

STATE OF TENNESSEE

Advisory Council on Workers' Compensation

<http://treasury.tn.gov/claims/wcadvisory.html>



~~~~~

### 2011 SUMMARY OF SIGNIFICANT TENNESSEE SUPREME COURT WORKERS' COMPENSATION DECISIONS

~~~~~

TREASURY DEPARTMENT
STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0225

David H. Lillard, Jr., State Treasurer, Chair
Lynn Ivanick, Administrator

Significant 2011 Tennessee Supreme Court Workers' Compensation Decisions

INTRODUCTION

Pursuant to Tennessee Code Annotated § 50-6-121(g), 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 summary of those significant decisions and a few other decisions of particular interest or pending review from the Tennessee Supreme Court Special Workers' Compensation Appeals Panel.

Full Court Review

Lazar v. J. W. Aluminum 346 S.W.3d 438 (Tenn. 2011)

The Lazar case involves reconsideration of a claimant's workers' compensation claim after a lay off. The claimant sought reconsideration and the Trial Court awarded him additional permanent partial disability benefits, which the employer appealed. The claimant had originally been given a 3% whole person impairment rating from the authorized treating physician and a 17% rating from an independent medical examiner, but the impairment rating ultimately agreed upon in the original settlement was not specifically nor numerically outlined in the settlement documents.

After the claimant's request for reconsideration was filed, the employer hired a physician from the Medical Impairment Rating ("MIR") Registry to do an additional evaluation of the claimant and the impairment rating by that physician was 7%. Accordingly, the case necessarily also addressed the issue of whether the MIR process may be used in a "reconsideration" action. The trial court's short answer was "no".

The trial court determined that since the original settlement amounted to 12.4%, and one and one-half times the impairment rating is the maximum amount allowable when an employee is returned to work, that the negotiated impairment rating was 8.27% accordingly. The trial court awarded benefits to the claimant using that figure. The employer appealed, claiming the MIR rating should have been used and that the award was excessive.

The Supreme Court determined that it was reasonable for the trial court to compute the rating in this manner. It held that a court's reconsideration of a workers' compensation award is limited to a determination of additional permanent partial disability based upon the employee's impairment rating at the time of the initial award or settlement. The Court

indicated that the impairment rating, if not specifically and numerically identified in an original award or agreement, may properly be figured by backing out the numbers in a prior award or settlement.

The employer's argument that the award was excessive was also denied since the award of the trial court was less than five times the impairment rating, so well within normal range pursuant to statute.

The employer's appeal was denied and the trial court's award affirmed in its entirety. The full case may be viewed here:

http://www.tncourts.gov/sites/default/files/robert_lazar_v_j_w_aluminum.pdf

Mansell v. Bridgestone Firestone North American Tire, LLC
_____ S.W.3d _____ (Tenn. 2011) (no cite yet)
**2011 WL 3758562, Tenn., August 25, 2011 (NO. M2010-02093-SC-R3-
WC)** (This opinion has not yet been released for publication in the permanent law reports, so is still subject to revision or withdrawal)

The claimant suffered a compensable injury to his shoulder, had treatment and returned to work. The authorized treating physician assigned a 3% impairment rating. An independent medical examining physician assigned a 10% impairment rating.

Although a Benefit Review Conference ("BRC") was appropriately held by the Tennessee Department of Labor and Workforce Development in an attempt to mediate the matter to settlement, the parties impasse. Having thereby exhausted their administrative remedies, the parties properly filed suit in court.

The employer then applied for use of the Medical Impairment Rating ("MIR") Registry to have an evaluation done to determine, with finality, the disparity in the impairment ratings under Tennessee Code Annotated § 50-6-204(d)(5) (2008 & Supp. 2010). The employee opposed the use of the MIR at such a late date, indicating that it was only meant for use during the administrative process, so moved to quash the employer's application.

The trial court agreed with the employee and ruled that use of the Registry only applied to the administrative process. Consequently, the trial court granted the employee's Motion to Quash the employer's application to the MIR. The employer appealed.

The employee continued to argue that the MIR process is for administrative use only. Additionally, the employee added the claim that if the MIR process was permitted once jurisdiction passed to the court system, that its use at that point would infringe on the court's function as a fact finder, violate the Separation of Powers clause and therefore, be unconstitutional.

The employer and the Department of Labor took the opposite position from the employee and proposed that the Registry was to be used in litigated cases in general, without regard

to whether the cause was under administrative or court jurisdiction. The Attorney General's office agreed with the employer and department of labor's positions, so filed an amicus brief supporting the argument that the MIR process is not precluded when there is a dispute in impairment ratings since the process solves the issue of the disparity in ratings by statute. The Tennessee Association for Justice filed an amicus brief as well.

The trial court denied the employer's application for use of the MIR since it came after the impasse, so after exhaustion of the administrative process. The Court indicated that allowing the use of the MIR after the impasse would "usurp [a] judicial power that is basically vested in [the court] once the lawsuit is filed".

The Supreme Court vacated the trial court's ruling and remanded the case with instruction to provide proper notice pursuant to the Tennessee Rules of Civil Procedure 24.04 to the attorney general and all parties of the question of constitutionality since it was never properly presented to the trial court. As of the date of this report, the trial court has held a preliminary, but not final hearing on the matter.

The full case may be viewed here:

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

Howell v. Nissan North America, et al. 346 S.W.3d 467 (Tenn. 2011)

The claimant applied for reconsideration of a previously settled workers' compensation claim. The employer denied the reconsideration request claiming she had voluntarily resigned, so wasn't entitled.

The claimant had suffered a compensable carpal tunnel work injury. After treatment and recovery, the authorized treating physician released the claimant to go back to work with the restriction of not using pneumatic guns. The employer refused to bring her back and told her they could not use her until she could come back without restrictions. Claimant, therefore, returned to her physician and asked him to remove the restrictions. He did as she requested, released her to return to work full duty and she then let the employer know she was available to use the pneumatic guns.

Before her injury, the claimant worked on what was referred to as the ZH line, where she used a pneumatic gun to bolt parts to V-8 motors. Upon her return the employer offered her a position on a different, faster line. The job offered was for the TR line which ran 70 parts as opposed to 20 parts in the same time period as the ZH line. The TR line was significantly faster and used pneumatic guns to bolt parts to 4 cylinder engines.

The claimant had, previous to her injury, trained on the faster line and it was at that time that she first noticed the symptoms of carpal tunnel presenting themselves even when she returned to the ZH line. Employee knew from personal experience she would be unable to physically withstand the TR line without risk of reinjury or significant pain from the

original injury, so declined to take the more physically demanding position and resigned instead. The employer argued that they offered her a job and she turned it down without even trying it, so they determined that she voluntarily quit after they had provided a meaningful return to work.

The trial court determined she was eligible for reconsideration because she did not have a meaningful return to work. When the employer appealed, the Supreme Court's Special Workers' Compensation Panel reversed the trial court. The full Supreme Court granted review.

Normally, voluntary resignation does not allow for reconsideration unless the person quits because the work injury prevents the person from the work. However, if the person isn't offered accommodations to meet her restrictions, reconsideration will be permitted. Likewise, if the person resigns because they have too much pain post injury to continue working, then they never had a meaningful return to work in the first place and reconsideration will be permitted.

As to the argument that she did not try before refusing the new job position, the Court found that the employee had personal knowledge of the conditions of the training line as well as of her own physical limitations. The full Supreme Court reversed the Panel and reinstated the trial court's award. The Court considered the employee's anxiety over the new line to be reasonable and so determined that the claimant voluntarily resigned for reasons related to her workers' compensation injury, there had been no meaningful return to work and she was, therefore, not capped and was entitled to reconsideration.

The full case may be viewed here:

http://www.tncourts.gov/sites/default/files/howelalicia.opn_.pdf

Dixon v. Travelers Indemnity Company
336 S.W.3d 532 (Tenn. 2011)

The court held that a truck driver's injuries as a result of an overturned semi-tractor-trailer in the path of a tornado were compensable because the claimant was in a work vehicle which was more easily overturned due to its size, weight and lack of maneuverability. Further, the claimant was restricted by law as to when and where he could redirect his route or stop with the vehicle. Even though the initial damaging event was an Act of God, the claimant was subjected to more danger due to his employment and presence in the work vehicle.

The full case may be viewed here:

http://www.tba2.org/tba_files/TSC/2011/dixono_030311.pdf

Repeal of Supreme Court Rule 37

On March 2, 2011 The Tennessee Supreme Court entered an order repealing Tennessee Supreme Court Rule 37, which required appellate mediation in workers' compensation cases.

The Supreme Court of Tennessee Special Workers' Compensation Appeals Panel

Appeals of trial court decisions in cases involving workers' compensation are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel for hearings. The panel reports its findings of fact and conclusions of law and such judgments automatically become the judgment of the full court in 30 days barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and Tenn. Code Ann. § 50-6-225(e). There were a large number of cases heard this year, just a few of particular interest are outlined here. Several have already been granted review and will be on the full Supreme Court's 2012 calendar.

Ceildeck Corporation v. Herbert Ivey

Appeal from the Chancery Court for Davidson County
No. 10-1639-111 Ellen Hobbs Lyle, Chancellor
No. M2011-00096-WC-Mailed - October 13, 2011
Filed - November 15, 2011

This case involved the much discussed 'race to the courthouse' after exhaustion of administrative remedies due to an impasse at a Benefit Review Conference. Pursuant to Tenn. Code Ann. § 50-6-225(a)(2)(A)(2008), the parties presently have the option of filing in court in either the county of the accident or the county of the employee's residence. The Court declined to adopt a bright line rule for trial courts to use in determining which party wins that race to the courthouse.

The full case may be viewed here:

http://www.tsc.state.tn.us/sites/default/files/ceildeck_v_ivey.opn_.pdf

Furlough v. Spherion Atlantic

No. M2011-00187-WC-R3-WC

The full Supreme Court granted review as of December 14, 2011. It may be on the February 2012 calendar. The issues concern the judicial review of a settlements approved by the Tennessee Department of Labor & Workforce Development and also the effect of an incomplete SD-1 form on the finality of an approved settlement.

**Troy Mitchell v. Fayetteville Public Utilities
No. M2011-00410-WC-R3-WC**

This case has been transferred to the full Supreme Court. It involves the application of Tenn. Code Ann. § 50-6-110, also known as the misconduct/safety appliance affirmative defense.

**Chapman v. Davita, Inc., No.
M2011-02674-SC-R10-WC**

The full Supreme Court has granted a Rule 10 application in this case. The issue presented is whether a trial court may retain jurisdiction over a case filed prior to the exhaustion of the administrative Benefit Review Process.

Tennessee Court of Appeals

(A constitutional question of significant interest
to those in the workers' compensation field)

**Randstad North America, L.P. v. Tennessee Dept. of Labor &
Workforce Development
No. M2011-00070-COA-R3-CV**

The Tennessee Court of Appeals reviewed the trial court's decision that the Tennessee Workers' Compensation Statute, Tenn. Code Ann. § 50-6-238, regarding temporary disability benefits, was constitutional.

The employer denied benefits to an employee who claimed she was disabled from a work injury. The employee filed a request for assistance with the Tennessee Department of Labor and Workforce Development and was granted temporary disability and medical benefits.

The employer properly appealed through the administrative process, but was unsuccessful. Thereafter, the employer filed a petition for a common law writ of certiorari claiming in part that the statute effectively denied the employer's right to due process. The trial court agreed and held the statute to be unconstitutional.

The Court of Appeals rejected the employer's argument because the law provides for reimbursement to the employer from the Second Injury Fund if the payment of benefits is ultimately determined to have been in error. Accordingly, the Court of Appeals found no procedural due process violation, determined the statute to be constitutional, and reversed the trial court's ruling.

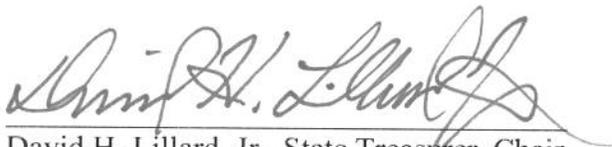
The full case may be viewed here:

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

CONCLUSION

Pursuant to Tenn. Code Ann. § 50-6-121(g), the Advisory Council on Workers' Compensation respectfully submits this report on significant Supreme Court decisions for the 2011 Calendar Year. 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 Employee Affairs Committee of the House of Representative, the Chair of the Commerce, Labor and Agriculture Committee of the Senate, and the Chair and Co-chair of the Special Joint Committee on Workers' Compensation. 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 107th General Assembly pursuant to Tennessee Code Annotated § 3-1-114. In addition, the report will be posted here: <http://treasury.tn.gov/claims/wcadvisory.html> under the Advisory Council on Workers' Compensation tab of the Tennessee Treasury Department website.

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



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