



# Death Benefits—EXPLAINED

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Steven Fifield, Sr. Attorney, Rocky McElhaney Law Firm**

# DEATH BENEFITS

*David Drobny, Manier & Herod, Employer Attorney*

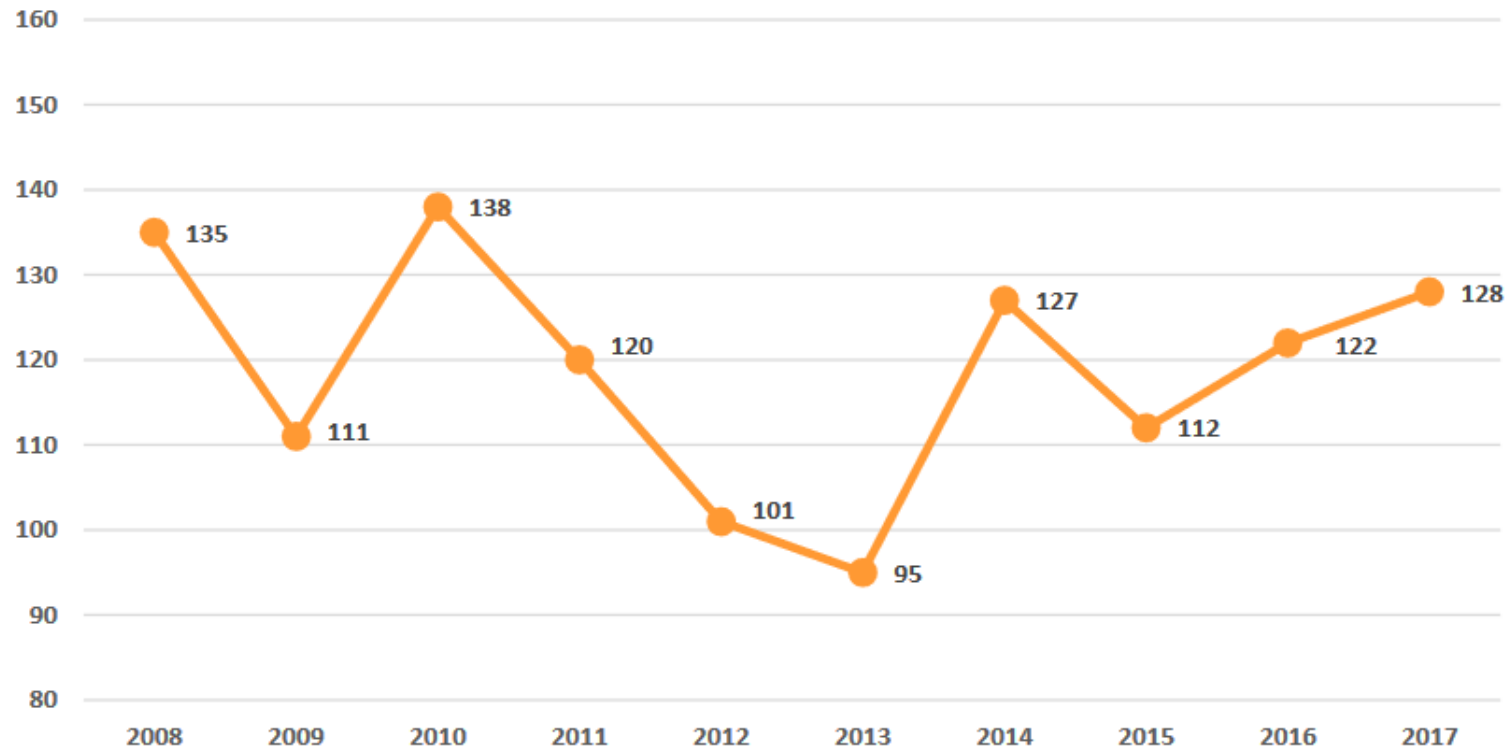
*Steven Fifield, Rocky McElhaney Law Firm, Employee Attorney*

# 2017 STATISTICS

Selected worker characteristics	2017						
	Total fatalities (number)	Event or exposure <sup>1</sup>					
		Transportation incidents <sup>3</sup>	Violence and other injuries by persons or animals <sup>2</sup>	Contact with objects or equipment	Falls, slips, trips	Exposure to harmful substances or environments	Fires and explosions
Total	128	57	20	18	21	12	--
Employee status							
Wage and salary <sup>4</sup>	101	47	17	9	17	11	--
Self-employed <sup>5</sup>	27	10	3	9	4	--	--
Gender							
Men	122	54	19	17	21	11	--
Women	6	3	1	1	--	--	--
Age							
Under 16 years	--	--	--	--	--	--	--
16 to 17 years	--	--	--	--	--	--	--
18 to 19 years	1	1	--	--	--	--	--
20 to 24 years	6	1	3	--	1	1	--
25 to 34 years	18	9	3	--	--	--	--
35 to 44 years	25	5	7	3	5	5	--
45 to 54 years	30	14	1	5	7	3	--
55 to 64 years	31	18	5	3	5	--	--
65 years and over	17	9	1	5	--	--	--

# 2017 STATISTICS

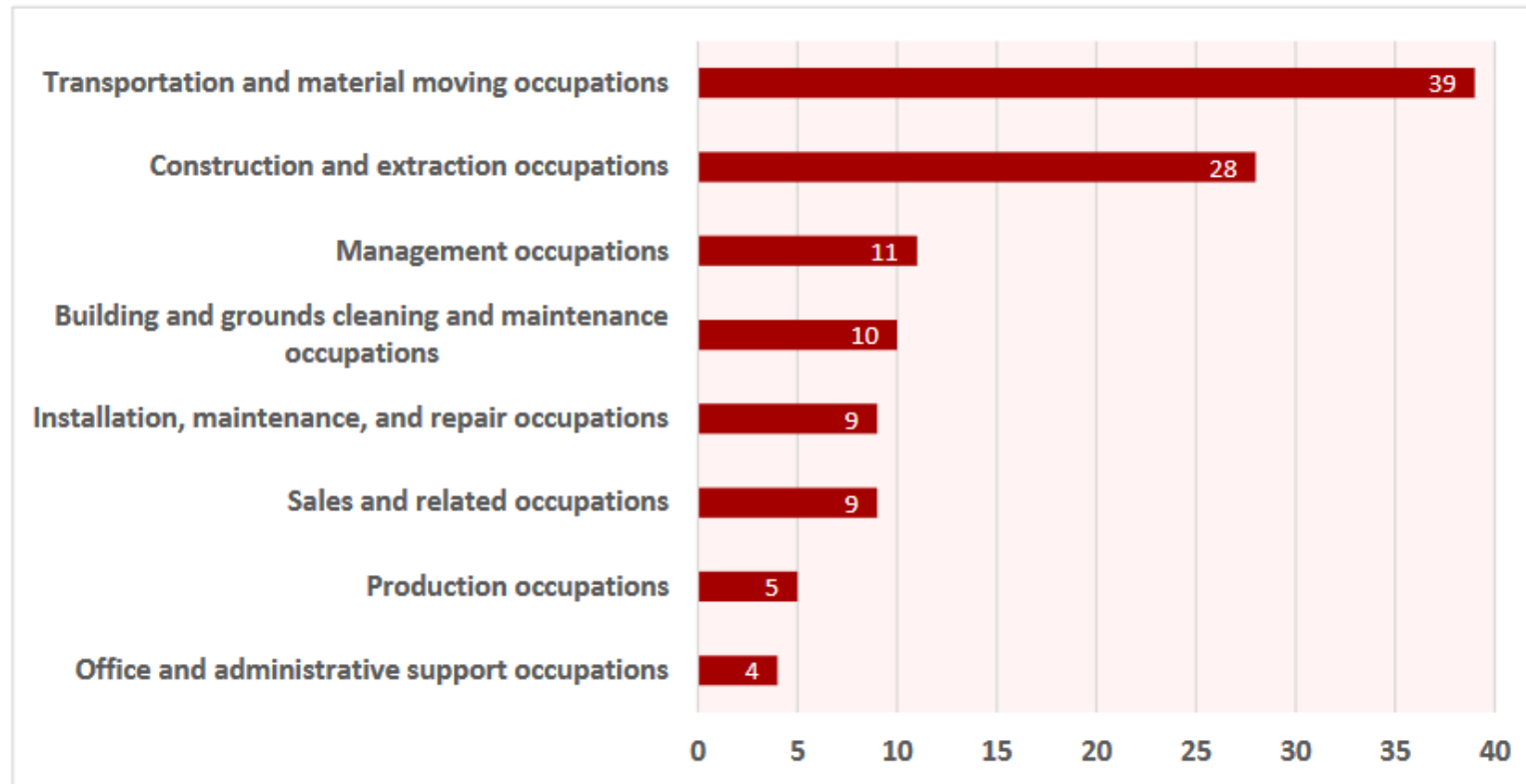
**Chart 13. Number of fatal work-related occupational injuries**  
Tennessee, 2008-2017



SOURCE: Bureau of Labor Statistics, U.S. Department of Labor, December 18, 2018

# 2017 STATISTICS

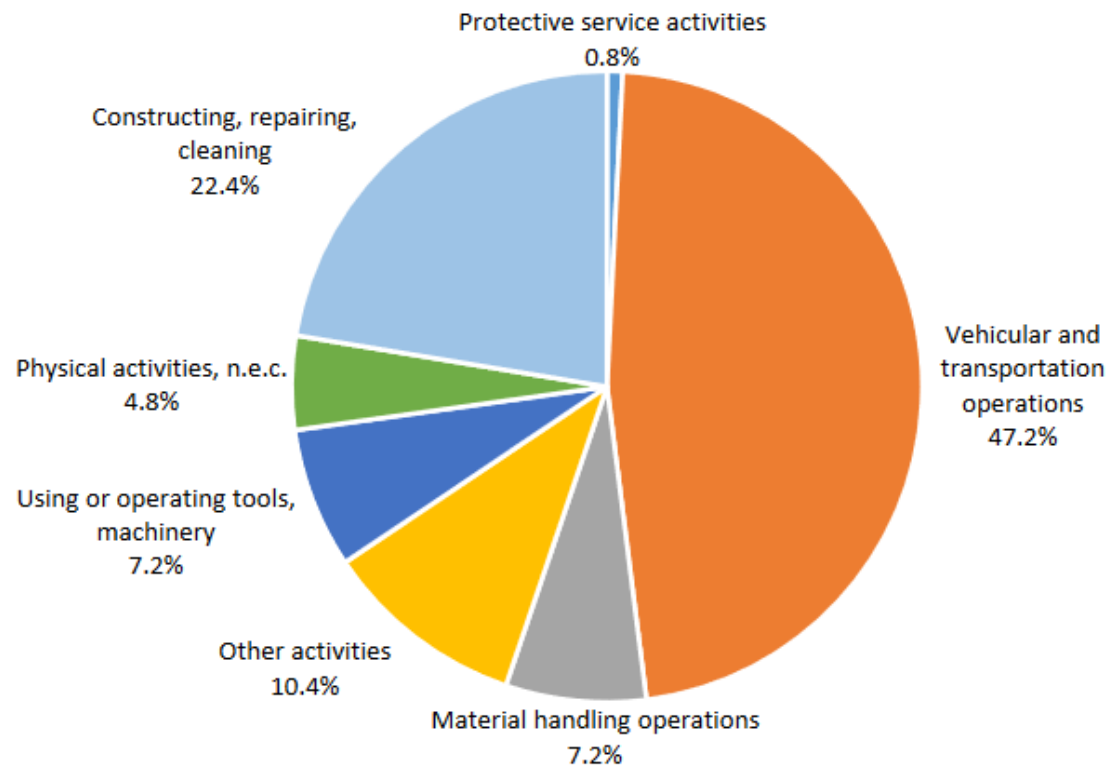
**Chart 14. Number of fatal work-related occupational injuries by major occupational group  
Tennessee, 2017 (128 fatalities)**



*SOURCE: Bureau of Labor Statistics, U.S. Department of Labor, December 18, 2018*

# 2017 STATISTICS

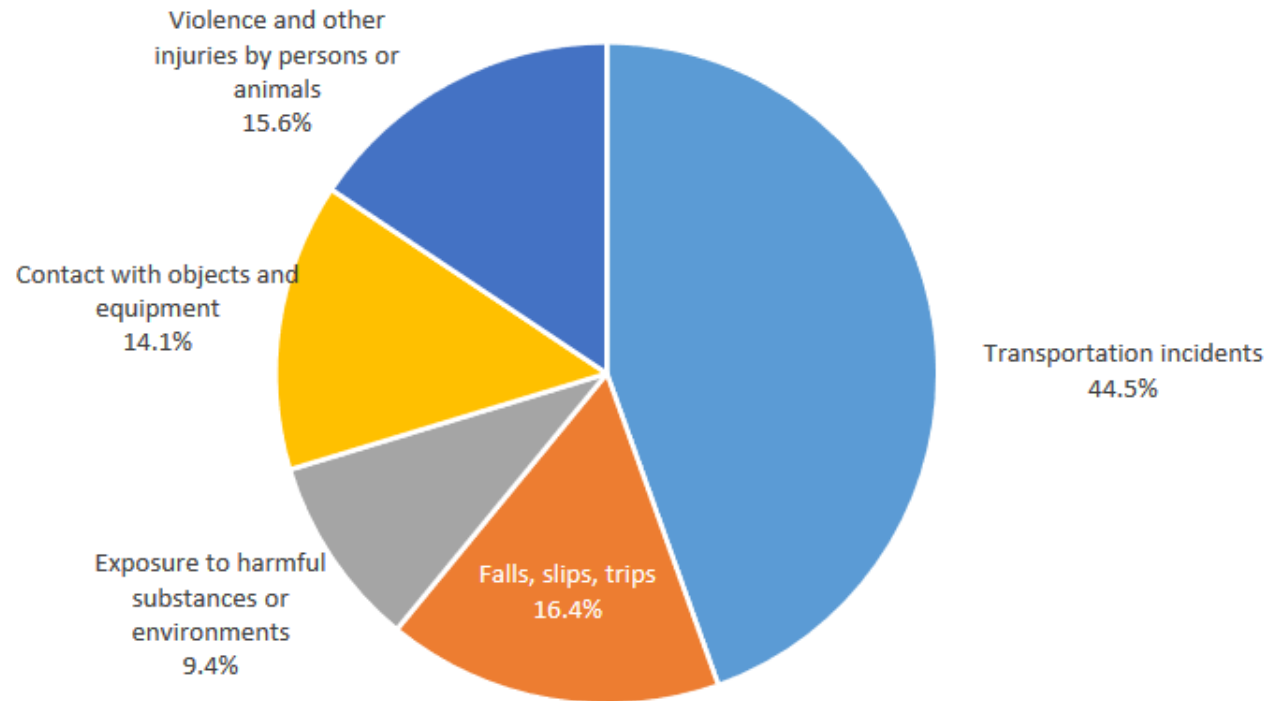
**Chart 15. Percent distribution of fatal work-related occupational injuries by worker activity  
Tennessee, 2017 (128 fatalities)**



SOURCE: Bureau of Labor Statistics, U.S. Department of Labor, December 18, 2018

# 2017 STATISTICS

**Chart 16. Percent distribution of fatal work-related occupational injuries by event or exposure  
Tennessee, 2017 (128 fatalities)**



*SOURCE: Bureau of Labor Statistics, U.S. Department of Labor, December 18, 2018*

# A NOTE ABOUT CAUSATION

- Not part of this talk
  - Except to say: it's the same as always . . . although in causation disputes the key witness is missing.
- “We are not unmindful of the challenges some employers may face in defending claims where the employee has died. After all, the key witness is no longer available. Thus, it may be difficult or even impossible in some cases to fully explore issues such as causation and extent of disability. Yet, these same challenges will be faced by the employee's personal representative, so neither party should enjoy an advantage over the other. Indeed, it may be impossible in some cases following the worker's death to determine whether he or she is entitled to any benefits.”

Warrick v. Cheatham Cty. Highway Dep't, 60 S.W.3d 815, 820 (Tenn. 2001).



# IN A DEATH CLAIM, WHAT IS THE DATE OF INJURY?

- Date of injury matters because it determines the controlling law and applicable maximum total benefit.
- The date of injury is the date of the accident that resulted in death.
- Example:
  - Accident/Injury occurred May 16.
  - Employee hospitalized for 6 days.
  - Employee died on the 7<sup>th</sup> day, May 23.
  - The date of injury is May 16, not May 23.
- It's probably a TTD claim until the IW dies.
- If there is a death by occupational disease, call a lawyer. It's very complicated and fact-dependent. This is its own 60 minute talk.

# DEDUCTIONS

- A death claim is held by the dependent(s)/family.
- The death claim is separate from the IW's TTD/PPD or PTD claim.
- However, there is a deduction in § 207(5)
  - "In case a worker sustains an injury due to an accident arising primarily out of and in the course and scope of the worker's employment, and during the period of disability caused by the injury death results proximately from the injury, all payments previously made as compensation for the injury shall be deducted from the compensation, if any, due on account of death."

# DEATH CLAIMS: 3 BENEFITS

1. Burial/Funeral Costs
2. Medical/Emergency Bills
3. Money Paid to Dependents

# 1. BURIAL AND FUNERAL COSTS

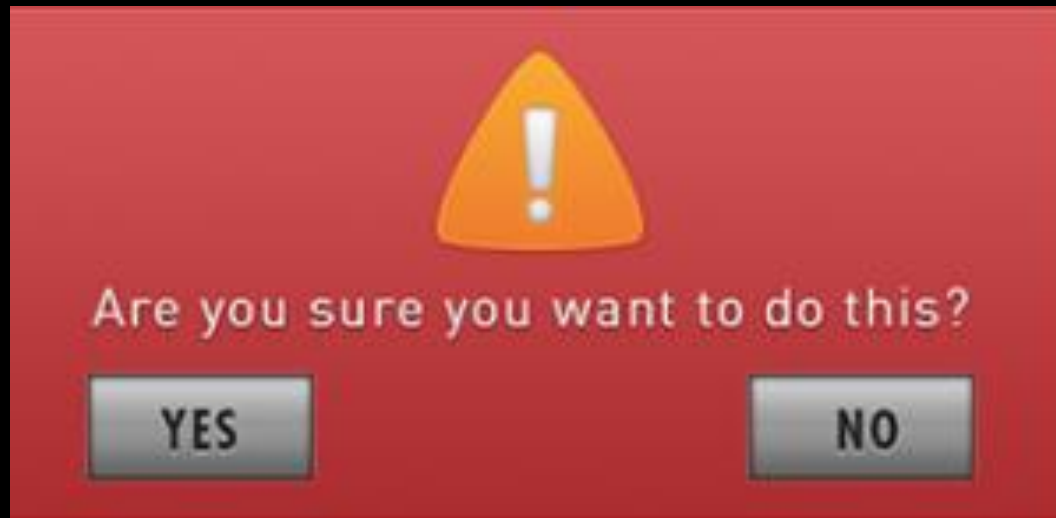
- Up to \$7,500 for injuries on & before May 18, 2017.
- Up to \$10,000 for injuries on & after May 19, 2017.
- Many times the Employer will voluntarily pay beyond this amount.

## 2. MEDICAL & EMERGENCY BILLS

- § 204(c) says “medical and hospital services.” Ambulance, Life Flight, emergency room, ICU, etc. *All* medical services.
- Be patient gathering these bills. In death cases medical bills come from several different places and providers, most/all of which rendered medical assistance without regard to who would ultimately pay.
- Be diligent. Work hard to ensure a bill doesn't end up in the mailbox of a widow, widower, orphan, or other close family member.

# AUTOPSY

- § 204(e)
- “In all death claims where the cause of death is obscure or is disputed, any interested party may require an autopsy, the cost of which is to be borne by the party demanding the autopsy.”



### 3. DEATH BENEFITS TO DEPENDENTS

I feel like it's getting complicated now that we are trying not to complicate things.



# WHO MIGHT BE DEPENDENTS?

- They're listed in § 210.
- Spouse, kids, stepkids, parents, grandparents, siblings, mother-in-law, and father-in-law may qualify for a share of death benefits.
- The hardest part is identifying all qualified dependents.



# DEPENDENTS: SPOUSE

- Surviving spouse always qualifies.
- Even if not technically married. The key is “dependency” and good faith belief of marriage.
- However, the surviving spouse does not qualify if voluntarily living apart at the time of injury.
  - The reason for separation matters.
  - Spouse gets benefits if separation was due to economic distress/necessity.
  - Spouse gets benefits if separation was involuntarily.
  - Separation due to abuse does not disqualify.
  - Extra-marital affairs are a popular inquiry in older cases.
  - Courts have discretion.

# DEPENDENTS: KIDS

- The decedent's kids get benefits.
- Kids under 16 are conclusively qualified as dependents.
- Kids 16-18 are “prima facie dependent” and qualify (unless they've emancipated themselves).
- Kids 18+ in a “recognized educational institution” qualify until age 22.
- All kids 18+ or older who are physically or mentally incapacitated from earning also qualify.
- Stepkids qualify.
- Grandchildren, in certain circumstances. Often a question of fact: key is whether the deceased grandparent supported the grandchild as if his or her own child.
- The idea is to include kids who have effectively lost a parent.

# DEPENDENTS: OTHER FAMILY MEMBERS

- The decedent's parents, mother-in-law, father-in-law, siblings, and grandparents qualify only if:
  - The individual regularly derived support from the deceased employee, and
  - Support went on “for a reasonable period of time immediately prior to the time of death.”
- There is no co-habitation requirement.
- “Support” is not just money. It can be housing, transportation, food, providing medical benefits, and other basic necessities of life.

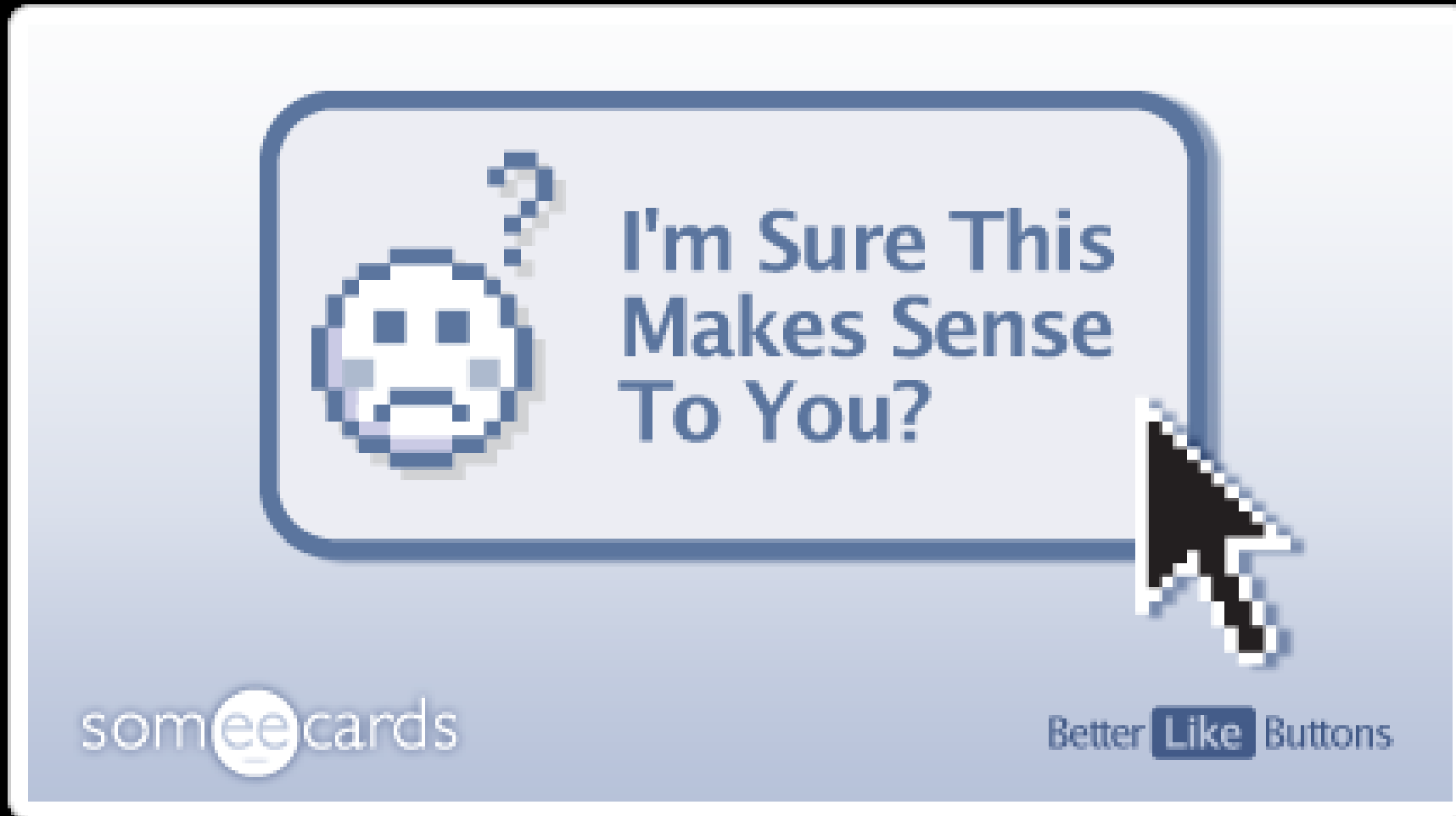
# WHEN THE FAMILY DISAGREES

- About who qualifies: The Court of WC Claims can hear the case and determine who qualifies as dependents and who gets what percentage of the weekly benefit.
- About who gets what:
  - Actual dependents who were “wholly supported” by the deceased are preferred over partial dependents, whose support from the deceased was only a part of their total support. Partial dependents can only take a share equal to the deceased’s support in relation to the partial dependent’s total support.
  - Priority order: first, the spouse, then child, followed by the mother, father, grandparent, sister, brother, mother-in-law, and father-in-law.

# IF NO DEPENDENTS

- Pay \$20,000 to the Estate of the Deceased.
- Reminder: up to \$10,000 in funeral/burial.
- Plus medicals.
- What happens if the Estate hasn't been opened?
  - Send a letter to the family.
  - Investigate. Find out what's going on.
  - File a PBD requesting ADR.

# HOW MUCH DO DEPENDENTS GET?



# FIRST, AVOID COMMON ERRORS

- **Error: Maximum exposure is limited 400 weeks or 450 weeks x the decedent's "comp rate."**
- **Correct:** *Maximum* exposure is the same for every claimant injured between July 1 and June 30. Only the *rate* of payment varies.
- **Error: Paying benefits indefinitely.**
- **Correct:** You pay until all dependents disqualify (age, remarriage, death) or the maximum total benefit is reached.
- **Error: No court approval needed.**
- **Correct:** All claims must be settled and court-approved, or subject to a hearing producing a final order.

# FOLLOW THESE STEPS

- First, compute the maximum total death benefit.
- Second, determine which dependents to pay, and the rate you pay them.
- Third, figure out for how long you pay them, then monitor their status.



# STEP 1: WHAT'S THE MAXIMUM DEATH BENEFIT POSSIBLY OWED?

- It's not in one place in the statute.
- § 210(e) says death compensation is paid during dependency not to exceed the "maximum total benefit."
- § 102(15) defines "Maximum total benefit" as 450 weeks times 100% of the state's average weekly wage as defined by §102(16)(B).
- §102(16)(B) defines the state's average weekly wage as an annual number effective July 1. It's published here:  
[https://www.tn.gov/content/dam/tn/workforce/documents/max\\_and\\_min\\_comp\\_rates.pdf](https://www.tn.gov/content/dam/tn/workforce/documents/max_and_min_comp_rates.pdf)
- Don't worry, this is easy, see the next slide:

# MAXIMUM TOTAL BENEFIT

TENNESSEE WORKERS' COMPENSATION													
WEEKLY COMPENSATION RATES; DEATH BENEFITS; FUNERAL EXPENSES; MEDICAL BENEFITS													
Dates	Mini Rate	Benefit %	State Av Wk Wage	Temporary Benefits		Permanent Benefits			Body as Whole	Max Total Benefit	Medical	Burial	Statute
				% of Avg Wk Wage for Temporary	Maxi Rate for Temporary Benefits	% of Avg Wk Wage for PPD	Maxi Rate for Permanent Benefits						
7/1/90 - 6/30/91	\$35.00	66.67%			\$273.00		\$273.00	400 wks	\$109,200	unlimited	\$3,000	unlimited	
7/1/91 - 7/31/92	\$35.00	66.67%			\$294.00		\$294.00	400 wks	\$117,600	unlimited	\$4,500	unlimited	
8/1/92 - 6/30/93	\$35.00	66.67%	\$408	78%	\$318.24	78%	\$318.24	400 wks	\$127,296	unlimited	\$4,500	unlimited	
7/1/93 - 6/30/94	\$64.80	66.67%	\$432	82.40%	\$355.97	82.40%	\$355.97	400 wks	\$142,388	unlimited	\$4,500	unlimited	
7/1/94 - 6/30/95	\$66.15	66.67%	\$441	86.80%	\$382.79	86.80%	\$382.79	400 wks	\$153,116	unlimited	\$4,500	unlimited	
7/1/95 - 6/30/96	\$68.40	66.67%	\$456	91.20%	\$415.87	91.20%	\$415.87	400 wks	\$166,348	unlimited	\$4,500	unlimited	
7/1/96 - 6/30/97	\$71.10	66.67%	\$474	95.60%	\$453.14	95.60%	\$453.14	400 wks	\$181,256	unlimited	\$4,500	unlimited	
7/1/97 - 6/30/98	\$73.80	66.67%	\$492	100.00%	\$492.00	100.00%	\$492.00	400 wks	\$196,800	unlimited	\$4,500	unlimited	
7/1/98 - 6/30/99	\$77.25	66.67%	\$515	100.00%	\$515.00	100.00%	\$515.00	400 wks	\$206,000	unlimited	\$4,500	unlimited	
7/1/99 - 6/30/00	\$81.15	66.67%	\$541	100.00%	\$541.00	100.00%	\$541.00	400 wks	\$216,400	unlimited	\$7,500	unlimited	
7/1/00 - 6/30/01	\$84.30	66.67%	\$562	100.00%	\$562.00	100.00%	\$562.00	400 wks	\$224,800	unlimited	\$7,500	unlimited	
7/1/01 - 6/30/02	\$87.15	66.67%	\$581	100.00%	\$581.00	100.00%	\$581.00	400 wks	\$232,400	unlimited	\$7,500	unlimited	
7/1/02 - 6/30/03	\$89.85	66.67%	\$599	100.00%	\$599.00	100.00%	\$599.00	400 wks	\$239,600	unlimited	\$7,500	unlimited	
7/1/03 - 6/30/04	\$92.70	66.67%	\$618	100.00%	\$618.00	100.00%	\$618.00	400 wks	\$247,200	unlimited	\$7,500	unlimited	
7/1/04 - 6/30/05	\$95.70	66.67%	\$638	105.00%	\$670.00	100.00%	\$638.00	400 wks	\$255,200	unlimited	\$7,500	unlimited	
7/1/05 - 6/30/06	\$99.45	66.67%	\$663	110.00%	\$729.00	100.00%	\$663.00	400 wks	\$265,200	unlimited	\$7,500	unlimited	
7/1/06 - 6/30/07	\$102.30	66.67%	\$682	110.00%	\$750.00	100.00%	\$682.00	400 wks	\$272,800	unlimited	\$7,500	unlimited	
7/1/07 - 6/30/08	\$106.95	66.67%	\$713	110.00%	\$784.00	100.00%	\$713.00	400 wks	\$285,200	unlimited	\$7,500	unlimited	
7/1/08 - 6/30/09	\$112.80	66.67%	\$752	110.00%	\$827.00	100.00%	\$752.00	400 wks	\$300,800	unlimited	\$7,500	unlimited	
7/1/09 - 6/30/10	\$114.15	66.67%	\$761	110.00%	\$837.00	100.00%	\$761.00	400 wks	\$304,400	unlimited	\$7,500	unlimited	
7/1/10 - 6/30/11	\$114.75	66.67%	\$765	110.00%	\$841.50	100.00%	\$765.00	400 wks	\$306,000	unlimited	\$7,500	unlimited	
7/1/11 - 6/30/12	\$118.35	66.67%	\$789	110.00%	\$867.90	100.00%	\$789.00	400 wks	\$315,600	unlimited	\$7,500	unlimited	
7/1/12 - 6/30/13	\$120.90	66.67%	\$806	110.00%	\$886.60	100.00%	\$806.00	400 wks	\$322,400	unlimited	\$7,500	unlimited	
7/1/13 - 6/30/14	\$125.25	66.67%	\$835	110.00%	\$918.50	100.00%	\$835.00	400 wks	\$334,000	unlimited	\$7,500	unlimited	
7/1/14 - 6/30/15	\$127.20	66.67%	\$848	110.00%	\$932.80	100.00%	\$848.00	450 wks	\$381,600	unlimited	\$7,500	unlimited	
7/1/15 - 6/30/16	\$128.70	66.67%	\$858	110.00%	\$943.80	100.00%	\$858.00	450 wks	\$386,100	unlimited	\$7,500	unlimited	
7/1/16 - 6/30/17	\$133.20	66.67%	\$888	110.00%	\$976.80	100.00%	\$888.00	450 wks	\$399,600	unlimited	\$7,500	unlimited	
7/1/17 - 6/30/18	\$135.30	66.67%	\$902	110.00%	\$992.20	100.00%	\$902.00	450 wks	\$405,900	unlimited	10,000	unlimited	
7/1/18 - 6/30/19	\$139.35	66.67%	\$929	110.00%	\$1,021.90	100.00%	\$929.00	450 wks	\$418,050	unlimited	10,000	unlimited	

# STEP 2: DETERMINE THE RATE TO PAY DEPENDENTS

- Surviving spouse only: 50% of the AWW.
- Surviving spouse and dependent child or children: 66 2/3% of the AWW. Note the court can decide how this money is divided up, and it may appoint a guardian ad litem. (More about this later).
- One dependent child only: 50% of the AWW.
- Two or more dependent children only: 66 2/3% of the AWW.
- Parent: 25% of the AWW.
- Parents: 35% of the AWW.
- Grandparent, brother, sister, mother-in-law, father-in-law: 20% of the AWW if only one, 25% of the AWW if more than one, divided equally.

# STEP 3: HOW LONG DO YOU PAY BENEFITS

- Until the maximum total benefit is paid.
- Benefits may end sooner.
- Benefits end when:
  - The dependent dies.
  - The dependent remarries.
  - The dependent turns 18, or if attending a recognized educational institution, when he or she turns 22.
  - Benefits continue for kids mentally or physically incapacitated from earning a wage until their death or marriage.
- Employers and insurers should monitor dependent status.

# EXAMPLE

- IW dies July 2, 2018.
- Her AWW was \$600.
- She left two dependents, her husband and 8 year old son.
- The maximum death benefit is \$418,050 paid out over time.
- Her husband and son collect \$400 per week.
- Benefits continue until both disqualify for benefits or \$418,050 is paid.
  - Husband's death or remarriage ends his benefit.
  - Son's death, 18<sup>th</sup> birthday, or if he goes to school, 22<sup>nd</sup> birthday, ends his benefit.

# RECALCULATING BENEFITS

- Example: Employee killed August 1, 2017.
- Determine max total benefit. \$405,900.
- Identify dependents. Spouse, three kids Liliana (23), Diego (17), and Caroline (15).
- Compute the rate. AWW \$600. Spouse, Diego, and Caroline are beneficiaries, court doesn't think a G.A.L. is needed, so money is paid to Spouse at \$400 per week. Spouse manages money for Diego and Caroline, each week she puts \$75 in an account for each.
- Diego turns 18, finishes high school, joins the Air Force. Spouse stops putting aside money for Diego because he is disqualified. Benefits remain \$400 per week.
- Caroline graduates from high school and moves away to college. Benefits continue at \$400 per week; however, her mom directs \$150 of it to go to Caroline now that she's out of the household.
- Caroline turns 22 on February 1, 2024. Spouse now gets ½ the AWW, or \$300/week.
- Spouse remarries July 1, 2028. Benefits end, even though only \$227,828.60 of \$405,900 was paid.

# EMPLOYERS: NOT SURE WHO TO PAY?

- File a PBD. Notify all potential dependents.
- Tell the mediator: we know we owe x dollars per week, but we don't know who to pay.
- If the mediator can't get the putative dependents to agree, ask for a DCN and get it into Court.
- Why? You owe it. People have needs. Let the Court sort it out.
- I've (David) filed and paid into the Chancery Court. I don't know if the CWCC is set up to do this.

# REMEMBER!

- All lives are worth the same *maximum*.
- But the rate at which dependents are paid varies and changes.
- This wasn't always the law: used to be you paid 400 weeks x 66 & 2/3 the AWW.
  - Now, it's a two step process: (1) the max is the same for everyone and (2) the rate at which benefits are paid will vary by case.



# LUMP SUM

- Death benefits may be paid in lump sum.
- However, only where there is no contingent beneficiary.
- Educators Credit Union v. Gentry, 2005 WL 6136607, at \*3 (Tenn. Workers Comp. Panel Mar. 9, 2005), considered whether “death benefits payable to a sole surviving spouse can be commuted to a lump sum.”
  - Gentry ruled “commutation of death benefits [to lump sum] is limited by subsections (e)(4) and (8)...[such that]
    - “Mrs. Gentry should not be awarded a lump sum because the ultimate sum of all future benefits payable to her cannot be ascertained at this point, as she may lose her dependency status at any time prior to the end of the installment payment period. In cases such as *Clayton* and *Perdue*, advance calculation of the aggregate award was not an issue due to the fact the surviving spouse had a contingent beneficiary who would be entitled to benefits even if the surviving spouse died or remarried.”

# LUMP SUM BENEFITS FOR MINOR KIDS

- Jones v. General Acc. Ins. Co. of America, 856 S.W.2d 133 (Tenn. 1993):
- “[W]e hold today that death benefits awarded under T.C.A. § 50–6–210 can be commuted to a lump sum.”
- “It is illogical to conclude that a living employee providing for dependents can benefit her family from a periodic payment or a lump sum, but after her death the family can still benefit from periodic payments but not from a lump sum. Indeed, it is easy to foresee situations where this result could impose extreme hardships on surviving dependents.”
- The burden is on the dependent(s) to establish first that a lump sum is in his or her best interest and second that the dependent(s) is/are capable of wisely managing and controlling the commuted award.
- Done at Court’s discretion; Jones was distinguished by Gentry.

# DO I HAVE TO GET DEATH BENEFIT PAYMENTS COURT APPROVED?

- Yes!
- All Settlements Require Court Approval!
- Until you do, Pay Benefits in interim
- What if I don't know who the dependents are? Pay first, ask later?

# 30 DAY LETTERS

- § 226
- When the employer makes a voluntary settlement offer in writing to dependents within 30 days of the employee's death and offers all benefits...
- Then any attorney representing a dependent can only receive as a fee reasonable payment for actual time and expenses incurred.

# GUARDIAN AD LITEM

- § 221 says spouse has to be the “trustee of the child.”
- But what if there is no surviving spouse? Or there is family discord? Or no adult capable of being a trustee?



# GUARDIAN AD LITEM

- § 238 governs
- CWCC judge has the authority to appoint a G.A.L.
- G.A.L. must be a lawyer.
- G.A.L.'s job is to “advocate for the best interest of the child and ensure that the child’s concerns and preferences are effectively advocated.”
- Court can award a fee.
- Employers pay the fee. It does not come out of the death benefit.
- This may cause representation problems for the Plaintiff’s attorney. Who do they represent?

# “ALIEN DEPENDENTS”

- § 227 “Alien dependents of deceased employee – Payment to consular officer of representative – Bond – List of dependents. [Applicable to injuries occurring prior to July 1, 2014]”
- This section was deleted in the 2013 Reform Act.
- Now see § 210(f). Basically the same.
- Applies when dependents are “residing outside of the United States.”
- Can still have an ADR as long as the dependent(s) has a representative.
- Consular officer can be required to furnish a sworn statement containing a list of dependents with the name, age, residence, extent of dependency, and relation of deceased of each dependent.
- Payments made to “the duly accredited consular officer of the country where the beneficiaries are a citizen.” The consular officer may be required to execute a bond.

# REMINDER: § 207(5) DEDUCTIONS

- Example: IW has an injury and collects 4 weeks of TTD, then dies.
- When he dies, it's now a different claim. It becomes a death claim, held by dependents (or the estate).
- Pay death benefits as you would as if he died on the date of injury.
- However, you reduce the death benefits you owe by the 4 weeks of TTD paid.
- You still pay the meds.
- Now you owe up to either \$7,500 or up to \$10,000 for burial/funeral.



# INSURERS: WHEN INVESTIGATING

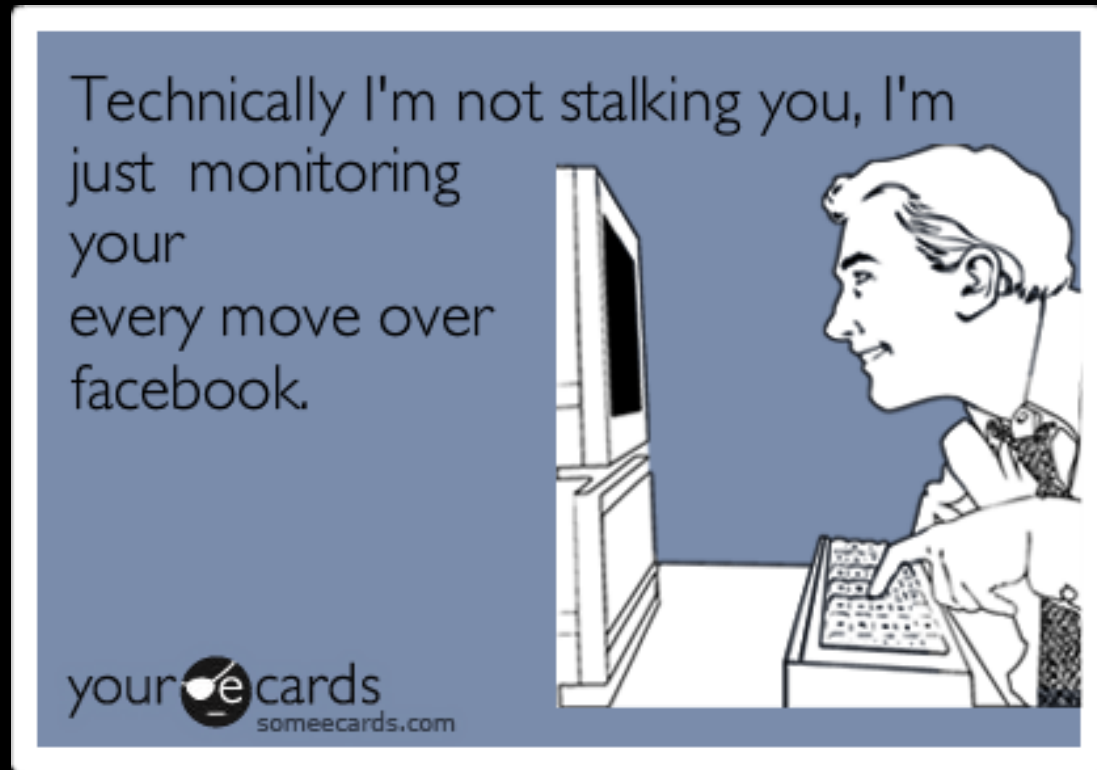
- Google the obituary.
- Get a good employer contact, to get a feel for family dynamics.
- Do not cold call a widow or widower.
- Wait for after the funeral.
- Documents needed: marriage license, kids' birth certificates establishing relationship, court documents (divorce, family law).
- Explain the law to the surviving spouse.
- Be direct and have compassion.

# SUBROGATION INTEREST IN WRONGFUL DEATH

- Employers: Beware of denials. You may impair your subro lien.
  - Hypothetical situation. IW falls from 8<sup>th</sup> floor of construction site, dies. Employer considers its “safety” defense. When considering, peer into your crystal ball:
    - Employer denied the claim on safety. CWCC Trial: IW violated our safety rules. Claim isn’t compensable. At trial, IW’s supervisor confesses on cross examination he let several prior violations of failures to use a safety harness go undisciplined. Employee’s family prevails.
    - Fast forward to the Liability Trial. Employer sits in the corner, hoping the family wins the wrongful death claim so it can recover the WC benefits paid. Liability defense uses testimony and evidence from the CWCC trial to reduce or eliminate the value of the case.

# MONITORING ONGOING BENEFITS

- Contact the dependents regularly.
- If family is unresponsive, file a Motion. Do not cut off benefits!



“NEVER MESS WITH A  
WIDOW”

The first thing Terry Hill taught me when I started handling death claims.

# KIDS' CHANCE

- <https://www.kidschanceoftn.org/>
- Kids' Chance of Tennessee is dedicated to financially helping young people in our state pursue higher education at a university, college or vocational school who have had a parent catastrophically injured or killed in a work related accident. We will make a difference in their lives through hope, opportunity and the providing of educational scholarships. Please help us fulfill our mission through [donations](#) and help in identifying scholarship applicants. Kids' Chance of Tennessee is one of many state chapters affiliated with the national organization [Kids' Chance of America](#).
- [info@kidschanceoftn.org](mailto:info@kidschanceoftn.org)

Questions?

