

**ALL ABOUT YOUR
WORKER'S COMPENSATION CLAIM**

Prepared By

**The
TITUS & MURPHY
Law Firm**

INJURY CLAIMS * CRIMINAL DEFENSE

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A Worker's Compensation Claim can be one of the most devastating events of a person's life. The loss of income, physical injury and maze of the claims process can be a nightmare to the injured person unfamiliar with the process.

At Titus & Murphy we help injured persons through the Worker's Compensation maze, dealing with insurance adjusters, rehab nurses, the Worker's Compensation Administration, and all the paperwork necessary for you to receive full and fair compensation. We have prepared these materials to help you understand the process we must go through in bringing your claim.

Please read it, keep it and read it again and again. It should help you with information, instructions and hopefully ease your fears as we work your claim to conclusion.

Remember, the information in these materials is generic in nature to all claims, but each claim is different, based on the particular facts. How your claim fits in these concepts will be the responsibility of you and your lawyer.

UNDERSTAND YOUR RIGHTS:

What is Worker's Compensation?

Worker's Compensation is an insurance system designed to deliver limited income replacement and medical benefits in a quick reliable fashion. Despite that goal, the system has been changed four times since 1985. The most recent version is for injuries after January 1, 1991, which we will describe in these materials.

What if I don't want Worker's Compensation - can I just sue?

In most cases - NO. The law in New Mexico has an exclusive remedy provision. That means for your employer and any co-employees, you may not sue them at all for physical injuries received on the job. Your only remedy - the exclusive remedy - is a worker's compensation claim. Types of claims not limited by the exclusive remedy provision are intentional torts, sex, race, age or handicap discrimination or wrongful termination.

You may always sue third persons - individuals or companies who are not your employer or co-employees. For third party claims, a full tort recovery (known as a personal injury claim) is available and you are not limited to the provisions of the Worker's Compensation Act. Ask your lawyer if you have both a worker's compensation and a third party personal injury claim.

However, remember any amounts recovered in a third party personal injury claim must reimburse worker's compensation payment and will cut off any further worker's compensation

benefits. In certain cases, because of this reimbursement requirement, a third-party claim is not practical. Ask your lawyer about this.

Prerequisites to the Claim:

To have a claim, you must have:

- 1) a physical or psychological injury,
- 2) which occurred at work,
- 3) while doing duties your employer required you to do.
- 4) which causes a loss of income before your maximum medical improvement (MMI) and/ or an impairment after MMI

Notice to Your Employer:

Once you receive an injury, you must give written notice to your employer within fifteen (15) days of the accident and injury or your claim is forever barred, and you may not receive either medical care or income replacement benefits.

Notice (the lack of it) has become the defense of the 1990's for employers seeking to avoid all payments of worker's compensation. Notice forms should be available and posted by all employers. The printed form is not required and any form is acceptable. A simple letter or note which sets out the date, time and place of injury, how it occurred, the part of your body injured, how it effects your work and, any witnesses names if delivered to your supervisor is effective notice.

That a co-worker saw it happen is not good enough. Send your written notice to the main office and make sure it is given to your supervisor or personnel manager. As with all legal documents, make sure you keep a copy.

Choice of Doctors:

New Mexico law provides that your employer has an option to either provide you with a doctor or allow you to select your own. (This does not apply to emergency care.) If your employer does not direct your care within the first 60 days after your accident, you may choose any doctor or chiropractor you are comfortable with. We suggest you see your family doctor. If he/she cannot take care of your injury and wants to refer you to a specialist, you must get a referral in writing from your treating doctor to the specialist. Any time you change doctors you must get the referral in writing or you may not change doctors.

At Titus & Murphy, we do not direct medical care. However, those doctors who understand the legal process and have experienced success with former clients include:

Back/Neck Injuries:

Dr. Peter Saltzman (505) 327-0333
1750 E. 30th
Farmington, NM 87401

Knee/Shoulder/Hand injuries:

Orthopedic Associates (505) 327-1400
2300 E. 30th St. Bldg D Suite 101
Farmington, NM 87401

Durango Orthopedic (970) 382-9500
1 Mercada St. Suite 202
Mercy Medical Center
Durango, CO 87301

Chiropractic:

Matt Verstraete, DC (505) 326-5476
2130 Farmington Ave.
Farmington, NM 87401

C. W. Rowse (505) 327-4845
2904 N. Hutton
Farmington, NM 87401

After the 60th day from date of injury, the party who did not make the initial selection of doctor may request a change of doctor. Therefore, if the employer designated the doctor initially, you may request a change of doctor after the 60th day. If you choose the 1st doctor your employer may then request a change after 60 days. Any request for change of doctor must be done on the approved form. Make sure this is done per the rules.

If your employer requests a change of doctor, you may object to their choice within 3 days of receipt of the notice of change. Failure to object timely waives your right to object. If you object timely, by filing your objection with the Worker's Compensation Administration, a judge will then select the new doctor.

Remember, if you fail to follow this procedure, two bad things happen:

- 1) Your employer does not pay for bills generated by non-authorized doctors or their referrals.

- 2) Non-authorized doctors may not testify at trial to provide evidence to support your case.

THEREFORE, make sure the proper procedure is followed so that your medical care is covered and may be used for your benefit.

Employer Interference with Medical Care:

Some companies have safety men, insurance adjusters, or rehab nurses which will try to go to your doctor appointments with you or talk to your doctor outside your presence. This is only allowable under New Mexico law if you consent. Therefore, this interference is avoidable if you do not consent.

We encourage our clients to tell the adjuster, safety man or rehab nurse that they may not attend medical appointments and do not have permission to talk to the doctor. Please tell them they may 1) get your medical records only or 2) ask Titus & Murphy for further information.

You've hired us to be your lawyers and we will take care of these matters. We want you to do what the doctor tells you to do.

Release to Work:

If your doctor releases you to return to work - either full or light duty - you should get the release, including any work restrictions, in writing. Make a copy of this form and bring it to us, and take the original to your employer. If your employer has work within the restrictions, you must accept it or forfeit Worker's Compensation Income Replacement Benefits. Therefore, if you're able, you must return to work as soon as your doctor releases you to do so. However, even after returning to work, you may be entitled to worker's compensation benefits in addition to your wages.

Income Replacement Benefits:

Worker's Compensation provides four types of income replacement benefits:

- Temporary Total Disability
- Temporary Partial Disability
- Permanent Partial Disability
- Permanent Total Disability

Temporary Total Disability (TTD):

After your injury, if your doctor says you are unable to do any work, you are entitled to 2/3 of your average weekly wage (AWW). (AWW means gross wages, not take home, for 6 months prior to accident ÷26). Please bring us 6 months of paystubs to calculate your AWW. There is a State maximum compensation rate (it changes every year, but will be \$300-\$350/week). These benefits are not payable unless you miss more than 7 days work. If you miss more than 30 days,

then the 7 day waiting period will be paid for. These benefits cease when your treating doctor releases you to work and your employer gives you either full or modified work.

Temporary Partial Disability (TPD):

If prior to maximum recovery from your injury, your doctor releases you to full or modified work and your employer provides you a job consistent with the doctor's release, you must accept the job or forfeit TPD benefits.

TPD benefits are based on a wage loss which must be calculated each week as follows:

AWW minus Actual Wages Paid x 2/3 = TPD due for that week (Note: This can change each week.)

If your employer pays you your pre-injury wage, you are not entitled to TPD. If you return at a lower wage, or at the same hourly rate, but for less hours (don't forget overtime) you should be paid TPD.

You must bring us all your paychecks received after date of injury to determine these TPD benefits, which can change each week.

Permanent Partial Disability (PPD):

Your treating doctor will be continually asked for the date of your maximum medical improvement (MMI). MMI comes when your doctor says you've either fully recovered from your injuries, or have plateaued at a level at which further recovery is not expected. Unfortunately, this has little or no connection to your ability to work.

When you reach MMI, we then for the first time can know the extent and permanency of your injuries, and what residual effect they will have on your life, work and family. We can calculate the permanent disability due.

Everyone's body heals itself at a different rate, as do different types of injuries. Minimal sprain/strain may be resolved in a few weeks. Major spinal injuries can take years to reach MMI and have significant residuals.

Remember the old commercial "We will sell no wine before it's time?" That concept applies here as well, and your case is certainly more important than a bottle of wine!

After MMI, TTD and TPD, benefits are no longer available. For most, Permanent Total Disability (PTD) is not either - as you must lose 2 arms, 2 legs, or 2 eyes to receive it.

Therefore, PPD is the only money benefit after MMI to compensate you for your injuries. However, vocational disability has nothing to do with PPD, as ability to work (or lack of it) has little to do with PPD.

Rather PPD is based on an "impairment" rating given to you by your doctor according to AMA Guidelines.

If you have a "scheduled injury" (to a foot, knee, hand, arm, or eye), the impairment rating is the % times your AWW to determine your compensation rate after MMI.

For neck or back injuries, you may receive "modifiers" to your impairment rating as follows:

Medical Expenses

Your employer and their insurer must pay all your authorized medical expenses. Authorized medical care must be from an authorized treating physician and his referrals. All other care is on your own. You should check from time to time as to whether all medical bills have been paid and bring to us any unpaid bills.

In addition to doctor, hospital, x-ray, physical therapy, pharmacy bills, you are also entitled to "medical mileage," if you travel from your home for treatment over ten miles one way. Keep a log on a form we will supply. We will submit your mileage at 32¢ per mile.

Vocational Rehabilitation

Job placement and/or retraining was eliminated from the Worker's Compensation Act in 1990. These benefits are no longer available. The State Division of Vocational Rehabilitation may provide some retraining for the seriously injured. They can be reached at 327-5123.

Return to Work

If your doctor releases you to work, you should return to your employer to work. Your employer should take you back if they have work available. They must not fire you or in anyway retaliate against you because you were injured. If you feel you are being discriminated because of your physical injury, you should contact each of the following:

Worker's Compensation Administration
Administrative Investigations
1-800-255-7965

Human Rights Division
(505) 827-6838

Equal Employment Opportunity Commission
(505) 841-8443

Attorney Fees

By hiring Titus & Murphy, we have taken your case on a contingent fee basis. We may not receive a fee unless it is approved by the WCA.

Any fee awarded must be based on the benefits we are responsible for securing, but is not a specific percentage of your benefits.

Any fee will be paid 50% by the employer/insurer and 50% by you.

In most cases, fees are \$500.00 to \$5000.00 (your ½ would then be, \$250.00 to \$2500.00).

In most cases, your ½ can be deducted from benefits received. In some cases, there will be fees due after all income benefits are received. You must then pay these fees awarded and we will bill you monthly until payment is received.

Lump Sums Settlements

There are only two circumstances when a lump sum settlement can be paid to an injured worker:

- 1) If you are returned to work for at least six (6) months at 80% of your pre-injury wage, then you may lump sum the impairment rating only. (No Modifiers.)

or
- 2) partial lump sum only pay debts accumulated or make delinquent during your disability.

DON'T EXPECT A LUMP SUM SETTLEMENT TO PUT MONEY IN YOUR POCKET UNLESS YOU RETURN TO WORK - IF YOU DON'T WORK, YOU CAN'T SETTLE! (AND the LUMP SUM WILL BE MISERLY SMALL.)

The Claim Process

When your employer and its insurer fail to pay any benefit due to you, we may file a claim with the Worker's Compensation Administration (WCA), the state agency which supplies the judges to decide worker's compensation claims. You may not sue in court for worker's compensation - the WCA claims process is the exclusive remedy.

When benefits are unpaid, there is a one-year limit to file a claim with the WCA or the claim is forever barred. (Read: You get 0 - zero) Our questionnaire gives us the information necessary to file your claim. Please provide us updated information immediately. If any benefit is unpaid, let us know so we can either get voluntary payment or file a claim.

Once a claim is filed, the WCA will first schedule a mediation. This is an informal process whereby you, your lawyer, the employer, insurance adjustor and their lawyer will meet with a WCA mediator to present each side. The mediation will be held within 60 days of filing the claim.

The mediator will try to get us to come to an agreement. If we cannot agree, the mediator will submit a "Recommended Resolution" (the RR). Each side will have thirty (30) days to accept or reject the RR. If both sides accept, this is the decision of the case.

If either side rejects the RR, a trial will be scheduled, usually 6 to 9 months from the date the claim was filed.

We will then take depositions of your doctors, interview all witnesses, and prepare for the formal trial before one of the 5 worker's compensation judges who hear these cases. You will have to testify as to your age, education, past relevant work, the accident, your injuries and its effect on your life and ability to work. The worker's compensation judge would then decide your case based on the evidence presented at the Formal Hearing.

What if they won't pay me?

If the employer denies compensability of your claim, they may pay nothing or a reduced rate while we process your claim. We will process it as rapidly as we can while making sure you receive maximum benefits due you. BE PATIENT!

We cannot loan you money, as it is unethical for us to do so. Work if you can, but follow your doctor's advice. Only by doing what your doctor tells you to do can you get to MMI as soon as possible and maximize the money to you for this injury.

What should I do to help my case?

See your doctor as often as he wants and do what he tells you. Make all appointments, describe all your complaints, symptoms and limitations. Oh how many times has an insurer argued that "there must be nothing wrong with him because he doesn't go to the doctor."

We want your doctor to see you as soon as possible and to closely monitor your recovery. The doctor will be a vital witness in your case to explain your injuries how they have or will effect or limit you, why medical costs were necessary to do and reasonable in amount, etc.

Your compliance with the treatment program is critical, not only to your recovery, but to development of this important witness.

How do I prepare myself to be a witness to help my own case?

We encourage all our clients to keep a diary on a calendar.

Go to a bookstore and buy a calendar that has big enough boxes for each day to write in notes. Each day you should note medical appointments, lost work, pain complaints, loss of hobby or activities you might otherwise have enjoyed (softball, horseback riding, even picking up your child).

If trial is 2-3 years after the accident these details can get lost in your memory unless you document them. (What did you have for lunch today?)

HELP YOURSELF! Damage claims are built like a jigsaw puzzle, - one small piece at a time. Your calendar puts these small pieces in place so we can see the big picture. Periodically, we will ask for your calendar/diary. You must keep it or you are limiting your evidence to your memory.

If I can't pay my bills, can I borrow money against my settlement?

No- It is unethical and we could be disbarred for loaning clients money. Ethics rules do however, allow us to advance litigation costs (copies, service, depo fees, etc.) for your case, for which you will be billed monthly.

What Other Possible Benefits are Available?

Recovery of benefits for your injury many times takes a long period of time. Other benefits may be available to compensate you during the case:

- 1) Social Security: If you will be totally disabled for twelve months or longer, you should apply for Social Security Disability through the local Social Security office. If you are denied these benefits, don't be discouraged. Most people are denied, no matter what their injuries. These benefits are easier for older people to receive, but any claimant must show they can do no job in the natural economy. Appeal any denial. If you get to the stage which requires a hearing before an Administrative Law Judge, we can represent you at that stage of the case.
- 2) Company disability programs: Many employers have as a part of their company benefit package sick leave, vacation or disability programs (both short term and long term). Take advantage of these benefits. Apply for them and demand the company pay them pursuant to the summary plan description in the company manual or other documents that the

employer has available. If you don't have these documents or manual, ask the personnel manager for a copy. Let us know of the receipt or denial of any benefits.

- 3) Unemployment compensation: If you become unemployed during our case, apply for unemployment compensation benefits at the Department of Labor. New Mexico law requires you to register for unemployment compensation when you first become unemployed, even if you are presently ineligible to receive benefits because you are disabled. Don't be discouraged. Register now, so benefits will be available when you are eligible.
- 4) Medical pay/uninsured motorist: If you were injured in an automobile wreck, the insurance policy on the car in which you were riding should have medical coverage and/or uninsured motorist coverage. Make a demand on the insurance carrier to pay these benefits. Get us a copy of the policy and declaration page so we can help you coordinate any available benefits.
- 5) Health insurance: Though someone else may ultimately be responsible to pay your medical bills and other damages, health insurance coverage might be the easiest source of payment of your medical expenses. Use these benefits, if available, to pay for necessary medical to reimbursement in most cases. Get us a copy of your health insurance policy if you are having medical expenses paid by health insurance.
- 6) V.A. or P.H.S. programs: Some of our clients are military veterans and may get benefits through the United States Veteran's Administration; Veterans may have free medical care at the local V.A. clinic; Indian clients have free medical care at the P.H.S. hospital. Take advantage of any such programs available to you.
- 7) Other government programs: If you are unable to return to your former job, the State Division Vocational Rehabilitation will provide free retraining in appropriate cases. Apply for these services if you need help getting back to work. If you have no income or other available asset to support yourself and your family, don't be embarrassed to apply for welfare, food stamps or other social programs.

If any of these programs or benefits are available to you, apply for them. Don't wait for the responsible party to pay for your lost wages, medical expenses or other damages. You should coordinate all the above benefits available to you to ease the financial burden of your injury. Please allow us to aid you in receipt of any of these benefits which might be available to you.

Does the Americans with Disabilities Act apply to me?

Title I of the American with Disabilities Act (ADA) 42 U.S.C. Section 12101 et. seq., became effective July 26, 1994 and provides you with rights preventing any employer of twenty-five or more employees and on July 26, 1995 for employers of fifteen or more employees from discriminating against you in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

Your employer or a prospective employer where you might apply may not deny you a job or promotion if you can, with or without reasonable accommodation, perform the essential functions of the employment position that you hold or desire. Any alleged job qualification must be job related and consistent with business necessity.

In looking for a new job, a prospective employer may not ask to whether you are disabled, or your workers compensation claims history.

Medical examinations prior to an offer of employment are prohibited. 42 U.S.C. Section 12112 (c) (2)(c)(3).

Your employer at the time of injury has an affirmative duty to take you back to work after a work related injury. 42 U.S.C. Section 12112 (b)(5).

If you can perform the "essential functions" of your prior job or a job you apply for (29 C. F. R. Section 1630.2(n)), the employer has an affirmative duty to make reasonable accommodations to allow you to do the job (29 C.F.R. Section 1630.9).

In certain instances, employers may be required to acquire adaptive equipment or devices. (29 C.R.F. Section 1630.9).

Can I be fired for filing a WC Claim?

In addition to the ADA, the Worker's Compensation Act requires your employer to rehire you if they have a position within your physical abilities if your treating doctor releases you to that job. Section 52-1-50.1 N.M.S.A. Your employer may also not retaliate against you for being injured or bringing a worker's compensation claim. 52-1-28.2 N.M.S.A.

Not only should you be aware of these new rights, but you should expect that they not be violated when you attempt to become reemployed and return to the work force to support yourself and your family.

If you suspect a violation by your employer or prospective employer, document your experience as much as possible. Start and keep a diary of all events. Save a copy of all applications, work rules, pre or post employment tests, etc. Get the names and addresses of all possible witnesses.

Remedies for an employer or prospective employer's violation of the ADA is reinstatement, back pay and attorney fees. In appropriate cases, punitive damages may be appropriate.

Remedies for violation for the Worker's Compensation Act's retaliatory or rehire provision is a civil penalty, up to \$5000.00.

If you believe a violation has occurred, do not wait to do something about it. If a claim is not brought within 6 months of the violation, it may be barred, no matter how valid. Please do not wait until the last minute. If you suspect a violation, provide us with your documentation, so we have time to investigate and file your claim if appropriate.

If you have any questions about this or any other rights, please do not hesitate to ask for further advice.

RECAP OF
INSTRUCTIONS TO CLIENTS
WORKERS' COMPENSATION

1. **TALK TO NO ONE** - Do not talk to anyone about your accident except one of the lawyers or investigators in our office. You should always require identification so that you are sure who you are talking to . Don't even talk to your own insurance company or to any lawyers hired by your own insurance company without notifying us so that we may be present if we desire. We will generally want these statements taken in our office.
2. **YOUR DOCTOR** - You should return to each of your doctors as often as necessary and should always tell them about all your complaints. If you see any additional doctors, be sure we are advised immediately of their names and addresses.
3. **RECORDS OF COMPLAINTS** - Please keep a daily or weekly diary or record of your complaints and progress. This can be very helpful when, a year later, you will be called upon to relate your pain and difficulties.

4. **WAGES AND EARNINGS LOST** - Please keep an accurate record of all days lost from work because of your injuries.
5. **MEDICAL BILLS** - Obtain and keep duplicate copies of all medical, hospital and drug bills. You should periodically send these bills to us for our files. Also keep records of any other expenses you may have in connection with your accident, such as the hiring of extra help. All your bills should be paid by check or you should obtain and keep receipts. You should keep a list of all your medical bills and the costs incurred in going to your doctor.
6. **WITNESSES** - Furnish to us immediately the correct names, addresses, and telephone numbers of any and all witnesses you may learn of.
7. **SAVE YOUR CAST** - If your injury requires a cast, brace, traction, or other appliance, save it. When the case is set for hearing you should bring these items with you.
8. **PHOTOGRAPHS** - Send us the negatives and prints of any photographs pertaining to your case which you or any of your friends have taken. If you are required to be in the hospital and are receiving any type of treatment like traction or physical therapy, please notify our office.
9. **HOSPITAL AND DOCTOR BILLS** - Submit all unpaid medical, hospital, doctor and pharmacy bills and claims for mileage reimbursement to our office. We will forward them to the worker's compensation carrier for payment.
10. **COPY ALL CHECKS RECEIVED** - We want to have a xerox of all checks you receive. Bring them in and we'll copy them for you before you cash them.
11. **QUESTIONS** - We will probably not contact you until we have something definite to report. If you go more than 30 days without hearing from us - feel free to call and talk to the legal assistant assigned to your case.
12. **REPORT ANY SUSPICIOUS ACTIONS** - Such as someone taking pictures, movies, etc.

What to bring to our office:

1. Copies of any statements previously made to anyone (opposing side, insurance carrier, etc.)
2. Correspondence with insurance company and insurance adjuster
3. Business cards from insurance company agents and adjusters, opposing driver, etc.
4. Copy of official accident report form
5. Copies of check stubs and/or other record showing hourly rate of pay, number of hours worked, etc., at time of accident - include wage record for the 26 weeks prior to date of accident
6. Any medical or hospitalization policies
7. Copies of any application for other insurance benefits
8. Copy of any application for unemployment benefits
9. Photos

We at Titus & Murphy seek to provide maximum recovery for your injuries in an expedient and efficient manner. Feel free to ask questions. We will try to send you copies of all our work and keep you fully informed. No settlement or offers of settlement will be made without your authority. This is your case - BE INVOLVED!

**WORKER'S COMPENSATION CLAIM
OUTLINE**

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Any Advertisement**

Compensation – Overview

The Basics:

- Must give written notice **within** 15 days of accident.
 1. Exceptions: Actual notice or latent injury
- Must file suit within one year of failure to pay benefits due
- Can't choose own doctor – Employer should designate their doctor or tell worker he can choose initial doctor.
- If employer chooses first, then worker can file written notice of change of doctor after 60 days.
- If doctor gives work restrictions, worker must give them to employer and ask for job within restrictions.
- If employer offers job within restrictions of doctor, worker must accept job or he forfeits all indemnity benefits until MMI.
- If employer offers no job – must pay Temporary Total Disability (TTD) – 2/3 of worker's Average Gross Wages (AWW).
- AWW = Gross Pay before taxes for 26 weeks before date of accident.
- If employer offers job at less pay for light duty or less hours, then TPD is due (Temporary Partial Disability).

To calculate TPD – must do a spreadsheet for every week as follows:

AWW minus Actual Pay equals difference

TPD is 2/3 of the difference

- TTD and/or TPD due until MMI (Maximum Medical Improvement) is determined by treating physician.
- At MMI Permanent Partial Disability (PPD) is figured in several ways:
 1. If scheduled injury 52-1-43 (legs, arms, eyes) – determine loss of use of the body part for weeks in schedule.

2. If can work and earn a comparable wage to AWW and injury is to non scheduled member PPD is impairment rating % of TTD not to exceed 500 weeks of Indemnity benefits.
 3. If worker can't earn a comparable wage after MMI then PPD is impairment + modifiers based on a formula: [Age + Education + SVP + Training] x RFC (See worksheet attached "A").
- If PPD per formula is < 80% - 500 weeks of total benefits; if >80% is 700 weeks of total benefits.
 - Lumps Sum can only be after MMI for:
 1. Payment of Debt incurred during disability; or
 2. For impairment rating only if returned to work earning >80% of AWW.
 - For all lumps, convert weeks remaining to present value (see chart attached 'B')
 - Worker can be paid mileage to go to doctor at 32 ¢/mile only if > 15 miles one way.
 - Use form letters (attached) for doctor opinions.
 1. Causation
 2. MMI
 3. Impairment
 4. Work ?????