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2021 SUMMARY OF SIGNIFICANT TENNESSEE SUPREME COURT WORKERS' COMPENSATION DECISIONS

TREASURY DEPARTMENT
STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0225

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Significant 2021 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 synopsis of the cases, with topical headings to facilitate review of the 2021 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. Participating judges who comprise the Panels are designated by the Supreme Court and each Panel includes a sitting Justice. 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 Supreme Court and its Special Workers' Compensation Appeals Panel issued opinions in 12 cases between February 16, 2021 and November 18, 2021. Six opinions were **"old law"** cases, based on claims arising prior to the July 1, 2014 effective date of the *Workers' Compensation Reform Act of 2013*. Six opinions issued in **"new law"** cases. Four of those involved appeals from the Court of Workers' Compensation Claims, and two came directly from the Workers' Compensation Appeals Board.

With the passage of time, fewer **"old law"** cases are working through the appeals process. Direct appeals to the Supreme Court decline as cases are increasingly resolved in the Court of Workers' Compensation Claims and the Workers' Compensation Appeals Board. Summaries of the

significant workers' compensation decisions by the Supreme Court and its Special Workers' Compensation Appeals Panel in 2021 are included here with headings that constitute an "issues list."

TABLE OF ISSUES

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Procedure

1. Statute of Limitations

John Pearson v. Memphis Light Gas and Water Division, **No. W2020-00462-SC-WCM-WC –** Filed March 24, 2021.

A 14-year employee regularly drove a bucket truck throughout the city to repair and install streetlights weighing between 25 and 60 pounds each. He installed about 16 per day and testified at trial he had to lift, bend, and twist on a daily basis. The employee saw Dr. Glenn Crosby, a neurosurgeon, for myelopathy that caused his left leg to drag while walking. Dr. Crosby determined the employee had severe spondylosis at C4-5 with spinal cord compression and a hyper-intense lesion within the spinal cord. He recommended a cervical fusion, which occurred on April 9, 2014.

The employee again experienced similar problems in early 2016. After a lifting incident and a bowling event, another physician diagnosed cervical disc disease with radiculopathy and referred him to Dr. Crosby. Dr. Crosby found a large ruptured disc at C3-4 with spinal cord compression and again recommended a cervical fusion. The procedure was performed July 28, 2016. After surgery, the employee's counsel posed a hypothetical question to Dr. Crosby on whether the C3-4 injury was potentially work related. Dr. Crosby responded by letter dated September 8, 2016 that assuming the employee's position required daily lifting, bending, and twisting as stated in the hypothetical, and assuming no off-work trauma, the employee's injury was 75% to 80% work related. The employee's counsel showed Dr. Crosby's letter to the employee on December 19, 2016. The employee gave the Defendant notice of the injury two days later on December 21. The employee filed his initial petition for benefit determination (PBD) on October 9, 2017.

The trial court held the employee's claim was barred by the statute of limitations, explaining that the date the employee discovered his injury was the date of Dr. Crosby's letter of September 8, 2016, not the date he actually saw the letter. Alternatively, the trial court held the employee had failed to prove the injury was more than 50% work related. The employee appealed on the issues of timely notice and filing within the statute of limitations, and whether the repetitive nature of his work aggravated his preexisting condition.

The Special Panel **affirmed**, finding the employee's claim was barred by the statute of limitations. The September 8, 2016 letter of Dr. Crosby to the employee's attorney constituted notice to the employee that he had a work-related injury since as the agent of the employee the attorney's knowledge was imputed to the employee. **"It is well established that 'a person generally is held to know what his attorney knows and should communicate to him, and the fact that the attorney has not actually communicated his knowledge to the client is**

immaterial.'" *Winstead v. First Tenn. Bank N. A., Memphis*, 709 S.W.2d 627, 632 (Tenn. Ct. App. 1986).
The full opinion is available at
https://www.tncourts.gov/sites/default/files/pearsonjohnopn.pdf

Memphis Light, Gas & Water Division v. Charles Nesbit, **No. W2019-02275-SC-WCM-WC** – Filed March 26, 2021.

A 30-year employee working as a bucket truck driver who repaired streetlights experienced pain in his right knee while stepping into the bucket on April 19, 2013. He reported the injury and saw several orthopedic surgeons through his workers' compensation coverage. The physicians advised he needed a knee replacement but that his condition was not work-related. He had knee replacement surgery under his private insurance on March 4, 2014. Several months later his operating surgeon opined that the right knee replacement was necessary because of the repetitive work the employee performed and that he also needed a left knee replacement. The employee did not make a workers' compensation claim until December 11, 2014. The employee asserted the claim was time barred and denied workers' compensation benefits.

Medical history showed the employee had a right knee injury in 2005 and that he injured his left knee in 2009. Physicians had indicated he had degenerative changes and underlying osteoarthritis. At trial, an occupational expert testified the employee had a 77% vocational impairment. The operating surgeon assigned a 37% permanent partial impairment to the right lower extremity, and confirmed the repetitive work aggravated or accelerated preexisting arthritis, although the degenerative changes were not work-related. He did state the surgery was necessary because of pain and anatomical changes in the right knee. Other orthopedic surgeons attributed the need for knee replacement to degenerative changes and arthritis, not work injuries, and stated they observed no anatomical or structural changes due to injuries. The employer maintained the employee's claim was untimely.

The trial court found the employee suffered a compensable, *gradually occurring injury* at work. The Special Panel **reversed**, finding **a reasonably prudent person in the employee's position who knew he had significant knee problems that worsened with time, would not wait nine months after replacement surgery to take any action.** The employee argued he could not have known he had experienced a work-related injury earlier because physicians he saw through his workers' compensation coverage had not established a causal connection. The Panel observed that while the employee did see the physicians for the April 19, 2013 acute work injury, the instant action related to a separate claim for a *gradually occurring injury*. The Panel distinguished two Supreme Court opinions relied on by the employee, *Pentecost v. Anchor Wire Corp.*, 695 S.W.2d 183 (Tenn. 1985) and *Livingston v. Shelby Williams Industries, Inc.*, 811 S.W.2d 511 (Tenn. 1991). In both cases, the employees had given notice within 30 days

(*Pentecost*) and "immediately after learning his condition could have been caused" by his work injury (*Jenkins*).

The full opinion is available at https://www.tncourts.gov/sites/default/files/nesbitopn.pdf

2. Subject Matter Jurisdiction

Angela Varner Nickerson v. Knox County, Tennessee, **No. E2020-01286-SC-R3-WC** – Filed June 8, 2021.

The employee filed a workers' compensation claim in June 2018, alleging she had sustained a cumulative mental injury from exposure to traumatic crime scenes while working as a forensics technician with the sheriff's department from 1998 to 2011. She claimed she did not know her injury was disabling until a PTSD diagnosis in 2018. The employer denied the claim, contending it was time-barred by the statute of limitations, and sought summary judgment. The Court of Workers' Compensation Claims (CWCC) denied summary judgment. The Workers' Compensation Appeals Board (WCAB) vacated the trial court's judgment and remanded the matter for determination whether the CWCC could exercise subject matter jurisdiction based on the date of injury. The employer renewed its motion for summary judgment based on lack of subject matter jurisdiction and the statute of limitations. The CWCC denied the motion due to the "cumulative" mental injury claim. The WCAB reversed the trial court and remanded for entry of dismissal based on lack of subject matter jurisdiction. **The sole issue on appeal before the Special Panel was whether the CWCC had subject matter jurisdiction based on the date of mental injury.** The Panel **affirmed** the WCAB judgment and adopted its opinion.

The employee had transferred to another department in 2011. After leaving the forensics division in 2011 she began experiencing nightmares and depression that worsened over time although she had no additional or aggravating work-related events after her transfer. Before March 2015, a primary physician told the employee she might have PTSD and that it was possible her work experiences in forensics had contributed to her mental health issues. She saw a psychiatrist in September 2015 and although they discussed PTSD, she did not return to him until April 2018 due to health insurance issues. The psychiatrist diagnosed PTSD on May 7, 2018. The employee identified her injury date as June 12, 2018. In response to the employer's denial of benefits and summary judgment motion, the employee argued the statute of limitations was suspended by the discovery rule, and alternatively that the injury was gradual to which the "last day worked" rule applied. The employer contended she knew or should have known the work-related nature of her mental injury in 2015 when she sought mental health treatment related to her work experiences.

The WCAB analyzed the subject matter jurisdiction issue. The CWCC did not have original and exclusive jurisdiction for workers' claims for injuries alleged to have occurred before July 1,

2014. The WCAB noted it must distinguish the determination of the "date of injury" from the date the statute of limitations began to run. It first defined mental injury as an "identifiable work-related event resulting in a sudden or unusual stimulus." The phrase, "date of injury," is not defined under Tennessee workers' compensation law, although an injury is perceived as one occurring close in time to an event. A cumulative, or gradually occurring, injury can be determined by the last day worked rule if the evidence "clearly establishes a date prior to the last day worked where injurious exposure ceased, the testimony clearly establishes that no further deterioration of the employee's condition occurred as a result of a workplace injury after the last day of injurious exposure, and the employee ceased working for the employer for reasons unrelated to the workplace injury." (Quoting *Hix v. TRW, Inc.*, 2009 LEXIS 285 (Tenn. Workers' Comp. Panel June 12, 2009)). The Panel observed the last day worked might not be the last day of an employee's exposure to work that caused the injury. Significantly, the WCAB noted the Supreme Court had previously declined to recognize "compensability of mental injuries caused by gradual or cumulative work-related stress which is not abnormal or unusual in nature." *Goodloe v. State*, 36 S.W.3d 62, 67 (Tenn. 2001). The WCAB observed that a mental injury under Tennessee law occurs when there is "a loss of mental faculties or a mental or behavioral disorder, arising primarily out of a physical injury or an identifiable work-related event resulting in sudden or unusual stimulus." T. C. A. §50-6-102(17). Here, there was no physical injury, and the events forming the basis of the claim occurred in or before 2011, well prior to the subject matter jurisdiction of the CWCC.

The full opinion is available at
https://www.tncourts.gov/sites/default/files/nickerson_vs._knox_county_opinion.pdf

Causation

1. Proof of a Causal Relationship.

***Jeffrey Garner v. Goodyear Tire & Rubber Company*, No. W2020-00280-SC-R3-WC –** Filed March 19, 2021.

The employee began working for the employer in August 1997, with stints in the curing department, the presses, the banbury and the tire room, all with noisy environments. Ear protection was not mandatory until near the end of his employment. The employer conducted hearing screens periodically but did not share the results with the employee. He left the position on July 9, 2011. Soon after leaving his position with the employer, he noticed he was having hearing difficulties. He filed a workers' compensation claim on July 24, 2014, alleging work-related hearing loss. The employer disputed causation as well as the methodology used by the employee's physician in assessing anatomical impairment. Dr. Karl Studtmann, otolaryngologist, examined the employee on March 2, 2017. He also reviewed hearing screens conducted in 1997 by the employer. Dr. Studtmann noted the employee had experienced decreased hearing in his

left ear since suffering from a ruptured ear drum as a child, and that the employer's hearing tests did not show significant loss in the right ear. Although he observed the employee may have had some loss due to gunfire noise during hunting, the physician ultimately opined the primary cause of the employee's hearing loss was noise exposure at the employer's plant. Because the physician did not believe the AMA guidelines adequately address high frequency hearing losses above 3000 hertz, as in the employee's case, he used an alternative "flat-line" method he derived from a 2006 article from the Journal of Acoustical Society of America. The employer's second hearing expert physician testified the most likely cause of the employee's hearing loss was hunting. He disagreed with the methodology used by Dr. Studtmann. A third hearing expert said there was no consensus among board certified otolaryngologists that hearing loss in the high frequency ranges should be included in evaluation since everyday speech can be heard by many with loss in such ranges. The trial court concluded by a preponderance of the evidence that the primary cause of the employee's hearing loss was due to his noise exposure and the employer's plant even though other factors may have contributed. The court adopted a 20% impairment.

The employer argued the trial court erred in concluding the employee's hearing loss was attributable to his work environment. The Special Panel observed that one of the hearing experts retained by the employer had opined the hearing loss was due to noise exposure at work, while the other had not. The Panel noted that in such a close case, the employee's testimony may have barely tipped the scales in his favor, and that it could not conclude the evidence preponderated against the trial court's ruling. Therefore, the Panel **affirmed** the finding as to *causation* but **reversed** as to all other issues. The Panel found the trial court had erred in admitting into evidence the impairment rating methodology used by Dr. Studtmann, concluding the method was not "used and accepted in the medical community."

The full opinion is available at
https://www.tncourts.gov/sites/default/files/garneropn.pdf

Brett Rosasco v. West Knoxville Painters, LLC, **No. E2020-01656-SC-R3-WC** – Filed November 18, 2021.

The employee, a painter, sustained spinal injuries when strong winds caused a dead tree to fall and strike him as he exited a portable restroom. The portable restroom was located on the street near the house he was painting. The employer had not obtained the portable restroom for the use of its employees. Neither the employer nor the employee knew who had placed the restroom at that location. The employer's standard practice was for its employees to use the customer's restroom. The employee underwent multi-level spinal fusion surgery to repair spinal fractures. The employer denied workers' compensation benefits, contending the injuries resulted from an "act of God" and did not arise primarily out of employment. The trial court agreed and granted the employer's motion for summary judgment. On appeal the employee argued his injuries arose out of his employment because "the undisputedly dead tree could have been cut down by

someone exercising reasonable foresight" and because the event "was not, by definition, an act of God."

The Special Panel **affirmed** the trial court's ruling, observing a workers' compensation injury is one that "arises primarily out of and in the course and scope of employment." T. C. A. §50-6-102(14). "Arising out of" refers to "a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Dixon v. Travelers Indem. Co.*, 336 S.W.3d 532, 537 (Tenn. 2011.) In *Dixon*, the Supreme Court held that "(W)hen an employee suffers an injury as a result of an uncontrolled force of nature or an act of God, to satisfy the 'arising out of' requirement, the employee must prove that the injury was caused by an increased risk peculiar to the nature of the employment and not a danger common to the general public at the time and place where it occurred." *Id*. at 537. "The mere presence of an employee at the place of injury because of the employment will not result in the injury being considered as arising out of the employment." *Wilhelm v. Krogers*, 235 S.W.3d 122, 127 (Tenn. 2007). Similarly, "an injury purely coincidental, or contemporaneous, or collateral, with the employment . . . will not cause the injury . . . to be considered arising out of the employment." Citing *Wait v. Travelers Indem. Co.,* 240 S.W.3d 220, 228 (Tenn. 2007). Here, there was no greater degree of risk to the employee because of his employment than that faced by the general public.

The full opinion is not yet available on the Supreme Court website

Bethany Shelton v. Hobbs Enterprises, LLC, et al. **No. M2020-01220-SC-R2-WC** – Filed September 27, 2021.

The employee allegedly sustained a right shoulder injury while working as a gas station cashier with responsibilities for cleaning and stocking. She reported she was hurt on August 26, 2017 while removing a heavy bag of trash from a container. She saw her pain management specialist, Dr. Nguyen, five days later. She had previously seen Dr. Nguyen for back pain associated with a motor vehicle accident several years earlier, and she had an appointment with him on August 16, 2017 at which time she allegedly complained of right shoulder pain she indicated had begun about a month earlier. Dr. Nguyen did not record a complaint about a new injury subsequent to the August 16 visit but did note his suspicion of a possible torn rotator cuff. An MRI on September 20, 2017 confirmed the torn rotator cuff. When the employee was being evaluated for shoulder pain at an emergency department on October 16, 2017, she indicated she had an injury on July 28, 2017 and presented the hospital staff with her MRI report. The employee returned to Dr. Nguyen on October 25, 2017, who noted pain in the right shoulder and lacerations of the muscles and tendons of the right rotator cuff. The employer terminated the employee on October 25, 2017 after trying to accommodate the employee's inability to perform the lifting required in her job. By referral, she saw Dr. Kaminsky, an orthopedic surgeon, on November 2, 2017. He diagnosed rotator cuff and degenerative abnormalities of the right shoulder joint. He noted she attributed the pain to the August 26, 2017 incident. Dr. Kaminsky was not made aware of the

employee's visits with Dr. Nguyen or the hospital emergency department. He performed surgery on the employee's right shoulder on January 10, 2018. He found severe arthritic changes and cartilage loss but no tearing of the rotator cuff, later testifying the MRI had shown a false positive on the rotator cuff. After following the employee for several months, Dr. Kaminsky assessed a five percent permanent partial impairment to her body as a whole. Dr. Kaminsky testified it was difficult to say whether the reported August 26, 2017 lifting incident was the sole cause of the employee's pain, but that it was "certainly possible" it was an aggravating factor.

The Special Panel **affirmed** the trial court's judgment that Dr. Kaminsky's testimony was insufficient to establish causation, which was the sole issue on appeal. The Panel found no medical evidence of a traumatic injury to support the employee's claim of aggravation and causation. "To establish an injury causes disablement or the need for medical treatment, the employee must show by a reasonable degree of medical certainty the employment contributed more than fifty percent (50%) in causing the disablement or need for medical treatment, considering all causes." T. C. A. §50-6-102(14)(C) (Supp. 2020)."
The full opinion is available at
https://www.tncourts.gov/sites/default/files/shelton.b.opnjud.pdf

2. Independent Intervening Cause

***Latoya Paris v. McKee Foods Corp.*, No. E2020-00358-SC-R3-WC –** Filed February 16, 2021.

In 2005, the employee injured her left wrist while working with pallets for the employer, McKee Foods. She underwent multiple surgeries for a triangular fibro-cartilage injury. Her authorized treating physician (ATP) assigned a three percent permanent partial impairment rating and gave her lifting restrictions. The employee settled her PPD claim on September 17, 2009. Her right to future medical treatment was preserved. After leaving her position with McKee, she began working for Amazon. In 2012, she experienced pain in her left wrist while lifting an item. After seeing her ATP, she viewed the wrist pain as a continuation of the original injury. The employer (McKee) contended she had sustained a new injury that relieved it of responsibility. She did not file a workers' compensation claim against Amazon. By 2015, the employee was working for another company, T. R. Moore. She experienced significant left wrist pain while working there. Her original ATP recommended conservative treatment. McKee again contended the employee had sustained a new injury and denied further treatment with the ATP. After seeking administrative review, the ATP again examined the employee and found no change in her condition. The employee filed a workers' compensation claim against McKee, seeking medical treatment benefits. The ATP opined the employee had not sustained a new injury in either of the work incidents at Amazon or T. R. Moore. He testified the lifting restriction he imposed applied only to her left hand and that the employee was capable of lifting more using both hands. At trial McKee argued the employee exceeded her lifting restrictions, which constituted an intervening cause that "broke the chain of causation." The trial court agreed. The employee appealed,

contending the trial court erroneously applied the **independent intervening cause rule**, absent a finding of a subsequent injury.

On appeal, the Special Panel noted that **the Supreme Court's "consistent description of the intervening cause principle indicates the presence of a new injury, or at least an aggravation of the original injury, is a premise of the rule."** (Quoting *McAlister v. Methodist Hosp. of Memphis*, 550 S.W.2d 240, 245 (Tenn. 1977). The Panel held if the employee's activity results "in only an increase in pain, but there is no new injury or aggravation of the original injury, the independent intervening cause principle is not applicable to relieve the original employer of liability." (Citing *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008). The Panel found no evidence of either a new injury or aggravation of the original injury and no progression of the original injury or anatomical change. The Panel **reversed** the trial court's holding on intervening cause and **affirmed** the trial court's conclusion that there was no new injury or aggravation of her existing condition. It also rejected the employer's assertion of the equitable doctrine of **unclean hands**. The employer contended the purported violation of the lifting restrictions constituted unconscionable conduct. The Panel upheld the ruling of the trial court that a lifting violation "does not amount to the kind of 'unconscionable, inequitable, or immoral conduct' that would warrant invocation of the doctrine of unclean hands."

The full opinion is available at
https://www.tncourts.gov/sites/default/files/e2020-358__opinion.pdf

3. Rebutting the Presumption Afforded the Authorized Treating Physician

Gwendolyn Jumper v. Kellogg Company, et al., **No. W2020-01274-SC-R3-WC** – Filed June 23, 2021.

A 30-year employee filed a petition for benefit determination on April 27, 2018, alleging she hurt her back at work on November 17, 2016. The parties stipulated she received treatment from her authorized treating physician (ATP) and also that she had a prior back injury in 2005. The employee testified her manual jobs for the employer over the years had involved bending, lifting, and twisting. When she experienced problems with her lower back in November 2016, she attributed it to gradually increasing pain over time and not to a specific incident. She chose Dr. Stephen Waggoner as her ATP from a panel of physicians provided by the employer. Dr. Waggoner had the medical records of two physicians who had treated the employee for back injuries in 2003 and 2014. Dr. Waggoner released the employee after the November 2016 report of pain, indicating to her the back pain was attributable to degenerative changes and not causally related to her employment. The employer denied the workers' compensation claim. The employee then sought treatment for her lower back and left leg symptomology on referral from her family physician and ultimately saw Dr. Glenn Crosby, a neurosurgeon, through her private insurance. Dr. Crosby performed a left L4 micro-discectomy on August 2, 2017. During the procedure he found a large ruptured disc with a fragment emerging underneath the nerve root,

which he opined would explain the employee's left leg pain. Dr. Crosby testified that the employee had not reported a work injury to him and he had not considered causation until the employee's attorney posed a hypothetical question to him whether the employee's disc injury was caused by the employee's repetitive work activities of bending, twisting, *squatting, stooping, pushing, and pulling* on a daily basis. Dr. Crosby said that assuming the factual description of her work activities posed to be true, he would conclude they would have comprised 75% to 80% of the cause of the injury for which he treated her. Dr. Crosby also testified that if the employee had any prior injuries or treatment to her back, that could affect his opinion on causation. He had not reviewed any reports from the employee's previous physicians, except for an independent medical evaluation by Dr. Apurva Dalal, an orthopedic surgeon. Dr. Dalal assigned a 12% permanent partial impairment after examining the employee. He testified the employee told him she had begun experiencing severe back pain in November 2016, that she was injured in December 2016, and that her job required her to lift and carry buckets weighing 35 to 40 pounds and that she had done so for several years. Dr. Dalal said he was unaware of any previous injury or a history of ongoing back pain. The ATP, Dr. Waggoner, testified the employee did not provide him with any information about incidents or injuries subsequent to the alleged 2014 injury, which apparently had never been reported to the employer. Dr. Waggoner concluded her symptomology was attributable to mild degenerative changes in her lumbar spine, without a definite history of a work-related injury. The trial court denied the employee's claim, finding *she had not established a gradually occurring work injury since she did not prove her injury was caused by a specific set of incidents, identifiable by time and place*. Also, the trial court found even if she had established an injury, she had not proven medical causation.

On appeal, after finding the employee's challenge of the presumption of correctness statutes to be meritless, the Special Panel **affirmed** the ruling of the trial court. The Panel agreed that the ATP's opinion as to the cause of the employee's lower back pain was entitled to the presumption of correctness. The Panel also agreed the hypothetical posed to Dr. Crosby assumed facts not fully supported in the evidence in its description of the employee's work activities. Therefore, Dr. Crosby's opinion was insufficient to overcome the opinion of the ATP.

The full opinion is available at
https://www.tncourts.gov/sites/default/files/jumperopn_0.pdf

Brian Coblentz v. Stanley Black & Decker, Inc., et al., **No. M2020-01622-SC-R3-WC** – Filed October 20, 2021.

The employee filed a motion to compel the employer to provide medical treatment under the terms of a consent order previously entered in the trial court. The employee had sustained injuries to his neck, face, and head in an accident at work on August 29, 2012. On January 30, 2020, the trial court entered a consent order approving a settlement of the employee's permanent partial disability benefits. The order preserved future medical benefits directly related to treatment of the work injuries. The employee continued to experience persistent headaches

attributed to traumatic head injury and post-concussion syndrome. He sought treatment from Dr. Dinesh Raju, his authorized treating physician (ATP), who requested authorization to use Botox to help treat the employee's chronic migraines concurrently with two new medications because previously prescribed medications had been determined to cause prohibitive side effects or to be ineffective. The employer referred Dr. Raju's request to utilization review to evaluate whether the proposed treatment was medically necessary or appropriate. In the utilization and review process, a pain management physician opined the Botox treatment was not medically necessary and that the effectiveness of the other medications proposed to be administered concurrently should first be assessed. The finding was upheld by the Medical Director of the Bureau of Workers' Compensation in the administrative appeal process. The employee then filed the motion to compel. The trial court denied the motion, finding that through the utilization review process the employer had rebutted the presumption afforded the ATP that the medical treatment requested was medically necessary and appropriate. The Special Panel **affirmed** the decision of the trial court, agreeing that the reasoning of the Medical Director about the need to assess the other proposed medications was well supported by the medical evidence.

The full opinion is available at
https://www.tncourts.gov/sites/default/files/20211020102205.pdf

Medical Issues

1. Permanent and Total Disability

Sandra Cummings v. Express Courier International, Inc., et al., **No. E2020-00548-SC-R3-WC** – Filed February 17, 2021.

The employee worked as a dispatcher for the employer. She was injured April 29, 2010 when a heavy box fell on her left foot. After surgery and physical therapy, she returned to work. Although her treating physician had imposed a 25-pound lifting instruction, her job required her to lift heavier boxes. On February 7, 2012, she dropped a 35-40-pound box on the same left foot. The employer terminated her in May 2012, allegedly because of poor performance and inability to work well with others. The employer denied her termination was due to work injuries or because she had made a gender discrimination claim. Ultimately, she had a toe fusion procedure in May 2017. At trial, the proof indicated the employee had poor balance, had fallen several times, used a cane, had trouble sleeping, and experienced severe pain when walking. Her physician determined she had a 92 percent impairment to her big toe, equating to a four percent impairment to her body as a whole.

The trial court found the employee was permanently and totally disabled and entitled to 260 weeks of benefits because her injury occurred after the age of 60. Although the employee had an

extensive work history and a good educational background, the trial court determined the employee was permanently and totally disabled because at age 69 she had trouble standing and balancing, experienced frequent falls, and had to take pain medication that caused significant drowsiness. The trial court also determined the employer was entitled to a $750 monthly offset because she was receiving $1,500 in Social Security income.

The employee filed a post-trial motion challenging the offset. Relative to the offset issue, the employee took the position that her toe injury was to a scheduled member, not the body as a whole. However, with respect to the award, she agreed with the trial court's finding that her impairment was to the body as a whole because the toe injury affected her ability to walk, stand, and balance. On appeal, the Special Panel **affirmed** the trial court's judgment that the employee was permanently and totally disabled. However, it agreed that the employee's impairment was to the body as a whole rather than to a scheduled member, based on the evidence. Therefore, the offset against her Social Security income was proper under T. C. A. §50-6-207(4)(A)(i).

The full opinion is available at
https://www.tncourts.gov/sites/default/files/e2020-548_opinion.pdf

Charles Hopper v. UGN, Inc., **No. W2019-00524-SC-WCM-WC** – Filed March 26, 2021.

The employee sustained injuries to his neck and back on June 12, 2013 when the forklift he was operating was struck from behind by another forklift. The employee had always worked in construction, maintenance, and loading and assembly jobs, all of which required heavy lifting and physical labor. After returning from initial treatment following the injuries, the employer first assigned him to lighter work but later moved him to a production line that required moving, bending, and stretching. The employee missed some work due to bronchitis but also because of pain from the neck injury. When he told the employer in March 2014 that he could no longer work because of the neck pain, he was fired for violations of the attendance policy. Although he applied for 12 or 13 jobs, he did not find work after his termination. Before the work injury, the employee had no problems with his neck. After the injury, he had pain which radiated into his left arm, had trouble turning and moving his head, and had difficulty driving and operating a riding lawn mower. At trial, a vocational expert testified the employee had lost 92.94 percent of his job potential due to his age, the work injury, mild depression, insulin dependent diabetes, and use of pain medication. An independent medical evaluation indicated the employee had significant neck pain, decreased range of motion, and tingling and numbness between his scapular blades. He also had cervical spine tenderness with paraspinal muscle spasms, decreased sensation, decreased bilateral strength, and pre-existing degenerative disease of the cervical spine. The IME assigned a three percent (3%) permanent partial impairment to the body as a whole and recommended lifting restrictions of no more than 15 pounds, with no pulling, pushing, nor overhead work. Another physician who had examined the claimant several months earlier testified he found moderate degenerative cervical changes but no other significant

abnormalities attributable to a specific incident. That physician assigned a two percent (2%) PPI, did not recommend restrictions, but did caution the employee that he could incur more damage in certain jobs.

The trial court found the employee permanently and totally disabled. On appeal the employer challenged the finding, emphasized the employee had only a two or three percent impairment rating, and contended he was fired for missing work, and had not looked for a new job. The Special Panel **affirmed** the trial court's judgment. "An employee may be found permanently and totally disabled 'when an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income.'" (T. C. A. §50-6-207(4) (B) (2014)). In determining whether an employee is permanently and totally disabled, courts consider a number of factors to ascertain 'a complete picture of an individual's ability to return to gainful employment.' *Hubble v. Dyer Nursing Home*, 189 S.W.3d 525, 535 (Tenn. 2006). These factors include the employee's skills, education, age, training, job opportunities and availability of work suited for an individual with that particular disability. The Panel concluded the evidence did not preponderate against the trial court's judgment.

The full opinion is available at
https://www.tncourts.gov/sites/default/files/hoppercopn.pdf

2. Temporary Total Disability

Nesreen Boutros v. Amazon.Com DEDC, LLC et al., **No. M2020-00455-SC-R3-WC** – Filed April 8, 2021.

The employee sought temporary total disability (TTD) benefits and future medical treatment benefits after sustaining injuries to her right arm and neck at work on April 23, 2015. In an expedited hearing, the trial court accredited her testimony and found she was likely to prevail at a hearing on the merits in establishing her injuries were caused by her employment and that she was entitled to future medical benefits. The trial court denied TTD at that time due to lack of medical proof to establish the employee was likely to prevail at trial on that issue. The trial court later set a compensation hearing which was held October 9, 2019. The issues to be determined were compensability of the employee's claim, her entitlement to future medical benefits, TTD benefits, and permanent partial disability benefits. Based on the medical evidence, the trial court determined the employee's injuries were compensable, and that she was entitled to future medical and TTD benefits, but that she had not suffered a permanent impairment.

On appeal, the employer challenged the TTD award, and attempted to show the employee received TTD benefits after she had reached her maximum medical improvement. The Special Panel **affirmed** the trial court's judgment, noting it could not conclude the evidence

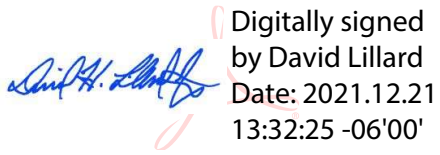
preponderated against the decision of the trial court to accept the opinions of the authorized treating physician that established the period when the employee was unable to return to work. The employer had also contended the employee was medically non-compliant, that she missed various appointments, declined invasive treatments, and that she should not be awarded TTD for those reasons. The Panel found the trial court had determined the employee's explanations for missing certain appointments and declining some treatment to be credible and reasonable.

The full opinion is available at
https://www.tncourts.gov/sites/default/files/boutrosnesreen.ufiled.opn_.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 workers' compensation decisions for the 2021 Calendar Year. 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 Commerce 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 112th 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: https://treasury.tn.gov/Explore-Your-TN-Treasury/About-the-Treasury/BoardsCommissions/Advisory-Council-on-Workers'-Compensation

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