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Sequence Number: 12-22-14
 Rule ID(s): 5854
 File Date: 12/22/14
 Effective Date: 3/22/15

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing. T.C.A. § 4-5-205

Agency/Board/Commission:	Tennessee Department of Labor and Workforce Development
Division:	Workers' Compensation
Contact Person:	Josh Baker
Address:	220 French Landing Drive, Nashville, Tennessee
Zip:	37243
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

Rule(s) (ALL chapters and rules contained in filing must be listed. If needed, copy and paste additional tables to accommodate more than one chapter. Please enter only ONE Rule Number/Rule Title per row.)

Chapter Number	Chapter Title
0800-02-01	General Rules of the Workers' Compensation Program
Rule Number	Rule Title
0800-02-01-.25	Medical Panels
0800-02-01-.26	Second Injury Fund Reimbursements

Revision Type (check all that apply):

- Amendment
 New
 Repeal

Chapter Number	Chapter Title
0800-02-24	Enforcement Procedures for the Court of Workers' Compensation Claims
Rule Number	Rule Title
0800-02-24-.01	Purpose and Scope
0800-02-24-.02	Securing Compliance with Orders
0800-02-24-.03	Referrals for Penalty Assessment
0800-02-24-.04	Investigation of Referrals for Penalty Assessment
0800-02-24-.05	Assessment of Civil Penalty
0800-02-24-.06	Appeals of Civil Penalty Assessment
0800-02-24-.07	Payment

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

New Rules
Chapter 0800-02-01
General Rules of the Workers' Compensation Program

Chapter 0800-02-01 is amended by adding the following as a new rule:

Rule 0800-02-01-.25 Medical Panels

- (1) Time requirement for provision of panel of physicians. Upon notice of any workplace injury, other than a minor injury for which no person could reasonably believe requires treatment from a physician, the employer shall immediately provide the injured employee a panel of physicians that meets the statutory requirements for treatment of the injury. In any case where the employer fails to provide a panel of physicians to the employee within a reasonable amount of time, but in no instance longer than five (5) business days from the date the employer has notice of an injury that would qualify for medical benefits, or provides a panel of physicians to the injured employee that does not meet statutory requirements on more than one (1) occasion for the subject injury, the employer may be assessed a civil penalty, not to exceed five thousand dollars (\$5,000).
- (2) Provision of three (3) physician list upon referral by original treating physician. In cases where the authorized treating physician, selected by the employee from the original three (3) physician panel provided by the employer, refers the employee for specialized care, the employer shall be deemed to have accepted the referral, unless the employer, within three (3) business days, provides a panel of three (3) or more independent reputable physicians, surgeons, chiropractors or specialty practice groups to the employee pursuant to T.C.A. § 50-6-204(a)(3)(A). If a panel of three (3) specialists is provided, the employee shall select a provider from the panel and that provider shall become the employee's authorized treating physician. For purposes of this section, receipt of the referral by the employer shall be accomplished whenever a copy of the referral is received at the employer or carrier's place of business by facsimile, email, post, hand delivery or commercial delivery service.

Authority: T.C.A. § 4-3-1409; T.C.A. § 50-6-204; T.C.A. § 50-6-233; T.C.A. § 50-6-118.

Chapter 0800-02-01 is amended by adding the following as a new rule:

Rule 0800-02-01-.26 Second Injury Fund Reimbursements

- (1) Any party seeking reimbursement from the Second Injury Fund pursuant to T.C.A. § 50-6-238(b) (2013) shall submit proof of the amount of money paid pursuant to the order of the specialist contemporaneously with the party's submission of a certified copy of an appropriate order to the Division via certified mail.
- (2) A copy of a signed SD-1 form for the claim shall constitute proof of payment. If an SD-1 is not available, any of the following may be submitted as proof of payment:
 - (a) Copies of EOB's (Explanation of Benefits) from the provider showing the provision of medical services for the claim;
 - (b) Copies of checks demonstrating payment for temporary disability or medical benefits provided to the employee for the claim; or
 - (c) Any other proof of payment deemed acceptable by the Division.
- (3) A reimbursement request that does not include documentation satisfying the requirements of this rule shall not be considered as having been received by the Division and interest as provided by T.C.A. § 50-6-238(b) (2013) shall not begin to accrue until such documentation has been received by the Division.

Authority: T.C.A. § 4-3-1409; T.C.A. § 50-6-238 (2013); T.C.A. § 50-6-233.

Chapter 0800-02-24
Enforcement Procedures for the Court of Workers' Compensation Claims

Rule 0800-02-24.01 Purpose and Scope

These rules are intended to ensure the effective and expedient resolution of workers' compensation claims within the adjudication process provided through the court of workers' compensation claims and the attendant mediation process. These rules govern only the procedures for the assessment of civil penalties that arise from actions related to the adjudication of claims with a date of injury that is on or after July 1, 2014, in the court of workers' compensation claims and the attendant mediation process. In addition to these penalties, the Division may also assess civil penalties, where appropriate, pursuant to Division rules.

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.02 Securing Compliance with Orders

- (1) Whenever a judge has issued an interlocutory or final order in a workers' compensation claim and a party has failed to comply with that order, the party seeking enforcement of the order may file a motion to compel with the court requesting that the court enforce the order. Prior to filing the motion, the moving party must make an attempt to contact the opposing party to inform the party that a motion to enforce the order will be filed.
- (2) Before filing the motion, the moving party must contact the clerk's office to obtain a date that the judge is available to hear the motion. The moving party shall include a notice of hearing in the motion setting forth the date and time of the hearing before filing the motion with the clerk. The moving party shall serve a copy of the motion and notice upon all other parties to the claim in the manner provided by rule 0800-02-21-.09.
- (3) All parties may file a response to the motion. Any response must be filed with the clerk and served upon all other parties to the claim in the manner provided by rule 0800-02-21-.09. All responses must be filed and served not later than five (5) calendar days before the scheduled hearing.
- (4) If at the hearing, the judge determines that a party has failed to comply with the order at issue, the judge, in addition to ordering compliance with the order, may refer the noncompliant party to the Division's penalty program for the assessment of a civil penalty.

Authority: T.C.A. § 50-6-118 and T.C.A. § 50-6-239.

Rule 0800-02-24-.03 Referrals for Penalty Assessment

In addition to referrals made by a workers' compensation judge, any Division employee may refer any person or entity to the penalty program for the assessment of a civil penalty whenever the referring employee believes that there may have been a violation of the Division's rules or the Tennessee Workers' Compensation Act. Pursuant to this chapter, the penalty program shall be responsible for investigating all referrals for civil penalties, making determinations of whether assessment of a civil penalty is appropriate under the circumstances, assessing civil penalties, collecting civil penalties, and appearing at contested case hearings whenever a party that has been assessed a civil penalty chooses to challenge the assessment.

Authority: T.C.A. § 50-6-118 and T.C.A. § 50-6-239.

Rule 0800-02-24-.04 Investigation of Referrals for Penalty Assessment

- (1) Upon receipt of a referral, the referral shall be assigned to an employee of the penalty program who shall attempt to collect all information necessary to determine whether a civil penalty should be assessed.
- (2) In investigating a referral, the investigating employee may contact any person or entity involved in the claim.

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.05 Assessment of Civil Penalty

- (1) The investigating employee may assess a civil penalty for each action of not less than fifty dollars (\$50) but no more than five thousand dollars (\$5,000) against the person or entity that is the subject of the referral for the following acts:

- (a) Failed to attend a scheduled alternative dispute resolution proceeding;
 - (b) Arrived more than thirty minutes late to any scheduled alternative dispute resolution proceeding without previously notifying the mediator of their tardiness;
 - (c) Denied or stopped providing benefits for a claim of temporary disability or medical benefits without first performing a reasonable investigation of the claim;
 - (d) Provided medical providers on a Form C-42 that the party knew, should have known, or had good reason to believe, would not provide treatment for the injured employee;
 - (e) Provided medical providers on a Form C-42 in an untimely manner;
 - (f) Failed to comply within a reasonable amount of time with any appropriate request or directive of an ombudsman;
 - (g) Failed to timely provide documents as required by the Tennessee workers' compensation act or the Division's rules; or
 - (h) Failed to provide a representative with authority to settle a case at alternative dispute resolution proceeding.
- (2) In addition to the assessment authority provided in paragraph (1), the investigating employee shall assess a civil penalty of not less than fifty dollars (\$50) but no more than five thousand dollars (\$5,000) against the person or entity that has failed to comply with any order of a workers' compensation judge in a timely manner or has performed any of the actions enumerated in § 29-9-102 in relation to any proceedings in the court of workers' compensation claims. In assessing a penalty under this subsection, the investigating employee shall not be required to determine that the person or entity acted in bad faith.
- (3) The investigating employee shall send written notice of the assessment to the assessed party in the manner provided by rule 0800-02-21-.09.
- (4) The person or entity against whom the penalty has been assessed shall have fifteen (15) calendar days from the date the penalty is assessed to challenge the assessment by requesting a contested case hearing. If a contested case hearing is not timely requested, the penalty shall become due and payable and shall not be subject to further review.
- (5) Failure to pay the penalty within five (5) business days after it has become due and payable may result in the assessment of additional civil penalties.
- (6) In addition to these penalties, the investigating employee may assess a civil penalty of up to five thousand dollars (\$5,000) for a violation of rule 0800-02-01-.25(1).

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.06 Appeals of Civil Penalty Assessment

- (1) All requests for a contested case hearing must be made in writing, received by the Division, and must include a copy of the penalty assessment.
- (2) A request for a contested case hearing shall not be timely unless the request is received by the Division before the close of business on the fifteenth (15th) calendar day after the date the penalty was assessed.

- (3) If the referral for a civil penalty was made by a workers' compensation judge, the judge who made the referral shall not be required to provide testimony, via deposition or in person, at the contested case hearing.
- (4) After the request has been filed, the contested case hearing shall be conducted in the manner provided by rule 0800-02-13-.17.

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.07 Payment

- (1) Unless otherwise provided by law, penalties shall be made payable to the Division of Workers' Compensation. Payment may be made by check or credit card and, if made by check, must be mailed to the Division at the address provided on the penalty assessment notice.
- (2) All penalties collected by the Division from an employer for failure to provide workers' compensation coverage or failure to qualify as a self-insurer shall be paid into and become a part of the uninsured employers fund. All other penalties collected pursuant to an assessment made under this section shall be paid to the division for use by the division, at the discretion of the administrator, to offset the cost of administering this chapter.

Authority: T.C.A. § 50-6-118.

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Division of Workers' Compensation (board/commission/ other authority) on January 10, 2014, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 12/18/13

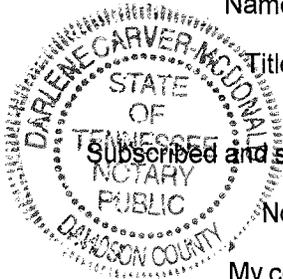
Rulemaking Hearing(s) Conducted on: (add more dates). 2/ 14/14

Date: November 5, 2014

Signature: Abbie Hudgens

Name of Officer: Abbie Hudgens

Title of Officer: Administrator, Division of Workers' Compensation



Subscribed and sworn to before me on: November 5, 2014

Notary Public Signature: Darlene Carver McDaniel

My commission expires on: May 9, 2017

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
 Herbert H. Slatery III
 Attorney General and Reporter
12/17/2014
 Date

Department of State Use Only

SECRETARY OF STATE
 RECEIVED
 2014 DEC 22 PM 2:01

Filed with the Department of State on: 12/22/14

Effective on: 3/22/15

Tre Hargett
 Tre Hargett
 Secretary of State

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

PUBLIC COMMENTS AND RESPONSES

Comment: There is no process provided for obtaining subpoenas.

Response: The Division agrees with the comment. The rules have been revised to include instructions on how to obtain subpoenas.

Comment: The Division should add a requirement to Rule 0800-02-23-.02 that the parties to attempt to resolve the issue informally before filing a motion for enforcement of an order with the court. Adding the requirement would save judicial resources.

Response: The Division agrees with the comment and has amended the rule to include a requirement that the party seeking enforcement of the order attempt to contact the non-compliant party prior to filing the motion.

Comment: The authority to collect information afforded the investigating employee in rule 0800-02-23-.04(3) is too broad and could result in the parties being required to release sensitive information that is not essential for resolving the referral.

Response: The Division agrees with the comment and has amended the rule to make it clear that only information that is reasonably related to the investigation of the penalty referral must be provided.

Comment: There is a typographical error in Rule 0800-02-23-.05(2). The rule states that maximum penalty will be ten thousand dollars and this is accompanied by a numerical value of \$5,000.

Response: The Division agrees with the response and has amended the rule so that it states the correct maximum penalty amount of five thousand dollars (\$5,000).

Comment: The language in Rule 0800-02-23-.05(2) which mandates that the investigating employee assess a civil penalty whenever a party has failed to comply with an order issued by a workers' compensation judge does not provide appropriate discretion. Suggest changing the language from "shall" to "may."

Response: The Division disagrees with this comment and no changes to the rule will be made. The language is mandatory to ensure that the orders are followed and the authority determination of whether or not a party should be penalized for failing to follow an order issued by a judge is appropriately vested in the judge under the rules.

Comment: The language in Rule 0800-02-23-.07 which provides that the money collected by the Division shall be placed in the Division's general fund account and used to offset the costs of administering the law is constitutionally suspect.

Response: The Division disagrees with the comment. However, because Public Chapter 903 has amended the code to ensure that the penalties collected are utilized to offset program costs, the language is redundant of that in the code and has been removed.

Comment: The language in rule 0800-02-23-.02(2) allows a party to file a motion for enforcement of an order issued by a workers' compensation judge. This rule appears to provide an unnecessary "second bite at the apple" for enforcement of an order.

Response: The Division disagrees that the language is unnecessary or inappropriate. If parties have a concern about compliance with an order, the rule provides an avenue for getting the issue before a judge. The inclusion of this language does not mean that the Division will be abandoning its current enforcement structure. Orders will still be monitored for compliance.

Comment: The language in the rules uses the term "good faith" as a kind of safe harbor for actions taken under the law. Does this represent a departure from the Division's current penalty assessment procedure?

Response: This is not a departure from the current process. The rules provide that penalties for a violation of an order issued by a judge must be assessed which is similar to the process for assessing penalties for violations of orders in the Benefit Review process.

Comment: We are very concerned about the changes to the MIR program in Rule 0800-02-20-.01. The changes could result in the accumulation of unnecessary expenses to procure an impairment rating. Request that the current definition of "dispute of degree in medical impairment" remain in effect.

Response: The Division agrees. This rule has been deleted from the final rules.

Comment: Rule 0800-02-01-.25 references a form to be provided by the Division for use in making a referral to a specialist physician or surgeon. The form cannot be found on the Division's website. Additionally, many in the medical community feel that use of the form would be unnecessarily burdensome.

Rule: The Division agrees with the comment. The portion of Rule 0800-02-01-.25 requiring that the referral be provided on a form approved by the Division has been deleted from the final rules.

Comment: The rules provide for the enforcement of civil penalties through a contested case hearing. Recommend keeping the entire process in house so that the penalties are enforced through the court rather than the contested case hearing process.

Response: The Division appreciates the concern expressed in this comment. However, the use of the contested case hearing procedure for a party to challenge a penalty assessment is statutory and any change to that procedure must come from legislative, as opposed to administrative, action.

Comment: The word "employee" is missing from the first line in the first paragraph of rule 0800-02-23-.05.

Response: The Division agrees. The rule has been amended in the manner suggested by the comment.

Comment: Rule 0800-02-01-.25 provides for the assessment of a civil penalty to be assessed in cases where the employer fails to provide a panel to an injured employee. If no panel is provided, is the physician that the employee visits for treatment deemed to have been accepted by the employer?

Response: The Division cannot respond to this comment. The issue of whether the law deems that the physician the employee utilizes in situations where no panel has been provided will be the authorized treating physician falls outside the scope of these rules. That is a question that will need to be addressed by the courts in reviewing the claims.

Comment: The portion of Rule 0800-02-01-.25 allowing for the provision of a panel of specialist physicians after a referral has been made will result in a delay in treatment for the patient under an early intervention sports medicine treatment model. Recommend inclusion of language allowing the employer to set up a preferred treatment panel to be provided by the treating physician when a referral is made.

Response: The Division neither agrees nor disagrees with this comment. There is nothing in the law that would prohibit an employer from establishing these types of panels to be utilized by their initial panel physicians so no change to the rules is necessary to address this issue.

Comment: Recommend adding the phrase "to the authorized employer representative" to the second sentence of paragraph 1 in rule 0800-02-01-.25(1).

Response: The Division disagrees with the recommendation made by this comment and no changes will be made to the rule. The change suggested by the comment could result in unnecessary difficulty for an employee in both reporting a claim and securing treatment. Furthermore, the rules are structured so that the employer will not be penalized when the failure to provide a panel was the result of an honest mistake or miscommunication.

Comment: Recommend reducing the amount of the maximum fine as it would be unaffordable to small business and overly burdensome on businesses in general.

Response: The Division disagrees. The penalties provided are in a range from \$50 to \$5,000 and no specific amount is required for any action. Furthermore, the maximum penalty is one-half of the maximum penalty provided under current law for the same or similar malfeasance.

Comment: Recommend clarifying that when an employer does not provide a panel of specialists, the specialist to whom the employee has been referred will become the authorized treating physician.

Response: The Division agrees with this comment. Rule 0800-02-01-.25(2) has been amended to reflect the changes suggested by the this comment.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

STATEMENT OF ECONOMIC IMPACT TO SMALL BUSINESSES

1. The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule: The amended rules will affect small employers that fall under the Tennessee Workers' Compensation Laws, which would be employers with at least five employees, or in the construction industry, at least one employee. The rules address the procedure for enforcing orders issued by a workers' compensation judge through the assessment of a civil penalty. Accordingly, any small business that refused to comply with an order issued by a workers' compensation judge could be penalized. However, the penalty could easily be avoided by complying with an order issued by a judge. Furthermore, in the past when similar penalties have been issued, the penalties have been paid by the insurance carrier. Finally, the maximum penalty amount that may be assessed under these rules is 50% less than the maximum amount that may be assessed under current law. Accordingly, the new procedures would be less burdensome in cases where the maximum penalty is assessed.
2. The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record: Generally, record keeping and administrative duties will be performed by employers' insurance carriers or third party administrators. Accordingly, any administrative impact to small businesses should be minimal.
3. A statement of the probable effect on impacted small businesses and consumers: Since the penalties assessed under these rules will generally be borne by the insurance carrier, the impact on small businesses and consumers should be minimal.
4. A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business: There are no less burdensome methods to achieve the purposes and objectives of these rules.
5. Comparison of the proposed rule with any federal or state counterparts: None.
6. Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule: It would be detrimental to small businesses that fall under the Tennessee Workers' Compensation Laws to be exempt from these rules because they are intended to ensure the effective administration of claims through the newly created Court of Workers' Compensation Claims. It is expected that the Court will provide speedier and more predictive outcomes in workers' compensation claims which should prove beneficial to the overall health of the Tennessee economy.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

Local governments have the option to accept the provisions of the workers' compensation laws pursuant to T.C.A. § 50-6-106(6), but are not required to do so. For those local governments that do accept the provisions of the workers' compensation laws, the impact of the rule amendments will be minimal.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

These rules provide the procedures for enforcement of orders issued by a judge on the Tennessee Court of Workers' Compensation Claims. The rules also provide enforcement authority to ensure that all parties to the mediation process are participating in the program faithfully. As these are all new rules, there is no change to any existing regulations.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

Public Chapters 282 and 289 made many statutory changes to the Tennessee Workers' Compensation Law and the adjudication of workers' compensation claims. These rules effectuate those changes.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Many groups will be affected by the rules including all attorneys practicing workers' compensation law; all employees that suffer an injury, on or after July 1, 2014, that is compensable under the Tennessee Workers' Compensation Law; all employers employing employees that suffer an injury, on or after July 1, 2014, that is compensable under the Tennessee Workers' Compensation Law; the Tennessee Bar Association; the Tennessee Chamber of Commerce; the National Federation of Independent Businesses, the Tennessee Medical Association, all doctors who treat workers' compensation patients, the Tennessee Hospital Association, and the AFL-CIO. None of these groups has urged adoption or rejection of the rules but many have provided comments which the Division has addressed.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

Local governments have the option to accept the provisions of the workers' compensation laws pursuant to T.C.A. § 50-6-106(6), but are not required to do so. For those local governments that do accept the provisions of the workers' compensation laws, the fiscal impact of the rule amendments will be minimal as these are largely procedural rules. The state government is subject to some provisions of the workers' compensation laws, but not all, and will not be impacted by these rule amendments.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation

- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

220 French Landing Drive
Floor 1-B
Nashville, TN 37243
(615) 253-6909
Josh.baker@tn.gov

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

None

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Rule 0800-02-01-.25 Medical Panels

- (1) Time requirement for provision of panel of physicians. Upon notice of any workplace injury, other than a minor injury for which no person could reasonably believe requires treatment from a physician, the employer shall immediately provide the injured employee a panel of physicians that meets the statutory requirements for treatment of the injury. In any case where the employer fails to provide a panel of physicians to the employee within a reasonable amount of time, but in no instance longer than five (5) business days from the date the employer has notice of an injury that would qualify for medical benefits, or provides a panel of physicians to the injured employee that does not meet statutory requirements on more than one (1) occasion for the subject injury, the employer may be assessed a civil penalty, not to exceed five thousand dollars (\$5,000).
- (2) Provision of three (3) physician list upon referral by original treating physician. In cases where the authorized treating physician, selected by the employee from the original three (3) physician panel provided by the employer, refers the employee for specialized care, the employer shall be deemed to have accepted the referral, unless the employer, within three (3) business days, provides a panel of three (3) or more independent reputable physicians, surgeons, chiropractors or specialty practice groups to the employee pursuant to T.C.A. § 50-6-204(a)(3)(A). If a panel of three (3) specialists is provided, the employee shall select a provider from the panel and that provider shall become the employee's authorized treating physician. For purposes of this section, receipt of the referral by the employer shall be accomplished whenever a copy of the referral is received at the employer or carrier's place of business by facsimile, email, post, hand delivery or commercial delivery service.

Authority: T.C.A. § 4-3-1409; T.C.A. § 50-6-204; T.C.A. § 50-6-233; T.C.A. § 50-6-118.

Chapter 0800-02-01 is amended by adding the following as a new rule:

Rule 0800-02-01-.26 Second Injury Fund Reimbursements

- (1) Any party seeking reimbursement from the Second Injury Fund pursuant to T.C.A. § 50-6-238(b) (2013) shall submit proof of the amount of money paid pursuant to the order of the specialist contemporaneously with the party's submission of a certified copy of an appropriate order to the Division via certified mail.
- (2) A copy of a signed SD-1 form for the claim shall constitute proof of payment. If an SD-1 is not available, any of the following may be submitted as proof of payment:
 - (a) Copies of EOB's (Explanation of Benefits) from the provider showing the provision of medical services for the claim;
 - (b) Copies of checks demonstrating payment for temporary disability or medical benefits provided to the employee for the claim; or
 - (c) Any other proof of payment deemed acceptable by the Division.
- (3) A reimbursement request that does not include documentation satisfying the requirements of this rule shall not be considered as having been received by the Division and interest as provided by T.C.A. § 50-6-238(b) (2013) shall not begin to accrue until such documentation has been received by the Division.

Authority: T.C.A. § 4-3-1409; T.C.A. § 50-6-238 (2013); T.C.A. § 50-6-233.

Chapter 0800-02-24
Enforcement Procedures for the Court of Workers' Compensation Claims

Rule 0800-02-24.01 Purpose and Scope

These rules are intended to ensure the effective and expedient resolution of workers' compensation claims within the adjudication process provided through the court of workers' compensation claims and the attendant mediation process. These rules govern only the procedures for the assessment of civil penalties that arise from actions related to the adjudication of claims with a date of injury that is on or after July 1, 2014, in the court of workers' compensation claims and the attendant mediation process. In addition to these penalties, the Division may also assess civil penalties, where appropriate, pursuant to Division rules.

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.02 Securing Compliance with Orders

- (1) Whenever a judge has issued an interlocutory or final order in a workers' compensation claim and a party has failed to comply with that order, the party seeking enforcement of the order may file a motion to compel with the court requesting that the court enforce the order. Prior to filing the motion, the moving party must make an attempt to contact the opposing party to inform the party that a motion to enforce the order will be filed.
- (2) Before filing the motion, the moving party must contact the clerk's office to obtain a date that the judge is available to hear the motion. The moving party shall include a notice of hearing in the motion setting forth the date and time of the hearing before filing the motion with the clerk. The moving party shall serve a copy of the motion and notice upon all other parties to the claim in the manner provided by rule 0800-02-21-.09.
- (3) All parties may file a response to the motion. Any response must be filed with the clerk and served upon all other parties to the claim in the manner provided by rule 0800-02-21-.09. All responses must be filed and served not later than five (5) calendar days before the scheduled hearing.
- (4) If at the hearing, the judge determines that a party has failed to comply with the order at issue, the judge, in addition to ordering compliance with the order, may refer the noncompliant party to the Division's penalty program for the assessment of a civil penalty.

Authority: T.C.A. § 50-6-118 and T.C.A. § 50-6-239.

Rule 0800-02-24-.03 Referrals for Penalty Assessment

In addition to referrals made by a workers' compensation judge, any Division employee may refer any person or entity to the penalty program for the assessment of a civil penalty whenever the referring employee believes that there may have been a violation of the Division's rules or the Tennessee Workers' Compensation Act. Pursuant to this chapter, the penalty program shall be responsible for investigating all referrals for civil penalties, making determinations of whether assessment of a civil penalty is appropriate under the circumstances, assessing civil penalties, collecting civil penalties, and appearing at contested case hearings whenever a party that has been assessed a civil penalty chooses to challenge the assessment.

Authority: T.C.A. § 50-6-118 and T.C.A. § 50-6-239.

Rule 0800-02-24-.04 Investigation of Referrals for Penalty Assessment

- (1) Upon receipt of a referral, the referral shall be assigned to an employee of the penalty program who shall attempt to collect all information necessary to determine whether a civil penalty should be assessed.
- (2) In investigating a referral, the investigating employee may contact any person or entity involved in the claim.

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.05 Assessment of Civil Penalty

- (1) The investigating employee may assess a civil penalty for each action of not less than fifty dollars (\$50) but no more than five thousand dollars (\$5,000) against the person or entity that is the subject of the referral for the following acts:

- (a) Failed to attend a scheduled alternative dispute resolution proceeding;
 - (b) Arrived more than thirty minutes late to any scheduled alternative dispute resolution proceeding without previously notifying the mediator of their tardiness;
 - (c) Denied or stopped providing benefits for a claim of temporary disability or medical benefits without first performing a reasonable investigation of the claim;
 - (d) Provided medical providers on a Form C-42 that the party knew, should have known, or had good reason to believe, would not provide treatment for the injured employee;
 - (e) Provided medical providers on a Form C-42 in an untimely manner;
 - (f) Failed to comply within a reasonable amount of time with any appropriate request or directive of an ombudsman;
 - (g) Failed to timely provide documents as required by the Tennessee workers' compensation act or the Division's rules; or
 - (h) Failed to provide a representative with authority to settle a case at alternative dispute resolution proceeding.
- (2) In addition to the assessment authority provided in paragraph (1), the investigating employee shall assess a civil penalty of not less than fifty dollars (\$50) but no more than five thousand dollars (\$5,000) against the person or entity that has failed to comply with any order of a workers' compensation judge in a timely manner or has performed any of the actions enumerated in § 29-9-102 in relation to any proceedings in the court of workers' compensation claims. In assessing a penalty under this subsection, the investigating employee shall not be required to determine that the person or entity acted in bad faith.
- (3) The investigating employee shall send written notice of the assessment to the assessed party in the manner provided by rule 0800-02-21-.09.
- (4) The person or entity against whom the penalty has been assessed shall have fifteen (15) calendar days from the date the penalty is assessed to challenge the assessment by requesting a contested case hearing. If a contested case hearing is not timely requested, the penalty shall become due and payable and shall not be subject to further review.
- (5) Failure to pay the penalty within five (5) business days after it has become due and payable may result in the assessment of additional civil penalties.
- (6) In addition to these penalties, the investigating employee may assess a civil penalty of up to five thousand dollars (\$5,000) for a violation of rule 0800-02-01-.25(1).

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.06 Appeals of Civil Penalty Assessment

- (1) All requests for a contested case hearing must be made in writing, received by the Division, and must include a copy of the penalty assessment.
- (2) A request for a contested case hearing shall not be timely unless the request is received by the Division before the close of business on the fifteenth (15th) calendar day after the date the penalty was assessed.

- (3) If the referral for a civil penalty was made by a workers' compensation judge, the judge who made the referral shall not be required to provide testimony, via deposition or in person, at the contested case hearing.
- (4) After the request has been filed, the contested case hearing shall be conducted in the manner provided by rule 0800-02-13-.17.

Authority: T.C.A. § 50-6-118.

Rule 0800-02-24-.07 Payment

- (1) Unless otherwise provided by law, penalties shall be made payable to the Division of Workers' Compensation. Payment may be made by check or credit card and, if made by check, must be mailed to the Division at the address provided on the penalty assessment notice.
- (2) All penalties collected by the Division from an employer for failure to provide workers' compensation coverage or failure to qualify as a self-insurer shall be paid into and become a part of the uninsured employers fund. All other penalties collected pursuant to an assessment made under this section shall be paid to the division for use by the division, at the discretion of the administrator, to offset the cost of administering this chapter.

Authority: T.C.A. § 50-6-118.

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Division of Workers' Compensation (board/commission/ other authority) on January 10, 2014, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 12/18/13

Rulemaking Hearing(s) Conducted on: (add more dates). 2/ 14/14

Date: _____

Signature: _____

Name of Officer: Abbie Hudgens

Title of Officer: Administrator, Division of Workers' Compensation

Subscribed and sworn to before me on: _____

Notary Public Signature: _____

My commission expires on: _____

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Attorney General and Reporter

Date

Department of State Use Only

Filed with the Department of State on: _____

Effective on: _____

Tre Hargett
Secretary of State

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

PUBLIC COMMENTS AND RESPONSES

Comment: There is no process provided for obtaining subpoenas.

Response: The Division agrees with the comment. The rules have been revised to include instructions on how to obtain subpoenas.

Comment: The Division should add a requirement to Rule 0800-02-23-.02 that the parties to attempt to resolve the issue informally before filing a motion for enforcement of an order with the court. Adding the requirement would save judicial resources.

Response: The Division agrees with the comment and has amended the rule to include a requirement that the party seeking enforcement of the order attempt to contact the non-compliant party prior to filing the motion.

Comment: The authority to collect information afforded the investigating employee in rule 0800-02-23-.04(3) is too broad and could result in the parties being required to release sensitive information that is not essential for resolving the referral.

Response: The Division agrees with the comment and has amended the rule to make it clear that only information that is reasonably related to the investigation of the penalty referral must be provided.

Comment: There is a typographical error in Rule 0800-02-23-.05(2). The rule states that maximum penalty will be ten thousand dollars and this is accompanied by a numerical value of \$5,000.

Response: The Division agrees with the response and has amended the rule so that it states the correct maximum penalty amount of five thousand dollars (\$5,000).

Comment: The language in Rule 0800-02-23-.05(2) which mandates that the investigating employee assess a civil penalty whenever a party has failed to comply with an order issued by a workers' compensation judge does not provide appropriate discretion. Suggest changing the language from "shall" to "may."

Response: The Division disagrees with this comment and no changes to the rule will be made. The language is mandatory to ensure that the orders are followed and the authority determination of whether or not a party should be penalized for failing to follow an order issued by a judge is appropriately vested in the judge under the rules.

Comment: The language in Rule 0800-02-23-.07 which provides that the money collected by the Division shall be placed in the Division's general fund account and used to offset the costs of administering the law is constitutionally suspect.

Response: The Division disagrees with the comment. However, because Public Chapter 903 has amended the code to ensure that the penalties collected are utilized to offset program costs, the language is redundant of that in the code and has been removed.

Comment: The language in rule 0800-02-23-.02(2) allows a party to file a motion for enforcement of an order issued by a workers' compensation judge. This rule appears to provide an unnecessary "second bite at the apple" for enforcement of an order.

Response: The Division disagrees that the language is unnecessary or inappropriate. If parties have a concern about compliance with an order, the rule provides an avenue for getting the issue before a judge. The inclusion of this language does not mean that the Division will be abandoning its current enforcement structure. Orders will still be monitored for compliance.

Comment: The language in the rules uses the term "good faith" as a kind of safe harbor for actions taken under the law. Does this represent a departure from the Division's current penalty assessment procedure?

Response: This is not a departure from the current process. The rules provide that penalties for a violation of an order issued by a judge must be assessed which is similar to the process for assessing penalties for violations of orders in the Benefit Review process.

Comment: We are very concerned about the changes to the MIR program in Rule 0800-02-20-.01. The changes could result in the accumulation of unnecessary expenses to procure an impairment rating. Request that the current definition of "dispute of degree in medical impairment" remain in effect.

Response: The Division agrees. This rule has been deleted from the final rules.

Comment: Rule 0800-02-01-.25 references a form to be provided by the Division for use in making a referral to a specialist physician or surgeon. The form cannot be found on the Division's website. Additionally, many in the medical community feel that use of the form would be unnecessarily burdensome.

Rule: The Division agrees with the comment. The portion of Rule 0800-02-01-.25 requiring that the referral be provided on a form approved by the Division has been deleted from the final rules.

Comment: The rules provide for the enforcement of civil penalties through a contested case hearing. Recommend keeping the entire process in house so that the penalties are enforced through the court rather than the contested case hearing process.

Response: The Division appreciates the concern expressed in this comment. However, the use of the contested case hearing procedure for a party to challenge a penalty assessment is statutory and any change to that procedure must come from legislative, as opposed to administrative, action.

Comment: The word "employee" is missing from the first line in the first paragraph of rule 0800-02-23-.05.

Response: The Division agrees. The rule has been amended in the manner suggested by the comment.

Comment: Rule 0800-02-01-.25 provides for the assessment of a civil penalty to be assessed in cases where the employer fails to provide a panel to an injured employee. If no panel is provided, is the physician that the employee visits for treatment deemed to have been accepted by the employer?

Response: The Division cannot respond to this comment. The issue of whether the law deems that the physician the employee utilizes in situations where no panel has been provided will be the authorized treating physician falls outside the scope of these rules. That is a question that will need to be addressed by the courts in reviewing the claims.

Comment: The portion of Rule 0800-02-01-.25 allowing for the provision of a panel of specialist physicians after a referral has been made will result in a delay in treatment for the patient under an early intervention sports medicine treatment model. Recommend inclusion of language allowing the employer to set up a preferred treatment panel to be provided by the treating physician when a referral is made.

Response: The Division neither agrees nor disagrees with this comment. There is nothing in the law that would prohibit an employer from establishing these types of panels to be utilized by their initial panel physicians so no change to the rules is necessary to address this issue.

Comment: Recommend adding the phrase "to the authorized employer representative" to the second sentence of paragraph 1 in rule 0800-02-01-.25(1).

Response: The Division disagrees with the recommendation made by this comment and no changes will be made to the rule. The change suggested by the comment could result in unnecessary difficulty for an employee in both reporting a claim and securing treatment. Furthermore, the rules are structured so that the employer will not be penalized when the failure to provide a panel was the result of an honest mistake or miscommunication.

Comment: Recommend reducing the amount of the maximum fine as it would be unaffordable to small business and overly burdensome on businesses in general.

Response: The Division disagrees. The penalties provided are in a range from \$50 to \$5,000 and no specific amount is required for any action. Furthermore, the maximum penalty is one-half of the maximum penalty provided under current law for the same or similar malfeasance.

Comment: Recommend clarifying that when an employer does not provide a panel of specialists, the specialist to whom the employee has been referred will become the authorized treating physician.

Response: The Division agrees with this comment. Rule 0800-02-01-.25(2) has been amended to reflect the changes suggested by the this comment.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

STATEMENT OF ECONOMIC IMPACT TO SMALL BUSINESSES

1. The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule: The amended rules will affect small employers that fall under the Tennessee Workers' Compensation Laws, which would be employers with at least five employees, or in the construction industry, at least one employee. The rules address the procedure for enforcing orders issued by a workers' compensation judge through the assessment of a civil penalty. Accordingly, any small business that refused to comply with an order issued by a workers' compensation judge could be penalized. However, the penalty could easily be avoided by complying with an order issued by a judge. Furthermore, in the past when similar penalties have been issued, the penalties have been paid by the insurance carrier. Finally, the maximum penalty amount that may be assessed under these rules is 50% less than the maximum amount that may be assessed under current law. Accordingly, the new procedures would be less burdensome in cases where the maximum penalty is assessed.
2. The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record: Generally, record keeping and administrative duties will be performed by employers' insurance carriers or third party administrators. Accordingly, any administrative impact to small businesses should be minimal.
3. A statement of the probable effect on impacted small businesses and consumers: Since the penalties assessed under these rules will generally be borne by the insurance carrier, the impact on small businesses and consumers should be minimal.
4. A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business: There are no less burdensome methods to achieve the purposes and objectives of these rules.
5. Comparison of the proposed rule with any federal or state counterparts: None.
6. Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule: It would be detrimental to small businesses that fall under the Tennessee Workers' Compensation Laws to be exempt from these rules because they are intended to ensure the effective administration of claims through the newly created Court of Workers' Compensation Claims. It is expected that the Court will provide speedier and more predictive outcomes in workers' compensation claims which should prove beneficial to the overall health of the Tennessee economy.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

Local governments have the option to accept the provisions of the workers' compensation laws pursuant to T.C.A. § 50-6-106(6), but are not required to do so. For those local governments that do accept the provisions of the workers' compensation laws, the impact of the rule amendments will be minimal.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

These rules provide the procedures for enforcement of orders issued by a judge on the Tennessee Court of Workers' Compensation Claims. The rules also provide enforcement authority to ensure that all parties to the mediation process are participating in the program faithfully. As these are all new rules, there is no change to any existing regulations.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

Public Chapters 282 and 289 made many statutory changes to the Tennessee Workers' Compensation Law and the adjudication of workers' compensation claims. These rules effectuate those changes.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Many groups will be affected by the rules including all attorneys practicing workers' compensation law; all employees that suffer an injury, on or after July 1, 2014, that is compensable under the Tennessee Workers' Compensation Law; all employers employing employees that suffer an injury, on or after July 1, 2014, that is compensable under the Tennessee Workers' Compensation Law; the Tennessee Bar Association; the Tennessee Chamber of Commerce; the National Federation of Independent Businesses, the Tennessee Medical Association, all doctors who treat workers' compensation patients, the Tennessee Hospital Association, and the AFL-CIO. None of these groups has urged adoption or rejection of the rules but many have provided comments which the Division has addressed.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

Local governments have the option to accept the provisions of the workers' compensation laws pursuant to T.C.A. § 50-6-106(6), but are not required to do so. For those local governments that do accept the provisions of the workers' compensation laws, the fiscal impact of the rule amendments will be minimal as these are largely procedural rules. The state government is subject to some provisions of the workers' compensation laws, but not all, and will not be impacted by these rule amendments.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation

- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

None