

Tennessee WORKERS' COMP Reporter

*Trends and
developments
from Tennessee and
around the nation*

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IN THE COURTS

Top 10 questions addressed in 2015

By Virginia Mayo

The Tennessee Supreme Court, the Workers' Compensation Appeals Board, and the Workers' Compensation Appeals Panel decided several cases during 2015. Most of the 2015 decisions of the appeals board were from expedited hearing orders of workers' compensation judges. The decisions of the appeals panels involved injuries occurring before July 1, 2014. The decisions addressed a wide range of questions. Here's a look at 10 of those questions.

1. *Can an employer refuse to hire an applicant because the applicant filed a workers' compensation claim against another employer?*

Answer: Yes.

The Supreme Court held that a job applicant does not have a cause of action under the Workers' Compensation Law against a prospective employer for failure to hire if the prospective employer refused to hire a job applicant because that applicant had filed, or is likely to file, a workers' compensation claim against a previous employer.

Yardley v. Hospital Housekeeping Systems LLC, 470 S.W.3d 800 (Tenn. Sup. Ct. 8/21/15).

2. *When can an employee recover for an injury that is caused by an idiopathic incident?*

Answer: When an employment hazard causes or exacerbates a work injury.

A workers' compensation appeals panel disagreed with a trial court's finding that an employee's injury was due to an idiopathic condition when an employee's kneecap moved out of place and then back into place, causing the employee to fall to a warehouse floor.

The employee's work duties required him to step on and off pallets many times in the course of a workday. This movement, done repeatedly during the workday, caused the employee's knee to be in a position that made it particularly vulnerable to slipping out of place. The employee had

a condition that made him predisposed to have his kneecap move out of place when his knee was flexed and rotation of his body on his knee was occurring.

The appeals panel found that the work duty constituted a "special hazard" incident to the employment and contributed to causing the injury. An injury that occurs due to an idiopathic condition is compensable if an employment hazard causes or exacerbates an injury.

Bike v. Johnson & Johnson Health Care Systems Inc., 40 TAM 14-3 (Tenn. Workers' Comp. App. Panel 3/13/15).

3. *What must an employee show to prove that a work condition caused his injury?*

Answer: That the employment contributed more than 50% in causing the injury.

The Workers' Compensation Appeals Board considered a case in which an employee dislocated his kneecap as he stood from a squatting position in a textile plant where he was working. The employer denied the claim based on its belief that the employee's injury was idiopathic in nature. The appeals board reversed a workers' compensation judge's finding that the employee's knee injury arose primarily out of his employment.

The appeals board noted that while a doctor's testimony that the employee's work activities "could have" contributed to the injury or were a "possible" cause of the injury, "in theory," may have been sufficient at one time to carry the day for the injured worker, it is not sufficient today. An injured worker is entitled to benefits "only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes." Today, the injury causes the need for medical treatment within a reasonable degree of medical certainty if "in the opinion of the physician, it is more likely than not considering all causes," as opposed to speculation or possibility.

Willis v. All Staff, 40 TAM 48-1 (Tenn. Workers' Comp. App. Board 11/9/15).

4. *When is an assault on an employee considered within the scope of the employment?*

Answer: The street risk doctrine may be used to find a causal connection between an employee's job and an assault.

Assaults with inherent connections to employment are compensable, assaults stemming from inherently private disputes are normally not compensable, and assaults resulting from a "neutral force" such as a random assault may or may not be compensable, depending on the circumstances.

A workers' compensation appeals panel considered whether an assault was within the employee's scope of employment. Two persons, posing as customers at the employer's mattress store, stole the purse of an employee, the manager on duty, from under the manager's desk at the front of the store. The employee pursued the assailants into the employer's parking lot. The employee reached into the assailants' vehicle through an open window in an attempt to grab the strap of her purse, and the assailant began rolling up the window on the employee's arm. The employee was dragged a distance through the parking lot. The employee sustained physical injuries from which she recovered and was later diagnosed with post-traumatic stress disorder.

The trial court held that the assault on the employee was a "neutral force" assault because the employee was assaulted in the workplace by random assailants. This holding required the trial court to further consider particular circumstances surrounding the assault. To do so, the trial court applied the street risk doctrine. Under the street risk doctrine, the risks of the street are risks of the employment, if the employment requires the employee's use of the street.

The appeals panel found that the evidence supported the trial court's application of the street risk doctrine. Hence, the employee's injury occurred in the course of her employment.

Mattress Firm Inc. v. Mudryk, 40 TAM 38-4 (Tenn. Workers' Comp. App. Panel 8/24/15).

5. *When does the traveling-employee exception to the general rule precluding recovery for injuries to and from work apply?*

Answer: The fact that an employee read reports or e-mails and made some phone calls before traveling to work is not enough to fall within this exception.

A workers' compensation appeals panel reversed a trial court's finding that an employee was within the scope of his employment when he was injured in an automobile accident. The employee accepted his employer's offer to become a franchise owner of three Florida locations. In order to take on his new responsibilities,

the employee had to transfer the Olive Branch, Mississippi, location to another Branch district manager. The employee traveled to Alabama and moved his ex-wife with whom he lived into a new home.

Before leaving Alabama, the employee did some work on a company laptop and made some business phone calls. While traveling near Corinth, Mississippi, on the way to Olive Branch, the employee was injured in an accident.

The appeals panel ruled that the employee did not fall within the traveling-employee exception to the coming-and-going rule when he was driving to work as he would have done on any other morning. The fact that he did some preliminary reading of reports or e-mails or made some business calls before he got into his personal vehicle and began his morning commute did not change the conclusion that he did not fall within the traveling-employee exception.

The appeals panel concluded that the special-errand exception to the coming-and-going rule did not apply when the only extra hazard to which the employee was exposed arose from his decision to drive to the scheduled meeting in Olive Branch from Alabama instead of from his home in Cordova, Tenn., in order to accommodate a personal errand.

Autwell v. Back Yard Burgers Inc., 40 TAM 15-3 (Tenn. Workers' Comp. App. Panel 3/16/15).

6. In order for an employee to recover benefits for a hernia, how quickly must the employee discover the hernia?

Answer: Immediately following the accident, but not necessarily instantaneously.

The Workers' Compensation Appeals Board affirmed a workers' compensation judge's finding that an employee met the requirements of the hernia statute, Tenn. Code Ann. 50-6-212. An employee lifted and stacked hundreds of 46-inch decks that weighed 60 to 70 pounds each while at work one day and experienced a "funny feeling" in his groin and noticed a bulge in his groin the next morning.

The appeals board ruled that the employee's discovery of the hernia on the morning after he lifted heavy items at work was sufficiently immediate for purposes of Tenn. Code Ann. 50-6-212(a)(2). The appeals board also ruled that for the purposes of the requirement that a hernia have "immediately followed the accident," "immediately" does not necessarily mean instantaneously.

Long v. Hamilton-Ryker, 40 TAM 36-1 (Tenn. Workers' Comp. App. Board 7/31/15).

7. When can an employee recover for the aggravation of a preexisting condition?

Answer: When the work accident contributed more than 50% in causing the aggravation, considering all causes.

The Workers' Compensation Appeals Board considered a case involving the aggravation of a preexisting condition. An employee fell on his left side after stepping backward onto a pallet jack on August 31, 2014. The employer accepted the accident as compensable and authorized certain medical treatment but denied that the employee suffered a compensable left

Loss Cost Filing Approved by Commissioner

On August 26, the National Council on Compensation Insurance (NCCI) submitted its annual Workers' Compensation Voluntary Loss Costs and Rating Values (Loss Cost Filing) with a proposed effective date of March 1, 2016, which recommended an overall decrease of 0.9% from the loss cost that became effective on March 1, 2015. The Workers' Compensation Advisory Council met on October 14 to consider the Loss Cost Filing pursuant to Tenn. Code Ann. 56-6-402(b) and, by letter to Julie McPeak, the Commissioner of Commerce and Insurance, dated October 22, recommended adoption of a decrease of 1.2% in the Loss Cost Filing to become effective on March 1, 2016.

On November 23, McPeak, after reviewing the information submitted by the NCCI and the recommendation of the Advisory Council, determined that the Loss Cost Filing submitted by the NCCI on August 26 should be approved to reflect an overall decrease of 0.9% from the loss cost that became effective on March 1, 2015.

Tenn. Code Ann. 50-6-402(b) requires the Commissioner of Commerce and Insurance to consult with the Advisory Council before approving any workers' compensation loss cost filing made by the designated rate service organization and approve, disapprove, or modify the filing within 90 days of receiving the filing. ♦

hip injury. The treating physician diagnosed left hip osteoarthritis and recommended hip replacement surgery. A workers' compensation judge concluded that the employee was entitled to medical benefits for his left hip, including hip replacement surgery, based on a finding that the employee's preexisting degenerative condition had been aggravated by a work injury and that such aggravation was primarily caused by a compensable accident.

The appeals board held that the trial court erred in relying on *Trosper v. Armstrong Wood Products Inc.*, 273 S.W.3d 598 (Tenn. 2008), in light of recent amendments to Tenn. Code Ann. 50-6-102(13), but that the error was harmless. To qualify for medical benefits at an interlocutory hearing pursuant to Tenn. Code Ann. 50-6-102(13)(A), an injured worker who alleges

Employee conduct must violate a policy or rule to constitute willful misconduct.

aggravation of a preexisting condition must offer evidence that the aggravation arose primarily out of and in the course and scope of his employment. The employee must come forward with sufficient evidence from which the trial court can determine that the employee would likely establish, to a reasonable degree of medical certainty, that a work accident contributed more than 50% in causing the aggravation, considering all causes. The aggravation or exacerbation need not be permanent for the injured worker to qualify for medical treatment reasonably necessitated by the aggravation.

The appeals board found that the evidence presented to date in the case before it supported the workers' compensation judge's determination that the employee is likely to prevail at a hearing on the merits. The employee is entitled to authorized, reasonable and necessary medical treatment as recommended by a doctor who attributed the need for surgery to the work accident.

The appeals board found that the evidence presented to date in the case before it supported the workers' compensation judge's determination that the employee is likely to prevail at a hearing on the merits. The employee is entitled to authorized, reasonable and necessary medical treatment as recommended by a doctor who attributed the need for surgery to the work accident.

Miller v. Lowe's Home Centers Inc., 40 TAM 47-3 (Tenn. Workers' Comp. App. Board 10/21/15).

8. *When will an event occurring after a work injury relieve the employer of liability for the resulting medical care?*

Answer: When the event is an intervening cause, rather than a direct and natural consequence of the original injury.

A workers' compensation appeals panel considered the issue of intervening cause. An employee tore her ACL in a work accident, and surgery to repair the knee took place on September 9, 2010. A doctor instructed the employee to use crutches, place no weight on her right leg, and wear a brace. On October 5, 2010, after returning home from a physical therapy appointment, the employee went into her backyard, noticed a sharp object on the ground, placed both crutches on her left side, and attempted to reach down to pick up the object and lost her balance. A doctor concluded that the graft had failed and recommended a second surgery using a donor tendon to repair the tear.

The appeals panel affirmed a trial court's finding that the event of October 5, 2010, was a direct and natural consequence of the original injury and that the employee's action was not an independent intervening cause when the employee did not violate her medical restrictions, the doctor considered her action to be foreseeable, and the doctor considered her action to be consistent with her therapeutic program.

United Parcel Service Inc. v. Brown, 40 TAM 37-3 (Tenn. Workers' Comp. App. Panel 8/11/15).

9. *When will the court apply the willful misconduct defense to defeat an employee's workers' compensation claim?*

Answer: The employer must show that the employee's conduct violated a policy or rule.

The willful misconduct defense consists of four elements: (a) an employee's actual, as opposed to constructive, notice of a rule; (b) the employee's understanding of the dangers involved in violating the rule; (c) the employer's bona fide enforcement of the rule; and (d) the employee's lack of a valid excuse for violating the rule.

The Workers' Compensation Appeals Board considered the willful misconduct defense in a case involving a door greeter at a Wal-Mart store. The employee was performing her duties near the front of the store when a customer ran into the store and sat on a motorized shopping cart. The employee informed the customer that she could not use the cart because the carts were for physically challenged customers only, and the customer asked the employee to get the manager. As the employee was walking away to find a manager, the customer began to drive the cart further into the store. In an attempt to stop the moving cart, the employee grabbed the back of the cart, and the

customer suddenly turned from her seated position on the cart and punched the employee in the face, knocking her out. A workers' compensation judge ordered the employer to provide medical benefits.

The appeals board ruled that the employee's injury had a rational, causal connection to work when the entire focus of the dispute was related to the employment setting and the employee was acting within her role as a door greeter. The appeals board affirmed a workers' compensation judge's finding that the employee did not violate the employer's Violence-Free Workplace Policy when the judge found credible the employee's testimony that she grabbed the back of the cart and did not touch the customer and when a training coordinator did not believe the employee committed an act of violence.

Johnson v. Wal-Mart Associates Inc., 40 TAM 34-2 (Tenn. Workers' Comp. Appeals Board 7/2/15).

10. When an employee tests positive on a drug test, how can the employee rebut the presumption that her drug use caused the work accident?

Answer: Test negative on a second drug test, deny using the drug, or show that any alleged drug use did not cause the accident.

The Workers' Compensation Appeals Board affirmed a trial court's finding that an employee who tested positive on a drug test rebutted the statutory presumption that the drug was the proximate cause of his injury. The employee alleged that he suffered a back injury caused by lifting a piece of heavy equipment while working as an HVAC service technician for an employer with a drug-free workplace program. The employee's urine tested positive for methamphetamines four days after the accident, thus triggering the rebuttable presumption in TCA 50-6-110(c)(1) that the drug was the proximate cause of the injury.

The employee, believing that the results of the drug screen were incorrect, took a second drug test, which used a hair sample, and the test was negative. The only evidence the employer presented in support of its illegal drug use defense was the positive drug screen. The employee testified that he had not used illegal drugs in many years, and there was no evidence that any illegal drug use caused or contributed to the accident.

Ellis v. A Air-One Services, 40 TAM 22-3 (Tenn. Workers' Comp. App. Board 4/16/15). ♦

HEALTH & SAFETY

Warehouse safety tips

By Rachel Mayo

When it comes to warehouse safety there are many benefits that are often overlooked. Safety procedures are frequently disregarded in a variety of workplaces due to insufficient time, inadequate resources, or an opportunity to cut corners in an attempt to save money. But when safety procedures are soundly implemented, there are major benefits such as higher employee satisfaction as well as increased productivity.

By minimizing the risk of injury, fewer workplace disruptions take place and absenteeism associated with injury is also reduced. Equipment downtime is another factor that can be avoided through the appropriate use of safety procedures.

Here are a few safety guidelines to help keep your warehouse safe:

Ensure safety equipment is used at all times. In the warehouse, it is vital that forklifts or hydraulic dollies are used to lift items that are too heavy. Appropriate eyewear and hard hats should also be worn when required. Employees should be aware of emergency exits, and the sprinklers installed in the roof should not be blocked at any time. Safety equipment is implemented in order to minimize workplace injury, so although it may be time-consuming to initiate its use, it does pay off in the long run.

Eliminate any potential safety hazards. Ensure all warehousing floors are free of "slip and trip" hazards. It is important that this safety check is carried out on a regular basis, by all employees, and that the floor is always free of stray cords, liquids, and any other potentially hazardous items. It is also essential that any cracks and pits in the flooring are attended to as these can cause serious injuries to employees as well as damage expensive machinery.

Clearly label designated hazardous zones. Dangerous equipment should be stored away in an area that is clearly labeled, and safe walkways should be highlighted through necessary signage. The easiest way to illuminate hazardous zones is by using tape or painting black and white stripes on the floor of the designated area. This enables employees to be aware of dangerous surroundings and can be useful in avoiding accidents that can cause serious injury.

Always use safe lifting techniques. When a load requires transporting, first assess what method is the best option for its movement. If lifting is the most suitable method, check the route to ensure no obstacles are in the way and ensure there is enough space for the load at its destination. Safe lifting techniques should always be carried out and the load should not obstruct the view of the lifter. Use all material handling equipment carefully and follow the proper operating procedures, including push rather than pull whenever possible and lean in the direction that is being traveled. Also, never drive a forklift or use other powered equipment without training or authorization.

Provide training and refresher courses. Ensure all staff are educated and up to date with knowledge about safe practices within the workplace. This allows for greater adherence to procedures as staff members will be completely aware of the consequences that can emanate from an unsafe workplace. Accidents most commonly occur when corners are cut in an attempt to save time. If staff and management are completely aware of the repercussions that can arise from this fact, procedures may be followed more closely.

Promote awareness in your warehouse. Having a sense of awareness in the workplace is an important safety factor. This can be achieved through communication between staff members. By employees being vocal and yelling out to others their location, collision incidents can be drastically reduced. When carrying items or driving machinery, a simple "coming through" can alert other coworkers of an employee's whereabouts and can allow the employee to steer clear of dangerous pathways. All staff members should be encouraged to be constantly aware of what's around them and to communicate where they are to ensure the avoidance of collision accidents.

A safe warehouse environment uses common sense. Every teammate must take safety precautions seriously and remain focused on the task at hand. Pay attention to the details, what you are doing, and where you are going. ♦

BEST PRACTICES

Raytheon Aurora: Staying fit and upright

In Aurora, Colorado, 2,500 employees on a five-building campus conduct software engineering for the defense and security giant Raytheon. The facility joined the Voluntary Protection Program (VPP) in 2004 and is one of about 30 Raytheon locations in the program.

Environmental, health, and safety (EHS) manager Mandie Atchity says the primary hazards workers face are ergonomics and slips, trips, and falls. Because site personnel have various levels of security clearance, an all-hands e-mail is not necessarily an effective way to reach everyone with a safety message. To address this challenge, Atchity and her colleagues have developed alternative strategies for communicating safety information.

One successful strategy is an employee safety video contest. Participants produce a 30-second safety video on a safety, health, or environmental topic relevant to work or home. Employees have embraced the contest and submissions have become increasingly sophisticated over the years.

Recalls Atchity, "We had a really great one on texting and driving with a group that wrote and performed an original song. The fun piece is when people involve their kids." One of her favorites featured an employee and her children portraying environmental superheroes. There are more than bragging rights at stake. The top prizewinner earns \$1,500; second prize is \$750; and everyone who submits a video is awarded \$50.

The company benefits, as well. The HSE team uses the videos for training or to illustrate a weekly safety topic. "For us, it's a big savings. If I had to have 15 videos professionally made, it could cost \$20,000, which I don't have the budget for. This way we get a wide variety of topics at a lower cost," Atchity adds.

Staying healthy, fit, and upright

To help employees avoid ergonomics injuries, Raytheon Aurora promotes early identification and reporting of discomfort. The emphasis is on proper workstation setup, stretching, and micro breaks during the day.

Employees are encouraged to pursue fitness activities at the on-site wellness center. "We see the center as an extension of our safety activities," Atchity explains. "The more fit and healthy people are, the less inclined they are to suffer an injury on or off the job." At the facility, employees can work out, see a company nurse, or attend a class on nutrition, stress reduction, or other topics.

With plenty of cold, icy weather to contend with, the effort to eliminate slips, trips, and falls starts

outdoors. During the workday, ice on walkways and in parking lots often melts as temperatures rise, but it refreezes overnight, creating a significant hazard in the morning. The safety department works closely with the site's snow removal vendor to communicate priorities, especially regarding the walkways among the five campus buildings.

To prevent employee injuries from falls on icy walkways, the company uses ice alert cones when temperatures are below freezing. These are regular yellow

RACHEL'S REPORT

Craziest workers' comp stories from 2015



By Rachel Mayo

One of my favorite parts of writing these stories each month is all of the other stories I stumble upon in research. There are some crazy people out there who try and cheat the system in a multitude of not-so-bright ways. There are incredible injury stories that even the most seasoned writer couldn't come up with. Here are a few crazy workers' comp cases that 2015 brought to us.

A nursing home employee alleged that her employer secretly arranged an "active shooter drill" in which an on-duty Carbondale, Colorado, police officer posed as a "gunman." The officer burst into the work area and held the plaintiff-employee hostage at gunpoint as she cried and begged for her life, and only then did the officer tell her in a hushed tone that it was a "drill."

A divided Supreme Court of Pennsylvania held that the state's commonwealth court erred in finding that a claimant met her burden of proving that she sustained a work-related injury in the course and scope of her employment when she was brutally stabbed by her son while she was sleeping in her bedroom. She was paid an hourly wage under a state-funded program that provided attendant care for her 33-year-old son, who suffers from significant health issues related to his long-term drug use. The son, carrying a butcher knife, attacked and stabbed his mother as she lay in her bed at approximately 1:30 a.m. one morning.

A Nebraska appellate court affirmed the denial of workers' compensation benefits for an employee who sustained injuries to his nose, clavicle, and shoulder

when he was assaulted on the employer's premises by a coworker wielding a brass hammer. The attacking coworker had, however, performed an Internet search and discovered that the other employee was named on the list of registered sex offenders. The attacking coworker assaulted the other employee and called him a "chimo" (short for child molester). The injured employee sought workers' compensation benefits, contending that in as much as the only contact the two men had was at the workplace, the employee's injuries arose out of and in the course of the employment.

A secretary at a medical facility who claimed she suffered from post-traumatic stress disorder after she responded to the suicide of a patient, was entitled to workers' compensation benefits, held a New York court. Affirming a decision of the state Board, the court held that psychological injuries caused by witnessing the aftermath of a suicide could be compensable where the claimant was an active participant in the tragedy, as opposed to a mere bystander. Evidence showed that a patient leapt from a window at the facility where the claimant worked and impaled himself on picnic tables outside the claimant's office. The claimant was one of the first workers to reach the scene and, despite her lack of medical training, her supervisor directed her to retrieve an oxygen tank for the patient. The secretary did so, but began to feel anxious and hyperventilate and "lost it" altogether after she was ordered by facility officials not to speak to investigators about her prior interactions with the patient.

That was just the tip of the iceberg; 2015 proved to be a little insane. Here's hoping for a quieter 2016! ♦

safety cones outfitted with flashing blue lights on top and signs that warn, "Ice Alert."

The company has taken steps to address indoor slip hazards as well. Representatives from Liberty Mutual, the facility's workers' compensation insurance carrier, conducted a slip, trip, and fall assessment using a meter that measures the slip coefficient of various floor surfaces. Following the assessment, a beautiful tile floor in the lobby was replaced with a less slippery surface.

What's in it for you?

"Why I Work Safe" is a program introduced at the Aurora facility several years ago that was borrowed

from another Raytheon location. All employees wear ID badges, and those who choose to participate in this program wear a second badge with tips about staying safe on the front. On the flip side is a clear plastic pocket. Employees are encouraged to insert a photo that represents their personal reason for working safely.

"People have pictures of their kids, their dog, their sailboat or other hobby," says Atchity. She says it's been an effective way to promote an injury-free lifestyle and to encourage employees to think about why working safely matters.

This article was originally published on Safety.BLR.com. ♦



Training Calendar

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2-11	5 Ways HR Can Create Organizational Alignment to Business Strategy	2-23	Anxiety, Workplace Stress and PTSD: HR's Legal and Practical Accommodation and Performance Management Road Map	3-3	Background Checks: What You Can, Should, and Shouldn't Do
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