

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

COMMERCE AND INDUSTRY )  
 INSURANCE COMPANY, and )  
 TRU-CHECK, INC., )  
 )  
 Petitioners, )  
 )  
 VS. ) NO. 10-1578-III  
 )  
 SUE ANN HEAD, Administrator, )  
 TENNESSEE DEPARTMENT OF )  
 LABOR AND WORKFORCE )  
 DEVELOPMENT AND WORKERS' )  
 COMPENSATION DIVISION, et al., )  
 )  
 Respondents. )

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MEMORANDUM AND ORDER

This lawsuit is a petition filed by an Employer and its Insuror for immediate judicial review of preliminary, procedural and intermediate rulings and orders of a specialist and administrator's designee of the Tennessee Department of Labor and Workforce Development and Workers' Compensation Division ("DOL"). The Petitioners' complaint is that the DOL specialist and designee, in exercising their statutory authority under Tennessee Code Annotated section 50-6-238 to order the Petitioners to pay temporary benefits, not only erred as a matter of law, but acted illegally and outside of their authority by:

- the specialist *sua sponte* reinstating temporary total disability, even though the attorneys did not seek that relief (paragraph 9 of the Petition);

- the specialist ordering that the Worker had not achieved maximum medical improvement despite a physician's opinion to the contrary (paragraphs 9-10 of the Petition); and
- the designee mandating that the Petitioners pay for unrelated oral surgery for which the Worker had not sought payment (paragraph 12 of the Petition).

The Petitioners assert that immediate review by this Court is necessary because DOL has assigned no stop date for payment of these temporary benefits, and the Petitioners will have greatly exceeded their liability under the Workers' Compensation Act by the time they are provided their statutory right of review by a trial court of a specialist's order of temporary benefits. The legal theories alternatively asserted in support of the Petition for judicial review are (1) the Uniform Administrative Procedures Act ("UAPA"); (2) a common law writ of certiorari; or (3) a constitutional challenge under the Declaratory Judgment Act.

This matter is presently before this Court on the motion to dismiss of the Respondent DOL for failure of the Petitioners to state a claim.

After considering the Petition and arguments and authorities of counsel, the Court denies the motion to dismiss. The Court concludes that the Petitioners have stated a claim for immediate judicial review under Tennessee Code Annotated section 4-5-322(a)(1). The Court's reasoning is as follows.

### Hybrid Administrative/Trial Court System

The Tennessee Workers' Compensation Act is a statutory system enacted by the Tennessee Legislature for employers and their insurance companies to pay for the effects of an on-the-job injury to a worker. Part of the policy behind the Act is that employers and their insurers, not public assistance programs or workers, should bear the costs of injuries sustained on the job. Under the Act, the benefits available to an injured worker consist of: temporary and permanent benefits. The former include those the worker incurs until he has recovered as much as he can from the injury. These benefits consist of a reduced wage (temporary disability benefits) paid while the worker is off of work and until the worker's condition stabilizes, and payment for medical treatment during recuperation. Then, there are permanent benefits to compensate the worker for the permanent vocational loss he has sustained from the injury (permanent impairment) and payment for life (future medical benefits) for medical expenses resulting from the injury.

The procedure for obtaining these benefits started out as a court-based statutory scheme. Trial judges determined all aspects of the case, both temporary and permanent benefits. Decisions pending the outcome of the litigation for temporary disability payments and payments for preliminary medical care as well as a decision of an award of benefits for a permanent injury and future medical care were made by a trial judge.

In 2004, with the Workers' Compensation Reform Act and in subsequent legislation, the Tennessee Legislature has taken some steps in the direction of the national trend of

removing workers' compensation claims from the court system to an administrative agency, the Department of Labor and Workforce Development. The Legislature has not, however, converted the process entirely to an administrative one. Presently, Tennessee has a "hybrid" administrative/court system. The Act requires employers and workers to first attempt to settle workers' compensation claims in an administrative agency mediation proceeding. As well, issues pending litigation concerning temporary benefits such as temporary wages and recuperative medical care are filed with and decided at the administrative level by a DOL specialist and administrator's designee. Once these remedies are exhausted, if there are still issues in dispute, the parties may file a lawsuit in a Tennessee trial court to proceed with the trial of the case on all remaining issues. Unlike the standard Tennessee statutory system of cases decided by administrative agencies under the Uniform Administrative Procedures Act, workers' compensation cases are not considered by the trial court in an appellate capacity with deference to the agency decision and from a record. The trial court decides the issues *de novo* with a full evidentiary trial.

### **Judicial Review of DOL Orders for Temporary Benefits**

One of the unique aspects of this hybrid system has to do with judicial review of decisions made by the DOL as to temporary benefits. As noted above, under the present hybrid scheme, a DOL specialist and designee decide if a worker is entitled to temporary wages and payment of medical expenses during recuperation. TENN. CODE ANN.

§ 50-6-238(a); (d)(1) (2). The procedure for reviewing those decisions for error is that review does not come unless a lawsuit is filed with a trial court. Erroneous awards by the DOL of temporary benefits can be reversed once the case has been filed before a trial court. TENN. CODE ANN. § 50-6-238(b). If reversal by the trial court of a decision by the DOL occurs, the remedy is that an employer can obtain reimbursement from Tennessee's Second Injury Fund at the conclusion of the trial. TENN. CODE ANN. § 50-6-238(b).

### **Illegality; Abuse of Authority**

A controversy that has developed with this hybrid administrative/trial *de novo* scheme are claims that some of the decisions of DOL specialists and designees about temporary benefits are not just incorrect but illegal, violative of fundamental rights and an abuse of authority.

For example, there are claims that the DOL is ordering redress of issues not raised by the parties or (2) the specialist neither acknowledges, cites nor applies fundamental well-known case law or (3) a specialist fails to provide access to medical records to the parties that they are entitled to receive by regulation before participating in a benefit review conference so that they are prejudiced and unable to provide meaningful input. The claim is that under these circumstances, the right of a party to obtain reversal once the case has been tried to a court is inadequate. Judicial review years later is incapable of redressing deprivation of due

process. The contention, then, is that there should be some immediate means of review when the DOL fails to comply with fundamental legal principles.

### **Alternative Theories of Immediate Judicial Review**

In a number of trial court decisions, including some by this Court, different approaches for immediate redress have been identified: petition for judicial review under section 4-5-322(h) of the UAPA (*Dollar General Corporation v. Tennessee Department of Labor*, filed in the Chancery Court of Davidson County, Cause No. 09-145-III); common law writ of certiorari (*MidSouth Transportation Management, Inc. v. Tennessee Department of Labor*, filed in the Chancery Court of Davidson County, Cause No. 10-790-III); and a declaration by a chancery court that a section of the Workers' Compensation Act is unconstitutional (*Randstad North America, L.P. v. Tennessee Department of Labor, et al.*, filed in the Chancery Court of Davidson County, Cause No. 09-716-II). Ultimately, and hopefully soon, a superior court will decide this question. But until then, this Court must consider and decide the issue.

Previously this Court has decided that when the allegation is that the agency is acting arbitrarily, capriciously or illegally, the method of redress is a common law writ of certiorari. See *MidSouth Transportation Management, Inc. v. Tennessee Department of Labor*, filed in the Chancery Court of Davidson County, Cause No. 10-790-III, Memorandum and Order. The problem with that approach, however, is that a common law writ of certiorari must be

accompanied by verification and a statement that it is the first application for the writ. Without those, this Court does not have jurisdiction. Many attorneys, however, unfamiliar with the common law writ of certiorari, fail to provide the verification and/or the required statement. They are, then, because of those deficiencies, unable to obtain redress of the agency's deprivation of fundamental rights.

As to the alternative of declaring a statute under the Act unconstitutional, that is problematic as it is the Court's duty to uphold the constitutionality of and sustain an act if possible in deference to the Legislature. *Dykes v. Hamilton County*, 191 S.W.2d 155, 159 (1945); *State v. Joyner*, 759 S.W.2d 422, 425 (Tenn. Ct. App. 1987).

In the face of these obstacles and with more thought about the issue as more cases have come before it, this Court has considered whether there are other alternatives and sees that there is another possible route for immediate review: section 4-5-322(a)(1)—the UAPA's equivalent to an immediate, extraordinary appeal, akin to Rule 10 of the Tennessee Rules of Appellate Procedure.<sup>1</sup>

#### **Appropriateness of Section 4-5-322(a)(1)**

In previous decisions by this Court and other courts, the UAPA as a method to provide review of an arbitrary, capricious or illegal decision by a DOL specialist or designee has been

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<sup>1</sup>“An extraordinary appeal may be sought on application and in the discretion of the appellate court of interlocutory orders . . . if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review . . . .”

rejected because the assumption has been that review would be conducted pursuant to subsection (h)<sup>2</sup> of section 4-5-322. That subsection authorizes a trial court to review a final agency decision from a contested case hearing based upon a record developed in the agency proceeding below. The procedure conducted by the specialist and designee with respect to ordering the payment of temporary total disability and medical benefits are not conducted as a contested case hearing. There is no court reporter, so no transcript is generated. Usually the record from the administrative proceeding consists of the request for assistance filed by a party, any exhibits and papers filed by counsel in support or against, and the decision of the specialist and the designee. There is no record of the evidence and proof as it unfolded at the administrative level. Moreover, the decision by the specialist or designee may be a preliminary or intermediate ruling, not a final order as required by subsection (h). Because section 4-5-322(h) review is so dependent upon a more detailed record from an administrative agency and requires a final order, that section has been rejected as a means

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<sup>2</sup>(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) (A) Unsupported by evidence that is both substantial and material in the light of the entire record.  
(B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.



to redress claims of arbitrariness, capriciousness or illegality of decisions by the DOL. But such is not the case with subsection (a)(1) of section 4-5-322.

That subsection, designed to perform at the administrative level the function a Rule 10 appeal provides for trial court decisions under the Tennessee Rules of Appellate Procedure, lends itself to the task of immediate court review of abuse of authority by an agency. Section 4-5-322(a)(1) provides as follows:

A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

This section, the Court concludes, fits the problem the trial courts are grappling with and the issue presented by this case. That is, when the circumstances are not just an incorrect decision by a specialist or designee but, instead, a decision violative of fundamental rights, such that review of a final agency decision is inadequate, immediate judicial review is available under section 4-5-322(a)(1) of a preliminary, procedural or intermediate DOL decision. Additionally fitting is that immediate review of a preliminary, procedural or intermediate decision of the DOL under 4-5-322(a)(1) is not unchecked. Incorrect decisions by the DOL will be declined for review by the trial court because there is an adequate remedy under Tennessee Code Annotated section 50-6-238(b) if the case is filed before a trial court, but DOL decisions that are fundamentally illegal can be immediately reviewed.

### Susceptibility of Section 50-6-238(a) and (d)(1) (2) to UAPA

However, to apply section 4-5-322(a)(1) to this case there is a key analytical link the Court must make. The Court must determine that the preliminary, procedural and intermediate rulings and orders issued by the DOL under sections 50-6-238(a) and (d)(1) (2) of the Workers Compensation Act come within and are covered by the UAPA. The hesitancy is that only one subsection, (d)(3), of 50-6-238 explicitly states that that subsection comes within the UAPA. The other subsections in issue in this case—(a) and (d)(1) (2)—do not explicitly refer to the UAPA.

More specifically, the way subsections 50-6-238(a) and (d)(1) (2) and (3) work is that subsection (a) vests authority in the specialist to order temporary benefits, and subsection (d)(1) (2) in the designee. Next, once a specialist or designee has ordered the employer to pay benefits, payment is mandatory. TENN. CODE ANN. § 50-6-238(d)(1)(B)(ii) and (2)(B). The statute further provides that if the employer fails to pay, the Commissioner “shall” assess a penalty. TENN. CODE ANN. § 50-6-238(d)(3). Lastly and significantly, appeal of the penalty is provided to the employer “pursuant to the Uniform Administrative Procedures Act.” TENN. CODE ANN. § 50-6-238(d)(3). From this statutory system, the Court’s reasoning is that by providing for review under the UAPA in subsection (d)(3), which is the final step (assessment of a penalty by the Commissioner) of the section 50-6-238 statutory scheme of DOL ordering temporary benefits, the Legislature indicated its intent and it logically follows that the preliminary and intermediate decisions by DOL concerning temporary benefits under

section 50-6-238 leading up to assessment of a penalty should be subject to judicial review under the UAPA. The Court therefore concludes that subsections (a) and (d)(1) (2) of section 50-6-238 are covered by the UAPA.

Accordingly, in deciding the Respondent DOL's motion to dismiss in this case, the Court shall evaluate whether the Petition for Judicial Review states a claim under section 4-5-322(a)(1) for review of a preliminary, procedural or intermediate agency action or ruling where review of the final agency decision will not provide an adequate remedy.

#### **Petition States a Claim**

Reference to the Petition reveals allegations at paragraphs 9, 10 and 12 (described *supra* at 1-2) that state a claim of illegality, arbitrariness and capriciousness, and allegations at page 16 that review of the final agency decision will not provide an adequate remedy (the Petitioner is "faced with an eternity of 'temporary' total disability benefit payments while waiting on an employee to unilaterally decide what course of treatment he wishes to take"). The Court therefore concludes that the Petitioners have stated a claim for immediate judicial review pursuant to section 4-5-322(a)(1).

It is therefore ORDERED that the Respondent's motion to dismiss is denied as the Petitioner has stated a claim for judicial review under Tennessee Code Annotated section 4-5-322(a)(1) of the Uniform Administrative Procedures Act.

It is further ORDERED that on March 3, 2011, at 9:30 a.m., the Court shall conduct a hearing to decide whether it should enter an order, pursuant to section 4-5-322(a)(1), reversing the preliminary, procedural and intermediate rulings of the DOL with instructions to DOL on how to proceed.



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ELLEN HOBBS LYLE  
CHANCELLOR

cc: David Rich  
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