



COVID-19 CLEARS THE WAY FOR TELEHEALTH TO TREAT TENNESSEE WORKPLACE INJURIES



Fredrick R. Baker

"[I]n only about a month and half, we have gone from not being able to use telehealth at all in the context of workers' compensation, to being able to use it routinely as a vital component of providing uninterrupted medical care for injured workers."

One of the most fundamental rights of an injured worker under the Tennessee Workers' Compensation Law is the right to medical treatment for the work-related injury or illness. Typically, this medical treatment is provided by a medical provider chosen by the injured worker from a list of doctors – i.e. the medical panel. The statute requires that the medical panel consist of providers who are located in the employee's community, with the clear intent being that the medical provider needs to be located near enough to where the injured worker lives so that the injured worker can be treated by the medical provider without any undue burden or expense of excessive travel. This entire framework assumes that the injured worker will receive treatment by physically going to the doctor's office and by undertaking an in-

person medical visit with the provider. Indeed, that is exactly what was required under the Tennessee Workers' Compensation law – that is, until the COVID-19 pandemic.

Before COVID-19, the Tennessee Workers' Compensation Law did not provide for nor did it allow an injured worker to receive treatment for his or her injury via a telehealth visit. However, that has now changed.

The first step occurred on March 17, 2020, when the Trump Administration announced expanded Medicare

telehealth coverage to enable beneficiaries to receive a wider range of healthcare services from their doctors without having to travel to a healthcare facility. Prior to this announcement, Medicare was only allowed to pay clinicians for telehealth services such as routine visits in certain circumstances. For example, the beneficiary receiving the services must live in a rural area and travel to a local medical facility to get telehealth services from a doctor in a remote location. In addition, the beneficiary would generally not be allowed to receive telehealth services in their home. President Trump's announcement came at a critical time as these new flexibilities would help healthcare institutions across the nation to offer some medical services to patients remotely, so that healthcare facilities like emergency departments and doctor's offices remain available to deal with the most urgent cases and to reduce the risk of additional infections.

On March 25, 2019, the Tennessee Bureau of Workers' Compensation issued a notice stating, for the first time, that a panel-chosen physician may utilize telehealth in the treatment of an injured worker. The notice clarified that there is no specific provision in the law that addresses the subject of a telehealth provider to be listed on the medical panel. Payment was directed to be made in accordance with all guidelines from the U.S. Centers for Medicare & Medicaid Services (CMS), including those announced on March 17, 2020.

The Tennessee Bureau of Workers' Compensation provided even further guidance on April 1, 2020, by issuing its Temporary Guidance on Telehealth for Workers' Compensation. This guidance specifically allows for telehealth in the context of workers' compensation *during the COVID-19 national emergency*, to provide appropriate care continuation and to improve functional considerations for both new and established patients. The Bureau required that telehealth visits be conducted by telephone only or by video/audio links with the express

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COVID-19 AND OSHA'S UPDATED RESPONSE TO INSPECTIONS



Courtney Hart

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and guidance to OSHA offices and compliance officers for handling COVID-19 related complaints, referrals, and severe illness reports. Employers can use this guidance to better understand what they should expect from OSHA inspections during this uncertain time.

Under these new guideline, OSHA will return to the inspection policy relied on prior to COVID-19 in communities where the spread of COVID-19 has significantly decreased. Employers in these areas should note that inspections are likely to be less prevalent for non-COVID reports, as OSHA will continue to prioritize inspections of reported COVID-19 cases. However, in most cases, fatalities, imminent danger reports, and life-critical unprogrammed activities will result in on-site inspections.

In high-risk workplaces (primarily healthcare facilities such as hospitals, nursing homes, morgues, and other facilities that come into close contact with the virus) or where a local area is experiencing either a sustained elevated community transmission or a resurgence of community transmission, OSHA inspectors are to follow *modified procedures*. Fatalities and imminent danger exposures related to COVID-19 will be prioritized for inspections. However, non-formal phone/fax inspections, instead of on-site inspections, will be used when necessary. In determining whether or not to conduct an in-person inspection, area OSHA offices will consider factors such as the severity of the complaint and the availability of PPE to OSHA inspectors. It is expected that OSHA will develop a program to conduct monitoring inspections from a randomized sampling of fatality or imminent danger cases

where inspections were not conducted in accordance with normal procedure due to resource limitations. That suggests that employers who suffer fatalities and imminent danger exposures related to COVID-19 and are not initially subjected to an on-site investigation should be prepared to undergo an on-site investigation at some point after the current restrictions are loosened.

These new guidelines further provide that all other formal complaints alleging COVID-19 exposure (those exposures that do not result in death or imminent danger), where employees are engaged in medium to lower exposure risk tasks (most non-healthcare related workers), might now result in an on-site inspection.

If, despite these new guidelines, OSHA determines that an on-site inspection is warranted, the process may still look a little different than pre-COVID. Opening conferences are to be conducted in a manner that recognizes current social distancing standards, such as in a meeting room large enough to accommodate individuals maintaining a 6-ft. distance from one another, in an outdoor location, or by telephone. Document review will occur electronically or remotely. OSHA inspectors must wear PPE, to include a minimal level of respiratory protection. OSHA inspectors are further required to ask employers if there are any facility-imposed PPE requirements and adhere to those PPE requirements during the course of their inspection. Also, if the formal inspection can be conducted without accessing a location of suspected or confirmed COVID-19 exposure, then all possible steps must be taken by the OSHA inspector to avoid such exposure.

The updated memorandum specifies that violations of OSHA standards cited under the current inspection guidance in the memorandum will normally be classified as serious. While this guidance can sound concerning, especially to healthcare and other high exposure facilities, the guidance does recognize the mass shortage of needed PPE, and it goes on to set out standards which should be followed if a facility lacks the necessary equipment certified by the National Institute for Occupational Safety and Health. The guidelines go on to say that OSHA inspectors should exercise enforcement discretion when considering issuing citations in cases where PPE is lacking due to shortage, but a plan has been formulated and other feasible measures have been taken to protect employees from possible exposure.

In short, employers should not expect OSHA to be conducting a lot of non-COVID inspections, for the foreseeable future. Employers who are reported for COVID-19 related fatalities and imminent danger situations can expect inspection of some sort. If an on-site inspection is not conducted immediately, employers should be prepared for an on-site investigation to take

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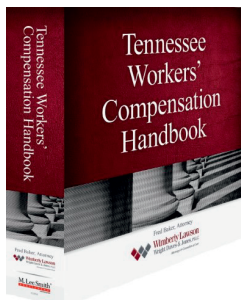
Greetings to all,

Summer is quickly approaching. Ordinarily that means that our advanced team starts to “shift gears into high” to prepare for much work in anticipation of our fall seminar. However, like the rest of our nation, as well as the world, our firm has been dealing with the COVID-19 pandemic. Given the effects of the coronavirus and the related health issues, not to mention a number of companies tightening travel and training budgets, we have decided that it will be impossible to have our traditional fall seminar this year.

As many of you know, we have held our fall seminar for forty years. In spite of being forced to break with forty years of tradition, we have decided not to totally allow the seminar season to go by without reaching out to our clients in some way. As such, we are actively planning to conduct a teleconference/webinar in the place of our traditional fall conference.

We are anxious to share information in the near future about what we believe will be an informative and entertaining alternative. We certainly hope that you will plan to attend. It is our plan to pick up in 2021 where we left off with our fall seminar. We will be sending more information to you about our teleconference/webinar for this fall and our 2021 Labor & Employment Conference. We appreciate your support through the years.

Jeffrey G. Jones
Firm Managing Member



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“COVID-19 CLEARS THE WAY FOR TELEHEALTH”

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agreement by both patient and provider. Although recommended to have the appropriate Tennessee licenses, certain requirements were waived for specific qualified providers. Moreover, certain telecommunications applications not previously allowed are now permitted for use during this period, including Skype and Facetime. It is anticipated that the provider will still make a good faith effort to protect patient privacy, and records should be kept as if the visit were in-person. Medical providers may bill for the visits using standard billing forms, and the bill should be paid pursuant to the applicable Medical Fee Schedule.

On April 30, 2020, CMS announced that it was waiving certain requirements of federal law which specify the types of practitioners that may bill for the services when furnished as telehealth services. The waiver of these requirements expands the types of health care professionals who can provide telehealth services. As a result, physical therapists, occupational therapists, and speech language pathologists were permitted to use telehealth to provide many Medicare services.

On May 1, 2020, this issue was also addressed by Governor Bill Haslam in Executive Order No. 32. That Executive Order addressed physical, occupational, and speech therapy via telemedicine for workers' compensation claimants, and it temporarily suspended certain existing workers' compensation regulations to specifically allow those types of services to be delivered via telemedicine. The Order also specified that the billing for such services should be reimbursed as if the services were delivered in-person.

As you can see from the above, in only about a month and half, we have gone from not being able to use

telehealth at all in the context of workers' compensation, to being able to use it routinely as a vital component of providing uninterrupted medical care for injured workers. Not only does this help the injured worker by providing continued care, it also helps employers and their workers' compensation carriers by helping to ensure that workers' compensation claims will continue to move toward resolution in an orderly fashion. After all, a claim cannot typically be resolved until the employee has completed his or her medical treatment with the authorized treating physician and placed at maximum medical improvement. Before the introduction of telehealth, COVID-19 presented quite an obstacle in this regard since most non-emergency medical care was placed on hold, including the necessary follow-up care for work injuries. However, the new availability of telehealth should benefit both injured workers and their employers by allowing that medical treatment to get back on track – at least to some extent.

Obviously, telehealth is not the right solution for every situation. There will always be a need for in-person medical treatment, particularly at the beginning and end of treatment, and for direct procedures. However, for routine follow up care and therapy, telehealth will sometimes be the best solution to keep the claim moving forward in a timely fashion. While the above-described measures by the Tennessee Bureau of Workers' Compensation are temporary and apply only during the COVID-19 pandemic, be on the lookout for more permanent measures. The benefits of telehealth under the right circumstances cannot be questioned, and it seems very likely that telehealth in some form is here to stay.

“COVID-19 AND OSHA”

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place at some point after COVID-19 restrictions are further loosened.

While it is inevitable that many healthcare facilities will be reported for COVID-19 related fatalities and imminent danger situations, there are steps that can be taken on the part of employers to avoid citations. Employers should stay up-to-date on -- and implement -- policies in accordance with CDC guidelines. In the event employers are unable to provide their employees with certified equipment, the employer should do the best they can to provide protections from the virus to all employees. Employers should further document their attempts to obtain certified

equipment and the steps they are taking to protect their employees.

As always, if you find your company being the focus of an OSHA inspection, we here at Wimberly, Lawson, Wright, Daves & Jones, PLLC are here to help and guide you through the process.

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