

STATE OF TENNESSEE

Advisory Council on Workers' Compensation

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### 2015 SUMMARY OF SIGNIFICANT TENNESSEE SUPREME COURT WORKERS' COMPENSATION DECISIONS

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Significant 2015 Tennessee Supreme Court Workers' Compensation Decisions

INTRODUCTION

Pursuant to Tennessee Code Annotated (“T.C.A.”) § 50-6-121(i), the Advisory Council on Workers' Compensation is required to issue this report reviewing significant Tennessee Supreme Court decisions involving workers' compensation matters for each calendar year. This report includes a highly condensed synopsis of a majority of the cases, divided into subject matter sections to facilitate review of the 2015 decisions from the Tennessee Supreme Court.

The Tennessee Supreme Court

Appeals of trial court, Claims' Commission and Appellate Court of Workers' Compensation Claims decisions in cases involving workers' compensation are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel (“Panel”) for hearings. The Panel gives considerable deference to the lower courts' decisions with respect to credibility of witnesses since the lower courts have the opportunity to observe individuals testify. The Panel reports its findings of fact and conclusions of law, and such judgments automatically become the judgment of the full Tennessee Supreme Court thirty (30) days thereafter, barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and T.C.A. §§ 50-6-225(e) (2008 & Supp. 2013), 50-6-225(a) (2014).

The Tennessee Supreme Court Special Workers' Compensation Appeals Panel

The following is a subject matter list with very brief specifics of several of the pertinent cases heard by the Panel in 2015, up to and including December 15, 2015, to be used as a reference tool. Those filed after December 15, 2015 will be included in next year's report.

The highest percentage of cases heard by the Panel this year involved Meaningful Return to Work issues. Decisions rested on the reasonableness of either the employer or the employee in attempting to return/returning to work. The permanent disability awards of employees who initially return to work, but cannot later continue working due to reasons related to the injury are not capped at 1.5 times the impairment rating, while those who return to work but are later terminated for non-injury related reasons such as absenteeism, misconduct or failure to recertify in their area of expertise are capped.

DONNA CALLINS v. NSK STEERING SYSTEMS AMERICA, INC. No. W2014-01225-SC-WCM-WC – Filed November 30, 2015. Aggravation of an employee's pre-existing condition caused her to be unable to return to her present or any previous jobs. Even though employee was willing to work in her seriously disabled condition, she was not employable, and, as such, was permanently and totally disabled. The full text of this opinion may be viewed here: <http://www.tncourts.gov/sites/default/files/callinsdopn.pdf>

ALFRED GAMBLE V. ABITIBIBOWATER, INC. ET AL. No. E2014-00449-SC-R3-WC-FILED-April 30, 2015. An employee sustained an injury to his knee and, due to a staph infection, three separate surgical procedures were required. The company physician had not approved Employee's return to work. The Panel upheld the trial court's ruling that the employee did not have a meaningful return to work, thereby authorizing an award in excess of 1.5 times the medical impairment rating. The full text of the opinion may be viewed here: <http://www.tncourts.gov/sites/default/files/gamblealfredopnjud.pdf>

ARNOLD HARRIS v. MR. BULT'S, INC. No. E2014-00961-SC-R3-WC-FILED - April 23, 2015. Employee's shoulder injury resulted in his suffering severe pain upon returning to the job, which pain continued even while he was off duty. He eventually could not continue and left the employment due to the injury. The Panel affirmed that the employee did not have a meaningful return to work. The full text of the opinion may be viewed here: <http://tncourts.gov/sites/default/files/harrisaopnjud.pdf>

VANESSA HOBBS v. AUTO OWNERS MUTUAL INSURANCE COMPANY No. M2014-00532-SC-R3-WC - Filed January 23, 2015. The Panel found that a meaningful return to work occurs and the 1.5 times cap should be applied if an injured employee is initially returned to work, but later not annually rehired due to the employee's failure to meet an unrelated federal education mandate, and not due to the employee's injury. The full text of the opinion may be viewed here: <https://www.tncourts.gov/sites/default/files/hobbsv.-autoownersopn.pdf>

PAUL V. PERMENTER v. BRIGGS AND STRATTON CORPORATION ET AL. No. W2014-00582-SC-R3-WC –Filed September 8, 2015. An employee who is terminated post-return-from-injury for excessive absenteeism, not counting time off for medical treatment or appointments, has had a meaningful return to work, and his award is capped. The full text of the opinion may be viewed here: <http://www.tncourts.gov/sites/default/files/permenteropn.pdf>

DONNA SWANER v. G4S YOUTH SERVICES, LLC, AND NEW HAMPSHIRE INSURANCE COMPANY No. M2014-01726-SC-R3-WC – Filed September 14, 2015. An employee who had been terminated, but continued to work under a temporary extension of her contract, was injured and not returned to her employment, so was not capped as she did not have a meaningful return to work. The full text of the opinion may be viewed here: <http://www.tncourts.gov/sites/default/files/g4s-swaneropnjo.pdf>

An additional topic of several cases this year was Whether a Permanent Impairment Resulted from an admittedly compensable injury. Since causation and impairment must be established by medical experts, who often have differing opinions, the court has the responsibility of selecting

the most credible upon which to make a determination as to whether there exists a permanent impairment related to a compensable workplace injury. Absolute medical certainty is not required, and lay testimony may be taken into consideration but should not be the sole testimony used in rendering the decision.

SAMANTHA ADKINS v. STUDSVIK, INC., ET AL. No. E2014-00444-SC-R3-WC – FILED July 21, 2015. Employer provided medical care after employee fell from a ladder but later denied that the injury was compensable or resulted in a permanent impairment. The last highly credible expert medical opinion admitted that previous physicians' misdiagnoses were understandable due to less advanced testing equipment, but that employee had experienced anatomical changes and an exacerbation of her preexisting condition attributable to the work related injury and was permanently and totally disabled since she possessed no marketable skills related to sedentary employment. The full text of the opinion may be viewed here: [http://www.tncourts.gov/sites/default/files/adkinsstudsvic_opn.jo .pdf](http://www.tncourts.gov/sites/default/files/adkinsstudsvic_opn.jo.pdf)

RANDY CARTER v. CITY OF CARTHAGE, TENNESSEE AND TENNESSEE SECOND INJURY FUND No. M2014-00852-SC-R3-WC - Filed June 16, 2015. Employee alleged that he sustained an injury, and the employer provided medical care, but the employer denied that he had sustained a permanent injury from the workplace incident. The Panel opinion indicated that if there is no credible expert medical testimony linking the injury to the present impairment, the court cannot simply rely on the statement of the employee, so no causation was found and the claim was dismissed. The full text of the opinion may be viewed here: https://www.tncourts.gov/sites/default/files/carterrandyv.carthage_opnjo.pdf

ALEXANDER KNIGHT v. PUBLIX SUPERMARKETS, INC. ET AL. No. M2014-00126-SC-R3-WC - Filed March 31, 2015. Employee alleged both physical and mental injuries and was determined to be a credible witness. Proof regarding the physical injury was undisputed except as to the degree of the impairment, and there was no preexisting condition. Much of the recommended treatment was long delayed due to denial by insurer and/or utilization review, which prevented significant permanent relief for the employee. Employer attempted to return him to work, but it was reasonable for him to refuse to work in a position that caused excruciating pain. Various expert opinions were weighed by the court, which ultimately determined that the employee had suffered both physical and mental injuries and based an uncapped award on both. The full text of this opinion may be viewed here: http://www.tncourts.gov/sites/default/files/knight-publix_opnjo.pdf

ORVILLE LAMBDIN v. GOODYEAR TIRE & RUBBER COMPANY No. W2013-01597-SC-WCO-WC - Filed January 29, 2015. The employee suffered a gradual loss of hearing over 37 years working for employer. There was argument over the medical rating method used by the physician with respect to frequency levels of sound over 3000 hertz and whether it should be addressed at all since that particular frequency was not rated under the AMA Guidelines. It was determined that the expert testimony established an appropriate method, which was used and accepted by the medical community to arrive at an impairment rating. The award was based on that impairment rating since the injury was related to the workplace. The full text of the opinion may be viewed here: https://www.tncourts.gov/sites/default/files/lambdinorvilleopn_0.pdf

DANIEL G. LEWIS v. COMCAST No. E2014-00962-SC-R3-WC-FILED-June 17, 2015.

Employee fell from a pole during a climbing recertification procedure. The employer provided medical care and paid temporary disability benefits but denied that the employee had sustained a permanent impairment or disability. The employee was found to be credible, the expert medical testimony was credited, and the court granted employee a disability award. The court further noted that a history of prior drug use by the employee did not change his diagnosis from the fall. The full text of the opinion may be viewed here: http://www.tncourts.gov/sites/default/files/lewis-comcast_opjud.pdf

ROBERT MORROW V. MR. BULT'S, INC., ET AL. No. W2014-00546-SC-WCM-WC – Filed November 30, 2015.

The employee failed to carry his burden of proving that his compensable work related injury resulted in a permanent disability. He had dueling physician reports, and the court found the report of the authorized treating physician more persuasive than that of an independent medical evaluator. The full text of this opinion may be viewed here: <http://www.tncourts.gov/sites/default/files/morrowropn.pdf>

CHAD SEIGMUND v. BELLSOUTH TELECOMMUNICATIONS, LLC, ET AL. No. M2014-00234-SC-R3-WC - FILED: December 30, 2014.

Employee was involved in a work related motor vehicle accident. Employer provided medical treatment, and the authorized treating physician assigned a 0% impairment while an independent medical evaluator physician provided an 11% permanent disability to the body as a whole. Each treating physician indicated that employee was asymptomatic prior to the accident, so the court determined that he had necessarily sustained permanent impairment and disability from the accident, allowing for an award. The full text of the opinion may be viewed here: <http://www.tsc.state.tn.us/sites/default/files/seigmundcopnjo.pdf>

An extension of the subject matter, and the next populous area of cases before the Panel this year, was the Tennessee Medical Impairment Rating Registry (MIR) which is meant to be the final evaluator in a case where the impairment rating given by treating and evaluating physicians is disparate. The presumption of correctness given to the medical impairment rating can only be overcome by clear and convincing rebuttal evidence. T.C.A. §50-6-204(d)(5). The court reiterated throughout this year, that the MIR provides an efficient method for presenting neutral, objective opinions regarding an employee's impairment to aid the court when the parties disagree regarding the extent of the impairment.

RALPH ALEXANDER v. A&A EXPRESS, LLC No. W2014-01643-SC-R3-WC –Filed September 10, 2015.

Employee suffered an injury which resulted in a permanent impairment. He returned to work but was later laid off due to lack of work. In his reconsideration claim, the employee argued that the presumption of correctness of the MIR rating should have been overcome because the AMA Guides, Sixth Edition, upon which the MIR physician based his rating, was medically incorrect as applied to his injury. The court found that although the AMA Guides are not the equivalent of law, there was not clear and convincing evidence rebutting the rating so as to deviate from the Guides under this set of facts. The court found that, although the

employee was not permanently totally disabled, he was due an award for partial permanent disability based upon the MIR rating. The full text of the opinion may be viewed here: https://www.tba.org/sites/default/files/alexander_091115.pdf

INGA BROCK v. HEWLETT-PACKARD COMPANY No. M2014-01889-SC-R3-WC – Filed September 23, 2015. The employee sustained a work-related injury which required surgery. The treating physician, independent medical evaluation physician and MIR physician assigned various ratings. The Panel found that the evidence was insufficient to rebut the presumption of accuracy so awarded a permanent partial disability based upon the MIR physician's rating. The full text of the opinion may be viewed here: https://www.tncourts.gov/sites/default/files/brock-hp_opnjo.pdf

CHRIS VICTORY v. BOB DUCKWILER D/B/A CUSTOM CONCRETE DESIGN ET AL. No. M2014-00952-SC-R3-WC Filed September 8, 2015. The employee alleged an injury which the employer initially accepted, then later denied. The Panel found that the employee had sustained a compensable injury, but that the testimony of employee's evaluating physician, in part suggesting that perhaps the other physicians started out with an adversarial opinion of the employee, did not raise serious or substantial doubt as to the accuracy of the MIR physician's rating and therefore did not rebut the presumption of accuracy by clear and convincing evidence, so awarded six times the permanent disability based up the MIR rating. The full text of the opinion may be viewed here: <http://www.tsc.state.tn.us/sites/default/files/duckweiler-victoryopnjo.pdf>

*Of interest coming up next year before the Tennessee Supreme Court is the issue of the constitutionality of T.C.A. § 50-6-241(e) in **Martinez v. Lawhon d/b/a Commercial Services, Auto Owners Insurance, No. M2015-00635-SC-R3-WC.** The Davidson County Chancery Court has found (e)(2)(A) and (e)(2)(B)(i) capping an award to an injured unauthorized employee to 1.5 times his impairment rating to be unconstitutional due to federal preemption by the Immigration Reform and Control Act of 1986 (IRCA). 8 U.S.C § 1324a(h)(2). Accordingly, the court's award in favor of the Employee was not capped. The Appellant/Employer claims the award should have been capped since the employee was ineligible to return to work. The employer argues that while both (e)(2)(A) and (e)(2)(B)(i) are constitutional, (e)(2)(B)(ii) is unconstitutional because it imposes criminal sanctions on an employer who knowingly employed an unauthorized worker and, as such, is preempted by IRCA. The Tennessee Attorney General's office supports the statutes' constitutionality and argues that the point is moot as neither (e)(2)(A) nor (e)(2)(B) is applicable since it was never proven that the employer knew of the employee's unauthorized status. Additionally, that there is no implied or express preemption by IRCA. Watch for a decision.*

CONCLUSION

Pursuant to T.C.A. § 50-6-121(i), the Advisory Council on Workers' Compensation respectfully submits this report on significant Supreme Court decisions for the 2015 Calendar Year up to and

including December 15, 2015. An electronic copy of the report will be sent to the Governor and to the Speaker of the House of Representative, the Speaker of the Senate, the Chair of the Consumer and Human Resources Committee of the House of Representative, the Chair of the Commerce and Labor Committee of the Senate. A printed copy of the report will not be mailed. Notice of the availability of this report will be provided to all members of the 109th General Assembly pursuant to T.C.A. § 3-1-114. In addition, the report will be posted under the Advisory Council on Workers' Compensation tab of the Tennessee Treasury Department website: <http://treasury.tn.gov/claims/wcadvisory.html>

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



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