

# TENNESSEE WORKERS' COMPENSATION UPDATE

## New Laws Change Workers' Compensation Practice

*Communications Addressed; Recreational Injuries Restricted*

The 2009 edition of the Tennessee State Legislature has passed four bills, which will affect the practice of workers' compensation in Tennessee. Manier's own Terry Hill drafted and was involved in the negotiations on several of these bills, including the Overstreet bill.

The following is a discussion of the four bills that are of the most significance in the workers' compensation arena. For copies of the actual bills, please log onto our website at [www.manierherod.com](http://www.manierherod.com) and click the "2009 New Statutes" section to pull up the text of the bills.

### SB 1574

This bill puts to rest the Overstreet decision, a 2008 Supreme Court case preventing employers, insurance carriers and attorneys from communicating with the authorized treating physician. SB 1574 allows us to communicate with the authorized treating physician under the following terms:

- The employer may send written communications to the treating physician, but must copy the employee or the employee's attorney on the correspondence with any attached materials and must provide the employee or the employee's attorney with copies of the physician's response to the correspondence within seven days of receipt.
- The employer may communicate orally with the treating physician, but must send the employee or the employee's attorney a written summary of the opinions or statements of the physician within seven days of a request by the employee or the employee's attorney.
- The employer's attorney may communicate orally with the authorized treating physician, but must provide written notice to the employee or the employ-

ee's attorney at least seven days prior to the communication and must provide the employee or the employee's attorney with a written summary of all opinions expressed by the physician within seven days of the communication.

It is our position that there should not be any restrictions on our ability to communicate with the authorized physician. However, it is also our feeling that this law will benefit us, and we felt very strongly that it should be passed. This bill was transmitted to the Governor for signature on June 12, 2009. When signed, it will take effect on July 1, 2009.

### SB 1909

This bill also deals with a recent Supreme Court decision. That decision greatly expanded the scope of employment to include workers who were voluntarily engaged in recreational activities. Our bill places some very specific restrictions on the employee's ability to successfully make a workers' compensation claim when he is injured during a recreational activity.

The bill disallows employees from recovering for injuries sustained during recreational activities, except in the following limited circumstances:

- When the employee's participation was expressly or impliedly required by the employer;
- When the employee's participation produced a direct benefit to the employer beyond improvement in employee health and morale;
- When the employee's participation was during the employee's work hours and was part of the employee's work-related duties; or
- When the injury occurred due to an

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# Timeliness and Consistency Essential in an Employee's Claim

*Panel Upholds Dismissal of Employee's Claim Based on Inconsistent History*

Longstanding Tennessee case law directs that an employee must support the causation element of his claim with credible expert medical evidence in order to recover workers' compensation benefits. The sufficiency of an employee's medical evidence depends on a number of factors, among them the timeliness of the employee's

*The employer should be skeptical of a claim supported by conflicting or delayed medical histories.*

report of injury to his treating physician.

An employee's delay in promptly relating the facts of his injury to his treating physician proved damaging to his claim in the 2009 Tennessee Supreme Court Panel decision, Ware v. McKesson Corporation, W2007-01181-WC-R3-WC (Tenn. W.C. Panel, March 30, 2009). In Ware, a forklift operator for a pharmaceutical warehouse claimed that he suffered a low back injury after

stepping down awkwardly from a forklift.

However, the employee had visited his primary care physician for lower back and left hip pain roughly one and a half months prior to the alleged work injury. The employee saw another primary care physician the day following the alleged work injury and never mentioned the alleged work incident to the physician, but did mention a history of lower back and left hip pain.

The employee did not report the alleged work injury to any physician until he visited an orthopedic surgeon roughly 11 months after the alleged work injury. He did not report the alleged work injury to his employer until one year following the alleged incident.

Following the delayed report to his employer, the employee saw a series of surgeons, the last of whom performed surgery, and opined that the employee's low back condition related to the alleged work incident.

The trial court dismissed the employee's claim. The court weighed heavily the discrepancies in the employee's testimony regarding the alleged work injury and the fact that the employee

*"The sufficiency of an employee's medical evidence depends on a number of factors, among them the timeliness of the employee's report of injury to his treating physician."*

delayed in timely relating the facts of his work injury to his treating physicians.

On appeal, the Panel affirmed the trial court, and denied the employee's claim based on his failure to establish causation. Similar to the trial court, the Panel emphasized the employee's failure to report the alleged incident to his physician the day after it allegedly occurred. Additionally, the Panel concluded that other physicians' testimonies disproved the last operating surgeon's assumptions upon which he based his causation opinion.

Ware demonstrates the importance of an employee's timely and consistent report of injury to his treating physicians immediately after an alleged work incident. If an employee provides conflicting or suspiciously delayed histories to his treating physician, the employer should be highly skeptical of the claim and investigate pre-existing or alternate causes for the injury.

## Department of Labor to Announce New Compensation Rates

Please check online at [www.manierherod.com](http://www.manierherod.com) for the new 2009 compensation rates as soon as they are announced. The rate announcement is expected in the latter part of June 2009.

# WORKERS' COMPENSATION UPDATE

## Establishing the Willful Misconduct Defense

### Supreme Court Panel Discusses Elements of Willful Misconduct Defense in Ruling for Employer

Tennessee Code Annotated Section 50-6-110(a) prevents an employee from recovering workers' compensation benefits when the employee's injury or death results from his willful misconduct. A recent Tennessee Supreme Court Panel decision clarified the factors necessary for an employer to carry its burden to establish this defense.

In Civil Constructors Inc. v. Haynes, M2008-00165-WC-R3-WC (Tenn. W.C. Panel, March 19, 2009), the employee worked as a truck driver for a contractor. While backing his truck onto a berm in attempting to empty a load of dirt onto the berm, the employee's truck overturned and injured the employee.

Earlier, the same day of the incident, the employee's supervisor specifically instructed him not to back his truck onto the berm because of the truck's instability. Only eleven days before this injury, the employee's truck had become unstable and tilted to one side when he backed his truck onto the berm. This prior incident had damaged the employee's truck.

The trial court granted the employer's motion to dismiss based on the premise that the employee's injury occurred because of his willful misconduct. The trial court took note of the employee's incident eleven days prior, and the fact that the employee's supervisors specifically instructed him not to drive his truck on the berm.

Furthermore, the court noted that on the same day of the incident, a

co-worker warned the employee of the same danger. The employee disregarded all of these warnings and instructions, which could have prevented the accident.

On appeal, the Panel affirmed the trial court's holding in favor of the

*Repeated, documented admonitions to employee remain relevant and valued by the court.*

employer. The Panel reiterated three elements necessary for an employer to establish an employee's willful misconduct, as set forth in the Tennessee Supreme Court decision Rogers v. Kroger Co., 832 S.W.2d 538 (Tenn. 1992).

According to Rogers, an employer must show the employee's "intention to do the act, a purposeful violation of orders, and an element of perverseness." Rogers, 832 S.W.2d at 538. The Panel found that the trial court properly applied these factors in dismissing the employee's case.

Haynes re-affirms the central elements necessary for an employer to establish the willful misconduct defense. Additionally, the ruling emphasizes the relevance and importance of an employer's repeated, documented admonitions to an employee to conduct workplace activities in a safe manner.



## Updated Firm Website Provides Easier Access to More Information

In March, Manier & Herod launched a redesigned website, which has given one of the state's oldest law firms a fresh look. The revamped site now features easier access to more information about the law firm, attorneys, areas of practice and publications such as the *Workers' Compensation Update*.

When you visit the website, you will immediately find the most recent firm news on the homepage. If you are in search of a more detailed look at the firm's current events, click "About" and "News." Here, you can learn even more about the recognitions, appointments and awards Manier & Herod attorneys are receiving, in addition to finding out when and where they will be speaking next.

Interested in finding more about a specific attorney? Clicking on "Attorneys" will allow you to select a specific attorney's profile and find information on their academic background, area of practice, published works and various certifications.

Another convenient addition to the website can be found under "Publications," where you can download the most recent Manier & Herod publications, such as the *Workers' Compensation Update* and *Employee Relations Matters*.

To utilize and learn more about the new features of the Manier & Herod website, please visit [www.manierherod.com](http://www.manierherod.com).

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## New Laws Spur Changes

unsafe condition during voluntary participation using facilities designated by, furnished by or maintained by the employer on or off the employer's premises and the employer had actual knowledge of the unsafe condition and failed to curtail the activity or program or cure the unsafe condition.

The Governor signed this bill into law on June 11, 2009, and it will become effective on that date.

### SB 1567

This bill states that if an employer is bought out by another company and retains the employee at the same or greater pay, the employee is not entitled to reopen his case under T.C.A. §50-6-241 (a). Prior case law counter-intuitively dictated that when a company simply changed its name, the employee could reopen his case and still keep his job. This bill was signed by the Governor on June 5, 2009 and will become effective on July 1, 2009.

### SB 2162

This bill makes it clear that an employee who is an illegal alien may not recover more than 1.5 times his impairment rating. The argument here is that the employee should not be able to go up to the 6 times cap if the employer is required to fire the employee because of the Federal law that prohibits the employer from retaining illegal workers.

However, the bill also holds that if the employer is aware that the employee is illegal, there will be an automatic award of 5 times the rating. The employee will not get those funds, which will go to the State Second Injury Fund.

We have received several inquiries as to who would pay this additional amount, whether it be the insurance company or the employer. The statute does not specify that; however, it would seem that if the employer was at fault that perhaps it would pay the additional 3.5 times.

This bill has passed the Senate and the House and was transmitted to the Governor for his signature on June 19, 2009. The bill will take effect on the date of the Governor's signature.

## Workers' Comp Division Directory

### Attorneys

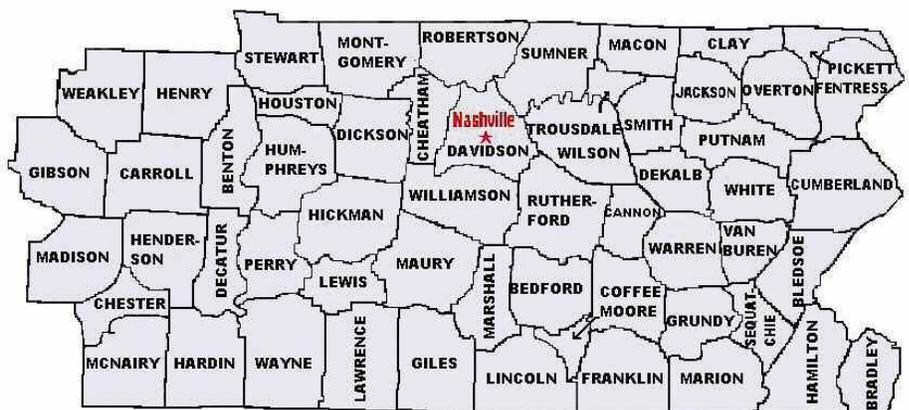
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## Workers' Compensation Practice Area

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.