STATE OF TENNESSEE

Advisory Council on Workers' Compensation

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2018 SUMMARY OF SIGNIFICANT
TENNESSEE SUPREME COURT
WORKERS' COMPENSATION DECISIONS

TREASURY DEPARTMENT
STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0225

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

Significant 2018 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 2018 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 33 cases between January 4, 2018 and December 6, 2018. Twenty-five 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. The other eight opinions were issued in **"new law"** cases. Four of those involved appeals from the *Court of Workers' Compensation Claims* and four came directly from the *Workers' Compensation Appeals Board*. **Note:** One Court of Appeals case is also included in this report due to its 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 2018 are presented here, with headings that constitute a workers' compensation "issues list."

TABLE OF ISSUES

Procedure

Causation

Compensability

Medical Issues

Procedure

1. Statute of Limitations

***Pamela Lyles v. Titlemax of Tennessee, Inc.*, et al. No. W2017-00873-SC-WCM-WC –** Filed September 14, 2018.

On May 19, 2010 the employee was a victim of an armed robbery while at work and she immediately began experiencing PTSD symptoms. She was diagnosed with PTSD by July 13, 2010. The employee requested a Benefit Review Conference (BRC) on September 16, 2011. A BRC was not conducted until September 16, 2013 and it resulted in an impasse. She filed suit on October 7, 2013. The trial court granted the employer's motion for summary judgment, finding the employee's claim was barred by the statute of limitations. The trial court found the employee had admitted she knew as early as July 13, 2010 that her PTSD diagnosis was a direct result of the armed robbery incident. Since she was required to request a BRC within one year of the incident or knowledge of injury as a result of the incident, the court concluded her request for a BRC on September 16, 2011 was outside the statute. The employee relied on *Oliver v. State*, 762

S.W.2d 562 (Tenn. 1988), contending the statute of limitations did not begin to run until she learned she had a permanent "anatomical change and impairment." The Special Workers' Compensation Appeals Panel **affirmed**, holding the statute was not tolled despite the employee's contention she did not learn she had sustained a *permanent* injury until late 2012 or early 2013. The Panel determined it was undisputed the employee knew she had sustained an injury by the time of her PTSD diagnosis on July 13, 2010 and she had failed to request a BRC within one year of that date. http://www.tncourts.gov/sites/default/files/lylesopn.pdf

Victory Thayer v. United Parcel Service, et al., **No. W2017-02153-SC-WCM-WC** – Filed August 13, 2018.

On January 16, 1997 the employee notified his employer he had sustained an eye injury as a result of an altercation with a coworker. He received treatment a week later. The employer denied the claim, contending the injury occurred outside the course and scope of employment. The employee took no action to challenge the denial. The medical bill he incurred in 1997 was finally paid by the employer's insurer in 1999. The employee requested a Benefit Review Conference on March 1, 2013. The employee filed suit on January 7, 2016, alleging he had been informed by a physician in January and February 2013 that he had sustained permanent eye damage as a result of the 1997 altercation. The trial court granted the employer's motion for summary judgment, concluding the employee's failure to appeal the 1997 denial of his claim precluded his attempt to toll the statute of limitations. The Special Panel **affirmed**, finding the employee's one-year time period began at the latest in 1999 when the last voluntary payments of medical bills were made. The employee would therefore have been required to request a BRC in 2000, but failed to do so until 2013, more than a decade after the statute of limitations expired. As in the ***Lyles*** case the employee relied on *Oliver v. State*, 762 S.W.2d 562 (Tenn. 1988) contending nothing led him to believe he had sustained permanent damage as a result of the altercation until much later. In *Oliver*, the Supreme Court had held the statute of limitations was not triggered until the employee was told he had permanent damage as a result of a work accident 20 years earlier. The Panel noted the Court in *Oliver* dealt with a compensable claim. Here, the employee's claim was denied and he had failed to timely challenge the denial. http://www.tncourts.gov/sites/default/files/thayeropn.pdf

Paul A. Westby v. Goodyear Tire & Rubber Company, **No. W2017-01408-SC-R3-WC** – Filed July 24, 2018.

The employee suffered gradual hearing loss while working 37 years at plants the employer owned. After the employer closed its Union City plant on June 11, 2011, the employee filed a workers' compensation claim, alleging an injury date of June 6, 2011. The employer argued the statute of limitations had expired. The trial court applied the "last day worked" rule and awarded the employee 60 percent permanent partial disability. The employer appealed, contending the

employee knew as early as 2002 he had suffered hearing loss because of his employment and therefore the "last day worked" rule did not apply. The Panel **affirmed**, citing *Lawson v. Lear Seating Company*, 944 S.W.2d 340, 341 (Tenn. 1997), which held the statute of limitations involving gradually occurring injuries "does not begin to run until the date the employee was unable to work due to his injury." The Supreme Court reaffirmed the Lawson holding in *Building Materials Corp. v. Britt*, 211 S.W.3d 706, 712 (Tenn. 2007), noting the last day worked rule "seeks to avoid placing the employee in a potential trap by either forcing the employee to submit a claim before he is actually disabled or allowing the statute of limitations to bar the employee's claim if the employee waits to file a claim." The evidence at trial indicated the employer had periodically conducted hearing tests for its plant employees which revealed the subject employee was experiencing gradual hearing loss, although the plant physician denied it was work related. The employee obtained hearing aids for his gradual hearing loss but never missed work because of the condition. The Panel agreed with the trial court's conclusion that the employer had actual notice of the employee's injury and that the employee was excused from giving notice under T. C. A. § 50-6-201(b) http://www.tncourts.gov/sites/default/files/westbyopn.pdf

2. Subject Matter Jurisdiction

***Rita Faye Hurst v. Claiborne County Hospital and Nursing Home et al*., No. E2017-01598-SC-R3-WC –** Filed October 24, 2018.
http://www.tncourts.gov/sites/default/files/rita_faye_hurst_v._claiborne_county_hospital_et_al..pdf
Rita Faye Hurst v. Claiborn County Hospital and Nursing Home et al., **No. E2017-01745-SC-R3-WC** – Filed October 24, 2018.http://www.tncourts.gov/sites/default/files/rita_hurst_vs._claiborne_county_hospital.pdf

The employee, a paramedic, filed suit for workers' compensation benefits, alleging two distinct injuries on different dates: physical injuries sustained in a work-related motor vehicle collision in 2001 and mental injuries from an incident involving a severely abused infant in 2000. The employee settled the mental injury claim. The approved settlement preserved future medical benefits for her *mental* injuries but not for physical injuries related to the collision. Nine years later the employee filed a motion to compel medical benefits for her physical injuries. The trial court ordered the employer to provide medical benefits for her physical injuries and separately ordered the employer to pay the employee's attorney's fees and costs. The Panel **vacated** the orders in two separate opinions, finding that the trial court did not have subject matter jurisdiction to compel medical benefits for the physical injuries. "Subject matter jurisdiction involves a court's lawful authority to decide a controversy brought before it. *Chapman v. DaVita, Inc*., 380 S.W.3d 71, 712 (Tenn.2012). Subject matter jurisdiction is conferred by statute or the Tennessee Constitution; parities cannot confer it by appearance, plea, consent, silence, or waiver. *In re Estate of Trigg*, 368 S.W.3d 483, 489 (Tenn. 2012). Any order entered

by a court lacking subject matter jurisdiction is void. *Id*. Whether a trial court has subject matter jurisdiction is a question of law that is reviewed with no presumption of correctness." The burden is on the plaintiff to establish that the court has jurisdiction to adjudicate the claim. (Citing cases) In this case the Panel found the trial court had not preserved future medical treatment for *physical* injuries related to the 2001 collision in its order and that there was no court approval of a subsequent 2009 settlement agreement approved by the Department of Labor and Workforce Development. Thus, there was no enforcement mechanism in place.

Tristar Centennial Medical Center v. Dana C. Pugh, **No. M2016-02470-SC-R3-WC** – Filed February 15, 2018.

The employee sustained a compensable back injury on April 28, 2014. The parties had a Benefit Review Conference (BRC) on June 22, 2015, at which they agreed upon compensability and past medical expenses but failed to resolve the nature and extent of permanent partial disability. The BRC report indicated that the parties had reached impasse and had exhausted the BRC process. The employee filed suit and the parties reached a settlement, which was approved by the trial court. The settlement order stated the employer would continue to provide medical treatment. Thereafter two recommendations for a surgical fusion procedure were declined in the utilization review (UR) process. Neither UR decision was appealed. Later the employee filed a motion to compel the employer to provide medical benefits to facilitate the recommended surgery. With the employer's approval, the surgery was completed. The employee then reset her motion to compel medical treatment and to award attorney fees. The trial court awarded a fee, and the employer appealed. While the appeal was pending, the Supreme Court ordered the parties to show cause why the appeal should not be dismissed for lack of subject matter jurisdiction since the record did not show the parties had engaged in a BRC before the motion to compel was filed. The Panel **vacated** the trial court judgment upon addressing the issue whether the June 22, 2015 BRC was sufficient to provide the trial court with subject matter jurisdiction over an issue (surgical recommendation) that arose after that BRC. The Panel concluded the BRC on June 22, 2015, "which could not have involved any mediation on the surgical recommendation, was an insufficient exhaustion of the BRC process. Thus, this Court does not have subject matter jurisdiction." The Panel referenced the holdings in *Robertson v. Roadway Express, Inc.*, 2012 WL 2054170 and *Holland Group v. Sotherland*, 2009 WL 1099275, both of which mandate exhaustion of the BRC process prior to court action.
http://www.tncourts.gov/sites/default/files/tristarcentenniealmedicalv.pugh_.opnjo_.pdf

3. Preserving Affirmative Defenses

Susie Plunk v. Professional Home Health Care Services, **No. W2018-00025-SC-WCM-WC** – Filed October 10, 2018.

The employee timely filed a workers' compensation suit, however the leading process was returned unserved. An alias summons was timely issued and returned showing it had been served on an individual but the information was ambiguous. The employer answered, asserting as an affirmative defense a lack of service and insufficiency of service. The parties then proceeded to engage in discovery over a two-year period, after which the employer filed a summary judgment motion alleging the employee's claims were time barred by insufficiency of service. The trial court granted the motion and the employee appealed. The Panel **reversed**, finding the employer had inadequately preserved the affirmative defense because it had not "set forth affirmatively facts in short and plain terms relied upon to constitute . . . an affirmative defense" (citing Tenn. R. Civ. P. 8.03). The Panel noted the employer's "generic" statement without factual allegations or details was insufficient under the guidelines of *Barker v. Heekin Can Co*., 804 S.W.2d 442 (Tenn. 1991). The Panel observed the reason for the Rule 8.03 requirement was to facilitate a prompt curative action by the employee to prevent "the dismissal of an otherwise meritorious claim on purely technical grounds." *Id*. at 443. The employer argued it had not waived its affirmative defense by participating in discovery. The Panel cited *Barker's* holding that the employer's failure to appropriately raise the defense made its continued participation in the litigation irrelevant. http://www.tncourts.gov/sites/default/files/plunkopn.pdf

4. Service of Process

See above **3. Preserving Affirmative Defenses**: ***Susie Plunk v. Professional Home Health Care Services***

5. Discretionary Costs

Paul Gray v. Wingfoot Commercial Tire Systems et al., **No. W2017-00380-SC-WCM-WC** – Filed May 21, 2018.

Following his work injury the employee was treated by several physicians, both authorized and not authorized. The trial court considered numerous issues, including subject matter jurisdiction, payment of unauthorized medical expenses, impairment, and disability. The employer appealed a permanent partial disability award in favor of the employee. The Panel **affirmed** in part**, reversed** in part and **remanded** to the trial court. The Panel considered the employer's argument that the trial court had erred in awarding *discretionary costs* for certain court reporter fees. Citing *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 214-15 (Tenn. Ct. App. 2008) with reference to Tenn. R. Civ. P. 54.04, the Panel agreed the trial court's award of discretionary costs was proper since the employee had submitted a timely and properly supported motion demonstrating his entitlement, and that the employer failed to carry its burden of showing the trial court abused its discretion. http://www.tncourts.gov/sites/default/files/graypaulopn.pdf

Louis Garassino v. Western Express, Inc., et al., **No. M2016-02431-SC-R3-WC**, Filed February 8, 2018.

The trial court awarded benefits to the injured employee and also discretionary costs for fees for his examining doctor for reviewing records and conducting an examination. The employer appealed to the Workers' Compensation Appeals Board, which reversed the trial court's award of discretionary costs. The employee appealed and the Panel **affirmed**, citing Tenn. R. Civ. P. 54.04 as the guideline for interpreting T. C. A. § 50-6-239(c)(8), which addresses discretionary costs awards for medical experts in worker's compensation cases. "Our courts have held that parties cannot recover discretionary costs for expert witness fees for depositions or trial, no matter how reasonable and necessary these fees are. *Miles v. Marshall C. Voss Health Care Ctr.*, 896 S.W.2d 773, 776 (Tenn. 1995)."
http://www.tncourts.gov/sites/default/files/garassino.louis_.opn_.pdf

6. Attorney Fees

Carolyn Annette Young v. Sugar Hollow Properties, LLC., **No. E2017-00981-SC-R3-WC** – Filed May 24, 2018.

The employee's work-related injury case was settled with a provision for future medical treatment benefits. Subsequently she moved to compel the defendants to provide medical treatment recommended by the authorized treating physician. She also asked for attorney fees. The trial court ordered the defendants to provide the requested medical services, which they ultimately did. The trial court subsequently awarded an attorney's fee pursuant to T. C. A. § 50-6-204(b)(2). Although the defendants ultimately authorized the services, they appealed the award of medical benefits and the attorney's fee. The Panel **reversed** both awards, holding that the issue of medical benefits was moot, and that attorney fees should not have been awarded since the employee had not established, "at a minimum," a causal relationship between the injury and the requested medical services via expert medical evidence. The employee had relied only upon her motion to compel medical services and had not obtained testimony of a causal link from the authorized treating physician. The Panel relied upon *Shelton v. Joseph Constr. Co.*, No. M2014-01743-SC-R3-WC, 2015 WL 3509283 (Tenn. Workers' Comp. Panel June 3, 2015) and *Russell v. Dana Corp.*, No. M2015-00800-SC-R3-WC, 2016 WL 4136548 (Tenn. Workers' Comp. Panel August 1, 2016).
http://www.tncourts.gov/sites/default/files/judgment_order_young_v._sugar_filed.pdf

7. Presumption of Correctness

Deborah Goodman v. Schwarz Paper Company et al., No. W2016-02594-SC-R3-WC – Filed January 18, 2018.

The sole issue presented to the trial court was whether the employee had rebutted the presumption of correctness attached to the authorized treating physician's impairment rating. All other matters, including compensability and medical expenses had been resolved. The trial court ruled the presumption had not been overcome and awarded benefits based on the authorized physician's rating. The employee appealed. The Panel **affirmed**, holding the authorized treating physician's testimony was more credible than that of a physician who examined her at the request of her attorney. "(I)t is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that [the accepted opinion] contains the more probable explanation." *Thomas v. Aetna Life & Cas. Co*., 812 S.W.2d 278, 283 (Tenn. 1991). http://www.tncourts.gov/sites/default/files/goodmandeborahopn.pdf

[*See also* under **Causation 3. Not Work Related: *Sisouphahn Thysavathdy v. Bridgestone Americas Tire Operations et al***. and ***James Green v. Kellogg Companies, et al***.]

8. Frivolous Appeal

***Lloyd Michael Harris, Jr. v. Mastec North America, Inc., et al*., No. M2016-02307-SC-R3-WC –** Filed January 9, 2018.

In March 2004 the trial court entered a final order finding the employee permanently and totally disabled. The order provided that the employee would receive $274.49 per week "until he is eligible for full benefits . . . under the Social Security Act." The employee was 24 at the time of the January 4, 1999 injury. In May 2016, more than 12 years after entry of the final order, the employer filed a motion to amend, alleging the order should have reflected the employee's retirement age as 65 and should have stated "with specificity when [the employer] shall receive a credit for the commuted portion of the award." The trial court found the motion untimely. The employer had relied upon Rule 60.01 of the Tennessee Rules of Civil Procedure. The employee had argued the motion was not filed within one year of the final order as required by Rule 60.02(1) or Rule 60.02(5), and that the order had provided him with weekly benefits through the date of his eligibility for Social Security, which in his case would be age 67. The employer appealed and the Panel **affirmed,** holding the employer's reliance on Rule 60.01 was misplaced since there was no clerical error and the order correctly reflected the trial court's ruling. The Panel further found the employer did not raise a mistake of law within one year or within a reasonable time, as required by Rules 60.01 or 60.02. (citing *Holiday v. Shoney's South, Inc*., 42 S.W.3d 90, 94 (Tenn. Ct. App. 2000) and *Furlough v. Spherion Atlantic Workforce, LLC,* 397 S.W.3d 114 (Tenn. 2013). The Panel concluded that rather than seeking clarification of the final order, the employer was actually asking that it be set aside and replaced with an amended order reducing the employee's future benefits by two years. Accordingly, the Panel held the appeal

was frivolous and remanded the case for determination and award of attorney fees and expenses incurred by the employee. http://www.tncourts.gov/sites/default/files/harris.lloyd_.fil_.opn_.pdf

Causation

1. Voluntary Sports Activity

Gregory E. Pope v. Nebco of Cleveland, Inc. et al., **No. E2017-00254-SC-R3-WC** – Filed January 16, 2018.

The employee sustained a knee injury in a charity running event sponsored by his employer and others. The employer argued the employee's injury was not compensable because it arose from voluntary participation in a non-work-related activity. The trial court determined the injury was compensable and awarded medical benefits and attorney fees. The Workers' Compensation Appeals Board reversed on the issue of compensability and fees. The Panel **affirmed,** holding the employee's constitutional challenges to the statute creating the Appeals Board had no merit and that the injury was not compensable. The parties agreed the race constituted a "recreational" and "athletic" event within the meaning of T. C. A. § 50-6-110(a)(6) although the employee contended his participation constituted one of four statutory exceptions, that of being "impliedly required" by his employer. The Panel first observed that the employee's participation was in fact voluntary because he ultimately chose to participate despite his earlier reluctance. The Panel noted the case provided the first opportunity to address the precise statutory interpretation raised in the appeal. The Panel applied four general principles of prior case law in analyzing the facts, ultimately concluding the evidence preponderated against the trial court's finding that the employee's participation was impliedly required.
http://www.tncourts.gov/sites/default/files/popeg.opn_.finalopinion_and_judgment.pdf

2. Misconduct Exception

Vicki Gandee v. Zurich North America Insurance Company**, No. W2017-01523-SC-WCM-WC –** Filed September 19, 2018.

The employee sustained two left knee injuries at work in 2004. She returned to work but left her job in 2006 after reaching her maximum medical improvement. The employee filed this claim maintaining she did not have a meaningful return to work. She sought permanent partial disability benefits at six times the impairment rating. The parties disputed whether the employee had been terminated for misconduct or resigned due to her injury. The trial court found the claim

compensable but capped the award at two and one-half times the rating having concluded the employee was terminated for misconduct. The employee appealed. The Panel **affirmed** the finding of compensability and the trial court's adoption of the impairment rating by the defendant's expert, but **reversed** the decision to cap the award based on misconduct. The Panel observed the employee had been employed in different capacities and ultimately as children's program director by a 7,000 member church for 12 years. The church had no human resources department and the employee received virtually no information concerning temporary total benefits, or how she would be paid for missed time due to injuries sustained in 2004. She used her personal and sick time for absences due to injuries in April and August 2004. An independent medical examination by a physician retained by the employer's insurer indicated the employee's restrictions would likely prevent her from returning as program director. She was assigned a five percent impairment rating. The employee contended the employer made no accommodation for her restrictions, that she had no meaningful return to work, and that she resigned due to the effects of her injuries. The Panel analyzed the "misconduct exception" to T. C. A. § 50-6-241(b), and determined it did not apply under the facts presented. The panel concluded the alleged misconduct was not the true motivation for the dismissal and that the employee failed to make a meaningful return to work.
http://www.tncourts.gov/sites/default/files/gandeeopn.pdf

3. Not Work-Related

Sisouphahn Thysavathdy v. Bridgetone Americas Tire Operations et al., **No. M2017-01575-SC-R3-WC** – Filed April 24, 2018.

The employee sustained a left shoulder injury on July 15, 2014, which he alleged was compensable. The authorized treating physician (ATP) indicated the injury was not work-related. The Court of Workers' Compensation Claims denied the claim and the Workers' Compensation Appeals Board affirmed. The Panel **affirmed** the judgment of the Appeals Board and **adopted** its opinion. The employee, a worker at a tire manufacturer, alleged he was hurt lifting tires at work. The ATP could not identify a specific work-related injury. The employee's physician indicated the left shoulder condition was multifactorial. The Appeals Board opined that the ATP's conclusion was entitled to be afforded a presumption of correctness and that the employee did not present sufficient medical evidence to overcome the presumption. "While it is not necessary for a physician to use particular words or phrases included in the statutory definition of 'injury' to establish the requisite medical proof to succeed at trial, it is necessary that a physician's testimony be sufficient to satisfy the statutory requirements of an injury as defined in T. C. A. § 50-6-102(14)." (citing *Panzarella v. Amazon.com, Inc.*, No. 2015-383, 2017 TN Wrk. Comp. App. Bd. LEXIS 30, at*14 (Tenn. Workers' Comp. App. Bd. May 15, 2017).
http://www.tncourts.gov/sites/default/files/thysvathdy.sisouphahn.opn_.pdf

***Samuel Panzarella v. Amazon.com, Inc.*, No. E2017-01135-SC-R3-WC** – Filed May 16, 2018.

The employee filed a claim after a left knee injury. The Court of Workers' Compensation Claims denied the claim, finding the employee failed to prove his injury arose primarily from his employment. The Workers' Compensation Appeals Board affirmed and the employee appealed. The Panel **affirmed** the Appeals Board judgment. The employee described his injury as having occurred as he was walking through the plant to obtain supplies when he bent over to pick up a piece of paper on the floor and felt a sharp pain in his left knee, causing him to lose his balance and twist the knee as he fell. He told the staff at the onsite medical facility the sensation he felt was a muscle spasm. The authorized treating physician's testimony did not show that the employee's employment contributed more than fifty percent in causing the injury as required by T. C. A. § 50-6-102 (14) and did indicate there were other possible causes.
http://www.tncourts.gov/sites/default/files/panzarellas_opn_and_jud.pdf

See also: ***James Green v. Kellogg Companies, et al.*, No. W2017-00549-SC-R3-WC** – Filed February 20, 2018, where the employee's medical proof was not sufficient to rebut the presumption of correctness afforded to the authorized treating physician, who opined that the employee's condition was attributable to preexisting arthritis.
http://www.tncourts.gov/sites/default/files/greenopn_0.pdf
And see: ***Thomas D. Flatt v. West-Tenn Express, Inc.*, et al. No. W2017-01727-SC-R3-WC** – Filed August 31, 2018, where the Panel reversed the trial court's award of permanent partial disability benefits upon concluding the employee's preexisting conditions rather than a new, distinct injury were the cause of his symptomology.
http://www.tncourts.gov/sites/default/files/flattthomasopn.pdf

Compensability

1. Statutory Employee/Loaned Servant

***Darryl Osborne v. Starrun, Inc., et al.*, No. E2018-00282-SC-R3-WC –** Filed October 19, 2018.

A truck driver, whose employer had no workers' compensation insurance coverage, was injured when he fell from his truck while tarping a load of goods at a manufacturer's facility. The driver filed a workers' compensation claim against the manufacturer, asserting the manufacturer was the driver's statutory employer under T. C. A. §50-6-113 (2014 and Supp. 2017). The Court of Workers' Compensation Claims granted the manufacturer's motion for summary judgment, holding that the driver failed to establish that the manufacturer undertook work for an entity other than itself, retained the right of control over the conduct of the work, or that the driver's conduct in tarping the load was part of the manufacturer's regular business or the same type of work performed by its employees. The Panel **affirmed**, agreeing with the trial court that the

Supreme Court's holding in *Lindsey v. Trinity Communications, Inc.*, 275 S.W.3d 411 (Tenn. 2009), which established a three-prong test by which a court may consider a company to be a principal contractor under §50-6-113(a), was controlling. The test involves whether the company performs work for other, retains the right to control the work, or controls the materials used in the job.
http://www.tncourts.gov/sites/default/files/darry_osborne_opinion.pdf

Hartford Casualty Insurance Company v. Comanche Construction Inc., et al., **No. W2017-02118-COA-R9-CV**, filed November 28, 2018.

This case involved a dispute between workers' compensation insurance carriers instead of a typical claim by an injured employee. The plaintiff filed a declaratory judgment action seeking indemnity for benefits voluntarily paid to an injured crane operator on the theory he was actually a loaned servant. The trial court denied the defendant's motion for summary judgment. An interlocutory appeal was filed in the Court of Appeals, which **affirmed**. The trial court relied upon *Winter v. Smith*, 914 S.W. 2d, 527 (Tenn. Ct. App. 1995), in which the Court stated "(c)ourts will impose an implied obligation to indemnify when the obligation *is a necessary element of the parties' relationship*." *Id*. at 542. The Court of Appeals agreed with the trial court's finding that the plaintiff produced sufficient evidence to show that defendant, a contractor hired to make repairs on a bridge, "borrowed" the employee and his crane from his actual employer and directed his work on its behalf. The Court of Appeals observed the Supreme Court indicated in *Travelers Ins. Co. v. Fidelity & Cas. Co. of New York,* 409 S.W.2d 175, 176 (Tenn. 1966) that "indemnification claims by a general employer against another employer borrowing an employee are permissible in the context of workers' compensation." *Id*. at 179. Here, the "question of implied indemnity is inextricably linked to the loaned servant issue . . .a question of fact." http://www.tncourts.gov/sites/default/files/hartfordcasualtyopn.pdf

2. Failure of Medical Proof

[See above under **Causation, 4**, ***Thomas D. Flatt v. West-Tenn Express, Inc., et al.***, Filed August 31, 2018.]

3. Temporary Total Disability

Sherilyne D. Duty v. East Tennessee Children's Hospital Association, Inc., No. E2017-02027-SC-R3-WC – Filed April 18, 2018.

The employee, a unit secretary, was assaulted by a visitor in the waiting area of a pediatric intensive care unit on March 22, 2006. She sustained an eye injury and developed PTSD. A settlement was reached for all aspects of her workers' compensation claim except for temporary

total disability (TTD). She filed suit, seeking TTD benefits from July 2007 until November 2015. The employer argued the employee was not entitled to TTD because she continued to work for 15 months after the injury and was later fired for cause in July 2007. The trial court denied the TTD claim. On appeal, the Panel **affirmed**, agreeing with the trial court that "a person cannot simultaneously work and claim that they are incapable of working." The Panel noted the physician who treated the employee from 2007 to 2013 never indicated the employee was unable to work although a physician who later treated the employee opined she would not have recommended the employee return to work after the incident. The Panel cited *Cobb v. Henry I. Siegel, Inc*., No. W2000-02656-WC-R3-CV, 2001 WL 1298917 (Tenn. Workers' Comp. Panel Oct. 24, 2001) in support of its decision. "Trial courts have broad discretion to determine whether to accept or reject the opinion of a proffered expert." *Id*. The Panel also determined the employee's claim was precluded by her for-cause termination.
http://www.tncourts.gov/sites/default/files/dutysherilyne_opinion_and_judgment_e2017-02027.pdf

Medical Issues

1. Medical Consequence or Sequelae

Steak N Shake v. Thomas Yeager, **No. M2017-01558-SC-R3-WC** – Filed November 26, 2018.

The employee sustained neck and back injuries in a fall at work on October 14, 2012. Several days later he returned to the emergency room with abdominal pain determined to be caused by gastrointestinal bleeding. The diagnosing physician's impression was "upper gastrointestinal bleed secondary to peptic ulcer disease." The employer contended the abdominal and gastrointestinal conditions were not work-related and filed suit to recover $48,278.85 in medical expenses it was ordered to pay by the Department of Labor for treatment of those conditions. The trial proceeded on requests for admissions, a physician's affidavit, and stipulations by the parties without live or depositional testimony. The evidence indicated the employee was predisposed to gastric ulcers and that after the fall he took both prescribed steroids and over the counter medications, which could cause gastric bleeding. The trial court determined that the gastrointestinal bleeding and the related medical treatment did not result from an independent intervening cause attributable to the employee's own intentional conduct. On appeal the Panel **reversed**, finding the treatment for the gastric condition was not a medical consequence or sequelae that flowed from the primary work injury.
http://www.tncourts.gov/sites/default/files/steaknshakev.yeager.opn_.pdf

2. Panel Entitlement

C. K. Smith, Jr. v. Goodall Buildings, Inc. et al., **No. M2017-01935-SC-R3-WC** – Filed September 14, 2018.

The employee sustained a compensable shoulder injury and was awarded lifetime medical benefits. Because he suffered chronic pain he was referred to a pain management physician, Dr. Jeffrey Hazlewood. When the employee began treatment he was already taking a high dosage of opioids. Ultimately, Dr. Hazlewood became concerned about the employee forming an addiction and he recommended weaning the employee off opioids. In response, the employee left Dr. Hazlewood and filed a motion for a new panel of physicians. The trial court granted the motion and the employer appealed, arguing T. C. A. § 50-6-204(j)(3) precluded the employee from receiving a new panel. The Panel **reversed**, citing *Patterson v. Prime Package & Label Co., LLC,* No. M2013-01527-WC-R3-WC, 2014 WL 7263811 (Tenn. Workers' Comp. Panel Dec. 22, 2014). In *Patterson*, the Panel had interpreted § 50-6-204(j) to preclude an employee from obtaining a second opinion with regard to "impairment, diagnosis, or prescribed treatment," relating to pain management. The Panel here agreed the trial court's ruling was in direct contravention of the statute. "(B)y its plain text [§ 50-6-204(j)(3)] makes a second opinion unavailable to employees undergoing chronic, long-term pain management who have been referred to a pain management specialist." The Panel concluded the statutory intent is to prevent overutilization and to curb or prevent addiction to opioids.
http://www.tncourts.gov/sites/default/files/cksmithfiled.opn_.pdf

3. Exposure

Alcoa, Inc. v. Georgette McCroskey, Individually and as Surviving Spouse of Marcus McCroskey, **No. E2018-00087-SC-R3** – Filed September 24, 2018.

In this occupational disease case, the employee's surviving spouse alleged her husband died of pancreatic cancer due to his work-related exposure to coal tar pitch while employed by the defendant. The trial court determined the employee's spouse had not carried her burden of proof as to causation. The Panel **affirmed**. For 30 years the employee had worked in and out of the rooms where aluminum smelting took place. Coal tar pitch was used in the smelting process. It was undisputed the employee was exposed to coal tar pitch. A physician for the employee's spouse testified that the employee was at significantly increased risk of developing pancreatic cancer because of his work exposures to coal tar pitch. However he acknowledged pancreatic cancer can occur without known risk factors. The defendant's physician testified the literature regarding a link between coal tar pitch and pancreatic cancer was inconclusive, although exposure could not be ruled out as a contributing cause. He cited other well-established risk factors for pancreatic cancer, such as diabetes, obesity, diet, age, and male gender. The Panel

defined the sole issue in the case as causation. It observed that the elements necessary to sustain an occupational disease claim were as specified in T. C. A. § 50-6-301, and confirmed in *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274 (Tenn. 2009). Here, the trial court found the testimony of the defendant's physician more persuasive and the plaintiff's physician's testimony insufficient to establish a causal connection. The Panel agreed.
http://www.tncourts.gov/sites/default/files/20181030080019.pdf

4. Impairment

Zoran Andric v. Costco Wholesale Membership, Inc., **No. W2017-01661-SC-R3-WC** – Filed August 2, 2018.

The trial court found the employee has sustained a compensable injury to his right foot and awarded a 64 per cent permanent partial disability. The employer argued on appeal that the trial court had erred in apportioning the impairment to the foot rather than to the body as a whole. The Panel **affirmed but modified** the award to 26 per cent. The authorized treating physician (ATP) assigned a three per cent impairment rating to the right foot, a two percent rating to the right lower extremity and a one percent rating to the body as a whole. The employee's physician assigned a ten percent rating to the right foot, a seven percent rating to the right lower extremity and a three percent rating to the body as a whole. An independent medical examiner gave a three percent rating to the right lower extremity and a four percent rating to the foot. The trial court found the employee had suffered an injury to his right foot and no permanent injury otherwise that would justify a rating to the leg or body as a whole. The Panel determined the trial court erred in failing to presume the correctness of the independent physician's four per cent impairment rating to the right foot pursuant to T. C. A. § 50-6-204(d)(5). Accordingly, the Panel modified the award. http://www.tncourts.gov/sites/default/files/andricopn.pdf

Michael Mayuric v. Huff & Puff Trucking, Inc., et al., **No. M2017-00102-SC-R3-WC** – Filed January 4, 2018.

The employee, a truck driver, was involved in a work-related accident while driving in a severe snow storm. He developed PTSD and was not able to drive again. He filed suit for workers' compensation benefits, alleging permanent and total disability. The trial court found the employee had sustained an 80 per cent permanent partial disability. The Panel **affirmed.** The case involved conflicting proof from physicians and vocational disability experts. The trial court adopted the 20 percent impairment rating by the psychiatrist who was not the original treating physician but later became the authorized treating physician (ATP). The employer raised two issues: it contended the trial court erred in accepting the opinion of the later ATP over the original treating physician and further erred in awarding a vocational disability greater than the expert the court found more credible. The trial court discounted the original physician because he

had abruptly discharged the employee and changed his diagnosis after being rehired by the employer for the purpose of reexamination. The Panel referenced *Kellerman v. Food Lion, Inc*., 929 S.W. 2d 333, 335 (Tenn. 1996) in finding the record more supportive of the trial court's assessment of the two physicians' testimony, and cited *Williams v. Tecumseh Prod. Co*., 978 S.W.2d 932, 936 (Tenn. 1998), relative to the court's exercise of discretion concerning vocational disability. http://www.tncourts.gov/sites/default/files/mayuric_v._huffpuff._opn.pdf

See also ***Kenneth E. Raymer v. Maintenance Insights, LLC, et al.,*** **No. M2017-00986-SC-R3-WC** – Filed June 14, 2018, where the employee sustained injuries to his left shoulder and neck in two separate work accidents five months apart. Medical and vocational experts offered conflicting opinions. The Panel **affirmed** the trial court's award. http://www.tncourts.gov/sites/default/files/raymer.kenneth.opnjo_.pdf

5. Vocational Disability

See above under **Impairment: *Zoran Andric v. Costco Wholesale Membership, Inc*., No. W2017-01661-SC-R3-WC, Michael Mayuric v. Huff & Puff Trucking, Inc., et al. No. M2017-00102-SC-R3-WC, and *Kenneth E. Raymer, Maintenance Insights, LLC*, et al No. M2017-00986-SC-R3-WC.**

6. Reasonable Excuse

See above, under **Procedure 5. Discretionary Costs**, ***Paul Gray v. Wingfoot Commercial Tire Systems, et al.*** **No. W2017-00380-SC-WCM-WC**

7. Acceleration of Preexisting Condition

***Anna Maria Butler v. McKee Foods Corporation*, No. E2017-02471-SC-R3-WC –** Filed December 6, 2018.

The employee, who worked many years as a forklift driver, sustained injuries in a fall on May 2, 2012. After the accident the employee experienced numbness in her arms and legs, which eventually resulted in her inability to operate a forklift or perform other tasks. Before the 2012 accident the employee had been injured at work in 1997 when several packages fell on her but she recovered and resumed her regular duties. During treatment for cervical strain following the 2012 injuries one of her authorized treating physicians (ATP) diagnosed preexisting cervical degenerative disc disease which he concluded did not arise out of employment. The employee later sought independent treatment from an orthopedic surgeon who concluded the employee had

sustained a spinal cord compression injury in the 2012 fall which accelerated her preexisting condition. The trial court found the employee had sustained permanent and total disability due to the 2012 injury. The employer argued the employee's condition did not arise from the work injury in 2012 and pointed to the conclusion by the ATP that her preexisting condition was not causally related to her fall in 2012. The trial court recognized the presumption of correctness to be afforded to opinions on causation by an ATP under T. C. A. § 50-6-102(12)(A)(ii)(2014), but held the employee's medical proof was sufficient to overcome the presumption. The Panel agreed, and **affirmed**.
http://www.tncourts.gov/sites/default/files/correct_butler_vs._mckee_opinion.pdf

Tommy B. Wyatt v. Mueller Company, **No. E2016-02360-SC-R3-WC** – Filed January 22, 2018.

The employee's work as a cell grinder involved moving and manipulating heavy objects. He had back pain for three years before undergoing surgery in 2006. He returned without restrictions but his symptoms persisted. His claim of a cumulative trauma injury was denied by his employer who alleged the employee had preexisting degenerative disease in his spine. The trial court awarded the employee permanent and total disability benefits. The Panel **affirmed**, agreeing the trial court had properly accredited the testimony of physicians who were familiar with the employee's strenuous work requirements and who opined his work primarily caused exacerbation of his spinal condition. **Note:** This case also dealt with a *notice* issue under T. C. A. § 50-6-201 (2008). The employer claimed the employee failed to give timely notice. The employee countered that the 30 day notice period began when he first received a medical diagnosis of the permanent, work-related nature of his injury. The Panel cited *Hill v. Whirlpool Corp.*, No. M2011-01291-WC-R3-WC, 2012 WL 1655768 (Tenn. Workers' Comp. Panel May 10, 2012 and *Banks v. United Parcel Serv., Inc.*, 170 S.W.2d 556, 561 (Tenn. 2005) in finding the evidence did not preponderate against the trial court's ruling that the employee gave timely notice under the circumstances. http://www.tncourts.gov/sites/default/files/wyatt-mueller_opn_and_judgmentfinal_draft.pdf

8. Permanent and Total Disability

***Mid-Cumberland Human Resources Agency v. Brenda Binnion*, No. M2017-00970-SC-R3-WC –** Filed October 31, 2018**.**

A commercial van driver sustained a severe neck injury while assisting a passenger into the van. She was diagnosed with a condition known as torticollis. The trial court found the employee permanently and totally disabled. The single issue on appeal was whether the evidence supported the trial court's finding. The Panel **affirmed**. The employer argued that the evidence as to the employee's disability was based solely on "her self-serving testimony about her overall physical condition and her subjective assessment of her physical limitations." The Panel concluded that

all the other evidence before the trial court, including her medical treatment history, the progression of medical interventions, her use of a deep brain stimulator as part of her treatment which caused side-effects when she attempted to work, the assessment of her credibility by a physician who treated her for years, and the trial court's opportunity to observe her at trial, did not preponderate against the trial court's finding.
http://www.tncourts.gov/sites/default/files/midcumberland-binnion.1opn.pdf

Wesley David Fly v. Mr. Bult's Inc., et al., **No. W2017-00828-SC-R3-WC** – Filed July 25, 2018.

The parties agreed the employee, a truck driver, was permanently and totally disabled but the employer contended non-working factors acting independently of his work injury contributed to his disability. The trial court's award of permanent and total disability was challenged on appeal. The employee was diagnosed with a bulging disc at the L4-5 level with stenosis after his injury on October 27, 2011. He was also diagnosed with degenerative disc disease and spondylosis. The Panel **affirmed**, holding the employee had sufficiently established causation. The employee had no symptoms prior to the injury and he was never able to return to work thereafter.
http://www.tncourts.gov/sites/default/files/flyopn.pdf

James Harrison v. General Motors, LLC, et al., **No. M2016-02522-SC-R3-WC** – Filed February 20, 2018.

The employee sustained a compensable work injury to his right shoulder on October 24, 2014. He had previously sustained a right wrist injury in 2011. He filed a workers' compensation claim alleging permanent and total disability after the shoulder injury. The Court of Workers' Compensation Claims found he was not permanently and totally disabled and awarded permanent partial disability benefits. The employee appealed and the Panel **affirmed**, agreeing with the trial court that the employee had failed to carry the burden of proof to demonstrate he was incapable of working at an income producing job. The employee's physician had assigned a three percent permanent impairment rating to the body as a whole as a result of the shoulder injury. There was conflicting evidence from medical and vocational experts. The trial court resolved the conflicts by evaluating the credibility and weight of the evidence. "(T)he trial court found the physicians' opinions non-determinative." The court's "primary guidance" came from the opinions of vocational experts, whose opinions "are not accorded the same weight as those of medical doctors." While the trial court recognized the employee had sustained a significant vocational disability, it considered the gap between a three percent rating and permanent and total disability too extreme. The Panel noted the trial court assigned greater weight to the testimony of one vocational expert because her opinion accounted for the treating physician's testimony, whereas the other expert's opinion was based on "less reliable sources." "When

expert medical testimony differs, it is within the discretion of the trial court to accept the opinion of one expert over another." Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 679 (Tenn. 2005) http://www.tncourts.gov/sites/default/files/harrison.james_.opn_.pdf

See also ***Billy W. Tankersley v. Batesville Casket Company, Inc., et al.***, **No. M2016-02389-SC-R3-WC –** Filed January 26, 2018. http://www.tncourts.gov/sites/default/files/tankersley-batesville_opn.pdf

9. Second Injury Fund

***Charles Steven Blocker v. Powell Valley Electric Cooperative et al.*, No. E2017-01656-SC-R3-WC** – Filed September 20, 2018.

The employee sustained a compensable cervical spine injury in 2010. He returned to work after a serious cervical fusion procedure but suffered a second, gradual injury to his spine in 2013. A second spinal fusion surgery rendered him permanently and totally disabled due to restrictions imposed by physicians. He filed an action against his employer and the Second Injury Fund (Fund). After an initial finding by the trial court the case was remanded by the Panel so the trial court could reassess the 2013 vocational disability and make the appropriate assignment of the award to the employer and the Fund. The Fund again appealed after the trial court assessed 20% of the award to the employer and 80% to the Fund. The Panel **affirmed**, finding the decision of trial court was supported by the evidence. According to the medical proof, the first fusion procedure was more serious and was the cause of the second fusion. If only the 2013 injury had occurred, the employee could have returned to work.
http://www.tncourts.gov/sites/default/files/blocker_vs._powell_valley.pdf

CONCLUSION

Pursuant to Tennessee Code Annotated Section 50-6-121(i), the Advisory Council on Workers' Compensation respectfully submits this report on significant Supreme Court decisions for the 2018 Calendar Year up to and including the decision filed on December 6, 2018. 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: http://treasury.tn.gov/claims/wcadvisory.html

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