

A NEWSLETTER FROM THE LAW OFFICES
OF MARTIN & JONES

MJ *notes*

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- Personal Injury
- Wrongful Death
- Medical Malpractice
- Workers' Compensation
- Social Security Disability
- Nursing Home Negligence
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- Insurance Bad Faith
- Environmental Contamination
- Assisted Living Negligence
- Premises Liability
- Consumer Class Action
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- Vehicle Accidents
- Construction Site Negligence

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Is Your Work Injury Compensable?

By Tamara Nance

Many employees assume that because their injury happened at work, it is automatically a compensable workers' compensation claim. Unfortunately, that is not the case. With some limited exceptions, your work-related injury will not be compensable unless it occurs under circumstances that would be considered an "accident" under the Workers' Compensation Act.

An accident has been defined as an interruption of the regular work routine and the introduction of unusual circumstances likely to result in injury. An injury that occurs while the employee is engaged in his normal work routine under normal working conditions is not compensable. There must be some unexpected or unusual event that causes the injury. The best example of an injury by accident is a slip, trip or fall. However, any injury that occurs when something unusual or unexpected occurs is compensable, even if it does not involve something as dramatic as a fall.

Oftentimes following an injury at work, the insurance adjuster will call the employee on the phone and take a recorded statement, asking the employee to describe in detail how the injury occurred. The insurance adjuster often asks the employee if he was doing something unusual or out of the ordinary to cause the injury. Many employees deny that anything unusual happened, thinking that if they did anything out of the ordinary, their claim will be denied. In fact, the exact opposite is true. If the employee does not describe for the adjuster circumstances that tend to show that something unusual and unforeseen happened to cause the injury, the employee's claim will be denied. If the employee later tries to amend their description of the injury to describe an accident, the insurance company, and oftentimes the North Carolina Industrial Commission, which regulates

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workers' compensation claims, will assume that the employee is now making things up in order to collect benefits. How the employee describes an injury in his recorded statement can make or break his case.

Hernias and back injuries are the only exceptions to this general rule. Those injuries will be found to be compensable even if there was not an accident, if the employee can show that the injury was the result of what is called a "specific traumatic incident." A specific traumatic incident is an event, or series of events that occur contemporaneously and at a cognizable time. Therefore, for back injuries and hernias, the employee can be performing his regular job and still sustain a compensable injury, if he can point to a specific event that happened at a time certain to cause his injury. For example, if the employee is loading a truck, and he bends over to lift a box and feels a pop in his back, the injury is compensable. An injury to the arm occurring under the same circumstances would not be compensable, because the employee was performing his usual and customary job duties in normal fashion.

Occupational diseases, which are injuries or illnesses that develop gradually over time due to repetitive motion or exposure to harmful substances at work, are governed by a entirely different set of rules. For all other injuries, it is important to remember what is necessary to prove your entitlement to workers' compensation benefits.

What is Contributory Negligence and Why Do We Have It?

Contributory negligence is old law, a holdover from our years as a British colony. Contributory negligence states that if you contribute to your injuries in anyway, you are entitled to no compensation. North Carolina is one of only four states that still adheres to this old law. The other forty-six states have done away with contributory negligence – for good reasons.

Contributory negligence is unfair. You do not hear about contributory negligence because insurance companies routinely fight for its survival. The remaining forty-six states have some form of comparative negligence. In comparative negligence, the jury determines the amount of fault. For example, if a jury determines that you are entitled to \$10,000 to compensate you for your injuries but also finds you 10 percent at fault, you would receive only \$9,000. In North Carolina, in that same scenario, you would be entitled to nothing.

Contributory negligence remains the law in North Carolina because insurance companies and big businesses spend millions of dollars lobbying the legislature. There is no one to fight these special interests. No one sees the need to challenge the law until they are already subject to its harsh consequences. For example, you are stopped at a stoplight when someone rear-ends you, destroying your car and causing you damages. The insurance company's lawyer tells the jury that you should have looked in your rearview mirror, seen that this car was coming, and pulled off to the side. You state that you didn't have time for such a maneuver. Twelve jurors hear the story and determine it is possible you could have pulled off to the side and avoided this collision. Sure, the defendant is mostly at fault, in fact the defendant is 99.9 percent at fault, but the jury decides that it cannot say that you could not have done something, did not "in any way contribute" to what happened. Therefore you are entitled to no compensation. This result occurs more often than not in North Carolina.

Because North Carolina law favors the insurance companies and big businesses, do not give a statement or speak with anyone other than law enforcement officers and medical providers if you have been injured. You should contact a lawyer immediately. In many instances a lawyer will tell you how to handle your claim on your own.

Finding a Good Nursing Home

By Hoyt Tessener

A recent Wall Street Journal headline stated "U.S. Nursing Homes Quietly Killing Thousands – Report." As we all approach an older age, it's natural for us to consider the consequences of our parents and even ourselves spending time in a nursing home. In North Carolina, the population of those 65 and older increased by 20 percent from 1990 to 2000.

A nursing home provides nursing or convalescent care for three or more persons. The federal government regulates nursing homes if they receive any money from Medicare. Nursing homes are also regulated by the State of North Carolina if they receive Medicaid benefits. The North Carolina Department of Health and Human Services, Division of Facility Services regulates nursing homes. It also regulates prisons.

The investigation for the Wall Street Journal article found that 90 percent of the nursing homes investigated do not have enough staff members to provide quality care to the residents. North Carolina commissioned an investigation into why so many licensed Certified Nurse Assistants (CNA) do not work in the nursing home industry. The median wage for Certified Nurse Assistants in 1998 was \$11,358. Only 20 percent of those individuals had wages from all sources exceeding \$18,360. CNAs perform strenuous, personal, and difficult jobs, yet they are paid below the poverty level. It is easy to see why there is inadequate staff.

The nursing home industry responds to these reports that inadequate reimbursement rates force compensation of minimum wages. The industry conducts a coast-to-coast campaign complete with high level lobbying and doomsday advertising, even though the records indicate that the nursing home industry is doing quite well. Whenever I hear how difficult it is to operate a nursing home or a rest home, I ask, "Why do they stay in business?"

At our law firm, we receive calls everyday from family members whose loved ones are neglected, injured and even abused in nursing homes. We have seen bedsores grow to the size of a softball. We see unattended residents who suffer from fractured limbs, suffocation and even rape. There are good homes, but you must investigate.

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A NEWSLETTER FROM THE LAW

Finding a good home requires some homework before you are in dire need. We hear from family members after something bad happens. We always ask why a particular facility was chosen. Often it is because a loved one is in the hospital facing immediate discharge, forcing the family to find a facility quickly.

Before you are forced into a decision, investigate the homes in your area. The internet is an excellent starting point. Prepare a short list to investigate when and if the time arises. Once you have a list: (1) make an unexpected visit to the facilities. The general cleanliness and smell will tell you a lot about how the facility is operated; (2) speak with some of the residents and the residents' families; (3) speak with the Certified Nurse Assistants; (4) ask the administrators who provides the ancillary services, such as the prescription drug company, the hairdresser, the laundry service, the cleaning service and any other such services. Many times the owners of the facility own all of these separate companies as a way to shift (and hide) profitability.

If a loved one is the subject of abuse or neglect, what should you do?

1. Remove that person from the facility immediately.
2. Photograph the facility and the injuries. Be certain to photograph any bedsores in particular.
3. Prepare a chronology beginning with the date your loved one went into the facility and why. Be as specific as you can as to time and dates and include the names of anyone involved in the care of your family member.
4. Contact the Division of Facility Services Hotline or a law firm experienced in handling nursing home abuse cases.

Getting older is difficult enough without having to think about spending your last days in a nursing home. Many facilities do a wonderful job. Our experience suggests that strong management in the facility makes the difference. Make sure you investigate the facilities and that you have an idea what is best for you or your loved one before the immediate need arises.

TOM BARWICK PROTECTS THE RIGHTS OF MEDICALLY INJURED VICTIMS

Medical negligence left a young lady with the use of her right arm, nothing else. As she laid motionless, bedsores bore to her bones. With local care failing to cure her, she would have died if something were not done. Tom Barwick arranged for her to be seen by one of the country's leading experts in rehabilitation. Under his watchful care, the bedsores healed. Thanks to Tom's efforts, she now has the chance for a long life to enjoy with her two young sons.

A large busy hospital turns off vital monitors to a desperately ill young woman because the noise bothers the nurses assigned to watch those very monitors. As a result, a young mother dies. Tom Barwick discovered the truth and made the hospital provide her young son with the financial means for a successful future.

Robbers brutally attack a 20-year-old with a two-by-four. He is rushed to the hospital to see the only neurosurgeon. The neurosurgeon callously abandons him. His father tries to transfer his son to another hospital but the neurosurgeon refuses to release him. Finally, a nurse calls the hospital administrator and the young man is transferred. It is too late. The delay caused the young man's death. Tom Barwick tracked down evidence uncovering secrets sending the message that a doctor cannot abandon a patient without consequences.

Nothing can replace a lost loved one, especially the loss of a child. Parents of a young child who died when she was admitted to the hospital without being seen by her pediatrician turned to us. Tom Barwick stood with the parents until the negligent parties admitted that their inattention resulted in a needless loss of a precious life.

You are probably aware of the efforts underway to limit the rights of individuals such as yourself and your loved ones from being fully compensated for your personal injuries. Although the debate has focused on medical malpractice, the proposed limitations are extensive and seek to redirect the right to recover in many, many other situations where people are injured or lose loved ones as a result of someone's carelessness.

This legislation is unfair. It takes away the rights of jurors to decide how an individual should be compensated. It limits recoveries. Its purpose is to discourage people like yourself from seeking help through our judicial system for personal injuries and loss of loved ones. It creates a privilege class of healthcare providers and manufacturers and shifts the burden for the losses caused by personal injuries and death from malpractice and manufacturing to the victims. The only real winners are insurance companies who will continue to charge high premiums while being the beneficiary of caps. Tort reform might sound like a good idea until you're the victim of someone else's negligence. And you cannot predict to whom or when that will occur.

You can do something. Join in support of the North Carolina Coalition for Patients' Rights. Martin & Jones recommends this organization to you as an organization that will work for you. The Coalition is working hard to protect the rights of injured people and survivors of lost loved ones, to ensure continued access to justice, and to maintain the ability of all North Carolinians to seek full and fair compensation for injuries and losses from a jury of our peers. They are lobbying your legislature. They are airing informative television ads. They are participating in debates. Most importantly, they are organizing victims whose rights are in jeopardy to let their voices be heard in our Congress and Legislature. It is easy. You can join on-line at www.nc-cpr.org. Or, you may also join by writing or calling the North Carolina Coalition for Patients' Rights with the information provided below:

Marion M. Smith, Coalition Coordinator
North Carolina Coalition for Patients' Rights
1049 Colleton Way, New Bern, NC 28562.
(252) 636-7466. Or email Ms. Smith at marionsmith@earthlink.org

If you wish, call our office and let us answer any questions you have about how you can join this organization in the fight against unfair tort reform legislation. Your efforts will affect you and anyone who will suffer unnecessary injuries and losses of loved ones in the future.

Nursing Home Fails To Provide Standard of Care

As the century turned, our elderly client was a patient at a nursing home in Sanford, N.C. An insulin-dependent diabetic, our client's blood sugar and insulin levels were to be checked several times each day to ensure that she did not become hypoglycemic. Our client was suffering from dementia and several other conditions that were severely impacting her quality of life. She was bed-ridden and totally dependent on the nursing home staff to care for her.

On December 31, 1999, our client's blood sugar dropped to a dangerously low level, fluctuating throughout the night. No doctor or ambulance was called, although the nurse on duty knew that she was supposed to contact a doctor when our client's blood sugar dropped to such a low level. Our client's daughter lived five minutes away from the facility and visited her mother every day. Although she was often called for such relatively minor injuries such as a discovered bruise or when her mother did not eat all of her dinner, no one called our client's daughter that New Year's Eve to report that her mother was so gravely ill. Our client's daughter never got the chance to say good-bye.

We took the video deposition of the nurse on duty that night, and asked her repeatedly why she chose not to call a doctor, an ambulance or her charge's daughter. She admitted that her failure to do so was a violation of the standard of care required for all nursing patients. Through court-ordered negotiations, the nursing home was held responsible.

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

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