

WORKERS' COMPENSATION

I. GENERAL MATTERS AND PROCEDURE:

A. Jurisdiction for claims for injuries occurring on or after July 1, 2014 is placed in the Bureau of Workers' Compensation ("Bureau"). More specifically, there are two administrative courts within the Bureau that adjudicate workers' compensation claims: the Court of Workers' Compensation Claims ("CWCC"), which is the trial court, and the Workers' Compensation Appeals Board ("Appeals Board"), which is an appellate court. Judges on both bodies are bound by the same rules of judicial ethics that apply to judges of the judicial branch. The practice of law before them is subject to the same legal ethics that all attorneys are subject to when practicing before courts in the judicial branch.

B. Procedure:

1. A claim in the Bureau is initiated with a Petition for Benefit Determination, which can be filed by any party in any Bureau office. Tenn. Code Ann. §50-6-203; Tenn. Comp. R. & Regs. 0800-02-21-.10 (1).
2. The petition must be filed within one year of the date of injury or of the date the employer ceases to pay benefits, whichever is later. Tenn. Code Ann. §50-6-203 (b).
3. Parties are expected to promptly exchange copies of medical records in their possession. Medical records thereafter must also be exchanged within 14 days of receipt. Tenn. Comp. R. & Regs. 0800-02-21-.10 (2). If either party has difficulty obtaining necessary documentation, the party may apply to the CWCC, which has subpoena power. Additionally, disputes regarding discovery can be submitted to a workers' compensation judge (after the issuance of a Dispute Certification Notice as discussed in paragraphs 4 and 5 below) for adjudication. Tenn. Code Ann. §50-6-238 (a) (3).
4. A mediator employed by the state is assigned to assist the parties' attempt to reach a resolution of the disputed issues by agreement without submitting the dispute to the court. Tenn. Code Ann. §50-6-236 (a). The mediator conducts mediations in person, electronically, and/or telephonically, and the parties are required to participate in good faith. Tenn. Code Ann. §50-6-236 (c) (1).
5. If mediation is unsuccessful, the mediator issues a Dispute Certification Notice ("DCN") identifying the specific issues in dispute and the specific defenses upon which the employer relies. Within five business days of that notice any party may request that the DCN be amended to include other disputed issues and/or defenses. Tenn. Code Ann. §50-6-236 (d) (1). Tenn. Comp. R. & Regs. 0800-02-21-.11 (4).

6. From the filing of the DCN, either party has 60 days to file a written request with the Bureau for a hearing before a workers' compensation judge for further resolution of the disputed issues. The clerk of the CWCC or a workers' compensation judge's legal assistant will schedule the hearing. If no request for a hearing is filed within 60 days, the clerk of the CWCC places the case on a show cause docket for the parties to explain to a judge why the case should not be dismissed for failure to prosecute. Tenn. Code Ann. §50-6-239 (a).

7. The CWCC is an administrative court that is part of the executive branch, not a part of the judicial branch of government. Its authority is derived from statute, not the common law. The judges on the CWCC are not elected; they are appointed for six-year terms by the Administrator of the Bureau. The judges on the Appeals Board are appointed for six-year terms by the Governor. Hearings in the CWCC are governed by the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence except where the Administrator of the Bureau has adopted different rules. Appeals to the Appeals Board are not governed by the Tennessee Rules of Appellate Procedure, although the Appeals Board may look to those rules for guidance. Appeals to the Supreme Court are governed by the Rules of Appellate Procedure. After a DCN has been prepared, the judge may hear disputes involving temporary disability or medical benefits in an expedited hearing or may conduct a trial if the case is ready for conclusion. Parties can engage in motion practice as allowed by the Tennessee Rules of Civil Procedure. A request for an expedited hearing must be accompanied by affidavit(s) and/or any other information that shows the employee is entitled to the benefits being sought. Other requirements may be found in Tenn. Comp. R. & Regs. 0800-02-21-.14(1)(a), (b) and -.14(2).

8. A party who is not represented by an attorney may request assistance of an ombudsman employed by the Bureau to help unrepresented parties in protecting their rights, resolving disputes, and obtaining information regarding workers' compensation benefits. Tenn. Code Ann. § 50-6-216(a); Tenn. Comp. R. & Regs. 0800-02-21-.04(1), (2).

9. Parties are entitled to an appeal as of right of all orders issued by the CWCC. If the order is interlocutory, the parties may only appeal to the Appeals Board, and there is no further appeal of the Appeals Board's decision. If the order being appealed follows a trial of the case, the parties may appeal to the Appeals Board or they may wait 30 days for the order of the CWCC to become final and appeal directly to the Tennessee Supreme Court. If a party appeals an order following a trial to the Appeals Board, the Appeals Board's order may then be appealed to the Tennessee Supreme Court if the Appeals Board certifies the trial court's order as final. Tenn. Code Ann. § 50-6-217(2).

II. LIMITATIONS AND REQUIREMENTS GENERALLY APPLICABLE:

A. Exclusive Remedy: Workers who suffer accidental injuries at work (as set out in the definition of injury in Tennessee Code Annotated section 50-6-102(14)) are only entitled to the remedies provided in the Workers' Compensation Act. An employer who intentionally injures an employee cannot rely on the exclusive remedy provision of the workers' compensation act, and the employee may successfully sue that employer in tort. Tenn. Code Ann. § 50-6-108(a).

B. Fair and Impartial Interpretation of the Statute: Since July 1, 2014, the workers' compensation statute is required to be interpreted fairly, impartially, and consistent with the usual principles of statutory construction. The statute is no longer given a remedial construction, and neither the employee nor the employer is to be treated favorably over the other. Tenn. Code Ann. § 50-6-116.

C. Unlawful Employment: As used in Tennessee Code Annotated section 50-6-102(12), the phrase "whether lawfully or unlawfully employed" means that an employee whose contract of hire is impermissible (such as minors and certain cases of illegal immigrants) but who is nonetheless engaged in legal activities is covered under the workers' compensation law. An employee whose activities are illegal, even if being performed at the direction of the employer, is not entitled to workers' compensation benefits if injured as a result of the employment. *See Bowers v. General Guaranty Ins. Co.*, 430 S.W.2d 698 (Tenn. 1993.)

D. In order for a worker to qualify as an employee, there must be a contract for hire, whether explicit or implied. Tenn. Code Ann. § 50-6-102(12)(A). The definition requires payment for work performed. However, work that is performed voluntarily or gratuitously does not qualify. *Garner v. Reed*, 856 S.W.2d 698 (Tenn. 1993).

E. Some employers and employees are exempt from workers' compensation laws. These include employers with fewer than five employees, casual employees, farm laborers, domestic servants, governmental entities, and common carriers otherwise covered by federal law. Tenn. Code Ann. § 50-6-106. However, workers in the construction industry are subject to workers' compensation laws regardless of how many employees there are.

III. INJURIES:

A. The terms "injury" and "personal injury" are defined in Tennessee Code Annotated section 50-6-102(14). There must be an injury by accident, a mental injury, occupational disease, or cumulative trauma condition that arises primarily out of and in the course and scope of employment. The injury must cause death, disablement, or the need for medical treatment of the employee. The injury must be caused by a specific incident or set of incidents and be identifiable by time and place of occurrence in order for it to be "accidental."

B. The definition specifically excludes the aggravation of a pre-existing condition unless it is shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of the employment. Tenn. Code Ann. § 50-6-102(14)(A).

C. In order for an injury to arise “primarily” from work, it must be shown by a preponderance of the evidence that the employment contributed more than 50% in causing the death, disablement, or need for medical treatment, considering all causes. The authorized treating physician’s opinion is presumed correct on the issue of causation, but this presumption can be rebutted by a preponderance of the evidence. Tenn. Code Ann. § 50-6-102(14).

D. An injury arises out of the employment when there is a causal connection between the work that was performed and the injury. *Navyac v. Universal Health Servs.*, No. 2015-06-0677, 2016 TN Wrk. Comp. App. Bd. LEXIS 17 (Tenn. Workers’ Comp. App. Bd. Mar 31, 2016). In other words, it is necessary that the cause of the injury was a “hazard” of or “risk” in the employment, *Jordan v. United Methodist Urban Ministries, Inc.*, 740 S.W.2d 411 (Tenn. 1987), or that the injury was caused by a “foreseeable risk” incident to the employment, *Hudson v. Thurston Motor Lines, Inc.*, 583 S.W.2d 597, 602 (Tenn. 1979).

E. The phrase “in the course of employment” refers to the time and place where the employee performs the duties as well as being engaged in activities that have a relationship to the duties the employer pays for. *McCurry v. Container Corp. of America*, 982 S.W.2d 841 (Tenn. 1998).

F. Special Examples:

1. While travel to and from work is generally not covered, an employee may be entitled to workers’ compensation benefits if he or she is injured in the place designated for employees to park, whether owned by the employer or not, and the injuries occur during a reasonable period before or after the employee’s work day when the employee may reasonably be expected to be on the premises for the purposes of his or her employment. *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989).

2. When travel is required as part of the job or when the employee is performing a special errand for the employer, then it may be covered *Crane Rental Serv. v. Rutledge*, 410 S.W.2d 418 (Tenn. 1966). There are several similar, specific fact situations that have led to coverage. Also, if an employer provides the employee with the means of transportation to and from work, injuries that occur while the employee is travelling to and from work may be compensable.

3. Generally courts have ruled that injuries occurring while using the restroom, drinking from a water cooler, or having a coffee break will be covered. *Navyac v. Universal Health Servs.*, No. 2015-06-0677, 2016 TN. Wrk. Comp. App. Bd. LEXIS 17 (Tenn. Workers’ Comp. App. Bd. Mar 31, 2016); *Jacobs v. Bridgestone Americas Tire Operations, LLC*, No. 2017-05-132, 2018 TN Wrk. Comp. App. Bd. LEXIS 4 (Tenn. Workers’ Comp. App. Bd. Feb. 7, 2018).

4. Acts of God: These include such things as floods, earthquakes, tornados, or lightning. Generally, injuries resulting from acts of God are not covered

unless, as a result of the employment, the employee is placed at a greater risk of being injured than the public at large. *Hill v. St. Paul Fire and Marine Ins. Co.*, 512 S.W.2d 560 (Tenn. 1974); *International Yarn Corp. v. Casson*, 541 S.W.2d 150 (Tenn. 1976).

5. Social or Recreational Activities: The statute creates an affirmative defense that excludes from coverage injuries suffered by employees as a result of the employee's voluntary participation in social or recreational activities. However, if participation was expressly or impliedly required by the employer, produced a direct benefit to the employer other than employee health and morale, or occurred during employee work hours and was part of the employee's duties, or if the injury occurred because of an unsafe condition of which the employer had actual knowledge of and failed to cure or stop the activity, then the employee may be protected. Tenn. Code Ann. § 50-6-110(a)(6).

6. Emergencies: Employees who give assistance in times of emergency are not covered by workers' compensation unless the employee proves that the employer received a benefit from the employee's action. *Hall v. Mason Dixon Lines, Inc.*, 743 S.W.2d 148 (Tenn. 1987).

7. Assaults: Covered assaults are those with a connection to the employment such as disputes over performance, pay or termination. *See Woods v. Harry B. Woods Plumbing Co., Inc.*, 967 S.W.2d 768 (Tenn. 1998) (decedent's family entitled to death benefits where dispute regarding working conditions resulted in co-worker shooting decedent employee). Disputes brought into the place of employment from the employee's domestic or private life (and not made worse by the employment) are not covered. *White v. Whiteway Pharmacy, Inc.*, 210 Tenn. 449, 360 S.W.2d 12 (Tenn. 1962) (decedent's family not entitled to benefits where the employee was murdered on employer's premises by husband over domestic dispute). "Neutral" assaults (those for which the specific cause and/or assailant is not known) on employees depend upon the facts of each case. *Padilla v. Twin City Fire Ins. Co.*, 324 S.W.3d 507 (Tenn. 2010) (decedent's family not entitled to benefits because the assailant and cause of the assault were unknown and there were insufficient circumstances for the court to find a causal connection between the employment and the assault).

8. Idiopathic Injuries: These are the results of a condition that is purely personal to the individual employee or an unknown cause not related to the employment and are, generally, not compensable. If the conditions of the employment cause the injury to be more severe than it would have otherwise been, the injured employee may be entitled to workers' compensation benefits. *See Panzarella v. Amazon.com, Inc.*, No. 2015-01-0383, 2017 TN Wrk. Comp. App. Bd. LEXIS 30 (Tenn. Workers' Comp. App. Bd. May 15, 2017); *McCaffery v. Cardinal Logistics*, No. 2015-08-0218, 2015 TN Wrk. Comp. App. Bd. LEXIS 50 (Tenn. Workers' Comp. App. Bd. Dec. 10, 2015).

G. Medical Issues Related to Certain Injuries:

1. Generally, the employee must establish causation and permanency through expert medical testimony. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991). The injured employee is also allowed to testify regarding the cause of the injury, and the employee's testimony is entitled to due consideration. *Uptain Construction Co. v. McClain*, 526 S.W.2d 458 (Tenn. 1975). Tennessee Code Annotated section 50-6-102(14)(D) requires that medical causation be established to a reasonable degree of medical certainty, meaning that it is the opinion of the treating physician that the employment is more likely than not, considering all causes, the cause of the injury and the need for medical treatment. The treating physician's opinion regarding causation is entitled to a presumption of correctness, which can be rebutted by a preponderance of the evidence. Given the statutory definition of injury applicable after July 1, 2014, it is no longer clear that medical proof is not necessary in even the most obvious cases.

2. The medical impairment rating resulting from an injury must be expressed as a percentage to the body as a whole, and the physician shall not consider pain when calculating the degree of impairment, notwithstanding allowances for pain provided in the AMA Guides. The treating doctor's or chiropractor's impairment rating is presumed to be accurate impairment rating, and this presumption can be rebutted by a preponderance of evidence. Tenn. Code Ann. § 50-6-204(k).

3. Gradually occurring injuries, also known as cumulative injuries or trauma, are subject to the same definitions and requirements as accidental injuries even though they occur over a period of time. When determining the date of injury of a gradually occurring injury in order to determine when the statute of limitations begins to run, the date of injury generally will be the last day worked by the employee. *Kelso v. Five-Star Food Service*, No. 2015-01-0413, 2016 TN Wrk. Comp. App. Bd. LEXIS 36 (Tenn. Workers' Comp. App. Bd. June 15, 2016).

Generally, heart attacks and strokes fall into two separate categories. Heart attacks or strokes that are caused by physical exertion or strain are one category. The other category includes heart attacks and strokes caused by stress from a specific, acute or sudden stressful event. These categories are covered by workers' comp. *Cunningham v Shelton Security Service*, 46 SW 3d 131, 136 (Tenn. 2001). Law enforcement officers and firefighters have a statutory presumption that any impairment caused by hypertension or heart disease arose out of and in the course of employment. Tenn. Code Ann. § 7-51-201(a)(1).

4. Hernias: There is a specific statute addressing alleged work-related hernias, which requires the employee to establish: (1) an injury resulting in hernia or rupture; (2) the hernia appeared suddenly; (3) the hernia was accompanied by pain; (4) it immediately followed the accident; and (5) the hernia or rupture did not exist prior to the date of the accident. Tenn. Code Ann. § 50-6-212. However, when an employee does have a recurrence of a

compensable hernia or in the course and scope of his employment he aggravates a previous work-related hernia, the employee may be entitled to benefits. *Cook v. Great West Cas. Co.*, 779 S.W.2d 365 (Tenn. 1989).

H. Occupational Diseases:

1. An occupational disease qualifies as a work-related injury if it satisfies the definition of injury set out in Tennessee Code Annotated section 50-6-102(14). Therefore, it must arise primarily out of and in the course and scope of employment (i.e., the employment contributed more than 50% in causing the injury, considering all the causes). The treating doctor's opinion is presumed correct on the issue of causation, but can be rebutted by a preponderance of the evidence.
2. The benefits are identical to those available to an injured worker who suffers an injury by accident.
3. For aggravations of pre-existing diseases, Tennessee Code Annotated section 50-6-102(14) requires that it must be shown to a reasonable degree of medical certainty (as defined by statute) that the aggravation arose primarily out of and in the course and scope of employment.
4. If an employee has a pre-existing disease but is not incapacitated from working and if that employee wants to continue working under the same conditions that cause the disease, then that employee may waive, in writing and approved by the Bureau, compensation for any aggravation of the condition that results from continuing to work in the same or similar occupation. Tenn. Code Ann. § 50-6-307(a)(1).

IV. MEDICAL BENEFITS:

A. The employer is liable for reasonably necessary medical, surgical and hospital treatment as well as medicine, crutches, prosthetics, eyeglasses, nursing, psychological and/or psychiatric services, and dental work which are prescribed by the authorized doctor or hospital. Tenn. Code Ann. § 50-6-204(a)(1). This includes such things as wheelchair ramps, grab bars, widened doorways and accessible cabinets and appliances but does not include basic things such as housing. An employer may be required to pay for transportation for medical appointments, but not for everyday activities such as transportation to and from work and visiting friends.

B. Procedure:

1. After receiving notice of an injury and the employee's request for medical care, the employer is required, as soon as practicable, but within three business days, to provide the employee a panel of physicians who are qualified and willing to treat the injury. The employee may choose any of the three doctors, and that doctor becomes the authorized treating physician. If

the employer fails to provide a panel, the employer may be assessed a penalty. If emergency services are necessary, the employer must provide emergency service immediately. Tenn. Code Ann. § 50-6-204(a)(3)(A); Tenn. Comp. R. & Regs. 0800-02-01-.06(2), (3).

2. Mid-level practitioners, such as nurse practitioners and physician assistants under the supervision, direction, and ultimate responsibility of a licensed doctor, may provide medical treatment ordered by the attending doctor to the employee. However only the doctor (or the name of a practice or treatment group) may be listed on the panel. Only a doctor can provide an expert opinion regarding medical causation, impairment rating, and the date of maximum medical improvement. Tenn. Comp. R. & Regs. 0800-02-01-.06(7).

3. If the employer denies the claim after an initial investigation and the parties participate in an expedited hearing, the employee must provide evidence from which a workers' compensation judge can decide that the employee will likely to prevail at a hearing on the merits. Tenn. Code Ann. § 50-6-239(d)(1), An employer who elects to deny a claim risks being held responsible for medical bills incurred with a medical provider of the employee's choosing and may be subject to penalties for failure to provide a panel. *McCord v. Advantage Human Resourcing*, No. 2014-06-0063, 2015 TN Wrk. Comp. App. Bd. LEXIS 6 (Tenn. Workers' Comp. App. Bd. Mar. 23, 2015).

4. Tennessee Code Annotated section 50-6-240(d) authorizes the termination of future medical benefits as part of a settlement agreement when approved by the workers compensation judge and after the employee has been advised of the possible consequences of the settlement with respect to Medicare and TennCare benefits and liabilities.

V. DISABILITY BENEFITS:

A. Definitions of average weekly wage and workers' compensation rate ("comp rate"):

1. The average weekly wage is calculated by taking the average of the 52 weeks of wages immediately preceding the injury. If the employee worked less than 52 weeks, then, generally, the average weekly wage is the average wage earned over that number of weeks. If the employee did not work enough weeks to determine an average, then the wages of a comparable employee may be used. Tenn. Code Ann. § 50-6-102(3).

2. The comp rate is $66\frac{2}{3}\%$ of the average weekly wage, subject to a statutory minimum and maximum comp rate.

B. Temporary partial disability occurs when an employee is able to come to work for part of the week. The percentage of time that the employee is able to spend at work is multiplied by the usual hourly rate. The percentage of time that the

employee must be off to heal is compensated at the comp rate. Adding the two amounts together constitutes the weekly income of the temporarily partially disabled employee. Tenn. Code Ann. § 50-6-207(2).

D. Temporary total disability occurs during the time the employee is being treated and is completely unable to work. The employee is paid the comp rate for each week. Tenn. Code Ann. § 50-6-205(a).

- D. Permanent partial disability occurs when the employee reaches maximum medical improvement and is able to return to work, whether with the original employer or with another employer. Tenn. Code Ann. § 50-6-207(3). All injuries are assessed as “body as a whole” injuries. To calculate the injured employee’s “original award,” the employee’s impairment rating is multiplied by 450 weeks to determine the period of compensation. The number of weeks is then multiplied by the employee’s comp rate to determine the “original award.” Tenn. Code Ann. § 50-6-207(3)(A). For instance, an employee with a 10% impairment rating and a \$400 comp rate would receive \$18,000 (10% x 450 weeks = 45 weeks x \$400.00). An employee’s original award may be increased at the end of the period of compensation (in the previous example, 45 weeks after the employee reached maximum medical improvement). There are various multipliers available depending upon certain conditions such as whether the employee has returned to work for any employer at the same or greater rate of pay, whether the employee has a high school diploma or GED, or whether the employee is over the age of 40. Tenn. Code Ann. § 50-6-207(3).
- a. Permanent total disability occurs when the employee is unable to return to work at an occupation that brings the employee an income. The employee is paid his or her comp rate on a weekly or bi-weekly basis until he or she is eligible for full social security retirement benefits. Tenn. Code Ann. § 50-6-207(4).
- b. Death benefits are available when an employee dies as a result of a work-related injury or disease. The amount of benefits is set, but distribution will vary depending upon whether the benefits are to be paid to a dependent or dependents (and those dependents’ relationship to the deceased employee) or to the estate of the deceased employee. Tenn. Code Ann. §§ 50-6-209, -210. Death benefits, however, are separate from other workers’ compensation benefits. For instance, if an employee was not killed instantly, the employee (or the employee’s estate) will be entitled to payment of any medical bills and temporary disability benefits that may have accrued prior to the employee’s death.

DI. CLAIMS AND DEFENSES:

- a. No compensation is allowed for an injury or death when the injury is the result of the employee’s willful misconduct, intentional self-inflicted injuries, intoxication or illegal drug use, willful failure to use a safety appliance, willful failure to perform a duty required by law, or voluntary participation in recreational, social, athletic, or exercise activities. Tenn. Code Ann. § 50-6-110.

- b. Notice of an injury: Generally, unless the employee has a reasonable excuse, the employee must provide written notice of the injury (if the employer does not already have actual knowledge of the injury) within 15 days after the accident. Tenn. Code Ann. § 50-6-201. The notice should state in plain and simple language the name and address of the employee and explain the time, place, nature, and cause of the accident resulting in injury. An employee is not required to know every discrete injury suffered, so long as enough information is provided to allow the employer to conduct a meaningful investigation. If an employer alleges a lack of proper notice, it must show it was prejudiced by the lack of notice. Tenn. Code Ann. § 50-6-201(a)(3)..
- c. Statute of Limitations: Generally, suit must be filed within one year of the date of the accident or the date of the last authorized medical treatment or the date the employer ceased paying benefits, whichever is later. Tenn. Code Ann. § 50-6-203. The statute of limitations may be tolled if, by reasonable diligence, the employee did not discover or did not have reason to know he or she suffered a work-related injury.

DII. SUBROGATION AND THIRD-PARTY ACTIONS.

- a. If the employee is injured due to the negligence of a third party, the employee is entitled to receive not only workers' compensation benefits but also to sue the third party for negligence. The employer will be entitled to recover, dollar for dollar, any amounts it paid as a result of the claim out of the employee's recovery from the third-party tortfeasor.
- b. If the employee does not pursue a claim against the third-party tortfeasor, the employer is entitled to also sue the third party for negligence in a subrogation claim for the workers' compensation benefits paid to or on behalf of the employee. Tenn. Code Ann. § 50-6-112(a).