

# TelcomWATCH

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## **Tennessee Legislature Passes Major Workers' Compensation Reform Bill**

After several years of gathering steam, the TN Workers' Compensation (WC) reform movement has culminated in arguably the most significant change in the law since the statute was enacted in 1919. The driving force behind this reform movement was the sentiment among many that rising WC costs in TN was driving away business. The reform bill easily passed both the state Senate and House, and it has been transmitted to the Governor for signature. Once signed by the governor, the new law will go into effect **July 1, 2014**.

The reform bill drastically changes several aspects of the TN WC law. Perhaps the most visible change is that an administrative system will be adopted. Under current law, TN claims are handled by a hybrid system where part of the claim is administered by the TN Department of Labor and another part of the claim is handled by the trial court. Under the new system, the trial courts will no longer have a role. All issues of temporary and permanent WC benefits will be decided by the new Courts of Workers' Compensation Claims, whose judges will be appointed by the Administrator of the Division of Workers' Compensation. The TN Supreme Court will remain as the ultimate level of appeal.

Another significant change in the law involves statutory construction. The current law provides that the TN WC statute is remedial in nature and is to be constructed equitably. In effect, this means that close issues are typically decided in favor of the injured worker. However, under the reform bill the remedial construction has been eliminated. The new WC statute states that it shall not be remedially or liberally construed, but shall instead be applied impartially favoring neither the employee nor employer.

The calculation of permanent indemnity benefits has also significantly changed under the new law. Currently, Permanent

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Partial Disability (PPD) benefits are based on either scheduled injuries (whose maximum value is determined by statute) or whole person injuries (whose maximum value is 400 weeks). The amount of those benefits is generally determined by a multiplier system. If there is a meaningful Return-To-Work program, then PPD benefits are capped at 1.5 times the impairment rating. If there is no meaningful return-to-work, then PPD benefits are capped at up to 6 times the impairment rating. Under the new law, the determination of PPD benefits will be completely different. For instance, all injuries will be examined as whole person injuries, and the maximum value will be increased to 450 weeks. PPD will be calculated based solely on the impairment rating, regardless of whether the employee has Returned-To-Work. However, the employee might be eligible for additional benefits if certain conditions are subsequently present. For instance, the PPD award may be increased by a factor of 1.35 times if the employee has not Returned-To-Work with any employer or is earning less than the pre-injury wages. The award may be further increased by multiplying the award by the product of the following factors: 1.45 times if the employee lacks a high school diploma or GED; 1.2 times if the employee is more than 40 years of age; and 1.3 times if the employee lives in a TN county with at least 2% higher unemployment rate than the state average. Finally, additional benefits might also be available to the employee if at the time of the award or settlement, the employee can prove by clear and convincing evidence at least three of the following four factors: the employee lacks a high school diploma or GED, or cannot read and write at the 8th grade level; the employee is 55 years of age or older; the employee has no reasonably transferrable job skills; and the employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Since this system is brand new and untested, it is difficult to determine with any certainty how it will ultimately affect exposure for PPD. Undoubtedly, some of these various factors have an element of redundancy. In addition, it remains to be seen how these different factors might work together on a single claim. However, according to the sponsors of the Bill, the end result of these changes is intended to lower average indemnity awards for WC claims. That is probably accurate, though an interesting open question is how this will affect the Return-To-Work analysis. Under the current multiplier system, employers have a tremendous financial incentive to return injured workers back to work. However, it would seem that there would be significantly less incentive to do so under the new system.

The causation analysis will also be affected by the new law, which changes the definition of injury to include an injury by accident, a mental injury, occupational disease, or cumulative trauma condition arising primarily out of an in the course and scope of employment. Two years ago, the “primarily” standard was introduced for repetitive trauma conditions and the new law will now apply to all injuries.

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Another change in the law concerns panels of physicians. Under the current law, the employer is required to provide a panel of three physicians or surgeons, not associated in practice, located in the employee's community, from which the employee may select the treating physician. For back injuries, the panel must be expanded to four, including one chiropractor. If the treating physician refers the employee for specialist care, the employer must then provide a new panel of three specialists, not associated in practice, located in the employee's community. Under the new law, employers will still be required to provide an initial panel of three physicians, surgeons, chiropractors, or specialty practice groups, if available in the employee's community, from which the employee will select the treating physician. If three or more providers are not available in the employee's community, then the panel may include providers from a 100 mile radius of the employee's community. If the treating physician makes a referral to a specialist, the employer shall be deemed to have accepted the referral unless, within three business days, a new panel is provided to the employee. It is important to note that both under the current law and the new law, "community" remains undefined.

The issue of medical expenses is a huge issue in TN WC. According to recent testimony in the TN Workers' Compensation Advisory Council, medical costs account for approximately 67% of all costs associated with TN WC claims. This issue is also addressed in the Reform Act through the creation of a Medical Advisory Committee. This committee shall consult with the Administrator, who must adopt guidelines by January 1, 2016, for the diagnosis and treatment of commonly occurring WC injuries. Any treatment that follows the guidelines will be presumed reasonable and necessary, and this presumption may only be rebutted by clear and convincing evidence.

In summary, big changes are on the horizon in TN. Proponents of the bill claim that these reforms will result in fairer, faster, and more efficient resolution of TN WC claims. Opponents of the bill have questioned the ability of the TN Department of Labor to effectively administer such a system, the perceived drastic reduction of WC benefits, and possible chilling effect on the filing of new claims in the future. **Note that since the new law will not go into effect until July 1, 2014, the TN legislature will have another legislative session to further tinker with the bill if they choose.**

Telcom Insurance Group is trying to stay ahead and keep you all informed of WC provisions that may affect your company. More to come as it continues to develop.

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