

STATE OF TENNESSEE

Workers' Compensation Advisory Council



SIGNIFICANT SUPREME COURT DECISIONS
CALENDAR YEAR 2008

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**STATE OF TENNESSEE  
WORKERS' COMPENSATION ADVISORY COUNCIL**

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**SUMMARY OF
SIGNIFICANT SUPREME COURT DECISIONS
CALENDAR YEAR 2008**

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**INTRODUCTION**

*Tennessee Code Annotated* §50-6-121(g) requires the Workers' Compensation Advisory Council to issue a report concerning significant Tennessee Supreme Court decisions on workers' compensation. The report, which is due on or before January 15 each year, is attached. The report includes a summary of each significant decision by the Supreme Court in 2008 and an explanation of the impact of the case on existing policy.

## SIGNIFICANT SUPREME COURT DECISIONS

### CALENDAR YEAR 2008

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1. MEANINGFUL RETURN TO WORK

Tryon v. Saturn Corporation, 254 S.W.3d 321 (Tenn. 2008)
[Opinion Filed: May 20, 2008]

Facts: The employee, Earl Tryon, sustained a series of injuries while working at the Saturn plant. In 1999 he suffered a disc herniation in his neck at C6-7 that required surgery. He was able to return to work following surgery without restrictions and did not file a workers' compensation claim as a result of the 1999 injury. In June, 2003, an overhead door struck Mr. Tryon in the head resulting in a disc herniation at C5-6. He continued to work but also returned to his doctor because he was experiencing pain. In July 2003, he was diagnosed with De Quervain's tenosynovitis in both hands. In August, 2003, he had surgery to release his thumb tendons. He returned to work but continued to experience pain. Mr. Tryon filed suit for the 2003 neck injury and the tenosynovitis in October 2003.

In March, 2004, Mr. Tryon underwent a second surgery on his neck. The doctor removed the metal apparatus implanted during the first surgery following the 1999 injury and replaced it with an apparatus that locked both herniated discs into place. Mr. Tryon returned to work with no restrictions. He continued to experience pain and discomfort while working.

In May, 2005, Mr. Tryon was diagnosed with bilateral carpal tunnel syndrome and Saturn placed him on work restrictions that were subsequently lifted by his doctor. In July, 2005, while performing heavier work, Mr. Tryon felt his neck pop and he returned to his surgeon as a result of the pain. In August, 2005, the surgeon, concerned that a third surgery on Mr. Tryon's neck would

provide him pain relief, suggested he should consider retirement or disability retirement options.

The doctor did not place any work restrictions on Mr. Tryon.

Mr. Tryon continued to work for Saturn until November 1, 2005 when he retired after earning his full thirty-year retirement. He testified he retired only because of the intense neck pain and the Doctor's advice he should retire from factory work.

Trial/Panel Results: The trial court determined Mr. Tryon's return to work was not meaningful even though it has lasted sixteen months following the second neck surgery in March, 2004. Therefore, the trial court concluded Mr. Tryon's disability benefits were not capped at 1.5 times the impairment rating(s) and awarded 55% permanent partial disability to the body as a whole which equated to 5.5 times the 10% impairment resulting from the second neck surgery. Saturn appealed.

The Appeals Panel reversed the trial court determining Mr. Tryon's permanent disability was subject to the 1.5 multiplier cap and reduced his award to 25% permanent partial disability to the body as a whole. The Supreme Court granted Mr. Tryon's petition for full-court review.

Supreme Court Decision: The Supreme Court determined Mr. Tryon had not made a meaningful return to work, reversed the Appeals Panel and reinstated the trial court's award of 55% permanent partial disability benefits.

Impact on Existing Policy: The Supreme Court provided an extensive review of the Supreme Court and Special Appeals Panel decisions related to the concept of "meaningful return to work", concluding the determination of the issue depends on the facts of each case. When the issue is retirement, the decision to retire retirement must be related to the workplace injury. The significance of this specific decision is the fact that the length of time from the injury to the retirement decision is not a factor to be considered.

2. PRIOR SUIT PENDING - RACE TO THE COURTHOUSE

West v. Vought Aircraft Industries, Inc., et al., 256 S.W.3d 618 (Tenn. 2008)
[Opinion Filed: June 10, 2008]

Thompson v. Peterbilt Motor Company and/or Paccar, Inc.
256 S.W.3d 618 (Tenn. 2008)
[Opinion Filed: June 10, 2008]

Facts: These two cases were consolidated for purposes of appeal. In each of the cases, an employee who resided in one county was injured while working in another county. In each case, the employer and employee participated in a benefit review conference with the Department of Labor and Workforce Development that resulted in an impasse.

In the West matter, the benefit review conference was conducted on March 6, 2007 and concluded at 2:11 p.m. without a settlement agreement. Immediately following the conclusion of the conference, the employer, Vought's, attorney telephoned a representative from his office who was waiting at the Davidson County Clerk & Master's office and instructed the representative to file a previously prepared complaint. That complaint was filed at 2:11 p.m. - less than a minute following the conclusion of the benefit review conference. Mr. West's complaint was filed four minutes later with the Smith County Circuit Court Clerk.

Vought was served with Mr. West's complaint on March 6, 2007; Mr. West was served with Vought's complaint on March 20, 2007. Vought filed a motion to dismiss the case pending in the Smith County court arguing that under the prior suit pending doctrine, the Davidson County case was the first to be filed. Mr. West argued the Smith County court had jurisdiction as that suit was the first to be served.

In the Thompson matter, a benefit review conference was held at 9:00 a.m. on March 28, 2006 and was concluded without a settlement agreement. Both parties filed suit later in the day. At

10:25 a.m., the employer, Peterbilt, filed suit in the Davidson County Chancery Court. Mr. Thompson filed suit in the Cheatham County Circuit Court; however, the clerk, in violation of the Tennessee Rules of Civil Procedure, failed to note the time the lawsuit was filed. Peterbilt was served on April 4, 2006 and Mr. Thompson was served on April 6, 2006.

Peterbilt filed a motion to dismiss the Cheatham County lawsuit on April 27, 2006 arguing that the Davidson County suit had exclusive jurisdiction over the workers' compensation claim as it was the first to be filed. Mr. Thompson argued Cheatham County had jurisdiction as that complaint was the first to be served.

Trial Court / Panel Results: In the West matter the Smith County trial court concluded it had jurisdiction over Mr. West's workers' compensation claim. Vought filed a motion for interlocutory appeal which the Smith County trial court granted. **The Supreme Court granted review and stayed further proceedings in Smith County.**

In the Thompson matter, the Cheatham County trial court agreed with Vought that the Davidson County court had jurisdiction as the complaint was filed first in Davidson County and dismissed Mr. Thompson's complaint filed in Cheatham County. Mr. Thompson appealed the decision of the Cheatham County trial court and the Supreme Court initially referred the appeal to the Special Workers' Compensation Appeals Panel. **After oral argument before the Panel, the Supreme Court granted review of *West v. Vought Aircraft Industries, Inc.*, transferred Mr. Thompson's appeal to the full Court and consolidated it with the *West* appeal.**

Supreme Court Decision: The primary issue before the Supreme Court was whether for purposes of the prior suit pending doctrine the pendency of a lawsuit begins with the filing of a

complaint or with the service of process. The Court concluded that the pendency of an action begins with the filing of a complaint rather than with the service of process.

Impact on Existing Policy: The Court's determination of the "prior suit pending" issue, while important to the current Workers' Compensation Law, is not the most noteworthy portion of the Court's opinion. Indeed the "dicta" concerning the race to the courthouse in workers' compensation claims is of more importance as it relates to the impact of the decision on existing policy and the current Workers' Compensation Law.

In its decision, the Supreme Court first commented on the legal framework and practices that gave rise to the consolidated cases. The Court noted the Tennessee Workers' Compensation Law permits lawsuits to be filed in either the employee's county of residence or in the county in which the accident occurred. Therefore, when the employee lives in one county and the injury occurred in another, the lawsuit may be filed in either county. The Court also noted the Workers' Compensation Law permits either the employer or the employee to initiate the claim by filing a complaint. The Supreme Court stated: "The availability of multiple forums combined with the right of either party to file has resulted in parties attempting to secure the forum of their choice by being the first to file."

The Supreme Court acknowledged parties have long raced to select their choice of forum. However, the Court pointed out the 2004 amendment to the Workers' Compensation Law that requires the parties to exhaust the benefit review conference process before filing a lawsuit appears to have "increased the frequency and fervor of this occurrence". The Court stated the conclusion of a benefit review conference without a settlement provides a definitive moment when the complaint can be filed and this has increased the pressure upon attorneys to file their lawsuits quickly. The Court referred to the unsuccessful completion of a benefit review conference as the "starting gun in the race to the courthouse".

The Supreme Court stated:

We find this process of racing to the courthouse unseemly. It reflects attorneys' lack of confidence in the judiciary of this state to apply the Workers' Compensation Law in an evenhanded manner and demonstrates that lack of confidence to clients and the public at large. Furthermore, this process engages attorneys in the undignified spectacle of literally racing to secure perceived procedural advantages. Such gamesmanship does little to improve the image of attorneys in the eyes of the public. ...

... Understandably, attorneys will seek to fulfill their duty to represent their clients zealously by attempting to gain those advantages that are ethically and legally permissible. Furthermore this Court cannot prevent attorneys from doing that which the Workers' Compensation Law plainly allows them to do...In short, this is a problem in want of a legislative rather than a judicial solution.

3. **EX PARTE COMMUNICATIONS WITH MEDICAL PROVIDERS**

Overstreet v. TRW Commercial Steering Division, et al., 256 S.W.3d 626 (Tenn. 2008)
[Opinion Filed: June 17, 2008]

Facts: The employee filed a claim for workers' compensation benefits. The defendant/ employer filed a motion seeking permission to have an *ex parte* interview with the treating physician regarding the medical condition of the employee.¹

Trial/Panel Results: The trial court denied the employer's request for an *ex parte* interview with Mr. Overstreet's treating physician and denied the employer's request for interlocutory appeal. TRW then file an application for extraordinary appeal under Rule 10 of the Tennessee Rules of Appellate Procedure. **The Supreme Court granted the petition for extraordinary appeal.**

¹ The specific facts underlying the employee's claim for workers' compensation benefits are not germane to the two issues on appeal. This report addresses only one of the two issues on appeal. The Supreme Court's decision that an employer does have the statutory right to require an employee to submit to an independent medical examination does not have a significant impact on current law.

Supreme Court Decision: The Supreme Court held that a covenant of confidentiality between the employee and the treating physician may be implied in law and should be applied to the physician-patient relationship in a workers' compensation claim.

The Court noted the Workers' Compensation Law addresses in detail how an employer may obtain medical information regarding the injured worker and how the doctor can disclose the information. The Court stated:

Although much disclosure is required under the (Workers' Compensation) Act, none of the terms permit *ex parte* communications by the employer with the employee's treating physicians. From this conspicuous absence, we must infer that the General Assembly did not intend such communications. A familiar canon of statutory interpretation expresses: *expressio unius est exclusio alterius* ("to express on thing is to exclude others:).

Had the General Assembly intended to eliminate all assurances of physician-patient confidentiality in the workers' compensation context...they would have been explicit. Moreover, the General Assembly has enacted several statutes that convey a public policy favoring the confidentiality of medical information. ... In our view, these statutes are representative of a policy promoting the maintenance of confidentiality in medical treatment. Because the General Assembly has enacted a right of privacy in health care and provided a comprehensive statutory scheme for the disclosure of information under the Workers' Compensation Act, we hold that an implied a (sic) covenant of confidentiality in law exists under these circumstances.

[Citations omitted.]

Impact on Existing Policy: The Supreme Court's holding is one of first impression. The concept of an implied covenant of confidentiality in law has never been applied to the workers' compensation system. Following the Supreme Court's decision, all parties to the Tennessee workers' compensation system have struggled with its applicability to the everyday management of workers' compensation claims.

Subsequent to the issuance of the *Overstreet* opinion, the Commissioner of the Department of Labor and Workforce Development asked the Tennessee Attorney General for an opinion as to whether *Overstreet* is applicable to case managers operating under *TCA* §50-6-123. The Attorney General issued an opinion on October 9, 2008² stating that *Overstreet*'s prohibition against *ex parte* communications between an employer and an employee's treating physician does **not** apply to case managers operating under *TCA* §50-6-123. [Emphasis added.] Following the release of the Attorney General's opinion, many in the workers' compensation system, including physicians, case managers, claims handlers, and attorneys continue to reach differing opinions as to who can contact a physician, how a physician may be contacted and how the rules of the Department of Labor and Workforce Development were impacted by the decision.

4. LAST INJURIOUS INJURY & LAST DAY WORKED RULES

Crew v. First Source Furniture Group, 259 S.W.3d 656 (Tenn, 2008)
[Opinion Filed: June 24, 2008]

Facts: The employee, Ms. Crew, worked for First Source d/b/a Anderson Hickey Company at different times beginning in 1991 and ending in January, 2002, when she was permanently laid off. The following dates and circumstances are pertinent to the decision of the Supreme Court:

- 1999 - returned to work for Anderson Hickey (last employed in 1995 by Anderson Hickey)
- October, 2001 through January 24, 2002 - noticed her left wrist swollen, treated by two doctors, EMG tests showed no carpal tunnel syndrome although tests did reveal she had lupus and returned to work with no restrictions;

² Tenn Atty Gen Op No.08-161

- **January 28, 2002 - permanently laid off by employer** (plant closed two months later);
- August, 22, 2002 - visited Dr. Janovich, orthopedic surgeon on referral from sister - tests conducted but no other treatment;
- December, 2002 - second set of EMGs ordered by original orthopedic doctor;
- **January, 2003 - began employment with Paslode** (lasted for 8 months);
- January 24, 2003 - Original orthopedic determined the EMGs were negative with no indication of carpal tunnel syndrome; no restrictions, released to full duty and opined no impairment;
- September through November, 2003 (near end of employment with Paslode) - treated by Dr. West, orthopedic surgeon ... EMG on right wrist was positive for carpal tunnel syndrome, surgical release performed - 2% impairment to right arm but unable to determine which employer responsible for carpal tunnel condition;
- April, 2004 through June, 2004 - returned to see Janovich with claim of left carpal tunnel syndrome; EMG positive and carpal tunnel release on left performed - 5% impairment.

The employer, First Source, denied the claims on the issue of causation asserting her injury was not caused while in their employ. The employee insisted when she began employment with Paslode her symptoms were identical to when employed at Anderson Hickey.

Trial/Panel Results: The trial court found employee had sustained compensable gradual injury to her arms and wrists while employed with Anderson Hickey. The Appeals panel reversed finding the employee had failed to establish causation noting the EMGs conducted prior to her employment with Paslode showed no evidence of carpal tunnel syndrome and her work at Paslode involved same types of repetitive motions that could cause carpal tunnel.

Supreme Court Decision: The Supreme Court agreed with the Panel that the employee had not sustained her burden of proof regarding causation since she had no expert proof that linked her condition with any employment. However, the Supreme Court took the opportunity to note that had the employee met her burden of establishing a causal connection of her carpal tunnel syndrome to her work at Anderson Hickey, the Court's analysis could have required it to consider whether Anderson Hickey would have been liable in light of the last injurious injury rule. The Supreme Court and then proceeded use the facts of the underlying case to review relevant case law and to discuss fully how the "last injurious injury rule" and the "last day worked rule" are to be applied in Tennessee law.

The Court cited case law to support the following black letter law regarding the "last injurious injury rule", noting the following:

- The last injurious injury rule requires an employer to take an employee as he finds him.
- The rule provides in determining which of two successive insurers is liable in a workers' compensation case, the insurer at the time of the employee's last injurious exposure is liable for the injury.
- It is neither the last employment nor the last exposure to the hazards of the disease which impose liability on an employer; rather, it is the last such exposure that is injurious to the employee;
- For the rule to apply there must be some showing the employee's condition worsened due to the working conditions at the second employer, either by advancement or aggravation of the injury.
- Liability will not attach to an injured employee's last successive employer if the employee's symptoms experienced while at the first employer merely persist.

- An aggravation or exacerbation of the employee's injury must occur at the second employer.
- The cause of an employee's carpal tunnel injuries is constant and the employee suffers a new injury each day.
- Gradually occurring injuries, such as carpal tunnel syndrome, are compensable as accidental injuries rather than occupational injuries.
- In most cases carpal tunnel syndrome is a repetitive stress injury where the symptoms appear and worsen over time - - it is characterized as a "new trauma" to the employee's hands each day worked.
- There is a compensable injury only if the severity of the condition is advanced, or if it results in a disabling condition other than increased pain.

[Citations Omitted]

The Supreme Court stated the last injurious injury rule is "inextricably linked" to the last day worked rule. The Court then proceeded to note the following legal concepts:

- Gradually occurring injuries, such as carpal tunnel syndrome, are compensable as "accidental" injuries rather than occupational.
- Carpal tunnel syndrome, in most cases, is a repetitive stress injury where the symptoms appear and worsen over time.
- Because the symptoms can be "episodic" as job duties change, it is difficult, at best, to determine when the "accident resulting in the injury" occurs.
- The statute of limitations set forth in TCA 50-6-203 does not begin to run in a gradually occurring injury until the employee is prevented from working due to the employee's injury.
- The last day worked rule is used to help establish the date on which the injury occurred.

Impact on Existing Policy: In 2005, the Supreme Court first held in *Mahoney v. NationsBank of Tennessee, N.A.*, 158 S.W.3d 340 (Tenn. 2005) that the “last injurious injury rule” applies to gradually occurring injuries as well as to occupational diseases. In 2006, the Supreme Court revisited the issue of gradually occurring injuries vis-a-vis the statute of limitations in *Barnett v. Earthworks, Unlimited, Inc.*, 197 S.W.3d 716 (Tenn. 2006). It held that the one year statute of limitations for a gradually occurring injury begins to run on the last day the employee worked for the employer whether or not the last day to work was related to the gradually occurring injury. In 2007, the Supreme Court again granted appeal in a case dealing with gradually occurring injuries and the statute of limitations. In re-iterating the applicability of the “last day worked rule” to workers’ compensation cases, the Supreme Court overruled its 2004 decision in *Bone v. Saturn Corp.*, 148 S.W.3d 69 (Tenn. 2004).³

The decision in the *Crew* case did not turn on the resolution of the “last injurious rule” issue or the “last day worked rule” issue. However, the Supreme Court took the opportunity, in dicta, to gather a compendium of the applicable case law on these two issues. One can only assume the Supreme Court wanted to publish these black letter law rules in a single reported decision to assist those who are involved with Tennessee workers’ compensation claims.

³ A full discussion of each of these cases can be found in the Advisory Council’s “Significant Case Report” for calendar years 2005, 2006 and 2007. Those reports can be located by clicking on the “Other Reports” icon on the Council’s website: www.state.tn.us/labor-wfd/wcac.

5. CAUSATION & INDEPENDENT INTERVENING CAUSE

Anderson v. Westfield Group, 259 S.W.3d 690 (Tenn, 2008)
[Opinion Filed: August 12, 2008]

Facts: Mr. Anderson sustained a compensable injury to his left elbow in 2001 that required surgery. In 2003, he and the employer reached a settlement of the claim that provided the employer's insurer would pay future medical benefits stemming from the 2001 injury. In 2004, Mr. Anderson returned to the doctor who determined a second surgery was necessary to remove loose bodies from the elbow. Subsequent to the 2004 surgery, Mr. Anderson had no feeling in his ring and small finger of his left hand. Approximately six weeks following the surgery, Mr. Anderson, whose left arm was still bandaged, dropped a pan in the floor while cooking and in reaching to retrieve the pan he placed his left hand on the stove for support. Mr. Anderson believed he had placed his hand on the edge of the stove in order to maintain his balance, but he had placed it on the hot stove instead. Because of the absence of feeling in the two fingers he did not realize he was suffering a severe burn to his left small finger. As a consequence of the burn, he had to undergo two surgical procedures, including the amputation of the finger and a skin graft.

Relying on the terms of the settlement agreement, Mr. Anderson filed suit to recover payment of medical benefits arising from the burn to his hand.⁴ The employer denied responsibility for the injuries asserting the injuries to his hand did not arise out of his employment and were not a direct and natural consequence of the original compensable elbow injury.

⁴ In February, 2005, while recuperating from the amputation and skin graft surgery, Mr. Anderson fell during a walk resulting in the damages to the recent skin graft. He also sought medical benefits as a result of the fall. Because the decision of the Court makes this issue moot, this discussion of the case omits the Court's decision on the injuries from the fall.

Trial Court / Panel Results: The trial judge denied Mr. Anderson's petition holding the injuries to the hand were the result of an independent intervening cause - Mr. Anderson's own negligence. The Special Appeals Panel reversed, holding the injuries to the fingers were the direct and natural consequence of the prior work-related injury. The Panel based its decision on the doctor's opinion that the numbness in the hand resulted from the second elbow surgery that was necessary as a result of the original work-related elbow injury. **The Supreme Court granted the employer's request for permission to appeal.**

Supreme Court Decision: The Supreme Court reversed the Appeals Panel and reinstated the trial court's decision. Acknowledging the general rule that a subsequent injury, whether in the form of an aggravation of the original injury or a new and distinct injury is compensable if it is the "direct and natural result" of a compensable injury, the Court held the rule has a limit that hinges on whether the subsequent injury is the result of an independent intervening cause. The Court concluded Mr. Anderson's own negligence was the cause of the burn to his finger and the subsequent amputation and skin graft.

Impact on Existing Policy: This case clarifies that an employee's intervening conduct can break the chain of causation necessary to impose liability for a subsequent injury based on the direct and natural consequences concept and the employee's conduct need not be intentional. Mere negligent conduct is sufficient to break the chain of causation. The Court stated:

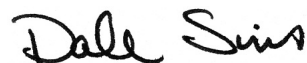
"... negligence is the appropriate standard for determining whether an independent intervening cause relieves an employer of liability for a subsequent injury purportedly flowing from a prior work-related injury. If the rule were otherwise, "workers' compensation coverage would become as broad as general health and accident insurance which it is not."

[Citations omitted.]

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 2008.⁵ 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.⁶ 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 106th 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, State Treasurer
Advisory Council Chair

⁵ This report does not include any Supreme Court decisions that were issued after December 11, 2008, the date the Advisory Council approved this report.

⁶ The report was approved by the Advisory Council prior to the Organizational Meeting of the 106th General Assembly. Therefore, electronic copies will be supplied to the members of the General Assembly who held those positions in the 105th General Assembly. As noted, all members of the 106th General Assembly will be given notice of the availability of the report.