

TENNESSEE WORKERS' COMPENSATION UPDATE

Work Comp Extended to Telecommuters

Tennessee Supreme Court Says Workers Entitled

In a case of first impression in Tennessee, the Tennessee Supreme Court held that telecommuters are entitled to workers' compensation benefits for injuries that are sustained within the telecommuter's home. The Court's holding has received national attention.

In the case before the Court, the employee worked in an office within her own home due to lack of space at her employer's office. The employee's home office functioned as her work place, and she often met with other employees within the home. However, the employee's home was usually locked and not open to the public. There was no evidence of designated work hours or parameters concerning the scope of the work space.

During a routine workday, the employee was preparing lunch in her kitchen when a neighbor she had befriended knocked on the door. The employee invited the neighbor inside and they had a brief conversation. The neighbor left and immediately returned to the employee's home, claiming that he had left behind his keys. When the employee let the neighbor back inside, the neighbor brutally assaulted and severely injured the employee.

INJURY OCCURRED WHILE PREPARING LUNCH

The issue before the Tennessee Supreme Court was whether the attack and injuries arose out of and in the course and scope of employment. The Court

Court says employee's injuries occurred in course and scope of employment.

found that the employee was within the course and scope of employment, despite the fact that the attack occurred while the employee was preparing lunch in her home. Citing cases permitting recovery of benefits for injuries occurring on the employer's premises during a break, the Court reasoned that the employer should reasonably have assumed that the employee would take personal breaks during the course of the workday, including lunch breaks.

COURT HELD EMPLOYER DID NOT RESTRICT ACTIVITIES, PROHIBIT BREAKS

The Court noted that the evidence did not show that the employer restricted the employee's activities during working hours or otherwise prohibited the employee from taking personal breaks. The employee was not engaging in any prohibited conduct or was violating any company policy by preparing lunch in the kitchen. The employer did not prohibit the employee's admitting acquaintances into the home during work hours.

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Supreme Court to Address 'Race to the Courthouse' Issue

The 2004 Workers' Compensation Reform Act mandated that the parties in a workers' compensation case participate in a pre-lawsuit Benefit Review Conference (BRC) mediation at the Department of Labor before filing a lawsuit in a court of competent jurisdiction. Either the employee or the employer can file a lawsuit to secure jurisdiction, but only after the Department of Labor Specialist files an impasse report officially ending the mediation.

LAW PROMOTES VENUE SHOPPING

Since the enactment of this legislation, counsel for employees and employers have engaged in a peculiar "race to the courthouse" to decide which possible venue would hold jurisdiction over a case. Tennessee Code Annotated Section 50-6-225 specifies that a workers' compensation lawsuit may be filed in either the county of the employee's residence or in the county where the employee's alleged injury occurred.

In *Peterbilt v. Terry Thompson*, No. M2006-01541-WC-R3-CV (Tenn. 2008), the Tennessee Supreme Court will consider whether jurisdiction after a BRC is

secured upon the first-filing of a complaint, or upon the completion of service of process on the opposing party.

In *Thompson*, the parties participated in a BRC on March 28, 2006. After the Specialist declared an impasse, the employer filed in Davidson County at 10:25 a.m., and completed service of process on the employee on April 6, 2006.

The employee also filed suit against the employer on April 6, 2006 in Cheatham County. However, the Cheatham County clerk did not provide a time stamp to memorialize the precise moment the employee's complaint was filed. The employee completed service of process on the employer on April 4, 2006.

At the trial court level, the employer moved to dismiss the employee's lawsuit in Cheatham County on the basis that the employer first-filed its complaint in Davidson County. The employee, in turn, argued that since he first completed service of process on the employer that his complaint in Cheatham County should prevail.

In a Memorandum Opinion, the Honorable Robert Burch of Cheatham County dismissed the employee's lawsuit and held that jurisdiction is determined

by the time of filing of a Complaint, which subjects a party to being served with process. The employee filed a timely Notice of Appeal on the jurisdictional issue.

CASE REFERRED TO TN SUPREME COURT

On appeal, the Tennessee Supreme Court ordered the case to be transferred out of the Special Workers' Compensation Appeals Panel to be considered by the full Supreme Court. This case was argued before the Tennessee Supreme Court on February 14, 2008.

Attorney Terry Hill of Manier & Herod appeared on behalf of Peterbilt to argue for the Court to affirm the trial court order dismissing the employee's complaint. The decision of the Supreme Court should follow several months after oral argument.

Employers across the state are advised to pay close attention to the Supreme Court's decision in the *Peterbilt v. Thompson* case. This forthcoming ruling will provide a guide for defense counsel for how to secure the most favorable jurisdiction for their clients in each workers' compensation case.

Sixth Edition of AMA Guides, Higher Ratings on the way

The Sixth Edition of the AMA Guides has been published and is making its way into doctors' offices at this time. Unfortunately, the new edition of the AMA Guides is not an improvement on the prior edition. The new version of the AMA Guides contains many more possibilities for physicians to assess impairment ratings. More importantly, the ratings for many common injuries will be higher than what physicians have been providing in recent years.

For example, a full thickness rotator cuff tear can receive an impairment rating of 8% to the body before additional impairments are added for "grade modifiers." Grade modifiers throughout the Sixth Edition of the AMA Guides will be used by physicians to attempt to personalize the impairment ratings for each injury. Carpal tunnel procedures will more commonly

receive an impairment rating of 10% to the upper extremity now; partial meniscectomies will move from 2% to 3% to the lower extremity; total meniscectomies will be assessed as high as 9% to the lower extremity; and recurrent low back pain without objective findings may now receive an impairment rating as high as 9% to the body. Lumbar disk herniations at multiple levels can be rated as high as 23% to the body.

Although the Sixth Edition of the AMA Guides is in the hands of attorneys and physicians in Tennessee already, the Tennessee Department of Labor has indicated that the Sixth Edition of the AMA Guides is not to be used until further notice from the Administrator of the Department of Labor. The Department of Labor's intention is that physicians in Tennessee should be given enough time to be trained in the use of the Sixth Edition of the AMA Guides before they are utilized for determining impairment in workers' compensation claims.

WORKERS' COMPENSATION UPDATE

New Requirements for Employers, Insurers

Now, more than ever, it is incumbent upon payors: (a) to ensure that any and all claims associated with workers' compensation, liability insurers, self-insurers and no fault insurers, and (b) to determine Medicare beneficiary status before reporting to CMS pursuant to Section 111 of the Medicare Secondary Payer Act ("SCHIP").

The Bill passed unanimously in Congress and was signed into law by the President on December 29, 2007. This Bill has **major** implications for liability insurance, self-insurance, no-fault insurance and workers' compensation insurance programs.

SETTLING FUTURE MEDS DOES NOT END LIABILITY

Effective July 1, 2009, SCHIP, Section 111, paragraph 8, requires liability insureds, self-insureds, no fault insureds and workers' compensation insureds to determine Medicare beneficiary status on **all** claims and report those claims involving a Medicare beneficiary to the Secretary at the time of settlement, judgment or award *regardless of whether the future medicals are to remain open or closed*. Under paragraph 8(B), the law requires that insurers provide information identifying the claimant and provide sufficient information specified by the Secretary so that it will be able to make appropriate determinations concerning the benefits the claimant is receiving and whether CMS will have any applicable claim it deems appropriate to recover.

The information to be submitted is required to be within a time specified by the Secretary after the claim is resolved through a settlement, judgment, award or payment. This will be required to be submitted even if the claim is disputed.

If an insurer fails to comply with the requirements under Section 111,

Noncompliance could cost employers \$1,000 per day in civil penalties

the insurer "**shall be subject to a civil monetary penalty of \$1,000 for each day of noncompliance** with respect to each claimant (in addition to any other penalties prescribed by law)."

The implications of this amendment to the Medicare Secondary Payer Act will have lasting implications. For example, if the reporting of the claim is not done in a timely manner, the Secretary may enforce a civil monetary penalty of \$1,000 per day per claim.

COMPLIANCE DIFFICULT WITHOUT INFORMATION

As of the writing of this article, the Secretary has provided neither: (a) information as to what data it will require nor: (b) when that information should be received. Although it is anticipated that CMS will release a policy memorandum at a future date, it has not been received ergo, compliance with the statute is not assured. Moreover, it is conceivable that the \$1,000 per day fine could have huge implications in that a simple case that was settled without notification to CMS could simply accrue \$1,000 a day for years, costing an insurer hundreds of thousands, if not millions, of dollars in penalties.

This amendment impacts conditional payments. Conditional payments will be much easier for Medicare to police given the huge amount of data that will now be compiled by the Secretary.

Manier & Herod will be tracking CMS and their policies to ensure that all workers' compensation claims will be reported pursuant to the Medicare Secondary Payer Act.

Employee Playing Basketball on Employer's Property Covered

A worker suffering from occlusive coronary artery disease voluntarily participates in a recreational basketball game during work hours on his employer's premises. The basketball goal is located on the employer's property, but was purchased by the employees. During the game, the worker suffers a fatal heart attack. Is the worker's widow entitled to workers' compensation death benefits for her husband's death?

This is the precise scenario addressed by the Tennessee Supreme Court in Gooden v. Coors Technical Ceramic Company, 236 S.W.3d 151 (Tenn. 2007). The trial court in this case ruled for the employer and denied the widow benefits on the basis that her deceased husband *voluntarily* participated in the basketball game.

On appeal, however, the Tennessee Supreme Court reversed the trial court and found that the decedent's heart attack had, in fact, occurred in the scope of and arose out of his employment with the employer.

The Supreme Court focused its analysis around the 2005 case Young v. Taylor-White, LLC, 181 S.W.3d 324 (Tenn. 2005). In Young, the Court previously held that an employee's injury during voluntary recreational activities during work hours is not compensable under the workers' compensation law.

In Gooden, however, the Court ruled that the employee's voluntary participation in the basketball game was only one factor to consider in the compensability analysis. The Court held that other factors must also be considered such as the employer's allowance of the games during employee breaks, the employer's rule that employees not leave work premises during breaks, and the question of whether or not the games became a "regular incident of employment."

The Gooden Court found that all of these factors weighed in favor of an award for the employee, and reversed the trial court. The case has been remanded to the trial level for a determination of the benefits due to the employee's widow.

Tennessee employers are advised to remain keenly aware of regular recreational activities which may occur on their premises. If an employer is found to have in any way permitted or sanctioned these regular activities, the employer will likely be held liable under the Workers' Compensation Law for any injuries which result.

Telecommuters included in Work Comp

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Finding that the brief social visit was not sufficiently long enough to conclude that the employee had departed from the course of employment, the Court acknowledged that longer social visits could result in such a departure.

Although the employee was in the course and scope of employment at the time of the attack, the Court found that the attack did not arise out of the employment. Relying on cases involving workplace assaults, the Court characterized the attack as a "neutral assault." A "neutral assault" is one that is "neither personal to the claimant nor distinctly associated with the employment." Also, the Court found that the "street risk" doctrine did not apply because there was no connection between the attack and the nature of the employee's employment. Accordingly, the Court ultimately found that the employee was not entitled to workers' compensation benefits.

COURT DID NOT DEFINE 'SCOPE OF EMPLOYMENT' FOR TELECOMMUTERS

In the opinion, the Tennessee Supreme Court did not precisely define when a telecommuter is within the course and scope of employment. However, the Court's statements in the opinion suggest that the Court may in future cases consider any reasonable parameters an employer places on the nature and scope of the work environment within the home when determining whether an injury occurs within the course and scope of employment.

Wait v. Travelers Indemnity Co. of Illinois, 240 S.W.3d 220 (Tenn. 2007)

Workers' Comp Division Directory

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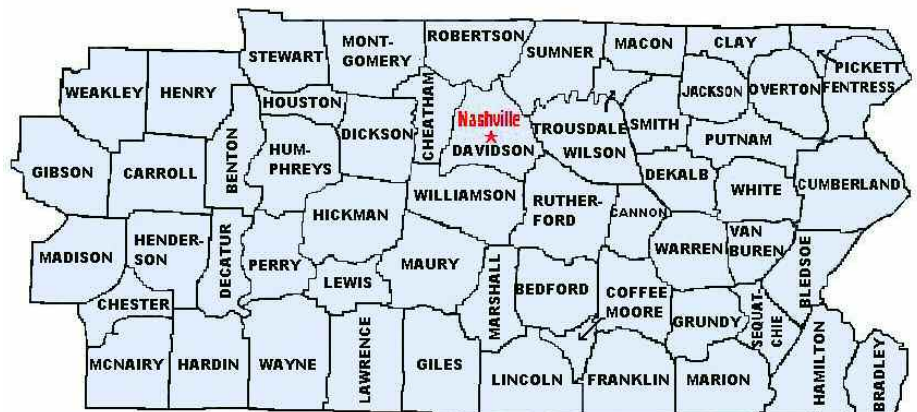
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Workers' Compensation Practice Area

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.