

# Quick Guide

## TENNESSEE

### WORKERS' COMPENSATION ACT

July 2010

#### COMPENSATION RATE ISSUES

**Average Weekly Wage:** "AWW" is determined by calculating the Employee's average gross wages per week for the 52 week period prior to the alleged accident date. If the Employee worked less than 52 weeks, or missed more than 7 days (even if non-consecutively), then the total wages are divided by the actual number of weeks worked to arrive at the AWW.

Source: *Tenn.Code Ann.* § 50-6-102(a)(1)(A). The wage statement must be filed with TDOL within 30 days of Notice of Injury or the maximum rate may apply.

**Compensation Rate:** "CR" is sixty-six and two thirds percent (66.67%) of the average weekly wage. Source: *Tenn.Code Ann.* § 50-6-207(1).

#### Maximum and Minimum Compensation Rates:

Date/Accident	Max. PPD Rate	Max. TTD Rate	Min. Rate
7-1-94 - 6-30-95	\$382.79		\$66.15
7-1-95 - 6-30-96	\$415.87		\$68.40
7-1-96 - 6-30-97	\$453.14		\$71.10
7-1-97 - 6-30-98	\$492.00		\$73.80
7-1-98 - 6-30-99	\$515.00		\$77.25
7-1-99 - 6-30-00	\$541.00		\$81.15
7-1-00 - 6-30-01	\$562.00		\$84.30
7-1-01 - 6-30-02	\$581.00		\$87.15
7-1-02 - 6-30-03	\$599.00		\$89.85
7-1-03 - 6-30-04	\$618.00		\$92.70
7-1-04 - 6-30-05	\$638.00	\$670.00	\$95.70
7-1-05 - 6-30-06	\$663.00	\$729.00	\$99.45
7-1-06 - 6-30-07	\$682.00	\$750.00	\$102.30
7-1-07 - 6-30-08	\$713.00	\$784.00	\$106.95
7-1-08 - 6-30-09	\$752.00	\$827.00	\$112.80
7-1-09 - 6-30-10	\$761.00	\$837.00	\$114.15
7-1-10 - 6-30-11	\$765.00	\$841.50	\$114.75

Source: *Tenn.Code Ann.* § 50-6-102(a)(7)(A).

#### TENNESSEE'S STATUTORY CAPS

For injuries occurring 7-1-04 or later, the total value of which could be 200 weeks or greater, the maximum award for employee who returns to work for the pre-injury employer at an equal or greater rate of pay is 1.5 times the permanent medical impairment rating. (In cases where the rating is in dispute, the rating must be resolved by agreement or be determined by the trier of fact.) As of 7-1-09, injured employees who are undocumented aliens are subject to the 1.5 cap. If there is proof that the employer "knowingly hired" the undocumented alien, the employer may be required to pay up to an additional 3.5 times the rating to the uninsured employer's fund.

Source: *Tenn.Code Ann.* sec. 50-6-241(e)(2).

"In appropriate cases," the award as described above may be subject to reconsideration if the Employee loses his job within a specified time after returning to work, as long as a request for Benefit Review Conference is filed in a timely manner. The Employee's voluntary resignation, retirement, or misconduct may preclude reconsideration.

If the Employee does not return to work for the pre-injury Employer at an equal or higher wage rate, or if the Employee files an appropriate petition for reconsideration, for injuries subject to a maximum of 200 weeks or more, then the award is limited to a maximum of 6 times the permanent medical impairment rating as determined by the Court, minus any PPD already paid. If the Court uses a multiplier of five or more, it must make specific findings of fact. Source: *Tenn.Code Ann.* § 50-6-241.

**"Breaking the Cap":** If the Employee establishes by clear and convincing evidence three of four criteria, the Court can award more than six times the rating. The award is limited to 400 weeks prior to 7-1-04 and up to the max. weeks in the schedule for injuries after 7-1-04:

1. Employee lacks high school diploma or equivalency, or cannot read and write at 8th grade level
2. Employee is age 55 or older
3. Employee has no reasonably transferable job skills
4. Employee has no reasonable employment opportunities locally.

Source: *Tenn.Code Ann.* § 50-6-242.

#### SCHEDULE OF COMPENSATION

**Temporary Total Disability Benefits:** "TTD" benefits are due for lost time following the seventh day after the injury. If less than 14 days has passed before employee's return to work, TTD is paid only from the eighth day forward. If 14 or more days has passed, TTD benefits must be paid from the first date of disability.

Source: *Tenn.Code Ann.* § 50-6-205(a).

Once Employee reaches MMI and PMI rating is given, weekly benefits (if voluntarily paid) must continue for up to 60 days or the value of the PMI rating, whichever is less. This amount is credited to the PPD award. Source: *Tenn.Code Ann.* § 50-6-234(d).

**Temporary Partial Disability Benefits:** If the Employee returns to work in a partially disabled condition and earns less than prior to the injury, the Employee is entitled to 66.67% of the difference between the Employee's pre-injury AWW and post-injury wages. Such benefits shall not exceed 400 weeks.

Source: *Tenn.Code Ann.* § 50-6-207(2).

**Permanent Partial Disability:** If the Employee is adjudged to have permanent partial disability, he or she is entitled to benefits for the percentage of permanent partial disability based on the following schedule:

MEMBER	UP TO		
Thumb	60 weeks	*Loss of first phlange of thumb, any finger or any toe is equal to 1/2	
1st (Index) finger	35 weeks	loss of such thumb, finger or toe;	
2nd (Middle) finger	30 weeks	loss of more than one phlange is	
3rd (Ring) finger	20 weeks	equal to loss of entire digit	
4th (Little) finger	15 weeks		
Great toe	30 weeks		
Any other toe	10 weeks	Eye and Leg	350 weeks
Hand	150 weeks	Eye and Arm	350 weeks
Arm	200 weeks	Eye and Foot	300 weeks
Foot	125 weeks	Two Arms	400 weeks
Leg	200 weeks	Two Hands	400 weeks
Eye	100 weeks	Two Legs	400 weeks
Hearing (both ears)	150 weeks	Two Feet	400 weeks
Arm and Other Hand	400 weeks	Leg and Hand	400 weeks
Hand and Foot	400 weeks	Arm and Leg	400 weeks
Arm and Foot	400 weeks		

\* Disfigurement to head, face or hands not otherwise provided for inschedule which alters appearance so as to affect employability in pre-injury job or other job for which Employee is qualified: not to exceed 200 weeks

\* Loss of mental faculties is no longer a "scheduled member," but is now considered an injury to the "body as a whole", including permanent injuries to shoulders and hips. However, a mental response due to loss of employment or employment opportunity is not compensable. Source: *Tenn.Code Ann.* § 50-6-102. As of 7-1-09, TTD in a mental injury case is limited to 2 years

\*All other cases are considered "body as a whole."

**Permanent Total Disability:** Employees who are adjudged permanently and totally disabled (unable to engage in any work activity which generates an income) are entitled to weekly benefits at the Employee's compensation rate until the Employee is, by age, eligible for full benefits in the OAB program of Social Security. Such benefits are not subject to the Maximum Total Benefit.

Source: *Tenn.Code Ann.* § 50-6-207.

**Maximum Medical Improvement (MMI):** As of 7-1-10, employees who have been referred for pain management treatment shall be presumed to have reached maximum medical improvement ("MMI") as of: (1) the date the treating physician places the employee at MMI, or (2) 104 weeks after the commencement of pain management treatment, whichever occurs first. Source: *Tenn.Code Ann.* sec. 50-6-207(1)(E).

**Reminder:** Have you considered the possible need for a Medicare Set-Aside Agreement? If the Employee is a Medicare Recipient or is reasonably expected to become a Medicare Recipient within 30 months, please contact your attorney if you seek to close future medical benefits in the settlement.

**Wage Statement:** Have you provided a 52-week wage statement to your defense counsel? This information must be provided to the Tenn. Department of Labor and/or the Court in a timely manner.

**Current Mileage Reimbursement Rate:** Mileage is reimbursed to injured workers for medical appointment trips greater than 15 miles one way from work or home. For current mileage rate, please check [http://www.state.tn.us/labor-wfd/pulic\\_info.htm](http://www.state.tn.us/labor-wfd/pulic_info.htm) and click on "mileage rates".



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\* This is intended for general informational purposes only and is not meant to replace legal counsel. We urge you to consult an attorney for any issue regarding applicability or interpretation of any provision contained herein. This is not intended to be a complete summary of the law.

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**SETTLEMENTS:** For injuries occurring after 7-1-04, settlement agreements cannot provide for closure of future medical benefits for any scheduled (or body) injuries involving a maximum possible value of 200 weeks or greater until three years after the settlement approval, at which time a new Agreement or Petition must be filed seeking approval to close future medical benefits. If injury maximum is less than 200 weeks, future medicals can be negotiated and closed. Future medical benefits cannot be closed in cases of permanent total disability. Settlements in "doubtful and disputed" cases cannot exceed the value of 50 times the minimum compensation rate as of the date of the injury and such agreements cannot attribute any amount toward future medical benefits. Such settlements must be deemed to be "in the best interests of the employee." An Employee cannot waive his right to reconsideration under section 50-6-241 in a settlement agreement.

Source: Tenn. Code Ann. § 50-6-206(a) & (b), § 50-6-241.

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**EXTRATERRITORIAL APPLICATION:** If an Employee is injured outside the State of Tennessee in an accident which would be considered compensable under Tennessee law, he or she may nevertheless be entitled to Tennessee workers' compensation benefits if: (1) The employment was principally localized within the State; or (2) The contract of hire was made in Tenn, or (3) there is a "substantial connection" between TN and the employment. Source: Tenn. Code Ann. § 50-6-115. **HOWEVER,** an Employee may make a knowing and willful election to receive workers' compensation benefits under the laws of another State, thus precluding Tennessee benefits. (Merely accepting payments of temporary or medical benefits under another State's laws is generally not enough to establish a knowing and willful election). If employee also lives outside the state of Tennessee, after BRC failure, complaint can be filed in any county where employer maintains an office.

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**INJURIES NOT COVERED:** No compensation is allowed for injury or death due to the Employee's willful misconduct, intentional self-inflicted injury, or due to intoxication or illegal drugs, or willful failure to use a safety appliance or perform a duty required by law. The Employer has the burden of proof on these issues, including the proximate cause of intoxication or drug use. **HOWEVER,** If the Employer has a "drug free workplace" pursuant to Tennessee law and there is a positive screening, the Employer may be entitled to a statutory presumption that the drug or alcohol use was the proximate cause of the injury, thereby providing a defense to the Employee's claim for workers' compensation benefits. See Tenn. Code Ann. § 50-6-110(c)(1) for details; see also Tenn. Code Ann. § 50-9-101 et seq. As of 6-11-09, benefits are not owed for injuries that occur during recreational activities that are not required by the employer and do not directly benefit the employer.

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**SUBROGATION CLAIMS:** If the Employee is injured under circumstances creating legal liability on the part of a third party (other than the Employer), then the Employee may have a claim against that third party and the Employer "shall" have a subrogation lien for WC benefits paid to date and a subrogation credit to be applied against future liability, up to the Employee's net recovery. However, when indemnity is concluded by lump sum, there is no future credit or setoff of net recovery against future medical benefits. (See *Graves v. Cocke County, TN and Cocke Co. Schools*). If the Employee fails to file suit against the other party within one year after the date of the injury, this acts as an assignment of the claim to the Employer, which then has an additional six months to file suit against the other party. The "made whole doctrine" is not applicable to workers' compensation subrogation. Source: Tenn. Code Ann. § 50-6-112.

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**STATUTE OF LIMITATIONS:** For injuries on or after 1-1-05: An injured Employee whose claim remains unresolved must file a Request for Assistance ("RFA") or a Request for Benefit Review Conference ("BRC") with the Tenn. Department of Labor within one year of the date of injury, if no benefits have been paid. If the Employer has paid benefits voluntarily or as a result of an Order to do so, then the request for BRC must be filed within one year of the latter of the date of last authorized treatment or the time the employer ceased making payments (date of issuance, not date of receipt). If the BRC is not successful, then either party has 90 days after the BRC impasse report is filed within which to file suit in Circuit or Chancery Court in county with proper venue. Source: Tenn. Code Ann. § 50-6-203. Section 50-6-238 has been amended to provide that the filing of a Request for Assistance ("RFA") for injuries occurring on or after 7-1-08 will toll the time period within which a Request for BRC must be filed until 60 days after the RFA has been resolved through a Benefit Review Report issued by the TDOL.

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**TENNESSEE DEPT. OF LABOR:** Workers' Compensation Specialists working for the Tennessee Dept. of Labor have three primary roles:

- (1) A **Request for Assistance** (also called "RFA"), filed by either party, authorizes them to conduct discovery, determine disputed issues concerning the payment of temporary disability benefits and the provision of medical care; and issue Orders either denying the RFA or compelling the payment of temporary and/or medical benefits.
  - (2) A **Request for Benefit Review Conference** authorizes them to schedule and conduct a mediation (mandatory in most cases and a prerequisite to the filing of a lawsuit);
  - (3) A **Request for Settlement** authorizes them to review and approve proposed settlements (only certain Specialists have this authority). In the Request for Assistance phase, the specialist must share all documentation and/or other information with all parties, if requested. Source: Tenn. Code Ann. section 50-6-236, 238.
- As of 4-30-10, TDOL Specialists are authorized to act upon a post-Judgment or post-settlement RFA addressing the provision of continued medical benefits and may order such benefits, as well as attorneys' fees and costs to the employee's attorney, if appropriate. Source: Tenn. Code Ann. sec. 50-6-204(g)(2)(A).

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**OCCUPATIONAL DISEASE:** Six criteria for establishing a work-related occupational disease: (1) it must have followed as a natural incident of the work exposure; (2) it can be fairly traced to the employment as a proximate cause; (3) it is not from a hazard to which employees are equally exposed outside of employment; (4) it is incidental to character of employment and not independent of relation of employer and employee; (5) it originated from a risk connected to employment and flowed as a natural consequence therefrom; and (6) there is a direct causal connection between the conditions under which the work is performed and the disease. Diseases of the heart, lung and hypertension arising out of and in the course of employment are considered occupational diseases. Source: Tenn. Code Ann. § 50-6-301.

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**PENALTIES:** Any Employer or carrier which fails to pay benefits as provided in the Act shall pay a penalty of six percent (6%) on any unpaid installments. For injuries after 7-1-04, this penalty increases to 25% of unpaid TTD if TTD not paid within 20 days after employer has knowledge of qualifying disability.

Source: Tenn. Code Ann. § 50-6-205(b)(3).

For injuries prior to 7-1-04, if an Employer wrongfully fails to pay an Employee's claim for TTD benefits, the Employer shall be liable, in the discretion of the Court, to an additional sum not to exceed twenty-five percent (25%) of such TTD claim. However, the Employee must establish that the failure to pay was not in good faith and inflicted additional expense, loss or injury upon the Employee. Source: Tenn. Code Ann. § 50-6-225(k).

An Employer who, within 60 days of settlement, judgment or decree, fails to reimburse compensable medical expenses, or fails in bad faith to provide reasonable and necessary medical benefits, after reasonable notice of such obligation to provide treatment, may be liable for (1) the amount due for medical expenses; and (2) an additional 25% of medical expenses. This provision applies only if the refusal was not in good faith and it inflicted additional expense, loss or injury on employee.

Source: Tenn. Code Ann. § 50-6-225 (Effective 7-1-00). An Employer who knowingly, willfully and intentionally fails to provide reasonable and necessary medical treatment (or reimbursement) when the Employer knew the claim was compensable is subject to a \$500.00 civil penalty. Source: Tenn. Code Ann. § 50-6-128 (Effective 7-1-00). If an Employer/Insurer fails to comply with an Order of a Workers' Compensation Specialist within 15 days, the Commissioner shall assess a \$10,000.00 penalty. If proof of compliance is not provided within five days of penalty assessment, additional penalties of \$1,000 per day shall accrue beginning on the 21st day.

Source: Tenn. Code Ann. § 50-6-238(d) (Effective 5-10-01).

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**MEDICAL BENEFITS:** In general, the Employer is required to provide an appropriate panel of three physicians not associated together in practice (or an orthopedic/neurosurgical panel of five with up to four associated together in practice) for selection of the attending physician by the Employee. In back injury cases, the panel must also include a chiropractor (limited to 12 sessions). A Choice of Physician Form (C-42) must be presented to the Employee on the prescribed form. As of 7-1-08, a panel must be given for each attending physician and/or operating surgeon. The Employer has the right to have the Employee examined by a physician of its choice (at all reasonable times). If the extent of impairment is disputed, either party may request a Medical Impairment Registry (MIR) from the TDOL. From this list of three, the Employer may strike one selection and the Employee must choose from the two remaining physicians. The opinion of this physician is presumptively correct on the issue of impairment. Nurse case management is optional in all cases and, if utilized, the Employee must cooperate. In addition, the 6th edition of the AMA Guidelines must be used for injuries after 1-1-08 and this edition will remain in effect until a new edition is designated by the general assembly. Source: Tenn. Code Ann. sec. 50-6-204.

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**SECOND INJURY FUND:** As of 7-1-06, only part (a) of the Second Injury Fund statute remains viable. An Employee must (1) have a preexisting disability of which the employer was aware, and (2) must now be permanently and totally disabled, in order for the SIF to have any liability.

### DEFENSE CHECKLIST

We recommend that you keep in mind the following defenses when evaluating a claim:

Notice (w/in 30 days unless reasonably excused)	§50-6-201
Statute of Limitations	§50-6-203, § 50-6-306
Misrepresentation on Employment Application	
Casual v. Regular Employee	§ 50-6-106(2)
Independent Contractor	§ 50-6-102(10)
Did not "arise out of" Employment	§ 50-6-102(12)
Was not "in course of" Employment	§ 50-6-102(12)
Willful misconduct, failure to use safety equip.	§ 50-6-110
Illegal drug/ alcohol use	§ 50-6-110
Medical Causation issues	§50-6-102(12)
"Last Injurious Injury/ Exposure" rule	
Second Injury Fund	§50-6-208

[section (b)(1) no longer applies for date of accident 7/1/06 and after.]

### TENNESSEE FORMS

(Most commonly needed)

<b>C-20:</b> First Report of Work Injury	<b>C-30A:</b> Final Medical Report
<b>C-22:</b> Notice of First Payment of Compensation	<b>C-31:</b> Medical Waiver & Consent
<b>C-23:</b> Notice of Denial of Claim	<b>C-32:</b> Physician's Standard Form Medical Report
<b>C-26:</b> Notice of Change or Termination of Benefits	<b>C-35:</b> Utilization Review Notification
<b>C-27:</b> Notice of Controversy	<b>C-40A:</b> Request for Assistance
<b>C-28:</b> Notice of Lawsuit	<b>C-40B:</b> Request for Benefit Review Conference
<b>C-29:</b> Final Report of Payment & Receipt	<b>C-41:</b> 52-week Wage Statement
<b>C-30:</b> Attending Physician's Report	<b>C-42:</b> Choice of Physician
	<b>SD-1:</b> Statistical Data Form