STATE OF TENNESSEE

Advisory Council on Workers' Compensation

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2017 SUMMARY OF SIGNIFICANT TENNESSEE SUPREME COURT WORKERS' COMPENSATION DECISIONS

TREASURY DEPARTMENT
STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0225

David H. Lillard, Jr., State Treasurer, Chair
Larry Scroggs, Administrator

Significant 2017 Tennessee Supreme Court Workers' Compensation Decisions

INTRODUCTION

Pursuant to Tennessee Code Annotated ("T. C. A.") § 50-6-121(i), the Advisory Council on Workers' Compensation is required to issue this report reviewing significant Tennessee Supreme Court decisions involving workers' compensation matters for each calendar year. This report contains a synopsis of the cases, with topical headings to facilitate review of the 2017 decisions from the Tennessee Supreme Court.

The Tennessee Supreme Court

Appeals of decisions in workers' compensation cases by trial courts, including the Circuit and Chancery Courts, the Court of Workers' Compensation Claims, the Tennessee Claims Commission, and appeals from Workers' Compensation Appeals Board decisions are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel ("Panel") for hearings. Participating judges who comprise the panels are designated by the Supreme Court and each panel includes a sitting Justice. The Panel gives considerable deference to the lower trial courts' decisions with respect to credibility of witnesses since the lower trial courts have the opportunity to observe individuals testify. The Panel reports its findings of fact and conclusions of law, and such judgments automatically become the judgment of the full Supreme Court thirty (30) days thereafter, barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and T. C. A. § 50-6-225 and see also T. C. A. § 50-6-217(a)(2)(B), relative to the appeal process from the Workers' Compensation Appeals Board.

The Tennessee Supreme Court Special Workers' Compensation Appeals Panel

The Supreme Court and its Special Workers' Compensation Appeals Panel issued opinions in 36 cases between January 9, 2017 and December 28, 2017. Thirty-one opinions, including one direct appeal from the Tennessee Claims Commission, were **"old law"** cases, based on claims arising prior to the July 1, 2014 effective date of the Workers' Compensation Reform Act of 2013. The other five opinions were issued in **"new law"** cases. Four of those involved appeals from the *Court of Workers' Compensation Claims* and one came directly from the *Workers' Compensation Appeals Board*.

With the passage of time, fewer **"old law"** cases will work through the appeals process. Direct appeals to the Supreme Court should gradually decrease as more cases are resolved in the Court of Workers' Compensation Claims and the Workers' Compensation Appeals Board. Pending legislation brought by the Administrative Office of the Courts on behalf of the Tennessee Supreme Court would eliminate the existing "appeal by right" to the Supreme Court. The Advisory Council on Workers' Compensation considered the legislation in three meetings in 2017 during the First Session of the 110th General Assembly but did not recommend that the appeal by right be eliminated.

Summaries of the cases decided by the Supreme Court and its Special Workers' Compensation Appeals Panel in 2017 are presented here, with headings that constitute a workers' compensation "issues list."

TABLE OF ISSUES

STATUTE OF LIMITATIONS

Jason Baker v. Total Air Group LLC F/K/A Tunica Air Group LLC, et al.
No. W2016-00965-SC-R3-WC- Filed August 7, 2017

The employee was injured at work on February 11, 2011 and reached maximum medical improvement on June, 13, 2011. The insurer made its final voluntary payment of medical expenses on December 31, 2012. The employee returned to work but was terminated July 29, 2104. He alleged he had requested and received authorization from the insurer for additional medical treatment in February 2015. He filed suit in Tennessee on May 1, 2015. The employer alleged the claim was barred by the statute of limitations. On cross-motions for summary judgment, the trial court held the claim was not barred and awarded benefits. This appeal by the employer challenged the ruling on the statute of limitations.

The Panel concluded the trial court's ruling was based on its finding that the employee's receipt of additional authorized medical treatment in February 2015 extended the one-year statute of limitations. The Panel found the employee's receipt of authorized medical treatment *did not* extend or revive the already expired statute of limitations but it **affirmed** on different grounds. The Panel held that the *doctrine of equitable estoppel* applied. The employer was prevented from relying on the statute of limitations defense since it had directed the employee to pursue his claim under Mississippi law. The Panel agreed with the trial court's ruling that the employee, although a Mississippi resident, was hired and regularly employed in Tennessee, thus depriving Mississippi of jurisdiction over the claim. The Panel agreed the employer's erroneous handling of the claim under Mississippi law misled the employee about the applicable statute of limitations.
http://www.tncourts.gov/sites/default/files/bakeropn.pdf

United Parcel Service, Inc. et al. v. Robert Charles Millican, Jr.
No. E2016-024242424-SC-R3-WC-Filed October 24, 2017

The employer filed suit to resolve a dispute with the employee over a hearing loss claim. The employer asserted the claim was barred by the statute of limitations since the claim was filed three years after a doctor advised the employee his hearing loss was work related. The trial court agreed. On appeal the employee contended that the statute of limitations was effectively tolled because of the *last day worked rule*. The employee, a truck driver, claimed he sustained additional hearing loss every day he worked. The Panel observed that under the last day worked rule, the statute of limitations to bring a workers' compensation claim begins to run on the first day the employee misses work due to his injury, citing *Crew v. First Source Furniture Group*, 259 S.W.3d 656, 670 (Tenn. 2008), and *Building Materials Corp. v. Britt*, 211 S.W.3d 706, 711 (Tenn. 2007). The rule is based on the idea that a gradually occurring injury is a new injury each day the employee works. *Britt*, at 711. The Panel **affirmed** the trial court, concurring in its finding that decibel level noise testing evidence did not support the employee's claim that noise from trucks he drove caused his gradual hearing loss.

http://www.tncourts.gov/sites/default/files/opinion_20171024125933.pdf

CAUSATION

Donald Ray Brown v. Zurich American Insurance Company
No. E2016-00237-SC-R3-WC-Filed April 21, 2017

The employee claimed his heart attack was compensable because of work related stress, depression and anxiety. Medical proof did not establish a triggering acute or unexpected event and instead pointed to a narrowed coronary artery. The trial court ruled the employee failed to carry his burden of proof to establish compensability. The Panel **affirmed**, after reviewing two categories of heart attack cases. In the first, the Panel noted heart attacks precipitated by physical exertion or strain, and in the second, "those resulting from stress, tension, or some type of emotional upheaval." *Bacon v. Sevier County*, 808 S.W.2d 46, 49 (Tenn. 1991). The Panel found no evidence of any causative physical exertion or strain. Citing *Bacon* and *Cunningham v. Shelton Sec. Serv., Inc.*, 46 S.W.3d 131 (Tenn. 2001), the Panel observed "(n)ormal ups and downs are part of any employment relationship and . . . do not justify finding an 'accidental injury' for purposes of workers' compensation law. *Bacon*, at 53. "Accordingly, the well-settled rule in Tennessee is that physical or mental injuries caused by worry, anxiety, or emotional stress of a general nature or ordinary stress associated with an employee's occupation are not compensable. The injury must be the result of an incident of abnormal and unusual stressful proportions. . ." *Cunningham*, at 137.

http://www.tncourts.gov/sites/default/files/brown-filed_20170519130829.pdf

Clifford Barker v. The Goodyear Tire & Rubber Company
No. W2015-01893-SC-R3-WC-Filed August 2, 2017

The employee retired in 1999 after 30 years with the employer. On March 18, 2014 he filed suit alleging employment-related noise induced hearing loss. The trial court awarded benefits for 30% permanent partial disability in both ears. On appeal the employer contested the award as well as the finding of causation. Medical proof indicated noise induced hearing loss with a significant worsening of the employee's hearing after his retirement. The doctors agreed age-related hearing loss was worse for persons who had sustained hearing loss earlier in life. The trial court found the employee's noise exposure at work was a "major contributing factor" to his hearing loss. The Panel **affirmed in part** but reduced the award to 15% in both ears, holding that the proof indicated the bulk of the employee's hearing loss took place after his retirement, that he had been able to obtain and hold post-retirement part-time employment without restrictions, and that he was minimally affected in his daily living activities.

http://www.tncourts.gov/sites/default/files/barkeropn.pdf

Steven Bell v. Goodyear Tire& Rubber Company
No. W2015-01675-SC-R3-WC-Filed August 7, 2017

The employee retired in 2011 after 37 years with Goodyear. He requested a benefit review conference shortly after retirement, contending he had sustained hearing loss a result of noise exposure at work. He filed suit on May 4, 2012. The employer denied the claim, alleging the employee had moderate to severe hearing loss when he was hired. The trial court awarded 40% permanent disability benefits for hearing loss in both ears. On appeal the Panel **affirmed** the judgment, noting the medical experts agreed the employee had a substantial hearing loss in the higher frequencies when hired, but that noise exposure at work "was the primary cause of the aggravation of Employee's low-frequency hearing loss." In reaching its decision the Panel observed the trial court had chosen to accredit one expert over another. "When a trial court faces conflicting expert testimony, it generally has the discretion to choose which expert to accredit." *Kellerman v. Food Lion, Inc*., 929 S.W.2d 333, 335 (Tenn. WC Panel 1996). The Panel disagreed with the employer's contention the award was excessive, citing *Lang v. Nissan N. Am. Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005). "The extent of an injured worker's permanent disability is a question of fact." Additionally, the court in *Lang* observed "It is well settled that an employee may recover for injury to a scheduled member without regard to loss of earning capacity." *Lang*, at 569.
http://www.tncourts.gov/sites/default/files/bellopn.pdf

James Ellis Phillips v. The Pictsweet Company
No. W2016-01704-SC-R3-WC-Filed August 28, 2017

The employee worked as a truck driver and mechanic. He allegedly sustained a compensable back injury on December 2, 2013. The employer denied the claim mainly because the treating

physician concluded the symptoms were due to degenerative changes unrelated to work. An independent medical evaluation indicated the employee's preexisting arthritic changes were aggravated by his work injury. The trial court awarded 72% permanent partial disability benefits. The employer appealed. The Panel **affirmed in part**, **modified in part** and **reversed in part**. The employer claimed delay of notice and lack of written notice, but the Panel concluded the delay was reasonable due to the employee's work travel requirements. As to compensability, the Panel reviewed the statutes and cases, concluding that the employer was liable "if the accidental injury is causally related to and brings about the disability by the aggravation, actual progression or anatomical change of the preexisting condition," citing *McKinney v. Inland Paperboard & Packaging, Inc*., No. E2005-2786-SC-R3-WC, 200 WL 293037 at 2-3. The employee had testified his injury occurred as he performed truck brake maintenance and changed tires, and was compensable pursuant to T.C.A. § 50-6-102(12)(A)(i). The employer contended the employee's injury was "cumulative" under T.C.A. § 50-6-102(12)(C)(ii) and that there was no medical testimony that his condition arose "primarily" from employment. The Panel credited the testimony of the evaluating physician and the employee about the circumstances of the injury, concluding he had sustained an acute accidental injury arising out of and in the course and scope of employment rather than a gradual injury from repetitive work. However, based on the evidence, the Panel determined the award to be excessive and reduced it to 36% and also disallowed certain past medical expenses.
http://www.tncourts.gov/sites/default/files/phillpsopn.pdf

Jonathan Engler v. Able Moving Company, et al.
No. W2016-02125-SC-R3-WC-Filed October 30, 2017

In this **"new law"** case, the employee alleged he injured his back at work and subsequently developed a serious infection requiring hospitalization and treatment. He sought temporary total disability benefits and medical expenses. The *Court of Workers' Compensation Claims* determined the employee had failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment. On appeal, the Panel **affirmed** the decision. There was conflicting medical testimony from very well qualified physicians specializing in internal medicine, orthopedics, neurosurgery, and infectious diseases about whether an injury could have triggered the infection. The Panel analyzed the evidence pursuant to T.C.A. § 50-6-102(14). An injury "arises primarily out of and in the course and scope of employment only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes." The Panel concluded the employee had established his infection was *possibly* related to his work-related back injury but that mere possibility was insufficient to prove causation.
http://www.tncourts.gov/sites/default/files/engleropn.pdf

Thomas Lee v. Federal Express Corporation
No. W2016-02126-SC-R3-WC-Filed October 30, 2017

In another **"new law"** case, an employee alleged he sustained a compensable injury to his left shoulder on July 24, 2014. The employer denied the claim due to conflicting descriptions of the accident to various medical personnel. The *Court of Workers' Compensation Claims* ruled that the employee had failed to sustain his burden of proof and dismissed the claim. The Panel **affirmed** the trial court, agreeing that inconsistencies in the medical proof about how the injury occurred would require speculation on the part of the trier of fact. The trial testimony of the employee was compared to numerous conflicting statements he had given to medical providers concerning the date of injury, how it occurred, and whether or not it was related to work. "The trial court had the opportunity to see and hear employee testify in open court. It implicitly found his explanations for his prior inconsistent statements to be wanting. It is our obligation to give deference to a trial court's findings as to credibility of live testimony." *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009).
http://www.tncourts.gov/sites/default/files/leeopn.pdf

Tracy Payne v. D & D Electric, et al.
No. E2016-01177-SC-R3-WC-Filed April 18, 2017

This **"new law"** case involves an employee who alleged he injured his foot at work. The employer denied the claim, citing lack of medical proof of causation from employment. The *Court of Workers' Compensation Claims* denied the employer's motion for summary judgment, finding there was a genuine issue of material fact whether the work injury contributed more than 50% in causing the injury. The *Workers' Compensation Appeals Board* reversed and remanded the case, holding the employee failed to produce sufficient evidence his foot condition arose primarily out of the course and scope of his employment. The Panel ***affirmed*** the Appeals Board ruling, agreeing the medical records did not contain sufficient expert opinion that the left foot injury arose out of and in the course and scope of employment. The employee had significant diabetes-related problems with his left foot before he slipped on the stairs at work. He had previously been treated for problems with the left foot and his post-accident surgery was due to infection. In applying statutory requirements under T.C.A. § 50-6-102(14)(A), (B), (D) and (E), the Panel concluded the employee had not submitted medical evidence that his employment contributed more than 50% to his injury.
http://www.tncourts.gov/sites/default/files/payne_-_filed.pdf

Joseph Kolby Willis v. All Staff, et al.
No. M2016-01143-SC-R3-WC-Filed August 3, 2017

In this **"new law"** case, the employee alleged he sustained a compensable injury to his left knee while at work. The *Court of Workers' Compensation Claims* found the injury compensable, however the *Workers' Compensation Appeals Board* reversed, holding the employee had failed to establish causation. The Panel **affirmed** the Appeals Board decision. The employee had been previously diagnosed with *patella alta*, a condition that predisposed him to kneecap dislocation. After the work incident, an MRI revealed an acute tear of the medial patellofemoral ligament in the left knee. The treating physician's deposition testimony indicated that the injury could have occurred while the employee was rising from a squatting position regardless where he was at the time, and that his body weight and mechanics could have caused his knee to dislocate as he was standing up. The Panel agreed with the Appeals Board's conclusion that the proof preponderated against the trial court's finding "that the employment contributed more than 50% in causing the injury, considering all causes." T.C.A. § 50-6-102(13)(B). Noting the statutory standards had changed after July 1, 2014, the Panel observed that the treating physician offered several alternative explanations for the dislocation. The physician did not testify that the employment contributed more than 50% in causing the injury. Instead he stated a work related incident was only a possibility. "While this testimony may have been sufficient to establish causation under prior law, it is insufficient under the statutes applicable to this appeal, which state that an injury arises out of employment "only if it has been shown by a preponderance of the evidence that the employment contributed more than 50% in causing the injury, considering all causes." http://www.tncourts.gov/sites/default/files/willis-allstaff2opn.pdf

ADVANCEMENT/ACCELERATION OF PREEXISTING CONDITION

Jenny Craig Operations, Inc. v. Lori Reel
No. M2016-01775-SC-R3-WC-Filed August 4, 2017

The employee, a Jenny Craig consultant, fell at work striking her right knee on the floor. In her suit she alleged the work-related injury aggravated a preexisting arthritis in the knee, necessitating a total knee replacement. The employer conceded the employee had sustained a temporary injury from the fall but denied liability for a total knee replacement. The trial court found the work-related fall caused an acceleration, advancement, or progression of her osteoarthritis, requiring the knee replacement, and that the injury was compensable. The employee was awarded a 46.5% permanent partial disability to her right lower extremity. The Panel **affirmed** the judgment of the trial court.

On appeal the employer argued the fall only increased the employee's level of pain due to her preexisting condition and that the medical proof did not demonstrate any permanent anatomical change. The Panel cited *Trosper v. Armstrong Wood Products, Inc*., 273 S.W.3d 598 (Tenn. 2008). "[An] employee does not suffer a compensable injury where the work activity aggravates the preexisting condition merely by increasing the pain. However, if the work injury advances

the severity of the preexisting condition, or if, as a result of the preexisting condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable." *Id.* at 607. The Panel noted the employee was asymptomatic before the fall, and that the pain experienced since the fall had materially disabled her in her ability to work and engage in normal daily activities. "We conclude that this pain was sufficient to constitute disabling pain and to evidence an aggravation or advancement of her preexisting condition under the facts and circumstances of this case, even absent evidence of an anatomical change." The Panel stated that medical and lay testimony must be considered.
http://www.tncourts.gov/sites/default/files/jennycraigopn_-_final.pdf

James Tucker v. Tree & Shrub Trucking, Inc., et al.
No. M2016-01898-SC-R3-WC-Filed August 29, 2017

The employee, a truck driver, sustained a compensable lower back injury in 2012. He had surgery and returned to work after reaching a settlement based on one and one-half times the anatomical impairment rating of 12%. On January 17, 2014 the employee had a dramatic increase in his symptoms while bending over to fuel his truck. A new injury claim was filed. Between the two incidents the employer's workers' compensation insurer had changed. Each insurer contended the other was liable for the employee's new claim. The employee was unable to return to work for the employer but eventually settled his claim with the second insurer. He then pursued a reconsideration claim on the previous settlement for the 2012 injury against the employer and the first insurer. The trial court found the employee entitled to reconsideration and awarded additional benefits of four times the original anatomical impairment. The employer appealed.

The Panel **affirmed** the trial court judgment. The proof indicated both the employee and his employer initially believed the employee had aggravated his preexisting injury. However, the treating physician considered the 2014 event a new injury, primarily because the employee's main symptoms were bilateral leg pain resulting from lumbar radiculopathy, which was a change from his previous symptomology. Because the two insurers were arguing over liability the employee was not receiving temporary total disability benefits and his financial situation deteriorated. When told by the employer there was no job available if he could not drive a truck, the employee resigned and collected his "escrow money" (a sum withheld by the employer amounting to $750.00). In an initial hearing the trial court determined the second insurer was liable and directed it to provide medical care. The treating physician opined the first injury and surgery in 2012 accelerated the degenerative process at L4-5, and that the second injury in 2014 caused an additional 3% whole body impairment and chronic low back pain which rendered the employee permanently unable to work as a truck driver. The employer contended the employee had voluntarily resigned prior to treatment and was not entitled to reconsideration of the award for the first injury. Basing its analysis on *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn.

2008), the Panel disagreed, finding that the employee had no meaningful return to work and that his resignation was reasonably related to his work place injury.
http://www.tncourts.gov/sites/default/files/tucker.v.treedshrub.opn_.pdf

Troy S. Alexander v. NGMCO, LLC A/K/A General Motors, LLC
No. M2016-01480-SC-R3-WC-Filed October 26, 2017

The employee worked for the predecessor to the defendant employer for many years and developed carpal tunnel syndrome. The defendant employer took over the business after the predecessor filed bankruptcy in 2009. The employee began performing a more hand intensive task at a different plant operated by the defendant employer in January 2010. In the summer of 2011 the employee developed more severe symptoms and filed a claim for benefits. After initially paying temporary total disability benefits the employer denied the claims, contending the symptoms were caused by preexisting medical conditions. Conflicting medical opinions were offered at trial. The trial court ruled for the employee and awarded benefits. The employer appealed. The Panel **affirmed** the trial court's ruling. The Panel observed that while causation of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred (citing *Thomas v. Aetna Life & Casualty Co*., 812 S.W.2d 278, 283 (Tenn. 1991). Here, one physician testified that the employee sustained a significant worsening of his preexisting carpal tunnel syndrome that made surgical treatment necessary and that his specific work activities were the primary cause. Although the second physician disagreed he recognized that the employee had experienced significantly increased symptoms while performing the specific job activities. The Panel noted the employee had been able to function well at work prior to the later work assignment that began in 2010.
http://www.tncourts.gov/sites/default/files/alexander_v._ngmco_aka_general_motors_llc.opn2_.pdf

James Estel Jeffers v. Armstrong Wood Products, et al.
No. E2017-00499-SC-R3-WC-Filed October 24, 2017

The employee claimed workers' benefits for a back injury. The employer denied the claim. At trial the court found the employee permanently and totally disabled and apportioned liability 52% to the employer and 48% to the Second Injury Fund. The employer appealed, contending the employee had not established a work related injury and that the apportionment of liability was in error. The Panel **affirmed** the trial court. The Panel noted the employee performed various types of manual labor and had sustained a back injury in August 1991, for which he underwent surgery but was able to return to work. On October 11, 2009, he was working as a "nester," lifting boards and stacking them onto a cart which he would then push. His back "locked up" and he sought medical treatment. He saw his family doctor and took off work three

days, then returned but avoided lifting and twisting. He then took a week's vacation to further recuperate. He was suspended after returning for a day and a half and terminated November 5, 2009.

At trial the employee testified he had dealt with soreness before the October 11, 2009 injury, but had not previously had the type of pain he experienced with the injury. In March 2010 an MRI revealed a broad-based central disc protrusion at L5-S1 and another disc bulge at L4-L5. The family physician acknowledged he had treated the employee for neck, shoulder and back injuries for several years before the October 2009 injury. A neurosurgeon testified the 2009 injury had aggravated preexisting degenerative and post-operative changes. Since the employee had been able to work before but not after the 2009 injury, the neurosurgeon testified the injury created anatomical change which he opined was indicated by decreased mobility. Similarly, an orthopedic surgeon testified the 2009 injury permanently aggravated and advanced the employee's preexisting, underlying degenerative disc disease, increasing its severity. Vocational experts differed about the degree of the employee's disability but agreed he was significantly limited in employability.

The Panel determined the circumstances were consistent with *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 645-46 (Tenn. 2008), a case with similar facts, where the Supreme Court held the employee suffered a work injury that "advanced the severity of his preexisting arthritic condition." The Panel also concluded the trial court's assessment of 52% disability was correct since the employee had been rendered permanently and totally disabled by the 2009 injury, citing *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001)
http://www.tncourts.gov/sites/default/files/20171024134832.pdf

Jamie Jordan v. City of Murfreesboro
No. M2016-02446-SC-R3-WC-Filed December 28, 2017

The employee, a city trash collector, was injured on May 22, 2012 while lifting a wet sofa onto a refuse truck. The employer defended the claim, relying on failure of notice and preexisting condition. The trial court found the employer had received actual notice and that the injury was compensable. The Panel **affirmed**. The Panel observed the employee had told his immediate supervisor of the injury when it happened even though a written first report was not filed until March 21, 2013. At trial the supervisor confirmed he had been told of the injury on the day it occurred. The Panel further observed "an employer is 'liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case.'" *Baxter v. Smith*, 211 Tenn. 347, 364 S.W.2d 936, 942-43 (1962).

Dramatically conflicting medical proof was offered at trial. A board certified orthopedic surgeon testified the employee had "a herniated disc at two places pressing on a nerve going down his leg causing radiculopathy, specifically a lumbar disc, Class 1." The orthopedic surgeon assigned a 9% permanent impairment. He subtracted 5% for the employee's preexisting problems which resulted in a 4% permanent partial impairment specifically for the May 22, 2012 injury. A primary care physician also testified. He stated the employee had sustained an acute or chronic lumbar sprain and that he believed the employee's movements and behavior didn't correspond with someone in severe pain as the employee claimed. The physician took video camera footage of the employee leaving his office. He testified the employee's behavior as consistent with "drug seeking behavior." The employee testified at trial that the physician ultimately "threw him out of his office and cussed him out." The trial court found the physician's testimony "unappealing."

The Panel observed the trial court found "highly credible" the lay testimony of the employee and his mother which corroborated the findings of the orthopedic surgeon. The panel concurred with the trial court's decision to accredit the testimony of the orthopedic surgeon, noting "(h)e understood Employee's preexisting problems and expressly considered such in arriving at his impairment rating." The testimony and supporting documentation "demonstrate the May 22, 2012 workplace injury advanced the severity of the Employee's preexisting condition." http://www.tncourts.gov/sites/default/files/jordan.jamie_.opn_.pdf

EXTENT OF DISABILITY

Tony Gray v. Vision Hospitality Group, Inc., et al
No. M2016-00116-SC-R3-WC-Filed January 26, 2017

The employee was chief engineer for the Hyatt Place Hotel Airport in Nashville. Although he had some supervisory duties he was regularly required to perform hands-on physical labor. On August 6, 2013 he injured his back while lifting and moving thirty rolls of carpet padding. He was diagnosed with back strain and prescribed physical therapy. After being released to return to work on September 6, 2013 he was fired four days later for "poor work." His back symptoms worsened, requiring surgery at L4-5 on January 29, 2014, and he was unable to return to work thereafter. By the time of trial he was 58. Based on his injuries, the trial court found him permanently and totally disabled, considering his age, skills, training, education, job opportunities in the immediate and surrounding communities, and the availability of work suited for his particular disability. The employer appealed, contending the trial court erred in finding permanent and total disability. The Panel **affirmed**.

The Panel cited *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 681 (Tenn. 2005), which referenced T. C. A. § 50-6-207(4)(B)(1999), holding that "an individual is permanently and totally disabled when he or she is incapable of 'working at an occupation that brings [him or her]

an income.'" The Court looks to "a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court." (Citing *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006). The Supreme Court noted the "employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment is 'a competent testimony that should be considered.'" *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). Both parties presented the testimony of vocational experts. Although neither found the employee had a 100% loss of access to employment, the employee's work history indicated he had almost exclusively performed physically demanding jobs. He testified his age, limited education, and physical restrictions from his injuries excluded him from almost every job he had held in his life, and that his use of a cane and limited movement would make work virtually impossible. The Panel held the trial court had correctly weighed the appropriate factors in considering the employee's circumstances. http://www.tncourts.gov/sites/default/files/gray.t.opnjo_.pdf

Brandon Thompson v. United Parcel Service, Inc., et al.
No. M2015-02526-SC-R3-WC-Filed February 17, 2017

The employee, a delivery driver, sustained a compensable injury to his lower back on January 18, 2012. He did not return to work. He filed suit seeking permanent and total disability benefits. The trial awarded 44% permanent partial disability benefits. The employee appealed. The Panel **affirmed**. The employee had sustained a previous back injury in 2010, specifically a ruptured disc at the L5-S1 level for which he had surgery. The new injury in January 2012 involved a herniation at L4-5. He was treated non-surgically with physical therapy and eventually through pain management with medication. An independent medical evaluation by an orthopedic surgeon indicated the employee had degenerative disc disease with a herniated disc at L4-5 and radiculopathy. Vocational evaluators also testified for both parties. The employee's expert concluded the employee had sustained a 41% loss of access to jobs previously available to him and a 70% loss of earning capacity, resulting in a combined vocational disability of 56%. The employer's expert testified the employee had sustained a 32.5% vocational disability.

The Panel considered *Hubble v. Dyer Nursing Home*, 188 W.W.3d 525 (Tenn. 2006) and *Worthington v. Modine Manufacturing Co.*, 78 S.W.2d 232, 234 (Tenn. 1990) in analyzing the evidence presented at trial. "The determination of permanent total disability is to be based on a variety of factors . . . includ(ing) the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. . . it is well settled that . . .an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is 'competent testimony that should be considered.'" *Hubble*, at 535-36. The extent of an injured worker's vocational disability is a question of fact. *Worthington*, at 234. The Panel concluded that had the trial court fully accredited the employee's testimony as to his

abilities and limitations a finding of permanent and total disability would have been in order. "(I)t is apparent that the trial court chose not to fully accredit that portion of Employee's testimony. We defer to that decision."
http://www.tncourts.gov/sites/default/files/thompson.brandon_wc_opn.pdf

COMPENSABILITY

Marilyn Miller Tansic v. Atkinson Enterprises, Inc., et al.
M2016-01138-SC-R3-WC-Filed

The employee obtained temporary total disability (TTD) benefits after injuring herself while mopping. Her employer acknowledged a compensable injury but claimed she was not entitled to TTD benefits because she worked for her own company while she was recuperating and unable to work for the employer. The trial court found the employee performed only token tasks at her company during her injury period, which did not constitute "work," and thus, denied the employer's requested credit against the permanent partial disability award. The employer challenged the award of TTD as well as the multiplier used. The Panel **affirmed** the trial court's decision. (Link not presently available)

Barbara Joan Rains v. Wal-Mart Associates, Inc.
No. W2016-00636-SC-R3-WC-Filed July 18, 2017

The employee alleged she sustained a low back injury in the course of her work as a cashier. The trial court found the employee had failed to sustain her burden of proof and dismissed the complaint. The employee appealed. The Panel **affirmed**, finding the employee had not presented any expert medical evidence to support her claim. The employee first alleged she injured her back while lifting packages of bottled drinks from the bottom of a customer's cart. However, at trial she testified the injury occurred when she pulled and turned over a bag of dog food. According to the employee, store video camera footage showed the employee rubbing her lower back and favoring her right leg shortly after her shift began. The trial court disagreed with her interpretation. Other store video recordings showed the employee shopping, picking up a twelve pack of drinks, and purchasing items several hours after the alleged injury. The Panel cited the holding in *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991) that "Except in the most obvious, simple and routine cases, the claimant in a workers' compensation action must establish by expert medical evidence the causal relationship . . . between the claimed injury (and disability) and the employment activity." The Panel observed there was "no medical evidence in the record that makes a diagnosis, states that Employee's injury is related to her employment, assigns a permanent impairment, or discusses temporary or permanent disability."
http://www.tncourts.gov/sites/default/files/rainsbarbaraopn.pdf

T & B Trucking v. Terry Pigue, et al.
No. W2016-01194-SC-WCM-WC-Filed December 14, 2017

The employee, a truck driver, alleged he sustained compensable injuries to his shoulder and cervical spine on October 15, 2008. The employer paid temporary total disability (TTD) benefits but filed a petition seeking determination of its obligations to pay further benefits. Somewhat conflicting medical proof was presented at trial. The employee had sustained injuries to his hand and neck in 2003 for which he had surgery in November 2004. After that time he had some manageable pain and stiffness in his neck and shoulder but was able to perform his job without difficulty until the October 2008 injury. The trial court found the injuries to his shoulder and cervical spine in October 2008 were compensable and that the employee was permanently and totally disabled. On appeal the Panel **reversed**.

The employer had contended the employee did not sustain a new injury or a compensable aggravation of his preexisting injury in the October 2008 incident. The Panel addressed the question whether a particular event constitutes a compensable aggravation of a preexisting condition. Citing *Fink v. Caudle*, 856 S.W.2d 952, 958, the Panel noted, "[A]n injury is compensable, even though the claimant may have been suffering from a serious preexisting condition or disability, if a work connected accident can be fairly said to be a contributing cause of such injury." "However, where an employee's work aggravates his preexisting condition by making the pain worse but does not otherwise injure or advance the severity of the condition, or result in any other disabling condition, the situation does not constitute a compensable injury." *Smith v. Smith's Transfer Corp*., 735 S.W.2d 221, 225-26 (Tenn. 1987). The Panel observed the evidentiary standard for proving causation at the time of the 2008 injury would have been met if medical testimony indicated employment *could or might have been the cause* of the injury, when from other evidence it could reasonably be inferred that employment was the cause. Weighing the medical testimony, the Panel held the preponderance of the evidence showed the employee's shoulder and neck conditions were degenerative and not related to or advanced by his reported work injury.
http://www.tncourts.gov/sites/default/files/tbtruckingopn.pdf

SECOND INJURY FUND

Charles Steven Blocker v. Powell Valley Electric Cooperative, et al.
No. E2016-01053-SC-R3-WC-Filed May 18, 2017

The employee sustained a compensable injury to his cervical spine in November 2010, for which he had surgery. He returned to work but suffered a second cervical injury in January 2013, after which he was unable to work. He filed suit against his employer and the Second Injury Fund. The parties stipulated the employee was permanently and totally disabled, and that the only issue

was apportionment of benefits between the employer and the Fund. The trial court found the Fund liable for 91% and the employer 9% of the employee's permanent and total disability. The Fund appealed, contending the trial court incorrectly apportioned the award. The Panel **reversed** and **remanded** for further proceedings.

The trial court applied a cap based on one and one-half times the impairment rating pursuant to T. C. A. § 50-6-241(d)(1)(A), relative to the second injury. The Panel observed that statute applies to employees who successfully return to work after injury. The proof presented indicated the employee could not return to the type of work he had done for many years, which was physically demanding and required daily lifting of nitrogen bottles weighing between 40 to 50 pounds and up to 185 pounds several times a month in the process of changing them out on power transformers. Prior to the 2013 injury he had been able to perform his work. The Panel noted testimony by vocational experts indicating the employee's skills were not transferable to other types of work. An orthopedic surgeon who performed an independent evaluation testified that the employee was unable to return to work because of the combined effect of both the 2010 and 2013 injuries in that the 2010 injury caused the subsequent injury to be disabling. Had only the 2013 injury occurred, the surgeon opined that the employee would have been able to return to work. His impairment rating for the 2013 injury was 8%. The treating physician had assigned 4% to the 2013 injury and 15% to the 2010 injury with restrictions relative to lifting techniques. When he released the employee after the second injury the restrictions he imposed resulted in the employee's termination since he could no longer perform the job. The Panel determined the trial court's application of the T. C. A. § 50-6-241 cap was not appropriate in the circumstances of the case. "(T)he evidence demonstrates that Employee suffered substantial disability of the 2013 injury alone and that preponderates against the trial court's finding that the injury caused a 9% disability to the body as a whole." The Panel remanded the case to the trial court to reassess the employee's 2013 vocational disability and to make an appropriate apportionment of the award between the employer and the Fund.
http://www.tncourts.gov/sites/default/files/20170518151756.pdf

Raymond Gibson v. Southwest Tennessee Electric Membership Corporation, et al.
No. W2016-01403-SC-R3-Filed August 28, 2017

The employee, a mechanic's helper, injured his lower back at work in a motorcycle accident on March 30, 2012. A settlement agreement for permanent partial disability benefits was reached in September 2013. The employee returned to work but experienced pain and related symptoms. He filed a petition for modification of the prior award claiming his back condition had worsened to the point of permanent total disability. The trial court found the employee permanently and totally disabled. The employer appealed the finding as well as the apportionment of 90% liability to the employer and 10% to the Second Injury Fund. The Panel **affirmed**.

The employee was 52 at the time of trial and testified he had performed physically demanding work since he was 16, including the last 10 or 11 years with the employer. He had no vocational training except for the type of work he was performing and had no other job skills. Despite herniated disc surgery at L5-S1 in 1991, 2007 and 2008, the evidence indicated the employee was highly motivated and returned to work without restrictions. After the 2012 motorcycle injury he had disc surgery at L4-5. He was assigned a 5% impairment rating by the treating physician in February 2013. He continued to have complaints of back pain despite having a nerve block treatment. The treating physician determined he was unable to work. The employee was evaluated by another orthopedic surgeon who assigned an impairment rating of 12%, later revised to 14%.

The Panel held the evidence supported the trial court's finding of permanent and total disability. It observed the trial court specifically accredited the employee's testimony about his physical condition. The Panel reviewed the statutes and case law and agreed the trial court had correctly apportioned the employer's liability at 90% because the proof at trial indicated that prior to the 2012 injury the employee was a good worker who rarely missed work and regularly performed strenuous tasks. Medical evidence supported the employee's testimony that he could no longer handle job requirements because of the 2012 injury.
http://www.tncourts.gov/sites/default/files/gibsonopn_0.pdf

And see:

James Estel Jeffers v. Armstrong Wood Products et al.
No. E2017-00499-SC-R3-WC-Filed October 24, 2017
http://www.tncourts.gov/sites/default/files/20171024134832.pdf
(Summarized above under Advancement/Acceleration)

INDEPENDENT INTERVENING CAUSE

Judy Kilburn v. Granite State Insurance Company, et al.
No M2015-1782-SC-R3-WC-Filed April 10, 2017

The employee, a trim carpenter, sustained severe injuries in a motor vehicle accident November 6, 2008 while in the course of his employment. He had cervical spine surgery. His authorized physician recommended lumbar spine surgery for his back pain but the request was denied through the utilization review process. The physician's request for epidural steroid injections was also denied. The employee was referred to a pain management clinic by his physician. Thereafter he began taking prescribed oxycodone to relieve his back pain. Six months after the surgery the employee died from an overdose of oxycodone combined with alcohol. The trial court found the

death compensable. The employer's appeal was first referred to the Panel but was subsequently transferred to the full Supreme Court for review.

The Supreme Court **reversed**, holding the employee's failure to consume his medication in accordance with his doctor's instructions was an independent intervening cause of his death. In a footnote, the Court emphasized the narrowness of its holding, stating, "We do not conclude that an individual can never prove that an overdose is the direct and natural result of the original compensable injury when a dependency or addiction to narcotics develops. We merely conclude that based on the facts and testimony in this case, the evidence preponderates against the trial court's finding that (the employee's) death was a direct and natural consequence of his original injury."

The Court cited its holding in *Anderson v. Westfield Grp.*, 259 S.W.3d 690, 696 (Tenn. 2008) with reference to the basic rule that "all medical consequences and sequelae that flow from the primary injury are compensable," noting that the rule has a limit that "hinges on whether the subsequent injury is the result of independent intervening causes, such as the employee's own conduct." In *Anderson* the Court had modified the willful or deliberate conduct standard to include an employee's "negligence as the appropriate standard for determining whether an independent intervening cause relieves an employer of liability for a subsequent injury purportedly flowing from a prior work-related injury." *Id*. at 698-99. Application of the intervening cause principle is not an affirmative defense but, rather, is a "way of assessing the scope of an employer's liability for injuries occurring after a compensable injury." *Id*. at 697. http://www.tncourts.gov/sites/default/files/kilburn.judy_.opn_.pdf

Angela Evans v. Alliance Healthcare Services
No. W2016-00653-SC-WCM-WC-Filed September 26, 2017

The employee worked as a bus driver, transporting patients and counselors to and from appointments. On December 16, 2009 she witnessed the shooting of a counselor by a patient. Immediately after the shooting the employee complained of flashbacks. About two weeks after the first shooting on December 16, 2009 the employee's landlord was shot and killed in front of her home. The employee received authorized psychiatric treatment from February 23, 2010 until March 28, 2012. She was initially diagnosed with acute stress disorder and PTSD. A lengthy course of treatment followed, with suicidal ideations and a later diagnosis of major depressive disorder with psychotic episodes. The first treating psychiatrist assigned a 40% permanent impairment as a result of the first shooting episode. A second psychiatrist examined the employee on October 11, 2011 and August 14, 2014. He concluded the employee's mental health issues were not work related, and that there were indications she had tested positive on drug screens. He opined personal problems and preexisting mental issues were the cause of most of her symptoms. Other evaluations were performed by disability evaluators and a rehabilitation

specialist, concluding the employee had PTSD and a major depressive disorder, that she had impairment in reality testing, communication, and logic, and complete vocational disability. The trial court found the employee's psychiatric impairment arose from the December 16, 2009 shooting episode. The Panel **affirmed**.

The employer had argued independent intervening cause. The Panel concluded that the medical opinions indicated the employee was functioning normally with no psychiatric or psychological problems before the December 16, 2009 shooting incident. "The shooting on December 16, 2009, was a specific, acute, sudden, unexpected, and stressful event that caused Employee to develop PTSD; therefore her mental injury is compensable." Citing *Beck v. State*, 779 S.W.2d 367, 370 (Tenn. 1989). Significantly, the Panel agreed with the trial court's decision to give greater weight to the testimony of the first psychiatrist who treated the employee over a two-year period. He had concluded the trauma and symptoms caused by the shooting compromised the employee's ability to cope with the stresses of everyday life. There was no evidence contradicting the history of flashbacks that began almost immediately and continued over a four year period. The Panel held that subsequent events that impacted the employee did not constitute an independent intervening cause of her symptoms and that she was permanently and totally disabled as a result of the December 16, 2009 shooting incident.
http://www.tncourts.gov/sites/default/files/evansopn_0.pdf

NOTICE

Jeffrey Scott Beck v. City of Brownsville, et al.
No. W2016-01402-SC-R3-WC-Filed July 18, 2017

The employee filed suit for benefits, claiming he had sustained a back injury six months earlier while engaging in a timed exercise of putting on his fireman's gear. The evidence indicated the employee had been warned on multiple occasions about his tardiness and performance issues relative to his gear. The employee testified that during the timed exercise on May 18, 2011 he felt a pop in his lower back that radiated down his leg when he grabbed his air pack, which weighed 20-30 pounds. He said he told no one about the incident. A few days later his supervisor noticed him walking in a hunched over position and asked if his back was hurting. The employee told his supervisor the pain was caused by sitting on bleachers at his stepson's graduation. After being told to take off work until he could get his back "100%," the employee sought treatment on his own. He never gave any health care provider a history of an on-the-job injury, nor did he provide any such information to his supervisors. The employee was terminated September 20, 2011 because of tardiness and performance issues. In the termination meeting the employee did not mention a work-related back injury. He gave the first notice of a work injury on September 27, 2011. The trial court found the notice four months after the alleged injury failed to satisfy the

requirements of T. C. A. § 50-6-201, that the employee's excuse for the delay was unreasonable, and that causation had not been established. The Panel **affirmed** the trial court's judgment.

The Panel cited *Banks v. United Parcel Serv., Inc.*, 170 S.W.3d 556, 560-61 (Tenn. 2005), stating, "It is well settled that an employee who fails to notify his employer within thirty days that he has sustained a work-related injury forfeits the right to workers' compensation benefits unless the employer has actual notice or the injury or unless the employee's failure to notify the employer was reasonable." The Panel considered the employee's contention the employer had actual notice, concluding the employee's own actions and responses to his supervisor undermined his argument. Further, the employee's claim there was a delay in diagnosis did not justify his failure to report a work injury when he knew in June 2011 that he had herniated discs. The Panel held the employee's alleged fear of losing his job was not a reasonable excuse since an employer may not fire an employee in retaliation for filing a workers' compensation claim. *Thomason v. Better-Bilt Aluminum Products, Inc.*, 831 S.W.2d 291, 292 (Tenn. Ct. App. 1992). http://www.tncourts.gov/sites/default/files/beckopn.pdf

Jeff Pevahouse v. Gerdau Ameristeel
No. W2016-01864-SC-WCM-WC-Filed December 12, 2017

The employee worked as an industrial bricklayer for 32 years. He developed weakness in his arms and legs and had balance problems in the fall of 2012, for which he sought medical care beginning with a primary care physician. Later, on November 13, 2012, a neurosurgeon determined he had a herniated cervical disc requiring immediate surgery. The employee and his wife testified they gave oral notice to the employer both before and after the surgery. The neurosurgeon could not state with medical certainty the injury was work-related, although an orthopedic surgeon who conducted an independent examination of the employee on March 26, 2014 stated the employee had sustained an acute injury at work on November 13, 2012, based on a history of repetitive work. The examiner also said the employee had not reported a specific event associated with the onset of his symptoms. The employee's attorney sent a letter to the employer on June 6, 2013, asserting the employee had sustained a work injury. The employer contended this was its first notice of a work-related injury. The trial court ruled the employee did not give timely notice and dismissed the claim, although it also issued an alternative ruling that, if timely notice was given, the employee had sustained a compensable injury and was permanently and totally disabled. The Panel **affirmed** the dismissal of the claim for failure of notice, agreeing there was "ample support for the trial court's finding."

The proof at trial indicated the employer convened a meeting November 1, 2012 to discuss the employee's continued difficulty with coordination and balance. At the time, neither the employee nor the employer knew the cause of the employee's problems and the employee did not suggest they were related to his work. The testimony revealed that was the last day the employee

worked. In reaching its opinion, the Panel explained, "The statute requiring "notice" is abundantly clear that such notice must be given in written form by the employee or someone on his behalf. The statute is further abundantly clear that such written notice must be given within thirty (30) days of the occurrence." The Panel stated there was no provision in the code section (T. C. A. § 50-6-201(a) (2008) for "oral notice" and proceeded to analyze the proof to determine whether the employer had "actual notice." The Panel concluded the employee had failed to carry his burden of proof on that issue, citing *McKinney v. Berkline Corp*., 503 S.W.2d 912 (Tenn. 1974), "[U]nless it is obvious that a work related injury has occurred, it is insufficient to charge the employer with knowledge that the employee sustained a work related injury." *Id*. at 915. http://www.tncourts.gov/sites/default/files/pevahouseopn.pdf

COMING AND GOING RULE EXCEPTIONS

Billy Joe Brewer v. Dillingham Trucking, Inc., et al.
No. M2016-00611-SC-R3-WC-Filed April 11, 1017

The employee, a truck driver, fell while climbing into the cab of the employer's truck, which was parked at the employee's home. The employer initially accepted the claim as compensable, but later denied it, asserting that the employee was not in the course of his employment when the injury occurred. The trial court found the injury to be compensable and awarded benefits. The employer appealed, asserting the claim was not compensable due to the "coming and going rule," and that the trial court erred in finding the employee was performing an act in the course of employment when injured. The Panel **affirmed** the trial court's judgment except for an order to pay the cost of the employee's independent medical examination (IME).

The employee, 53, was a longtime truck driver for different employers. He drove a dedicated route Monday through Friday. He would leave his home in Lawrenceburg, drive to the FedEx terminal there, pick up a trailer, drive to Nashville, pick up another trailer, drive to Cookeville and then bring a trailer back to Nashville. He would then return home in the employer's truck which he kept parked there between work days. From the beginning of his employment with the employer he had followed the same routine. At trial the employer testified the employee was not allowed to drive the truck home, but the employee maintained the employer knew he did so and never prohibited the practice.

The employee regularly completed required pre-trip inspections at his home prior to beginning his route, checking the oil, air lines, tires and cleaning the windows. While performing the inspection on September 16, 2013 he slipped on the top step and fell four feet to the ground, injuring his left leg. He was diagnosed with an ACL tear and had surgery on December 9, 2013. Upon being cleared to return to work on June 3, 2014 the employer told the employee the dedicated route was no longer available.

The Panel noted Tennessee has recognized certain exceptions to the "coming and going rule," which is that "an injury received by an employee on his way to or from his place of employment does not arise out of his employment and is not compensable, unless the journey itself is a substantial part of the services for which the workman was employed and compensated," citing *Smith v. Royal Globe Ins. Co.*, 551 S.W.2d 679 (Tenn. 1977). One exception to the rule applies to injuries sustained by employees traveling in a vehicle furnished by the employer while going to and from work. "(w)here transportation is furnished by the employer as an incident of the employment, an injury suffered by an employee while going to or returning from his work in the furnished vehicle arises out of and in the course of the employment." *Eslinger v. F & B Frontier Constr. Co.*, 618 S.W.2d 742, 744 (Tenn. 1981). The Panel cited *Wait v. Travelers Indem. Co. of Ill.*, 240 W.W.3d 220, 226 (Tenn. 2007) in holding that, when injured, the employee "already had commenced work by completing the mandatory pre-check of Employer's vehicle, and was preparing to travel to the FedEx terminal to pick up his first load of the evening." http://www.tncourts.gov/sites/default/files/brewer-dillinghamopnjo.opn_.pdf

Paula Dugger v. Home Health Care of Middle Tennessee, et al.
No. M2016-01284-SC-R3-WC-Filed April 13, 2017

In another **"new law"** case, the employee, a home health nurse, was injured in a motor vehicle accident while returning to her home after an attempt to travel to a regular patient's residence which was approximately 75 miles from the employee's home. The employer denied her claim, contending the injury did not occur in the course of her employment. The employee sought temporary benefits in the *Court of Workers' Compensation Claims*, which denied her petition. The denial was affirmed by the *Workers' Compensation Appeals Board*, which remanded the case to the trial court. The employer then moved for summary judgment on the issue of compensability. The trial court granted the motion. The employee appealed directly to the Supreme Court. The Panel **reversed** and **remanded** the case.

The evidence indicated one of the essential functions listed in her job description required the employee to be available to make as needed and routine patient visits when requested and to be available and rotate on-call assignments. The employee worked a 12 hour shift that did not begin until she reached a patient's home and ended when she left. Occasionally, the employer would request that she leave one patient's home and go to another patient's home in the same day. The employer required the employee to provide her own transportation to deliver health care services to the employer's patients. She had to maintain automobile liability insurance coverage at the 100,000/300,000 level and could not have passengers on such trips. She was reimbursed for mileage only to the extent the mileage to or from a patient's home was greater than the distance from her own home to the employer's office.

The Panel noted the broad exception built into the "coming and going rule" outlined in *Smith v. Royal Globe Ins. Co*., 551 S.W.2d 679, 681 (Tenn. 1977) "spawned more specific exceptions, such as the traveling-employee exception and the contract-of-employment exception, which recognize situations where an employer furnishes transportation or reimburses an employee for the value of the use of the employee's own car." *Pool v. Metric Constructors, Inc*., 681 S.W.2d 543, 545 (Tenn. 1984). The Panel analyzed the language in the employment agreement, concluding that it suggested the employer recognized the employee's use of her automobile to travel to and from home visits with patients was in the scope of her employment, and for that reason attempted to insulate or limit its own liability by requiring her to maintain the 100,000/300,000 liability coverage and by prohibiting her to have passengers in her car on such trips. "Although the employee used her own vehicle and was not receiving wages for travel time, "the journey itself was clearly a substantial part of the services for which she was employed." "(H)aving employees traveling to its patients' homes is an essential component of that service, secondary only to the actual health care which is provided."
http://www.tncourts.gov/sites/default/files/dugger-homeopnjo.pdf

EXCLUSIVE JURISDICTION

Douglas E. Shuler v. Eastman Chemical Company et al.
No. E2016-02292-SC-R3-WC-Filed November 17, 2017

This case illustrates the required statutory interplay and construction resulting from the Reform Act of 2013. The employee filed suit against his former employer, alleging he had developed bladder cancer from exposure to harmful substances in the employer's workplace. Both the employer and the Second Injury Fund filed motions to dismiss the claim, asserting the *Court of Workers' Compensation Claims* had original and exclusive jurisdiction over the subject matter. The trial court granted the motions. The employee filed a direct appeal to the Supreme Court. The Panel **affirmed** the judgment of dismissal based on lack of subject matter jurisdiction.

The employee worked for employer from 1965 until his retirement in 1999. He alleged he was exposed to cigarette smoke, asbestos, toluene, and other harmful substances during the course of his employment. He attributed his bladder cancer, *diagnosed* in 2015, to his exposure to harmful substances. The defendants relied upon T. C. A. § 50-6-237 (2014), asserting the trial court lacked subject matter jurisdiction. The statute provides that the *Court of Workers' Compensation Claims* would "have original and exclusive jurisdiction over all contested claims for workers' compensation benefits when the date of the alleged injury is on or after July 1, 2014." The employer argued his injury occurred in December 1999, the *date of his last occupational exposure* to harmful substances and that the referenced statute did not apply.

The Panel noted the Supreme Court held in *Liberty Mutual Ins. Co. v Starnes*, 563 S.W.2d 178, 179 (Tenn. 1978) that "In the case of a claim arising from an occupational disease, the date of the "accident or injury" is the date on which the employee becomes partially or totally incapacitated for work. T. C. A. § 50-6-1105. By using this definition of "accident or injury" in connection with occupational diseases, the legislature has provided a certain, determinable date at which the afflicted employee's cause of action accrues. . . Therefore, the applicable statute. . .is that in effect on the date on which the employee becomes disabled as a result of the disease, rather than that in effect on the date on which he was last exposed to the agent causing the disease." The Panel considered the holding in *Lively ex rel. Lively v. Union Carbide Corp.*, No. E2012-02136-WC-R3-WC, 2103 WL 4106697 at *7 (Tenn. Workers' Comp. Panel Aug. 13, 2013), which construed T. C. A. § 50-6-303(a)(1). That section provides that "the partial or total incapacity for work or the death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident or death by accident . . ." The Panel here observed that the *Lively* Panel concluded the date of diagnosis is not an option for determining the date of injury.

The Panel in this case continued, "(t)he workers compensation statutory scheme currently in effect has eliminated the definition of "occupational diseases" previously contained in T. C. A. § 50-6-301, as referenced in T. C. A. § 50-6-303(a)(1) above. Instead, T. C. A. § 50-6-102(14) (Supp. 2017) provides the definition . . . (h)owever, the provisions contained within [303(a)(1)] stating that "the partial or total incapacity for work or the death of an employee resulting from an occupational disease. . . . shall be treated as the happening of an injury by accident or death by accident," *have remained unchanged*. Accordingly, we determine the *Lively* Panel's interpretation of this statutory section to be ***authoritative***." (Emphasis added) http://www.tncourts.gov/sites/default/files/20171117103828.pdf

COURSE AND SCOPE

Melissa Duck v. Cox Oil Company, et al.
No. W2016-02261-SC-WCM-WC-Filed November 21, 2017

In another **"new law"** case, and **a case of first impression in Tennessee**, the employee, a store clerk, was injured when she fell on her way out of the store after abruptly quitting her job. She later made a claim for benefits, which the employer denied on the basis her employment relationship had already ended before the accident occurred. The *Court of Workers' Compensation Claims* awarded benefits, however the *Workers' Compensation Appeals Board* reversed and remanded. The employer filed a summary judgment motion, which was granted. The employee filed her appeal directly to the Supreme Court. The Panel **reversed** and **remanded,** holding the appeal was not barred by the "law of the case doctrine" and that the employee remained employed at the time the alleged injury occurred for a reasonable length of time to effectuate the termination of her employment.

The employee was working on March 22, 2015 when she was asked by her supervisor to work the main cash register while he finished cleaning the freezer. She refused and also declined to instead take over the task of cleaning the freezer. She began gathering her belongings and told her supervisor she was quitting. Almost immediately she slipped and fell in a puddle of water on the floor. She later claimed she injured her low back, left arm and shoulder, and the back of her head. The trial court adopted her position, that she remained in the course and scope of her employment for a reasonable period of time to exit the premises. The *Appeals Board* reversed, determining the employment relationship had ended before she fell. On remand, the trial court granted the employer's summary judgment motion.

The Panel considered the employer's contention that the "law of the case doctrine" applied because the holding of the *Appeals Board* (that the employment relationship had ended) was not appealed prior to the remand to the *Court of Workers' Compensation Claims* and thus was binding. The Panel disagreed, citing *State v. Hall*, 461 S.W.3d 469, 500 (Tenn. 2015) and other cases, and noting that while the law of the case doctrine directs a court's discretion, it does not limit the tribunal's power. The Panel also relied upon *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co*., 240 U. S. 251, 258 (1916), which held "[A]though . . . the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself on the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

The Panel noted there are no Tennessee cases addressing the precise issue in this case i.e., ***whether the employment relationship continued for a reasonable time after her employment ended,*** it reviewed cases involving injuries to current employees that occurred outside of their fixed time and place for work and whether those injuries occurred in the course and scope of employment. "Because this case presents an issue of first impression, we reviewed how the question has been decided in other jurisdictions. . . [T]he great majority extend to terminated employees the general principle that an injury sustained by an employee while arriving and leaving the employee's premises is compensable. Because leaving the workplace is incidental to the employment relationship, a terminated employee who "sustains injuries while leaving the premises within a reasonable time after termination" of the employment is deemed to have suffered a compensable injury." *Price v. R & A. Sales*, 773 N.E.2d 873, 876-77 (Ind. Ct. App. 2002) (And other cases, also citing *Larson's Workers' Compensation Law* 26-1 (2008). Although a few jurisdictions follow the *immediate termination* approach, the Panel declined to do so and held the employee remained covered by the workers' compensation statutes while she was leaving the work site. "We do not undertake to describe the outer limits of the reasonable interval during which the employment relationship persists after an employee quits or is fired; we simply hold that it was not exceeded in this case."

http://www.tncourts.gov/sites/default/files/duckopn.pdf

And see:
Billy Joe Brewer v. Dillingham Trucking, Inc., et al.
No. M2016-00611-SC-R3-WC-Filed April 11, 2017
http://www.tncourts.gov/sites/default/files/brewer-dillinghamopnjo.opn_.pdf
(Summarized above under Coming and Going Rule Exceptions)

PERMANENT TOTAL DISABILITY

Tony Gray v. Vision Hospitality Group, Inc., et al.
No. M2016-00116-SC-R3-WC-Filed January 26, 2017
http://www.tncourts.gov/sites/default/files/gray.t.opnjo_.pdf
(Summarized above under Extent of Disability)

Raymond Gibson v. Southwest Tennessee Electric Membership Corporation, et al.
No. W2016-01403-SC-R3-WC-Filed August 28, 2017
http://www.tncourts.gov/sites/default/files/gibsonopn_0.pdf
(Summarized above under Second Injury Fund)

ATTORNEY'S FEE

Holly L. Grissom v. United Parcel Service, Inc., et al.
No. M2016-00127-SC-R3-WC-Filed January 9, 2017

On October 28, 2011, the employee entered into a compromise settlement agreement with her employer, resolving her compensable workers' compensation claim for an April 2007 injury. One year earlier, a judgment had been entered in her favor, finding she had sustained an 80% vocational disability and awarding her future medical treatment. The subsequent settlement order directed she was to be provided future medical treatment benefits. However, in April 2013, the employer declined to permit a procedure ordered by the authorized physician. The employee filed a motion to compel the employer to authorize the procedure. The trial court ordered the employee to pay $187.00 to the employee and to provide future medical care to her. A second such motion was filed, after which the parties entered into an agreed order which required the employer to pay the $187.00 and to reimburse the employee for mileage to and from medical treatment. The employee petitioned for an award of attorney fees and expenses in the amount of $27,353.63. The employer responded, contending the amount was excessive in light of the relatively small sum the employee received as a result of the trial court's order. The trial court

ordered the employer to pay the full amount of the requested attorney fees and expenses. The employer appealed from the order. The Panel **affirmed** the judgment of the trial court.

On appeal, the employer's single issue was whether the award of attorney's fees and expenses was excessive. The Panel considered T. C. A. § 50-6-204(b)(2) (2014) (for injuries occurring before July 1, 2014), which allows a trial court to award attorney's fees and expenses arising from an employer's refusal to provide medical care required by a settlement or judgment. The Panel noted the standard established by the Supreme Court in *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166 (Tenn. 2011) had been approved in workers' compensation proceedings brought pursuant to the referenced statute. *Welcher v. Cent. Mut. Ins. Co*., No. M2012-00248-SC-R3-WC, 2013 WL 1183314, *7 (Tenn. Workers' Comp. Panel March 21, 2013). The Panel found the trial court had thoroughly gone through the ten factors set forth in *Welcher,* and had determined the time and labor required on matter to be significant, that the matter kept the attorney from engaging in other work, the fee was in line with that customarily charged, and that counsel had pursued the case vigorously. The proof demonstrated the basis for the fee. Although it appeared disproportionate, considering the dollar amount recovered by the employee, it was clear the defendant employer's insurer had firmly resisted providing the medical treatment directed by the authorized physician and ordered by the court, thus significantly increasing the time and effort necessary to obtain the desired relief. The Panel determined the trial court had correctly evaluated the *Welcher* factors, had not given greater weight to proportionality than to any of the other nine factors, and thus had not abused its discretion in making the award. ***http://www.tncourts.gov/sites/default/files/grissom.holly_.opnjo_.pdf***

MEDICAL IMPAIRMENT REGISTRY

Kelsey Williams v. Ajax Turner Company
No. M2016-00638-SC-R3-WC-Filed April 12, 2017

The employee sustained a compensable injury on August 2, 2012 when a co-worker ran over the back of his left foot with a forklift, causing a severe laceration. The treating physician assigned a 20% permanent anatomical impairment to the left leg. The employer sought a second opinion. The employer's physician opined the employee sustained a five percent permanent impairment. Due to the conflicting opinions the employer requested an evaluation through the medical impairment registry ("MIR") program. The MIR physician also opined the employee had sustained a five percent permanent impairment. However, the trial court found the employee had rebutted by clear and convincing evidence the presumption of correctness statutorily attached to the MIR physician's ruling, applied a multiplier of four, and awarded the employee 80% permanent partial disability to the left leg. The employer appealed. The Panel **reversed** and **modified** the trial court's judgment.

The Panel first considered whether the trial court erred in admitting the MIR physician's report and testimony, an issue raised by the employee. The Panel considered T. C. A. § 50-6-204(d)(5), which establishes a method for selecting a MIR physician, and noted that the Supreme Court had held *either* party may seek the opinion of an MIR physician. *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 401 (Tenn. 2013). The Panel also referenced current rules of the Bureau of Workers' Compensation, which were pertinent. Tenn. Comp. R. & Regs. 0800-02-20-.01(7). Secondly, the Panel determined whether the presumption of correctness of the MIR physician's finding had been rebutted. "In determining whether the presumption has been rebutted, 'the focus is on the evidence offered to rebut that physician's rating.'" *Beeler v. Lennox Hearth Prod., Inc.*, No.W2007-02441-SC-WCM-WC, 2009 WL 396121, at 4* (Tenn. Workers' Comp. Panel Feb. 18, 2009). The Panel concluded the treating physician's testimony failed to raise "serious or substantial" doubt about the rating methods used by the MIR physician, which were diagnosis-based rather than the range-of-motion based method chosen by the treating doctor. Finally, the Panel deferred to the trial court's use of a multiplier of four, but modified the award using the MIR physician's rating of five percent.
http://www.tncourts.gov/sites/default/files/williams-ajax_turner.opnjo_.pdf

ELECTION OF REMEDIES

James Russell et al. v. Transco Lines, Inc., et al.
No. E2015-02509-SC-R3-WC-Filed June 201, 2017

The issue presented was whether a Tennessee trial court had subject matter jurisdiction over workers' compensation claims brought by two married truck drivers injured in a Louisiana accident while employed by an Arkansas based company. The employees were Tennessee residents. After the accident and injuries on July 5, 2013, the employer and its insurer accepted the claims as compensable and made medical and temporary disability payments under Arkansas law. After the Arkansas administrative process was exhausted, the employees filed a workers' compensation action in Washington County, Tennessee where they lived. The employer contended that the Tennessee trial court lacked subject matter jurisdiction and that the employees had made an election of remedies under Arkansas law and were precluded from pursuing their claims in Tennessee. The trial court ruled for the employees, holding it had subject matter jurisdiction and that the employees had not made an election of remedies. The employees were awarded permanent partial disability benefits of 65% and 85% respectively. The employer and insurer appealed. The Panel **affirmed** the judgment of the trial court.

The evidence indicated the employment discussions had begun in Tennessee when the employer called the employees them at their home in Johnson City. After the call, the employees resigned their current positions and traveled to Russellville, Arkansas for orientation training. At trial the employer contended the hiring process was not complete until new drivers had satisfactorily

passed background, motor vehicle records, and driving records checks, physicals, drug screens, and had finished the orientation training program. (One of many documents that had to be completed and signed by the new drivers was a certificate that indicated that any workers' compensation claims would be covered under Arkansas law.) The new employees made their first run on April 23, 2008. They testified they drove through Tennessee 14 or 15 days out of every month. They were given permission to haul freight when they went home to Johnson City. After they were injured in the 2013 accident they received medical and temporary disability benefits under Arkansas law, but the employees maintained they filed no documents with the Arkansas Workers' Compensation Commission. Evidence also showed the employer had opened a small office in Chattanooga in March 2013.

The Panel observed the trial court had found a "substantial connection between this state and the particular employer and employment relationship existed," in considering T. C. A. § 50-6-115(b)(2), which contains the three elements required to establish subject matter jurisdiction. The Panel agreed with the trial court's reasoning that the telephone call to the drivers' home did not constitute an effective job offer, citing *Perkins v. BE & K, Inc.*, 802 S.W.2 215, 216 (Tenn. 1990), and that the employment was not principally localized in Tennessee. The Panel noted as of the date of the accident the courts were required to give the workers' compensation statutes "an equitable construction" and agreed with the trial court that the employer's consent for the employees to drive and store the truck and trailer in a secured location in Tennessee provided a sufficient basis to support a finding that a substantial connection existed between Tennessee and the particular employment. Other connecting factors included their retrieval of loads in Memphis, their regular travel through Tennessee, and the fact that each route began and ended in Tennessee. The employer's contention that the employees had made an election of remedies failed because they were never consulted about pursuing claims in Arkansas, nor did they sign or file documents or take any affirmative action to obtain or consent to benefits.
http://www.tncourts.gov/sites/default/files/us_20170620073113.pdf

EMPLOYEE PRESSURED TO RESIGN

Alicia Hunt v. Dillard's Inc., et al.
No. W2016-02148-SC-WCM-WC-Filed December 13, 2017

The employee, 63, the Clinique counter manager for her employer's retail store, sustained injuries to her left ankle and knee on September 21, 2013 when she fell from a stool while taking down signs over a counter. She reported the injury to her supervisor, who helped her complete the workers' compensation forms and arranged for her to go to a hospital emergency room. Later, when she tried to return to work with the restrictions imposed by the authorized physician she could not perform her job duties as she had before because of swelling and pain in her knee. The employer would not authorize the arthroscopic surgery recommended by her physician. The

employee tried to continue working but on March 27, 2014 she was told by her employer she needed to step down as counter manager and that she could work for $20 per hour without commission. She testified she was shocked by the request and that her spontaneous response was she would rather quit first. The employer immediately required her to complete and sign resignation paperwork. Nothing on the forms referenced her injuries, her inability to perform her job duties as she had before the accident, or that she had been asked to take a demotion. After she left employment she had surgery on her knee in August 2014. She was assigned a 12% permanent impairment rating by her treating orthopedic surgeon. The employer argued her vocational disability award should be capped at one and one-half times the impairment rating because of her "voluntary resignation." The trial court refused, finding she had left her job because of her work-related injury after the employer's demotion and lowering of her pay and thus she had no meaningful return to work. The trial court awarded a 60% permanent partial disability to the left leg, and also awarded temporary total benefits from her surgery until she reached maximum medical improvement.

The employer appealed on the issue of the cap, contending the employee did have a meaningful return to work. The Panel **affirmed** the trial court's judgment and award, finding that the employee was pressured to resign. The employer argued the employee could have actually returned to work performing the same job she had before the injury, but the Panel observed "(v)ocational disability is 'measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living.'" (Citing *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 570 (Tenn. 1998). The Panel noted almost all of the employee's work experience was in jobs that required extended periods of standing and walking, and although she had applied for several positions since her injuries, none were offered because of her permanent restrictions.
http://www.tncourts.gov/sites/default/files/huntopn.pdf

RECONSIDERATION

William H. Lewis v. State of Tennessee
No. M2016-00738-SC-R3-WC-Filed August 8, 2017

The employee, a highway maintenance worker, was employed from 2002 until June 2010. During his employment he sustained compensable injuries to his right shoulder, left shoulder, and right eye. All the claims resulted in settlements or awards, each of which provided the employee had the right to reconsideration under T. C. A. § 50-6-241(d). The employee collapsed at work on May 24, 2010, stating that his knees "gave out." He filed a claim for bilateral knee injuries, and petitioned for reconsideration of his three previous settlements. The *Tennessee Claims Commission* awarded 90% permanent partial disability to both legs for the May 24, 2010 injuries but declined to award additional benefits for the reconsideration claims. The employer

appealed from the award of disability to the legs and the employee appealed from the denial of additional benefits for the reconsideration claims. The Panel **affirmed** the judgment on the award but **reversed** on the reconsideration claims and **remanded** to the Commission to recalculate the employee's disability relative to his shoulders.

The employer argued the employee was rendered permanently and totally disabled from his prior injuries to his shoulders and face and was not entitled to any additional benefits for his knees, citing *Princinsky v. Premier Mfg. Support Services, Inc*., 2010 W. L. 3715636 (Sup. Ct. W.C. Panel 2010). The Panel noted *Princinsky* stands for the proposition that an employee who has a subsequent injury and a reconsideration case will not be allowed to receive more than the benefits for permanent and total disability if either the reconsideration case or the subsequent injury leaves the employee permanently and totally disabled. The *Claims Commission* had disagreed the employee was permanently and totally disabled after all three prior injuries. The Panel cited *Rhodes v. Capital City Ins. Co*., 154 S.W.3d 43, 48 (Tenn. 2004), in which the Supreme Court held "it would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled. . . (t)he evidence would have to show that the employee was not employable in the open labor market and that the only reason that the employee was currently working was through the magnanimity of his or her employer." The Panel observed the evidence "does not come close" to the "extremely rare situation" contemplated in *Rhodes*. The Panel disagreed with the Commission's interpretation of T. C. A. § 50-6-241(d)(1)(B)(iii), which precludes reconsideration awards when the loss of employment is due to voluntary resignation or retirement. Pointing out the resignation must be *voluntary*, the Panel stated, "(I)f the employee's resignation or retirement is not voluntary, then it makes no difference whether the employee's retirement or resignation results from his prior work-related disabilities." The Commission had determined the employee's retirement was not voluntary in that he had no meaningful return to work after the May 2010 injuries. Essentially, he was told to retire or be fired.
http://www.tncourts.gov/sites/default/files/williamh.lewis_.wc_.opn_.pdf

INHALATION EXPOSURE

Sheila Holbert v. JBM Incorporated, et al.
No. E2017-00324-SC-R3-WC-Filed November 1, 2017

The deceased employee's widow filed this action for the death of her husband, allegedly from inhalational exposure to dust in the course of his job with the employer. The trial court ruled the decedent's widow had sustained her burden of proof on causation, awarded death benefits and ordered the employer to pay medical expenses into the registry of the court. The trial court ruled medical expenses of the decedent were governed by the workers' compensation schedule. The employer appealed relative to causation and the order on medical expenses. The decedent's

widow appealed the application of the workers' compensation schedule. The Panel **affirmed** in part, **reversed** in part, and **remanded.**

In its analysis of the causation issue the Panel reviewed the medical testimony and records, as well as lay testimony with a focus on the decedent's condition just before and after he was sent by his employer to Stokertown, Pennsylvania on August 12, 2012 to act as project foreman for the installation of a synthetic gypsum system at a cement plant. Testimony by a co-worker indicated the decedent became ill on August 20 or 21, and thereafter seemingly became worse and was sometimes unable to return to the job site. He visited a clinic on August 27 complaining of a cough. His chest and lungs were noted to be normal but he did not improve. On August 30 he allowed the co-worker to take him to the hospital. He was found to be hypoxemic in significant respiratory distress, requiring intubation. By August 31 he was in a coma on life support. During transfer to another hospital he suffered cardiac arrest. He died October 10.

Medical proof from two treating physicians indicated the decedent's inhalation of dust, probably containing grout, epoxy, and/or concrete dust, caused his death, rather than infectious disease. An employer retained physician who had not treated the decedent and only reviewed medical records, claimed the cause was more likely an intra-abdominal process due to infection. He said the employee's symptoms were consistent with an acute, high level exposure but said the autopsy report did not mention an inhalation injury. Prior to going to Pennsylvania the employee was apparently in good condition although employer representatives said he seemed a little under the weather. The Panel noted the trial court had looked to the then applicable statutory directive to liberally construe the workers' compensation law, T. C. A. § 50-6-115 (2008 & Supp. 2013), and the judicial directive to resolve reasonable doubts in favor of the employee. *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 665.The Panel held the evidence did not preponderate against the trial court's decision on causation. However, the Panel ruled the payment of medical expenses into the court's registry was impermissible and also vacated the application of the medical payment schedule.
http://www.tncourts.gov/sites/default/files/20171101080112.pdf

AVERAGE WEEKLY WAGE CALCULATION

Victor Dunn v. Tradesmen International, Inc.
No. E2015-01930-SC-R3-WC-Filed May 10, 2017
On July 24, 2011, the employee, a millwright who helped maintain heavy machinery in factories and plants, was injured when he fell off a ladder while working for the employer on a job in Iowa. The employer accepted the injury as compensable but disputed Tennessee's jurisdiction over the claim, contending any award should be limited to one and one-half times the impairment rating, and also disagreed with the employee's calculation of his average weekly wage. The trial court held it had jurisdiction, that the claim was not capped, and that the wage was correct. It

awarded 25% to the body as a whole. The employee appealed on the wage calculation issue. The Panel **affirmed**.

The evidence indicated the employee worked for the employer on different jobs in Virginia and Tennessee before the assignment in Iowa. Applying T. C. A. § 50-6-102(3)(B), the trial court computed the average weekly wage by dividing the total gross wages by five, which was the number of weeks the employer actually worked for the employer before the injury. The employee, relying on *Gaw v. Raymer*, 553 S.W.2d 576 (Tenn. 1977) and *Toler v. Nashville C. & St. L. Ry.*, 117 S.W.2d 751 (Tenn. 1938), claimed he was an "intermittent employee" and that the total number of weeks from the inception of his employment with the employer should not be used in calculating his average weekly wage since there were gaps of time between the actual job assignments. The employer claimed the employee was a full time employee which meant the computation should run from the inception of his hiring until the injury, which was a period of eleven weeks. The Panel found only working five of eleven weeks between being hired and the time of the injury was inconsistent with the term "full time employment." Their decision was in accord with the holding by the Supreme Court in *Cantrell v. Carrier Corp*., 193 S.W.3d 467 (Tenn. 2006), that "(T)he determination of whether a day an employee does not work should be deducted from the computation of the average weekly wage is dependent upon the facts and circumstances of each case." *Id*. at 472. Therefore the Panel found no fault with the trial court's method of calculation.
http://www.tncourts.gov/sites/default/files/dunn-filed_20170519131730.pdf

CONCLUSION

Pursuant to Tennessee Code Annotated Section 50-6-121(i), the Advisory Council on Workers' Compensation respectfully submits this report on significant Supreme Court decisions for the 2016 Calendar Year up to and including the last decision filed on December 28, 2017. An electronic copy of the report will be sent to the Governor and to the Speaker of the House of Representatives, the Speaker of the Senate, the Chair of the Consumer and Human Resources Committee of the House of Representatives, and the Chair of the Commerce and Labor Committee of the Senate. A printed copy of the report will not be mailed. Notice of the availability of this report will be provided to all members of the 110th General Assembly pursuant to T. C. A. § 3-1-114. In addition, the report will be posted under the Advisory Council on Workers' Compensation tab of the Tennessee Treasury Department website: http://treasury.tn.gov/claims/wcadvisory.html

Respectfully submitted on behalf of the Tennessee Advisory Council on Workers' Compensation,

/s/David H. Lillard, Jr 1/11/18
David H. Lillard, Jr., State Treasurer, Chair

/s/ Larry Scroggs, 1/1/18
Larry Scroggs, Administrator