

STATE OF TENNESSEE

Workers' Compensation Advisory Council



**SUMMARY OF COURT DECISIONS
CALENDAR YEAR 2004**

**DALE SIMS, STATE TREASURER
CHAIR**



STATE OF TENNESSEE WORKERS' COMPENSATION ADVISORY COUNCIL



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INTRODUCTION

Public Chapter 962, Section 26, codified in *TCA* §50-6-121(c), requires the Workers' Compensation Advisory Council to include, in its annual report, a summary of significant court decisions relating to workers' compensation and an explanation of their impact on existing policy. Inasmuch as the annual report is due mid-year, the Advisory Council thought it would be beneficial to the members of the General Assembly to receive the case law information from the prior calendar year at the beginning of the subsequent legislative session. Therefore, the following is the Advisory Council's report regarding the significant court decisions during calendar year 2004.

SIGNIFICANT TENNESSEE COURT DECISIONS - 2004**1. Weekly Wage/Compensation Rate**

Bone v. Saturn Corporation, _SW3d_[M2004-00195-SC-R3-CV, filed November 2, 2004]

Facts: Employee was diagnosed with “tennis elbow” in her left arm in 1997 and she reported it to the employer on February 7, 1997. The employee continued to work in the employer’s plant while undergoing conservative treatment. Conservative treatment did not succeed and the employee had surgery on May 25, 2001. The employee had not missed any work from the date of her injury until the date of surgery.

Trial Results: The trial court initially awarded benefits based on a weekly compensation rate as of the date the employee reported the injury but later amended the order to award benefits based on the weekly compensation rate as of the date the employee underwent surgery. The trial court modified the judgment based upon the last day worked rule for gradually occurring injuries.

Supreme Court Decision: The Supreme Court reviewed the general law regarding the last day worked rule stating the its purpose is to fix a date certain when the employee knows or should have known he/she had sustained a work-related injury. The Court noted it has not applied the last day worked rule in the context of determining an employee’s weekly compensation rate but the Special Workers’ Compensation Appeals Panel has addressed the subject with conflicting results.

The Supreme Court held that it is unnecessary to utilize the last day worked rule when the employee gives actual notice of the injury to the employer prior to missing time from work

on account of the injury. The Court stated if no such notice has been given to the employer, the last day worked rule would apply.

Impact on Existing Policy: This case resolved a conflict in opinions of the Appeals Panel and gave direction as to whether the last day worked rule would apply in the context of determining the weekly compensation rate.

2. Temporary Total Disability

Gray v. Cullom Machine, Tool & Die, Inc., 29 TAM 52-2 (Tenn. 2004) -opinion filed on 12/20/04

Facts: The employee was injured on May 26, 2000; he continued to work for the employer until he had surgery on November 2, 2000. After leaving the employer, the employee operated a tool sharpening business from November, 2000 until October, 2002 when he was forced to close the business because it was not profitable. The employee claimed he was entitled to temporary total disability benefits from the date of the injury until he left his employment in November, 2000 and from November 2000 until October 2002. The employer contended he would not be entitled to these benefits.

Trial Results: The trial court ordered temporary total disability benefits for these periods.

Supreme Court Decision: The Supreme Court reversed holding there was no showing by the employee that he was not able to work and was totally disabled during the time periods in question. The Court stated, ... “Although his business did not make a profit, the standard for awarding temporary total disability benefits is not profitability, but rather an employee’s ability to work.”

Impact on Existing Policy: This opinion of the Court appears to apply a different standard to temporary total disability benefits than it has in cases involving permanent total disability benefits.

3. Permanent Total Disability

A. *Galloway v. Liberty Mutual Insurance Co.*, 137 SW3d 568 (Tenn. 2004)

Facts: The employee was injured when he was less than 58 years of age. However, he received medical treatment for over three years and was 61 years of age when he reached maximum medical improvement. The parties agreed the employee was entitled to permanent total disability benefits. However, the employee claimed he would be entitled to 260 weeks of permanent total disability benefits because he was over age 60 when he reached maximum medical improvement. The employer claimed the employee was entitled to permanent total benefits until he was eligible for full Old Age Social Security benefits which was less than 260 weeks.

Trial Results: The trial court held the employee was entitled to only 232 weeks of benefits because he was less than 60 years old on the date of injury.

Supreme Court Decision: The Supreme Court held even though an employee's injury may be classified or reclassified to permanent total disability after the age of 60, the date of injury controls eligibility for a minimum of 260 weeks of permanent total disability benefits pursuant to *TCA* §50-6-107(4)(A)(I). The holding was based on the clear language "disabilities resulting from injuries which occur after 60 years of age" as used in *TCA* §50-6-207(4)(A)(I), which provides that permanent total disability benefits are payable for 260 weeks applies only

to injuries sustained after age 60. Since the employee was injured prior to that age, the Court held he was entitled to receive permanent total disability benefits until he reached age 65, which was less than 260 weeks.

Impact on Existing Policy: This case clarifies that it is the date of injury which will govern the duration of the permanent total disability benefits an employee is eligible to receive.

B. *Rhodes v. Capital City Insurance Co.*, 29 TAM 52-1 (Tenn. 2004)

Facts: The employee claimed he was entitled to permanent total disability benefits following a heart attack. He continued to work after the heart attack with the aid of an assistant. The employee argued he was totally disabled from the time he reached maximum medical improvement and he should collect benefits from that date to the time he ultimately stopped work. The employer argued the employee was not entitled to receive permanent total disability benefits for the period he continued to work following maximum medical improvement, which was a three year period.

Trial Results: The trial court ordered permanent total disability benefits to be paid as of the day the employee last worked.

Supreme Court Decision: The Supreme Court concluded since the employee was working following the date of MMI he did not meet the criteria for permanent total disability [totally incapacitated from working at an occupation which brings the employee an income]. The court rejected the employee's reliance on the unreported case of *Atkinson v. Sinage, Inc.*, 2003 WL 21782292 (Tenn. Workers' Comp. Panel Aug. 4, 2003) which held an employee entitled to permanent total disability even though he continued to work for the employer in a job the

employer created for the employee. The Supreme Court reaffirmed its decision in *Skipper v. Great Central Ins. Co.*, 474 SW2d 420, 424 (Tenn. 1971) in which it held that the fact an employee is employed after the injury in the same type of employment and the same wage does not preclude a finding of total disability stating: "To hold otherwise would have the result of discouraging those few hardy individuals who try to work under great physical handicap, by the threat of denying them compensation which they might otherwise be entitled to if they did not work. We do not think it was the intent of the Legislature that the Workmen's Compensation Statutes be so construed. In determining permanent total disability ...this fact of employment after injury is a factor to be considered along with all the other factors involved when applying the test, which is whether the employee, in light of his education, abilities, physical and/or mental infirmities, is employable in the open labor market.

Impact on Existing Policy: The decision adds clarity to this issue by the Court's statement that it would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled and for this situation to occur the evidence must show the employee was not employable in the open labor market and the only reason the employee was currently working was through the magnanimity of his/her employer.

4. Medical Benefits

A. Moore v. The Town of Collierville, 124 SW3d 93 (Tenn. 2004)

Facts: The employee sustained three injuries while employed by the Town of Collierville. As a result of the injuries the employee ultimately received conservative treatment which was provided by the employer. The employee was dissatisfied with his treatment and without approval by the employer sought the services of another doctor who performed surgery. The

employer refused to pay these unauthorized medical expenses and they were paid by the employee's personal health insurer, except for co-pays paid by the employee. The employee filed suit against the employer.

Trial Results: At trial another doctor testified the "unauthorized" surgery was reasonable, necessary and related to the work injuries. Despite finding the unauthorized medical treatment was reasonable and necessary, the trial court refused to require the employer to pay the unauthorized medical expenses to the health insurance carrier holding the employee's health insurer was required to intervene to protect its interest.

Supreme Court Decision: The Supreme Court held that workers' compensation law makes it "crystal clear" that the employer is obligated to the employee to pay reasonable and necessary medical expenses for work related injuries. The Court noted, however, the statute does not provide for or prohibit employer reimbursement of medical expenses to a third-party health insurer for treatment which was necessary and reasonable and the statute does not address the question of intervention. The Court held a health insurer should not be required to intervene in a workers' compensation case and an employee should not be required to force such intervention in those instances where the employer does not authorize or pay for medical expenses and instead forces an employee who seeks early treatment to use personal health insurance benefits for expenses that are later determined to be necessary and reasonable. Thus, once a finding has been made that an injury is work-related, the health insurer can seek reimbursement from the employer for the medical expenses paid on the employee's behalf because health insurance contracts do not cover work-related injuries.

Impact on Existing Policy: This issue had not been addressed by the Supreme Court. It had, however, been addressed in two cases heard by the Special Workers' Compensation Appeals Panel in which the judges reached opposite results. The Court's rationale was based on the concept that allowing health insurers to receive reimbursement without formally intervening in workers' compensation claims is consistent with the remedial nature of the workers' compensation laws and the employee should not be required to force such intervention. The court stated this may result in employees having earlier access to medical treatment and the full range of workers' compensation while requiring health insurers to intervene may have a chilling effect on health insurers' willingness to pay claims that could ultimately be deemed work-related and outside their contractual obligations. For the health insurer to recover medical expenses from the employer these expenses have to be reasonable, necessary and due to the work-related injuries sustained by the employee.

B. *Kilgore v NHC Healthcare*, 134 SW3d 153 (Tenn. 2004)

Facts: The employee sustained a back injury in 1999. The claim against her employer was settled in January, 2001. The judgment ordered two years of future medical treatment from December 4, 2000 to December 4, 2002. Following the settlement approval and entry of the judgment the plaintiff reported continued pain in her back. The doctor ordered an MRI and discogram. The employer's utilization review program would not authorize the tests. The plaintiff filed a motion in court requesting that the employer be ordered to provide the tests.

Trial Results: The Chancellor found the diagnostic tests were reasonable and necessary and ordered that they be provided by the employer. The employer appealed contending the court

did not have jurisdiction to hear the matter as an employee's recourse was limited to review by the Commissioner of Labor and Workforce Development's utilization review program.

Supreme Court Decision: The Supreme Court concluded the trial court had jurisdiction to consider the employee's appeal of the decision to deny diagnostic tests made by the employer's utilization review program. First, the Court noted the language of the statute provides an employee who disagrees with the employer's utilization review "shall have recourse" to the Commissioner's utilization review program and noted the plain and ordinary meaning of this phrase does not replace or limit judicial review. The Supreme Court's rationale for its decision is noted in the following statements contained in the opinion: (a) the statute relied on by the employer does not expressly state the appeals of decisions made by an employer's utilization review program are solely or exclusively through the Commissioner's utilization review program and, therefore, must be construed harmoniously with provisions that allow appeals in workers' compensation matters and (b) granting employees recourse through the Commissioner in addition to judicial review is consistent with the remedial purpose of the Workers' Compensation Act [Citing the 2003 opinion of *McCall v. Nat'l Health Corp.*, 100 SW3d 209 that held a trial court's authority to initiate workers' compensation benefits before the final adjudication was not divested by the legislature when it enacted the workers' compensation specialist program.]

Impact on Existing Policy: This issue had never been considered by the Supreme Court. It was a case of first impression.

C. *Sullivan v. Edwards Oil Co.*, 141 SW3d 544 (Tenn. 2004)

Facts: The employee was shot in the face and suffered a severe, traumatic injury while working at a market owned by the employer. She lives with her grandmother and her mother and her mother serves as her court-appointed conservator and primary care giver. The employee is permanently totally disabled. Her mother claimed she is entitled to be paid by the employer/insurer for the present and future care of her daughter as part of the reasonable and necessary medical expenses to which the employee is entitled. The treating doctor testified the employee is capable of dressing and bathing herself, but cannot be left alone for more than 15-30 minutes and that any competent adult could supervise her. The doctor did not order any professional nursing or home care for the employee.

Trial Results: The trial court held the mother was not entitled to compensation concluding the statutory language only requires the employer to pay for professional nursing services ordered by the treating physician and the mother was not a professional nurse.

Supreme Court Decision: The Court was asked to define “nursing services” and to decide if the mother was providing nursing services that would require the employer to compensate her. The Supreme Court stated the statutory language is clear and unambiguous and held “nursing services” refers to the services of a professional nurse. The Court then opined that while the mother’s care and supervision is commendable it “...is not the role of this Court to broadly expand employers’ liability under the Law by inserting a new category of compensable services. ... The Legislature is better suited to consider the costs and benefits of such compensation and to define its parameters.”

Impact on Existing Policy: While the Supreme Court interpreted the current statute as the law requires its dicta appears to support a modification of the law.

5. Specific Injuries

A. Idiopathic Episode

Phillips v. A & H Construction Co., 134 SW3d 145 (Tenn. 2004).

Facts: The employee was driving his personal vehicle to Nashville at his employer's instructions to pick up two other employees and transport them to an out-of-state job site. The employer compensated him for his time during travel and for operation of his vehicle and required him to provide transportation for another employee. A short distance from his house, the employee lost consciousness, due to unknown causes, and hit another vehicle.

Trial Results: The trial court determined that the employee's injuries did occur in the course of his employment but held the injuries did not arise out of his employment. The trial court concluded an injury that occurs due to an idiopathic loss of consciousness is not compensable because a causal connection could not be shown between the employment and the loss of consciousness. The trial court denied benefits. The Supreme Court granted a Rule 10 application for an extraordinary appeal.

Supreme Court Decision: The Supreme Court held compensation is available to an employee who is injured as a result of an idiopathic episode if the employee can show a causal connection between the injury and some hazard incident to the employment. The justices concluded if driving a vehicle is part of an employee's job, then it is a hazard incident to employment. Therefore, the employee is required to prove driving the vehicle caused or exacerbated his injuries not that a condition of work caused the loss of consciousness.

Impact on Existing Policy: The case clarifies prior case law involving an injury caused by an idiopathic condition by holding that such an injury is compensable if an employment

hazard causes or exacerbates the injury. The necessary causal link is between the employment and the accident or injury rather than between the employment and the idiopathic episode.

B. Heart Attack

Clark v. Nashville Machine Elevator Co., 29 SW3d 42 (Tenn. 2004)

Facts: The employee had worked as an elevator mechanic for the employer for approximately 8 years before his death from complications stemming from a heart attack suffered while driving home from work in the employer's vehicle. The day before the attack, the employee told his wife he was short of breath, tired, aching. Two or three weeks previously he had difficulty breathing while at work. The employee often worked more than forty hours per week and was frequently on call. His work was characterized as heavy labor and his tool box weighed 28 pounds. The only medical proof was from the employee's treating physician who testified the employee had coronary artery disease which develops over time. The physician testified that although he did not know for certain what precipitated the heart attack, it was "possible" the physical demands of the job caused it. The doctor also testified that the employee was at risk for heart disease because he smoked cigarettes, was on medication for high cholesterol and had a family history that included heart problems.

Trial Results: The trial court found the employee's job required him to carry a heavy toolbox from his vehicle to the location of the work to be done, to climb stairs, to climb on top of elevator cars and to climb in and out of elevator shafts. The trial court found the employee serviced or repaired nine elevators on the day of his heart attack and thirteen on the day before. The trial court relied on the physician's testimony that the heart attack "could have" resulted

from the physical exertion of his job and held the employee's death arose out of his employment. The widow and child were awarded medical expenses, funeral expenses and death benefits.

Supreme Court Decision: The Supreme Court affirmed the decision of the lower court's finding that there was no dispute the heart attack occurred in the course of employment [driving home in the company vehicle]. The dispute, however, was whether the heart attack arose out of the employment. The Court added that heart attack cases are necessarily fact dependent and it would be difficult to formulate a bright-line rule that would be applicable to all heart attack cases and still produce just results. The Supreme Court stated the key in these type cases is whether the evidence links the physical activities of the employment with the heart attack, not merely whether there is proof of physical exertion at the moment the heart attack occurred.

Impact on Existing Policy: This case provided additional clarity regarding heart attack cases by holding normal physical activities of the employment - not merely the physical exertion at the moment of the heart attack will - will support a holding of compensability.

6. Subrogation / Assignment

A. *Hickman v. Continental Baking Company*, 143 SW3d 72 (Tenn. 2004)

Facts: The employee suffered an injury when a conveyor belt jammed. The employee filed a tort action against the manufacturer of the machine and also filed a workers' compensation action against his employer. The tort action was settled prior to the trial of the workers' compensation case. The employer did not intervene in the tort action. At the trial of the workers' compensation case, the employer claimed it was entitled to be reimbursed for benefits it had previously paid to or on behalf of the employee.

Trial Results: The trial court held the employer was not entitled to be reimbursed for benefits previously paid because the employer had not “fully or partially paid and discharged its liability” to the employee. The employer appealed claiming error in the interpretation of *TCA* §50-6-112(c)(1).

Supreme Court Decision: The Supreme Court held an employer does have a subrogation lien against any recovery received by the employee in the tort action as well as a credit against any future liability that accrues. However, the Court determined the subrogation/credit applies only to the award of periodic payments of permanent partial disability benefits but does not apply to future medical expenses because the amount is unknown and incalculable at the time of the workers' compensation trial. The Court's decision applies to cases in which workers' compensation cases are settled for a lump sum and those in which the employee receives periodic payments.

Impact on Existing Policy: The Court expanded its holding in a 2000 case in which the workers' compensation case was settled for a lump sum to apply to cases in which the employer/insurer has continued obligations for future medical expenses. The employer would be entitled to a credit for the sum of future disability benefits because those benefits are certain.

B. *Reliance Insurance Company v. Mackey*, No. M2003-03106-COA-R3-CV (Tenn. Court of Appeal, filed November 18, 2004).

Facts: Reliance Insurance provided workers' compensation benefits to Marty Kratz as a result of a work-related injury on March 22, 2000. Following the injury, Dr. Mackey performed surgery on the employee on August 18, 2000 during which it is alleged Dr. Mackey

negligently lacerated the employee's aorta. The loss of blood from this event led to a debilitating stroke for which Reliance paid substantial workers' compensation benefits (in excess of \$500,000). The employee filed a medical malpractice action against the doctor on August 17, 2001 and subsequently voluntarily dismissed the action on September 27, 2001. The employee never revived nor re-filed the action against the doctor. On August 15, 2004, approximately two years later (and almost three years after the cause of action accrued to the employee), Reliance filed an action against the doctor as the purported assignee of the employee's third party claim against the doctor.

Reliance alleged under *TCA* §50-6-112(d)(2) it is the assignee of the employee and argued when the employee voluntarily dismissed the malpractice action against the doctor that this constituted a failure to effectively bring an action and this resulted in an assignment of the cause of action to Reliance on August 20, 2001, the one-year anniversary of the accrual of the cause of action. Reliance then argued it an additional six months from that date to file suit against the doctor, or until February 20, 2002. During that six month period, Reliance was placed into liquidation on October 3, 2001. Tennessee law grants the liquidator two years to institute an action after an order appointing a liquidator if "the period of limitation fixed by applicable law has not expired" as of the date of the liquidation order. The action against the doctor was filed on August 15, 2003, less than two years following the entry of the liquidation order.

The doctor maintained under the statutory language an employer becomes an assignee of an employee's cause of action only if the employee does not file his/her own lawsuit. The doctor argued the employee's timely filing of a malpractice suit against him precluded the assignment to the insurer under the statute.

Trial Results: The trial court held the insurance company was not entitled to the six month extension following the voluntary dismissal and the action was time barred.

Supreme Court Decision: The Supreme Court held that once an employee files a complaint against a third party tortfeasor, the action has been “brought” and the timely filing of the original action against the third party tortfeasor precludes the assignment of the cause of action to the insurer. Therefore, since the Reliance Insurance Company is not an assignee it is not entitled to the six month extension of the statute of limitations.

Impact on Existing Policy: To the extent the intent of *TCA* §50-6-112(d)(2) was to provide protection for insurance carriers when the employee fails to prosecute a third party tort claim to its conclusion, this case changes that legislative intent.

CONCLUSION

The Workers' Compensation Advisory Council respectfully submits this report to the General Assembly. A copy of the report will be sent to the Governor, the Speaker of the Senate and the Speaker of the House. A copy of the report will be posted on the website of the Advisory Council [www.state.tn.us/labor-wfd/wcac] and notification of the posting will be sent vial e-mail to all members of the General Assembly.

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

A handwritten signature in black ink that reads "Dale Sims". The signature is written in a cursive, slightly slanted style.

Dale Sims, State Treasurer
Chair