

TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 4 WORKERS' COMPENSATION
PART 3 PAYMENT OF CLAIMS, POST-ACCIDENT DRUG AND ALCOHOL TESTING, AND
CONDUCT OF PARTIES

11.4.3.1 ISSUING AGENCY: Workers' Compensation Administration.
[6/1/96; 11.4.3.1 NMAC - Rn, 11 NMAC 4.3.1, 11/30/04]

11.4.3.2 SCOPE: This part governs all employers and workers subject to the act.
[6/1/96; 11.4.3.2 NMAC - Rn, 11 NMAC 4.3.2, 11/30/04]

11.4.3.3 STATUTORY AUTHORITY: Section 52-5-4 NMSA 1978 (Repl. Pamp. 1991), as amended, authorizes the director of the WCA to adopt reasonable rules and regulations for effecting the purposes of the act. Sections 52-5-20 to 52-5-22 NMSA 1978 (Repl. Pamp. 1991), as amended, contain certain payment deadlines and requirements for reporting by insurer. Section 52-1-28.1 NMSA 1978 (Repl. Pamp. 1991), specifically directs the WCA to create regulations on unfair claims processing practices and bad faith. Section 52-1-12.1 NMSA 1978 (2016) directs the director to promulgate rules governing post-accident drug and alcohol testing.
[6/1/96; 11.4.3.3 NMAC - Rn, 11 NMAC 4.3.3, 11/30/04; A, 6/30/16]

11.4.3.4 DURATION: Permanent.
[6/1/96; 11.4.3.4 NMAC - Rn, 11 NMAC 4.3.4, 11/30/04]

11.4.3.5 EFFECTIVE DATE: June 1, 1996 unless a later date is cited at the end of a section.
[6/1/96; 11.4.3.5 NMAC - Rn & A, 11 NMAC 4.3.5, 11/30/04]

11.4.3.6 OBJECTIVE: This rule is intended to regulate the manner of payment of workers' compensation claims, to provide for post-accident drug and alcohol testing, and to clarify the parties' mutual obligations of prompt payment, cooperation and information reporting.
[6/1/96; 11.4.3.6 NMAC - Rn, 11 NMAC 4.3.6, 11/30/04; A, 6/30/16]

11.4.3.7 DEFINITIONS: See 11.4.1.7 NMAC.
[6/1/96; 11.4.3.7 NMAC - Rn, 11 NMAC 4.3.7, 11/30/04]

11.4.3.8 PAYMENT OF CLAIMS:

- A. If an accidental injury or occupational disease occurs to a worker during the course of employment and results in lost time to the worker of more than seven cumulative days, the employer shall file an E1.2 report with the WCA, and shall concurrently provide a copy to the worker.
- B. The employer shall pay the worker the first installment of compensation benefits on a compensable claim no later than 14 days of the date of filing of the E1.2 report with the WCA.
- C. If a claim is denied, the employer shall, upon the request of the worker, provide a written statement of the basis for the denial.
- D. Compromise payments by the employer shall not be construed as an admission of liability by any person or party.

[5/2/87, 5/26/87, 5/29/91, 6/1/96; 11.4.3.8 NMAC - Rn, 11 NMAC 4.3.8, 11/30/04; A, 6/30/16]

11.4.3.9 LATE PAYMENT OF CLAIMS:

- A. The WCA shall determine the timeliness of initial payments to workers.
- B. Upon request of the WCA, an employer shall provide documentation to verify the timeliness of initial payments.
- C. If an employer is identified by the WCA as having made initial payments on an untimely basis, the WCA may require the employer to implement a plan to prevent future late payments, and may require the employer to furnish proof of compliance with the plan.

[1/24/91, 6/1/96; 11.4.3.9 NMAC - Rn, 11 NMAC 4.3.9, 11/30/04; A, 6/30/16]

11.4.3.10 INSURERS' REPORTING DUTY TO EMPLOYER:

A. Upon written request of an employer, the insurer, self-insurer, or third-party administrator carrying the employer's workers' compensation insurance shall provide a list of workers' compensation claims made against that employer, which shall contain the information specified in Section 52-5-20 NMSA 1978 (Repl. Pamp. 1991).

B. Upon written request of an employer, the insurer carrying the employer's workers' compensation insurance shall provide the employer with notice of any proposed settlement of any claim against that employer. [5/29/91, 6/1/96; 11.4.3.10 NMAC - Rn, 11 NMAC 4.3.10, 11/30/04]

11.4.3.11 MILEAGE BENEFITS:

A. Employer shall pay worker's mileage, transportation, meal and commercial lodging expenses for travel to HCPs pursuant to this rule. Payment shall be made only to the injured worker and within 30 days of the employer's receipt of an original itemized receipt that complies with the requirements of this rule:

(1) for travel to HCPs of 15 miles or more, one way, from the worker's residence or place of employment, depending upon the point of origin of travel, mileage shall be reimbursed at the mileage reimbursement rate set by the New Mexico Department of Finance and Administration regulations in effect on the date of travel;

(2) actual reimbursement for the cost of a ticket on a common carrier, if applicable;

(3) actual reimbursement up to \$15.00 for any one meal with up to three meals total and \$30.00 total reimbursed for a 24 hour period; and,

(4) actual reimbursement up \$85.00 for the cost of overnight commercial lodging in the event of required travel of at least 150 miles one way from worker's residence or place of employment, depending upon the point of origin of travel.

B. The employer in its sole discretion may make payments under this section in advance. If worker accepts an advance payment and fails to appear for the scheduled HCP or IME appointment for which an advance has been issued, the employer/insurer may deduct the amount of the advance from the present indemnity benefits. [5/26/87...6/1/96; 11.4.3.11 NMAC - A/E, 11/15/04; 11.4.3.11 NMAC - Rn, 11 NMAC 4.3.11, 11/30/04; A/E, 2/19/10; A, 12/31/12; A, 6/30/16]

11.4.3.12 POST-ACCIDENT DRUG AND ALCOHOL TESTING

A. GENERAL PROVISIONS

(1) This section establishes regulations for post-accident drug and alcohol testing pursuant to Section 52-1-12.1 NMSA 1978.

(2) These rules are not intended to supersede other laws and are only intended to establish post-accident testing protocols and cut off levels as required by Section 52-1-12.1 NMSA 1978. Nothing in these rules shall prohibit an employer from conducting any drug or alcohol testing of employees which is otherwise permitted by law.

(3) If the worker requires emergency medical attention, medical treatment shall not be delayed to collect a drug or alcohol sample, provided that sample collection may occur in conjunction with the provision of medical treatment.

(4) A party may call a health care provider, toxicologist or similar forensic specialist as an expert witness to assist the workers' compensation judge in determining the degree to which intoxication or influence contributed to the worker's injury or death.

B. DEFINITIONS

(1) "Actual knowledge" means direct observation, by a supervisor or manager of the employer, of the consumption or use of drugs, alcohol or combination thereof, or of the clear physical symptoms or manifestations of intoxication or influence of the worker, or worker's admission to consumption or use of drugs or alcohol made to a supervisor or manager.

(2) "Alcohol" means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols, including methyl and isopropyl alcohol.

(3) "Confirmatory test" or "confirmatory drug test" means a second analytical procedure performed on the original sample used to identify and quantify the presence of a specific drug or drug metabolite.

(4) "Constructive knowledge" means that a supervisor or manager of the employer, by exercise of reasonable diligence, should have had actual knowledge that the injured worker was impaired on the date of the workplace accident.

(5) "Drug" means any chemical agent that affects living processes and has the potential to impair those processes, including, but not limited to, substances listed under the New Mexico Controlled Substances

Act. "Drug or controlled substance" does not include medications prescribed to a worker by the worker's licensed health care provider and taken in accordance with directions of the prescribing health care provider or dispensing pharmacy, unless such medication is combined with alcohol or a non-prescribed drug or controlled substance to cause intoxication or influence.

(6) "Initial test" or "initial drug test" means a screening test used to differentiate a negative specimen from one that requires further testing for drugs or drug metabolites.

(7) "Implement" or "implemented" means that the employer has put into effect and enforces a written policy on drug and alcohol use in the workplace.

(8) "Intoxication" or "influence" means a temporary state or condition of impaired physical, mental or cognitive function by means of alcohol, a drug, a controlled substance, or a combination of two or more substances at the time of injury or death.

(9) "Refusal to submit" means a worker who, by words or actions, refuses to submit to a drug or alcohol test, fails to appear for a test, fails to complete a test, fails to cooperate with collection of a sample, or otherwise intentionally conceals him or herself or makes him or herself unavailable to test.

(10) "Testing facility" as referenced in Section 52-1-12.1(F) means a testing facility selected by the employer to test a sample.

C. MINIMUM REQUIREMENTS FOR EMPLOYERS' DRUG AND ALCOHOL POLICIES

(1) To comply with the provisions of Section 52-1-12.1(H), the employer's written drug and alcohol policy shall:

- (a) declare a drug and alcohol free workplace;
- (b) advise workers of the types of testing they may be required to submit to and the circumstances under which workers may be tested for alcohol or drugs;
- (c) advise workers that workers' compensation benefits may be reduced if their intoxication or influence contributes to a work place injury;
- (d) advise workers that refusal to submit to or an intentional delay of post-accident testing may result in a complete denial of benefits pursuant to Section 52-1-12.1(E) NMSA 1978.
- (e) advise workers that they may request a second test of the original sample within twelve (12) months of the original drug and alcohol test at the worker's expense.

(2) Notice of the policy may be given to workers through any of the following methods: posting the policy in a conspicuous place, including the policy in an employee policy handbook, having the worker sign an acknowledgement form that is placed in the worker's personnel file, a wallet card, a flyer inserted semi-annually with pay checks, or any other method employer reasonably believes will be successful in alerting the worker.

D. TESTING AND CUT OFF LEVELS

(1) Test samples, whether urine, breath or blood, shall only be collected by facilities, medical providers, or health care providers certified to collect such samples, provided that nothing prohibits an employer from relying on testing performed by law enforcement pursuant to the New Mexico Implied Consent Act.

(2) Sample collection, testing, and storage methods shall substantially comply with generally accepted standards in the medical or scientific community, which may include standards established by the federal Department of Transportation, the New Mexico Department of Transportation, the federal Substance Abuse and Mental Health Administration, or the New Mexico State Personnel Office.

(3) Post-accident alcohol testing shall be conducted as soon as practicable after the accident. Any post-accident alcohol test conducted more than 8 hours after the accident shall not be relied upon to reduce benefits under Section 52-1-12.1, unless the worker intentionally caused the delay in the testing.

(4) Post-accident drug testing shall be conducted as soon as practicable after the accident. Any post-accident drug test conducted more than 32 hours after the accident shall not be relied upon to reduce benefits under Section 52-1-12.1, unless the worker intentionally caused the delay in the testing.

(5) A worker who requests a second test of an original sample shall be responsible for any costs associated with the testing of that sample. The worker shall provide timely written notice of the worker's request for a second test to the laboratory or custodian of the sample and to the employer.

(6) Provisions set forth in Section 52-1-12.1(F) requiring storage of samples shall only apply to testing facilities selected by the employer and shall not apply to hospitals or facilities providing emergency medical care to the worker.

(7) Cut off concentration levels for intoxication or influence

(a) An otherwise valid post-accident alcohol test creates a rebuttable presumption of intoxication or influence under Section 52-1-12.1 if the test results show a blood or breath alcohol concentration of .04 or above.

(b) An otherwise valid post-accident drug test creates a rebuttable presumption of intoxication or influence under Section 52-1-12.1 if initial and confirmatory testing performed by the testing facility show concentration levels at or above the cut off concentration levels set forth herein.

(c) Initial test cut off concentrations

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| (1) | Marijuana metabolites: | 50 (ng/mL) |
| (2) | Cocaine metabolites: | 150 (ng/mL) |
| (3) | Opiate metabolites (Codeine/Morphine): | 2,000 (ng/mL) |
| (4) | 6-Acetylmorphine: | 10 (ng/mL) |
| (5) | Phencyclidine (PCP): | 25 (ng/mL) |
| (6) | Amphetamines (AMP/MAMP): | 500 (ng/mL) |
| (7) | Methylenedioxymethamphetamine (MDMA): | 500 (ng/mL) |

(d) Confirmatory test cut off concentrations

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|-----|--|-----------------|
| (1) | Marijuana metabolite (Delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA)) | 15 (ng/mL) |
| (2) | Cocaine metabolite (Benzoylecgonine): | 100 (ng/mL) |
| (3) | Opiate metabolites: | 2,000 (ng/mL) |
| (4) | 6-Acetylmorphine: | 10 (ng/mL) |
| (5) | Phencyclidine (PCP): | 25 (ng/mL) |
| (6) | Amphetamines / Methamphetamine: | 250 (ng/mL) (to |

be reported as positive for methamphetamine, the sample must also contain amphetamine at a concentration equal to or greater than 100 ng/mL)

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| (7) | Methylenedioxymethamphetamine (MDMA), Methenedioxyamphetamine (MDA), or Methylenedioxyethylamphetamine (MDEA): | 250 (ng/mL) |
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(e) For any other drug not specifically enumerated in these rules, a cut off level established by any other nationally recognized authority may be relied upon.

(8) The employer shall provide a copy of the test results to the worker if relied upon to reduce benefits or upon worker's request.
[11.4.3.12 - N, 6/30/16]

11.4.3.13 CONDUCT OF PARTIES:

A. Worker's duties:

- (1) Worker shall answer reasonable requests from the employer regarding work status.
- (2) When a worker is receiving disability benefits, worker shall report to employer, within 15 days, any return to work, any written medical release to return to work provided to worker, and any physical limitations imposed by a physician and provided to worker in writing.
- (3) Worker shall, upon request, give employer the names, addresses, relationship and degree of dependency of all dependents, and may be required to make a verified statement regarding these matters.
- (4) Worker may be required to sign the authorization form approved by the WCA to release medical information as a condition of receipt of workers' compensation benefits.

B. Employer's duties:

- (1) Upon receipt of a medical release to return to work employer shall notify worker about any required procedures for application for a pre-injury job or modified work.
- (2) The employer shall not require the worker to sign any medical release form, other than the WCA approved worker's authorization for use and disclosure of health records, as a condition of receipt of workers' compensation benefits. If a health care provider refuses to accept the WCA approved worker's authorization for use and disclosure of health records, the worker may be required to execute the health care provider's requested release.
- (3) The employer shall sign any notice of accident form on the date submitted by the worker.
- (4) The employer shall report every accident to their insurer or, in the case of a self-insured employer or member of a self-insurance group, their claims administrator, whether or not the employer considers the claim to be valid, within 72 hours of the earlier of:

(a) actual knowledge of the accident by the employer; or

(b) presentation of a notice of accident form to the employer.

(5) An insured employer is prohibited from making any payment of statutory workers' compensation benefits directly to a worker, the dependents of a worker, or to a health care provider on behalf of a worker, except when the employer is a self-insurer, or member of a group self-insurance program, certified by the director. Payments of statutory benefits by a certified self-insurer or a member of a certified group self-insurance program must be made by the authorized claims administrator for the self-insurance program. This prohibition does not preclude any employer from paying a worker his or her full wage or salary pursuant to a wage continuation program, or from paying wages or salary to a worker for limited or light duty employment.

(6) Employers who are subject to the Act but uninsured at the time of a compensable accident shall pay statutory workers' compensation benefits directly to a worker or eligible dependent, or HCP upon request. Any uninsured employer paying a claim under this subsection shall inform the director in writing within 10 days of the initial payment, and shall provide the employer's business location, the total number of employees, and the worker's name, address, and benefit status. The director may impose upon the employer any conditions regarding the manner of payment of benefits as may reasonably be required to protect the interests of the worker and insure compliance with the act.

[5/26/87, 6/20/89, 1/24/91, 6/1/96; 11.4.3.12 NMAC – Rn & A, 11 NMAC 4.3.12, 11/30/04; A, 10/1/15; Rn & A, 6/30/16]

11.4.3.14 CONDUCT OF ATTORNEYS AND REPRESENTATIVES APPEARING BEFORE THE WCA:

A. An attorney or other representative of a party may not engage in or advocate meritless claims or defenses when appearing before the WCA.

B. An attorney or other representative of a party shall be courteous and professional and shall be punctual for mediations and hearings.

C. Attorneys and other representatives of a party shall be attired in an appropriate manner, suitable to a court proceeding.

D. The director may sanction any attorney or representative who engages in the conduct proscribed by Subsections A, B and C of this Section or who violates any provision of the Act or these rules. In cases of repeated violations, or a single act of an egregious nature, and upon a written finding that the attorney or representative's behavior is not likely to be controlled by imposition of a fine, the director's sanctions may include suspension, termination or limitation of the right to practice before the WCA.

E. The director's imposition of a sanction against an attorney or representative shall be governed by the procedures in 11.4.5 NMAC.

[5/26/87, 6/1/96; 11.4.3.13 NMAC - Rn, 11 NMAC 4.3.13, 11/30/04; Rn & A, 6/30/16]

11.4.3.15 ENFORCEMENT: Any violation of these rules may be investigated and penalized pursuant to the procedures in 11.4.5 NMAC.

[N, 6/30/16]

HISTORY OF 11.4.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:

WCA 86-4, Payments and Benefits, filed 5/26/87.

WCA 89-4, Payments and Benefits Rules, filed 6/20/89.

WCA 92.5, Rules Governing Payments and Benefits, filed 10/30/92.

History of Repealed Material: [RESERVED]