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New Future Medicals Procedures Permit Discretionary Costs



On April 30, 2010, an important new law addressing future medical benefits went into effect. The legislation grants the DOL the primary jurisdiction to consider disputes over future medical benefits after a claim is resolved. Under the law, either party can file an RFA, but there are two separate procedures for appealing the DOL's decision.

Appropriateness Standard

Much like other DOL decisions, there is no articulated standard for ordering benefits. Instead, the DOL can order employers and carriers to authorize benefits if they feel it is "appropriate" to do so. Interestingly, there is also no mention of utilization review or whether the benefits are medically necessary and reasonably related to the actual claim.

Unfortunately, the end result of this new law is indefinite DOL interference, long after claims are resolved. It also encourages litigation by creating a less burdensome procedure for disputes arising after a trial.

Post-Trial Disputes

The first stage of feuds over future medicals is the same regardless of how the claim was actually resolved. Once a dispute arises, either party can file an RFA and drag the DOL back into the fold. The difference arises after the DOL determines whether benefits are "appropriate."

For claims that went to trial, an appeal of the specialist's decision goes back to the trial court for a *de novo* review. The judge reconsiders that matter without any presumption of correctness given to the specialist's conclusion, but also without any new proof or testimony.

Post-Settlement Disputes

For disputes arising after a settlement, either party can file an RFA in the same manner as a post-trial dispute. The crucial difference, however, is that appeal of the specialist's decision is handled by the DOL's Administrative Review process--just like a normal RFA. If the employer does not comply with the Administrative Review order, they are subject to \$10,000.00 penalties for non-compliance.

Discretionary Costs

Finally, the new law, which amends T.C.A. § 50-6-204(g)(2), gives workers' compensation specialists the power to order employers and carriers to pay expert witness deposition fees as well as court reporter fees. The bottom line is that specialists now retain significant powers, long after a claim is resolved. However, employers and carriers can avoid future penalties by trying contested claims.

By: Gregory H. Fuller

Licensed to Adjust..

DOL plans to use new certification requirements to educate and track adjusters, bill reviewers and supervisors.

Tennessee Adjuster Certifications Are Coming!

For years the Tennessee DOL has talked about licensing requirements for adjusters. Now it appears as though such certifications are finally coming to fruition. A public rule making hearing is scheduled for August of 2010 to review proposed rules for a licensing program.

Certification Begins In 2011

Once approved, these rules will go into effect on July 1, 2011. The rules will require all adjusters, including medical only and bill reviewers, as well as supervisors, to obtain a certification number. There will be no grandfathering or reciprocity.

Licensing Requirements

Licensing will involve three certifications: A provisional number will be issued first. The individual will then have six months to complete training and prepare for a written examination. The preparation will include internet instruction and two days of six hour instruction in a classroom setting. The written examination will be offered four times a year.

After passing the written examination, a certification number will be issued. This number must be included on every C20 first report of injury filed with the State. Probationary numbers will be issued when the DOL determines that an individual is not timely reporting or paying benefits.

Maintaining Certification

After becoming certified, individuals must participate in six hours of classroom instruction on an annual basis. Medical review managers will be required to obtain three hours of instruction a year to meet CEU requirements.

Penalties

Those who do not meet these certification requirements will be subject to penalties between \$1,000 and \$10,000. So it is important to start planning for these new requirements now. MIJS is exploring options to facilitate the transition into the new program.

By: Troy Hart

Tennessee Case Law Snapshot Update

In the past year, several Supreme Court cases have made an impact on Tennessee's workers' comp system. We have taken some of the more interesting cases and boiled them down to the bottom line to help you stay current with Tennessee's trends.

Intellectually Challenged Addict

In Tennessee, employers with a certified "Drug Free Workplace" program benefit from a presumption if the employee tests positive: the drugs caused the accident.

The recent case *Campbell v. PML, Inc.* helps to clarify the type of evidence necessary to overcome the presumption.

Campbell injured his thumb on a conveyor belt. He tested positive for marijuana on the day of the accident. But at trial, Campbell testified that he hadn't gotten high for four whole days prior to the accident.

Campbell testified that he had worked the entire day prior to the accident without incident. Two co-workers testified that he did

not appear to be impaired on the morning the injury occurred. Finally, the trial court found that the employee was "intellectually challenged" and was therefore more likely to act unwisely and without caution around dangerous machinery than the average worker.

The appellate court found that the evidence offered at trial, together with the trial court's finding that Campbell was intellectually challenged, was sufficient to overcome the presumption.

Tennessee Case Law Snapshot Update

Unfortunately, the standard implicitly laid out in this case leaves the door fairly wide open for drug-using employees to circumvent the statutory presumption by merely stating without corroborating evidence that their drug usage occurred several days prior to the accident.

Equally unfortunate is the fact that the "intellectually challenged" language found in Campbell allows a substantial portion of Tennessee workers a get-out-of-jail-free card if they happen to test positive for drugs or alcohol following a workplace accident.

By: Phillip G. Gombar

Parking Lot Injuries

A recent decision of Tennessee's Special Workers' Compensation Appeals Panel affirmed that injuries on the job extend to the employer's parking lot. In this case, the employee received a call at work requesting that she leave work to go check on her younger sister.

The employee asked her supervisor for permission and then left the building. However, on the way to her car, the employee tripped over the curb of a grassy median and broke her wrist during the fall.

The employer denied the compensability of the claim, arguing at trial that the injury was not in the course and scope of employment because the employee was on a "personal mission" at the time of the accident. The Appeals Panel found the injury to be compensable, stating that "a worker who is on the employer's

premises coming to or going from the actual work place is acting in the course of employment." Additionally, "if the employer has provided a parking area for its employees, that parking area is part of the employer's premises."



The Appeals Panel also stated a practical test to utilize for parking lot injuries. "In cases where an employee is injured while en route to or from work, the injury is in the course of employment if it occurs on the employer's premises or on a necessary route between the work facility and the areas provided for employee parking. Once the employee has exited the parking area and begins traveling on personal time, away from the employer's premises, he is no longer in the course of employment." By: Todd I. Heird

Hearing Loss SOL

In the hearing loss case of *Douglas v. Goodyear Tire*, the Employer appealed the trial Court's decision that the Employee sustained a compensable work-related injury and Employee's one-year statute of limitations to file suit was not time barred. The evidence showed that the claimant's hearing likely began to deteriorate prior to 1983, when the Employer didn't have a hearing loss prevention program in place.

However, hearing exam test results showed that the noise in the work place was to a degree that affected the Employee's hearing even after the Employer implemented its hearing loss prevention program and the Employee used hearing protection devices.

The Employer argued that the statute of limitations began to run in 1996 when the claimant began to notice hearing loss. However, the claimant was not first notified that his hearing loss could potentially be work related until he saw hearing specialist, Dr. Rowland in September 2003.

At that time, Employee was informed that the hearing loss was work related. Claimant filed suit on October 17, 2003, which was within one year from the day he was first notified that his hearing loss was work related.

By: Jaime Knoebel

Willful Misconduct!

Daniel Starnes of MIJS had the personal pleasure of handling the appellate brief and oral argument in a case where the willful misconduct defense prevailed, *Civil Constructors, Inc. v. Haynes*. The employee violated verbal orders from his supervisor, along with warnings from other employees, to not drive his dump truck on top of a berm to dump his load. The trial court and appeals panel agreed

Comp Defense Refresher

that Haynes, intentionally violated orders to not drive on the berm, and his willful misconduct was the cause of his injuries.



Mr. Haynes was told multiple times on different days not to drive on the berm. He had already damaged the truck once by joyriding on the forbidden dirt mound. Only eleven days later on June 16, 2006, before Mr. Haynes began working on the Avalon site, Pat Lafever, the superintendent of that site, had a discussion with Mr. Haynes and instructed him not to drive the dump truck on top of the berm.

Despite all of these instructions, Mr. Haynes drove his dump truck on the berm at the Avalon site on June 16, 2006, causing serious injury to his sternum, back, shoulder and ribs when the truck rolled over while on top of the berm.

Multiple witnesses testified at trial regarding Haynes' refusal to follow orders. Ultimately, the trial court was upheld and the claim was denied. A little luck and fast action by Civil Constructors enabled them to limit their liability by establishing an oral site specific workplace rule of not driving on the berm. "I told you not to dump on that BERM!!!"

By: Daniel Starnes

- Statute of Limitations – The applicability of this defense depends upon whether benefits have been paid. If benefits have been paid, a claim is barred by the statute of limitations if it is not filed within one-year of the last authorized treatment or the last indemnity payment. Conversely, if benefits have not been paid, the claim will be barred if it is filed over one year after the injury.
- Intoxication and Illegal Drug Use – No compensation is allowed for injury or death due to intoxication or illegal drugs. Generally, the burden is on the employer to show that the employee would not have been injured but for the intoxication or illegal drug use. However, if the employer maintains a Drug Free Workplace, there may be a presumption that the intoxication or illegal drugs caused the injury or death.
- Intentional Infliction of Injury - An employee may not receive workers' compensation benefits for an injury that they intentionally inflicted upon themselves.
- Willful Failure to Use Safety Device - An employee's willful failure or refusal to use a safety device may terminate their right to workers' compensation benefits. However, this defense requires more than mere negligence, and there must be a willful failure or refusal to use the safety device.
- Willful Failure to Perform Duty Required by Law – An employee's right to workers' compensation benefits may be terminated if they willfully failed or refused to perform a duty required by law. This defense typically arises where an employee was speeding or driving recklessly in an automobile.
- Notice – Typically, a work-related injury must be reported within 30 days from date of injury. However, if the injury qualifies as an occupational disease, it must only be reported within 30 days after first clear manifestation of occupational disease. Additionally, courts will "relax" this 30-day rule if there is a "reasonable excuse" for the delay (i.e., gradually occurring injuries).
- Casual Employees – A "casual employee" is not entitled to workers' compensation benefits. In asserting this defense, the key issue is whether the injured claimant was performing work that is necessary to carry out the particular business venture. In determining compensability, special attention should be paid to those employees who are not employed in the usual course of that business.
- Persons Not Eligible for Benefits – The following persons are not entitled to receive workers' compensation benefits in Tennessee: common carriers, domestic servants, voluntary ski patrol persons, governmental entities, independent contractors, and persons employed at businesses with less than five employees.
- Causation – To be compensable, an injury must arise within the course of the claimant's employment, which refers to the time, place, and circumstances of the injury, as well as arise out of their employment, which requires a causal connection between the conditions under which the work is required to be performed and the resulting injury.



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- Last Injurious/Exposure Rule – In determining which of two successive insurers is liable in a workers' compensation case, the insurer at the time of the employee's last injurious exposure is liable for the injury. To assert this defense, there must be some showing that the employee's condition worsened due to the working conditions at the second employer, either by advancement or aggravation of the injury.
 - Willful Misconduct – In most instances, an employee conduct that is negligent, or even grossly negligent, may still recover benefits. However, if it can be proven that the employee was engage in willful misconduct, which requires a connotation of calculated and intentional wrongdoing, their claim may be denied.
 - Misrepresentation of Physical Condition - An employee who misrepresents his/her physical condition in his/her application for employment may be denied compensation. For this defense to apply, (1) the employee must have knowingly and willfully made a false representation as to his/her physical condition; (2) the employer must have relied on the false representation, and the reliance must have been a substantial factor in the hiring; and (3) there must be a causal connection between the false representation and the injury.
 - Horseplay – If an employee is injury while involved in a prank and in other action constituted a serious departure from their employment duties, their claim may be denied. However, if an employee is an intended victim of a co-worker's prank, the innocent victim may receive benefits.
 - Idiopathic Injuries – If an injury is the result of purely personal actions or a purely personal condition, the employee may not receive workers' compensation benefits for that injury. Rather, the injury must have arose as the result of some hazard incident to their employment.
 - Act of God – An Act of God, such as a floods, earthquake, tornado, meteorite or lightning strike is generally not compensable unless the employee was put at an increased risk of being injured due to their employment.
- By: Alex B. Morrison

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.

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 Tennessee offices specialize in workers' compensation defense allowing us to aggressively minimize the overall expenses of claims. By leveraging the experience of 13

comp attorneys, we help employers and insurers navigate Tennessee's workers' compensation system with an eye towards cutting costs.

We are pleased to announce the opening of two new offices in Nashville, TN and Jacksonville FL. These new facilities will allow us to better serve our clients by reducing travel time. Please contact Troy Hart to see how MIJS can help you meet your workers' comp goals.