidence in the record below. These and other issues are briefed in detailed writings, citing facts from the record and case law, designed to present each side's case in its most favorable light. While the Superior Court may allow oral argument, most cases are decided on the written briefs of the parties. Only a very, very small percentage of appeals result in the reversal of the IAB's decision.

***ALERT!***

*Only a very, very small percentage of appeals result in the reversal of the IAB's decision.*

# **ELEMENTS OF A WORKERS' COMPENSATION CLAIM**

It is always a good idea to consult an attorney about your workers' compensation claim. The elements of your claim which the attorney will evaluate in considering whether you need an attorney include:

1. Did the incident occur while you were within the course and scope of your employment?
2. Did the work incident result in injury?
3. Was the injury verified by a Physician who is certified with the Industrial Accident Board?
4. Is this an accepted or contested claim?
5. If it is a contested claim, are there reliable witnesses to the work incident, and certified expert medical witnesses willing to testify in support of the claim?
6. If it is an accepted claim, have you been paid all applicable benefits outlined above pursuant to the Delaware Workers' Compensation Statute?
7. Is the claim within the applicable statute of limitations?

## **WHAT YOU MUST KNOW ABOUT THE STATUTE OF LIMITATIONS**

It is critically important to appreciate that action

needs to be taken quickly after a work related accident or injury in order to preserve and secure benefits available under the statute. Indeed there are several time limits that may apply to the facts of each individual case. It is important to remember these issues are applied and decided in an adversarial process. The various and sometimes complex time limitations can and will be used by the employer's representative or carrier as a weapon to deny you benefits that otherwise would have been available.

Generally, the time period within which an employee has to file a case with the IAB is two years from the date of the original incident, or five years from the payment of any benefit under the statute by the workers' compensation insurance carrier. However, the limitations period is shortened to one year for occupational exposure cases. Occupational exposure cases include cases where the statutory definition of an "occupational disease" is met as a material component of the injury.

The best way to avoid having problems with deadlines is to make sure the

### **ALERT!**

*The various and sometimes complex time limitations can and will be used by the employer's representative or insurance carrier as a weapon to deny the injured worker benefits that otherwise would have been available.*



claim is opened properly following your work incident. There are two documents which should be completed and filed with the IAB right away: (1) Agreement as to Compensation; and (2) First Report of Injury. While it is the responsibility of the employer and its carrier to see that these documents are filed with the Board, the insured worker should make sure this has been done. One of the advantages of being represented by an experienced workers' compensation attorney is that your attorney acts as your watchdog to make sure that the employer and its carrier do what they are supposed to do.

# DO I NEED AN ATTORNEY TO HANDLE MY INJURY CLAIM?

*Whether you have suffered a personal injury due to a motor vehicle accident, a non-motor vehicle accident (for instance, a slip and fall incident), or a work related accident, every insurance company involved in a personal injury claim has one goal. That goal is to pay you as little as possible to resolve all of your claims. The insurance company has at its disposal experienced adjusters, investigators, doctors, and defense attorneys. Their goal is the direct opposite of yours. You need an effective, experienced personal injury or workers' compensation attorney to protect your interests.*

As a person who has no experience in the areas of personal injury or workers' compensation claims, you are at a distinct legal disadvantage against experienced insurance company personnel. In most cases, handling your own claim without an attorney guarantees that you will not be fairly compensated. Promptly hiring an effective and experienced Delaware personal injury or workers' compensation attorney is your best protection from being taken advantage of by the experienced insurance company on the other side.

Each year, hundreds of new prospective clients ask us to consider handling their cases. Our attorneys are committed to delivering the best results to victims of motor vehicle accidents, non-motor vehicle accidents, and work related accidents and to the family members of those who have tragically lost loved ones to fatal motor vehicle or work related accidents. We have over 150 years of combined trial experience and recover millions of dollars for injured victims every year.

Our lawyers have devoted their entire professional careers to handling injury cases. We have a unique understanding of the lengths to which insurance companies will go in order to avoid paying fair compensation to injured victims. Two of our partners spent earlier parts of their careers representing negligent drivers and their insurance companies. We

understand how insurance companies operate and we are in the best position to navigate you through the defenses, delays, and roadblocks that will be mounted by the insurance companies.

We are pleased to provide free initial consultation to review and evaluate your potential case. You may contact us via phone or e-mail to set-up an initial consultation. For your convenience, we have six office locations throughout the State of Delaware.