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Tennessee's Comp System On the Verge of Reform



The Tennessee Workers' Compensation Advisory Council recently voted 5 to 1 to recommend passage of employer-friendly legislation. The bill, SB 932/HB 1503, is endorsed by the Tennessee Chamber of Commerce & Industry. According to Chamber spokesman Bradley Jackson, the legislation is intended to correct Tennessee's overly-complicated system. The bill is a prelude to more comprehensive reform to be developed over the summer and advanced in next year's session.

In the meantime, Senate Majority Leader Mark Norris of Collierville and Representative Jimmy Eldridge of Jackson, have spearhead three substantial revisions to the current law.

"Injury" Redefined

The most sweeping change addresses the statutory definition of injury. Currently, T.C.A. § 50-6-102(12) defines "injury" as "an injury by accident arising out of and in the course of employment that causes either disablement or death of the employee."

The reform bill inserts the following language, "An injury, including a mental injury, is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence."

Repetitive Motion Claims Limited

In addition to the "specific incident" language, SB 932 also eliminates certain cumulative trauma claims. With a few exceptions, hearing loss claims and carpal tunnel syndrome claims will not be considered compensable "unless the disease exists and arose primarily out of and in the course of employment... and did not result primarily from a cause outside of the employment..." This sensible change will reduce claims that arise mostly from pre-existing or age-related conditions.

Closing Future Medicals

Another aspect of the proposed legislation is the removal of the arbitrary 3-year time limit for closing future medicals. Under current Tennessee law, future medical benefits for arm, leg or body as a whole claims may be immediately closed only in "doubtful and disputed" cases. The new change will make it easier to fully resolve claims, while making Medicare set-aside agreements more prevalent in Tennessee.

Overstreet Requirements

Finally, SB 932 resets the medical communications restrictions first created by the 2008 Supreme Court case and amended by legislation in 2009. Under the new legislation, employers and adjusters will enjoy increased access to authorized treating physicians. These are welcome changes. The convoluted nature of Tennessee's present system delays resolution and encourages litigation. The legislation is schedule for a floor vote soon and MIJS will keep you updated.

Inside This Issue:

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- MIJS Successfully Sues DOL... Again!
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MIJS recently utilized the Uniform Administrative Procedures Act to reverse a DOL order requiring an employer to place a specific physician on a panel.

MIJS Wins Another Victory Against the Department of Labor

Following its successful constitutional challenge, MIJS recently forced the DOL to rescind an unlawful order to include a specific physician on a panel. On January 26, 2011 a Request for Assistance was filed with the Tennessee Department of Labor seeking medical benefits. The employee alleged an injury to her lower back and her authorized treating physician referred the employee to a specific neurosurgeon.

On March 16, 2011, the Department of Labor issued an Order for Medical Benefits requiring the employer to provide a panel of neurosurgeons to include the specific neurosurgeon. A timely Request for Administrative review was filed on behalf of the employer.

Administrative Review

During the administrative review informal teleconference MIJS argued that a Specialist for the Department of Labor did not have the statutory authority to require the employer to provide a panel of physicians to include a specific physician. The Department's position at the time was that T.C.A. § 50-6-238 provided authority to for a specialist to issue an order for an "appropriate" panel. To this position MIJS argued that an appropriate panel was defined under T.C.A. § 50-6-204, which states in relevant part "the employer shall designate" a group of three or more reputable physicians.

Despite this statutory argument the Administrator's Designee issued an Order affirming the specialist's order on April 8, 2011.

Petition for Judicial Review

After receiving the April 8, 2011 order MIJS discussed the options with the carrier, at which time we decided to file a Petition for Judicial Review of an Administrative Agency's Order in the Chancery Court for Davidson County. Shortly thereafter, MIJS filed a Motion

for Stay of the order and requested an expedited hearing. This prompted a call from the Attorney General's office to discuss the petition and motion.

Subsequent to the conversation with the Attorney General's office, MIJS received a call from the Department of Labor Specialist that issued the original order for benefits. We discussed the issues with the order and specifically whether the specialist had the authority to require an employer to place a specific physician on a panel.

Modified Order

On May 9, 2011, the Department of Labor issued a Modified Order for Medical Benefits. The Department wrote that after some deliberations, it determined that the Order for Medical Benefits needed to be modified to exclude the requirement of that a specific provider be included on the panel. A new panel of three neurosurgeons selected by our client was issued.

Holding the Department Accountable

This unprecedented reversal is a decisive victory for employers and carriers. It demonstrates that Department orders can be successfully challenged prior to a BRC via the Uniform Administrative Procedures Act. But we're not done yet. We have seen the Department order specific providers be placed on a panel on numerous occasions.

It is our position that this excessive act is capable of repetition and that the Department is trying to evade review from the Chancery Court by rescinding its order. Accordingly, the issue needs to be addressed by the Chancery Court and the case will proceed.

By: Daniel Starnes

Recent Tennessee Case Law Review

Refusal to Return to Work

A recent case capped an award for an employee who refused to return to work because *she did not believe that she could perform her job duties*. Following a work-related slip and fall injury, a timeshare sales representative eventually was given permanent restrictions by her psychiatrist.

The ATP opined that the employee's job duties complied with the restrictions he gave. Employer then attempted to schedule employee's return to work, which employee declined under the subjective belief that she would be unable to perform her job due to pain.

The appeals panel reversed the trial court's ruling and found that an employee's subjective belief alone of being unable to perform their duties is insufficient. In order to decline a reasonable offer to return to work, without some other evidence supporting employee's decision, particularly medical advice or opinion.

The panel emphasized the employee's failure to even attempt to make a return to work, in that had employee made an attempt to return but ultimately was prevented from performing her duties due to pain, as corroborated by her physician, then a different result might have been appropriate. However, since employee did not make such an attempt, the court stated "any conclusion about what might have happened is mere speculation."

Blair v. Wyndham Vacation_Ownership, Inc.



Layoffs & Meaningful Return to Work

Claimant worked for an employer who routinely laid-off employees at least two times per year for short periods of time. Layoffs were assigned in order of seniority, with the lowest level employees being laid off first. During layoff periods employees were not paid and did not receive any benefits.

Given the uncertain duration of the layoff, the Claimant chose to retire rather than wait to see if he would be brought back after the layoff. After retiring the Claimant continued to pursue a claim for second injury as well as reconsideration of a previous injury. The Claimant said that he was entitled to reconsideration due to the fact that he had not had a meaningful return to work.

The Supreme Court of Tennessee held that the Claimant had not had a meaningful return to work, that he could seek reconsideration of his initial injury and was not subject to the lower statutory caps. Specifically, the Court held that the Claimant's employment ended when he was laid off not when he retired.

The Court provided a number of factors to be used in determining whether a layoff is a loss of employment and, therefore, not a meaningful return of work: (1.) whether the layoffs are a customary or expected part of the employee's position and, if so, whether the specific layoff in question falls within the pattern of previous layoffs in the position;

(2.) whether the employee expected or should have expected, at the time of the layoff, to be recalled to work; and (3.) whether the employee received pay or benefits while laid off. These factors should be kept in mind when determining whether a layoff breaks the cap. *Nichols v. Jack Cooper Transport Co.*

Pre-existing Mental Issues

In *Transport Service LLC v. Donald Allen*, the employee suffered a shoulder injury when he fell at work. This injury was not disputed. However, he also claimed to suffer a mental injury due to depression and anxiety suffered subsequent to the injury. This, he said, was due to the fact that, when he was allowed to return to work on a light-duty basis, he was harassed and taunted by his fellow employees.

The trial court found this to be a compensable mental injury, after hearing testimony of two mental health experts, one of whom went only on what Mr. Allen reported to him, even though Mr. Allen had an extensive mental health history prior to his shoulder injury. However, the appellate court reversed when it reviewed the record and discovered that Mr. Allen had been treated for depression and anxiety prior to the injury, the same mental conditions he was claiming were caused by the shoulder injury. Why the trial court disregarded this fact is unclear.

This case shows why it is important to aggressively obtain all prior medical records, especially in mental claims.



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Department of Labor Educational Conference

The Department of Labor will host its annual educational conference on June 14 and 15 in Nashville. MIJS will be attending and encourages its clients to participate in order to stay up to date on developments in Tennessee.

This year's topics include:

- Social Networking in Comp Claims
- Utilization Review Process
- Aging and Degenerative Conditions
- Judicial Review of DOL Orders

The educational conference is a great opportunity to get to know the vendors, administrators and medical providers who shape Tennessee's comp process. It is also a chance to reconnect with the MIJS, get some CEU credits and experience Music City's unique culture.

It's not too late to register. The cost is \$375.00 per registrant. For more information http://www.tn.gov/labor-wfd/wc_conf_register2011.pdf

Due Process Update

As you may know, MIJS recently won a ground-breaking constitutional challenge to the Request for Assistance process. The Davidson County Chancery Court struck down T.C.A. 50-6-238(a)(2) as a violation of procedural due process because the statute provides no independent judicial review of the Department's orders for TTD benefits.

The Department appealed the Court's decision and oral argument has been set for June 28, 2011, in the Court of Appeals. As the discussed above, MIJS's challenge has paved the way for more successful challenges to Tennessee's comp system. If you've been wronged by the Request for Assistance process, call MIJS today to discuss your options. To view the decision, visit

<http://www.tennesseeattorneysmemo.com/documents/35-TAM-49-35.pdf>

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.

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

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 a new office Louisville, KY. MIJS also operates an office in Nashville, TN and serves its clients in Florida as well. Please contact Troy Hart to see how MIJS can help you meet your workers' comp goals.