The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Timothy Wade Conner

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INTRODUCTION

The State of Tennessee Executive Order No. 54 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. 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 your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Presiding Judge, Tennessee Workers' Compensation Appeals Board

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

1992, BPR 015410

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.

1993-2016, GA. State Bar No. 182101. I voluntarily surrendered my Georgia license in good standing after becoming a judge on the Workers' Compensation Appeals Board.

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).

1992-2014: Leitner, Williams, Dooley & Napolitan, PLLC (associate from 1992-1997; member from 1997-2014);

2013-2019: Adjunct Professor, University of Tennessee College of Law: taught upper level course on Workers' Compensation Law;

2014-present: Judge, Tennessee Workers' Compensation Appeals Board;

2017-present: Adjunct Professor, LMU's Duncan School of Law: teach first year legal writing course.

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.

I was appointed by Governor Bill Haslam to serve on the Workers' Compensation Appeals Board as of August 1, 2014. I was re-appointed in 2016. I became Presiding Judge in January 2020. In my current position, I am one of three judges responsible for reviewing orders and decisions of the Court of Workers' Compensation Claims. We handle all appeals across the state as an appellate tribunal. We review all records, conduct oral argument in certain cases, discuss appropriate disposition of every appeal, respond to motions on appeal, and draft, edit and release opinions. All opinions we release are available on Lexis and Westlaw.

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.

During my 22 years of practice, I appeared in numerous courts across east and middle Tennessee. I handled various kinds of cases, including premises liability cases, product liability claims, personal injury claims, employment discrimination cases, and workers' compensation claims. I represented a large restaurant franchisee in various tort cases. I also assisted numerous clients in the area of Wills and Estates. Over time, I concentrated my practice in the area of workers' compensation defense, with a particular emphasis on toxic exposure claims. In 2002, I was chosen as lead outside counsel for a large government contractor that operated a U.S. Department of Energy site in Oak Ridge, Tennessee. I handled or supervised approximately 1,200 claims for this contractor and successor clients, including cases that involved lung dysfunction, cancer, neurological dysfunction, and hearing loss. I was involved in appeals to the Tennessee Supreme Court and the Supreme Court's Special Workers' Compensation Appeals Panel.

During my tenure at the firm, I served on the Management Committee and Client Development Committee. I also became a frequent speaker at seminars across the southeast, including many in Tennessee and several in Kentucky, Georgia and Florida. I was also the author or co-author of numerous legal articles. In 2013, I was selected to teach the course on workers' compensation law at the University of Tennessee College of Law as an adjunct professor. In 2017, I became an adjunct professor at LMU's Duncan School of Law, where I teach a first-year legal writing course.

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

In 2018, I authored an opinion on behalf of the Workers' Compensation Appeals Board that was appealed to the Tennessee Supreme Court. Instead of referring it to the Special Workers' Compensation Appeals Panel, the Supreme Court selected the case for full court review. The Court not only affirmed our opinion but adopted the opinion I authored in its entirety and made it the opinion of the Supreme Court. *Batey v. Deliver This, Inc.*, 568 S.W.3d 91 (Tenn. 2019).

In 2019, a case in which I had dissented was appealed. The Supreme Court's Special Workers' Compensation Appeals Panel reversed the majority opinion and adopted significant portions of my dissent in its opinion. *Joiner v. UPS*, 2019 Tenn. LEXIS 522 (Tenn. Workers' Comp. Panel Dec. 6, 2019).

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.

In 2007, I became at Rule 31 Listed General Civil Mediator. Although mediation was not a significant part of my practice, I served as mediator in eight cases between 2008 and 2014. After being appointed to the Appeals Board, I became inactive as a mediator.

As an Appeals Board judge, I and my colleagues have resolved over 400 appeals since 2014, and I have been lead author on 115 opinions to date. I was the primary author of the Appeals Board's opinion in *McCord v. Advantage Human Resourcing*, No. 2014-06-0063, 2015 TN Wrk. Comp. App. Bd. LEXIS 6 (Tenn. Workers' Comp. App. Bd. Mar. 27, 2015), which addressed several important issues arising from the Reform Act, including burdens of proof, evidentiary standards, reliance on precedent, and entitlement to medical benefits. This opinion has been cited in hundreds of subsequent cases.

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

Not applicable

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

In 2018 and 2019, I led a team of writers and editors within the Tennessee Bureau of Workers' Compensation to mark the 100th anniversary of the passage of the Tennessee Workers' Compensation Law. In May 2019, we completed this project and published a book entitled *A Century of Progress and Perspective: Workers' Compensation in Tennessee*.

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 or similar 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.

On June 10, 2014, I appeared before the Governor's Commission for Judicial Appointments for consideration of appointment to the Tennessee Workers' Compensation Appeals Board. My name was submitted to Governor Haslam and I was one of three selected for the inaugural Appeals Board. I was re-appointed by Governor Haslam in 2016.

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.

1984-1988 – Boston University, Bachelor of Arts, *cum laude* with distinction in International Relations (included one semester studying abroad at St. Catherine's College, Oxford University, Oxford, England, where I studied British government and politics);

1989-1992 – Wake Forest University School of Law, Juris Doctorate, top twenty percent; National Moot Court Team (second and third year); Order of the Barristers.

PERSONAL INFORMATION

15. State your age and date of birth.

53 – [redacted] 1966

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

Other than college and law school, I have lived in Tennessee my entire life.

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

I was born in Knox County and lived there until I left for college in 1984. After law school, I lived in Hamilton County, TN for approximately two-and-a-half years (1992-1994). I have lived in Knox County continuously since 1994.

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

Knox 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 placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

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 identify the number of formal complaints you have responded to that were 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. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None

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.

None

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, First Baptist Church, Concord. I have served in various capacities at my church, including Deacon, Worship Committee, Weekday Early Education Committee, and Pianist.

Between 2014 and 2018, I participated in an annual charitable concert called "Keyboards at Christmas," the proceeds of which benefitted Mission of Hope, an East Tennessee charity that provides assistance to disadvantaged families of rural Appalachia.

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.

Not applicable

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.

Tennessee Bar Association (1992-present); Knoxville Bar Association (1995-present); Hamilton Burnett American Inns of Court (2012-present); National Association of Workers' Compensation Judiciary (2014-present). In the NAWCJ, I have served on the Annual Conference Committee and the New Judge's Conference Committee. Prior to being appointed to my current position, I was a member of the Defense Research Institute and the Tennessee Defense Lawyers' Association.

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.

AV Preeminent Rating awarded by Martindale-Hubbell, 2010 – present;
Master, Hamilton Burnett American Inn of Court, 2012 – present;
"Top Attorneys," Knoxville's CityView Magazine, 2011 – 13.

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

Author, "Then and Now: 100 Years of Workers' Compensation in Tennessee," *Dicta* (pub. of Knoxville Bar Association), September 2019.

Co-Author, A CENTURY OF PROGRESS AND PERSPECTIVE: WORKERS' COMPENSATION IN TENNESSEE, Tenn. Bureau of Workers' Compensation, May 2019.

Author, "The Decline of Civil Discourse and the Rise of Extremist Debate: Words Matter," Tennessee Journal of Law and Policy, Vol. 12, Issue 2, Winter 2018.

Author, "Tennessee Workers' Compensation: 2012 Legislative Changes," www.leitnerfirm.com, June 2012.

Author, "Tennessee Appeals Court Affirms Authority of Tennessee Department of Labor," www.leitnerfirm.com, December 2011.

Co-Author, "A Brief Survey of Recent Legislative Changes to the Tennessee Workers' Compensation Act," *Dicta* (pub. of Knoxville Bar Association), February 2008.

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.

Between 2013 and 2019, I taught the course on Workers' Compensation Law at the University of Tennessee College of Law.

Since 2017, I have taught a first year legal writing course at Lincoln Memorial University's Duncan School of Law.

Other CLE courses taught in last five years:

Co-Presenter, "Writing Effective Decisions and Creating an Appellate Record: Ten Ways to Attract Undue Appellate Scrutiny," National Association of Workers' Compensation Judiciary's Annual Judicial College, Orlando, FL, August 13, 2019.

Co-Presenter, "What Judges Find Helpful," Nineteenth Annual Tennessee Workers' Compensation Educational Conference, Tennessee Bureau of Workers' Compensation, Murfreesboro, Tennessee, June 22, 2016.

Co-Presenter, "The Bureau of Workers' Compensation: Navigating the System from Start to Finish," 2016 Spring Conference, Outpatient Diagnostic Center and OrthoKnox Orthopedic Clinic, Knoxville, Tennessee, April 27, 2016.

Presenter, "Navigating the Workers' Compensation Appeals Board," Tennessee Workers' Compensation Conference, M. Lee Smith Publishers, Nashville, Tennessee, November 19, 2015.

Lecturer, "History of Workers' Compensation: a Tennessee Perspective, 1919-2015," Eighteenth Annual Tennessee Workers' Compensation Educational Conference, Bureau of Workers' Compensation, Nashville, Tennessee, June 8, 2015.

Presenter, "Navigating Tennessee's Workers' Compensation Law: the Appeals Process," Knoxville Bar Association, Knoxville, Tennessee, March 27, 2015.

Co-Presenter, "New Courts: Rules & Procedure," Tennessee Workers' Compensation Conference, M. Lee Smith Publishers, Nashville, Tennessee, November 20, 2014.

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.

Not applicable

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

Not applicable

34. Attach to this application 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:

Author, "The Decline of Civil Discourse and the Rise of Extremist Debate: Words Matter," Tennessee Journal of Law and Policy, Vol. 12, Issue 2, Winter 2018. I was the sole author of this article.

Batey v. Deliver This, Inc., No. 2016-05-0666, 2018 TN Wrk. Comp. App. Bd. LEXIS 2 (Tenn. Workers' Comp. App. Bd. Feb. 6, 2018), *aff'd and adopted in its entirety* 568 S.W.3d 91 (Tenn. 2019). I was the primary author of this opinion with editorial suggestions from other judges and staff attorneys.

ESSAYS/PERSONAL STATEMENTS

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

I believe in the rule of law, the role of the judiciary in a tripartite government, and the separation of powers. The foundations of the law lie in statutes, common law precedent, and regulations, all of which must be interpreted in a fair and impartial manner, regardless of personal bias or core convictions. The Tennessee Court of Appeals plays an important role in preserving the rule of law in Tennessee, and its judges are required to consider a broad range of cases. It would be a challenging and rewarding role, and I believe I possess the skills and experience to make a meaningful contribution. I would be honored to serve as a judge on that court.

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)***

When I practiced law, I volunteered for Wills for Heroes, an event that allows service members and veterans to obtain wills, powers of attorney, and other estate documents free of charge. I

also provided pro bono or discounted services for disadvantaged members of my church who needed wills and powers of attorney. As a judge, I have forged partnerships with local law schools to provide externship opportunities for law students, and I teach at a law school committed to producing practice-ready graduates that can serve local communities in Appalachia and beyond.

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)***

I am applying to serve as a judge on the Eastern Section of the Tennessee Court of Appeals. The Tennessee Court of Appeals consists of twelve judges serving in the three grand divisions of the state. I believe my varied legal experiences (22 years practicing in a general civil firm, 5 ½ years as an appellate tribunal judge, and 8 years as a law school instructor) give me a broad base of knowledge and experience to contribute to the Court of Appeals. I believe that strong legal writing requires knowledge of the subject matter, excellent organizational skills, and an emphasis on the academic foundations of the law. I believe appellate judges are mandated to interpret and apply the law impartially based on a strict interpretation of applicable case law, statutes, and regulations, without regard to personal bias.

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)***

I have been involved in my church, First Baptist Concord, in various capacities for twenty-five years, including as a deacon, teacher, musician, and committee member. When my daughters were in school, I served as a member of the School Board for Concord Christian School, a pre-K – 12 school operated by FB Concord. I plan to continue serving my church in various ways in the foreseeable future.

In 2013, I traveled with my daughter to Managua, Nicaragua, where we spent a week serving a small community, school, and local church. We worked on remodeling projects and interacted with students in class.

In the past, I volunteered to assist Mobile Meals, which is a service that delivers hot meals to disadvantaged residents of the local community.

Since 2014, I have been involved as a volunteer for Mission of Hope, a local charity serving underprivileged families in rural Appalachia. I plan to continue this volunteer work in the future.

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 have extensive experience in writing and public speaking. Beginning in high school, I developed these skills through participation in forensics competitions, essay competitions, and church activities. In college, I was a producer and musical director of amateur theatrical productions, which required organizational skills and strong "people skills." I continued developing my writing and public speaking abilities in law school. During my first year, I won the best brief award and the first year moot court competition. I was selected to participate on our school's National Moot Court team my second and third years, and my team was awarded best brief in the 1991 regional competition. As a young attorney, I was tasked by my firm with helping open a new office, managing staff, developing clients, and mentoring other attorneys. During my tenure with the firm, the Knoxville office grew from two attorneys to eighteen. I became a frequent speaker at area conferences and had several articles published. When I was selected by Governor Haslam to serve on the inaugural Workers' Compensation Appeals Board, I am my colleagues were tasked with building a new appellate system from the ground up. We drafted rules, forms, practices, and procedures. We instituted a system for oral arguments. We have statutorily-imposed deadlines for releasing our opinions, and we have never missed a deadline. I believe I have developed the skills and abilities that would allow me to contribute as a judge on the Tennessee Court of Appeals.

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)***

As an appellate judge, I have encountered cases where we were obligated to apply the law as written even when I would have preferred a different result or when I wished the law had been written differently. However, I strongly believe it is not the role of a judge to make policy, but it is the court's role to interpret the law as written, to rely on binding precedent, and to reach the right result through a fair and impartial application of the law. For example, there have been numerous occasions in my current role where we have addressed appeals filed by self-represented litigants. Even if that self-represented litigant *could have* obtained a different result if he or she had correctly presented the evidence to the trial court, we were constrained to consider only the record before us, and we emphasized that self-represented litigants must be held to the same substantive rules and evidentiary standards as represented litigants. See, for example, *Walton v. Averitt Express*, 2017 TN Wrk. Comp. App. Bd. LEXIS 37 (Tenn. Worker's Comp. App. Bd. June 2, 2017) ("Employee has not made any argument in support of his appeal, and we decline to do so for him."). In short, a fair interpretation of the law and an impartial application of that law to the facts must take priority over personal beliefs.

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.	Marshall L. Davidson, III, Chief Disciplinary Counsel, Tennessee Board of Judicial Conduct [redacted] Nashville, TN 37215 [redacted] [redacted]
B.	Pamela B. Johnson, Judge Tennessee Court of Workers' Compensation Claims [redacted] Knoxville, TN 37902 [redacted] [redacted]
C.	David F. Hensley, Judge Tennessee Workers' Compensation Appeals Board [redacted] Chattanooga, [redacted] [redacted] [redacted]
D.	Abbie Hudgens, Administrator Tennessee Bureau of Workers' Compensation [redacted] Nashville, TN 37243-1002 [redacted] [redacted]
E.	Jason Zachary, State Representative [redacted] [redacted] Nashville, TN 37243 [redacted] [redacted]

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 Court of Appeals 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 application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application 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: 30 January, 2026.

Jay W. Conner

Signature

When completed, return this application to Ceesha Lofton, 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.

Timothy W. Conner

Timothy W. Conner
Signature

30 Jan. 2020
Date

015410
BPR #

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

State Bar of Georgia, 1993-2016

State Bar No. 182101

License surrendered voluntarily in good standing

TENNESSEE JOURNAL
OF LAW AND POLICY

VOLUME 12 WINTER 2018 ISSUE 2

ARTICLE

THE DECLINE OF CIVIL DISCOURSE AND THE RISE OF EXTREMIST DEBATE

WORDS MATTER

*Timothy W. Conner**

Most attorneys are familiar with the adage: "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell."[1] We have entered

* Timothy W. Conner has served as a judge on the Tennessee Workers' Compensation Appeals Board since August 1, 2014. Prior to that, Judge Conner practiced law for twenty-two years in the areas of workers' compensation, workplace exposure claims, wills and estates, and employment discrimination. He has been an Adjunct Professor at The University of Tennessee College of Law since 2013, where he teaches the course on Workers' Compensation Law. He received his bachelor's degree from Boston University in 1988, *cum laude* with distinction, and his Juris Doctor from Wake Forest University School of Law in 1992. The opinions expressed in this article are those of Judge Conner individually and are not intended to reflect the collective opinion of the Tennessee Workers' Compensation Appeals Board.

[1] This adage derives from CARL SANDBURG, THE PEOPLE, YES 181 (1937) ("'If the law is against you, talk about the evidence,'

an age where, in any given debate, proponents of a particular position no longer seem to care about the facts or the law. They bypass all reason, attempt no civil discourse, and proceed straight to yelling. This proclivity knows no political, generational, or socio-economic bounds. It is an equal-opportunity philosophy that threatens to tear down the very foundations on which our representative republic was built; for when the objective of the discourse is simply to shout down the other side, very little of substance can be accomplished. Why have we digressed to this point? Can we change course and re-introduce the vital concept of respect for well-reasoned opinions, even if they are diametrically opposed to our own? Is it too late to salvage human dignity in the public sphere?

In my tenth-grade debate class, we discussed the elements of an effective argument. We learned that great debaters were the ones who had a good grasp of the facts, understood both sides of an argument, and methodically laid a foundation in support of their position. Ineffective debaters were the ones who did not understand the facts, relied on unsubstantiated sources, and, more often than not, attacked the other side's motives and character, neither of which is relevant to the substance of the issues being debated. Attacking your opponent, we were told, is a sure sign of your own weakness.

Despite this maxim of debate, individuals across a range of professions, socio-economic groups, and political parties have no reservations about using the "yell like hell" philosophy as the first, and sometimes only, course of action. Whether they are politicians, comedians, musicians, or authors, they have filled the public forum with anger, accusations, unfair generalities, and unfounded conclusions about the character of "the

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said a battered barrister. 'If the evidence is against you, talk about the law, and, since you ask me, if the law and the evidence are both against you, then pound on the table and yell like hell.'").

other side." They oppose the other side's positions not on merit, but on their hatred of "the other side." A few recent examples illustrate the escalating problem: (1) a presidential candidate accused another nation of "bringing drugs, and bringing crime, and their rapists" to America;[2] (2) another presidential candidate, though acknowledging ahead of time that her comment would be "grossly generalistic," stated that half of the supporters of the other candidate belonged in a "basket of deplorables;"[3] (3) a California political leader led a profane chant against the President while he and a crowd of supporters used a profane gesture;[4] (4) a late-night comedian used his national platform to insult the President with a series of escalating comments too offensive to reprint here;[5] (5) a musician included in his concert a message displayed in giant letters across several large video screens disparaging the President;[6] and (6) following a terrorist attack in London in June

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[2] Adam Gabbatt, *Donald Trump's Tirade on Mexico's 'Drugs and Rapists' Outrages U.S. Latinos*, THE GUARDIAN (June 16, 2015), https://www.theguardian.com/us-news/2015/jun/16/donald-trump-mexico-presidential-speech-latino-hispanic.

[3] Angie Drobnic Holan, *In Context: Hillary Clinton and the 'Basket of Deplorables'*, POLITIFACT (Sept. 11, 2016), http://www.politifact.com/truth-o-meter/article/2016/sep/11/context-hillary-clinton-basket-deplorables/.

[4] Peter W. Stevenson, *California Democrats Give Trump the Finger*, WASH. POST (May 22, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/05/22/california-democrats-give-trump-the-finger/?utm_term=.68888af76d0e.

[5] Sarah Taylor, *Stephen Colbert Eviscerates Donald Trump in Vulgar, Insult-Laden Network TV Rant*, THE BLAZE (May 2, 2017), http://www.theblaze.com/news/2017/05/02/stephen-colbert-eviscerates-donald-trump-in-vulgar-insult-laden-network-tv-rant/.

[6] William Cummings, *What Blew Up the Liberal and Conservative Media Bubbles This Week*, USA TODAY (June 1, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/06/01/this-week-trending-liberal-conservative-posts/102355218/.

2017, a Louisiana congressman posted in a Facebook message that "radicalized Islamic suspect[s]" should be denied entry into America and that we should "[h]unt them, identify them, and kill them. Kill them all."[7] I could continue ad nauseum, because there are any number of websites dedicated to documenting the ridiculing of various individuals or groups, including climate scientists on one side or the other, politicians of all kinds, celebrities, those of various religious faiths, and many others.[8]

The advent of social media has compounded the problem. The perceived potential to communicate, quite literally, to *the entire technology-connected world* is an intoxicant many cannot resist. This potential inflates one's sense of self-importance and emboldens one to say or write whatever it takes to "go viral." This desire naturally leads to extremism because a well-reasoned,

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[7] Ken Stickney, *Louisiana Congressman on Radicalized Islam: 'Kill Them All'*, USA TODAY (June 5, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/06/05/louisiana-congressman-radicalized-islam-kill-them-all/102519398/.

[8] I would be remiss in not acknowledging that, sometimes, actions speak louder than words. Within a forty-eight hour period of the initial drafting of this article, I noted one celebrity who posed for photographs holding a likeness of the decapitated, bloody head of the President, *see* Libby Hill, *Kathy Griffin Shocks in Gory Photo Shoot with Donald Trump's (fake) Head,* L.A. TIMES (May 30, 2017), http://www.latimes.com/entertainment/la-et-entertainment-news-updates-may-kathy-griffin-shocks-in-gory-photo-1496183372-htmlstory.html, while another individual hung a noose inside the National Museum of African American History and Culture. Lorraine Boissoneault, *Noose Found in National Museum of African American History and Culture*, SMITHSONIAN MAG. (May 31, 2017), http://www.smithsonianmag.com/smithsonian-institution/noose-found-national-museum-african-american-history-and-culture-180963519/). Each act oozes the kind of vitriol that suppresses thoughtful discourse on important issues.

calm, methodical approach rarely rises to the top of a search engine result. In a recent example, a host on a prominent cable news network responded to a tweet from the President with his own tweet using vulgar language and calling the President "an embarrassment to America," "a stain on the presidency," and "an embarrassment to humankind."[9] The host later apologized, but not before his tweet went viral.[10]

Moreover, the ability of any individual or group to create its own "publication" at little cost and disseminate it widely has led to the predominance of extreme language and "fake news." Many such websites, blogs, posts, and other similar media have no need of and no use for journalistic integrity. These new media, in turn, cause once-respected news organizations to lean toward extreme fringes in an effort to compete with the more sensationalistic elements on the internet. This pushes venerated reporters to blur the line between fact and opinion. In short, the media is caught in a "spin cycle" that will not slow down. The perceived demand for constant access to new and salacious news stories means that in-depth investigative journalism, which mandates a time-consuming, methodical approach to interviewing and verifying sources, is shunted to the side in favor of whatever rumor or innuendo is the "flavor of the moment." Owners and stockholders of legitimate media demand revenue; revenue is generated by advertisers who require ratings and increased subscription bases, which apparently are generated only through "gotcha" headlines, unverified speculation, and outrage. We, the consumers, watch, click on, purchase, and download this drivel. And on it goes.

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[9] Josh Feldman, *CNN Host Reza Aslan Apologizes for Calling Trump a 'Piece of Sh*t'*, MEDIAITE (June 4, 2017), https://www.mediaite.com/online/cnn-host-reza-aslan-apologizes-for-comments-calling-trump-a-piece-of-sht/.
[10] *Id.*

One commentator summarized his thoughts on this topic in a recent article:

> [W]e're moving toward two Americas—one that ruthlessly (and occasionally illegally) suppresses dissenting speech and the other that is dangerously close to believing that the opposite of political correctness isn't a fearless expression of truth but rather the fearless expression of ideas best calculated to enrage your opponents.
>
> . . . For one side, a true free-speech culture is a threat to feelings, sensitivities, and social justice. The other side waves high the banner of "free speech" to sometimes elevate the worst voices to the highest platforms—not so much to protect the First Amendment as to infuriate the hated "snowflakes" and trigger the most hysterical overreactions.[11]

What does the decline in civil discourse have to do with the law? Consider the impact extreme language has had on national immigration policy. In *International Refugee Assistance Project v. Trump*,[12] the United States Court of Appeals for the Fourth Circuit framed the issue as follows: "whether [the Constitution] protects Plaintiffs' right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and

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[11] David French, *David French: The Threat to Free Speech*, COMMENTARY MAG. (June 27, 2017), http://www.commentarymagazine.com/politics-ideas/david-french-threat-free-speech/.

[12] 857 F.3d 554 (4th Cir. 2017), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017), *vacated as moot*, No. 16-1436, 2017 U.S. LEXIS 6265 (Oct. 10, 2017).

discrimination."[13] The case addressed President Trump's executive orders that seek to prohibit "foreign nationals who 'bear hostile attitudes' toward [America]" from entering the country for a certain period of time.[14] In analyzing whether the plaintiffs could pursue a cause of action to stop the implementation of these orders, a majority of the Fourth Circuit found it relevant and probative to consider "public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump's assumption of office."[15] After recounting various public statements in which President Trump described "hatred [and] danger coming into our country,"[16] and claimed that "Islam hates us,"[17] the court agreed with the plaintiffs' claim that there was an "anti-Muslim message animating [the second executive order]."[18]

Following an extensive review of what the court believed to be binding precedent on the constitutional issue, the majority concluded that if the plaintiffs make "an affirmative showing of bad faith" that is "plausibly alleged with sufficient particularity" against the government's proposed action, then the court may "'look behind' the challenged action to assess its 'facially legitimate' justification."[19] The court then determined that it must "step away from our deferential posture and

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[13] *Id.* at 572.
[14] *Id.*
[15] *Id.* at 575.
[16] Donald Trump (@realDonaldTrump), TWITTER (Dec. 7, 2015, 1:47 PM), https://twitter.com/realdonaldtrump/status/673982228163072000?lang=en.
[17] 857 F.3d at 576.
[18] *Id.* at 575–76, 576, 578.
[19] *Id.* at 590–91 (quoting Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring)).

look behind the stated reason for the challenged action."[20] The court noted that

> Plaintiffs point to ample evidence that national security is not the true reason for [the second executive order], including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; the issuance of [the first executive order], which targeted certain majority-Muslim nations and included a preference for religious minorities; [and] an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way. . . .[21]

The court then concluded that "Plaintiffs have more than plausibly alleged that [the second executive order's] stated national security interest was provided in bad faith . . . ."[22] Although the court acknowledged that it could not engage in "judicial psychoanalysis of a drafter's heart of hearts,"[23] it had a duty to consider "the action's 'historical context' and 'the specific sequence of events leading to [its] passage.'"[24] Moreover, the court determined that "as a reasonable observer, a court has a 'reasonable memor[y],' and it cannot 'turn a blind eye to

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[20] *Id.* at 591.
[21] *Id.*
[22] *Id.* at 592.
[23] *Id.* at 593 (quoting McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 862 (2005)).
[24] *Id.* at 593 (alteration in original) (quoting Edwards v. Aguillard, 482 U.S. 578, 595 (1987)).

the context in which [the action] arose.'"[25] The Fourth Circuit concluded that

> [t]he evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that [the second executive order's] primary purpose is religious. Then-candidate Trump's campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States. For instance, on December 7, 2015, Trump posted on his campaign website a "Statement on Preventing Muslim Immigration," in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on" and remarked, "[I]t is obvious to anybody that the hatred is beyond comprehension. . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life."[26]

In response to the Government's arguments that the stated purpose of the executive order was secular in nature, that it banned persons of all religions from the designated countries, and that it did not ban Muslims from countries other than the designated countries, the majority commented that the executive order's "practical operation is not severable from the myriad statements explaining its operation as intended to bar Muslims from

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[25] *Id.* (quoting *McCreary*, 545 U.S. at 866).
[26] *Id.* at 594.

the United States."[27] Regardless of one's political perspective, religious views, or thoughts on the legal analysis employed by the Fourth Circuit, there can be no doubt that the primary focus of this important legal case was on one thing: language.[28] A candidate's use of words that some considered ill-advised and inflammatory resulted in a United States Court of Appeals blocking implementation of an executive order that otherwise constituted a facially legitimate exercise of executive discretion. Words matter.

Though certainly not on the same scale as *International Refugee*, other recent litigation has hinged on the ill-advised use of words. In 2014, a high school student in Minnesota was suspended due to a two-word tweet ("actually yes") he sent off campus and after school hours in response to a Twitter inquiry about a rumored occurrence between the student and a teacher.[29] The student sued, alleging, among other things, that his First Amendment rights had been violated.[30] The school district responded to the complaint by arguing that the student's tweet was "obscene" and therefore not protected

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[27] *Id.* at 597.

[28] It should be noted that three judges on the Fourth Circuit dissented in *International Refugee*, arguing that the court had no precedential basis for "look[ing] behind" the Government's "'facially legitimate and bona fide' exercises of executive discretion," *id.* at 639 (Niemeyer, J., dissenting) (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)), and had no just cause for "consideration of campaign statements to recast a later-issued executive order . . . ." *Id.* at 639 (Neimeyer, J., dissenting).

[29] Cyrus Farivar, *Lawsuit Over Two-Word Tweet—"actually yes"—Can Move Ahead, Judge Finds*, ARSTECHNICA (Aug. 15, 2015), https://arstechnica.com/tech-policy/2015/08/lawsuit-over-two-word-tweet-actually-yes-can-move-ahead-judge-finds/.

[30] Sagehorn v. Indep. Sch. Dist. No. 728, 122 F. Supp. 3d 842, 848 (D. Minn. 2015).

by the First Amendment.[31] The district court cited Supreme Court precedent holding that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[32] The district court concluded, however, that the tweet in question was not patently obscene and that the issue should be left for the jury to decide.[33]

Much of the debate surrounding the legal implications of word use and word choice can be traced back to the United States Supreme Court's decision in *Brandenburg v. Ohio*,[34] a 1969 free speech case. Clarence Brandenburg was a Ku Klux Klan ("KKK") leader in rural Ohio who invited a reporter to attend a KKK rally in 1964.[35] Portions of the rally were recorded and broadcast on a local television station and Brandenburg was later convicted of "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . ."[36] The Supreme Court reversed Brandenburg's conviction and declared the Ohio statute on which the conviction was based unconstitutional.[37] In so holding, the Court stated,

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

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[31] *Id.* at 853 (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).
[32] *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
[33] *Id.* at 854.
[34] 395 U.S. 444 (1969).
[35] *Id.* at 445.
[36] *Id.* at 444–45 (alteration in original).
[37] *Id.* at 449.

> producing imminent lawless action and is likely to incite or produce such action.[38]

The Court then concluded:

> [W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.[39]

However, there are limits to the First Amendment's protective reach. In 2006, the Supreme Court of Michigan issued a controversial opinion addressing public comments made by an attorney about appellate judges who were hearing his client's case.[40] After the attorney obtained a large jury verdict for a client in an earlier medical malpractice case, a three-judge panel of the Michigan Court of Appeals reversed the award and directed entry of a judgment notwithstanding the verdict.[41] The court of appeals commented in its decision that the conduct of the plaintiff's attorney during the trial was "truly egregious" and that it "completely tainted the proceedings."[42] Within a few days of the release of this decision, on a then-daily radio program the attorney hosted on a local station, the attorney made highly derogatory and offensive comments about the three appellate court judges who issued the

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[38] *Id.* at 447.
[39] *Id.* at 449.
[40] Grievance Adm'r v. Fieger, 719 N.W.2d 123 (Mich. 2006).
[41] *Id.* at 129. *See generally* Badalamenti v. William Beaumont Hosp.–Troy, 602 N.W.2d 854, 862 (1999).
[42] *Badalamenti,* 602 N.W.2d at 860; *see also Fieger*, 719 N.W.2d at 129.

opinion.[43] Not surprisingly, Michigan's Attorney Grievance Commission filed a formal complaint against the attorney, alleging that his public comments violated several provisions of the Michigan Rules of Professional Conduct.[44]

On appeal, a majority of the Supreme Court of Michigan noted that the legal profession, unlike other professions, "impose[s] upon its members regulations concerning the nature of public comment."[45] "The First Amendment implications are easily understood in such a regulatory regime," and the Supreme Court of Michigan "has attempted to appropriately draw the line between robust comment that is protected by the First Amendment and comment that undermines the integrity of the legal system."[46] The court concluded that "these rules are designed to prohibit only 'undignified,' 'discourteous,' and 'disrespectful' conduct or remarks. These rules are a call to discretion and civility, not to silence or censorship, and they do not even purport to prohibit criticism."[47] The court then determined that the attorney's disparaging comments about the three judges "warrants no First Amendment protection when balanced against this state's compelling interest in maintaining public respect for the integrity of the legal process."[48]

Finally, the majority sought to address the objections of its dissenting colleagues, who concluded

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[43] *Fieger*, 719 N.W.2d at 129.

[44] *Id.* at 130. The subsequent disciplinary proceedings in *Fieger*, which involved an appeal to the Attorney Disciplinary Board in Michigan, are convoluted and irrelevant to this Article, and therefore this Article does not discuss those proceedings. *See generally id.* at 130–31.

[45] *Id.* at 131.

[46] *Id.* at 131–32.

[47] *Id.* at 135.

[48] *Id.* at 142 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

that the attorney's disparaging public comments should be protected by the First Amendment:

> In their repudiation of "courtesy" and "civility" rules, the dissents would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove. It is a legal culture in which rational and logical discourse would come increasingly to be replaced by epithets and coarse behavior, in which a profession that is already marked by declining standards of behavior would be subject to further erosion, and in which public regard for the system of law would inevitably be diminished over time.[49]

Additionally, our nation's college campuses are increasingly marked by divisive, extreme, and abusive language, as well as attempted censorship:

- In 2015, a professor at the University of Missouri attempted to prohibit a video journalist from recording video at a student protest. The professor yelled, "Who wants to help me get this reporter out of here? I need some muscle over here."[50]

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[49] *Id.* at 144.

[50] Justin Moyer, Michael Miller & Peter Holley, *Mass Media Professor Under Fire for Confronting Video Journalist at Mizzou*, WASH POST (Nov. 10, 2015), https://www.washingtonpost.com/

- In 2015, a faculty training guide distributed by the University of California cautioned faculty members against using words and phrases that could result in "microaggressions," including the phrase "America is the land of opportunity."[51]

- A 2016 Gallup poll found that thirty-one percent of college students say they frequently or occasionally hear someone at their college making "disrespectful, inappropriate or offensive comments" about others' race, ethnicity, or religion, while fifty-four percent of students surveyed said the climate on their campus "prevents some people from saying what they believe."[52]

- In 2017, a professor at Evergreen State College sent an email (that was then posted to Twitter) objecting to an event called "Day of Absence," in which white students and teachers were asked to leave campus for the day so that students of color could organize and attend discussions about race.[53] Student protestors concluded the professor

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news/morning-mix/wp/2015/11/10/video-shows-u-of-missouri-protesters-and-journalism-professor-barring-media-coverage/?utm_term=.7581e8f24914.

[51] Nick Gillespie, *This Counts as a Microaggression: "America is the Land of Opportunity"*, REASON FOUNDATION (JUNE 15, 2015), http://reason.com/blog/2015/06/15/this-counts-as-a-microaggression-america.

[52] GALLUP, FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS 4, 18 (2016).

[53] Susan Svrulga & Joe Heim, *A Washington State College, Caught Up in Racial Turmoil, Remains Closed Friday After Threat of Violence*, WASH POST (June 2, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/06/02/evergreen-state-caught-up-in-racial-turmoil-remains-closed-friday-after-threat-of-violence/?utm_term=.e517f9009028.

was racist and demanded he be fired, and threats of violence prompted the school to close for two days.[54]

- In February 2017, a professor at Fresno State University tweeted, "to save American democracy, Drumpf must hang. The sooner and the higher, the better."[55]

- In 2017, two conservative commentators were banned from the campus of DePaul University for using "inflammatory speech."[56]

- Harvard's campus newspaper, *The Crimson*, reported in June 2017 that ten students who had been admitted into the incoming freshmen class had their admissions rescinded when the school discovered sexually explicit and/or racially insensitive memes in a private Facebook chat.[57]

Despite this disturbing trend, an analysis by CNN reporter Eliott C. McLaughlin concluded that students "will listen to speakers they disagree with if they're

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[54] *Id.*

[55] Melissa Etehad, *Fresno State Professor Placed on Leave After Tweeting "Drumpf Must Hang"*, L.A. TIMES (April 19, 2017), http://www.latimes.com/local/lanow/la-me-ln-fresno-professor-paid-leave-20170419-story.html.

[56] Kassy Dillon, *After Protests and Riots, Free Speech is MIA on College Campuses*, THE HILL (Feb. 3, 2017), http://thehill.com/blogs/pundits-blog/education/317719-after-protests-and-riots-free-speech-is-mia-on-college-campuses.

[57] Hannah Natanson, *Harvard Rescinds Acceptances for at Least Ten Students for Obscene Memes*, HARV. CRIMSON (June 5, 2017), http://www.thecrimson.com/article/2017/6/5/2021-offers-rescinded-memes/.

civil."[58] He cited as an example a 2015 speech Senator Bernie Sanders gave at Liberty University, a well-known Christian college in Virginia. One student commented that although she and most of her fellow students disagreed with Senator Sanders's views on a variety of topics, she listened to his speech and thoughtfully considered his comments about alleviating poverty in light of her own beliefs, saying "[e]veryone I talked to was glad he came," and that "[i]t's important to communicate with those we disagree with."[59]

Thus, there can be no doubt that the First Amendment is the great constitutional protector of free speech, as it should be, but it is not without its limits. For purposes of this article, the question is not whether divisive, rude, profane, or derogatory language is constitutional. In most instances, it is certainly protected speech. Instead, the question is whether, in an age where one's words can be disseminated immediately to millions of people across multiple digital platforms, such language contributes anything useful to society. As Shakespeare's great character Falstaff said, "The better part of valor is discretion . . . ."[60]

I believe a significant majority of Americans, who I dub the "Middle Majority," abhor extremist, hate-filled rhetoric, regardless of which end of the political spectrum produces it. The average American, I maintain, finds the vitriol spewed by white supremacists as distasteful as the far-left's radicalized malevolence directed at our current President. As one commentator explained, "[r]age and sanctimony always spread like a virus, and become

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[58] Eliott C. McLaughlin, *War on Campus: The Escalating Battle Over College Free Speech*, CNN (May 1, 2017), http://www.cnn.com/2017/04/20/campus-free-speech-trnd/.
[59] *Id.*
[60] WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH, act 5, sc. 4.

stronger with each iteration."[61] And yet, the Middle Majority feels helpless to stop, or even slow down, this bullet train of bitterness.

The Middle Majority does, however, hold the keys to reversing this descent into hostility and hyperbole. One answer, as is often the case in a capitalist society, lies in our wallets. We can choose to weaken the impact of extremism by refusing to buy that person's book, or subscribe to that magazine, or watch that television program. We can refuse to click on that story, and, more importantly, ignore the link to that advertiser's website. Companies take notice when clicks, sales, and ratings fall. It is high time we reacted to extremists in a way that relegates them to the shadows from whence they came. While I will support that person's constitutional right to speak, I also believe in our right to react to that speech in a way that minimizes its impact on society and opens the door for more thoughtful, well-reasoned, *civil* discourse. For those who seek a more proactive approach, remember that advertisers crave your dollars. The marketplace compels companies to react in a way that maximizes profit. If enough people register disgust with that company spokesman, or author, or You-Tuber, advertisers will react swiftly to distance themselves from the extremism, and the influence of the extremists will ebb over time. It is the failure to react that leads to the normalization of the extreme.

A second key lies in our own access to the public forum. The Middle Majority needs to contribute to the debate as often as possible in a way that rejects extremism and replaces it with logic and calm, articulate reasoning. It is not a sign of weakness to acknowledge valid points made by those who oppose your view. It furthers the public interest to seek common ground and offer suggestions that move the country forward, as

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[61] Peggy Noonan, *Rage is All the Rage, and It's Dangerous*, WALL ST. J., June 17-18, 2017, at A13.

opposed to the ongoing stalemate left in the wake of dogmatic extremism. Compromise is not a four-letter word. As one former president memorably stated, "Let us never negotiate out of fear. But let us never fear to negotiate."[62] It is high time we reject extremism of all kinds, show respect for various viewpoints through civil discourse, and seek common ground for the good of our communities, our states, and our nation.

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[62] John F. Kennedy, President of the U.S., Inaugural Address (Jan. 20, 1961), https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Quotations/Inaugural-Address.aspx).

TENNESSEE BUREAU OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD
(HEARD JANUARY 10, 2018, IN JACKSON)

Christopher Batey	)	Docket No. 2016-05-0666
	)	
v.	)	
	)	State File No. 19123-2015
Deliver This, Inc., et al.	)	
	)	
	)	
Appeal from the Court of Workers'	)	
Compensation Claims	)	
Thomas Wyatt, Judge	)	

Affirmed in Part, Modified in Part, and Certified as Final –
Filed February 6, 2018

In this case presenting issues of first impression, the employee was awarded 275 weeks of permanent partial disability benefits pursuant to Tennessee Code Annotated section 50-6-242 (2017), which allows such relief in "extraordinary" cases if the employee proves certain criteria. In addition, following a post-trial motion hearing, the trial court denied the employee's motion for pre-judgment interest. The employer has appealed the trial court's order awarding the enhanced permanent partial disability benefits, and the employee has appealed the trial court's order denying pre-judgment interest. Upon careful consideration of the record, we affirm in part and modify in part the trial court's orders, and we certify both orders as final.

Judge Timothy W. Conner delivered the opinion of the Appeals Board in which Presiding Judge Marshall L. Davidson, III, and Judge David F. Hensley joined.

Michael L. Haynie, Nashville, Tennessee, for the employer-appellant, Deliver This, Inc.

D. Russell Thomas, Murfreesboro, Tennessee, for the employee-appellee, Christopher Batey

Factual and Procedural Background

Christopher Batey ("Employee"), a forty-six-year-old resident of Cannon County, Tennessee, worked as a delivery driver for Deliver This, Inc. ("Employer"). On February 24, 2015, while bending over to wrap a pallet, Employee felt a "pop" and immediate pain

in his low back and left leg. He was provided a panel of physicians and selected Dr. Melvin Law, an orthopedic surgeon, as his authorized treating physician. Dr. Law diagnosed a large disc herniation at L5-S1 and, after Employee completed a course of physical therapy, recommended surgery.

Following surgery, Employee continued to complain of weakness and pain in his left leg, and Dr. Law concluded he retained some degree of permanent nerve dysfunction. He placed Employee at maximum medical improvement on August 19, 2015, and assigned a permanent medical impairment rating of 14% to the body as a whole.[1] He also released Employee to "return to work at this time" and listed no permanent work restrictions.[2]

In an October 26, 2015 report, a nurse practitioner in Dr. Law's office noted that Employee "is currently not working." Employee still had complaints of pain, and the nurse practitioner recommended a foraminal steroid injection due to chronic lumbar pain. A referral was made for pain management at that time. On January 6, 2016, the nurse practitioner noted on-going lumbar pain with neuritis and radiculitis.[3]

In a March 29, 2016 Standard Form Medical Report (Form C-32), Dr. Law noted in the "Functional Capacity Assessment" section certain physical limitations, including limits on lifting, prolonged sitting, prolonged standing or walking, repetitive pushing or pulling, and frequent or repetitive climbing, balancing, stooping, kneeling, crouching, crawling, or twisting. In a February 2017 deposition, Dr. Law testified that, in his opinion, Employee "would not be able to return to his pre-injury status" at work. On cross-examination, however, Dr. Law admitted that he had previously released Employee to return to work as of August 19, 2015, with no permanent work restrictions. Upon further questioning, Dr. Law drew a distinction between formal work restrictions and physical "limitations" based on his review of Employee's functional assessment. On July 26, 2017, Dr. Law completed a Physician Certification Form opining that Employee's permanent restrictions prevented him from performing his pre-injury occupation. Dr.

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[1] During his deposition, Dr. Law acknowledged that he originally assigned an impairment rating of 10% to the body as a whole, which he then increased to 14%. He could not recall a specific reason for the increase, but testified it was likely due to Employee's residual symptoms and on-going nerve dysfunction.

[2] In the medical records introduced as Exhibit 4 during the trial, there were two forms entitled "Final Medical Report" (Form C-30A). On the first, which is undated, Dr. Law indicated that Employee could return to "restricted duty" as of August 19, 2015. On the second, dated August 19, 2015, Dr. Law indicated that Employee could return to "regular duty" as of that date.

[3] Each report electronically signed by the nurse practitioner was also reviewed and "electronically co-signed" by Dr. Law.

Law, or someone on his behalf, typed an additional sentence onto the form stating, "[t]his is per my testimony by deposition and the job description in the deposition."[4]

During the compensation hearing, the primary issue was the amount of the permanent disability benefits to which Employee was entitled. Both parties presented testimony from vocational experts, and Employee sought one of three remedies: (1) permanent total disability pursuant to Tennessee Code Annotated section 50-6-207(4)(A) (2017); (2) "extraordinary" relief up to a maximum of 275 weeks of permanent partial disability benefits pursuant to Tennessee Code Annotated section 50-6-242(a)(2); or (3) increased benefits pursuant to Tennessee Code Annotated section 50-6-207(3)(B). Employer denied that Employee was entitled to any of these remedies, and asserted it was responsible only for an "original award" based on the degree of permanent medical impairment.

The trial court concluded Employee was entitled to permanent partial disability benefits of 275 weeks pursuant to the "extraordinary" relief described in section 50-6-242(a)(2). In so holding, the trial court considered the six criteria identified in the statute: (1) Employee was eligible for increased benefits pursuant to section 50-6-207(3)(B) (also called a "resulting award"); (2) Employee was assigned a permanent medical impairment rating at or above 10% to the body as a whole; (3) the treating physician certified that Employee could not perform his "pre-injury occupation"; (4) Employee was not earning wages equal to or greater than 70% of his pre-injury salary; (5) limiting Employee's award to the increased benefits as provided in section 50-6-207(3)(B) would be inequitable; and (6) Employee's case was "extraordinary." Employer has appealed the compensation order.[5]

Following the issuance of the compensation order, Employee filed several post-trial motions, including a motion for pre-judgment interest. Following a motion hearing, the trial court denied Employee's motion, concluding the exclusive remedy provisions of

[4] The trial court observed in footnote 5 of its compensation hearing order that the parties had submitted over 350 pages of medical records reviewed by Dr. Law in preparation for his deposition. The trial court, after reviewing the deposition, concluded that a review of those records was unnecessary to its determination of the issues. The court further indicated that, in the event of an appeal, the parties could file a motion with the Appeals Board "to determine if it will accept the subject records as part of the record on appeal." However, we caution that such a motion would be inappropriate, as we have noted on numerous previous occasions that we will not consider information on appeal that was not admitted into evidence and considered by the trial court. *See, e.g.*, *Hadzic v. Averitt Express*, No. 2014-02-0064, 2015 TN Wrk. Comp. App. Bd. LEXIS 14, at *13 n.4 (Tenn. Workers' Comp. App. Bd. May 18, 2015) ("[W]e will not consider on appeal testimony, exhibits, or other materials that were not properly admitted into evidence at the hearing before the trial judge."); *see also* Tenn. Comp. R. & Regs. 0800-02-22-.04(1) (2015) ("Evidence not contained in the record submitted to the clerk of the workers' compensation appeals board shall not be considered on appeal.").

[5] Employee has not appealed the trial court's decision not to award permanent total disability benefits.

the Workers' Compensation Law and cases interpreting this language precluded an award of pre-judgment interest. Employee has appealed that order.

Standard of Review

The standard we apply in reviewing a trial court's decision presumes that the court's factual findings are correct unless the preponderance of the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-239(c)(7) (2017). When the trial judge has had the opportunity to observe a witness's demeanor and to hear in-court testimony, we give considerable deference to factual findings made by the trial court. *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009). However, "[n]o similar deference need be afforded the trial court's findings based upon documentary evidence." *Goodman v. Schwarz Paper Co.*, No. W2016-02594-SC-R3-WC, 2018 Tenn. LEXIS 8, at *6 (Tenn. Workers' Comp. Panel Jan. 18, 2018). Similarly, the interpretation and application of statutes and regulations are questions of law that are reviewed de novo with no presumption of correctness afforded the trial court's conclusions. *See Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013). We are also mindful of our obligation to construe the workers' compensation statutes "fairly, impartially, and in accordance with basic principles of statutory construction" and in a way that does not favor either the employee or the employer. Tenn. Code Ann. § 50-6-116 (2017).[6]

Analysis

Permanent Disability Benefits

The manner in which a trial court determines an injured worker's eligibility for permanent disability benefits is governed primarily by two statutes: Tennessee Code Annotated sections 50-6-207 and 50-6-242. When a worker suffers a compensable work injury, reaches maximum medical improvement, and is assigned a permanent medical impairment rating, he or she is entitled to receive permanent disability benefits. *See* Tenn. Code Ann. § 50-6-207(3)(A). The amount of such benefits is calculated by multiplying the employee's medical impairment rating by 450, then multiplying the result by the employee's weekly compensation rate. This amount is designated the "original award." An injured worker is entitled to the "original award" regardless of his or her employment status as of the date of maximum medical improvement. *Id.*

[6] Employee relies on the former standard of review embodied in Tennessee Code Annotated section 50-6-217(a)(3) (repealed 2017). Section 50-6-217(a)(3) authorized us to reverse or modify a trial court's decision if the rights of a party were prejudiced because the findings of the trial judge were "not supported by evidence that is both substantial and material in light of the entire record." However, this code section was deleted effective May 9, 2017. Consequently, as noted above, the standard we apply in reviewing the trial court's decision presumes that the trial judge's factual findings are correct unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-239(c)(7).

If, at the end of the initial period of compensation (the number of weeks represented by the original award), the employee has not returned to work for any employer at an equal or greater rate of pay as before the injury, then the employee qualifies for an increased benefit equal to 1.35 times the original award (minus a credit for payment of the original award). A trial court can further increase this award if: (1) the employee lacks a high school diploma or general equivalency diploma; (2) the employee is over the age of 40 at the time the initial period of compensation ends; or (3) the unemployment rate in the employee's Tennessee county of employment was at least two percentage points higher than the state's unemployment rate at the time the initial period of compensation ends. *Id.* These additional benefits are generally called an "increased award" or "increased benefits."

If an employee qualifies for increased benefits as provided in section 50-6-207(3), but the trial court finds the employee's case to be "extraordinary" pursuant to section 50-6-242(a)(2) and further determines by clear and convincing evidence that limiting the injured worker to the increased benefits in section 207(3)(B) would be inequitable in light of the totality of the circumstances, the trial court can award permanent partial disability benefits not to exceed 275 weeks if three additional facts are shown: (1) the employee's medical impairment rating is 10% or higher; (2) the authorized treating physician has certified on a Bureau form that the employee "no longer has the ability to perform the employee's pre-injury occupation" due to "permanent restrictions on activity" caused by the work accident; and (3) at the time of trial, the employee is earning less than 70% of his or her pre-injury average weekly wage or salary. *See* Tenn. Code Ann. § 50-6-242(a).

In the alternative, if a trial court finds that the work injury "totally incapacitates the employee from working at an occupation that brings the employee an income," it can award the employee permanent total disability benefits, which are paid at the employee's weekly compensation rate from the date of maximum medical improvement until the date the employee qualifies for "full benefits in the Old Age Insurance Benefit Program under the Social Security Act." *See* Tenn. Code Ann. § 50-6-207(4).

In the present case, Employee alleged at trial entitlement to: (1) permanent total disability benefits under section 207(4); or, in the alternative, (2) "extraordinary relief" under section 242(a)(2); or, in the alternative, (3) increased benefits under section 207(3)(B). Employer argued in the trial court that because Employee was originally released to return to work without restrictions and unreasonably failed to return to work, he should have been limited to the original award as provided in section 207(3)(A).[7] Following the compensation hearing, the trial court concluded that Employee qualified for extraordinary relief pursuant to section 242(a)(2) and awarded 275 weeks of permanent partial disability benefits. Although we disagree with several of the trial

[7] This argument appears to be based on Employee's alleged failure to seek or obtain employment with any employer, as counsel for Employer noted during trial that his client had gone out of business.

court's determinations, we conclude the evidence does not preponderate against the award of permanent partial disability benefits pursuant to Tennessee Code Annotated section 50-6-242(a)(2).

Extraordinary Relief

First, with respect to the "qualifying" criteria for application of section 242(a)(2), the trial court concluded that Employee was eligible for increased benefits, that Employee's case was "extraordinary," and that limiting Employee's award to the benefits provided in section 207(3)(B) would be "inequitable in light of the totality of the circumstances." Among other findings, the trial court considered the fact that limiting Employee to the benefits provided in section 207(3)(B) would result in Employee's receiving a permanent partial disability award significantly less than the vocational disability ratings of both testifying vocational experts. In consideration of this and the totality of the circumstances, we conclude the evidence does not preponderate against the trial court's determination on this issue.

Second, with respect to the three additional factors listed in section 242(a)(2), there is no question the authorized treating physician assigned a permanent medical impairment rating of at least ten percent to the body as a whole. It is also undisputed that, at the time of trial, Employee was not earning an average weekly wage or salary greater than or equal to seventy percent of his pre-injury average weekly wage or salary. Thus, the critical issue is whether Employee established that the authorized treating physician had properly certified that Employee "no longer has the ability to perform the employee's pre-injury occupation." It is on this issue that we diverge from the trial court's analysis.

In considering whether Employee satisfied the criteria concerning the certification of the authorized treating physician, the trial court concluded that "[Employee]'s submission of the certification signed by Dr. Law established [this] factor . . . by clear and convincing evidence." We conclude, however, the statute does not require an injured worker to establish this factor by clear and convincing evidence. Instead, the plain language of the statute requires a trial court to find by clear and convincing evidence only that limiting the employee's recovery to the benefits provided in section 207(3)(B) would be "inequitable in light of the totality of the circumstances." Thereafter, if the trial court makes such a finding, then the three factors listed in section 242(a)(2)(A)-(C) need only be established by a preponderance of the evidence.

This interpretation is further supported by the language in section 242(a)(2)(B), which specifies the employer's burden of proof in rebutting the injured worker's evidence but says nothing about the injured worker's burden of proof. In circumstances where an employee offers into evidence the required certification form signed by the authorized treating physician, the opinion as reflected on that form is accorded a presumption of correctness, and the burden shifts to the employer to prove, by "contrary clear and

convincing evidence," that the employee has the ability to perform his or her pre-injury occupation.

In the present case, Dr. Law signed a "Physician Certification Form," which is the relevant form available from the Bureau of Workers' Compensation, certifying that Employee "no longer has the ability to perform the employee's pre-injury occupation." Employer asserts that by adding a sentence to the form ("This is per my testimony by deposition and the job description in the deposition."), Dr. Law qualified his opinion that Employee cannot return to his pre-injury occupation and, as a result, the burden-shifting mechanism described in section 242(a)(2)(B) was never triggered. Therefore, under Employer's theory, Employee failed to satisfy the necessary criteria in section 242(a)(2)(B) and, as a result, Employer had no burden to satisfy.

We disagree. The sentence Dr. Law added to the certification form does not detract from the previous sentence certifying that the employee "no longer has the ability to perform the employee's pre-injury occupation." Instead, the additional sentence adds to his opinion by referencing his deposition testimony and the job description attached thereto. Once Dr. Law signed the certification form and it was properly submitted to the court, Employee's burden of establishing this criteria as required by section 242(a)(2)(B) was satisfied. The burden then shifted to Employer to show, by "contrary clear and convincing evidence," that Employee was capable of performing his pre-injury occupation. Employer did not meet this burden.

Pre-Injury Occupation

Employer next argues that the trial court erred in concluding Employee established he "no longer has the ability to perform [his] pre-injury occupation" due to permanent restrictions on his activities. Specifically, Employer asserts the trial court erred in defining the term "pre-injury occupation" to include only "the job held by the employee at the time of the injury." Since the phrase "pre-injury occupation" is not defined in the statute, we must consider its plain and ordinary meaning. *See Maupin v. Methodist Med. Ctr.*, No. E1999-02181-WC-CV, 2000 Tenn. LEXIS 102, at *4 (Tenn. Workers' Comp. Panel Mar. 2, 2000) ("In construing a statute, proper interpretations should give effect to the entire statute by giving its words their natural and ordinary meaning."). Black's Law Dictionary defines the term "occupation" as "a person's usual or principal work or business." Black's Law Dictionary (10th ed. 2014). Merriam-Webster defines "occupation" as "an activity in which one engages." Merriam-Webster Dictionary, https://www.merriamwebster.com/dictionary/occupation (last visited Feb. 6, 2018). The plain and ordinary meaning of the word "occupation" includes more than a specific job, but describes the *type* of work one does as his or her "usual or principal work."

Moreover, we must consider the statutory context in which the term is used. To qualify for "extraordinary" relief as described in section 242(a)(2), an employee must

first show that he or she did not return to work for "any employer" at an equal or greater rate of pay as noted in section 207(3)(B). In other words, having returned to work as of the date the initial period of compensation ends at any job that pays at least as much as the employee's pre-injury job will disqualify that worker from receiving increased benefits, which, in turn, would disqualify that same worker from seeking extraordinary relief under section 242(a)(2). It would be incongruous to conclude that an employee can get increased benefits under section 207(3)(B) only by showing he or she did not return to work for "any employer" at an equal or greater rate of pay, but can satisfy section 242(a)(2)(B) merely by showing that he or she was unable to return to "the job held by the employee at the time of injury," as was found by the trial court. Stated another way, it would be illogical to conclude the criteria to qualify for extraordinary relief under section 242(a)(2) is *less* burdensome than the criteria to qualify for "increased benefits" under section 207(3)(B).

Thus, we agree with Employer that the trial court's definition of "employee's pre-injury occupation" as used in section 242(a)(2)(B) is too restrictive. Instead, section 242(a)(2)(B) requires a physician to certify that the injured employee is incapable of returning to that employee's pre-injury "occupation," as that term is commonly understood. Employee asserts, and the trial court agreed, that such an interpretation would place an unreasonable burden on injured workers, since a person's "occupation" may encompass innumerable potential jobs. Under Employee's argument, most physicians will be unable, or at least reluctant, to sign such a certification without sufficient information as to the physical requirements of every potential job within that injured worker's "occupation." However, such an argument is more appropriately directed to the General Assembly.[8]

Furthermore, as discussed above, the statute requires only that the injured worker submit the required certification form signed by the authorized treating physician, and the burden then shifts to the employer to establish, by contrary clear and convincing evidence, that the injured worker *is* capable of returning to a job within his or her pre-injury occupation. In the present case, the required physician certification form was signed and properly admitted into evidence. We previously concluded that the additional language added by Dr. Law did not negate the required certification. Thus, Dr. Law's certification is entitled to a presumption of correctness and the burden shifted to

[8] We also note that both parties presented expert vocational testimony during trial. In his November 2, 2016 report, Employee's expert concluded that, "[g]iven the residual functional limitations . . ., [Employee] is precluded from resuming future employment above a restricted range of activities at the limited [l]ight exertional demand level." In her July 19, 2017 report, Employer's vocational expert acknowledged that if the limitations set out in Dr. Law's Form C-32 are accepted, Employee "[c]ould perform a limited range of light work." Given that both vocational experts concluded Employee's prior occupation as a truck driver fell within the medium to heavy job classification, such information would support Dr. Law's certification that Employee is unable to return to his pre-injury occupation.

Employer to show, by contrary clear and convincing evidence, that Employee was capable of returning to his pre-injury occupation. No such evidence was presented in this case. As a result, although we conclude the trial court erred in its interpretation of the phrase "pre-injury occupation," we also conclude this error was harmless under the circumstances presented, since Employer did not meet its burden of rebutting Dr. Law's certification by "contrary clear and convincing evidence" as set forth in section 242(a)(2)(B).

Pre-judgment Interest

Finally, Employee asserted in a post-trial motion his entitlement to pre-judgment interest, which the trial court denied. Employee argues on appeal that while pre-reform law indicated pre-judgment interest was unavailable in workers' compensation cases, *see, e.g.*, *Woodall v. Hamlett*, 872 S.W.2d 677 (Tenn. 1994) (holding the statute authorizing pre-judgment interest is inapplicable in workers' compensation cases due to the exclusive remedy provision in Tennessee Code Annotated section 50-6-108), this issue should be reconsidered in light of the recent amendments to the Workers' Compensation Law.

However, the pertinent language in Tennessee Code Annotated section 50-6-108 (2017), which describes the benefits available under the Workers' Compensation Law as an injured worker's exclusive remedy, has not changed. As a result, we find nothing in the Workers' Compensation Reform Act of 2013, or subsequent amendments, that authorizes an award of pre-judgment interest pursuant to Tennessee Code Annotated section 47-14-123 (2017).[9] Accordingly, we find Employee's argument to be without merit and affirm the trial court's order denying pre-judgment interest.

Conclusion

For the foregoing reasons, we conclude the trial court erred in defining an employee's burden of proof under Tennessee Code Annotated section 50-6-242(a)(2) and in defining the phrase "employee's pre-injury occupation" as used in subsection 242(a)(2)(B). However, we conclude these errors were harmless under the circumstances presented and, therefore, affirm the trial court's determinations as to Employee's entitlement to permanent partial disability benefits. We also affirm the trial court's denial of Employee's claim for pre-judgment interest. All other aspects of the compensation hearing order are affirmed, and the order, as modified, is hereby certified as final. The order denying pre-judgment interest is likewise certified as final.

[9] We also note that Tennessee Code Annotated section 50-6-225(c)(1) (2017) defines how an injured worker's entitlement to post-judgment interest is calculated in certain circumstances, but does not authorize an award of pre-judgment interest.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 4, 2018 Session

CHRISTOPHER BATEY v. DELIVER THIS, INC., ET AL.

Appeal from the Workers' Compensation Appeals Board
Court of Workers' Compensation Claims
No. 2016-05-0666 Thomas Wyatt, Judge

No. M2018-00419-SC-WCO-WC

In this workers' compensation case, Christopher Batey ("Employee") filed a Petition for Benefit Determination after he sustained a back injury while working for Deliver This, Inc. ("Employer"). The trial court determined that Employee was entitled to 275 weeks of permanent partial disability benefits pursuant to Tennessee Code Annotated section 50-6-242(a)(2). On appeal, the Workers' Compensation Appeals Board affirmed the trial court's judgment, holding that the trial court erred in "defining an employee's burden of proof under Tennessee Code Annotated section 50-6-242(a)(2) and in defining the phrase 'employee's pre-injury occupation' as used in subsection 242(a)(2)(B)" but concluding that the errors were harmless under the circumstances presented. Batey v. Deliver This, Inc., No. 2016-05-0666, 2018 WL 805490, at *7 (Tenn. Workers' Comp. App. Bd. Feb. 6, 2018). Employer and its insurer, Auto-Owners Insurance Company, have appealed. Pursuant to Tennessee Supreme Court Rule 51, section 2, this Court directed that the appeal not be referred to the Special Workers' Compensation Panel. Upon our review, we affirm the judgment of the Workers' Compensation Appeals Board and adopt its opinion in its entirety as set forth in the attached Appendix.

Tenn. Sup. Ct. R. 51, § 2; Judgment of the Workers' Compensation Appeals Board Affirmed

JEFFREY S. BIVINS, C.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, SHARON G. LEE, HOLLY KIRBY, and ROGER A. PAGE, JJ., joined.

Michael L. Haynie, Nashville, Tennessee, for the appellants, Deliver This, Inc., and Auto-Owners Insurance Co.

D. Russell Thomas, Murfreesboro, Tennessee, for the appellee, Christopher Batey.

OPINION

On July 13, 2016, Christopher Batey ("Employee") filed a Petition for Benefit Determination with the Tennessee Bureau of Workers' Compensation, seeking permanent disability benefits for a back injury he sustained while working for his employer, Deliver This, Inc. ("Employer"), on February 24, 2015. After a compensation hearing, the Court of Workers' Compensation Claims determined that Employee was entitled to 275 weeks of permanent partial disability benefits pursuant to Tennessee Code Annotated section 50-6-242(a)(2). In reaching this conclusion, the trial court considered the six criteria identified in section 50-6-242(a)(2):

> (1) Employee was eligible for increased benefits pursuant to section 50-6-207(3)(B) (also called a "resulting award"); (2) Employee was assigned a permanent medical impairment rating at or above 10% to the body as a whole; (3) the treating physician certified that Employee could not perform his "pre-injury occupation"; (4) Employee was not earning wages equal to or greater than 70% of his pre-injury salary; (5) limiting Employee's award to the increased benefits as provided in section 50-6-207(3)(B) would be inequitable; and (6) Employee's case was "extraordinary."

Batey v. Deliver This, Inc., No. 2016-05-0666, 2018 WL 805490, at *2 (Tenn. Workers' Comp. App. Bd. Feb. 6, 2018). On September 11, 2017, following the issuance of the compensation order, Employee filed a motion for prejudgment interest under Tennessee Code Annotated section 47-14-123 on the benefits awarded, which the trial court denied.

Employer and its insurer, Auto-Owners Insurance Company, appealed the compensation order, and Employee appealed the denial of prejudgment interest. The Workers' Compensation Appeals Board ("Appeals Board") determined that "the trial court erred in defining an employee's burden of proof under Tennessee Code Annotated section 50-6-242(a)(2) and in defining the phrase 'employee's pre-injury occupation' as used in subsection 242(a)(2)(B)." Id. at *7. However, the Appeals Board concluded that the errors were harmless under the circumstances of the case, and it affirmed the trial court's award of permanent partial disability benefits. Id. The Appeals Board also affirmed the trial court's denial of prejudgment interest. Id.

Employer and its insurer have appealed the decision of the Appeals Board. Pursuant to Tennessee Supreme Court Rule 51, section 2, this Court directed that the appeal not be referred to the Special Workers' Compensation Panel. Oral arguments were heard in Nashville on October 4, 2018. After careful consideration, we affirm the

judgment of the Appeals Board and adopt its well-reasoned opinion in its entirety as set forth in the attached Appendix. Costs of this appeal are taxed to Deliver This, Inc., and Auto-Owners Insurance Company, for which execution may issue if necessary.

JEFFREY S. BIVINS, CHIEF JUSTICE