

A NEWSLETTER FROM THE LAW OFFICES
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MJ *notes*

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TRIAL LAWYERS

Benzene Exposure Associated With Leukemia

By Spencer Parris

Many working and retired North Carolina men and women are diagnosed each year with Leukemia. The disease is a cancer that affects the blood and bone marrow, causing persistent bleeding, fatigue, bone pain and weight loss. It can occur at any age. There are a number of types of Leukemia, and some are caused by exposure to chemicals, such as Benzene.

Produced in large amounts in the United States, Benzene is a colorless liquid with a sweet odor that evaporates quickly. One of the top 20 chemicals produced in this country each year, Benzene is used in gasoline and diesel fuel and is combined with other chemicals to make plastics, nylon and synthetic fibers, rubbers, lubricants, dyes, detergents and pesticides. Leukemia is often directly associated with Benzene exposure in the work place. People who work or have worked in these industries are the most likely to develop Leukemia. It can take a relatively short length of exposure to Benzene or other chemicals to cause Leukemia and more than 30,000 people are diagnosed each year with some form of Leukemia.

The primary sources of exposure are (1) inhalation, (2) dermal exposure, and (3) ingestion of water and other foods contaminated with Benzene. Although the respiratory route is commonly the primary source of human exposure, skin absorption is

more prominent in the working population. Many workers never know they have been exposed until years later.

If you, a family member, or someone you know has any form of Leukemia, they may be entitled to workers' compensation benefits and additional compensation from the chemical companies which manufactured the chemicals they were exposed to on the job. North Carolina law permits someone injured under these circumstances to recover for medical bills, lost wages, pain and suffering, or wrongful death compensation in the event the person has died.

North Carolina has statutes of limitation which require the person injured or their family to bring a claim within three years from the date they were first diagnosed with the disease if the person is still living, or two years from the date of death in the event the person died. The law in North Carolina provides these remedies because employers and manufacturers should not be allowed to escape responsibility when they cause injury or death. The purpose of these laws in North Carolina is to make sure that employers and the manufacturers of dangerous products are held responsible, just like everyone else, when they do something that causes disease or death.

Select the Right Nursing Home

By Nina Roselle

Entrusting the care of a family member to a nursing facility is a difficult decision. After you have narrowed down your choices and visited each facility, you may still have doubts. A common concern is selecting a facility with adequate staffing to properly care for your loved one.

Understaffing and frequent staff turnover has plagued the nursing home industry for many years. Insufficient staffing is not only a disruption and hindrance to the resident's daily routine, but can also result in improper care and treatment such as failing to turn and reposition patients to prevent skin breakdown or failing to provide assistance during mealtimes.

How can you tell if a nursing home has sufficient staff? First, be aware of the medical staff that should be available to each patient during their residency in a skilled nursing facility. Nursing home residents can receive care from a variety of medical staff in addition to their primary care physician. Registered Nurses, Licensed Practical Nurses, Certified Nursing Assistants, Medical Technicians, and in some cases, Feeding Assistants, are caretakers who are available to skilled nursing facility residents. Many facilities have nursing staff that specialize in restorative care or wound care. Find out about the staff that will be available to care for your family member.

In addition, careful observation during your visits to the facility can help you to determine whether there is an adequate level of staffing. How many nurses and Certified Nursing Assistants do you see during your visit and what are they doing? Are the residents' requests for assistance answered in a timely manner? Visiting the facility at varying times of the day can help you to have a more accurate picture of the staff available to care for your family member.

Finally, ask questions about the staffing levels and staff turnover rates within the facility you are considering. Once you have admitted your loved one to a skilled nursing facility, be sure to visit them frequently and speak with the facility's Administrator or Director of Nursing if you notice any areas of concern.

The Centers for Medicare and Medicaid Services ("CMS") provides information to the public on the average staffing hours for a nursing home facility located in the State of North Carolina. According to CMS, in a facility with 98 residents, a Registered Nurse would average 36 minutes with each resident per day; a Licensed Practical Nurse would spend 48 minutes per day; a Certified Nursing Assistant would spend an average of 2 1/4 hours per day. Be aware of the time that the staff is spending with your family member. For example, standard nursing practice requires that a resident who is immobile and totally dependent upon the nursing staff for care, should be turned and repositioned at least every two hours to prevent the development of pressure ulcers.

Understaffing may continue to be a problem for the nursing home industry. Nevertheless, by being conscious of this issue and by being actively involved in the care your loved one receives, you may lessen the consequences of staff shortages in the nursing facility you have selected.

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A NEWSLETTER FROM THE LAW

Injured Workers May Receive Additional Compensation

By Chris Olson

Many workers may think they can receive only workers' compensation benefits when injured on the job. Those workers' compensation benefits are limited and generally consist of payment of medical expenses related to the workplace injury and two-thirds of the injured worker's weekly wages. While it is generally true that an injured worker will receive only those limited benefits, there are exceptions to the rule. Under certain circumstances, an injured worker may be entitled to additional compensation.

In North Carolina, there are two primary situations in which an injured worker may be entitled to further recovery: (1) the injury was caused by a third party; and (2) misconduct on the part of the employer. If either situation applies, the injured worker would be allowed to pursue a lawsuit in ordinary civil court. The worker would be permitted to seek damages based upon his or her medical expenses, lost wages, physical pain, mental suffering, and, if applicable, punitive damages. A jury would determine the amount of damages the injured worker is entitled to receive. Generally, this recovery would be more substantial than the limited workers' compensation benefits allowed.

If a workplace injury is caused by the negligence or wrongful conduct of some party not employed by the injured worker's employer, the injured worker can pursue a third party lawsuit. For instance, if an employee of Company X is injured due to the fault of an employee of Company Y, the injured worker can file a third party lawsuit against Company Y and/or the employee of Company Y who was negligent.

If a recovery is obtained, either through a negotiated settlement or a jury verdict at trial, the injured worker's employer may be entitled to reimbursement for benefits paid by the employer. Often, attorneys for the employer and the injured worker negotiate how much of the settlement sum will be paid back to the employer. In North Carolina, any agreement regarding the amount of workers' compensation benefits to be paid back to the employer must be approved by the Industrial Commission, the agency that oversees administration of the Workers' Compensation Act

in this state. Because the employer stands to get back some of the money, the employer has an incentive to cooperate with the lawsuit.

A much more limited exception to the North Carolina Workers' Compensation Act exists where a workplace injury results from wrongful conduct on the part of the employer. To fall within this exception, the injured worker must prove that the employer knew that one of its employees would very likely be killed or seriously injured if the employer did not take corrective action. It is not enough for the injured worker to prove that the workplace was generally unsafe. Rather, the injured worker must show that the employer knew that workplace conditions were so unsafe that it was simply a matter of time before a serious workplace injury or fatality occurred.

Factors which will help an injured worker show that a workplace injury resulted from employer misconduct include the following:

- Numerous and repeated OSHA safety violations.
- The absence of any safety plan or safety rules at the workplace.
- An employer encouraging or requiring workers to perform work in an unsafe manner or without proper safety precautions.

If you, a friend, or a family member suffers an injury on the job, recovery most likely will be limited to those provided for under the North Carolina Workers' Compensation Act. Nonetheless, where circumstances exist which indicate a workplace injury or death may have been due to the negligence or fault of a third party or employer misconduct, it is important to discuss all potential remedies with a knowledgeable attorney.

These materials have been prepared by Martin & Jones for informational purposes only and are not to be considered legal advice.

State Employees Lose Benefits

By Hoyt Tessener

In 2004, the North Carolina Legislature created a "super lien" on proceeds received from third-party funds for state employees and retirees from the state. The lien was inserted in the state budget and passed without notice.

The lien overturned the North Carolina insurance commission regulation that prevented payment to the state when the third-party is liable for medical costs. If you were a state employee (or retiree) and you were injured by the negligence of another (such as a car wreck, medical malpractice or products liability), your health care was paid by the State Health Plan. If you received a recovery from the negligent third-party, you did not have to pay the health insurance company for the benefits you have paid for over the years. Quite simply, you worked for your health care benefits. The benefits were part of your compensation. There was no need to repay those when injured by someone else. It is the sort of benefit that you do not normally understand or appreciate until you are injured.

The effect of this "super lien" is that any amount paid by the health plan must be repaid first. For example, if you were in a motor vehicle collision that results in medical bills of \$50,000 and the person who hit you only has minimum limits of \$30,000, you may be able to recover the \$30,000 in minimum limits but every dollar will have to go to the health plan because it paid \$50,000 in insurance benefits on your behalf.

There is no provision for attorney's fees or costs in recovering the insurance benefits. As a result, no attorney can represent you on a contingency fee because there will be no payment to you. You certainly do not want to pay an attorney on an hourly basis to recover money for the health plan.

In the most serious situations where there are large medical expenses and limited insurance, the new "super lien" benefits the negligent party and his/her insurance company. The stated purpose of the "super lien" — repay the state so it will keep costs down — does not work. There is no reason to seek recovery since you will receive nothing, so there is no payment to anyone.

Contrast the North Carolina "super lien" with Medicare and Medicaid. If Medicare paid for your health care, it is entitled to full reimbursement less one-third attorney's fees and expenses. There is also a hardship provision in Medicare to allow you to petition Medicare to receive some of the benefits. Although the situation arises where you may not receive any recovery and the attorney would be paid for their fee, at least you have the opportunity of recovery under the hardship provision and Medicare does receive some return on its payment for your healthcare.

With Medicaid, the lien is limited to one-half of the recovery after payment of attorney's fees. In this instance, much like a worker's compensation lien, you are always entitled to some benefits.

Medicare, Medicaid, and workers' compensation encourages you to pursue your legal rights against the negligent party. By doing so, you ensure that the person responsible pays for at least a portion of your medical bills. Such a plan benefits all North Carolina taxpayers.

The North Carolina health plan super lien does nothing but protect private insurance companies and the negligent parties.

Paralyzed Construction Worker Receives Needed Benefits

A 37-year-old construction worker who was left paralyzed after being knocked from a roof where he was working received a \$1.5 million dollar settlement in Wake County. He and his co-workers were not wearing fall protection gear and stood atop a second-floor wall doing roof truss installation work using set tresses for support. The workers would grab trusses that were swung into place by a crane and nail the trusses into place. As roof trusses were swung into position, the worker was knocked from the roof to the concrete driveway below. He suffered permanent injuries, including paraplegia.

Representing the injured worker, Martin & Jones filed suit against the crane company responsible for moving the roof trusses, the general contractor, and the framing contractor. The worker, who was an undocumented alien, worked for an unlicensed, uninsured framing crew. Because the employer carried no workers' compensation insurance, the framing contractor became liable for the workers' compensation claim. The framing company accepted responsibility for the claim, and the suit proceeded against the general contractor and the crane company.

The injured worker will have his medical needs covered for the rest of his life as well as a handicapped-accessible home.

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