STATE OF TENNESSEE

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2019 SUMMARY OF SIGNIFICANT TENNESSEE SUPREME COURT WORKERS' COMPENSATION DECISIONS

TREASURY DEPARTMENT
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Significant 2019 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 2019 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 28 cases between January 16, 2019 and December 19, 2019. Eighteen opinions were **"old law"** cases, based on claims arising prior to the July 1, 2014 effective date of the Workers' Compensation Reform Act of 2013. Ten opinions were issued in **"new law"** cases. Five of those involved appeals from the *Court of Workers' Compensation Claims* and four came directly from the *Workers' Compensation Appeals Board*. One came from the Tennessee Claims Commission. **Note:** Two Court of Appeals cases and one interlocutory appeal to the Supreme Court are also included in this report due to their significance.

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.
Summaries of the cases decided by the Supreme Court and its Special Workers' Compensation Appeals Panel in 2019 are presented here, with headings that constitute a workers' compensation "issues list."

TABLE OF ISSUES

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Procedure

1. Statute of Limitations

***Cheryl Lynn Williams v. SWS LLC d/b/a SecureWatch*, No. E2018-00922-SC-R3-WC** – Filed September 20, 2019.

The employee claimed she sustained a compensable injury due to mold exposure during her work with the defendant, which began in 2010. The employer moved for summary judgment, contending the statute of limitations barred her claim. The trial court granted the motion and dismissed the case. The appeal was referred to the Special Panel, which **reversed** the judgment and **remanded** for a trial on the merits. The employee began experiencing upper and hypo pharyngeal airway symptoms after her employer's move into a new building in June 2010. In January and July of 2011 she missed time from work and had two surgical procedures, one involving her tonsils. On August 1, 2011 the employee wrote her employer that her physician attributed her condition to mold exposure in her work environment. She left her position voluntarily on April 25, 2012 after finding another job. On December 17, 2012, the employee filed a request for assistance and then filed a complaint on June 24, 2013. The trial court applied the "discovery rule," holding that the employee did not timely file because she waited more than one year from when she knew or should have known her injury was work related. The Panel found that genuine issues of material fact existed "concerning whether the employee's condition was a gradually occurring injury and/or an occupational disease." The Panel disagreed with the employer's contention that the last day worked rule applied because the employee was incapacitated for work during her treatment. The Panel noted that in *Brown v. Erachem Comilog, Inc.*, 231 S.W.3d 918 (Tenn. 2007), the Court held that an employee's absence from work for

treatment will not begin the running of the statute of limitations in an occupational disease case if the employee's capacity to work is affected only by the treatment, not by the disease." *Id*. at 923.

2. Notice

***Richard Moser v. Hara, Inc. d/b/a Hot Shot Delivery, et al.*, No. M2018-02045-SC-R3-WC** – Filed September 25, 2019.

The employee began working as a truck driver for the defendant in 2010. He alleged he sustained a compensable injury on August 12, 2013 when he tried to pull a duffle bag from his truck. He provided timely notice to the employer but the employer refused to provide any benefits. The employer contended the employee was actually injured in August 2014, when he cranked a landing gear on a trailer and that he did not provide adequate notice of the 2014 injury. The employee had filed a request for assistance for the 2013 injury in July 2014, before the 2014 injury occurred. Although the employee missed some work and sought medical treatment for the 2014 injury, he testified about his continuing symptomology from the 2013 injury. The employee's physician opined that the 2014 injury aggravated the earlier injury and exacerbated its symptoms, which included nerve damage, disc protrusions, lumbar radiculopathy and foot drop. The trial court found the employee sustained a compensable injury in August 2013 and awarded permanent partial disability benefits. The Panel **affirmed**. The employer's appeal raised two issues, whether the evidence preponderated against the trial court's finding that the August 2013 caused the employee's permanent injury, and whether the award was unsubstantiated. The employer also relied on an independent intervening cause defense but the Panel noted the August 2014 injury was itself work-related and not a result of negligence.

***Bettye Shores v. State of Tennessee*, No. M2018-00954-SC-R3-WC** – Filed February 12, 2019.

The employee, a program coordinator for the Tennessee Department of Human Services, alleged she suffered a mental injury on July 1, 2016 when a supervisor's reprimand "lit up" her preexisting post-traumatic stress disorder stemming from an automobile accident during her childhood. The employee did not give written notice of the alleged injury until November 9, 2016. The employer moved to dismiss the claim, contending the employee had failed to give timely notice of the alleged injury under T. C. A. § 50-6-201 (Supp. 2017). After a hearing the Claims Commissioner granted the motion to dismiss. The employee appealed, contending she had been incapable of reporting a work-related injury from August through October of 2016 due to her hospitalization for suicidal ideations. The Panel **affirmed** the Commissioner's judgment. The proof indicated the employee claimed her supervisor had accused her of being "untrustworthy," a "liar," and "dishonest" relative to remarks the employee said she made in jest to a coworker about a promotion. The employee claimed the reprimand reactivated her PTSD from a serious childhood accident, after which she had been subjected to disparagement and

mistreatment from classmates during her recovery. She testified she did not realize she had suffered a work-related injury until November 2016 during her medical treatment for suicidal issues. The supervisor said she knew the employee had taken Family Medical Leave in July 2016 but was unaware of the reason and only learned about the employee's work injury claim in mid-November. The Panel found it was undisputed no timely written notice was given, and that the employer had no actual knowledge of a work injury. In the absence of actual knowledge or waiver of notice by the employer, or reasonable excuse by the employee for not giving notice, statutory notice is an "absolute prerequisite to the right of the employee to recover benefits." [Citing *Jones v. Sterling Last Corp.*, 962 W.W.2d 469, 471 (Tenn. 1998) and *Aetna Cas. & Sur. Co. v. Long*, 569 W.W.2d 448 (Tenn. 1978)]. Waiver of notice was not considered since it was raised for the first time on appeal and should have been brought up at a Benefit Review Conference. The Panel also determined the employee's reliance on *reasonable excuse* was belied by her own assertions she had immediate suicidal ideations from the incident yet claimed she was unaware on an injury until causation was established by subsequent medical confirmation.

3. Attorney Fees

***Shirley Keen v. Ingles Markets, Inc.*, No. E2018-00306-SC-R3-WC** – Filed May 14, 2019.

The employee, a store worker, sustained a compensable injury in 1997. The settlement in 1999 preserved her right to future medical treatment. In 2016 her employer refused to pay for medical treatment based on a utilization review under T. C. A. § 50-6-124. The trial court granted the employee's motion to compel the medical treatment and held in abeyance her request for attorney fees under T. C. A. § 50-6-204(b)(2). The employee filed a second motion to compel the employer to provide a certain medication, Nexium. At that time the trial court awarded attorney fees but less than as requested. Both parties appealed. The employee contended the trial court erred in awarding attorney fees in failing to make findings based on the factors in Supreme Court Rule 8, Rule of Professional Conduct 1.5(a) (RPC 1.5(a). The employer claimed the trial court erred by issuing the second order to compel. The Panel **vacated** the trial court's award of attorney fees and **remanded** for determination of attorney fees under RPC 1.5(a). The second judgment to compel for the particular medication was **affirmed**. The utilization review had determined certain prescribed medications including trigger point injections were not medically necessary and also that the employee should be weaned from some medications. The employee filed a first motion to compel and a second such motion relative to one prescribed drug, both of which were granted. The trial court did not order requested attorney fees for the first motion to compel but did so for the second motion, although the amount sought was reduced by half. Experienced attorney witnesses for both parties offered conflicting testimony about the reasonableness of the requested fees. Although the trial court indicated it had reviewed the ten factors in RPC 1.5(a) it made no specific findings about each factor. The Panel observed that in awarding attorney fees a trial court must "develop an evidentiary record and clearly and

thoroughly explain its findings concerning each of the factors and the particular circumstances supporting its determination of a reasonable fee in each case." *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 185-186. "It is insufficient for a trial court to merely allude to the factors."

4. Subrogation Lien

***Memphis Light, Gas & Water Division v. Tykena Watson, et al.*, No. W2018-00218-COA-R3-CV** – Filed February 13, 2019.

This Court of Appeals case of first impression is included because of the issue raised, which is whether case management fees are recoverable as part of an employer's workers' compensation subrogation lien under T. C. A. § 50-6-112. The Court of Appeals **affirmed** the trial court's judgment that such fees are not recoverable as part of the subrogation lien. The employee, a meter reader, had suffered injuries when a dog attacked her. Memphis Light, Gas & Water Division (MLGW) provided workers' compensation benefits and a settlement agreement was approved on January 6, 2015. The employee also pursued a tort claim in a third party action. The tort case settled for $80,000 in November 2015. MLGW sued its employee and her attorney to enforce its subrogation lien under § 50-6-112, asserting it had paid over $40,000 in workers' compensation benefits. The defendants did not dispute that MLGW was subrogated to a part of the tort settlement but raised two issues: they claimed the attorney was entitled to a fee as compensation in settling the tort claim where recovery was beneficial to MLGW and second, that MLGW's lien should not include certain case management fees claimed by MLGW totaling $10,691.01. The trial court determined that "T. C. A. § 50-6-112 does not provide for an employer to recover case management fees as part of its subrogation lien against an employee's third-party claim." MLGW had contended case management was required by law. The defendants had argued case management was a service to save employer costs, not a benefit to the employee. The Court of Appeals disagreed with MLGW's position that case management was required in this case, finding it was discretionary for employers based on a 2004 amendment to T. C. A. § 50-6-123 and a subsequent regulation amendment in 2007 (Tenn. Comp. R & Regs. 0800-2-7-03.(1) (2007). The Court of Appeals held case management was not a benefit to an employee but rather a cost control service for the employer.

Causation

1. Burden of Proof

***Tina E. Hayes v. Costco and Liberty Mutual Insurance Company*, No. W2017-02130-SC-R3-WC** – Filed February 12, 2019

The employee, a stocker for the employer, alleged she sustained a compensable injury to her left knee on April 8, 2015 while at work. She claimed the injury required her to undergo left knee replacement surgery. The Court of Workers' Compensation Claims held the employee had failed to establish by a preponderance of the evidence a compensable injury or aggravation arising primarily out of and in the course and scope of her employment. On the appeal by the employee, the Panel **affirmed** the trial court's judgment. The physician selected by the employee from the panel provided by her employer acknowledged she had related a history of twisting her left knee at work however he indicated she was suffering from osteoarthritis with an arthritic flare and recommended conservative treatment instead of surgery. Ultimately he cleared her to return to work with no restrictions and no impairment rating. The physician saw the employee again after she experienced a popping in her knee while at home. His impression at the last visit on August 10, 2015 was early degenerative changes, including a degenerative meniscus tear in the left knee. He again recommended against surgery but did refer her to another orthopedic surgeon after concluding the knee issues were not causally related to her work injury. The second surgeon performed a left knee replacement on October 29, 2015. The employee's attorney later requested that the employee see another physician for an independent medical evaluation. That physician opined that the employee's injury on April 8, 2015 necessitated the left knee replacement surgery and assigned a seven percent (7%) permanent impairment to the left lower extremity, however his testimony lacked specificity. The trial court determined the employee's evaluating physician's testimony was insufficient to prove her work injury contributed more than fifty percent (50%) to causing her disability under T. C. A. § 50-6-102(13) (2014). The trial court also held that even if sufficient to meet applicable standards it did not overcome the statutory presumption afforded the testimony of the authorized treating physician.

***Donald R. Loveless v. City of New Johnsonville, et al.* No. M2018-00523-SC-R3-WC** – Filed February 15, 2019

The employee fell while at work at the defendant employer's water plant on February 9, 2014, sustaining injuries to his lower back, right leg and right foot. The employee initially saw a primary care physician who prescribed medications and physical therapy while the employee remained off work for a month. The employee then selected a neurosurgeon as his authorized treating physician (ATP) from the panel provided by his employer. The authorized treating neurosurgeon testified that the February 9, 2014 fall resulted in a soft tissue injury but no anatomical changes, and no impairment rating. A second ATP concluded there was no permanent impairment and that the employee had spondylosis, or mild arthritis, but not spondylothesis (Slipping of vertebrae over the one below). The employee's attorney referred him to a third physician, who diagnosed degenerative lumbar spondylothesis with radiculopathy and assigned a nine percent (9%) impairment. He concluded the conditions were causally related to the fall. The trial court awarded the employee benefits based on a seven and one-half percent (7.5%) permanent partial impairment. On appeal the Panel noted two authorized treating

physicians had opined the employee's fall had caused no permanent anatomical impairment. The Panel also observed that on cross examination the employee's physician had acknowledged that spondylothesis must be established radiographically and had conceded that he had no such data available to him. The opinions of the ATPs were "presumed to be correct, unless rebutted by a preponderance of the evidence." T. C. A. § 50-6-102(12)(A)(ii) (Supp. 2013). The Panel **reversed** the trial court's judgment, holding the employee had not sustained a compensable injury.

***Roger Joiner v. United Parcel Service, Inc., et al.*, No. M2018-01876-SC-R3-WC** – Filed December 6, 2019.

The employee hurt his neck while lifting a mail sack at work on February 26, 2016. The employer provided medical benefits but limited them to treatment at the C6-7 level of the employee's cervical spine where tests indicated a disc rupture. The ATP having found that mild disc degeneration at the C5-6 level was not causally related the employer refused benefits for treatment at that level. The employee was evaluated independently by another physician, who concluded the work accident had indeed caused injury at the C5-6 level, indicated by a disc rupture there as well as at the C6-7 level. The trial court concluded the causation opinion of the evaluating physician overcame the statutory presumption afforded the ATP's opinion and awarded permanent partial disability and medical treatment benefits for both cervical levels. The employer appealed to the *Workers' Compensation Appeals Board* (WCAB), which reversed the trial court's judgment as to the C5-6 level, excluding treatment for that condition. On appeal the Special Panel **reversed** the WCAB, holding that the causation opinion of the evaluating physician "was more persuasive and that it was sufficient to rebut the presumption afforded the causation opinion of (the ATP)." The Panel agreed with the dissenting judge on the WCAB, who had concluded that prior to the injury at work the employee had no prior cervical injuries and had not experienced prior symptoms. It was undisputed the employee had suffered compensable injury to his cervical spine when lifting the mail bag and that he had experienced pain and numbness in both arms and tingling in his right hand immediately after the injury, although he had more pain around his left shoulder and arm. According to the evaluating physician, the employee's degenerative condition at the C5-6 level was "sub-clinical" before the accident and "became clinical" after the accident. The Panel held that a totality of the evidence was sufficient to support the trial court's judgment, which it reinstated.

***Jerry Coleman v. Armstrong Hardwood Flooring Company and Indemnity Insurance Company of North America*, No. W2017-02498-SC-R3-WC** – Filed April 12, 2019.

This case illustrates a physician's extrapolation of a portion of an employee's hearing loss related to conditions other than noise exposure. The trial court accepted the methodology used by the physician, a hearing specialist, to support a finding of permanent partial disability based on a

modified impairment rating. Prior to his retirement, the employee had regularly driven a dump truck in and around an area containing a very large wood chipper, an exceptionally loud machine. The employer provided protective devices and annual hearing tests for its employees but when the employee retired in June 2015 he was suffering from hearing loss in both ears. He filed a Petition for Benefit Determination and selected a hearing specialist from a panel provided by the employer. The physician determined the employee had suffered sensorineural hearing loss due to noise exposure, but had also sustained some conductive hearing loss, usually attributable to eardrum damage, infection related scarring, or otosclerosis, a type of bone overgrowth in the inner ear. The employer argued the specialist did not use an appropriate method to assign an impairment rating. The trial court found the physician's explanation of how he arrived at an impairment rating to be consistent with AMA guidelines. After arriving at an overall impairment rating, the physician extrapolated the level of non-noise exposure related loss, resulting in a modified rating for the sensorineural loss. The Special Panel **affirmed** the trial court's judgment.

***Ameenah House v. Amazon.Com, Inc.*, No. E2017-02183-SC-R3-WC** – Filed March 16, 2019.

The employee filed a *pro se* workers' compensation claim against her employer, alleging work-related back and leg injuries arising from two incidents on November 20, 2014 and April 6, 2015. In the first incident a forklift struck the back of the one on which she was standing. The evidence was unclear whether a panel of physicians was offered by the employer, or accepted by the employee. She sought treatment from a chiropractor and had physical therapy. In the second incident she was allegedly thrown down on a pallet by another employee. The employer arranged for an independent medical evaluation. The employer's physician associated the employee's complaints with pre-existing arthritis and said her problems were not causally related to her work. The trial court denied benefits, ruling the employee had not provided a causative opinion even though chiropractors testified she had permanent medical impairment. On appeal, the Panel **affirmed** the trial court's judgment, adopting the opinion of the WCAB. The employee was simply unable to properly present a causative opinion and the trial and appellate courts were prohibited from assisting her. The WCAB cited *Webb v. Sherrell*, No. E2013-02724-COA-R3-CV, 2015 Tenn. App. LEXIS 645, at *5 (Tenn. Ct. App. Aug. 12, 2015), "(A)ppellate courts will not 'dig through the record in an attempt to discover arguments or issues that [a pro se party] may have made had [that party] been represented by counsel' as doing so would place [the opposing party] in a distinct and likely insurmountable and unfair disadvantage.'"

2. Misconduct Exception

***Tennessee Clinical Schools, LLC, d/b/a Hermitage Hall v. Jeffrey E. Johns*, No. M2018-00985-SC-R3-WC –** Filed August 2, 2019**.**

The employee, a healthcare worker, had worked two months in a therapeutic residential treatment facility for trauma-based teenagers when he sustained a left shoulder injury during an incident in which he restrained a youth using a one-person hold. His employer filed a petition for benefit determination. The employee answered, and the trial court issued an order in favor of the employee. The employer appealed, contending the employee had engaged in disqualifying willful misconduct under T. C. A. § 50-6-110(a)(1). The employer had policies prohibiting physical restraint unless necessary to protect the resident or others from imminent harm. The employee testified he did not knowingly or intentionally violate the policies prohibiting the use of force, and used the restraint method only after the youth struck him. The trial court found that the employee had notice of the policies, recognized the danger in violating them, and did not have an objective excuse for violating them, but that the employer had not satisfied its burden to show it had engaged in bona fide enforcement of the policies. The Panel **affirmed** the trial court's judgment in favor of the employee, after analyzing the case in view of the four- part test developed by Professor Larson for evaluating claims of willful misconduct or willful failure to follow safety rules as a defense. The employer claimed the trial court had misapplied the Larson test. The test had been adopted by the Supreme Court in *Mitchell v. Fayetteville Public Utilities*, 368 S.W.3d 442, 453 (Tenn. 2012). Although it reversed the trial court's finding that the employer had not carried its burden of showing bona fide enforcement of its policies, the Panel agreed with the trial court's finding that the employer had not proved the employee's conduct was willful or "more than mere error in judgment, negligence, or even recklessness." (Citing *Nance v. State Industries, Inc.*, 33 S.W.3d 222 (Tenn. Special W.C. Panel 2000), distinguishing willful conduct from error in judgment.)

***Corey Bunton v. Sanderson Pipe Corp., et al.*, No. M2018-01028-SC-R3-WC** – Filed August 14, 2019.

The employee, a lead line operator, sustained a hand injury while attempting to clean a drain in a beller machine making PVC pipe. The disputed fact issue was whether he turned off the machine before reaching in to clean the drain. Failure to turn off moving machinery before attempting cleaning was a company policy violation. The employer relied upon the willful conduct defense. The employee acknowledged he knew and understood the policy but insisted he turned the machine off first. Co-workers' testimony and video evidence indicated otherwise. The trial court denied the employee's claim, concluding he had engaged in willful conduct which barred any recovery. On appeal, the Panel **affirmed** the trial court's judgment, again considering the test set forth in *Mitchell v. Fayetteville Pub. Utilities,* 368 W.W.3d 442 (Tenn. 2012). The employee contended the trial court had incorrectly eliminated the "willful" requirement outlined in Mitchell, insisting the trial court held Mitchell had abolished the requirement that an employer asserting a willful misconduct defense must establish the employee's misconduct was willful in order to prevail. The Panel disagreed, noting the trial court had specifically found from the

evidence that the employee intended to place his hand in the moving machine in violation of company policy.

Compensability

1. Employer-Employee Status and Obligations

***Jimmy Wayne Helton v. Earl Lawson*, No. E2018-02119-COA-R3-CV** – Filed December 18, 2019.

This Court of Appeals case discusses criteria required to establish the employer-employee relationship. The defendant, a residential contractor who decided to build a house for himself on a lot he owned, contracted with a local "handyman" to help with the work. The handyman in turn hired the plaintiff as a laborer. The plaintiff sustained a fractured ankle when he fell after a makeshift scaffold collapsed while he was hanging vinyl siding. Instead of seeking workers' compensation the plaintiff sued the defendant, contending he was entitled to seek his remedy in tort because the defendant failed to carry workers' compensation insurance or have a valid certificate of insurability under T. C. A. § 50-6-405(a). The employee moved for partial summary judgment on the issue of liability – duty and breach of duty. Under § 50-6-405(c) the defendant could not set up as a defense that the employee was negligent or that the injury was caused by a fellow employee, or that the employee had assumed the risk of injury. While admitting he did not carry workers' compensation insurance, the defendant claimed there was a disputable issue of material fact as to who was the plaintiff's employer. The trial court concluded the plaintiff's employment status was in dispute and denied the motion. At trial the defendant acknowledged he paid the bills and basically controlled the operation but that the handyman hired the plaintiff. The jury found the plaintiff to be the employee of the handyman, not the defendant and awarded no damages. In a lengthy analysis, the Court of Appeals reviewed the workers' compensation statutes in determining the requirements for providing or excluding coverage and the factors to consider when deciding whether a worker is an employee or an independent contractor. The Court of Appeals ultimately concluded the plaintiff was an employee of the non-party handyman, who had a direct contract, not a subcontract, with the defendant owner, "even if the owner holds himself out as, and performs the duties of, a general contractor." (Citing *Winter v. Smith*, 914 S.W.2d 527, 539-40 (Tenn. Ct. App. 1995). The Court of Appeals **affirmed** the jury's verdict but **vacated** and **remanded** the zero damages award, stating it was not supported where it was uncontroverted the plaintiff suffered an injury that required evaluation and treatment.

***Katherine D. Chaney v. Team Technologies, Inc.*, No. E2018-00248-SC-R9-WC** – Filed January 31, 2019.

The employee collapsed at work due to a cardiac arrest, a non-work related medical condition. The employer knew of the employee's immediate need for medical assistance. The employer had previously acquired an automated external defibrillator (AED) but did not use it to assist the employee while awaiting emergency medical responders. The employee suffered permanent brain damage due to oxygen deprivation. The employee filed suit for workers' compensation benefits for the injuries resulting from the employer's failure to use the AED. The employer moved to dismiss on two grounds: first, that the employee's injury was unrelated to her employment, and second, that an employer has no statutory or common law duty to use an acquired AED, citing *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886 (Tenn. 2016). The employee asserted that under the "emergency rule," *Vanderbilt University v. Russell*, 556 S.W.2d 230 (Tenn. 1997), the employer had a duty to provide her with medical assistance, which included using its AED, and that *Wallis* did not apply since it involved a duty owed to a business invitee, not an employee.

In this interlocutory appeal the full Supreme Court **reversed** the trial court's denial of the employer's motion to dismiss and **remanded** the case for an order of dismissal. The Court revisited its decision in *Russell,* where it had held that when an employee becomes helpless at work because of illness or other cause unrelated to her employment, needs medical assistance to prevent further injury, and the employer can make such medical assistance available but does not do so, then any disability caused by the failure of the employer is considered to have "arisen out of and in the course of the employment." In *Russell* the Court adopted the emergency rule based on the common law rule that when an employee becomes helpless by an unforeseen accident while doing his job, the "dictates of humanity, duty, and fair dealing demand that the employer if cognizant of the injury furnish medical assistance." *Id*. "The basic premise of the Russell emergency rule remains good law." "Humanity, duty, and fair dealing" still require an employer, if aware that an employee has been rendered helpless, to provide medical assistance. That said, courts should not apply this rule so broadly as to require employers to provide *any and all* medical assistance to a helpless employee. Instead, a reasonableness standard must be read into this rule. For this reason, we clarify and restate the Russell emergency rule: an injury that is caused by an employer's failure to provide **reasonable** medical assistance arises out of and in the course of employment when an employee becomes helpless at work because of an illness or other cause unrelated to her employment, the employee needs medical assistance to prevent further injury, the employer knows of the employee's helplessness, and the employer can provide **reasonable** medical assistance but does not do so." (Emphasis added) The Court held that the employee's claim did not arise out of her employment because the employer had provided reasonable assistance by calling for emergency personnel and had neither a statutory or common law duty to use its AED to assist the employee.

2. Burden of Medical Proof

***Christopher Batey v. Deliver This, Inc., et al.*, No. M2018-00419-SC-WCO-WC** – Filed January 29, 2019.

The employee sustained a back injury and filed a petition for benefit determination. The trial court determined the employee was entitled to 275 weeks of permanent partial disability benefits under T. C. A. § 50-6-242(a)(2). On appeal the WCAB affirmed the trial court's judgment, although it determined harmless errors were committed in defining an employee's burden of proof under 242(a)(2) and in defining the phrase "employee's pre-injury occupation" as used in 242(a)(2)(B). The employer appealed. In **affirming** the trial court's judgment the Supreme Court adopted the opinion of the WCAB. The WCAB agreed with the trial court's determination that the employee was entitled to *extraordinary* relief up to 275 weeks in benefits based on the six criteria set forth in T. C. A. § 50-6-242(a). Medical proof indicated the employee's permanent restrictions made him unable to perform his pre-injury occupation. Considering the burden of proof required with respect to proper certification by the ATP that the employee no longer has the ability to perform his pre-injury occupation, the WCAB held the statute does not require clear and convincing evidence, but requires a preponderance of the evidence. It does require clear and convincing evidence to find that limiting the employee's recovery to increased benefits under T. C. A. § 50-6-207(3)(B) would be "inequitable in light of the totality of the circumstances." The WCAB opinion also considered the definition of pre-injury occupation, indicating it must be given its plain and ordinary meaning, in that the phrase describes the type of work one does as his usual work. The WCAB held the burden of proof shifted to the employer to prove by clear and convincing evidence that the employee could return to his pre-injury occupation once the ATP issued his certification. In this case, the employer did not meet that burden.

***Stacy Clark v. Charms, L.L.C.*, No. W2017-02552-SC-R3-WC** – Filed March 19, 2019.

The employee, who worked as a packer and box line operator, claimed she injured her back and left knee in a fall on May 22, 2013. She selected a physician from a panel provided by her employer. The ATP concluded she had sustained lumbar strain and a contusion to her left knee. In his deposition the ATP indicated the employee did not report knee pain in her last two visits but according to his records she received physical therapy for her back and knee in August 2013. Subsequently, the employee was seen by a functional capacity specialist and a neurologist, neither of whom indicated a knee problem. On April 10, 2014 the employee was seen by another physician, who recorded a history of left knee pain from a fall in a parking lot on May 22, 2013 and prescribed medication and physical therapy. The employee underwent a left knee arthroscopy on June 18, 2014. Another physician performed an independent medical evaluation of the employee and concluded she had sustained a permanent impairment as a result of the fall at work in May 2013 and the resulting injury to her left knee. The trial court found the employee

had sustained a compensable injury to her left knee and awarded benefits. No award was made for her back. The employer appealed, arguing the employee had not established a compensable injury to her left knee. Since neither the initial panel physician nor the neurologist had made significant findings relative to the left knee, the employer maintained they had not found a causal connection to the May 22, 2103 fall. The employer also contended the employee should be *estopped* from seeking workers' compensation benefits for her knee injury since she had used group insurance and short term disability benefits to cover treatment for the knee. In **affirming** the trial court's judgment, the Panel found the employee had immediately reported an injury to her left knee, as well as her back, that the ATP recorded information about the knee, and prescribed therapy. After the employee told her employer she was having continuing problems with her knee, the employer told the employee further treatment would not be covered under workers' compensation. Only then did the employee access other resources for treatment. The Panel observed the trial court had determined the employee had no other option for treatment and was justified in having a non-authorized physician perform her knee surgery. The estoppel argument was rejected since the employer had not relied on any representations by the employee.

Medical Proof Issues

1. Psychological Injury

***Natchez Trace Youth Academy et al. v. Christopher Tidwell*, No. M2018-01311-SC-R3-WC** – Filed August 16, 2019.

The employee suffered facial injuries on June 28, 2013 during an altercation while restraining a resident. He filed a workers' compensation claim for physical and psychological injuries. The trial court determined the employee did not make a meaningful return to work and awarded benefits for physical and psychological injuries, using a 4.85 multiplier. The employer appealed. The Panel **affirmed** the judgment of the trial court in awarding benefits beyond the 1.5 cap for the physical injuries and in its award of psychological injury benefits for depression and PTSD. The employer challenged the trial court's ruling that the employee had no meaningful return to work, arguing there were no physician imposed restrictions that would have prevented a return and that the employee abandoned his position. However there was a work excuse document which indicated the employee should have a psychiatric evaluation and release before returning. This did not occur during the timeframe the employer imposed upon the employee for returning to work. The trial court had determined the employer had improperly terminated the employee when he had not been cleared to return by a psychiatrist, and therefore he had no meaningful return. Proof of psychological injury was substantial, with the only dissenting view posed by the employer's retained psychiatrist, which the trial court found lacked credibility.

2. Panel Referral

***Ronald Brantley v. Mike Brantley, et al.*, No. E2018-01793-SC-R3-WC** – Filed November 6, 2019.

The employee sustained a crush injury to his left hand on March 13, 2008. The injury necessitated amputation of his small finger and insertion of pins by his ATP. A lump sum settlement was approved in March 2009. In June 2017 the employee returned to the ATP for the first time since he was discharged in September 2008, seeking narcotic pain medication for pain and numbness in his hand. The ATP opined his symptoms were unrelated to the previous injury and advised the employee he could do nothing further for him and that he would not prescribe pain medication. He later testified by deposition that he did not refer the employee for pain management, although the employee maintained he had received a referral from the physician's office. The employee then sought a panel of physicians for pain management, which the employer refused. The employee filed a motion to compel payment of benefits and alternatively for contempt. After a hearing the trial court found the ATP did not make and did not intend to make a referral for pain management and denied the employee's motion. The employee appealed, contending the trial court erred in not compelling the employer to provide pain management. The Panel **affirmed** the judgment of the trial court, observing that the ATP had testified unequivocally that any pain the employee was experiencing was not attributable to the 2008 injury and there was no reason to refer him to pain management. Since no referral was made by the ATP, T. C. A. § 50-6-204(j)(2)(A) did not apply and the employer was not required to provide a panel for pain management.

3. Exposure

***Joe Butler v. Tennessee Municipal League Risk Management Pool*, No. E2017-01981-SC-R3-WC** – Filed January 16, 2019.

The employee was a 15-year employee of the water department. He began feeling ill and was hospitalized on February 22, 2013. He was diagnosed with invasive pulmonary aspergillosis, a fungal infection, and placed on numerous restrictions. He never returned to work for the employer. The employee made a claim for workers' compensation benefits, contending his work had exposed him to the pulmonary fungus while digging a trench for a water line at the county landfill. He described the working conditions as dusty with dampness in the trench. The employer denied the employee had suffered an occupational disease and moved for summary judgment, which the trial court denied. Proof at trial established the employee also owned a small farm, on which he raised cattle, harvested hay, and operated a small sawmill. Five

coworkers testified they also became ill after working on the trench. Although none was diagnosed with the fungus, none were tested for it. Expert medical proof indicated the fungus exists "everywhere" where moisture is present, and that it can be found in soil, moldy hay, and decaying vegetative matter. One expert said in order to get invasive pulmonary aspergillosis, a person would have to have had a "massive exposure." Three experts presented opinions on behalf of the employee all concluding his exposure was most likely due to the trench work at the landfill. Two experts for the defendant opined his exposure was probably due to his farm work. The trial court found for the defendant and dismissed the employee's claim, holding he had not established causation by a preponderance of the evidence. On appeal the Panel identified the key issue was the source of the exposure. The Panel **reversed** the trial court's finding and **remanded** for determination of benefits, concluding that absolute certainty is not required to establish causation, and that the experts were equivocal in their testimony as to causation. "Notably, the experts were equivocal in their respective opinions and often used the terms "could have" or "most likely" when indicating whether or not the exposure to aspergillus occurred at the landfill site. We must resolve any reasonable doubt in favor of employee," *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 275 (Tenn. 2009). The Panel found it "strangely coincidental" all of the men fell ill with similar symptoms after working at the landfill.

***Cheryl Lynn Williams v. SWC LLC d/b/a SecureWatch*, No. E2018-00922-SC-R3-WC** – Filed September 20, 2019.
[Claim for mold exposure. See above under **Procedure**, 1. Statute of Limitations]

4. Impairment

***Deborah L. Bain v. UTI Integrated Logistics LLC, et al.*, No. W2018-00840-SC-WCM-WC** – Filed October 16, 2019.

The employee, a truck driver, sustained a compensable injury to her right shoulder and right wrist on August 10, 2010. She settled with her employer for 19.5% (or 1.5 times an impairment rating of 13%) permanent partial disability. After returning to work she suffered an injury to her left shoulder on January 23, 2013. The trial court applied the 1.5 times cap, found she was not permanently and totally disabled, but rather had a 6% whole body impairment for the January 2013 injury. The Panel **affirmed** the judgment of the trial court, concluding that the employee had a meaningful return to work and the 1.5 cap was correctly applied. The employee had voluntarily resigned her position on March 23, 2015. As a result she deprived the employer of the ability to accommodate her in a different position. The Panel found the trial court had correctly adopted the diagnostic-based impairment rating of the employee's treating physician instead of an evaluating physician's use of a range of motion loss.

5. Increased Benefits

***Salvador Sandoval v. Mark Williamson, et al.*, No. M2018-01148-SC-R3-WC** – Filed March 28, 2019.

The employee, an undocumented immigrant, was injured and the parties settled his claim for permanent partial disability (PPD) benefits. After failing to return to work at the end of the compensation period he sought additional PPD benefits under T. C. A. § 50-6-207(3)(B) because he could not return to work as he was not eligible or authorized to work in the U. S. under federal immigration law. The employee challenged the constitutionality of T. C. A. §50-6-307(3)(F) which does not allow for additional benefits under (3)(B) for any employee not eligible or authorized to work in the U.S. The trial court determined it lacked jurisdiction to decide the issue but denied the employee's request for increased benefits. On appeal the employee argued (3)(F) is preempted by both field and conflict presumptions under the federal *Immigration Reform and Control Act of 1986* (IRCA), codified primarily in 8 U.S.C. §§ 1324a and 1324b. IRCA is intended to combat employment of illegal aliens through civil penalties on employers. The employee contended (3)(F) could not be used to deprive an undocumented worker of recourse to increased benefits under (3)(B) since federal law preempts the state statute. The Panel **affirmed** the decision of the trial court, holding (3)(B) is constitutional. The Panel reviewed its earlier opinion in *Martinez v. Lawhon*, No. M2015-00635-SC-R3-WC, 2016 WL 684087 (Tenn. Workers Comp. Panel 2016) where it found unconstitutional a similar statute, T. C. A. § 50-6-241(e)(2)(B)(ii) (2008), because of preemption by IRCA. The statute at issue in *Martinez* restricted benefits based on immigration status and penalized employers who knowingly hired undocumented workers. In *Martinez* the Panel had determined the legislature had intended to establish what amounted to a state immigration policy. Since IRCA expressly prohibited civil penalties such as that imposed by the statute, it was preempted. Here, the Panel found that (3)(F) does not punish employers for hiring undocumented workers, nor does it reduce the permanent partial disability award to the employee. Thus, there was no *express* preemption. The Panel also determined there was no *field* or *conflict* presumption, ultimately finding all injured employees receive the same award regardless of immigration status; "however, only injured employees who are in the country legally can receive additional benefits."

***Kenneth M. Wright v. National Strategic Protective Services, LLC et al.*, No. E2018-01019-SC-R3-WC** – Filed May 23, 2019.

The employee, a security officer and 29-year veteran at the Department of Energy's facilities at Oak Ridge, sustained a large cervical disc injury at C5-6 during a training exercise in September 2014, which required surgery. The trial court found he was entitled to increased PPD benefits under T. C. A. § 50-6-207(3)(B) and then awarded extraordinary benefits under T. C. A. § 50-6-242(a)(2). The employer appealed the extraordinary award. After surgery the employee

experienced continuing cervical symptomology and ultimately was medically disqualified from work by his employer. He did not try to return to any type of work thereafter. The main issue before the Panel was whether the employee was entitled to extraordinary relief. The Panel **affirmed** the trial court judgment, finding there was clear and convincing evidence that limiting the employee to benefits under (3)(B) was inequitable, and that the trial court had correctly made specific findings under § 50-6-242(a)(2), which are prerequisite to affording extraordinary relief.

6. Future Medical

***Darla McKnight v. Hubbell Power Systems, et al.*, No. M2019-00205-SC-R3-WC** – Filed December 19, 2019.

The employee filed a motion to require additional medical treatment for a work-related injury she had suffered March 2007. The trial court granted the motion and denied the employer's motion to appoint a neutral physician. On appeal, the Panel **affirmed** the trial court's decision, agreeing that the medical evidence established a causal link between the work-related injury and the need for additional treatment. The employee's treating physician had carefully established that the work injury triggered long standing symptoms from degenerative disc disease with disc protrusions and cervical radiculopathy that worsened over a ten year period and ultimately necessitated surgical treatment.

7. Permanent and Total Disability

***Christopher Batey v. Deliver This, Inc., et al.*, No. M2018-00419-SC-WCO-WC** – Filed January 29, 2019.
[See above under **Compensability**, 2. Burden of Proof]

***Mohammad Hamad v. Real Time Staffing Services, LLC, et al.*, No. M2017-02538-SC-R3-WC** – Filed January 30, 2019.

In April 2011 the employee sustained a left meniscus injury in a fall at work. After knee surgery he returned to work but sustained a left shoulder injury and inguinal hernia in a lifting incident in September 2012. He did not return to work and filed suit, claiming permanent and total disability. The trial court found him only permanently and partially disabled. The Panel **affirmed** the trial court's judgment, finding ample evidence to support the decision. The trial court had rejected the opinions of the employee's personal physician and a vocational expert who had based his own opinions on that of the physician. None of the other medical experts had found the employee to be restricted from resuming employment. The Panel also agreed the trial court had determined the employee did not qualify for benefits under the "Escape Clause" (T. C. A. § 50-6-242 because he did not prove three of the four requirements by clear and convincing evidence.

***Venture Express v. Jerry Frazier*, No. W2018-00344-SC-R3-WC** – Filed March 27, 2019.

The employee, a truck driver with heavy lifting duties, was injured on January 29, 2014 when his truck hit a pothole. The impact caused immediate shoulder and arm pain. His neurosurgeon performed a cervical discectomy January 19, 2015. His symptomology continued and while the neurosurgeon did not assign permanent restrictions he indicated the neck injury would likely interfere with the employee's driving and other activities. Prior to his injury the employee had driven up to eleven hours per day. After his surgery the employee became depressed, did not return to work and stopped almost all activities. He had suicidal thoughts and panic attacks. A mental IME established the depression and anxiety were permanent conditions. The trial court found him permanently and totally disabled, concluding that he was unable to perform his job as a truck driver based on his physical condition after the accident and subsequent treatment. The employer had argued the 1.5 times cap should apply. On appeal, the Panel **affirmed** the judgment, holding the trial court had correctly evaluated the physical limitations as well as the employee's age, education, and job history.

***Ricky Armstrong v. Armstrong Hardwood Flooring Company*, No. W2018-00427-SC-R3-WC** – Filed April 5, 2019.

The employee, a material handler, was hurt at work on February 25, 2014 when he was struck in the head by a falling pipe and knocked unconscious. He did not return to work after the accident and was laid off due to work force reduction in April 2014. His principal injury was left shoulder rotator cuff tear and adhesive capsulitis, for which he had surgeries in March and July 2015. In view of the employee's post-injury lifting restrictions, COPD issues, and cognitive limitations a vocational expert determined he had virtually no transferable job skills. The trial court found the employee to be permanently and totally disabled. The Panel **affirmed**, having found causation uncontested and substantial support for the trial court's ruling.

***Duwan Duignan v. Stowers Machinery Corp., et al.*, No. E2018-01120-SC-R3-WC** – Filed June 19, 2019.

The employee had worked as a warehouse associate or delivery driver for more than 37 years. He hurt his lower back on June 1, 2016 when he lifted a heavy box. After treatment he and his employer could not agree on a job he could perform with his post-injury restrictions. The employee filed for benefit determination. The trial court found the employee to be permanently and totally disabled. The WCAB reversed, finding the employee had failed to establish he was unable to work at a job "that brings him an income by a preponderance of the evidence." A dissenting member of the WCAB concluded the "meaningful return to work" concept does not apply to the determination of permanent total disability and that post-injury employment is only

one factor to consider in the determination. The Panel agreed with the dissent, **reversed** the WCAB, and reinstated the trial court's judgment. The Panel noted it has declined to apply a meaningful return to work analysis in a case where the employee was permanently and totally disabled. *Gray v. Vision Hospitality Grp*., No. M2016-00116-SC-R3-WC, 2107 WL 384430, at *5 (Tenn. Workers' Comp. Panel Jan. 26, 2017). The meaningful return to work analysis addresses claims by employees who had become permanently and partially disabled by a work injury, returned to work for the pre-injury employer, and later left the employer. *Tryon v. Saturn Corp*., 254 W.W.3d 321, 328 (Tenn. 2018).

See also, ***Michael McCloud v. Charter Communications, Inc*., No. W2018-02166-SC-R3-WC** – Filed October 24, 2019. (Relative to proof of transferable job loss and significant restrictions on lifting and bending after two post-injury back surgeries)

8. Second Injury Fund

***Carol Nolan v. Goodyear Tire & Rubber Co., et al*., No. W2018-01382-SC-R3-WC** – Filed August 16, 2019.

The trial court found the employee permanently and totally disabled and apportioned 85% of the award to the employer and 15% to the Second Injury Fund. The employee suffered work-related injuries to her back and knees in April 2011. The employer appealed both the finding of permanent and total disability and apportionment. The Panel **affirmed** the judgment of the trial court. The employee had undergone both a spinal fusion and left knee replacement after her April 2011 injuries. She had two surgical procedures following a right shoulder injury in September 2007 and had carpal tunnel surgical release for her right hand in 2009. She was not under work restrictions prior to her April 2011 injury. The evidence in trial indicated the employee had a history of physically demanding jobs and below average cognitive ability. She had worked without restrictions, accommodations or medication prior to the April 2011 injuries, but since had needed pain management, and was unable to stand, sit or walk for long periods of time and could not lift as before. With respect to apportionment the Panel confirmed the Second Injury Fund is liable only for the portion of the award remaining after considering the extent of disability attributable to the subsequent injury. T. C. A. §50-6-208(a)(1); *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001).

9. Presumption Afforded Authorized Treating Physician

***Bradley Harlow v. Love's Travel Stops & Country Stores, Inc., et al*., No. E2018-01905-SC-R3-WC –** Filed October 14, 2019.

The employee, a diesel mechanic, was hurt on August 26, 2013 while removing a tire and hub assembly from a truck. He experienced pain in his back, right shoulder and right hip and it worsened over the next several days. The employee sought help from primary care physicians, one of whom told him he had a herniated disc and an annular tear. He quit his job in February 2014, telling his supervisor he could not work because of back pain. He saw a panel physician in February 2015 and was told the disc and annular tear were unrelated to work injury. However an independent medical examination (IME) in December 2016 concluded the employee had indeed sustained an annular tear and associated disc herniation as a result of the work injury. The trial court accredited the testimony of the IME physician rather than that of the ATP, and awarded permanent partial disability benefits based on a 52% rating, or four times the 13% impairment rating assigned by the IME physician. The Panel **affirmed** the trial court's judgment, observing that while the opinion of an authorized treating physician is presumed to be correct on the issue of causation, the presumption may be rebutted by a preponderance of the evidence. T. C. A. § 50-6-102(12)(A)(ii) (2014). "When medical testimony differs, the trier of fact must choose which expert is more credible. In making this determination, the trial court may consider, among other things, the experts' qualifications, the circumstances of their evaluations, the information available to them, and other experts' evaluation of the importance of that information." *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672,676 (Tenn. 1991). The Panel noted that the IME physician spent far more time with the employee, had significantly more information available to him, and took a detailed history that disclosed the twisting nature of the injury which he concluded produced the annular tear.

[For a similar result, **see** ***Teresa Adams v. Rich Products Corporation*, No. W2018-00288-SC-R3-WC** – Filed August 30, 2019. Where the employee successfully rebutted the presumed accuracy of the Medical Impairment Rating Registry (MIR) Program, whose physician found the employee suffered from inflammatory arthritis unrelated to her employment. An IME physician concluded the employee had sustained complex regional pain syndrome (CRPS) resulting from her original work injury, which involved carpal tunnel syndrome and resulting surgeries which rendered her hands almost non-functional.]

[And ***see also*** above under **Causation**, 1. Burden of Proof, ***Roger Joiner v. United Parcel Service, Inc., et al.*, No. M2018-01876-SC-R3-WC** – Filed December 6, 2019.

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 2019 Calendar Year up to and including the decision filed on December 19, 2019. 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 111th 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: https://treasury.tn.gov/Explore-Your-TN-Treasury/About-the-Treasury/Boards-Commissions/Advisory-Council-on-Workers'-Compensation

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

/s/_____
David H. Lillard, Jr., State Treasurer, Chair

/s/_____
Larry Scroggs, Administrator