

TENNESSEE WORKERS' COMPENSATION UPDATE

Pain Management Law Impacts Many Claims

New procedures became effective July 1, 2012

Through the efforts of Manier & Herod attorneys Terry Hill, James Tucker and Michael Haynie, the Tennessee General Assembly passed legislation that will have a significant impact on pain management in Tennessee workers' compensation claims. Governor Haslam signed the legislation, which went into effect on July 1, 2012. The attorneys prepared the initial bill and authored numerous revised drafts of the legislation based upon negotiations with the Tennessee Association for Justice (Trial Lawyers) and Tennessee Medical Association and upon suggestions from the Tennessee Department of Labor and Tennessee Attorney General's Office.

The pain management legislation addresses several aspects of pain management, including uncontrolled prescribing and abuse of Schedule II, III and IV controlled substances. The legislation applies to claims with a date of injury on or after July 1, 2012. However, there may be ways of applying portions of the legislation to claims existing prior to July 1, 2012.

Utilization Review

The legislation provides that prescriptions of Schedule II, III, and IV controlled substances prescribed for a period of more than 90 days are subject to utilization review. By providing for utilization review of Schedule II, III, and IV controlled substances, employers and insurers may be able to confirm whether an employee is being overmedicated and address the

situation accordingly. Utilization review may also identify less expensive alternatives to medications being prescribed. The utilization review aspect of the legislation may apply to medications prescribed on or after July 1, 2012, even though the injury occurred prior to the effective date.

The Panel of Physicians

The legislation provides that the employee is entitled to a panel of pain management physicians who meet specified qualifications. Due to the recognized unequal distribution of qualified pain management specialists throughout the state, the legislation provides that the panel may include a qualified physician whose office is no more than 175 miles from the employee's residence or place of employment. The employee is not entitled to a second opinion. This panel provision may apply to referrals to pain management that occur on or after July 1, 2012, regardless of the date of injury.

Drug Contract

The legislation provides that the employee may sign a formal written agreement with the prescribing physician as a condition of receiving Schedule II, III, and IV controlled substances. If the employee violates the contract on two occasions, the employee is no longer entitled to Schedule II, III and IV controlled substances and the employee

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Tennessee Workers' Compensation Update is a publication of the law firm of

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Appeals Panel Provides Means of Avoiding Attorney Fees

The Tennessee Workers' Compensation Law provides that a court may award attorney fees and reasonable costs to include reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred when the employer fails to furnish appropriate medical treatment to an employee provided for pursuant to a settlement or judgment. In such cases, the courts have been awarding the employees' attorneys fees at the rate of \$350.00 per hour, which in some cases results in an attorney fee award in excess of \$4,000.00. Even minor disputes over prescription medication have resulted in exorbitant fees awarded to attorneys representing employees.

The employer and insurer may be able to avoid these fees pursuant to a recent

Workers' Compensation Appeals Panel decision. In Kephart v. Hughes Hardwood International, Inc., the employer filed a motion to compel an employee to submit to an IME in an effort to terminate future medical treatment. The trial court denied the motion on the grounds that the request was unreasonable. Of note, the trial court also denied the employee's attorney's request for fees incurred as a result of the employee's having to defend the motion. The Panel affirmed the denial of attorney fees.

The Panel observed that the statute providing for attorney fees, "by its explicit terms ... applies to cases in which an employer denies medical treatment, and the employee is forced to resort to judicial proceedings to obtain that care." The petition for an IME did not constitute a denial of medical treatment. Further-

more, the Panel observed that there is no statutory language relating to an employer's request for a medical examination. "In the absence of explicit statutory authority, the trial court could not award attorney's fees."

Pursuant to the Panel's decision, attorney fees may be avoided if the employer or insurer files a motion to terminate or limit medical benefits prior to denying medical benefits. In such a case, there has been no denial of medical benefits in connection with the workers' compensation claim and, therefore, the attorney fee provision may not apply. If the employer or insurer denies treatment prior to seeking a court order and the employee resorts to filing a motion to compel treatment, the employer or insurer would be liable for the employee's attorney fees and expenses.

Offering to Rehire Terminated Employee Does Not Extinguish Reconsideration Rights

The employee was employed as a security guard when he sustained an injury to his neck. After he completed treatment, he returned to work for the employer with no restrictions. Consequently, he settled his workers' compensation claim within the 1.5 cap set forth in Tenn. Code Ann. § 50-6-241.

About two years later, the employer terminated the employee as part of a company wide workforce reduction due to economic reasons. A few days later, the employee pursued a reconsideration claim by filing a request for a BRC with the Tennessee Department of Labor. Shortly thereafter, the employer offered the employee a part-time job and then a full-time position. The employee rejected both job offers for reasons unrelated to his injury.

The employer denied that the employee was eligible for reconsideration in light of the offers of reemployment. After a trial, the trial court concluded that the employee was eligible

for reconsideration and awarded permanent partial disability benefits based on a 78 percent vocational disability. The employer appealed.

On appeal, the Tennessee Workers' Compensation Appeals Panel agreed with the trial court. The Panel noted that the employee became eligible for reconsideration once the employer terminated him. The Panel observed that the employer did not provide any employment related benefits, compensation, or assurances of reemployment after terminating the employee and concluded that subsequent offers of reemployment did not extinguish the employee's right to seek reconsideration.

The Panel also affirmed the 78 percent permanent partial disability award, despite the fact that the employee had no work restrictions and was able to work as a security guard prior to his being terminated for reasons unrelated to his injury. Flatt v. ERMCo, No. W2012-00483-WCM-WC (Oct. 26, 2012)

Tennessee Court of Appeals Rules Hospital Liens Quashed by Carrier's Payment in Full

In the recent opinion of [Diane West v. Shelby County Healthcare Group](#), the Tennessee Court of Appeals held that a lien filed pursuant to the Tennessee Hospital Lien Act ("HLA") was extinguished after the hospital accepted a compromised "full and final" payment from the patient's insurance carrier for the services provided to the patient.

Diane West v. Shelby County Healthcare Group

In this case, three appellants suffered injuries as a result of another person's negligent operation of a motor vehicle in separate accidents. The appellants treated at "the Med" in Memphis. After treatment ended, the Med filed liens for the services rendered, pursuant to the HLA.

Although the appellants' insurance carriers paid the Med an agreed-upon amount, the Med refused to quash its lien against each appellant's potential

recovery from the third-party tortfeasors. Rather, the Med maintained that the payments made by the insurance carriers were "contingent payments" for which the carriers would be reimbursed after the Med collected funds from the third-party tortfeasors.

Hospital Lien Act (HLA)

The appellants raised the issue of whether the HLA permits a hospital to enforce a lien after the hospital has accepted payment from an individual's health insurance provider as "payment in full." In citing relevant sections of the HLA, the Court of Appeals stated,

"The HLA grants Tennessee hospitals an unqualified right to collect their bills from any recovery available to a patient related to his or her injuries." However, the court further explained that the "proposition that a lien presupposes the existence of debt is deeply rooted in our jurisprudence." Accordingly, the court determined

that by accepting the payments from the appellants' insurance carriers, the hospital agreed to extinguish each appellant's debt.

The Decision

Although this case did not involve workers' compensation, the decision is readily applicable to cases in which a claimant's treatment for a work-related injury is initially paid by health insurance. Providers often assert liens alleging payment should have been made under workers' compensation.

In compensable cases, workers' compensation carriers will agree to make payments pursuant to the fee schedule and can often negotiate further discounts. The holding in [West](#) confirms that in those satisfaction agreements, the provider cannot continue to assert the lien after the compromised payment has been made by the carrier and accepted by the provider.

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remains ineligible for a second opinion on treatment. In light of this provision, employers and insurers should attempt to include only physicians who require drug contracts on the panel. This provision could arguably apply in cases where the pain management referral occurs on or after July 1, 2012.

Limits Permanent Partial Disability Benefits

The legislation provides that if the employee violates the formal written agreement on two occasions, then the employee's permanent partial disability award will be subject to

the 1.5 cap and the employee cannot seek reconsideration. Also, in the event that the disqualifying violation occurs prior to receiving a disability award, the disability resulting from the lack of pain management cannot be factored when determining whether an employee is totally disabled. This section of the law will only apply to claims with a date of injury on or after July 1, 2012.

For more information on how you may utilize this legislation in existing and new claims, please feel free to contact Manier & Herod.

State Mileage Rate

Effective Dates	Mileage Rate
July 1, 2009	\$0.51
January 1, 2010	\$0.46
August 1, 2011	\$0.47



Workers' Compensation Reform

A comprehensive bill fundamentally changing the administration and litigation of Tennessee workers' compensation claims has been drafted by the Governor's advisory committee. It is anticipated that the bill will be finalized and presented for approval in the coming weeks. Manier & Herod is diligently advocating the interests of Tennessee businesses during the review process. Please contact us with questions or input regarding this landmark legislation.

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Benefit Rate Table

Dates	Minimum Rate	Max Rate for Temporary Benefits	Max Rate for Permanent Benefits
7/1/02 - 6/30/03	\$89.85	\$599.00	\$599.00
7/1/03 - 6/30/04	\$92.70	\$618.00	\$618.00
7/1/04 - 6/30/05	\$95.70	\$670.00	\$638.00
7/1/05 - 6/30/06	\$99.45	\$729.00	\$663.00
7/1/06 - 6/30/07	\$102.30	\$750.00	\$682.00
7/1/07 - 6/30/08	\$106.95	\$784.00	\$713.00
7/1/08 - 6/30/09	\$112.80	\$827.00	\$752.00
7/1/09 - 6/30/10	\$114.15	\$837.00	\$761.00
7/1/10 - 6/30/11	\$114.75	\$841.50	\$765.00
7/1/11 - 6/30/12	\$118.35	\$867.90	\$789.00
7/1/12 - 6/30/13	\$120.90	\$868.00	\$806.00

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 with your particular legal questions. Certifications of specialization are available to Tennessee lawyers in all areas of practice. 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.