

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: James Edwin (Eddie) Lauderback

Office Address: 104 East Main Street
(including county) Johnson City, Washington County, TN 37604

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INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am employed by Herndon, Coleman, Brading & McKee, LLP, where I have been a partner since 1991.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1982 B.P.R. #009806

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee, B.P.R. #009806. I have been licensed since 1982, and my license is currently active.
Admitted, United States District Court, Eastern District of Tennessee, May 3, 1983
Admitted, United States Court of Appeals for the Sixth Circuit, July 30, 1990

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

After graduating from The University of Tennessee College of Law in December, 1981, and taking the Bar exam in February, 1982, I began working for the law office of Bob McD. Green in Johnson City, Tennessee, where I worked for approximately four years. I then joined the law offices of Carter & Slagle in Johnson City, where I worked as an associate for another three and one-half years. I joined my present firm, Herndon, Coleman, Brading & McKee, LLP, in February, 1989, and was named a partner in 1991. I am currently the senior partner in the firm.

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My present practice consists primarily of insurance defense work, mainly automobile liability (65%) and workers' compensation (15%) defense work. I am also a mediator, and this constitutes approximately 15% of my practice. The remainder consists of plaintiff personal injury and miscellaneous general practice work.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I consider myself a litigation attorney. I have tried numerous jury trials in my 33-year career in every county of Northeast Tennessee (except Johnson County), including Hamblen, Hawkins, Greene, Unicoi, Carter, Sullivan, and Washington Counties. I have argued appeals in the Court of Civil Appeals, Court of Criminal Appeals, and the Tennessee Supreme Court. During my first eight to ten years of practice, I handled contested and uncontested divorces, adoptions, defended criminal matters, and represented plaintiffs in personal injury matters. After joining my current firm, I began handling the defense of all kinds of civil matters, including personal injury, premises liability, products liability, and medical malpractice defense work. In the great majority of the cases in which I have been involved, I was the sole attorney for my client. I have assisted as co-counsel in several medical malpractice trials, as well as in one first degree murder trial. I have prepared numerous motions and briefs and argued countless motions before judges all over Northeast Tennessee. In addition, I have tried many, many bench trials, mostly domestic cases or workers' compensation matters. I have represented both plaintiffs and defendants in wrongful death cases. I have acted as counsel for small employers, as well as larger corporations, offering legal advice and representation in such areas as workers' compensation, Americans with Disabilities Act, Family and Medical Leave Act, and other employee/employer related issues. I have handled several hundred cases in the Department of Labor involving various workers' compensation issues. As far as my

work habits, I generally work, on the average, 40 to 50 hours per week, oftentimes bringing work home when my case load requires it.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

One of my most rewarding experiences occurred early in my legal career. Shortly after becoming licensed, I was privileged to assist my employer, Bob McD. Green, in a first degree murder trial in Washington County, Tennessee. That case involved virtually every aspect of criminal law, including bond revocation with an interlocutory appeal, a mistrial, contempt of court charges against lead counsel, numerous evidentiary issues, and after a jury verdict convicting the defendant of first degree murder, an appeal to the Court of Criminal Appeals and subsequently to the Tennessee Supreme Court. I was the primary writer of the brief on appeal. The Court of Criminal Appeals reversed and dismissed the charges against our client. The dismissal was upheld by the Tennessee Supreme Court. We were able to be present when, after two years, our client was freed from prison. (State of Tennessee v. Vesper Denton Hicks, 1986 Tenn. App. LEXIS 3552)

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I am currently a Rule 31 Listed Mediator in the field of General Civil Mediation, having been approved by the Tennessee Supreme Court Alternative Dispute Resolution Commission on July 26, 2011. However, I have been serving as a mediator since 2002 and have mediated between 475 and 500 cases. In most of these mediations, counsel involved in the litigation agreed to select me to serve as mediator. I have also been court appointed to serve as mediator in several cases. These mediations include personal injury matters, construction disputes, property disputes, contract disputes, shareholder litigation, estate matters, and other types of cases. I have agreed to serve as an arbitrator on several cases when requested to do so by counsel involved. These cases have included uninsured motorist disputes, as well as construction lawsuits. I was certainly honored that my colleagues selected me to arbitrate their cases and believe that this is indicative of their belief in my fairness, my insight into legal issues, and my legal ability. On May 3, 2012, I was appointed as Special Master by Chancellor G. Richard Johnson in Washington County Chancery Court, Civil Action No. 40597. This lawsuit involved an issue between insurance carriers in a workers' compensation matter and involved hearing proof and making a ruling on the issue, which was then incorporated into the court's final ruling. (A copy of my "Report of Special Master" is attached hereto as one of my writing examples in response to question 34.) I was also appointed by Circuit Judge Thomas J. Seeley, Jr., as Special Master in Washington County Circuit Court, Civil Action No. 30983, on February 20, 2013. This case involved a serious bus accident injuring approximately 30 Washington County students and required the

apportionment of \$700,000.00 of available insurance funds between the minor plaintiffs. It involved hearing testimony from various parties and evaluation of each minor's claim for their personal injury. Needless to say, this was a high profile case involving significant media exposure, and my decision was highly anticipated by the parties, as well as by the general public. (My decision in that case is attached as one of my writing examples in response to question 34.)

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I served as a guardian ad litem several times early in my legal career. I have never served as a conservator or trustee.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I currently serve as a Hearing Committee member of the Board of Professional Responsibility. In addition, in January, 2015, I was appointed by the Tennessee Supreme Court to serve on the Alternative Dispute Resolution Commission.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Tennessee, Bachelor of Science in Communications, 1975-1979, with Honors, majoring in Advertising

University of Tennessee, Doctor of Jurisprudence, 1979-1981

PERSONAL INFORMATION

15. State your age and date of birth.

I am 57 years old, my date of birth being August 21, 1957.

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee my entire life.

17. How long have you lived continuously in the county where you are now living?

I have lived in Washington County, Tennessee, since 1983.

18. State the county in which you are registered to vote.

Washington County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or

unprofessional conduct by you.

Not applicable

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No, I have never been a party to any litigation.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Member, Munsey Memorial United Methodist Church (Worship Leader and Praise Team guitarist)

Member, United Emmaus Community (Board of Directors 2010-2013)

Board of Directors, Counseling and Consultation Services, Inc. (non-profit organization dedicated to prevention of child sexual abuse)

Board of Governors, University of Tennessee National Alumni Association (2010-2011)

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches

or synagogues.

- a. If so, list such organizations and describe the basis of the membership limitation.
- b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Washington County Bar Association (1982 - current)

Tennessee Bar Association (1982 - current)

American Bar Association (1991 - current)

Tennessee Defense Lawyer Association

Defense Research Institute

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

President, Washington County Bar Association (1993)

Selected to serve as Hearing Committee member for the Board of Professional Responsibility

Appointed by the Tennessee Supreme Court to serve on Alternative Dispute Resolution Commission

30. List the citations of any legal articles or books you have published.

Not applicable

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Not applicable

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I ran (unsuccessfully) for Washington County General Sessions Judge in 1998.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Please see attached legal writing examples. Each writing example is my sole effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

It would be an honor, privilege, and tremendous responsibility to serve as the next Circuit Judge in our judicial district. Litigants are entitled to qualified, experienced judges. During my 33-year legal career, I have been fortunate to practice in front of some excellent trial judges. I would like the opportunity to put my years of experience to work for the general public and to try to uphold that standard of excellence from our judiciary. I believe I have a very wide range of experience, the legal ability and knowledge, the respect from fellow members of the Bar, the integrity, fairness and temperament that are required of a judge, and the work ethic, efficiency, and organizational skills that will help me become a successful Circuit judge. While I truly enjoy my current practice representing clients and helping them resolve their disputes, and when necessary preparing for and proceeding to trial, I have seen and heard "first hand" the satisfaction that litigants express when they believed that they had been treated fairly, impartially, and with dignity in their court proceeding, regardless of the outcome. I believe I can be a judge that exhibits those characteristics and provides that type of atmosphere in the courtroom.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

I have supported and actively participated in the Access to Justice initiatives through pro bono work in my firm and participated in Free Legal Advice Clinics in Washington County. I have accepted pro bono cases from Legal Services of Upper East Tennessee over the years of my practice. I also from time to time agree to represent, pro bono, lower income families referred from our church, or from Good Samaritan Ministries, with legal issues, questions, or who simply need some legal advice. I have also performed pro bono mediations for parties who could not afford their share of expense of mediation.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*)

The judgeship which I am seeking is a Circuit Judge in our First Judicial Circuit, consisting of Washington, Carter, Unicoi and Johnson Counties. This judgeship involves civil matters, including personal injury litigation, domestic disputes including divorce, custody, and child support issues, condemnation cases, contract and business disputes, medical malpractice litigation, and other civil litigation. Currently, there are four Circuit judges, two that handle civil matters and two that handle criminal matters, as well as one Chancellor presiding over Chancery Court in the First Judicial Circuit. I believe my selection would be positive for the court. I am hard working, efficient, organized, and confident that I can maintain the high level of judicial excellence we have been fortunate to have in the First Judicial Circuit.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

The majority of my community service is related to my involvement in my church and mission work, through services such as assisting with meals for the needy in our Melting Pot ministry, as well as fund raising and occasional legal services for Good Samaritan Ministries. I served for seven (7) years (1992-1999) as a member of the Board of Directors of The Holston Conference Foundation of The United Methodist Church. I have also been involved with United Way of Johnson City, Inc., having served on its Board of Directors for several years. I would anticipate continued involvement in all of those areas. I would also anticipate being available as needed to speak to community organizations, civic clubs, and Bar Associations, if called upon to do so, to further the public's knowledge and understanding of our legal system.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

I believe one of my biggest talents, related to serving as a judge, involves my ability to dissect complicated matters down to simple issues and explain them in easy fashion. This has been extremely helpful as a mediator, which requires listening to opposing points of view on various issues, weighing strengths and weaknesses of those differing viewpoints and helping the parties understand the dispute, in order to guide them to a fair compromise and settlement. As an arbitrator, I have been required to make difficult decisions, including one particular case

in which I knew my decision would ultimately result in the bankruptcy of a party. I believe my peers select me to serve as mediator and arbitrator based on my reputation for the ability to sort through complex issues in a logical manner and based upon my reputation for dealing with the parties in a fair, unbiased manner.

As far as life experiences are concerned, I have been married for 31 years to my wife, Sandy, and we have raised three sons, one of whom is married. We have two grandchildren. We recently experienced the pain caused by divorce when one of our sons went through that process. I have experienced the death of a sibling, and I am currently dealing with issues created by aging, elderly parents. I have had to counsel extended family members and friends on issues involving child custody, support, visitation, but also shared in the joy of adoption when my niece was adopted at birth. I believe all of these life experiences provide me with the insight, empathy, and understanding to handle the difficult decisions a Circuit Judge may face.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Yes. I can provide two examples of upholding or dealing with laws, the substance of which I disagree with. In handling the defense of workers' compensation cases, I have represented employers who unknowingly hired an illegal alien who misrepresented their employment eligibility, was hired, and subsequently sustained an on-the-job injury. Even though the law limits their recovery, I disagree with the substance of the law and believe that if the employee has misrepresented his or her employment eligibility, then he or she should not be allowed to obtain workers' compensation benefits of any kind. A second example involves Tennessee's comparative fault law. Currently, a driver who fails to comply with Tennessee's mandatory seatbelt law cannot have that failure to use a seatbelt raised as a defense or in mitigation of claimed damages. I disagree with that statute, but deal with it frequently in evaluating personal injury claims and occasionally in serving as a mediator or arbitrator in cases where those issues exist.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. C. Thomas Davenport, Esq.
B. Dan Eldridge, County Mayor
C. Mark Kinser, Executive Vice President General Shale Corporation
D. Bishop Richard Looney (United Methodist Church, Retired)
E. Honorable Pamela L. Reeves United States District Judge for the Eastern District of Tennessee

AFFIRMATION CONCERNING APPLICATION

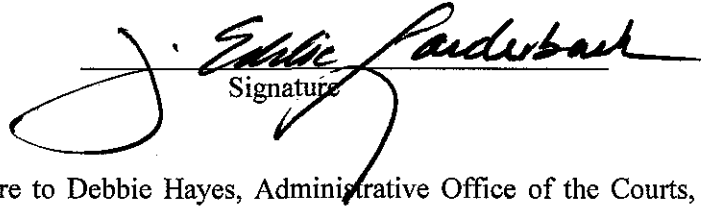
Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Circuit Court, First Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons

who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: March 20, 2015.


Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS**

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

JAMES EDWIN LAUDERBACK

Type or Print Name

James Edwin Lauderbach
Signature

March 20, 2015
Date

009806
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

WRITING EXAMPLE NO. 1

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY
AT JONESBOROUGH, TENNESSEE

TENNESSEE RISK MANAGEMENT)
TRUST for the use and benefit of the)
WASHINGTON COUNTY BOARD)
OF EDUCATION,)

Plaintiff)

vs.)

S.A. (DOB: 1997); D.B. (DOB: 1997);)
J.B. (DOB: 1996); C.B. (DOB: 1996);)
J.B. (DOB: 1995); M.B. (DOB: 1997);)
S.B. (DOB: 1996); E.B. (DOB: 1996);)
C.B. (DOB: 1996); J.D. (DOB: 1997);)
Z.D. (DOB: 1996); T.D. (DOB: 1998);)
H.D. (DOB: 1996); C.D. (DOB: 1996);)

A.G. (DOB: 1998); A.G. (DOB: 1996);)
C.G. (DOB: 1997); C.G. (DOB: 1996);)
J.H. (DOB: 1998); M.L. (DOB: 1997);)
D.L. (DOB: 1997); D.M. (DOB: 1996);)
D.M. (DOB: 1998); C.M. (DOB: 1996);)
R.M. (DOB: 1996); D.M. (DOB: 1996);)
K.P. (DOB: 1998); J.R. (DOB: 1996);)
D.R. (DOB: 1997); M.S. (DOB: 1996);)
C.S. (DOB: 1995); D.S. (DOB: 1994);)
H.T. (DOB: 1998); S.W. (DOB: 1998);)
C.W. (DOB: 1995); J.W. (DOB: 1997);)
M.W. (DOB: 1998); E.W. (DOB: 1998);)
and J.W. (DOB: 1996),)

Defendants)

Filed 15 day of
OCT 2013 at
4:35 o'clock P.
Karon Quinn, Clerk

CIVIL ACTION NO. 30983

REPORT OF SPECIAL MASTER

Pursuant to the Court Order entered in this cause by the Honorable Thomas J. Seeley, Jr., Circuit Judge, on March 6, 2013, the undersigned Special Master has reviewed the claims of all of the above-referenced children, passengers on Washington County School Bus

No. 88, involved in a motor vehicle accident on September 20, 2012, for a determination of the amount of damages, if any, that each child should be awarded, pursuant to Complaint filed in interpleader on behalf of Tennessee Risk Management Trust, for the use and benefit of the Washington County Board of Education.

On March 28, 2013, an initial hearing was held in Washington County Circuit Court to meet with any interested parties to discuss with them the status of my duties as Special Master in this case, the information needed to evaluate claims, and to set a time frame within which to provide such information for evaluation.

On August 2, 2013, this Court entered an Order setting forth a deadline for submission of the claims information to the Special Master for consideration. The Court established the deadline of September 27, 2013, for the submission of such damage documentation to the Special Master. In addition, the Court set the deadline of October 4, 2013, within which any party should contact the Special Master to schedule a hearing to have any minor child personally interviewed or personally examined by the Special Master as part of the claims consideration and evaluation process. Only one child (C.B., 2-7-96) was personally interviewed and examined by the undersigned as part of this evaluation process.

In making the determinations as to the value of each child's claim, no consideration has been given as to whether or not the child, or his or her parents, had available to them any health insurance coverage, or any other available insurance coverage of any type. Under Tennessee law, injuries and damages are not increased or decreased because a party does or does not have such coverage available to them. Therefore, I have not taken into consideration whether the child's bills have been paid, either wholly or in part, whether any health insurance

carrier might be entitled to subrogate against any recovery in this matter, or whether or not any child might have the possibility of recovering additional proceeds from any other available insurance coverage, such as an uninsured motorist insurance policy. Those matters are outside the scope of my duties as Special Master and will have to be addressed by the Court at a later date.

In reaching my opinions and conclusions, I evaluated each child's claim individually and without respect to the value of any other child's claim. Once all of the individual claims had been evaluated, I then determined the pro rata share of each claim based upon the statutory maximum amount of liability of Washington County, Tennessee, and the available funds paid into the Registry of the Circuit Court Clerk by the interpleader, Tennessee Risk Management Trust (\$700,000.00). The combined value of all claims considered by the Special Master totals \$1,912,700.00. Therefore, each child's pro rata share of the available funds was based on a percentage (.366) of the value of that child's injury claim.

In determining the value of each child's claim, I was permitted under Tennessee law to consider the following elements of damage:

1. The medical expenses incurred by the child and/or his or her parents.
2. Physical pain and mental suffering.

Physical pain and suffering under Tennessee law includes reasonable compensation for any physical pain and suffering and physical and mental discomfort suffered by each child. It also includes the present cash value for pain and suffering that is likely to be experienced in the future.

3. Permanent injury.

Permanent injury includes any injury that a person must live with for life that may result in inconvenience or the loss of physical vigor. Damages for permanent injury can be awarded whether or not the permanent injury causes any pain or inconvenience.

4. Loss of enjoyment of life.

This element of damage simply takes into account the loss of the normal enjoyments and pleasures which have occurred, as well as which will occur in the future, as well as limitations on a person's lifestyle resulting from the injury.

Based on the information provided to me as Special Master within the deadlines ordered by this Court, I have apportioned the available proceeds among the injured parties. [I would point out that no damage information was received in conjunction with the claims of J.D. (DOB 10/2/1997), A.G. (DOB 9/24/1996), D.M. (DOB 4/24/96), D.R. (DOB 5/29/97), and C.S. (DOB 6/2/95). Therefore, the claims of those five children have not been considered in my apportionment of the available funds.]

Pursuant to the Order entered in this case appointing me as Special Master, I have filed this report with the Court, containing an individual award for each child, with all awards attached as exhibits to this report, and have also filed with the Court all of the damage documentation provided to me as Special Master, for the Court's review, if necessary.

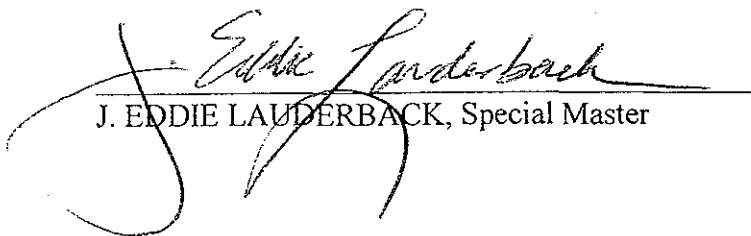
An individual copy of this report, with an attached exhibit pertaining only to an individual child, has been mailed to that child's attorney or parents, with no other information being provided regarding the remaining awards of the other minor children. The Court will need

to make a determination as to whether or not any other party in this case is entitled to discover the amount of the award for the other individual children involved in this accident.

Pursuant to Rule 53.04(2), "Within ten days after being served with notice of the filing of this Report, any party may serve written objections thereto upon the other parties." Attached to this Report and served upon all counsel and *pro se* litigants is a copy of an Order, entered by the Court, scheduling a hearing to address any objections that may be filed to this Report.

Finally, though not contained in the Order as one of my duties as Special Master, I feel compelled to comment on the minimal amount of insurance coverage available to the children involved in this accident. While the Special Master recognizes this is controlled by statute, it should be both alarming and concerning to every parent whose child or children are being transported daily in school buses throughout this state that the available liability insurance coverage is "capped" at this level. This needs to be addressed by our legislature. Thankfully, no children lost their lives in this unfortunate accident. However, several children received very serious, life-changing injuries, and the amount of compensation available to them is woefully inadequate.

Respectfully submitted,


J. EDDIE LAUDERBACK, Special Master

CERTIFICATE OF SERVICE

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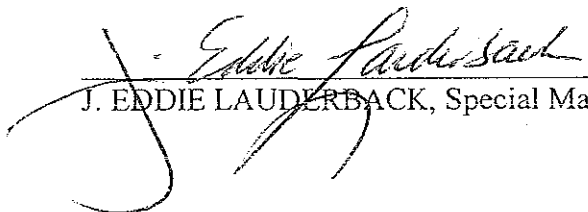
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This the 15th day of October, 2013.



J. EDDIE LAUDERBACK, Special Master

WRITING EXAMPLE NO. 2

IN THE CHANCERY COURT FOR WASHINGTON COUNTY
AT JONESBOROUGH, TENNESSEE

TOWER GROUP COMPANIES)
d/b/a CASTLEPOINT NATIONAL)
INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
LYNDA DAWSON AND HUGHES)
DAWSON LUMBER COMPANY, INC.)
)
Defendants.)

CIVIL ACTION NO. 40597

REPORT OF SPECIAL MASTER

This cause was heard on the 3rd day of August, 2012, upon the Order of Reference entered in the above-styled cause appointing the undersigned as Special Master, pursuant to Rule 53, Tennessee Rules of Civil Procedure, and make findings of fact and draw conclusions of law in conjunction with the above-styled matter. After hearing testimony of the parties and witnesses and hearing arguments of counsel, the Special Master makes the following findings of fact:

1. Defendant Hughes Dawson Lumber Company, Inc., entered into a contract with SUA Insurance Company to provide workers' compensation and employers liability insurance coverage (Exhibit 1), with a policy period of June 8, 2009 to June 8, 2010.
2. The policy of insurance in question sets forth certain rights, duties and obligations of both SUA Insurance Company and Hughes Dawson Lumber Company, Inc. Part

Four of the policy in question sets forth the duties owed by Hughes Dawson Lumber Company, Inc., if an injury occurs as follows:

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.
3. On or about June 26, 2009, Lynda Hughes Dawson was notified by

Greeneville Eye Clinic that Mr. Timothy Sharp had been seen at their facility, and he was alleging an on-the-job injury for which Hughes Dawson Lumber Company, Inc., was responsible. Ms. Dawson advised the Greeneville Eye Clinic representative at that time that Mr. Sharp was not an employee of her company. (Exhibit 2)

4. The records of the Tennessee Department of Labor show that a Request for Assistance was submitted by Mr. Sharp (or his attorney) on July 7, 2009, to determine

whether it was appropriate to initiate temporary total disability and medical benefits for Mr. Sharp. (Exhibit 15)

5. On July 20, 2009, the Department of Labor mailed a letter to Hughes Dawson Lumber, Inc., at an address located at 3016 Highway 81, Fall Branch, Tennessee 37656. (Exhibit 15) Ms. Dawson denies ever receiving that letter, however, there is nothing in the Department of Labor's file to indicate it was not delivered.

6. The Department of Labor records indicate that Mr. Kinnie McKinney, a workers' compensation specialist for the Department of Labor, spoke to Lynda Hughes Dawson on August 14, 2009, and she stated that Mr. Sharp was not an employee of her business. She confirmed to Mr. McKinney that she had advised a medical provider that Mr. Sharp was not an employee. (Exhibit 15)

7. The Department of Labor records further indicate that on August 26, 2009, Mr. McKinney spoke to a secretary at Hughes Dawson Lumber Company, Inc., who advised that Mr. Sharp was working with Mr. Howard Humble and that "they paid the claimant and Howard Humble at the place of business." Mr. McKinney requested an "accounting" be faxed to the Department of Labor, and the secretary advised that it may be a day or two because the "employer is out of town." He provided the secretary with the Department of Labor phone number and fax number. (Exhibit 15)

8. The Department of Labor records further state that Brian Addington, an employee of the Department of Labor, "called the employer and spoke with the secretary who stated that on Friday she gave Timothy Sharp cash money and gave Howard Humble cash money." (Exhibit 15)

9. On October 6, 2009, the Department of Labor sent a certified letter to Hughes Dawson Lumber Company, Inc., requesting a Wage Statement. The Department of Labor records show this letter was accepted by Lynda Hughes Dawson.

10. On October 20, 2009, the Department of Labor sent a certified letter to SUA Insurance Company requesting information about the claim. This letter was accepted on October 26, 2009, by the carrier. As of November 5, 2009, no response had been received by the Department of Labor. (Exhibit 15)

11. On November 6, 2009, the Department of Labor issued an Order regarding temporary total disability and medical benefits for Timothy Sharp and mailed the Order to Hughes Dawson Lumber Company, Inc., and to the insurance carrier. (Exhibit 4 and Exhibit 15)

12. On November 23, 2009, Mr. John Kelley, the local insurance agent for Hughes Dawson Lumber Company, Inc., faxed the Order for benefits to SUA Insurance Company. (Exhibit 16) In addition, the records of SUA Insurance Company show that Mr. Kelley spoke with Mr. Jeff Beason, an employee of SUA Insurance Company, on November 23, 2009, and advised the insurance carrier of the claim that had apparently never been reported by the insured/employer. (Exhibit 3)

13. The Order entered by the Department of Labor allows a 7-day time period for seeking administrative review of the workers' compensation specialist's Order, and this 7-day period had expired before Mr. Kelley notified SUA Insurance Company of the Order on November 23, 2009.

14. Tennessee Code Annotated §50-6-238 states that if no request for administrative review is filed within seven days, the party against whom the specialist issued an

Order to provide benefits shall (emphasis supplied) comply with the Order within 15 days of receipt. Further, if an insurer fails to comply with the Order, the Commissioner of Insurance shall (emphasis supplied) assess a \$10,000.00 penalty against the insurance carrier.

15. SUA Insurance Company chose to abide by the Order of the Tennessee Department of Labor and pay temporary total disability and other benefits to Mr. Timothy Sharp as ordered by the Department of Labor.

16. SUA Insurance Company mailed a reservations of right letter to Hughes Dawson Lumber Company, Inc., and this certified letter was accepted by Hughes Dawson Lumber Company, Inc., on December 21, 2009.

17. SUA Insurance Company has paid a total of \$64,151.75 in indemnity payments, medical benefits and other expenses associated with this claim.

18. The Special Master finds that notice from the Department of Labor is not sufficient notice of a claim under the policy in question, and that the insured is required to provide notice of any claim. The Special Master further finds that the policy in question allows the carrier a right of reimbursement against the insured for any payments required to be made because of the insured's "serious and willful misconduct."

19. The Special Master further finds that the insurance carrier chose not to make any determination regarding the employment status of Timothy Sharp and had a legal right to contest the compensability of this claim pursuant to Tennessee workers' compensation laws, however, it chose not to do so and instead reached a compromise settlement of the employee's claim.

20. The Special Master further finds that Hughes Dawson Lumber Company, Inc., through its agent, Lynda Hughes Dawson, was aware of the existence of a potential workers' compensation claim against its employee as early as August 14, 2009, when she spoke to Mr. Kinnie McKinney at the Department of Labor, and quite possibly as early as July 20, 2009, when a letter was sent to Hughes Dawson Lumber Company, Inc., at 3016 Highway 81, Fall Branch, Tennessee. (While Ms. Dawson denies there is a mailbox at this location, she does admit that Federal Express has delivered packages to this location.)

CONCLUSIONS OF LAW

The Special Master, after considering the above findings of fact, makes the following conclusion of law and rulings in this case:

1. The employer, Hughes Dawson Lumber Company, Inc., failed to give timely notice of the existence of a possible claim for which benefits could possibly be applicable under the policy in question as required under Part Four of the insurance policy as set forth above.

2. The Tennessee Supreme Court, in the case of Alcazar v. Hayes, 982 S.W.2d 845 (Tenn. 1998), adopted the rule of law that "once it is determined that the insured has failed to provide timely notice in accordance with the insurance policy, it is presumed that the insured has been prejudiced by the breach. The insured, however, may rebut this presumption by pro-offering competent evidence that the insurer was not prejudiced by the insured's delay." (Alcazar, p. 856)

3. As a result of the failure of the insured to give timely notice to the insurance carrier, the carrier was denied an adequate opportunity to properly investigate the

claim, determine the compensability of the same, file an appropriate Wage Statement, and make other filings with the Department of Labor before an Order for benefits was issued on November 6, 2009. As a result, the insurance carrier was significantly prejudiced, and without recourse to appeal the Order entered by the Department of Labor without incurring a substantial statutory penalty.

4. After receipt of the Department of Labor's Order for benefits, the insurance carrier made a conscious decision not to investigate the employment status of Mr. Sharp or in any way contest the compensability of the claim, but instead, chose to reach a compromise settlement with the alleged employee, Mr. Sharp.

5. The Special Master finds and concludes that the insured in this case has not provided sufficient evidence to overcome the presumption of prejudice as set forth in the Alcazar case.

6. The Special Master concludes that as a result of the lack of notice given to it, the carrier sustained damages in the amount of \$55,015.48. The Special Master specifically deducts from the Plaintiff's claimed damages the amount of permanent partial disability awarded to the employee, and attorney's fees associated with the settlement approval by the Department of Labor, concluding that the carrier had a right to contest the claim in court, and if successful, could have avoided those expenses.

7. The carrier's damages (\$55,015.48) should be assessed against its insured, Hughes Dawson Lumber Company, Inc., only, and the carrier has no right of recovery against Lynda Hughes Dawson personally.

8. The Special Master attaches hereto, pursuant to Rule 53, Tennessee Rules of Civil Procedure, the transcript of evidence in this case along with all applicable exhibits for the Court's review, if necessary.

Respectfully submitted,



J. EDDIE LAUDERBACK, Special Master

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the Findings of Fact, Conclusions of Law, transcript and all exhibits has been served upon counsel for all parties of interest in this cause by delivering to counsel or by placing a true and exact copy of said pleading in the United States Mail addressed to said counsel at his/her office, with sufficient postage thereon to carry the same to its destination, as follows:

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This the 22nd day of August, 2012.

HERNDON, COLEMAN, BRADING & McKEE

By 

WRITING EXAMPLE NO. 3

**IN THE SUPREME COURT OF TENNESSEE
EASTERN DIVISION AT KNOXVILLE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL**

TINA LYNN WYATT,

Plaintiff/Appellant

vs.

IVY HALL NURSING HOME, INC.,

Defendant/Appellee

*
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*
*
*
*
*

Case No. E2006-00227-WC-R3-CV

Carter County Circuit No. CV-9773

**BRIEF OF APPELLEE
IVY HALL NURSING HOME, INC.**

“Oral Argument Requested”

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ABBREVIATIONS TO CITATIONS IN RECORD

For clarity of reference, citations to the Appellate Record shall be as follows:

1. Citations to pleadings and documents contained in Volume I of the Record shall be cited as “Vol. I, p. ____.”
2. Citations to the Trial Transcript contained in Volume II of the Record shall be cited as “Vol. II, p. ____.”
3. Citations to exhibits contained in Volume II of the Record shall be cited as “Exhibit ____, Vol. II, p. ____.”

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court, Special Workers' Compensation Appeals Panel, has jurisdiction over this matter pursuant to Tennessee Code Annotated §50-6-225(e)(1).

STATEMENT OF ISSUE
PRESENTED FOR REVIEW

Did the Trial Court correctly overrule and dismiss the Plaintiff's "Motion for Temporary Total Disability Benefits and to Require Defendants to Furnish Medical Treatment"?

STATEMENT OF THE CASE

This workers' compensation action was filed in the Circuit Court for Carter County at Elizabethton, Tennessee, on May 13, 2005. (Vol. I, Complaint, pp. 1-4) On June 2, 2005, the Defendant, Ivy Hall Nursing Home, Inc., (hereinafter referred to as "Ivy Hall") filed an Answer denying that the Plaintiff had sustained a compensable injury and denied that the Plaintiff was entitled to any workers' compensation benefits. (Vol. I, Answer, pp. 7-9) Plaintiff filed a "Motion for Temporary Total Disability Benefits and to Require Defendant to Furnish Medical Treatment," and attached the deposition of Dr. Robert Nelson as an exhibit to the Motion. (Vol. I, pp. 14-69) Defendant filed a Response to Plaintiff's Motion. (Vol. I, pp. 70-71)

This Motion was heard before the Honorable Jean Stanley on December 7, 2005. After considering the testimony of the witnesses, the exhibits introduced, and the evidence presented, the Court overruled the Plaintiff's Motion. On January 6, 2006, an "Order Overruling Motion for Temporary Total Disability and Medical Benefits" was entered in the Carter County Circuit Court. (Vol. I, p. 73)

The Plaintiff filed her appeal on January 26, 2006. (Vol. I, p. 75) The Appellate record was filed in this Court on June 2, 2006. The Plaintiff/Appellant, Tina Wyatt, filed her Brief on June 29, 2006.

STATEMENT OF FACTS

The Plaintiff, Tina Lynn Wyatt, was employed as a housekeeper for Ivy Hall Nursing Home. (Vol. II, p. 15) The Plaintiff allegedly injured her right shoulder on July 30, 2004, while performing her housekeeping duties. (Vol. II, p. 19) The Plaintiff testified that she was working with her supervisor, Dorothy Maupin, and that she felt a pop in her shoulder while mopping. (Vol. II, p. 20) She testified that Ms. Maupin sent her to see the physical therapist located inside the Nursing Home. (Vol. II, p. 22) She testified that she injured herself at approximately 9:30 a.m., and that later in the afternoon advised her supervisor, Dorothy Maupin, that she could no longer work, and that she left and went to the Johnson City Medical Center, arriving at approximately 7:00 or 7:30 p.m. (Vol. II, p. 26)

The Plaintiff examined the Johnson City Medical Center Emergency Room note from July 30, 2004, in particular the nurse's note that her shoulder was "popping times one week," and the Plaintiff denied ever providing the nurse with that history. (Vol. II, p. 27)

The Plaintiff later saw other physicians and continued working through most of August, 2004. (Vol. II, p. 33) The Plaintiff testified that she later chose a treating physician, Dr. Barwick, from a panel provided to her by her employer. (Vol. II, p. 37) Shortly thereafter, the Plaintiff received a letter from her employer's workers' compensation insurance carrier advising her that they would no longer be responsible for

her medical treatment and that her claim was being denied. (Exhibit 5, Vol. II, p. 62) The Plaintiff thereafter came under the care of Dr. Robert Nelson.

The Plaintiff was questioned during her direct examination as to whether she had ever had an occasion to horseplay or wrestle with her husband, and she denied any such occurrence. (Vol. II, p. 42) She testified that she did not recall being treated at the Sycamore Shoals Hospital Emergency Room on May 1, 2004. (Exhibit 4, Vol. II, p. 44)

On cross-examination, the Plaintiff testified that she was working with Dorothy Maupin on the date she allegedly injured her shoulder and that Ms. Maupin actually felt of her shoulder when the Plaintiff told her she had injured herself. (Vol. II, p. 50) Ms. Wyatt testified that she advised the hospital that she had “hurt herself at work mopping,” but had no explanation as to why that history was not included in the emergency room record. (Exhibit 2, Vol. II, p. 54) She also testified that she told the emergency room personnel that she had not had any problems with her shoulder up until her work injury occurred that day and had no explanation as to why the nurse would include in the record “pops times one week.” (Vol. II, p. 55)

Ms. Wyatt testified that she had never made any complaints to any co-workers about problems with her shoulder before July 30th, the day she went to the emergency room (Vol. II, p. 56), and admitted being present during the depositions of several of her co-workers, who all testified that the Plaintiff advised them prior to the day she hurt herself that she had injured her shoulder wrestling with her husband. (Vol. II, p. 57) She admitted that shortly after being provided with an authorized physician from a

panel of physicians, she was contacted by the employer's insurance company, provided them with a statement, and shortly thereafter received a letter notifying that her claim was denied based on her history provided to the emergency room personnel on July 30, 2004. (Vol. II, p. 62) She also admitted on cross-examination that when asked in her discovery deposition whether she had ever been to Sycamore Shoals Hospital for any reason before this injury, she denied that she had, and that when presented with the record from Sycamore Shoals Hospital on May 1, 2004, she admitted that, "I guess I had." (Vol. II, p. 63) Ms. Wyatt admitted that she had a good recollection regarding each of the doctor visits after her alleged work injury but could not recall going to the emergency room on May 1, 2004, after she had been wrestling with her husband. She denied ever injuring herself wrestling with her husband. (Vol. II, p. 64)

Dorothy Maupin testified on behalf of the Defendant. She is the house-keeping supervisor for the Defendant, Ivy Hall Nursing Home, Inc., and was the direct supervisor of the Plaintiff. (Vol. II, p. 82) Ms. Maupin testified that she was working on a different hall than Ms. Wyatt on July 30, 2004, and recalls Ms. Wyatt coming up to her and advising her that she had injured her shoulder and needed to leave early. (Vol. II, p. 82) She denied working near the Plaintiff on the date of this alleged injury, as testified to by the Plaintiff. (Vol. II, p. 83) Ms. Maupin also testified as to her recollection of the conversation with the Plaintiff prior to her July 30, 2004, alleged work injury when she stated that she had been horseplaying with her husband and thrown him across her shoulder. (Vol. II, p. 85) Ms. Maupin denied at any time ever examining or touching Ms. Wyatt when she complained of injuring her shoulder. (Vol. II, p. 86)

Tammy Cochran also testified on behalf of the Defendant. She is a house-keeper for the Defendant and worked occasionally with the Plaintiff, Tina Wyatt. (Vol. II, p. 99) She testified that she recalled a conversation with the Plaintiff when the Plaintiff advised that she had been horseplaying with her husband and had lifted him over her shoulder. Shortly after this, she complained of being injured at work. (Vol. II, p. 100)

The Defendant also introduced as exhibits subpoenaed medical records from Sycamore Shoals Hospital and from Mountain States Health Alliance.

The Court also considered the deposition testimony of Dr. Robert Nelson, which was not introduced during the hearing, but was an exhibit to the Plaintiff's Motion for Temporary Total Disability Benefits. (Vol. I, p. 24) Dr. Nelson is an orthopaedic surgeon located in Elizabethton. He first saw Ms. Wyatt on February 3, 2005. She provided to him a history of developing shoulder pain in her right shoulder while working with a mop. She described an acute onset of pain occurring on July 30, 2004. (Vol. I, p. 25) In summary, Dr. Nelson testified that Ms. Wyatt sustained a work-related injury on July 30, 2004, when she sustained an aggravation of a pre-existing condition with a diagnosis of chronic impingement syndrome with rotator cuff tendinopathy. (Vol. I, p. 28) When asked whether the July 30, 2004, injury caused her chronic impingement syndrome, he stated that "according to her history, she hadn't had any problems before that." As a result, he felt that this incident advanced or aggravated her pre-existing condition. (Vol. I, p. 29) On cross-examination, Dr. Nelson was asked to review the record from Johnson City Medical Center (Mountain States Health Alliance) dated July 30, 2004. He read the history provided to the intake nurse which stated "right shoulder, unknown injury, hurts

with movement, pops times one week, sore to touch.” He admitted that the history provided in that July 30, 2004, medical record is not consistent with the history the Plaintiff provided to him. More importantly, he admitted that if the history she provided to the Medical Center on July 30, 2004, was accurate, then he would not be in a position to state that the work injury she described to him in any way worsened her pre-existing problem. (Vol. I, p. 34)

ARGUMENT

I. THE STANDARD OF REVIEW

Review of the findings of fact made by the Trial Court is *de novo* upon the record of the Trial Court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise. [T.C.A. §50-6-225(e)(2)]; Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995); Houser v. BiLo, Inc., 36 S.W.3d 68, 70-71 (Tenn. 2001) The application of this standard requires the Tennessee Supreme Court to weigh in more depth the factual findings and conclusions of the Trial Court in workers' compensation cases. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988); GAF Building Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001) However, where the Trial Court has seen and heard the witnesses, especially if issues of credibility and weight given to oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the Trial Court which had the opportunity to observe the witnesses' demeanor and hear the in-court testimony. Long v. Tri-Con Ind. Ltd., 996 S.W.2d 173, 177 (Tenn. 1999) The Trial Court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001)

II. THE TRIAL COURT CORRECTLY OVERRULED PLAINTIFF'S MOTION BASED ON THE EVIDENCE PRESENTED.

The sole issue before the Court was whether it should grant or overrule the Plaintiff's "Motion for Temporary Total Disability Benefits and to Require Defendant to

Furnish Medical Treatment.” The evidence presented at the hearing consisted of testimony of the Plaintiff, Tina Lynn Wyatt, her husband, Norman Wyatt, the testimony of two employees of the Defendant, as well as certain medical records and the deposition of Dr. Robert Nelson, which was attached as an exhibit to Plaintiff’s Motion. In determining how to rule on Plaintiff’s Motion, the Court had to make a finding that the Plaintiff sustained a compensable injury under the Tennessee Workers’ Compensation Act. Under the particular facts of this case, such a determination included having to make a finding that the medical evidence substantiated such a compensable injury. Very simply stated, the Plaintiff’s proof was not sufficient to make such a finding that would allow the Court to grant Plaintiff’s Motion.

At the hearing on Plaintiff’s Motion, the Defendant’s housekeeping supervisor, Ms. Maupin, admitted that the Plaintiff came to her on July 30, 2004, and reported her injury to her shoulder and asked to leave work early. (Vol. II, p. 82) Ms. Maupin completed a Supervisor’s Report of Work Injury. (Vol. II, p. 91) It was not until a statement was obtained from the Plaintiff by the Defendant’s workers’ compensation carrier and the emergency room treatment record from July 30, 2004, was obtained that the carrier and employer denied the Plaintiff’s claim. That emergency room treatment record (Exhibit 2, Vol. II, p. 28) showed a history of the Plaintiff’s right shoulder popping for one week prior to the visit. Dr. Nelson, the Plaintiff’s treating physician and the only doctor who testified in this case, stated:

“...[S]ince she had a bone spur there, that probably would indicate that it was a preexisting, a that part would be a pre-

existing condition there. And that this was an aggravation of a preexisting condition.”

(Dep. of Dr. Robert Nelson, Vol. I, p. 28)

To establish a compensable aggravation of a pre-existing condition, the employee must present expert medical testimony to establish that there has been some anatomical change in the pre-existing condition or that the employment caused an actual progression, worsening or advancement of the underlying condition. Sweat v. Superior Industries, Inc., 966 S.W.2d 31 (Tenn. 1998); Talley v. Virginia Insurance Reciprocal, 775 S.W.2d 587 (Tenn. 1989); Boling v. Raytheon Co., 448 S.W.2d 405 (Tenn. 1969); and Smith v. Smith’s Transfer Corp., 735 S.W.2d 221 (Tenn. 1987) One of the leading cases involving the issue of aggravation of pre-existing conditions is Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888 (Tenn. 1991). In that case, Mr. Cunningham argued that his pre-existing arthritic condition was aggravated by his employment. In denying benefits, the Court reiterated the rule that in order to establish a compensable injury, the employee must show, through competent medical evidence, that the employment caused further injury or advancement of the severity of the pre-existing condition and that an increase in pain from that condition is not sufficient.

In the case at bar, Dr. Nelson initially testified on direct examination that the July 30, 2004, work incident advanced or aggravated the Plaintiff’s pre-existing condition. (Vol. II, p. 29) However, after reviewing the emergency room treatment record of July 30, 2004 (Exhibit 2), Dr. Nelson admitted that the history provided by the Plaintiff to the emergency room nurse was NOT consistent with the history the Plaintiff provided

to him. More importantly, he admitted that if the history contained in the July 30, 2004, emergency room treatment record was accurate and if the Plaintiff did have ongoing problems for one week prior to July 30, 2004, then he would not be able to testify that her work injury in any way worsened her pre-existing problem. (Vol. II, p. 34)

The Plaintiff denied telling the emergency room nurse that she had been experience popping in her shoulder. (Vol. II, p. 28) The Trial Court was, therefore, left with a credibility issue as to whether the Plaintiff's testimony was truthful, or whether the emergency room treatment record was correct, and as the Trial Judge stated in reaching her decision, "...[T]hat's what this all boils down to." (Vol. II, p. 123)

The Trial Judge very carefully reviewed and described the "enormous number" of discrepancies between the Plaintiff's testimony and the remainder of the proof in this case (See Vol. II, pp. 121-125). After doing so, the Trial Court found that "[T]he medical record from July the 30th of '04 is more reliable than the witness' testimony and/or memory." (Vol. II, p. 125)


Having found that particular medical record to be reliable, the Trial Court then found that the Plaintiff's medical proof, consisting of the deposition testimony of Dr. Nelson, did not support the fact that the Plaintiff had sustained a compensable injury under the Tennessee Workers' Compensation Act. The Trial Court, therefore, dismissed the Plaintiff's Motion. (Vol. II, p. 126) After the Court issued its ruling, Plaintiff counsel asked for the Court to make its judgment a "Final Order" under Tennessee Rule of Civil Procedure 54, which the Court allowed.

CONCLUSION

The Trial Court correctly overruled and dismissed the Plaintiff's Motion for Temporary Total Disability Benefits and to Require the Defendant to Furnish Medical Benefits in this case. In order to have granted the Plaintiff's Motion, the Court would have had to have made a finding that the medical proof substantiated that the Plaintiff sustained a compensable injury. The Court correctly found that the Plaintiff's medical proof was not sufficient to make such a finding of compensability and, therefore, denied Plaintiff's Motion.

Respectfully submitted,

IVY HALL NURSING HOME, INC.

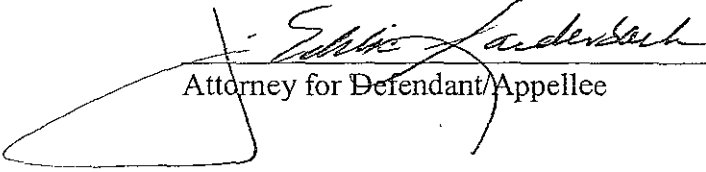
By 
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Attorney for Defendant/Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing document has been served on this date upon Plaintiff/Appellant's attorney by placing a true and exact copy of said document in the United States Mail addressed as follows, with sufficient postage thereon to carry the same to its destination.

Angela Vincent Jones
926 West Oakland Avenue, Suite 220
Johnson City, Tennessee 37604

This the 20th day of July, 2006.



Attorney for Defendant/Appellee