STATE OF TENNESSEE

Workers' Compensation Advisory Council

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SIGNIFICANT SUPREME COURT DECISIONS
CALENDAR YEAR 2006

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SUMMARY OF
SIGNIFICANT SUPREME COURT DECISIONS
CALENDAR YEAR 2006

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INTRODUCTION

Tennessee Code Annotated §50-6-121(g) requires the Workers' Compensation Advisory Council to issue an annual report that includes a summary of significant supreme court decisions on workers' compensation on or before January 15 of each year. The following is the Advisory Council's report that includes a summary of each significant case and an explanation of the impact of the case on existing policy.

SIGNIFICANT SUPREME COURT DECISIONS

CALENDAR YEAR 2006

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1. CONSTITUTIONALITY OF 2004 REFORM ACT

Lynch v. City of Jellico, et al., and *Lozano v. Lincoln Memorial University, et al.*,
205 S.W.3d 384 (Tenn. 2006)
[Opinion Filed: August 30, 2006]

Facts: For purposes of discussion of the appeal heard by the Supreme Court, the underlying facts pertaining to the actual injuries sustained by the employees are not relevant. Each named plaintiff filed a workers' compensation action seeking benefits and included in the complaint a challenge to the constitutionality of key portions of the Workers' Compensation Reform Act of 2004 (Reform Act). The portions challenged as unconstitutional were: the mandatory benefit review conference; the cap on benefits for permanent partial disability and the use of AMA Guides to determine anatomical impairment.

Trial Court / Panel Results: The trial judge was the same in both cases. The trial court held the mandatory benefit review conference violated the separation of powers doctrine of the Tennessee Constitution; procedural and substantive due process under both the state and federal constitutions; the open courts doctrine of the Tennessee Constitution and *TC A* §50-6-225. The trial court found the multiplier provisions of *TCA* §50-6-241 violated due process and equal protection. Regarding the sections of the law requiring use of the AMA Guides, the trial court found these sections violated equal protection, due process, the Tennessee Human Rights Act (THRA) and the Tennessee Handicap Act (THA). The trial court certified its decisions as final in each case as to the constitutional claims only. The plaintiffs' underlying claims for vocational benefits were not determined. **The Supreme Court consolidated the two cases and transferred the cases to the full Court prior to a hearing before the Appeals Panel.**
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Supreme Court Decision: The Supreme Court held the benefit review conference process does not violate procedural or substantive due process; does not violate the separation of powers doctrine and does not violate the open courts doctrine. The Court noted the benefit review conference requirement does not prohibit a workers' compensation court action and that injured workers can have their rights judicially determined notwithstanding the benefit review conference.

Regarding the multiplier provisions of the Reform Act, the Supreme Court held the provisions do not violate the equal protection provisions of the federal and state constitutions under the rational basis test because the classification system has a reasonable relationship to legitimate state interests - i.e., predictability in the law and keeping workers' compensation premiums from escalating to the point that employers cannot afford them. In addition, the Supreme Court noted the statute gives trial courts discretion to exceed the multipliers in appropriate cases.

The Supreme Court also held constitutional the statute mandating the use of the AMA Guides holding the reasonable and legitimate state interests applicable to multipliers - uniformity, fairness and predictability - are equally applicable to the use of the AMA Guides. The Supreme Court also recognized the statute has a provision allowing use of another method of determining impairment in cases not covered in the AMA Guides.

Finally, the Supreme Court held the multiplier provisions used in conjunction with the AMA Guides do not violate the THRA and the THA.

Impact on Existing Policy: This case clarifies the law for the trial courts and practitioners. Since the effective date of the Reform Act, many attorneys continued to file workers' compensation complaints in the trial courts and many included claims that the Act was unconstitutional. As a result of the Supreme Court's decision, the law is now settled and the lawyers know they must exhaust the benefit review process prior to filing a workers' compensation complaint in court.

[Note: Anecdotal information indicates some Tennessee courts and/or clerks of court are still permitting complaints to be filed prior to the exhaustion of the benefit review conference process. This is obviously contrary to the holding in the Lynch-Lozano case even if the case is filed and then held in abeyance.]

2. RECONSIDERATION OF DISABILITY

Clark v. Lowe's Home Centers, et al., 201 S.W.3d 647 (Tenn. 2006)

[Opinion Filed: August 24, 2006]

Facts: The employee, Mr. Clark, worked for Lowe's from 1992 until his discharge in 2003. In 1994, he sustained a work related injury [INJURY #1] to his right shoulder and the claim was settled for 17.5% permanent partial disability (PPD) to the body as a whole. In 2000, the employee suffered another injury to his right shoulder, neck and right arm [INJURY #2]. The claim for INJURY #2 (2000 claim) was settled for 46.72% PPD to the body as a whole, which was within the statutory multipliers in effect in 2000 (i.e., 2.5 times the medical impairment rating). In 2003, Mr. Clark sustained another injury [INJURY #3] - this time to his right hand, wrist, elbow and arm. The employer terminated him later in the same year.

On September 19, 2003, Mr. Clark filed a complaint against the employer and the Second Injury Fund seeking reconsideration of the 46.72% PPD settlement for INJURY #2 because the employer had discharged him. Also, on September 19, 2003, Mr. Clark filed a separate workers' compensation complaint against Lowe's for INJURY #3 - the 2003 wrist injury.

Trial/Panel Results: In November, 2004, the trial court enlarged the award (settlement) of INJURY #2 (for which Mr. Clark had originally received 46.72% PPD) by an additional 214 weeks, giving him a total of 400 weeks for INJURY #2. The court apportioned the enlarged award between the employer and the Second Injury Fund. Although the Second Injury Fund did not dispute the apportionment, it filed an appeal arguing the employee was not entitled to an enlargement of the benefits initially paid for INJURY #2 because he sustained and sought workers' compensation benefits for INJURY #3. The Second Injury Fund argued that *Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226 (Tenn. 1999) preluded an enlargement of the award for INJURY #2 because Mr. Clark had filed a complaint seeking benefits for INJURY #3.

The Appeals Panel heard oral argument for the increased award for INJURY # 2 in November, 2005. **Prior to a decision by the Panel, the case was transferred to the full Supreme Court.**

Supreme Court Decision: The issue before the Supreme Court was the effect of INJURY # 3 on the applicability of *TCA* §50-6-241(a)(2) to the claim for increased benefits for INJURY #2. The Supreme Court held *Brewer* was not applicable to the claim because Mr. Clark had not sought an enlargement of the award for INJURY #2 and benefits for INJURY #3 in the same lawsuit, which is what the Court's opinion in *Brewer* prohibited. The Supreme Court held that reconsideration of a prior award under *TCA* §50-6-241(a)(2) is not precluded by a subsequent work-related injury noting that "(a) worker does not forfeit his right to reconsideration simply because he is unlucky enough to have a subsequent work-related injury."

Impact on Existing Policy: This issue was one of first impression for the Court. The Supreme Court clarified an employee may pursue a claim for statutory reconsideration (for permanent partial disability) and pursue benefits for a subsequent work related injury in another lawsuit.

3. EMPLOYEE STATUS - SUBROGATION

Hubble v. Dyer Nursing Home, 188 S.W.3d 525 (Tenn. 2006)
[Opinion Filed: April 12, 2006]

Facts: At age 17, Ms. Hubble became interested in working at the Dyer Nursing Home and went to the nursing home on December 15, 2000, and completed a work application. As a part of the hiring process, Ms. Hubble was required to take a skin TB test, which she did on December 15. She returned three days later on December 18, learned the TB test was negative and was given an "employee package" by the Director of Nursing. On the 18th, Ms. Hubble also filled out and signed employment documents necessary for tax and payroll purposes. She and the Director of Nursing agreed on the hourly pay rate and Ms. Hubble was sent to a nearby facility for a physical examination, which she passed. The Director of Nursing told her she was required to attend three days of orientation (December 19, 20 and 21) before starting work at the nursing home. The

orientation would be held at a separate nursing home facility, unaffiliated with Dyer Nursing Home, located 30 miles away in Bells, Tennessee. Ms. Hubble was told to report to work at the Dyer Nursing Home at 6:00 a.m. on the day following her orientation training.

Ms. Hubble rode to the orientation in a car driven by Scarlet Caton, an employee of the Dyer Nursing Home who was going to the Bells facility for additional training. Also in the car was Casey Sheffield, another newly-hired employee. While driving to Bells on the third day of orientation, the women were involved in an automobile accident. Ms. Hubble sustained significant injuries resulting in the fusion of her spine and her right ankle. Her medical expenses totaled $587,331.50.

Dyer Nursing Home denied workers' compensation benefits to Ms. Hubble claiming she was only a "prospective employee", not an employee because her employment was conditioned on her attending all three days of orientation and arriving at the nursing home on the morning following the completion of orientation and "clocking in". However, at trial the Director of Nursing did testify that all employees get paid for the full time spent in orientation and the pay was reflected on the first check from the nursing home.

At the time of the accident, the driver, Scarlet Caton, was insured by State Farm Insurance Company under a policy that included $100,000 liability benefits and $100,000 medical expenses. State Farm settled with Ms. Hubble for the full policy limits for both liability and medical expenses.

Ms. Hubble sued the nursing home for workers' compensation benefits. State Farm sought to intervene alleging if the nursing home was liable then State Farm was entitled to reimbursement of its $200,000 subrogation interest.

Trial/Panel Results: The trial court found Ms. Hubble to be an employee of Dyer Nursing Home at the time of the accident. The court awarded Ms. Hubble permanent partial disability benefits in the amount of 95% to the body as a whole, plus past and future medical payments. In addition, the court ordered Dyer Nursing Home to reimburse State Farm for the $100,000 in medical payments it had made under the liability insurance policy. **The Supreme Court accepted review of the appeal before the case was heard or considered by the Panel.**

Supreme Court Decision:

* Issue #1: Employee Status - employee or not?

The Supreme Court discussed two Panel decisions that appear similar in facts, but different in outcome. In the 2000 Panel decision, *Beach v. Schwan's Sales Enter., Inc.*, 2000 WL 758341, Tenn. Workers' Comp. Panel, June 13, 2000 (No. M1999-00416-WC-R3-CV), the plaintiff had completed an interview and was told he would be offered the job if he successfully completed a "ride day" with another salesperson. During ride day, the plaintiff fell as he stepped out of the truck and was seriously injured. The Panel denied benefits stating the plaintiff had to prove there was an express or implied agreement the worker was to be compensated for his services by the alleged employer and there was no evidence in the record that he was or expected to be compensated by Schwan's. In the 2001 Panel decision, *Williams v. Walden Sec.*, 2001 WL 363070, Tenn. Workers' Comp. Panel, April 12, 2001 (No. M2000-01273-WC-R3-CV), the plaintiff applied for a security position at Nashville Electric Service and was told he needed the approval of a representative of NES prior to commencing work. He received this approval and was instructed to meet with the guard he would be replacing for training - a two hour period for which he would not be paid. During a walking tour of the facility, he fell, sustaining a severe injury to his eye. The Panel held for the plaintiff stating, "[w]e find in the record nothing which would exclude the claimant and it is clear from the record that the claimant was under a contract of hire at the time of the injury, whether he was paid for his time or not." *Id.* at 2.

The Supreme Court found the facts in Ms. Hubble's claim were distinguishable from *Beach* and more akin to *Williams* and that the evidence made it clear that Ms. Hubble was offered a job at the nursing home and she accepted the job and that she was to be paid for attending orientation, but the orientation was not part of the application process in the way a test or physical would be part of the application process.

* Issue #2: Subrogation - who gets what?

Another issue addressed by the Supreme Court was subrogation. The trial court had ordered the employer/defendant to reimburse State Farm the $100,000 it had paid to/on behalf of Ms. Hubble for medical payments. State Farm argued it was entitled to be reimbursed by the employer

because the workers' compensation law requires the employer to pay all reasonable and necessary medical expenses. The employer argued not only should it not have to reimburse State Farm, but that it should receive a credit for the $100,000 paid by State Farm because the law gives an employer who has paid work comp benefits the right of subrogation against any recovery the employee obtains from a third-party for the same injury.

The Supreme Court noted that State Farm's policy provided that medical payment coverage benefits are not payable "to the extent workers' compensation benefits are required to be payable". The Court also noted that Tennessee law is crystal clear that an employer bears the responsibility to pay reasonable and necessary medical expenses for work-related injuries and where the employee or employee's health insurance carrier has paid the medical expenses, the employer must reimburse the payor. In this case, however, the entity that paid for the medical expenses was the liability carrier for the driver of the automobile. When this $100,000 was paid, the employer was denying Ms. Hubble was entitled to workers' compensation benefits. The Supreme Court held that State Farm was entitled to recover the $100,000 medical payment benefits from the employer because the employer has the statutory obligation to pay medical expenses and State Farm's policy specified that medical benefits were not payable if the medical expenses are covered by workers' compensation.

State Farm also claimed it was entitled to recover the $100,000 it had paid to Ms. Hubble under the liability provision of its policy under the doctrine of "equitable subrogation". The employer claimed it should receive a credit under the workers' compensation statute for the $100,000 State Farm paid to Ms. Hubble so she does not receive a double recovery. The Supreme Court held that State Farm did not have a legal duty to pay anything to Ms. Hubble because its insured, the driver, was immune from suit as she was Ms. Hubble's co-employee. Therefore, State Farm's payment became a voluntary payment and they were not entitled to "equitable subrogation". The Supreme Court then addressed the question of whether the employer was entitled to a credit for the $100,000 received by Ms. Hubble from State Farm. The Supreme Court held the subrogation statute, §50-6-112, applies only where the injury "was caused under circumstances *creating a legal liability against some person other than the employer* to pay damages". (emphasis added by the Supreme Court.) Citing a 1954 case in which it had held that a co-employee who negligently causes

an injury to a co-employee while acting within the course of his employment is not "some person other than the employer", the Supreme Court denied the employer's claim for the $100,000 credit.

Impact on Existing Policy:

* Issue #1: Employee Status

The Supreme Court appears to be attempting to clarify the law on an issue in which two Panel decisions appear in conflict - - whether remuneration is required in order to be deemed an employee or whether an offer and acceptance is all that is required. On the one hand, language in the *Hubble* case appears to embrace the rule that no remuneration is required, but on the other hand it recognized there was evidence that Ms. Hubble was to be paid for the orientation period. It is suggested this opinion may not clarify this issue and that there still exists conflicting Panel decisions.

* Issue #2: Subrogation

Application of "equitable subrogation" and "statutory subrogation" in one workers' compensation claim appears not to have been addressed by the Supreme Court prior to this case. While the Court recognized the validity and applicability of the workers' compensation subrogation statute in appropriate circumstances and approved the "equitable subrogation" concept, this apparently simple resolution may mask a more complex problem.

In the Hubble opinion, the Supreme Court discusses the difficulty for injured workers when the "employer" denies a claim and the health insurance policies and liability policies have provisions that they do not pay if the injuries are covered by workers' compensation. However, it does not resolve the issue: How is an employee to obtain medical benefits when the workers' compensation claim is denied by the employer, but other insurance contracts do not cover injuries that "occur at work", are "work-related" or are "covered by workers' compensation". If the employee answers truthfully that the injury occurred at work, the insurance carrier may deny benefits because they are covered by workers' compensation.

4. DEATH BENEFITS - SOCIAL SECURITY OFFSET & SUBROGATION

Correll v. E.I. DuPont de Nemours & Co., ___S.W.3d____, 2006 WL 3246097, Tenn. November 9, 2006 (No. E2005-02112-SC-R3-CV)

Facts: The employee, Mr. Correll, worked for DuPont for 37 years prior to retirement in 1985. During his employment he was exposed to asbestos and during his employment he developed malignant mesothelioma. He filed a workers' compensation claim in Chattanooga against his employer on June 28, 2004. At approximately the same time, he filed a products liability cause of action against several defendants in Georgia. Mr. Correll died on August 24, 2004. His wife of 55 years continued to litigate both claims. She received a recovery in the Georgia products liability claim and the Tennessee workers' compensation claim was tried on May 24, 2005.

Trial/Panel Results: The trial court ordered permanent total disability benefits for the time period March 8, 2004 until Mr. Correll's death on August 24, 2004 and also awarded workers' compensation death benefits to Mrs. Correll. The Chancellor determined the employer was entitled to subrogation with respect to the Georgia products liability case as to the amount awarded for the death of Mr. Correll but the employer was not entitled to any subrogation interest as to Mrs. Correll's loss of consortium claim. The Chancellor also determined the employer was entitled to an offset for Social Security old-age benefits with regard to the permanent total award and the award for death benefits, holding the workers' compensation benefits would be based on a weekly compensation rate based upon the Social Security credit. **The Supreme Court accepted the appeal prior to its review by the Special Workers' Compensation Appeals Panel.**

Supreme Court Decision:

* Issue #1: Subrogation - Does the employer have a subrogation lien against a wrongful death claim?

Stating the purpose of the subrogation lien statute, *TCA* §50-6-112, is to prevent a double recovery to the employee, the Supreme Court held an employer is permitted a subrogation lien as to

the benefits received from a third party tortfeasor for wrongful death, but not against the benefits received by the spouse for loss of consortium. The Court noted its prior decisions of *Hudson v. Hudson Mun. Contractors, Inc.*, 898 S.W.2d 187 (Tenn. 1995) and *Hunley v. Silver Furniture Mfg.* Co., 38 S.W.3d 555 (Tenn. 2001) supported its holding. [*Hunley* held an employer's subrogation right does not extend to a recovery by an employee's spouse for loss of consortium against a third-party tortfeasor because the spouse has no cause of action in a workers' compensation claim for loss of consortium. *Hudson* held the employers' subrogation interest does extend to a surviving spouse's claim for death benefits under Tennessee workers' compensation law.]

The Supreme Court held the purpose of the subrogation lien statute - to prevent double recovery - is present when a surviving spouse obtains a wrongful death recovery from the third-party tortfeasor; but, is absent when the spouse obtains a recovery for loss of consortium. The Court's rationale for the holding is based on Tennessee's workers' compensation law that does provide compensation to the surviving spouse for death benefits, but not a separate claim to the surviving spouse for loss of consortium.

* Issue # 2: - Social Security Offset - Is the offset for Social Security old-age benefits applicable to the weekly benefits received by the surviving beneficiaries in a death claim?

The specific language of the permanent total disability section of the workers' compensation law, *TCA* §50-6-207(4)(A), contains two directives:

(1) that awards are capped at 260 weeks for workers' over age 60; and

(2) an offset for Social Security old-age benefits attributable to employer contributions.

The Supreme Court held in 1996 and 1999 that the language contained in the permanent total disability section of the law (limiting benefits to 260 weeks) was applicable to *both* permanent partial and permanent total disability benefits if the employee was over age 60. In 2000, the Supreme Court held the language contained in the permanent total disability section of the law directing an offset for Social Security old-age benefits is applicable to *both* permanent total and permanent partial disability benefits received by workers over age 60. [The offset equals 50% of the total amount of any old age benefits received by employees over sixty.]

Relying on its prior decisions that the directives contained in the permanent total section of the workers' compensation act are not limited to only permanent total disability benefits, but also apply to permanent partial disability benefits, the Supreme Court held the offset for Social Security old-age benefits provided in *TCA* §50-6-207(4)(A) also applies to workers' compensation death benefits.

Impact on Existing Policy:

* Issue # 1 - Subrogation

The Supreme Court clarified Tennessee law regarding subrogation in a workers' compensation action as it applies to a wrongful death claim against a third-party tortfeasor and the claim for loss of consortium that is also available against the tortfeasor. This case makes it clear that the employer is entitled to subrogation as to the amounts awarded or obtained for the wrongful death of the deceased employee but the employer is not entitled to claim any portion of the amounts awarded or obtained by the surviving spouse for the loss of consortium claim.

* Issue # 2 - Social Security Old-Age Offset

This is the first time the Supreme Court has held the offset provision contained in the language of the permanent total disability section of the law to be applicable to workers' compensation death benefits. The holding results in a reduction of the weekly compensation rate by 50% of the Social Security benefits the injured employee was receiving at the time of death when calculating the death benefits available to the surviving beneficiaries. [Although this would normally be only the surviving spouse given the age of the deceased, the holding will also be applicable to all statutory beneficiaries - such as a disabled child, etc.] While it appears this holding is only applicable to employees over age 60 at the time of death, the opinion does not address this issue specifically.

5. CALCULATION OF AVERAGE WEEKLY WAGE & COMPENSATION RATE - SET OFF

(A) *Cantrell v. Carrier Corporation*, 193 S.W.3d 467 (Tenn. 2006)
[Opinion Filed: May 30, 2006]

Facts: The employee, Ms. Cantrell, claimed workers' compensation benefits for carpal tunnel. During the 52 weeks prior to the date of the injury, Ms. Cantrell had been on leave of absence for 8 weeks for an unrelated problem. The employer paid her short-term disability for those weeks. The employer argued the 8 weeks should not be subtracted when calculating the employee's average weekly wage (earnings for the 52 weeks prior to the injury divided by 52) because she received short-term disability benefits. In addition, the employer maintained that *TCA* §50-6-114(b) permitted it to set off the short term disability payments from the total compensation paid to Ms. Cantrell. The employee argued the 8 weeks should be subtracted when calculating the average weekly wage to determine the weekly compensation rate and argued the employer was not entitled to set off benefits received from short term disability for an unrelated problem.

Trial/Panel Results: The trial court held the 8 weeks leave of absence should be included in calculating the average weekly wage. The Panel declined to address the issue of compensation rate.

Supreme Court Decision: The Supreme Court addressed both issues: (1) whether the weeks during which the employee received short term disability benefits should be deducted in calculating the average weekly wage and (2) whether an employer is entitled to set off the amounts paid for short term benefits for an unrelated injury/problem.

* Issue #1- Calculation of Average Weekly Wage

The Supreme Court noted the statutory definition of "average weekly wages" requires the deduction of lost time in excess of 7 days in the prior 52 week period. The Court held the employer was not entitled to include the 8 weeks of short term disability in the calculation of the average weekly wage because of previous case law that held:

(1) days not worked must be deducted from the 52 week period if the inability to work is a result of sickness, disability or some other fortuitous circumstance;

(2) "fortuitous circumstances" are closing of a plant for repairs, occasional loss of work due to bad weather, reduction of work due to market conditions and unforeseen shortage of orders or material;

(3) days are not deducted if the employer simply had less work for the employee - for example hourly paid construction workers who are not able to work in bad weather, noting provisions for those expected suspension of work are made through an increase in the hourly wage paid to the worker; and

(4) concluded the determination of whether days are to be deducted in calculating the average weekly wage depends on the facts and circumstances of each case.

The Court stated its conclusion is consistent with the purposes of the workers' compensation law that is to be liberally and equitably construed in favor of the employee and is intended to provide periodic payments as a substitute for lost wages in a manner consistent with the workers' regular wage - to "ensure that injured employees are justly and appropriately reimbursed for debilitating injuries suffered in the course of their employment". *Id.* at 472-473 (quoting *Mackie v. Young Sales Corp.*, 44 S.W.3d 459, 556).

* Issue # 2- Set Off of Disability Benefits

The second issue addressed by the Court was whether *TCA* §50-6-114(b) permits a set off of disability benefits for paid absences that are not due to the work-related injury. The Court said the plain meaning of the statute precludes its application to the present case and stated: "Any extension of the statute to disability benefits unrelated to the injuries for which an employee is seeking compensation is more appropriately addressed to the legislature." *Id*. at 5.

(B) *Goodman v. HBD Industries, Inc., et al.*, ____S.W.3d____, 2006 WL 3185286, Tenn., November 6, 2006 (No. E 2005-02661-SC-R3-CV.)

Facts: The employee, Mr. Goodman, worked for the employer or its predecessor B.F. Goodrich for about 26 years prior to his injury. Mr. Goodman was a member of the union at HBD. In the spring of 2001, the union voted to strike and Mr. Goodman, who believed he was required by the union bylaws that forbid union members from crossing the picket line and returning to work, did not work for the 28 weeks of the strike that ended in early January, 2002. After he returned to work, Mr. Goodman injured his neck on January 31, 2002. The employer paid temporary workers' compensation benefits to Mr. Goodman for the neck injury. Mr. Goodman filed a complaint for

workers' compensation benefits on April 18, 2002. He reached maximum medical improvement on August 27, 2002 and the trial was conducted on October 11, 2005.

Trial/Panel Results: The trial court awarded 264 weeks of benefits at the rate of $388.77 per week. In the 52 weeks prior to his neck injury Mr. Goodman had earned $11,651.24 and in computing the compensation rate, the trial court deducted the 28 weeks during which Mr. Goodman had not worked due to the strike. Had the trial court calculated the compensation rate using the full 52 weeks, the weekly benefit would have been $149.38. The trial court declined to follow a case that was directly on point, *Hartley v. Liberty Mut. Ins. Co.*, 197 Tenn. 504, 276 S.W.2d 1 (1954), not because it did not apply, but because the court found it unfair. The employer filed an appeal challenging only the computation of Mr. Goodman's average weekly wage and weekly compensation rate. **The Supreme Court accepted review before the case was heard or considered by the Appeals Panel.**

Supreme Court Decision: The employer relied on the *Hartley* opinion and the attorneys for Mr. Goodman argued the case should not be followed as it did not deal with the impact of federal labor law. Citing *Cantrell v. Carrier Corp.*, 193 S.W.3d 467 (Tenn. 2006), the Supreme Court noted the determination of whether days an employee does not work should be deducted from the calculation of the average weekly wage is dependent upon the facts and circumstances of each case. Therefore, the question becomes whether the employee lost time from work due to "the employee's voluntary act or the act and choice of the employer. Voluntary absences from work are not deducted; days not worked due to sickness, disability or other fortuitous circumstance are deducted from the calculation of the average weekly wage. Fortuitous circumstances include plant closings for repairs, reduction in work or unforseen lack of work or orders, etc.

The Supreme Court noted it had not specifically revisited the issue of whether absences from work due to a strike is to be included in calculating the average weekly wage. The Supreme Court stated, however, that *Hartley* has been cited with approval several times by the Supreme Court, particularly when drawing the distinction between voluntary and involuntary absences from work.

The Supreme Court held there is no valid reason to overrule the decision in *Hartley* and noted the Legislature has also expressed its tacit acceptance of the decision, in that it has chosen not to overrule it by statute, quoting from the case of *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977):

> The legislature is presumed to know the interpretation which courts make of its enactments; the fact that the legislature has not expressed disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction, especially where the law is amended in other particulars, or where the statute is reenacted without change in the part construed.

Id., at 776 (citations omitted).

Impact on Existing Policy: The impact of these two cases is the Supreme Court has raised two issues [calculation of the employee's average weekly wage when disability benefits are paid for unrelated causes and the relationship of the set off provisions of the law] and made it clear if its rulings are unacceptable, the legislature is the venue for changes.

6. GRADUALLY OCCURRING INJURIES - STATUTE OF LIMITATIONS

Barnett v. Earthworks Unlimited, Inc., 197 S.W.3d 716 (Tenn. 2006)
[Opinion Filed: July 25, 2006]

Facts: The employee, Mr. Barnett, was diagnosed with carpal tunnel syndrome, a gradually occurring injury. He notified his employer of the diagnosis and told the employer he thought it was work-related. He did not discuss the work-related nature of his injury with his doctor until about a year later. Mr. Barnett did not miss any work due to his carpal tunnel injury. He was terminated by the employer for unrelated reasons. His lawsuit was filed 13 months after he initially spoke with the employer about his injury and 6 months after his last day worked.

Trial/Panel Results: The trial court held the claim was not barred by the statute of limitations. **The Supreme Court accepted review before the case was heard or considered by the Appeals Panel.**

Supreme Court Decision: The Supreme Court agreed with the trial court that Mr. Barnett's claim was not barred because his oral "notice" to his employer that he thought the diagnosed carpal tunnel syndrome was work-related did not constitute "notice" as contemplated by the workers' compensation law. The Supreme Court held the one year statute of limitations for bringing a claim for workers' compensation benefits for a gradually-occurring injury begins to run on the last day the employee worked for the employer, (whether the last day was due to the injury itself or a result of termination for an unrelated cause, the last day the employee would have been exposed to the work activity that caused the injury) **UNLESS** the employee has knowledge of the existence of a compensable work-related injury (mere notice of a problem, without knowledge of the nature and extent of the injury - i.e., the injury was caused by work and resulted in a permanent injury - will not constitute the notice required by the workers' compensation statute).

Impact on Existing Policy: Although the Supreme Court addressed the relationship of gradually occurring injuries to the statute of limitations in 2005; this case clarifies that when using the last day worked to calculate the statute of limitations, the last day worked is literally the last day worked for the employer whether or not it resulted from the injury.

7. PERMANENCY OF DISABILITY

Barron v. State of Tennessee Department of Human Services, 184 S.W.3d 219 (Tenn. 2006)
[Opinion Filed: February 14, 2006]

Facts: The employee, Ms. Barron, was employed as an inspector of daycare centers and while walking down a ramp at a daycare center and injured her back and hip. Ms. Barron was treated by Dr. Waggoner from March 2002 through June 2002. After that she sought treatment from Dr. Thomas. During the doctors' depositions, they both testified as to the various treatments and Ms. Barron's continued pain despite treatment. Both doctors testified they made objective findings of her pain. Neither doctor assigned an anatomical impairment rating or permanent restrictions due to

Ms.

Barron's injury. The doctors did, however, acknowledge they did not consider the AMA Guides' chapter on pain.

Trial/Panel Results: The Commissioner for the Tennessee Claims Commission denied workers' compensation benefits finding the evidence insufficient to establish that Ms. Barron suffered a permanent injury as a result of the fall. **Following oral argument before the Appeals Panel, but before a ruling, the case was transferred to the Supreme Court.**

Supreme Court Decision: The Supreme Court noted that proof at trial indicated Ms. Barron's pain was obvious to a layman, but that it failed to establish that the permanency of the pain was obvious to a layman. Therefore, expert medical testimony is required. The Supreme Court held the absence of expert testimony of permanent restrictions do not alone preclude a finding of permanency. The Court held the doctors' deposition testimony, taken as a whole, was sufficient to establish Ms. Barron's condition is permanent.

Impact on Existing Policy: This is the first case in which the Supreme Court has announced that an employee may recover permanent disability benefits when there is no testimony of a permanent impairment rating and no permanent restrictions given by the physicians. Thus, workers' compensation benefits appear to be available for pain only, if the record includes facts sufficient to support the conclusion the injury is permanent. Apparently in this case, testimony that the employee was not able to conduct activities of daily living and continued to have pain despite treatment was sufficient to support an award of permanent disability benefits.

8. SETTLEMENT APPROVALS & MEDICAL BENEFITS (MODIFICATION OF HOUSING)

Dennis v. Erin Truckways, Ltd., 188 S.W.3d 578 (Tenn. 2006)

[Opinion Filed: April 17, 2006]

Facts: On November 7, 1997, the employee, Mr. Dennis, was injured in a truck accident. He was twenty-nine years old and as a result of the accident he sustained severe injuries, including paralysis from the waist down and a crushed upper gum. He reached maximum medical improvement on November 23, 1998. His treating physician assigned a 75% permanent impairment rating.

The claim of Mr. Dennis was settled at a benefit review conference (BRC) that was conducted in Chattanooga on July 11, 2000. The claim was settled at BRC for 400 weeks of permanent partial disability benefits and the Department approved the settlement agreement. The settlement agreement recited the employee had already been advanced $32,919.09 and that "the parties have resolved all issues remaining on the claim for $123,000.00.

On May 23, 2002, nearly two years after the BRC, Mr. Dennis filed a petition in Rutherford County Chancery Court seeking to set aside the settlement. In the petition, Mr. Dennis also sought wheelchair-accessible housing because he was suffering additional medical problems because his mother's home, where he lived, was not handicapped-accessible.

Trial/Panel Results: At trial, conducted on November 29, 2004, Mr. Dennis testified he was initially represented by attorneys but discharged his attorney because he was told by the insurance adjuster that he was eligible for only 400 weeks of benefits and that the attorney would get 25% of his benefits. He also testified that he was not represented by counsel at the BRC, that the adjuster was present at the BRC and told the mediator that the employer wanted to offer 400 weeks of benefits and that "he went along with it".

The adjuster testified she had told him he could be entitled to benefits for life but they could find he would be capped at 400 weeks because he wanted to start his own business and go to work for himself. She said a settlement was not reached prior to the BRC.

Mr. Dennis testified the mediator never told him it was possible for him to get more than 400 weeks of benefits. The mediator testified she did not remember whether the employee asked about permanent total disability benefits and did not remember whether she volunteered the information.

When asked if she told the employee the maximum he could receive was 400 weeks, the mediator stated she probably did but was not sure of that either. She testified she did not normally volunteer information to claimants about permanent total disability benefits but will explain the benefits if asked.

The medical testimony indicated wheelchair-accessible housing was medically necessary for Mr. Dennis' physical and mental health and that if this was provided, he would no longer need daily skilled nursing visits.

The trial court set aside the settlement mediated at the BRC finding the specialists failed to perform their duties to the detriment of the employee. The court then determined Mr. Dennis was entitled to permanent total disability benefits until eligible for Social Security benefits. The court credited the employer with the benefits paid at the settlement. The trial court found there to be a clear medical need for Mr. Dennis to live in wheelchair-accessible housing, but that the statute does not specify that the employer shall furnish housing, holding the term "other apparatus" contained in *TCA* §50-6-206(a)(1) was limited to medical supplies and would not apply to housing costs. **The Supreme Court accepted review of the appeal before the case was heard or considered by the Appeals Panel.**

Supreme Court Decision: In its decision, the Supreme Court considered the issue of whether the settlement should have been set aside. In affirming the trial court's set aside of the settlement, the Supreme Court relied on the procedural safeguards regarding settlements set forth in *TCA* §50-6-206. First, the Court found the settlement insufficient as it did not provide the employee with "substantially" the benefits to which he was entitled [*TCA* §50-6-206(c)(1)(B)]. Second, because there was no proof the parties had agreed to have the settlement approved by the department, the Court found a violation of *TCA* §50-6-206(c)(3)(B) which requires settlements involving unrepresented employees be approved by a court unless the parties agree to seek approval from the department. Third, the Supreme Court found a violation of *TCA* §50-6-206(c)(5) because Mr. Dennis was not throughly informed of the scope of benefits available under the workers' compensation law. The Court stated that not just the fact that benefits exist should be explained, but

a detailed explanation of the full range of benefits available to each employee, including, **but not limited to**, an explanation of the difference between the types of benefits, the amount and duration of the compensation available and the eligibility requirements of each.

The Supreme Court also addressed the issue of whether the term "other apparatus" contained in *TCA* §50-6-204 (a)(1) should be broadly interpreted to include housing. In rejecting the employee's construction of that section, the Supreme Court noted its prior decisions approving housing benefits pertained to employees who required continuous nursing supervision in a nursing facility due to psychiatric conditions and Mr. Dennis did not require continuous supervision.

The Supreme Court noted the purpose of workers' compensation is to replace lost wages and from that compensation it is expected that the employee will purchase the ordinary and necessary expenses of life such as food and shelter. Requiring an employer to pay the full cost of housing would be an unintended windfall that relieved the employee of the entire cost of housing.

However, the Supreme Court stated its decision does not relieve the employer of the responsibility to supply modifications necessary to make housing wheelchair-accessible to an injured employee confined to a wheelchair. The Court also held that the law (the term "apparatus") requires an employer to pay for medically-necessary modifications (such as ramps, grab bars, widened doorways and accessible cabinets and appliances) to make existing housing wheel-chair accessible.

Impact on Existing Policy: This case clarified its prior decisions in which housing was ordered to be furnished by an employer from cases in which the employee does not require constant supervision and clarified the term "apparatus" does include modifications to existing housing that are medically necessary for the injured employee.

In addition, the Court made it abundantly clear that the procedural safeguards contained in the workers' compensation law must be adhered to by the workers' compensation specialists and that they owe a responsibility to make sure an employee receives a detailed explanation of the benefits to which he/she may be entitled. In addition, the Court made it clear the department is not permitted to approve a settlement reached during a benefit review conference with an unrepresented employee unless both parties agree. Although not included in the specific language of the opinion, one would assume this would place a requirement on the department to tell the unrepresented employee that

he/she has the right to have a court approve the settlement.

CONCLUSION

Pursuant to *Tennessee Code Annotated* §50-6-121(g), the Workers' Compensation Advisory Council respectfully submits this report on significant Supreme Court decisions in 2006.[1] A copy of the report will be sent to the governor, 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. Notice of the availability of this report will be provided to all members of the general assembly pursuant to *Tennessee Code Annotated* §3-1-114. In addition, the report will be posted on the website of the Advisory Council [www.state.tn.us/labor-wfd/wcac].

Respectfully submitted on behalf of the

Workers' Compensation Advisory Council Dale Sims

Dale Sims, State Treasurer
Advisory Council Chair

[1] This report does not include any Supreme Court decisions that were issued after December 14, 2006, the date the Advisory Council approved publication of the report.