



**An Ounce of Prevention:  
Strategies for Avoiding Headaches and Penalties After a Work Injury is Reported**

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# *An Ounce of Prevention: Strategies for avoiding headaches and penalties after a work injury is reported*



"An ounce of prevention  
is worth a pound of cure."  
Benjamin Franklin



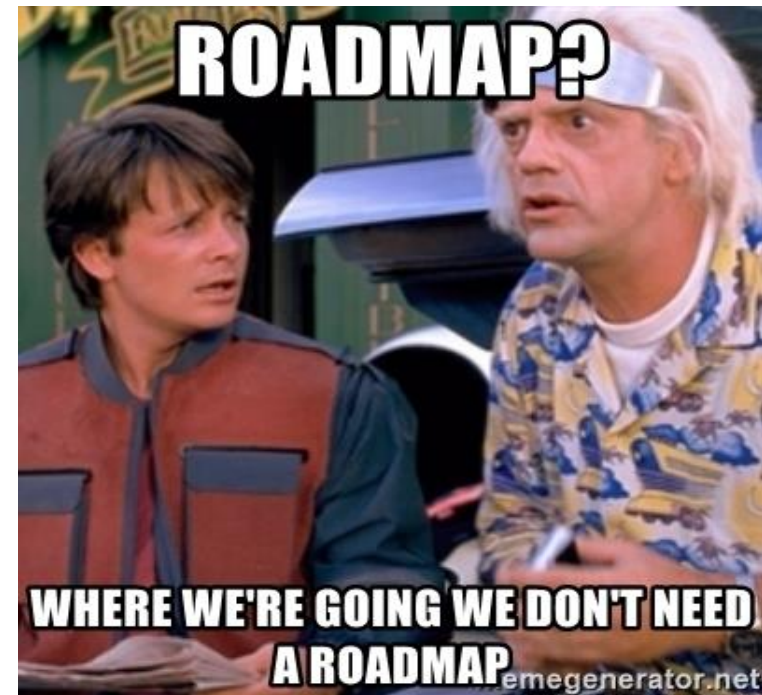
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# Our Road Map

- The Employee's obligation to provide notice
- The Employer's obligations upon receipt of notice
- Strategies for gathering information regarding the alleged injury
- Maintaining communication
- Avoiding penalties
- Case law/practical examples





- Keep in mind that every case is unique.
- What works best in one situation may not translate as well to another.
- Be mindful of and sensitive to the specific Employee/Employer relationship:
  - Small business or large operation?
  - Long-term or short-term employee?
  - Does the Employee have a positive or negative relationship with management?
  - Is the Employee a valued team-member or a struggling performer?



- Recurring Themes:

- Communication

- Documentation

- Direction (having and sticking to a plan)



## Employee's obligation to provide notice

Tennessee Code Annotated § 50-6-201(a)(1):

**(a) (1)** Every injured employee or the injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation that may have accrued under this chapter, from the date of the accident to the giving of notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under this chapter, unless the written notice is given to the employer within fifteen (15) days after the occurrence of the accident, unless reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.



## Important Points:

- The Employee “shall” give notice immediately after the injury or as soon as reasonable and practical
- Notice must be in writing
- Written notice must be given to the Employer within 15 days – unless the Court finds the Employee had a reasonable excuse for not doing it
- The Employee is not entitled to “physician’s fees or any compensation that may have accrued” from the date of the accident to the giving of notice
- If the Employee does not provide written notice within 15 days, the Employee’s only alternative is to:
  - (1) establish that the Employer had “actual notice” of the occurrence of an injury,
  - (2) show waiver of notice by the employer, or
  - (3) prove reasonable excuse by the employee for not giving notice
- The Employee has the burden of proving the required notice was given or excused.



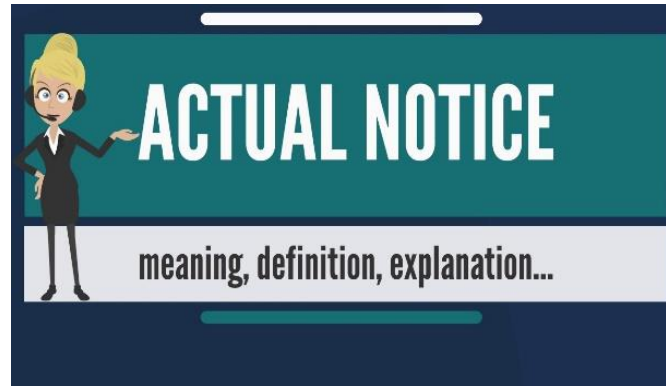


“In the absence of **actual knowledge** of the injury by the employer, **waiver** of notice by the employer, or **reasonable excuse** by the employee for giving notice, the statutory notice to the employer is an absolute prerequisite to the right of the employee to recover benefits.”

*Shores v. State of Tennessee*, 2019 LEXIS 24, \*10 (Special Workers’ Comp. Appeals Panel Feb. 12, 2019 (quoting *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998)).







## When does an Employer have “actual notice” for purposes of T.C.A. § 50-6-201(a)(1)?

TN Courts say:

“an employee who relies upon alleged actual knowledge of the employer must prove that the employer had actual knowledge of the **time, place, nature and cause of the injury**.... In order for a communication to constitute either written notice or actual knowledge on the part of the employer, it must be calculated to reasonably convey the idea to the employer that **the employee claims to have suffered an injury** arising out of and in the course of her employment.”

*Masters v. Industrial Garment Mfg. Co.*, 555 S.W.2d 811. 815-816 (Tenn. 1980)



**“notice to the agent or representative of the employer** is a sufficient notice to the employer, provided the agent or representative to whom notice is given **has actual or apparent authority to receive notice** on behalf of the employer.”

*Kirk v. Magnovox Consumer Electronics Co.*, 665 S.W.2d 711 (Tenn. 1984)



*See* T.C.A. § 50-6-201(a)(4): The notice shall be given personally to the employer or the employer's agent or agents having charge of the business at which the injury was sustained by the Employee.

Oral Notice to the employee's supervisor **may constitute** actual notice for purposes of T.C.A. § 50-6-201.

*Aluminum Co. of America v. Baker.* 542 S.W.2d 819, 822 (Tenn. 1975)



**“Unless it is obvious that a work related injury occurred, it is insufficient to charge the employer with knowledge that the employee sustained a work related injury.”**

*McKinney v. Berkline Corp.*, 503 S.W.2d 912, 915 (Tenn. 1974)



## Case Example:

- Employee worked as bricklayer for Employer for 32 years
- Fall of 2012, began experiencing weakness in arms, legs and balance problems
- Employee's supervisor noticed Employee appeared to have problems with coordination and balance, leading to the Employer to modify the Employee's job assignments
- On November 1, 2012, the Employee met with supervisor and HR manager. Given information about FMLA and short-term disability. At that time, neither the Employee nor anyone associated with the Employer knew the cause of the Employee's problems



- Employee seeks treatment on his own – diagnosed with herniated cervical disc requiring immediate surgery, which was performed on November 15, 2012
- June 6, 2013 Employee’s attorney sends letter to Employer claiming that Employee had sustained a work injury
- Employee’s treating surgeon could not relate the injury to the Employee’s work
- In March 2014, an IME physician found the Employee had sustained a repetitive stress injury as a result of his work activities and assigned a medical impairment of 21% BAW



- Trial court held that Employee did not give timely notice of the injury and dismissed the claim

(Court also gave alternative holding that if timely notice had been given, Employee had met burden of providing causation and was permanently and totally disabled)

- Appeals Panel upheld dismissal: “We agree with the trial court’s finding that Employer ‘did not have actual notice that [Employee] had incurred a work related injury, even though they knew [he] was experiencing medical issues.’”

*Pevahouse v. Ameristeel*, 2017 Tenn. LEXIS 749 (Tenn. Special Workers’ Comp. Panel, Dec. 12, 2017)





### **When does the Employer “waive” notice?**

- Very little case law directly on point, but cannot raise notice for first time on appeal
- If valid, the Employer should identify notice as a defense in the Dispute Certification Notice





## When is the employee reasonably excused from providing notice?



- Employee may seek to postpone the obligation to provide notice because he was unaware his illness was work related until he was told by a physician (i.e. the “discovery rule”)
- Employers would argue that the “discovery rule” is a dated legal fiction used by trial courts to award benefits under the liberal construction applied to injuries before July 1, 2014
- Most often an issue in repetitive stress or cumulative trauma cases, not acute injuries.



## What must the Employee's written notice contain?



Tennessee Code Annotated § 50-6-201(a)(2):

**(2)** The notice of the occurrence of an accident by the employee required to be given to the employer shall state in plain and simple language the name and address of the employee and the time, place, nature, and cause of the accident resulting in injury or death. The notice shall be signed by the claimant or by some person authorized to sign on the claimant's behalf, or by any one (1) or more of the claimant's dependents if the accident resulted in death to the employee.



*Important Points:*

- Must include the name and address of the Employee
- Shall state in “plain and simple language” the time, place, nature and cause of the accident resulting in injury
- Must be signed by the Employee or an authorized signor



# Defects in notice only matter to the extent the Employer is prejudiced



Tennessee Code Annotated § 50-6-201(a)(3):

**(3)** No defect or inaccuracy in the notice shall be a bar to compensation, unless the employer can show, to the satisfaction of the workers' compensation judge before which the matter is pending, that the employer was prejudiced by the failure to give the proper notice, and then only to the extent of the prejudice.



# Special Notice Requirements for Cumulative Trauma Cases



Tennessee Code Annotated § 50-6-201(b)

**(b)** In those cases **where the injuries occur as the result of gradual or cumulative events** or trauma, then the injured employee or the injured employee's representative shall provide notice of the injury to the employer within fifteen (15) days after the employee:

**(1)** Knows or **reasonably should know** that the employee has suffered a work-related **injury that has resulted in permanent physical impairment**; or

**(2)** Is rendered **unable to continue to perform the employee's normal work activities** as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.



*Important Points:*

- This section only applies to gradual/cumulative “events or trauma.” Not acute injuries.
- Employee’s 15 day window for providing notice is extended until the Employee knows or reasonably should know she has suffered an injury that has resulted in permanent impairment, or
- Employee knows or reasonably should know she is unable to perform normal work activities as a result of a work-related injury
- An Employee typically will not “know” for purposes of the discovery rule that she has a permanent physical impairment or is unable to perform her work activities because of a work-related injury until notified by a medical expert.



# Notice and Causation



- It is rare for an Employee to suffer an acute traumatic injury and not report it for 15 days
- A good notice defense typically goes hand in hand with a good medical causation defense
- Often an Employee may miss work for an unknown cause or the Employer is aware the Employee has issues, but there is no indication the issues are work-related



- In all but the most obvious cases, the Employee will be required to have a medical expert opine that the employment contributed more than 50% in causing the Employee's injury, considering all causes
- It often benefits the Employer to seek clarification whether the Employee believes the problems are work-related, as it could prevent many problems from arising later due should the case proceed to litigation





# Employer's Obligations Upon Receipt of Notice



- The “Claims Handling Standards” in the Workers’ Compensation regulations require the Employer/Carrier to be responsive and proactive when notice of an injury is received
- Information and documentation obtained from the Employee at this early stage is typically vital in evaluating compensability and causation issues
- Information and documentation obtained from the Employee at this early stage can also limit the facts surrounding the injury and the extent of the Employee’s injury from evolving over time



# Obligations of Employer from the Claims Handling Standards



The Rules of the Tennessee Department of Labor and  
Workforce Development  
Bureau of Workers' Compensation  
Chapter 0800-02-01  
“General Rules of the Workers’ Compensation Program”



Important Points:

- An Employer “**must accept any notice** of a claim for workers’ compensation benefits from any employee or employee’s representative alleging and injury?”
- Employer’s shall report all known or reported accidents or injuries to their adjusting entity **within one (1) business day** of knowledge of injury



- Employers are prohibited from paying any benefits due to a work-related injury in any manner that unlawfully shifts responsibility away from the adjusting entity or conceals the occurrence of the injury or extent of payment of benefits
- Following receipt of notice of a workplace injury “**and the employee expressing a need for medical care,**” the employer shall provide a panel of physicians as required by T.C.A. § 50-6-204 as soon as practicable but **no later than three (3) business days**



The Rules of the Tennessee Department of Labor  
and Workforce Development  
Bureau of Workers' Compensation  
Chapter 0800-02-14  
“Claims Handling Standards”



*Important Points:*

- Every adjusting entity shall submit a First Report of Work Injury Form to the Bureau ASAP
  - 7 calendar days of disability or less, submit before 15<sup>th</sup> day of month following injury
  - More than 7 days of disability, submit no later than 14 days after notice from Employer



- **Within 2 business days** of receiving verbal/written notice from the Employer, the adjusting entity must:

- send a Notice of Reported Injury and a copy of the Beginner's Guide to TN Workers' Compensation to the Employee's last known address via first class US Mail

- Make verbal or written contact with the Employee to provide the adjuster's contact information and investigate the facts of the claim

- Make personal, written or telephone contact with the Employer to verify details regarding the claim



- A new adjuster assigned to the case must notify the Employee **within 2 business days** and provide the new adjuster's contact information
- In claims when compensability is questioned, the adjuster must contact all authorized providers **within 3 business days** of an initial office visit to investigate details and make a preliminary compensability determination





- Decisions on compensability shall be made by the adjuster **within 15 calendar days** of the verbal/written notice of injury

-The adjuster must file a Form C-23 Notice of Denial with the BWC **within 5 days** of reaching the decision on compensability



- An Employer electing to controvert liability and terminate the payment of benefits after temporary or medical benefits have been paid must file a Form C-27 Notice of Controversy **within 15 calendar days** of the due date of the first omitted payment
- Adjusting entities must file the Form C-22 First Report of Payment of Compensation with the BWC **within 5 business days** of the initial payment of benefits
- Must file the Form C-26 Notice of Change or Termination of Compensation Benefits **within 5 business days** of a change or termination of the payment of benefits



# Employer's Should Have A Plan & Not Stick Their Head in the Sand



- The worst thing an Employer can do when an injury is reported, is to do nothing at all
- Many problematic and disputed cases arise when the Employee claims the Employer was nonresponsive or indifferent to a reported injury



# What Injuries Must be Reported to the BWC?



*The BWC regulations tell us:*

Minor injuries such as scratches, scrapes, paper cuts and/or injuries treated solely by minor first aid are not required to be reported to the Bureau. More serious injuries such as sprains, strains or bruising must be reported.

0800-02-14-.04(4)(c)





- The Employee is responsible for giving notice of an injury, not knowing the extent of the injury
- As noted earlier, the Employer “must accept any notice of a claim” when provided by the Employee and comply with all deadlines outlined in the BWC regulations



# What to do when the Employee is injured



## **Step 1:** Be Prepared to respond to workplace accidents

- Plan ahead to develop response plans to minimize hazards and prevent work injuries
- Train employees and supervisors what do in response to a work injury





**Step 2:** Respond Immediately and confront the situation

Safety First: get injured worker to safe place and assess the situation

Gather information and keep evidence while the incident is still fresh

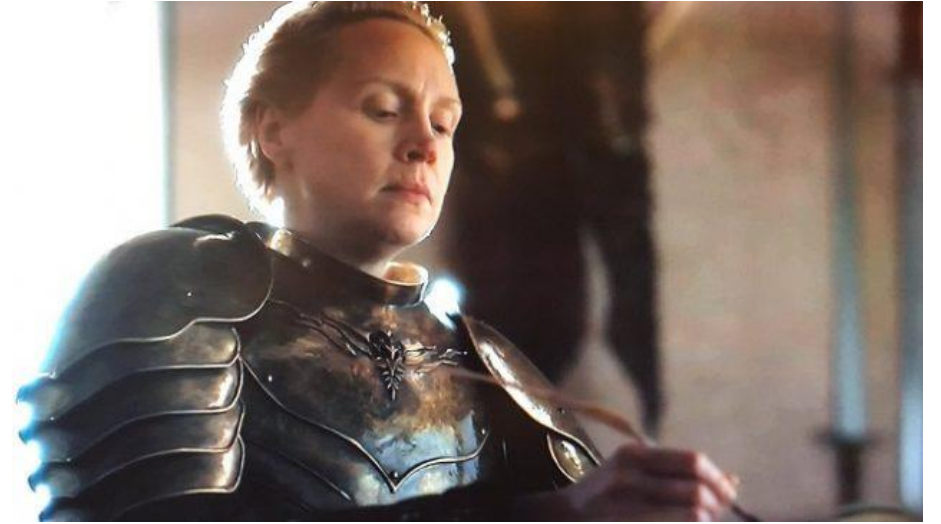
Gather witness testimony, pictures/videos of scene

Injuries should be documented even if employees say they are fine, as they may seek medical treatment and pursue a claim at a later time



## Get the Employee's story in writing:

- Quite possibly the best method for gathering information on a work injury is to get a statement from the Employee in writing at or near the time the injury is reported
- Avoid the checkbox (yes or no) questions and allow the Employee to describe the injury and any physical complaints in his or her own words
- This written statement will be vital in assessing compensability and can easily be used in providing information to medical experts in addressing medical causation
- An Employee's history of injury and complaints are often less likely to dramatically change or evolve over time if the Employee has previously provided a written statement
- An Employee who subsequently contradicts a prior written statement will often lose credibility with medical providers and the Court





# What Questions Should the Employee be asked after reporting an injury?

- How did your work injury occur? Any witnesses?
- What body part or parts do you believe are injured as a result of your work?
- Explain how and when you first noticed any problems?
- Have you received any medical treatment for these problems? When and where?
- Do you believe you need to seek medical treatment for a work injury?





**Step 3:** Follow through with paperwork and communication

- Work with the Employee to file the workers' compensation claim
- It is in the Employer's best interest to maintain open communication between the injured employee, claims adjuster, and medical providers
- A good working relationship with the Employee typically facilitates a quicker return to work and resolution of the claims process



## An Employer that fails to respond proactively, could face penalties:

The Penalty Program investigates penalties for violations of the Workers' Compensation Act and supporting regulations. The Program enforces several penalties, including:

- 25% penalty for failure to pay or timely pay temporary disability benefits  
(if assessed, go to the injured worker, not the BWC)
- A potential penalty up to \$5,000.00 for failure to comply with a Specialist or Administrative Designee's Order  
(for injuries prior to July 1, 2014 the penalty is capped at \$10,000.00)
- Various penalties for an insurance company or self-insured employer's failure to timely file claim forms



## Penalty Program:



An overview of the Penalty Program and the Penalty Program Rules is available on the BWC website: <https://www.tn.gov/workforce/injuries-at-work/bureau-services/bureau-services/penalty-program.html>

*See also **Tenn. Code Ann. § 50-6-118*** which provides authority for BWC to assess penalties and the specific grounds for which penalties may be assessed.





**Some common penalties assessed include:**

- Failure to file C-20 First Report of Injury within 14 calendar days  
(\$25 for each 15 days)
- Failure to file C-22 Notice of First Payment immediately upon first payment  
(\$10 for each 15 days past up to \$200)
- Failure to file C-23 Notice of Denial immediately upon denial  
(\$10 for each 15 days past required date)



## More Penalties:



- Failure to file C-26 Notice of Change or Stop in Benefits  
(\$10 for each 15 days past required date)
- Failure to attend BRC & with settlement authority per T.C.A. § 50-6-237  
(\$50-\$5,000.00)



## Penalties - Continued:

- Wrongful failure to satisfy the terms of an approved settlement
- Wrongful failure to provide reimbursement of medical expenses actually paid by the Employee within 60 days of a settlement, order, judgment that provides for such payment



(penalty up to 25% of the expenses owed to the Employee provided the court finds the failure to pay inflicted additional expense, injury or loss on the Employee)



## Penalties: Failure to provide a timely & valid panel of physicians



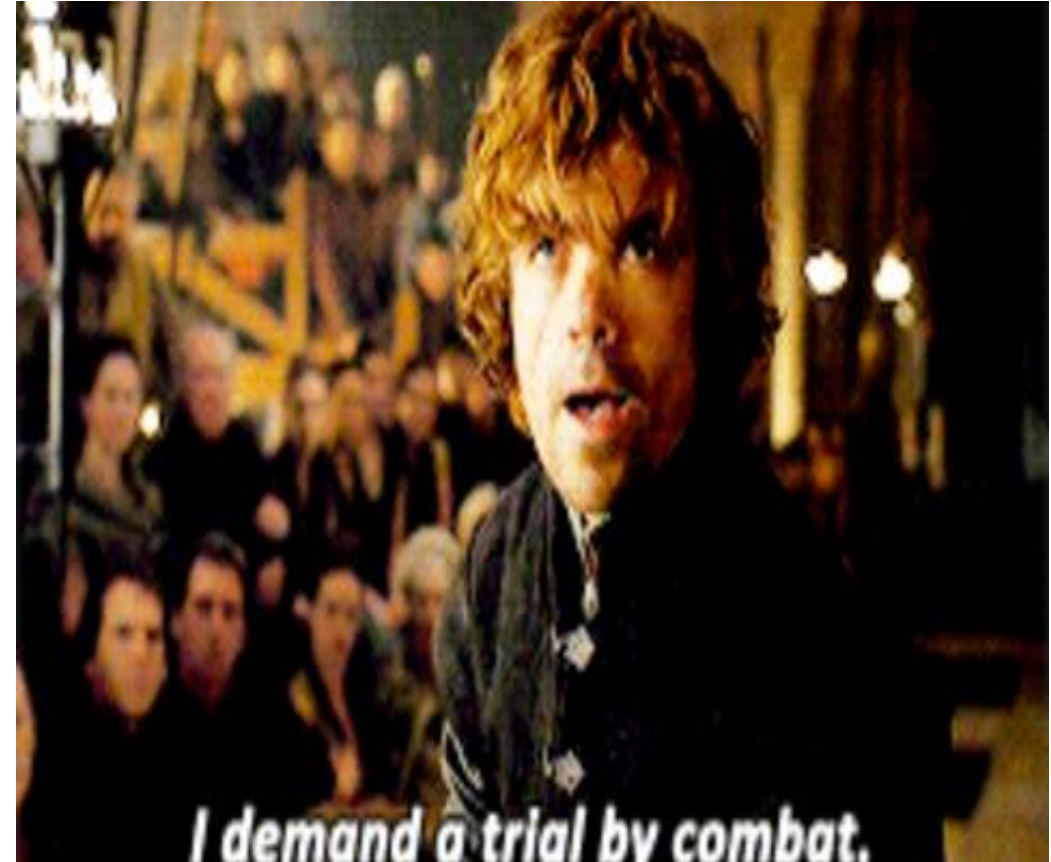
- A civil penalty may be assessed up to \$5,000.00 against an Employer/Carrier for:
  - Failing to provide a Form C-42 panel of medical providers in a timely manner  
(no later than 3 business days after receipt of request for medical care)
  - Providing medical providers on a Form C-42 that the party knew, should have known, or has good reason to believe, would not provide treatment for the injured employee





## Appeal of a Penalty Assessment:

- The Commissioner, Commissioner's Designee or an Agency Member has the authority to hear an appeal of a penalty assessment as a contested case or an administrative appeal of the agency decision
- When a hearing or review is requested, the penalized party has the burden of proving by a preponderance of the evidence that the penalty should not have been assessed
- Penalized party might show the BWC didn't have authority to assess the penalty
- Most common defense to penalty assessment is the Employer acted in good faith based on communications or interactions with the Employee



## Act in Good Faith to Prevent Future Problems:



- Use good judgment and be proactive in identifying and responding to work injuries
- Give the Employee ample opportunity to explain what issues he or she may have
- Courts are not sympathetic to an Employee or Employer that fails to cooperate in the claim process



# Any Questions?

