

TENNESSEE WORKERS' COMPENSATION NEWSLETTER



A Quarterly Publication from the law firm of

Manier & Herod
Suite 2200, One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219-2494
(615) 244-0030
www.ManierHerod.com

MARCH 2003

Contributors: Terry L. Hill, David J. Deming, Fred C. Statum, III, James H. Tucker, Jr., Sarah H. Reisner, John W. Barringer, Jr., Stacey B. Cason, Michael L. Haynie, Chad I. Pearman & David M. Drobny

NEW RULES PROHIBIT LAWYERS FROM SURVEILLANCE

The Supreme Court of the State of Tennessee has put down new rules of professional conduct which become effective March 1, 2003. These rules are ethical rules for lawyers and do not apply to clients. One of the new rules could have a profound impact on workers' compensation cases.

Rule 8.4 provides that it is "professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." On its face, this rule would not seem to have a lot of effect on the defense of workers' compensation claims. However, Comment 5 to the rule says that, "the conduct prohibited by paragraph (c) includes the secret or surreptitious recording of a conversation or the actions of another. Before any party may be recorded, that fact must be disclosed in advance of the recording"

The Tennessee Bar Association has filed a petition asking the Court for reconsideration or clarification of this rule.

The Court has asked for comments and will be taking comments up to March 14, 2003. However, the rules still go into effect March 1, 2003. The brief filed by the Tennessee Bar Association says, "Many Tennessee lawyers have reasonably read the inclusion of this phrase to mean that the most routine of surveillance activities directed at opposing parties or witnesses in litigation -- surveillance of the type that is lawful today and that traditionally has been a legitimate and effective tool of lawyers of all kinds to seek the truth and advocate for their clients -- will be unethical on and after March 1, 2003." The brief goes on to say that, "Assuming that the filming in a public place of a supposedly totally disabled workers' compensation claimant might otherwise reveal him to be moving without any restriction, can any reasonable person believe that such fraud would be revealed with this tool if the fraudulent claimant were given advance notice of the filming?"

Written comments on this rule should be addressed to Cecil V. Crowson, Clerk, 100 Supreme Court Building, 401 Seventh Avenue North, Nashville, TN 37219-1407. Please let the Court hear from you with your comments as soon as possible.

**SPECIAL APPEALS PANEL ATTEMPTS
TO CLARIFY RECONSIDERATION
OF PRIOR AWARDS WHEN
EMPLOYEE VOLUNTARILY RETIRES**

The employee worked for Wilson Sporting Goods for more than thirty years. In April 1997, he sustained a back injury when he was involved in a collision with an electric cart at work. The Plaintiff was originally treated by Dr. Bagby and Dr. Dimick. Both those doctors assigned the employee a 0% impairment rating for the back injury. The Plaintiff was sent to Dr. Richard Fishbein, who evaluated the employee and assigned a permanent impairment rating of 5% to the whole body. The employee returned to work for Wilson and the case went to trial.

At trial, the trial court awarded the employee 7.5% permanent partial disability to the body as a whole. This equates to 1 ½ times the impairment rating of Dr. Fishbein. This award could also have been a compromise between the 0% of Dr. Bagby and Dr. Dimick and the 5% of Dr. Fishbein.

The Plaintiff continued to work at Wilson until October 1999, when he took sick leave from the company. He visited Dr. Paul McCombs, who informed the employee that surgery was not an option. Dr. McCombs also helped the employee obtain social security disability benefits. At this time, the employee retired from Wilson under its disability plan.

The employee filed for reconsideration with the trial court after his voluntary retirement. The trial court held that reconsideration was not appropriate in this case. The reasoning of the trial court was, first, the initial award was less than 2 ½ times the rating of Dr. Fishbein. Second, the trial court concluded that the employee had not been terminated by Wilson. The employee appealed the trial court's decision.

The Tennessee Workers' Compensation Special Appeals Panel reversed the decision of the trial court and remanded the case for reconsideration of the original judgment. In so doing, the Special

Appeals Panel held that the original judgment does not have to be 2 ½ times the medical impairment rating to be eligible for reconsideration. Furthermore, the Special Appeals Panel held that "the employee should not be entitled to retire and thereby unilaterally entitle himself to an increased award. We agree that the statute was not intended to allow reconsideration for every injured employee who has returned to work and subsequently retires." The Special Appeals Panel went on to hold that voluntarily retirement does not absolutely preclude reconsideration. The appropriateness of allowing reconsideration must be evaluated under the facts and circumstances of each individual case. The Special Appeals Panel also held that an award can be reconsidered if retirement is due to the employee's inability to perform the work because of injury or the employer's refusal to accommodate restrictions.

Hill v. Wilson Sporting Goods Co., 2002 WL 31740215

**TENNESSEE SUPREME COURT
HOLDS THAT 100% PERMANENT
PARTIAL DISABILITY DOES
NOT EXIST**

The employee, a driver for UPS, sustained injuries to his back and hip as a result of a motor vehicle accident. His injuries resulted in a 40% anatomical impairment to the body as a whole. The only evidence presented at trial was the testimony of the employee and the Standard Form Medical Report of the treating physician. The trial court found that the employee was entitled to benefits based on a 100% permanent partial disability to the body as a whole. The employee appealed, maintaining that he is entitled to permanent total disability benefits.

On appeal, the Tennessee Supreme Court reversed, holding that "a review of the workers' compensation statutes and cases of this state reveals no classification of '100% permanently partially disabled' exists. ... [I]f an individual is 100% permanently 'partially' disabled, then he or she must be 100% totally disabled." Based on

this reasoning alone, the Court set aside the trial court's ruling.

The Court went on to hold that the employee was entitled to permanent total disability benefits, despite acknowledging that the evidence on the issue of vocational disability was "sparse." The Court reached this conclusion based on the employee's testimony concerning the injury's impact on his ability to work and a written statement signed by the treating physician. The employee's failure to present proof of his disability through a vocational expert was not fatal to his claim. Indeed, the Court's opinion seems to lower the standard of proof required to establish a claim for permanent total disability.

**SUPREME COURT HOLDS
EMPLOYER NOT REQUIRED TO
MAKE A POST TREATMENT OFFER
OF EMPLOYMENT TO EMPLOYEE
WHEN EMPLOYEE FIRED FOR
MISCONDUCT PRIOR TO
TREATMENT**

The Employee worked for the employer on an assembly line making filing cabinets. At the time of the trial the employee was 45 years old. She has a high school education, and her work experience consisted of waitressing, nursing home work and factory work. Her work for the employer consisted of lifting pedestals and hammering drawers into place with a rubber mallet. The Plaintiff sustained an injury to her right shoulder at work in January, 2000.

Before a complete diagnosis had been made, Plaintiff was involved in an altercation at work. A co-employee called the employee a "bitch" and the employee responded by chasing the other employee with a box cutter and kicking him. As a result of this incident, and pursuant to the employer's policy against violence in the workplace, the employee was terminated for gross misconduct.

Following her termination from the employer, the employee underwent arthroscopic surgery to her

shoulder. She completed one month of physical therapy and was released by her physician, Dr. Riley Jones, with a full range of motion in some continuing residual pain. At the time she was released at maximum medical improvement, the employee was given no permanent restrictions on her physical activity and a 6% impairment rating to the body as a whole. The employee's attorney sent her to Dr. Joseph Boals for a one time, independent medical examination. Dr. Boles assigned an 11 % impairment rating to the body as a whole because he believed that a ligament was removed during the surgery by Dr. Jones.

At trial, the trial court gave more way to Dr. Boals' impairment rating and used the 11% impairment to the body as a whole. The Court also held that the 2 ½ times cap in T.C.A. Section 50-6-241 did not apply, the Court awarded the employee 30% permanent partial disability to the whole body.

The employer appealed to the Special Workers' Compensation Appeals Panel asserting that the trial court erred in holding that the 2 ½ times cap did not apply and that the evidence preponderated against a 30% disability of the body as a whole. The Special Appeals Panel affirmed the Court and found that the 2 ½ times multiplier did not apply because the employer made no offer of reemployment to the employee after she finished treating for her injury. Further, the Panel affirmed the trial court's 30% permanent partial disability award.

The Supreme Court of Tennessee granted the employers Motion for Review and reversed the trial court's judgment. The Supreme Court held that the employer does not have to offer the employee to return to work after firing the employee for misconduct. The Court held as follows:

We agree with the Defendant that an employer should be permitted to enforce workplace rules without being penalized in a workers compensation case. In our view, the General Assembly, by passage of

T.C.A. Section 50-6-241(a), did not intend to require an employer to make an offer of reemployment to an employee previously fired for violating workplace rules.

Accordingly, the employer in this case was not required to make a post treatment offer of reemployment to the employee who had been fired for misconduct prior to treatment in order to gain the benefit of the 2 ½ times multiplier found in T.C.A. Section 50-6-241.

Furthermore, the Supreme Court held that the 6% impairment rating of Dr. Jones was to be used because Dr. Boals' opinion was based on a different surgical procedure. The Supreme Court found that Dr. Boals based his opinion on an older surgical procedure and not an arthroscopic procedure. The Court found that Dr. Boals had not performed an arthroscopic procedure in the last seven to ten years.

The Supreme Court ultimately held that the employee's permanent partial disability was 15% to the body as a whole, the maximum award under the 2 ½ times cap of T.C.A. Section 50-6-241.

Carter v. First Source Furniture Group, 92 S.W. 3d 367, (TENN. 2002)

BREDESEN INDICATES THERE WILL BE NO MAJOR CHANGES TO WORKERS' COMPENSATION IN 2003

The lobbyist for the Tennessee Defense Lawyers Association reported that when asked several questions by the employers about Workers' Compensation reform, the governor said, "I accept the fact that we have a problem in the costs of Workers' Comp., but it will be tackled next year because of the pressures of the budget this year." This is an indication that no major changes to the Workers' Compensation Act will be introduced this year.

This newsletter is intended to summarize recent developments in Tennessee Workers' Compensation Law and should not be construed as legal advice. Please consult competent legal counsel for answers to your particular legal questions.

Certifications of specialization are available to Tennessee lawyers in all areas of practice relating to or included in the areas of civil trial, criminal trial, business bankruptcy, consumer bankruptcy, creditors' rights, medical malpractice, legal malpractice, accounting malpractice, elder law, and estate planning. Listing of related or included practice areas herein does not constitute or imply a representation of certification of specialization.

If you would like to be added to our newsletter mailing list, please contact Annette Fountain at (615) 742-9418.