

***MISSISSIPPI WORKERS'
COMPENSATION***

LAW AND CLAIMS PROCEDURES

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Table of Contents¹

I.	REPORTING THE CLAIM	<u>1</u>
A.	What Injuries Must be Reported?	<u>1</u>
B.	What Forms Must be Used?	<u>1</u>
	1. "Workers' Compensation-First Report of Injury or Illness" Form	<u>1</u>
	a. items to be completed	<u>1</u>
	2. MWCC Form B-39	<u>2</u>
	3. MWCC Form R-1	<u>3</u>
	a. items to be completed	<u>3</u>
C.	When Must Reports be Filed With the Commission?	<u>3</u>
D.	How is Filing Accomplished?	<u>3</u>
E.	Penalty for Failure to Timely Report	<u>3</u>
II.	PROCESSING THE CLAIM	<u>4</u>
A.	Paying and Reporting Disability Benefits	<u>4</u>
	1. Average weekly wage	<u>4</u>
	2. Minimum and maximum benefits	<u>6</u>
	3. Waiting period	<u>7</u>
	4. Temporary benefits	<u>8</u>
	a. temporary total disability	<u>8</u>
	b. temporary partial disability	<u>8</u>
	c. date due	<u>9</u>
	5. Permanent benefits	<u>9</u>
	a. whole body impairments	<u>9</u>
	b. scheduled member impairments	<u>11</u>
	c. permanent total disability	<u>12</u>
	(1) date due	<u>13</u>
	d. permanent partial disability	<u>14</u>
	(1) scheduled member formula	<u>14</u>
	(2) body as a whole formula	<u>14</u>
	(3) date due	<u>15</u>
	(4) acceleration	<u>15</u>
	6. Lump sum payments	<u>15</u>
	7. Forms	<u>16</u>

¹ This paper is designed to provide general information only and to aid in the reporting and processing of non-controverted workers' compensation claims (those being administered and paid on a voluntary basis); The controverted claims procedure is beyond the scope of this paper and may be found generally in the Procedural Rules of the Commission. References hereafter to the "Act" or "Law" are to the Mississippi Workers' Compensation Law, §71-3-1 et seq. (Rev. 2000). The opinions expressed herein are those of the authors alone and should not under any circumstance be regarded as the opinion or view of the Mississippi Workers' Compensation Commission. Furthermore, nothing stated or provided herein should be construed or regarded as legal advice or an attempt to provide legal advice.

8.	Credit	<u>16</u>
	a. advancements	<u>16</u>
	b. wages paid in lieu of compensation; earned wages	<u>16</u>
	c. unemployment benefits	<u>17</u>
	d. sick/vacation pay	<u>17</u>
	e. other collateral benefits	<u>18</u>
B.	Paying and Reporting Medical Benefits	<u>18</u>
	1. Choice of physician	<u>19</u>
	2. Fee schedule	<u>20</u>
	3. Mileage	<u>20</u>
	4. Forms	<u>20</u>
	5. Balance billing	<u>20</u>
C.	Paying and Reporting Death Benefits	<u>21</u>
	1. Funeral expenses	<u>22</u>
	2. Lump sum payment to spouse	<u>22</u>
	3. Weekly benefits	<u>22</u>
	a. spouse only	<u>22</u>
	b. child(ren) only	<u>22</u>
	c. spouse and child(ren)	<u>23</u>
	d. no spouse or child(ren) or aggregate less than maximum	<u>23</u>
	4. Minimum and maximum benefits	<u>23</u>
	5. Pro rating death benefits.	<u>24</u>
	6. Forms	<u>25</u>
	7. Second Injury Fund	<u>25</u>
D.	Rehabilitation Benefits	<u>25</u>
E.	Suspending Benefits	<u>26</u>
F.	Penalty and Interest	<u>26</u>
G.	Child or Spousal Support Withholding	<u>27</u>
III.	SETTLEMENT OF CLAIMS	<u>28</u>
	A. Lump Sum Settlements (a/k/a "13(j) settlement")	<u>28</u>
	B. Compromise Settlement (a/k/a "9(i) settlement).	<u>29</u>
	C. Third Party Settlements	<u>30</u>
IV.	CLOSING THE CLAIM	<u>30</u>
	A. "Medical Only" Claims	<u>30</u>
	B. "Lost Time" Claims	<u>31</u>
	1. MWCC Form B-31 - purpose and effect	<u>31</u>
	2. When and how to file MWCC Form B-31	<u>32</u>

3. Interrupting the statute	<u>34</u>
V. DENYING (CONTROVERTING) THE CLAIM	<u>35</u>
A. MWCC Form B-52	<u>35</u>
VI. IMPORTANT PROVISIONS OF THE MWCA	<u>36</u>
VII. PRACTICAL SUGGESTIONS FOR PROCESSING CLAIMS	<u>37</u>
VIII. DIRECTORY	<u>39</u>
APPENDIX	<u>40</u>
1. Minimum/Maximum Benefits Chart	<u>41</u>
2. How to Apply General Rule 10	<u>42</u>
3. Mileage Chart	<u>44</u>

I. REPORTING THE CLAIM

A. What Injuries Must be Reported? All injuries causing death, or resulting in a loss of time beyond the 5-day waiting period prescribed in Miss. Code Ann. §71-3-11 (Rev. 2000), or which cause or likely will cause permanent disability or serious head or facial disfigurement (e.g. burn, amputation), must be reported to the Commission. Injuries not otherwise provided for above and for which only medical benefits are due (so-called "medical only" claims) need not be reported to the Commission. If, however, a "medical only" claim subsequently causes loss of time in excess of the 5-day waiting period, or causes permanent disability or serious head or facial disfigurement, a report of the injury should be filed thereafter.²

The employer must keep a report of all injuries regardless of consequence, which reports shall be made available to the Commission upon request.³

Also, the employer should report injuries to the Commission only through their carrier, or through their adjusting or servicing company if self-insured.

B. What Forms Must be Used?

1. **"Workers' Compensation-First Report of Injury or Illness" Form:**⁴ This form should be used to report those claims specifically referred to above in part A.

a. **items to be completed:** The form is largely self-explanatory. It is imperative, not only for statistical purposes, but also in order to establish and process a claim in a timely manner, that this form be completed accurately and in its entirety. Set forth below are some of the more important pieces of information which are essential to the claims process⁵:

(1) Provide the complete name, mailing address and FEIN of the employer;

(2) Please show the specific products manufactured or produced by the employer, if applicable. This information is vital for statistical purposes,

² Miss. Code Ann. §71-3-67(1), (2) (Rev. 2000); MWCC Procedural Rule 1 (effective April 1, 2001).

³ Miss. Code Ann. §71-3-65 (Rev. 2000).

⁴ The "Workers Compensation-First Report of Injury or Illness" form has been reproduced by the MWCC with permission of IAIABC, and is a standard workers' compensation form for making the first report of injury or illness.

⁵ This form along with a full set of instructions for this form is available at www.mwcc.state.ms.us.

and provides us with the basis for assigning an appropriate Standard Industrial Classification code ("SIC" code) to the employer. If already known, please include the appropriate SIC code for the employer;

(3) Provide the employee's full name and complete mailing address;

(4) Please furnish the complete name, mailing address and FEIN of the insurance company which issued the policy of insurance. Do not show the agent or agency selling the policy.

If the employer is self-insured, please indicate. If the employer is a member of a self-insured group, please list the complete name of the group (e.g. Miss. Automobile Dealers Association).

If the claim is being processed by a servicing or adjusting company or claims administrator on behalf of the carrier or self-insured (Sedgwick James, e.g.), please provide the complete name, mailing address and FEIN of this company in addition to the above information;

(5) Please provide complete information regarding the nature and cause of the injury as well as the body part(s) affected. This information is vital for statistical purposes. This information provides us with the basis for assigning applicable "NCCI" codes which designate the nature of the injury, the cause of the injury, and the body part(s) affected. If your company currently compiles this same information using applicable "NCCI" codes, please also include the applicable codes;

(6) When providing the date disability began, keep in mind this refers to the day the employee first became unable to earn full pay. This will most often be the day of injury, or the next day, but may not occur until days or weeks later. If the employee was paid in full for the date of injury, and did not return to work, disability begins with the work day next following the date of injury. If the employee is not paid in full for the date of injury, and does not return to work, disability begins that day.⁶

2. **MWCC Form B-39:** This form was formerly used to make quarterly reports of so-called "medical only" claims. It is mentioned here only to alert you to the fact that, effective July 1, 1995, such claims are no longer required to be reported

⁶ MWCC General Rule 11.

to the Commission.⁷

3. **MWCC Form R-1:** This form should be used in addition to the First Report form to report severe injuries such as major amputations, brain damage, spinal cord injuries, severe burns, loss of sight, etc.

a. **items to be completed:** Self-explanatory.

C. When Must Reports be Filed With the Commission? In case of injury causing death, a report should be filed with the Commission within ten (10) days thereafter.

Injuries causing loss of time in excess of the five (5) day waiting period should be reported to the Commission within ten (10) days after the prescribed waiting period has been satisfied.

Within ten (10) days after the employer or carrier knows, or reasonably should know, that an injury has resulted, or likely will result, in permanent disability or serious head or facial disfigurement, but which does not cause a loss of time in excess of the prescribed waiting period (e.g. some amputations or burns), a report thereof shall be filed with the Commission.⁸

D. How is Filing Accomplished? Filing of injury reports may be by regular mail, electronic means⁹, or any other form of delivery reasonably calculated to accomplish receipt by the Commission. If filing is by regular mail, the report shall be considered filed on the date of mailing; if filing is by electronic means, the report shall be considered filed on the date the electronic equipment being used acknowledges receipt of the material; otherwise, the date of filing shall be the date of actual receipt by the Commission.

E. Penalty for Failure to Timely Report. The failure or refusal to file the first report of injury within the time prescribed exposes the employer or carrier to liability for penalties. The Commission may, in its discretion, and after giving the employer or carrier notice and opportunity to show cause to the contrary, levy a penalty not to exceed one hundred dollars (\$100.00) for each report not filed within the time allowed.

In addition to this civil penalty, a sum not to exceed one hundred dollars (\$100.00) may be added to any award made as the result of an injury not timely

⁷ Miss. Code Ann. §71-3-67(2) (Rev. 2000).

⁸ Miss. Code Ann. §71-3-67(1), (2) (Rev. 2000).

⁹ Any attempt to file by electronic means should first be approved by the Commission. Please contact the Commission's Information Systems Manager for further information.

reported.¹⁰

II. PROCESSING THE CLAIM

The payment and reporting of benefits, and the suspension thereof, is what is being referred to herein as the processing of the claim. Set forth below are basic rules to be observed at this stage of the claims process.

A. Paying and Reporting Disability Benefits. Disability benefits take two forms -- temporary disability benefits and permanent disability benefits.¹¹ Disability benefits are a certain sum of money paid directly to the injured employee over a period of days or weeks. These benefits are expressed as a percentage of the average weekly wage of the injured employee at the time of injury, subject to a maximum weekly limit set by law.¹²

1. **Average weekly wage.** Once the decision to pay disability benefits has been made,¹³ a compensation rate must be computed. The compensation rate is the amount of money to be paid an injured employee, and is computed as a weekly amount representing 66 2/3% of the average weekly wage of the injured worker at the time of injury, subject to applicable minimum and maximum limits. This computation begins with the average weekly wage of the injured employee at the time of injury. In computing the average weekly wage, the following rules are to be observed:

(1) if the employee has worked for the same employer for at least 52 weeks immediately preceding the date of injury or disability without losing more than 7 days, total the wages earned by the employee for these 52 weeks and divide by 52 to yield the average weekly wage;

(2) if the employee lost more than 7 days during the 52 weeks immediately preceding the date of injury or disability, and not in the same week, deduct the time lost from 52 weeks and divide the total earnings for this period by the remaining weeks;

(3) if the employee worked less than 52 weeks but at least 4 weeks, divide total

¹⁰ Miss. Code Ann. §71-3-67(4) (Rev. 2000).

¹¹ Although benefits for rehabilitation may also be awarded in an amount not to exceed \$10.00 per week for not more than 52 weeks, those benefits are not being considered here as disability benefits. Miss. Code Ann. §71-3-19 (Rev. 2000).

¹² Miss. Code Ann. §71-3-13, -31 (Rev. 2000).

¹³ What is said here about average weekly wage applies as well to the payment of death benefits. Death benefits are discussed later.

earnings for the period worked by the number of weeks and days worked;¹⁴

(4) if the employee worked less than 4 weeks immediately preceding the date of injury, consideration should be given to basing the average weekly wage on the average wages earned by a person employed in the same grade for the same or similar work, although the employee's own wages, or rate of pay may be used if a just and fair result can be achieved.

(5) "wages" include the money rate paid to the worker plus the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, plus tips and gratuities. This is "gross" wages, not "net" pay.¹⁵ Overtime earnings and regularly recurring bonuses are included. The costs to the employer of providing fringe benefits such as life insurance, health insurance, pension benefits, etc. is not included in the calculation of average weekly wage.¹⁶

(6) for someone employed in two different jobs, count only the earnings from the job being performed at the time in injury, except that wages earned in more than one job for the "same" employer may be combined.¹⁷

(7) the average weekly wage is usually determined from the earnings of the employee during the period immediately preceding the date of injury; however, if there is a lapse of time between the date of the accident or exposure, and the onset of disability (the date the employee begins losing time), compute the average of wages for the period immediately preceding this latter date.¹⁸

(8) if the injury occurs in the middle of a week or pay period, or lost time begins in the middle of a week or pay period, begin the count backwards from the immediately preceding week or pay period.¹⁹

¹⁴ A period of 4 weeks has been considered sufficient to support a fair computation of average weekly wage. H. H. Pepper v. Barrett, 225 Miss. 30, 82 So.2d 580 (1955).

¹⁵ Miss. Code Ann. §71-3-3(k) (Rev. 2000).

¹⁶ Berdia Casey v. Bovina Grocery and Service Industries Workers' Compensation Trust, MWCC No. 94-14709-F-5439-A-00 (May 2, 1997); Walter Glen Johnson v. City of Jackson, MWCC No. 91-03770-F-0983 (Sept. 27, 1995); Donna M. Jones v. Mississippi State Hospital, MWCC No. 91-12646-E-6979 (Aug. 30, 1993).

¹⁷ Sullivan v. City of Okolona, 370 So.2d 921, 924 (Miss. 1979); Miss. Code Ann. §71-3-31 (Rev. 2000). Piney Woods Country Life School v. Young, 946 So.2d 805 (Miss.Ct.App. 2006).

¹⁸ J. H. Moon & Sons v. Johnson, 753 So.2d 445 (Miss. 1999); Dunn, Mississippi Workmen's Compensation, §66.1 (3d ed. 1982).

¹⁹ Id.

(9) in computing the average weekly wage, week refers to actual "work week," not a standard seven day week. In converting days lost into weeks lost, divide total days lost by the number of days in the employee's actual work week. Example: Joe was employed at least 52 weeks immediately preceding the date of his injury on a 5 day work week (Monday to Friday); gross wages for the period were \$10,000.00; Joe missed 50 days of work during this period for which he was not paid; divide 50 days by 5 to yield 10 weeks lost; subtract the 10 weeks from 52; divide total earnings of \$10,000.00 by 42 to yield average weekly wage of \$238.10.

(10) for those paid on salary, divide yearly salary by 52, or multiply monthly salary by 12 and divide by 52, to yield average weekly wage.²⁰

2. **Minimum and maximum benefits.** There are minimum and maximum limits on the amount and duration of compensation to be paid an injured worker for disability, or to the dependents of an injured worker for death. A claim is generally subject to the minimum and maximum limits in effect on the date of injury or death.

For those injuries occurring prior to May 15, 1992, there is a \$25.00 per week minimum on payments for any disability or death, except that this minimum does not apply to one entitled to death benefits who was only partially dependent on the deceased.

Effective May 15, 1992, and for injuries occurring thereafter, the \$25.00 weekly minimum no longer applies in cases of partial disability. It will only apply in cases of total disability, and in death cases, except where there is partial dependency. Thus, one partially disabled is entitled to compensation measured by the degree of partial disability regardless of the amount of the benefit.

No more than once each year, there is established a maximum weekly amount to be paid in the event of injury or death. In the event of injury, this sum represents the maximum amount per week which may be paid to an individual; in death cases, this sum represents the maximum combined amount per week which may be paid to all dependents. This maximum amount represents 66 2/3% of the statewide average weekly wage.

There is also a maximum overall limit which represents the total amount of compensation which may be recovered in the event of disability and/or death.

²⁰ For general discussion of these and other principles related to computation of average weekly wage, see Dunn, supra at §§ 62 - 66.1.

This overall maximum is 450 times the weekly maximum benefit amount. This is the maximum amount to be recovered for injury (disability), for death, or for any combination of injury and death. Medical benefits are excluded from this limit.²¹

Finally, there are weekly limits which govern the duration of compensation payments. For temporary total disability, the weekly limit is 450; for temporary partial disability, the weekly limit is 450; for permanent partial disability, the weekly limit is 450; for permanent total disability, the weekly limit is 450; for death benefits, the weekly limit is 450; and for certain scheduled member injuries and hernias, the weekly limit varies according to the body part injured.²²

The net result of these maximum limits is that benefits may not exceed the currently weekly maximum amount, may not be paid for more than the maximum number of weeks allowed for the particular disability, and the total amount recovered on a claim, excluding medical payments, may not exceed the overall maximum in effect at the time of injury or death.

3. Waiting period. No benefits are payable for disability until the employee shall have incurred more than five (5) days of disability. A day of disability is any day on which the employee is unable, because of injury, to earn his or her full pre-injury wages or pay.²³ No benefits are payable for these first five (5) days of disability unless the employee incurs at least fourteen (14) days of disability, in which case benefits are paid retroactive to the first day of disability.²⁴

In determining whether this waiting period has been met, there is no

²¹ A chart showing current and previous limits may be found in the Appendix.

²² See Miss. Code Ann. §§71-3-13, -17, -21, -23, -25 (Rev. 2000); but see Walls v. Hodo Chevrolet Company, Inc., 302 So.2d 862, 867 (Miss. 1974) (holding that "the only limits to recovery by an injured employee under the Mississippi Workmen's Compensation Act are that the weekly benefits shall not exceed the sum prescribed by the Act and the benefits shall be paid for a period of time not to exceed 450 weeks or the total sum allowed by the Act, whichever is less.") (emphasis added). This opinion is directly contrary to the plain language of the Act and is probably due to the fact that Hodo was a permanent total disability case. Payments for permanent total disability are limited to 450 weeks and are retroactive to the first day of disability. Therefore, the limit on permanent total disability benefits would be 450 weeks or the maximum dollar amount set by the Act, whichever is less. This is the rule for death cases as well since benefits are payable from and after the date of death for a maximum of 450 weeks. In cases which do not involve death or permanent total disability (e.g. TTD followed by PPD), payments could conceivably be made for longer than 450 weeks, but could never exceed the maximum dollar amount set by the Act.

²³ Miss. Code Ann. §71-3-3(i) (Rev. 2000); MWCC General Rule 11 (effective April 1, 2001).

²⁴ Miss. Code Ann. §71-3-11 (Rev. 2000).

requirement that the days of disability be consecutive.²⁵ Also, opinions vary on whether a day of disability for waiting period purposes refers only to regularly scheduled work days, or to all days on which the employee is unable to work or earn full pay because of injury, even days such as Saturday or Sunday when the employee is otherwise not scheduled to work. Plausible arguments can be made for either approach. It is simply suggested here that you be consistent, whichever method is used.

Assuming the employee actually begins losing time from work immediately after the injury, the following rules apply: if the employee is paid in full for the date of the accident, disability begins with the next day on which the employee is absent or unable to earn full pay; if the employee is not paid in full for the date of the accident or injury, disability begins that day.²⁶

4. Temporary benefits. These benefits are paid during the period of an injured employee's recovery from injury or illness. Temporary status begins with the disabling injury and continues until such time as the employee reaches maximum medical improvement.²⁷ Disability in the industrial sense continues only as long as the employee is experiencing a total or partial loss of wage earning capacity. Temporary benefits represent a substitute for wages lost by the employee during this period, whether that loss is total or partial. If the employee is still technically in recovery, but has returned to work and is suffering no loss of wages, then temporary disability benefits are not payable.²⁸

a. temporary total disability. Benefits for temporary total disability are payable when the employee is completely unable to engage in work. In each case of TTD, the injured employee is entitled to the lesser of the applicable weekly maximum, or 66 2/3% of his/her average weekly wage at the time of injury, with a minimum a \$25.00 per week.²⁹

²⁵ MWCC General Rule 11 (effective April 1, 2001).

²⁶ MWCC General Rule 11.

²⁷ John Bryant v. Winston R. Bailey and National American Insurance Co., MWCC No. 94-04200-F-3283-B-00 (May 2, 1997).

²⁸ Arender v. National Sales, Inc., 193 So.2d 579, 587 (Miss. 1966) (payments for TD extend only during continuance of "disability" and/or until MMI); Mid-South Packers, Inc. v. Hanson, 253 Miss. 703, 178 So.2d 689, 691 (1965) (no benefits due during temporary period while claimant working and earning full pay); James E. Montgomery v. Cooper Tire & Rubber Company, MWCC No. 92-06479-E-8336, 91-19468-E-8337 (Oct. 10, 1994).

²⁹ Miss. Code Ann. §71-3-17(b) (Rev. 2000).

b. temporary partial disability: Benefits for temporary partial disability are payable when the employee is partially able to work, and is therefore suffering only a partial decrease in wage earning capacity. One may be temporarily and partially disabled from the first day of disability, or may enter a period of temporary partial following a period of temporary total disability, as where one previously temporarily and totally disabled is released by his treating physician for return to light duty or part time work for a period of time prior to maximum recovery.

There is, after May 15, 1992, no minimum benefit amount for partial disability. An employee in temporary partial disability status is entitled to the lesser of the applicable weekly maximum, or 66 2/3% of the difference between his/her pre-injury average weekly wage and his/her earning capacity thereafter.³⁰

c. date due: Installments of compensation are payable every fourteen (14) days. The first installment is due on the fourteenth (14th) day after the employer has notice of the injury or death.³¹

5. Permanent benefits. Subject to what is stated below regarding permanent total disability, these benefits should be paid immediately following the injured employee's maximum medical recovery.³² They represent compensation for any disability which is more than merely temporary. There is no clear litmus test, and a disability is considered permanent "if the required period for elimination of the disability is longer than that which, reasonably considered, is only temporary."³³

Having set forth the obvious regarding the timing of permanent benefits, it becomes necessary to explain exactly what permanent disability is within the meaning of the Act. The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be

³⁰ Miss. Code Ann. §71-3-21 (Rev. 2000).

³¹ Miss. Code Ann. §71-3-37(3) (Rev. 2000).

³² A person who returns to full duty prior to maximum recovery technically should be considered still in a temporary status, at least medically speaking, and compensated for such only if there is a corresponding loss of wage earning capacity. However, it is more or less accepted practice to begin payment of compensation for permanent partial disability on the earlier of the MMI date or the return to full duty date. Payment for PPD should begin no later than the date of MMI.

³³ Dunn, supra at §77.

supported by medical finding."³⁴ This is what is commonly referred to as loss of wage earning capacity. Despite, however, being the only definition of disability in the Act, this is not the only measure of permanent disability.

a. **whole body impairments.** Disability as defined by the Act, or loss of wage earning capacity, is the sole and only measure of permanent disability when an injury is to the body as a whole. A claimant, to be entitled to compensation for permanent disability involving the body as a whole, must demonstrate (1) a bona fide permanent physical impairment, and (2) a permanent loss of wage earning capacity in the same or other employment as the result of that impairment.³⁵ In other words, one claiming compensation for a whole body disability, i.e. permanent loss of wage earning capacity, must show an inability because of injury to earn pre-injury wages in the same or other employment. Compensation technically is not due for a permanent medical impairment to the body as a whole in the absence of a corresponding loss of wage earning capacity.

In evaluating a claimant for loss of wage earning capacity, a comparison of pre-injury wages and post-injury wages is a logical first step. If the latter sum equals or exceeds the former, then presumably no permanent disability exists, i.e., there is no loss of wage earning capacity. If the latter sum is less than the former, then presumably there is a degree of permanent disability commensurate with the difference, and compensation would be paid at 66 2/3% of the difference in wages.

To ensure that any reliance which may be placed on the presumption created by the comparison of pre-injury and post-injury wages is not misplaced, anyone evaluating disability under these circumstances would be well advised to consider whether the post-injury wages are an accurate indicator of the claimant's true wage earning "capacity." Consider the temporal nature of the work, whether the claimant is performing the same work as before, whether he is actually "earning" these wages or whether the employer is generously accommodating the worker. In other words, ask whether in light of his age, education, experience and restrictions he could compete favorably in the open market for jobs which pay as much or more than his pre-injury wage before you determine that the post-injury wages are in fact a reliable indicator of earning capacity.

³⁴ Miss. Code Ann. §71-3-3(i) (Rev. 2000).

³⁵ Robinson v. Packard Elec., Div. of G.M.C., 523 So.2d 329 (Miss. 1988); Miss. Code Ann. §71-3-3(i) (Rev. 2000).

If, however, the claimant has not returned to gainful employment of any kind, he must show that he has engaged in reasonable efforts to find other gainful employment. If the claimant has engaged in reasonable efforts to find employment following recovery but has been unsuccessful, the claimant has presumably suffered a total loss of wage earning capacity and is entitled to compensation accordingly.

In evaluating the reasonableness of the claimant's effort to find employment, consideration must be given to the economic and industrial aspects of the local community, jobs available in the area, the claimant's educational and occupational background, and the particular nature of the injury and disability for which compensation is sought. The end question is whether, under the circumstances just considered, the claimant has engaged in reasonable yet unsuccessful efforts to find employment, and whether because of injury, he is unable to secure gainful employment. An affirmative conclusion compels payment for permanent total disability.

The above rule has been modified somewhat by the Court in cases where the injured employee, following maximum recovery, reports back to his employer and is refused a return to work. Where it appears the employer has refused to reinstate or rehire its employee because of the injury or limitations associated with the injury, this alone creates a presumption that the worker is totally disabled. A burden then falls upon the employer to show that the worker is employable elsewhere, notwithstanding its own refusal to rehire or reinstate the worker.³⁶

In sum, a whole body impairment is compensable only if there is a corresponding loss of wage earning capacity. After having considered all relevant factors, compensation should be paid for the loss of wage earning capacity which has been demonstrated, whether partial or total.³⁷

b. scheduled member impairments. The Act arbitrarily schedules the number of weeks for which compensation is payable when a loss to a so-called scheduled member has resulted. And unless an injured employee can demonstrate a permanent total loss of wage earning capacity or permanent total disability as a matter of law, thus entitling him to compensation for 450 weeks, compensation will be limited to the number

³⁶ Marshall Durbin, Inc. v. Hall, 490 So.2d 877, 880 (Miss. 1986); Jordan v. Hercules, Inc., 600 So.2d 179, 183 (Miss. 1992), and progeny.

³⁷ Dunn, supra at §67-68, 72-72.1.

of weeks scheduled for the member involved.

The following rules have evolved from court and Commission opinions discussing permanent disability and scheduled members, and should guide your decisions regarding payment of these type claims.³⁸

(1) an employee suffering an injury to a scheduled member is at least entitled to compensation based on the permanent medical impairment assigned by the treating physician;

(2) if an employee sustains an occupational disability arising from the loss or loss of use of a member which exceeds the medical impairment, but is not total, then compensation is measured by the greater loss, but still subject to the maximum number of weeks allowed for that member. The test for determining the extent of occupational disability in these cases is one of the most widely disputed issues in workers' compensation litigation. Questionable cases of this nature should be referred to legal counsel for specific advice.³⁹

(3) if the employee, because of a scheduled member injury, sustains a total loss of wage earning capacity (in the same or other employment), or is deemed permanently and totally disabled as a matter of law, then compensation is payable for 450 weeks for permanent total disability and the schedule is not applicable.⁴⁰

c. permanent total disability. Except as provided below, permanent total disability describes a disability which is caused by the injury in question and which results in a 100% loss of wage earning capacity to the

³⁸ This discussion does not include hernia claims which are addressed separately by the Act. See Miss. Code Ann. §71-3-23 (Rev. 2000).

³⁹ See e.g. Betty J. Robinson v. Tri-Lakes, Ltd. & Miss. Manufacturers' Assoc. W. C. Trust, MWCC No. 94-13678-F-8709 (June 7, 1999 & July 7, 1999); Hope Puckett v. Caterpillar, Inc. & Employer's Ins. of Wausau, 96-16157-F-9703 (July 7, 1999); Brenda A. Weatherspoon v. Croft Metals & Liberty Mutual Ins. Co., MWCC No. 95-01541-F-7097 (July 1, 1999); see also Alumax Extrusions, Inc. v. Wright, 737 So.2d 416 (Miss.Ct.App. 1998); Jensen v. Meridian Professional Baseball Club, 2000 WL 1499455 (Oct. 10, 2000). In Jensen the Court stated that the question of occupational loss of use of a scheduled member is to be answered by reference to the evidence as a whole, including evidence concerning the claimant's capacity to earn wages in the same or other employment.

⁴⁰ Smith v. Jackson Const. Co., 607 So.2d 1119, 1128 (Miss. 1992); Miss. Code Ann. §71-3-117(a) (Rev. 2000) (total loss of two eyes, two arms, two hands, two legs, two feet, or any two thereof constitutes permanent total disability as a matter of law, without regard to loss of earning capacity).

injured employee. If, because of the injury, an individual is completely unable to work, or unable to earn any wages in the same or other employment, then that individual is considered permanently and totally disabled, and entitled to benefits at the applicable compensation rate for a

period of 450 weeks from and after the first day of disability.⁴¹ Recall what has been stated previously regarding reasonable efforts by the claimant to find other employment and other presumptions and factors which are considered in making this determination.

One may be permanently and totally disabled either as the result of a scheduled member impairment or a body as a whole impairment. In either case, compensation is due and payable for 450 weeks pursuant to § 71-3-17(a) of the Act.⁴²

One may be considered permanently and totally disabled without the necessity for proof of loss of wage earning capacity if there is a total loss or loss of use of both hands, both arms, both feet, both legs or both eyes, or any combination thereof. Any other alleged case of permanent total disability must be supported by proof of total loss of wage earning capacity in the same or other employment.⁴³

(1) **date due.** Technically, benefits for permanent total disability are payable for 450 weeks from and after the date of injury or disability, and should be reported this way on Form B-18. One adjudged permanent and totally disabled is considered to be so from the date of injury or disability. A claimant is not entitled to 450 weeks of benefits for permanent total disability in addition to benefits which may have already been paid for temporary disability.⁴⁴

In few cases, the permanent and total nature of the disability is apparent at the time of injury, and benefits therefor are commenced immediately. In most cases, however, benefits are

⁴¹ Miss. Code Ann. §71-3-3(i), -17(a) (Rev. 2000).

⁴² Smith, 607 So.2d at 1125-29.

⁴³ Miss. Code Ann. §71-3-17(a) (Rev. 2000).

⁴⁴ Brogden v. Link-Belt Co., 298 So.2d 697, 698 (Miss. 1974); Mullin & Parker v. Rucker, 237 Miss. 330, 114 So.2d 761, 764 (1959); Prince v. Nicholson, 229 Miss. 718, 91 So.2d 734, 737-38 (1957); Morgan v. J. H. Campbell Construction Co., 229 Miss. 289, 90 So.2d 663, 666-68 (1956).

paid for a period of temporary total disability. At some point, whether at maximum medical improvement or before, a decision is made to pay the claim on a permanent total basis. In these cases, the paying party is entitled to take credit for the number of weeks previously paid for temporary disability, and need only pay the balance of 450 weeks which remains.

The effect of such a limit on claims adjudged to be permanent and total is that someone who is only partially disabled may receive benefits for a longer period of time, and in excess of the amount payable for permanent total disability. This is because benefits for permanent partial disability, as discussed below, are payable in addition to temporary benefits. But the courts have consistently held this is a legislative matter and not one for the courts to correct. When the "putative temporary total disability prove[s] to be a permanent total disability," it is considered permanent and total from the date of the injury or disability, and benefits therefor are limited to 450 weeks from and after that date.⁴⁵

d. permanent partial disability. Permanent partial disability describes a disability which, obviously, is less than total. Proper payment for permanent partial disability depends on whether the loss involves a scheduled member, or the body as a whole.⁴⁶

(1) **scheduled member formula.** The Act arbitrarily schedules the maximum number of weeks for which compensation is payable in the event of a permanent partial disability of certain body parts.⁴⁷ In the case of permanent partial disability of a scheduled member, multiply the percentage of disability times the number of weeks allowed for total loss of the member, and pay benefits for this period of time at the applicable compensation rate, commencing with the date of MMI.⁴⁸

(2) **body as a whole formula.** If the disability involves the body as a whole, and compensation is being paid presumably on the

⁴⁵ Mullin & Parker v. Rucker, 114 So.2d at 764.

⁴⁶ Miss. Code Ann. §71-3-17(c)(1) - (23), (25) (Rev. 2000).

⁴⁷ Miss. Code Ann. §71-3-17(c) (Rev. 2000).

⁴⁸ Miss. Code Ann. §71-3-17(c)(23) (Rev. 2000); Jackson, 607 So.2d at 1126.

basis of loss of wage earning capacity, pay 2/3 of the difference between the pre-injury wage and the wage earning capacity thereafter. If the loss of wage earning capacity is expressed as a percentage, then you may multiply the percentage of disability times the employee's average weekly wage, then multiply the result times .6667, and pay either this amount or the weekly maximum amount, whichever is less, for a period of 450 weeks, commencing with the date of MMI.⁴⁹ The result in either case should be the same.

(3) **date due.** Unlike benefits for permanent total disability, permanent partial disability benefits are paid following and in addition to temporary disability benefits, and should begin on the date temporary status ends, which is the date of maximum medical improvement.⁵⁰ As previously mentioned, it is more or less accepted practice to commence payment for permanent partial disability once the employee has returned to full duty even though maximum medical improvement technically has not been reached. Whatever date is selected by the payer, it must be remembered that compensation, once started, must be paid at least every 14 days.

(4) **acceleration.** Benefits for permanent partial disability involving the body as a whole (450 week benefits) may be accelerated in accordance with MWCC General Rule 13. That Rule provides in part:

In any case in which compensation is to be paid to a claimant for permanent partial disability for a period not to exceed 450 weeks and at a weekly rate less than that computed for temporary total disability, whether voluntary or by order, such compensation may, as an alternate method of payment, be accelerated by paying the same weekly rate established for temporary total disability until the full amount has been paid.

If the payment of benefits is to be accelerated as provided above, this fact should be reported to the Commission on Form B-18.

6. Lump sum payments: The payment of benefits for permanent disability in a lump sum is governed by Miss. Code Ann. § 71-3-37(10) (Rev. 2000) which

⁴⁹ Miss. Code Ann. §71-3-17(c)(25) (Rev. 2000); Ebasco Services v. Harris, 227 Miss. 85, 85 So.2d 784 (1956).

⁵⁰ Cockrell Banana Co. v. Harris, 212 So.2d 581, 585 (Miss. 1968); Midland Shirt Co. v. Ray, 249 Miss. 486, 163 So.2d 251, 253 (1964); Morgan v. J. H. Campbell Construction Co., 229 Miss. 289, 90 So.2d 663, 665-66 (1956).

provides that the Commission is the sole judge as to whether or not a lump sum payment should be made. This refers to the lump sum payment of future, unaccrued benefits, and such a decision is made by the Commission only after an application for such payment (MWCC Form B-19) has been filed by the claimant. The employer or carrier is not considered a party to this process.⁵¹ The only time payment in a lump sum should be made unilaterally by the employer or carrier is for accrued, past due benefits.

7. **Forms:** Immediately upon the commencement of payment for either temporary or permanent disability, a report should be filed with the Commission.⁵² Benefits for both temporary and permanent disability may be reported on MWCC Form B-18. Section II of this Form is for reporting the commencement of temporary total disability benefits. Section III of this Form should be used to report the commencement of all other benefits.

8. **Credit.** Credit against the payment of compensation benefits is allowed under certain circumstances. Where credit is being taken for wages or other benefits paid the employee in lieu of compensation, credit is for the week and not for the number of dollars previously paid. Any monies paid to the employee for a particular week which are in excess of the applicable compensation rate may not be carried over as credit against subsequent weekly liability.⁵³ For example, if an employee's wages in the amount of \$400.00 per week are continued in lieu of compensation for the first two weeks of disability, and the employee is entitled to \$243.75 per week in workers' compensation benefits, credit is allowed only for two weeks, and not for \$800.00.

a. **advancements.** If an employee has received advanced payments of compensation, or has been overpaid, the full amount of the advance or overpayment may be recovered by the payer out of any future benefits yet to be paid.⁵⁴

b. **wages paid in lieu of compensation; earned wages.** The payer is entitled to credit for wages which are paid to an employee in lieu of

⁵¹ Dunn, supra at §314.

⁵² Miss. Code Ann. §71-3-37(3) (Rev. 2000).

⁵³ Siemens Energy & Automation, Inc. v. Pickens, 732 So.2d 276, 288 (Miss.Ct.App. 1999); Sturgis v. International Paper Co., 525 So.2d 813 (Miss. 1988); South Central Bell Telephone Co. v. Aden, 474 So.2d 584, 596 (Miss. 1985).

⁵⁴ Miss. Code Ann. §71-3-37(11) (Rev. 2000); Siemens Energy & Automation, Inc. v. Pickens, 732 So.2d at 288; Jackson Ready-Mix Concrete v. Young, 236 Miss. 550, 111 So.2d 255, 257 (1959).

compensation.⁵⁵ As noted above, credit here is for the number of weeks for which wages are paid.

Wages which are paid to an employee even though the employee does no work and performs no service are presumed to be in lieu of workers' compensation benefits.

This presumption may be rebutted by a showing that such wages were paid to the employee as a gift or gratuity by the employer, and in that case, credit is not allowed. Such payments would be in addition to workers' compensation benefits.⁵⁶

On the other hand, the employer/carrier is not entitled to credit for wages which are earned by the employee. Earned wages, by definition, cannot be considered paid in lieu of workers' compensation benefits.⁵⁷

c. unemployment benefits. The Commission first ruled in 1994 that an injured employee may not receive workers' compensation benefits and unemployment compensation benefits for the same period of time.⁵⁸ Thus, credit should be allowed for any unemployment compensation received by the employee for the same period as the workers' compensation disability. However, the Mississippi Court of Appeals has since held the Commission lacked statutory authority to make this offset. Thus, credit is not allowed against workers' compensation payments for unemployment compensation received by the claimant.

d. sick/vacation pay. It is the general rule that credit is not allowed for wages or salary paid as the result of an employee's use of accrued leave if the leave was accrued and earned by the employee on the basis of past service. The essence of this rule is that such a benefit was earned by the employee prior to his absence for the work connected injury and earned collateral benefits may not be used to offset the workers' compensation liability of the employer. In these cases, an injured employee may take

⁵⁵ Siemens Energy & Automation, Inc. v. Pickens, 732 So.2d at 288; City of Kosciusko v. Graham, 419 So.2d 1005, 1009 (Miss. 1982).

⁵⁶ Lanterman v. Roadway Express, Inc., 608 So.2d 1340, 1348-49 (Miss. 1992).

⁵⁷ Siemens Energy & Automation, Inc. v. Pickens, 732 So.2d 276 at 288; Hendershot v. Weiser Security Systems, Inc., MWCC 97-08017-G-0280 (May 25, 1999).

⁵⁸ Don E. Danley v. Cleaver-Brooks and Allianz Insurance Co., MWCC No. 91-15214-E-5766 (June 22, 1994); Bernard Washington v. Mobile Medic Ambulance Services, Inc. and U. S. F. & G., MWCC No. 91-19966-E-5895 (June 22, 1994).

paid leave in addition to receiving workers' compensation benefits if the leave was earned or accrued on the basis of past service.⁵⁹ This rule assumes the employer has no policy or rule against using accrued leave for absences which are covered by workers' compensation.

e. **other collateral benefits.** The question of credit may arise in other contexts as well, most notably when an injured employee is receiving benefits from a collateral source such as other insurance plans.⁶⁰ The general rule is that credit is allowed for any benefits paid pursuant to a collateral benefit plan which is maintained solely at the employer's expense for the benefit of its employees, such as a short or long term disability plan. Credit is allowed, however, only where it appears that payment under such a plan is being made for the same work-connected disability and the same period for which workers' compensation benefits would otherwise be due. Payment under a disability plan for an injury unconnected to the workers' compensation injury may not be used in offset of workers' compensation payment.⁶¹ Nor may credit be taken for disability plan payments made to an injured worker while the employer/carrier disputes or denies liability for workers' compensation benefits. In these situations, such collateral benefits cannot be regarded as payments in lieu of workers' compensation benefits.

Where an employee has secured insurance or some other collateral benefit plan at his or her own expense, benefits paid pursuant to such a plan are in addition to worker's compensation benefits and no credit is allowed against the workers' compensation obligation.⁶²

B. Paying and Reporting Medical Benefits. Medical benefits represent the second major obligation the employer owes to an injured employee. The employer is under an obligation in the event of a covered injury or illness to provide the employee with whatever reasonable and necessary services and supplies are required by the nature of the injury and the process of recovery.

⁵⁹ Staple Cotton Services, Ass'n v. Russell, 399 So.2d 224 (Miss. 1981); Pet, Inc. v. Robertson, 329 So.2d 516 (Miss. 1976).

⁶⁰ Credit questions arise as well in the context of third party liability. Credit is generally allowed for recovery from a third party tortfeasor.

⁶¹ Jose Murillo v. KLLM, MWCC No. 91-19550-E-8407 (June 26, 1995).

⁶² Siemens Energy & Automation, Inc. v. Pickens, 732 So.2d 276 at 288-89; South Central Bell Telephone Co. v. Aden, 474 So.2d 584 (Miss. 1985); Bowen v. Magic Mart of Corinth, 441 So.2d 548 (Miss. 1983); Western Electric, Inc. v. Ferguson, 371 So.2d 864 (Miss. 1979).

A physician or provider rendering treatment under the Act is required to submit a preliminary report thereof to the employer, if self-insured, or to the carrier, within twenty (20) days of the initial treatment. Progress reports are required to be submitted periodically or at least every thirty (30) days thereafter, until the final medical report has been submitted. Failure to file these reports with the self-insured employer or carrier may result in the claim for treatment being denied.

Effective July 1, 1995, the physician or provider giving treatment is no longer required to simultaneously file these reports with the Commission. It is the responsibility of the employer/carrier to promptly furnish copies of these reports to the Commission.⁶³

1. **Choice of physician.** Mississippi law gives the employee the right to choose, although the right of choice is limited. An injured employee "shall have the right to accept the services furnished by the employer or, in his discretion, to select one (1) competent physician of his choosing" to administer medical treatment.⁶⁴ This choice is not limited to licensed medical doctors, and an injured worker may select the services of a chiropractor or any other recognized medical provider.⁶⁵

A physician to whom the employee is referred by his employer does not count as the employee's choice unless accepted as his or her choice in writing. There is no approved form for this purpose and the creation of a written acceptance form for this purpose is left to the discretion of the employer. At a minimum, such a form should explain to the employee his or her right to choose a physician and should either be notarized or witnessed, or both.

Once a selection has been made by the employee, the treating physician is allowed to make one referral to a specialist or sub-specialist to continue with or consult on medical treatment.

Except in emergency situations requiring immediate treatment, any additional selections or referrals must be pre-approved by the employer or carrier. If approval is not given, then the employee may apply to the Commission for approval.

Second opinion evaluations are allowed to evaluate the extent of temporary or permanent disability, or the reasonableness and necessity of medical treatment being rendered. The employer or carrier may require the employee to submit to a second opinion evaluation by a physician of the employer's or carrier's

⁶³ Miss. Code Ann. §71-3-15(1) (Rev. 2000); MWCC General Rule 9.

⁶⁴ Miss. Code Ann. §71-3-15(1) (Rev. 2000).

⁶⁵ White v. Hattiesburg Cable Co., 590 So.2d 867 (Miss. 1991).

choosing.

Independent medical examinations may be ordered only by the Commission and are available to evaluate the extent of temporary or permanent disability.

2. **Fee schedule.** Currently, fees for a number of medical services are regulated by *The Mississippi Workers' Compensation Medical Fee Schedule*. The breadth of this *Schedule* is too broad to be covered in any detail, and it is respectfully recommended that the *Schedule* itself be consulted for further information. It not only contains limits on fees for medical service, it sets maximum reimbursement levels for copies of records, affidavits, depositions, sets time limits for the submission and payment of bills, and contains a specific dispute resolution procedure.⁶⁶

3. **Mileage.** Employees who are receiving medical treatment under the authority of the Act are entitled to mileage reimbursement for trips to and from medical treatment. Effective February 1, 2007 the rate of reimbursement is 48.5 cents per mile.⁶⁷

4. **Forms.** Medical reports which are required to be filed with the Commission may be submitted on the MWCC Form B-9, 27, or on HCFA Form 1500. The HCFA Form 1500 will be accepted in lieu of the B-9, 27 provided appropriate office/progress notes are attached thereto.⁶⁸

5. **Balance billing.** Effective July 1, 1995, the Act was amended to provide:

Any employee receiving treatment or service under the provisions of this chapter may not be held responsible for any charge for such treatment or service, and no doctor, hospital or other recognized medical provider shall attempt to bill, charge or otherwise collect from the employee any amount greater than or in excess of the amount paid by the employer, if self-insured, or its workers' compensation carrier. Any dispute over the amount charged for service rendered under the provisions of this chapter, or over the amount of reimbursement for services rendered under the provisions of this chapter, shall be limited to and resolved between the provider and the employer or carrier in accordance with the fee dispute resolution procedures adopted by the commission.

⁶⁶ To order a copy of the *Fee Schedule*, or for more information, contact the Cost Containment Division of the Mississippi Workers' Compensation Commission.

⁶⁷ MWCC General Rule 14; Miss. Code Ann. §25-3-41 (Rev. 1999). Current and past mileage rates can be found on the internet at www.mwcc.state.ms.us.

⁶⁸ MWCC General Rule 9. The B-9, 27, introduced in 1997, combines the preliminary and final report into one form.

This amendment put an end once and for all to the debate which had previously existed regarding the practice of balance billing of workers' compensation patients. This amendment codified the Commission's previous interpretation of the Act.⁶⁹ This amendment is also consistent with a like provision of the Fee Schedule.

If, on the other hand, treatment rendered to an injured employee is not accepted by the employer or carrier and does not fall under the terms of the Act, then the employee may be held responsible as would any other patient. The prohibition against balance billing applies only to charges for treatment which fall under the terms of the Act and for which payment is made accordingly.

C. Paying and Reporting Death Benefits. When an injury or accident arising out of and in the course of employment causes death, the compensation payable is referred to as a death benefit. Death benefits fall into three distinct categories, and are discussed separately below. With the exception of funeral expenses, no benefits are due for death unless there is a surviving spouse and/or surviving dependents.

In determining whether there is a surviving spouse entitled to benefits, common law marriages are not recognized. One either has to be the legal wife of the decedent at the time of death, or has to have entered into a ceremonial marriage with the decedent at least one year prior to the date of death and stood in the relationship of wife or husband on the date of death, provided no living legal spouse exists.⁷⁰ A surviving spouse is presumed to have been wholly dependent upon the deceased at the time of death.⁷¹

In determining whether there are dependent children entitled to death benefits, legitimate, unmarried children under age 18 and living with the deceased at the time of death are presumed dependent. A posthumous child, legally adopted children, step-children, acknowledged illegitimate children, and children in relation to whom the deceased stood in loco parentis for at least 1 year prior to death, if under 18 years of age, are also considered "children" of the deceased, and therefore presumed dependent.⁷²

Other potential beneficiaries, such as grandchildren, siblings, parents, and

⁶⁹ See Blanchie Jones v. Miss. Dept. of Mental Health, MWCC No. 91-10836-E-4365 (May 17, 1995) (The obligation to pay for treatment under the Act "runs from the employer to the physician or to the hospital." The Act does not allocate any of this burden to the employee and "a hospital or doctor may not collect fees from the employee over and above the amount paid by the employer [or carrier]," or beyond those charges allowed by the Commission.)

⁷⁰ Miss. Code Ann. §71-3-3(n) (Rev. 2000); Yager v. Gregory Cattle Co., 638 So.2d 1266 (Miss. 1994).

⁷¹ Miss. Code Ann. §71-3-25(g) (Rev. 2000).

⁷² Miss. Code Ann. §71-3-3(l), -25(g) (Rev. 2000).

grandparents, must establish dependency upon the deceased at the time of death, and would be compensated if dependent to any degree on the deceased, but only if there is no surviving spouse or children, or if the amount payable to the spouse and/or children shall in the aggregate be less than the maximum weekly amount payable on the claim.⁷³

Persons over 18 years of age may receive benefits if they were "wholly dependent" upon the decedent and incapable of self-support by reason of physical or mental disability, or if they are dependent on the deceased and pursuing a full-time education. Benefits for this latter group may not extend past the age of 23.⁷⁴

1. **Funeral expenses.** Reasonable funeral expenses not to exceed two thousand dollars (\$2,000.00) should always be paid on behalf of the deceased. This payment is exclusive of other insurance or burial benefits which may be available.⁷⁵

2. **Lump sum payment to spouse.** If there is a surviving spouse, there shall immediately be paid to such spouse a lump sum of two hundred fifty dollars (\$250.00), which is in addition to any other benefits payable.⁷⁶

3. **Weekly benefits.** Finally, if there is surviving spouse and/or surviving dependents, certain weekly benefits are due.

a. **spouse only.** If there is a surviving spouse only, and no other dependents, then a weekly benefit equal to 35% of the average weekly wage of the deceased, or the maximum weekly amount, shall be paid to such surviving spouse for a period of 450 weeks, or until death or remarriage, whichever first occurs.⁷⁷

b. **child(ren) only.** If there are only dependent children surviving, then each such child is entitled to a weekly benefit equal to 25% of the average weekly wage of the deceased, provided that the aggregate payable to children shall not exceed 66 2/3% of the deceased's average weekly wage or the maximum weekly limit set by the Act. These benefits are payable for 450 weeks, or until age 18, or age 23 if in school, whichever first

⁷³ See generally Dunn, supra at §§197-224; Miss. Code Ann. §71-3-25(e) (Rev. 2000).

⁷⁴ Miss. Code Ann. §§71-3-3(l), (q), -25(g) (Rev. 2000).

⁷⁵ Miss. Code Ann. §71-3-25(b) (Rev. 2000).

⁷⁶ Miss. Code Ann. §71-3-25(a) (Rev. 2000).

⁷⁷ Miss. Code Ann. §71-3-25(c) (Rev. 2000).

occurs.⁷⁸

c. **spouse and child(ren).** If there are both a spouse and children, then the spouse's weekly benefit shall be 35% of the average weekly wage of the deceased, and 10% of such wages shall be allotted for each child. If the spouse dies or remarries, the child's share is increased to 15%. The total amount payable shall not exceed 66 2/3% of the deceased's average weekly wage or the weekly maximum set by the Act.⁷⁹

d. **no spouse or child(ren) or aggregate less than maximum.** If there are no surviving children, and no surviving spouse, or if the aggregate amount payable to a spouse and/or children is less than 66 2/3% of the deceased's average weekly wage or less than the weekly maximum, then other dependents such as grandchildren, brothers, sisters, parents and grandparents are entitled to benefits equal to 15% of the average weekly wage of the deceased, subject of course to the maximum weekly limit set by the Act. This entitlement arises only if this class of beneficiaries can establish dependency (partial or total), and in no case shall the total amount payable to this group exceed the difference between what is paid to the spouse and/or children, and the maximum allowable amount.⁸⁰

4. **Minimum and maximum benefits.** A person wholly dependent on the deceased is entitled to a minimum benefit of \$25.00 per week. This minimum benefit does not apply to those only partially dependent on the deceased.⁸¹

When there is more than one dependent entitled to death benefits, the \$25.00 weekly minimum applies in the aggregate to the entire group. The minimum benefit requirement is met if the total payable to all dependents is at least \$25.00 per week.⁸²

The total of weekly payments to all beneficiaries shall not exceed the lesser of the weekly maximum in effect at the time of death, or 66 2/3% of the deceased's average weekly wage, shall not be made for a period longer than 450 weeks, and shall not be greater in overall amount than 450 times 66 2/3% of the deceased's average week wage, or 450 times the applicable maximum weekly

⁷⁸ Miss. Code Ann. §71-3-25(d) (Rev. 2000).

⁷⁹ Miss. Code Ann. §71-3-25(c) (Rev. 2000).

⁸⁰ Miss. Code Ann. §71-3-25(e) (Rev. 2000).

⁸¹ Miss. Code Ann. §71-3-13(1) (Rev. 2000).

⁸² Dunn, supra at §191.

benefit. Importantly, if the deceased survived for a period of time and then died as the result of the injury or complications therefrom, then any non-medical compensation benefits paid to the deceased during his or her lifetime will apply toward the overall maximum set by the Act. The Act plainly provides that the total recovery of compensation, exclusive of medical payments, for injury, for death, “or any combination of such injury or death, shall not exceed” 450 weeks times 66 2/3 of the average weekly wage for the State.⁸³

5. Pro rating death benefits. In computing death benefits, the total of weekly benefits payable to all beneficiaries may not exceed the maximum amount noted above. If the combined total of weekly benefits would otherwise exceed the maximum weekly amount payable under the Act, then it becomes necessary to pro rate the weekly benefit amount among the eligible beneficiaries.

To pro rate weekly death benefits among the eligible beneficiaries when the maximum weekly limit is in play, divide the applicable maximum weekly compensation rate by the total percentage due all beneficiaries; then multiply each beneficiary's percentage share by the result.

Example: John Doe earned an average weekly wage of \$600.00 at the time of his death in 1996. The maximum weekly compensation rate on this death claim would therefore be \$264.55 (the weekly maximum in effect for 1996). John Doe was survived by a spouse and 3 children. First, you must determine the weekly benefit due each survivor based on John Doe's average weekly wage to see if the maximum weekly limit will be exceeded.

Spouse	35%	x	\$600.00	=	\$210.00
Child	10%	x	\$600.00	=	\$ 60.00
Child	10%	x	\$600.00	=	\$ 60.00
Child	10%	x	\$600.00	=	\$ 60.00
	65%				\$390.00

In this example, the combined benefits payable to spouse and children (\$390.00) exceed the maximum amount payable on this claim (\$264.55). It is therefore necessary to pro rate the maximum allowable amount among the spouse and children. To do this, take the total percentage (65%) and divide into the maximum weekly amount (\$264.55), which may be expressed as $65X = 264.55$. This yields a factor of 4.07 ($264.55 \div 65 = 4.07$). To compute the pro rated amount due each survivor, multiply the factor of 4.07 times the percentage amount due each.

⁸³ Miss. Code Ann. §§71-3-13, -25(f) (Rev. 2000).

Spouse	35 x 4.07	=	\$142.45
Child	10 x 4.07	=	\$ 40.70
Child	10 x 4.07	=	\$ 40.70
Child	10 x 4.07	=	\$ 40.70
			<hr/>
			\$264.55

Each time a dependent drops off of the payment schedule, as when a spouse remarries or a child turns 18 and is not enrolled full time in school, the weekly benefits should be recalculated from square one to see if the maximum will be exceeded, and if so, to recalculate the pro rated amount due each.

6. **Forms.** To report the commencement of death benefits, please use MWCC Form B-18, section III. Please also include a list of beneficiaries with their name, address, date of birth, relationship, and the amount paid each.

7. **Second Injury Fund.** For every death which is compensable under the Act, there must be a corresponding payment by the employer or carrier into the Second Injury Fund. If there are dependents, a payment of \$300.00 is required; if there are no dependents, a payment of \$500.00 is required.⁸⁴

D. Rehabilitation Benefits. "An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the commission is being rendered fit to engage in a remunerative occupation may, in the discretion of the commission under regulations adopted by it, receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed Ten Dollars (\$10.00) a week for not more than fifty-two (52) weeks."⁸⁵

All claims filed with the Commission are reviewed by a Commission representative to determine whether rehabilitation assistance is appropriate. If deemed appropriate, the Commission representative will refer the claim to an appropriate rehabilitation provider, usually the State Department of Rehabilitation Services. If the injured employee is accepted for rehabilitation training by the provider, the employee may apply to the Commission for additional compensation. The exact amount of

⁸⁴ Miss. Code Ann. §71-3-73 (Rev. 2000). A special situation arises in connection with death claims which are settled under §71-3-29 of the Act [former section 9(i)]. It is standard practice in these claims for the employer/carrier to pay benefits but without admitting any liability (i.e., without admitting the claim is compensable). Arguably the claim is "compensable" for Second Injury Fund purposes since benefits are being paid on account of the death. Notwithstanding, the Commission is currently paying respect to the fiction of non-compensability which is created by these settlements and is not insisting on second injury fund contributions in such cases.

⁸⁵ Miss. Code Ann. §71-3-19 (Rev. 2000).

compensation to be awarded for rehabilitation, subject to the above stated limit, is left to the discretion of the Commission. The Commission has provided by rule it will look to the recommendation of the Vocation Rehabilitation Division.⁸⁶

E. Suspending Benefits. Under certain circumstances, benefits may be suspended, and sometimes prior to the expiration of the period otherwise provided for payment. Immediately upon suspension of disability benefits, Form B-18 should be filed with the Commission.⁸⁷

The most common event justifying the suspension of temporary benefits is the employee's return to full duty work at full pay with no permanent disability.

Benefits for either temporary or permanent disability may also be terminated in the event the employee dies of causes unrelated to his work related injury. Benefits are considered personal to the injured employee, and all benefits not accrued on the date of an unrelated death are lost.⁸⁸

All benefits, whether medical or disability, may be suspended if the injured employee unreasonably refuses to submit to medical treatment.⁸⁹ However, only the Commission has authority to determine whether the employee's refusal is unreasonable, and for this reason, no such suspension should occur without prior approval of the Commission.⁹⁰

Finally, benefits for permanent partial disability based on loss of wage earning capacity may be suspended or terminated prior to the expiration of 450 weeks if the disability giving rise to such benefits ceases to exist; that is, if the claimant works back up to his/her full pre-injury level of pay prior to the expiration of 450 weeks. However, reconsideration of the degree or existence of permanent partial disability can only be by the Commission. Therefore, if good cause to suspend or modify benefits for this type disability is thought to exist, permission to change or eliminate the amount of benefits being paid must be sought in advance from the Commission.⁹¹

F. Penalty and Interest. The obligation to pay workers' compensation benefits is

⁸⁶ MWCC Procedural Rule 19.

⁸⁷ Miss. Code Ann. §71-3-37(3) (Rev. 2000).

⁸⁸ Dunn, supra at §43.

⁸⁹ Miss. Code Ann. §71-3-15(1) (Rev. 2000).

⁹⁰ Dunn, supra at §342.

⁹¹ Miss. Code Ann. §71-3-17(c)(25) (Rev. 2000).

considered to be in the nature of a contract debt. An employee is entitled to interest at the prevailing legal rate on all installments of compensation which are not timely paid, said interest to accrue from the due date of each such installment until paid or properly tendered.⁹²

There shall also be added to each installment of compensation not paid within 14 days after it becomes due a penalty equal to 10% thereof. Remember that installments are due every 14 days during the continuance of the disability. This penalty applies to all installments of compensation which are "payable without an award." This means that so long as the claim is being paid voluntarily, the penalty applies to all accrued installments not timely paid. If the claim is controverted (litigated), the penalty will only apply to installments accrued through the date of the award by the administrative judge and which have not been timely paid.⁹³

The 10% penalty may be avoided if the employer or carrier controverts the right to compensation by filing MWCC Form B-52 or its equivalent within 14 days after receiving notice or knowledge of the injury, or by showing that non-payment was due to conditions over which the employer or carrier had no control.⁹⁴

G. Child or Spousal Support Withholding. It is becoming quite common for custodial parents to seek withholding from a non-custodial parent's workers' compensation payments in order to satisfy past due or on-going child support obligations, or for divorced parties to seek withholding to satisfy spousal support obligations. Without question, workers' compensation benefit payments may be subject to withholding for these purposes.⁹⁵

Typically, this is accomplished by an order for withholding issued by a chancery court which directs the payment of a certain amount of money either to the custodial parent, to the court, or to the Department of Human Services in satisfaction of the claimant's child support or spousal support obligations. Be aware that workers' compensation benefits are not immune from such collection procedures. If a party paying workers' compensation benefits to an injured worker is served with a valid order or other directive for withholding arising out of child or spousal support proceedings, it must be

⁹² South Central Bell Telephone Co. v. Aden, 474 So.2d at 598. Court decisions increasingly are holding, however, that interest runs only from the date the claimant's petition to controvert is filed. Resolution of the differing approaches is beyond the scope of this work.

⁹³ Medart Lockers, Inc. v. Yarborough, 251 Miss. 124, 168 So.2d 660, 662 (1964). Once an award is made by the Commission, an additional 20% penalty may apply to all installments due under the award if they are not paid within 14 days after becoming due. Miss. Code Ann. §71-3-37(6) (Rev. 2000).

⁹⁴ Miss. Code Ann. §71-3-37(5) (Rev. 2000).

⁹⁵ Miss. Code Ann. §71-3-129 (Rev. 2000); Miss. Code Ann. §93-11-101 et seq. (Rev. 1994).

complied with on pain of contempt.

III. SETTLEMENT OF CLAIMS

There are primarily three types of settlements provided for in the Workers' Compensation Act - lump sum settlement, compromise settlement, and third party settlement.

A. Lump Sum Settlements (a/k/a "13(j) settlement"). Benefits otherwise payable over a number of weeks for permanent disability or death may be commuted to a present value lump sum if requested by the employee or beneficiary and ordered by the Commission. If there is no dispute over the nature and extent of permanent disability or death benefits due, the employee or beneficiary to whom benefits are owed may apply to the Commission using MWCC Form B-19 to have these payments commuted to a lump sum and paid accordingly. The employer or carrier should not pay benefits for permanent disability or death in a lump sum unless ordered to do so by the Commission, except to bring current any due and unpaid installments.

Once application is made by an injured employee, the Commission examines the claim file to verify that (1) a final medical report giving the date of maximum medical improvement and the degree of permanent impairment is present, and also that (2) the employer or carrier has filed Form B-18 signifying their agreement to pay benefits for permanent disability consistent with the final medical report. A final medical report obviously is not required in cases involving death. Once these documents are verified, the applicant is asked to come in to the Commission offices for an interview with a Commissioner, or meet with an administrative judge. This allows a Commission representative to determine whether the applicant fully understands the nature and effect of this type settlement, and whether payment of benefits in a lump sum is in the best interest of the applicant.

If the applicant is represented by counsel, the application for lump sum payment may be mailed to the Commission and considered without the necessity of a personal interview. If the applicant is less than 21 years old, then the Commission will not consider the lump sum settlement until approval or permission for the minor to obtain such has been secured from a chancery or other court of competent jurisdiction. This approval may take the form of a guardianship or simply having the disability of minority removed; this is left entirely to the court's discretion.

If the application is approved, an order is prepared and forwarded to the paying party directing payment of benefits to the employee in a lump sum. If payment in a lump sum is ordered, the paying party receives a modest discount on the benefits which have not yet accrued at the time of the order.

It is important to remember that a lump sum settlement as herein above described

is nothing more than a commutation of the permanent disability or death benefits due on the claim, and has no effect on the employer's and carrier's continuing obligation to provide reasonable and necessary medical services. Therefore, a lump sum settlement does not by itself close a claim; only by having paid all benefits due and complying with the rules set forth in section IV below may the claim be considered closed. Additional disability or medical benefits may be ordered after approval of a lump sum settlement if the request for same is made before the applicable statute of limitations (discussed below in section IV) expires.⁹⁶

B. Compromise Settlement (a/k/a "9(i) settlement). A so-called compromise settlement is technically only appropriate when there is a bona-fide dispute between the parties over the nature and extent of permanent disability suffered by the employee or of benefits due beneficiaries in the event of death.⁹⁷ These settlements typically involve the payment of a lump sum of money in full discharge of the employer's and carrier's liability under the Act.

It is important to remember that the consummation of a compromise settlement does not officially "close" the claim. In order to finally close a claim which has been settled on a compromise basis, the procedure set forth below in section IV must still be followed, and as with any other "lost time" or death claim, a settled claim will be conclusively closed only after the applicable statute of limitations has expired.⁹⁸

There is no official form for presenting a compromise settlement. Such settlements are instead presented by a petition or motion drafted by the parties.

As with the lump sum settlement, the applicant's or petitioner's presence for an interview is not required if he or she is represented by counsel. However, unrepresented petitioner's must present themselves to the Commission or to an administrative judge for an interview. It is generally the employer's or carrier's responsibility to make the petitioner available and to pay the expenses therefor.

Also, as with lump sum settlements, if the applicant/petitioner is less than 21 years old, then the Commission will not consider the compromise settlement until approval or permission for the minor to obtain such has been secured from a chancery or other court of competent jurisdiction. This approval may take the form of a guardianship or simply having the disability of minority removed; this is left entirely to the court's

⁹⁶ J. H. Moon & Sons v. Hood, 244 Miss. 564, 144 So.2d 782 (1962); Armstrong Tire & Rubber Co. v. Franks, 242 Miss. 792, 137 So.2d 141 (1962).

⁹⁷ Miss. Code Ann. §71-3-29 (Rev. 2000).

⁹⁸ Metal Trims Industries, Inc. v. Stovall, 562 So.2d 1293 (Miss. 1990); Bailey Lumber Co. v. Mason, 401 So.2d 696 (Miss. 1981).

discretion.

C. Third Party Settlements. These settlements are governed entirely by section 71-3-71 of the Act. Like compromise settlements, there is no particular form. Often these type settlements are done in conjunction with a compromise settlement. A third party settlement arises where some person or entity other than the employer or employee is responsible for the injury or death and that party is called upon to pay damages. Important points regarding settlement of third party tort claims are:

- (1) Any proposed settlement with a third party which is governed by the Act must be approved by the Commission, or by the court where such action is pending if suit has been filed;⁹⁹
- (2) Failure to obtain the requisite approval renders the settlement void;
- (3) Commission or court approval is thought necessary in order to ensure fairness to the claimant, and to protect the subrogation interests of the employer and carrier;
- (4) If any recovery is made from the third party, the proceeds therefrom shall be disbursed in order as follows: reasonable costs of collection (attorney fees), reimbursement to the workers' compensation employer or carrier for sums paid and to be paid, and the remainder, if any, to the injured employee.¹⁰⁰

IV. CLOSING THE CLAIM

While it may be thought that the final payment of benefits actually closes a workers' compensation claim, it is the expiration of the applicable statute of limitations which conclusively and absolutely bars a claim. Not until the applicable statute of limitations has expired may a claim be considered officially closed. And because there are two different statutes of limitations in the Act, which one applies depends on the type of claim involved.

A. "Medical Only" Claims. Medical only claims are those where no indemnity benefits have been paid for either temporary or permanent disability or disfigurement. The applicable statute of limitations provides that "if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits filed with the commission within two (2) years from the date of injury or death, the right to

⁹⁹ Third party settlements are presented in the same way as compromise settlements.

¹⁰⁰ Dunn, supra at §§234-237.

compensation therefor shall be barred."¹⁰¹

This means simply that the running of the 2 year statute of limitations is all that is required to close a medical only claim. If no benefits other than medical or burial are paid for an injury, and the employee does not file a written application or claim for benefits with the Commission, within 2 years of the date of injury, the statute of limitations expires and no further benefits will be due. The claim may be considered closed at that point.¹⁰² If, however, one of these two events does occur, the 2 year statute is erased and is no longer applicable.¹⁰³ Once the two year statute ceases to apply, the claim may be closed only by expiration of the one year statute of limitations.

B. "Lost Time" Claims. Claims which are not medical only claims are referred to as lost time claims. This means that compensation has been or is being paid for disability. These claims are not governed by the two year statute of limitations since the payment of compensation erases the two year statute. Instead, these claims are considered closed only after the one year statute of limitations expires.¹⁰⁴ That statute provides that under certain circumstances, "the commission may, at any time prior to one (1) year after the date of the last payment of compensation . . . review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation."¹⁰⁵

This means simply that an injured employee or beneficiary has sort of a grace period following the final payment of benefits in which to assert a claim for additional benefits, and until this statute of limitations expires, an employer or carrier cannot with any confidence consider the claim to be closed. Once this period does expires, the Commission loses jurisdiction over the claim and the right to any additional benefits is barred.

Set forth below are basic rules to observe once you are confronted with a so-called "lost time" claim. Always remember that a non-controverted "lost time" claim or death claim cannot be considered closed until the one year statute of limitations expires, and the statute of limitations will not expire unless compliance with these rules is achieved.

1. MWCC Form B-31 - purpose and effect. The proper filing of Form B-31 is the one and only way to start the running of the one year statute of limitations on a

¹⁰¹ Miss. Code Ann. §71-3-35(1) (Rev. 2000).

¹⁰² Speed Mechanical, Inc. v. Taylor, 342 So.2d 317 (Miss. 1977).

¹⁰³ Brown v. F. W. Woolworth Co., 348 So.2d 236, 240 (Miss. 1977).

¹⁰⁴ The same rules apply for death claims.

¹⁰⁵ Miss. Code Ann. §71-3-53 (Rev. 2000).

lost time or death claim where indemnity benefits have been paid voluntarily. The B-31 serves as notice to the employee/beneficiary that the employer and carrier consider their workers' compensation obligation to have been fulfilled, and serves also to notify the employee/beneficiary that the running of the applicable statute of limitations has begun.

It is provided by statute that "[n]o case shall be closed" absent notice to the claimant. Form B-31 serves as that notice. This mandate has been interpreted to apply only to so-called lost time claims or death claims; for whatever reason, advance notice as provided by the B-31 is not required for medical only claims.¹⁰⁶

Minor or technical defects in the completion of this form will not prevent the statute of limitations from starting to run,¹⁰⁷ but it is absolutely imperative that the proper steps be taken to provide the claimant with the notice to which he or she is entitled. Unless Form B-31 is properly filed and the claimant is properly notified of this filing, the statute of limitations never starts running.

2. When and how to file MWCC Form B-31. When to file the B-31 is an easy question to answer; how to file it properly in order to start the one year statute of limitations in motion is more problematic. The Act requires that a B-31 be filed with the Commission "[w]ithin thirty (30) days after final payment of compensation has been made."¹⁰⁸

It is not thought, however, that filing the B-31 outside of the 30 day period allowed by the Act renders it ineffective to start the running of the statute of limitations. The only consequence of not filing the B-31 within this period is that the employer or carrier risks the possible assessment of a civil penalty not to exceed \$100.00.¹⁰⁹

A B-31 should not be filed until the employer or carrier, in good faith, considers the final payment of benefits to have been made. A B-31 which is filed at a time when the employer or carrier knows or should know that additional

¹⁰⁶ Miss. Code Ann. §71-3-37(7) (Rev. 2000); MWCC Procedural Rule 17; Speed Mechanical, Inc. v. Taylor, 342 So.2d 317 (Miss. 1977); Bradley, Time Limitations Which Bar Claims in Mississippi Workers' Compensation: A Re-Examination, 62 Miss.L.J. 511, 552-563 (1993).

¹⁰⁷ Carter v. Wrecking Corp. of America, 234 Miss. 559, 107 So.2d 116 (1958); Webster v. Bechtel Construction, Inc. and Industrial Indemnity Insurance Company, MWCC No. 92-00883-F-0947 (May 28, 1997) (failure to include explanation on the form itself why claimant refused to sign not fatal).

¹⁰⁸ Miss. Code Ann. §71-3-37(7) (Rev. 2000).

¹⁰⁹ Cf. Hale v. General Box Manufacturing Co., 87 So.2d 679 (Miss. 1956); Miss. Code Ann. §71-3-37(7) (Rev. 2000).

benefits are due or needed is not sufficient to set the one year statute of limitations in motion.¹¹⁰

How to file the B-31 in order to trigger to running of the statute of limitations is the most important of the claim closing questions. The importance of this question should be obvious. If the B-31 is not properly filed, the statute of limitations does not begin to run, and if the statute is not set in motion, the employer and carrier will find themselves indefinitely liable to an employee, not so much for disability benefits which have built in time limits, but for medical benefits which are potentially unlimited both in time and amount. Set forth below are the proper steps to take in order to ensure the running of the applicable statute once final payment has been made and the B-31 has been completed:

- (1) a completed B-31 should be forwarded to the claimant for his or her review and signature prior to filing with the Commission. Delivery should be by provable means reasonably expected to accomplish receipt by the claimant;
- (2) if the claimant returns the form along with a signature affixed thereto, it may then be filed with the Commission and the one year statute of limitations begins to run on the date the signed form is filed with the Commission;
- (3) if, after a reasonable period of time, the claimant does not return the form, or refuses to sign the form, an unsigned form may be filed with the Commission;
- (4) **after** the unsigned form has been filed with the Commission, the employer or carrier is required to notify the claimant of this fact by certified mail. Again, notice should be by provable means reasonably calculated to accomplish receipt by the claimant, and notice by certified mail, return receipt requested is required;
- (5) the employer or carrier is also well advised to send the claimant a copy of the unsigned form showing the date it was stamped received by the Commission, and also a brief letter explaining the significance of this form, i.e., that the final payment of benefits has been made, that the employee has one year from the date the unsigned form was filed with the Commission in which to assert a claim for additional benefits, and that if no additional benefits are paid or sought within this period, the employee will have no further rights to any benefits;

¹¹⁰ Hale v. General Box Manufacturing Co., 228 Miss. 394, 87 So.2d 679, 680 (1956). A convincing argument could be made as well that the filing of Form B-31 following the unilateral, lump sum payment by a carrier of all benefits due on a claim, if not yet accrued, without Commission approval is not sufficient to set the statute in motion; the B-31 arguably would not be proper and effective until after the expiration of the period of weeks represented by the lump sum payment.

(6) in the case of an unsigned form being filed with the Commission, the one year statute does not begin to run until the claimant has been given proper notice by certified mail that the form **has** been filed with the Commission.¹¹¹

The one year statute does not begin running against an employee during his minority. The running of the statute may commence as of the time the minor reaches majority.¹¹²

3. Interrupting the statute. There are events which interrupt or stop the running of the statute of limitations and require the filing of a new B-31 and the start of a new one year period. However, if none of these events occur within one year after the proper filing of the B-31 and notice to the claimant, the claim may be considered closed.

One such event is the filing by an injured worker of a claim for additional benefits within the one year period. It has been held that no specific claim form is required, and a written letter from the claimant to the Commission giving notice of her injury and her need for continuing medical help was sufficient to stop the running of the one year statute. A new one year period could not be started until after this "claim" was resolved.¹¹³

If the employer or carrier either provides or authorizes any additional benefits, most commonly medical benefits, within the one year period, there is an interruption of the limitations period which requires the proper filing of a new B-31 after the benefits have been provided. This can occur many times during the life of a claim.¹¹⁴

Finally, it has been held by the Commission, though never decided by the courts, that by simply incurring needed medical expense or obtaining needed medical treatment, a claimant can interrupt the running of the statute, even though a formal claim for additional benefits may not be filed with the Commission until more than one year after the B-31 was properly filed, and even though this

¹¹¹ MWCC Procedural Rule 17 (effective April 1, 2001); Staple Cotton Services Ass'n. v. Russell, 399 So.2d 224 (Miss. 1981); Brown v. F. W. Woolworth Co., 348 So.2d 236 (Miss. 1977); Bradley, supra at pp. 589-96.

¹¹² Powe v. Jackson, 236 Miss. 11, 109 So.2d 546 (1956); Dunn, supra at §258.

¹¹³ Harper v. North Mississippi Medical Center, 601 So.2d 395 (Miss. 1992).

¹¹⁴ Graeber Bros., Inc. v. Taylor, 237 Miss. 691, 115 So.2d 735 (1959), sugg. error overruled 117 So.2d 469.

expense may not be paid by the employer or carrier within the one year period.¹¹⁵

V. DENYING (CONTROVERTING) THE CLAIM

Practically, a claim may be denied at anytime by the employer or carrier, and all that is required is that written notice to this effect be provided to the Commission and to the claimant. In any event, once the Commission is notified that a claimant's entitlement to benefits is being denied, or controverted, the Commission as a matter of course will notify the worker or his dependents in writing of this fact at his or her last known address.

A. MWCC Form B-52. Form B-52 was developed by the Commission to serve as the "form approved by the commission" for providing notice of the denial of a claim. The Act provides that "if the employer controverts the right to compensation he shall file with the commission, on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice in accordance with a form prescribed by the commission . . ." By Rule, notice to the employee is required as well.¹¹⁶

This does not mean that Form B-52 can only be used within this 14 day period. As mentioned above, a claim may be denied at any time, and common sense suggests that proper investigation of a claim may take considerably longer than 14 days. The significance of filing this form within the 14 day period noted above is that the employer and carrier thereby avoid penalties on any compensation which may ultimately be awarded to the worker or dependents.¹¹⁷ Therefore, any time the decision is made to deny a claim, or controvert the employee's right to compensation, in whole or in part, it is recommended that you notify the Commission of that decision using Form B-52.

Once Form B-52 or its equivalent is filed with the Commission, the employee or beneficiaries will be notified. It then becomes the claimant's burden to pursue the claim further by the filing of a written application or claim for benefits with the Commission.¹¹⁸

In conjunction with rules set forth above regarding closure of the claim, the

¹¹⁵ Nevil v. Guerdon Industries, Inc., MWCC No. 85-06756-D-3910 (Jan. 12, 1990). The Commission held recently, however, that a "need" for treatment alone which arises within the one year period and which is unknown, and hence incapable of being addressed by either the employer/carrier or the Commission, is not a sufficient event to interrupt to limitations period. Webster v. Bechtel Construction, Inc., *supra*.

¹¹⁶ Miss. Code Ann. §71-3-37(4) (Rev. 2000); MWCC Procedural Rule 2.

¹¹⁷ Miss. Code Ann. §71-3-37(5) (Rev. 2000).

¹¹⁸ The claimant's written claim for benefits may be, and typically is, by Petition to Controvert (Form B-5,11). Once the claimant files a Petition to Controvert or its equivalent, the claim is transferred to the Commission's hearing section where it will be assigned to an Administrative Judge and handled accordingly as a litigated matter.

following should be kept in mind: (1) if no compensation other than medical or burial benefits has been paid at the time Form B-52 or its equivalent is filed, the 2 year statute of limitations continues to run. The claim will be considered closed upon the expiration of this period unless prior thereto a written claim is filed with the Commission by the injured worker; (2) if non-medical or non-burial benefits have been paid before Form B-52 or its equivalent is filed, the 2 year statute of limitations is not applicable. Therefore, it becomes necessary to file Form B-31 in order to start the running of the one year statute of limitations.

VI. IMPORTANT PROVISIONS OF THE MWCA

There are several provisions of the Mississippi Workers' Compensation Act which come into play quite often during the course of an on-going claim. These are provisions you should be familiar with and which deserve special mention.

(1) "No compensation shall be payable if the intoxication of the employee was the **proximate cause** of the injury. . ." ¹¹⁹ This means that a positive post-accident drug or alcohol, standing alone, is not a legally sufficient reason to deny a claim. If a denial is based on this ground, be prepared to prove the employee's use of drugs or alcohol was the "proximate cause" of the injury, i.e., but for the use of such substances, the injury would not have occurred.

(2) "Compensation for loss of more than one (1) phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half (1/2) of the compensation for loss of the entire digit." ¹²⁰ This means that loss of more than one phalange entitles the claimant to 100% of the digit, and loss of exactly the first phalange entitles the claimant to at least 50% of the digit, regardless of the rating assigned by the physician. If in the latter situation the doctor rates the impairment greater than 50%, it is recommended that payment be made for the greater impairment.

(3) "Compensation for an arm or leg, if amputated at or above wrist or ankle, shall be for the loss of the arm or leg." ¹²¹ This means that any amputation at or above the wrist or ankle entitles the claimant to 100% loss of the arm or leg, regardless of the assigned rating.

(4) "Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two (2) thereof shall constitute permanent total disability." ¹²² This provision is self-explanatory, and should be kept in mind with (3) above and with (5) below.

¹¹⁹ Miss. Code Ann. §71-3-7 (Rev. 2000).

¹²⁰ Miss. Code Ann. §71-3-17(c)(18) (Rev. 2000).

¹²¹ Miss. Code Ann. §71-3-17(c)(19) (Rev. 2000).

¹²² Miss. Code Ann. §71-3-17(a) (Rev. 2000).

(5) "Compensation for loss of binocular vision or for eighty percent (80%) or more of the vision of an eye shall be the same as for loss of the eye."¹²³ This means that a loss of binocular vision or of at least 80% of vision entitles the claimant to compensation for 100% loss of use of the eye.

(6) "Compensation for loss of two (2) or more digits, or more than one (1) phalange of two (2) or more digits, of a hand or foot may be proportioned to the loss of the use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot."¹²⁴

(7) "In any case in which there shall be a loss of, or loss of use of, more than one (1) member or parts of more than one (1) member set forth in paragraphs (1) to (23) of this subsection, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or parts thereof, which awards shall run consecutively, except that where the injury affects only two (2) or more digits of the same hand or foot, paragraph (21) of this subsection shall apply."¹²⁵ This section means that unless there is a loss to more than one digit of a hand or foot, or unless there is a loss of more than one member which amounts to permanent total disability, the employee is entitled to compensation for each separate member loss as the result of a single accident.

(8) "Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining or wrongfully withholding any benefit or payment under this chapter is guilty of a felony and on conviction thereof may be punished by a fine of not to exceed Five Thousand Dollars (\$5,000.00) or double the value of the fraud, whichever is greater, or by imprisonment not to exceed three (3) years, or by both fine and imprisonment."¹²⁶ This prohibition now applies to both claimants and employers/carriers. It is equally felonious to attempt to fraudulently obtain benefits or to fraudulently withhold benefits.

(9) "If an employee who has previously lost, or lost the use of, one (1) hand, one (1) arm, one (1) foot, one (1) leg, or one (1) eye, becomes permanently and totally incapacitated through the loss, or loss of use, of another member or organ, the employer shall be liable only for the compensation payable for such second injury. In addition to such compensation and after the completion of the payment therefor, the employee shall be paid the remainder of the compensation that would be due for permanent total incapacity, out of special fund known as the "Second Injury Fund" . . ."¹²⁷ Either the employer/carrier or the employee may make written request to the Commission for payment out of this Fund for a qualifying disability.

¹²³ Miss. Code Ann. §71-3-17(c)(20) (Rev. 2000).

¹²⁴ Miss. Code Ann. §71-3-17(c)(21) (Rev. 2000).

¹²⁵ Miss. Code Ann. §71-3-17(c)(26) (Rev. 2000).

¹²⁶ Miss. Code Ann. §71-3-69 (Rev. 2000).

¹²⁷ Miss. Code Ann. §71-3-73 (Rev. 2000).

VII. PRACTICAL SUGGESTIONS FOR PROCESSING CLAIMS

There are certain things you can do when filing documents with the Commission to speed up the claims process, and cut down on the need for so many exchanges of information and requests for information. Please observe the following:

(1) Never submit any document or form for filing without an MWCC file number. If you do not know the MWCC file number at the time, please call the Commission first and get this information.

(2) When submitting more than one document or form simultaneously, particularly with the First Report of Injury, be sure that all related documents are securely fastened together.

(3) Please note that prior approval of Form B-18 is not required in order for payment of benefits to begin. You should begin the payment of benefits on or before the date the form is filed. If there is an error on the notice of payment form, you will be notified in due course by the Commission.

(4) When reporting the payment of permanent disability benefits on Form B-18, please verify whether a final medical report giving the date of maximum medical improvement and the degree of permanent impairment has been filed with the Commission. These matters cannot be reviewed without this additional information. To be safe, send the final medical report along with the Form. If the injury involves an amputation, we must also have an amputation chart or drawing which depicts the level of the amputation.

(5) When completing section III of Form B-18, the date you agree to begin paying compensation for permanent partial disability should always be either the date of maximum medical improvement or the return to work date, whichever you are using. If for some reason you do not actually begin paying on this date, please include an explanation on or with the form. If reporting permanent total disability payments, these are retroactive to the date of disability and this is the date you should put on Form B-18.

(6) Always keep in mind that the Commission will not consider or approve any proposed settlement involving a minor (person under the age of 21) unless prior approval has been secured from a chancery or other court of competent jurisdiction.

(7) Whenever there are circumstances requiring a departure or deviation from the norm, please note this situation either on a particular form or document, or by attachment. An example would be where wages are being continued in lieu of compensation. Simply note this on Form B-18 when reporting the first payment of benefits.

VIII. DIRECTORY

<u>Name</u>	<u>Number</u>	<u>For</u>
Switchboard	601-987-4200	General information
Phyllis Clark Commission Secretary	601-987-4252	Orders, Certified Records
Sheila Cheatham Director, Claims Dept.	601-987-4291	Information/questions about paying, reporting and processing claims.
Claims Examiners	601-987-4238 601-987-4239 601-987-4242 601-987-4249 601-987-4288 601-987-4246 601-987-4281	Information on status of non-controverted claims, to get or verify MWCC file number First Report of Injury information Attorney Contracts, Notice of Controversion
Preston Williams Mary Sanders	601-987-4207 601-987-4248	Self Insurance Directopr Insurance information
Scott Clark Margaret Redmond	601-987-4266 601-987-4293	Legal inquiries. Legal inquiries.
Sherry Hofmister Cost Containment Director	601-987-4280	Information or questions about medical fee schedule, fee billing and disputes, cost containment, and benefit computations.
Joel Peeler Amanda Hammond Miranda Baker	601-987-4298 601-987-4251 601-987-4273	Rehabilitation/Claims Assistance General claims assistance, information on status of claims, non-adversarial dispute resolution.
Marilynne Nelson	601-987-4287	Information System Director
Keith Knott	601-987-4297	Copies of records
LEXIS Publishing	800-542-0957	To order Miss. Workers' Compensation Law and Rule Book.

APPENDIX

**DISABILITY BENEFITS
MINIMUM AND MAXIMUM RECOVERY**

EFF. DATE	WK. MIN.	WK. MAX	CAT. MAX	OVERALL MAX
1/1/49	\$ 7.00	\$ 25.00	\$ 8,600.00	\$ --
4/6/50	\$10.00	\$ 25.00	\$ 8,600.00	\$ --
1/1/59	\$10.00	\$ 35.00	\$ 12,500.00	\$ 14,500.00
8/9/68	\$10.00	\$ 40.00	\$ 15,000.00	\$ 17,000.00
7/1/72	\$10.00	\$ 56.00	\$ 21,000.00	\$ 23,500.00
7/4/74	\$10.00	\$ 63.00	\$ 21,000.00	\$ 23,500.00
7/1/76	\$25.00	\$ 84.00	\$ 37,800.00	\$ 37,800.00
7/1/77	\$25.00	\$ 91.00	\$ 40,950.00	\$ 40,950.00
7/1/79	\$25.00	\$ 98.00	\$ 44,100.00	\$ 44,100.00
7/1/81	\$25.00	\$112.00	\$ 50,400.00	\$ 50,400.00
7/1/84	\$25.00	\$126.00	\$ 56,700.00	\$ 56,700.00
7/1/85	\$25.00	\$133.00	\$ 59,850.00	\$ 59,850.00
7/1/86	\$25.00	\$140.00	\$ 63,000.00	\$ 63,000.00
7/1/88	\$25.00	\$198.00	\$ 89,100.00	\$ 89,100.00
1/1/89	\$25.00	\$206.60	\$ 92,970.00	\$ 92,970.00
1/1/90	\$25.00	\$212.58	\$ 95,661.00	\$ 95,661.00
1/1/91	\$25.00	\$218.26	\$ 98,217.00	\$ 98,217.00
1/1/92	\$25.00*	\$227.18	\$102,231.00	\$102,231.00
1/1/93	\$25.00*	\$235.84	\$106,128.00	\$106,128.00
1/1/94	\$25.00*	\$243.75	\$109,687.00	\$109,687.00
1/1/95	\$25.00*	\$252.59	\$113,665.50	\$113,665.50
1/1/96	\$25.00*	\$264.55	\$119,047.50	\$119,047.50
1/1/97	\$25.00*	\$270.67	\$121,801.50	\$121,801.50
1/1/98	\$25.00*	\$279.78	\$125,901.00	\$125,901.00
1/1/99	\$25.00*	\$292.86	\$131,787.00	\$131,787.00
1/1/2000	\$25.00*	\$303.35	\$136,507.50	\$136,507.50
1/1/2001	\$25.00*	\$316.46	\$142,407.00	\$142,407.00
1/1/2002	\$25.00*	\$322.90	\$145,305.00	\$145,305.00
1/1/2003	\$25.00*	\$331.06	\$148,977.00	\$148,977.00
1/1/2004	\$25.00*	\$341.11	\$153,499.50	\$153,499.50
1/1/2005	\$25.00*	\$351.14	\$158,013.00	\$158,013.00
1/1/2006	\$25.00*	\$364.57	\$164,056.50	\$164,056.50
1/1/2007	\$25.00*	\$387.68	\$174,456.00	\$174,456.00

* \$25.00 minimum applicable only in case of death or total disability. Minimum not applicable to partial dependency, and effective 5-15-92, no longer applicable in partial disability cases.



Mississippi Workers' Compensation Commission

1428 Lakeland Drive / Post Office Box 5300
Jackson, Mississippi 39296-5300
(601) 987-4200
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Ben Barrett Smith, Chairman
Barney J. Schoby, Commissioner
Lydia Quarles, Commissioner

Ray Minor, Executive Director

February 2002

HOW TO APPLY GENERAL RULE 10 WHEN PAYING INDEMNITY BENEFITS

Mississippi Workers' Compensation Commission General Rule 10 was amended effective April 1, 2001 to provide a formula for computing the "daily rate" of compensation to be paid in situations where payment for less than a whole week is due. This Rule directs that the "daily rate" shall be computed by dividing the weekly compensation rate by five (5). **Importantly**, this Rule does not prescribe how one determines the number of days lost from work in the first instance. It merely establishes what the "daily rate" of compensation shall be after it has first been determined how many days of compensation are owed, and is subject to the statutory weekly maximum limit on compensation. Miss. Code Ann. §71-3-13(a), 71-3-17(a) - (c), (c)(25), 71-3-21, 71-3-25(c) - (f), (d) (Rev. 2000). In light of this change, questions have arisen as to the proper method for computing the amount of compensation due in cases where the use of the new "daily rate" formula would possibly cause the total payments due in any given week to exceed the maximum weekly compensation otherwise due.

In applying General Rule 10 it must be remembered that it does not amend or override the statutory provisions for maximum compensation, but is instead subject to these provisions. Consequently, the compensation payable for up to seven (7) **consecutive calendar days** can not exceed the statutory weekly maximum in effect for the injury in question. This means, in effect, that in any case where you owe compensation for at least five (5), six (6) or seven (7) **consecutive calendar days**, you will pay no more than the maximum weekly benefit due on that claim. You do not, for example, have to pay for six (6) **consecutive calendar days** at the "daily rate" prescribed by General Rule 10 since this would result in compensation which exceeds the statutory weekly maximum. Your liability for a period of up to seven (7) **consecutive calendar days** is statutorily limited to the weekly maximum benefit in effect at the time of injury.

If, on the other hand, you owe indemnity benefits for a period of less than five (5) **consecutive calendar days**, then in that event you would pay using the "daily rate" prescribed by General Rule 10. You may also pay using the "daily rate" prescribed by General Rule 10 anytime you have recurring periods of disability which do not extend for at least five (5) **consecutive calendar days**. This would occur, for example, when an injured employee incurs days or periods of disability on an intermittent basis, such as one or two days per week over the course of several weeks. In this situation, the employee may have more than five (5) total days of disability extending over a period of several weeks, but because there would not be any period when the employee had at least five (5) **consecutive calendar days** of disability, payment might be made on a daily basis using the "daily rate" prescribed by General Rule 10.¹²⁸

¹²⁸ You may also treat periods of intermittent disability such as that just described as temporary partial disability and pay according to Miss. Code Ann. §71-3-21 (Rev. 2000), in which case General Rule 10 would not apply.

Example #1: Employee makes \$500.00 per week, is injured January 1, 2002, and is out of work because of a compensable injury continuously from January 2, 2002 through January 24, 2002, and returns to work on January 25. If you use the "consecutive calendar day" method of counting lost time (i.e., you count all days, including intervening weekends and other non work days), then this person would have 23 consecutive calendar days of total disability. Applying General Rule 10 and the statutory weekly maximum, you would pay this person three whole weeks of benefits at the rate of \$322.90¹²⁹ per week for the first twenty-one (21) consecutive calendar days, and you would pay this person for the last two (2) days using the daily rate prescribed by General Rule 10 ($\$322.90 \div 5 \times 2 = \129.16).

Example #2: Same employee as above except that he misses time from work intermittently at the rate of two (2) days per week for eight (8) weeks. Consequently, he has sixteen (16) days of total disability for which he should be paid, but there is no period in which he incurred at least five (5) **consecutive calendar days** of disability. If you pay this person for sixteen (16) days of total disability at the "daily rate" prescribed by General Rule 10, you would pay $\$322.90 \div 5 \times 16 = \1033.28 .¹³⁰

Example #3: Employee makes \$300.00 per week, is injured January 1, 2002, and is out of work continuously due to a compensable injury from January 2, 2002 through January 28, 2002, and returns to work on January 29. If you use the "consecutive calendar day" method of counting lost time (i.e. you count all days, including intervening weekends and other non-work days), then this person would have 27 consecutive calendar days of total disability. Applying General Rule 10 and the statutory limits on compensation, you would pay this person three (3) whole weeks of benefits at the rate of \$200.00 per week¹³¹ for the first twenty-one (21) consecutive calendar days. For the remaining six (6) consecutive calendar days, you would pay this person an additional whole week of benefits at the rate of \$200.00 per week since application of the "daily rate" prescribed by General Rule 10 would cause the compensation otherwise due for this six (6) day period to exceed the maximum weekly limit on compensation, and General Rule 10 is still subject to the maximum weekly limits set by statute.

Reporting Payments: Upon filing of the B-31, Notice of Final Payment Form, please report each full weekly payment as a "week" of benefits paid, whether that weekly payment covers a five (5), six (6) or seven (7) consecutive calendar day period. For example, you would report the payments in example #3 above as four (4) weeks of temporary total disability benefits. If, instead, you report this as three (3) weeks and six (6) days, and we can not tell whether the six (6) days were consecutive calendar days, we will assume the six (6) days were not consecutive calendar days. We will then figure the compensation due for these six (6) days using the "daily rate" prescribed by General Rule 10 ($\$200.00 \div 5 \times 6 = \240.00).

¹²⁹ Pursuant to Miss. Code Ann. §71-3-13(a), 71-3-17(b), this person is entitled to weekly compensation equal to the lesser of two-thirds of his average weekly wage (\$333.35) or the weekly maximum in effect for 2002 (\$322.90).

¹³⁰ This example serves only to illustrate how the statutory weekly maximum limits the compensation payable for any period of five (5) to seven (7) consecutive calendar days, and not for periods which, in the aggregate, are greater than five (5) days but are not consecutive calendar days. Lost time like in this example may also be paid as temporary partial disability pursuant to Miss. Code Ann. §71-3-21 (Rev. 2000), in which case General Rule 10 would not apply.

¹³¹ Pursuant to Miss. Code Ann. §71-3-17(b), this employee's weekly compensation benefit is equal to two-thirds of his average weekly wage, "subject to the maximum limitations as to weekly benefits" as prescribed by Miss. Code Ann. §71-3-13(a).

MILEAGE REIMBURSEMENT RATES	
Effective Date	Rate per Mile
Before 7/1/1994	20 cents
7/1/1994	25 cents
1/1/1995	30 cents
8/12/1996	31 cents
10/1/1998	32.5 cents
4/1/1999	31 cents
1/14/2000	32.5 cents
1/22/2001	34.5 cents
1/21/2002	36.5 cents
1/16/2003	36 cents
1/1/2004	37.5 cents
2/4/2005	40.5 cents
9/1/2005	48.5 cents
1/6/2006	44.5 cents
2/1/2007	48.5 cents