

# Tennessee WORKERS' COMP Reporter

*Trends and  
developments  
from Tennessee and  
around the nation*

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Jean Simpkins, Editors  
Jason Bohanan,  
Editorial Assistant

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## IN THE COURTS

### How layoffs affect employees' workers' comp benefits

*By Virginia Mayo*

An employee returns to work following an injury but is subsequently laid off. Is the employee's workers' compensation award limited to 1.5 times his medical impairment? If the employee settles his workers' comp claim for 1.5 times his medical impairment, may he file a claim for reconsideration of the capped award? The Tennessee Supreme Court recently addressed these two questions.

#### *The facts*

The facts in *Nichols v. Jack Cooper Transport Co.*, 35 TAM 36-1 (Tenn. Sup. Ct. 8/27/10), were that Don Nichols joined the Teamsters Union in 1969 and worked as a truck driver for most of his career. He was employed by Jack Cooper Transport Company, Inc., in 2000. By 2007, Nichols ranked in seniority near the middle of the drivers employed at Jack Cooper Transport's Murfreesboro terminal. Under the collective bargaining agreement between Jack Cooper Transport and the Teamsters Union, Nichols maintained the same level of seniority during any layoffs, so long as the period of time off did not exceed seven years.

The business at Jack Cooper Transport's Murfreesboro terminal depended entirely upon the manufacture of automobiles at Saturn's plant in Spring Hill and Nissan's plant in Smyrna. For that reason, Jack Cooper Transport had a history of temporary layoffs for many of its drivers during biannual shutdowns at the two plants. Drivers were regularly laid off for one to two weeks in July of each year and often experienced layoffs for the same length of time during the Christmas/New Year's holidays. Both layoffs and recalls were based on seniority — those with the least seniority were laid off first and recalled last.

During the layoffs, the drivers did not qualify for pay or health insurance benefits from Jack Cooper Transport and were eligible to apply for unemployment insurance benefits from the state. While drivers who were recalled to work were paid the same wage as they previously had earned, they typically had to wait approximately one month to qualify for health insurance. Jack Cooper Transport provided no assurances to

the drivers as to when or if they would be recalled. According to the manager of the Murfreesboro terminal, the length of the seasonal layoffs had varied over the years, but the drivers had always been recalled. During the layoffs, drivers were given the opportunity to work temporarily out of other terminals owned by Jack Cooper Transport. Under the terms of the collective bargaining agreement, if a driver worked at another terminal during a layoff, the driver would maintain seniority at the Murfreesboro terminal, but the seniority would not transfer to the new location.

During his seven years of employment with Jack Cooper Transport, Nichols suffered two work-related injuries. In July 2004, he injured his neck. He received treatment for about a year and eventually settled a workers' comp claim based upon an award of 5.5 percent permanent disability. In August 2005, after having returned to work for only a few weeks, Nichols injured his shoulder. The shoulder injury required surgery. Nichols was assigned a permanent impairment rating of six percent by his treating physician and 10 percent by an evaluating physician.

In June 2006, Nichols returned to work with no medical restrictions. Nichols' earnings did not change, and he had no plans to retire. In early April 2007, Saturn's parent company, General Motors, halted operations in Spring Hill for the plant to retool and for a modification of its lines. Because the Spring Hill plant provided 50 to 55 percent of Jack Cooper Transport's business at the Murfreesboro terminal, Jack Cooper Transport responded to the shutdown with a significant layoff that affected about one-half of the drivers, including Nichols. The indefinite shutdown at the Spring Hill plant was without precedent, and Jack Cooper Transport could not predict the length of time the drivers would be without work in Murfreesboro. Jack Cooper Transport provided no pay or benefits to its drivers during this period and encouraged them to take temporary jobs.

On April 27, 2007, while Nichols was laid off, he informed Jack Cooper Transport that he would be willing to accept temporary employment at other terminals. But, in the following weeks, when Jack Cooper Transport offered him work at terminals in Lansing, Michigan, San Antonio, Texas, and Muncie, Indiana, Nichols declined. On May 31, 2007, Nichols notified the Teamsters Union of his intent to retire. Nichols explained that he and his wife needed health insurance benefits to cover the costs of their prescribed medications.

After his retirement, Nichols sought reconsideration of the settlement amount of his neck injury on the theory that he had not made a meaningful return to work. The request for reconsideration was consolidated with his pending workers' comp claim for his shoulder injury. A trial court held that because Nichols was laid off in April 2007, he was not returned to work by his employer at a wage equal to or greater than his pre-injury wage and, therefore, was neither precluded from seeking reconsideration of the settlement of his neck injury or subject to the benefits cap of 1.5 times the impairment rating for his shoulder injury. The trial court awarded Nichols an additional 5.5 percent disability for his first injury and found a seven percent impairment rating for his second injury, using a multiple of three to calculate his vocational disability.

Jack Cooper Transport appealed. A workers' compensation appeals panel reversed the holding of the trial court. The appeals panel held that Nichols voluntarily retired while he was still employed by Jack Cooper Transport. The appeals panel, therefore, declined reconsideration of the neck injury and applied the minimum multiplier of 1.5 to the award for the shoulder injury. The Tennessee Supreme Court granted full court review to consider the question of whether Nichols' layoff constituted a "loss of employment" under Tennessee's workers' comp law.

### *Meaningful return to work and reconsideration*

Two provisions, set forth in Tenn. Code Ann. 50-6-241(b), are at the heart of this case. First of all, for injuries occurring on or after July 1, 2004, where an injured employee is eligible to receive any permanent partial disability benefits either for body as a whole or for certain schedule member injuries, and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive is 1.5 times the employee's medical impairment rating. For this provision to apply, the return to work must be "meaningful." For example, if the injured employee returns to work but is not physically able to perform his duties because of pain from the injury, then the return to work is not meaningful, and the 1.5 cap does not apply.

The second provision at issue provides that if the injured employee receives benefits for body as a whole

injuries and the employee is subsequently no longer employed by the pre-injury employer at a wage equal to or greater than the wage the employee was receiving at the time of the injury within 400 weeks of the day the employee returned to work for the pre-injury employer, the employee may seek reconsideration of the award of permanent partial disability benefits. The employee is not entitled to reconsideration when the loss of employment is due to either (1) the employee's voluntary resignation or retirement, provided such resignation or retirement does not result from the work-related disability which is the subject of such reconsideration, or (2) the employee's misconduct that is connected with his employment.

Because Nichols was no longer working for his employer, the standard for determining the applicability of the cap and the reconsideration of the initial award is the same. Because Nichols' retirement was unrelated to the work-related injuries to his neck and shoulder, he ordinarily would be precluded from seeking reconsideration of the award for his neck injury, and any award of permanent partial disability for his shoulder injury would be subject to the cap of 1.5 times his medical impairment. If Nichols' layoff qualifies as a "loss of employment" that preceded his voluntary retirement, then he did not make a meaningful return to work, may seek reconsideration of his initial injury, and is not subject to the lower benefits cap on his pending second claim. The resolution of each claim turns on whether the layoff terminated the employment relationship prior to Nichols' retirement.

### *Does a layoff constitute loss of employment?*

The Supreme Court refused to adopt a bright line rule applicable to all layoffs in determining whether a layoff constitutes a loss of employment. Instead, the court applied a fact-intensive method for determining whether a layoff is a "loss of employment" and, therefore, a meaningful return to work under Tennessee's workers' comp law. The court wrote that factors that may assist trial courts in the meaningful return to work inquiry include, but are not limited to, the following:

- Whether the layoffs are a customary or expected part of the employee's position and, if so, whether the specific layoff in question falls within the pattern of previous layoffs in the position;

- Whether the employee expected or should have expected, at the time of the layoff, to be recalled to work; and
- Whether the employee received pay and/or benefits while laid off.

Applying the pertinent factors, the court held that the loss of employment occurred when Nichols was laid off on April 27, 2007, shortly before his voluntary retirement. The court gave three reasons for its holding. First of all, the layoff did not fall within the pattern of previous layoffs. Although Jack Cooper Transport commonly engaged in biannual layoffs, during which its employees received neither pay nor benefits, those periods typically occurred during the summer and during the Christmas season. The April 27, 2007, layoff occurred at a different time of the year, lasted longer, and affected a number of drivers whose seniority had previously served as protection from layoffs.

Secondly, Nichols did not know in April and May 2007 when or if he would be recalled to work. While there was testimony that drivers had always been recalled at the end of the seasonal layoffs, the indefinite shutdown at the Spring Hill plant was without precedent. Hence, Jack Cooper Transport had no way of predicting the length of time the drivers subjected to the layoff would be without work in Murfreesboro. The key factor is not whether Nichols would actually have been recalled at the time he was laid off, but whether he knew or should have known at that time that a recall was likely. Given the unusual timing and duration of the layoff, the number of drivers affected, and the economic uncertainty surrounding the shutdown of the Spring Hill plant, it was reasonable for Nichols to determine that a recall to his pre-layoff position was unlikely.

Finally, Nichols was not paid and did not receive health benefits during the term of the layoff. Instead, he was eligible to receive unemployment benefits and encouraged by Jack Cooper Transport to take temporary jobs. Faced with the indefinite period of time without pay or benefits, it was reasonable for Nichols to choose retirement. Because his seniority did not transfer to those other positions, the types of jobs available to Nichols at the other terminals likely would have been eliminated. Nichols's testimony that living and travel expenses related to those positions often outweighed any potential income was not refuted. That Nichols chose to retire rather than take

temporary jobs that were not equivalent to his previous position suggests that his return to work after his on-the-job injuries did not qualify as meaningful.

## Other layoffs

The Supreme Court distinguished the facts in Nichols' case from two prior cases involving layoffs decided by workers' compensation appeals panels.

*Edwards v. Saturn Corp.*, 33 TAM 45-3 (Workers' Comp. Appeals Panel 7/30/08), is a case also arising out of the April 2007 shutdown of the Spring Hill plant. Robert Edwards had returned to work following an on-the-job injury without incident for over a year until he and 2,500 other Saturn employees were laid off. Although laid off, Edwards remained an employee of General Motors and received 95 percent of his pre-layoff wage and all of his health care, life insurance, and other benefits.

Under the circumstances, a workers' compensation appeals panel ruled that Edwards had a meaningful return to work and that his permanent partial disability award was capped at 1.5 times his medical impairment rating. The appeals panel placed great emphasis on the specific terms of the contract between the union and the employer that allowed Edwards to continue to receive almost the exact same benefits and compensation that he was receiving prior to his layoff. In other words, the terms of the collective bargaining agreement constituted the "functional equivalent of continued employment."

In *Wheeler v. Whirlpool Corp.*, 35 TAM 12-3 (Tenn. Workers' Comp. Appeals Panel 2/3/10), after Kimberly Wheeler returned to work following an on-the-job injury, the air purifier line on which she worked was shut down and moved to another location. Wheeler was offered the option of accepting a voluntary layoff or moving to another built-in refrigeration line. Wheeler chose the voluntary layoff. Under the terms of her employment contract, she continued to be an employee although she was not working. The entire plant eventually closed, and Wheeler was terminated.

A workers' compensation appeals panel determined that Wheeler had neither resigned nor retired. The appeals panel wrote that Wheeler "anticipated the availability of being recalled" because she had been laid off and recalled several times during her tenure with the employer and she had significant seniority.

Moreover, there was evidence that Wheeler's choice to accept the layoff was not entirely voluntary because her work injury may have prevented her from meeting the demands of the new position. Although the appeals panel did not address whether Wheeler received pay or benefits during the layoff, it referred to the testimony of her human resources representative, who stated that Wheeler continued her employment during the layoff. Based upon these facts, the appeals panel held that Wheeler's acceptance of the voluntary layoff did not amount to a "voluntary resignation or retirement." Therefore, she did not have a meaningful return to work, and her workers' comp award was not limited to 1.5 times her medical impairment. ♦

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## HEALTH & SAFETY

# Ridding the workplace of those pesty bed bugs

By Jason Bohanan

Before World War II, bed bugs were a common household pest. In many American homes, bed bugs were considered a normal, but bothersome, part of life. After the war, an emphasis on improved hygiene and the development of more lethal pesticides practically eliminated the bugs from the United States. But in recent years increased travel and less-effective pesticides have allowed the creepy critters to make a nationwide return.

As bed bugs have infested more homes, they have infiltrated many public areas as well, including movie theaters, libraries, and office buildings. According to a recent survey of extermination firms by the National Pest Management Association (NPMA) and the University of Kentucky (UK), nearly 20 percent of exterminators have found bed bugs in office buildings, compared to less than one percent in 2007. Four out of every 10 bed bug treatments occur in commercial buildings, according to the survey. And the bugs have the potential to cause serious workers' compensation issues.

Jane Clark, a Fox News employee in New York City, received workers' compensation benefits from her bout with bed bugs and is currently suing the building owner, management agency, and other parties for unspecified damages. According to Clark, the defendants were negligent in removing the bugs when

the bites began in the autumn of 2007 in the media giant's newsroom. Clark's attorney, Alan Schnurman, says Clark was reassured by managers the problem had been rectified, but the bites continued. The legal case is still pending.

The brown, apple-seed sized bugs feed on human blood, often leaving swollen, itching welts on their victims. Initially, many people misdiagnose the welts as mosquito bites since the wounds look and feel very similar. Some victims experience intense itching and painful swelling, while others have almost no reaction. Fortunately, bed bugs are not known to spread disease.

The bugs most often enter office buildings on the briefcases, purses, or other belongings of workers, guests, or vendors as they commute from home, another company, hotels, or even schools. In large buildings, more than one person may be inadvertently allowing bed bugs to tag along. The bugs normally prove particularly troublesome in urban areas, where they can spread quickly, but may also be found in small and medium-sized towns.

In homes, bed bugs most often congregate around the bed or sofa. In office environments, however, infestations normally have no central location, leaving the pests to hide in any of the thousands of small cracks or crevices in a building. Bed bugs prefer locations close to the floor and can be spotted walking on floors or creeping down walls in search of food. If detected early, an infestation may be limited to a few offices or cubicles. But if the critters go unnoticed or if management is slow to act, bed bugs can eventually take over several floors of a property.

Unfortunately, the bugs are unharmed by many pesticides, reproduce quickly, and may live up to one year without eating. However, there are some steps that can be taken if the creatures invade your office space:

- **Listen to employees.** If workers report sightings of the bugs, take them seriously. Employees working nights will most likely see, and be bitten by, bed bugs first since the bugs prefer to feed at night. The most common signs are the bugs themselves or black spots of fecal matter.
- **Encourage reporting.** Denial or lack of reporting of bed bugs by management and employees can exacerbate the problem. When the bugs are unreported, they are unable to be exterminated.

- **Hire a professional.** Bed bugs are notoriously hard to destroy, even for professional exterminators. According to the NPMA and UK survey, the vast majority of exterminators rate bed bugs as the most difficult pest to treat. Attempting to solve the problem yourself will only allow the bugs more time to infest other areas.
- **Avoid a scare.** Many firms avoid treating for bed bugs or do so secretly for fear of unwanted publicity. Others fear the company's brand names will be damaged if others know about the issue. Be honest with employees about the situation and discuss what steps have been taken to rectify the problem. Hiding the problem will result in finger pointing and panic if word leaks out.
- **Follow up.** Ridding a building of bed bugs typically requires more than one treatment by exterminators. Continue to look for signs of the critters after the building has been treated. Remember that tackling the problem early will save both time and money in the long run. ♦

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## HEALTH & SAFETY

### How to spend \$1 to save \$4: Improve your safety program

*By Jim Stanley, President of FDRsafety*

For the past year, the focus in occupational safety has been on enforcement, with the Occupational Safety and Health Administration's (OSHA) proclamation that there is a "new sheriff" in town. But while it is certainly a good idea to keep one eye on the sheriff's office, companies should not forget that there's also a banker down the street.

#### *Safety research and surveys*

Researchers for a recent study on the financial impact of safety interviewed 231 corporate financial officers at medium and large companies. On average, participants perceived that for every dollar spent on improving workplace safety, their organizations saved \$4.41. Such savings included:

- lower insurance premiums;
- improved productivity;

- reduced costs of training new employees; and
- less workplace disruption and downtime.

That same group was asked to name the top benefits of an effective workplace safety program. Their answers were as follows:

- increased productivity (42.5 percent);
- reduced costs (28.3 percent);
- improved employee retention (7.1 percent); and
- better employee morale and job satisfaction (5.8 percent).

Their perceptions about the financial costs of accidents are borne out by the 2009 Liberty Mutual Workplace Safety Index. That study estimates that the most disabling workplace injuries cost industry \$53 billion a year.

The importance that employees place on workplace safety was underscored by a recent public opinion survey conducted by the National Opinion Research Center at the University of Chicago. The study found 85 percent of respondents rated workplace safety regulations as very important to workers. Safety was rated as more important than the minimum wage, paid sick time, or receiving time and a half for overtime.

## Takeaways

What does this all add up to? It demonstrates that it is smart for organizations to take a proactive approach to safety and install a strong safety program without waiting for a negative OSHA inspection to force the issue. (For some tips on how to build such a program, take a look at my article, "Building a culture of safety at construction companies" at [www.fdrsafety.com/OHSarticle3-10constructionsafety.pdf](http://www.fdrsafety.com/OHSarticle3-10constructionsafety.pdf). While the article uses construction companies as an example, the principles involved apply to all companies.)

And with all the talk about financial benefits, it is important to keep the true bottom line in mind: A strong safety program protects your most precious asset — your people.

*Jim Stanley, president of FDRsafety (www.fdrsafety.com), served as Deputy Assistant Secretary of Labor for OSHA. Jim can help your company set up a proactive safety program. Contact Jim at [jstanley@fdrsafety.com](mailto:jstanley@fdrsafety.com) or (513) 317-5644. ♦*

## REPORTS

# Fatal workplace injuries decline by 17 percent in 2009; slow economy cited

*By Kathleen A. Carlson*

It really shouldn't be a huge surprise, given a still-sluggish economy, to learn that U.S. workplace fatalities fell from 5,214 in 2008 to 4,340 in 2009, a drop of nearly 17 percent and 874 fewer deaths, according to preliminary data from the Department of Labor (DOL). After all, people worked six percent fewer hours last year, and the economic downturn has hit accident-prone industries such as construction particularly hard.

The total number of workplace deaths last year was the smallest annual preliminary total since the DOL's Census of Fatal Occupational Injuries program began in 1992. When the fatalities are represented as a rate — number of deaths per 100,000 full-time equivalent (FTE) workers — there's still a decline, from a 2008 final rate of 3.7 deaths per 100,000 to last year's preliminary rate of 3.3 per 100,000 FTEs.

So what, if any, of the DOL's information defied the downward trend or was otherwise surprising, and what could it all mean to you?

## Against the grain

First, fatal injuries rose in the wholesale trade industry (establishments that sell merchandise at wholesale, including goods for resale, nonconsumer durable goods for production, and raw materials for production). They also rose among buildings and grounds workers who performed maintenance and cleaning. When the data is examined by age group, fatalities rose only in the youngest group, those under age 16. Specific accidents in which deaths rose included water vehicle accidents, becoming caught in running equipment, ladder falls, and situations involving exposure to temperature extremes.

The 13-page U.S. Bureau of Labor Statistics (BLS) report wasn't more specific on these exceptions to declining deaths, so it's unknown what led to fatal accidents among groundskeepers, for instance. The report suggests that education on basic issues — ladder safety and proper use of running equipment, for

example — could help lower serious and fatal accidents. Anyone who employs young teen workers could consider beefing up safety training for the teens as well.

Another area that stands out involves the 521 workplace homicides in 2009. The number represented a decrease of just one percent compared with 2008, well below the average decline. (The DOL preliminary report states that it counted the 2009 workplace shootings at Fort Hood, in which 13 people were killed; if that unusual event hadn't occurred, the drop in homicides would have been greater.) Some workplace slayings cannot be prevented, but it may

be possible in other cases to upgrade security (bullet-resistant glass in convenience stores, for example) and take other measures to lessen the likelihood of shootings and stabbings.

## High rates of death

Finally, here are the occupational groups with the highest rates of fatalities per 100,000 FTE workers, starting with the group with the highest rate. The rate and total number of deaths also are included.

- Fishers and related fishing workers, 200 per 100,000 (56 deaths)

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- Returning an Employee to Work After Layoffs — **Kitty Boyte**
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- Outside the Lines: Emerging Workers' Comp Issues — **Mark Travis**
- When is an Injury Within the Scope of Employment? — **Wade Cowan**

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- Settlement Negotiation Strategies in Workers' Compensation — **Mark Travis**
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- Logging workers, 61.8 per 100,000 (34 deaths)
  - Aircraft pilots and flight engineers, 57.1 per 100,000 (63)
  - Farmers and ranchers, 38.5 per 100,000 (293)
  - Roofers, 34.7 per 100,000 (60)
  - Structural iron and steel workers, 30.3 per 100,000 (18)
  - Refuse and recyclable material collectors, 25.2 per 100,000 (19)
  - Industrial machinery installation repair maintenance, 18.5 per 100,000 (81)
  - Driver/sales workers and truck drivers, 18.3 per 100,000 (586)
  - Construction laborers, 18.3 per 100,000 (224)
- Employers for these occupational groups and industries may want to examine safety training and procedures more closely given a comparatively high rate of fatal injuries. ♦



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- 10-28 **"Control FMLA Abuse: Documentation Tactics to Deter Employees Who 'Work the System,'"** presented by attorneys James F. Kilcur and Christine Kenny.
- 11-1 **"Union Avoidance Strategies,"** presented by attorney Bonnie Glatzer.
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- 11-4 **"Workplace Wellness Programs: Legal issues for Employers,"** presented by attorney Ashley Gillihan.

- 11-9 **"Workplace Scents, Employee Allergies and the ADA: What Employers Need to Know,"** presented by attorney Dennis J. Merley.
- 11-10 **"Smart Compensation Strategies for 2011,"** presented by David Wudyka, SPHR, MBA, Westminster Associates.
- 11-15 **"Preparing for Outbreaks of the Flu Virus in the Workplace,"** presented by attorney Amy M. McLaughlin.
- 11-16 **"Control FMLA Abuse: Documentation Tactics to Deter Employees Who 'Work the System,'"** presented by attorneys James F. Kilcur and Christine Kenny.
- 11-18 **"Paperless HR,"** presented by attorney Jeffrey S. Beck.
- 11-30 **"Essential Function: Writing ADA-Compliant Job Descriptions,"** presented by attorneys Audra K. Hamilton and Jonathan R. Mook.

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