

**STATE OF TENNESSEE**

*Workers' Compensation Advisory Council*



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SIGNIFICANT SUPREME COURT DECISIONS  
CALENDAR YEAR 2009

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**STATE OF TENNESSEE  
WORKERS' COMPENSATION ADVISORY COUNCIL**

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**SUMMARY OF  
SIGNIFICANT SUPREME COURT DECISIONS  
CALENDAR YEAR 2009**

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**INTRODUCTION**

*Tennessee Code Annotated* §50-6-121(g) requires the Workers' Compensation Advisory Council to issue a report concerning significant Tennessee Supreme Court decisions on workers' compensation. The report, which is due on or before January 15 each year, is attached. The report includes a summary of three decisions of the Supreme Court filed in December, 2008, after the Advisory Council presented approved its report concerning significant 2008 court decisions. In calendar year 2009, the Supreme Court filed only three workers' compensation opinions; therefore, all three opinions are discussed in this report. In addition, the Special Workers' Compensation Appeals Court issued one opinion in which it urged the General Assembly review a specific workers' compensation statute and a summary of that opinion has also been included in this report.

## SIGNIFICANT SUPREME COURT DECISIONS

### CALENDAR YEAR 2009

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#### 1. AGGRAVATION OF PRE-EXISTING INJURY OR CONDITION

*Trosper v. Armstrong Wood Products, Inc.*, 273 S.W.3d 598 (Tenn. 2008)  
[Opinion Filed: December 30, 2008]<sup>1 2 3</sup>

**Facts:** In 1997, the employee, Clarence Trosper, developed intense pain in both of his hands after being assigned to remove heavy and long boards from a conveyor by hand rapidly and continuously, sorting them and stacking them by grade. Following medical treatment his pain worsened and he requested a job that involved less stress on his hands and the employer transferred him to a different job. The employee did not experience any further difficulty until 2000 or 2001 when he was transferred to a job requiring him to lift forty-five to seventy pound buckets to shoulder level to pour chemicals into a hopper. He experienced a sharp pain during each lift of the bucket.

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<sup>1</sup> This opinion was filed by the Supreme Court on December 30, 2008, after the Advisory Council had submitted its 2008 Significant Court Decisions to the General Assembly.

<sup>2</sup> On December 30, 2008, the Supreme Court also filed its decision in *Cloyd v. Hartco Flooring Company*, 274 S.W.3d 638 (Tenn. 2008). The Court had initially referred the case to the Appeals Panel but then granted review prior to a Panel decision. Mr. Cloyd had filed suit for workers' compensation benefits claiming a work-related injury to his right wrist caused an aggravation of his underlying dormant arthritic condition. Finding the evidence showed the employee had suffered a work injury that advanced the severity of his pre-existing condition, the Supreme Court affirmed the trial court's award of benefits based on the rule adopted in *Trosper v. Armstrong Wood Products*, 273 S.W.3d 598 (Tenn. 2008).

<sup>3</sup> On December 31, 2008, the Supreme Court filed its decision in *Foreman v. Automatic Systems, Inc. et. al.*, 272 S.W.3d 560 (Tenn. 2008) which also addressed the issue of pre-existing condition. The employee claimed a work-related back injury in 2004 when moving 100 pound pallets. The employee had been treated for back problems intermittently since 1995 and had been diagnosed previously with spondylolisthesis. The employer asserted the 2004 injury caused only a temporary aggravation of the pre-existing condition and that any permanent disability was a result of the pre-existing spondylolisthesis. The trial court agreed with the employer that the 2004 injury did not result in a change of the employee's anatomical condition and denied permanent disability benefits. The Appeals Panel affirmed the trial court's conclusion that the employee sustained only a temporary aggravation of a pre-existing injury. The Supreme Court granted review and on this issue affirmed the trial court and Panel decisions under its holding in the *Trosper* case that pain, by itself, is not sufficient to support a workers' compensation award but that an injury that advances the severity of the pre-existing condition, or the employee sustains a new, distinct injury - other than increased pain - as a result of the pre-existing condition, then the claim is compensable.

In 2004, after returning to work from knee surgery unrelated to his job, the employee again experienced pain in his hands from lifting the buckets of chemicals and asked if the buckets could be made lighter. The employer instructed him to consult with the doctor who had performed the knee surgery. The doctor diagnosed bilateral carpometacarpal osteoarthritis, a joint disease characterized by degeneration of cartilage in the joints of the hands, specifically at the base of the thumb near the wrist. In October, 2004, the doctor performed a surgical fusion of the joint of the right hand. When the employee returned to work he experienced pain in the left hand and in June, 2005 fusion surgery was performed on his left hand. After this surgery, the employee retired.

After the second surgery, an independent medical evaluation was conducted on the employee. The physician concluded that more likely than not the employee's arthritic condition existed as a disease process prior to 1997 although the condition was dormant until he undertook the job duties. It was the doctor's opinion that the employee's work duties resulted in cumulative trauma that aroused the condition from dormancy into regularly painful reality. The doctor opined the job duties permanently aggravated and advanced the pre-existing arthritis in both thumbs that necessitated the two surgeries.

A second physician conducted an independent medical examination and concurred in the osteoarthritis diagnosis and testified its causation was a combination of genetics and that any and all activity, including work, would cause the condition to worsen. A third physician reviewed the employee's medical records at the employer's request but did not examine the employee as the other two doctors had. This physician testified the cause of osteoarthritis for those in their 60's and 70's is unknown, regardless of work activity. It was his opinion there was no known relationship between

repetitive use of the hands and the development of the disease and disagreed with the second doctor's opinion that the employee's work aggravated his pre-existing condition.

**Trial/Panel Results:** The trial court determined the employee's underlying osteoarthritis was worsened and advanced by his work activities which made the fusion surgeries necessary. The trial court awarded 40% permanent partial disability to each hand and temporary total disability benefits for the periods the employee was off work following each surgery. The employer appealed contending the trial court erred by finding a compensable aggravation of a pre-existing condition. The Appeals Panel reversed the trial court concluding the osteoarthritis was not caused or aggravated by the work performed for the employer because all of the physicians agreed the underlying condition itself was not caused by the employment, and the disease, by its nature, is progressive. The Supreme Court granted Mr. Trosper's petition for full-court review.

**Supreme Court Decision:** The Supreme Court began its opinion by reviewing Tennessee cases that had addressed whether aggravation of pre-existing arthritic conditions are compensable. The Court noted the following well-settled principles:

- the employer takes the employee "as is" and assumes the responsibility of having a pre-existing condition aggravated by a work-related injury that might not affect an otherwise healthy person;
- an employer is liable for disability resulting from a work-related injury even though it aggravates a previous condition with resulting disability far greater than would otherwise have been the case;

- a worker may sustain a compensable gradual injury as a result of continual exposure to the conditions of employment;
- in Tennessee, unlike in some other states, there is no requirement that an injury be traceable to a definite moment in time or triggering event in order to be compensable.

The Supreme Court then stated:

However firmly implanted the principle may be that an employer must bear the risk of aggravation of an employee's pre-existing condition, the precise contours of the rule have not always been articulated in a consistent manner. We recently stated in *Barnett v. Milan Seating Systems*:

Under Tennessee law, when a plaintiff suffers from a pre-existing condition, a claim is not compensable when the employment does not cause an actual progression or aggravation of the underlying injury. If the employment causes an increase in pain with no corresponding permanent anatomical change, then there is no new compensable injury.

215 S.W.3d 828, 835 (Tenn. 2007). (Citations omitted.) This description of the law finds its origin in cases that denied compensability because the work injury only made the pain of the pre-existing condition worse, but did not otherwise advance or progress the condition or result in any other disabling condition. (citations omitted) It is notable than none of these cases used the "anatomical change" terminology, although numerous subsequent opinions of the Workers' Compensation Appeals Panel have done so.

*Trosper* at 605.

The Court also stated there is a long history of Tennessee cases holding that pain is considered a disabling injury, and compensable, when it occurs as a result of a work-related injury. It then acknowledged confusion in this area of the law has manifested itself in cases similar to Mr. Trosper's claim, which involve aggravation of pre-existing arthritic conditions. After reviewing several of the cases that addressed similar circumstances but produced disparate results, the Supreme

Court concluded it was ...“resolved to provide some clarity for the trial courts”, holding: (1) an employee does not suffer a compensable injury where the work activity aggravates a pre-existing condition merely by increasing pain and (2) an employee does sustain a compensable injury if the work injury advances the severity of the pre-existing condition or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain. *Trosper* at 607.

Based on these principles, the Supreme Court concluded the dispositive question is not whether Mr. Trosper’s job caused his osteoarthritis as suggested by the employer but rather whether Mr. Trosper’s work caused only an increase in the severity of his pain which would result in no workers’ compensation benefits. Based on its independent review of the medical depositions and other trial proof, including lay testimony, the Supreme Court held the evidence did not preponderate against the trial court’s finding that Mr. Trosper sustained a compensable injury and reversed the Appeal’s Panel decision.

**Impact on Existing Policy:** After extensively reviewing prior Supreme Court and Appeals Panel decisions related to the concept of “aggravation of a pre-existing condition”, it determined prior decisions related to similar circumstances had produced disparate results. The Supreme Court’s opinion clarified Tennessee law on this issue; not only for the trial courts, but for all workers’ compensation stake holders in Tennessee.

## 2. PERSONAL JURISDICTION/EMPLOYMENT STATUS/STATUTORY EMPLOYER

*Lindsey v. Trinity Communications, Inc.*, 275 S.W.3d 411 (Tenn. 2009)  
[Opinion Filed: January 12, 2009]

**Facts:** Trinity Communications, Inc. (“Trinity”), a Tennessee television producer, contracted with Broadband Specialists (“Broadband”), a Texas corporation, to install a cable system in Marion County, Tennessee. Broadband was insured for workers’ compensation purposes by Texas Mutual Insurance Company (“Texas Mutual”), a non-profit mutual insurance company that was created by the Texas Legislature to create competition in the Texas market and to serve as an insurer of last resort in Texas and a company that issues workers’ compensation policies only in Texas to Texas companies. The insurance policy Texas Mutual provided to Broadband stated the law of Texas was applicable to the policy and that it covered only work locations in Texas.

Broadband subcontracted a portion of the Trinity job to HFC Services (“HFC”), a Texas partnership. HFC did not have workers’ compensation insurance. HFC hired Richard Lindsey to splice cable for the Trinity project. In May, 2004, Mr. Lindsey was injured while splicing cable in Marion County, Tennessee. HFC maintained Mr. Lindsey was an independent contractor, not an employee. Mr. Lindsey filed a workers’ compensation claim against: Trinity; St. Paul Fire and Marine Insurance Company (“St. Paul”), which was Trinity’s workers’ compensation carrier; Broadband; Texas Mutual; and HFC.

**Trial Court / Panel Results:** The trial court, during the course of several hearings, held that Mr. Lindsey was an employee of HFC, not an independent contractor and that he was eligible to receive workers’ compensation benefits under Tennessee law. The trial court found that HFC, Mr.



Lindsey's principal employer, did not have workers' compensation insurance and, therefore held both Broadband and Trinity qualified as Mr. Lindsey's "statutory employer" pursuant to TCA §50-6-113(a) (2005)<sup>4</sup> and ordered both Texas Mutual and St. Paul to pay a portion of the workers' compensation award of disability benefits and medical benefits to Mr. Lindsey.

Texas Mutual appealed contending: (1) the trial court lacked both personal and subject matter jurisdiction over it; (2) the trial court erred in applying Tennessee's "statutory employer" law to an insurance policy governed by Texas law; and (3) Broadband's insurance policy did not provide coverage to employees of Broadband's subcontractors. Trinity appealed arguing that Mr. Lindsey was an independent contractor, not an employee of HFC, and, therefore, Trinity was not liable under Tennessee's "statutory employer" law. Before the case was heard by the Special Workers' Compensation Appeals Panel, the Supreme Court granted review.

**Supreme Court Decision:** The Supreme Court noted Tennessee courts recognize two types of personal jurisdiction: general personal jurisdiction (when the defendant maintains continuous and systematic contacts with the state) and specific personal jurisdiction (when a defendant purposely directs activities toward the citizens of a state to the extent the defendant can reasonably expect to be haled into court in the state). Texas Mutual did not do business in the state, did not provide insurance to Tennessee companies, and, while Texas Mutual could insure Texas-based employees who work temporarily outside the State of Texas, there was no evidence of the frequency of such occurrence in Tennessee. The Supreme Court held Texas Mutual's acts did not constitute the "continuous and systematic" contacts with Tennessee required for a Tennessee court

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<sup>4</sup> TCA §50-6-113(a) provides a principal contractor, intermediate contractor, or subcontractor is liable to pay workers' compensation to an employee injured in the employee of any subcontractors of the principal contractor, intermediate contractor or subcontractor engaged upon the subject matter of the contract to the same extent as the immediate employer.

to exercise general personal jurisdiction over the insurer. The Supreme Court also held the trial court could not exercise specific personal jurisdiction over Texas Mutual because the insurer had not directed its activities toward the citizens of Tennessee and had no reasonable expectation it could be haled into court in Tennessee as a result of its insurance contract with Broadband.<sup>5</sup>

The issue of whether Trinity was liable for workers' compensation benefits as a result of the "statutory employer" statute depended on the answer to two separate questions. First, whether Mr. Lindsey was an independent contractor as Trinity asserted or whether he was an employee of HFC and, second, whether Trinity was a principal contractor and, therefore, liable to Mr. Lindsey for workers' compensation benefits as a result of Tennessee's "statutory employer" law.

The Supreme Court reviewed Tennessee case law holding that once an employment relationship is established the employer bears the burden of proving the worker was an independent contractor rather than an employee and it is the court's duty to give the workers' compensation act a liberal construction in favor of the fact that one is an employee rather than a strict construction holding him to be an independent contractor. The Supreme Court pointed out that under Tennessee case law the most significant factors in determining a worker's status is the right to control the conduct of the work<sup>6</sup> and the right to terminate the relationship, which is contrary to the full control of work activities usually enjoyed by an independent contractor. The Supreme Court agreed with the trial court's determination that HFC failed to carry its burden of proof that Mr. Lindsey was an

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<sup>5</sup> Having found the trial court did not have personal jurisdiction over Texas Mutual, the Supreme Court did not have to consider the other issues raised by Texas Mutual: whether the trial court had subject matter jurisdiction and whether its policy issued to Broadband covered the employee (Mr. Lindsey) of its subcontractor, HFC.

<sup>6</sup> The Supreme Court noted also that a party may have some right to control the results of the work without creating the employer/employee relationship.

independent contractor rather than an employee because HFC could terminate the work relationship at any time and for any reason and the time sensitive nature of the job mandated the level of control exercised by HFC.

In addition, the Supreme Court rejected the defendants' assertion that Mr. Lindsey's execution of a Texas Workers' Compensation Commission form declaring he met the qualifications of an independent contractor under Texas law and that he was not an employee of HFC, the hiring contractor.<sup>7</sup> In rejecting that assertion, the Supreme Court stated "this Court has held that a contract purporting to establish the plaintiff as an "independent contractor" is insufficient when the facts surrounding the arrangement indicate that the plaintiff is an employee. (Citation omitted.)

With regard to whether Trinity was a "statutory employer" and, therefore, liable to Mr. Lindsey for workers' compensation benefits under *TCA* §50-6-113, the Supreme Court first explained the statute is intended to ensure that all workers will receive workers' compensation benefits when they are injured in the course of their employment by extending liability from the employer who does not have coverage to the employer who does have coverage. The Supreme Court also noted this provision of Tennessee law "prevents employers from contracting out normal work simply to avoid liability for workers' compensation" and encourages employers to hire responsible, insured subcontractors. (Citations omitted.)

The trial court had held Mr. Lindsey could seek workers' compensation benefits under *TCA* §50-6-113 from both Trinity and Broadband as "statutory employers" because Mr. Lindsey's

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<sup>7</sup> HFC failed to file the form with the Texas Workers' Compensation Commission. The Supreme Court concluded that under Texas law if the form had been filed, Mr. Lindsey would have been an independent contractor as a matter of Texas law.

employer, HFC, did not have workers' compensation insurance coverage<sup>8</sup> and Trinity was a principal contractor. The Supreme Court noted for a company to be considered a principal contractor (1) it must undertake work for an entity other than itself; (2) it must retain the right of control over the conduct of the work and the subcontractor's employees; or (3) the work being performed by the subcontractor's employees is part of its regular business or is the same type of work normally performed by its employees. The Supreme Court determined Trinity did not meet any of these criteria and concluded Trinity was not a principal contractor under *TCA* §50-6-113 and reversed the trial court on this issue.

**Impact on Existing Policy:** First, the Supreme Court reaffirmed the factors to be considered in determining whether Tennessee courts have personal jurisdiction over out-of-state entities in workers' compensation cases. Second, the Supreme Court clarified that the primary factors for determining employee status are right to control and right of termination. Third, the Supreme Court provided a detailed analysis of how trial courts and other stakeholders are to analyze the factors necessary to determine whether an entity is a "principal contractor" under *TCA* §50-6-113, Tennessee's "statutory employer" law.

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<sup>8</sup> Broadband did not dispute the trial court's finding that it was Mr. Lindsey's "statutory employer"; rather, Texas Mutual argued that Texas did not have a similar law and, therefore, Tennessee law should not affect possible coverage under its policy. Therefore, the Supreme Court did not decide whether the trial court erred in concluding Broadband was a "statutory employer" under Tennessee law.

### 3. SUBJECT MATTER JURISDICTION

*Madden v. The Holland Group of Tennessee, Inc.*, 277 S.W.3d 896 (Tenn. 2009)  
[Opinion Filed: February 3, 2009]

**Facts:** The employee, Lisa Madden, was a resident of Macon County, Tennessee. The employer, The Holland Group of Tennessee (“Holland”) provided temporary employees to other companies and had its corporate offices in Murfreesboro, Rutherford County, Tennessee. It also had branch offices in eight other states, including Kentucky. In 2004, Ms. Madden telephoned the Holland office in Scottsville, Kentucky from her home seeking a job in Kentucky. She traveled to Scottsville, completed an application and interviewed with the manager of Holland’s Scottsville office. The manager offered her a job at a plant located in Kentucky. The parties disputed whether Ms. Madden accepted the job at that time, as the Holland manager asserted, or whether she telephoned later from her Tennessee home to accept the offered job.

Ms. Madden reported to work in Kentucky on September 14, 2004, as instructed by Holland and was placed at a Scottsville, Kentucky company by Holland. In October, 2004 she injured her right wrist while working for the Kentucky company. Ms. Madden filed a claim for workers’ compensation benefits in Macon County, Tennessee seeking Tennessee workers’ compensation benefits for the injury she sustained while working at the Kentucky company. Holland filed a motion to dismiss the claim, asserting the trial court did not have subject matter jurisdiction because Ms. Madden was hired in Kentucky, worked in Kentucky for a Kentucky employer and there was no substantial connection between Tennessee and the employer-employee relationship.

The evidence was undisputed that Ms. Madden never worked for Holland outside of Scottsville, Kentucky, she had never traveled to the Holland corporate office in Murfreesboro, the Holland manager in Kentucky made all personnel decisions without checking with superiors at the corporate office, and none of the employees hired by the Holland manager in Scottsville, Kentucky ever worked in Tennessee. The paychecks were printed at the Tennessee corporate offices and personnel policies and procedures were formulated at the corporate offices in Tennessee.

**Trial/Panel Results:** The trial court dismissed the complaint finding that Ms. Madden's contract of hire was made in Kentucky, not Tennessee, and there was not a substantial connection between the state of Tennessee and the employer-employee relationship. The Appeals Panel affirmed the trial court. The Supreme Court granted the motion for review.

**Supreme Court Decision:** The Supreme Court began its consideration of the case by reviewing *TCA* §50-6-115 which sets out the requirements an employee who is injured outside the state of Tennessee must meet in order to be entitled to recover Tennessee workers' compensation benefits: (1) the employment was principally localized within Tennessee; (2) the contract of hire was made in Tennessee or (3) at the time of the injury the employee was a resident of Tennessee and there was a substantial connection between Tennessee and the particular employer-employee relationship.

The Supreme Court also summarized the principles of Tennessee law applicable to determining whether a contract of hire is made in Tennessee: (1) where an acceptance of an offer is given by telephone, it is generally held the place of contracting is the place where the acceptor speaks the acceptance; (2) an offer of a job by telephone to a person in Tennessee is sufficient even if the

contract is later executed in another state; (3) notification of the availability of employment in another state does not establish the contract of hire in Tennessee. (Citations omitted.) The Supreme Court stated whether a contract of hire is made in Tennessee is a question of fact and since the trial court had accepted the Holland manager's testimony that she offered the job to Ms. Madden during the Kentucky interview and Ms. Madden accepted the offer, the Supreme Court held the evidence did not preponderate against the trial court's finding the contract of hire was formed in Kentucky.

The Supreme Court pointed out that *TCA* §50-6-115(3) contains two requirements an employee must satisfy to establish the right to receive Tennessee workers' compensation benefits for an injury that occurred in another state: the employee must have been a Tennessee resident at the time of the injury and at the time of the injury there existed a substantial connection between the state of Tennessee and the particular employer-employee relationship. The Supreme Court centered its analysis on the second prong as it was not disputed Ms. Madden was a Tennessee resident when she was injured.

In discussing the second prong of the statutory requirement, the Supreme Court pointed out that the plain language of the statute makes it unlikely the General Assembly intended the second requirement to be met in all cases where the injured employee was a Tennessee resident and that the use of the word "substantial" makes it unlikely the legislature intended for *any* connection between Tennessee and the employer-employee relationship to be sufficient. (Emphasis provided by the court.) After a review of case law dealing with the issue, the Supreme Court held that "substantial connection" requires much more than just an employee's residence in Tennessee and a court must consider all relevant factors related to the employer-employee relationship and the involvement of

the state of Tennessee to determine whether the “substantial connection” exists as required by the statute.

After a consideration of the evidence, the Supreme Court held that Holland’s acts were not the substantial connection to Tennessee that the statute requires. Therefore, the Supreme Court affirmed the trial court’s dismissal of Ms. Madden’s claim for Tennessee workers’ compensation benefits.

**Impact on Existing Policy:** While the Supreme Court’s decision did not change existing law, the opinion contains an excellent review of the factors to be considered in determining whether a Tennessee resident who is injured in another state is entitled to receive Tennessee workers’ compensation benefits.



## 5. SECOND INJURY FUND

*Seiber v. Reeves Logging*, 284 S.W.3d 294 (Tenn, 2009)  
[Opinion Filed: May 1, 2009]

**Facts:** The decision in the case on appeal does not relate to the underlying workers' compensation claim made by the employee, Mr. Seiber. Rather, the decision relates to the employer's status as a properly insured employer under Tennessee law. Therefore, only the facts related to that issue will be summarized.

The employer, Leon Reeves, owned and operated a small logging business, Reeves Logging, for over thirty years. Most of those years, he did not regularly employ more than four persons and did not obtain workers' compensation insurance. However, in June, 2002, he did obtain workers' compensation insurance coverage when he entered into a contract with a third party that required him to obtain such coverage. Thus, at that time, Mr. Reeves voluntarily elected to be subject to the workers' compensation law in Tennessee.

On January 28, 2003, Mr. Reeves discontinued the workers' compensation insurance coverage because he could not afford it. However, when he discontinued his coverage, he did not file the required I-9 form with the Department of Labor and Workforce Development to notify the department of the withdrawal of his voluntary election to accept the workers' compensation law.

Mr. Seiber sustained a work-related injury in July, 2005, but did not seek workers' compensation benefits from his employer. He sustained a second injury on June 15, 2007. On October 3, 2007, Mr. Reeves filed an I-9 form with the Division of Workers' Compensation, signifying his withdrawal of his 2002 election to come under the workers' compensation law. Two

weeks later, Mr. Seiber filed a workers' compensation claim against Reeves Logging and he also named the Second Injury Fund as a defendant because he had sustained the previous workers' compensation injury in 2005.

Reeves Logging denied it was liable to Mr. Seiber alleging it was not bound by the workers' compensation law. The Second Injury Fund filed a Motion for Summary Judgment on the ground that pursuant to §50-6-208(a)(2) it is liable to pay benefits only when the employer has workers' compensation insurance in place.

**Trial Court / Panel Results:** The trial court denied the Motion for Summary Judgment because the employer had not filed the I-9 form before Mr. Seiber was injured; that the employer remained subject to the workers' compensation law until the form was filed and all its employees were covered until the I-9 form was filed. The trial court awarded Mr. Seiber permanent total disability benefits in the amount of \$286,616 and apportioned 15% of the liability to Reeves and 85% to the Second Injury Fund. Both Reeves and the Second Injury Fund appealed. While the appeal was pending Mr. Seiber reached a settlement with Reeves; therefore, Reeves dismissed its appeal. While the appeal filed by the Second Injury Fund was pending before the Appeals Panel, the Supreme Court granted review.

**Supreme Court Decision:** The Supreme Court reviewed the history of the Second Injury Fund which was not created until 1945, 26 years following the initial creation of the workers' compensation law in Tennessee. The Supreme Court noted:

- the Second Injury Fund was created to encourage employers to hire workers with permanent physical disabilities by limiting the employers' workers' compensation liability;

- the Second Injury Fund was created to ensure the economic well-being of employees who sustain additional work-related injuries by providing funds to pay worker's compensation benefits that their employers are not required to pay;
- the Second Injury Fund is funded by a tax on workers' compensation insurance premiums paid by employers who are properly insured employers.
- when the Second Injury Fund is not liable to pay workers' compensation benefits to an injured employee, the employer is liable for all benefits to which the employee is entitled.

As the appeal did not involve Mr. Seiber's right to collect workers' compensation benefits or the amount of the benefits to which the employee was entitled, the only issue on appeal was whether the four requirements of TCA §50-6-208(a) were met. The Supreme Court found that the first three requirements were met: the employee had sustained a permanent physical disability prior to the injury in question; the employee became permanently and totally disabled as a result of the subsequent injury; and the employer had actual knowledge of the prior injury at time of hire or before the subsequent injury. However, the Supreme Court found the fourth requirement - that the injured employee must work for an employer who had "properly insured" its workers' compensation liability or had properly qualified as self-insured - had not been met.

Therefore, the Supreme Court held an employer that does not have workers' compensation liability insurance or is not a qualified self-insured employer at the time the employee sustains the work-related injury does not meet the statutory requirement of being "properly insured" and an employee of such a company is not entitled to recover benefits from the Second Injury Fund. The

Supreme Court stated to permit recovery when an employer had previously had proper coverage at some time but did not have coverage at the time of the injury

...would only encourage employers to forego obtaining workers' compensation liability insurance and to become "free riders," thereby shifting the burden of their employees' work-related injuries to the other insured employers who have paid the tax on their workers' compensation insurance premiums to finance the Second Injury Fund.

*Seiber* at 302.

**Impact on Existing Policy:**

The Supreme Court held, clearly, that the Second Injury Fund has no liability to an injured employee when the employer was not properly insured (purchased workers' compensation insurance policy or qualified as a self-insured employer) at the time the employee sustained the injury.

## 5. COMMON CARRIER & LEASED OWNER/OPERATOR

*Moore v. Howard Baer, Inc.*, Slip Copy, 2009 WL 3321377, Tenn. Workers Comp Panel, October 15, 2009 (NO. M200802357WCR3WC)<sup>9</sup>

**Facts:** Mr. Moore was an over-the-road truck driver employed off and on for 15 years by a small corporation, RBI, that was owned by Mr. Baker, a senior vice-president of a large trucking company, Howard Baer, Inc. (“Baer”). RBI owned semi-tractors and hired drivers to drive them and pursuant to a written lease agreement, RBI leased the tractors and drivers to Baer. Baer had a contract with Kroger to deliver milk to its stores. All of RBI’s drivers and tractors made milk deliveries to Kroger supermarkets. No evidence was introduced that RBI performed any purpose other than to supply drivers and tractors to Baer. Baer also employed drivers who performed the same duties as Mr. Moore.

Mr. Moore was paid by and received W-2 forms from RBI; the tractors he drove were titled to RBI but registered to Baer and bore the Baer logo as did the hat and shirt he wore. RBI retained no personnel records except for payroll records; all personnel records were maintained by Baer; Baer maintained a seniority list of its drivers and RBI drivers, including Mr. Moore. Mr. Moore received safety awards and bonuses directly from Baer. RBI’s contract with Baer required it to maintain workers’ compensation insurance and it had done so until shortly before Mr. Moore sustained his work-related injury. RBI did provide occupational and accidental injury insurance for its employees and Mr. Baker, the owner of RBI<sup>10</sup> testified he thought this was the equivalent to workers’ compensation insurance.

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<sup>9</sup> This decision is “Not for Publication”.

<sup>10</sup> The owner of RBI was also President of Baer as of the time of trial.

Mr. Moore suffered gradual injuries to both shoulders in late 2004 and early 2005 while employed by RBI and his treating doctor assigned an impairment rating of 29% to the body as a whole and placed lifting restrictions of no more than ten pounds. In April 2005, Mr. Moore filed suit against both RBI and Baer.

**Trial Court Results:** The trial court considered the issue to be whether Baer was Mr. Moore's joint employer for purposes of the workers' compensation law. The trial court based its analysis on TCA §50-6-211 and found that the facts did not make Mr. Moore an employee of Baer. The trial court awarded 72.5% permanent partial disability, unpaid temporary total disability benefits and medical benefits against only RBI. Subsequently, RBI filed bankruptcy which rendered Mr. Moore's judgment worthless. Mr. Moore appealed the trial court's ruling that Baer had no liability. RBI was not a party to the appeal.

**Special Workers' Compensation Appeals Panel Decision:** On appeal, Mr. Moore argued the trial court should have found that RBI was the "general" or "lending" employer while Baer was the "special" or "borrowing" employer and ordered Baer to pay benefits under TCA §50-6-211. Baer contended that Mr. Moore was prohibited from receiving any workers' compensation benefits as a result of TCA §50-6-106(1(A) that specifies no common carrier shall be deemed the employer of a leased owner or leased operator of a motor vehicle under a contract with the common carrier.

The Appeals Panel stated Tennessee has recognized multiple employers may have joint liability for workers' compensation benefits under the "borrowed employee" theory. The Panel specifically found the evidence in the case was sufficient to imply a contract of hire between Mr. Moore and Baer and to conclude he was a "borrowed employee" of Baer and entitled to workers'

compensation benefits from Baer *except for* TCA §50-6-106(1)(A) which precludes imposing liability on Baer. (Emphasis added.)

The Appeals Panel noted its agreement with Mr. Moore's argument that the application of TCA §50-6-106(1)(A) to the facts of the case creates a "result which is inequitable, unfair, and at odds with the overall purpose of the workers' compensation statute." In addition, the Panel stated that Mr. Baker's parallel position as owner of RBI and a senior executive of Baer was suggestive of collusion.

The Panel then stated:

The language of the statute, however, is unambiguous. Baer is a common carrier, and Mr. Moore was clearly a leased-operator. Unfortunately for Mr. Moore and regrettably for us, we have no choice but to affirm the decision of the trial court, and leave it to the General Assembly to review section 50-6-106 and, if it deems it appropriate to do so, revise it in a manner that will prevent similar inequitable results in the future.

*Id.* at p.5.

**Impact on Existing Policy:** This case clearly indicates the Panel felt TCA §50-6-106 to be an inequitable statute in need of review by the General Assembly for revision to prevent future inequitable results.

## CONCLUSION

Pursuant to *Tennessee Code Annotated* §50-6-121(g), the Workers' Compensation Advisory Council respectfully submits this report on significant Supreme Court decisions filed in late December, 2008 and in 2009. An electronic copy of the report will be sent to the governor and to the speaker of the house of representatives, the speaker of the senate, the chair of the consumer and 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. 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 106<sup>th</sup> 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](http://www.state.tn.us/labor-wfd/wcac)].

Respectfully submitted on behalf of the  
Workers' Compensation Advisory Council

*M. Linda Hughes*

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Executive Director