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Advisory Council on Workers' Compensation

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January 14, 2011

MEMORANDUM

TO: Honorable Bill Haslam, Governor of Tennessee
Honorable Beth Harwell, Speaker of the House of Representatives
Honorable Ron Ramsey, Lieutenant Governor
Honorable Jack Johnson, Tennessee State Senator
Honorable Jimmy Eldridge, Tennessee State Representative

FROM: David H. Lillard, Jr., Tennessee State Treasurer and
Chairman, Advisory Council on Workers' Compensation

SUBJECT: Report on Significant Tennessee Supreme Court Cases affecting Workers' Compensation

Pursuant to Tennessee Code Annotated § 50-6-121(g), the Advisory Council on Workers' Compensation hereby issues the attached report reviewing significant Tennessee Supreme Court decisions involving workers' compensation matters for the 2010 calendar year. This report includes a summary of significant decisions, several of which are outlined in detail, but most of which are included in appendix form for easy reference. A majority of the cases are Supreme Court Special Workers' Compensation Panel opinions which more clearly define or uphold the law as it stands, albeit under the unique facts and circumstances presented. If I can be of further assistance, please contact me at (615) 741-2956 or Lynn Ivanick, Administrator for Advisory Council on Workers' Compensation, at (615) 741-4358.

STATE OF TENNESSEE

Advisory Council on Workers' Compensation

SIGNIFICANT SUPREME COURT DECISIONS
CALENDAR YEAR 2010

TREASURY DEPARTMENT
STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0225

David H. Lillard, Jr., State Treasurer, Chair
Lynn Ivanick, Administrator

Significant 2010 Tennessee Supreme Court Workers' Compensation Decisions

INTRODUCTION

Pursuant to Tennessee Code Annotated § 50-6-121(g), 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. Due to its statutorily mandated due date, opinions filed later than early December will be on the 2011 report. This report includes a summary of significant decisions, several of which are outlined in detail, but most of which are included in appendix form for easy reference. A majority of the cases in the appendix are Supreme Court Special Workers' Compensation Panel opinions which more clearly define or uphold the law as it stands, albeit under the unique facts and circumstances presented.

FULL COURT REVIEW

Padilla *addresses the concepts of neutral assault, street risk and the presumption favoring compensability.*

Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507 (Tenn. 2010)

Employee, Jose Sanchez, was found on Employer's premises deceased from gunshot wounds. Employee had not been robbed and there was no burglary of Employer's premises amidst the evidence in this unsolved homicide. Employee's widow filed suit in Chancery Court for Davidson County requesting death benefits under Tennessee's workers' compensation laws.

Even though the location was in a high crime area and the widow theorized that her husband may have interrupted a break-in, the evidence as a whole did not establish a connection between the business and the death. The claim did not, therefore, meet the element of "arising out of" the employment relationship since the fatal assault did not result from the employment situation. The Court additionally found no evidence of the Employee's personal circumstances which would have lead to the assault. As such, it was determined to be a "neutral assault" and not one for which death benefits would issue under Tennessee's workers' compensation statutes. *Wait v. Travelers Indemnity Co. of Illinois*, 240 S.W.3d 220, 227 (Tenn. 2007).

Additionally, the Employee did not have exposure under the proposed "street risks" doctrine since Employer was a manufacturer specifically not open to the general public.

The widow was unable to meet her burden of proof under any of her proposed theories, therefore her claim was denied and no compensation was awarded.

In upholding the Trial Court's decision, the Supreme Court Panel agreed that the neutral assault was not compensable under Tennessee's workers' compensation laws.

The widow then requested full court review, which was granted.

The full Supreme Court upheld the Panel and Trial Court decisions agreeing on the neutral assault and street risks doctrines and indicating that it was not willing to incorporate, in a permanent way, a non-statutory presumption favoring compensability under these circumstances.

Justice Gary R. Wade dissented indicating that the ruling was more in line with the minority rulings rather than following the intent of the statute. Justice Wade pointed out that when there is "reasonable doubt" surrounding the claim's compensability as there was under these facts, the remedial purpose of the Workers' Compensation Act mandates a decision in favor of the employee. In the alternative, Justice Wade believed the "street risk doctrine" was, in particular, directly applicable to this situation since Employee was authorized to open the Employer's business in an area prone to criminal activity, thereby establishing a causal link between the death and the employment sufficient to sustain the widow's claim.

Impact on existing policy: Previous policies regarding the determination as to whether an attack is a "neutral assault" and whether an injury is "arising out of and in the course and scope of" one's employment remain intact with the Court's decision. It is unclear, however, whether this decision represents any departure from prior judicial precedent with respect to the "street risk" doctrine and the "presumption in favor of the employee" when there is *reasonable doubt* as to the circumstances leading to the injury.

Nichols *outlines what circumstances determine whether a layoff is deemed to be a loss of employment.*

Nichols v. Jack Cooper Transport Co. et al., 318 S.W.3d 354 (Tenn. 2010)

Employee suffered two compensable work injuries and returned to work at the pre-injury wage but was later laid off for economic reasons. Employee then voluntarily retired. At issue was whether the layoff constituted a "loss of employment" under the workers' compensation laws for purposes of reconsideration of his previously settled neck claim and, along the same lines, whether he made a "meaningful return to work" for purposes of determining if the lower caps should apply for his pending shoulder claim.

Employee was laid off in April 2007 due to the retooling shut down of a plant which fed Employer's business. It was undisputed that Employee elected to retire in May 2007 in order to maintain medical insurance rather than for reasons related to the injuries. The trial court indicated that if the evidence showed Employee lost his employment prior to his retirement, it would be considered a loss of employment allowing for both reconsideration of the previously settled neck claim *and* a failure to return to work prohibiting the application of the lower statutory cap for the pending shoulder claim.

The trial court outlined three items it took into consideration. First, the court determined that the layoff didn't fall within the normal and customary nature of layoffs

for this employer. This layoff was longer, affected more senior employees, and was at a different time of the year than commonly experienced. Second, recall was not expected. The layoff was announced to be indefinite, so the Court considered it reasonable of Employee to assume he would not be recalled. Third, Employee did not receive any type of pay or benefits during the period of the layoff. All three of these factors led to the trial court's decision that the loss of employment legally occurred in April 2007. Since the Employee's May 2007 retirement came after the loss of employment, the trial court determined Employee was entitled to reconsideration of the previously settled neck claim and was not capped at lower amount for the pending shoulder claim.

Employer appealed the decision arguing that Employee had declined offers to work in facilities in other states during the layoff, that the layoff was expected rather than unusual for this Employer and that "but for" the voluntary retirement, the Employee would have been called back two weeks later. The Panel agreed and found that the employee's own voluntary retirement was the "loss of employment" trigger and overturned the trial court's decision.

The Employee requested review by the full Court. With a recession in full swing and the incidence of layoff on the rise, the Supreme Court granted full court review to address the important and relevant issue of *whether* and *when* a layoff constitutes a "loss of employment" for purposes of Tennessee's workers' compensation laws. The Court found this layoff not to be of the usual and customary type and the offer of work in other terminals to be insufficient to change Employee's work status since the living and travel expenses outweighed the potential income. They further determined there was no expectation of recall and the retirement was previously unplanned.

The full court indicated that each claim must be determined by the date the employment relationship ended chronologically considered with the date of the Employee's retirement. They found the date of loss of employment to be the April 2007 layoff date preceding the May 2007 retirement date. In reversing the Panel and reinstating the trial court's judgment, the full Court concluded that the employment relationship terminated when the employee was laid off, rather than when he subsequently retired. Since the employee was not, therefore, meaningfully returned to work, he qualified for reconsideration of his first injury and was not subject to the lower cap on the second.

Impact on existing policy: The Court distinguished this set of circumstances from its decision in *Edwards* because Edwards was receiving substantially the equivalent of his pay and benefits during the layoff period. When you have both a layoff and retirement, each case must be viewed chronologically under its own facts. If the layoff is out of the ordinary in size, time of year, length and it appears there is no expectation of recall, then a "loss of employment" date is set thereby. If that date precedes a voluntary retirement date, reconsideration of a previously settled claim is permitted and any pending claim is not subject to the lower caps. Likewise, if that "loss of employment" date **follows** the voluntary retirement date, reconsideration will not be permitted on a previously settled claim and the lower cap will apply to a pending claim.

Henderson *addresses Tennessee Rule of Civil Procedure 60.02 regarding setting aside a judgment approving a settlement.*

Henderson v. SAIA, Inc., 318 S.W.3d 328 (Tenn. 2010)

An unrepresented Employee agreed, via affidavit, to the approval of her permanent partial disability settlement. She later filed suit attempting to have the award set aside for fraud and mistake. All evidence before the trial court indicated that Employee had signed the affidavit outlining her understanding and acceptance of not only the amount of the award, but to the award's approval in her absence (per her request). Although the settlement was on the low end, it was still within the realm of "substantially" that to which she was entitled per T.C.A. § 50-6-225(e)(3). The trial court denied her claim.

Employee appealed. After the Panel heard oral argument, but before a decision was rendered, the full Court took the case to consider her request under Tennessee Rule of Civil Procedure 60.02 to set aside a judgment approving a settlement. The trial court's denial of her request for relief was affirmed.

Impact on existing policy: This ruling resulted in no change to Tennessee Rule of Civil Procedure 60.02 regarding when settlements will be set aside. Employees, especially unrepresented Employees, should be mindful that settlements are final.

Carter *and* ***Arias*** *address the admissibility of written medical evidence. In both cases, the same physician was unavailable for cross examination due to his own illness).* ***Arias*** *was decided prior to* ***Carter*** *and cited therein. Together they address evidentiary hearsay exceptions under Tenn. Rules of Evidence, 801-804 and T.C.A. § 50-6-235.*

Carter v. Quality Outdoor Products, Inc., et al., 303 S.W.3d 265 (Tenn. 2010)

Employee filed a workers' compensation complaint and, pursuant to T.C.A. § 50-6-235(c)(2), provided proper notice of his intent to rely at trial on a physician's report. The Employer/Carrier timely objected and properly filed notice of its intent to depose the physician under the same statute.

The Employer was unable to depose the physician, however, due to the doctor's illness, so moved to exclude his report. The trial court denied the motion to exclude the physician's report but granted Employer/Carrier permission to seek an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure.

The Supreme Court granted the appeal and found that, even though the Independent Medical Examination (IME) by the doctor was followed up with both a properly submitted C-32 Standard Form Medical Report for Industrial Injuries and a detailed written report assigning an impairment rating, the physician's unavailability for cross examination rendered the report inadmissible.

The Supreme Court also agreed with Employer/Carrier that the report was not otherwise admissible under the "business records" hearsay exception of the Tenn. Rules of Evid. since this doctor's report was based on an IME performed specifically in anticipation of litigation as opposed to a medical record kept in the normal course of business. Rule 803(6), 804. The report did not fall under any hearsay exception regarding unavailable declarants either, and as such was inadmissible. Rule 804(b). Accordingly, the trial court's decision to allow the report was reversed.

Impact on existing policy: Medical reports of IME physicians are inadmissible if the doctor is not available for cross examination. The reports are, likewise, not automatically admissible as a business record since an IME physician is hired specifically for litigation, and therefore falls outside the "normal course of business" hearsay exception.

Arias v. Duro Standard Products Company, et al., 303 S.W.3d 256 (Tenn. 2010)

Employee sought benefits under workers' compensation laws for an occupational disease and offered an Independent Medical Examination (IME) report in support of causation and permanency. Employer/Carrier objected to the admission of the report citing T.C.A. § 50-6-235(c) and claiming its statutory right to depose the physician thereunder. The physician became too ill, however, to allow for such cross examination.

The Employee argued that § 50-6-235(c) was not the exclusive means of introducing written reports in workers' compensation cases and that the report fell under the hearsay exception for records maintained in the normal course of business. Tenn. Rules of Evid. 803(6). Employer objected. The trial court overruled the objection, admitted the report and awarded benefits to Employee. Employer appealed.

The Supreme Court found that the IME report should not have been admitted into evidence under the workers' compensation statute without the opportunity of cross examination upon proper notice and timely objection as outlined in the statute. The Court pointed out that it is also required that the deposition be taken within a reasonable time, which, if not pursued, will waive the objection and allow the admission of the report.

In reviewing the argument of admissibility under the Rules of Evidence, the Supreme Court referred to its previous decision in the unpublished case of *Baker v. Sally Beauty Supply*, No. 02Sol-9709-CH-0078, (Tenn. 1998) wherein it held that since the T.C.A. § 50-6-235(c) statute was more *specific* than the Rule 803(6) *general* statute, the more specific T.C.A. should be given effect.

The Court overruled its *Baker* decision pointing out that the legislature intended for the Rules of Evidence to *complement* the Workers' Compensation Law, and so determined that T.C.A. § 50-6-235(c) and Rule 803(6) were not inconsistent, but rather, provided *alternative* means of introducing medical evidence in workers' compensation cases. The Court ruled that neither the statute nor the rule was the "exclusive" method of admissibility.

The alternative mean of using Rule 803(6), does not, however, eliminate proponent's satisfaction of that hearsay exception in order to submit the evidence. The Court determined that the report *did not* fall within the business records exception because the

IME report was not created as a regular course of action in business, but was specifically prepared for litigation by one side, and consequently inadmissible.

Having decided that the medical report was inadmissible, the Court determined that, without the report, there was insufficient evidence to establish either causation or permanency, so vacated the trial court's award and dismissed the Complaint instead of remanding.

Impact on existing policy: T.C.A. § 50-6-235(c) is not the exclusive means of introducing written medical reports in workers' compensation cases. The Tennessee Rules of Evidence may serve as a basis for the admission of such reports *if* the report satisfies an exception to the hearsay rule. *Arias* overruled *Baker*.

Excel *speaks to the trial court's discretion regarding weight and admission into evidence of records or testimony of a treating physician as opposed to the independent medical examination (IME) report of a full-time "expert" physician prepared in anticipation of litigation.*

Excel Polymers, LLC v. Broyles, 302 S.W.3d 268 (Tenn. 2010)

In this occupational disease case, a twenty-nine year Employee with long term exposure was awarded permanent total disability by the trial court, then died two days later. His widow filed an additional motion for consideration after his death.

Employer appealed on grounds that the treating physician's testimony establishing causation should not have been admitted, that Employee failed to prove his injury resulted from an occupational disease, and that the trial court erred in its disposition of the widow's motion and suggestion of death following the award.

The Supreme Court determined that the treating physician's testimony was properly allowed as the trial court had weighed the physician's credibility having already been informed of defense counsel's criticisms regarding the doctor's certainty and knowledge. The Court reiterated that it is within the trial court's discretion to determine if such expert testimony is admissible under the Tenn. Rules of Evid.

No ruling was made by the trial court on the motion and suggestion of death since, although it was accepted, it was filed *post* trial court proceedings. The Supreme Court advised that a separate action would have been the better route. However, since no action had been taken, the Court affirmed the judgment of the Panel and trial court and remanded the case for a determination as to the employee's legal dependents and, if proper, the amount of death benefits owed them.

Impact on existing policy: The trial court has discretion regarding the admissibility of evidence and weight to be given competing physicians' opinions. The trial court here chose to give more weight to a treating physician's opinion regarding causation as compared to an opinion from a physician considered to be a "full time expert witness" hired for litigation purposes and without actual practical field experience. The court may

logically give greater weight to the opinion of a physician who has actually *treated* the patient versus one who is hired for litigation purposes and may have only seen the patient once or simply reviewed the medical records without perhaps even seeing the patient.

Further, the six items outlined in T.C.A.§ 50-6-301 regarding whether an injury is an occupational disease remain intact.

Time periods of temporary total disability must be supported by medical evidence.

Austin v. Genlyte Thomas Group, LLC et al., Tenn. Workers Comp. Panel July 12, 2010 THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee alleged a back injury. The authorized treating physician did not find causation, so the Employer denied the claim. The trial court found the injury compensable based upon an independent medical examination (IME) physician's opinion and awarded permanent partial disability benefits as well as past due temporary total disability benefits.

The Employer appealed. The Panel found that temporary total disability benefits may only be awarded during the specific time periods for which they are adequately supported by the medical evidence. The full Supreme Court affirmed and adopted the findings of fact and conclusions of law of the Panel and made the decision of the Panel the judgment of the Court.

Impact on existing policy: This case reiterates the fact that time periods during which temporary total disability benefits are requested must be specifically supported by medical evidence.

SUPREME COURT SPECIAL WORKERS' COMPENSATION PANEL DECISIONS

Appeals of trial court decisions are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel for hearings. The Panel reports its findings of fact and conclusions of law and such judgments automatically become the judgment of the full court in 30 days barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and Tenn. Code Ann. § 50-6-225(e).

Blake applies the new 2010 law regarding the reduction in hours or pay of 50% of a location's workforce not changing an employee's "return to work" status.

Blake v. Nissan North America, Inc., et al., Tenn. Workers Comp. Panel, November 10, 2010 (No. M2009-02173-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee sustained a compensable injury to his right arm. Upon recovery from arm surgery, he returned to work at the same pay. Eighteen months after his return to work, there was a plant wide reduction in hours from 40 to 32 in an effort to save jobs due to a downturn in the economy. Additionally, the Employer offered a buy-out/resignation package to attempt to thin its workforce.

While working the reduced hours, Employee voluntarily took the buyout offer and resigned. When it later came time for settlement of his injury, trial court held that Employee didn't have a meaningful return to work because of the reduction in work hours, so did not apply the lower cap in its award.

The employer appealed contending that the "return to work" status should not change when a plant-wide event affecting all employees occurs. Employee, himself, testified that he thought the reduction in hours was a great idea to prevent layoffs and save jobs.

The Panel applied the new 2010 legislative amendments to T.C.A. § 50-6-241(d)(1)(B)(iii) (Act of June 11, 2010, ch. 1034, §1, 2010 Tenn. Pub. Acts __) which direct that if one location is affected by a pay or hour reduction to at least 50% of its workforce, then the status of the employee doesn't change for either reconsideration or application of lower cap purposes. Accordingly, the Panel modified the trial court's judgment and indicated that there was no easy formula, but rather that the circumstances of each case would need to be reviewed to determine the proper outcome.

SUPREME COURT DECISIONS IN NON-WORKERS' COMPENSATION CASES WITH THE POTENTIAL TO AFFECT WORKERS' COMPENSATION CLAIMS

Gossett v. Tractor Supply, 320 S.W.3d 777 (Tenn. 2010)

Employee claimed he was discharged in retaliation for his refusal to participate in illegal activity. Employer had requested Employee look for creative ways to lower his *previously submitted* inventory reserve analysis. Employee contended that if he removed products from the inventory reserve as so instructed, it would artificially increase the quarterly earnings statement/report to the Securities & Exchange Commission which would violate federal securities regulations. Employee refused and was terminated shortly thereafter.

Although this case primarily addressed issues of Summary Judgment and its proper application, the Court therein reiterated the protected status of either a whistleblower or a person who refuses to partake of illegal activity. It reminded us that once a complainant provides a causal link between his/her termination and the exercise of a protected right (filing a workers' compensation claim would be one example) or compliance with clear public policy, then the burden shifts to the Employer to show a non-pretextual, legitimate reason for the termination.

Jane Doe and John Doe v. Walgreens Company, et al. Tenn. Ct. App. November 24, 2010 (No. W2009-02235-COA-R3-CV)

Employee was a pharmacy technician at Employer. Employee purposefully obtained her personal medications from a different pharmacy location of Employer to protect her privacy and, as such, was both an employee and a customer of Employer. Co-workers inappropriately accessed a secure database, discovered Employee's HIV positive status, and disclosed said information both generally and to Employee's fiancée.

Employee and fiancée sued Employer. The trial court granted Employer's motion to dismiss the suit because of the exclusive remedy rule under the workers' compensation act. T.C.A. § 50-6-108.

Employee appealed. The Court of Appeals found that the injuries sustained did not solely arise out of Employee's employment and that she had sufficiently pled causes of action that fell outside the workers' compensation law. The court pointed out that "[t]here is no formula which will clearly defines the line between accidents and injuries which arise out of and in the course of employment and those which do not." ***DeBow v. First Inv. Prop., Inc.***, 623 S.W.2d 273, 275 (Tenn. 1981). Instead, "each case must be decided with respect to its own attendant circumstances and not by resort to some formula." ***Braden v. Sears, Roebuck & Co.***, 833 S.W.2d 496, 499 (Tenn. 1992). Additionally, Tennessee courts have created an exception to the exclusivity provision for intentional torts committed by an employer against an employee; these torts give rise to a common-law tort action for damages. ***Mize v. Conagra, Inc.***, 734 S.W.2d 334, 336 (Tenn. Ct. App.1987).

The Court of Appeals reversed the trial court and remanded the case.

CONCLUSION

Pursuant to Tennessee Code Annotated § 50-6-121(g), the Advisory Council on Workers' Compensation respectfully submits this report on significant Supreme Court decisions. 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 Employee Affairs Committee of the House of Representatives, the Chair of the Commerce, Labor and Agriculture Committee of the Senate, and the Chair and Co-chair of the special Joint Committee on Workers' Compensation. 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 107th General Assembly pursuant to Tennessee Code Annotated § 3-1-114. In addition, the report will be posted under the Advisory Council on Workers' Compensation tab on the Treasury Department website.

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

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David H. Lillard, Jr., State Treasurer, Chair

APPENDIX

Cases of Interest

Hill v. Whirlpool Corporation, __S.W.3d __(Tenn. 2010) Tenn. Workers Comp. Panel October 21, 2010 (No. M2009-01858-SC-WCM-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

After a plant closure, Employee sought reconsideration of a prior workers' compensation settlement for right shoulder and elbow injuries under T.C.A. § 50-6-241(a)(2) (2008). Employer claimed the elbow injury was a separate injury and a scheduled member not entitled to reconsideration under T.C.A. § 50-6-241(a)(1).

The trial court allowed reconsideration for both injuries as it found them to be concurrent gradual injuries. Additionally, the trial court awarded Employee an amount over the 6x cap due to its finding that Employee had proven three of the four factors required to so breach the impairment cap under T.C.A.§ 50-6-242(a).

Employer appealed and the Panel affirmed the trial court's decision that the injuries were concurrent, but, upon review of vocational expert testimony, which it found to be lacking, concluded that employee had not satisfied his burden of proof under T. C. A. § 50-6-242(a), and so modified the trial court's award by applying the cap to the permanent partial disability award.

Employee appealed the Panel's decision, but the full Supreme Court denied the motion. The Panel decision was adopted and affirmed.

Griffin v. Walker Die Casting, Inc., et al., Tenn. Workers Comp Panel, November 10, 2010 (No. M2009-01773-SC-WCM-**WC)** THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee sought to have a total left knee replacement based upon a previously settled compensable left knee contusion claim. The trial court awarded him benefits including the cost of surgery and attorney's fees. The Employer appealed.

Employee relied solely on written medical records rather than a current deposition or testimony of a physician linking the knee replacement causally to the work related knee contusion. The medical records since the 2007 settlement repeatedly referred to Employee's bilateral degenerative joint disease and osteoarthritis as the reason for the need for treatment. None established causation. Employee failed to sustain his burden of proving the causal relationship between the injury and the need for the total knee replacement via a preponderance of expert medical testimony, so the Panel reversed the trial court's award.

Gardner v. Randstad North America, L.P., Tenn. Workers Comp. Panel, November 1, 2010 (No. M2009-01214-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee complained of a work related left arm injury. Employer denied causation. The trial court awarded benefits for the left wrist, left elbow and left shoulder. Additionally, the trial court ordered payment to the physician and instructed that the

physician should reimburse TennCare. Employer appealed contending the C-20 First Report of Injury should not have been admitted into evidence and that there were intervening acts terminating its responsibility, among other items.

Although the physician testified at trial that he remembered Employee complaining about her shoulder injury, nothing was in his notes to so document. Next, there was some cloudiness regarding contradictory testimony of two altercations which took place *after* the workplace accident and whether they affected the injury.

The Panel concluded that the evidence supported the claim for Employee's arm, but found that the evidence did not support the trial court's ruling regarding her shoulder. Additionally, the Panel advised that the Employer/Carrier must pay third party providers directly. The case was remanded to the trial court for a determination of benefits for the arm *only* and for entry of a proper order regarding reimbursement of medical expenses to both the physician and TennCare directly.

Calvin D. Ervin v. Jones Bros., Inc, et al. and Kevin D. Ervin v. Jones Bros., Inc, et al., Tenn. Workers Comp. Panel, October 22, 2010 (Nos. M2008-02755-WC-R3-WC, M2008-02753-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

This consolidated appeal involves two employees who were injured while traveling in a personal vehicle during lunchtime while going from one job site to another.

Employees Calvin and Kevin dropped Kevin's car off for repairs in Clarksville. Their supervisor picked them up in Employer's van to take them to a job site in Nashville. After completion of that job, supervisor drove employees back to Clarksville to pick up their car and informed them that he was going to pick up their paychecks before heading to a new job site across town for which he gave them directions. Supervisor told employees that they could take a lunch break if they wanted, but they skipped lunch and headed to the new job site so as not to risk losing their jobs if they weren't prepared prior to the arrival of the asphalt truck. On the way to the new job site, with Kevin driving and Calvin a passenger, they were involved in an automobile accident.

It is undisputed that Employer provided an unpaid, 30-minute lunch break to its employees and that the employees would not be paid for working until the Supervisor arrived at the job site. Further, Employer did not pay their employees for mileage or for maintenance of their personal vehicles, because its employees were not considered to be on the clock when driving to and from job sites.

Medically, the parties produced dueling physician reports regarding causation and impairment. Based upon all of the evidence, the trial court found the injuries compensable and awarded benefits for permanent partial impairment to both Employees.

The Employer appealed, arguing that the Employees were not injured in the scope of employment and the injuries did not arise out of employment citing *Howard v. Cornerstone Med. Assoc.*, 54 S.W.3d 238 (Tenn. 2001) wherein the employee was a physician who used his own personal vehicle to travel between his employer's office and the various locations required to work, whether that be a hospital, clinic or nursing home. When the physician was in an accident between his home and the first location, he was

not yet considered to be working for the employer and so the injuries were not compensable. *Id.* At 240.

The Panel indicated that this case presented a "close call" but distinguished these facts from those in *Howard* since the Employees herein were not on their way to work at the onset of their workday, nor were they leaving work at the end of their work day. They had already begun their workday and were traveling to a new job site, therefore the travel was deemed to be "for" their Employer and the injuries arising out of that employment compensable. The Panel did modify the trial court's ruling on the extent of disability, however, indicating that the proof of permanent impairment was weak. It reduced the award for each Employee and held each of them responsible for a portion of the costs of the appeal.

Williams v. United Parcel Service, et al. __S.W.3d__, Tenn. Workers Comp. Panel, September 28, 2010 (No. M2009-02334-WC-R3-WC)

Employee had a 2006 compensable *left* knee injury. He later filed a claim for benefits for injury to his *right* knee resulting from over-compensation due to the left knee injury. The employer denied liability for the right knee and presented a Medical Impairment Registry ("MIR") report in support prepared pursuant to T.C.A.§ 50-6-204(d)(5) (Supp. 2009). The trial court, however, sustained the Employee's objection to the introduction of that report and awarded permanent partial disability benefits for each leg.

The Employer appealed, claiming error for the exclusion of the MIR report and for the determination that the right knee was a separate compensable injury. The Panel affirmed the trial court's judgment.

Princinsky v. Premier Manufacturing Support Services, Inc., et al., Tenn. Workers Comp. Panel, September 23, 2010 (No. M2009-00207-SC-WCM-WC). THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee suffered a compensable 2002 injury. Initially, she was able to return to work and settled that claim properly under the lower cap. In 2005, Employee suffered another workplace injury from which she was unable to return to work. She settled the 2005 injury without being subject to the lower cap accordingly. Employee then sought reconsideration of her 2002 settlement under T.C.A. § 50-6-241(a)(2). The trial court found that Employee was permanently and totally disabled as a result of that injury and awarded benefits accordingly.

The Employer and the Second Injury Fund have appealed. The Panel affirmed the trial court's decision that Employee was permanently and totally disabled from the 2002 injury, but found that it failed to offset the award by benefits previously provided, so the case was remanded for correction of that error only.

Douthit v. Griffin Industries, Inc. and Liberty Mutual Group, Tenn. Workers Comp. Panel, September 08, 2010, (No. M2009-01857-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee suffered a compensable injury to his left knee, returned to his employment and settled the claim within the lower caps as appropriate under T.C.A. § 50-6-241(d)(1)(A). Employee then had a second injury. A committee of co-workers determined that both injuries were preventable and Employee was terminated for

violation of company rules. Employee filed for reconsideration and the trial court determined that Employee's behavior did not amount to the level sufficient to deny reconsideration and that he was, therefore, eligible.

Employer appealed. The Panel affirmed the trial court's decision to permit reconsideration

Meeks v. Hartford Insurance Company of the Midwest, Tenn. Workers Comp. Panel, August 30, 2010 (No.W2009-01919-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Meeks *was heard* before *the new law went into affect, so is an opposite result from* ***Blake****, cited earlier.*

Employee suffered two compensable injuries on the same day. Before he reached maximum medical improvement, his Employer was sold to another entity. The trial court held that the corporate transaction/sale caused a loss of employment pursuant to T.C.A. § 50-6-241(d) and awarded permanent partial disability benefits without applying the lower cap.

Employer appealed contending that the change in stock ownership did not amount to a loss of employment. The Panel affirmed the trial court's judgment.

Tomlinson v. Zurich American Insurance, Tenn. Workers Comp. Panel, August 30, 2010 (No. W2009-01350-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

The Panel affirmed the trial court's decision that the sale of the employer amounted to a loss of employment under T.C.A. § 50-6-241(d).

Hughes vs. Robert Brent d/b/a Apartment Maintenance Specialists, et al., Tenn. Workers Comp. Panel, August 25, 2010 (No. E2009-01377-WC-R3-WC). THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

The Panel reversed the trial court's grant of summary judgment in favor of Employer and held that Employee's action was not barred by the one year statute of limitations under T.C.A. § 50-6-203(b) within which to file for a benefit review conference, and was, instead, tolled by the filing of his request for assistance. Remanded with instruction not to penalize an employee for using the administrative process as this would subvert the purpose of the workers' compensation statute.

Tuten v. Johnson Controls, Inc., et al., Tenn. Workers' Comp. Panel, August 25, 2010 (No.W2009-01426-SC-WCM-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee suffered a compensable work injury, gave notice and began receiving treatment. Employer "sold" to another company which continued operations. Employee had surgery, returned to work, but was then permanently laid off. Employee brought action against both Employers, each of which argued that the other was the responsible party. The trial court found the "purchasing" Employer responsible and awarded compensation based upon an impairment rating achieved through the Medical Impairment Registry (MIR) program. The Panel affirmed the trial court's award.

Mayes vs. Peebles, Inc., Tenn. Workers Comp. Panel, August 23, 2010, (No. E2009-02030-WC-R3-WC). THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee settled his compensable injury, but his authorized treating physician (ATP) later recommended surgery. The Employer/Carrier's utilization review (UR) program declined to approve the surgery. Employee appealed without success, then sued for coverage. Employer claimed failure to exhaust administrative remedies. The Panel affirmed the trial court's decision to compel the authorization of the surgery as well as for an award of attorney's fees for Employee.

Richardson vs. James Brown Contracting, Inc. d/b/a James Brown Trucking Co., et al., Tenn. Workers Comp. Panel, August 18, 2010 (No.E2009-01785-WC-R9-WC). THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

The injured Employee was an owner/operator of a tractor trailer, and, as such, an independent contractor. He had, however, contracted with his carrier for workers' compensation coverage as permitted by statute. He was entitled to workers' compensation benefits for a workplace injury. The trial court reserved judgment on the award and permitted an interlocutory appeal on that sole issue. The Panel upheld the trial court and remanded for the disposition of the remaining issues.

Moran vs. Fulton Bellows, Inc., Tenn. Workers Comp. Panel, August 17, 2010 (No. E2009-01923-WC-R3-WC). THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee filed a civil action for work related hearing loss 94 days after an impasse was reached at a benefit review conference. The Panel affirmed the trial court's granting of Employer's motion to dismiss on the basis of the 90-day statute of limitations, T.C.A.. § 50-6-203(g)(1) (2008).

Park-Pegram, et al. v. Findley & Pegram Company, Inc., Tenn. Workers Comp. Panel, August 17, 2010 (No. W2009-00231-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Decedent was the president of Employer. He died from injuries sustained in a motorcycle accident which occurred shortly after he had made a bank deposit for the business. His itinerary was unknown, but he was carrying business documents and headed in the direction of a potential future project. The trial court concluded that he was a traveling employee at the time of the accident, and awarded workers' compensation death benefits to his widow along with post-judgment interest.

Employer has appealed. The Panel concluded that Decedent was *not* a traveling employee, but *was* acting in the course of his employment at the time of the accident, so was covered by the workers' compensation statute. The statute does not allow for the award of post-judgment interest, however, so the trial court's award was modified with respect to the interest, but affirmed in all other respects.

Benson vs. Old Republic Insurance Company, et al., Tenn. Workers Comp. Panel, July 28, 2010 (No. E2009-01173-WC-R3-WC). THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

While working for Employer in 2002, Employee developed bilateral carpal tunnel syndrome. Her claim was accepted, she had surgery on her right arm in 2004 and returned to work. She was later terminated for reasons unrelated to her injury. She found new employment in 2006, and in 2007, her treating physician recommended surgery for her left arm. This Employer denied the claim, contending that her subsequent employer was liable for the condition and its effects. The Panel affirmed the trial court's ruling that Employee's condition had been worsened by her later employment. The claim was dismissed.

Kelton v. Bridgestone Americas Holding, Inc. a/k/a Bridgestone/Firestone, Inc., et al. Tenn. Workers Comp. Panel, July 08, 2010 (No. M2009-01026-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee alleged compensable neck and back injuries. Employer denied liability asserting that the injuries were either pre-existing degenerative conditions or were worsened by an intervening auto accident. Dueling doctors' opinions were presented as is usually the case. One physician saw the Employee closer in time to the injury but the other was able to see the spine during the surgery. The authorized treating physician felt that most of the issues in the spine were age, rather than work related. The other physician indicated that, after 32 years working for this employer, it was all work related. The trial court found the neck injury to be compensable, but denied recovery for the alleged lower back injury. It awarded permanent partial disability benefits, temporary total disability benefits, and required the employer to provide medical care for the neck injury. Upon Employer's appeal, the Panel affirmed the trial court's judgment.

Thomison v. Yates Services, LLC, Tenn. Workers Comp. Panel, July 08, 2010 (No. M2009-01556-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee claimed to have suffered two compensable injuries to his left knee. The 2004 injury was accepted as compensable by employer. Treatment included surgery. Employee returned to work and the claim settled. Employer denied liability for an alleged 2006 injury to the same knee, however.

The trial court found that the proof established that the employee suffered a second injury in 2006 and awarded benefits. The Employer appealed.

The Panel concluded that the record lacked medical evidence of causation or of any connection between the 2006 injury and the disability. Although the Employee had sought treatment, he had failed to mention the 2006 injury to either his primary care physician or the physician who performed his independent medical examination (IME), so the Panel reversed the judgment of the trial court and remanded the case.

Allred v. Berkline, LLC, et al., Tenn. Workers Comp. Panel, June 30, 2010, (No. M2009-01236-SC-WCM-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee claimed gradual repetitive motion injuries to his arms and shoulders. The Employer denied liability based on an affirmative defense of misrepresentation of physical condition. During the application process, Employee had not disclosed prior

gradual injuries to his left shoulder and arm from a previous job for which he had settled a workers' compensation disability claim.

The trial court concluded that the employer did not sustain its burden with respect to the misrepresentation defense, so ordered disability benefits. Employer appealed.

The Panel found that the employee's misrepresentation was willful, was relied upon by the employer and was causally related to his present injuries. It reversed the trial court's award of benefits.

Hall v. Am Comp Assurance Corporation, Tenn. Workers Comp. Panel, June 28, 2010 (No.W2009-01461-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee suffered injuries as a result of repetitive use of his hands and arms in the course of his employment. Employer denied Employee's claim was compensable and claimed any such injury to be as a result of Employee's part time second job. The trial court found that Employee had sustained compensable injuries and awarded benefits.

Employer appeal was denied and the Panel affirmed the trial court's judgment.

Todd v. MTD Consumer Group, et al., Tenn. Workers Comp. Panel, May 13, 2010 (No.W2008-02707-SC-WCM-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

The employee sustained a compensable injury, was treated and released by the authorized physicians to return to work with no permanent impairment or restrictions. The employee sought further medical treatment on his own including surgery on his back and neck. He filed suit against his employer, and, having had two previous workers' compensation awards, several months later amended his complaint to add the Second Injury Fund as a defendant.

The trial court found that the employee's injury was compensable and awarded benefits. The court apportioned the award between Employer and Second Injury Fund according to T.C.A. § 50-6-208(b), but it then dismissed all claims against the Second Injury Fund based upon the statute of limitations. The Panel affirmed the trial court's judgment.

Myers v. Vanderbilt University, Tenn. Workers Comp. Panel, May 11, 2010 (No. M2008-02009-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee claimed an occupational disease and filed a claim for benefits. The Employer requested the court order Employee to undergo an independent medical examination in accordance with T.C.A. § 50-6-204(d)(1) (Supp. 2009), but the court refused to so order. The trial court determined that Employee's injury was an occupational disease and awarded benefits. The Employer appealed. The Panel found that the IME should have been ordered so vacated the trial court's judgment and remanded the case for further proceedings.

Day v. Zurich American Insurance, Tenn. Workers Comp. Panel, March 31, 2010 (No. W2009-01349-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee suffered a compensable injury and returned to her pre-injury job, but the holding company which owned her employer had been sold to another entity. The trial court held that she had not had a meaningful return to work and awarded benefits in excess of the statutory lower cap contained in T.C.A.§ 50-6-241(d)(1)(A). Employer appealed, but the Panel noted that the trial court had applied existing caselaw and affirmed the judgment.

Resh v. Building Materials Manufacturing Corporation d/b/a GAF Fiberglass Corporation, Tenn. Workers Comp. Panel, March 11, 2010 (No. M2009-00028-SC-WCM-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee filed a claim for hearing loss due to exposure to workplace noise. The trial court found in Employee's favor and awarded benefits. The Employer appealed. The Panel found that the expert medical evidence was not sufficient to establish that Employee's hearing loss was work related, so reversed the trial court's judgment.

Turner v. Bridgestone/Firestone North American Tire, LLC, et al., Tenn. Workers Comp. Panel, March 02, 2010 (No. M2009-00554-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee suffered a compensable injury and alleged that he also sustained a mental injury as a result of chronic pain. The Employer denied the mental injury contending that any such alleged chronic pain was the result of previous injuries or surgeries. The trial court awarded benefits for the mental injury. The employer appealed, but the Panel affirmed the trial court's award.

Brooks v. Paccar, Inc. d/b/a Peterbilt Motors Company, __S.W. 3d __ Tenn. Workers Comp. Panel, February 10, 2010 (No. M2009-00602-WC-R3-WC)

Voluntary non-suit is not effective until an Order is entered. Tenn. R. Civ. P. 41.01(3).

Employee first filed an action in Chancery Court, later filed a notice of voluntary nonsuit, and then immediately refiled his action in Circuit Court. The employer moved to dismiss the Circuit Court action since the Chancery Court action was *still pending* at the time the Circuit Court action was filed (no judgment had yet been entered). The Circuit Court granted the motion. The Panel upheld that dismissal as did the full court.

Wheeler v. Whirlpool Corporation, Tenn. Workers Comp. Panel, February 02, 2010 (No. M2009-00206-WC-R3-WC) THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Employee had compensable injuries with surgery and returned to work. Her product line was later shut down and she was offered the option of voluntary layoff or a move to another line. She chose voluntary layoff. The trial court found that she had a meaningful return to work, so awarded benefits by applying the lower cap. Employee appealed. The Panel reversed and modified her award so as not to be limited by the lower cap.

ABBREVIATIONS USED THROUGHOUT

ATP = Authorized treating physician
IME = Independent medical examination
M.I.R.R. = Medical Impairment Rating Registry Program
MMI = Maximum Medical Improvement
Panel = The Supreme Court Special Workers' Compensation Appeals Panel = Tenn. Workers' Comp. Panel
PPD = Permanent partial disability
PTD = Permanent total disability
T.C.A. = Tennessee Code Annotated, also known as the Workers' Compensation Act or The Workers' Compensation Statute or Law when referring to §§ 50-6-101 et. seq. = Tenn Code Ann.
Tenn. S.Ct. = Tennessee Supreme Court
TPD = Temporary partial disability
T.R.E., Tenn. Rules of Evid. = Tennessee Rules of Evidence
T. R. Civ. Pro = Tennessee Rules of Civil Procedure
Trial Court – any of the numerous Chancery or Circuit courts which exist in the counties of the state of Tennessee
TTD = Temporary total disability