

WORKERS'
COMPENSATION LAW:
CASES, MATERIALS, AND
TEXT

Fifth Edition

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WORKERS' COMPENSATION LAW: CASES, MATERIALS, AND TEXT

Fifth Edition

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President Employment Law Research, Inc.

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James B. Duke Professor Law Emeritus Duke University (1910–1993)

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MATTHEW  BENDER

PREFACE TO THE FIFTH EDITION

This casebook is offered in the conviction that workers' compensation, as a field of law, is big enough and important enough to deserve a place in the curriculum.

It comes as something of a surprise, to students as well as professors, to learn that workers' compensation, by any standard of measurement, is one of the largest areas of American law. Based on on-line legal database searches, there were over four thousand reported workers' compensation court decisions in calendar year 2012. This is more than the number of automobile negligence decisions, for the same period.

And the reported court-generated compensation decisions are only the tip of the iceberg of lawyer involvement. There are many times that number of cases decided at the administrative agency level, not to mention the numerous additional cases that are settled.

A most striking development is the dramatic increase in the volume of benefit payments. In 1972 total benefit payments nationwide totaled about \$4 billion, but by 2010 they had reached \$57.5 billion. Actual costs to employers are, of course, much higher.

One of the principal reasons the importance of compensation law in law practice has been underestimated is that a large part of it is concerned not with compensation claims at all, but rather with tort litigation. There are two reasons for this. One is the universal provision making compensation the exclusive remedy against the employer. The other is the third party features of the compensation law, governing the rights of the employer and employee as against third parties. Take the following familiar set of facts: an employee is riding as a passenger in a car driven by a co-employee, and there is a collision with a third party's truck. A personal injury lawyer cannot even begin to analyze the rights of the parties here without a thorough knowledge of compensation law. For a start, the attorney must know whether the employee was within the course of employment, as a prerequisite to determining whether there might be a cause of action against the co-employee or against the employer. And if the accident was covered by the compensation act, the employee's cause of action against the third party may be assigned at once to the employer. A host of detailed questions must be answered and the answers lie within compensation law.

Compensation law is also notable for the rich variety of legal areas it embraces. One could, for example, teach almost a complete course in conflict of laws without ever leaving the field of workers' compensation. And many of the liveliest growth areas of the law are deeply entangled with compensation law, such as products liability, automobile no-fault law, social security disability, and employment discrimination including sexual harassment.

PREFACE TO THE FIFTH EDITION

Quite apart from its own particular subject matter, then, compensation law offers unusual opportunities in the law school curriculum. Among other things, it is important to understand the difference between a traditional common law subject, like torts, and a *statute-based* subject like workers' compensation, on which a sort of common law is erected. For this purpose there is no better vehicle than workers' compensation law.

Lex K. Larson
May 2013

ACKNOWLEDGMENTS

In preparing this Fifth Edition and previous editions, I am grateful for the invaluable research and writing contributions of my colleague Thomas A. Robinson: the book has benefited extensively from his talent and from the breadth and depth of his knowledge of workers' compensation law.

In addition, I would like to acknowledge the considerable contributions to past editions of Professor Lisa M. Hervatin, who brought to this project her experience teaching with the Second Edition at Loyola Law School (Los Angeles); and of Professor Randy H. Lee of the University of North Dakota School of Law and Professor John Levering of Empire College of Law, Santa Rosa, California, for their most helpful comments. And I am indebted to Roger J. Thompson, of Travelers Medical Management Services, for giving permission to make use of and adapt material he has previously authored on the subject of special injury funds.

Finally, no words can adequately express the invaluable contribution of my father, who authored both the first and second editions. Arthur Larson was unquestionably one of the great legal writers and scholars of the twentieth century. While major revision and updating has taken place with the third edition, the book remains fundamentally a work of Arthur Larson's conception, and much of the writing is still his.

Lex K. Larson
May 2013

BIOGRAPHY

LEX K. LARSON

Lex K. Larson is President of Employment Law Research, Inc., a legal research group located in Durham, North Carolina. A graduate of Haverford College (1962) and Harvard Law School (1965), he practiced law in Washington, D.C. for fourteen years. From time to time he has taught courses as a member of the adjunct faculty of Duke University Law School. In 1991 he assumed the authorship of Larson's Workers' Compensation Law (12 vols. Matthew Bender & Co.) and Larson's Workers' Compensation, Desk Edition (3 vols. Matthew Bender & Co.), and he is author of three other multi-volume treatises on various facets of employment law. In addition, he has served as a member of the North Carolina Industrial Commission Advisory Council. Finally, he has been a certified mediator in the North Carolina court system and past Vice Chairman of the Board of Directors of the Dispute Settlement Center of Durham.

ARTHUR LARSON (1910–1993)

Arthur Larson grew up in Sioux Falls, South Dakota, and received his law degree from Oxford as a Rhodes Scholar. After the Second World War, he became a professor of law at Cornell University, where, in 1952, he authored and published what was then a two-volume treatise on Workers' Compensation. The recognition he received from that publication led to his appointment to the deanship of the law school of the University of Pittsburgh, and then to three high level governmental positions: Undersecretary of Labor, Director of the U.S. Information Agency and special assistant to and speech writer for President Eisenhower.

Dr. Larson arrived at Duke Law School in 1958, where in addition to teaching, he founded the school's Rule of Law Research Center. After retiring from teaching in 1980, Dr. Larson continued to work on his publications, including the workers' compensation treatise, which by the time of his death in 1993 had grown to eleven volumes. His other publications included a treatise on employment discrimination, as well as numerous books and articles on politics, workers' compensation, and international law.

THOMAS A. ROBINSON

Thomas A. Robinson, Durham, N.C., received his B.A., cum laude, for both Economics and History, in 1973 from Wake Forest University, his J.D. in 1976 from Wake Forest University School of Law, where he served as Managing Editor, Wake Forest Law Review, and his M.Div. in 1989 from Duke University Divinity School. From 1976 to 1986, Mr. Robinson was in private practice, where he focused on workers' compensation defense work. From 1987 to 1993, he was research and writing assistant to Professor Arthur Larson. Since 1993, Mr. Robinson has worked with Lex Larson as primary upkeep writer for Larson's Workers' Compensation Law (LexisNexis) and Larson's Workers' Compensation, Desk Edition (LexisNexis). He is a contributing writer for California Compensation Cases (LexisNexis) and Benefits Review Board Service—Longshore Reporter (LexisNexis). He is also a contributing author of New York Workers' Compensation Handbook (LexisNexis) and a contributing editor for Workers' Compensation: The Survival Guide for Business (LexisNexis). Author of numerous short pieces on workers' compensation and employment law, Mr. Robinson has lectured widely on workers' compensation issues. Finally, he is a member of the

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