TENNESSEE WORKERS' COMPENSATION LAW

(Revised as of September 12, 2013)

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I. GENERAL OVERVIEW OF THE TENNESSEE WORKERS' COMPENSATION LAW.

Traditional lawsuits in Tennessee for personal injury are based on tort or common law or statutory negligence, recklessness or willful acts. There is no schedule as to the amount of recovery. It is based on items, including, but not limited to: lost wages, pain and suffering, punitive damages and loss of consortium.

When the Tennessee Workers' Compensation Act was enacted, it replaced common law and other statutory remedies for personal injury. Essentially, it is a contract between the employer and worker. The employer gives up common law defenses. The worker gives up the right to sue for the items listed above.

The Exclusive Remedy Rule provides that the Tennessee Workers' Compensation Act is the Exclusive Remedy for injuries on the job within the course and scope of employment. There are a couple of exceptions. If an employer does a "willful" act, like shooting the employee, then the employee may have a remedy outside the Tennessee Workers' Compensation Act. Also, if a "Third Party" is responsible for the injury, even though it was within the course and scope of employment, then T.C.A. Section 50-6-112 gives the employee the right to sue the Third Party in tort. The workers' compensation insurer will be involved, as usual, and they have a subrogation right to the amount they spend on the claim to be recovered from the proceeds of the Third Party Suit. An example is as follows: If the Mayfield delivery person spills milk all over the floor at Wal-Mart, and a Wal-Mart employee slips on it and injuries his or her self during work, then the employee will both make a claim against Wal-Mart for workers' compensation medical and indemnity benefits and sue Mayfield in a Third Party Action.

The law is given an equitable construction, which means that most disputes over the application of the law are resolved in favor of the employee.

II. WHAT TYPES OF EMPLOYMENT DOES THE TENNESSEE WORKERS' COMPENSATION ACT COVER?

Typically, the Comp Act covers a W-2 employee of a company that has five (5) or more employees. A partner in a partnership may elect in or out of the Comp Act. Corporate officers can elect to be exempt. For State employees, you have to litigate them in the Claims Commission, which is a different arena. The largest argument is whether you are an Independent Contractor or Employee. There is a very complex test to determine this, and it usually takes a lot of time to resolve the issue.

If a company with more than five (5) employees does not have workers' compensation insurance, is not exempt, and the State takes action against them, they can owe thousands of dollars of penalties. I represented one such entity one time, and it took eight (8) months to reach resolution with the State.

Even if an employee is "illegal" under the eyes of Tennessee Comp Law, they are generally covered.

Issues with principal contractors, intermediate contractors and subcontractors are very complex. If you have that type of situation, I would consult with me, because there are a variety of factors in play.

III. EXEMPTIONS

If an employee's injury is not within the course and scope of employment, then the law does not cover them. An example is an employee who is on his/her way to the job site and decides to stop by Wal-Mart to buy a lawnmower for his/her personal use. If they get injured, there is no coverage for that "deviation." Idiopathic injuries are excluded. The best example of an idiopathic injury is when an employee is walking down a hallway with no tile or other obstructions and simply falls and injuries his or her self. If the fall is due to a "hazard of employment," then the Tennessee Workers' Compensation Act covers it. Hazards can include tripping on tile, running into desks and a variety of other situations. However, a strict fall on level pavement is not covered.

There are literally dozens of other exemptions. Logically, most of these can be explained by the fact that the person was doing something other than working "in the course and scope of employment." Deviations, horseplay and traveling always throw up red flags.

IV. CAUSATION

In normal common law and statutory tort actions, the Plaintiff has to prove "proximate cause." Under the Tennessee Workers' Compensation Act, if an "injury by accident" causes medical problems, causation is on a "could be" standard. However, if the problem is an "occupational disease," then the standards are far stricter, in fact more strict than proximate cause in tort cases. I have a reported case that I argued before the Tennessee Supreme Court on the issue. The cite is as follows: Fritts v. Safety Nat'l Cas. Corp. 163 S.W.3d 673 (Tenn. 2005).

The basic rule in the State of Tennessee is that you take an injured worker as he/she is. This means that if the worker has a pre-existing condition that is advanced, aggravated or exacerbated by an

injury at work, then the claim is compensable. This is a heavily litigated issue. Many defense attorneys will argue that if there has been no anatomical change in the pre-existing condition, and then it is not compensable. MRI's and other diagnostic tests are helpful in resolving this issue.

V. DEFENSES

There are numerous defenses to a Workers' Compensation Claim. Willful Misconduct is one, but it is very difficult to prove. I did it once. It was an employee's violation of "lock-out, tag-out" procedure. Essentially, he did not lock out the machine, stuck his arm in the blender to clean it, the blender clocked on and removed his arm. In order to defend, there had to be numerous safety meetings on the subject, numerous policy forms signed by him, the fact that he ignored all of this, the fact that he was written up for the incident, and the fact that others were written up consistently for the same violation. The case law says there has to be an element of "perverseness." This is very difficult for a Defendant to prove.

An intentional self-inflicted injury is a defense.

Willful failure to use a safety appliance and willful failure to perform a duty required by law are defenses. These are very difficult to prove. Typically, they are situations where an employee doesn't strap him or herself into a raising forklift or doesn't wear a seat belt. In most of these cases, the Plaintiff's attorney is able to show that they just negligently forgot to do so.

VI. DISABILITY BENEFITS

Before the 2004 legislation, most Workers' Compensation complaints were filed in the court in the jurisdiction where the employee lived or the employer had a place of business. The Tennessee Department of Labor would occasionally get involved if temporary indemnity or medical benefits were not being paid. They had the authority to issue Orders for same.

As a start, you figure out the Average Weekly Wage of the Employee by taking the 52 weeks that he/she worked before the date of injury, and dividing the total gross compensation by 52. The actual workers' compensation rate is 2/3 of that figure. That is the number that you use for benefits.

Prior to 2004, there were many options for Workers' Compensation Insurers. The Act, itself, provides for lifetime medical benefits. However, at that time, you could settle on a "doubtful and disputed" basis for any amount that you want and pay a sum to close medical care. This allowed the insurers to close their books.

The 2004 legislation created an entirely new scenario. Every new claim for workers' compensation benefits has to be first filed with the Tennessee Department of Labor. Typically, the Plaintiff's attorney will file a Request for a BRC to toll the statute of limitations. Once the employee reaches Maximum Medical Improvement (which, according to the doctors, is a state where they will get no better or no worse), then the Plaintiff's attorney files a Certificate of Readiness and you go to mandatory mediation with the Tennessee Department of Labor. If that does not work, they issue an impasse, and you are allowed to file a lawsuit in court.

In June of 2011, the legislature made major changes to the Tennessee Workers' Compensation Act. For cases after the date of implementation of the law, you can now settle a case with closed medicals at any amount you want. The only requirement is that the Agreement must be approved by either a Court or the Tennessee Department of Labor with specific language that the worker's Medicare and/or Tenncare interests have been taken into consideration.

Disability benefits go by a schedule. Arms and legs are worth 200 weeks. Feet and hands are worth less. Shoulders and backs are considered "whole body" injuries, and they are worth 400 weeks. These are maximum amounts, and benefits are calculated on a percentage of same. Based on the 2008 reports of the Department of Labor, most cases settle at three (3) times the medical impairment rating. The medical impairment rating is something that is issued by the treating doctor. As an example, if you have a shoulder injury worth ten percent (10%) to the body as a whole, then you multiply three (3) times that and get to 30% of 400 weeks. That would be 120 weeks times the Plaintiff's worker's compensation rate. Depending on the date, you would settle for that plus open medicals or an amount to close out open medicals.

Temporary disability is calculated on 2/3 of the Average Weekly Wage. It is paid if the worker is not able to work due to his/her disability. Temporary partial disability benefits are paid when the worker is able to work, but not at the same wage that he or she was previously earning.

If a worker becomes totally incapacitated from working for any type of income, then Permanent Total Disability benefits are paid. These are paid until the worker reaches the age when he or her can draw Social Security Retirement benefits. However, if a worker is over sixty (60) years old when he or she has an injury, then they are capped at 260 weeks of benefits. The calculation of this cap is not based on a 260-week system. It is based on 400 weeks, but capped at 260 weeks. In situations of Permanent Total Disability, medical benefits cannot be closed. Additionally, you can only commute 100 weeks of benefits to a lump sum. Everything else has to be paid out biweekly.

VII. DEATH BENEFITS

The topic of Death benefits is one of the most complicated parts of the Tennessee Workers' Compensation Act. Generally, if there are no eligible dependents, the lump sum of \$20,000 is recoverable by the estate of the deceased employee. If there are eligible dependents, compensation in the amount of $66\ 2/3\%$ of the deceased employee's average weekly wage is distributed, subject to the weekly maximum and minimum. Burial expenses, not exceeding \$7,500 are payable by the employer.

The determination of "eligible dependents" is very complicated. If someone with dependents dies due to an injury by accident within the course and scope of their employment, consult with your attorney to determine how the benefits should be distributed and for how long they should be distributed.

Benefits are terminated under certain circumstances. Compensation to a widow or widower is terminated upon remarriage. Compensation to a child not incapacitated or attending school is

terminated upon reaching 18 years of age. Compensation to any dependent is terminated by death or marriage.

VIII. CONFLICT OF LAW PROVISIONS

There are situations where a worker may have an option of pursuing benefits in more than one state. The worker may live in another state. The employer may be located in another state. And, the injury may occur in another state.

In these cases, one must analyze which state will provide the most benefits. Tennessee has an "Election of Remedies" doctrine. It is not the product of a statute, but it is a judicially constructed law. Simply put, if an employee actively (and knowingly, with advice) makes affirmative efforts to obtain benefits in another state, Tennessee "closes its doors" to an action in this state and will allow no claim. Other states are different. For example, Georgia will allow you to petition their Administrative system for more benefits even if you have received benefits in another state. However, Georgia's laws are probably more restrictive, and you may not be entitled to more benefits.

T.C.A. Section 50-6-115 provides:

If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or, in the event of the employee's death, the employee's dependents, would have been entitled to the benefits provided by this chapter had the injury occurred within this state, the employee, or in the event of the employee's death resulting from the injury, the employee's dependents, shall be entitled to the benefits provided by this chapter; provided, that at the time of the injury:

- (1) The employment was principally localized within this state;
- (2) The contract of hire was made in this state; or
- (3) If at the time of the injury the injured worker was a Tennessee resident and there existed a substantial connection between this state and the particular employer and employee relationship.

This sounds simple enough on its face, but it is not. With respect to the "principally localized" element, many of the cases involve long haul truck drivers. Their employer may have a presence in Tennessee, as well as other states. An analysis has to be made regarding the percentage of time that they spend outside of Tennessee versus the time that they spend in Tennessee.

The "contract of hire" provision is not easy either. At times, contracts are made over the telephone with employers that are in Tennessee or not in Tennessee. Some factors to be considered are as follows: If the employee goes to another state to interview, sign paperwork and have physical examinations, then the contract of hire is probably in that state. If all of this occurs in Tennessee, then the opposite is true. The element of "contract of hire" is analyzed on a case-by-case basis.

The third provision is relatively new and requires a look at the most recent case law for guidance on determining if there is a "substantial connection" with the State of Tennessee.

There are occasions when injuries to marina workers, seamen and railroad workers may be covered by Federal Law. In many instances, Federal law is more beneficial to these workers than state law.

IX. THIRD PARTY ACTIONS

As discussed above, T.C.A. Section 50-6-112 allows a worker to sue a Third Party if the Third Party was responsible for their injuries, even if they were working for an employer within the course and scope of employment. Another example of this situation is an automobile accident. If an employee for a parts manufacturer is making a delivery, acting within the course and scope of his/her employer, and he/she is struck by an automobile operated by a Third Party, then he/she has a common law and/or statutory negligence action against the operator of the other automobile. The worker will make a claim for workers' compensation benefits against his/her employer, and the worker will file a common law suit against the owner of the automobile. Theoretically, if the case went to trial, the workers' compensation insurer would have a subrogation right in the Third Party tort case up to the extent of all expenditures that it made in the workers' compensation case, with the exception that the Plaintiff's attorney has a first lien on 1/3 of the recovery for his/her attorneys' fees.

In reality, it usually works differently. If the automobile insurer tenders its policy limits, there may not be enough money to cover what the workers' compensation insurer has paid. The Plaintiff's attorney will usually agree to a Settlement on a 1/3, 1/3, 1/3 basis. This means that the Plaintiff's attorney gets 1/3 of the tort recovery as his/her attorney's fee. The worker gets 1/3, and the workers' compensation insurer gets 1/3.

There are times, for unknown reasons, that the Plaintiff's attorney does not sue the Third Party in tort. The statute of limitations for personal injury in the State of Tennessee is one year. If the Plaintiff's attorney does not file suit within this time, T.C.A. Section 50-6-112 allows the workers' compensation insurer an additional 6 months to "step into the shoes" of the Plaintiff and file suit against the Third Party on behalf of him/her. Theoretically, the Plaintiff is supposed to cooperate; however, in reality, this may or may not happen.

X. NOTICE OF INJURY

Unless the employer has "actual notice" of an on-the-job injury (e.g., they see the employee fall off of a forklift), then T.C.A. Section 50-6-201 states that the employee must provide written notice of the injury within 30 days. However, in reality, the Courts and the Tennessee Department of Labor are very relaxed about the notice requirement. Notice is a very weak defense under Tennessee Workers' Compensation Law.

The Courts and the Department of Labor usually have no problem with oral notice. Furthermore, a worker does not have to give notice until he/she knows that he/she has a permanent injury that

was caused by an incident at work. Sometimes, the worker may not know that they have a significant problem until a physician tells them. This could be eight (8) or ten (10) months later.

In fifteen (15) years of defense work, I won on Notice once.

XI. STATUTE OF LIMITATIONS

Two statutes (T.C.A. Section 50-6-203 and T.C.A. Section 50-6-224) set the Statute of Limitations at one year. Workers have one year from the date of injury to make a claim for benefits. Before 2004, they had to file a Complaint in Court within that time. Now, they have to request a BRC (which is an informal mediation) with the Tennessee Department of Labor. Good attorneys will file for a BRC immediately, even if the worker has not finished his/her medical treatment. The Tennessee Department of Labor allows this to toll the Statute of Limitations, and they issue a document requiring the worker to provide a Certificate of Readiness when the worker reaches Maximal Medical Improvement. The term "Maximal Medical Improvement" is defined as the date when the worker will get no better or no worse. The physician determines this.

If the employer has paid workers' compensation benefits, then the worker has one year after the last medical treatment or benefit payment to file a claim with the Tennessee Department of Labor. As a caveat, if there was treatment that was paid for and it stopped for over a year, and an inadvertent payment was made after that period, then the worker may be blocked from suing by the Statute of Limitations.

XII. PROCEDURE

If a worker suffers an injury by accident within the course and scope of his/her employment, then he/she should consult with the employer and fill out an injury report. The worker should not answer questions on paper or sign admissions without first consulting an attorney. The employer is obligated to give the worker a panel of three (3) physicians to choose from for treatment. Again, an attorney should be consulted on this issue. Usually, the first panel is a group of "Doc-in-the-box" physicians, such as Physicians Care. If the injury is significant, they will refer the worker to another appropriate specialist. At that point, the employer must supply another panel of three (3) physicians. If it is a back injury, then the panel must also include a chiropractor as a fourth choice.

In the event that the employer does not act, the worker can file a Request for Assistance with the Tennessee Department of Labor and Workforce Development. They are very liberal, and will usually order that a panel be given or the workers' compensation insurer will be subject to penalties.

If the worker is unable to work during medical treatment, then he/she is entitled to Temporary Total Disability benefits. These are calculated by multiplying the Average Weekly Wage by 2/3 as noted above. If these are not paid, the worker can file a Request for Assistance.

If the worker can only work part-time due to the disability, then the worker is entitled to Temporary Partial Disability benefits. You take the Workers' Compensation rate and subtract out

what they are making on a part-time basis. If these are not paid, the worker can file a Request for Assistance.

Depending on the extent of the injury, at some point the worker will reach Maximal Medical Improvement. His/her attorney should then file a Certificate of Readiness with the Tennessee Department of Labor and Workforce Development. A BRC (which is an informal mediation) is held at the Department of Labor. The case may settle. If it does not, then the Department Specialist issues an "impasse" report. At that point, either party has the right to sue in Court.

If a Complaint is filed in Court, it is usually filed with the State Chancery or Circuit Court. The Defendant has 30 days to Answer. Motions for Summary Judgment are not favored in workers' compensation cases. Discovery is exchanged, and then depositions are taken. Usually, only physicians' depositions are taken. However, sometimes the worker will want to depose officials of the employer. The case could still settle at any time.

After depositions, one party will set the case for trial. If the result at trial is not acceptable, then either of the parties has the right to appeal. Appeals go to the Tennessee Supreme Court, but you do not get the full court. You argue before a panel that includes one Justice from the Supreme Court and two Judges. If a party is not satisfied with the ruling, they can petition the Supreme Court for full court review. This is rarely granted, unless there is a significant question as to the law. If granted, there is another brief writing period and argument before the full court. Their ruling is final. In Fritts v. Safety Nat'l Cas. Corp. 163 S.W.3d 673 (Tenn. 2005), I won at the Panel level; however, the Plaintiff's attorney filed a Motion for Full Review, which was granted. Thus, we argued the case before the full Tennessee Supreme Court.

SIGNFICANT 2012 LEGISLATIVE CHANGES

A. MAXIMUM & MINIMUM BENEFIT CHANGES

Temporary Benefits – The maximum weekly benefit rate for injuries occurring July

1, 2012 through June 30, 2013 is \$886.60 or 110% of the state's average weekly wage.

Permanent Benefits – The maximum weekly benefit rate for injuries occurring July

1, 2012 through June 30, 2013 is \$806.00 or 100% of the state's average weekly wage.

Minimum Weekly Benefit - The minimum weekly benefit rate for injuries occurring

July 1, 2012 through June 30, 2013 for both temporary and permanent benefits is \$120.90.

B. PAIN MANAGEMENT

If an injured employee is referred for pain management, a panel of physicians must be provided, with each physician's office no more than 175 miles from the injured employee's residence or place

of employment. No second opinions are allowed. The employer may use Utilization Review. (Effective July 1, 2012)

C. VENUE

If the employee relocates to another county, he/she cannot file suit in that county, unless it is where the injury occurred.

SIGNIFICANT 2013 LEGISLATIVE CHANGES

A. MAXIMUM & MINIMUM BENEFIT CHANGES

Temporary Benefits - The maximum weekly benefit rate for injuries occurring July 1,

2013 through June 30, 2014 is \$918.50 or 110% of the state's average weekly wage.

Permanent Benefits – The maximum weekly benefit rate for injuries occurring July 1,

2013 through June 30, 2014 is \$835.00 or 100% of the state's average weekly wage.

Minimum Weekly Benefit - The minimum weekly benefit rate for injuries occurring

July 1, 2013 through June 30, 2014 for both temporary and permanent benefits is \$125.25.

B. CONFIDENTIALITY OF WORKERS' COMPENSATION INSURANCE POLICIES

The Department of Labor and Workforce Development can request information on WC insurance policies. Some information is public record, and other information is confidential. (Effective March 26, 2013)

C. EXTRATERRITORIAL WORKERS' COMPENSATION COVERAGE

Workers from a foreign state temporarily performing work in Tennessee for a foreign state employer are covered under the workers' compensation laws of the foreign state, if: (1) the foreign state employer has furnished workers' compensation coverage under the laws of the foreign state; (2) the extraterritorial provisions of Tennessee workers' compensation law are recognized in the foreign state; and (3) employees and employers who are covered in Tennessee are exempted from the application of the workers' compensation insurance or similar law in the foreign state.

Tennessee employees working in a foreign state temporarily (no more than 14 days consecutively or no more than 25 days in a calendar year) shall only be entitled to Tennessee comp benefits if injured incidental to their employment.

A Tennessee employee injured while working in a foreign state, other than temporarily, may still receive benefits in Tennessee if: (1) the employment was principally localized in Tennessee; (2) the contract for hire was made in Tennessee; or (3) the employee was a Tennessee resident at the time the injury occurred in the foreign state and there existed a substantial relationship between Tennessee and the particular employer/employee relationship. (Effective May 13, 2013)

D. 2013 REFORM ACT

The Division of Workers' Compensation is separated from the Department of Labor and Workforce Development, except for administrative matters only. For injuries on or after July 1, 2014, maximum total benefits are now 450 times 100 percent of the state's average weekly wage. There is an alternative dispute method for resolving claims with a workers' compensation mediator. The Court of Workers' Compensation Claims is created, consisting of judges for adjudication of claims. There is a program to assist employees and employers that are not represented by an attorney. The law establishes a medical payment committee and medical advisory committee. As far as rulemaking goes, the effective date is April 29, 2013. Otherwise, the effective date is July 1, 2014.

The bill signed into law this year removes the administration from local courts and creates a new worker's comp administrative system. While administratively tied to the Department of Labor and Workforce Development it is an independent body. The Administrator of this new entity will be appointed directly by the Governor and there will be two levels of judges-one to initially rule on disputed cases and a second level to hear appeals from the initial decisions. Appeals from this second level go to the Supreme Court.

DISCLAIMER

The within and foregoing document is a very general overview of legal principles. Additionally, the law is constantly
$changing\ with\ new\ legislation, administrative\ rules\ and\ cases.\ As\ with\ any\ law,\ there\ are\ always\ exceptions\ that\ need\ to always\ exceptions\ that\ need\ that\ need\ that\ need\ that\ need\ that\ need\ that\ $
$be \ considered. \ There \ are \ always \ time \ periods \ for \ filing \ legal \ actions. \ If you \ have \ specific \ questions \ or \ situations, \ do \ not \ no$
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