STATE OF TENNESSEE

Workers' Compensation Advisory Council

SIGNIFICANT TENNESSEE SUPREME COURT DECISIONS
CALENDAR YEAR 2007

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SUMMARY OF
SIGNIFICANT TENNESSEE SUPREME COURT DECISIONS
CALENDAR YEAR 2007

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INTRODUCTION

Tennessee Code Annotated §50-6-121(g) requires the Workers' Compensation Advisory Council to issue a report annually that includes a summary of significant Tennessee Supreme Court decisions on workers' compensation on or before January 15 of each year. The following is the Advisory Council's report that includes a summary of each significant decision by the Supreme Court and an explanation of the impact of the case on existing policy.

SIGNIFICANT TENNESSEE SUPREME COURT DECISIONS

CALENDAR YEAR 2007

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1. COVERAGE - SOLE PROPRIETOR

Schelle v. Hartford Underwriters Ins. Co., 218 S.W.3d 636, Tenn. 2007
[Opinion Filed: February 28, 2007]

Facts:

Mr. Scheele was employed to begin work as a sole proprietor and independent contractor for a Virginia Company on January 12, 2004 and was required by the Company to obtain his own workers' compensation insurance policy. Mr. Scheele contacted an insurance agent and on December 29, 2003 he filled out an application, gave the agent a completed I-4 form (Department of Labor/WFD form "Election of Sole Proprietor or Partner to Come Within the Provisions of the Tennessee Workers' Compensation Law"), submitted the payment of $750 for workers' compensation coverage and requested the policy to be effective on January 12, 2004, the date he was to begin work. The insurance agent sent the I-4 form to the Department and it was stamped received on December 31, 2003. The agent also sent the Virginia company a certificate of insurance that indicated coverage would begin on January 14, 2004.

The Hartford Insurance Company sent Mr. Scheele a "welcome letter" dated January 14, 2004 that indicated coverage under the policy began on January 12, 2004. The insurer also sent a binder letter that indicated the effective date of the policy was January 12, 2004. Mr. Scheele suffered a fall on January 21, 2004 severely injuring his hip. On January 22, Hartford issued its policy with an endorsement that changed the coverage date to January 30, 2004 - 30 days after the
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Department received the I-4 form and charged him an additional $4,121 as additional premium for sole proprietor coverage.

Mr. Scheele filed suit seeking workers' compensation benefits and Hartford denied the claim asserting Mr. Scheele was not an "employee" under the Tennessee workers' compensation law as he had not complied with the 30 day waiting period required by *TCA* §50-6-102(10)(B).

Trial Court / Panel Results:

The trial court found the insurance policy covered Mr. Scheele because every document sent by Hartford prior to the injury indicated the policy effective date was before the injury. The trial court also found the 30 day waiting period required by *TCA* §50-6-102(10)(B) was not mandatory and Mr. Scheele's substantial compliance with the requirements of the law was legally sufficient. Mr. Scheele was awarded 60% permanent partial disability benefits to the body as a whole. **The Supreme Court granted review of the appeal before the case was heard or considered by the Panel.**

Supreme Court Decision:

The Supreme Court held the 30 day notice requirement of *TCA* §50-6-102(10)(B) to be directory, not mandatory and a sole proprietor's substantial compliance with the 30 day notice requirement is legally sufficient. The Court based its decision on (1) a long line of cases that held similar notice provisions to be directory, rather than mandatory because provisions relating to mode or time of doing an act are ordinarily directory, (2) the intent of the General Assembly is the workers' compensation act is to be equitably construed and (3) it is the duty of the Court to interpret the workers' compensation laws so as to protect workers and their families from economic devastation and to ensure injured employees are justly and appropriately reimbursed for injuries suffered in the course of service to the employer.

The Supreme Court also rejected Hartford's claim that since Mr. Scheele had only paid the $750 deposit premium and not the full $4,121 additional premium there was no coverage. The Court noted Tennessee insurance law will not permit collection of premium for insurance without the insurer's exposure to risk; noted a binder - which is a temporary contract of insurance - had been issued by Hartford prior to the injury; and noted the full policy stated the initial premium is an estimate and the actual premium will be determined after the policy ends (not after the injury).

Impact on Existing Policy:

The Supreme Court clarified that prior case law is still effective and if a sole proprietor or independent contractor purchases a workers' compensation policy, pays the initial premium, and submits the I-4 form to the department, the insurance carrier is required to cover injuries prior to the expiration of the 30 day waiting period set forth in the statute. To the extent the waiting period continues to remain in the statute, this case effectively concludes it is directory - not mandatory - and substantial compliance will be sufficient to require coverage by the carrier.

2. COURSE/SCOPE OF EMPLOYMENT

A. *Gooden v. Coors Technical Ceramic Co.,* 236 S.W.3d 151, Tenn. 2007
[Opinion Filed: September 6, 2007]

Facts:

Employee, Mr. Gooden, died of a heart attach while (or shortly after) participating in a basketball game during a work break on the employer's premises. The basketball goal had been purchased by the employees, installed on the employer's premises and the employer knew the employees played basketball during breaks and had acquiesced in the activity. In addition, the

employer strongly encouraged the employees not to work through their breaks and supervisors often played basketball with the other employees. The employees were not permitted to leave the employer's premises during breaks and were paid for their break time. However, Mr. Gooden's participation in the game was voluntary and not encouraged by the employer.

His widow sued for death benefits; the employer denied the claim asserting the employee's death did not arise out and in the course of employment as he had voluntarily participated in the basketball game. The employer relied on the Supreme Court decision, *Young v. Taylor-White, LLC*, 181 S.S.3d 324, 329 (Tenn. 2005), that held the "voluntary nature of the activity, rather than the fact that the activity occurs on the employer's premises or provided a benefit to the employer, is the touchstone for determining whether the injury occurred during the course of employment".

Trial Court / Panel Results:

The trial court denied death benefits basing its decision solely on its conclusion that the death did not arise out of employment. **The Supreme Court granted review of the appeal before the case was heard or considered by the Panel.**

Supreme Court Decision:

The Supreme Court held the trial court erred when it determined the death (injury) did not arise out of the employment because the uncontested medical proof established and the employer conceded on appeal that the exertion of playing basketball contributed to Mr. Gooden's death. The Supreme Court determined the sole issue on appeal to be whether the death occurred in the course of employment.

The Supreme Court noted an injury must both "arise out of" the employment and occur "in the course of" the employment for an injury to be compensable. The requirements are separate and

distinct from one another. The "arise out of" requirement refers to causation and is satisfied whenever it reasonably appears upon consideration of all the circumstances that there exists a causal connection between the conditions of the work to be performed and the resulting injury. The "in the course of" requirement is met when the injury takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental to the work duties.

The Supreme Court rejected its prior decision in *Young*, in which it held the injury was not compensable because the participation in the three-legged race at the company picnic was voluntary and "the voluntary nature of the activity...is the touchstone for determining whether the injury occurred during the course of employment". In *Gooden*, the court stated its reference to the voluntary nature of the activity as the "touchstone" in the determination was "not a judicious use of the term and elevating that factor above all others would be a clear departure from the Court's traditional emphasis on "the time, place and circumstances" of the injury.

After determining the voluntary nature of the basketball game did not bar recovery, the Supreme Court turned to the issue of whether the facts of the case justified concluding the death occurred in the course of employment. The Court noted it had frequently held injuries occurring during breaks and on the employer's premises to occur in the course of employment and are compensable. The Court concluded death benefits were due because the employer's knowingly permitted the employees to play ball during breaks combined with the frequency of the games made the games a regular incident of Mr. Gooden's employment.

Impact on Existing Policy:

Following the *Young* decision in 2005, most concluded that if the employee's participation in an activity that caused injury was voluntary, this would bar any recovery without looking at any other factor. The *Gooden* decision makes it clear that the voluntary nature of an activity, while an important consideration, is only one factor to be considered in determining whether an activity occurs in the course of employment.

B. *Wait v. Travelers Indem. Co. Of Illinois*, _ _ S.W. 3d _ _ , Tenn. 2007
[Opinion Filed: November 16, 2007 - No. M2007-00099-SC-R3-WC]

Facts:

With the permission of her employer, who did not have sufficient office space, Ms. Wait converted a bedroom into an office and worked from home. The employer provided the necessary office equipment; her supervisor and other employees had attended meetings at her home office. Her work did not necessitate her home office to be open to the public.

On September 3, 2004, Ms. Wait was working alone in her office. When she was preparing her lunch in her kitchen, an acquaintance knocked on her door. The visitor stayed a short time and left; he returned a moment later and brutally assaulted Ms. Wait without provocation or explanation. She suffered severe and permanent injuries. Ms. Wait sued the employer's insurance carrier for workers' compensation benefits alleging her injuries from the assault were compensable. The insurer denied the claim asserting the injuries neither arose from her employment nor occurred in the course of her employment.

Trial Court / Panel Results:

Following discovery, the insurer filed a Motion for Summary Judgment, which was granted by the Trial Court. **The Supreme Court accepted review before the case was heard or considered by the Special Workers' Compensation Panel.**

Supreme Court Decision:

The issue - the applicability of the workers' compensation act to a telecommuting situation - is one never before decided by the Supreme Court. The Court noted to be compensable the injuries sustained by Ms. Wait must have arisen out of her employment and must have occurred in the course of her employment.

The Court stated an employee telecommutes when he/she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site. The Court noted telecommuting is a growing trend that benefits employees, employers and society.

The Court first examined whether Ms. Wait's injuries occurred in the course of her employment. The insurer had relied on the fact that at the time of the assault Ms. Wait was preparing her lunch - not fulfilling a work duty. The Court observed that generally injuries sustained during personal breaks are compensable because the remedial policies of workers' compensation would be undermined if too severe a line were drawn controlling the compensability of injuries that occur during the normal course of the work day after the employee arrives at work, have started work and before leaving for the day.

The Court held the injuries sustained by Ms. Wait's while on her lunch break occurred in the course of her employment as she was assaulted at a place where her employer could reasonably

expect her to be. The Court stated that an employee working from a home office who answers the door and briefly admits an acquaintance does not depart so far from the work duties so as to remove herself/himself from the employment.

Next, the Court considered whether the injuries arose from employment - whether a causal connection existed between the employment condition and the injuries. The Court noted it had previously divided assaults into three general classifications: (1) assaults with an "inherent connection" to employment such as disputes over performance, pay or termination [compensable]; (2) assaults stemming from "inherently private" disputes imported into the employment setting from the employee's private life and not exacerbated by the employment [not compensable]; and (3) assaults resulting from a "neutral force" such as assaults neither personal to the employee not distinctly associated with the employment relationship [possibly compensable, depending on the facts and circumstances of the employment].

The Court found the assault on Ms. Wait to be a "neutral assault" and, therefore, compensability must be determined by the facts and circumstances of the plaintiff's employment and its relationship to the injuries sustained by the plaintiff. The Court noted that generally for an injury to "arise out of" employment, the injury must result from a peculiar danger or risk inherent to the nature of the employment - an injury merely coincidental or contemporaneous or collateral to the employment is not one that arises out of the employment. In limited circumstances, however, where the employment itself involves indiscriminate exposure to the general public, the "street risk" doctrine (limited in application to workers whose employment exposes them to the hazards of the street or who are assaulted under circumstances that fairly suggest they were singled out for attack because of their association with their employer) may supply the required causal connection between

the employment and the injury. The Supreme Court concluded the facts specific to Ms. Wait did not provide the necessary causal connection because the facts do not establish (1) that her employment exposed her to a street hazard; (2) that she was singled out for her association with her employer; (3) that she was charged with safeguarding the employer's property; (4) that she was advancing the interests of her employer when she admitted the acquaintance into her home; or (that) her employment imposed a duty to admit the assailant into her home.

Impact on Existing Policy:

Telecommuting is affecting more and more employer-employee relationships. This case presented an issue of first impression in Tennessee: under what circumstances will injuries sustained by a an employee who is working from home be compensable. The decision by the Court underscores the fact for an injury to be compensable it must both "arise out of" the employment and "occur in the course of" the employment and each must be examined based on the facts and circumstances of each case.

3. STATUTE OF LIMITATIONS - GRADUALLY OCCURRING INJURIES AND OCCUPATIONAL DISEASE INJURIES

A. Gradually Occurring Injuries

Building Materials Corp. V. Britt, 211 S.W.3d 706 (Tenn. 2007)
[Opinion Filed: January 24, 2007]

Facts:

Mr. Britt reported a back injury to his employer in 1997 and following medical treatment approved by his employer his back pain improved and he did not miss any time from work. He did not file a claim for benefits at that time. In late 1999 and in 2000 the pain began to extend down his leg and he did not miss any time from work despite the increase in pain. In August, 2001, he

reported to his employer that his back pain was worsening. The personnel manager for the employer contacted the workers' compensation carrier who denied benefits contending the statute of limitations had run with regard to the back injury that had been reported in 1997. The insurance carrier filed suit against Mr. Britt and Mr. Britt filed a counterclaim alleging a gradual injury to his back and alleging the statute of limitations commences on the first day he missed work due to the injury.

Trial Court / Panel Results:

The trial court dismissed Mr. Britt's claim finding his claim to be barred by the statute of limitations. The Special Workers' Compensation Panel determined Mr. Britt's back injury was a gradual injury and that the last-day-worked rule applied to his case and that his claim was not barred by the applicable one-year statute of limitations. The Panel, therefore, reversed the trial court's judgment and remanded for further proceedings. **The Supreme Court granted review**.

Supreme Court Decision:

The Supreme Court held Mr. Britt's claim was not barred by the statute of limitations despite the fact he had given notice of a gradual injury several years prior to the filing of the complaint. The Court noted *TCA* §50-6-203 provides a claim for workers' compensation benefits must be filed within one year after the occurrence of an injury or within one year of the date of the last authorized treatment or the time the employer ceased to make payments to or on behalf of the employee, whichever is later.

The Court stated that if Mr. Britt had filed a claim in 1997, when he first gave notice, he would have received limited benefits due to the minor nature of the injury at the time and it would be unjust to bar the employee from collecting permanent partial disability benefits simply because

he first reported the work-related nature of his injury years earlier. The Court said to hold otherwise would create a potential trap of forcing an employee to file a claim before he/she is actually disabled, or to have the claim denied due to the running of the statute of limitations if he/she waits. The Court concluded this result is clearly inconsistent with both the spirit and purpose of the workers' compensation system.

The Supreme Court also discussed its holding in *Bone v. Saturn Corp.*, 148 S.W.3d 69 (Tenn. 2004) in which the Court retreated from the "last day worked" rule. In *Bone* the employee gave notice of the injury in 1997 but continued to work while undergoing conservative treatment. Her condition failed to improve and she had surgery on May 25, 2001, the first day she was prevented from working. In that case, the Court held the "last-day-worked rule inapplicable in determining an employee's compensation rate if the employee had previously given notice of a gradually occurring injury. The Supreme Court stated:

> At the time we decided *Bone*, we were persuaded that a retreat from the bright line last-day-worked rule established in *Barker* and *Lawson* was appropriate. After further consideration and application of the *Bone* rule, however, we are convinced that the "first notice" rule we announced in *Bone* is unfair in its application and conflicts with the purposes of our Workers' Compensation Law. The last-day-worked rule is consistent with the requirement that we liberally construe the Workers' Compensation Law in order to secure benefits for injured workers.
> ...
> We now hold that the better-reasoned view is that the date of an employee's gradually occurring injury should be determined using the last-day worked rule. To the extent that Bone and its progeny hold otherwise, they are hereby overruled.

Impact on Existing Policy:

The case retreated from the position it took in 2004 when it issued its opinion in *Bone* regarding date the statute of limitations begins to run for gradually occurring injuries and reinstated the "last-day-worked" rule as applicable to these injuries.

B. Occupational Disease Cases

Brown v. Erachem Comilog, Inc., 231 S.W.3d 918 (Tenn. 2007)
[Opinion Filed: August 30, 2007]

Facts:

The dates that are important to this claim are as follows:

1991 Ms. Brown began her employment with Erachem where she was continuously exposed to chemicals in the plant.

1999 She was diagnosed with lung cancer.

2000 In February she was told her cancer was caused by exposure to the chemicals. She gave notice to Erachem that she believed her cancer was caused by exposure to chemicals at work and she underwent lung surgery the same month.

2000 February 14, 2000 through August 28, 2000 - missed time from work due to lung surgery. She returned to work with no restrictions.

2001 She underwent further treatment; missed work from December 27, 2001 through March 19, 2002. She again returned to work.

2002 In the spring her cancer recurred. She continued to work until July 11, 2002.

2003 April 3 she filed a claim for workers' compensation benefits on April 3, 2003 and died of causes related to the cancer in November.

Trial Court / Panel Results:

The trial court dismissed the claim as untimely holding the statute of limitations began to run in February 2000 when she gave notice to her employer that the cancer was work-related. The Panel affirmed the trial court, relying on a 1982 case for the proposition that occupational disease cases are treated the same as gradually occurring injuries for the purpose of determining when the statute

of limitations begins to run and on *Bone v. Saturn Corp.*, 148 S.W.3d 69 (Tenn. 2004), a gradually occurring injury case, that held the date notice is given begins the statute of limitations. **The Supreme Court granted review.**

Supreme Court Decision:

The Supreme Court held Ms. Brown's claim for benefits was filed timely. The Court pointed out that gradually occurring injuries and occupational disease cases are governed by two different statutes of limitations: gradually occurring [*TCA* §50-6-224(1)]; occupational [*TCA* §50-6-306(a)]. The Supreme Court stated it was error to rely on a gradually occurring injury case to determine the statute of limitations in an occupational disease case. The statue of limitations in an occupational disease case requires an actual "incapacity for work" to trigger the statute.

The Supreme Court held the employee's absence from work for treatment will not begin the running of the statute of limitations in an occupational disease case if the employee's capacity to work is affected only by the treatment, not by the disease. Also, the mere payment of temporary benefits during a treatment period does not affect the running of the statute of limitations in an occupational disease case.

The Court held it was not until July 11, 2002 that Ms. Brown could no longer fulfill the responsibilities of her employment. Therefore, the complaint filed in April, 2003 was timely.

Impact on Existing Policy:

The Supreme Court has clarified that while both occupational disease cases and gradually occurring injury cases pose similar difficulties in determining when the statute of limitations begins to run, the determination is made in the context of two different statute of limitations. Claims involving gradual injuries are governed by the one year statute of limitations for accidental injuries

while claims involving occupational diseases are governed by a different statute that requires "incapacity for work". The beginning of the incapacity for work resulting from an occupational disease starts when the employee is unable to perform his/her regular duties, not from the date of treatment.

4. STATUTE OF LIMITATIONS - SAVINGS STATUTE

A. Savings Statue & Revival by Voluntary Medical Payment

Dye v. Witco Corp., 216 S.W.3d 317 (Tenn. 2007)
[Opinion filed: March 5, 2007]

Facts:

Mr. Dye developed an allergic condition affecting his hands during his employment with Witco. The following dates are significant to the case:

1996 August - Mr. Dye began treatment for his condition and the employer paid medical benefits.

1998 August - The employer had an analysis conducted that found no support for exposure to chemicals as a result of Mr. Dye's employment and Witco determined his condition was not caused by employment.

December - Mr. Dye's treating doctor requested another survey of the work environment. As a result of the testing, the doctor signed a statement received from the employer that his medical care was for a person health matter and there was no evidence his condition was caused by his job.

1999 March 4 - Mr. Dye filed a complaint seeking workers' compensation benefits.

July - Mr. Dye received medical treatment until July 22, 1999 - the doctor continued

to note in the medical records that from the patient's history it sounds like his condition is work related.

October 22 - Witco ceased payment of all benefits to Mr. Dye.

2001 May 8 - Mr. Dye filed a voluntary dismissal (non-suit) of his workers' compensation claim.

2002 March - Mr. Dye returned to the physician for treatment of the same allergic condition. The parties disputed whether Witco authorized the medical treatment.

October 9, 2002 - Witco made a single payment for the March 2002 treatment.

December 13 - Mr. Dye filed a second workers' compensation complaint.

Witco filed a motion for summary judgment asserting the complaint was barred by both the statute of limitations and the savings statute (permits re-filing of a suit within one year following a voluntary dismissal of a lawsuit).

Trial Court / Panel Results:

The trial court granted summary judgment for the employer. **After oral argument before the Panel, the Supreme Court granted review of the appeal before a decision was rendered by the Panel.**

Supreme Court Decision:

The Supreme Court held that Witco ceased making payments on October 22, 1999 and that the statute ran on October 22, 2000. The Court held a voluntary payment of compensation and medical treatment occurring after the statute of limitations has already run is of no effect.

Regarding the savings statute, the Court held the second complaint was filed more than 19 months following the voluntary non-suit of the first action and the savings statute did not save the claim.

Impact on Existing Policy:

The Court clarified that a voluntary payment made by an employer after the statute of limitations has expired will not save a claim from dismissal and a voluntary payment will not have any effect on the expiration of the savings statute.

B. Savings Statue & Second Injury Fund
Davidson v. Lewis Bros. Bakery, 227 S.W.3d 17 (Tenn. 2007)
[Opinion Filed: June 28, 2007]

Facts:

The following dates are pertinent to this case:

2001 January 6 - Mr. Davidson sustained a shoulder injury

August 22 - Filed suit for workers' compensation benefits against the employer and the Second Injury Fund

2004 April 28 - Filed voluntary non-suit against both employer and SIF

December 22 - Filed second suit against both employer and SIF

In its answer to the second complaint, the employer asserted it was not liable to the employee for any new benefits. The Second Injury Fund asserted it was not liable to the employee because the one year statute of limitation had expired and the "savings statute" [*TCA* § 28-1-105(a)] did not allow the employee to re-file his claim because the statute did not waive the Fund's sovereign immunity.

Trial Court / Panel Results:

The trial court held the employee was entitled to permanent total disability benefits and ordered the employer to pay 64.4% and the Second Injury Fund to pay 35.6% of $245,282.27 in benefits and $5,067.74 in discretionary costs. Pending appeal, the employer settled with the plaintiff,

leaving only the Second Injury Fund as a party. **The Supreme Court accepted review before the case was heard or decided by the Special Workers' Compensation Panel.**

Supreme Court Decision:

The Court held the claim against the Second Injury Fund was barred because the "savings statue" does not contain the waiver of sovereign immunity necessary to support a suit against the State. Therefore, a claim against the Fund is not "saved" when the applicable statute of limitations has otherwise run. The Court held the statute of limitations ran against the Fund in January, 2002, one year following the injury. The Court dismissed the case against the Fund.

Impact on Existing Policy

This case makes it clear that a claim against the Second Injury Fund cannot be voluntarily dismissed and re-filed. The 'savings statute" does not contain a waiver of the Fund's sovereign immunity.

4. DEATH BENEFITS - - NON-RESIDENT FOREIGN NATIONALS AS DEPENDENTS

Fusner v. Coop Const. Co., LLC, 211 S.W.3d 686 (Tenn. 2007)
[Opinion Filed: January 18, 2007]

Facts:

The employee, who was a Mexican national, fell to his death in a work-related accident. There was no dispute that between the parties that the deceased was covered by the Tennessee workers' compensation law as he had worked as a laborer for the employer for a total of 62 weeks on four occasions during the years 199-2002 and no dispute as to his average weekly wage.

His parents, residents and citizens of Mexico, sought workers' compensation benefits with the assistance of the Mexican Consulate who appointed attorney Fusner as its representative to

prosecute the claims on behalf of the parents. There was evidence presented via depositions that the son had sent money to his parents for their support. The parents, through the attorney, contended they were solely supported by their son; the employer strongly resisted the contention that the parents were actual dependents entitled to death benefits.

Trial Court / Panel Results:

The trial court found the deceased consistently sent money to his parents and that the parents had no other means of support. The trial court found the parents to be "wholly supported" by the deceased employee's income and thus were "actual dependents" entitled to death benefits. **The Supreme Court accepted review of the appeal before the case was heard or considered by the Panel.**

Supreme Court Decision:

The Supreme Court concluded the General Assembly clearly expressed in *TCA §*50-6-227 its policy determination that non-resident foreign nationals who qualify as dependents must receive the same treatment under the statute as resident United States citizens. Therefore, if the foreign nationals meet the statutory definitions of dependency under *TCA §*50-6-210 they are entitled to receive death benefits. In the specific case, the Supreme Court concluded a review of all the evidence indicated the parents were only partial dependents because the father earned some income of his own at the time of the employee's death.

Impact on Existing Policy:

This case made it clear that foreign nationals can be dependents of an employee who is killed as a result of a work-related accident in Tennessee and entitled to receive death benefits.

5. DISABILITY BENEFITS

A. *Barnett v. Milan Seating Systems*, 215 S.W.3d 828 (Tenn. 2007)
[Opinion Filed: February 2, 2007]

Facts:

Ms. Barnett was diagnosed with bilateral carpal tunnel syndrome in May, 2003 after performing repetitive work at Milan Seating for about 14 years. She had surgery on the left wrist but not on the right. In June she filed suit and in November, 2003 she settled the claim for 19.75% to the left arm and 9.87% to the right upper extremity and medical benefits remained open. In November, 2004, Ms. Barnett complained again with symptoms of carpal tunnel syndrome and was diagnosed with moderately severe carpal tunnel syndrome and mild cubital tunnel syndrome on the right. She filed a second suit in December, 2004 seeking disability benefits for both the right carpal tunnel release and the right cubital tunnel release. A carpal tunnel release and a cubital tunnel release was performed on Ms. Barnett in February, 2005. Her employer contended the prior settlement was res judicata as to second claim.

On June 5, 2005, Milan Seating was sold to Kongsberg Automotive. The sale resulted in no changes to Ms. Barnett's employment and she continued to perform the same job at the same location at the same rate of pay.

Trial Court / Panel Results:

The trial court held that the settlement of the first claim for carpal tunnel syndrome on the right barred further recovery for disability benefits. The trial court held the cubital tunnel syndrome was a new injury and Ms. Barnett was entitled to disability benefits for that injury. The court concluded the employee was subject to the 1.5 multiplier found in *TCA* §60-6-241(d)(1(a). **The**

Supreme Court accepted review of the appeal before the case was heard or considered by the Panel.

Supreme Court Decision:

The Supreme Court, relying on its decision in *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d (Tenn. 2003)[1], held Ms. Barnett was not subject to the 1.5 multiplier to limit her recovery as her pre-injury employer, Milan Seating, had been sold to Kongsberg several months prior to trial.

Impact on Existing Policy:

The case makes it clear that when an employer is sold and the employee continues to work at the successor employer at the same job and pay, the employee is NOT working for the pre-injury employer and, therefore, subject to the 1.5 multiplier to restrict the amount of permanent partial disability benefits.

B. Turner v. HomeCrest Corp., 226 S.W.3d 273 (Tenn. 2007) [Opinion Filed: April 26, 2007]

Facts:

Ms. Turner worked for HomeCrest for over 16 years. She injured her back in 1999 but not suit for workers' compensation benefits was filed. In August, 2001, she injured her neck. In October, 2001 she notified her employer she had pain and numbness in both arms. She was treated by several doctors for bilateral carpal tunnel syndrome.

[1] In *Perrin* the employee was employed by TNN, owned by Gaylord Entertainment Company and sustained a back injury. Following the injury he returned to work for TNN. Prior to the settlement of his claim, TNN was purchased by CBS in October, 1997. He settled his claim with Gaylord in March, 1998 for 2.5 times his impairment rating. Following the sale of TNN his job duties and pay did not change. The employee's job was terminated in December, 1998. He filed suit in September, 1999 against Gaylord seeking reconsideration of the settlement for the back injury. The Supreme Court held the employee's cause of action for reconsideration was barred as he did not file the suit within one year of the loss of his job with his pre-injury employer - the date on which CBS purchased TNN in October, 1997.

In August, 2002 she filed suit seeking benefits for the 2001 injury to her neck. The Second Injury Fund was not named in that suit.

In February, 2003 she was referred to another doctor for the bilateral carpal tunnel syndrome who diagnose bilateral carpal tunnel syndrome that was worse on the left than on the right. In September, 2003, she had a spinal fusion on her neck. She reached maximum medical improvement following the fusion on November 24, 2003 and received an impairment rating of 28% to the body as a whole.

On January 2, 2004 she was terminated by HomeCrest. That same month she again sought medical treatment for her numbness in her upper extremities. A suit for workers' compensation benefits for the carpal tunnel syndrome was filed in January, 2004 and the Second Injury Fund was named as a defendant. A couple of months later bilateral carpal tunnel releases were performed on both wrists. She reached maximum medical improvement from the CTS releases on August 17, 2004 and received 5% impairment to each arm.

Trial Court / Panel Results:

The trial court consolidated both suits for trial. In the suit for the cervical injury, the trial court determined the employee to be permanently and totally disabled. As to the second suit - for the carpal tunnel syndrome - the trial court found the employee had a 60% vocational disability to the body as a whole and concluded the Second Injury Fund was liable for the entire 60%. The Second Injury Fund appealed that judgment in the second suit.

The Panel reversed the judgment against the Second Injury Fund finding there was no evidence the employee had rehabilitated herself from the cervical injury for which she was determined to be permanently totally disabled; therefore, the employee was not entitled to any further vocational disability benefits in the second suit. **The Supreme Court granted review.**

Supreme Court Decision:

The Supreme Court held an employee who has been determined to be permanently totally disabled must prove rehabilitation from that injury in order to receive further disability benefits. Absent rehabilitation, once an employee is found permanently and totally disabled, that employee is receiving all of the vocational disability benefits available under the law.

Impact on Existing Policy:

The Supreme Court's opinion clarifies the law and effectively overrules a Panel decision to the contrary.

6. PRIOR SETTLEMENTS - IDIOPATHIC INJURY

Wilhelm v. Krogers, 235 S.W.3d 122 (Tenn. 2007)
[Opinion Filed: August 17, 2007]

Facts:

Mr. Wilhelm began working for the employer in 1998. Several months later he ruptured his right Achilles tendon while on the job. As a result of the injury he developed reflex sympathetic dystrophy (RSD), a condition that causes sharp pain and swelling in his lower right leg. Since the original injury, he walked with a pronounced limp. His doctor testified that the limp would likely cause left hip and lower back problems in the future. The claim was settled in 2003 for a lump sum payment in "full an final settlement of all claims or nature due to the Plaintiff under the [workers'] compensation law of Tennessee." Medial treatment for the injury remained open.

After the settlement, Mr. Wilhelm returned to work for his employer in a light duty position. On May 1, 2004, after clocking in, he felt a "pop" while walking to his work station and then

experienced pain in his low back and left hip. A few days later, he told a physical therapist performing contract work for the employer that this was the second time in three years that this had happened to him.

Mr. Wilhelm filed a claim for the impairment to his left hip and back and admitted the new injuries were a direct result of the 1999 ruptured Achilles. However, he argued he was entitled to additional disability benefits because the most recent injury affected entirely different parts of his body. He asserted the pain was not idiopathic but the result of his deteriorating condition occurring directly and naturally as a result of the 1999 injury. The employer contended the 2004 condition was a direct result of the limp caused by the 1999 injury and because both the RSD and the limp were apparent at the time of settlement, the employee was not entitled to further benefits.

Trial Court / Panel Results:

The trial court concluded the employee was entitled to 35% vocational disability to the body as a whole as the back injury occurred as he walked to his workstation and the increased pain was the result of his employment. The trial court held the prior settlement was for a specific scheduled member (right lower extremity) and there was no injury to the left hip or back at that time.

The Panel determined the plaintiff's injury was an idiopathic event. However, the Panel concluded because walking as much as 600 yards daily was a hazard incident to employment, the injury was compensable. The Panel also observed that because the 2004 injury had not manifested itself at the time of the settlement, the prior settlement did not bar the claim.

The employer also contended the prior lump sum settlement of the 1999 injury barred any further claims for benefits. The Panel disagreed holding the settlement was for an injury to a scheduled member and, therefore, the settlement for disability to the right leg could not have compensated him for injuries to his back and left hip. **The Supreme Court granted review.**

Supreme Court Decision:

The Supreme Court held that the employee's injury was not compensable because the injury could have occurred anywhere outside of work and there was no condition or hazard at the place of employment that caused the injury. The Court held that an injury that occurs as an employee walks on a level, obstacle-free, concrete surface is not compensable unless a hazard contributes to the injury.

As to the employer's claim that the 1999 settlement barred any further recovery, the Supreme Court held the subsequent injury to the back and hip was the natural and probable consequence of the 1999 injury and that at the time of the settlement all parties had every reason to contemplate a further progression of symptoms. The Court also concluded *TCA* §50-6-231 provides that all amounts paid by lump sum payments shall be final.

Impact on Existing Policy:

The Supreme Court re-affirmed the line of cases that bar recovery for an injury while walking unless there is a hazard that contributed to the injury and re-affirmed that lump sum settlements can bar recovery for any subsequent injury.

7. DRUG FREE WORKPLACE - STATUTORY PRESUMPTION

Interstate Mechanical Contractors, Inc. v. McIntosh, 229 S.W.3d 674 (Tenn. 2007)
[Opinion Filed: June 29, 2007]

Facts:

Mr. McIntosh injured his left hand on September 8, 2004 when it was caught in a machine when he was demonstrating to a new employee how to operate the machine and the new employee activated the machine. After the accident, Mr. McIntosh was rushed to the hospital and while at the

hospital a drug screen was performed at the insistence of a supervisor who was present at the hospital.

The drug screen showed the presence of marijuana and the employee admitted he had smoked marijuana in the week leading up to and on the night before his injury. He denied smoking any marijuana or being otherwise impaired on the day of the accident.

Trial Court / Panel Results:

Interstate Mechanical is a certified drug-free workplace pursuant to *TCA* §50-9-101,et seq. Because Mr. McIntosh tested positive for marijuana, there is a presumption that the drug caused the injury and the burden of proof shifted to him to prove his injury was not caused by the drug use. The trial court held the employee had rebutted the statutory presumption because under the evidence there would have been no time for anyone to act to prevent the machine from crushing the fingers even if the employee's reaction time may have been impaired due to the drug use. **The Supreme Court accepted review of the appeal before the case was heard or considered by the Panel.**

Supreme Court Decision:

The Supreme Court held the evidence supported the conclusion the employee had rebutted the statutory presumption that the employee's injury was caused by his drug use.

Impact on Existing Policy:

The holding of the court clarifies that an employee's injury must be caused by the drug or alcohol use in order to deny benefits; that drug use alone does not defeat a claim for benefits.

8. FRAUD

Bryant v. Baptist Health System Home Care of East Tennessee, 213 S.W.3d 743 (Tenn. 2007)
[Opinion Filed: December 21, 2006 [2]]

Facts: [3]

Ms. Bryant injured her back in May, 1997 while employed by Baptist Health System, a self-insured employer. Baptist did not pay any benefits or provide a panel of physicians to the employee until ordered to do so by the Department of Labor. In October, 1997 she was released to return to light duty. She left the employ of Baptist in December, 1997 after she explained to her employer that she was unable to continue the light duty work because the filing involved heavy lifting and bending. She was told no other jobs were available to accommodate her physical limitations. After she left, Ms. Bryant filed suit for workers' compensation benefits.

In December, 1998, Baptist deposed Ms. Bryant. She testified in response to several questions that she had not worked anywhere since leaving Baptist in December, 1997. Following this deposition, the Tennessee Department of Labor advised Baptist that it had received an anonymous telephone "tip" about Ms. Bryant. As a result of this information, Baptist hired a private investigator who discovered Ms. Bryant had worked since leaving Baptist. Baptist then filed a counterclaim against Ms. Bryant under the Workers' Compensation Fraud Act.[4]

At a second deposition, Baptist showed Ms. Bryant copies of checks she had received for work performed from August 1998 through March 1999. Ms. Bryant admitted she had not

[2] This opinion was issued in 2006; however, it is included in the 2007 report as it was issued after December 14, 2006, the date the Advisory Council approved publication of the Significant Supreme Court Decisions - Calendar Year 2006.

[3] The facts pertaining to the injury and the award of disability benefits are omitted; only the facts pertinent to the issue of Baptist's counterclaim under the Fraud Act are included.

[4] *TCA* §56-47-101, et seq.

responded truthfully to questions posed at her first deposition and that she had been working for more than four months at the time of her first deposition.

Trial Court / Panel Results:

The trial court dismissed Baptist's counterclaim, finding that Baptist had not been prejudiced by the false information Ms. Bryant provided during her first deposition. The trial court also ruled that her false deposition testimony was not a "fraudulent insurance act" within the meaning of *TCA* §56-47-103. **The Supreme Court accepted review of the appeal before the case was heard or considered by the Panel.**

Supreme Court Decision:

The Supreme Court held the trial court did not err in dismissing Baptist's counterclaim. The Court held that Baptist is not included within the Fraud Act definition of "insurer" and Baptist is not "purporting to engage in the business of insurance". Additionally, since Baptist is a self-insured employer it has not undertaken to indemnify another against loss or liability arising from an unknown event related to causes arising under the workers' compensation act. In addition, the Court noted the Fraud Act does not define "insurance transaction" to include the litigation of a workers' compensation claim and a fundamental rule of statutory construction is that the mention of one subject in a statute means the exclusion of all other subjects that are not mentioned.

Impact on Existing Policy:

The Supreme Court made it clear that the Fraud Act does not apply to the litigation of workers' compensation claims and it does not apply to a self-insured employer.

CONCLUSION

Pursuant to *Tennessee Code Annotated* §50-6-121(g), the Workers' Compensation Advisory Council respectfully submits this report on significant Supreme Court decisions in 2007.[5] A copy of the report will be sent to the governor, the speaker of the house of representatives, the speaker of the senate, the chair of the consumer and employee affairs committee of the house of representatives, 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. Notice of the availability of this report will be provided to all members of the general assembly pursuant to *Tennessee Code Annotated* §3-1-114. In addition, the report will be posted on the website of the Advisory Council [www.state.tn.us/labor-wfd/wcac].

Respectfully submitted on behalf of the
Workers' Compensation Advisory Council

Dale Sims, State Treasurer
Advisory Council Chair

[5] This report does not include any Tennessee Supreme Court decisions that were issued after December 31, 2007.