

## TENNESSEE

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### 1. Citation for the state's workers' compensation statute.

T.C.A. § 50-6-101, *et seq.*

### 2. Who are covered "employees" for purpose of workers' compensation?

A covered employee is every person under contract of hire or apprenticeship, written or implied, including a paid corporate officer. T.C.A. § 50-6-102(12)(A). It also includes a sole proprietor or a partner, if he or she properly elects. T.C.A. § 50-6-102(12)(B). Please see #52 below for additional information regarding "illegal aliens."

### 3. Identify and describe any "statutory employer" provision.

T. C. A. § 50-6-113

(a) A principal contractor, intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

(b) Any principal contractor, intermediate contractor or subcontractor who pays compensation under subsection (a) may recover the amount paid from any person who, independently of this section, would have been liable to pay compensation to the injured employee, or from any intermediate contractor.

(c) Every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, but the proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal contractor or intermediate contractor; provided, that the collection of full compensation from one (1) employer shall bar recovery by the employee against any others, nor shall the employee collect from all a total compensation in excess of the amount for which any of the contractors is liable.

(d) This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or that are otherwise under the principal contractor's control or management.

(e) A subcontractor under contract to a general contractor may elect to be covered under any policy of workers' compensation insurance insuring the contractor upon written agreement of the contractor, by filing written notice of the election, on a form prescribed by the administrator, with the division. It is the responsibility of the general contractor to file the written notice with the division. Failure of the general contractor to file the written notice shall not operate to relieve or alter the obligation of an insurance company to provide coverage to a subcontractor when the

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subcontractor can produce evidence of payment of premiums to the insurance company for the coverage. The election shall in no way terminate or affect the independent contractor status of the subcontractor for any other purpose than to permit workers' compensation coverage. The election of coverage may be terminated by the subcontractor or general contractor by providing written notice of the termination to the division and to all other parties consenting to the prior election. The termination shall be effective thirty (30) days from the date of the notice to all other parties consenting to the prior election and to the division.

(f) This section shall not apply to a construction services provider, as defined by § 50-6-901 **What types of injuries are covered and what is the standard of proof for each:**

Generally, the plaintiff in a workers' compensation suit has the burden of proving his case by a preponderance of the evidence. *Owens Ill., Inc. v. Lane*, 576 S.W.2d 348 (Tenn. 1978). This is subject to the exception, herein, allowing for presumptions and requirement for clear and convincing evidence to overcome the drug free workplace presumption. T.C.A. § 50-6-110(c)(1).

### **A. (1) Traumatic or "single occurrence" claims.**

An "injury" or "personal injury" is an injury by accident "aris[ing] primarily out of and in the course and scope of employment" that causes either disablement or death of the employee by a showing to "a reasonable degree of medical certainty that [the injury] contributed more than fifty percent (50%) in causing the disablement. In other words, the employee must be within the time and space boundaries of the employment, and he or she must be engaged in an activity that bears (1) a causal connection between the conditions of work and the resulting injury; and (2) that the injury resulted from a danger or hazard peculiar to the work or was caused by a risk inherent to the nature of the work. An "injury" or "personal injury" also includes occupational diseases and mental injuries arising primarily out of and in the course of employment that cause either disablement or death of the employee. T.C.A. § 50-6-102(14). (The causation opinion of the panel physician shall be rebuttably presumed to be correct).

### **A. (2) Repetitive (multiple) trauma (motion) claims.**

See the definition in 4.A.(1); however, conditions such as carpal tunnel syndrome, repetitive back motions, etc. may be covered, as well as hearing loss, as of 6/6/11 only if the condition arose primarily out of and in the course and scope of employment. See T.C.A. § 50-6-102(14) for injuries occurring on or after July 1, 2014; and T.C.A. § 50-6-301(b) applicable to injuries occurring between 6/6/11 and before July 14, 2014. [T.C.A 50-6-301 repealed]. The causation opinion of the authorized treating physician will be entitled to presumption of correctness, rebuttable by a preponderance of the evidence effective 6/6/11. See T.C.A. § 50-6-102(14)(E) for injuries on or after July 1, 2014; and T.C.A. § 50-6-301(b) applicable to injuries occurring between 6/6/11 and before July 14, 2014. [T.C.A 50-6-301 repealed].

### **B. Occupational disease (including respiratory and repetitive use).**

See T.C.A. § 50-6-102(14) A-E: (14) "Injury" and "personal injury" mean an injury by accident, a mental injury, occupational disease including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions, arising primarily out of and in the course and scope of employment,

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that causes death, disablement or the need for medical treatment of the employee; provided, that: (A) An injury is “accidental” only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence, and shall not include the aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment; (B) An injury “arises primarily out of and in the course and scope of employment” only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes; (C) An injury causes death, disablement or the need for medical treatment only if it has been shown to a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the death, disablement or need for medical treatment, considering all causes; (D) “Shown to a reasonable degree of medical certainty” means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility; (E) The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to § 50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence.

#### 4. What, if any, injuries or claims are excluded?

Compensation is not allowed for an employee’s injury or death when:

- the employee engaged in willful misconduct, such as deliberately violating safety rules or instructions, T.C.A. § 50-6-110(a)(1);
- the employee intentionally inflicted injury to him or herself, such as committing suicide, T.C.A. § 50-6-110(a)(2);
- the employee was intoxicated or used illegal drugs, T.C.A. § 50-6-110(a)(3);
- the employee willful failure or refusal to use a safety appliance, T.C.A. § 50-6-110(a)(4);
- the employee willful failure to perform a duty required by law, T.C.A. § 50-6-110(a)(5); or
- with some exceptions, the employee was voluntarily participating in recreational, social, athletic or exercise activities, T.C.A. § 50-6-110(a)(6).

The burden of proof for this defense, including causation, is on the employer. T.C.A. § 50-6-110(b). However, if the employer has qualified as a “drug-free workplace,” then a rebuttable presumption is created that such drug or alcohol use was the proximate cause of the injury, unless waived by the employer’s prior actual notice and acquiescence of such activity. T.C.A. § 50-6-110(c)(1). As of 6/6/11, the presumption can only be rebutted by “clear and convincing evidence.”

Note also that compensation may be denied if an employee intentionally misrepresents his or her physical condition in an application for employment. *Federal Copper & Aluminum Co. v. Dickey*, 493 S.W.2d 463, 465 (Tenn. 1973). In addition, a number of statutory provisions allow employees who suffer from specific illnesses to waive their right to certain workers’ compensation benefits. *See, e.g.*, T.C.A. §§ 50-6-213(a) (epileptics); 50-6-307(a) (occupational diseases); 50-6-307(b) (heart conditions).

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### 5. What psychiatric claims or treatments are compensable?

Benefits may be awarded for a mental illness following a physical injury. This normally occurs when anxiety, depression or post-traumatic stress syndrome emerge after a work-related physical injury.

Courts have also awarded benefits for mental illnesses following mental stimuli. In these situations, the mental disorder must be caused by a sudden, acute or unexpected mental stimulus. If the mental condition is caused by general work-related stress, it will not be compensable.

Effective July 1, 2014, a “mental injury” is defined as a loss of mental faculties or a mental or behavioral disorder, arising primarily out of a compensable physical injury or an identifiable work-related event resulting in a sudden or unusual stimulus, and shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities. T.C.A. § 50-6-102(17).

The date of maximum medical improvement for mental injuries is conclusively presumed (1) at earlier of treating psychiatrist’s conclusion that MMI reached, or (2) 104 weeks after date of mental injury if no underlying physical injury. The opinion of a psychiatrist is necessary for the assignment of permanent impairment, which is unchanged from pre-July 2014 law.

Tennessee Courts have held that mental injuries could or may give rise to recovery in workers’ compensation. *Jose v. Equifax, Inc.*, 556 S.W.2d 82, 84 (Tenn. 1977). In order to be compensable, a psychological injury must meet the traditional prerequisites of any workers’ compensation claim: it must arise out of and be in the course of employment. T.C.A. § 50-6-103(a). With respect to mental injuries, the phrase “arising out of employment” has been construed to include only those injuries stemming from “an identifiable stressful, work-related event producing a sudden mental stimulus such as fright, shock, or excessive unexpected anxiety.” *Goodloe v. State*, 36 S.W.3d 62, 65 (Tenn. 2001) (citing *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 n. 10 (Tenn. 1999)). This does not include every “undesirable experience” encountered in a job. *Goodloe*, 36 S.W.3d at 66 (quoting *Jose*, 556 S.W.2d at 84). It only includes traumatic experiences that are outside the normal bounds of the particular job in which the employee is engaged. *Saylor v. Lakeway Trucking, Inc.*, 181 S.W.3d 314, 320 (Tenn. 2005); *Gatlin v. Knoxville*, 822 S.W.2d 587, 592 (Tenn. 1991). That is, the event “must be extraordinary and unusual in comparison to the stress ordinarily experienced by an employee in the same type duty.” *Gatlin*, 822 S.W.2d at 592. Physical or mental injuries caused by worry, anxiety, or emotional stress of a general nature or ordinary stress associated with an employee’s occupation are not compensable. *Brown v. Zurich Am. Ins. Co.* No. E2016-00237-SC-R3-WC, 2017 Tenn. Lexis 267. Loss of employment or employment opportunity does not qualify as a compensable mental injury.

### 6. What are the applicable statutes of limitations?

#### A. Injuries.

In instances when the employer has not paid workers’ compensation benefits to or on behalf of the employee, the right to compensation . . . shall be forever barred, unless the notice required by § 50-6-201 is given to the employer and a petition for benefit determination is filed . . . within one (1) year after the accident resulting in injury. Tenn. Code Ann. § 50-6-203(b)(1).

For injuries occurring after July 1 2014, if the employer has voluntarily paid workers’ compensation

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benefits to the employee, unless a petition for benefit determination is filed with the bureau on a form prescribed by the administrator within one (1) year from the latter of the date of the last authorized treatment or the time the employer ceased to make payments of compensation to or on behalf of the employee. T.C.A. §§ 50-6-203(b)(2).

In instances of gradually occurring injuries, the statute of limitations does not begin to run until the employee discovers, or in the exercise of reasonable diligence, should have discovered that their gradually occurring injury is permanent and work-related. *Banks v. United Parcel Serv., Inc.*, 170 S.W.3d 556, at 561 (Tenn. 2005)

If the parties are unable to settle all issues at the mediation, the mediator will prepare a Dispute Certification Notice listing all unresolved issues which may be heard by a workers' compensation judge. If a party desires to have their claim decided by a workers' compensation judge, he or she must file a request for hearing with the Division of Workers' Compensation. This document must be submitted to the Clerk of the Court of Workers' Compensation Claims within sixty (60) days after the issuance of the Dispute Certification Notice.

A workers' compensation judge may hear and determine claims for compensation, approve settlements of claims for compensation, conduct hearings, and make orders, decisions, and determinations. Workers' compensation judges conduct such hearings in accordance with the Tennessee Rules of Civil Procedure, the Tennessee Rules of Evidence, and the rules adopted by the bureau. T.C.A. § 50-6-238.

### **B. Occupational diseases.**

For occupational diseases occurring after January 1, 2005, a claim must be initiated within one year "of the date of the beginning of the incapacity for work." T.C.A. § 50-6-306(a). The "beginning of the incapacity for work" is the date when the employee knows, or in the exercise of reasonable care, should know, that he or she has an occupational disease and that it has substantially affected his or her capacity to work. *Smith v. Asarco Inc.*, 627 S.W.2d 946 (Tenn. 1982). A claim for benefits due to coal workers' pneumoconiosis must be initiated within three years of discovery of total disability. T.C.A. § 50-6-306(b). For occupational diseases occurring before January 1, 2005, the suit must be initiated within one year "after the beginning of the incapacity for work resulting from an occupational disease." T.C.A. § 50-6-306(a).

### **C. Deaths.**

The payment of death benefits is governed by T.C.A. §§ 50-6-209 and 50-6-210. T.C.A. § 50-6-210(e)(10), states that "this compensation shall be paid during dependency not to exceed the maximum total benefit." Moreover, T.C.A. § 50-6-209(b)(3) states that "the total amount of compensation payable under this subsection (b) shall not exceed the maximum total benefit...."

There are only two circumstances in which death benefits can be terminated: (1) the period of dependency ends (e.g. the surviving spouse gets remarried, the minor child comes of age, the dependent dies); or (2) the "maximum total benefit" is reached. The maximum total benefit is not limited to 400 weeks. The Tennessee Supreme Court has stated that "[the statute] does not specifically limit death benefits to dependents for any set number of weeks." *Jones v. Gen. Acc.*

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*Ins. Co. of Am.*, 856 S.W.2d 133, 135 (Tenn. 1993). Although “death benefits to dependents are subject to the maximum and minimum weekly benefit and maximum total benefit, [the statute] does not place a limit on the number of weeks such benefits are to be paid.” *Id.* Any award of death benefits should thus “continue to be paid beyond 400 weeks until the maximum total benefit is reached.” *Id.*

As of July 1, 2014, in death claims, the dependent(s) shall file a petition for benefit determination on a form presented by the administrator within one year of the employee’s death. T.C.A. §50-6-203(e)(1)

See T.C.A. §§ 50-6-203 & 50-6-306 for more information on statutes of limitation.

### 7. What are the reporting and notice requirements for those alleging an injury?

An injured employee must immediately report the injury and provide written notice, unless such was not reasonable or practical at the time, within fifteen (15) days of date of the accident unless the employer had “actual notice.” T.C.A. § 50-6-201. The Notice must be signed by the claimant. The report must state in plain language the name and address of the employee, the time, place and nature and cause of the accident resulting in the injury to the employee. T.C.A. § 50-6-202(a)(2). Notice must be given personally to the employer, and in order to bar compensability, the employer must show prejudice. T.C.A. §50-6-201(a)(3).

An occupational disease must be reported to the employer within thirty (30) days after the first distinct manifestation of the disease. Written notice for an occupational disease should be given within (30) days after the first distinct manifestation in the same manner provided for an accidental injury. T.C.A. § 50-6-305(a). Somewhat later notice may be allowed if there is good cause for the delay and no prejudice exists as to the employer. Notice is not required until the condition is known to be disabling and related to a specific work accident or repetitive work activity. T.C.A. § 50-6-201(b).

### 8. Describe available defenses based on employee conduct:

#### A. Self-inflicted injury.

An employer may use an employee’s self-inflicted injury as a defense. The employer has the burden of proof in showing that the employee’s actions constituted an intentional self-inflicted injury. T.C.A. § 50-6-110.

#### B. Willful misconduct, “horseplay,” etc.

The employer has the burden of proving that the employee was engaged in willful misconduct, “horseplay,” etc. The defense of willful misconduct requires (1) an intention to do the act; (2) a purposeful violation of orders; and (3) an element of perverseness. Willful failure or refusal to use a safety appliance is also a defense that the employer can use. The defense is predicated on a rule requiring the use of a safety appliance, and the employee must have had actual notice of the rule, which is routinely and systematically enforced. A willful failure or refusal to perform a duty required by law will also provide a defense for the employer. T.C.A. § 50-6-110; *see Stafford v. Sara Lee Corp.*, 2001 WL 65584 (Tenn. 2001) (claim non-compensable when employee failed to use safety device).



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An employer is entitled to enforce workplace policies during the pendency of a workers' compensation action. In fact, the Supreme Court of Tennessee explicitly stated this proposition in *Carter v. First Source Furniture Group* when the Court said that "an employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case." *Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 371 (Tenn. 2002). That is, an employer may terminate an employee who violates an established company policy during the term of a workers' compensation action.

### **C. Injuries involving drugs and/or alcohol.**

A defense is available to the employer when the employee has been found to have been injured due to intoxication or illegal drugs. A blood alcohol level of .08 for non-safety sensitive positions and .04 for safety sensitive positions creates a presumption that the alcohol was a proximate cause of the injury. The employee then has the burden to prove that the alcohol or drugs was not the proximate cause of the injury, as long as the employer implements and follows the Drug-free Workplace Program set out in T.C.A. §§ 50-9-101 to 50-9-114. Otherwise, the employer has the burden of providing both level of intoxication and causation. T.C.A. § 50-6-110. If an injured worker refuses to submit to a drug test, then absent a preponderance of the evidence to the contrary, it shall be presumed that the accident was proximately caused by the use of drugs. T.C.A. § 50-6-110.

### **9. What, if any, penalties or remedies are available in claims involving fraud?**

Knowing, willing, and intentional switching of a work-related medical expense claim to group insurance or knowing failure to provide compensable medical treatment results in a \$500 penalty and no offset of group payments made. T.C.A. § 50-6-128. Both the employee and the employer may be subject to civil and criminal penalties for violation of the applicable statutory fraud provisions, including knowingly making or causing to be made any false or fraudulent material statements or material representations to obtain or deny compensation benefits or expenses. A fraudulent insurance act is punishable as a criminal act under the statute. T.C.A. §§ 56-47-101 to 56-47-112.

### **10. Is there any defense for falsification of employment records regarding medical history?**

Misrepresentation or falsification of employment records, which includes medical representations in a post-job offer, pre-employment physical exam medical questionnaire, may be a defense for an employer. However, the following elements must be met: (1) the employee must have knowingly and willfully made a false representation as to his physical condition; and (2) the employer must have relied upon the false representation, and the reliance must have been a substantial factor in the hiring; and (3) there must have been a causal connection between the false representation and the injury. *See Federal Copper & Aluminum Co. v. Dickey*, 493 S.W.2d 463, 465 (Tenn. 1973); *see also Quaker Oats Co. v. Smith*, 574 S.W.2d 45 (Tenn. 1978). For example, if an employee states on his employment application that he left his former job for "a better job," when in fact he left due to his former employer's inability to accommodate the employee's medical restrictions, then workers' compensation benefits may be barred because the employee made a "willful misrepresentation." *Mark Allred v. Berkline, LLC*, 2010 WL 2612695 (Tenn. Workers Comp. Panel 2010).

### **11. Are injuries during recreational and other non-work activities paid for or supported by the**

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### **employer compensable?**

No compensation is allowed for an injury caused by the employee's voluntary participation in recreational, social, athletic or exercise activities, including, but not limited to, athletic events, competitions, parties, picnics, or exercise programs, whether or not the employer pays some or all of the costs of the activities unless (1) participation was expressly or impliedly required by the employer; (2) participation produced a direct benefit to the employer beyond improvement in employee health and morale; (3) participation was during employee's work hours and was part of the employee's work-related duties; or (4) the injury occurred 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 had actual knowledge of the unsafe condition and failed to curtail the activity or program or cure the unsafe condition. T.C.A. § 50-6-110.

### **13. Are injuries by co-employees compensable?**

An injury resulting from an assault by a co-employee is compensable if the assault arose out of and within the course and scope of employment (*e.g.*, if the assault followed from a dispute over some aspect of employment). *See, e.g., Lewis v. Saturn Corp.*, 2000 WL 1262462 (Tenn. Workers' Comp. Panel 2000). However, an injury resulting from an assault is not compensable if it followed from a dispute over a personal matter. As long as a work-related action may be established, then the injury is probably compensable. As noted herein, the common law aggressor defense has been abolished by case law.

### **14. Are acts by third parties unrelated to work, but committed on the premises, compensable?**

Claims arising out of a purely personal altercation, even though on the premises, can be recoverable as long as the work-related action is satisfied. Also, simply because an employee is the "first aggressor," is no longer an automatic bar to recovery. The "arising primarily out of" portion of the statute appears to take precedence, noting that workers' compensation law is a "no fault concept." *See Woods v. Harry B. Woods Plumbing Co.*, 967 S.W.2d 768 (Tenn. 1998).

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### **15. What criterion is used for calculating the average weekly wage?**

Pursuant to T.C.A. § 50-6-102(3)(A) and subject to the limitations stated therein, the average weekly wage means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by the number of weeks actually worked. Earnings generally include any benefits reported on W-2 form.

### **16. How is the rate for temporary/lost time benefits calculated including minimum and maximum rates?**

The rate for temporary total benefits is calculated by multiplying the average weekly wage by 66 2/3%. T.C.A. § 50-6-207(1)(A). Benefits are paid subject to statutory maximum and minimum weekly amounts. The wage caps vary and are increased periodically up to 110% of the state's average weekly wage as determined by the division. *See* T.C.A. § 50-6-102(16)(xi)(b). Likewise, the



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minimum weekly benefit is recalculated annually at the rate of 15% of the state's average weekly wages. *See* T.C.A. § 50-6-102(18).

Temporary partial disability is calculated by taking 66 2/3% of the difference between the average weekly wage earnings of the worker at the time of the injury and the wage that the worker is able to earn in his disabled condition. This is subject to a 450-week cap. These benefits are also subject to the statutory maximum and minimum amounts. *See* T.C.A. § 50-6-207(2).

**17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?**

Compensation must be paid promptly and within fifteen (15) days after the employer has knowledge of any disability or death, and compensation must thereafter be paid semimonthly. T.C.A. § 50-6-205(b)(2). No benefits are payable for the first 7 days of disability; however, the disability will commence on the 8th day. *See* T.C.A. § 50-6-205(a).

**18. What is the “waiting” or “retroactive” period for temporary benefits (e.g., must be out 14 days before recovering benefits for the first day)?**

The first 7 days of disability are not initially recoverable; however, the benefit payment period becomes retroactive to the 1st day after the disability if the disability lasts for 14 days or more. T.C.A. § 50-6-205(a).

**19. What is the standard/procedure for terminating temporary benefits?**

The maximum medical improvement date or return to work, whichever first occurs, terminates temporary total disability. *See Prince v. Sentry Ins. Co.*, 908 S.W.2d 937, 939 (Tenn. 1995). A notice of termination or change of benefits (Form C-26) must be filed with the state, as appropriate.

When an employer makes temporary total disability payments to an injured employee beyond the date that the employee reaches maximum medical recovery, the employer is entitled to deduct the amount of the overpayment from a subsequent award of permanent partial disability payments. *See Mack v. Shelby County Government*, 1992 Tenn. App. LEXIS 383, \*9 (Tenn. Ct. App. May 5, 1992).

**20. Is the amount of temporary total disability paid toward the amount entitled for permanent partial disability?**

No credit is generally allowed for temporary total benefits paid on a permanent partial award, except as the combined total may exceed the maximum total benefit, as defined in T.C.A. § 50-6-102(15).

**21. What disfigurement benefits are available and how are they calculated?**

Prior to July 1, 2014, serious disfigurement to the head, face or hands, and not resulting from the loss of a member or other specific injury already compensated, that so alters the personal appearance of the employee as to materially affect their employability in an employment that they were otherwise qualified to perform may entitle the employee to benefits. This employee would

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be eligible for permanent partial disability benefits, but not to exceed 200 weeks. T.C.A. § 50-6-207(3)(E).

However, as of July 1, 2014, T.C.A. § 50-6-207(3) no longer delineates benefits for disfigurement. These injuries are now apportioned to the body as a whole.

### 22. How are permanent partial disability benefits calculated, including the minimum and maximum rates? (See Response to No. 16. for minimum and maximum weekly benefits rates)

#### A. How many weeks are available for scheduled members/parts, and the standard for recovery?

As of July 1, 2014, benefits are no longer calculated based on scheduled members/parts. All injuries are now apportioned to the body as a whole with a maximum value of 450 weeks, which was increased from 400 weeks as of July 1, 2014.

#### B. Number of weeks for “whole person” and standard for recovery.

1. Permanent Partial – Subject to the maximum weekly benefit and the minimum weekly benefit, employee shall receive 66 2/3% of the average weekly wages received for the 52-week period next preceding the injury for permanent partial for the applicable percentage of weeks assigned to the injury. T.C.A. § 50-6-207(3).
2. Permanent total disability benefits are payable until the employee is, by age, eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act, except, see Response to No. 22(B)(3) below. T.C.A. § 50-6-207(4)(A). As of July 1, 2014, T.C.A. § 50-6-207(4) the capped 260-week compensation period for permanent total disability for employees injured after they are over the age of 60 is expanded to apply to an employee’s permanent total disability occurring less than 5 years before the date the employee is eligible for full benefits in the Old Age Insurance Benefit Program. By case law, this capped compensation period for permanent total disability applied to permanent partial disability and it is believed this amendment will likewise apply to permanent partial disability. *See Smith v. U.S. Pipe and Boundary Co.*, 14 S.W.3d 739, 742 (Tenn. 2000); *see also Vogel v. Wells Fargo Guard Serv.*, 937 S.W.2d 856, 862 (Tenn. 1996)).
3. If employee is over age 60 on the date of injury and is permanently and totally disabled, then the maximum benefit available is a cap of 260 weeks. T.C.A. § 50-6-207(4)(A)(i); *Peace v. Easy Trucking Co.*, 38 S.W. 3d 526 (Tenn. 2001). By case law, this section also applies to permanent partial disability cases. The payments are offset by old age benefits attributable to employer contributions.
4. The current statutory framework for determining permanent partial disability benefits as provided in T.C.A. § 50-6-207(3) is as follows:

#### (3) Permanent Partial Disability.

(A) In case of disability partial in character but adjudged to be permanent, at the time the injured employee reaches maximum medical improvement the injured employee shall be paid sixty-six and two-thirds percent (66 2/3 %) of the employee's average weekly wages for the period of compensation, which shall be determined by multiplying the employee's impairment

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rating by four hundred fifty (450) weeks. The injured employee shall receive these benefits, in addition to the benefits provided in subdivisions (1) and (2) and those provided by § 50–6–204, whether the employee has returned to work or not; and

(B) If at the time the period of compensation provided by subdivision (3)(A) ends, the employee has not returned to work with any employer or has returned to work and is receiving wages or a salary that is less than one hundred percent (100%) of the wages or salary the employee received from his pre-injury employer on the date of injury, the injured employee may file a claim for increased benefits. If appropriate, the injured employee's award as determined under subdivision (3)(A) shall be increased by multiplying the award by a factor of one and thirty-five one hundredths (1.35); in addition, the injured employee's award shall be further increased by multiplying the award by the product of the following factors, if applicable:

- (1) Education: One and forty-five one hundredths (1.45), if the employee lacks a high school diploma or general equivalency diploma;
- (2) Age: One and two tenths (1.2), if the employee was more than forty (40) years of age at the time the period of compensation ends; and
- (3) Unemployment rate: One and three tenths (1.3), if the unemployment rate, in the Tennessee county where the employee was employed by the employer on the date of the workers' compensation injury, was at least two percentage (2%) points greater than the yearly average unemployment rate in Tennessee according to the yearly average unemployment rate compiled by the department for the year immediately prior to the expiration of the period of compensation.

(C) In determining the employee's increased award pursuant to subdivision (3)(B), the employer shall be given credit for payment of the original award of benefits as determined under subdivision (3)(A) against the increased award.

(D) Any employee may file a claim for increased benefits under subdivision (3)(B) by filing a new petition for benefit determination, on a form prescribed by the administrator, with the division no more than one (1) year after the period of compensation provided in section (3)(A) ends. Any claim for increased benefits under this subdivision (3)(D) shall be forever barred, unless the employee files a new petition for benefit determination with the division within one (1) year after the period of compensation for the subject injury ends. Under no circumstances shall an employee be entitled to additional benefits when:

- (1) The employee's loss of employment is due to the employee's voluntary resignation or retirement; provided, however, that the resignation or retirement does not result from the work-related disability;
- (2) The employee's loss of employment is due to the employee's misconduct connected with the employee's employment; or
- (3) The employee remains employed but received a reduction in salary, wages, or hours that is concurrent with a reduction in salary, wages or reduction in hours that affected at least fifty percent (50%) of all hourly employees operating at or out of the same location.

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(E) Nothing in this subsection shall prohibit the employer and employee from settling the issue of additional benefits at any time after the employee reaches maximum medical improvement. Any settlement or award of additional permanent partial disability benefits pursuant to this subdivision shall give the employer credit for prior permanent partial disability benefits paid to the employee.

(F) Subdivision (3)(B) shall not apply to injuries sustained by an employee who is not eligible or authorized to work in the United States under federal immigration laws.

(G) The total amount of compensation payable in this subdivision 50–6–207(3) shall not exceed the maximum total benefit. The payment of temporary total disability benefits or temporary partial disability benefits shall not be included in calculating the maximum total benefit.

(H) All cases of permanent partial disability shall be apportioned to the body as a whole, which shall have a value of four hundred fifty (450) weeks, and there shall be paid compensation to the injured employee for the proportionate loss of use of the body as a whole resulting from the injury. If an employee has previously sustained an injury compensable under this section and has been awarded benefits for that injury, the injured employee shall be paid compensation for the period of temporary total disability or temporary partial disability and only for the degree of permanent disability that results from the subsequent injury.

### 5. The “Escape Clause”

For injuries occurring on or after July 1, 2014, in “extraordinary cases” where the Judge finds by clear and convincing evidence that limiting the employee’s recovery to the factors specified would be “inequitable in light of the totality of the circumstances,” the Judge may award any amount up to a maximum of 275 weeks if the Judge documents the following three facts:

- (1) The authorized treating physician has assigned a medical impairment rating of 10% to the body as a whole or greater;
- (2) The authorized treating physician has certified on a TDOL form that the employee’s injury has resulted in permanent restrictions which prevent the employee from returning to the “pre-injury occupation”; and
- (3) The employee is earning an average weekly wage less than 70% of the pre-injury “wage or salary” at the time of trial.

See T.C.A. § 50-6-242.

### **23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?**

Vocational rehabilitation is not mandatory in Tennessee; however, pursuant to T.C.A. § 50-6-233(b), the administrator shall cause the division of workers’ compensation to refer all feasible cases for vocational rehabilitation to the department of education.

### **24. How are permanent total disability benefits calculated, including the minimum and maximum rates?**

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Permanent total benefits are paid at 66 2/3% of the employee's average weekly wage, subject to the minimum and maximum rates applicable on the date of injury until the employee is eligible, by age, for full old age benefits under the Social Security Act, T.C.A. § 50-6-207(4)(A), with respect to disabilities resulting from injuries that occur less than five (5) years before the date when the employee is eligible for full benefits in the Old Age Insurance Benefit Program or after the employee is eligible for full benefits, permanent total benefits are payable for a period of 260 weeks, subject to a reduction for old age insurance benefit payments attributable to employer contributions which may be received by the employee.

**25. How are death benefits calculated, including the minimum and maximum rates?**

**A. Funeral expenses.**

If death results from injury or occupational disease, the employer shall pay the burial expenses of the deceased employee, not exceeding seven thousand five hundred dollars (\$7,500). T.C.A. § 50-6-204(c).

**B. Dependency claims.**

Death benefits for dependency claims are computed in T.C.A. § 50-6-210. In cases of death of an employee, sixty-six and two-thirds percent (662/3%) of the average weekly wages shall be paid in cases where the deceased employee leaves dependents, subject to the maximum weekly benefit. The total amount of compensation payable shall not exceed the maximum total benefit, exclusive of medical, hospital and funeral benefits. T.C.A. § 50-6-209.

The compensation payable in case of death to persons wholly dependent shall be subject to the maximum weekly benefit and minimum weekly benefit; provided, that if at the time of injury the employee receives wages of less than the minimum weekly benefit, the compensation shall be the full amount of the wages a week, but in no event shall the compensation payable under this provision be less than the minimum weekly benefit. The maximum total benefit from death is the product of 450 times the state's maximum weekly rate, increased from 400 as of July 1, 2014.

Payment ceases to a dependent upon death, marriage, or achieving age 18 unless mentally incompetent or enrolled in a recognized educational institution until age 22. A surviving spouse can receive payments on behalf of dependent children.

As of July 1, 2014, T.C.A. § 50-6-210 was amended by adding subsection (f), which applies to situations where compensation is payable due to the death of an employee where the decedent employee leaves an alien dependent or dependents residing outside of the United States.

**C. No dependents – estate claim.**

A lump sum benefit is payable to the decedent's estate if there is no eligible dependent. As of 7/1/99, the lump sum payable was increased from \$10,000.00 to \$20,000.00. T.C.A. § 50-6-209(b)(2).

**26. What are the criteria for establishing a "second injury" fund recovery?**

For injuries occurring on or after July 1, 2006, there is only one way to recover from the Second Injury Fund. To obtain a recovery, it must be shown that the employee previously

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sustained a permanent physical disability and has become permanently and totally disabled through a subsequent injury. In that event, the employee is entitled to payment from its employer or employer's insurer for only the disability that would have resulted from the subsequent injury, and the employer or the employer's insurer is not responsible for any payment attributable to the previous permanent physical disability. Any compensation that the employee is owed over and above the specific compensation for the subsequent injury is paid out of the Second Injury Fund. T.C.A. § 50-6-208(a)(1). However, for the Second Injury Fund to be responsible for any remainder of compensation, the previous physical disability must have been within the knowledge of the employer. T.C.A. § 50-6-208(a)(2).

**27. What are the provisions for reopening a claim for worsening of condition, including applicable limitations periods?**

**Lump sum** awards are no longer necessarily final thirty (30) days after receipt by the Division of Workers' Compensation of settlement papers. Settlements, where the amount paid or to be paid in settlement or award does not exceed the compensation for six (6) months of disability are final and not subject to readjustment. T.C.A. § 50-6-230.

For body as a whole injuries occurring on or after July 1, 2004, if an injured employee received benefits for body as a whole and is subsequently no longer employed by the pre-injury employer at the same or greater wage within four hundred (400) weeks, the employee may seek reconsideration of the permanent partial disability benefits.

For scheduled member injuries occurring on or after July 1, 2004, if an injured employee is subsequently no longer employed by the pre-injury employer at the same or greater wage within the number of weeks for which the employee was eligible to receive benefits under T.C.A. 50-6-207, the employee may seek reconsideration of the permanent partial disability benefits.

Effective July 1, 2010, employees who continue in their employment after a reduction in pay or a reduction in hours due to economic conditions shall not be entitled to reconsideration of their claims if the reduction in pay or hours affected at least fifty percent (50%) of all hourly employees operating at or out of the same location. T.C.A.. This applies to both body as a whole and scheduled injuries.

For injuries occurring on or after July 1, 2009, where the pre-injury employer is sold or acquired after employee receives permanent partial disability benefits, then the injured employee shall not be entitled to seek reconsideration so long as (1) the injured employee continues to be employed by the successor employer at the same or higher pay; or (2) the employee declines an offer of employment with the successor employer at the same or higher pay. T.C.A. §50-6-241(d)(1)(C)(i). Credit will be given for the previous payments. T.C.A. § 50-6-241.

The provisions in T.C.A. §§ 50-6-241(d)(1)(A ), 50-6-241(d)(1)(C)(i), and 50-6-241 regarding the right of reconsideration are not applicable for injuries occurring on or after July 1, 2014. For injuries occurring on or after July 1 2014, an Employee may petition the Court for increased benefits under certain circumstances. *See* Section 22.B.4, *infra*.

**28. What situation would place responsibility on the employer to pay an employee's attorney fees?**



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For injuries occurring on or after July 1, 2014, statutory language applies to permit Workers' Compensation Judges to award attorney's fees following disputes regarding an employee's entitlement to future medical benefits. In addition to any attorneys' fees provided for in this section, the court of workers' compensation claims may award attorneys' fees and reasonable costs, including reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred when the employer fails to furnish appropriate medical, surgical and dental treatment or care, medicine, medical and surgical supplies, crutches, artificial members and other apparatus to an employee provided for in a settlement or judgment under this chapter. Tenn. Code Ann. § 50-6-226(d) (2015).

Additionally, for injuries that occur on or after July 1, 2016, the Court of Workers' Compensation Claims is now permitted to award attorney's fees to an employee if the Court determines at an expedited hearing or compensation hearing that the employer wrongfully denied a claim or failed to timely initiate medical or temporary/permanent disability benefits. *See* Public Chapter 1056 (SB2582/HB2416)

### EXCLUSIVE/TORT LIABILITY

#### 29. Is the compensation remedy exclusive?

##### A. Scope of immunity.

The compensation remedy is exclusive and protects employers maintaining proper coverage, co-employees for unintentional acts, and workers' compensation insurers. T.C.A. § 50-6-108(a).

##### B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

An exception exists where the employer has actual intent to injure. *Valencia v. Freeland and Lemm Const. Co.*, 108 S.W.3d 239 (Tenn. 2003). Gross or criminal negligence or violation of safety laws is insufficient to establish requisite and actual intent to injure. *Gonzales v. Alman Const. Co.*, 857 S.W.2d 42 (Tenn. Ct. App. 1993).

Discrimination claims are intentional in nature and therefore not barred by the exclusive remedy provision. Although fraud is an intentional tort in Tennessee, a fraud claim is not necessarily an exception to the exclusive remedy provision. Third party indemnity actions against an employer are not precluded when an employer has expressly contracted to indemnify the third party. T.C.A. § 50-6-108(c). Exclusive remedy provision under Tenn. Code Ann. § 50-6-108(a) does not bar a claim for unemployment benefits. *See Bates v. Neeley*, 2007 WL 789519 (Tenn. Ct. App. 2007).

Tennessee at this time rejects the dual capacity doctrine, which is where an employer who is normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers upon him obligations independent of those imposed upon him as employer. *See Gonzalez v. Methodist Hosp. of Memphis*, 1993 Tenn. App. LEXIS 184, \*8 (Tenn. Ct. App. Mar. 9, 1993).

As of July 1, 2014, no employer who fails to secure compensation as required shall be permitted to defend a suit brought by a covered employee or the dependents of a covered employee to recover damages for personal injury or death on any of the following grounds:

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- 1) The employee was negligent;
- 2) The injury was caused by the negligence of a fellow servant or fellow employee; or
- 3) The employee had assumed the risk of the injury.

**30. Are there any penalties against the employer for unsafe working conditions?**

Penalties for unsafe working conditions are administered under the Tennessee Occupational and Safety and Health Act and not under the Workers' Compensation Act. However, certain employers with specified accident histories may be required to establish a safety committee.

Every insurer writing workers' compensation insurance must submit modification factors (or rates) for each insured to the Administrator of the Workers' Compensation Division, if requested. Failure to do so can result in a monetary penalty. T.C.A. §§ 50-6-501 & 50-6-502.

**31. What is the penalty, if any, for an injured minor?**

None is provided. A "minor" is expressly included under the definition of "employee," whether "lawfully" or "unlawfully" employed. T.C.A. § 50-6-102(10)(A). Payment for injury to a minor must be made to a duly and regularly appointed guardian or Trustee, and any such settlement must be approved by the court. T.C.A. § 50-6-221 and § 50-6-240.

**32. What is the potential exposure for "bad faith" claims handling?**

Under T.C.A. § 50-6-236(c), when a mediation is held, the parties must mediate all issues in good faith. When a mediator determines a party is not mediating in good faith, the mediator shall include comments to that effect in the Dispute Certification Notice. Violations of this subsection may subject the parties to a civil penalty of between \$50.00 and \$5,000.00.

A medical payment committee hears disputes between providers and insurers on medical bill payments and has the authority to render decisions on the merits of a dispute. If it is determined that a provider or insurer has acted in bad faith in refusing to provide payment for a medical bill or refusing to provide reimbursement for overpayment, the medical payment committee, upon a majority vote, shall refer the malfeasant provider or insurer for consideration of assessment of a civil penalty of no more than one thousand dollars (\$1,000) per occurrence. A provider or insurer aggrieved by the assessment of a penalty shall have the right to seek review in the manner provided by T.C.A. § 50-6-118(c). T.C.A. § 50-6-125(a)(1).

If an employer/insurer fails to make timely TTD payments within 20 days of knowledge of any disability that would qualify for benefits under this chapter, a Workers' Compensation Judge can assess a penalty in the amount of 25% of any unpaid TTD payments. T.C.A. 50-6-205(b)(3)(A). Additional penalties can be found on the Tennessee Department of Labor & Workforce Development website:

<https://www.tn.gov/workforce/injuries-at-work/employers/employers/compliance/penalty-program.html>

**33. What is the exposure for terminating an employee who has been injured?**

Under T.C.A. § 50-6-207(3)(B), if at the time the period of compensation ends, or 180 days

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after the employee reaches MMI, whichever is later, the employee has not returned to work with any employer or has returned to work and is receiving wages or a salary that is less than 100% of his pre-injury wages, the employee may file a claim for increased benefits. If eligible, the employee may be entitled to increased benefits based on several factors as outlined in subsection (3)(B).

Although Tennessee is an employment-at-will state, an employee who is discharged for filing a workers' compensation claim may have a cause of action against the employer for retaliatory discharge, regardless of the eventual outcome of the workers' compensation claim. Such claim may be subject to punitive damages. *Leatherwood v. United Parcel Serv.*, 708 S.W.2d 396 (Tenn. Ct. App. 1985). Termination of an employee who has a permanent impairment may be subject to a recovery under the Americans with Disabilities Act.

### THIRD PARTY ACTIONS

#### 34. Can third parties be sued by the employee?

Third party actions are permissible under T.C.A. § 50-6-112. Failure of employee to file suit within one year operates as an assignment to the employer, who then has an additional six months to file suit to avoid being time barred. § 50-6-112(d)(2).

A statutory employer enjoys the same exclusive remedy as the original employer. *Slaughter v. Duck River Elec. Membership Corp.*, 102 S.W.3d 612 (Tenn. Ct. App. 2002).

#### 35. Can co-employees be sued for work-related injuries?

Yes. Co-employees can be sued where the co-employee intentionally assaults the employee or where the co-employee was acting outside the scope of his employment. *Scott v. AMEC Kamtech, Inc.*, 583 F.Supp.2d 912 (E.D. Tenn. 2008).

#### 36. Is subrogation available?

Yes. See T.C.A. § 50-6-112(c)(1).

#### 37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

Undisputed and properly submitted medical bills shall be paid within thirty (30) calendar days of receipt. A medical provider who does not receive timely payment of the undisputed portion of the bill may institute a collection action in court to obtain payment. Tenn. Comp. R. & Regs. 0800-2-17-.10.

Any violation of the payment rules shall subject the violator to a civil penalty of between \$50.00 and \$5,000.00. Tenn. Comp. R. & Regs. 0800-02-17-.13(1).

Under the 2013 Workers' Compensation Act, a medical payment committee hears disputes between providers and insurers on medical bill payments and has the authority to render decisions on the merits of a dispute. If it is determined that a provider or insurer has acted in bad faith in refusing to provide payment for a medical bill or refusing to provide reimbursement for overpayment, the medical payment committee, upon a majority vote, shall refer the malfeasant

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provider or insurer for consideration of assessment of a civil penalty of no more than one thousand dollars (\$1,000) per occurrence. A provider or insurer aggrieved by the assessment of a penalty shall have the right to seek review in the manner provided by T.C.A. § 50-6-118(c). T.C.A. § 50-6-125(a)(1).

**38. What, if any, mechanisms are available to compel the production of medical information reports and/or an authorization at the administrative level?**

Employers, carriers, and case managers may communicate with the employee's authorized treating physician, orally or in writing, and each medical provider shall be required to release the records of any employee treated for a work-related injury to both the employer and the employee within 30 days after admission or treatment. There shall be no implied covenant of confidentiality with respect to these records. T.C.A. § 50-6-204(a)(2)(A).

A doctor can be compelled through a court order or a subpoena to produce the records.

**39. What is the rule on: (a) Claimant's choice of physician; (b) Employer's right to second opinion and/or Independent Medical Examination?**

**A. Claimant's choice of physician.**

For injuries occurring after July 1, 2014, T.C.A. § 50-6-204(a)(3)(A) provides that when the employee has suffered an injury and expressed a need for medical care, the employer shall designate a group of three (3) or more independent reputable physicians, surgeons, chiropractors or specialty practice groups if available in the injured employee's community or, if not so available, within a 125-mile radius of the employee's community of residence. Pursuant to Tenn. Comp. R. & Regs. 0800-02-01-.06(1), this panel must be provided "as soon as practicable but no later than three (3) business days after receipt of such request."

When the authorized treating physician makes a referral to a specialist physician, "the employer shall be deemed to have accepted the referral unless the employer, within three (3) business days, provides the employee a panel" of 3 or more physicians in that specialty. T.C.A. § 50-6-204(a)(3)(A)(ii).

If a physician, surgeon or chiropractor on the panel of three (3) submitted by the employer declines to see the employee after the employee has chosen him/her from the panel, the employee may select from the remaining two (2) medical providers on the panel, or the employee may request the employer to replace the medical provider that declined treatment with another option. T.C.A. § 50-6-204(a)(3)(G).

**B. Employer's right to second opinion and/or Independent Medical Examination.**

When the treating physician or chiropractor refers the injured employee, the employee shall be entitled to have a second opinion on the issue of surgery and diagnosis from a physician or chiropractor from a panel of two (2) physicians practicing in the same specialty as the physician who recommended the surgery. T.C.A. § 50-6-204(a)(3)(C).

When a dispute exists as to the degree of medical impairment, either party may request an independent medical examiner from the Medical Impairment Registry (MIR) of the Tennessee

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Department of Labor. T.C.A. §50-6-204(d). Generally, an MIR evaluation is requested if there are two different ratings, and the parties cannot agree on which rating is appropriate. The employer bears the expense of an MIR evaluation. The MIR physician's opinion is presumed correct on the issue of impairment, subject to being overcome by clear and convincing evidence. T.C.A. § 50-6-204(d)(4).

**40. What is the standard for covered treatment (e.g., chiropractic care, physical therapy, etc.)?**

The employer/insurer is responsible for payment of authorized, causally-related, reasonable and necessary medical treatment, including chiropractic care, pursuant to the requirements of T.C.A. § 50-6-204.

**41. Which prosthetic devices are covered, and for how long?**

T.C.A. § 50-6-204(a)(1)(A) provides:

The employer or the employer's agent shall furnish, free of charge to the employee, such medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members, and other reasonable and necessary apparatus, including prescription eyeglasses and eye wear, such nursing services or psychological services as ordered by the attending physician and hospitalization, including such dental work made reasonably necessary by accident as defined in this chapter.

**42. Are vehicle and/or home modifications covered as medical expenses?**

Yes, if they are reasonable and necessary. See *Dennis v. Erin Truckways, Ltd.*, 188 S.W.3d 578 (Tenn. 2006) (finding the term "apparatus" in the statute to include medically necessary modifications to an injured worker's house, but not the entire cost of housing).

In *Calderon v. Auto Owners Ins. Co.*, the Special Workers' Compensation Appeals Panel for the Supreme Court of Tennessee, citing *Dennis*, limited the employer's requirement to pay for employee's housing to the costs directly attributable to modification of the housing to make it handicap accessible (but not the increase in rent between non-handicap accessible housing and handicap accessible housing), as well as affirming the lower court's decision that the employer was not obligated to purchase a CCT Paratransit pass for the employee, so long as the employer ensures transportation to the employee's injury-related appointments. *Calderon v. Auto Owners Ins. Co.*, 2016 Tenn. LEXIS 813 at \*9-10 (Tenn. Workers Comp. Panel Oct. 24, 2016).

**43. Is there a medical fee guide or schedule, or other provisions for cost containment?**

Yes. Fee disputes are subject to review by a medical payment committee, appointed by the administrator. The medical payment committee will have authority to render a decision on the merits of a dispute. T.C.A. § 50-6-125.

Pursuant to T.C.A. § 50-6-204, the comprehensive medical fee schedule includes three "chapters." The first chapter, Tenn. Comp. R. & Regs. 0800-2-17, contains Rules for Medical Payments. Tenn. Comp. R. & Regs. 0800-2-18 contains the Medical Fee Schedule Rules. Tenn. Comp. R. & Regs. 0800-2-19 contains the In-patient Hospital Fee Schedule.

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### 44. What, if any provisions or requirements are there for “managed care”?

Employers are authorized, but not required, to use health maintenance organizations (HMO) and preferred provider organizations (PPO). T.C.A. § 50-6-122(a)(2). An employer or insurer may provide for a system of case management for cases involving compensable injuries. T.C.A. § 50-6-123 & Tenn. Comp. R. & Regs. 0800-2-7-.02 & .03. If an employee suffers a catastrophic injury, an employer or insurer should provide case management services and there must be a face-to-face meeting between case manager and employee within fourteen (14) calendar days after the assignment, and as necessary thereafter. If the employee experiences a significant decline in medical condition, there must be a face-to-face meeting within fourteen (14) days of notification of that change. For a non-catastrophic injury, there must be one face-to-face meeting if and when a case manager is assigned to the claim, within 14 days of the assignment. Tenn. Comp. R. & Regs. 0800-2-7-.03.

## PRACTICE/PROCEDURE

### 45. What is the procedure for contesting all or part of a claim?

File a Form C-23 (Notice of Denial of Claim). “Decisions on compensability shall be made by the adjusting entity within fifteen (15) calendar days of the verbal or written notice of injury.” If after conducting a reasonable investigation the claim is denied, the adjuster must notify the Bureau within five (5) business days of reaching the decision by filing the required information via EDI and must provide the employee or their representative, the treating physician and the insured a non-EDI version of the Notice of Denial, simultaneously with notification to the Bureau. The notification must include the basis for denial. Tenn. Comp. R. & Regs. 0800-02-14-.04 (6).

Either party may file a Petition for Benefit Determination to resolve disputes for benefits. See Tenn. Comp. R. & Regs. 0800-02-21-.10 (1).

### 46. What is the method of claim adjudication?

#### A. Administrative level.

Either party may file a Petition for Benefit Determination to resolve disputes for benefits. See Tenn. Comp. R. & Regs. 0800-02-21-.10 (1).

After the PBD is filed, a mediator is assigned. The parties must exchange medical records relating to the injury and respond to the mediator’s requests for documents and information. The mediator then attempts to assist the parties in reaching a resolution. If any settlement is reached, a Judge must approve the settlement before it becomes final. If a non-settlement resolution is reached, the mediator issues a Dispute Resolution Notice. If no resolution is reached through mediation, then the mediator must prepare a “Dispute Certification Notice” (DCN) specifying the issues which remain in dispute. T.C.A. § 50-6-236 (d)(1).

#### B. Trial level.

Workers’ compensation disputes are handled by the Court of Workers’ Compensation Claims, which has “original and exclusive jurisdiction over all contested claims for workers’ compensation benefits.” T.C.A. § 50-6-237.



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A hearing request must be filed within sixty (60) days of issuance of the DCN. T.C.A. § 50-6-239(a). Hearings in the Court of Workers' Compensation Claims shall be conducted in accordance with the Tennessee Rules of Civil Procedure, the Tennessee Rules of Evidence, as well as any rules adopted by the administrator. T.C.A. § 50-6-239(c)(1). The workers' compensation judge need only address issues which are contained in the DCN. The judge may grant permission for other issues to be raised only upon finding that: (1) the parties did not have knowledge of the issue prior to the issuance of the DCN and the parties could not have known of the issue despite reasonable investigation; and (2) prohibiting presentation of the issue would result in substantial injustice to the petitioning party. T.C.A. § 50-6-239(b).

### **C. Appellate Level.**

The Workers' Compensation Appeals Board hears appeals of Orders issued by the Court of Workers' Compensation Claims. The Appeals Board is comprised of three judges who are appointed by the Governor.

#### **47. What are the requirements for stipulations or settlements?**

The parties may settle a claim at any time. Any settlement agreement must be approved by a workers' compensation judge before it is binding on either party. T.C.A. § 50-6-240(a).

#### **48. Are full and final settlements with closed medicals unavailable?**

The parties may compromise and settle the issue of future medical benefits at any time. However, the Tennessee Workers' Compensation Act prohibits closure of future medical benefits in the case of an employee who is permanently and totally disabled. T.C.A. § 50-6-240(d).

#### **49. Must stipulations and/or settlements be approved by the state administrative body?**

Any settlement agreement must be approved by a workers' compensation judge before it is binding on either party. T.C.A. § 50-6-240(a).

### **RISK FINANCE FOR WORKER'S COMPENSATION**

#### **50. What insurance is required; and what is available (e.g., private carriers, state fund, assigned risk pool, etc.)?**

"Every employer under and affected by [the Tennessee Workers' Compensation Act] shall insure and keep insured the employer's liability under this chapter in some person or persons, association, organization or corporation authorized to transact the business of workers' compensation insurance in [Tennessee]; or possess a valid certificate of authority from the commissioner of commerce and insurance by furnishing satisfactory proof of the employer's financial ability to pay all claims that may arise against the employer under this chapter and guarantee the payment of claims in the amount and manner and when due as provided for in this chapter." T.C.A. § 50-6-405(a).

#### **51. What are the provisions/requirements for self-insurance?**

##### **A. For individual entities.**

An individual employer who chooses to self-insure must pay a nonrefundable application

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fee of five hundred (\$500.00) or in an amount the commissioner shall promulgate by rule. The employer shall also file and maintain with the Department of Commerce and Insurance: (1) Security of not less than \$500,000; and (2) records, as required, to demonstrate the financial ability to pay all claims. T.C.A. § 50-6-405.

**B. For groups or “pools” of private entities.**

A group of ten or more employers in the same trade or professional association may self-insure as a pool, subject to specific requirements. T.C.A. § 50-6-405(c).

- 52. Are “illegal aliens” entitled to benefits of workers’ compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of “employee”?**

“Illegal aliens” are to be included for purposes of the Tennessee Workers’ Compensation Law *Silva v. Martin Lumber Co.*, 2003 Tenn. App. LEXIS 1047 (Tenn. 2003). “Employee” includes every person, whether lawfully or unlawfully employed, pursuant to T.C.A. § 50-6-102(10)(A).

However, Tenn. Code. Ann. § 50-6-207(3)(F) excludes employees who are not eligible or authorized to work in the United States under federal immigration laws from receiving “increased benefits” pursuant to § 50-6-207(3)(B).

- 53. Are terrorist acts or injuries covered or excluded under workers’ compensation law?**

While there is no Tennessee statute on point, a court would likely analyze the question by determining whether the injury “arises primarily out of and in the course and scope of” the employment pursuant to § 50-6-102(12). In making its determination, the court would likely determine whether the injury arose from a risk peculiar to the employment. The location, timing and circumstances of the terrorist attack would be relevant factors for consideration.

- 54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare’s interests pursuant to the Medicare Secondary Payer Act?**

Settlement agreements should contain the Court’s preferred language and disclaimers relating to the potential impact of the settlement on Medicare. The Court requires CMS approval for closed-medicals settlements involving employees who meet the CMS review thresholds. <https://wccourt.com/2022/10/04/update-settling-cases-with-msas/>

- 55. How are subrogation liens of Medicaid and health insurers treated under workers’ compensation law?**

Settlement agreements should contain the Court’s preferred language and disclaimers relating to the potential impact of the settlement on Medicaid and personal health insurance.

The Tennessee Workers’ Compensation Act does not contain specific guidance on Medicaid and/or health insurer liens. However, for a compensable claim, the Employer and/or Carrier should pay for authorized, causally-related, reasonable and necessary medical treatment.

- 56. What are the requirements for confidentiality and privacy of medical records under workers’ compensation law, and how are they affected by state and federal law (HIPAA)?**

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Employers, carriers, and case managers may communicate with the employee's authorized treating physician, orally or in writing, and each medical provider shall be required to release the records of any employee treated for a work-related injury to both the employer and the employee within 30 days after admission or treatment. There shall be no implied covenant of confidentiality with respect to these records, which will include all written memoranda or visual or recorded materials, emails and any written materials provided to the employee's authorized treating physician, by case managers, employers, insurance companies, or their attorneys or received from the employee's authorized treating physician. T.C.A. § 50-6-204(a)(2)(A).

HIPAA regulations specifically consider disclosure of protected health information arising from a workers' compensation injury. In particular, 45 CFR § 164.512(l) provides:

Standard: Disclosures for workers' compensation. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

**57. What are the provisions for "Independent Contractors"?**

Independent contractors are excluded from coverage. To determine whether an individual is an "employee" or an "independent contractor," one should consider several factors under T.C.A. §50-6-102(10)(D)(i): (1) the right to control conduct of the work; (2) the right of termination; (3) the method of payment; (4) the freedom to select and hire helpers; (5) the furnishing of tools and equipment; (6) self-scheduling of working hours; and (7) the freedom to offer services to other entities.

**58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?**

No. However, there are specific rules relating to contribution in cases of two or more employers. T.C.A. § 50-6-211.

**59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?**

The workers' compensation laws do not apply to common carriers engaged in interstate commerce. T.C.A. § 50-6-106(1)(A).

An owner-operator of a motor vehicle under contract to a common carrier may elect to be covered under any policy of workers' compensation insurance. T.C.A. § 50-6-106(1)(B).

**60. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?**

No. Settlement agreements should contain the Court's preferred language and disclaimers relating to the potential impact of the settlement on Medicare. The Court requires CMS approval for closed-medicals settlements involving employees who meet the CMS review thresholds.

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