STATE OF TENNESSEE

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2020 SUMMARY OF SIGNIFICANT TENNESSEE SUPREME COURT WORKERS' COMPENSATION DECISIONS

TREASURY DEPARTMENT
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Significant 2020 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 2020 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 16 cases between January 22, 2020 and December 11, 2020. Twelve 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*. Four opinions issued in **"new law"** cases. Two of those involved appeals from the Court of Workers' Compensation Claims, one came directly from the Workers' Compensation Appeals Board, and one came from the Tennessee Claims Commission.

With the passage of time, fewer **"old law"** cases are working through the appeals process. Direct appeals to the Supreme Court decline as cases are increasingly resolved in the Court of Workers' Compensation Claims and the Workers' Compensation Appeals Board. Summaries of the

significant workers' compensation decisions by the Supreme Court and its Special Workers' Compensation Appeals Panel in 2020 are included here with headings that constitute an "issues list."

TABLE OF ISSUES

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Procedure

1. Attorney's Fees and the Technical Record on Appeal

Mary Denson v. VIP Home Nursing and Rehabilitation Service, LLC, **No. M2019-02145-SC-WC –** Filed July 21, 2020.

The issue in the case is whether the trial court erred in awarding attorney fees. However, the opinion is noteworthy because of its focus on the technical record on appeal. The employee sustained a compensable back injury at work, and the parties settled the workers' compensation claim. The settlement agreement required the employer to pay her future medical expenses. When the employer refused to pay for prescribed pain medication, the employee petitioned for contempt and to compel payment for the medication. The employer then reversed its denial of payment, asked for an independent medical evaluation, and disputed the employee's entitlement to an attorney's fee and its reasonableness. After an October 25, 2019 hearing on the petition, without testimony, exhibits, or a transcript, the trial court awarded a $7,500 attorney's fee in an order entered November 8, 2019. The employer filed a statement of the evidence, to which the employee filed objections. Thereafter, on March 25, 2020, the trial court entered an order clarifying and correcting its ruling pursuant to Tennessee Rule of Appellate Procedure 24(e) and (f), which permit correction of the record. On appeal, the Special Panel **affirmed** the trial court's judgment and **remanded** the determination of a reasonable attorney's fee to the employee for the appeal.

Before the trial court entered its March 25, 2020 order, the employer had prematurely submitted a brief, challenging the award of attorney fees, contending there had been no finding of contempt and that the medication prescribed was causally unrelated to the work injury. The trial court's order entered March 25, 2020, concluded the employer was in contempt and that it was undisputed the prescribed medication was causally related to the work injury. The employer did not file a reply brief to clarify its argument after the trial court entered its March 25, 2020 order.

The Special Panel observed that this case "is an example of how *not* to prepare a record for appeal." No transcript was prepared or filed, no witnesses testified, nor were any documents introduced into evidence; yet, the employer filed a statement of the evidence, to which the employee objected. The trial court's March 25, 2020 order essentially resolved the dispute about the statement of evidence. It stated that the court had considered the affidavit and supporting itemization by the employee's attorney relative to the fee request, even though not formally introduced into evidence. Further, the order indicated the court had considered the brief and arguments by the employer in opposition to the fee request. It also stated the question of causal relation of the medication was undisputed by the time of the October 25, 2019 hearing. The Special Panel held "(t)he trial court's determinations about these matters are 'conclusive.'" Tenn.

R. App. P. 24(e). Rule 24 also reflects the reality that "the trial judge is in the best position to determine which matters are necessary to 'convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.'" (Citing *Bradshaw v. Daniel*, 854 S.W.2d 865, 868 (Tenn. 1993)). The Panel found the employer had not established *any extraordinary circumstances* to overcome the trial court's conclusive determinations about what issues were in dispute at the October 25, 2019 hearing and about what documents the trial court considered as evidence in making its decision. The Panel also found the trial court had appropriately considered the factors set forth in Tennessee Supreme Court Rule 8 that constitute the correct legal standard for determining the reasonableness of attorney's fees. [Good practice note: the technical record is a critical component of appellate procedure and must be complete and accurate.]
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/densonm._filedopn.pdf

2. Election of Remedies and Forum

Mack Bilbrey v. Active USA, LLC et al., **No. M2019-00720-SC-R3-WC –** Filed June 17, 2020.

This appeal required a determination whether the employee's decision to receive workers' compensation benefits under Texas law barred his recovery in Tennessee because of the *election of remedies doctrine*. The employee, a truck driver, sustained a back injury at work while in Florida on October 13, 2012. His employer completed an Employer's First Report of Injury or Illness on October 15, 2012, but the employee indicated he was unaware of either the completion or filing of the form. On October 26, 2012, the employee filed a claim for workers' compensation with the Texas Department of Insurance, Division of Workers' Compensation. He received benefits under the Texas workers' compensation law while receiving treatment for his injuries. On November 27, 2013, Tennessee counsel retained by the employee notified the third-party administrator for his employer's workers' compensation carrier that the employee elected to have his case governed by Tennessee law. However, the third-party administrator continued to pay benefits in accordance with Texas workers' compensation law. On January 23, 2014, the employee, without counsel, requested a Benefit Review Conference (BRC) by the Texas Department of Insurance, Workers' Compensation Division. He disputed the maximum medical improvement date as well as the impairment rating. He received assistance from the Texas Office of Injured Employee Counsel, later testifying he thought he would lose all benefits by not going through the process. After he did not attend the BRC, a contested case hearing was set for May 21, 2014. Before the hearing date, the employee notified his Tennessee counsel of the paperwork he had submitted and communication he was receiving from Texas. His counsel requested a continuance of the Texas hearing. A few months earlier, the employee's Tennessee counsel had filed a request for assistance with the Division of Workers' Compensation in Tennessee to

determine whether the employee's claim was compensable under Tennessee law. The Division denied the claim on April 29, 2014, and the counsel filed a complaint in the Chancery Court for Trousdale County on May 21, 2014. After a trial on February 27, 2019, the trial court concluded it had jurisdiction since the employment contract originated in Tennessee, but that the employee could not recover in Tennessee because he had elected to receive workers' compensation benefits under Texas law. The trial court specifically found the employee "knowingly and voluntarily" accepted the Texas benefits.

The Special Panel **affirmed** the trial court's judgment, observing that "(t)he question of whether an employee has elected to receive benefits in another jurisdiction, and, thus, is precluded from recovering under Tennessee law, is a question of law that is reviewed de novo." (Citing *Bradshaw v. Old Republic Ins. Co., Inc.*, 922 S.W.2d 503, 504 (Tenn. 1996)). The Panel noted mere acceptance of benefits from another state does not constitute an election, and that it is not necessary that an employee actually receive benefits in another state. However, "affirmative action to obtain benefits or knowing and voluntary acceptance of benefits from another state will be sufficient to establish a binding election." *Perkins v. BE & K, Inc*., 802 S.W.2d 215, 217 (Tenn. 1990). The Panel distinguished between affirmative action and knowing acceptance of benefits on one hand, and mere acceptance of benefits tendered by an employee's insurance carrier at a time when the employee lacked sufficient knowledge to make an informed choice of remedy or forum. (Citing *Gray v. Holloway Constr. Co.*, 834 S.W.2d 277, 280 (Tenn. 1992)). [Good practice note: Clear and complete communication between client and lawyer is essential.] The full opinion may be viewed at http://www.tncourts.gov/sites/default/files/bilbreym_opnus_-filed20202107.pdf

Charles R. Goodwin v. Morristown Driver's Services, Inc., et al., **No. E2019-01517-SC-R3-WC –** Filed June 15, 2020.

A different outcome resulted in this case, where a truck driver who resided in Georgia sustained injury on November 3, 2016 while driving a truck in Tennessee for his Tennessee-based employer. The employee first filed for workers' compensation benefits in Georgia in January 2017. His employer and its insurer contended Georgia did not have subject matter jurisdiction to hear the claim. While continuing to pursue his claim in Georgia, the employee then filed a claim in Tennessee in October 2017. In January 2018, after both parties had engaged in discovery and a hearing, the Georgia State Board of Workers' Compensation dismissed the employee's claim for lack of subject matter jurisdiction but did not rule on the merits. The Georgia Board ruled that, although the employee may have received a conditional offer by telephone while in Georgia, his employment contract became effective only after he traveled to Tennessee, completed paperwork, and passed a driving test. The Court of Workers' Compensation Claims (CWCC) denied a motion by the employer for summary judgment, finding

no one had yet ruled on the merits. The trial court found no vexatious litigation or forum shopping had occurred. It also found it disingenuous that the employer had argued before the Georgia Board that it lacked subject matter jurisdiction and then claimed the election of remedies doctrine barred the employee from recovery in Tennessee.

In a split decision, the Workers' Compensation Appeals Board (WCAB) reversed the trial court's denial of the employer's summary judgment motion. The lead majority opinion concluded the employee's engagement in discovery and participation in a hearing, even though the issue of subject matter jurisdiction had yet to be decided, constituted an election of remedies and that his failure to establish jurisdiction did not prevent application of the doctrine. The employee relied on the decision in *Gray*, supra. The Special Panel **reversed** the WCAB. The Panel agreed with *Gray's* conclusion that an employee cannot elect a remedy that is not available. Since Georgia lacked subject matter jurisdiction, there was no remedy in that state for the employee to elect. The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/goodwin_unsigned_opinion.pdf

3. Determining Dependent Children of a Deceased Employee

Estate of Clarence Turnage, et al. v. Dole Refrigerating Co., Inc., **No. M2019-00422-SC-R3-WC** – Filed February 12, 2020.

The employee died August 3, 2017, because of injuries from a work accident. He was unmarried but lived with and had an out-of-wedlock child, EJT, with Megan Black. It was undisputed EJT was entitled to workers' compensation death benefits as a *conclusively presumed dependent child* under T. C. A. §50-6-210 (a)(2). Previously, the employee had two other children out-of-wedlock with another woman. Prior to his death, the employee had surrendered his parental rights to NRT and SMT, and his mother had adopted the children. NRT and SMT sought workers' compensation death benefits as either *conclusively presumed wholly dependent children* of the employee under §50-6-210(a)(2), or alternatively, as *partial dependents* under §50-6-210(d). The CCWC determined NRT and SMT were not entitled to benefits, either as presumed wholly dependent children or as partial dependents, and awarded EJT benefits equal to 50% of the employee's average weekly wage. NRT and SMT appealed. The Special Panel **affirmed** the judgment.

The proof before the trial court indicated that while the employee was living in Florida with their mother, he left NRT and SMT at home alone after he got into trouble, for which he was required to serve six months in jail. Their mother had also left the home. Initially, the Florida Department of Children's Services placed the children in separate foster homes. Later, the employee's mother took custody of NRT and SMT and they came to live with her in Tennessee. Some years

later, the employee's mother adopted the two children. When the employee returned to Tennessee after his release, he moved in with Ms. Black, with whom he had EJT. The employee sporadically provided only limited financial support for NRT and SMT, and the two children occasionally spent weekends with the employee. However, his mother usually provided the food for the children during those visits. In the four months before his death, the employee did not interact with NRT and SMT or provide any support, allegedly due to a verbally abusive confrontation he had with his mother in front of the children. On appeal, NRT and SMT tried to analogize their status as parentally surrendered and adopted children to *stepchildren* or *illegitimate* children for purposes of the statutory presumption of wholly dependent children under §50-6-210(a)(2). The Special Panel noted the Tennessee Supreme Court had addressed the issue in *Wilder v. Aetna Casualty & Surety Co.*, 477 S.W.2d 1 (Tenn. 1972) The Panel observed "(T)he employee indisputably surrendered all parental rights, and the children were adopted prior to employee's death." NRT and SMT alternatively claimed to be within the class to which subsection (d) applied as either the employee's children or his *brother and sister* because of their adoption by his mother. **The Panel determined that *Wilder* controlled the decision, in that the evidence failed to establish they regularly derived part of their support from the wages of the employee at the time of death and for a reasonable time immediately prior to his death.** Noting the employee provided no support during the four-month period before his death, the Panel held "It is the absence of support from the employee, which served to disqualify NRT and SMT from the receipt of benefits under this subsection [(d)]."
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/20200212083245.pdf

Causation

1. Overcoming Presumption of Correctness afforded selected treating physician

***James Ivy v. Memphis Light, Gas & Water Division*, No. W2019-00104-SC-R3-WC –** Filed January 31, 2020.

This case involves conflicting medical proof by treating and evaluating physicians. **The issue is whether the trial court was correct in determining the employee's medical evidence overcame the *presumption of correctness* afforded the selected treating physician.** The employee, a meter reader, fell while reading meters in the rain. He experienced left hip and shoulder pain that later radiated to his right leg. The selected treating physician, an orthopedic surgeon, concluded his symptoms resulted from a degenerative condition rather than the work injury. He treated the employee non-surgically. The employee sought an evaluation by a neurosurgeon by referral from his family doctor. The neurosurgeon testified he discovered a synovial cyst rupture causing compression of the nerve root on an MRI previously ordered by the

treating physician. The neurosurgeon obtained a second MRI and noted the same condition. On August 25, 2015, the neurosurgeon performed corrective surgery and assigned an impairment rating of twelve percent (12%) to the body as a whole. He testified the work injury had caused rupture of the cyst or at least had aggravated the underlying spinal problems. The employee's treating physician countered that if the cyst was present at all it was due to the degenerative condition, not the work injury. Another neurosurgeon who had offered a second opinion for the employee essentially agreed with the treating physician. An orthopedic surgeon who performed an independent medical examination at the employee's request opined that work injury aggravated the preexisting condition. A physical medicine and rehabilitation physician conducted a medical records review on behalf of the employer and found the cyst was a degenerative condition. All the physicians who testified were very well qualified; however, the trial court found the testimony of the operating neurosurgeon and the concurring orthopedic surgeon more credible. In **affirming** the judgment, the Special Panel agreed with the trial court's finding that, based on a preponderance of the evidence, the medical proof presented by the employee was sufficient to rebut the presumption of correctness. "It is well settled that the trial court, as fact finder, may consider each expert opinion and give it the weight, if any, the court thinks the testimony deserves." *Reeves v. Olson*, 691 S.W.2d 227, 231 (Tenn. 1985)… "For the most part, questions regarding the competency of expert testimony are left to the discretion of the trial court." *Hunter v. Ura*, 163 S.W.3d 686, 704 (Tenn. 2005).
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/ivyopn.pdf

Brenda Merriweather v. UGN, Inc., et al., **No. W2018-02094-SC-R3-WC** – Filed January 28, 2020.

This case similarly presents conflicting medical testimony concerning causation, with a different outcome. The issue is whether the trial court erred in its acceptance of the opinion of one medical expert over another. The employee's job involved making automobile parts and the work was fast-paced. She reported repetitive movement, such as sometimes slipping and sliding due to oil on the floor, caused her to twist or hit her left knee. The employee worked for the employer in portions of 2012 and 2013. She never indicated her left knee condition was work-related during a period when she was on Family Medical Leave or when she received short-term disability benefits. She had received a diagnosis of arthritis and had scheduled a surgical procedure before contacting her employer about workers' compensation benefits. The employer asked her to delay the surgery for purposes of providing a physicians' panel but she declined. An orthopedic surgeon performed an independent medical examination (IME) at the request of the employee's attorney. He concluded her arthritic knee became symptomatic after her injury. He testified the employee told him the injury resulted from constantly hitting her knee on equipment "for a very long time and over a period of years." The employer retained another

orthopedic surgeon for an IME. The employer's physician testified that the employee had not reported any specific event or trauma, just increasing pain and discomfort. He concluded the employee had degenerative arthritis, medial compartment joint space narrowing, and subchondral sclerosis "indicative of longstanding changes." He testified other objective findings pointed to chronic and long-standing issues, and that there was no evidence the employee's work activity advanced or accelerated the arthritic condition. In dismissing the employee's claim for failure to prove causation, the trial court found the employer's physician had "a better and more persuasive explanation of (employee's) condition and its source" than the employee's physician. The trial court noted the employee's physician based his opinion on his mistaken understanding that the employee had worked at her job for a very long time, and that his statements did not show anatomical change had occurred or, if it had, that it resulted from a work injury. The Special Panel **affirmed** the judgment of dismissal by the trial court, finding the evidence did not preponderate against its determination that the employee had failed to establish causation. The full opinion may be viewed at http://www.tncourts.gov/sites/default/files/merriweatheropn.pdf

2. **Evaluating the Persuasive Weight of Medical Opinions.**

***Memphis Light, Gas & Water Division v. John Pearson*, No. W2018-01511-SC-WCM-WC –** Filed February 26, 2020.

In this case, very well-qualified medical professionals disagreed on whether a slip and fall injury aggravated the employee's preexisting arthritic condition in his left shoulder, but all agreed if there was an aggravation, it was just an increase in pain. **The trial court ruled the employee failed to establish a compensable injury after considering more persuasive the opinions of two physicians selected by the employee from panels.** The Special Panel **affirmed**, holding the selected physicians were both entitled to the presumption of correctness in their causation opinions. The Panel observed the two physicians were the only ones "fully privy to (the employee's) history when they formulated their opinions."

The employee had slipped on ice January 16, 2013, as he walked from his vehicle to his place of employment. The fall hurt his left shoulder, but he did not initially report it as a work-related injury. He consulted a number of physicians about his left shoulder as well as his cervical spine. Prior to the fall on January 13, 2013, the employee received non-surgical treatment for severe arthritis in his left shoulder beginning in November 2010. The employee first sought treatment through his employer on July 24, 2013, when he reported he believed his left shoulder pain was due to the January 26, 2013 incident. Dr. Randall Holcomb, a panel orthopedic surgeon selected by the employee, diagnosed degenerative osteoarthritis in the left shoulder, complicated by shoulder contusion and sprain, chronic. He opined that the fall in January activated, or increased

the pain of, the preexisting degenerative arthritis. The physician recommended shoulder replacement surgery, but the employer denied the condition was work-related. A utilization review reached the same conclusion. Dr. Jeffrey Dlabach, a second employee-selected orthopedic surgeon, concluded the employee met criteria for shoulder replacement as early as 2010. "The glenohumeral arthritis is pre-existing with no supporting documentation or change in imaging from a fall in January that led to advancement . . . Shoulder arthroplasty is indicated . . . but it is not work-related," the orthopedist noted. He testified any aggravation would have caused an increase in symptoms but did not cause an injury. On December 31, 2013, the employee had shoulder replacement surgery by another, non-panel, orthopedic surgeon, Dr. Thomas Throckmorton, who was initially unaware of any claimed work-related injury. The employee next underwent a fusion of the cervical spine on April 9, 2014, by Dr. Glenn Crosby, a non-panel neurosurgeon. Although both Dr. Throckmorton and Dr. Crosby later testified the January fall accelerated the preexisting degenerative conditions, neither physician had full access to the employee's medical history before formulating their opinions.
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/pearsonopn.pdf

3. Clear and Convincing Evidence to Overcome Presumption of Correctness

***Robert Rodgers v. Rent-A-Center East, Inc., et al.*, No. W2019-01106-SC-R3-WC –** Filed July 29, 2020.

This case illustrates that "(a) disagreement between medical expert witnesses as to the proper diagnosis of an employee's condition may not, in itself, constitute the clear and convincing evidence needed to overcome the statutory presumption of the accuracy afforded an MIR physician's impairment rating." *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 411 (Tenn. 2013). The employee sustained a low back injury in an automobile accident on May 7, 2013, while running job-related errands for his employer.

An employee-selected panel physician, an orthopedic surgeon, determined from an MRI that the employee's condition was normal, that he reached maximum medical improvement on October 9, 2013, and suffered no permanent impairment. A second opinion by a neurosurgeon reached the same conclusion based on evaluation and review of x-rays. The employee then sought treatment on his own from a physical medicine and rehabilitation specialist and an independent medical examination (IME) by an orthopedic surgeon. The rehabilitation specialist determined based on an MRI, an EMG, and x-rays, that the employee exhibited no peripheral radiculopathy, although there was an indication of myofascial pain syndrome. The IME by an orthopedic surgeon reflected findings of chronic lower back pain and patellofemoral syndrome in the employee's right knee. The employee obtained an IME from another orthopedic surgeon who found moderate multilevel degenerative disc disease. He assigned a 7% permanent partial

impairment to the body as a whole because of the employee's own statement that he had radiculopathy in both his legs. Because of this finding, the employer obtained an IME from the Medical Impairment Registry. *See* T. C. A. §50-6-204(d)(5) (2005). The MIR physician determined the employee displayed pain behavior, was "self-limiting," and exhibited symptom magnification. He concluded the employee had chronic low back pain with *non-verifiable* radicular components and assigned a 2% impairment rating.

The trial court found that the employee proved by "clear and convincing evidence" that he had sustained a 7% permanent partial impairment. On appeal, the employer challenged the trial court's finding that the employee had overcome the statutory presumption of correctness of the MIR physician's rating. The Special Panel observed the clear and convincing evidence "means that the MIR evaluation is the accurate impairment rating 'if no evidence has been admitted which raises a 'serious and substantial doubt' about the evaluation's correctness.'" *Mansell*, *supra,* at 411. The Panel **modified** the trial court's judgment as to the degree of impairment, finding the documentation in evidence raised no "serious or substantial doubt" about the correctness of the MIR physician's opinion. The Panel found the disparity in ratings was attributable to the presence or absence of objective findings of radiculopathy. Here, there were no such objective findings. The Panel agreed with the trial court's finding the employee did not have a meaningful return to work, as well as its other rulings.
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/rodgersopn.pdf

Compensability

1. Application of the "Coming and Going" Rule.

***Vicki Pillow v. State of Tennessee*, No. M2019-02274-SC-R3-WC –** Filed December 11, 2020.

On October 28, 2016, a long-time state employee sustained multiple severe injuries when struck by the bus from which she had just disembarked at a bus stop near her office building. She had ridden the bus in accordance with a commuting option provided by her employer, which permitted state employees to travel to and from work using a transit card on Metro Transit Authority (MTA) and Regional Authority buses as well as the Music City Star commuter train. The transit cards were available to qualified employees and paid for by the state. **The issue in the case is whether the Claims Commission correctly applied the "coming and going" rule in granting summary judgment in favor of the defendant.**

The employee contended her use of the transit system fell within an exception to the "coming and going" rule, which is generally that "an accidental 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 employee was employed and compensated." *Smith v. Royal Globe Ins. Co.*, 551 S.W.2d 679, 681 (Tenn. 1977). Other exceptions to the rule include when the "transportation is furnished by the employer as an incident of the employment," *Eslinger v. F&B Frontier Constr. Co.*, 618 S.W.2d 742, 744 (Tenn. 1988), or while an employee is injured while completing a "special errand" in furtherance of his or her employment or at the direction of the employer. *Stephens v. Maxima Corp.*, 774 S.W.2d 931, 934 (Tenn. 1989). Here, the employee argued the state's payment for the transit service option amounted to furnishing transportation. The employee further claimed the benefit of a *premises exception* to the rule, asserting that when she arrived at or in close proximity to the employer's premises, she was within the course of employment. The Special Panel **affirmed** the Claims Commission's grant of summary judgment for the employer after analyzing the facts with the controlling case law. The Panel found the state's payment for the transit cards a convenient alternate transportation mode or option beneficial to the public as well as state employees. The option did not factor in the employee's salary or compensation, and its use was not required as a condition of employment. The employer had no control over the bus route or the location of the bus stop. Further, the Panel held the premises exception was not available. Although the bus stopped on a public street that the employee might have had to cross, the location was not physically on the employer's premises, nor did the street bisect its premises. The full opinion may be viewed at http://www.tncourts.gov/sites/default/files/pillow_v_filed_opinion_updated_2020dec14.pdf

2. **A Meaningful Return to Work.**

Kenneth Brian Coates v. Tyson Foods, Inc., **No. W2019-00904-SC-R3-WC**-Filed July 28, 2020.

One issue presented is whether the employee had a *meaningful return to work* after recovering from elbow tendon injuries. The employee experienced elbow pain June 6, 2013, using a sledge hammer to help unload soybean meal from a railcar. Although he mentioned the pain to his supervisor, he did not formally report a work injury until November 6, 2014, after an orthopedic surgeon informed him he needed surgery to repair bilateral ruptured elbow tendons. The employee's family physician had referred him to the surgeon. After initially providing the employee with a form to select an authorized treating physician, the employer denied the claim. The employee did not miss any work until his first elbow surgery in January 2015. His second surgery was in March 2015. After the two surgeries, the employer advised the employee it intended to post his job in June 2015 after the expiration of his Family Medical Leave. The employee was unable to return to work before June 15, 2015, due to restrictions imposed by his physician.

The trial court first found the statute of limitations did not begin to run until December 23, 2014, when the employee saw an orthopedic surgeon and learned he needed surgery. The request by the employee for a Benefit Review Conference (BRC) was therefore timely. Next, the trial court found the employee did not have a meaningful return to work because his termination was not voluntary or due to misconduct. On appeal, the employer argued the statute of limitations barred the claim, and that a 1.5 multiplier cap applied to any permanent partial disability award. The Special Panel **affirmed** the trial court's judgment. The Panel gave considerable deference to the trial court's factual determinations, noting the claim arose before the July 1, 2014 effective date of the *Reform Act of 2013*. "We are also mindful that for this injury . . . the workers' compensation law is 'remedial in nature and must be given a liberal and equitable construction in favor of the employee.'" (Citing *Cantrell v. Carrier Corp.*, 193 S.W.3d 467, 472 (Tenn. 2006)). The Panel relied on *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008) in addressing the meaningful return to work issue. The Panel noted the trial court found the employee did not have a meaningful return to work because the employer posted his job and told him he would have to start over. "The determination of the reasonableness of the actions of the employer and the employee depend on the facts of each case." *Id* at 328.
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/coatesopn_0.pdf

Medical Proof Issues

1. Basis and Extent of Impairment

***Frederick Perry v. Thyssenkrupp Elevator Corporation*, No. W2019-01549-SC-R3-WC –** Filed September 16, 2020.

The employee slipped and fell at work on February 22, 2013, when he tried to move a large steel panel with a jib crane. The trial court adopted its own modified anatomical impairment ratings for the employee's right hip and right knee injuries that differed from the ratings by physicians. **The issue on appeal was whether valid expert medical evidence supported the trial court's findings and judgment.** The Special Panel **affirmed** in part and **reversed** in part.
Compensability was not in dispute. The parties reached impasse on the extent of the employee's anatomical or vocational impairment at a Benefit Review Conference (BRC). His treating orthopedic surgeon, Dr. Adam Smith, assigned impairment ratings of 3% for the right hip injury and 3% for the right knee injury, for a combined 2% to the body as a whole. An independent medical examination by Dr. Samuel Chung resulted in a 15% rating for the right knee, 22% for the right hip, and a combined rating of 13% to the body as a whole.

The trial court concluded Dr. Smith's rating for the knee took into account only the employee's meniscus surgery and not aggravation of preexisting arthritis. In reaching its own anatomical ratings, the trial court did not explain its methodology. The Special Panel determined there was insufficient evidentiary support for the trial court's finding that preexisting arthritic conditions in the right hip were aggravated. Dr. Smith testified that the employee's fall only required labral repair to the right hip and that the remaining procedures for the hip related to chronic arthritis. The Panel determined the trial court erred in rejecting Dr. Smith's rating for the hip. However, the Panel found sufficient evidentiary support for the trial court's anatomical rating for the right knee, based on Dr. Chung's testimony that the fall aggravated preexisting arthritis in the knee. The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/perryopn.pdf

2. Permanent and Total Disability

August Hedrick v. Penske Truck Leasing Corp., **No. W2019-01522-SC-R3-WC** – Filed June 26, 2020.

The employee, a diesel maintenance technician, sustained low back and right shoulder injuries on May 16, 2014, while rolling two large truck tires in a rainstorm. One tire rolled away and the employee tried to grab it, lost his balance, and was pinned to the ground by the tire. **The issue in this case was whether the trial court's judgment that the employee was permanently and totally disabled because of his injuries, was correct based on the medical and vocational evidence.** The trial court found the employee's work history was that of jobs that required heavy lifting or manual labor. The employee had back surgery on September 24, 2014, and a second back surgery on October 10, 2014. He underwent a rotator cuff repair surgery for his right shoulder in February 2015, and then had a lumbar fusion on October 14, 2015. Following his surgical treatment, the employee maintained he could no longer perform any of his previous jobs.

The medical and vocational expert evidence indicated the employee was significantly restricted in his ability to lift, carry, walk, stand, bend, or sit. He had to wear a back brace, use a cane, and take substantial medication, including a prescribed narcotic. The Special Panel observed that the trial court had found credible and more persuasive the medical expert testimony of a panel physician who had seen and treated the employee for pain management numerous times over a three-year period, and who had opined the employee was unable to work. The Panel **affirmed** the trial court's judgment, noting "(t)he trial court analyzed the lay and medical evidence as it relates to (the employee's) injuries, skills, training, education, age, and vocational opportunities." The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/hedrickopn.pdf

Richard Vaughn v. City of Murfreesboro and the Second Injury Fund, **No. M2018-02048-SC-R3-WC** – Filed October 7, 2020.

In a different outcome, the trial court found the employee not permanently and totally disabled, although he had developed a convulsion disorder with intermittent violent movements of his head after sustaining a left shoulder injury on September 14, 2009. The employee, a firefighter, underwent a surgical repair of his left shoulder after suffering a torn ligament during a training session involving heavy lifting. Subsequently, he had a surgical procedure to release his left biceps tendon. On December 1, 2011, the employee passed all but one of the elements of a "return to duty" test, after the employer's physician provided a letter purporting to lift all restrictions. The physician later testified he did not authorize the letter and had never modified the restrictions he placed on the employee. The employee was hesitant to take the return to duty test since he was uncertain about the apparent lifting of restrictions. He testified he did so in order to preserve his job. The medical records showed the employee's range of motion and symptomology varied over time according to his authorized treating orthopedic surgeon. During one session involving cervical traction with a physical therapist, the employee experienced an uncontrollable twitch that occurred randomly. The employee saw a neurologist with complaints of chronic pain and involuntary movements. The neurologist diagnosed a conversion disorder, or physical abnormality triggered by an external stressor. He opined that the unpredictability and magnitude of the movements made the employee totally disabled. A psychiatrist concurred with the conversion disorder diagnosis, opining it directly related to his work injury, his difficulty healing after surgery, his inability to return to work, and his perception of being forced back to work too soon. However, the psychiatrist detected some symptom magnification and lowered his permanent partial psychiatric rating accordingly. The Special Panel **affirmed** the trial court's judgment, noting the employee's evidence did not include testimony of a vocational expert. Further, the psychiatrist's conclusions about symptom magnification affected the employee's credibility, especially in view of testimony that the employee regularly engaged in extensive driving despite his conversion disorder. "The extent of vocational disability is a question of fact for the trial court to determine from all the evidence, including lay and expert testimony, the rating of anatomical disability by the experts and the testimony of the injured employee, which is relevant in determining the extent of vocational disability. . ." *Pittman v. Lasco Ind., Inc.*, 908 S.W.2d 932, 936 (Tenn. 1995).
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/20201007144037.pdf

3. Gradually Occurring Injury

***Kevin W. Taylor v. G.UB.MK Constructors*, No. E2019-00461-SC-R3-W –** Filed June 2, 2020.

The employee, who worked as a union boilermaker from 1999 to November 2013, filed a workers' compensation claim on January 10, 2018, alleging permanent hearing loss due to his work environment. He contended he learned of the causal connection between his work and his hearing loss on June 30, 2014 and promptly gave notice to his employer in July 2014. The trial court determined his hearing loss was compensable and, based on a 14.1% anatomical impairment rating, gave the employee a 56.4% vocational disability. The Special Panel **affirmed** the claim was compensable, but **modified** the vocational disability to 30%. At trial, the employee testified of his exposure to loud industrial noise over a long working career as a certified welder, millwright, and boilermaker, as well as 20 years' service with the Army National Guard where he engaged in target practice with an M-16 rifle. In his last 13 years of work as a boilermaker, he worked in plants that were loud and confined, with excessive noise from pneumatic tools. After his last assignment with his employer, he had difficulty finding work, but it was mainly because of heart, back, shoulder, and knee problems. He had never turned down or left a job due to hearing problems. Expert medical proof showed he had permanent, bilateral noise-induced hearing loss. The trial court found the cause of the hearing loss to be cumulative noise exposure during his work as a boilermaker over several years. The employer argued the employee failed to give timely notice, that his claims was barred by the statute of limitations, and that he did not prove his condition was attributable to the last 13-year stint with the employer.

The evidence indicated the employee worked for the employer by assignment 23 times in 13 years. Although medical evidence did not establish a single incident or time-period, his noise exposure over several years caused a progressive problem. The Panel observed that with hearing loss and other gradually occurring injuries, the timeframes applicable to notice and the statute of limitations are "difficult to determine because these injuries tend to occur over lengthy periods of time." **In these types of cases, the statute of limitations begins "to run 'at that time when the employee, by a reasonable exercise of diligence and care, would have discovered that a compensable injury had been sustained.'"** *Gerdau Ameristeel, Inc., v. Ratliff*, 368 S.W.3d 503, 509 (Tenn. 2012). "Therefore, an employee who sustains a gradually occurring injury may be relieved of the notice requirement until a medical diagnosis confirms the injury." *Banks v. United Parcel Service, Inc.*, 170 S.W.3d 556,561 (Tenn. 2005). The Panel explained the purpose of the "last day worked" rule is to prevent employees with gradually occurring injuries from losing the opportunity to bring workers' compensation claims due to the running of the statute of limitations. *Barker v. Home-Crest Corp.*, 805 S.W.2d 373, 375 (Tenn. 1991).
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/taylorkevin_filed.opn_.pdf

Potter South East, LLC et al. v. Brian Bowling, et al., **No. E2019-01009-SC-R3-WC**-Filed June 2, 2020.

A different outcome resulted where the proof indicated the employee became aware of his noise-induced hearing loss several years before he had a hearing test and confirming diagnosis on October 9, 2017. In this case, the trial court granted the employer's motion for summary judgment based on the statute of limitations. The Special Panel **affirmed** the trial court. Here, the evaluating physician for the employee documented the employee was first aware of his hearing loss as early as 2011, according to his self-report. The employee's last date of employment was September 4, 2012. His first notice of his hearing loss was when he filed a request for a Benefit Review Conference (BRC) on January 9, 2018. The trial court determined the employee knew or reasonably should have known that his hearing loss was caused by his employment by the time he terminated his employment on September 4, 2012, and that the statute of limitations therefore expired on September 4, 2013. The Panel agreed, observing that the Tennessee Supreme Court found in the case of a gradually occurring injury, the *last day worked rule* useful in helping identify a date on which the injury occurred. *Bldg. Materials Corp., v. Britt*, 211 S.W.3d 706, 711 (Tenn. 2007) (also citing *Barker*, *supra*, at 375). The Panel also noted the employee had not filed an affidavit in contradiction to the evaluating physician's C-32 form. "We think the undisputed proof set forth in the C-32 form is sufficient to establish an undisputed inference that Employee knew he had a work-related injury as far back as 2010 when he was in his early thirties. There is no countervailing proof. Given these facts, a reasonably prudent person should have sought a doctor's opinion long before October 9, 2017, and therefore the one-year statute of limitations bars Employee's claim."
The full opinion may be viewed at
http://www.tncourts.gov/sites/default/files/pottersouthfiled.opn_.pdf

4. Unauthorized Medical Treatment

***Floyd McCall v. Ferrell Paving, et al.*, No. W2018-01676-SC-WCM-WC**-Filed January 22, 2020.

The employee, a cement truck driver, sustained injury in a fall at work on October 6, 2014. He received authorized treatment for the injury, paid for by the employer. He also received temporary total disability (TTD) benefits. After his release by his authorized treating physician (ATP), he received *unauthorized* medical treatment, including cervical spine surgery. The employee then sought additional TTD and medical benefits, permanent disability benefits, and future medical treatment. The Court of Workers' Compensation Claims (CWCC) determined he was not entitled to any additional workers' compensation benefits. The Special Panel **affirmed** the trial court's judgment. The proof at trial reflected that after his fall at work, the employee

received physical therapy and work hardening under his ATP. The ATP concluded based on diagnostic studies that the employee had mild progressive degenerative arthritis due to age, with no fractures, ruptured discs, or abnormal radiculopathy. The ATP testified the employee's neurologic, strength, reflex, and range of motion examinations were all normal, although he had some impingement in his left shoulder resulting from the degenerative condition, not the work injury. There was no reason for surgery on the left shoulder, left elbow, or cervical spine, according to the ATP.

After release, the employee tried to return to work but his employer advised things were slow and gave him an unemployment card. He then worked three or four months for Nike through a staffing agency. His job involved loading boxes of shoes from a conveyor belt onto pallets. The boxes weighed up to 15 pounds. He had an IME in April 2015, but did not tell the physician about the physical requirements of his Nike job. He then began working for Ingersoll Rand, packaging parts that were continuously coming down a conveyor belt. He also operated machinery. All his work involved repetitive light lifting. He saw a neurosurgeon in 2016, who recommended cervical spine surgery. At trial, the employee maintained he had no problems with his neck, shoulder or elbow before his fall at work in 2014, but now had pain, numbness and tingling in his left shoulder, arm and hand. Testimony from the neurosurgeon who performed the cervical procedure indicated that by January 13, 2017, the employee had spondylosis and a disc osteophyte complex at C6-7, that stenosis was worsening, and that surgery was medically necessary. While the neurosurgeon attributed the conditions to the work injury, the proof indicated neither he nor the evaluating physician had any information about the type of repetitive lifting performed by the employee after release by the ATP. The trial court ruled the medical proof of the employee failed to rebut the presumption of correctness afforded the opinions of the ATP.
The opinion may be viewed at
http://www.tncourts.gov/sites/default/files/mccallopn.docx_.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 workers' compensation decisions for the 2020 Calendar Year up to and including the decision filed on December 11, 2020. 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.
David H. Lillard, Jr., State Treasurer, Chair

s/ Larry Scroggs
Larry Scroggs, Administrator