

# TENNESSEE WORKERS' COMPENSATION UPDATE

## Employees Must Show Injury Arose out of Employment

*Tennessee Supreme Court declines to extend coverage to a traveling employee in Manier & Herod case*

**M**anier & Herod recently achieved a significant victory before the Tennessee Supreme Court Special Workers' Compensation Appeals Panel in a case involving a traveling employee. In McDonnell v. Continental Machine Movers, No. M2008-00968-SC-WCM-WC (Tenn. W.C. Panel 2009), the Panel reversed the trial court judgment in favor of the employee.

### THE McDONNELL CASE

In McDonnell, the employer had paid for accommodations for several employees to travel out of state to Kentucky on a job. The employee claimed benefits for a shoulder injury during a seizure he sustained in the cab of a co-worker's truck. The workers had stopped at a fast food restaurant before the workday to obtain breakfast, and the employee sustained the seizure while waiting for his co-workers to return with food.

### TRIAL COURT RULING

The trial court granted the employee benefits largely on the basis that he sustained his injury as a "traveling employee." Citing the Tennessee Supreme Court case McCann v. Hatchett, 19 S.W.3d 218, 221 (Tenn. 2000), the trial court reasoned that injuries sustained on the job by traveling employees were compensable, regardless of whether or not the employee could establish that his injury arose out of his employment.

### RULING REVERSED

On appeal after oral argument, the Supreme Court Panel reversed the trial court. The Panel's opinion emphasized that traveling employees must still establish that their injuries both occurred in the course and scope of employment and arose out of employment in order to recover benefits.

The Panel stressed that the only medical proof presented at trial indicated that the employee sustained a purely idiopathic seizure and that his shoulder injury was in no way "enhanced or exacerbated by any hazard attributable to his job." In other words, the Panel concluded that while the employee established that his injury occurred in the course and scope of employment, he could not carry his burden to prove that his injury arose out of his employment. The full Tennessee Supreme Court declined the employee's Motion for Full Review, thus adopting and affirming the findings of the Panel.

### SIGNIFICANCE

The McDonnell ruling is important for Tennessee employers as it clarifies the analysis for workers' compensation claims involving traveling employees. The Panel declined a broad interpretation of McCann, and determined that traveling employees must still establish the compensability of their claims in the same fashion as any other workers' compensation claimant.

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# Findings in Hearing Loss Claims Drive Change

*Tennessee Supreme Court's increased engagement in hearing loss cases has resulted in the transformation of related laws*

**H**earing loss has been a scheduled member worth 150 weeks since 1919. However, a review of appellate decisions dating back to 1927 reveals that hearing loss has recently become more popular with the Tennessee Supreme Court. That is partially due to the increased frequency of hearing loss claims, and a majority of the claims appear to involve retiring employees or those who have been laid off due to work force reduction or plant closure. Some have referred to hearing loss as "the new carpal tunnel case."

The Tennessee Supreme Court's increased involvement in hearing loss cases has resulted in an evolution of law governing the subject. In the last five years, the Tennessee Supreme Court, in the context of hearing loss cases, has addressed notice, the statute of limitations, causation and permanent partial disability.

## NOTICE AND STATUTE OF LIMITATIONS

As for notice and the statute of limitations, the Tennessee Supreme Court has held that the statute does not begin to run until the employee knows, or reasonably should know, that a permanent, work-related hearing loss has been sustained. The Court has gone so far as to hold that generic written notices distributed to employees following routine hearing tests as part of a hearing conservation program may not be enough to trigger the notice requirement. Furthermore, courts have held that notice is excused when employers, by virtue of hearing conservation programs,

know as much or more about the degree and cause of the hearing loss as the employee.

## CAUSATION

The Tennessee Supreme Court has also made it easier for employees to establish causation. For instance, the Court has held that evidence of noise levels within the workplace is not necessary to establish causation. All that is needed to establish causation is the employee's testimony concerning the noisy environment and expert proof establishing that hearing tests are consistent with noise induced hearing loss. However, the Court has observed that noise level data may be used to refute causation.

## PERMANENT PARTIAL DISABILITY

The Court has also enabled employees to obtain permanent partial disability benefits for hearing loss based on the body as a whole as opposed to the 150 week scheduled member. According to the Court, if the employee experiences tinnitus that interferes with concentration, sleep, or ADLs, the employee may receive benefits for an injury to the body as a whole. Depending on the situation, this can hurt or help the employer. An employer may benefit if the whole person impairment rating is low enough that application of the caps would result in a maximum award of less than 150

weeks. Conversely, an employer could face significantly more exposure in cases involving a high impairment rating, as well as the potential for a permanent total disability award.

## SUCCESSFUL DEFENSE

Despite recent case law, hearing loss cases can be successfully defended or mitigated. Successful defense of these claims begins prior to the employee's giving notice. Employers should strictly enforce hearing conservation programs, including required use of hearing protection. Although the courts have not addressed the exact issue, an employer may be able to raise a safety violation defense if the employee fails to use hearing protection in violation of the employer's strictly enforced hearing conservation program.

Once a claim has been filed, the employer should compile all available hearing tests. This data can be extremely valuable when determining causation and may provide a basis for evaluating exposure before the employee sees a doctor. Furthermore, a thorough social and medical history should be obtained, as ototoxic medications and medical conditions can cause hearing loss and tinnitus. Although a medical expert generally has the final say in causation and permanency, a complete history and review of hearing test data may reveal potential causation and permanency issues very early in the case.

*Author: Michael L. Haynie, a partner at Manier & Herod, who has defended over 150 hearing loss cases in Tennessee.*

*"Once a claim has been filed, the employer should compile all available hearing tests."*

## Employer Must Prove Meaningful Return to Work

*Supreme Court Panel declines to apply cap when employee returned to work above pre-injury wage*

In Patton v. Hartco Flooring Company, No. E2008-01829-WC-R3-WC (Tenn. W.C. Panel 2009), the Tennessee Supreme Court Panel declined to apply the return to work cap of Tennessee Code Annotated Section 50-6-241, even though the employer returned the employee to work at her same pre-injury position at an increased hourly wage. The Panel affirmed the ruling of the Scott County Chancery Court. *“Regardless of these facts, the trial court refused to apply the cap ...”*

The Patton employee suffered a compensable neck, right shoulder and right arm injury in her position as an unfinished line grader for her employer. At the time of her injury, she earned \$11.61 per hour.

After undergoing authorized medical treatment, including surgery, her employer returned her to work at her unfinished line grader position at a wage of \$12.07 per hour. When the employee complained that she was physically unable to perform her usual position eight months later, her employer transferred her to a less strenuous position as a nester. In this new position, she started at a wage of approximately \$11.37 per hour.

Interestingly, at the time of trial, the employee had received three “longevity raises,” which brought her pay as a nester up to \$12.21 per hour. In other words, at the time of trial, even though the employee initially accepted a reduced wage at the time of her transfer, her pay rate became higher than the rate she earned at her time of injury. Regardless of these

facts, the trial court refused to apply the cap and found that the employer had not carried its burden to prove that the employee made a “meaningful return to work.”

In affirming the trial court opinion, the Panel cited the Tryon v. Saturn Corporation, 254 S.W.3d 321 (Tenn. 2008) opinion. As discussed previously in this newsletter, the Panel refused to apply the return to work cap in Tryon, even though the employee had returned to his pre-injury employer at his pre-injury wage for 16 months before finally retiring upon advice of his doctor.

In Patton, the Panel found that the employee was reasonable, per the recommendation of her treating physicians, to accept the less strenuous nester job at lesser pay. Furthermore, the Panel disregarded the increased wage the employee had earned by the time of trial because of her three longevity raises. The Court refused to credit this argument because the employee “would have received the same raises at her unfinished line grader position had she been capable of continuing it.”

The Patton and Tryon decisions provide warning that Tennessee Courts will strictly hold employers to their burden of proving that an employee made a meaningful return to work. Employers are advised to closely monitor employees’ return to work wages and carefully evaluate any request by an employee to move to a lesser paying or less strenuous position.

## Disability Plans Provide Leverage in Workers’ Compensation Cases

An employer denies an employee’s workers’ compensation claim. The employee subsequently files for and receives benefits under his employer’s long-term and short-term disability (LTD/STD) plan. The parties later reach a settlement with the employer accepting the claim and paying the employee workers’ compensation benefits.

The question presents itself: What effect does the employee’s receipt of LTD/STD benefits have on the workers’ compensation claim? Tennessee employers are advised to keep defense counsel updated on an employee’s receipt of LTD/STD benefits as significant savings could result under two different scenarios.

Pursuant to Tennessee Code Annotated Section 50-6-114(b), employers may claim a credit for LTD/STD benefits paid to an employee against that employee’s workers’ compensation award if:

- The disability plan permits such an offset;
- The employee received the disability benefits for the same injury as alleged in the workers’ compensation case; and
- The offset may not result in an employee receiving less than the employee would otherwise receive under this chapter.

*LTD/STD plans can contain a provision to reduce an employee’s ongoing benefits if awarded compensation.*

Even if an employer cannot establish the three components of Section 50-6-114(b) to achieve an offset, the employer can still use the employee’s ongoing receipt of LTD/STD benefits as leverage in workers’ compensation settlement negotiations. Many LTD/STD plans contain a provision which reduce an employee’s ongoing LTD benefits if an employee receives a workers’ compensation award.

In other words, the larger an employee’s workers’ compensation award, the greater the reduction in his or her ongoing LTD benefits. In effect, even if the employee secures a sizeable workers’ compensation award, the employee will pay back a significant

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## Disability Plans Provide Leverage

portion of that award in reductions from his ongoing LTD benefits.

In settlement negotiations, defense counsel can achieve significant savings by proposing a greatly reduced workers' compensation settlement, such that the settlement does not dramatically affect the employee's ongoing LTD benefits. Thus, the employee's counsel actually bolsters his client's net benefit by taking less money in workers' compensation in order to preserve the amount of the ongoing LTD benefits.

The attorneys of Manier & Herod are well-versed in the implications of the above-mentioned scenarios. For an evaluation of how your LTD/STD plans may affect your workers' compensation exposure, please contact any of Manier & Herod's attorneys for legal advice.

## Workers' Comp Division Directory

### Attorneys

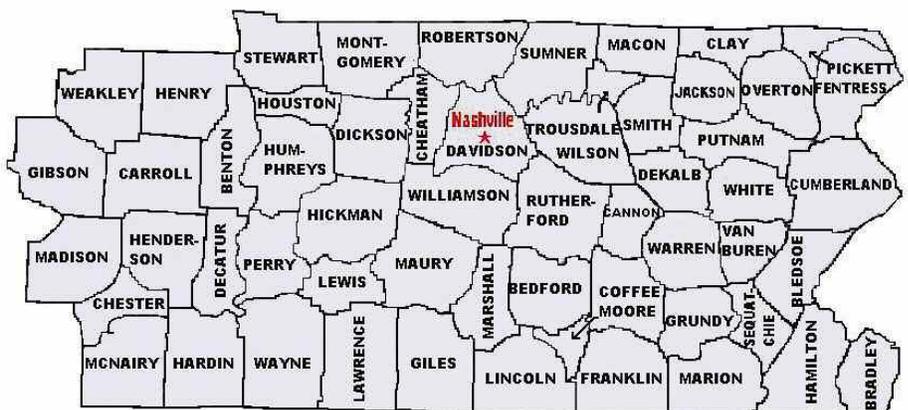
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## Workers' Compensation Practice Area

Although Manier & Herod's Workers' Compensation practice services the entire state upon client request, it is based in Nashville and regularly services the following 57 counties:



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.