

# STATE OF TENNESSEE

## *Advisory Council on Workers' Compensation*

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### 2016 SUMMARY OF SIGNIFICANT TENNESSEE SUPREME COURT WORKERS' COMPENSATION DECISIONS

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TREASURY DEPARTMENT  
STATE CAPITOL  
NASHVILLE, TENNESSEE 37243-0225

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

# **Significant 2016 Tennessee Supreme Court Workers' Compensation Decisions**

## **INTRODUCTION**

Pursuant to Tennessee Code Annotated (“T. C. A.”) § 50-6-121(i), the Advisory Council on Workers' Compensation is required to issue this report reviewing significant Tennessee Supreme Court decisions involving workers' compensation matters for each calendar year. This report contains a condensed synopsis of a majority of the cases, with headings to facilitate review of the 2016 decisions from the Tennessee Supreme Court.

### **The Tennessee Supreme Court**

Appeals of decisions in workers' compensation cases by trial courts, including the Circuit and Chancery Courts, the Court of Workers' Compensation Claims, the Tennessee Claims Commission, and appeals from Workers' Compensation Appeals Board decisions are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel (“Panel”) for hearings. The Panel gives considerable deference to the lower trial courts' decisions with respect to credibility of witnesses since the lower trial courts have the opportunity to observe individuals testify. The Panel reports its findings of fact and conclusions of law, and such judgments automatically become the judgment of the full Supreme Court thirty (30) days thereafter, barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and T. C. A. § 50-6-225 and see also T. C. A. § 50-6-217(a)(2)(B), relative to the appeal process from the Workers' Compensation Appeals Board.

### **The Tennessee Supreme Court Special Workers' Compensation Appeals Panel**

The following is a list with summaries of several of the pertinent cases heard by the Special Workers' Compensation Appeals Panel in 2016, up to and including December 19, 2016, to be used as a reference tool. Although the first listed case was decided October 15, 2015 it is included here because of its significance.

## **Employee Misconduct Not Connected to Work**

### **Christopher Shondale Stacey v. Nissan North America, Inc., et al.**

**M2014-00796-SC-R3-WC** – Filed October 15, 2015. An employee terminated due to a verbal altercation with an employee of a contractor that operated his employer’s fitness center later sought reconsideration of three previous workers’ compensation claims. The employer asserted the employee was not eligible for reconsideration because he had been terminated for misconduct connected with his work. The trial court found the employer had not met its burden of proof that the employee’s misconduct was connected with his employment, determined he was entitled to reconsideration, and awarded additional permanent partial disability benefits. The employer’s appeal was referred to the Special Workers’ Compensation Appeals Panel. The Panel affirmed the trial court’s decision, noting the employee had completed his regular work day, gone home for dinner, and later returned to the fitness center on his employer’s premises to work out. The Panel agreed his altercation with the contractor’s employee had no connection to his work and did not bar him from reconsideration.

[http://www.tncourts.gov/sites/default/files/stacey-nissan\\_opnjo.pdf](http://www.tncourts.gov/sites/default/files/stacey-nissan_opnjo.pdf)

### ***Res Judicata* Applies on the Point at Issue**

**Jimmy Segroves v. Union Carbide, et al. E2015-00572-SC-WCM-WC** – Filed December 10, 2015. An employee filed a workers’ compensation lawsuit for hearing loss and breathing “impairments” in 2003. The hearing loss claim was settled in 2005 and the employee voluntarily dismissed the breathing dysfunction claim with prejudice as part of the settlement. In 2011 the employee was diagnosed with asbestosis related lung disease. He filed a new lawsuit for benefits for that condition, contending the 2005 settlement had not specifically dismissed his claims for lung dysfunction. The trial court granted summary judgment for the employer, who had asserted defenses of *res judicata*, collateral estoppel, issue or claim preclusion, and accord and satisfaction and release based on the 2005 settlement. The employee’s appeal was referred to the Special Workers’ Compensation Appeals Panel, which reversed the judgment and remanded the case to the trial court for further proceedings.

The Panel noted a judgment is *res judicata* only as to the matter at issue. “To be conclusive, the adjudication should be upon the very point brought directly in issue by the pleadings,” citing *White v. White*, 876 S.W.3d 837 (Tenn. 1994). *White* had quoted with approval *Banks v. Banks*, 77 S.W.2d 74 (Tenn. Ct. App. 1934), which held, “The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and does not prevent reexamination of the same question between the parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.” Since neither the 2003 complaint nor the 2005 settlement order mentioned asbestos, or described any specific disease or type of lung dysfunction, the Panel determined the existence or cause of

asbestos-related disease was not at issue in the prior lawsuit. The medical evidence also indicated the employee had no knowledge of the existence of asbestos-related disease prior to 2011. With respect to the employer's contention the 2005 settlement order barred the later suit, the Panel cited T. C. A. § 50-6-114(a) and pertinent cases, indicating an agreement to prospectively extinguish or reduce an employer's obligations under the Workers' Compensation Law violates public policy and is unenforceable.

<http://www.tncourts.gov/sites/default/files/segroves-unioncarbideopn.pdf>

### **Medical Proof Not Always Certain**

**Karen Alford v. HCA Healthcare Services of Tennessee, Inc., et al. – M2014-02455-SC-R3-WC** – Filed December 15, 2015. The plaintiff, a nurse, alleged she sustained injuries to her hip in an August 24, 2011 work incident when she slipped on a wet surface. She also alleged nerves in her leg were injured during treatment for the hip problem and that she had sustained a mental injury as well. The employer contended the hip problems were preexisting and that she did not meet her burden of proof on the nerve and mental injuries. The employee had sought medical help for right hip pain earlier that summer. Medical evidence indicated the work incident caused a worsening of pre-existing labral damage. Medical evidence concerning nerve damage to the employee's right leg was not precise. The trial court found the hip and nerve injuries were compensable but not the mental injuries. It awarded certain medical expenses for unauthorized providers. The employer appealed, asserting the evidence preponderated against the award of benefits. The employee did not appeal the dismissal of the claim for mental injury. The employers' appeal was referred to the Special Panel which reversed the award of medical expenses but otherwise affirmed the judgment.

The Panel found the evidence relative to the hip injury did not preponderate against the finding of compensability. On the nerve injury claim, the Panel noted that while "causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof rarely can be certain . . ." *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004), and that all "reasonable doubts as to the causation of an injury and whether it arose out of the employment should be resolved in favor of the employee," *Phillips v. A & H Construction Co.*, 34 S.W.3d 145, 150 (Tenn. 2004). The element of causation is satisfied where the "injury has a rational, causal connection to the work," *Braden v. Sears, Roebuck & Co.*, 833 S.W.2d 496, 498 (Tenn. 1992). The Panel agreed the medical evidence was not certain, but noted the sequence of the hip surgery with accompanying nerve blocks after the procedure and the employee's consistent testimony about the onset of numbness supported the trial court's finding that the nerve injury was compensable. The reversal of medical expenses to unauthorized physicians was due to the employee's failure to follow correct procedures to secure a neutral physician or consult with her employer about arranging for other providers when she

became dissatisfied with the panel of neurologists.

[http://www.tncourts.gov/sites/default/files/alford-hcaopnjo\\_.pdf](http://www.tncourts.gov/sites/default/files/alford-hcaopnjo_.pdf)

### **Treating Physicians Should Explore Work History in Depth**

**Mary Hovatter v. JDAK, LLC, et al. – M2015-01015-SC-R3-WC – Filed December 30, 2015.**

An employee developed carpal tunnel syndrome. For eight years she built windows using a vibrating air drill. Then for another 12 years she used scissors to cut felt and rubber for lining window frames. Her employer provided medical treatment until the authorized treating physician (ATP) opined the condition did not arise primarily from her work. The employer then denied the claim. At trial an evaluating physician testified her work was the primary cause of the condition. The trial court found the employee had successfully rebutted the opinion of the ATP, as required by T. C. A. § 50-6-102(12)(C)(ii). It further found the condition arose primarily from her employment, as required by § 50-6-102(12)(A)(ii) and awarded benefits. The employer's appeal was referred to the Special Panel, which affirmed the trial court.

The Panel observed the ATP saw the employee only once and concluded the employee's age, gender and diabetes were most responsible for the carpal tunnel syndrome, although he thought her work had at least aggravated her symptoms. According to the ATP, connecting the syndrome to work would require heavy, forceful lifting, gripping or exposure to vibration. While continuing to work for her employer as a quality inspector the employee was independently evaluated by another orthopedic surgeon. The evaluating physician testified the employee's condition was work related considering the "classic" causes of carpal tunnel syndrome of cumulative trauma and overuse. He cited the employee's repetitive use of scissors, and gripping and squeezing. Although he acknowledged the syndrome is multi-factorial in etiology and the relationship between repetitive activity and the syndrome is disputed in medical literature, he still maintained the employee's condition was primarily work related, and that any repetitive use of the hands, forceful or not, was enough to cause or advance the syndrome. The employer contended the independent physician's testimony should be given less weight than that of the ATP. The Panel found both physicians to be equivalently competent. While acknowledging the presumption of correctness applied to the ATP's conclusions, the Panel determined the ATP had not questioned the employee concerning her work history prior to the most recent 12 to 13 years and was unaware of her prior, extensive use of vibrating equipment. The Panel found the evidence sufficiently demonstrated the employee's exposure to vibration over many years and thus supported the evaluating physician's testimony that the syndrome was primarily caused by work activity. It is not clear whether the evaluating physician was himself fully aware of the employee's earlier work history however, his opinions plus the ATP's testimony that exposure to vibration could cause the syndrome directly linked to the employee's evidence.

[http://www.tncourts.gov/sites/default/files/horvatter-jdak\\_opn.pdf](http://www.tncourts.gov/sites/default/files/horvatter-jdak_opn.pdf)

## The Direct and Natural Consequences Rule

**Johnny Braden v. M&W Transportation Co., Inc., et al. – M2015-00555-SC-R3-WC** – Filed December 30, 2015. The employee, a truck driver, sustained a compensable injury to his right elbow in a specific incident in April 2005 while working for the employer. Within six months of returning to work the employee began experiencing pain in his right shoulder and numbness in his hand. He received treatment over the next two years and eventually was assigned a seven percent (7%) permanent partial impairment rating. Three different insurers covered the employee during the time of his treatment. Each disclaimed liability for the eventual disability. The trial court found the disability to be the direct and natural consequence of the original injury and assigned liability to the first insurer. The insurer appealed, contending liability for the shoulder and hand conditions should be assigned to the subsequent insurers based on the “last day worked rule.” The appeal was referred to the Special Panel, which affirmed the trial court.

The Panel discussed the three rules Tennessee courts have used to determine liability when causal connection is at issue. The “*direct and natural consequences rule*” applies when a single incident causes the employee’s disability. Under this rule, liability for a subsequent injury in the form of aggravation of the original injury or a new and distinct injury is assigned to the employer and insurer who provided coverage on the date of the accident if it is the direct and natural result of the original injury. *Anderson v. Westfield Group*, 259 W.W.3d 690, 696 (Tenn. 2008). The “*last day worked rule*” applies when repeated, injurious incidents cause a “gradual injury.” Under this rule, liability is assigned to the employer and insurer who provided coverage on the date the employee could no longer work. The “*last injurious injury rule*” applies when a second, distinct occurrence combines with or advances the severity of the employee’s pre-existing condition, citing *Fink v. Caudle*, 856 S.W.2d 952, 959 (Tenn. 1993). To decide which rule applies, “each case must be decided on its facts based upon the proof relating to causation.” *Mynatt v. Liberty Mut. Ins. Co.*, 699 S.W.2d 799, 800 (Tenn. 1991). Based on the medical evidence, the Panel determined it was undisputed the employee’s original injury was caused by a specific incident in April 2005, and that the trial court had properly applied the direct and natural consequences rule.

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## Second Injury Fund Not Liable

**Bob A. LaPradd v. Nissan North America, Inc., et al. – M2014-01722-SC-WCM-WC** – Filed January 14, 2016. While working on an automobile assembly line, the employee sustained a back injury on June 29, 2005. The employer provided medical treatment and after several weeks the employee appeared to recover. By October 2005 he had developed more severe symptoms, including shooting pains in his right leg, and the employer denied additional treatment. The employee eventually had a fusion of three vertebrae in his lower back. The trial court found the

employee's injuries, including a mental injury, compensable and awarded permanent total disability benefits. It found the Second Injury Fund was not liable for any portion of the award. The court also denied the employer a set-off for benefits paid by the employer's disability plan. The appeal was referred to the Special Panel, which affirmed the award of permanent total disability benefits and the decision not to assign liability to the Second Injury Fund, but reversed the denial of the set-off.

Significant medical evidence and the employee's testimony at trial indicated the employee had not fully recovered from the work injury by the time he began experiencing additional symptoms in October 2005. The Panel agreed that the evidence supported the trial court's finding the employee's temporary total disability resulted solely from the June 29, 2005 injury. It also held the employer had failed to meet its burden of proving the existence of previous awards for permanent disability specific to the body as a whole that is necessary to make a claim against the Second Injury Fund.

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### **Determining Meaningful Return to Work**

**Cecilia Thompson v. Kroger Limited Partnership I – W2015-00075-SC-R3-WC** – Filed February 1, 2016. An employee sustained a compensable injury to her left shoulder in April 2010 while working in the delicatessen section of a supermarket. She returned to work in a transitional modified job and settled her claim within the one and one-half times impairment cap. T. C. A. § 50-6-241(d)(1)(A). Her employer offered her a permanent job as a fuel center cashier with accommodations for her medical restrictions. The employee did not accept the position, indicating she preferred to work in the deli, and was terminated from her transitional job in October 2011 because the employer determined she was unable to perform the deli job. She sought reconsideration of her settlement. The trial court found the employer had acted reasonably and that the employee had a meaningful return to work. The trial court declined to award additional benefits. The employee's appeal was referred to the Special Panel, which affirmed the trial court's judgment.

The Panel cited *Tryon v. Saturn Corporation*, 254 S.W.3d 321, 328-9 (Tenn. 2008) in considering the issue of a meaningful return to work. "When determining whether a particular employee had a meaningful return to work, the court must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to or remain at work. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of the case." The Panel then referenced *Yang v. Nissan North America, Inc.*, 440 S.W.3d 593, 594 (Tenn.2014), which held "This fact-intensive determination, however, is typically best left to the trial judge who has had the opportunity to observe the witnesses, determine their credibility, and assess 'the reasonableness

of the employer . . . and the . . . employee.’’ The Panel agreed with the trial court that the employer did everything it could be reasonably required to do when it was determined the employee could not accomplish her work at the deli.

<http://www.tncourts.gov/sites/default/files/thompsoncopn.pdf>

### **Statute of Limitations tolled by Employee’s Late Discovery of Permanence of Injury**

**Clyde E. Cowan v. Knox County, Tennessee – E2015-00405-SC-R3-WC** – Filed February 24, 2016. The employee, a sheriff’s lieutenant, sustained a low back injury in April 2001 as he exited his patrol vehicle to chase a fleeing suspect. His first report of injury indicated he had sustained a “ruptured disc in low back.” After conservative treatment he recovered and returned to work without restrictions for the next ten years. In June 2011 the employee experienced a recurrence of back pain and notified his employer he believed it stemmed from the 2001 injury and was now permanent. He filed a second First Report of Injury. The employer denied his claim for compensation. The employee underwent surgery in August 2011 and six weeks later returned to work with restrictions. The employee filed suit after the parties could not reach a resolution at a Benefit Review Conference. The employer moved to dismiss, contending the claim was barred by the statute of limitations. The trial court denied the motion. The employee filed a motion *in limine* to exclude a one page note prepared by the employee’s original treating physician, who had noted a disc injury. The trial court granted the motion. The court found the employee’s claim timely and compensable, awarded temporary total disability benefits for the six week period after his August 2011 surgery, and found the employee had a thirty percent permanent partial impairment to his body as a whole. The employer appealed, asserting the claim was barred by the statute of limitations. The employer also contended the claim was for a non-compensable preexisting back injury. The appeal was referred to the Special Panel, which affirmed the trial court’s judgment.

At trial an independent medical examiner had testified that the employee had sustained a disc injury in April 2001 that was consistent with a permanent weakening of the L5 disc segment, which explained the employee’s left lower extremity symptoms through the years since 2001. The examiner testified the employee atypically had gained sufficient control over his initial symptoms and his ongoing symptoms to be able to maintain a high level of function in his work and normal daily activities for the ensuing ten years. Despite some temporary exacerbation episodes, the employee’s symptoms returned to his pre-episode level of severity until a June 2011 episode. For the first time, the 2011 episode caused numbness in the left foot, which eventually necessitated the surgery in August 2011. The examiner stated the 2001 disc injury was permanent although any radiculopathy had subsided until the June 2011 episode. The Panel determined the employee had only discovered the permanence of his injury in August 2011 and that the statute of limitations did not begin to run until he “learned he had a permanent anatomical change and impairment,” citing *Oliver v. State*, 762 S.W.2d 562, 565 (Tenn.1988).

The question before the trial court was when the employee knew or reasonably should have known he had suffered a permanent injury to his back as a result of the April 2001 injury. The Panel agreed with the trial court's finding that the employee had no idea the 2001 injury would be permanent until August 2011. The Panel also agreed medical evidence, including the original treating physicians' one page note which had been excluded at trial, supported the finding that the employee had reason to believe his symptoms were completely and fully resolved within a few months of the 2001 injury.

[http://www.tncourts.gov/sites/default/files/cowan\\_clyde\\_wc\\_opinion\\_judg.pdf](http://www.tncourts.gov/sites/default/files/cowan_clyde_wc_opinion_judg.pdf)

### **Death of Surviving Spouse Does Not Extinguish Pending Claim Dependent Child Entitled to Pursue Benefits in Own Right**

**Gene Stamps ex rel. Estate of Marilyn Sue Stamps, et al. v. Trinity Marine Productions, Inc. et al. – M2015-00373-SC-R3-WC – Filed March 22, 2016.** A widow filed suit seeking workers' compensation death benefits for herself and her son, the stepson of the deceased worker. She alleged her husband's death was caused by a lung disease contracted in the course of his employment. The employer denied liability. While the action was pending, the widow died. An amended complaint was filed by her estate and her son. The trial court granted the employer's motion for summary judgment, holding that neither the estate nor the son had standing to sue for benefits. The appeal was referred to the Special Panel, which reversed the trial court's judgment and remanded the case for further proceedings.

The employer maintained that under T. C. A. § 50-6-210(d)(8), the right to continue receiving benefits terminates upon the spouse's death, and since her claim had been denied and no benefits had been paid prior to her death, her estate lacked standing to pursue benefits. Also, the employer contended any right of the stepson to pursue benefits was through his mother and since her estate had no standing, his right to seek recovery was also extinguished by her death. The Panel noted it was undisputed the mother was the surviving spouse of the deceased employee, and the son, age 20, was a full time student at a recognized educational institution at the time of the employee's death, thus the facts gave them standing. The Panel disagreed with the employer's contention that because no benefits had been paid the right to pursue a claim is extinguished. "In our view, Employer's narrow interpretation of section 210(e)(8) directly conflicts with the mandate to construe the statute in a manner that justly compensates workers and their families. Had she survived, it is undisputed that Ms. Stamps would have had standing to seek benefits based on her husband's death. To deny her estate standing to seek benefits simply because she died while Employer was contesting liability would be contrary to the remedial purpose of the workers' compensation statute." The employer also claimed an award of benefits to Ms. Stamps' estate would be tantamount to allowing her to pass her right to receive compensation to her heirs. The Panel disagreed, holding the stepson was entitled to seek compensation in his own right as the dependent stepchild of the deceased employee under T. C.

A. § 50-6-210(e)(11) and was not restricted to pursuing benefits through the surviving spouse, “although all claims must be presented in a single action.” *Berry v. Kroger Grocery & Baking Co.*, 89 W.W.2d 344, 345 (1936).

[http://www.tncourts.gov/sites/default/files/stamps-trinity.opnjo\\_.pdf](http://www.tncourts.gov/sites/default/files/stamps-trinity.opnjo_.pdf)

**Summary Judgment is “Almost Never an Option” in Workers’ Compensation Actions  
(But see *Terry Arnold v. Courtyard Management Corporation* Below)**

**Demetrius D. Walton v. Colonial Freight Systems, Inc. – E2015-00088-SC-R3-WC – Filed May 6, 2016.** The workers’ compensation claimant was an independent contractor for the defendant, a common carrier engaged in interstate commerce. The claimant and the defendant agreed the defendant would provide workers’ compensation coverage for claimant under T. C. A. § 50-6-106(1)(B) (2012). The claimant was seriously injured while driving a tractor trailer for the defendant in June 2011. The injuries included a punctured/collapsed lung, broken arm, lacerated leg, and trauma to his liver, spleen, and right kidney. The claimant’s claim for benefits was denied and he sued for workers’ compensation benefits. The defendant moved for summary judgment, claiming the employment agreement was void *ab initio* because of alleged material representations by the claimant about his physical condition in his pre-employment medical examination. The trial court granted summary judgment, citing material misrepresentations, failure to disclose certain medical conditions, and also relied on T. C. A. § 56-7-103 (2012), dealing with misrepresentations in applying for an insurance policy. The appeal was referred to the Special Panel, which vacated the summary judgment and remanded the case.

The Panel first noted that “summary judgment is almost never an option in a contested workers’ compensation action,” citing *Berry v. Consol. Sys., Inc.*, 804 S.W.2d 445, 446 (Tenn. 1991). The employer had asserted the claimant made three knowing and willful false representations of his physical condition in responses to questionnaires during his pre-employment medical examination. The first involved undisclosed hypertension. The second related to an undisclosed muscular disease, polymyositis/dermatomyositis. The third involved right shoulder weakness. The claimant responded, indicating he told the examining physician he had been on medication for hypertension and had stopped. At the first visit with the examiner he was told to return after resuming his blood pressure medication. A week later the examiner certified him to drive. The claimant indicated he had been diagnosed with polymyositis in 1981 at age 16, had received treatment, was told he was in remission, and believed he was cured. He had not received treatment or experienced any symptoms in 30 years. The claimant indicated he had not had a shoulder problem before the accident in June 2011, although a minor automobile accident in 2007 led him to seek treatment for soreness in his neck and lower back. The employer asserted a contract theory that the employment agreement was conditioned on misrepresentations about the claimant’s medical condition and was therefore void *ad initio*. The claimant countered that workers’ compensation laws, not contract law should govern. The Panel agreed. “By choosing to

extend workers' compensation benefits to Mr. Walton, Colonial voluntarily subjected itself to the rules and procedures of the workers' compensation system." An employer can assert misrepresentation of physical condition as a defense in a workers' compensation action, but must prove three elements: that the employee knowingly and willfully made a false representation of his physical condition; that the employer relied on the misrepresentation in making the decision to hire; and that the misrepresentation was material, i.e. that there was a causal relationship between the subject matter of the false representation and the injuries later sustained by the employee. *Berry*, at 846. The Panel noted the employer failed to show there was no genuine issue of material fact and did not establish a causal relationship between the alleged false representation and the work-related injuries. The Panel also determined T. C. A. § 56-7-103 applied to life and health insurance applications, not workers' compensation situations. <https://www.tncourts/sites/default/files/waltondemetriusd.pdf>

### **Employer's Safety Rule a Valid Defense**

**Damon Hawks v. Lisa Christian, et al. – M2015-02200-SC-R3-WC** – Filed June 20, 2016. The employee was injured while performing roofing work when he fell off a roof. The employer denied his claim for workers' compensation benefits pursuant to T. C. A. § 50-6-110 because the employee failed to use a required safety appliance. The employee testified he was wearing the required safety harness with an attached retractable cable. He said he was working a few inches from the edge of the roof when the cable became wrapped around his left leg. He unhooked the cable to unwrap it and accidentally stepped off the roof and fell eight feet to the ground, fracturing his hip socket. The trial court found the employee provided a valid excuse for failing to wear the required equipment and awarded benefits. The employer's appeal was referred to the Special Panel, which reversed the trial court's judgment.

Prior to trial the parties had stipulated that the employer required all workers to wear a safety harness with an attached cable "100 per cent" of the time. At trial the employee testified he didn't think there was any other way to get untangled but to unhook the harness, that he did so in order to save time, and that he thought he would be safe because of his long roofing experience. The Panel relied upon *Mitchell v. Fayetteville Public Utilities*, 368 W.W.3d 442, 449 (Tenn. 2012) in determining whether the statutory defense had been established by the employer. The *Mitchell* test requires consideration of four factors: (1) the employee's actual notice of the (safety) rule; (2) the employee's understanding of the danger involved in violating the rule; (3) the employer's bona fide enforcement of the rule; and (4) the employee's lack of a valid excuse for violating the rule. (453). The Panel determined the first three factors were met by the parties' stipulation, and viewed the employee's explanation for unhooking the harness as similar to the factual situation in *Mitchell* where a lineman willfully decided to take off his safety gloves to hammer a staple into a pole and sustained an electrical shock and burn. The Panel found the employee "chose to violate the rule at the very edge of the roof, where the possibility of falling

was greatest. Employee's belief that he would be safe while unharnessed because of his experience is not an excuse in the circumstances of this case. *The purpose of safety rules in general is to avoid employees applying their own individual determinations of what is safe.* While there may be circumstances in which an experienced employee must make a decision in emergency situations, this case does not provide such circumstances." (Emphasis added) [http://www.tncourts.gov/sites/default/files/hawks-christian\\_opnjud.pdf](http://www.tncourts.gov/sites/default/files/hawks-christian_opnjud.pdf)

### **Employee had Burden of Excusing Failure of Notice**

**John E. Houston v. Conagra Foods Packaged Foods LLC – W2015-01257-SC-WCM-WC -** Filed June 30, 2016. The employee alleged he sustained a compensable injury to his back in June 2013. He first sought treatment through his health insurer but told his physicians his injury occurred in the course of his employment. When he submitted a claim for short-term disability benefits and FMLA leave through his employer, he stated his condition was *not* work related. He had back surgery in August 2013. In September 2013 he gave notice of a work-related injury to his employer via a letter from counsel. At trial, the employee testified he had not previously informed any representative of his employer that he believed his injury was work-related. Employer denied the claim, based in part on lack of timely notice. The trial court found the employee's application for short-term disability benefits provided notice that the employer had an injured employee and that if the employer had investigated at the time, it would have become aware the injury was work-related. It awarded permanent partial disability benefits and entered judgment. The employer's appeal was referred to the Special Panel, which reversed the judgment.

The employer asserted the trial court erred by finding the employee gave appropriate notice of his alleged work-related injury as required by T. C. A. § 50-6-201 (a) (2008). The Panel relied upon *Ingram v. Heads Up Hair Cutting Center*, No. M2012-00464-WC-R3-WC, 2013 WL 1458872 (Tenn. Workers' Comp. Panel April 10, 2003), in determining when a failure to give notice is excusable. "To determine whether an excuse is reasonable, we consider: '(1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusing of the requirement, and (3) the excuse or inability of the employee to timely notify the employer.'" (Citing cases) "[T]hese laws should be rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers' who fall within its coverage." (Citing cases). *Ingram*, 2013 WL 1458872, at 4. The Panel found it undisputed that the injury occurred in June 2013 and that notice was not given until September 2013. The burden was on the employee to show he had a reasonable excuse for failing to provide timely notice since the employer had no actual knowledge of the injury until September. The evidence indicated the employee knew his injury was work-related in June 2013 and certainly before his surgery in August 2013. The Panel noted the employee completed paperwork in June 2013 denying his injury was work-related in his application for disability benefits and FMLA leave

and thus deliberately misrepresented the situation to circumvent the workers' compensation structure for treatment. "We conclude that knowingly giving false information in response to an employer's direct questions about the cause of his condition does not constitute a reasonable excuse for failing to give timely notice as required by section 50-6-101." The Panel found the trial court erred in concluding the employer was obligated to conduct an investigation in the circumstances. "[M]ere knowledge of an employee's illness, unless it is obvious that a work-related injury has occurred, is insufficient to charge the employer with knowledge that the employee sustained a work-related injury." (Citing cases.)

[http://www.tncourts.gov/sites/default/files/houstonopn\\_0.pdf](http://www.tncourts.gov/sites/default/files/houstonopn_0.pdf)

### **Employer Can Rebut "Reasonable and Necessary Treatment" Presumption**

**Vicki Russell v. Dana Corporation** – M2015-00800-SC-WC – Filed August 1, 2016. In 1994 the employee received workers' compensation benefits for a work-related cervical spine injury and left carpal tunnel syndrome she sustained in 1991. The employee returned to work in 1992, was laid off in 1993, and never resumed employment. The year after the employee received workers' compensation benefits the physician who treated her work-related injury referred the employee to her primary care physician for continued treatment of her work injury. From 1995 to the present, the employee's primary care physician has treated her work-related injury and other medical problems unrelated to her work. In 2010 the employee underwent two surgeries on her left shoulder and left knee unrelated to her work injuries. In June 2013, the employer filed a motion seeking an independent medical evaluation, which was granted. After receiving the evaluation report, the employer filed motions to "de-authorize" or remove the employee's treating physician and permission to provide a panel of three pain management physicians for the employee's future medical treatment. These motions were denied. The employer's appeal was referred to the Special Panel, which reversed the trial court and remanded the case.

The evidence revealed the employee had seen her primary care physician over the years for both her work-related injuries and multiple other medical conditions. The physician prescribed numerous medications for the employee, for low back pain, panic attacks, chronic pain syndrome, depression, and other conditions, including two suicide attempts due to overdose of pain medications. As of February 2010 the employee was taking about 510 pills a month. Several of the medications were being prescribed for her work-related injuries. At that point the employer engaged a pain management specialist to conduct a medication therapy review of the employee's medication regimen. Despite the recommendations of the specialist to gradually reduce and ultimately discontinue most of the medications related to her work injuries, the primary care physician refused. In June 2013 the employer moved for an independent medical examination, which was conducted in September 2013. The examiner could not relate any of several prescribed medications to conditions resulting from the employee's work injuries of 1991. The employer then sought to de-authorize the primary care physician, relying on T. C. A. §

50-6-204(j), which applies to pain management. The trial court denied the motion, concluding an employer may not force an employee to change physicians after treatment has commenced and that section 50-6-204(j) did not apply. In the appeal, the employer contended the section did apply and required the employer to provide a panel of pain management physicians for future medical treatment. *The question of law for the Panel was whether an employer has the legal ability to present evidence in an effort to require an employee to change physicians once treatment has begun.* The Panel held the employer had rebutted by a preponderance of the evidence the presumption that the primary care physician's treatment of the employee's work-related injuries was reasonable and necessary, and had established that the treatment was defective. The Panel also determined section 50-6-204(j) was applicable.

[http://www.tncourts.gov/sites/default/files/russellvickiv.dana\\_.opnjo\\_.pdf](http://www.tncourts.gov/sites/default/files/russellvickiv.dana_.opnjo_.pdf)

### **Summary Judgment Was an Option for Statute of Limitations Defense**

**Terry Arnold v. Courtyard Management Corporation** – W2015-02266-SC-WCM-WC – Filed September 28, 2016. The employee, a maintenance technician, filed suit alleging she sustained a compensable injury to her neck on August 18, 2012. The employer provided medical and temporary partial disability benefits for a period of time. Her last day of treatment by the authorized treating physician (ATP) was April 1, 2013. The last payment for medical treatment was issued April 29, 2013. Thereafter, the employer filed a final report of payment and receipt of compensation with the Department of Labor (DOL), although the employee did not sign it. The employee requested additional medical treatment on May 5, 2014. The employer denied the claim based on the one-year statute of limitations, T.C.A. § 50-6-203(b), (c). The employee filed a request for assistance with DOL on May 7, 2014, and a request for a benefit review conference (BRC) on May 13, 2014. DOL issued a benefit review report May 30, 2014, which noted the existence of the legal issue relative to the statute of limitations and waiving the BRC process. Suit was filed November 19, 2014. The employer filed a motion for summary judgment, relying on the one year statute of limitations in T.C.A. § 50-6-203(b) and (c), and the 90 day statute in (g)(1). The employee contended she had not reached maximum medical improvement by April 1, 2013 and therefore the statute had not begun to run. She also claimed the employer was estopped to raise the statute defense since the ATP had not filed a final report with an impairment rating, and the employer's filing of a final report was a deliberate misrepresentation that she relied on in delaying the filing of her suit. The trial court denied the motion but granted the employer's subsequent request for an interlocutory appeal, which was referred to the Special Panel. The Panel reversed the trial court's judgment and remanded the case for entry of summary judgment.

The Panel concluded the trial court had erred in denying the employer's motion for summary judgment based on the one-year statute of limitations. The Panel noted T.C.A. § 50-6-203(b) does not mention maximum medical improvement. Further, the DOL rules state only that a BRC cannot be scheduled until maximum medical improvement occurs but that the request must be

filed within the statute of limitations in § 50-6-203. The Panel noted the employee was well aware of her claim and discounted her assertion that the “discovery rule” applied. In the absence of evidence that the employer had misrepresented or concealed any facts from the employee, or that employee delayed filing suit in reliance on any action by the employer, the Panel rejected the employee’s estoppel argument.

<http://www.tncourts.gov/sites/default/files/arnoldopn.pdf>

### **Wheelchair Accessibility Modifications, not Housing, Contemplated by Statute**

**Selvin Calderon v. Auto Owners Insurance Company, et al.** – M2015-01707-SC-R3-WC – Filed October 24, 2016. The employee suffered a compensable injury to his spine when he fell from a two-story roof and was rendered a paraplegic. The trial court found the employee to be permanently and totally disabled and ordered the insurer to pay benefits and provide medical care for the injury. Seven months after the judgment the employee filed a “Motion to compel appropriate medical accommodations and expenses and for an award of attorney’s fees,” seeking to have the insurer pay the difference in rent between his present apartment and a wheelchair accessible residence and for a bus pass to be used for daily activities unrelated to his disability. The employee contended his apartment could not be appropriately modified. The insurer’s position was that it was fulfilling its obligations under the workers’ compensation laws by being willing and able to modify any apartment for wheelchair accessibility and by providing transportation to the employee for his medical appointments. Relying on *Dennis v. Erin Truckways*, 188 S.W.3d 578 (Tenn. 2006), the trial court found the insurer liable for modifications to the employee’s existing or a future residence but not obligated to pay the difference between the employee’s present rent and the potentially greater rent at an accessible or modified location. The trial court held the insurer was required to provide transportation for medical treatment but not for unrelated activities. The trial court denied the employee’s motion in its entirety. The employee appealed, contending the trial court had misinterpreted *Dennis* and T. C. A. §50-6-204(a)(1)(A), relative to medical treatment and supplies, and “other reasonable and necessary apparatus.” The appeal was referred to the Special Panel, which affirmed the judgment of the trial court.

The Panel noted *Dennis*’ careful distinction between housing modifications to make a residence wheelchair accessible, and the entire cost of housing. “(T)he language of the statute simply cannot sustain the analytical leap necessary to construe housing as ‘medical apparatus . . . The statute contemplates specialized accessories and aid particularly necessary to an injured employee. It does not contemplate basic necessities of life, such as housing.” *Dennis*, at 591-592. The Panel agreed with the trial court that *Dennis* was controlling in its conclusion that the necessities of life, including housing and incidental transportation, should be paid from the employee’s permanent disability benefits, intended under workers’ compensation to replace his wages.

[http://www.tncourts.gov/sites/default/files/calderons.c.wc..jo\\_opn.pdf](http://www.tncourts.gov/sites/default/files/calderons.c.wc..jo_opn.pdf)

### **Cap and Penalty Provisions Preempted by Federal Immigration Act**

**Carlos Martinez v. Steve Lawhon, et al. – M2015-00635-SC-WCM-WC** – Filed November 21, 2016. An undocumented employee sustained a compensable work-related injury while operating a lawn mower on a hillside. The employee slipped on wet grass and lost control of the mower, which ran over his left arm and caused severe lacerations and multiple fractures. Ultimately, five surgeries were performed. Two physicians examined the employee and assigned medical impairment ratings of 16% and 24% respectively. Because of the employee’s undocumented status, the employer did not return the employee to work when he reached maximum medical improvement 18 months after the injury. The employee sought workers’ compensation benefits and challenged the constitutionality of the statutory provision potentially limiting his award to one and one-half times the medical impairment rating in such circumstances. The Attorney General filed an answer defending the constitutionality of the challenged statutory provision, T. C. A. § 50-6-241(e). The trial court held the challenged statute unconstitutional on the basis of federal preemption under the *Immigration Reform and Control Act of 1986*, 8 U. S. C. § 1324a et seq. and awarded permanent partial disability benefits of 84% or three and one-half times the 24% medical impairment rating. The trial court held that section 241(e), which imposes a fine on employers of undocumented employees, is expressly prohibited by the Immigration Reform Act’s prohibition of civil penalties upon such employers. The trial court then decided the case under section 241(d), which permits a higher disability multiplier. The appeal by the Attorney General and the employer was referred to the Special Panel, which affirmed the judgment of the trial court.

The Panel considered the limits adopted by the General Assembly on compensation available to undocumented workers who have suffered a permanent partial disability and the penalties for employers who knowingly hiring undocumented workers. The Panel found that the penalty section 241(e)(2)(B)(ii), applied to the situation presented in the appeal but that it was preempted by the federal immigration act. It next considered whether subsection 241(e)(2)(B)(ii) could be severed from the remaining parts of subsection (e). The Panel concluded the subsection could not be severed, because it was not “fairly clear of doubt” the General Assembly would have enacted the statute without the penalty, referencing *Gibson County Special Schl. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985). In the Panel’s view, the provision amounted to the General Assembly’s attempt to establish “what amounts to a state immigration policy,” and therefore crossed into Congress’s exclusive constitutional power to regulate immigration. The Panel determined the trial court correctly applied section 241(d), which did not impose a one and one-half times cap.

[http://www.tncourts.gov/sites/default/files/martinez.carlos.opnjo\\_.pdf](http://www.tncourts.gov/sites/default/files/martinez.carlos.opnjo_.pdf)

## **Permanent and Total Disability Attributed to the Subsequent Injury**

**United Parcel Service v. James Wyrick, et al. – E2015-02523-SC-R3-WC** – Filed November 30, 2016. A 34-year employee working as a feeder driver was injured at work in 2012 while connecting two trailers and became permanently and totally disabled due to left shoulder injuries. The employer filed a petition asking the trial court to determine the workers' compensation benefits due the employee. The primary disputed issue was the extent of the employee's disability attributable to the employer. The trial court ruled the employer was responsible for 35 percent of the employee's disability. The employee's appeal was referred to the Special Panel, which found the employer liable for 100 percent of the employee's disability and reversed the trial court.

The evidence indicated that despite an injury to his left shoulder in 1998 and a knee injury in 2005, the employee was working with no restrictions at the time of the 2012 injury. That injury necessitated a total left shoulder replacement. Afterwards he was unable to return to work and had difficulty with routine chores. The Panel noted the somewhat confusing procedural history. The parties had stipulated the employee was permanently and totally disabled but the trial judge had limited the percentage of disability attributed to the 2012 injury to 35 percent or two and one-half times the 14 percent medical impairment rating. The trial judge had also cited T.C.A. § 50-6-241(a), which capped permanent partial disability awards at two and one-half percent and pertained to employees who returned to work at a wage greater or equal to that received at the time of injury. The Panel concluded the provision was not applicable, nor was § 50-6-241(b) which related to injuries occurring between August 1, 1992 and July 1, 2004. "In short, to the extent that the trial court referenced Tennessee Code Annotated section 50-6-241(a) or (b) or implicitly applied the statutory cap to the impairment rating to arrive at an award of 35 percent, it did so in error." The Panel concluded that although the employee had experienced prior injuries during his work career, he had become permanently and totally disabled as a result of the 2012 injury. The Panel considered T. C. A. § 50-6-208, which provides for claims against the Second Injury Fund, and noted the trial judge must determine the extent of the disability from the subsequent injury without consideration of the prior injury, *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 77 (Tenn. 2001). The Panel also cited *LaPradd v. Nissan North America, Inc.*, No. M2014-01722-SC-R3-WC, 2016 WL 197323 (January 14, 2016). See above. In *LaPradd*, the *Allen* standard was applied, the employee's disability was attributed solely to the subsequent injury and the Second Injury Fund was determined not liable.

<http://www.tncourts.gov/sites/default/files/wyrickj.pdf>

## **Chemical Odors Exposure Caused Debilitating Migraines**

**Lisa Patton v. Paris Henry County Medical Clinic – W2016-00203-SC-R3-WC** – Filed November 30, 2016. An X-ray technician sought workers' compensation benefits for disability

arising from migraine headaches she alleged were caused by exposure to chemicals at her workplace. Her employer denied the claim, asserting her condition did not arise out of and in the course of her employment. The trial court held that the employee's claim was compensable and awarded her permanent and total disability benefits. The employer's appeal was referred to the Special Panel, which affirmed the judgment.

The evidence indicated the employee began working for the employer in 2008 and that she worked with chemicals in the X-ray development process in a small room where the smell of chemicals was "very potent." She was treated in June 2008 for her first serious migraine headache. Her headaches became more frequent and severe in 2010, sometimes occurring three to four days a week and including blurred vision, floaters, and light sensitivity. She began seeing a neurologist in October 2010 and had in-patient treatment on three occasions. Finally, in January 2011 a migraine headache forced her to leave work and she did not return. The employee was referred to a preeminent headache specialist in Chicago in 2011. She was also seen, treated and evaluated by other physicians and was treated in a hospital on multiple occasions between 2011 and 2014. The parties stipulated that the employee's injury, if compensable, was a gradually occurring injury. The primary issues at trial were whether the claim was compensable, and if so, the extent of disability. By the time of the trial in November 2015 the employee was having migraine headaches three to four days per week, requiring her to lie in bed in a darkened room, wear sunglasses, and not drive when taking medication. Extensive medical evidence was presented at trial by both parties. The trial court gave substantial weight to the testimony of the employee's well-known migraine headache specialist, who had treated her for several years. The specialist testified the employee's chronic migraines were now a permanent condition, and prevented her from working. The trial court found the employee's migraine headaches were exacerbated by her exposure to the chemical odors that resulted in a chronic disabling condition and rendered her permanently and totally disabled. The Panel found the evidence did not preponderate against the trial court's ruling. "The medical proof supporting causation in this case was not speculative or conjectural." The Panel agreed the evidence supported the finding of permanent and total disability, which occurs "when an injury not otherwise specifically provided for [under the Workers' Compensation Act] totally incapacitates the employee from working at an occupation that brings the employee an income." T. C. A. § 50-6-207(4)(B). The Panel referenced *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525-36 (Tenn. 2006), which describes the factors to be considered in determination of permanent total disability.

<http://www.tncourts.gov/sites/default/files/pattonlopn.pdf>

### **1.5 Cap Limit due to Employee Misconduct Justifiable**

**Dyson-Kissner-Moran Corporation v. Gerry Shavers – E2015-02005-SC-R2-WC** – Filed December 16, 2016. An employee who had worked since 2000 as a senior manufacturing

engineer developed symptoms of carpal tunnel syndrome in 2008. His claim was accepted as compensable. He was undergoing treatment while continuing to work at the same job until August 2009 when he was terminated for violation of company policy. The primary issue at trial was whether his award of permanent partial disability was subject to the one and one-half times impairment cap in T. C. A. § 50-6-241(d)(1)(A) (2008). The employee had received a 31 percent impairment rating from his treating physician after reaching maximum medical improvement from his carpal tunnel injury in January 2012. The trial court found the cap applied because of the employee's termination for misconduct and awarded 46.5 percent permanent partial impairment to the body as a whole. The employee's appeal was referred to the Special Panel which affirmed the judgment of the trial court.

The question presented was whether the employer had met its burden to establish that the termination was due to the employee's misconduct. On appeal the employee asserted the evidence preponderated against the trial court's decision on the misconduct issue. The Panel observed that the determination of whether the employee has committed misconduct "requires the court to address whether the employer has satisfactorily demonstrated that the employee's misconduct was its actual motivation in terminating the employee," citing *Wheeler v. Hennessy Indus.*, No. M2007-00921-WC-R3-WC, 2008 WL 3342878, at 8. "The guiding principle to be applied in determining whether an employee has made a meaningful return to work is the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work," *Tryon v. Saturn Corp.*, 254 S.W.3d 321 (Tenn. 2008). Although the employee had been terminated before he reached maximum medical improvement and therefore could not actually return to work, the employer still had to establish that the 1.5 cap applied. The Panel concluded the testimony at trial established several significant ongoing problems with the employee, clearly justifying his termination for misconduct. The Panel also noted an employer should be able to enforce workplace rules without being penalized in a workers' compensation case, citing *Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 371.

<http://www.tncourts.gov/sites/default/files/20161216120614.pdf>

### **Collateral Estoppel Not Applicable on Reconsideration Motion**

**Ulysses Strawter v. Mueller Company – E2015-02374-SC-R3-WC** – Filed December 16, 2016. The employee was injured at work August 11, 2012 when he stepped off a forklift and fell, injuring his lower back. He spent several months on temporary disability. Seven months after he returned to work his pre-injury job was eliminated and he was assigned a lower-paying job. The employee sued for workers' compensation benefits. The trial court found the employee *initially* had a meaningful return to work and that his award for permanent partial disability benefits was limited to one and one-half times the impairment rating. Between the trial and the filing of the court's decision the employee returned to his previous job, which had been reestablished, at a

wage higher than his pre-injury wage. Some months after the court's decision awarding 12 per cent in permanent partial disability benefits, the employee was re-assigned to a lower paying position. He filed a petition for reconsideration and was awarded additional permanent disability benefits. The employer's appeal was referred to the Special Panel, which affirmed the judgment of the trial court.

When he sought reconsideration, the employee's motion for summary judgment was challenged by the employer, who asserted the employee was collaterally estopped, and that the trial court's finding the employee had a meaningful return to work was the "law of the case." The trial court found collateral estoppel did not apply because the facts relevant to reconsideration did not exist when the prior judgment was entered and thus were not identical as required by *Mullins v. State*, 294 S.W.3d 529 (Tenn. 2009). The trial court awarded 35 percent permanent partial disability on the petition for reconsideration. The Panel observed the party invoking collateral estoppel has the burden of proof to show the issue to be precluded is (1) identical to an issue decided in an earlier proceeding, (2) that it was actually raised and decided, (3) that the judgment has become final, (4) that the party against whom collateral estoppel is asserted was a party previously, and (5) that there was a full opportunity to contest the issue now sought to be precluded. The Panel acknowledged four factors were met, but the issue to be decided on reconsideration was not identical. The facts had changed when the employee was ultimately reassigned to a lower wage position, therefore collateral estoppel did not apply. Neither did the "law of the case" argument, which the Panel found to be the employer's "restated version of collateral estoppel."  
<http://www.tncourts.gov/sites/default/files/strawter.pdf>

### **Treating Physicians' Testimony Afforded Greater Weight**

**Eric Benson v. Southern Electric Corporation of Mississippi – W2015-02053-SC-R3-WC –** Filed December 19, 2016. The employee, a lineman, sustained an electrical shock injury while working on a power line on July 12, 2011. He has no recollection of the incident and there were no witnesses. He sustained burns to his back and groin area and the left side of his head. He bit his tongue severely and injured his right knee. He further asserted he developed depression, headaches and post-traumatic stress disorder (PTSD) as a result of the accident and that he was permanently and totally disabled due to his injuries. The employer disputed the assertion. After a trial, the court found the employee permanently and totally disabled and entered judgment accordingly. The employer's appeal was referred to the Special Panel, which affirmed the judgment.

At trial a vocational evaluator testified on behalf of the employee. He testified that he administered several tests to the employee and that he reviewed medical records of all treating and evaluating physicians and psychologists. The evaluator concluded the employee's physical limitations and psychological conditions rendered him unable to resume employment. The

employer's expert witness, a neuropsychologist, testified he had reviewed various medical records but had not examined the employee. He opined there were inconsistencies in the records concerning the employee's psychological symptoms and questioned whether PTSD caused any level of disability. On appeal, the employer's issues were: whether the trial court erred by allowing the vocational evaluator to offer expert testimony based, in part, on facts or data which indicated a lack of trustworthiness; and whether the evidence preponderated against the trial court's finding of permanent and total disability. The employer's expert had testified it was not credible for a treating psychologist to become involved in forensic issues for someone they are treating. The Panel found that approach to be impractical in the workers' compensation field and not a legal basis to exclude evidence. "Trial courts have long accepted opinions from treating providers to assess causation, permanence and impairment. The Supreme Court has chosen to give greater weight to the opinions of treating physicians, based on the facts of specific cases." (Referencing *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 677 (Tenn. 1991). The Panel held the trial court had not abused its discretion in permitting the vocational evaluator's testimony and that the evidence did not preponderate against the finding of permanent and total disability. <http://www.tncourts.gov/sites/default/files/bensoneopn.pdf>

## CONCLUSION

Pursuant to Tennessee Code Annotated Section 50-6-121(i), the Advisory Council on Workers' Compensation respectfully submits this report on significant Supreme Court decisions for the 2016 Calendar Year up to and including the last decision filed on December 19, 2016. An electronic copy of the report will be sent to the Governor and to the Speaker of the House of Representatives, the Speaker of the Senate, the Chair of the Consumer and Human Resources Committee of the House of Representatives, and the Chair of the Commerce and Labor Committee of the Senate. A printed copy of the report will not be mailed. Notice of the availability of this report will be provided to all members of the 110<sup>th</sup> General Assembly pursuant to T. C. A. § 3-1-114. In addition, the report will be posted under the Advisory Council on Workers' Compensation tab of the Tennessee Treasury Department website: <http://treasury.tn.gov/claims/wcadvisory.html>

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

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

/s/ Larry Scroggs  
Larry Scroggs, Administrator