

TENNESSEE WORKERS' COMPENSATION UPDATE

Legislature Makes Major Changes to Workers' Comp Law

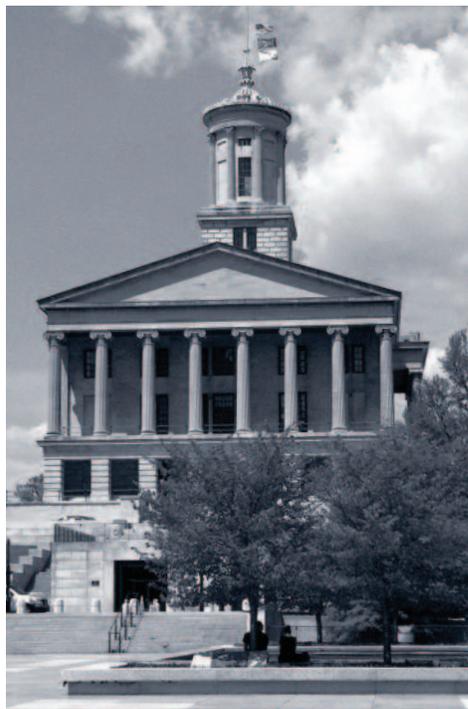
Manier & Herod drafted legislation to address Overstreet, closure of future medical benefits

On May 21, 2011, the legislature passed the most extensive statutory reform since 2004. Although all of the concerns raised have not been fully addressed, these statutory changes will significantly improve the Tennessee Workers' Compensation Law in favor of the employers and carriers. The new legislation essentially addresses four major areas, including future medical benefits, communication with doctors, gradual injuries and causation.

1 SETTLEMENT OF FUTURE MEDICAL BENEFITS

The revised version of Tenn. Code Ann. §50-6-206(a)(2) eliminates the current prohibition against closing out future medical benefits immediately in most cases. The statute previously required parties to leave future medical benefits open for at least three (3) years for injuries to scheduled members with a statutory value of 200 weeks or more, as well as injuries to the body as a whole. Under the prior law, the parties could immediately settle future medical benefits only in cases where the injury is to a scheduled member with a statutory value of 199 weeks or less, or in cases that are settled on a doubtful and disputed basis.

The new law eliminates the three (3) year open medical benefits provision. Tenn. Code Ann. §50-6-206(a)(2) has been revised to state:



“Nothing in this Section shall be construed to prohibit the parties from compromising and settling at any time the issue of future medical benefits. The settlement agreement must be approved by a trial court, the Commissioner, or the Commissioner’s designee, with the specific findings that Medicare and TennCare liability or consequences to the claimant have been addressed specifically in the order approving the settlement.”

The only prohibition is that parties may not close an injured employee’s future medical benefits in a case of permanent total disability. There are otherwise no

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restrictions against closing future medical benefits at any point, or in allocating an additional payment to the injured employee in exchange for the agreement to waive the right to future medical treatment.

Under the prior law, parties could only settle doubtful and disputed cases for a maximum lump sum payment of fifty (50) times the statutory minimum compensation rate. The revised Tenn. Code Ann. §50-6-206(b) eliminates the current ceiling for settling doubtful and disputed claims. Parties are now free to settle disputed claims in full for any agreed upon amount.

2 COMMUNICATION WITH DOCTORS

The revised statute makes it easier for employers, carriers and their representatives to communicate with authorized doctors, as Tenn. Code Ann. §50-6-204 has been revised in several places to address the issues resulting from the decision in Overstreet v. TRW Commercial Steering Division, 256 S.W.3d 626 (Tenn. 2008). These new provisions almost return the state of the law to the pre-2008 amendments. In 2008, the legislature codified the Overstreet decision and placed significant limitations on employers, carriers and their representatives speaking with authorized physicians. Such parties were not allowed to communicate with an authorized physician in a claim without first obtaining a Department of Labor approved written authorization from the employee. If the employer or carrier communicated with the physician in writing, a copy of the written document was to be provided to the injured employee or the employee's attorney. If the communication between the employer or carrier and the physician was verbal, the law set forth specific requirements for notifying the employee or the employee's attorney of the substance of the conversation.

Under the new version of Tenn. Code Ann. §50-6-204, employers, carriers and their representatives may once again communicate with authorized physicians. The injured employee must first sign a Department of Labor approved medical authorization. Tenn. Code Ann. §50-6-204 (2)(C) now states:

“(i) An employee claiming workers' compensation benefits or any attorney representing the employee shall be entitled to obtain medical information, records, professional opinions, or reports from or communicate in writing or in person with, any medical provider who has treated or provided medical care to the employee; provided that the employee executes and provides the medical provider with an appropriate written authorization; an employee claiming workers' compensation benefits or any attorney representing the employee shall be entitled to obtain medical information, records, or reports from, or communicate in writing or in person with, any medical provider who has treated or provided medical care to the employee;

(ii) Any medical provider authorized by the employer pursuant to this section and who has treated or provided medical care to an employee claiming workers' compensation benefits shall communicate, orally or in writing, with the employer or any attorney representing the employer, and shall honor any request by the employer for medical information, medical records, professional opinions, or medical reports pertaining to the claimed workers' compensation injury. Oral communication may be achieved, but is not limited to telephone or an in-person meeting.”

The only significant restriction on these communications is that the employer, carrier or their representative must provide the injured employee or the employee's attorney with any “written memorandum, or visual or recorded materials” that are

provided to the authorized treating physician for review. This production must take place no later than ten (10) days in advance of any deposition or live court appearance.

The new version of the statute makes it clear that “no relevant information developed in connection with authorized medical treatment or examination provided pursuant to this section for which compensation is sought by the employee shall be considered a privileged communication and no medical provider shall incur any liability as a result of providing medical information, medical records, professional opinions, or medical reports” pursuant to this statute.

3 LIMITATION ON WHAT CONSTITUTES COMPENSABLE INJURY

Through an amendment to the definition of “injury,” the new legislation significantly limits the scope of what constitutes a compensable injury, especially gradual injuries. Tenn. Code Ann. §50-6-102(12) previously stated:

“‘Injury’ and ‘personal injury’ mean an injury by accident arising out of and in the course of employment that causes either disablement or death of the employee and shall include occupational diseases arising out of and in the course of employment that cause either disablement or death of the employee and shall include a mental injury arising out of and in the course of employment.”

This section of the statute has been significantly revised and now states:

“‘Injury’ and ‘personal injury’ means an injury by accident arising out of and in the course of employment that causes either disablement or death of the employee. ‘Injury’ and ‘personal injury’ shall not include a disease in any form, except when it arises out of and in the course and scope of employment. ‘Injury’ and ‘personal injury’ include a mental injury arising out of and in the course of employment. An injury is ‘accidental’ only if it is caused by a specific incident (or incidents) arising out of and in the course of employment and is identifiable by time and place of occurrence.

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Cumulative trauma conditions, hearing loss, carpal tunnel syndrome, and all other repetitive motion conditions shall not be considered an 'injury' or 'personal injury' unless such conditions arose primarily out of and in the course and scope of employment."

Thus, the new statute narrows the definition of "injury" to "a specific incident or incidents arising out of and in the course of employment, and is identifiable by time and place of occurrence."

The revised statute also places significant limitations on the compensability of cumulative trauma conditions and repetitive or gradual injuries. Tenn. Code Ann. §50-6-102(12) now provides that "[c]umulative trauma conditions, hearing loss, carpal tunnel syndrome, and all other repetitive motion conditions" are no longer compensable injuries in Tennessee unless these conditions arose primarily out of and in the course of employment. This is the legislature's first attempt at limiting the scope of compensable gradual injuries.

4 CAUSATION TO BE DETERMINED BY AUTHORIZED TREATING PHYSICIAN

The revised statute now provides that the authorized treating physician's opinion on causation is presumed to be correct. Tenn. Code Ann. §50-6-102(12) has been amended to include the following language, which was previously excluded from the statute:

"The opinion of the physician selected by the employee from the employer's designated panel of physicians pursuant to §50-6-204(a)(4)(A), (B) shall be presumed correct on the issue of causation and shall only be defeated by a preponderance of the evidence to the contrary."

Thus, the panel chosen physician's opinion on causation is presumed to be correct, and can only be defeated by a preponderance of the evidence. Considering the new limitations on gradual injuries, the authorized physician's opinion on causation is paramount.

Termination Procedures Must be Reasonable to Assert Misconduct Defense

Employee allowed reconsideration because employer's procedure for determining whether misconduct occurred was unreasonable

Though often difficult to prove, an employee is not entitled to reconsideration of vocational disability if the employee is terminated due to misconduct. Typically, unless the employee has deliberately and intentionally violated a known regulation consistently enforced by the employer, this defense will not be successful. The Tennessee Supreme Court Workers' Compensation Panel recently clarified the standard for determining whether an employee's termination was for willful misconduct.

In *Douthit v. Griffin Industries*, CC-11060 (Tenn. W.C. Panel 2010), the Panel held, "[i]t is the reasonableness of an employer's work rule and the reasonableness of the application of that rule to a particular employee which determines whether or not a terminated employee's application for reconsideration is barred by his misconduct." In this case, the employer had a policy of terminating employees who sustained two preventable injuries within a three year period. Whether or not an injury was preventable was decided by a peer review committee, which was not given any specific guidelines for making the determination. The Panel found the policy itself was reasonable, but the lack of framework for the committee ultimately making the decision was insufficient. "Absent such a standard, there is a potential for the arbitrary application of rules imposing discipline for 'preventable' injuries." The Panel held that the employee had a right to reconsideration.

In light of this decision, employers with similar policies should utilize a well-defined standard that allows for presentation of information by both the employer and the employee in determining what constitutes a violation and ultimately supports termination.

Supreme Court Finds That Settlements May be Approved by Affidavit

Manier & Herod successfully preserves efficient means of obtaining approval of settlements

Having settlements approved utilizing an affidavit of the injured employee in lieu of the employee's appearance in court is a common practice in many Tennessee counties. This method of approval is convenient and efficient for both the parties and the court. Although affidavit approvals have been controversial for some time among the plaintiff's bar, this approval method has only recently come under scrutiny by the Tennessee Supreme Court.

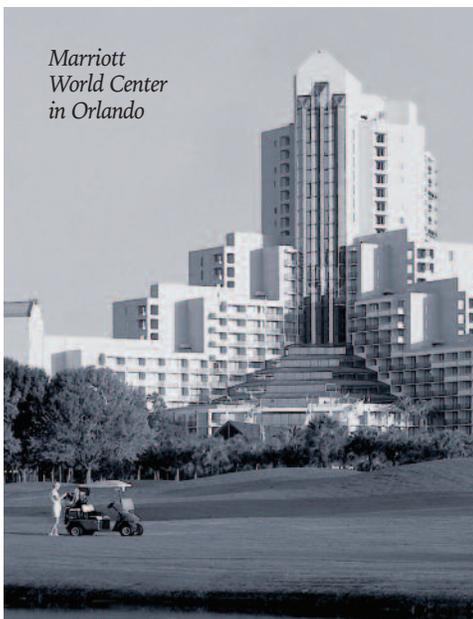
Manier & Herod attorneys successfully defended the use of affidavit approvals in *Henderson v. SAIA*, M2009-01723-SC-R3-WC (Tenn. 2010). In *Henderson*, the Tennessee Supreme Court held that settlement documents approved by sworn affidavit in the employee's absence are valid. The Court found that the Tennessee Workers' Compensation Law does not require personal appearance by the employee for court approval of settlements. The Court commended counsel for the employer for clearly explaining in writing the terms of the settlement, the settlement process, and the employee's rights, so as to remove any "hint of fraud." Court approvals by affidavit are valid, and unrepresented employees will be expected to understand what they are signing, as long as the settlement terms have been adequately explained to them by the employer.

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Workers' Comp Education Conference Approaches

Conference to be held Aug. 21-24 at Marriott World Center in Orlando

The 66th Annual Workers' Compensation Educational Conference & 23rd Annual Safety and Health Conference will be held on August 21-24, 2011 at the Marriott World Center in Orlando, Fla. Manier & Herod's workers' compensation attorneys, in conjunction with representatives from other participating states, will present informative break-out sessions for those working with claims in Tennessee, Kentucky, Georgia, Mississippi, Florida, North Carolina, South Carolina, Texas, and Louisiana. These break-out sessions are specifically designed to keep you ahead of the learning curve through educational offerings that highlight case law updates, current insurance regulations, and emerging national trends. The annual conference will provide a unique opportunity to bring workers' compensation professionals together for networking, fun and information sharing.



Marriott World Center in Orlando

Workers' Comp Department Directory

Attorneys

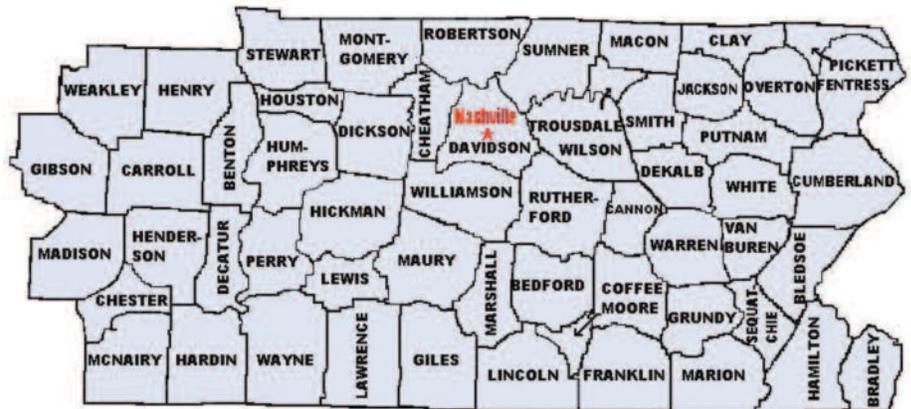
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Workers' Compensation Practice Area

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.