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*Managing the Risk of Litigation in Mississippi*

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**The ACB's of Mississippi Workers' Compensation Law 2022**

A. Accidental Injury

To be compensable, injuries must arise out of and occur in the course and scope of employment although current interpretations tend to blend the two tests. An injury can be compensable if the medical condition is contributed to, aggravated or accelerated by the employment in a significant manner. NOTE: For injuries after 7-1-2012, the law is not to be construed to favor either party.

B. Benefits

Effective Date	Weekly Minimum	Weekly Maximum	Dollar Maximum	Mileage Rate
July 1, 2022	\$25.00	\$551.02	\$247,959.00	\$.625 per mile
January 1, 2022	\$25.00	\$551.02	\$247,959.00	\$.585 per mile
January 1, 2021	\$25.00	\$523.16	\$235,422.00	\$.56 per mile
January 1, 2020	\$25.00	\$505.43	\$227,443.50	\$.575 per mile
January 1, 2019	\$25.00	\$494.48	\$222,516.00	\$.58 per mile

C. Compensation

- > Disability Benefits are based on two thirds of the Injured Worker's (IW) average weekly wage (referred to as IWs "compensation rate") subject to the minimums and maximums set forth in the chart above. The date of injury determines the applicable rates for that claim.
- > Average Weekly Wage (AWW) is based on a 52-week period before the injury date.
- > Temporary Total Disability (TTD) is paid until a release to return to work or maximum medical recovery.
  - + Waiting period is 5 days that disappears after 14 days lost time.
  - + Lost time is paid on an assumed 5-day work week (i.e. divide weekly compensation rate by 5 to get the daily rate.)
- > Temporary Partial Disability (TPD) is paid at two thirds of the difference in IW's pre-injury average weekly wage as compared to his/her partial wage-earning capacity following the injury such as in a case where IW is released to return to light duty work before maximum medical recovery. Weekly minimums do not apply to partial disability claims but the same maximums are applicable.
- > Permanent Partial Disability (PPD) is calculated separately for scheduled member injuries as opposed to the "body as a whole" cases (or those not listed in the schedule).
  - + The scheduled member PPD benefits are listed in MCA § 71-3-17 (c). As an example, 100% loss of an arm would be 200 weeks at IW's compensation rate. 10% PPD to the arm would be 20 weeks (200 x 10%) at the IW's compensation rate. The rating is the minimum amount payable, and an IW can get more than the impairment rating since the real issue is the industrial loss of use of the scheduled member. Industrial loss of use of a scheduled member is measured by the IW's ability to perform the substantial acts of his usual employment. If an IW cannot perform the substantial acts of his/her usual employment, 100% loss of the scheduled member is payable.

<b>The # of weeks for several scheduled members are:</b>	Arm	200 weeks	First finger	35 weeks	Testicle, one	50 weeks
	Leg	175 weeks	Great toe	30 weeks	Testicle, both	150 weeks
	Hand	150 weeks	Second finger	30 weeks	Breast, female, one	50 weeks
	Foot	125 weeks	Third finger	20 weeks	Breast, female, both	150 weeks
	Eye	100 weeks	Toe other than great toe	10 weeks	Loss of hearing, 1 ear	40 weeks
	Thumb	60 weeks	Fourth finger	15 weeks	Loss of hearing, both ears	150 weeks

- > For the "body as a whole" cases (or those cases not covered by the schedule), benefits are based on two thirds of the loss of wage-earning capacity paid out over 450 weeks. As an example, with an average weekly wage of \$500 and a 15% loss of wage-earning capacity, multiply the \$500 AWW times the rating (15%) times two thirds (\$50), payable for 450 weeks (\$22,500). See MCA § 71-3-17 (c) (25) for the statutory provision regarding these cases. *Remember that the real issue in PPD cases is based on the concept of lost earning capacity and one must always consider IW's age, education, training, work experience, transferrable work skills, and post injury earnings and work history to evaluate the effect of the PPD rating on his ability to earn wages on the open labor market in order to determine the actual value of the PPD claim.*
- > Permanent Total Disability (PTD) is loss of both arms, hands, legs, feet, eyes, or any combination and in other cases as the facts appear. A total loss of wage-earning capacity can come from any kind of injury. Benefits are not lifetime but are paid for a maximum of 450 weeks and at the applicable maximums in the chart above.
- > Death Benefits are not lifetime but subject to the same 450 weekly and dollar maximums in the chart above:
  - + Surviving spouses and minor children are *conclusively* presumed dependent. Children are paid to age 18 or up to age 23 if a full-time student or incapable of self-support due to mental or physical impairment.
  - + Surviving Spouse: \$1,000 immediate lump sum payment and 35% of the decedent's AWW
  - + Children: If surviving spouse exists, each child receives 10% of AWW, but increases to 15% if spouse dies or remarries; if no surviving spouse, then each child gets 25% of AWW subject to a maximum of 66 2/3% of the decedent's total AWW.
  - + Parents, siblings and others who are dependent on the decedent can also get 15% of the decedent's AWW but only if the spouse and children take less than 66 2/3% of the decedent's AWW.
  - + Funeral benefit is \$5,000 and a \$1,000 immediate lump sum payment is due the surviving spouse.
  - + MWCC Second Injury Fund: \$500 if there are no death beneficiaries or \$300 if there are death beneficiaries.

- D. Litigation Time Frames**
- > The Answer to the Petition to Controvert is due 23 days after the Commission requests an Answer.
  - > Standard Discovery Period of 120 days (liberally extended upon the request of either party) but can be shortened in specific cases. Pre-Hearing Statements are due following expiration of Discovery Period; Evidentiary Hearing within 2-3 months thereafter.
- E. Doctors and medical care.**
- > It is the employer's obligation to provide the necessary and reasonable medical treatment and services such as the nature of the injury or process of recovery requires. There is a MWCC fee schedule in effect on which to rely for medical cost containment efforts. Medical case management is permissible but not required. Medical benefits can be for the Claimant's lifetime.
  - > *Ex parte* (or one sided) communications with **Injured Worker's (IW)** treating physicians are not permitted in controverted claims.
  - > IW's choice of physician is limited to acceptance of the physician tendered by the employer or choosing his own. Once the choice is made *in writing*, that chosen physician may refer IW to one physician in as many specialties as necessary but cannot make referrals to multiple physicians in the same specialty (i.e. referrals can be made to one neurosurgeon, one orthopedic surgeon, etc). The MWCC can allow a change of physicians even after the choice has been made in writing, however. **NOTE:** For injuries after 7-1-2012, being treated by a physician for 6 months, or undergoing surgery by a physician, makes the physician an IW's physician choice.
  - > The Employer/Carrier can have IW examined by a physician of their choice (called Employer's Medical Examination or EME). The procedure is to set up the appointment, give the claimant and the MWCC notice in writing of the appointment, and *prepay* IW's travel expense to the appointment. A copy of the report must be sent to the MWCC and the IW.
  - > Mileage. Travel expense to and from medical treatment is reimbursable and no minimum travel distance is required. The rate changes regularly and generally will follow the IRS published rate. **The reimbursement rate which is applicable is determined by the date on which the travel occurred.** Check the MWCC website for current rates: <http://www.mwcc.state.ms.us/faq/rates.asp>.
- F. Defenses to Claims:** There are defenses to a claim. Examples are:
- > No compensation is payable if IW's **intoxication** is the proximate cause of the injury. Employers have the right to test for alcohol ( $\leq .08\%$  is standard), illegal drugs, or improperly used prescription drugs. A positive test/refusal to take the test establishes a rebuttal presumption of intoxication and proximate cause, but IW can rebut the presumption with proof the intoxication was not a contributing cause of the accident.
  - > No compensation is payable if the injury is the result of IW's **willful intent to injure himself or another.**
  - > There are **2 Statute of Limitations** to remember and they are mutually exclusive:
    - ❖ Where no compensation is paid (other than medical), Claimant has 2 years from the date of injury to make a claim. The time bar applies to both indemnity and medical benefits.
    - ❖ Where compensation benefits are paid, IW has 1 year from the date of filing the B-31 with the MWCC to make further claim. Paying benefits after a B-31 is filed tolls the running of the statute and a new B-31 has to be filed to start the time running again. Once the year has run, the time bar applies to both indemnity and medical benefits. **As per a rule change effective January 18, 2018,** the form no longer has to be signed by IW, but IW or IW's attorney must be given notice of the filing by any means which acknowledges delivery of the B-31. The rule also provides that if the B-31 is signed by the IW, that signature will constitute acknowledged delivery of the B-31.
  - > **Apportionment** is a reduction in the payment of permanent disability or death benefits where it is shown that a pre-existing condition is a *material contributing factor* to the disability or death. Proof of occupational effects of a pre-existing condition is not required, but the application of apportionment as a defense remains a subjective determination.
- G. Important Forms.** All forms are available online in .pdf format at the MWCC website: <http://www.mwcc.state.ms.us>.
- > B-3 (IAIABC 1A)—First Report of Injury. File with MWCC immediately for all lost time claims (more than 5 days lost time).
  - > B-18—Payment Report. Informs MWCC and Claimant of starting and stopping compensation benefits, changing from TTD to PPD, re-starting benefits after a prior termination, etc.
  - > B-19—Application for Lump Sum Payment. Filed by Claimant for a 13(j)-lump sum—*not an alternative to a 9(i) settlement.*
  - > B-52—Employer's Notice of Controversion. This form is used to give notice of a dispute by the employer/carrier—does not start litigation.
  - > B-31—Notice of Final Payment. This form summarizes all payments and is necessary to start the Statute of Limitations.
  - > B-5, 11—Petition to Controvert. Claimant files this form to start litigation and make a claim for benefits.
  - > B-5, 22—Answer. The Employer/Carrier file this in response to claimant's Petition to Controvert. It is due 23 days after MWCC's notice of the B5,11 and must be filed by a Mississippi attorney.
- H. General Terms**
- > **Bad Faith.** Mississippi recognizes a separate "bad faith" cause of action against the Employer, Carrier, Adjuster, Third Party Administrator, etc, for a wrongful denial of a claim or refusal to pay a claim or any part of a claim without reasonable grounds. Bad Faith damages are not included in the limits of the MWCA and both actual and punitive damages are potentially recoverable. A claims professional should always proceed with a sense of urgency; honor the obligation to complete a prompt and thorough investigation; base any denial on legitimate and arguable reasons; and seek advice of counsel when in doubt.
  - > **Settlements.** Settlements are permissible and they usually include a closure of future medical. Generally called 9(i) settlements, they are subject to approval of the MWCC. The MWCC regularly considers settlements on Tuesdays and Wednesdays of each week.
  - > **Trials.** The trial of a claim is before one of the 8 Administrative Judges (AJ) employed by the MWCC. The decision of the AJ is final unless appealed within 20 days of the issuance of the Judge's Order. The full Commission sits as an appellate review board for that appeal. Once the MWCC makes its decision, it may be appealed to the MS Supreme Court (which usually assigns the case to the Court of Appeals). After the COA decision, the case might go back to the MS Supreme Court on a Writ of Certiorari.
  - > **IW's attorney's fees** are paid by IW from his recovery and are usually 25% of the recovery unless appealed outside of MWCC.
  - > **Third Party Claims.** If a third party has caused the injury, Miss. Code Ann. Section 71-3-71 controls how a recovery from the third party is to be distributed. In general terms, costs of collection (including IW's attorney fees) are first paid; the Employer/Carrier are next reimbursed for their liability under the MWCA; any balance belongs to the IW. Settlements regarding third party recoveries are subject to approval of the MWCC or, if suit has been filed against the third party, the court where the action is pending.
  - > **Medicare's interests.** As in every jurisdiction, every settlement involving closure of future medical must consider Medicare's interests pursuant to 42 USC 1395(y), the Medicare Secondary Payer Statute. Current workload thresholds for submission adopted by CMS:
    - ❖ Settlement greater than \$25,000.00 and Claimant is current Medicare beneficiary;
    - ❖ Settlement greater than \$250,000.00 and a Claimant has a reasonable expectation of becoming a Medicare beneficiary within 30 months.