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## 2009 Legislative Update



### **Overstreet Amendment**

In an effort to promote the swift resolution of claims, the General Assembly modified the 2008 *Overstreet* decision. Effective July 1, 2009, there is no longer an implied covenant of confidentiality in comp claims. The new amendment is designed to foster communication between parties to a claim.

If a proper release is obtained, causation questionnaires and other written correspondence may be sent to an ATP as long as the employee or their attorney is carbon copied. This should allow all parties involved in a claim to resolve issues and move employees towards maximum medical improvement. Any response from the physician must also be timely sent to the employee or their representative.

More importantly, employers and carriers are now allowed to orally discuss a claim with the ATP, provided they comply with the new amendment's requirements. Before contacting the physician, seven-day advance notice must be provided. Further, the employee or attorney must be given a written summary of the ATP's opinions within seven days of the communication. Such communication also requires a signed release.

### **C31 Confusion**

The transition to the new rules has created uncertainty regarding the need for signed releases in pre-July 2009 claims. In response to the C31 chaos, MIJS contacted the sponsors of the amendment and asked that they take action to clarify the confusion surrounding the Department of Labor's interpretation of the new rules.

When the concerns of employers and carriers were brought to the Senate Majority Leader's attention, the policy advisors to the sponsors of the bill, arranged for a meeting with the Department to discuss their interpretation of the new law.

On July 23, 2009, that meeting was held and the Department retracted its incorrect summary of the *Overstreet* amendment. Notice was posted on the Department website clarifying that for claims occurring before July 1, 2009, any signed release of medical information furnished to a medical provider remains valid. Signed C31's are required for all new claims and for old claims where no release whatsoever has been obtained.

If you have questions regarding a claimant's failure to sign a release, please call MIJS to discuss your options.

### **Ownership Changes & Reconsideration**

Another new law prohibits reconsideration of capped claims in those instances where the ownership of the business changes but the employee continues to be employed by the successor business with the same or higher rate of pay or the employee declines an offer of employment with the same or higher rate of pay. This applies to injuries occurring on or after July 1, 2009.

By: Gregory H. Fuller

## New Form Streamlines Requests For Discovery




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Informal  
Teleconferences Are  
Held to Resolve  
Discovery Disputes

The Tennessee Department of Labor recently made changes to the Form C-40A, Request for Assistance. The first change is found in the types of disputes in which assistance may be requested. The new C-40A allows a party to request assistance for discovery related issues, under section (B).

Prior to the most recent addition, the C-40A only listed temporary disability benefits, medical care benefits and/or penalties for late payment or non-payment of benefits as options for requesting assistance.

However, prior to the new change many attorneys simply added “discovery” to the form under section (B) when such assistance was required. Therefore, this addition appears to be more form than substance.

The reason behind adding discovery related issues to the Request for Assistance has not been addressed by the Department of Labor. However, one could surmise that it stems from an increase in discovery disputes in which the Department of Labor has had to resolve. Specifically, when dealing with medical related discovery issues, thanks

to the Overstreet debacle.

The Department of Labor has long addressed discovery related issues through the Benefit Review Process Rules, specifically Chapter 0800-2-5-.06. The purpose of this rule is to “strongly encourage” parties to resolve discovery disputes informally.

### Discovery Attorney

However, as is usually the case, when such efforts fail a Workers’ Compensation Specialist may request the assistance of a Designated Discovery Attorney.

When a discovery dispute occurs, the Department’s Designated Discovery Attorney conducts an informal teleconference to determine whether there is a genuine need for more information. The new change will be most useful when doctor depositions are needed early in a claim to determine causation. The form is available at:

<http://www.state.tn.us/labor-wfd/forms/c40a.pdf>

By: Daniel Starnes

## New Administrative Review C44 Form

Employers and Insurers are required to comply with a Specialist’s Order for payment or provision of workers’ compensation benefits within fifteen (15) calendar days from receipt of the order. Failing to do so can result in drastic financial penalties.

However, Tennessee’s Workers’ Compensation Law expressly provides for an administrative review, and a new form is now available for filing with the TDLWD.

Employees, Employers, Insurance Carriers and their Attorneys have the right to request administrative review of a Workers’ Compensation

Specialist’s Order. Filing this request provides the affected party a measure of immediate relief, by temporarily forestalling compliance with the adverse Order. Administrative Review teleconferences are the only real avenue for making meaningful arguments at the Request for Assistance stage.

### Primary Change

There is one important change worth discussing. The previous form allowed written waiver of an informal teleconference whereby the administrator’s decision would be based solely on the written documentation provided.

The new form C-44 requires the requesting party to list their availability for the following 10 days, as the telephone conference must be scheduled within that time frame.

After receiving the Specialist’s Order, requesting parties are only allowed seven days to game plan, articulate their legal arguments, and submit their completed Form C-44 and documentation to the TDLWD.

The revised Form C-44 can be found online at <http://www.state.tn.us/labor-wfd/forms-c44.pdf>.

By: Todd Heird

## MIJS Challenges Constitutionality of RFA Process

Moore Ingram Johnson & Steele, LLP recently filed a petition on behalf of one of our valued clients which may have wide-ranging effects on Tennessee's Workers' Compensation Law. In the petition filed by Gregory H. Fuller, Moore Ingram Johnson & Steele, LLP challenges the constitutionality of Tennessee Code Annotated § 50-6-238.

The petition also addresses the landmark issue of whether the Tennessee Uniform Administrative Procedures Act applies to agency action undertaken by the TDLWD in determining a request for assistance and the subsequent administrative review of the specialist's order.

### Arbitrary Standard

The claims for relief asserted in the petition seek redress for one of the most important issues in Tennessee Workers' Compensation Law: How do employers and insurer carriers in Tennessee obtain an adequate remedy for arbitrary agency orders and actions in excess of statutory authority?

Tennessee Code Annotated § 50-6-238 allows workers' compensation specialist to award "temporary disability benefits" if determined to be "appropriate" in light of available "information." Many employers believe this ambiguous standard gives specialists too much discretion in ordering benefits. This is especially true in light of the fact that there is no such thing as "temporary disability benefits." The statutes provide only for temporary total or temporary partial benefits.

### Second Injury Refund Inadequate

Under the current statutory scheme, a refund from the Second Injury Fund is potentially recoverable.

However, "the entity or person who paid the benefits pursuant to a specialist's order or orders is not entitled to receive the refund until the claim has been fully concluded by the trial court or, if appealed, by the Tennessee Supreme Court." In many cases this could take years to pan out.

At the same time, other provisions make evidence of a workers' compensation specialist's order inadmissible in subsequent proceedings.

Tennessee's workers' compensation statutes do not provide any adequate mechanism for reviewing the actions taken by the Department in issuing or reviewing orders.

Accordingly, Moore Ingram Johnson & Steele, LLP has petitioned for a declaratory judgment to address the substantive and procedural Due Process issues of a statutory provision empowering the Department to deprive employers of property based upon an arbitrary standard without an evidentiary hearing.

A motion to dismiss filed by the Department was denied in late June, 2009. The Chancery Court of Davidson County was sympathetic to the complaints of Tennessee employers and will soon decide for itself whether the Department has too much power.

By: Todd Heird



Do the Department's RFA Procedures Comply with Due Process?



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This is a legal advertisement. The articles are intended to provide background and general guidance to the TN workers' comp system. They are not intended as legal advice as each lawsuit is unique and requires specific analysis. Please contact MIJS to discuss the details of your claim.

## Good Sports: Limiting Recreational Compensability



Employers may not have to take down those basketball goals in the break area just yet... The Tennessee legislature recently passed a compromise bill providing that no compensation will be allowed for an injury or death due to an employee's voluntary participation in recreational, social, athletic, or exercise events.

This welcome change comes in response to an outlandish Supreme Court opinion holding that heart attacks suffered during break-time basketball games are in fact compensable.

### Express or Implied Participation

Under the new law, employers will not be liable for injuries unless participation is expressly or impliedly required.

While compulsory competition remains a bad idea, the question of what "impliedly" means could make for interesting litigation.

Employers will be liable, however, if the participation produces a direct benefit to the employer beyond improvement in employee health and morale.

### Hazardous Conditions

Another way in which employer's can be liable for recreational activities is if the injury occurs due to an unsafe condition during voluntary participation using facilities designated by, furnished by, or maintained by the employer on or off the employer's premises and the employer has actual knowledge of the unsafe condition and fails to curtail the activity or program or cure the unsafe condition.

This new law puts a common sense limit on the course and scope of employment. Although mandatory dunking contests will continue to be frowned upon, employers who follow these guidelines, can now safely boost morale without betting the checkbook.

By: Juliane Morris

### ***About Moore Ingram Johnson & Steele...***

MIJS is a value oriented law firm focused on providing customized solutions for our clients. Based in Marietta, GA, MIJS offers a full spectrum of legal services ranging from general liability to transactional tax planning.

Our Knoxville office specializes in workers' compensation defense

allowing us to aggressively minimize the overall expenses of claims. By leveraging the experience of twelve comp attorneys, we help employers and insurers navigate Tennessee's workers' compensation system with an eye towards cutting costs. Please contact Troy Hart to see how MIJS can help you meet your workers' comp goals.